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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14700

In the Matter of	:	
GREGORY BARTKO, Esq.,	:	**DIVISION OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION AND MEMORANDUM OF LAW AGAINST RESPONDENT GREGORY BARTKO, ESQ.**
Respondent.	:	

The Division of Enforcement ("Division") moves for summary disposition in this matter of its claims under Section 15(b)(6)(A) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203(f) of the Investment Advisers Act of 1940 ("Advisers Act") against Respondent Gregory Bartko, Esq. ("Bartko"). There are no genuine issues of material fact, and the sanctions sought against Bartko should be imposed as a matter of law pursuant to Rule 250 of the Commission's Rules of Practice.

I. INTRODUCTION

Sanctions are appropriate, in the public interest for the protection of investors, and should be imposed on the basis of Bartko's November 18, 2010 criminal conviction for conspiracy to commit mail fraud and certain other offenses, mail fraud, and the sale of unregistered securities in *United States v. Gregory Bartko,* No. 5:09-CR-321, in the United States District Court for the Eastern District of North Carolina (Western Division) ("Criminal Action"). Bartko has had an opportunity to fully litigate the facts underlying the criminal conviction and is collaterally estopped from relitigating those facts in this proceeding. Thus, there are no material facts

genuinely at issue in this action, and summary disposition is appropriate as a matter of law pursuant to Rule 250.

II. STATEMENT OF FACTS

A. Criminal Action

1. The Superseding Indictment

On January 6, 2010, a federal grand jury in the Eastern District of North Carolina returned a Superseding Indictment against Bartko and co-defendants, Darryl Lynn Laws ("Laws") and Rebecca Plummer. The Superseding Indictment charged Bartko with leading an interstate criminal scheme "to profit from fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits." (A true and correct copy of the Superseding Indictment is attached hereto as Exhibit A). The Superseding Indictment contained the following charges: Count One - conspiracy to commit mail fraud, to sell unregistered securities, and to launder monetary instruments; Counts Two through Five - mail fraud; Count Six - sale of unregistered securities.[1]

The Superseding Indictment alleged as follows: Beginning in early 2004, Bartko and Laws participated in an interstate criminal scheme to profit from fraudulent sales of investments. (Exhibit A at 2). Bartko held himself out as an investment banker operating through Capstone Partners, L.C. (Id. at 1). Laws, who falsely purported to have a Ph.D. in finance, held himself out as an investment banker operating through Charlotte Square Capital Ventures. (Id. at 1-2). Numerous entities were formed and/or used in conducting the scheme, including "Franklin Asset LLC Fund I"; "Caledonian Partners LLC"; and "Capstone Private Equity Bridge & Mezzanine

[1] On October 29, 2010, upon the government's motion, the Court dismissed Counts Seven and Eight of the Superseding Indictment and certain objects of the conspiracy in Count One, namely, false statements and obstructing proceedings of the Securities and Exchange Commission. (See Order of October 29, 2010, Criminal Action, attached hereto as Exhibit B).

Fund, LLC." (Id. at 2). Bartko and Laws used bank accounts controlled by Bartko in Georgia to collect hundreds of thousands of dollars in proceeds from fraudulent sales of investments. (Id. at 5, 7, 8). Nearly all of the money collected by Bartko and Laws as part of the scheme had been obtained by a single salesman, Scott Bradley Hollenbeck ("Hollenbeck"), whom the Superseding Indictment names as an unindicted co-conspirator. (Id. at 6). In making these sales, Hollenbeck used numerous materially false statements and omissions, including false promises to investors designed to conceal the true risk of the investment, such as "guarantees" of yearly earnings of at least twelve percent, and the promise that the investment was insured when it was not. (Id.)

2. Conviction Upon Jury Trial

On November 18, 2010, following a thirteen-day jury trial in the United States District Court for the Eastern District of North Carolina, Bartko was found guilty of all six counts of the Superseding Indictment. (Order of Dever, J. filed January 17, 2012 in the Criminal Action, denying Bartko's motions for a new trial, attached hereto as Exhibit C, at 5) ("1/17/12 Order");[2] see also, a true and correct copy of the verdict form against Bartko from the Criminal Action, attached hereto as Exhibit D); Judgment against Bartko from the Criminal Action, a true and correct copy of which is attached hereto as Exhibit E).

At trial, the Government's evidence showed that in January 2004, Bartko and Laws had a newly formed fund called the Caledonian Fund. (Exhibit C at 5). John Colvin, who was convicted in a trial in the United States District Court for the Eastern District of North Carolina in June 2010 for related mail fraud and conspiracy charges (id. at 79-80), started talking with Bartko and Laws about providing funding for the Caledonian Fund. (Id. at 5). Colvin also sent sample brochures to Bartko and Laws about how the money was being raised. (Id.). These

[2] Judge Dever's 120-page Order contains detailed findings regarding the trial evidence introduced against Bartko and is cited throughout this motion.

brochures contained numerous false statements promising that the investment was insured and that the principal and 14.4 percent interest on the investment were secure and guaranteed. (Id.) . Colvin also sent materials to Bartko identifying Hollenbeck as the founder and creator of the entities raising the money. (Id.) . On January 15 and 16, 2004, Bartko performed a NASD record check of Colvin; the records referenced fraud that Colvin had committed in the securities industry (Id. at 7-8). On February 17, 2004, Bartko performed a NASD record check of Hollenbeck; the records referenced Hollenbeck's prior sanctions for forgery and misconduct concerning the sale of securities. (Id. at 6-7).

Bartko nevertheless entered into a letter of intent, and subsequently, a notes subscription agreement, for Colvin to provide money to the Caledonian Fund. Hollenbeck, acting at Colvin's direction, sent the Caledonian Fund $701,000 between February 27, 2004 and May 6, 2004. (Id. at 8-10, 17). This money had been raised using many of the very same fraudulent documents that Bartko had received in January 2004. (Id.)

On April 26, 2004, the North Carolina Secretary of State's office entered a cease and desist order against Hollenbeck for his sale of Mobile Billboards of America. (Id. at 10-14). On May 6, 2004, Bartko began to represent Hollenbeck as his attorney. (Id. at 16-17). In the course of this representation, Hollenbeck provided Bartko with information about how he was selling his investments--including the money that had gone to the Caledonian Fund. (Id. at 17-21). Hollenbeck told Bartko that he had promised investors that their money was guaranteed and insured. (Id.). On June 8, 2004, Hollenbeck faxed Bartko a copy of the promotional materials he was using and the application for the insurance policy that he claimed to be relying upon in his promises that the investment was insured. (Id. at 18-19). On June 11, 2004, in a letter copied to Bartko, Bartko's co-counsel, Wes Covington, told Hollenbeck that the insurance policy he was

relying on did not cover the investment and that Hollenbeck should stop using promises of insurance to sell the investment. (Id. at 19-20).

Nonetheless, on October 20, 2004, Bartko told Laws that he wanted Hollenbeck to raise $4.3 million for their fund in the last two months of the year. (Id. at 26-27). Evidence in the record shows that Bartko was aware that Hollenbeck he was using promises of insurance to sell the investment. (Id. at 31-32). In November 2004, the Caledonian Fund ceased operations after spending nearly all of the $701,000 received from Colvin and Hollenbeck through Franklin Asset Exchange. (Id. at 27). That same month, Bartko started a new fund, the Capstone Private Equity Bridge and Mezzanine Fund (the "Capstone Fund"). (Id. at 28). Hollenbeck was Bartko's main fundraiser for this new fund. (Id.). In an e-mail responding to an investor's inquiry on December 1, 2004, Hollenbeck told the investor to feel free to talk with Bartko about the "insurance bonds" because Bartko was aware of them. Bartko admitted at trial that on December 7, 2004 he had a conversation with this investor about "insurance bonds," but Bartko claimed that he could not understand what the investor meant about insurance bonds. (Id. at 32).

Hollenbeck was selling his false promises of insurance by using documents that he had altered from a Directors' and Officers' Liability Errors and Omissions Liability Insurance Policy from AIG obtained through insurance broker Arthur J. Gallagher & Co. (Id. at 10). On December 7, 2004, the same day that Bartko had talked to an investor about insurance bonds, he also called a representative of Arthur J. Gallagher & Co. and asked about extending the AIG policy to cover his newest investment fund, the Capstone Fund. (Id. at 32-33). He had this conversation despite his knowledge that Hollenbeck had used this very policy to falsely promise insurance to investors in the past. (Id. at 31-32). The next day, December 8, 2004, Hollenbeck was deposed by the Securities and Exchange Commission as part of its investigation of Mobile

Billboards of America. (Id. at 33). In that deposition, Hollenbeck, who was represented by Bartko, admitted that he had been using the surety bond--his promises of insurance--to claim to investors that their investment was insured. (Id.). He also admitted that he now knew these claims were false. (Id.). Despite being asked what investments Hollenbeck was currently selling, Hollenbeck did not mention the Capstone Fund, and Bartko did not correct his client's omission. (Id. at 33-34).

On January 11, 2005, Bartko met with potential investors in the offices of Legacy Resource Management, a business run by Rebecca Plummer and Levonda Leamon. (Id. at 44). After his meeting with investors, Bartko told Plummer and Leamon that he could no longer do non-legal business with Hollenbeck. (Id. at 44-45). Bartko spoke with Leamon and Plummer about forming an investment club and having Hollenbeck's clients invest their soon-to-be returned money back into the Capstone Fund. (Id. at 45). Bartko told Leamon and Plummer that Legacy Resource Management would receive a six percent finder's fee from the Capstone Fund for any investments from Legacy Resource Management or its clients. (Id.).

On January 12, 2005, during the same trip in which Bartko met with Leamon and Plummer, Bartko and Hollenbeck met with Robin Denny, whose mother, Judy Wright Jarrell, had invested $800,000 to $900,000 with Hollenbeck and Colvin via Franklin Asset Exchange. (Id. at 47). According to Denny, who testified at trial, Bartko and Hollenbeck met with Denny, her two brothers, her sister-in-law, and her mother, and assured them that Jarrell's money was safe, insured by AIG, and would be returned within two weeks if Jarrell wanted to liquidate the investment. (Id.).

On January, 19, 2005, Leamon and Plummer opened a bank account for the purpose of receiving the money that Bartko determined to return to investors. (Id. at 52). On January 19,

2005, Bartko sent money that he had received from non-accredited investors, which had been raised by Hollenbeck, back to the investors. (Id. at 53-54). Bartko, however, did not have addresses for six of the investors, so he sent their checks to Hollenbeck. (Id. at 53-54). Hollenbeck forged the investors' names on the checks, deposited the money, and used the proceeds to pay his earlier investors their December 2004 "distribution." (Id.). Ten of the non-accredited investors to whom Bartko returned checks endorsed them over to Legacy Resource Management in order to get into the Capstone Fund. (Id. at 54-55). These checks totaled nearly $700,000. (Id. at 55). An e-mail exchange between Bartko and an investor, in which the investor referred to the "work-around" devised by Hollenbeck, and in which Bartko acknowledged having discussed the same with Hollenbeck, showed that Bartko knew Hollenbeck was contacting the non-accredited investors in order to persuade them to pool the money and immediately reinvest in the Capstone Fund. (Id. at 56). The Court found that the foregoing evidence, together with evidence that Bartko and Hollenbeck spoke on the telephone 40 times and exchanged eleven fax transmissions between January 18, 2005 and January 21, 2005, provided ample support for the jury's verdict on the conspiracy count. (Id.).

In February 2005, the North Carolina Secretary of State's office learned that Hollenbeck was continuing to sell investments using the surety bond, and that he was selling them for Bartko's Capstone Fund. (Id. at 62). The North Carolina Secretary of State's Office forwarded this information to the Securities and Exchange Commission. (Id.). On March 14, 2005, an attorney for the Securities and Exchange Commission met with Bartko and discussed with him evidence that Hollenbeck had fraudulently raised money for the Capstone Fund. (Id. at 66). On May 26, 2005, Bartko filed an interpleader action on behalf of the Capstone Fund in United States District Court for the Middle District of North Carolina. (Id. at 71). Bartko tendered

$1,346,926 to the court, representing the investors' money less a six percent finder's fee paid to Legacy Resource Management. (Id. at 71-72). In the interpleader action, Bartko claimed that no investors had been promised that their money was guaranteed and that Legacy Resource Management had been a direct investor. (Id. at 72).

Bartko testified at trial in his own defense. Bartko claimed that Hollenbeck's role was strictly limited to being a "finder"and that Bartko did not want Hollenbeck to sell securities for the Capstone Fund. (Id. at 30). Further, Bartko testified that he had no knowledge that Hollenbeck was making false promises in the sale of the investment. (Id. at 7). Bartko claimed that he had not read the NASD records that he accessed regarding Hollenbeck's and Colvin's respective regulatory histories (id. at 6-8), and that he did not carefully review the fraudulent materials that he received starting in January 2004. (Id. at 7).

The jury started deliberating on November 18, 2010 and reached a verdict of guilty on all counts after deliberating for approximately four hours. (Id. at 81). Following the verdict, the Court granted the government's request to remand Bartko to the custody of the United States Marshals pending sentencing. In deciding to incarcerate Bartko immediately upon the guilty verdict, the Court stated on the record its belief that Bartko committed perjury while testifying in his own defense. (Transcript of Post-Verdict Hearing, a true and correct copy of which is attached as Exhibit F hereto, at 22).

3. January 17, 2012 Order and Opinion of the Court Denying Bartko's Motions for A New Trial

Following his conviction, Bartko filed a series of motions for a new trial. Bartko's sentencing was postponed pending the disposition of the motions. On January 17, 2012, Judge Dever denied Bartko's motions for a new trial. (See Exhibit C). In his Order denying Bartko a new trial, Judge Dever found that "Bartko's case was not a close one. The trial record reveals

overwhelming evidence of Bartko's guilt." (Id. at 118). Further, the Court wrote: "The mountain of evidence marshaled against Bartko demonstrated his guilt beyond any shadow of a doubt. Moreover, if the jury had any doubts, Bartko's testimony destroyed them." (Id.).[3]

4. Sentencing

On April 4, 2012, following a sentencing hearing, Judge Dever sentenced Bartko to 23 years' imprisonment to be followed by three years of supervised release. In addition, Bartko was order to pay $885,946.89 in restitution. (See Exhibit E).

B. Order Instituting Proceedings

On January 18, 2012, the Commission issued an Order Instituting Proceedings ("OIP") pursuant to Section 15(b)(6) of the Exchange Act[4] and Section 203(f) of the Investment Advisers

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[3] In denying Bartko's motions, the Court recounted certain facts that had not been presented to the jury in response to one of Bartko's arguments. (Id. at 74 n.42). These facts concerned Bartko's role as an attorney for Webb Group and Franklin Asset Exchange against BMP Capital Resources, Inc., Colvin Enterprises, Colvin, and others. (Id. at 74). The action was filed by Wes Covington on January 18, 2005 in the Superior Court of Forsyth County, North Carolina. (Id.). The lawsuit alleged that Webb Group and Franklin Asset Exchange, through Hollenbeck, had invested millions of dollars with the defendants in return for the defendants' promise to pay plaintiffs on certain promissory notes. (Id. at 74-75). The lawsuit further alleged that the defendants failed to pay and that they had defrauded the plaintiffs into investing. Ultimately, the plaintiffs, through Covington and Bartko, recovered $20 million by way of a negotiated settlement. (Id. at 75). Bartko and Covington persuaded North Carolina Superior Court Judge Anderson Cromer to establish a receivership to return the settlement money to plaintiffs' investors, and to appoint as receiver an individual who had worked with Bartko for a number of years at Capstone Partners. (Id.). Judge Dever determined that Bartko, in his role as counsel to the receiver, had egregious conflicts of interest that he failed to disclose to Judge Cromer. (Id. at 75-78). Further, Judge Dever noted that Bartko stood idly by while Covington asserted to Judge Cromer that he and Bartko had told Judge Cromer "everything" about their relationship with Hollenbeck and Colvin. (Id. at 78). In addition, Judge Dever determined that Bartko made statements to Judge Cromer that contradicted Bartko's sworn testimony in the Criminal Action concerning the January 12, 2005 meeting at Robin Denny's home. (Id.). On September 5, 2008, Judge Cromer awarded Bartko and Covington more than $2 million each in attorney's fees for their work on the case. (Id. at 79).

[4] Section 15(b)(6)(A) of the Exchange Act provides, in part: "With respect to any person ... at the time of the alleged misconduct, who was associated or seeking to become associated with a broker or dealer ... the Commission, by order, shall censure, place limitations on the activities or

Act[5] initiating this action. The OIP essentially pleaded Bartko's November 18, 2010 conviction in the Criminal Action (OIP ¶¶ II.B.2.-3.), and Bartko's association with Capstone Partners, L.C., a broker-dealer registered with the Commission and an investment adviser registered in Georgia and North Carolina during the pertinent period. (OIP ¶ II.A.1.). The purpose of the proceeding is simply to determine: (1) the truth of the allegations concerning the Criminal Action and Bartko's association with a broker-dealer and an investment adviser during the pertinent period; (2) and what, if any, remedial action is appropriate in the public interest against Bartko pursuant to Section 15(b) of the Exchange Act and Section 203(f) of the Advisers Act.

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functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, on the record after notice and opportunity for a hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person - (ii) has been convicted of any offense specified in subparagraph (B) of such paragraph (4) within 10 years of the commencement of the proceedings under this paragraph ...." Section 15(b)(4) defines such offense, in part, as "any felony ... which the Commission finds -- (i) involves the purchase or sale of any security ... (ii) arises out of the conduct of the business of a broker, dealer ... (iii) involves the ... misappropriation of funds ... or (iv) involves the violation of section ... 1341, 1342 of Title 18 ...."

[5] Section 203(f) of the Advisers Act provides, in pertinent part: "The Commission, by order, shall censure or place limitations on the activities of any person associated ... with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (5), (6), (8), or (9) of subsection (e) or has been convicted of any offense specified in paragraph (2) or (3) of subsection (e) within ten years of the commencement of the proceedings under this subsection .... , or is enjoined from any action, conduct, or practice specified in paragraph (4) of subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order."

Service of the OIP was deemed to have been effected on January 30, 2012. (Order Following Prehearing Conference dated March 9, 2012). On February 14, 2012, Bartko submitted an Answer to the OIP in which he admitted the entry of the judgment of conviction (Answer at ¶ II.B.2), and further admitted his association with a broker-dealer and investment adviser during the pertinent period. (Answer at ¶ I.A.1). On March 8, 2011, a prehearing conference was held in this matter, at which time the Administrative Law Judge authorized the parties to file motions for summary disposition.

III. ARGUMENT

A. Summary Disposition is Appropriate Pursuant to Rule 250

1. Standard for Summary Disposition

Rule 250 of the Rules of Practice provides that a motion for summary disposition should be granted if there is "no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law." 17 C.F.R. § 201.250(b). Summary disposition is particularly appropriate where the facts have been litigated and determined in an earlier judicial proceeding. See, e.g., Joseph P. Galluzzi, Exchange Act Rel. No. 46405, 2002 SEC LEXIS 2202 (August 23, 2002) (Opinion of the Commission), aff'g, Initial Decisions Rel. No. 187, 2001 SEC LEXIS 1582 (August 7, 2001) (ALJ Kelly) (summary disposition affirmed where facts were determined by earlier criminal conviction and injunctive action); John S. Brownson, Exchange Act Rel. No. 46161, 2002 SEC LEXIS 1715 (July 3, 2002) (Opinion of the Commission), aff'g, Initial Decisions Rel. No. 182, 2001 SEC LEXIS 537 (March 23, 2001) (ALJ Foelak) (summary disposition affirmed where facts were determined by earlier criminal conviction); see also, Richard P. Callipari, Initial Decisions Rel. No. 237, 2003

SEC LEXIS 2318, at * 10-12, (September 30, 2003) (ALJ Foelak)(granting summary disposition based on criminal conviction); Michael D. Richmond, Initial Decisions Rel. No. 224, 2003 SEC LEXIS 448 (February 25, 2003) (ALJ Mahony) (granting summary disposition based on respondent's criminal convictions and civil injunction entered against him); Brad Haddy, Initial Decisions Rel. No. 164, 2000 SEC LEXIS 927 (May 8, 2000) (ALJ Foelak) (granting summary disposition based on criminal conviction).

Bartko is collaterally estopped from relitigating the facts giving rise to his criminal conviction. Based on the undisputed conviction, there is no genuine material issue of fact and summary disposition in favor of the Division is appropriate as a matter of law. See, Jerome M. Wenger, Initial Decisions Rel. No. 192, 2001 SEC LEXIS 1933, at *12-13 (September 24, 2001) (ALJ Foelak) (summary disposition granted imposing penny stock bar based on injunction); Michael Lapp, 2000 WL 1206207, at *3 (March 29, 2000) (Interim Order) (ALJ Mahoney) (ALJ granted partial summary disposition recognizing conviction for securities fraud as basis for a penny stock bar); see also, Brownson, supra, at *8 (Commission found that summary disposition particularly appropriate where respondent has pled guilty to securities fraud); Galluzzi, supra, at * 8 (Commission held that imposition of sanctions based on conviction and injunction appropriate under summary judgment).

2. Bartko is Collaterally Estopped from Relitigating the Facts Underlying His Criminal Conviction on which this Action is Based

The doctrine of collateral estoppel prevents a party who received a full and fair opportunity to litigate in one action decided against him from relitigating the same claims and issues of fact and law in a second action. Parklane Hosiery Company v. Shore, 439 U.S. 322, 322-333 (1979). Once a court has decided an issue of fact necessary to its judgment, that fact is conclusively determined in a second suit based on a different cause of action but involving a

party to the first litigation. State of Montana v. United States, 440 U.S. 147, 153 (1979); see also 18 Moore's Federal Practice §§ 131.13[1] and 132.01[4].

Bartko was convicted in the Criminal Action following a jury trial. Accordingly, the criminal conviction establishes conclusively for purposes of this proceeding that Bartko engaged in the conduct charged in the Criminal Action. See Elliot v. SEC, 36 F.3d 86, 87 (11th Cir. 1994), *aff'g*, Charles P. Elliott, Exchange Act Rel. No. 31202, 1992 SEC LEXIS 2334 (September 17, 1992) (Opinion of the Commission)(affirming imposition of broker dealer bar and refusing to "entertain the collateral attack on the criminal conviction" in an administrative proceeding based on the conviction); see also, Galluzzi, supra, at *10, 18 n.33 (Commission holding that a respondent is collaterally estopped from "challeng[ing] his injunction or criminal conviction in a subsequent administrative proceeding"); Brownson, supra, at *10 (Commission holding that respondent's "criminal conviction cannot now be challenged collaterally" in a subsequent administrative proceeding); Peter C. Lybrand, Initial Decisions Rel. No. 234, 2003 WL 22056639, at * 5-8 (September 3, 2003)(ALJ McEwen)(prior criminal conviction, and findings of fact and conclusions of law made in prior injunctive action may not be collaterally attacked in administrative proceeding to impose penny stock bar); Brett L. Bouchy and Richard C. Whelan, Initial Decisions Rel. No. 209, 2002 SEC LEXIS 1743, at *24, n.3 (July 9, 2002) (ALJ Mahony) ("doctrine of collateral estoppel, as well as Commission case law, preclude Respondents from any attack in this proceeding on the validity of the findings and conclusions of law made by the District Court"); Haddy, supra, at *2 (Commission "does not permit criminal convictions to be collaterally attacked in its administrative proceedings. This prohibition extends to the validity of the conviction, including the credibility of evidence presented at the criminal trial and any defenses to the criminal charge").

B. Bartko Should Be Barred From Association with any Investment Adviser, Broker, Dealer, Municipal Securities Dealer, Municipal Advisor, Transfer Agent or Nationally Recognized Statistical Rating Organization

Bartko's conviction for conspiracy and mail fraud establishes his active participation in a scheme to defraud various investment clients of their assets. The United States Attorney's Office for the Eastern District of North Carolina viewed the activity as being so pernicious as to warrant criminal prosecution. The jury, after hearing thirteen days of testimony, need just four hours to reach guilty verdicts against Bartko on six felony counts involving the fraudulent sales of investments to members of rural Baptist churches and others.

The potential for substantial harm to investors from Bartko's continued participation in the securities industry is significant. Bartko is 58 years old, and his conviction involves conduct in which he engaged from the ages of approximately 50 through 56. In carrying out his scheme, Bartko attempted to remain largely behind the scenes while others bilked hundreds of victims, who were unaccredited and unsophisticated investors, of all or part of their life savings. The ill-gotten gains were funneled to Bartko, who was overwhelmingly on notice that the funds were fraudulently obtained. Bartko largely remained in the background in order to maintain the facade of plausible deniability.

Bartko's demonstrated tendency to make self-serving statements without regard to their veracity, both in and out of the courtroom, is particularly troublesome. In addition to the evidence that he lied to investors to try to avoid the consequences of his fraudulent activity, Judge Dever determined that Bartko lied repeatedly to the jury and to the Court to try to get himself out of trouble. In fact, the Court determined that Bartko had a prior record of deceit in the courtroom, as evidenced by his undisclosed conflicts of interest in the matter before Judge Cromer and by the statements to Judge Cromer that flatly contradicted his testimony in the

Criminal Action. The public interest requires that an individual who would perpetrate the kind of fraudulent investment scheme demonstrated at trial, and who would repeatedly make false statements in the courtroom, be barred from the securities industry. That Bartko engaged in these activities while a member of the bar is an aggravating circumstance.

Bartko has neither accepted responsibility for his illegal conduct nor demonstrated remorse for it. In fact, the record shows just the opposite: Bartko was found by the Court to have obstructed justice by testifying falsely in his own defense, resulting in his immediate incarceration following the jury's guilty verdict. Given Bartko's lack of remorse and his attempt to evade responsibility for his conduct, there is no possible argument that Bartko has rehabilitated himself.

The Commission, in applying the *Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979) standards to determine whether a bar is in the public interest, considers: (1) the egregious nature of the respondent's actions; (2) the degree of scienter; (3) the isolated or recurrent nature of the infraction; (4) the respondent's recognition of the wrongful nature of his conduct; and (5) the likelihood that his occupation will present opportunities for future violations. *See Galluzzi* (Commission Op), supra, at 17 and n. 32 (appropriate under *Steadman* to impose a bar against respondent on basis of criminal conviction for mail and wire fraud and injunction); *In the Matter of Brownson,* 77 SEC Docket 3636, Exchange Act Rel. No. 46116, 2002 SEC Lexis 1715 (July 3, 2002), *aff'g,* Initial Decision Rel. No. 182, 2001 SEC Lexis 537 (March 23, 2001) (ALJ Foelak (same on basis of criminal conviction for securities fraud).

Applying this framework to Bartko's activities, as delineated by the criminal prosecution, it is apparent that a bar is warranted in this case. Bartko arranged for individuals to raise investment money for him who had histories of committing fraud, and there was compelling

evidence that Barkto well knew of their checkered past. There is also compelling evidence that Bartko was aware that these individuals were bilking unsophisticated investors by making false promises to them about guaranteed rates of return and insurance, but that Bartko gladly accepted the funds they raised and pushed them to raise more. While Bartko's sentence of incarceration is admittedly long, he has filed a notice of appeal and will undoubtedly seek to overturn his conviction and/or reduce his sentence. It is not impossible for an individual who is incarcerated to commit fraud; barring Bartko from the securities industry could reduce the chances of this occurring. In any event, the length of Bartko's prison sentence is beside the point, as it would turn reason on its head to allow a long prison sentence arising from an egregious fraud to avoid a bar from the securities industry. The securities industry has an interest in barring convicted criminals who have perpetrated investment fraud schemes from its roles in order to protect its integrity and reputation. The broadest bar possible is warranted based upon Bartko's criminal conviction.

For all of these reasons, it is appropriate that the Commission impose a bar in this matter. That bar should prohibit Bartko from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization.[6] *See § 203(f) of the Adviser's Act; See Also e.g. In the Matter of Feeley & Willcox Asset Management Corp.*, Securities Act Release No. 8249, 2003 WL 22680907 (2003) (imposing bar as to both registered and unregistered investment advisers); *In the Matter of*

[6] Chief Administrative Judge Brenda P. Murray has taken the position that the collateral bars from association with municipal advisors and nationally recognized statistical rating organizations added by the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law on July 21, 2010, are impermissibly retroactive to the extent that they are applied to conduct that occurred before that date. See *In the Matter of Terry Harris*, File No. 3-14610, Initial Decision, March 19, 2012, at p. 5 n.4.

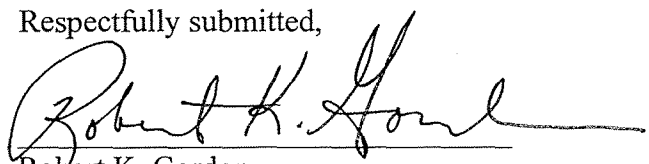
Batterman, (ALJ Kelly) Initial Decision Release No. 246, 2004 WL 2387487 (February 12, 2004) (same).

CONCLUSION

Accordingly, for the foregoing reasons, the Division respectfully requests that its motion for summary disposition of this action be granted against Bartko pursuant to Rule 250 of the Commission's Rules of Practice and that he be permanently barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent or nationally recognized statistical rating organization.

Dated: April 23, 2012

Respectfully submitted,



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IN OPEN COURT
on 1/6/10
Dennis P. Iavarone, Clerk
US District Court
Eastern District of NC

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
GREGORY BARTKO	)	NO. 5:09-CR-321-1BR
	)	
DARRYL LYNN LAWS	)	NO. 5:09-CR-321-2BR
	)	
REBECCA PLUMMER a/k/a Rebecca Blackburn	)	NO. 5:09-CR-321-3BR

I N D I C T M E N T
(SUPERSEDING)

The Grand Jury charges:

Introduction

1. The essence of the crimes charged in this Indictment is the interstate criminal scheme, led by defendant BARTKO, to profit from fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits.

2. Defendant GREGORY BARTKO maintained an office in Atlanta, Georgia, and lived in Berkeley Lake, Georgia. BARTKO was licensed to practice law in Georgia, Michigan, and North Carolina, and also held himself out as an investment banker, operating through a Utah corporation, Capstone Partners, L.C.

3. Defendant DARRYL LYNN LAWS maintained an office in La Jolla, California and lived in La Jolla. LAWS held himself out as an investment banker, operating through a California corporation,

Exh R

Charlotte Square Capital Ventures. LAWS falsely purported to have a Ph.D. in Finance.

4. Defendant REBECCA PLUMMER, a/k/a Rebecca Blackburn, maintained an office in Winston-Salem, North Carolina. Using a North Carolina corporation, Legacy Resource Management, Inc., PLUMMER and another known to the Grand Jury held themselves out as financial advisors specializing in advice concerning retirement.

5. In conducting the criminal scheme described in this Indictment, one or more of the defendants formed and/or used numerous entities, including "Franklin Asset LLC Fund I," formed in Nevada on March 1, 2004; "Caledonian Partners LLC," formed in the Isle of Man on April 23, 2004; "Capstone Private Equity Bridge & Mezzanine Fund, LLC," formed in Delaware on November 23, 2004; and "LRM Group, Inc.," formed in Delaware on April 1, 2005.

COUNT ONE

[ALL DEFENDANTS: Conspiracy to Commit Mail Fraud, Sell Unregistered Securities, Launder Monetary Instruments, Engage in Unlawful Monetary Transactions, Make False Statements, and Obstruct S.E.C. Proceedings]

6. The allegations of paragraphs 1 through 5 are re-alleged as if fully set forth herein.

A. OBJECTS OF THE CONSPIRACY

7. Beginning in or about early 2004, at an exact date unknown to the Grand Jury, and continuing through the date of this Indictment, in the Eastern District of North Carolina and elsewhere, defendants GREGORY BARTKO, DARRYL LYNN LAWS, and REBECCA

PLUMMER, a/k/a Rebecca Blackburn, and others both known and unknown to the Grand Jury, knowingly and unlawfully combined, conspired, and agreed to commit the following offenses against the United States:

a. Mail Fraud. Having devised a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, for the purpose of executing such scheme, to place in a post office and authorized depository for mail matter, and deposit and cause to be deposited to be sent by a private and commercial mail interstate carrier, and take and receive therefrom, and knowingly cause to be delivered by mail and such carrier according to the direction thereon, any matter or thing, in violation of Title 18, United States Code, Section 1341;

b. Offer and Sale of Unregistered Securities. Directly and indirectly willfully offering and selling securities when no registration statement was filed with the United States Securities and Exchange Commission ("S.E.C.") and in effect as to the securities, and using the means and instruments of transportation and communication in interstate commerce and the mails in connection with the offer and sale;

c. Laundering of Monetary Instruments. Knowingly conducting and attempting to conduct financial transactions affecting interstate commerce and which involve the proceeds of a

specified unlawful activity, knowing that the transactions are designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity, and knowing that the property involved in the financial transactions represents the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i);

d. Engaging in Unlawful Monetary Transactions. Knowingly engaging and attempting to engage in monetary transactions affecting interstate commerce in criminally derived property of a value greater than $10,000 and derived from specified unlawful activity, in violation of Title 18, United States Code, Section 1957(a);

e. False Statements. In a matter within the jurisdiction of an agency and department within the executive branch of the government of the United States, knowingly and willfully falsifying, concealing, and covering up by scheme a material fact, making a materially false, fictitious, and fraudulent statement and representation, and making and using a false document knowing the same to contain a materially false, fictitious, and fraudulent statement, all in violation of Title 18, United States Code, Section 1001; and

f. Obstructing S.E.C. Proceedings. Corruptly obstructing and impeding and endeavoring to influence, obstruct,

and impede the due and proper administration of the law under which any pending proceeding is being had before the S.E.C., a department and agency of the United States, all in violation of Title 18, United States Code, Section 1505.

B. MANNER AND MEANS OF THE CONSPIRACY

8. The above objects of the conspiracy were carried out in substance in the following manner and means, among others:

a. It was a part of the conspiracy that defendants BARTKO, LAWS, and PLUMMER, and others, used bank accounts they controlled to collect hundreds of thousands of dollars in proceeds from fraudulent sales of investments. Defendants BARTKO and LAWS rarely collected this money directly from investors. Instead, they collected the money only after it had been deposited and then withdrawn from several North Carolina bank accounts controlled by others, including PLUMMER. In this way, defendants concealed and attempted to conceal the true source and nature of the money, and the fraudulent means by which the money had been obtained.

b. It was a further part of the conspiracy that, after collecting this money, the defendants transferred the money among bank accounts they controlled located in Georgia, California, and North Carolina in order to convert a significant portion of it to their personal use.

c. It was a further part of the conspiracy that defendants BARTKO, LAWS, and PLUMMER conducted financial

transactions knowing that the money involved was from some form of unlawful activity. During 2004 and early 2005, nearly all of the money defendants collected had been obtained by a single salesman, Scott Bradley Hollenbeck, a co-conspirator unindicted herein, through fraudulent sales of investments. In making these sales, Hollenbeck used numerous materially false statements and omissions, both oral and written, including false promises designed to conceal the true risk of the investment, such as "guarantees" of yearly earnings of at least 12%, and the promise that the investment was insured when it was not.

d. It was a further part of the conspiracy that defendants BARTKO, LAWS, and PLUMMER aided and abetted these fraudulent sales of investments by supplying tools used by Hollenbeck and other salespeople to give a false impression of legitimacy. BARTKO's assistance in this regard included assistance with the formation and naming of several "funds" purporting to pay 12% returns. LAWS repeatedly used his false credentials in order to create a fraudulent impression of accomplishment and know-how.

e. It was a further part of the conspiracy that, in order to conceal their profits from fraudulent sales of investments, defendants BARTKO and LAWS agreed to make, and to have others make, false and misleading statements and omissions to the United States Securities and Exchange Commission in Atlanta,

Georgia and the Federal Bureau of Investigation in Raleigh, North Carolina.

C. OVERT ACTS

9. In furtherance of the conspiracy, and in order to accomplish its unlawful objectives, defendants BARTKO, LAWS, and PLUMMER, and others both known and unknown to the Grand Jury, committed and caused to be committed overt acts in the Eastern District of North Carolina and elsewhere, including, but not limited to, the following:

a. On or about January 19, 2004, BARTKO faxed LAWS a lengthy promotional document for The Webb Financial Group, Inc. On the cover page, BARTKO wrote "[t]hese documents are more explanatory in terms of what John I [sic] doing to raise this dough."

b. Between February 27, 2004 and May 6, 2004, BARTKO collected $701,000 in wire transfers by Hollenbeck from an account Hollenbeck controlled at Bank of North Carolina in Kernersville, North Carolina into two accounts BARTKO controlled at Wachovia Bank in Atlanta, Georgia;

c. On or about August 11, 2004, BARTKO wired $150,000 from an account he controlled at Wachovia Bank in Atlanta, Georgia to an account controlled by LAWS at Citibank in La Jolla, California.

d. On or about October 20, 2004, BARTKO e-mailed LAWS about getting Hollenbeck "to commit to raise at least $1.0 million each month for us religiously (no pun intended)." LAWS replied "I would prefer to see one or two months where a significant amount was raised, say $3 million, then allow him to modulate down."

e. On or about November 4, 2004, BARTKO supplied LAWS with a copy of an "Offering Summary" for "Caledonian Private Equity Partners Bridge & Mezzanine Fund, LLC," which BARTKO had sent to Hollenbeck.

f. On or about December 15, 2004, LAWS transferred $100,000 from an account he controlled at Citibank in La Jolla, California to a second account he had recently opened at the same bank.

g. On or about December 27, 2004, BARTKO transferred $25,000 from an account he controlled at Wachovia Bank in Atlanta, Georgia to a second account he controlled at the same bank.

h. On or about January 19, 2005, BARTKO sent a check drawn on an account he controlled at Wachovia Bank in Atlanta, Georgia in the amount of $95,860.64 by FedEx to victim CRS in Elm City, NC.

i. Also on or about January 19, 2005, BARTKO mailed a Notice of Sale of Securities in "Capstone Private Equity Bridge & Mezzanine Fund, LLC" to North Carolina regulators in Raleigh, North Carolina;

j. On or about January 27, 2005, PLUMMER and another known to the Grand Jury deposited the $95,860.64 check to victim CRS, now endorsed by victim CRS, into a newly-opened account in the name "Legacy Resource Management, Inc." at TriStone Community Bank in Winston-Salem, North Carolina.

k. On or about March 11, 2005, PLUMMER and another known to the Grand Jury opened an account in the name "Legacy Resource Management, Inc." at Wachovia Bank in Winston-Salem, North Carolina.

l. On or about April 1, 2005, PLUMMER and another known to the Grand Jury mailed victim CRS in Elm City, North Carolina and others a "Quarterly Statement" reflecting "1st Quarter Earnings" for an investment in "Capstone Private Equity Fund."

m. On or about April 15, 2005, PLUMMER and another known to the Grand Jury deposited a check in the amount of $35,000 into their "Legacy Resource Management, Inc." account at Wachovia Bank.

n. On or about April 18, 2005, PLUMMER and another known to the Grand Jury mailed victim CRS in Elm City, North Carolina and others a letter on letterhead from Legacy Resource Management in Winston-Salem, North Carolina regarding "an administrative error."

o. In or about June, 2005, during an S.E.C. examination in Atlanta, Georgia, BARTKO made false and misleading statements,

including statements concerning money he and LAWS had been provided by Scott Hollenbeck.

p. On or about August 19, 2005, BARTKO e-mailed LAWS, telling LAWS that among the things BARTKO had told another individual to "tell the SEC" was that the individual "has no information about CPE because he has no awareness or relationship with CPE . . . ."

q. On or about January 7, 2009, LAWS was interviewed by a Federal Bureau of Investigation agent at the United States Attorney's Office in Raleigh, North Carolina, and made materially false and misleading statements, including statements concerning money he and BARTKO had been provided by Scott Hollenbeck.

r. On or about October 2, 2009, LAWS was interviewed by a Federal Bureau of Investigation agent at the United States Attorney's Office in Raleigh, North Carolina and made materially false and misleading statements, including statements concerning money he and BARTKO had been provided by Scott Hollenbeck.

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH FIVE

[ALL DEFENDANTS: Mail Fraud and Aiding and Abetting]

10. The allegations of paragraphs 1 through 5, 8, and 9 are realleged as if fully set forth herein.

11. On or about the dates set forth below, each date constituting a separate count of this Indictment, in the Eastern

District of North Carolina and elsewhere, defendants GREGORY BARTKO, DARRYL LYNN LAWS, REBECCA PLUMMER, a/k/a Rebecca Blackburn, and Scott Bradley Hollenbeck, a co-conspirator unindicted herein, and others both known and unknown to the Grand Jury, aiding and abetting each other, having devised a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, did, for the purpose of executing such scheme and artifice, place in a post office and authorized depository for mail matter, and deposit and cause to be deposited to be sent by a private and commercial mail interstate carrier, and take and receive therefrom, and knowingly cause to be delivered by mail and such carrier according to the direction thereon, the following items:

Count	Date (on or about)	Item Mailed
TWO	January 19, 2005	Check in the amount of $95,860.64 and accompanying letter signed by BARTKO sent by FedEx to victim CRS in Elm City, North Carolina.
THREE	January 21, 2005	Endorsed check in the amount of $95,860.64 mailed by victim CRS in Elm City, North Carolina to Hollenbeck.
FOUR	April 1, 2005	"Quarterly Statement" reflecting "1st Quarter Earnings" for investment in "Capstone Private Equity Fund" mailed to victim CRS in Elm City, North Carolina.

Count	Date (on or about)	Item Mailed
FIVE	April 18, 2005	Letter on letterhead from Legacy Resource Management in Winston-Salem, North Carolina regarding "an administrative error," mailed to victim CRS in Elm City, North Carolina.

Each count in the above table constituting a separate violation of Title 18, United States Code, Sections 1341 and 2.

COUNT SIX

[DEFENDANTS BARTKO and PLUMMER:
Sale of Unregistered Securities and Aiding and Abetting]

12. The allegations of paragraphs 1 through 5, 8, and 9 are realleged as if fully set forth herein.

13. On or about January 21, 2005, in the Eastern District of North Carolina and elsewhere, defendants GREGORY BARTKO, REBECCA PLUMMER, a/k/a Rebecca Blackburn, and Scott Bradley Hollenbeck, a co-conspirator unindicted herein, and others both known and unknown to the Grand Jury, directly and indirectly, aiding and abetting each other, willfully offered and sold, and caused the offer and sale of, securities to victim CRS when no registration statement was filed with the S.E.C. and in effect as to the securities, and used the means and instruments of transportation and communication in interstate commerce and the mails in connection with the offer and sale of the securities, in violation of Title 15, United States Code, Sections 77e and 77x, and Title 18, United States Code, Section 2.

COUNT SEVEN

[DEFENDANTS BARTKO and LAWS: False Statements]

14. The allegations of paragraphs 1 through 5, 8, and 9 are realleged as if fully set forth herein.

15. On or about January 7, 2009, in the Eastern District of North Carolina, in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency within the executive branch of the government of the United States, defendant DARRYL LYNN LAWS, aided and abetted by defendant GREGORY BARTKO, did knowingly and willfully make materially false, fictitious, and fraudulent statements and representations to an FBI Special Agent, including statements concerning money LAWS and BARTKO had been provided by Scott Hollenbeck, in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT EIGHT

[DEFENDANTS BARTKO and LAWS: False Statements]

16. The allegations of paragraphs 1 through 4, 7, and 8 are realleged as if fully set forth herein.

17. On or about October 2, 2009, in the Eastern District of North Carolina, in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency within the executive branch of the government of the United States, defendant DARRYL LYNN LAWS, aided and abetted by defendant GREGORY BARTKO, did knowingly and willfully make materially false, fictitious, and fraudulent

statements and representations to an FBI Special Agent, including statements concerning money LAWS and BARTKO had been provided by Scott Hollenbeck, in violation of Title 18, United States Code, Section 1001(a)(2).

FORFEITURE NOTICE

18. Defendants GREGORY BARTKO, DARRYL LYNN LAWS, and REBECCA PLUMMER, a/k/a Rebecca Blackburn, are given notice pursuant to Federal Rule of Criminal Procedure 32.2(a) that, under the provisions of 18 U.S.C. § 981, 18 U.S.C. § 982, 18 U.S.C. § 853, and 28 U.S.C. § 2461, all of each defendant's interest in all property specified herein is subject to forfeiture.

19. As a result of the foregoing offenses in this Indictment, the defendants shall forfeit to the United States any and all property constituting, or derived from, any proceeds defendants obtained directly or indirectly as a result of the offenses and, in addition with respect to Count One, all property involved in the violations stated therein, or proceeds traceable to that property.

20. If any of the above-described forfeitable property, as a result of any act or omission of a defendant (a) cannot be located upon the exercise of due diligence; (b) has been transferred or sold to, or deposited with, a third person; (c) has been placed beyond the jurisdiction of the court; (d) has been substantially diminished in value; or (e) has been commingled with other property which cannot be subdivided without difficulty, it is the intent of

the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

A TRUE BILL

1/6/2010

DATE

GEORGE E. B. HOLDING
United States Attorney

BY: CLAY C. WHEELER
Assistant United States Attorney
Chief, Economic Crimes Section

B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:09-CR-00321-1D

UNITED STATES OF AMERICA	)	**ORDER FOR DISMISSAL OF COUNTS SEVEN AND EIGHT AND CERTAIN OBJECTS OF THE CONSPIRACY IN COUNT ONE**
v.	)	
GREGORY BARTKO	)	

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, and with leave of the Court, the United States Attorney for the Eastern District of North Carolina hereby dismisses Count Seven, Count Eight, and Conspiracy objects A.7.e, False Statements (page 4, lines 14-22), and A.7.f, Obstructing S.E.C. Proceedings (page 4, line 23 to page 5, line 4) of the Superseding Indictment, filed on January 6, 2010, against GREGORY BARTKO for the purpose of streamlining the case for trial.

GEORGE E.B. HOLDING
United States Attorney

/s/ David A. Bragdon
DAVID A. BRAGDON
Assistant United States Attorney
U.S. Attorney's Office
310 New Bern Avenue, Suite 800
Raleigh, NC 27601
Telephone: 919-856-4530
Fax: 919-856-4487
e-mail: david.bragdon@usdoj.gov
State Bar No. 33564

Leave of Court is granted for the filing of the foregoing dismissal.

10/29/10
Date

James Dever
THE HONORABLE JAMES C. DEVER III
UNITED STATES DISTRICT JUDGE

Exh B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
GREGORY BARTKO	)	NO. 5:09-CR-321-1BR
	)	
DARRYL LYNN LAWS	)	NO. 5:09-CR-321-2BR
	)	
REBECCA PLUMMER a/k/a Rebecca Blackburn	)	NO. 5:09-CR-321-3BR

I N D I C T M E N T
(SUPERSEDING)

The Grand Jury charges:

Introduction

1. The essence of the crimes charged in this Indictment is the interstate criminal scheme, led by defendant BARTKO, to profit from fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits.

2. Defendant GREGORY BARTKO maintained an office in Atlanta, Georgia, and lived in Berkeley Lake, Georgia. BARTKO was licensed to practice law in Georgia, Michigan, and North Carolina, and also held himself out as an investment banker, operating through a Utah corporation, Capstone Partners, L.C.

3. Defendant DARRYL LYNN LAWS maintained an office in La Jolla, California and lived in La Jolla. LAWS held himself out as an investment banker, operating through a California corporation,

Exh D

Charlotte Square Capital Ventures. LAWS falsely purported to have a Ph.D. in Finance.

4. Defendant REBECCA PLUMMER, a/k/a Rebecca Blackburn, maintained an office in Winston-Salem, North Carolina. Using a North Carolina corporation, Legacy Resource Management, Inc., PLUMMER and another known to the Grand Jury held themselves out as financial advisors specializing in advice concerning retirement.

5. In conducting the criminal scheme described in this Indictment, one or more of the defendants formed and/or used numerous entities, including "Franklin Asset LLC Fund I," formed in Nevada on March 1, 2004; "Caledonian Partners LLC," formed in the Isle of Man on April 23, 2004; "Capstone Private Equity Bridge & Mezzanine Fund, LLC," formed in Delaware on November 23, 2004; and "LRM Group, Inc.," formed in Delaware on April 1, 2005.

COUNT ONE

[ALL DEFENDANTS: Conspiracy to Commit Mail Fraud, Sell Unregistered Securities, Launder Monetary Instruments, Engage in Unlawful Monetary Transactions, Make False Statements, and Obstruct S.E.C. Proceedings]

6. The allegations of paragraphs 1 through 5 are re-alleged as if fully set forth herein.

A. OBJECTS OF THE CONSPIRACY

7. Beginning in or about early 2004, at an exact date unknown to the Grand Jury, and continuing through the date of this Indictment, in the Eastern District of North Carolina and elsewhere, defendants GREGORY BARTKO, DARRYL LYNN LAWS, and REBECCA

PLUMMER, a/k/a Rebecca Blackburn, and others both known and unknown to the Grand Jury, knowingly and unlawfully combined, conspired, and agreed to commit the following offenses against the United States:

a. Mail Fraud. Having devised a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, for the purpose of executing such scheme, to place in a post office and authorized depository for mail matter, and deposit and cause to be deposited to be sent by a private and commercial mail interstate carrier, and take and receive therefrom, and knowingly cause to be delivered by mail and such carrier according to the direction thereon, any matter or thing, in violation of Title 18, United States Code, Section 1341;

b. Offer and Sale of Unregistered Securities. Directly and indirectly willfully offering and selling securities when no registration statement was filed with the United States Securities and Exchange Commission ("S.E.C.") and in effect as to the securities, and using the means and instruments of transportation and communication in interstate commerce and the mails in connection with the offer and sale;

c. Laundering of Monetary Instruments. Knowingly conducting and attempting to conduct financial transactions affecting interstate commerce and which involve the proceeds of a

specified unlawful activity, knowing that the transactions are designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity, and knowing that the property involved in the financial transactions represents the proceeds of some form of unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i);

d. Engaging in Unlawful Monetary Transactions. Knowingly engaging and attempting to engage in monetary transactions affecting interstate commerce in criminally derived property of a value greater than $10,000 and derived from specified unlawful activity, in violation of Title 18, United States Code, Section 1957(a);

e. False Statements. In a matter within the jurisdiction of an agency and department within the executive branch of the government of the United States, knowingly and willfully falsifying, concealing, and covering up by scheme a material fact, making a materially false, fictitious, and fraudulent statement and representation, and making and using a false document knowing the same to contain a materially false, fictitious, and fraudulent statement, all in violation of Title 18, United States Code, Section 1001; and

f. Obstructing S.E.C. Proceedings. Corruptly obstructing and impeding and endeavoring to influence, obstruct,

and impede the due and proper administration of the law under which any pending proceeding is being had before the S.E.C., a department and agency of the United States, all in violation of Title 18, United States Code, Section 1505.

B. MANNER AND MEANS OF THE CONSPIRACY

8. The above objects of the conspiracy were carried out in substance in the following manner and means, among others:

a. It was a part of the conspiracy that defendants BARTKO, LAWS, and PLUMMER, and others, used bank accounts they controlled to collect hundreds of thousands of dollars in proceeds from fraudulent sales of investments. Defendants BARTKO and LAWS rarely collected this money directly from investors. Instead, they collected the money only after it had been deposited and then withdrawn from several North Carolina bank accounts controlled by others, including PLUMMER. In this way, defendants concealed and attempted to conceal the true source and nature of the money, and the fraudulent means by which the money had been obtained.

b. It was a further part of the conspiracy that, after collecting this money, the defendants transferred the money among bank accounts they controlled located in Georgia, California, and North Carolina in order to convert a significant portion of it to their personal use.

c. It was a further part of the conspiracy that defendants BARTKO, LAWS, and PLUMMER conducted financial

transactions knowing that the money involved was from some form of unlawful activity. During 2004 and early 2005, nearly all of the money defendants collected had been obtained by a single salesman, Scott Bradley Hollenbeck, a co-conspirator unindicted herein, through fraudulent sales of investments. In making these sales, Hollenbeck used numerous materially false statements and omissions, both oral and written, including false promises designed to conceal the true risk of the investment, such as "guarantees" of yearly earnings of at least 12%, and the promise that the investment was insured when it was not.

d. It was a further part of the conspiracy that defendants BARTKO, LAWS, and PLUMMER aided and abetted these fraudulent sales of investments by supplying tools used by Hollenbeck and other salespeople to give a false impression of legitimacy. BARTKO's assistance in this regard included assistance with the formation and naming of several "funds" purporting to pay 12% returns. LAWS repeatedly used his false credentials in order to create a fraudulent impression of accomplishment and know-how.

e. It was a further part of the conspiracy that, in order to conceal their profits from fraudulent sales of investments, defendants BARTKO and LAWS agreed to make, and to have others make, false and misleading statements and omissions to the United States Securities and Exchange Commission in Atlanta,

Georgia and the Federal Bureau of Investigation in Raleigh, North Carolina.

C. OVERT ACTS

9. In furtherance of the conspiracy, and in order to accomplish its unlawful objectives, defendants BARTKO, LAWS, and PLUMMER, and others both known and unknown to the Grand Jury, committed and caused to be committed overt acts in the Eastern District of North Carolina and elsewhere, including, but not limited to, the following:

a. On or about January 19, 2004, BARTKO faxed LAWS a lengthy promotional document for The Webb Financial Group, Inc. On the cover page, BARTKO wrote "[t]hese documents are more explanatory in terms of what John I [sic] doing to raise this dough."

b. Between February 27, 2004 and May 6, 2004, BARTKO collected $701,000 in wire transfers by Hollenbeck from an account Hollenbeck controlled at Bank of North Carolina in Kernersville, North Carolina into two accounts BARTKO controlled at Wachovia Bank in Atlanta, Georgia;

c. On or about August 11, 2004, BARTKO wired $150,000 from an account he controlled at Wachovia Bank in Atlanta, Georgia to an account controlled by LAWS at Citibank in La Jolla, California.

d. On or about October 20, 2004, BARTKO e-mailed LAWS about getting Hollenbeck "to commit to raise at least $1.0 million each month for us religiously (no pun intended)." LAWS replied "I would prefer to see one or two months where a significant amount was raised, say $3 million, then allow him to modulate down."

e. On or about November 4, 2004, BARTKO supplied LAWS with a copy of an "Offering Summary" for "Caledonian Private Equity Partners Bridge & Mezzanine Fund, LLC," which BARTKO had sent to Hollenbeck.

f. On or about December 15, 2004, LAWS transferred $100,000 from an account he controlled at Citibank in La Jolla, California to a second account he had recently opened at the same bank.

g. On or about December 27, 2004, BARTKO transferred $25,000 from an account he controlled at Wachovia Bank in Atlanta, Georgia to a second account he controlled at the same bank.

h. On or about January 19, 2005, BARTKO sent a check drawn on an account he controlled at Wachovia Bank in Atlanta, Georgia in the amount of $95,860.64 by FedEx to victim CRS in Elm City, NC.

i. Also on or about January 19, 2005, BARTKO mailed a Notice of Sale of Securities in "Capstone Private Equity Bridge & Mezzanine Fund, LLC" to North Carolina regulators in Raleigh, North Carolina;

j. On or about January 27, 2005, PLUMMER and another known to the Grand Jury deposited the $95,860.64 check to victim CRS, now endorsed by victim CRS, into a newly-opened account in the name "Legacy Resource Management, Inc." at TriStone Community Bank in Winston-Salem, North Carolina.

k. On or about March 11, 2005, PLUMMER and another known to the Grand Jury opened an account in the name "Legacy Resource Management, Inc." at Wachovia Bank in Winston-Salem, North Carolina.

l. On or about April 1, 2005, PLUMMER and another known to the Grand Jury mailed victim CRS in Elm City, North Carolina and others a "Quarterly Statement" reflecting "1st Quarter Earnings" for an investment in "Capstone Private Equity Fund."

m. On or about April 15, 2005, PLUMMER and another known to the Grand Jury deposited a check in the amount of $35,000 into their "Legacy Resource Management, Inc." account at Wachovia Bank.

n. On or about April 18, 2005, PLUMMER and another known to the Grand Jury mailed victim CRS in Elm City, North Carolina and others a letter on letterhead from Legacy Resource Management in Winston-Salem, North Carolina regarding "an administrative error."

o. In or about June, 2005, during an S.E.C. examination in Atlanta, Georgia, BARTKO made false and misleading statements,

including statements concerning money he and LAWS had been provided by Scott Hollenbeck.

p. On or about August 19, 2005, BARTKO e-mailed LAWS, telling LAWS that among the things BARTKO had told another individual to "tell the SEC" was that the individual "has no information about CPE because he has no awareness or relationship with CPE . . . ."

q. On or about January 7, 2009, LAWS was interviewed by a Federal Bureau of Investigation agent at the United States Attorney's Office in Raleigh, North Carolina, and made materially false and misleading statements, including statements concerning money he and BARTKO had been provided by Scott Hollenbeck.

r. On or about October 2, 2009, LAWS was interviewed by a Federal Bureau of Investigation agent at the United States Attorney's Office in Raleigh, North Carolina and made materially false and misleading statements, including statements concerning money he and BARTKO had been provided by Scott Hollenbeck.

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH FIVE

[ALL DEFENDANTS: Mail Fraud and Aiding and Abetting]

10. The allegations of paragraphs 1 through 5, 8, and 9 are realleged as if fully set forth herein.

11. On or about the dates set forth below, each date constituting a separate count of this Indictment, in the Eastern

District of North Carolina and elsewhere, defendants GREGORY BARTKO, DARRYL LYNN LAWS, REBECCA PLUMMER, a/k/a Rebecca Blackburn, and Scott Bradley Hollenbeck, a co-conspirator unindicted herein, and others both known and unknown to the Grand Jury, aiding and abetting each other, having devised a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, did, for the purpose of executing such scheme and artifice, place in a post office and authorized depository for mail matter, and deposit and cause to be deposited to be sent by a private and commercial mail interstate carrier, and take and receive therefrom, and knowingly cause to be delivered by mail and such carrier according to the direction thereon, the following items:

Count	Date (on or about)	Item Mailed
TWO	January 19, 2005	Check in the amount of $95,860.64 and accompanying letter signed by BARTKO sent by FedEx to victim CRS in Elm City, North Carolina.
THREE	January 21, 2005	Endorsed check in the amount of $95,860.64 mailed by victim CRS in Elm City, North Carolina to Hollenbeck.
FOUR	April 1, 2005	"Quarterly Statement" reflecting "1st Quarter Earnings" for investment in "Capstone Private Equity Fund" mailed to victim CRS in Elm City, North Carolina.

Count	Date (on or about)	Item Mailed
FIVE	April 18, 2005	Letter on letterhead from Legacy Resource Management in Winston-Salem, North Carolina regarding "an administrative error," mailed to victim CRS in Elm City, North Carolina.

Each count in the above table constituting a separate violation of Title 18, United States Code, Sections 1341 and 2.

COUNT SIX

[DEFENDANTS BARTKO and PLUMMER:
Sale of Unregistered Securities and Aiding and Abetting]

12. The allegations of paragraphs 1 through 5, 8, and 9 are realleged as if fully set forth herein.

13. On or about January 21, 2005, in the Eastern District of North Carolina and elsewhere, defendants GREGORY BARTKO, REBECCA PLUMMER, a/k/a Rebecca Blackburn, and Scott Bradley Hollenbeck, a co-conspirator unindicted herein, and others both known and unknown to the Grand Jury, directly and indirectly, aiding and abetting each other, willfully offered and sold, and caused the offer and sale of, securities to victim CRS when no registration statement was filed with the S.E.C. and in effect as to the securities, and used the means and instruments of transportation and communication in interstate commerce and the mails in connection with the offer and sale of the securities, in violation of Title 15, United States Code, Sections 77e and 77x, and Title 18, United States Code, Section 2.

COUNT SEVEN

[DEFENDANTS BARTKO and LAWS: False Statements]

14. The allegations of paragraphs 1 through 5, 8, and 9 are realleged as if fully set forth herein.

15. On or about January 7, 2009, in the Eastern District of North Carolina, in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency within the executive branch of the government of the United States, defendant DARRYL LYNN LAWS, aided and abetted by defendant GREGORY BARTKO, did knowingly and willfully make materially false, fictitious, and fraudulent statements and representations to an FBI Special Agent, including statements concerning money LAWS and BARTKO had been provided by Scott Hollenbeck, in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT EIGHT

[DEFENDANTS BARTKO and LAWS: False Statements]

16. The allegations of paragraphs 1 through 4, 7, and 8 are realleged as if fully set forth herein.

17. On or about October 2, 2009, in the Eastern District of North Carolina, in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency within the executive branch of the government of the United States, defendant DARRYL LYNN LAWS, aided and abetted by defendant GREGORY BARTKO, did knowingly and willfully make materially false, fictitious, and fraudulent

statements and representations to an FBI Special Agent, including statements concerning money LAWS and BARTKO had been provided by Scott Hollenbeck, in violation of Title 18, United States Code, Section 1001(a)(2).

FORFEITURE NOTICE

18. Defendants GREGORY BARTKO, DARRYL LYNN LAWS, and REBECCA PLUMMER, a/k/a Rebecca Blackburn, are given notice pursuant to Federal Rule of Criminal Procedure 32.2(a) that, under the provisions of 18 U.S.C. § 981, 18 U.S.C. § 982, 18 U.S.C. § 853, and 28 U.S.C. § 2461, all of each defendant's interest in all property specified herein is subject to forfeiture.

19. As a result of the foregoing offenses in this Indictment, the defendants shall forfeit to the United States any and all property constituting, or derived from, any proceeds defendants obtained directly or indirectly as a result of the offenses and, in addition with respect to Count One, all property involved in the violations stated therein, or proceeds traceable to that property.

20. If any of the above-described forfeitable property, as a result of any act or omission of a defendant (a) cannot be located upon the exercise of due diligence; (b) has been transferred or sold to, or deposited with, a third person; (c) has been placed beyond the jurisdiction of the court; (d) has been substantially diminished in value; or (e) has been commingled with other property which cannot be subdivided without difficulty, it is the intent of

the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

A TRUE BILL

1/6/2010

DATE

GEORGE E. B. HOLDING
United States Attorney

BY: CLAY C. WHEELER
Assistant United States Attorney
Chief, Economic Crimes Section

D

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA
V.
GREGORY BARTKO

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:09-CR-321-1-D

USM Number:61509-019

Donald F. Samuel/R. Daniel Boyce/Edward T.M. Garland/
Amanda Clark Palmer
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1s through 6s of the Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
**See page 2			

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) 7s - 8s and Original Indictment ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Sentencing Location:
Raleigh, North Carolina

4/4/2012
Date of Imposition of Judgment

Signature of Judge

James C. Dever III, Chief United States District Judge
Name and Title of Judge

4/4/2012
Date

Exh. E

DEFENDANT: GREGORY BARTKO
CASE NUMBER: 5:09-CR-321-1-D

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to Commit Mail Fraud, Sell Unregistered Securities, Engage in Money Laundering, Engage in Unlawful Monetary Transactions	1/6/2010	1s
18 U.S.C. § 1341 and 2	Mail Fraud and Aiding and Abetting	1/6/2010	2s through 5s
15 U.S.C. § 77e and 77x and 18 U.S.C § 2	Selling Unregistered Securities and Aiding and Abetting	1/6/2010	6s

DEFENDANT: GREGORY BARTKO
CASE NUMBER: 5:09-CR-321-1-D

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Counts 1s and 6s - 60 months per count and shall run concurrent with each other but consecutive to Counts 2s through 5s
Counts 2s through 5s - 216 months per count and shall run concurrently - (Total term of 276 months)

☑ The court makes the following recommendations to the Bureau of Prisons:

The court recommends that he serve his term at a Federal Correctional Institution as close as possible to Atlanta, Georgia.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: GREGORY BARTKO
CASE NUMBER: 5:09-CR-321-1-D

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

Counts 1s through 6s - 3 years per count, all such terms to be served concurrently - (Total term of 3 years)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☑ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

☑ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. The defendant shall support the defendant's dependents and meet other family responsibilities.
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6. The defendant shall notify the probation officer at least then (10) days prior to any change of residence or employment.
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician.
8. The defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered, or other places specified by the court.
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10. The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: GREGORY BARTKO
CASE NUMBER: 5:09-CR-321-1-D

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

DEFENDANT: GREGORY BARTKO
CASE NUMBER: 5:09-CR-321-1-D

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 600.00	$	$ 885,946.89

☐ The determination of restitution is deferred until ______. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
**See attached list	$885,946.89	$885,946.89	
TOTALS	$885,946.89	$885,946.89	

☐ Restitution amount ordered pursuant to plea agreement $ ____________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

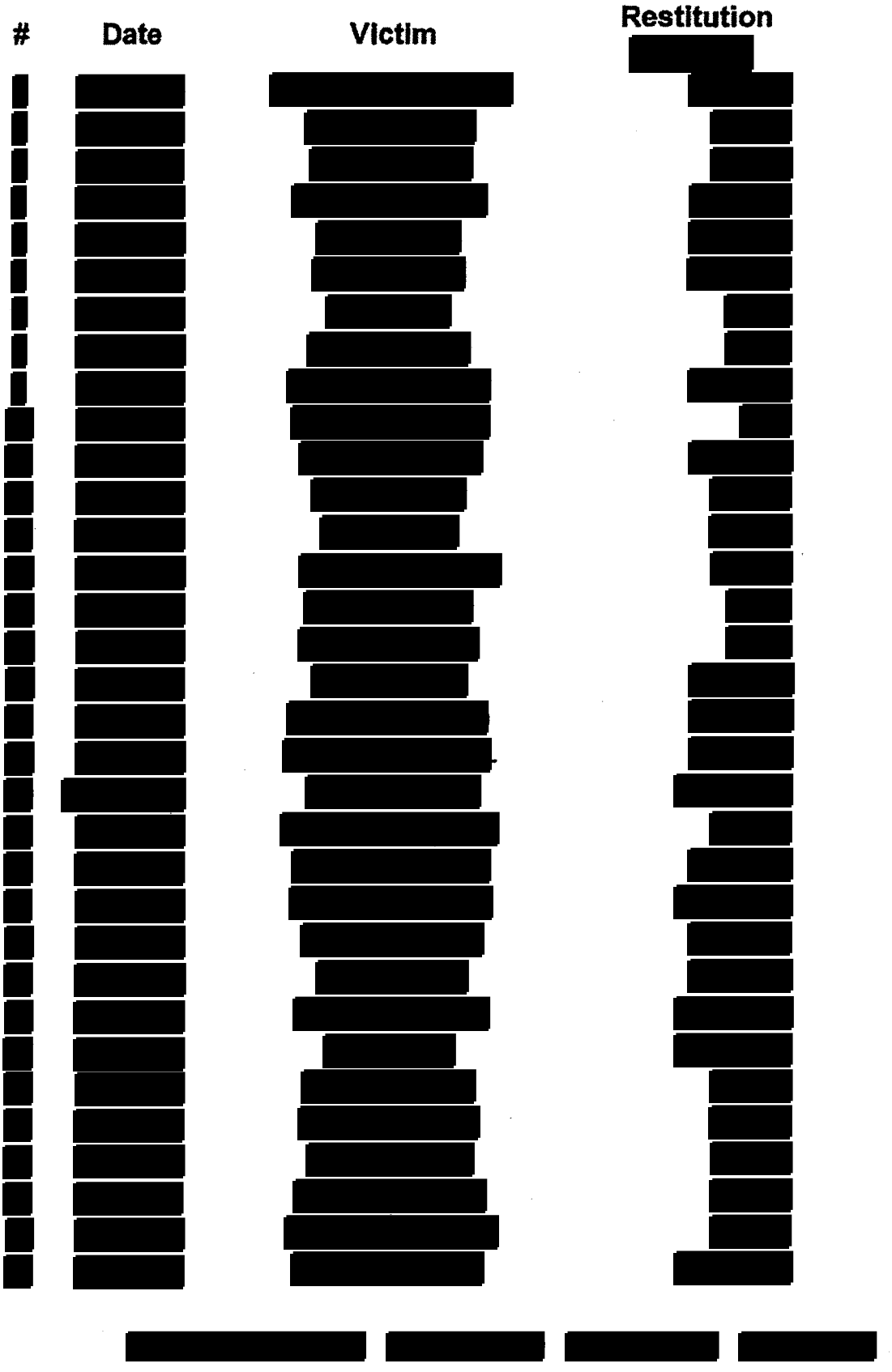
☑ the interest requirement is waived for the ☐ fine ☑ restitution.

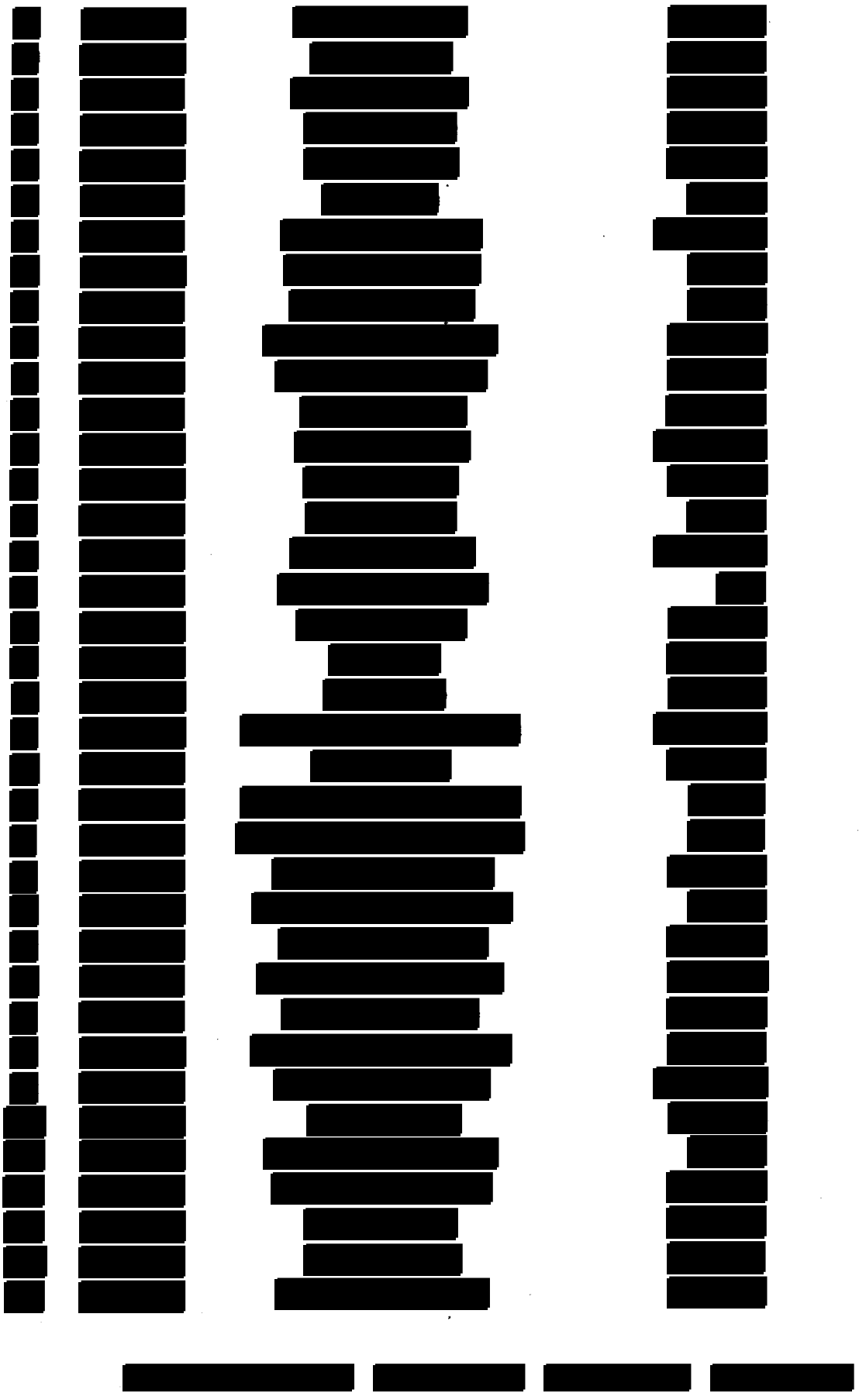
☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

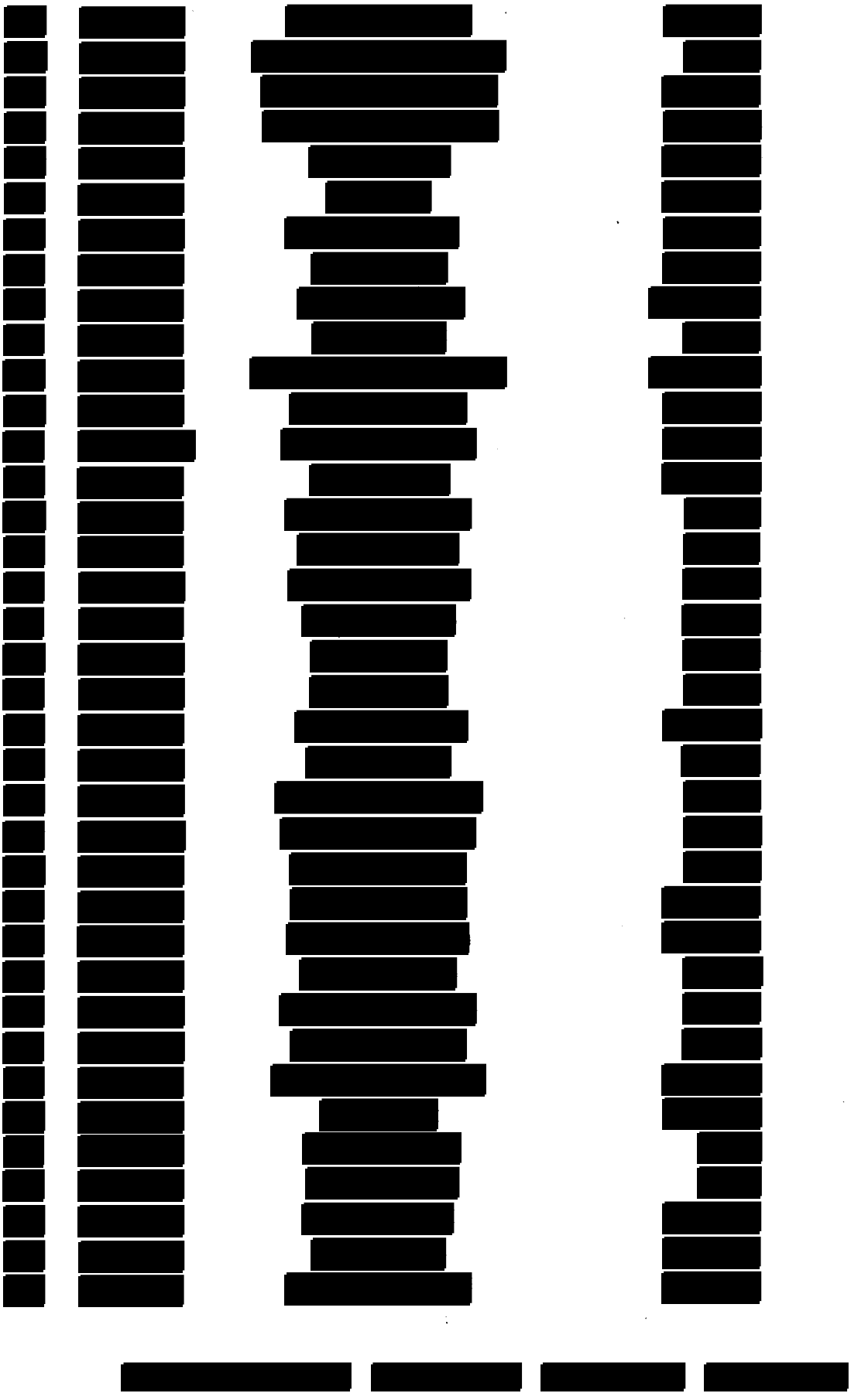
* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

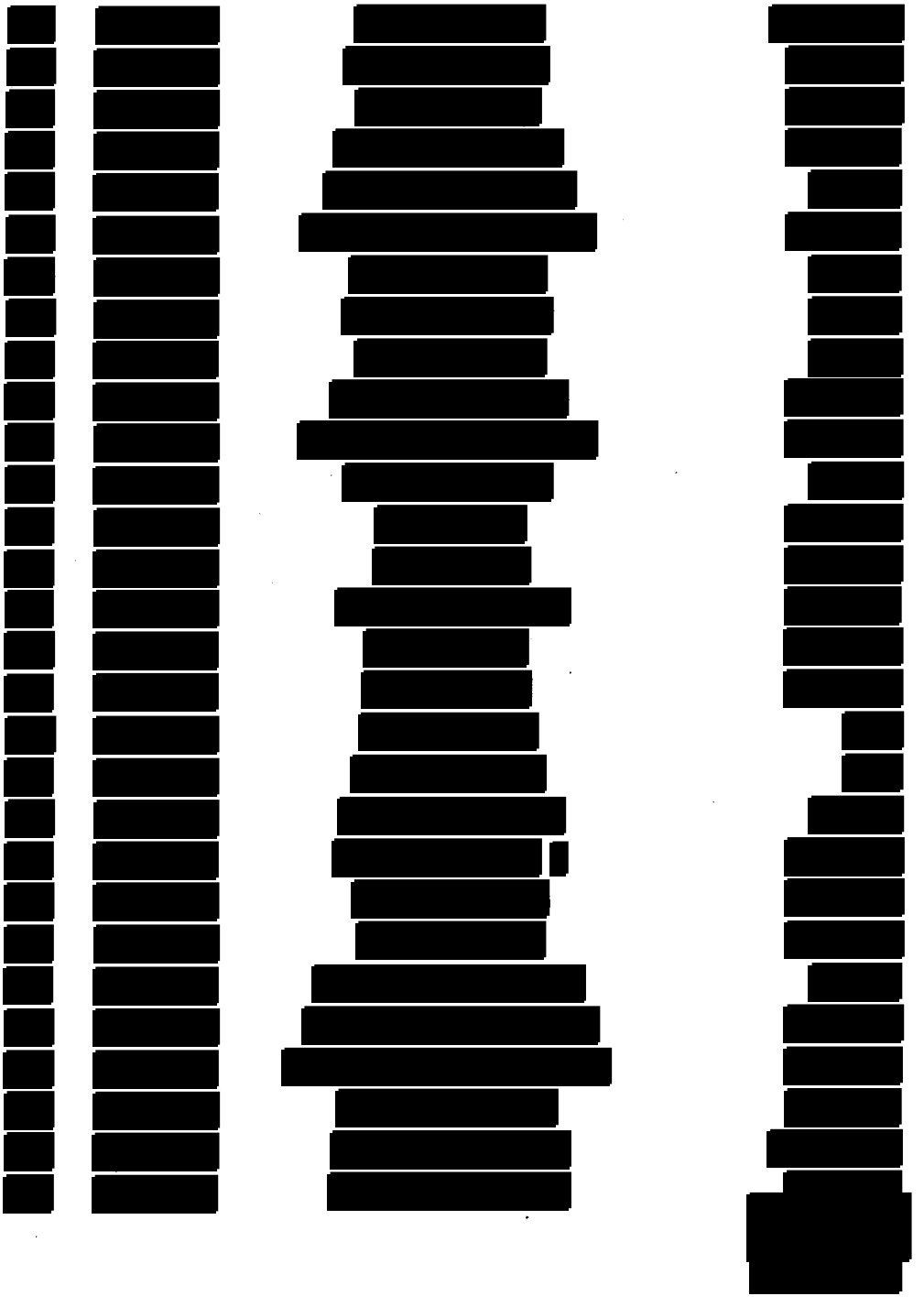
Victim	Loss	Amount Returned After Detection	Restitution
[redacted]	$ [redacted]	$ [redacted]	$ 10,200.00
	$	$	$ -
	$	$	$ -
	$	$	$ 1,415.12
	$	$	$ 16,872.63
	$	$	$ 6,000.00
	$	$	$ 84.91
	$	$	$ 707.56
	$	$	$ 11,631.42
	$	$	$ 4,528.38
	$	$	$ 26,820.00
	$	$	$ 1,698.14
	$	$	$ -
	$	$	$ 1,981.17
	$	$	$ 5,839.42
	$	$	$ 10,787.51
	$	$	$ 5,094.43
	$	$	$ 2,529.91
	$	$	$ 1,415.12
	$	$	$ 9,870.13
	$	$	$ 1,558.01
	$	$	$ -
	$	$	$ 6,000.00
	$	$	$ 2,830.24
	$	$	$ 4,245.36
	$	$	$ 1,698.14
	$	$	$ 6,967.01
	$	$	$ 5,235.94
	$	$	$ 2,830.24
	$	$	$ 3,396.28
	$	$	$ 1,981.17
	$	$	$ 5,539.55
	$	$	$ 3,962.33
	$	$	$ 4,245.36
	$	$	$ 16,981.42
	$	$	$ 184,946.89

The Caledonian Fund
January 15, 2004 through May 6, 2004









DEFENDANT: GREGORY BARTKO
CASE NUMBER: 5:09-CR-321-1-D

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of $600.00 shall be due immediately.
Payment of restitution shall be due and payable in full immediately. However, if the defendant is unable to pay in full immediately, the special assessment and restitution may be paid through the Inmate Financial Responsibility Program. The court, having considered the defendant's financial resources and ability to pay, orders that any balance still owed at the time of release shall be paid in installments of $75.00 per month to begin 60 days after the defendant's release from prison. At the time of the defendant's release, the probation officer shall take into consideration the defendant's ability to pay the restitution ordered and shall notify the court of any needed modification of the payment schedule.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Gregory Bartko	5:09-CR-321-1-D	$885,946.89
Darryl Lynn Laws	5:09-CR-321-2-D	$150,000.00
Rebecca Plummer	5:09-CR-321-3-D	$405,096.42
John Kent Colvin	4:09-CR-72-1-D	$5,315,385.71

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
V.	)	5:09-CR-321-D
	)	
GREGORY BARTKO,	)	
	)	
DEFENDANT.	)	
	)	

POST-VERDICT HEARING

NOVEMBER 18, 2010
BEFORE THE HONORABLE JAMES C. DEVER III
U. S. DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

MR. CLAY WHEELER
MR. DAVID BRAGDON
ASST. U.S. ATTORNEY
310 NEW BERN AVE.
RALEIGH, NC

FOR THE DEFENDANT:

MR. DONALD SAMUEL
MR. EDWARD GARLAND
MS. AMANDA CLARK-PALMER
GARLAND, SAMUEL & LOEB, P.C.
3151 MAPLE DRIVE
ATLANTA, GA

COURT REPORTER: DONNA J. TOMAWSKI
STENOTYPE WITH COMPUTER AIDED TRANSCRIPTION

Exh F

NOVEMBER 18, 2010

* * * *

(JURY VERDICT READ AND JURORS DISMISSED.)

(RECESS TAKEN.)

THE COURT: WILL THE DEFENDANT PLEASE RISE. GREGORY BARTKO, HAVING BEEN FOUND GUILTY BY A JURY AFTER A TRIAL, THE COURT HEREBY ADJUDGES YOU GUILTY OF THE SIX COUNTS IN THE SUPERSEDING INDICTMENT. SENTENCING IS SET FOR THE TERM OF COURT FEBRUARY 21, 2011 HERE IN THIS COURT.

MR. WHEELER, WHAT IS THE POSITION OF THE UNITED STATES ON LIBERTY STATUS?

MR. WHEELER: THE UNITED STATES DOES NOT THINK THE DEFENDANT COULD CARRY HIS BURDEN UNDER 3143 SHOWING THAT THERE'S CLEAR AND CONVINCING EVIDENCE HE WILL NOT FLEE OR POSE A DANGER TO THE SAFETY OF THE COMMUNITY. THERE ARE THREE GROUNDS FOR THIS, YOUR HONOR.

THE FIRST IS OBSTRUCTIVE CONDUCT, BOTH AS AN OFFICER OF THE COURT AND ALSO AT TRIAL HERE IN NORTH CAROLINA. THERE IS EVIDENCE INTRODUCED AT TRIAL THAT THE DEFENDANT USED THE FEDERAL COURT IN THE MIDDLE DISTRICT OF NORTH CAROLINA AS PART OF HIS SCHEME IN THIS INTERPLEADER WHERE FALSE REPRESENTATIONS WERE MADE ABOUT WHAT HAD HAPPENED, HAD A DISTRICT COURT JUDGE THERE SIGN AN ORDER WHICH CONCEALED THE DEFENDANT'S INVOLVEMENT WITH MR. HOLLENBECK.

THERE'S ALSO, IT WAS NOT PART OF THIS CASE, BUT THE DEFENDANT'S INVOLVEMENT IN THIS RECEIVERSHIP IN FORSYTH COUNTY, NORTH CAROLINA, IN STATE COURT, WHERE THE DEFENDANT CONCEALED THE FACT THAT HE HAD RECEIVED THIS $701,000 AS AN OFFICER OF THE COURT AND RECEIVED ALMOST $2 MILLION IN CONTINGENT FEES IN THAT CASE AFTER DOING THAT.

AND THEN THIRD, AND PERHAPS MOST IMPORTANT, YOUR HONOR, THE DEFENDANT TOOK THE STAND AND BY THE JURY'S VERDICT THE JURY DETERMINED THAT ALL OF THE STATEMENTS THAT THE DEFENDANT MADE, COUNTLESS STATEMENTS THE DEFENDANT MADE, WERE NOT TRUE AND THEREFORE HE TESTIFIED FALSELY. WE THINK THAT IS VERY SIGNIFICANT EVIDENCE, TAKEN TOGETHER A PATTERN OF CONDUCT, AND WE DO NOT THINK THERE ARE CONDITIONS THAT WILL REASONABLY ASSURE THE COURT, ESPECIALLY BY CLEAR AND CONVINCING EVIDENCE.

TWO OTHER THINGS I WANT TO BRIEFLY MENTION, YOUR HONOR. THERE'S THIS ISSUE OF ASSETS. THE DEFENDANT WITHIN THE LAST TWO YEARS RECEIVED ALMOST $2 MILLION IN CONTINGENCY FEES. WE KNOW THAT SOME OF THAT HAS GONE TO HIS ATTORNEYS BUT CERTAINLY NOT ALL. SO WE DO THINK THE DEFENDANT HAS AVAILABLE ASSETS.

WE ALSO KNOW OF INTERNATIONAL TIES THE DEFENDANT HAS. PRIMARILY, WE KNOW OF WIRE TRANSFERS, SIGNIFICANT WIRE TRANSFERS TO CANADA, INCLUDING MONTREAL AND VANCOUVER.

THERE ARE FOUR POTENTIAL CLIENTS, ALTHOUGH WE DON'T KNOW THAT, NAMED GREENWOOD CAPITAL, LIVE-STAR ENTERTAINMENT GROUP, TOTALING TENS, PROBABLY HUNDREDS OF THOUSANDS OF DOLLARS OVER THE YEARS. AND THEN WE ALSO KNOW THAT THERE ARE SOME INTERNATIONAL TIES THROUGH HIS WIFE, WHO, OUR UNDERSTANDING, IS FROM NIGERIA. WE ALSO KNOW OF SOME INTERNATIONAL TRAVEL TO THE CAYMAN ISLANDS OVER THE LAST TWO OR THREE YEARS, AS WELL AS THE CARIBBEAN AND SOME OTHER LOCATIONS.

SO WE THINK ALL OF THOSE FACTORS COMBINED SHOW THERE CANNOT BE CLEAR AND CONVINCING EVIDENCE THAT WOULD ASSURE THE COURT.

THE COURT: THANK YOU. I'LL HEAR FROM MR. SAMUEL.

MR. SAMUEL: YOUR HONOR, UNDER 3143(A), THE QUESTION IS WHETHER WE CAN ESTABLISH BY CLEAR AND CONVINCING EVIDENCE -- MAY MY CLIENT SIT DOWN?

THE COURT: HE MAY.

MR. SAMUEL: WHETHER THE COURT CAN FIND BY CLEAR AND CONVINCING EVIDENCE THAT HE'S NOT A DANGER TO THE COMMUNITY OR A FLIGHT RISK. I THINK THE BEST EVIDENCE OF THAT IS THE FACT THAT THE PAST YEAR, WHILE THE CASE HAS BEEN PENDING, IT'S BEEN A YEAR NOW, SINCE NOVEMBER, HE HAS ABIDED BY EACH AND EVERY CONDITION OF THE COURT. HE HAS NOT TRAVELED. FOR THE MOST PART, HE HAS EITHER BEEN IN MY

OFFICE OR HIS OWN LAW OFFICE. HE ATTENDED COURT EVERY TIME HE WAS REQUIRED TO ATTEND.

THE EMPIRICAL EVIDENCE IS THAT HE HAS ABIDED BY EACH AND EVERY ONE OF THE CONDITIONS. THAT EXPERIENCE ALONE IS SUFFICIENT TO ESTABLISH, WE BELIEVE, BY CLEAR AND CONVINCING EVIDENCE THAT HE DOES NOT POSE A DANGER TO THE COMMUNITY OR A FLIGHT RISK. I AM NOT EVEN SURE WHAT THE DANGER TO THE COMMUNITY EXACTLY IS IN THIS CASE; IT'S NOT A DRUG CASE OR VIOLENT CRIME CASE. NO EVIDENCE OF ANY MISCONDUCT WHATSOEVER INVOLVING DANGER TO THE COMMUNITY.

WITH REGARD TO FLIGHT RISK, HE'S TURNED HIS PASSPORT IN, HE'S NOT TRAVELED IN THE LAST YEAR. HE HAS FAMILY HERE. HIS WIFE IS AN AMERICAN CITIZEN, SHE LIVES HERE. HIS SISTER IS HERE. HIS FATHER IS HERE, NOT HERE IN NORTH CAROLINA, BUT HIS FATHER IS HERE. HE HAS CHILDREN, YOU HEARD TESTIMONY ABOUT THAT. ONE DAUGHTER WHO IS JUST TAKING A YEAR OFF FROM COLLEGE, A SON WHO GOES TO LAW SCHOOL AT EMERY. ALL OF HIS TIES ARE TO THE ATLANTA AREA OR, AGAIN, HIS FATHER LIVES IN MICHIGAN.

HE OWNS HIS OWN HOME IN ATLANTA. IT'S THE ONLY HOME THAT HE OWNS. AS I SAID, THE EXPERIENCE FROM THE PAST YEAR, IF NOT THE PAST FIVE YEARS, SIX YEARS, SHOULD BE SUFFICIENT FOR THIS COURT TO FIND BY CLEAR AND CONVINCING EVIDENCE THAT HE'S NOT A FLIGHT RISK.

LET ME ADDRESS SOME OF THE COMMENTS MADE BY MR.

WHEELER. FIRST OF ALL, THE INTERPLEADER WAS FIVE YEARS AGO. I'M NOT GOING TO SIT HERE AND SECOND-GUESS THE JURY OR WHAT IT MEANS OR WHETHER THEY INTERPRETED THE INTERPLEADER AS BEING IRRELEVANT AS OPPOSED TO FRAUDULENT. I HAVE TO SIT HERE AND THINK ABOUT WHAT IT IS EXACTLY THAT MR. WHEELER CONTENDS WAS FRAUDULENT ABOUT THE INTERPLEADER.

THE FACT THAT HE WENT TO A COURTHOUSE TO HAVE THE MONEY RETURNED, OBVIOUSLY DIDN'T CARRY THE DAY WITH THE JURY, BUT IT HARDLY SEEMS LIKE EVIDENCE OF -- I'M NOT SURE WHAT THE GOVERNMENT THINKS. IS IT FLIGHT RISK THAT HE GOES TO FEDERAL COURT OR DANGER TO THE COMMUNITY? DOESN'T SEEM EITHER IS APPROPRIATE.

WITH REGARD TO THE RECEIVERSHIP, WE CAN SPEND A GOOD THREE WEEKS TALKING ABOUT THE EVIDENCE INVOLVING RECEIVERSHIP. I'M NOT SURE IF YOU ARE AWARE OF THE CIRCUMSTANCES INVOLVING THE RECEIVERSHIP, BUT HE BASICALLY REPRESENTED MANY OF THE INVESTORS IN THIS CASE AND SUING THE COAL COMPANY THAT YOU HEARD SO MUCH ABOUT.

THE EARLIER WITNESSES WHO TESTIFIED IN THIS CASE GOT THEIR MONEY BACK BECAUSE HE SUED THE COAL COMPANY, AND GOT BACK MILLIONS OF DOLLARS, MILLIONS OF DOLLARS FOR THE INVESTORS WHO WERE WITNESSES IN THIS CASE. OF COURSE THAT WAS ALL EXCLUDED FROM EVIDENCE BASED ON THE MOTION IN LIMINE, BUT IT WAS LITIGATION THAT WENT ON FOR SEVERAL

YEARS. THE GOVERNMENT, I UNDERSTAND, CONTENDS THAT THERE WAS MISREPRESENTATIONS MADE DURING THE RECEIVERSHIP BECAUSE THE ARGUMENT COULD BE MADE THAT THE RECEIVER SHOULD ALSO HAVE TRIED TO GET BACK THE $700,000. BUT THE BULK OF THAT LITIGATION, IN FACT THE RECEIVER WAS APPOINTED.

THE SOLE PURPOSE OF THE RECEIVER IN THE COURT'S ORDER FROM, I CAN'T REMEMBER THE NAME OF THE COUNTY HERE IN NORTH CAROLINA, WAS TO DISBURSE THE MONEY RECEIVED FROM THE COAL COMPANY. MR. BARTKO AND MR. COVINGTON SUED THE COAL COMPANY, THEY SPENT YEARS IN THAT LITIGATION, THEY RECOVERED MILLIONS OF DOLLARS. IT ALL WENT TO THE RECEIVER AND THE RECEIVER THEN --

THE COURT: WHO WAS INVOLVED IN IT?

MR. SAMUEL: MR. COVINGTON AND MR. BARTKO WERE THE LAWYERS. THEY REPRESENTED THE INVESTORS, THESE INVESTORS, MANY OF THE PEOPLE WHO TESTIFIED WHO SAID THEY GOT MONEY BACK TWO AND THREE YEARS LATER. REMEMBER THOSE WITNESSES? THAT'S BECAUSE THEY WERE REPRESENTED BY MR. BARTKO. HE REPRESENTED THE RECEIVER -- IT'S A LITTLE CONFUSING. BUT THE COAL COMPANY BASICALLY WAS FORCED TO PAY THE MONEY BACK.

IT WENT INTO THE REGISTRY OF THE COURTHOUSE, THE STATE COURT. A RECEIVER WAS APPOINTED TO DISBURSE THAT MONEY TO ALL THE INVESTORS. MR. BARTKO HANDLED THAT

LITIGATION. THE RECEIVER THEN PAID ALL THE INVESTORS THEIR MONEY BACK FROM THE COAL COMPANY, THEIR PRIOR INVESTMENTS THROUGH COLVIN AND HOLLENBECK.

AS PART OF THAT REPRESENTATION, HE HAD A CONTINGENCY FEE AGREEMENT, WHICH THE COURT IN FORSYTH COUNTY, NORTH CAROLINA, THEY HAD A FEE HEARING, THEY HAD AN EXTENSIVE HEARING, AND THE JUDGE ULTIMATELY AGREED THAT HE WAS ENTITLED TO A CONTINGENCY FEE THAT WAS PART OF THE FEE AGREEMENT, MR. COVINGTON AND MR. BARTKO WOULD PAY THE FEES.

THE COURT: WHO WAS THE FEE AGREEMENT WITH?

MR. SAMUEL: THE PLAINTIFFS, THE INVESTORS. THERE WERE A HUNDRED INVESTORS OR -- I DON'T KNOW THE NUMBER OF INVESTORS, BUT THERE WERE NUMEROUS INVESTORS WHO, IN ESSENCE, WERE SUING THE COAL COMPANY TO GET THEIR MONEY BACK. HE REPRESENTED THEM AND GOT THE MONEY BACK.

IT'S THE GOVERNMENT'S THEORY THAT THE RECEIVER SHOULD ALSO HAVE BEEN TRYING TO GET BACK THE 700,000 FOR THE INVESTORS AND THAT THE COURT DIDN'T KNOW THAT THERE WAS ANOTHER 700,000 IN ADDITION TO THE TEN, 12, I DON'T KNOW THE NUMBER, I DON'T WANT TO EXAGGERATE, BUT THE AMOUNT OF MONEY PAID BACK BY THE COAL COMPANIES. IT WAS A VERY --

THE COURT: THE RECEIVERSHIP HAD TO DO WITH ISSUES ASSOCIATED JUST WITH MONEY THAT COLVIN INVESTED THERE AT BULL MOUNTAIN, BUT NOT ANYTHING ELSE?

MR. SAMUEL: WELL, THAT WAS WHAT WAS DISPUTED AND THAT'S WHERE THE GOVERNMENT AND DEFENSE DISAGREE. HAD THAT BEEN AN ISSUE IN THIS CASE, THERE WERE PLEADINGS IN THAT COURT THAT PROVIDE, AND I HAVE THEM BACK AT MY HOTEL BUT IT'S PRETTY COMPLICATED, THAT THE RECEIVER WAS APPOINTED FOR THE PURPOSE OF MARSHALING THE ASSETS OF THE COAL COMPANY AND DISTRIBUTING THEM.

THERE ARE OTHER ARGUMENTS THAT COULD BE MADE. I GRANT THE GOVERNMENT THAT THE RECEIVER WAS CHARGED WITH THE OBLIGATION OF GETTING ALL THE MONEY THAT THEY COULD FROM COLVIN AND FROM DISCIPLES AND THOSE COMPANIES. THE DISPUTE WITH REGARD TO THAT WAS WHO OWED WHO MONEY.

THE CALEDONIAN FUND, WHICH WOULD HAVE BEEN A DEFENDANT, IF MR. WHEELER IS CORRECT, TOOK THE POSITION, AND DARRYL LAWS WROTE TO THE RECEIVER, I DON'T OWE YOU 700,000, MR. COLVIN OWES ME $2.3 MILLION. I'M NOT GOING TO PAY THE $700,000 BACK TO THE REGISTRY OF THE COURT EVEN IF YOU DO HAVE AUTHORITY, MR. RECEIVER.

THE COURT: WAS THE SUPERIOR COURT JUDGE EVER ADVISED OF THE RELATIONSHIP BETWEEN MR. BARTKO AND MR. LAWS AND THE CALEDONIAN FUND; DO YOU KNOW? WAS THERE? IS THERE A PLEADING THAT THIS WAS REVEALED TO A SUPERIOR COURT JUDGE IN GUILFORD COUNTY? WAS THERE? DO YOU KNOW? OR FORSYTHE COUNTY IN WINSTON-SALEM?

YOU SAID THE PLEADINGS AREN'T HERE, BUT DID SOMEONE

EVER SAY TO THE SUPERIOR COURT JUDGE, THERE'S SOME CORRESPONDENCE WITH THE RECEIVER AND DARRYL LAWS IS WRITING TO A RECEIVER ON BEHALF OF THE CALEDONIAN FUND AND ASSERTING A POSSIBLE COUNTER-CLAIM AND THERE'S A LAWYER INVOLVED WHO'S A PARTNER TO THE CALEDONIAN FUND? WAS THAT EVER REVEALED TO A SUPERIOR COURT JUDGE IN OUR STATE; DO YOU KNOW? IF YOU DON'T KNOW, YOU DON'T KNOW. IF YOU ARE NOT SURE, I UNDERSTAND WHY YOU HESITATE. YOU ARE A MEMBER OF THE BAR, I UNDERSTAND THAT.

MR. SAMUEL: YEAH. I'M NOT ABSOLUTELY POSITIVE OF THAT.

THE COURT: THAT'S FINE.

MR. SAMUEL: I THINK THERE WAS -- IT WAS A TIME WHEN WE BELIEVED THAT'S WHAT THIS CASE WAS GOING TO BE ABOUT. I'M GOING BACK A YEAR. WHEN THE INDICTMENT CAME OUT, IT DIDN'T INCLUDE THAT, I GOT IT OUT OF MY HEAD.

THE COURT: I UNDERSTAND. ALL RIGHT.

MR. SAMUEL: I JUST -- REGARDLESS, THAT ALL HAPPENED IN 2005. I MEAN, THAT MAY BE A SENTENCING ISSUE, IT MAY BE SOMETHING THE COURT MUST CONSIDER AT SENTENCING, BUT TO DECIDE TODAY, FIVE YEARS LATER, THAT THAT LITIGATION IS A BASIS NOW FIVE YEARS LATER TO FIND AN ABSENCE OF RISK OF FLIGHT OR DANGER TO THE COMMUNITY SEEMS TO ME TO BE FAR-FETCHED, WITH RESPECT TO THE GOVERNMENT.

FOR FIVE YEARS HE'S BEEN PRACTICING LAW IN COURTS

THROUGHOUT THE COUNTRY. THERE'S BEEN NO ALLEGATIONS THAT I KNOW OF OF ANY MISCONDUCT WHATSOEVER. HE'S NOT ENGAGED IN ANY MISCONDUCT OUTSIDE OF THE COURT WITH THE SEC OR ANYWHERE ELSE.

I DON'T KNOW, YOU KNOW, WHATEVER HAPPENED IN CONNECTION -- OBVIOUSLY HE'S GUILTY OF THIS CASE. THE FACTS OF THIS CASE DON'T PRESENT FLIGHT RISK OR DANGER TO THE COMMUNITY. A DRUG DEALER OR SOMEONE WITH GUNS OR SOMETHING, WOULD BE A CLEAR DANGER TO THE COMMUNITY BY RELEASING HIM FOR TWO MONTHS.

FINALLY, WITH REGARD TO THE ATTORNEY'S FEES, HE REPRESENTS TWO CANADIAN COMPANIES, THREE PERHAPS, AND IS PAID ATTORNEY'S FEES BY THEM. THEY ARE INCOMING FEES THAT ARE PAID TO HIM IN CONNECTION WITH HIS REPRESENTATION OF THOSE COMPANIES.

YEARS AGO, IN CONNECTION WITH THE COMPANY, I THINK -- ALL OF THIS DEALS WITH CANADA, THERE WERE PAYMENTS MADE BY HIM AS PART OF A CORPORATE RESTRUCTURING OR SOMETHING. I DON'T KNOW THE DETAILS OF THAT, BUT NOTHING MYSTERIOUS ABOUT IT. IN FACT, THIS WAS BROUGHT TO THE ATTENTION OF THE MAGISTRATE IN ATLANTA WHO ORIGINALLY GRANTED BOND IN THIS CASE. NO CERTAINTY ABOUT IT AT ALL AND NO ALLEGATION THAT IT POSED A RISK OF FLIGHT. THE MAGISTRATE IN ATLANTA OBVIOUSLY GRANTED BOND, IT WAS NOT APPEALED TO THIS COURT, TO YOUR PREDECESSOR, JUDGE BRITT, BEFORE. THE MAGISTRATE

NEVER CHALLENGED IT.

AS I SAID, HE'S COMPLIED WITH EACH AND EVERY CONDITION OF HIS PRETRIAL RELEASE BETWEEN NOVEMBER OF 2009 AND TODAY.

THE COURT: BUT YOU WOULD AGREE THAT AT LEAST FROM THE PERSPECTIVE OF -- IN THE GUIDELINE CALCULATION, THEY'RE ADVISORY. I'M OBVIOUSLY AWARE OF *BOOKER*, BUT THE ADVISORY GUIDELINES CAN BE PRETTY HIGH IN THIS CASE.

MR. SAMUEL: IT IS A COMPLICATED CALCULATION. IT DEPENDS HOW MANY MONETARY OR FINANCIAL TRANSACTIONS YOU CONCLUDED OCCURRED. IF YOU TAKE THE 1.3, MULTIPLY IT FOUR TIMES, YES, THERE WOULD BE A NUMBER OF FINANCIAL TRANSACTIONS. IF YOU WERE JUST TO 1.3 MILLION AND THE 700,000, IT'S --

THE COURT: I MEAN, THERE COULD BE ISSUES ASSOCIATED WITH -- WELL --

MR. SAMUEL: THERE COULD BE ENHANCEMENTS. I RECOGNIZE SPECIAL SKILLED ENHANCEMENT.

THE COURT: MY MEMORY OF THE PROVISIONS, I THINK THERE'S -- IF YOU ARE A REGISTERED BROKER DEALER YOU GET FOUR LEVELS UNDER 2D1.1. YOU GOT VICTIM ISSUES, MANAGER, SUPERVISOR ISSUES.

ANYTHING ELSE? I'LL HEAR AGAIN FROM MR. WHEELER. ANYTHING ELSE, MR. SAMUEL?

MR. SAMUEL: WE HAVE HIS SISTER HERE TO TESTIFY

ABOUT THE FAMILY SITUATION, HIS HOME, AND IF YOU WANT TO HEAR FROM HER I THINK MY PROFFER, I ASSUME --

THE COURT: MR. SAMUEL, YOUR PROFFER IS SUFFICIENT. MR. WHEELER?

MR. WHEELER: YES, YOUR HONOR. JUST TO RESPOND TO A FEW THINGS. ONE IS DEFENDANT'S ACTIONS OVER THE LAST YEAR ARE REALLY NOT THAT RELEVANT TO THIS INQUIRY. AS OF 30 MINUTES AGO, THE DEFENDANT'S POSITION HAS NOW CHANGED DRAMATICALLY. WE KNOW THIS BECAUSE WE RECEIVED AN E-MAIL THE DEFENDANT SENT TO SOMEONE IN THE SEC THAT HE'S LITIGATING WITH. THIS WAS AN E-MAIL FROM TWO DAYS AGO. THE DEFENDANT WROTE TO THE SEC: WELL, MY CASE IS ALMOST DONE. THE JURY IS DELIBERATING THURSDAY AND I WILL BE ACQUITTED FRIDAY. SO THE DEFENDANT PLANNED ON WALKING OUT OF HERE. THIS IS A VERY DIFFERENT SITUATION AND IT CREATES VERY DIFFERENT INCENTIVES FOR BEHAVIOR IF HE'S RELEASED.

WE ALSO REJECT THIS IDEA THAT THERE'S NO DANGER TO THE COMMUNITY POSED BY THE EVIDENCE THAT'S BEEN SUBMITTED HERE. YOUR HONOR, WITHIN THE LAST YEAR THE DEFENDANT CONTINUES TO REPRESENT UNREGISTERED SALES AND SECURITIES IN THIS STATE THAT ARE GOING ON RIGHT NOW. THERE IS A MASSIVE INVESTMENT THAT'S GONE ON IN A COMPANY CALLED SURE-LINE CAPITAL. THE DEFENDANT IS INVOLVED WITH THAT. HE'S BEEN GOING UP AGAINST THE SECRETARY OF STATE'S OFFICE

HERE, SAYING THIS IS NOT A SECURITY, WE DON'T NEED TO REGISTER IT. THERE ARE MILLIONS OF DOLLARS THAT ARE INVESTED. OUR INITIAL EVIDENCE IS THAT THOSE ARE UNSOPHISTICATED INVESTORS. THAT'S DANGER TO THE COMMUNITY AND IT'S GOING ON. THE DEFENDANT HAS BEEN INVOLVED WITH THAT SINCE THE TIME OF THIS.

THE DEFENDANT, AFTER THIS HAPPENED IN THIS TRIAL, WENT OUT AND HIMSELF WAS GOING INTO CHURCHES TO TRY TO RECRUIT INVESTORS. IT WAS OUTRAGEOUS. SO WE THINK THERE IS A DANGER TO THE COMMUNITY POSED BY THIS DEFENDANT.

THE COURT: AFTER THIS TRIAL? THIS TRIAL JUST ENDED.

MR. WHEELER: EXCUSE ME. AFTER THE FACTS IN THIS TRIAL.

THE COURT: OKAY.

MR. WHEELER: AFTER THE FACTS OF THIS TRIAL.

WE ALSO -- THE WIRE TRANSFERS WE'RE TALKING ABOUT ARE NOT INCOMING WIRE TRANSFERS, THEY ARE OUTGOING. THEY ARE GOING TO CANADA.

WE HAVE A LIST OF WIRE TRANSFERS IN '05, '06, '07, AND A LITTLE BIT INTO '08 THAT TOTAL OVER $1.5 MILLION. SO WE THINK THAT'S EVIDENCE THE COURT CAN CONSIDER.

THE COURT: I WOULD NEED TO SEE IT.

MR. WHEELER: WE CAN PASS THAT UP TO YOUR HONOR.

THE COURT: THAT'S FINE. MR. SAMUEL CAN LOOK AT

IT.

MR. WHEELER: YOUR HONOR, TWO OTHER POINTS. ONE IS THE QUESTION ABOUT THE INTERPLEADER. I MEAN, ONE OF THE PROBLEMS WITH THE INTERPLEADER IS THE DEFENDANT REPRESENTED TO THE COURT IN THIS FILING THAT HE HAD GOTTEN THIS DIRECT INVESTMENT FROM LEGACY. WELL, WE KNOW THAT WAS FALSE, AND THAT'S WHAT THIS CASE WAS ABOUT, HOW HE CREATED THAT FALSE IMPRESSION. SO HE USED THE FEDERAL COURT SYSTEM TO CONCEAL WHAT HE HAD DONE. WE THINK THAT'S VERY SIGNIFICANT.

IT'S THE EXACT SAME THING HE DID IN THIS RECEIVERSHIP, IT WAS INGENIOUS. HE DIDN'T HAVE A FEUD WITH THESE CLIENTS, YOUR HONOR. THIS WAS A RECEIVERSHIP THAT THE DEFENDANT SET UP WITH HIS OLD CRONY, GLENN SMITH, WHO WAS A PERSON WHO WORKS WITH CAPSTONE. I DON'T THINK THAT WAS EVEN DISCLOSED TO A FULL EXTENT TO THE COURT.

THE DEFENDANT'S FEE AGREEMENT WAS NOT WITH THE VICTIMS. THEY WERE OUT OF THE LOOP. THIS WAS LIKE AN EX PARTE THING. THE DEFENDANT'S FEE AGREEMENT WAS WITH HOLLENBECK, AND HOLLENBECK BASICALLY SAID, OKAY, I'M GOING TO DO A FEE AGREEMENT WITH YOU AND THEN I'M GOING TO TURN EVERYTHING OVER. THE RECEIVER WILL STEP INTO HOLLENBECK'S SHOES AND GO GET THIS MONEY THAT HOLLENBECK SENT OUT.

IT'S A RIDICULOUS CONFLICT OF INTEREST. OF COURSE, THE RECEIVER IS NOT GOING TO GO AFTER THE MONEY THAT

HOLLENBECK SENT TO THE DEFENDANT BECAUSE THE DEFENDANT'S RIGHT THERE AS THE ATTORNEY. IT WAS ABSURD. SO THE VICTIMS WERE NOT SIGNING UP TO GIVE THIS CONTINGENCY FEE TO THE DEFENDANT, THAT DIDN'T HAPPEN. THAT CONTINGENCY FEE CAME RIGHT OUT OF THE VICTIMS' POCKETS. THEY DIDN'T GET ALL THEIR MONEY BACK, THEY GOT 75 PERCENT OF THEIR MONEY BACK, AND ROUGHLY THE OTHER 25 PERCENT WENT INTO MR. BARTKO'S POCKET AND MR. COVINGTON'S POCKET.

THE RECEIVERSHIP IS COMPLEX. WE HAVE NOT CHARGED THAT CASE AS WE STAND HERE TODAY. SO I DON'T THINK THAT SHOULD BE THE PRIMARY BASIS FOR OUR ASKING THAT HE BE DETAINED, BUT WE THINK IT SHOWS THIS PATTERN, AS AN OFFICER OF THE COURT, MANIPULATING THE JUDICIAL SYSTEM AND WE THINK, BASED ON THAT, THERE'S NO WAY THE COURT CAN HAVE ASSURANCES THAT IF HE IS RELEASED HE WILL BE ABIDING BY THE CONDITIONS THE COURT SETS FOR HIM.

THE COURT: THAT GOES TO BOTH YOUR ARGUMENT ON DANGER AND RISK OF FLIGHT?

MR. WHEELER: YES, YOUR HONOR. AND AGAIN, YOUR HONOR, WITH RESPECT TO THIS, WE DON'T KNOW WHAT THIS IS, TO BE FRANK. WE DON'T KNOW WHAT'S GOING ON HERE.

THE COURT: YOU RELY ON THE BURDEN OF PROOF THEN AT THAT POINT?

MR. WHEELER: YES.

THE COURT: MR. SAMUEL, DID YOU WANT TO BE HEARD

FURTHER?

MR. SAMUEL: A COUPLE THINGS. OBVIOUSLY I NEED TO POINT OUT TO THE COURT THAT HE HAS -- HE'S CONTINUED TO PRACTICE LAW FOR THE PAST YEARS. MANY TIMES HE HAS ASKED ME, WHAT DO I DO? I SAID, LOOK, WE'RE GOING TO HAVE A TRIAL BUT YOU CAN'T FIRE ALL YOUR CLIENTS IN ANTICIPATION OF TRIAL. THAT MAY END UP HAPPENING IF YOU ARE CONVICTED. SO HE'S GOT A PRACTICE, A LIMITED PRACTICE, BUT HE'S GOT CASES PENDING IN THE 9TH CIRCUIT, D. C. CIRCUIT. HE HAS SEC CASES PENDING, HE HAS CLIENTS.

HE CAN'T PRACTICE LAW ANYMORE AND HE CAN'T OPERATE THE BROKER-DEALER AS OF TWO HOURS AGO, BUT HE HAS TO TRANSFER THESE CASES, HE HAS TO FIND PEOPLE, LAWYERS, FOR THESE PEOPLE TO BE REPRESENTED BY.

I KNOW FREQUENTLY JUDGES SAY, WHY DID YOU WAIT UNTIL NOW? THE ANSWER IS, YOU CAN'T JUST SHUT DOWN AN ENTIRE LAW PRACTICE.

THE COURT: BUT YOU CAN MAKE CONTINGENCY PLANS. UNDER THE LOCAL RULES OF THIS COURT -- HE'S A MEMBER OF THE BAR OF THIS COURT, ISN'T HE?

MR. SAMUEL: STATE, NORTH CAROLINA BAR.

THE COURT: IS HE A MEMBER OF THE BAR OF THE EASTERN DISTRICT OF NORTH CAROLINA; DO YOU KNOW?

MR. BARTKO: YES, SIR.

THE COURT: WE HAVE A LOCAL RULE, 83.7, UPON THE

FILING OF A JUDGMENT WITH THE CLERK OF A SERIOUS CRIMINAL CONVICTION, THE COURT MAY ORDER -- ENTER AN ORDER IMMEDIATELY SUSPENDING AN ATTORNEY, AND THERE'S A PROCESS WHERE THE CLERK, UNDER OUR LOCAL RULES, THE CLERK IS MANDATED TO TRANSMIT A CERTIFICATE OF CONVICTION TO OTHER JURISDICTIONS WHERE A PERSON APPEARS TO BE ADMITTED WITHIN 14 DAYS, WHICH WOULD SEEM TO REQUIRE OUR CLERK TO IMMEDIATELY, BASED ON THE ALLEGATIONS IN THE SUPERSEDING INDICTMENT, THAT HE'S A MEMBER OF THE BAR IN NORTH CAROLINA, IN GEORGIA, AND MICHIGAN. IT'S NOTICE TO THEM, THEN THEY DO WHATEVER THEY ARE GOING TO DO.

MR. SAMUEL: HE WILL BE SUSPENDED IN GEORGIA, TOO. THAT'S NOT WHAT I WAS SAYING. HE JUST NEEDS TO MAKE PROVISIONS. I'M NOT SAYING HE'S GOING TO CONTINUE TO REPRESENT THEM.

AS I SAID, HE'S GOING TO HAVE TO STOP PRACTICING LAW AND SHUT DOWN THE BROKER-DEALER, BUT THE CLIENTS NEED TO HAVE A NEW LAWYER. I'M NOT SAYING HE'S GOING TO REPRESENT THEM. HE NEEDS TO TRANSFER THE CASES, HE'S GOT TO EDUCATE A LAWYER ABOUT WHAT THE CASES ARE ABOUT, HE'S GOT TO GET THESE PEOPLE TAKEN CARE OF. IF HE'S REMANDED TODAY, I MEAN, HE'S A ONE LAWYER OFFICE, THERE'S NO ASSOCIATES, NO LAW PARTNERS THERE. HE'S GOT CASES THAT ARE ACTUALLY HEADING FOR TRIAL. OBVIOUSLY THE COURT IS GOING TO DELAY THE TRIAL BUT SOME LAW FIRM WILL HAVE TO TAKE OVER THESE

CASES. I THINK THAT THAT IS THE REASON THAT, YOU KNOW, CONDITIONS CAN BE IMPOSED THAT ASSURE NO DANGER TO THE COMMUNITY.

AGAIN, I QUESTION EXACTLY WHAT THE DANGER IS THAT THE PROSECUTION IS PORTRAYING HERE. HE'S NOT A PHYSICAL DANGER; HE'S NOT A VIOLENT DANGER TO ANYBODY. I DON'T THINK ANYBODY HAS EVER CONTENDED ANYTHING LIKE THAT.

HE IS PREPARED, IF YOU WANT TO ASK QUESTIONS ABOUT THE MONETARY TRANSACTIONS OR THE CLIENTS HE HAS IN CANADA, WHAT THOSE TRANSACTIONS REPRESENT, NOTHING TO DO WITH HIS OWN MONEY, IT'S ALL CLIENT MONEY, WITH ONE EXCEPTION WHICH I KNOW ABOUT, HAS BEEN WRITTEN ABOUT IN THE NEWSPAPER. THERE'S JUST, YOU KNOW, YOU CAN LOOK AT A BANK ACCOUNT, SAY THIS LOOKS SUSPICIOUS AND THIS LOOKS SUSPICIOUS, BUT THEY ARE ALL JUST CLIENT FUNDS IN CONNECTION WITH HIS REPRESENTATION OF CLIENTS.

HE'S PREPARED TO ANSWER ANY QUESTIONS YOU HAVE ABOUT THE BANK ACCOUNTS.

THE COURT: THANK YOU, MR. SAMUEL.

MR. SAMUEL: AND WITH REGARD TO FLIGHT RISK, HIS PASSPORT, OF COURSE, IS IN THE PROBATION OFFICE, EITHER HERE OR IN ATLANTA, HAS THE PASSPORT.

THE COURT: AND, MR. WHEELER, IS YOUR DANGER -- TELL ME AGAIN YOUR ISSUE ON DANGER.

MR. WHEELER: YOUR HONOR, THE TRIAL IN THIS CASE

WAS ABOUT HOW THE DEFENDANT USED BOTH HIS LEGAL SKILLS AS WELL AS THESE BROKER-DEALER SKILLS TO CONDUCT A SCHEME TO DEFRAUD, AND THE JURY'S FOUND THAT THAT HAPPENED.

WHAT I CAN REPRESENT TO THE COURT IS THAT WE SEE -- WE'RE NOT SAYING THAT WE'VE CONCLUDED THE INVESTIGATION, BUT WE SEE ALL OF THE SAME INDICIA OF THAT SCHEME GOING ON RECENTLY, WHICH IS SELLING UNREGISTERED INVESTMENTS, CLAIMING THEY'RE NOT SUBJECT TO REGISTRATION, OFFERING 12 PERCENT RETURNS, TARGETING INDIVIDUAL INVESTORS WHO ARE UNSOPHISTICATED IN CHURCHES, ALL OF THAT KIND OF ACTIVITY.

SO THE FACT THAT HE'S NOT A PHYSICAL DANGER TO PEOPLE, WE DON'T DISPUTE THAT, WE DON'T HAVE ANY EVIDENCE OF THAT. BUT ECONOMIC DANGER CAN BE CONSIDERED AS A DANGER AND WE THINK WE SHOWED THAT IN THE CASE HERE AND WE THINK THERE'S EVIDENCE THAT IS ONGOING. SO WE DO THINK THAT'S SIGNIFICANT, YOUR HONOR.

MR. SAMUEL: YOUR HONOR?

THE COURT: YES, SIR.

MR. SAMUEL: I DON'T KNOW ANYTHING ABOUT SURE-LINE. I THINK I HEARD OF IT ONCE BEFORE. I NEED TO HAVE HIM EXPLAIN THAT TO THE COURT. THOSE KINDS OF ALLEGATIONS THAT ARE MADE, NOTHING WAS SAID TO US ABOUT IT LAST NIGHT. WE ASKED HIM ABOUT IT LAST NIGHT. NOTHING WAS SAID ABOUT SURE-LINE SO I COULD BE PREPARED TO RESPOND TO IT TODAY.

HE IS NOT OUT RAISING MONEY IN CHURCHES OR RAISING MONEY IN NORTH CAROLINA, BUT I DON'T KNOW THE SPECIFICS OF SURE-LINE. I CAN ONLY ASK HIM, IF THE COURT IS GOING TO CONSIDER THAT KIND OF PROFFER --

THE COURT: WELL, THAT ASSUMES THAT I WOULD FIND MR. BARTKO CREDIBLE. IN TERMS OF -- I MEAN, AND I HAVE TO TELL YOU, I HAVE SOME SERIOUS CONCERNS ABOUT HIS CREDIBILITY.

MR. SAMUEL: WELL, I THINK ALL I CAN SAY IS THAT I QUESTION THE PROPRIETY OF THE GOVERNMENT MAKING A VERY LOOSE KIND OF PROFFER. YOU KNOW, WE'RE KIND OF STILL INVESTIGATING, WE'RE KIND OF STILL LOOKING AT THIS. I'M NOT SURE WHAT THE ALLEGATION IS, IF THEY ARE CLAIMING HE'S PERSONALLY RAISING MONEY OR HE'S A LAWYER IN THE CASE AND LITIGATING THAT. I JUST DON'T --

THE COURT: ALL RIGHT. UNDER 18, U.S.C. SECTION 3143, A JUDICIAL OFFICER SHALL ORDER A PERSON WHO HAS BEEN FOUND GUILTY OF AN OFFENSE AND WHO IS AWAITING IMPOSITION OR EXECUTION OF SENTENCE, OTHER THAN A PERSON FOR WHOM THE APPLICABLE GUIDELINES PROMULGATED PURSUANT TO 28, U.S.C. SECTION 994, DOES NOT RECOMMEND A TERM OF IMPRISONMENT BE DETAINED UNLESS THE JUDICIAL OFFICER FINDS BY CLEAR AND CONVINCING EVIDENCE THAT THE PERSON IS NOT LIKELY TO FLEE OR POSE A DANGER TO THE SAFETY OF ANY OTHER PERSON OR THE COMMUNITY IF RELEASED UNDER SECTION 3142(B) OR (C).

IT IS THE DEFENDANT'S BURDEN OF PROOF UNDER THE LAW TO SHOW EACH OF THESE THINGS. THE COURT HAS CONSIDERED THE ARGUMENTS OF COUNSEL. THE COURT, IN ORDER TO RELEASE THE DEFENDANT, WOULD NEED TO FIND BY CLEAR AND CONVINCING EVIDENCE THAT HE IS NOT LIKELY TO FLEE OR POSE A DANGER TO ANY OTHER PERSON OR THE COMMUNITY.

IN THIS CASE, THE COURT DOES BELIEVE THAT MR. BARTKO, DURING HIS TESTIMONY HERE AT TRIAL, OBSTRUCTED JUSTICE. THE COURT BELIEVES THAT HE COMMITTED PERJURY WHILE TESTIFYING. THE COURT EXPRESSLY FINDS THAT HE IS NOT A PERSON WHO WILL BE A PERSON WHO GETS AN ADVISORY GUIDELINE RANGE THAT DOES NOT RECOMMEND A TERM OF IMPRISONMENT. THE LOSS CALCULATION IS YET TO BE DONE BUT THERE ARE ISSUES ASSOCIATED WITH $700,000 IN CALEDONIAN FUND SEED MONEY, THE 1.3 MILLION ASSOCIATED WITH THE CAPSTONE FUND. YOU'VE GOT VICTIM ISSUES. UNDER THE NUMBER OF VICTIMS UNDER 2B1.1D2, THERE ARE ISSUES ASSOCIATED WITH WHETHER THERE WOULD BE A VIOLATION -- WHETHER THERE WOULD BE AN ENHANCEMENT OR AN INCREASE ASSOCIATED WITH THE CEASE AND DESIST ORDER UNDER 2B1.1B8; THE BROKER DEALER ISSUE UNDER 2B1.1B17; ISSUES ASSOCIATED WITH VULNERABLE VICTIMS DUE TO THE AGE OF SOME OF THE VICTIMS, UNDER 3A1.1B1; ISSUES ASSOCIATED WITH WHETHER MR. BARTKO WAS AN ORGANIZER AND A LEADER, UNDER 3B1.1C.

BASED UPON HIS TESTIMONY HERE AT TRIAL, WHICH THE

COURT BELIEVES INCLUDES PERJURED TESTIMONY, THE COURT BELIEVES HE WILL GET AN ENHANCEMENT FOR OBSTRUCTION AND THE COURT BELIEVES HIS ADVISORY GUIDELINE RANGE WILL BE SUBSTANTIAL.

THE COURT DOES BELIEVE THERE'S BEEN A DRAMATIC CHANGE IN CIRCUMSTANCES AS OF THE JURY VERDICT. THE DEFENDANT IS NOW CONVICTED OF SIX SERIOUS FELONIES. THE COURT HAS LEARNED, THROUGH THE PROFFER HERE TODAY, THAT HE DOES HAVE APPARENTLY SUBSTANTIAL ASSETS, OR AT LEAST EARNED A SUBSTANTIAL FEE OF SOME KIND IN THE CONTINGENCY MATTER THAT WAS REFERENCED.

THE COURT, FOR PURPOSES OF THE HEARING TODAY, IS VERY CONCERNED ABOUT ISSUES OF ONGOING DANGER IN TERMS OF USING A BROKER-DEALER LICENSE OR, EVEN IF TOLD NOT TO, OR PRACTICING LAW, EVEN IF TOLD NOT TO. IT DOES SEEM TO THE COURT TO SWEEP WITHIN ISSUES ASSOCIATED WITH DANGER BUT IN PARTICULAR ISSUES ASSOCIATED WITH RISK OF FLIGHT.

THE COURT NOTES THAT THE DEFENDANT'S CHILDREN ARE ADULTS, THE DEFENDANT HAS SUBSTANTIAL ASSETS AND FUNDAMENTALLY THE COURT IS NOT OF THE VIEW THAT IT COULD TRUST MR. BARTKO TO ABIDE BY THE CONDITIONS OF THE COURT. THUS, THE COURT FINDS THAT HE HAS FAILED TO MEET HIS BURDEN OF PROOF UNDER 18, U.S.C. SECTION 3143.

HE WILL BE REMANDED TO THE CUSTODY OF THE UNITED STATES MARSHAL. UNDER LOCAL CIVIL RULE 83.7(A), THE

COURT, BASED UPON MR. SAMUEL ADVISING ME THAT MR. BARTKO IS A MEMBER OF THE COURT, HEREBY ORDERS THAT HE BE IMMEDIATELY SUSPENDED TO THE EXTENT UNDER OUR LOCAL RULES, TO THE EXTENT THERE ARE ANY ISSUES ASSOCIATED WITH THAT BEYOND THE IMMEDIATE SUSPENSION, WHICH THE COURT KNOWS IT HAS THE AUTHORITY TO ORDER, THE COURT HEREBY REFERS ANY FURTHER ISSUES ASSOCIATED WITH DISCIPLINE IN THIS COURT TO CHIEF JUDGE FLANAGAN. FOR ALL PROCEEDINGS THIS COURT WILL NOT BE THE PRESIDING JUDGE IN THAT, IT WILL SIMPLY ABIDE BY ITS UNDERSTANDING OF WHAT LOCAL RULE 83.7A REQUIRES OR PERMITS, WHICH IS AN ORDER IMMEDIATELY SUSPENDING AN ATTORNEY CONVICTED OF THE TYPES OF CRIMES THAT MR. BARTKO STANDS CONVICTED OF.

THE COURT ALSO DIRECTS THE COURTROOM DEPUTY TO NOTIFY THE CLERK OF THIS COURT OF THE CONVICTION SO THAT THE CLERK OF COURT CAN FULFILL HIS DUTIES UNDER RULE 83.7(J) ASSOCIATED WITH NOTIFYING OTHER JURISDICTIONS.

THE COURT DOES NOT BELIEVE THAT IT CAN FASHION CONDITIONS IN LIGHT OF THE TOTALITY OF THE RECORD, INCLUDING THE TRIAL RECORD. MR. BARTKO WILL BE REMANDED TO THE CUSTODY OF THE UNITED STATES MARSHAL.

WE'LL BE IN RECESS.

END OF TRANSCRIPT

CERTIFICATE

THIS IS TO CERTIFY THAT THE FOREGOING TRANSCRIPT OF PROCEEDINGS TAKEN AT THE CRIMINAL SESSION OF UNITED STATES DISTRICT COURT IS A TRUE AND ACCURATE TRANSCRIPTION OF THE PROCEEDINGS TAKEN BY ME IN MACHINE SHORTHAND AND TRANSCRIBED BY COMPUTER UNDER MY SUPERVISION.

THIS THE 26TH DAY OF APRIL, 2011.

/S/ DONNA J. TOMAWSKI

DONNA J. TOMAWSKI
OFFICIAL COURT REPORTER

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-CR-321-D

UNITED STATES OF AMERICA	)	
	)	
v.	)	**ORDER**
	)	
GREGORY BARTKO,	)	
	)	
Defendant.	)	

On November 1, 2010, Gregory Bartko ("Bartko" or "defendant") stood trial accused of one count of conspiracy to commit mail fraud, money laundering, and the sale of unregistered securities, four counts of mail fraud and aiding and abetting, and one count of selling unregistered securities and aiding and abetting. The superseding indictment essentially charged Bartko with leading an interstate criminal scheme "to profit from fraudulent sales of investments to individual members of rural Baptist churches and others, and to conceal those profits." [D.E. 1] at 1. The investments primarily concerned two private equity funds that Bartko—a long-time securities lawyer and securities dealer in Atlanta, Georgia—created, named the Caledonian Fund and the Capstone Fund. Ultimately, the trial focused on Bartko's knowledge, intent, and good faith. After a thirteen-day trial, on November 18, 2010, a jury convicted Bartko of all six counts.

On July 1, 2011, Bartko filed two motions for a new trial [D.E. 211–13].[1] The first motion alleged that the government violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to disclose to Bartko an IRS agent's report concerning an interview of North Carolina Superior Court Judge Anderson Cromer ("Judge Cromer Interview Report") about receivership litigation in Forsyth County, North Carolina [D.E. 211]. The second motion alleged that the government violated Giglio v. United States, 405 U.S. 150 (1972), by failing to disclose to Bartko two 2009

[1] D.E. 212 and D.E. 213 are the same motion.

Exh C

proffer agreements, one concerning government witness Scott Hollenbeck ("Hollenbeck") and the other concerning Hollenbeck's wife, Crystal Hollenbeck ("2009 Hollenbeck Proffer Agreements") [D.E. 212–13]. On July 15, 2011, Bartko filed a supplemental motion for a new trial [D.E. 225], alleging that the government violated Giglio by failing to disclose to Bartko two 2010 tolling agreements with government witness Levonda Leamon ("2010 Leamon Tolling Agreements"), [D.E. 225-1], which tolled the statute of limitations on Leamon's potential crimes until after Bartko's trial.[2] The government filed responses in opposition [D.E. 219–20, 227]. On July 25, 2011, the court held a hearing on the motions and permitted Bartko to file an omnibus reply, which he did on August 1, 2011 [D.E. 236]. On October 3, 2011, Bartko filed a fourth amended motion for a new trial [D.E. 237], arguing that government witness Gary Mlot ("Mlot") used false demonstrative exhibits and presented false testimony concerning certain money that Hollenbeck and John Colvin ("Colvin") had wired to Bartko in 2004. See Napue v. Illinois, 360 U.S. 264, 265 (1959). On October 5, 2011, the government responded in opposition [D.E. 238]. On October 26, 2011, the parties filed a joint notice of request for a transcript of Mlot's testimony [D.E. 240]. On November 21, 2011, the Mlot transcript was filed [D.E. 242]. On November 23, 2011, the government filed a supplemental response in opposition concerning the Mlot testimony and the Mlot exhibits [D.E. 243]. On December 7, 2011, Bartko filed a reply [D.E. 244–45].[3] For the reasons stated below, Bartko's motions for a new trial are denied.

I.

To evaluate Bartko's motions, the court has carefully reviewed the entire trial record. During the thirteen-day trial, thirty-one witnesses testified for the government and the

[2] Leamon was suspected of criminal activity stemming from her participation in Bartko's schemes. See [D.E. 225-1] at 2–3, 4–5.

[3] Bartko filed his reply as an attachment to a motion for leave to file a reply. See [D.E. 244-2]. The court granted the motion on December 14, 2011 [D.E. 245].

government introduced 366 exhibits. In turn, four witnesses, including Bartko, testified for the defense and the defense introduced forty-eight exhibits. The court cannot possibly recount all of the testimony and documents presented. Nor can it highlight all of the telephone conversations, fax and email exchanges, mailings, and other communications that occurred and connections that existed between Bartko, Hollenbeck, Colvin, and others. Nevertheless, in this section, the court recounts in detail some of the evidence presented against Bartko. In doing so, the court divides the evidence into four chronological segments: the Caledonian Fund, the Capstone Fund, the Forsyth County receivership litigation, and the post-Capstone Fund litigation.

A.

In 1992, Hollenbeck moved to Kernersville, North Carolina, and began selling insurance and other investment products. Hollenbeck held himself out as a devout Christian and was a prominent member of Gospel Light Baptist Church ("Gospel Light"), a very large Baptist church in Forsyth County, North Carolina. Hollenbeck often gave financial seminars at rural Baptist churches throughout the United States and would meet clients through such seminars and through referrals from such services.

Beginning in 2000, Hollenbeck sold a succession of investment products to customers. The investment products were for a fixed term (e.g., seven years, five years, or thirteen months) and an alleged guaranteed rate of return (e.g., 12 percent or 14.4 percent). After making the sale, Hollenbeck would collect the customer's money, send the money to the company whose investment product he was selling, and receive a commission. Hollenbeck sold investment products for several independent companies, beginning with ETS Payphones, Inc., continuing with Mobile Billboards of America, Inc. ("Mobile Billboards"), and then ending with two companies that he founded and managed, Franklin Asset Exchange, LLC ("Franklin Asset

Exchange") and Webb Financial Group, Inc. ("Webb Group"). Depending on the company and the investment product, Hollenbeck's sales commission ranged from 6 to 18 percent of the investment. Hollenbeck was an excellent salesman and sold approximately $25 million worth of these investment products between 2000 and 2005.

Hollenbeck's remarkable success, however, was too good to be true. Hollenbeck was a fraud. He used a variety of fraudulent tactics to sell securities, including telling investors—both orally and in writing—that their investment was insured with either a surety bond or an insurance policy with American International Group, Inc. ("AIG"). For a while, Hollenbeck could maintain the facade. The companies whose securities Hollenbeck sold would initially pay the quarterly "interest" to investors. See Hollenbeck Tr. [D.E. 200] 7–16. Either Hollenbeck or the company would then send quarterly statements to investors reflecting "interest" earned or "interest" distributed. See id. 48. But the companies were not legitimate businesses; they were Ponzi schemes in which those operating the companies were using new investor money to make the interest payments to earlier investors. Like all Ponzi schemes, Hollenbeck's eventually unraveled. When each successive scheme began to unwind, Hollenbeck would find a new fraudulent investment to sell, assure his earlier investment clients that the old investment would work out, and use some of his own commissions on new sales to placate his old investment clients. See id. 7–16.

In January 2004, Bartko was an attorney licensed to practice law in Georgia, North Carolina, and Michigan. He had specialized in securities law for approximately fifteen years. See Bartko Tr. [D.E. 193] 253. At the time of the events for which he was indicted and convicted, he was specializing in securities law as a sole practitioner at his own law firm, Law Office of Gregory Bartko, LLC, in Atlanta.

Bartko received a Juris Doctor degree from Detroit College of Law in 1979, and an LL.M. degree in securities regulation from Georgetown University Law Center in 1989. Additionally, Bartko was a licensed securities dealer who held himself out as an investment banker. Bartko ran his investment banking operations in Atlanta—out of the same office as his law firm—through a Utah corporation, Capstone Partners, L.C. ("Capstone Partners"). As an investment banker, Bartko sold securities. Bartko had a Series 7, a Series 24, a Series 63, and a Series 79 securities license. Id. 48–49. Notwithstanding Bartko's academic, legal, and business credentials, 2003 was a down year for Bartko's law practice. By January 2004, Bartko was in financial distress. See Govt. Exs. 631–32, 634–35, 638–39, 648, 687–88, 696–97; Bartko Tr. 287–88; Mlot Tr. [D.E. 242] 3–25, 129–30.

In January 2004, Bartko sought investors for a private equity fund, the Caledonian Fund, which Bartko and his business partner Darryl Laws ("Laws") planned to create. Laws lived in La Jolla, California, and, like Bartko, held himself out as an investment banker. On January 15, 2004, Bartko received promotional material via telefax from Colvin, a Tennessee businessman, concerning Webb Group and the financial products it offered. The promotional material contained references to guaranteed, fixed returns of 14.4 percent and included other indicators of fraud, such as the claim that the "[i]nvestments are protected by the Securities Investor Protection Corporation." Govt. Ex. 202. Colvin also faxed the promotional material to Laws. See Govt. Ex. 201; Laws Tr. [D.E. 233] 7–8. The material identified Hollenbeck as president of Webb Group. See Govt. Ex. 202. Hollenbeck was Colvin's business partner and top salesman. Despite the documents' overt indications of fraud, Bartko testified that he was unaware of any potential illegal activity because he did not closely review the documents. See Bartko Tr. 10–11.

Bartko's diligence concerning Colvin, however, had not otherwise waned. After

receiving the promotional material from Colvin on January 15, 2004, Bartko accessed the National Association of Securities Dealers ("NASD") records concerning Colvin. See Govt. Ex. 38. Bartko admitted that he checked the box on the NASD forms indicating that he was considering Colvin for employment in order to gain access to Colvin's NASD records. Bartko Tr. 162–64. He testified that he falsely made this representation and that he really was not considering Colvin for employment at that time. See id. On January 16, 2004, Bartko conducted a second NASD record search on Colvin. See Govt. Ex. 38. The NASD records referenced fraud that Colvin had committed in the securities industry. See Bartko Tr. 148–52. Again, Bartko claimed carelessness, that the purpose of his NASD search was not to find past instances of fraud or illegality, and that he did not recall clicking through to access the screen pages referencing Colvin's fraudulent past. See id. 15–16, 148–52.

Colvin and Bartko had more discussions in January 2004. According to Bartko, Colvin had originally sought Bartko's and Laws's advice regarding some corporate documentation and assistance with a possible acquisition. See id. 8–9, 12–14. Bartko and Laws had even agreed to provide investment banking services to Colvin for $10,000. See id. 9. But the relationship among the three men quickly expanded to something more: raising money for the Caledonian Fund. See id. 17–18.[4]

On January 19, 2004, Bartko sent a fax to Laws in La Jolla, California, detailing Colvin's fundraising methods. Bartko's fax cover sheet noted that the attached "documents are more explanatory in terms of what John I [sic] doing to raise this dough." Govt. Ex. 203. The documents included numerous indicators of fraud, including promises of a "guaranteed return"

[4] In fact, when negotiating their initial retainer with Colvin, Bartko and Laws offered to reduce their price if Colvin would agree to provide an initial investment for the Caledonian Fund. Bartko Tr. 17.

of 12 percent and statements that the "[i]nvestments are secured by [a] surety bond program registered with AIG Insurance Company." Id.; Laws Tr. 18–25. The documents also indicated that Colvin, through Webb Group, was raising money and that the money was coming from individuals. See Govt. Ex. 203; Bartko Tr. 176–77. Notwithstanding the clear indications of fraud in the documents, Bartko, a long-time securities lawyer and securities dealer, testified that he did not know that Colvin was fraudulently raising money. See Bartko Tr. 166–70. Again, Bartko testified that he barely reviewed the documents. Id. 177–78.

Bartko and Laws continued to speak to Colvin about investing money in the Caledonian Fund. See Govt. Ex. 288; Laws Tr. 30–39. On February 9, 2004, Colvin sent a lengthy fax to Bartko referencing Colvin's willingness, now through Franklin Asset Exchange, to invest $1 million into the Caledonian Fund over the next five months. Govt. Exs. 204–05. Specifically, the fax proposed a private equity agreement between Franklin Asset Exchange and the Caledonian Fund. See id.; Laws Tr. 30–33. The fax referred to Hollenbeck as a "Co-Managing General Partner" of Franklin Asset Exchange and also described Hollenbeck as "the founder and creator of both Franklin Asset Exchange, LLC and The Webb Group Financial Services, Inc." Govt. Ex. 204. Although Hollenbeck is referred to as a manager and creator in the documents concerning Franklin Asset Exchange and Webb Group—and although Bartko had already sent faxed documents to Laws detailing how Webb Group would be raising money for the Caledonian Fund—Bartko testified that he did not believe that Hollenbeck was involved in raising funds for Colvin. See Bartko Tr. 24, 153–55.

On February 17, 2004, Bartko conducted a NASD record check concerning Hollenbeck. See Govt. Ex. 38. Bartko admitted at trial that he checked the box on the NASD records indicating that he was considering Hollenbeck for employment in order to gain access to

Hollenbeck's records, even though that representation was false. See Bartko Tr. 162–63. The NASD records referenced Hollenbeck's prior sanctions: one in 1999 for committing forgery, and another in 2003 for misconduct concerning the sale of securities. See Govt. Ex. 40; Bartko Tr. 157–60. By his own testimony, Bartko conducted this search because he thought it was important to know who the founder and creator of Franklin Asset Exchange and Webb Group was. Bartko Tr. 157. Apparently, however, it was not important enough for Bartko to actually read the records. Although evidence of Hollenbeck's fraudulent past was right before his eyes, Bartko once more testified that he did not recall seeing the information concerning Hollenbeck's 1999 forgery and that he learned about Hollenbeck's 2003 misconduct "much later." Id. 159, 162–63. Laws, Bartko's business partner in the Caledonian Fund, was not so blind. Laws's notes on his copy of Colvin's February 9, 2004 fax reveal Laws's knowledge of Hollenbeck's 2003 sanction. See Govt. Ex. 204; Laws Tr. 31–33.

On February 18, 2004, Bartko's telephone records reveal a five-minute telephone call with Colvin. See Govt. Ex. 400. Thereafter, Colvin orally agreed with Bartko and Laws to provide $3 million to the Caledonian Fund. See Govt. Ex. 220; Laws Tr. 38–40. On February 24, 2004, the parties signed a letter of intent, which Bartko drafted. See Govt. Ex. 220; Bartko Tr. 25; Laws Tr. 38–40. Under the terms of the letter of intent, Webb Group agreed to provide $3 million to the Caledonian Fund over the next six months in monthly installments of $500,000. See Govt. Ex. 220; Laws Tr. 38–40.[5]

[5] Although only Webb Group and the Caledonian Fund were parties to the letter of intent, most of the money Webb Group had pledged would come from Franklin Asset Exchange. In a February 9, 2004 fax to Bartko, Colvin had explained the relationship between Webb Group and Franklin Asset Exchange. See Govt. Ex. 204. As of 2004, Webb Group "will continue to perform administrative functions such as the execution of . . . investor statements, welcoming letters, and other administrative functions. Franklin Asset Exchange, LLC will assume ownership of all previous instruments which were issued to execute the investment objectives of The Webb Financial Group, Inc. and will . . . achieve the [Caledonian] Fund's objectives . . . by managing the Fund's

As of February 24, 2004, Bartko and Laws had not yet formally established the Caledonian Fund or obtained a separate bank account for it. Any money sent pursuant to the letter of intent would have to be sent to and placed in another account. Accordingly, on February 27, 2004, and pursuant to the letter of intent, Franklin Asset Exchange wired $251,000 to Bartko's bank account for his company, Capstone Partners. See Govt. Ex. 207; Mlot Tr. 25. The wire transfer request stated, "[p]er Scott Hollenbeck." Govt. Ex. 207. Bartko testified that he received the wire transfer form, but did not notice "[p]er Scott Hollenbeck" on the wire transfer request. See Bartko Tr. 160–61, 284–85.

Hollenbeck continued to raise money, and on March 2, 2004, received a $321,157 investment from Landmark Baptist Church. See Govt. Exs. 504, 673. Before investing, Pastor Michael Lamb ("Pastor Lamb") of Landmark Baptist Church received from Hollenbeck certain Webb Group documents and a document that Hollenbeck falsely claimed was a surety bond insuring the investment. See Govt. Exs. 50, 70. On that same date, telephone records indicate a ten-minute call from Colvin to Bartko. See Govt. Ex. 401. On March 4, 2004, two days after Colvin and Bartko spoke, Franklin Asset Exchange wired $100,000 to Capstone Partners. Hollenbeck signed the wire transfer form. See Govt. Ex. 208; Mlot Tr. 25–26. Once again, Bartko testified that he received the wire transfer form, but that he did not notice Hollenbeck's name on it. See Bartko Tr. 160–61, 284–85.

On March 10, 2004, Hollenbeck received an $80,000 investment from Barry M. Singletary ("Singletary"). See Govt. Exs. 61, 504. Before investing, Singletary received from Hollenbeck certain Webb Group documents and a document that Hollenbeck falsely claimed was a surety bond insuring the investment. See Govt. Ex. 60. On March 18, 2004, Franklin Asset

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capital assets . . . ." Id. Hollenbeck had created both entities.

Exchange wired $150,000 to Capstone Partners. See Govt. Ex. 650; Mlot Tr. 26–27.

On March 29, 2004, Colvin, on behalf of Franklin Asset Exchange, purchased a Directors' and Officers' Liability Errors and Omissions Liability Insurance Policy from AIG through insurance broker Arthur J. Gallagher & Co. See Govt. Exs. 340, 343–44; Reno Tr. [D.E. 220-3] 6–7, 11–13. The policy cost $51,475. See Reno Tr. 10–11. At trial, Cal Reno ("Reno") of Arthur J. Gallagher & Co. testified that such a policy provides insurance protection to directors, officers, and employees of a firm providing services to other people. Id. 4. If someone alleges that such a director, officer, or employee committed a wrongful act in providing such services, the insurance policy will pay to defend the director, officer, or employee and will potentially pay any court costs or indemnity that a court might find against the person or firm. Id. 4–5, 52–53. An errors and omissions insurance policy does not, however, extend to individual investors. In other words, the policy will not cover a purchased investment or a loss related to that investment. Id. 5, 52–53. Reno also testified that the policy sold to Franklin Asset Exchange provided $3 million in aggregate insurance coverage, and that the insured had to pay the first $150,000 of any claim. See id. 8, 11–13.

On March 30, 2004, Franklin Asset Exchange formalized its relationship with the Caledonian Fund by entering a notes subscription agreement with it. See Govt. Ex. 221; Bartko Tr. 26; Laws Tr. 40–41. Under the agreement, Franklin Asset Exchange agreed to provide the Caledonian Fund $3 million in installments of $500,000 on March 23, 2004, March 30, 2004, April 15, 2004, May 15, 2004, June 15, 2004, and July 15, 2004. Govt. Ex. 221. In return, the Caledonian Fund agreed to pay 10 percent interest on the money and to repay interest and principal in forty-eight months. Id.; Laws Tr. 38. On April 1, 2004, Bartko's telephone records reveal an eleven-minute call from Colvin. See Govt. Ex. 401.

On March 31, 2004, Bartko and Laws each took a $50,000 draw against the money raised for the Caledonian Fund. See Bartko Tr. 180–81. Bartko testified that the draw was the equivalent of their quarterly salary. Id.

Bartko and Laws formally created the Caledonian Fund in April 2004. Once formed, the Caledonian Fund hired several employees who worked in California, opened a bank account, prepared a budget, and began looking for investment opportunities. See Def. Ex. 202; Bartko Tr. 28–31; Laws Tr. 89–101, 105. Other than the $501,000 received to date from Colvin and Hollenbeck, however, the Caledonian Fund lacked any money to invest.

In late April 2004, Hollenbeck received a cease and desist order dated April 26, 2004, from the North Carolina Secretary of State Securities Division ("North Carolina Securities Division"), which ordered him to stop selling all securities, including the securities of Mobile Billboards. See Govt. Ex. 330. Mobile Billboards had advertised itself as a company that facilitated placement of advertising on truck-mounted billboards, and had raised money through the sale of its own securities. Mobile Billboards, however, actually was a Ponzi scheme involving the sale of unregistered securities, and Hollenbeck was its most successful salesman. Alone, Hollenbeck had raised over $10 million for the company. But Hollenbeck's success with Mobile Billboards ended when, on April 26, 2004, Agent J.C. Curry ("Agent Curry") and Agent Cheryl Young ("Agent Young") of the North Carolina Securities Division delivered the cease and desist order to Hollenbeck at his office in Kernersville, North Carolina.

According to the cease and desist order,

FINDINGS OF FACT

1. Respondent **SCOTT BRADLEY HOLLENBECK** (hereinafter "**Hollenbeck**") is, upon information and belief, a natural person who resides at [redacted], Kernersville, North Carolina, 27284 and maintains offices at 1202-C N. East Mountain Street, Kernersville,

North Carolina, 27284.

2. On February 18, 2002, Respondent Hollenbeck offered and sold an "investment opportunity" in the form of a sale-and-leaseback program to members of the public in North Carolina whereby investors could allegedly earn a fixed 13.49% rate of return by purchasing equipment from Mobile Billboards of America, Inc. (hereinafter "MBA") and simultaneously leasing the purchased equipment to management/lease companies related to MBA.

3. The offer and sale of the sale-and-leaseback program to persons in North Carolina under the circumstances described in Paragraph 2, above, constitutes the "offer" of and "sale" of a "security" as those terms are defined in N.C.G.S. §§78A-2(8) and 78A-2(11) respectively.

4. The security offered and sold by the Respondent to persons in North Carolina was not registered with the Securities Division of the Department of the Secretary of State under the provisions of the Securities Act prior to or at the time of being offered or sold to persons in North Carolina and was not exempt from registration nor covered under federal law, in violation of N.C.G.S. §78A-24.

5. At the time of effecting securities transactions on February 18, 2002 (as described in Paragraph 2, above), Respondent Hollenbeck was registered as a salesman with a dealer registered under the Securities Act, however the security transactions effected were not recorded on the regular books or records of the dealer and the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions.

6. Due to a review of representative activity by the dealer with whom Respondent Hollenbeck was registered at the time of the securities transactions (as described in Paragraph 2, above), the dealer discharged Hollenbeck on May 17, 2002 and concluded that Hollenbeck effected security transactions with customers not recorded on the regular books or records of the dealer and [that] the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions, in violation of firm policy.

7. Respondent Hollenbeck is not currently registered as a salesman or dealer pursuant to the Securities Act.

8. In connection with the offer and sale of the aforesaid security to persons in North Carolina, the Respondent omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in violation of N.C.G.S. §78A-8(2), in that the Respondent omitted to state to offerees that the

security being offered was not registered pursuant to the provisions of the Securities Act, in violation of N.C.G.S. §78A-24.

9. It is in the public interest of the citizens of North Carolina that Respondent be prohibited from violating the provisions of the Securities Act in connection with selling or making offers to sell securities, buying or soliciting offers to buy securities, and transacting business as a dealer or salesman.

CONCLUSIONS OF LAW

. . .

2. There is reasonable cause to believe the Respondent has engaged in violations of the Securities Act, specifically N.C.G.S. §§78A-8, and 78A-24.

3. There is reasonable cause to believe the Respondent will continue to commit acts and omissions in violation of the Securities Act.

4. It is necessary and appropriate for the protection and preservation of the public interest or for the protection of investors that the Respondent be temporarily ordered to cease and desist from making offers and sales of securities in violation of the Securities Act and, in connection with such solicitations, omitting to state material facts necessary to make other statements made, in light of the circumstances under which they were made, not misleading.

5. The public interest would be irreparably harmed by the delay inherent in issuing an order under the provisions of N.C.G.S. §78A-47(b)(1).

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority contained in N.C.G.S. §78A-47(b)(2), that Respondent, **SCOTT BRADLEY HOLLENBECK** and **ANY AND ALL PERSONS IN ACTIVE CONCERT AND PARTICIPATION WITH SCOTT BRADLEY HOLLENBECK**, shall immediately cease and desist:

a. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America, Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until such securities have been registered pursuant to the provisions of the Securities Act*;

b. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America,

> Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until said persons become registered as dealers or salesmen pursuant to the provisions of the Securities Act*;
>
> c. *in connection with the offer, sale or purchase of any security, omitting to state material facts necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading.*

Id. (bold emphases in original) (italicized emphases added).

On April 26, 2004, while Agents Curry and Young were at Hollenbeck's office, Hollenbeck called Colvin concerning the agents and the cease and desist order. Colvin, in turn, told Hollenbeck to call Bartko for legal advice. Colvin also called Bartko and told Bartko that a team member had received a cease and desist order and needed his legal advice. See Bartko Tr. 40. Hollenbeck then spoke with Bartko about the order, see id. 39–41, but Bartko did not take any action until April 30, 2004.

In the meantime, on April 27, 2004, Bartko sent an unrelated fax to Laws. Bartko had problems beyond Hollenbeck's cease and desist order. NASD was auditing Capstone Partners, one of Bartko's companies. Bartko's fax complained of "a grueling week here with the NASD looking down my windpipe . . . ." Govt. Ex. 210. He lamented having "to openly disclose the [Caledonian Fund] investment to explain why we had $500,000 come thru [sic] our bank account." Id. In the next breath, however, Bartko explained that he had devised a solution: "I rectified the issue today by transferring all remaining [Caledonian Fund money received from Colvin] to my IOLTA lawyer's trust account." Id.; Laws Tr. 44–45.

The next day, Bartko sent a related fax to Colvin: "[P]lease wire your next funds using our lawyer's trust account. The cash coming into Capstone [Partners] created snafus during the NASD audit." Govt. Ex. 211. On that same date, Bartko's telephone records reflect a

seventeen-minute call from Colvin. See Govt. Ex. 401.

On April 30, 2004, Bartko responded to Hollenbeck's cease and desist order. Bartko faxed a letter to Agent Curry, referencing the North Carolina Secretary of State's "continuing inquiry concerning Mr. Hollenbeck . . . ." Govt. Ex. 331. The fax implored Agent Curry that Bartko "did not and do[es] not represent Mr. Hollenbeck individually, rather I have done some limited general corporate legal work for The Webb Financial Group, Inc., a North Carolina corporation, which legal work is essentially complete at this time." Id.[6] The letter went on to state that Bartko had recommended to Hollenbeck that Hollenbeck hire a securities lawyer in Raleigh. Id.

When Bartko faxed this letter to Agent Curry, Hollenbeck was continuing to use fraud to raise money for Franklin Asset Exchange, and Colvin and Hollenbeck were continuing to send money, through Franklin Asset Exchange, to Bartko for the Caledonian Fund. For example, on May 3, 2004, Hollenbeck received a $61,140 investment from George D. Brown ("Brown"). See Govt. Ex. 658. Before Brown invested, Hollenbeck gave him Webb Group documents that included fraudulent information and a document purporting to be a surety bond. See Govt. Ex. 70. On the date that Hollenbeck received Brown's money, he placed a seven-minute telephone call to Bartko. See Govt. Ex. 406. Moreover, on May 3, 2004, and in accordance with Bartko's previous instructions, see Govt. Ex. 211, Franklin Asset Exchange wired $100,000 to Bartko's attorney IOLTA trust account. See Govt. Ex. 650; Mlot Tr. 27.

Bartko admitted at trial that he knew by May 3, 2004, that the money he was receiving

[6] At trial Bartko admitted that, by this date, the Caledonian Fund had received over $500,000 from Hollenbeck and Colvin via either Webb Group or Franklin Asset Exchange. See Bartko Tr. 190–91. Nonetheless, he claimed that he could not figure out the relationship between Webb Group and Franklin Asset Exchange, see id. 191, even though he had received a February 9, 2004 fax from Colvin detailing the relationship between the two companies and explaining that Hollenbeck was "the founder and creator of both . . . ." Govt. Ex. 204.

for the Caledonian Fund was coming from either Franklin Asset Exchange or Webb Group. See Bartko Tr. 191–92.[7] Bartko insisted, however, that he did not know that Hollenbeck was using fraud to raise money for Franklin Asset Exchange and Webb Group. See id. 147, 167–70, 180, 187–88, 191–92.

In any event, on May 4, 2004, Hollenbeck received a $15,111 investment from Hayden M. Furrow ("Furrow"). See Govt. Ex. 662. Before investing, Furrow received from Hollenbeck some fraudulent Franklin Asset Exchange documents and a document purporting to be a surety bond. See Govt. Exs. 77–78. On that same date, Bartko's telephone records reveal a sixteen-minute call to Hollenbeck. See Govt. Ex. 400.

On May 6, 2004, Franklin Asset Exchange wired $100,000 to Bartko's attorney IOLTA trust account. See Govt. Exs. 209, 650; Mlot Tr. 27–28. The wire transfer request referenced Scott Hollenbeck. See Govt. Ex. 209. Once more, Bartko testified that he received the wire transfer request, but did not notice Hollenbeck's name. See Bartko Tr. 284–85.[8]

On May 6, 2004, Bartko faxed a letter to Agent Curry of the North Carolina Securities Division. The fax stated, in part, "I spoke in detail with [my former law partner, Durham, North

[7] Of course, the jury was entitled to believe that Bartko knew this fact well before the date he claimed. On January 19, 2004, Bartko faxed to Laws documents indicating that Colvin would be raising money for the Caledonian Fund through Webb Group. Govt. Ex. 203. Then, on February 9, 2004, Colvin sent Bartko a lengthy fax proposing a private equity agreement between Franklin Asset Exchange and the Caledonian Fund, and detailing the relationship between Franklin Asset Exchange and Webb Group. Govt. Exs. 204–05. Several other documents predating May 3, 2004—including separate, express agreements under which Franklin Asset Exchange and Webb Group would each provide $3 million to Bartko's Caledonian Fund—indicated that both Franklin Asset Exchange and Webb Group were raising money for and supplying money to the Caledonian Fund. See, e.g., Govt. Exs. 207–09, 220–21.

[8] This is now the third time in a four-month span that Bartko has received a wire transfer from Franklin Asset Exchange concerning the transfer of a large sum of money and referencing Hollenbeck, but claimed that he failed to see Hollenbeck's name. In this regard, it is worth noting that each wire transfer form is a one-page document, and that Hollenbeck's name is not buried in a sea of other data. Quite the contrary, Hollenbeck's name appears prominently on all three documents. See Govt. Exs. 207–09.

Carolina attorney Wes Covington] about this investigation [of Hollenbeck] and he and I have agreed to represent Mr. Hollenbeck as co-counsel in connection with your pending investigation and any civil or other actions that may arise therefrom." Govt. Ex. 332. On May 14, 2004, Hollenbeck met with Bartko and Covington at Covington's office in Durham. Bartko Tr. 39–41, 44. Hollenbeck paid Bartko and Covington $12,500 each as a retainer for their legal services. See Govt. Ex. 521; Hollenbeck Tr. 72–73.[9]

According to Bartko, Hollenbeck told Bartko that Mobile Billboards involved the sale of a business opportunity, not the sale of a security. Bartko Tr. 42. Bartko also testified that as of May 14, 2004, he had no idea that Hollenbeck had been raising funds for Colvin and Franklin Asset Exchange, or that Hollenbeck was the source of the $701,000 that Franklin Asset Exchange provided the Caledonian Fund. See id. 44. The jury, however, was certainly entitled to credit rapidly mounting evidence that strongly suggests otherwise. After all, according to Bartko's own testimony, Bartko knew by May 3, 2004, that either Webb Group or Franklin Asset Exchange was providing money to the Caledonian Fund. See id. 192. Bartko had also received myriad documents detailing the relationship between Webb Group and Franklin Asset Exchange and Hollenbeck's deep involvement—including as a co-managing general partner—with both. See, e.g., Govt. Exs. 203–05, 207–09, 220–21. In fact, by May 14, 2004, Bartko had received three wire transfers from Hollenbeck. See Govt. Exs. 207–09. Hollenbeck signed one of those transfers. Govt. Ex. 208. The other two were "[p]er Scott Hollenbeck." Govt. Exs. 207, 209. Finally, Bartko had twice spoken with Hollenbeck on days that Hollenbeck had secured large investments. The first was a seven-minute call from Hollenbeck to Bartko on May 3, 2004, the day Hollenbeck received a $61,140 investment from George D. Brown. See

[9] Bartko's check was made out to Capstone Partners. Govt. Ex. 521.

Govt. Exs. 406, 658. The other conversation was a sixteen-minute call from Bartko to Hollenbeck on May 4, 2004, when Hollenbeck obtained a $15,111 investment from Hayden M. Furrow. See Govt. Exs. 400, 662.

The mountain of circumstantial evidence of Bartko's guilt would continue to rise. On June 4, 2004, Mel Locke of Arthur J. Gallagher & Co., the insurance brokerage company that had sold the AIG errors and omissions insurance policy to Franklin Asset Exchange, received a call from Rita Harfield of AIG concerning someone using the policy and telling investors that it protected the investor's investment and guaranteed the return on that investment. See Govt. Ex. 345; Reno Tr. 16–17, 20.[10] On June 8, 2004, Jeanne Blasher ("Blasher") of Arthur J. Gallagher & Co. received a similar call. Alanna Schow, an underwriter at AIG, notified Blasher about someone with Franklin Asset Exchange distributing false certificates of insurance. See Govt. Ex. 346; Reno Tr. 18–20.

After receiving these inquiries, Reno, the Arthur J. Gallagher & Co. employee who had sold the AIG errors and omissions insurance policy to Franklin Asset Exchange, spoke with Hollenbeck and Colvin. Reno Tr. 20. Reno told them that he was calling to advise them that AIG had received inquiries about the Franklin Asset Exchange insurance policy and that the insurance policy did not guarantee a return on investment. Id. Colvin and Hollenbeck confirmed their understanding of this fact and told Reno that they would reconfirm this fact with their investment clients. Id.

On June 8, 2004, Hollenbeck faxed Bartko documents concerning Hollenbeck's

[10] At trial, Reno compared government exhibit 149, which Hollenbeck had used in a sales presentation, and government exhibit 344, an actual errors and omissions insurance policy document issued by AIG through Arthur J. Gallagher & Co. See Reno Tr. 8–9. Reno noted that government exhibit 149 had information concerning "notice" and "retention" (i.e., deductible) removed. See id. 9. Reno also identified other fraudulent insurance documents that were contained in Hollenbeck's sales-presentation materials. See id. 13–15; see also Govt. Exs. 90, 149.

fraudulent method of selling investments, including promotional materials of Franklin Asset Exchange that promised a "guaranteed return" of 12 percent. The fax also referenced Hollenbeck's use of a document purporting to be a surety bond to fool investors into believing that their principal was insured. See Govt. Exs. 280–81.[11] Hollenbeck's fax also included a copy of Colvin's March 2, 2004 application to AIG to obtain the errors and omissions insurance policy for Franklin Asset Exchange. See Govt. Ex. 280; Bartko Tr. 45–47; Reno Tr. 28–29. On June 9, 2004, Bartko replied by fax to Hollenbeck. "Scott," Bartko wrote, "I am in receipt of all pages you faxed to my office last night relating to the 'Franklin Asset Surety Bond' issue. I will be sending copies of this material directly to Wes. . . . [W]e should schedule a follow up call this afternoon." Govt. Ex. 281; see also Hollenbeck Tr. 90–92.

At trial, Bartko admitted that the documents that he received from Hollenbeck on June 8, 2004, repeatedly referenced Franklin Asset Exchange, the company Bartko already knew was raising money for the Caledonian Fund. See Bartko Tr. 200; cf. Govt. Exs. 280–81. Covington, Bartko's co-counsel, also understood what these documents showed: Hollenbeck—acting through Franklin Asset Exchange—was engaging in fraud. Accordingly, on June 11, 2004, Covington wrote a letter to Hollenbeck, with a copy to Bartko, concerning Hollenbeck's fraudulent sales tactics. "I am concerned," wrote Covington,

> that while you have stopped selling the Mobile Billboards product, that you may be nonetheless exposing yourself to additional scrutiny and/or prosecution *by the ongoing sale of products* that purport to be guaranteed by a surety bond when, in fact, the only potential coverage is from an errors and omissions insurance policy apparently purchased by John Colvin.

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[11] At trial, Reno testified that a surety bond is typically found in the construction industry. Such a bond promises to pay to complete a construction project if the party obligated to complete the project fails to fulfill the obligations in accordance with the construction contract. See Reno Tr. 5–6. Reno also testified that he had never heard of a surety bond that covered an investment or that covered a loss if something went wrong with an investment. Id. 6. In fact, Reno testified that he had never heard of an insurance policy that would insure an investment in a private equity fund. Id.

Govt. Ex. 243 (emphasis added). Covington's letter also warned Hollenbeck that

> [i]t is important, in my opinion, to insure whenever possible that you are not exposing yourself to any further scrutiny or actions by the Secretary of State's Office. For that reason, I am suggesting that you refrain from any further sales of any kind save products that Greg and I approve until this matter can be finally resolved.

Id.

By no later than June 11, 2004, therefore, Bartko had documents showing that Hollenbeck had used fraudulent sales tactics to convince investors to invest in Franklin Asset Exchange. Bartko also knew that Hollenbeck had raised money for Franklin Asset Exchange and that Franklin Asset Exchange had invested $701,000 in the Caledonian Fund.[12] Nonetheless, Bartko did not sever his business or legal ties with Hollenbeck, Webb Group, or Franklin Asset Exchange. Nor did he dissolve the Caledonian Fund and return the $701,000 to investors. Instead, on June 30, 2004, Bartko and Laws each took a $50,000 draw against the $701,000 raised by Franklin Asset Exchange for the Caledonian Fund. See Bartko Tr. 180–81.

Although Franklin Asset Exchange had agreed on March 30, 2004, to provide $3 million to the Caledonian Fund by July 15, 2004, Colvin and Hollenbeck delivered only $701,000. And although Bartko testified that he had hoped to raise $100 million for the Caledonian Fund, id. 18, the Caledonian Fund had received investment funds from no other source. Furthermore, the Caledonian Fund had yet to invest a penny of the $701,000. See id. 180–82. Because Colvin failed to deliver the remaining $2.3 million, the relationship between Colvin and the Caledonian Fund deteriorated in the summer of 2004. See Laws Tr. 132–46. Hollenbeck, however,

[12] Additionally, at trial, Bartko admitted that he knew by June 2004 that Hollenbeck had made false promises of a guaranteed return and had used a fake surety bond to convince people to invest in Mobile Billboards. See Bartko Tr. 197–200, 203. Bartko also admitted that those same false promises and a similarly fake surety bond appeared in the June 8, 2004 fax Hollenbeck had sent to Bartko. See id. 197–200.

remained in the fold with Bartko.

Despite Bartko's knowledge of the cease and desist order and of Hollenbeck's illegal behavior—including fraud in connection with raising money for Mobile Billboards and Franklin Asset Exchange—on September 3, 2004, Bartko, Hollenbeck, Laws, and Covington met to discuss having Hollenbeck raise funds directly for the Caledonian Fund. See Govt. Exs. 212–14; Laws Tr. 49–56. During the meeting, Hollenbeck discussed how he had raised approximately 90 percent of the $14 to $16 million that Colvin, through Franklin Asset Exchange, had invested during 2003 and 2004. See Govt. Ex. 212; Laws Tr. 53–56. Hollenbeck also discussed the 12 percent guaranteed return on the notes that he had sold, and discussed his use of AIG's errors and omissions insurance policy. See Govt. Ex. 212; Laws Tr. 53–56. In Laws's notes from the meeting, Laws wrote that "Scott [Hollenbeck] is circumventing 'Regs' by taking a finder's fee." Govt. Ex. 212. According to Laws, the "Regs" referenced securities regulations that required Hollenbeck to have a securities license to sell securities and to raise capital. See Laws Tr. 55–56. Even Bartko testified that he remembered discussing Hollenbeck "circumventing the Regs." Bartko Tr. 51.

After the September 3, 2004 meeting ended, Bartko, Laws, and Covington conferred. Covington stated to Bartko and Laws that Hollenbeck was raising money in coffee klatsches after Bible study meetings. See Laws Tr. 165. Despite being one of only three people in a face-to-face meeting, the very purpose of which was to discuss using Hollenbeck to raise money directly for an investment fund Bartko operated, Bartko denied hearing Covington make this comment. See Bartko Tr. 244–45.

In any event, Bartko testified that he did not want Hollenbeck to be a salesman for the Caledonian Fund. Id. 50. Rather, Bartko wanted Hollenbeck to be only a "finder," one who

would simply refer interested investors to Bartko. See id. 50–51. Again, however, the evidence belies Bartko's testimony. On September 1, 2004, two days before meeting with Hollenbeck, Laws emailed Bartko. "Prior to our meeting [with Hollenbeck]," Laws wrote,

> I would like to get a feel for the following:
>
> - How much capital can Scott [Hollenbeck] really raise in a thirty day period?
> - Does Scott require us to cover his and his team's expenses that are incurred in the course of raising money for [the Caledonian Fund]?
> - The timing for [the Caledonian Fund] to prepare documents to enable Scott and his team to raise funds for us?
> - What church building funds, endowments, pensions and high net worth individuals will he and his team approach on [the Caledonian Fund's] behalf?
>
> . . .
>
> - What kind of capital commitments can he queue up in short order?

Govt. Ex. 213. Having received the email, Bartko did not object to Laws's questions or clarify that he intended Hollenbeck to be a finder only. Instead, Bartko faxed these talking points to Hollenbeck the next day. See Govt. Ex. 214. Moreover, in an October 20, 2004 email to Laws, Bartko referenced "[g]et[ting] Scott to commit to raise at least $1.0 million each month for us," and detailed what securities Hollenbeck could sell to raise that money and what commissions scale might keep Hollenbeck motivated to continue raising money for the Caledonian Fund in the long term. See Govt. Exs. 217–18. Clearly, the jury was entitled to believe that Bartko envisioned Hollenbeck being much more than "a finder."

On September 27, 2004, Hollenbeck wrote Covington a panicked note. "WES—I NEED YOUR HELP!" Govt. Ex. 254 (emphases in original). Up to this point, Hollenbeck had been using some of his commissions from his fraudulent sale of investments to pay investors in

Mobile Billboards and other "guaranteed" investments their quarterly distributions. But the funds he needed to maintain his various Ponzi schemes were withering. Hollenbeck stated that he had only $31,000 total in all of his bank accounts, but that investors were expecting to receive $240,000 in quarterly distributions and that two church investors had closings that week and needed to liquidate their investments of $70,000 and $30,000, respectively. Id. Hollenbeck asked Covington to call Colvin and to have Colvin wire at least $340,000 to Hollenbeck. Id.

On October 19, 2004, Hollenbeck, on Bartko's and Covington's legal advice, consented to the entry of a final cease and desist order issued by the North Carolina Securities Division. See Govt. Ex. 330. The cease and desist order stated,

> **WHEREAS,** Scott Bradley Hollenbeck (hereinafter, "Hollenbeck" or "Respondent") is a natural person who resides at [redacted], Kernersville, North Carolina, 27284 and maintains offices at 935 N. East Mountain Street, Kernersville, North Carolina, 27284; and
>
> **WHEREAS,** the Secretary of State of the State of North Carolina (the "Secretary of State"), as Administrator of the North Carolina Securities Act (North Carolina General Statutes, Chapter 78A), the Securities Division of the Department of the Secretary of State (the "Securities Division"), and *counsel for the Respondent* have negotiated this Final Order to Cease and Desist; and
>
> . . .
>
> **NOW, THEREFORE,** the Securities Administrator, acting through her duly appointed Deputy Securities Administrator, pursuant to and under all authority granted by the North Carolina Securities Act, and with the consent of the Respondent, does hereby issue this Final Order to Cease and Desist in settlement of the above-captioned matter.
>
> . . .
>
> II.
>
> FINDINGS OF FACT
>
> . . .
>
> 2. On February 18, 2002, Respondent Hollenbeck offered and sold an

"investment opportunity" in the form of a sale-and-leaseback program to members of the public in North Carolina whereby investors could allegedly earn a fixed 13.49% rate of return by purchasing equipment from Mobile Billboards of America, Inc. (hereinafter "MBA") and simultaneously leasing the purchased equipment to management/lease companies related to MBA.

3. The offer and sale of the sale-and-leaseback program to persons in North Carolina under the circumstances described in Paragraph 2, above, constitutes the "offer" of and "sale" of a "security" as those terms are defined in N.C.G.S. §§78A-2(8) and 78A-2(11) respectively.

4. The security offered and sold by the Respondent to persons in North Carolina was not registered with the Securities Division of the Department of the Secretary of State under the provisions of the Securities Act prior to or at the time of being offered or sold to persons in North Carolina and was not exempt from registration nor covered under federal law, in violation of N.C.G.S. §78A-24.

5. At the time of effecting securities transactions on February 18, 2002 (as described in Paragraph 1, above), Respondent Hollenbeck was registered as a salesman with a dealer registered under the Securities Act, however the security transactions effected were not recorded on the regular books or records of the dealer and the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions.

6. Due to a review of representative activity by the dealer with whom Respondent Hollenbeck was registered at the time of the securities transactions (as described in Paragraph 2, above), the dealer discharged Hollenbeck on May 17, 2002 and concluded that Hollenbeck effected security transactions with customers not recorded on the regular books or records of the dealer and that the transactions were not disclosed nor authorized in writing by the dealer prior to execution of the transactions, in violation of firm policy.

7. *Respondent Hollenbeck is not currently registered as a salesman or dealer pursuant to the Securities Act.*

8. In connection with the offer and sale of the aforesaid security to persons in North Carolina, the Respondent omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in violation of N.C.G.S. §78A-8(2), in that the Respondent omitted to state to offerees that the security being offered was not registered pursuant to the provisions of the Securities Act, in violation of N.C.G.S. §78A-24.

9. It is in the public interest of the citizens of North Carolina that Respondent be *permanently prohibited from violating the provisions of the Securities Act in connection with selling or making offers to sell securities, buying or soliciting offers to buy securities, and transacting business as a dealer or salesman.*

CONCLUSIONS OF LAW

. . .

2. *There is reasonable cause to believe the Respondent has engaged in violations of the Securities Act, specifically N.C.G.S. §§78A-8, and 78A-24.*

3. *There is reasonable cause to believe the Respondent will continue to commit acts and omissions in violation of the Securities Act.*

4. It is necessary and appropriate for the protection and preservation of the public interest or for the protection of investors that the Respondent be *permanently ordered to cease and desist from making offers and sales of securities in violation of the Securities Act and in connection with such solicitations, omitting to state material facts necessary to make other statements made, in light of the circumstances under which they were made, not misleading.*

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority contained in N.C.G.S. §78A-47(b)(2), that Respondent, **SCOTT BRADLEY HOLLENBECK** and **ANY AND ALL PERSONS IN ACTIVE CONCERT AND PARTICIPATION WITH SCOTT BRADLEY HOLLENBECK**, shall permanently cease and desist:

a. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America, Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until such securities have been registered pursuant to the provisions of the Securities Act*;

b. offering for sale, soliciting offers to purchase, or selling, in or from North Carolina, the securities of Mobile Billboards of America, Inc. in the form of a "sale-and-leaseback program" *and any security of any issuer, howsoever denominated, unless and until said persons become registered as dealers or salesmen pursuant to the provisions of the Securities Act*;

c. *in connection with the offer, sale or purchase of any security,*

> *omitting to state material facts necessary in order to make statements made, in light of the circumstances under which such statements were made, not misleading.*

Id. (bold emphases in original) (italicized emphases added); see Bartko Tr. 189–90.

On October 20, 2004, the same date that the North Carolina Securities Division issued the cease and desist order, Bartko emailed Laws about "Scott ad nauseam." Govt. Ex. 216; Laws Tr. 56–60. The email stated that Bartko planned to meet with Hollenbeck and Covington "this coming Monday in Durham." Govt. Ex. 216. The meeting concerned

> two things. First there are some brewing securities issues associated with some of Scott's offering activities 2–3 years ago for [Mobile Billboards] that just got sued by the SEC and Wes [Covington] and Scott have asked for my help. Scott is not in hot water, but let's just say his clients aint [sic] too happy that [Mobile Billboards] is no longer making quarterly distributions.
>
> More importantly, Scott is ready to sit down and talk about the alternatives we presented to him when we met in Charlotte. I think he is finally getting the message that he needs [a] "Plan B" and that [Colvin] is not likely to be mailing million dollar checks anytime soon. Scott asked Wes if he (Wes) thought he [(Hollenbeck)] should turn to Greg [Bartko] and [the Caledonian Fund] as the alternative deployment vehicle for his funds and Wes said "of course."

Id.; see Laws Tr. 57–58.

That same day, Bartko sent Laws a second email and discussed getting Hollenbeck "to commit to raise at least $1.0 million each month for us religiously (no pun intended)." Govt. Ex. 218; see Laws Tr. 59–63. Bartko testified at trial that this comment simply referred to Hollenbeck's devout Christianity, and not to where or how Hollenbeck raised money from investors. Bartko Tr. 55. In fact, Bartko testified that he did not believe that Hollenbeck was going to churches, making presentations, and raising money from individuals. Id. The evidence, however, suggests otherwise. After all, in the September 3, 2004 meeting between Bartko, Laws, and Covington, Covington commented "about [Hollenbeck] . . . rais[ing money] in coffee clutches [sic] after a Bible study meeting." Laws Tr. 165. Bartko's comment was just more of

the same.

Also in Bartko's second email to Laws, Bartko told Laws that he wanted Hollenbeck "to honor the Franklin [Asset Exchange] seed commitment to [the Caledonian Fund] by paying down the balance of $2.3 million to us." Govt. Ex. 218. Thus, Bartko wanted Hollenbeck to raise $4.3 million for the Caledonian Fund by December 31, 2004. Id.; Laws Tr. 61–63. Laws wanted even more, suggesting in response that Hollenbeck should raise $5 million for the Caledonian Fund by December 31, 2004. Govt. Ex. 217; Laws Tr. 63–66, 68–69. At trial, Bartko testified that by October 20, 2004, he was aware that Hollenbeck had been the primary fundraiser for Colvin and Franklin Asset Exchange. See Bartko Tr. 52–53. Again, however, Bartko claimed that he had no idea that Hollenbeck used fraud to sell investments and denied conspiring with Hollenbeck or anyone else. See id. 55–56, 308.

Hollenbeck never raised any more money for the Caledonian Fund. The $701,000 was the only money that the Caledonian Fund ever received from any investors and the Caledonian Fund never invested a penny of it. See id. 180–81; Laws Tr. 171. Rather, the Caledonian Fund essentially ceased operations in November 2004 after spending nearly all of the $701,000 received from Colvin and Hollenbeck through Franklin Asset Exchange. See Bartko Tr. 57, 61–62; Laws Tr. 70. In 2004, Bartko alone received and spent $331,042 of the $701,000. See Govt. Ex. 691.[13]

As the Caledonian Fund was failing, a great deal of negative publicity surrounded Mobile Billboards and its top salesman, Hollenbeck. The SEC filed suit against Mobile Billboards on

[13] On December 27, 2004, Bartko transferred $25,000 from his attorney IOLTA trust account to his Capstone Partners account. See Govt. Ex. 692; Bartko Tr. 223–24; Mlot Tr. 46–48. This $25,000 constituted the last remaining portion of the $701,000 originally sent to Bartko for the Caledonian Fund. Bartko's records described the $25,000 transfer as Bartko's "[d]raw (half)" for the Caledonian Fund for the period "9/30/04." Govt. Ex. 692; see also Bartko Tr. 223–24; Mlot Tr. 46–48.

September 21, 2004, and discussed Mobile Billboards's fraudulent behavior. Furthermore, on November 1, 2004, Bartko and Covington filed a lawsuit in the United States District Court for the Middle District of North Carolina on behalf of 139 plaintiffs against various individuals and entities associated with Mobile Billboards. See Bartko Tr. 110–13. Bartko and Covington's lawsuit concerned the sale of unregistered securities and fraud—much of which had been perpetrated by Hollenbeck—and sought to recover damages. According to SEC attorney Alex Rue ("Rue"), who testified at trial and who had represented the SEC in its case against Mobile Billboards, Bartko and Covington essentially copied the September 21, 2004 SEC complaint seeking injunctive relief against Mobile Billboards and sued executives and entities associated with Mobile Billboards. Bartko and Covington did not, however, sue Mobile Billboards's top salesman, Hollenbeck. Rather, Bartko and Covington listed Hollenbeck, Levonda Leamon ("Leamon"),[14] and 137 others as plaintiffs. Bartko and Covington even asked Hollenbeck to obtain the signatures from the other plaintiffs that would indicate their consent to participate as plaintiffs. Ever the fraudster, Hollenbeck then forged the signatures of the other plaintiffs. See Hollenbeck Tr. 101.

B.

With the Caledonian Fund now defunct, Bartko decided in November 2004 to create a new private equity fund, Capstone Private Equity Bridge and Mezzanine Fund, LLC ("Capstone Fund"). The new fund would not include Laws, but would use Hollenbeck or corporate entities that Hollenbeck controlled to raise money from investors. By this time, Bartko had represented Hollenbeck in negotiating a final cease and desist order with the North Carolina Securities

[14] Leamon was co-owner of Legacy Resource Management, Inc. ("Legacy"), a North Carolina corporation that had also illegally sold Mobile Billboards's securities. Her role in Mobile Billboards and in Bartko's schemes is discussed more fully, below.

Division, an order that stemmed from Hollenbeck's fraudulent sale of Mobile Billboards's securities. Bartko had read and understood a June 8, 2004 fax from Hollenbeck indicating that Hollenbeck had used fraudulent tactics to raise money through Franklin Asset Exchange. A June 11, 2004 letter from Covington had confirmed those suspicions. Bartko had sent and received countless other documents evincing Hollenbeck's fraud in connection with Webb Group, Franklin Asset Exchange, and fundraising for the Caledonian Fund. Yet, Bartko wanted—indeed, needed—Hollenbeck's participation. After all, Bartko needed money for his new private equity fund, and Hollenbeck knew how to get it.[15]

So, on November 12, 2004, Bartko sent a fax to Hollenbeck, with a copy to Wes Covington, concerning Bartko's new private equity fund. See Def. Ex. 351; Bartko Tr. 84–87; Hollenbeck Tr. 184–85. The fax stated,

> Scott—I have revised this draft agreement to accommodate our discussions yesterday with Wes as well as you. I also added some "protective" language in section 5(d) and the attached exhibit that should make it abundantly clear to everyone that we must stay away from any activities that could be construed as requiring agent or [broker-dealer] registration.
>
> I offer this for your comments if any. I will include this version in the Fed X [sic] delivery coming to you tomorrow which will include all of the final offering documents for the Fund.

Def. Ex. 351. Bartko attached an "Introducing Party's Agreement" between the Capstone Fund and "Crystal Enterprises, LLC, a North Carolina limited liability Fund, with its principal place of business at 935-N East Mountain Street, Kernersville, North Carolina 27284 ('Finder')." Id. The address of Crystal Enterprises, LLC ("Crystal Enterprises") was the business address that Hollenbeck used for his various business entities. See Govt. Exs. 4–5. It was also the business

[15] Bartko testified that, in November 2004, he had no idea that Hollenbeck had used fraud to raise the money that the Caledonian Fund received. See Bartko Tr. 90–91. Of course, the jury was entitled to credit the mountain of evidence to the contrary, including Bartko's own incredible testimony.

address referenced in the final cease and desist order Bartko and Covington had negotiated on Hollenbeck's behalf. See Govt. Ex. 330. "Crystal" was the name of Hollenbeck's wife, and "Crystal Enterprises, LLC" was a corporate name Bartko created in drafting the proposed agreement. See Bartko Tr. 85, 208; Hollenbeck Tr. 317–18. By using Crystal Enterprises instead of Scott Hollenbeck, Bartko removed Hollenbeck's name from the SEC's and North Carolina's regulatory radar screen. Such concealment was necessary because by this time—as Bartko the lawyer and Bartko the securities dealer well knew—Mobile Billboards had imploded and negative publicity shrouded its top salesman, Scott Hollenbeck.

Just as Bartko had claimed for the Caledonian Fund, he testified that he wanted Hollenbeck to act only as a "finder" and to forward the names of interested and qualified investors to Bartko. Bartko Tr. 87–88.[16] He did not want Hollenbeck to sell securities for the Capstone Fund. Id. Yet, on November 16, 2004, Bartko sent a fax to Hollenbeck: "Scott—I am sending you the one page from the final [Private Placement Memorandum] for the Capstone Fund, that now better sets forth the rollover process after one-year. Also, today, we should talk about how to structure the investments to be made by the *non-accredited investors*." Govt. Ex. 257 (emphasis added).

On November 23, 2004, Bartko, without Laws's participation, officially formed the

[16] As will become clear, "qualified investors" referred to accredited investors. SEC Regulation D permits the sale of unregistered securities to accredited investors. Accredited investor is defined in Regulation D, Rule 501. Specifically, that term refers to "[a]ny natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000," or as "[a]ny natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess of $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year . . . ." 17 C.F.R. § 230.501(a)(5)–(6). The term also encompasses 501(c)(3) organizations, which can be accredited investors if their total assets exceed $5 million and if the organization was "not formed for the specific purpose of acquiring the securities offered . . . ." 17 C.F.R. § 230.501(a)(3).

Capstone Fund. See Govt. Ex. 46. Bartko never filed a registration statement with the SEC for the securities associated with the Capstone Fund. See Govt. Ex. 311.

When Bartko created the Capstone Fund, Hollenbeck had already communicated with one potential investor: Danny Briley ("Briley"). Briley, who testified at trial, lived in Tennessee, and his brother-in-law was a friend of Hollenbeck. In 2004, Briley had some experience investing in stocks and mutual funds. He had sold his house and wanted to invest the equity at a good rate of return. On December 1, 2004, Briley emailed Hollenbeck:

> I was going to talk to Greg Bartko later this week. Before I talk with him, I wanted to make sure it was OK to talk to him about how you are "bundling" the product with insurance bonds. I don't expect him to acknowledge any principal safety etc., but wanted to make sure he was at least aware. Are you OK with this or would you prefer I did not mention that to him.

Govt. Ex. 287. Hollenbeck responded via email and stated, "Feel free to talk to Greg—he is aware of the insurance bonds . . . ." Id.

The following day, Hollenbeck advised Briley to send his application to invest in the Capstone Fund directly to Hollenbeck. Id. Hollenbeck also stated that he had spoken with Bartko and that Bartko would call Briley. Id.

That same day, December 2, 2004, Bartko spoke with Cal Reno's assistant's secretary, Kathleen Somers, of Arthur J. Gallagher & Co., about adding some additional named funds to the Franklin Asset Exchange insurance policy. See Govt. Ex. 347; Reno Tr. 20–22. On December 3, 2004, Reno returned Bartko's call and left a telephone message with Bartko. In the message, Reno asked Bartko to send a prospectus for the funds to be added and said that, upon receipt and review, Reno would ask AIG to add the funds to the policy. See Govt. Ex. 348; Reno Tr. 22–24.

On December 7, 2004, Bartko sent a fax to Hollenbeck at "CMH Enterprises, LLC." See

Govt. Ex. 260; Bartko Tr. 208.[17] CMH are the initials of Hollenbeck's wife, Crystal M. Hollenbeck. The fax stated, "Investor packages have been sent to [five potential investors]. . . . Also, as per our discussion last evening, Danny Briley has a call into me about his interest. I will call him within the hour, but you might wish to touch bases with him too. . . . Lastly, let's make the connections with . . . Cal Reno today." Govt. Ex. 260.

According to Bartko's trial testimony, on December 7, 2004, he did speak with Briley about investing in the Capstone Fund. Bartko Tr. 209. Briley raised the topic of bundling the product with insurance bonds. Id. Bartko testified that he had no clue what Briley meant. Id. 209–10.

Still on December 7, 2004, Reno again spoke with Bartko. See Reno Tr. 24–28. Bartko reiterated his desire to add some investments to the Franklin Asset Exchange insurance policy. Among those investments was the Capstone Fund. See Govt. Ex. 349; Reno Tr. 23–28. As he had done in his December 3, 2004 telephone message to Bartko, Reno stated that he would need to review the Capstone Fund's prospectus. Reno also noted that because Bartko was neither the insured nor the person with whom Arthur J. Gallagher & Co. had dealt when placing the original insurance policy, Reno would need to discuss Bartko's proposed addition with Colvin and Hollenbeck and obtain their consent. Reno Tr. 25–27. Finally, Reno told Bartko that the

[17] Bartko formally incorporated CMH Enterprises, LLC ("CMH Enterprises") on January 3, 2005. See Govt. Exs. 48, 293. On January 4, 2005, Bartko sent a fax to Hollenbeck at CMH Enterprises. See Govt. Ex. 265. The fax stated, "This is the final form of Introducing Party-Finder's Agreement that is needed between CMH and our Fund in order for the Fund to pay a fee associated with referrals made to us. . . . This is the same form as given to you in draft form several weeks ago. Now that CMH is formally organized as a Delaware LLC effective 1/3/05, we should have this fully executed so that fees can be paid." Id. Crystal Hollenbeck signed the agreement as "Managing Member" of CMH Enterprises, and Scott Hollenbeck faxed the document back to Bartko. Id.; Hollenbeck Tr. 142–43.

insurance policy did not guarantee investment returns or provide any similar coverage. Id. 27.[18]

On December 8, 2004, in his capacity as Hollenbeck's lawyer, Bartko represented Hollenbeck at a deposition that the SEC took at Bartko's law office in Atlanta. See Govt. Ex. 430. Covington represented Hollenbeck at the deposition as well. See id. SEC attorney Rue represented the SEC at the deposition. The deposition arose out of the SEC's September 2004 lawsuit against Mobile Billboards. During the deposition, Hollenbeck admitted to fraudulent sales tactics, including using a document purporting to be a "surety bond" to sell investments in Mobile Billboards. See id. (Dep. 157–61 & Ex. 26); Bartko Tr. 221–22. In addition, during the deposition, Hollenbeck denied having sold any securities since being fired from a securities firm and losing his securities licenses in 2003. Govt. Ex. 430 (Dep. 25–28 & Exs. 25–27). As for his current activities, Hollenbeck testified that he traveled to churches and led seminars on biblical principles of money management. See id. (Dep. 36). Rue specifically asked Hollenbeck, "Are you selling any sort of a financial product at this time?" Id. Hollenbeck responded, "Yes, sir." Id. Rue then asked, "And, what is that?" Id. Hollenbeck replied, "It's a private equity fund that has a fixed rate that you—it rolls every 12 months and can be used to get a quarterly distribution or let the money accumulate, and it is not a security." Id. (Dep. 37). Rue then inquired as to whether "that [is] a product that you put together yourself?" Id. Hollenbeck answered, "No, sir. It was put together by John Colvin." Id. Hollenbeck also testified in the deposition that he had put approximately one hundred clients into Colvin's fund, that no one else sells interests in the

[18] At trial, Bartko testified that he did indeed speak with Reno on December 7, 2004. See Bartko Tr. 212–14. According to Bartko, he called Reno merely to see whether the Capstone Fund would fall within the AIG policy's definition of portfolio-entities and to see whether the Capstone Fund could buy the type of coverage reflected in the policy. Id. 213–16. Bartko denied knowing that Hollenbeck used the AIG policy to defraud investors and denied wanting to add the Capstone Fund to the AIG policy to facilitate Hollenbeck's fraudulent sales. See id. Of course, the jury was entitled to disbelieve Bartko's testimony and to infer that Bartko hoped to add the Capstone Fund to the AIG policy in order to facilitate Hollenbeck's fraudulent sales.

fund, and that the fund contained approximately $13 million. Id. (Dep. 156). At no time during the deposition did Hollenbeck mention selling a financial product involving the Caledonian Fund or the Capstone Fund. Bartko likewise said nothing.[19]

After the deposition on December 8, 2004, Hollenbeck continued to meet with prospective investors about investing in the Capstone Fund. On December 9, 2004, Hollenbeck received and deposited Briley's $100,000 investment into the Capstone Fund via Franklin Asset Exchange. See Govt. Exs. 513, 595, 655.

On December 14, 2004, Hollenbeck secured Rebecca Mathes's ("Mathes") $75,000 investment (F/B/O Winifred Piek) into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 675. Mathes, who testified at trial, lived in Delavan, Wisconsin, and was a nurse. Mathes wanted to make an investment on her mother Winifred Piek's behalf. Mathes and her mother were not sophisticated investors. At the time, her mother was making $1,000 per year and had sold her house for $102,000. Other than that $102,000, her mother had no assets. Mathes learned about Hollenbeck because Hollenbeck was her pastor's brother. Cf. Govt. Ex. 16. Because Mathes wanted to invest some of her mother's money, she contacted Hollenbeck. Hollenbeck then spoke to her about an investment with a return of 12 percent that was "secure," "guaranteed," and "insured." See Govt. Exs. 100–02. Based on these assurances, Mathes invested $75,000 on her mother's behalf into the Capstone Fund via Franklin Asset Exchange. See Govt. Exs. 103–06, 513.

In December 2004, Bartko received two separate investments from Donna Gates

[19] Despite significant evidence to the contrary, see, e.g., Govt. Exs. 203, 207–09, 212–13, 243, 280–81; Bartko Tr. 174–76; Laws Tr. 18–25, 53–56, Bartko testified that, as of December 8, 2004, he did not know that Hollenbeck had raised $701,000 for the Caledonian Fund while making false promises about guaranteed and insured investments. Bartko Tr. 223. Bartko also testified that Franklin Asset Exchange was very confusing. Id.

("Gates"), which he deposited directly into the Capstone Fund. The first was a $400,000 investment; the second, an additional $47,000. See Govt. Ex. 663. Gates testified that she and her husband obtained the $447,000 after settling a personal-injury claim for themselves and their adopted minor daughter. Gates lived in Oregon and had worked as a welder. Her husband, who was disabled, had worked as a laborer in the construction industry. Neither was a sophisticated investor. Gates heard Hollenbeck give a presentation at her Baptist church in rural Oregon in November 2004. During his sales presentation, Hollenbeck never revealed the cease and desist order, the pending SEC investigation, or Bartko's dual role as Hollenbeck's attorney and as the owner of the Capstone Fund. Gates and her husband then had a separate meeting with Hollenbeck and the Gateses' pastor. There, Hollenbeck provided written material to Gates, which included fraudulent statements concerning the AIG insurance policy. See Govt. Exs. 90–92. Gates questioned Hollenbeck and her pastor about Hollenbeck's claim during his sales presentation that the investment was insured for up to $1 million, but ultimately decided to trust Hollenbeck and her pastor. Accordingly, Gates decided to invest the money in the Capstone Fund. Gates completed an investment suitability questionnaire, Def. Ex. 512, and wrote a $400,000 and a $47,000 check, both made payable to the Capstone Fund. See Govt. Ex. 595. After receiving the checks, Bartko, on behalf of the Capstone Fund, mailed correspondence to Gates concerning the investment. See Govt. Exs. 239–40; Def. Ex. 512.

Bartko testified that he received and reviewed Gates's investor suitability questionnaire. Bartko Tr. 94–96; see Def. Ex. 512. Bartko also testified that he concluded that the Gateses were "accredited investors"[20] and notified them that the Capstone Fund accepted both

[20] Again, an accredited investor is defined in SEC Regulation D, Rule 501 to include "[a]ny natural person whose . . . joint net worth with that person's spouse . . . at the time of his purchase exceeds $1,000,000," or as "[a]ny natural person who had . . . [a] joint income with that person's spouse in excess of $300,000 in each of [the two most recent years] and has a reasonable expectation

investments. Bartko Tr. 95–96; see also Def. Ex. 512. Bartko, on behalf of the Capstone Fund, mailed Gates quarterly statements dated December 22, 2004, and March 31, 2005, concerning the investment. See Govt. Exs. 95, 98.

Bartko admitted that before he accepted the Gateses' investment into the Capstone Fund, he knew that Hollenbeck did not have a securities license, that Hollenbeck was subject to a cease and desist order, that Hollenbeck admitted at his December 8, 2004 SEC deposition that he had falsely assured investors in Mobile Billboards that their investment was insured, and that he had reviewed documents that Hollenbeck had forwarded on June 8, 2004, concerning Hollenbeck's fraudulent sales tactics. See Bartko Tr. 276–77. Nonetheless, Bartko admitted that he did not inform Gates or her pastor of these facts and did not know whether Gates was aware of this information. Id. At trial, Gates testified that she was not aware of this information and that such information would have negatively impacted her decision to invest in the Capstone Fund.

On December 20, 2004, the SEC, through SEC attorney Rue, issued a Wells Notice to

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of reaching the same income level in the current year . . . ." 17 C.F.R. § 230.501(a)(5)–(6). On their investor suitability questionnaire, the Gateses listed their joint net worth as between $350,000 and $699,000, and their joint income as between $60,000 and $100,000. Def. Ex. 512. Both ranges fell well below the applicable accredited-investor thresholds. Even the quickest glance at the investor suitability questionnaire would reveal that the Gateses were far from qualifying as accredited investors. Bartko admitted at trial that he knew and understood the definition of accredited investor. Bartko Tr. 255. Nevertheless, Bartko accepted the Gateses into the Capstone Fund. At trial, Bartko tried to justify this decision by adding the Gateses' stated net worth to their $447,000 investment, reaching a total net worth in excess of the $1 million threshold. Id. 95. Bartko's calculation was obviously flawed. All sophisticated securities lawyers and investment bankers know that an individual's net worth is the difference between that individual's total assets and total liabilities. All sophisticated securities lawyers and investment bankers also know that an investment is an asset encompassed in both an individual's total assets and, ultimately, net worth. Bartko holds an LL.M. in securities regulation from Georgetown and specialized in securities law for sixteen years. He also held himself out as a sophisticated investment banker. Yet, his proffered justification for believing the Gateses to be accredited investors contained elementary miscalculations. The jury was entitled to disbelieve Bartko's testimony.

Hollenbeck through Hollenbeck's attorneys, Covington and Bartko. According to Rue, a Wells Notice advises a person that the SEC enforcement staff is going to recommend to the SEC that the SEC file suit against that person. The Wells Notice is intended to give the targeted person an opportunity to persuade the SEC enforcement staff not to make the recommendation and thereby avoid an SEC lawsuit. Rue testified that he provided the Wells Notice as a result of Hollenbeck's admissions of fraud in his December 8, 2004 deposition and as a result of the SEC's investigation of Mobile Billboards. Rue testified that he spoke with Bartko about the Wells Notice in December 2004.

On December 21, 2004, Hollenbeck, on behalf of Franklin Asset Exchange, wrote checks totaling $375,620 to the Capstone Fund. See Govt. Ex. 690. The checks were the proceeds of money that Hollenbeck had fraudulently raised from Danny Briley, Winifred Piek (i.e., Rebecca Mathes's mother), Michael Lewis, Susan I. Mitchell, and Raymond Reddick. An individual name appeared in the memo line of each check. See id. Bartko received and deposited the money into the Capstone Fund's account. See id.

On December 30, 2004, Hollenbeck received Sharon Glover's ("Glover") $30,000 investment into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 665. Glover, who testified at trial, is a high school graduate and a widow from rural Michigan. In 2004, Glover was unemployed. She had no annual income. Glover's husband had been the family's sole provider, but he had died in October 2003. Glover received $200,000 from a life insurance policy, but that money was rapidly dwindling. At the time, her only other assets were a small older house with a mortgage and a 1997 car. Jobless and desperate to generate some income to pay her mortgage and other living expenses, Glover decided to invest $30,000 of the remaining life insurance proceeds. She had never previously invested money, but wanted to earn interest

on the $30,000. Glover heard of Hollenbeck through her son-in-law, Berean Baptist Church Pastor Tim Cook ("Pastor Cook"). Hollenbeck called Glover and they discussed an investment. Eventually, Hollenbeck sent her documents, which included fraudulent statements concerning insurance. See Govt. Exs. 109, 160, 163–64. She decided to invest the $30,000. See Govt. Ex. 665. Glover was never told about Hollenbeck's cease and desist order or his prior forgeries.

On December 30, 2004, Hollenbeck also received Jason Hemsted's ("Hemsted") $35,000 investment into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 669. Hemsted, who testified at trial, was a college graduate and a member of a Baptist church in Hammond, Indiana. His father died in 2004, and he received $35,000 from a life insurance policy. At the time, Hemsted's annual income was $33,000 and his net worth consisted of the $35,000 and a van worth $2,000. Cf. Def. Exs. 171–72. A friend from church recommended speaking with Hollenbeck about investing. Thereafter, Hollenbeck spoke with Hemsted on the telephone and discussed an insured investment with a 12 percent guaranteed interest rate. Hemsted then invested $35,000 in the Capstone Fund via Franklin Asset Exchange. When Hemsted invested, he did not know that Hollenbeck had a cease and desist order, that Hollenbeck admitted in a December 2004 deposition to using fraudulent insurance policies to sell investments, or that Bartko was Hollenbeck's attorney.

Hollenbeck also fraudulently received money for the Capstone Fund from Berean Baptist Church. See Govt. Ex. 651. Pastor Cook, who testified at trial, explained that Berean Baptist Church is in Adrian, Michigan, approximately thirty miles northwest of Toledo, Ohio. The church is a 501(c)(3) non-profit organization, and Pastor Cook served as Stewardship Pastor for twelve years. By late 2004, the church was debt free and had $250,000 in the bank.

Hollenbeck came to the church and gave a financial seminar. The church was interested

in investing a portion of the $250,000, and Hollenbeck provided documents to Pastor Cook concerning the Capstone Fund. See Govt. Exs. 123, 128. During Hollenbeck's sales presentation to the Deacon Board, Hollenbeck said that the investment in the Capstone Fund was covered by an AIG insurance policy for up to $3 million. Hollenbeck never revealed that the North Carolina Securities Division had issued a cease and desist order against him, that he had lost his securities license, or that some documents associated with the alleged AIG insurance policy were forged. Hollenbeck likewise never stated that he was only a "finder" and never revealed that he was not permitted to discuss the investment in the Capstone Fund and that he could only refer the church to Bartko. Ultimately, the church invested $170,000 in three checks and planned to use the interest income for certain expenses. See Govt. Ex. 651. The church made the checks payable to Franklin Asset Exchange. At the time of its investment, the church's total assets were well below $5 million. See Bartko Tr. 260. The church indicated its financial status on an investor suitability questionnaire the church completed before investing. See Def. Ex. 511.

At trial, Bartko testified that during the holidays in late 2004 and early 2005, he reviewed the suitability questionnaires that Hollenbeck's prospective investors had submitted. See Bartko Tr. 98. He testified that he concluded that Berean Baptist Church was an accredited investor and accepted Berean Baptist Church into the Capstone Fund. Id. 99–100; see also Def. Ex. 511.[21]

[21] A 501(c)(3) organization cannot be an accredited investor without a net worth in excess of $5 million. 17 C.F.R. § 230.501(a)(3). Berean Baptist Church listed its net worth as exceeding $1 million, but did not otherwise specify a precise amount. See Def. Ex. 511. Nor did Bartko have independent knowledge of the church's finances. See Bartko Tr. 258–60. Indeed, according to Pastor Cook, the church's net worth fell well short of $5 million. See id. 260. On direct examination, Bartko testified that he deemed Berean Baptist Church to be an accredited investor based on its stated annual income in excess of $200,000 and on its stated net worth of over $1 million. Id. 100. On cross examination, Bartko admitted that he knew that those thresholds applied only to individuals, id. 254–56, and that he knew that Berean Baptist Church was not an individual. Id. 259–61. Bartko then tried to escape from this last admission by testifying to his belief that Pastor

Bartko testified that he never spoke with Pastor Cook, the church's finance pastor, but did speak with Pastor Rogers, who was in charge of the church. See Bartko Tr. 258–60. According to Bartko, he and Pastor Rogers did not discuss the church's finances or financial condition. See id. Moreover, Bartko admitted that when he accepted Berean Baptist Church into the Capstone Fund, he knew that Hollenbeck did not have a securities license, that Hollenbeck was subject to a cease and desist order, that he had reviewed the documents that Hollenbeck had forwarded on June 8, 2004, and that Hollenbeck had admitted at his December 8, 2004 SEC deposition that he had falsely assured investors in Mobile Billboards that their investment was insured. Id. 276–77. Nonetheless, Bartko admitted that he did not inform Berean Baptist Church of these facts and did not know whether Berean Baptist Church was aware of this information. Id. 277. At trial, Pastor Cook testified that the church was not aware of this information and that it would have negatively impacted the decision to invest in the Capstone Fund.

On December 30, 2004, Hollenbeck, on behalf of Franklin Asset Exchange, wrote checks totaling $285,000 to the Capstone Fund. See Govt. Ex. 690. The checks were the proceeds of money that Hollenbeck had fraudulently raised from Sharon Glover, Jason Hemsted, Wiley Reddick,[22] and Berean Baptist Church. See id. An individual or church's name appeared on the memo line of each check. Id. Bartko received and deposited the money into the Capstone Fund's account. See id.

On January 4, 2005, Hollenbeck received investments of $95,861 and $2,004 from

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Rogers, not the church as an organization, was the true investor. Id. 259. But when the Assistant United States Attorney ("AUSA") confronted Bartko on this incredible statement, Bartko conceded that Berean Baptist Church was listed as the investor on the investor suitability questionnaire and that all three of the church's investment checks were written in the name of Berean Baptist Church. Id. 261.

[22] Wiley Reddick made a second investment of $10,000 in the Capstone Fund on January 21, 2005. Govt. Exs. 596, 690.

Carlene Rudd-Smith ("Rudd-Smith") into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 681. Rudd-Smith, who testified at trial, is a seventy-four-year-old retired postal worker who lived in rural North Carolina. After her father's death, she and her siblings decided to sell the family farm and invest the proceeds to earn interest to care for their widowed mother. Hollenbeck assured Rudd-Smith that the rate of return was 12 percent and that the investment was insured. Before investing, Rudd-Smith spoke with members of Gospel Light who were happy with their investments with Hollenbeck. Rudd-Smith, however, knew nothing about Hollenbeck's cease and desist order or that he had confessed to forging documents. Without that knowledge, Rudd-Smith filled out one check for $95,861 and another check for $2,004, made them payable to Franklin Asset Exchange, and mailed them to Hollenbeck. See Govt. Exs. 514, 681.

On January 5, 2005, Hollenbeck received an investment of $72,982 from Guy G. Smith, Sr. into the Capstone Fund via Franklin Asset Exchange. See Govt. Ex. 677. Smith, who testified at trial, is seventy years old and a retired furniture-factory worker. He lived on a $550 monthly disability check, but had inherited $85,000 from his deceased brother. He wanted to invest the money to earn interest income. Smith's wife had invested some money with Hollenbeck; therefore, Smith met with Hollenbeck to discuss investing $70,000. Hollenbeck promised Smith that he would not lose his principal. No one, however, told Smith about Hollenbeck's sordid history.

On January 10, 2005, Hollenbeck, on behalf of Franklin Asset Exchange, wrote checks totaling $435,505 to the Capstone Fund. See Govt. Ex. 690. The checks were the proceeds of money that Hollenbeck had fraudulently raised from Carlene Rudd-Smith, Guy G. Smith, Sr., Max Hudson, Claude Dean Hopper, Jr., Hemalatha Rachapudy, Jim Dykes, Richard Kennedy,

Carol Frey, and Archibald Brown. See id.

In sum, from early December 2004 until early January 2005, Hollenbeck had made fraudulent sales presentations to investors concerning the Capstone Fund, had received $1,156,125 from investors who wanted to invest in the Capstone Fund, and had forwarded that money via Franklin Asset Exchange to Bartko. See id. Bartko, in turn, deposited that money in the Capstone Fund's bank account. Id.

In early January 2005, Bartko persuaded Dr. Teo Dagi ("Dagi") to become a partner in the Capstone Fund. See Bartko Tr. 63–64. Bartko described Dagi as a wealthy and successful medical doctor and investor. See id. 64–65.[23] According to Bartko, after reviewing the Franklin Asset Exchange's suitability questionnaires (which Hollenbeck completed) between December 2004 and January 2005, Bartko and Dagi decided that there was too much risk associated with the Franklin Asset Exchange investment due to the references to individual names of people who had invested through Franklin Asset Exchange. Id. 102. Accordingly, the Capstone Fund decided in early January 2005 to return the funds to the individuals. See id. 102–03.

Bartko testified that, at the time that Bartko made the decision to return the funds, he knew that Hollenbeck did not have a license to sell securities, was subject to a cease and desist order, and was not legally allowed to sell securities. See id. 239–40. Bartko admitted knowing that, other than Danny Briley, he had not spoken to any of the seventeen individual investors listed on the Franklin Asset Exchange checks and that seventeen individuals would not have invested tens of thousands or hundreds of thousands of dollars without someone explaining the investment to them. See id. 240–41.[24] Bartko also admitted being unsure of the background or

[23] Dagi did not testify at trial.

[24] This testimony draws into question Bartko's earlier testimony that he intended for Hollenbeck to act only as a "finder" for the Capstone Fund who simply forwards the names of interested and qualified investors to Bartko. See Bartko Tr. 85–88.

financial sophistication of the seventeen individual investors who had invested through Franklin Asset Exchange. See id. 241.

Bartko advised Hollenbeck that he would be returning the checks to the individual non-accredited investors who had invested through Franklin Asset Exchange. Id. 109–10. Bartko and Hollenbeck then discussed how non-accredited investors could invest in the Capstone Fund. See id. Bartko described to Hollenbeck the idea of an investment club. Id. 110. In fact, Bartko testified that he and Hollenbeck discussed that idea several times. Id. 109–110.

After speaking with Hollenbeck about the possibility of forming an investment club to pool money to invest in the Capstone Fund, Bartko broached the topic with Leamon and Rebecca Plummer ("Plummer") of Legacy. See id. 120; Plummer Tr. [D.E. 217-9] 23–25, 27–30.[25] Bartko had met Leamon and Plummer on August 31, 2004, at Covington's Durham law office in connection with a possible lawsuit against various individuals and entities associated with Mobile Billboards. See Bartko Tr. 110–13, 116–17. As mentioned, Bartko and Covington filed that suit on November 1, 2004, and represented Hollenbeck, Leamon, and 137 other individuals who had invested in Mobile Billboards. See id. 110–13.

Leamon and Plummer were two unsophisticated, elderly woman who operated Legacy. See Govt. Exs. 6–7. Neither had more formal education than a high school degree. Plummer Tr. 3; Leamon Tr. [D.E. 217-9] 130. Leamon and Plummer started Legacy in 2001 and each owned 50 percent. Legacy was a two-person operation in Kernersville, North Carolina. Leamon was the president and Plummer was the secretary/treasurer. Leamon was a retired flight attendant, but she also had an insurance license. Legacy (and its predecessor company CLR Group, Inc.)

[25] Plummer and Leamon testified separately at trial, but their testimony is contained in a single transcript [D.E. 217-9]. Plummer's testimony comprises pages 3–129; Leamon's, pages 129–153.

provided financial advice and sold certain financial products, including insurance and investments in Mobile Billboards. Leamon and Plummer also had sold investments in Webb Group, Franklin Asset Exchange, and Disciples Trust.[26] When Mobile Billboards imploded in the summer of 2004, Leamon and Plummer each received a cease and desist order just like Hollenbeck's from the North Carolina Securities Division, prohibiting them from selling securities. Thereafter, Legacy struggled financially. See Plummer Tr. 26; Leamon Tr. 136–40. After meeting Covington and Bartko at the August 31, 2004 meeting, Leamon and Plummer sought legal and business advice from Covington and Bartko. See, e.g., Plummer Tr. 20–21, 23, 29; Leamon Tr. 136–40.

Bartko periodically spoke with Leamon and Plummer in December 2004 and January 2005 about the Capstone Fund. See Bartko Tr. 117–18. In January 2004, Bartko and Hollenbeck told the two women that Bartko wanted to use Legacy's office to make a presentation to possible Capstone Fund investors. Id. 118–19; Plummer Tr. 29–32; Leamon Tr. 140–41, 148–49. The meeting occurred on January 11, 2005, at Legacy's office, and Bartko, Dagi, Leamon, Plummer, and Glenn O'Ferrell ("O'Ferrell") attended. O'Ferrell was a retired firefighter and supposedly had access to certain firefighter pension funds. During the meeting, Bartko made a presentation concerning the Capstone Fund. See Bartko Tr. 118–19, 247; Plummer Tr. 29–32; Leamon Tr. 140–41, 148–49.

According to Leamon and Plummer, at about the same time as the January 11 meeting, Bartko told them that he could no longer do non-legal business with Hollenbeck,[27] and that the Capstone Fund was going to be refunding the money of Hollenbeck's individual non-accredited

[26] Disciples Trust was another fund that Colvin created in 2004 and that Hollenbeck fraudulently sold.

[27] Bartko testified that at the meeting at Legacy on January 11, 2005, he stated that he did not wish to do any more non-legal work for Hollenbeck. See Bartko Tr. 248.

Franklin Asset Exchange clients. But at the same time, Bartko spoke with Leamon and Plummer about forming an investment club and having Hollenbeck's clients invest their soon-to-be-returned money back into the Capstone Fund. See Bartko Tr. 117–18, 120–21, 125–26; Plummer Tr. 23–24; Leamon Tr. 141–42.

Bartko admitted at trial that he did speak with Plummer and Leamon about forming an investment club to allow individual non-accredited investors to invest in the Capstone Fund. See Bartko Tr. 117–18, 120–21, 125–26. But Bartko denied ever telling Hollenbeck, Leamon, or Plummer to contact Hollenbeck's individual non-accredited investors to persuade them to invest in the Capstone Fund. See id. 126, 246, 248. Bartko also denied ever joining a conspiracy with anyone to launder money, commit mail fraud, or sell unregistered securities. See id. 125–26, 248–52.

In Bartko's discussions with Legacy about investing in the Capstone Fund, Bartko told Leamon and Plummer that Legacy would receive a 6 percent finder's fee from the Capstone Fund for any investments from Legacy or its clients. Id. 125–28; Plummer Tr. 53–54, 68; Leamon Tr. 150. Hollenbeck and Legacy, in turn, agreed with Hollenbeck that they would split the 6 percent finder's fee. Hollenbeck would get 4 percent and Legacy would receive the remaining 2 percent. See Plummer Tr. 51–54; Leamon Tr. 150.

At trial, Bartko denied knowing that Hollenbeck and Legacy had reached an agreement to split Legacy's 6 percent finder's fee. Bartko also testified, however, that such an arrangement between Hollenbeck and Legacy would not have surprised him. See Bartko Tr. 251–52. Again, Bartko denied participating in a criminal conspiracy with Hollenbeck, Plummer, and Leamon to launder money, commit mail fraud, or sell unregistered securities. See id. 125–26, 248–52.

After the January 11, 2005 meeting at Legacy, Bartko remained in North Carolina and

attended a meeting on January 12, 2005, at Gospel Light. Gary Hall ("Hall"), a retired airline pilot and member of Gospel Light who testified at trial, had grown concerned in late 2004 about Gospel Light's investments through Hollenbeck. Hall had previously invested with Colvin and Hollenbeck in Franklin Asset Exchange, but had withdrawn his investments in November 2004 after learning about Hollenbeck's cease and desist order on the internet. Hall also investigated the purported insurance policy Hollenbeck had promised would protect Hall's investment and learned that it did not insure the principal. In addition, in November 2004, Hall had rejected Hollenbeck's sales presentation to invest in the Caledonian Fund. Due to his growing concerns about Hollenbeck, Hall told the Gospel Light pastor that Gospel Light should withdraw its investment. As a result, the pastor scheduled a meeting for January 12, 2005, to be held at the church in Walkertown, North Carolina.

On January 12, 2005, Bartko, Covington, and Hollenbeck attended the meeting at Gospel Light. The Gospel Light pastor and various church leaders also attended. See Govt. Ex. 62. During the meeting, Hall asked Bartko what role Bartko and Covington had with Franklin Asset Exchange. Initially, each said none. Bartko then stated that he had minimal contact with Colvin and minimal involvement with Franklin Asset Exchange. Hall also asked Covington whether Hollenbeck had a duty to disclose the cease and desist order to potential investors. Covington responded that Hollenbeck had no such responsibility so long as the new investment was not similar to Mobile Billboards. Thereafter, the Gospel Light pastor asked to withdraw the church's $2 million investment in Franklin Asset Exchange.

According to Hall, after the pastor asked for the funds to be returned, Bartko explained where the funds were and that it would take some time to return the funds. A deacon then asked about Hollenbeck's guarantee and surety bond. See id. Covington answered that an insurance

agent mistakenly had told Hollenbeck that the surety bond insured the principal. Bartko then stated that he and Covington had told Hollenbeck "last week" that the agent's information was erroneous and that Hollenbeck should stop passing it along to investors. Id. (providing Hall's notes written during the meeting).[28] Of course, this statement contradicted Bartko's testimony that he and Covington had "told [Hollenbeck] . . . way back in June" to stop telling investors that their investment was covered by a surety bond. Bartko Tr. 227; see also Govt. Ex. 243.

After the meeting at Gospel Light concluded, Hollenbeck drove Bartko to the airport. On the way, the two stopped and met with Robin Denny ("Denny") of Kernersville, North Carolina, at her home. See Denny Tr. [D.E. 220-12] 3–6. Earlier that day, Denny's sister-in-law, whose father served on the board at Gospel Light, had called Denny and had told her that Gospel Light was having difficulty getting Hollenbeck to return money that it had invested with Hollenbeck. Id. 6. Denny was concerned about an $800,000 to $900,000 investment that her mother, Judy Wright Jarrell ("Jarrell"), had made with Hollenbeck and Colvin via Franklin Asset Exchange. See id. 3–6, 23–26. Denny called Hollenbeck and they agreed to meet that evening at Denny's home. Id. 6–7.

Denny, her two brothers, her sister-in-law, and her mother attended the meeting with Hollenbeck and Bartko. Id. 7. According to Denny, who testified at trial, both Hollenbeck and Bartko assured Denny and the others for thirty minutes that Jarrell's money was safe, that the money was insured by AIG, and that the money would be returned within two weeks if Jarrell wanted to liquidate the investment. Id. 7–9, 27–28. Bartko also said that if there were a problem with the investment, then Jarrell would need to seek compensation from Hollenbeck and the

[28] At trial, Bartko testified that he did not recall Covington making such statements. See Bartko Tr. 226. Bartko also testified that he did not make such statements at the meeting. Id. 226–27.

family would have the burden to prove fraud. Id. 7–8, 10–11. Bartko and Hollenbeck provided Denny with their and Covington's business cards. Id. 12. Hollenbeck also said that he would send a fax the next morning instructing the family on how to liquidate the investment. Id. 12.[29]

On January 13, 2005, Hollenbeck sent a fax addressed to Judy Wright Jarrell, Barry Denny, and Robin Denny. He attached three business cards and stated, "Please send letter to request liquidation to these three people. God bless you. Thank you for your friendship." Govt. Ex. 52; Denny Tr. 12–13. The three business cards were Hollenbeck's (identifying his business name as SBH Enterprises, LLC), Bartko's (identifying him as Managing General Partner with the Capstone Fund), and Covington's (identifying Covington's law firm). See Govt. Ex. 52; Denny Tr. 12–13.

In response, on January 13, 2005, Barry Denny, on behalf of his mother-in-law, Jarrell, wrote and faxed letters to Hollenbeck, Bartko, and Covington. See Govt. Ex. 53; Denny Tr. 13–14. Per Bartko's business card and Hollenbeck's instructions, Denny addressed the letter to Bartko in his capacity as Managing General Partner with the Capstone Fund, listed Jarrell's accounts, and requested liquidation. See Govt. Ex. 53; Denny Tr. 13–15.

Bartko did not comply. Instead, on January 14, 2005, Bartko faxed a letter to Barry Denny on Bartko's law firm letterhead. Govt. Ex. 54; Denny Tr. 16–18. The letter stated as follows:

Upon coming to my office this morning, I have received and reviewed the letter

[29] At trial, Bartko testified that he attended the meeting solely in his capacity as Hollenbeck's lawyer. Bartko Tr. 229. Bartko did not recall Hollenbeck assuring those assembled that the investment was safe. Id. 230. Bartko did recall Hollenbeck saying that Jarrell could get her money back, but was fuzzy on whether Hollenbeck added a two-week time limit. Id. 230–31. Bartko did not recall Hollenbeck assuring those assembled that insurance with AIG protected the investment. Id. 231. Bartko denied telling those assembled that the investment was safe or insured. Id. 231–32. According to Bartko, he merely explained how a person would make a claim under AIG's errors and omissions insurance policy. See id. 232.

faxed to my attention that relates to the demand being made for liquidation of certain investments made for the benefit of Judy M. Wright. I understand that Mrs. Wright is your mother-in-law.

Please note that your letter is incorrectly directed to me in my capacity as a managing-member of a private equity fund, Capstone Private Equity Bridge & Mezzanine Fund, LLC ("Fund"). When I was with Scott Hollenbeck on Wednesday evening, I was accompanying him in my capacity as one of his two attorneys that are assisting him throughout his dealings with the Mobile Billboards of America, Inc. matters, as well as related matters, but I in no way was present in any capacity as a principle [sic] in the Fund that you directed your letter to. The Fund is a recently-formed Delaware limited liability company that does make a variety of private equity investments in the bridge and mezzanine sectors, but the Fund has no involvement with any investments made by Mrs. Wright and accordingly has no involvement in permitting the return or liquidation of her investments made through companies controlled by Scott Hollenbeck.

Scott has advised me that the import of your letter of January 13, 2005 was really directed to me as one of his lawyers, and I will treat it as such.

Govt. Ex. 54.

While Barry Denny and Bartko engaged in this exchange, Robin Denny conducted some research of her own. She "spent most of the morning [of January 13, 2005,] on the telephone with [AIG] . . . . [AIG] did not know who [we] were." Denny Tr. 18. Robin Denny "faxed our certificates" to AIG, but AIG did not recognize the documents. Id. AIG told Denny that AIG did not guarantee the investment and that AIG had no record of the investment. See id.

Denny's mother did not receive the return of her investment within two weeks. Id. 18–19. She later learned that Franklin Asset Exchange had invested the money in a coal mine in Montana named Bull Mountain. Id. 22–23.[30]

On January 14, 2005, Bartko and investor Danny Briley engaged in a lengthy email exchange concerning Briley's investment of $100,000 in the Capstone Fund via Franklin Asset

[30] As explained infra in connection with the Forsyth County receivership litigation, Jarrell ultimately recovered approximately 75 percent of the money she had invested with Hollenbeck via Franklin Asset Exchange.

Exchange. See Govt. Ex. 136. Bartko told Briley that his "investment was included in a 'batch' of subscriptions that were actually submitted to [the Capstone Fund] by Franklin Asset Exchange, LLC, which is one of Scott's companies." Id. Bartko then wrote,

> Based on Franklin's subscription and suitability questionnaire, it is an accredited investor so we thought initially that we were able to accept all subscriptions from Franklin. On further analysis, some of the capital received by Franklin is represented by some non-accredited investors. Your subscription is one that I am reviewing today among several and on first blush, your subscription does NOT qualify as an accredited subscription so we believe we will be returning your funds to you no later than Monday.
>
> Danny . . . . [sic] I would like to discus this with you personally to explain to you the facts giving rise to our decision NOT to formally accept any non-accredited subscriptions and to confirm your address so we can get your funds out to you by check on Monday.

Id.

Briley testified that he understood Bartko's message to mean that he did not qualify as an accredited investor. Briley responded to Bartko's email and stated, "What's a good time to call? I'm wide open." Id. Bartko replied and told Briley to call at 4:30 p.m. Id. Bartko added, "I would love to keep you in the Fund. I need you to qualify as being an accredited investor under one or more of the definitions contained in the [Private Placement Memorandum] you received from us. Take a look at that before you ring me and we can discuss this issue at some length." Id.

At 5:18 p.m. on January 14, 2005, Briley responded:

> [T]hank you for the insight. I'm curious on one thing—in our previous conversation, I thought you had said that interest accrual started from the time [the] check was placed with you. I thought that odd since you could not start doing business until you had reached a certain level. Loss of interest is a risk that I was willing to take, so no harm done. If I had been able to stay in the fund, when would I have started accruing the 1% [sic]?
>
> Thanks again for all of the information. I'm disappointed but understand the regulatory concerns.

Id.

At 5:29 p.m. on January 14, 2005, Bartko replied:

> Danny . . [sic] we reached the minimum of $1.0 MM on 12/31/04 just coincidentally. So the answer to your question is 1/1/05, but since we were advised NOT to formally accept the non-accredited investments, we now have fallen back under the minimum. So since that is the case, no interest accrues. That is why we had to make this decision NOW and not later as much longer would begin to incur the wrath of investors if interest was NOT accruing.
>
> Your check is going out [on] Monday without fail.

Id.

On January 18, 2005, Bartko wrote a letter on behalf of the Capstone Fund and faxed it to Hollenbeck. See Govt. Ex. 271. In the letter, Bartko stated that the Capstone Fund determined Franklin Asset Exchange to be an accredited investor and not specifically formed for purposes of investing in the Capstone Fund. Id. Nevertheless, "[f]urther analysis reveals that *the individual investors that provided funds to Franklin are not accredited investors and that their respective investments into Franklin may very well consist of the offer and sale of unregistered securities in violation of Section 5 of the Securities Act and comparable state law.*" Id. (emphasis added) Thus, "*we have decided not to accept any direct or indirect investments from those people that subscribed to Franklin in order to enable Franklin to subscribe to our Fund investments.*" Id. (emphasis added).

But while Bartko was saying one thing, he was doing quite another. On January 18, 2005, Bartko and Hollenbeck's telephone records reveal that they spoke nine times. See Govt. Ex. 686; Plummer Tr. 35–36. During that time, Bartko sent a securities filing to the SEC and the North Carolina Securities Division regarding "Capstone Private Equity Bridge & Mezzanine Fund, LLC—Regulation D Rule 506 Covered Securities Filing." Govt. Ex. 338; see also Govt. Ex. 310. Regulation D, Rule 506 provides an exemption from securities registration

requirements for certain limited offers and sales. 17 C.F.R. § 230.506.

The filings required Bartko to list any

> person who has been or will be paid or given, directly or indirectly, any commission or similar remuneration for solicitation of purchasers in connection with sales of securities on the offering. If a person to be listed is an associated person or agent of a broker or dealer registered with the SEC and/or with a state or states, list the name of the broker/dealer.

Govt. Exs. 310, 338. Bartko listed only CMH Enterprises. Id. Bartko did not mention Hollenbeck, Legacy, Leamon, or Plummer in the filings. Nor did Bartko identify any other person or entities that had or would be paid for solicitations or purchases in connection with the sale of the securities in the Capstone Fund offering. See id. In addition, the filings stated that the Capstone Fund did not intend to sell to non-accredited investors in the offering and that the minimum investment was $50,000. See id.

On that same date, Bartko's telephone records reveal a call from his telephone to Legacy for six minutes. See Govt. Ex. 402. The day after that telephone call, Leamon and Plummer opened a new bank account for Legacy at TriStone Bank ("TriStone") to handle the refund checks of Hollenbeck's individual investors. Govt. Exs. 627, 686; Plummer Tr. 33–36; Leamon Tr. 141–42. Despite these suspicious circumstances, Bartko, as he was apt to do, testified that he did not remember talking to either Leamon or Plummer about opening a new bank account to handle refund checks. See Bartko Tr. 246. Bartko, however, admitted knowing shortly after January 19, 2005, that Legacy had opened a new bank account at TriStone. Id. 246–47.

January 19, 2005, the day that Legacy opened its new bank account, would turn out to be a very busy day for Bartko. First, Bartko, through the Capstone Fund, sent refund checks and letters via Federal Express to individual investors who had invested money in the Capstone Fund through Franklin Asset Exchange. See, e.g., Govt. Exs. 140 (Carlene Rudd-Smith), 169 (Sharon

Glover), 665 (Sharon Glover), 669 (Jason Hemsted), 675 (Rebecca Mathes (F/B/O Winifred Piek)), 677 (Guy G. Smith, Sr.), 681 (Carlene Rudd-Smith). On that same date, Bartko sent a fax to Hollenbeck, noting that several "FED X [sic] packages are going out today. We need correct addresses for Carlene Rudd and Carole [sic] Frey." Govt. Ex. 269. Bartko sent another fax on that date to Hollenbeck, listing "additional FED X [sic] packages that went out today as well." Govt. Ex. 270. The faxes identified each individual non-accredited investor who had invested via Franklin Asset Exchange, provided a copy of Bartko's letter to the investor, and provided a copy of the refund checks that the Capstone Fund issued to the investors. See Govt. Exs. 269–70.

Bartko's letter to each non-accredited investor stated the following:

> Enclosed you will find our Fund check representing the amount that you were proposing to invest with our Fund through the submission of your Subscription Agreement and related Suitability Questionnaire. We are extremely grateful for your interest in subscribing for units of limited liability membership ("Units") in our Fund.
>
> Initially, we were of the opinion that subscriptions that our Fund received directly from the Franklin Asset Exchange, LLC ("Franklin"), which does qualify as being an accredited investor, were appropriate under circumstances where investors such as yourself initially pooled their funds with Franklin for the specific purpose of having Franklin then subscribe for Fund Units. *However, upon further analysis and consideration of all the circumstances, our Fund is not able to accept your subscription due to the fact that you, as the indirect subscriber, do not qualify as being an "accredited investor" as defined in our Fund information Memorandum and under Section 18 of the Securities Act of 1933.*
>
> The managing-members of our Fund resolved unanimously on January 13, 2005 to return all investment funds tendered to the fund that fall within this category. Accordingly, enclosed is your check representing your investment without interest, since the Fund has not yet received subscriptions representing the mandatory minimum level of subscriptions, which is a condition to the accrual of any interest on your investment. I am hopeful that this situation has not caused you any undue hardship.
>
> Please give me a call if you have any questions or comments. Again, thank you

> very much for your confidence in our Fund. Believe me, I wish we were sending you your confirmation of receipt of your subscription, but we must be mindful of all of the compliance considerations we are governed by.

E.g., Govt. Exs. 140, 169, 269–70 (emphasis added).

Bartko sent the checks and the letters via Federal Express directly back to most of the individual non-accredited investors.[31] Bartko, however, did not have addresses for six of the individual investors; therefore, he sent those six checks to Hollenbeck in Kernersville, North Carolina. See Govt. Ex. 272; cf. Govt. Ex. 690 (listing the seventeen individual investors and Berean Baptist Church, all of whom had invested via Franklin Asset Exchange). [redacted] When Hollenbeck received these checks, he decided not to forward them to the respective investors. Instead, Hollenbeck forged these six investors' names on the checks, deposited the money, and used the proceeds to pay his earlier investors their December 2004 "distribution." See Hollenbeck Tr. 157–58.[32]

As for the other individual non-accredited investors who had invested in the Capstone Fund via Franklin Asset Exchange and received their checks via Federal Express directly from Bartko, five victims testified about endorsing their refund checks over to Legacy in order to get into the Capstone Fund. Specifically, Rebecca Mathes, Jason Hemsted, Sharon Glover, Carlene Rudd-Smith, and Guy G. Smith, Sr., all testified concerning their own investments and the endorsement of their refund checks to Legacy. Mathes, investing on behalf of her mother

[31] Included among these investors is Carlene Rudd-Smith. The mailing she received is specifically referenced in count two of the superseding indictment.

[32] At trial, the defense argued that Hollenbeck's theft of the six checks helped prove that Bartko and Hollenbeck were not co-conspirators. The jury, however, was entitled to view Hollenbeck's conduct as proof of the age-old adage that there is no honor among thieves.

Winifred Piek, testified that Hollenbeck called her and told her to endorse her mother's check to Legacy to get into the Capstone Fund and then to send it back. Hemsted testified that Hollenbeck told him to endorse his check to Legacy and to send it back. Carlene Rudd-Smith, who took notes of the conversation, testified that Hollenbeck told her that the Capstone Fund was filled, but that they were starting another fund and to endorse her check "Carlene Rudd-Smith, Payable only to Legacy Resource Management," and to send it back. Govt. Ex. 140. Guy Smith testified that he could not recall the details of endorsing the check to Legacy, but that his signature was on the check, that he did endorse it, and that he trusted Hollenbeck to invest the money. Sharon Glover testified that she spoke with either Bartko or Hollenbeck, who told her to endorse her check to Legacy and to send it back. The five victims testified that they did as they were instructed. See Govt. Ex. 686. In addition, five other victims endorsed their refund checks to Legacy and sent them back.

TriStone Bank's records corroborate this testimony. Those records show that ten individual investors endorsed their refund checks to Legacy, and that Legacy deposited the checks into Legacy's new TriStone account.[33] In sum, $698,485 of the refund checks that the Capstone Fund sent to individuals were immediately endorsed to Legacy and returned. See id.

On the same day that Legacy—after a telephone call from Bartko—opened its TriStone bank account, and on the same day that nearly $700,000 made its way from Bartko's Capstone Fund, to individual non-accredited investors, who were then told to endorse the checks to Legacy, Bartko and Hollenbeck's telephone records reveal that the two men spoke an

[33] [redacted]

astonishing eighteen times. See id.

An email with another potential investor sheds light on the subject matter of those eighteen calls. On January 19, 2005, Danny Briley, who as mentioned also received a refund check and letter from Bartko, emailed Bartko:

> Greg,
>
> I rec'd the check back from Capstone yesterday. Thank you for getting that out to me quickly. *Scott also called and said that he had come up with a work-around—I believe it was a non securities registered investment club which could pool the money together and invest in Capstone.* I thought about this last night and discussed with my wife. We have decided not to pursue this opportunity at this time.

Govt. Ex. 137 (emphasis added).

Bartko replied to Briley's email later that day:

> Danny,
>
> *I just was on the phone with Scott and he reported the same to me.* Thanks for consideration of our Fund. I think we will do something in the future for our mutual benefit. Don't close the book entirely!!

Govt. Ex. 138 (emphasis added).

This email reveals Bartko's knowledge that Hollenbeck was contacting the non-accredited investors who received the refund checks from the Capstone Fund. It reveals Bartko's knowledge that Hollenbeck was discussing with those investors pooling the money to immediately reinvest in the Capstone Fund. It reveals that Hollenbeck was actually reporting the results of such contacts to Bartko. The jury was entitled to regard this email as powerful evidence that Bartko and Hollenbeck were conspiring to launder money, to commit mail fraud, and to sell unregistered securities.

On January 20, 2005, Bartko's telephone records reveal that he twice spoke by telephone with Legacy. See Govt. Ex. 686. That same day, Bartko and Hollenbeck's telephone records

reveal that they spoke another astounding twelve times. See id. On January 21, 2005, Bartko and Hollenbeck's telephone records reveal that they spoke one time. See id.

In sum, between January 18, 2005, and January 21, 2005—during which Bartko called Legacy, Legacy opened the TriStone bank account, and almost $700,000 in alleged "refund" checks circulated from Bartko's Capstone Fund to Hollenbeck's non-accredited investors and then to Legacy—Bartko and Hollenbeck spoke on the telephone *forty* times and exchanged *eleven* fax transmissions. See id. The jury was entitled to infer that the forty telephone calls and the eleven faxes exchanged in this four-day period were powerful evidence of the charged conspiracy. See, e.g., United States v. Yearwood, 518 F.3d 220, 226 (4th Cir. 2008).

The ten non-accredited investors mentioned earlier were not the only ones who, after hearing a presentation from Hollenbeck, invested in the Capstone Fund via Legacy. For instance, on January 21, 2005, after a sales presentation from Hollenbeck, Shirley Bibey ("Bibey") gave Hollenbeck one check for $55,246.98 and another for $56,783.82 to invest in the fund via Legacy. See Govt. Exs. 514, 653. Bibey, who testified at trial, explained that Hollenbeck had provided her various documents concerning the Capstone Fund and assured her that the investment yielded a 12 percent return and was insured. See Govt. Exs. 149, 155, 157. After investing, Bibey received correspondence dated January 25, 2005, from Legacy concerning her investment. See Govt. Exs. 152–53.

On January 24, 2005, Legacy deposited $605,151.39 into its TriStone bank account. See Govt. Ex. 628.

On January 25, 2005, Legacy received Bibey's two checks from her January 21, 2005 investment. See Govt. Exs. 628, 653. Bartko's telephone records from that day reveal a telephone call with Legacy. See Govt. Ex. 402; see also Govt. Ex. 408.

On January 27, 2005, Legacy deposited another $698,930.10 into the TriStone account. Govt. Ex. 628. The deposit included money received from the ten individual non-accredited investors who had received the "refund" checks from Bartko and then immediately endorsed the checks over to Legacy. See id.[34] Plummer then wrote a single check for $1,303,881.40 from Legacy's TriStone account to the Capstone Fund, and mailed that check to Bartko. See id.

On January 27, 2005, Bartko faxed a proposed "Introducing Party's Agreement" to Leamon and Plummer "to cover Legacy's referral of accredited investors to the Fund + [sic] any and all direct investments by Legacy into the Fund." Def. Ex. 61; see also Bartko Tr. 251. On that same date, Leamon signed the agreement and sent it back to Bartko. See Def. Ex. 81. The agreement provided that the Capstone Fund would pay Legacy a 6 percent finder's fee either on its own investments into the Capstone Fund or on the investments of others that Legacy found. See id.

Thereafter, Legacy sent statements and other correspondence to the individual investors. See Govt. Exs. 104–06, 112–13, 152–53, 170–71. The statements did not reflect an investment in Legacy. Rather, the statements reflected that the individuals had invested directly in the Capstone Fund.

On January 31, 2005, Bartko spoke by telephone with Legacy. See Govt. Ex. 402. That same day, Bartko received and deposited into the Capstone Fund the $1,303,881.40 check from Legacy. See Govt. Ex. 596.

At trial, Bartko admitted that he knew that Legacy's $1,303,881.40 check included money from the ten individual non-accredited investors that he had refunded through the Capstone Fund only eight days earlier. See Bartko Tr. 265; cf. Govt. Ex. 686.

[34] Plummer testified that Legacy had never had anything close to $1.3 million in its bank accounts before these transactions. See Plummer Tr. 44, 60–61.

On February 2, 2005, telephone records reveal a seventeen-minute call from Legacy to Bartko. See Govt. Ex. 408. On that same date, the Capstone Fund paid Legacy $78,232.90 in "[r]eferral [f]ees." See Govt. Exs. 234, 693. On February 4, 2005, Legacy, in turn, paid Hollenbeck $51,255 in "[r]eferral fees." See Govt. Exs. 235, 693.

On February 7, 2005, telephone records reveal a ten-minute call from Legacy to Bartko. See Govt. Ex. 408. The next day, the Capstone Fund paid Legacy $53,820 for a "[f]inder's [f]ee." See Govt. Exs. 236, 693. On February 11, 2005, telephone records reveal a six-minute call from Legacy to Bartko. See Govt. Ex. 408. Telephone records reveal a fifteen-minute call from Bartko to Legacy four days later. See Govt. Ex. 402. On that same date, February 15, 2005, Legacy paid a $51,578 commission to Hollenbeck. See Govt. Ex. 693.

At trial, Bartko denied conspiring with Hollenbeck or anyone else to get individual non-accredited investors who had initially invested in the Capstone Fund via Franklin Asset Exchange to reinvest in the Capstone Fund via Legacy. See Bartko Tr. 245. From there, Bartko's testimony became muddled and contradictory. Although Bartko denied any sort of explicit reinvestment plan, he admitted that he had assumed that some of the money that the Capstone Fund had returned to non-accredited investors on or about January 19, 2005, would be "pooled" by Legacy. Id. 249. Bartko then retreated further from his initial denial, admitting that he knew that the money that Legacy sent to the Capstone Fund included some of the money that the Capstone Fund had just refunded to non-accredited investors. See id. 265. Despite these admissions, Bartko tried to avoid liability by denying knowledge of the names of the ten specific non-accredited investors. Id. 249. The jury was entitled to find his claimed ignorance to be false. After all, the Capstone Fund's bank records clearly show the names of the ten individual investors who had endorsed the Capstone Fund refund checks to Legacy, and Bartko possessed

and controlled those bank records. Govt. Ex. 596. Perhaps more tellingly, the money, fax, and telephone record trail shows that within less than two weeks, nearly $700,000 circulated from Bartko's Capstone Fund, to the "refunded" non-accredited investors, then to Legacy, and then right back into the Capstone Fund. Govt. Ex. 686. Furthermore, Bartko admitted knowing that Leamon and Plummer did not have licenses to sell securities and admitted knowing that the Capstone Fund could not directly accept investments in its unregistered securities from non-accredited investors. Id. 251.

On February 10, 2005, Bartko emailed SEC attorney Rue concerning the lawsuit that Bartko and Covington had filed on behalf of Hollenbeck, Leamon, and 137 other plaintiffs involving Mobile Billboards:

> We . . . have received and reviewed the recent Motion filed by David Dantzler on behalf of the Receiver[, raising concerns about the lawsuit Bartko and Covington had filed]. Reference is made . . . to [a] call that the 4 of us had before we filed our NC complaint.
>
> . . . . During that call, it is our recollection that although you may have questioned the wisdom of filing the NC lawsuit, the SEC did not object so long as we did not include the Receiver Entities, which you pointed out was prohibited by the existing order. I believe that was David's tack too.
>
> I would like an affidavit from you that we would append to our response that would indicate the content of the call. We are not seeking to draw swords between the SEC and the Receiver, but it is clear that no one contested our filing of the complaint . . . .

Govt. Ex. 300.

On February 14, 2005, Rue responded, asking specific questions about Hollenbeck and the Wells Notice:

> I am out of the country and will discuss your request with my colleagues when I return, although my initial reaction is that we will not provide an affidavit. As I recall the telephone conversation, David did raise questions regarding the issues he has raised in the receiver's filing. Moreover, at the time of the call, we did not know that Hollenbeck's victims had not been told that Hollenbeck was filing a

lawsuit naming them as plaintiff[s] without their knowledge or consent.

> I will be back in the office next week. I expect you will have information for me by that time. We are going to need to have the details [concerning] the Franklin Private Equity fund. Mr. Hollenbeck testified that he had raised $21 million in that fund. Who did he raise that money from? What did he tell those people? Where did that money go? Has he stopped raising money for the fund? Is he selling anything else now? Where is the church money invested? We cannot recommend any settlement with your client if he is engaged in ongoing [violations] of the law.

Id.

On February 18, 2005, Shirley Bibey spoke to Hollenbeck about getting a refund of her $112,030.80 investment. See Govt. Ex. 150. She then wrote Hollenbeck a follow-up letter, again requesting liquidation. Id. Bibey testified that she wrote the letter because a friend had alerted her to problems involving Hollenbeck.

Four days after her call to Hollenbeck, Bibey spoke with Agent Curry of the North Carolina Securities Division. During that interview, Bibey provided some of the fraudulent documents that Hollenbeck had given her during his sales presentation. See Govt. Ex. 339.

On that same day, February 22, 2005, Rue sent a letter to Bartko concerning Hollenbeck's Wells Notice. See Govt. Ex. 302. The letter stated, inter alia, that

> we will need the following information before we can make any recommendation to the Commission to accept a settlement from Mr. Hollenbeck:
>
> *(1) The source of any "finder's fees and commissions" Mr. Hollenbeck has received from any other source than Mobile Billboards, paid either through the Webb Group or from any other source;*
>
> *(2) Mr. Hollenbeck's current sources of income, including a detailed description of any product Mr. Hollenbeck has sold (or is currently selling) and the amount of income from his sales of any such product;*
>
> *(3) Details concerning what Mr. Hollenbeck described as the "private equity fund," including the promotional materials Mr. Hollenbeck used to sell the fund, the disposition of the funds raised, the names, contact information and amount invested by each investor and the commissions*

Mr. Hollenbeck was paid;

. . .

> While we would certainly like to see this matter resolved through a settlement, as I have told you several times, we simply cannot make any settlement recommendation with regard to Mr. Hollenbeck without a complete understanding of Mr. Hollenbeck's financial affairs and his past and current business activities.

Id. (emphases added). On that same date, Bartko's telephone records reveal a ten-minute call to Legacy. See Govt. Ex. 402. On February 23, 2005, Bartko's telephone records reveal another twenty-one-minute call to Legacy. See id.

Also on February 22, 2005, Bartko attended a hearing in federal court in Georgia. According to Bartko, the hearing concerned the lawsuit that he and Covington had filed on behalf of Hollenbeck, Leamon, and 137 other plaintiffs against individuals and affiliates of Mobile Billboards. During the hearing, a defense lawyer stated that some of the 139 plaintiffs did not know that they were involved in a lawsuit. See Bartko Tr. 112. Shortly after the hearing, Bartko spoke with Hollenbeck and Hollenbeck admitted that he had forged the consent forms of other plaintiffs. See id. 112–13. Nevertheless, Bartko did not sever his relationship with Hollenbeck.

On February 24, 2005, Agent Curry faxed Rue various sales materials that Bibey had received from Hollenbeck in January 2005 before she had invested $112,030.80 in the Capstone Fund. See Govt. Ex. 339. The sales materials stated that the principal investment "is secured," and that the "stated interest [rate is] guaranteed . . . ." Id. The sales materials also included an AIG "Surety Bond Program" and stated—in Hollenbeck's handwriting—that Bartko would speak directly to Bibey about the Capstone Fund. Id. The materials included in this fax alarmed Rue. He was concerned that Hollenbeck was continuing to use a fake surety bond to defraud

investors, and that the fund that Hollenbeck was now selling was connected to Hollenbeck's lawyer—Gregory Bartko.

On February 28, 2005, Leamon wrote a letter to Bibey. See Govt. Ex. 159. The letter stated that,

> [i]n accordance with your request for a refund of money, which was intended to be invested, we are enclosing the following two checks:
>
> 1. $56,783.82, which represents IRA, [sic] funds. This check needs to be deposited into an IRA account immediately so it will qualify as a rollover and you will not be taxed on this amount.
>
> 2. $55,246.98 of non-qualified funds.
>
> It was a pleasure to handle the administrative duties for this transaction and please contact us with any questions you might have.

Id. Upon receiving the Legacy letter and the Legacy checks, Bibey testified that she immediately drove to TriStone Bank and *cashed* the checks.

On March 1, 2005, Bartko's telephone records reveal a six-minute call to Legacy. See Govt. Ex. 403. On that same date, the Capstone Fund paid Legacy $5,602.61 in "[r]eferral [f]ees." See Govt. Exs. 598, 693. On March 4, 2005, Legacy paid $3,735.07 in "Capstone referral fees" to Hollenbeck. See Govt. Exs. 237, 693.

On March 7, 2005, TriStone closed Legacy's account. See Govt. Ex. 630. Legacy had been in financial disarray since Mobile Billboards collapsed in the summer of 2004. But in less than two months since Legacy had opened the account on January 19, 2005, Legacy had funneled $1,303,881.40 to Bartko's Capstone Fund.[35] In exchange, Legacy received from the Capstone Fund a total of $137,655.90 in three payments, two of which exceeded $50,000. Those payments all occurred within one month. Legacy, in turn, made three payments to Hollenbeck in

[35] This money was almost all of the money that the Capstone Fund ever received.

less than one month. Those payments totaled $106,568.07.

Not surprisingly, upon seeing such large amounts of money moving through Legacy's brand new account in such rapid succession, TriStone astutely recognized that something was amiss. According to both Leamon and Plummer, TriStone's president called Legacy. See Plummer Tr. 60–61; Leamon Tr. 146–47. He spoke with Leamon, telling her that there was a problem with Legacy's account, that TriStone would be closing the account, and that someone from Legacy needed to come retrieve what little money remained in the account. Leamon Tr. 146–47.

Leamon and Plummer immediately called Covington and asked him to find out why TriStone was closing the Legacy account. Id. 147. Covington later called back and told Leamon and Plummer that TriStone would not provide any information to him. Id. Plummer and Leamon then called Bartko to relay the news. Id. Legacy's telephone records reveal a four-minute call to Bartko, and Bartko's reveal another thirteen-minute call to Legacy. See Govt. Exs. 402, 408. Unconcerned that TriStone had uncovered Legacy's suspicious activities and undeterred by the bank's actions, Bartko told Leamon and Plummer to open an account at a larger financial institution. See Bartko Tr. 126, 246; Leamon Tr. 147. Bartko then suggested Wachovia, where Bartko banked. Bartko Tr. 126, 246; Leamon Tr. 147

On March 9, 2005, Bartko sent a letter to SEC attorney Rue in response to Rue's February 22, 2005 letter concerning Hollenbeck's Wells Notice. Bartko's correspondence stated, inter alia,

> (1). Other than Mobile Billboards of America, Inc. ("MBA"), Mr. Hollenbeck has received compensation during the last three years in two principal categories. He has received "agent compensation" for his sales of investment products offered by Merchant Capital and he has received "principal compensation" in the form of management fees received for his efforts in managing investment capital received by the Franklin Asset

Exchange, LLC. In that regard, Mr. Hollenbeck received payment of management fees directly from Colvin Enterprises, Inc., a company owned and managed by John K. Colvin of Nashville, Tennessee. Specifically, Mr. Hollenbeck received a 6% management fee on all funds deployed to Mr. Colvin or nominee companies of Mr. Colvin. At the present time, we are completing a full accounting on all funds managed through Franklin Asset Exchange, LLC, but we can estimate these funds to be approximately $21.0 million over the course of the last two years to three years.

(2) *Mr. Hollenbeck's current sources of income are now quite spotty. He is not engaged in the offer or sale of any investment products that require broker-dealer or insurance registration. His activities have been and are solely that of a financial planner, for which he is registered as such by the International Association of registered Financial Consultants, Inc. Occasionally, Mr. Hollenbeck refers clients to other sources of investment and may receive a finder's or introducing fee.* Mr. Hollenbeck recently closed his office location and now conducts his financial planning and referral business from his home in Kernersville, N.C. *His activities over the last three to four months have primarily involved providing financial planning and consulting advice to his clients, church groups and church related organizations and in some measure, referring selected customers to others that offer or provide investment products or services. His compensation received for these efforts has been either in the form of set consulting fees or "referral fees." Again, even if Mr. Hollenbeck has received referral fees for the introduction of a prospective customer to an issuer or another offering investment products, we are informed that his activities have been strictly limited to referring customers to others, which does not involve any activities that would require broker dealer or agent registration.*

. . .

With this letter, we are herewith delivering to you copies of promotional literature and disclosure documents that were approved for distribution to investors of Franklin. These materials were prepared with the advice and guidance of Mr. Colvin and approved by him for distribution to the Franklin investors. *You may assume that as soon as we realized the nature of the distribution of these materials, we strongly recommended to Mr. Hollenbeck that he cease offering any investment products by Franklin.* However, Mr. Colvin pressed our client for additional investment capital through the summer and fall of 2004. Due to what Mr. Colvin perceived to be issues and potential liabilities relating to the management of Franklin, he decided to continue raising capital through the referrals made to him by our client, through a new limited liability company he authorized to be formed by the name of Disciples Trust, LLC, renamed Disciples Limited, LLC.

. . .

> Virtually all of the investment capital raised by Franklin Asset was deployed not by Mr. Hollenbeck, but by Mr. Colvin. It was not uncommon for Mr. Colvin to simply contact Mr. Hollenbeck and instruct him to wire or transfer large sums of capital to one or more borrowers that Mr. Colvin had a relationship with.

See Govt. Ex. 303 (emphases added). Obviously, Bartko's letter does not mention the Capstone Fund, Hollenbeck's role in raising money for the Capstone Fund, or a "finder" relationship between the Capstone Fund and CMH Enterprises. The letter likewise omits any mention of Legacy. Nor does it mention Hollenbeck's recent receipt of $106,568.07 from Legacy. Nor does it mention Berean Baptist Church, Donna Gates, or any others who invested in the Capstone Fund following a presentation from Hollenbeck.

On March 10, 2005, Rue responded to Bartko by email:

> I haven't read the package carefully yet, but I have serious concern about the sales into the private equity fund that were made on December 25, 2004. These sales ($300,000+) took place after his deposition. We need to talk about these sales and exactly what you mean by Hollenbeck "referring selected customers to others that offer or provide investment products or services." Based on that, it appears that Hollenbeck may be doing the same thing he did with Colvin and the Disciples Trust.
>
> . . .
>
> We need to have a frank discussion about what now appears to be in excess of $30 million in fraudulent sales Mr. Hollenbeck has made over the last several years and how to resolve the entire situation.

Govt. Ex. 306. Rue and Bartko agreed to meet on March 14, 2005.

When that day arrived, Rue met with Bartko in Atlanta and discussed with him evidence that Hollenbeck had fraudulently raised money for the Capstone Fund, including the late January 2005 investment of Shirley Bibey. Cf. Govt. Ex. 307. Bartko told Rue that Hollenbeck was a "finder" for the Capstone Fund, that Hollenbeck had referred a number of non-accredited investors to the Capstone Fund, but that Bartko had sent the money back to the non-accredited

investors. Bartko said nothing to Rue about the fact that ten of those "refunded" non-accredited investors had immediately returned their money to the Capstone Fund via Legacy. Bartko also did not mention Legacy or the $106,568.07 that Hollenbeck had recently received from Legacy.

Despite Bartko's myriad omissions and concealments, the Capstone Fund and Bartko's scheme were starting to unravel. As they were, Bartko began to cover his tracks. After his meeting with Rue, Bartko had a conference call with Hollenbeck and Covington, during which Bartko told Hollenbeck about the meeting with Rue and complained about Hollenbeck using a surety bond in his meeting with Bibey. See Bartko Tr. 130–31.

At trial, Bartko testified that on March 14, 2005, and based on Rue's information, Bartko then knew that Hollenbeck had used a fake surety bond to sell the Capstone Fund. See id. Of course, the jury was entitled to find that Bartko knew of this fact well before March 14, 2005.

On March 18, 2005, Rue emailed Bartko. See Govt. Ex. 308. "To follow up on our conversation Monday," the email began,

> please let me know when I can expect to receive the following:
>
> 1. Copies of the materials from Hollenbeck concerning investors in the Capstone Partners Private Equity B & M Fund. I would like to see both those you accepted and those you sent back.
>
> 2. Names and contact information of the investors identified on the Franklin Asset and Disciples Trust spreadsheets.
>
> 3. Accountings of Franklin Asset Exchange, Disciples Trust and The Webb Group.
>
> We share your concern about John Colvin's role in the two Hollenbeck funds and would like to get any documents Mr. Hollenbeck may have that show Mr. Colvin's role in the two funds.

Id.

On March 22, 2005, Bartko sent a letter to Hollenbeck (with a copy to Covington). In the

letter, Bartko discussed the March 14, 2005 meeting with Rue and reminded Hollenbeck of the "rules of the road" concerning being a finder (as opposed to a salesman). But Bartko did not abandon Hollenbeck. Rather, Bartko closed his letter by assuring Hollenbeck that the letter was not intended "as harshness on my part." Def. Ex. 350; Bartko Tr. 132–34.

On March 24, 2005, Bartko wrote to Rue. See Govt. Ex. 309. Bartko's letter stated, in part,

> This letter with attachments follows our meeting in your office on March 14, 2005.
>
> . . .
>
> As to your last inquiry requesting documents that our client has relative to the involvement of Mr. Colvin with Webb and Franklin, we are now undertaking a search of all materials that fall within this category. That search will take some time, especially in light of the fact that our client is visiting family out of state through early next week. In the meantime, I have reviewed my files maintained in this office as one of the managing members of Caledonian Private Equity Partners, LLC (an Isle of Man limited liability company completely separate and distinct from Capstone Private Equity Bridge & Mezzanine Fund, LLC), and I am herewith delivering to you the following in that regard:
>
> February 24, 2004 Commitment Letter;
>
> March 30, 2004 Notes Subscription Agreement;
>
> March 30, 2004 Promissory Note;
>
> September 1, 2004 Letter To John Colvin; and
>
> October 1, 2004 Demand Letter By Fund Counsel.
>
> The request you made for documentation relating to the Capstone Private Equity Bridge & Mezzanine Fund, LLC ("Capstone Fund") places me in somewhat of a ticklish situation, as I am one of the managing members of the Capstone Fund and my decisions on behalf of that fund must be made in furtherance of my fiduciary duty as such, yet also in line with my role as co-counsel for Mr. Hollenbeck in this case. Before I actually deliver materials to the SEC that relate to that fund, I have decided to consult with our counsel, Squire, Sanders & Dempsey, LLP in Palo Alto, CA. I want to be able to secure independent advice from counsel to the fund before we just deliver documents relating to our fund that do not have

> anything to do with the above-referenced SEC investigation and related civil litigation, especially considering the fact that the fund has not paid any compensation to Mr. Hollenbeck, individually or to any entity he controls.

Id.

The SEC now temporarily at bay, Bartko's Capstone Fund activities and dealings with Legacy proceeded apace. On March 23, 2005, Legacy's telephone records reveal a twenty-four-minute call to Bartko. See Govt. Ex. 408. On March 29, 2005, the Capstone Fund paid $5,460 in "referral fees" to Legacy. See Govt. Exs. 598, 693.

On April 1, 2005, Legacy mailed quarterly statements reflecting "1st Quarter Earnings" for investments in the "Capstone Private Equity Fund." See, e.g., Govt. Exs. 106, 147, 173; Plummer Tr. 50–51. Legacy prepared and mailed the statements to all investors who had received refund checks from the Capstone Fund and then endorsed those checks over to Legacy to reinvest in the Capstone Fund. See Plummer Tr. 50–51.[36]

By early April 2005, however, Bartko also had retained attorney Ross Albert ("Albert") as legal counsel. See Bartko Tr. 134–35, 138. Bartko now knew that his efforts to avoid liability while simultaneously keeping the money in the Capstone Fund could not continue. Rue testified that beginning on April 5, 2005, he received various letters from Albert concerning Bartko and the Capstone Fund. See Def. Exs. 53–55. On April 6, 2005, the Capstone Fund terminated the finder's agreement with Hollenbeck. See Bartko Tr. 134; Def. Ex. 355.[37] Two days later, Bartko, on behalf of the Capstone Fund, demanded that Legacy send a letter to each investor and inform the investors that Legacy, not the Capstone Fund, had received their money and that all correspondence and statements would come from Legacy, not the Capstone Fund. See Govt.

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[36] One person who received such a quarterly statement was Carlene Rudd-Smith. See Govt. Ex. 147. This mailing is referenced in count four of the superseding indictment.

[37] Technically, the agreement had been with CMH Enterprises.

Exs. 107, 141, 176; Bartko Tr. 136–37.[38] On April 12, 2005, Bartko terminated his attorney-client relationship with Hollenbeck. See Def. Ex. 349; Bartko Tr. 136.[39]

On April 18, 2005, in accordance with Bartko's letter ten days earlier, Leamon mailed letters to all investors[40] informing them of "an administrative error" with their investment paperwork. See, e.g., Govt. Exs. 107, 141, 176. Specifically,

> [t]he purpose of this letter is to correct an administrative error regarding your account with Legacy Resource Management, Inc. You were previously mailed a letter of acknowledgment along with a statement showing the amount of funds deposited in our account from you. The error we found when we reviewed the statements at the end of the first quarter was that Capstone Private Equity Fund was shown as the entity receiving your funds when actually it was our company.
>
> Please be advised that all correspondence, interest payments, etc. regarding your funds will come from our office. Please call us with any questions you might have.

Govt. Ex. 107. Carlene Rudd-Smith testified that she received this mailing.

Eventually, Bartko's attorney, Albert, advised Rue that Bartko planned to file an interpleader action on behalf of the Capstone Fund and return all money invested in the Capstone Fund, less commissions. Before filing the action, however, Bartko received two calls from investors.

Donna Gates testified that she called Bartko on May 16, 2005, to speak with him about the investment in the Capstone Fund. She wanted to inquire about withdrawing what she thought would be $16,000 in accrued interest on her investment. During the call, Bartko told

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[38] According to Bartko, on April 8, 2005, Bartko was surprised to learn that Legacy had sent correspondence to investors reflecting an investment directly into the Capstone Fund. See Bartko Tr. 134–35. Given the mountain of circumstantial evidence suggesting otherwise, the jury was entitled to infer that Bartko's claimed "surprise" was feigned.

[39] Bartko said he did so after discovering that Hollenbeck had forged six of the Capstone Fund refund checks. See Bartko Tr. 136.

[40] These investors included victim Carlene Rudd-Smith. The mailing sent to her is identified in count five of the superseding indictment.

Gates that Hollenbeck had a cease and desist order at the time of his presentation and that the insurance was a fraud. Bartko also said that he could return the investment, less a 6 percent finder's fee, or that Gates could stick with Bartko and invest the money. Gates then asked Bartko whether she needed an attorney, and he said no. Bartko told Gates that the FBI was on the case. Gates then asked Bartko if she could speak with the FBI in Oregon about the case, and Bartko told her, "No, the FBI won't tell you anything."

At trial, Bartko admitted speaking with Gates in May 2005 about the Capstone Fund's impending interpleader action. Bartko denied making these other statements to Gates. Bartko Tr. 273–75.

Gates was not the only investor with whom Bartko spoke. After not receiving an interest check in April 2005 for his investment in the Capstone Fund, investor Jason Hemsted testified that he repeatedly called Hollenbeck. Hollenbeck, however, never returned Hemsted's calls. Eventually, Hemsted called Bartko. According to Hemsted, Bartko told him that something had gone wrong with the Capstone Fund, that there were some legalities that he could not discuss, and that Hemsted would get his money back but that it might take some time. Bartko also told Hemsted that Bartko was an attorney and had been "put over this" to help rectify the situation. Bartko did not address this conversation in his testimony.

On May 26, 2005, the Capstone Fund—through Bartko as its lawyer—filed an interpleader action in the United States District Court for the Middle District of North Carolina, claiming that Legacy had been a direct investor in the Capstone Fund and seeking the return of Legacy's investment to the proper parties. In the interpleader action, Bartko named the purported investors in the Capstone Fund as defendants and tendered $1,346,926.76 to the

court.[41] The amount tendered did not include the 6 percent finder's fee paid to Legacy. In the complaint, Bartko wrote, "The Fund PPM made no guarantees of any returns to any subscribers to the Fund, nor were any Fund representations, either oral or written ever made to any prospective subscribers that any investment in the Fund was guaranteed." Govt. Ex. 356 ¶ 5. The complaint described Legacy as a finder. Id. ¶¶ 10–12. The complaint also asserted that Legacy had invested in the Capstone Fund as an accredited investor and on its own account. See id. ¶¶ 12–13. The complaint further stated that "[t]he Defendants that are named in this interpleader action are believed to be Legacy Clients. They are not and never have been subscribers accepted to the Fund, although some of the Legacy Clients were rejected as Fund subscribers due to the fact that they did not qualify as accredited investors." Id. ¶ 16.

The complaint did not describe Legacy as operating an investment club or as pooling investor funds. At trial, however, Bartko claimed that Legacy was legally pooling investor funds. See Bartko Tr. 264–65. Bartko also admitted that he knew that ten of the investors who had invested through Legacy were ten non-accredited investors who the Capstone Fund purportedly rejected on January 19, 2005, *because* they were non-accredited investors. See id. 265. The complaint did not mention this information. The complaint likewise omitted any reference to Hollenbeck or CMH Enterprises, as well as statements that Bartko learned from Rue on March 14, 2005, about Hollenbeck's fraudulent use of documents to sell investments in the Capstone Fund. See Govt. Ex. 356; Bartko Tr. 262–65.

[41] At trial, Bartko argued that he could not be a fraudster because he returned most of the money to investors. The interpleader action, he contended, demonstrates a lack of criminal intent. The jury obviously disagreed. Furthermore, the fact that Bartko returned most of the investors' money does not negate the fact—which the jury was entitled to find—that he fraudulently obtained it in the first place. The jury easily could have concluded that once SEC attorney Rue confronted Bartko on March 14, 2005, Bartko ultimately had only two options: he could flee, or he could shut down the Capstone Fund and return the money. Either of the two was inevitable. Only one of the two possibly could have ended well.

SEC attorney Rue testified that after Bartko filed the interpleader action, Rue decided not to ask the SEC to pursue a civil action against Bartko or the Capstone Fund. Rue did, however, advise the SEC broker-dealer section about his concerns arising from Bartko, Hollenbeck, and the Capstone Fund.

In June and July 2005, David McClellan ("McClellan") of the SEC examined Bartko's broker-dealer license with Capstone Partners. McClellan, who testified at trial, stated that he was the branch chief of the broker-dealer office of compliance for the SEC in Atlanta. As part of the examination, McClellan interviewed Bartko and asked Bartko about the Caledonian Fund and the Capstone Fund. With respect to the Caledonian Fund, Bartko told McClellan that some money from the Caledonian Fund was initially deposited in the Capstone Partners account, but was transferred to the Caledonian Fund once the Caledonian Fund established its own bank account. Moreover, Bartko told McClellan that once the money was transferred to the Caledonian Fund account, he did not know what happened to the money because he had no day-to-day duties concerning the Caledonian Fund. Bartko also told McClellan that he did not have access to the Caledonian Fund's bank account after the money was transferred to the Caledonian Fund because he (Bartko) was not the managing member of the Caledonian Fund. Rather, Bartko told McClellan that Laws was the managing member.

During the June and July 2005 examination, McClellan also asked Bartko about the Capstone Fund. Bartko told McClellan that he created the Capstone Fund to raise money from accredited investors and that he initially received about $1.6 million in December 2004 and January 2005 from Franklin Asset Exchange. After reviewing subscription documents from Franklin Asset Exchange, however, Bartko determined that eighteen investors were not accredited and returned about $1 million to those non-accredited investors.

McClellan also asked Bartko about Legacy. Bartko told McClellan that the Capstone Fund entered a finder's agreement with Legacy on or about January 24, 2005, and agreed to pay Legacy a 6 percent finder's fee. Bartko also said that Legacy invested about $1.5 or $1.6 million on January 31, 2005, and later provided about $700,000 in referrals to the Capstone Fund. Bartko told McClellan that the Capstone Fund paid Legacy a total of $143,000 in finder's fees.

On September 21, 2005, the United States District Court for the Middle District of North Carolina entered an order in the interpleader action. The order distributed the interpleaded funds to the individuals and entities identified as Legacy clients, including the ten victims whose money circled from the Capstone Fund, to the victim, to Legacy, and then back to the Capstone Fund between January 19, 2005 and January 31, 2005. See Def. Ex. 154. Each victim received 94 percent of his or her investment. No victim received the 6 percent finder's fee that the Capstone Fund had paid to Legacy. No victim received any interest payments from the Capstone Fund.

C.

Bartko's fraud had not yet run its course.[42] On January 18, 2005, Covington filed a lawsuit in the Superior Court of Forsyth County, North Carolina, on behalf of Webb Group and Franklin Asset Exchange against BMP Capital Resources, Inc. (formerly BMP Investments, Inc.) ("BMP"), Bull Mountain Development, Co. 1, LLC ("BMDC-1"), Colvin Enterprises, Inc., George Parthemos, Joseph W. Dickey, and Colvin. [D.E. 220-4]. Hollenbeck verified the complaint on behalf of Webb Group and Franklin Asset Exchange. Id. Essentially, the lawsuit alleged that Webb Group and Franklin Asset Exchange, through Hollenbeck, had invested

[42] The jury did not hear evidence concerning the events recounted in this section of the order. The court adds the information in this section to address Bartko's motion for a new trial concerning the Judge Cromer Interview Report.

millions of dollars with the various Bull Mountain defendants in return for the defendants' promise to pay plaintiffs on certain promissory notes. See generally id. Defendants, however, failed to pay what was due to Webb Group and Franklin Asset Exchange and had defrauded both entities into investing. See id. at ¶¶ 11–21. After Covington filed suit, Bartko entered a notice of appearance in the case on behalf of Webb Group and Franklin Asset Exchange.

On February 25, 2005, the Forsyth County Clerk of Court filed an entry of default against BMP and BMDC-1. See Smith v. Bull Mountain Coal Props., Inc., No. CV-06-169-BLG-RFC-CSO, 2008 WL 1736047, at *2 (D. Mont. Mar. 7, 2008). On March 15, 2005, before a default judgment was entered, Webb Group and Franklin Asset Exchange obtained a confession of judgment from BMP and BMDC-1. Ultimately, Webb Group and Franklin Asset Exchange, through attorneys Covington and Bartko, recovered over $20 million by way of a negotiated settlement with the Bull Mountain entities and others. See id.

In April 2006, Covington and Bartko contacted North Carolina Superior Court Judge Anderson Cromer ("Judge Cromer") about establishing a receivership to return the BMP settlement money to the individuals who had invested in Webb Group and Franklin Asset Exchange. Judge Cromer agreed to establish a receivership. On April 19, 2006, and at Bartko's and Covington's suggestion, Judge Cromer appointed Glenn Smith, Jr., ("Smith") as receiver. See [D.E. 220-5] (April 19, 2006 order appointing receiver). Smith and Bartko had worked together for a number of years at Capstone Partners, and Smith had also done financial work for the Capstone Fund. See Bartko Tr. 65–66.

Although Judge Cromer agreed to establish a receivership and to appoint Smith as the receiver, he "was skeptical of the actions of Covington and Bartko from the moment the attorneys first approached the Court . . . . [Bartko, Covington, and Smith were e]ach . . . told that

every action taken in the case either before or after the Receiver was appointed would have to be totally transparent . . . ." [D.E. 220-8] at 7–8.

On January 5, 2007, Judge Cromer held a hearing, which Covington and Smith attended. See [D.E. 220-7]. Smith told Judge Cromer that Webb Group and Franklin Asset Exchange "made other investments in other entities besides Bull Mountain . . . ." Id. at 24. Covington told the court that "our goal here is to get all these people's money back if at all possible." Id. at 34. Judge Cromer then ordered Smith to make another filing to address entities other than Bull Mountain that had received money from Webb Group or Franklin Asset Exchange. Id. at 40–42. Covington agreed to make an "all-inclusive" filing. Id. at 41.

On January 19, 2007, Covington wrote Judge Cromer concerning other entities that had received money. Among others, Covington discussed the Caledonian Fund:

> This is a series of notes totaling approximately $700,000.00 issued between February 27, 2004, and May 4, 2004 based on a $3,000,000 total funding commitment by John Colvin that was never completed. The notes carry a four (4) year maturity at 4% [sic] per annum. It is apparent that this is another example of fraud, misrepresentation, and breach of contract by Mr. Colvin who has already been sued and a Judgment obtained which has been domesticated in the state of his residence, Tennessee. We believe that this debt is probably uncollectible as quite a number of suits are already filed against Mr. Colvin. In addition, the Receiver has received documentation directly from [the Caledonian Fund] that clearly indicates that the [Caledonian Fund] is now uncollectible and most likely insolvent.

See [D.E. 220-17] at 2. Covington's letter did not tell Judge Cromer about Bartko's role with the Caledonian Fund, or with Laws, Colvin, and Hollenbeck.

On January 23, 2007, Smith filed a report with Judge Cromer concerning investments that Colvin and Hollenbeck had made in entities other than BMP. See [D.E. 220-8] at ¶ 30. One of the investments involved the $701,000 that Franklin Asset Exchange, via Colvin and Hollenbeck, had invested in the Caledonian Fund. See id. Before preparing this report, Smith

wrote Laws on August 6, 2006, seeking to recover the $701,000. See [D.E. 220-13]. On August 14, 2006, Bartko—*who was simultaneously acting as legal counsel to Smith in the receivership litigation*—assisted Laws in drafting a response to Smith in which the Caledonian Fund refused to repay the $701,000 to Smith and alleged that Colvin had defrauded the Caledonian Fund. See [D.E. 220-14, -15]. On January 23, 2007, Smith reported to Judge Cromer that the $701,000 was not recoverable. See [D.E. 220-8] at ¶ 30. Neither Bartko nor Smith ever disclosed to Judge Cromer Bartko's relationship with Laws, Colvin, Hollenbeck, or the Caledonian Fund.

On April 5, 2007, Judge Cromer held another hearing in the Forsyth County receivership litigation. Judge Cromer held a third hearing on July 25, 2008, this time concerning disbursements of the settlement proceeds and to consider Bartko's and Covington's request to each receive a $2 million contingent attorney fee in connection with their work on the Forsyth County receivership litigation. See [D.E. 220-6]. During the hearing, attorney Kevin Miller ("Miller") spoke on behalf of Judy Wright Jarrell. See id. at 39–62.[43] Miller raised issues concerning the tangled web of conflicts among Bartko, Covington, Hollenbeck, Colvin, Smith, and the various corporate entities, including Webb Group and Franklin Asset Exchange. See id. Miller then opposed Bartko's and Covington's fee request and discussed, among other things, Hollenbeck, Smith, and the meeting that took place in Robin Denny's living room on January 12, 2005. See id. at 49–50, 68. In response to Miller's argument, Bartko told Judge Cromer that he had terminated Hollenbeck as a legal client in March 2005. Id. at 94. Bartko also told Judge Cromer,

> I can't say enough about Glenn Smith because of what you heard, I think, from the witness stand today. Glenn and I have worked together on a variety of projects, none of which involved this. I am a CEO and a broker-dealer. Mr.

[43] Yes, the same Judy Wright Jarrell already discussed in connection with the January 12, 2005 meeting at Robin Denny's home.

> Smith is a broker. We hold his license and he does my financial operations work. That's it.

Id. at 95. With respect to the meeting in Robin Denny's living room on January 12, 2005, Bartko told Judge Cromer,

> And addressing just a moment the visit that [Miller] recounted at the home of his client, what he didn't know and couldn't relate to you was, *yes, I was there that day*. And the reason I was there was because we had had a meeting in January of '05, I think he said it was. The purpose for the meeting—and my recollection is that the meeting included Mr. Covington and Mr. Smith, and we were trying to get our hands around these records so that Mr. Smith could develop capital accounts for all the investors. There was really no record keeping on who had invested in this venture or these three ventures. So why was I at [Denny's] house? *Because Scott Hollenbeck offered to take me to the airport. I had to be with him. We did stop at his client's house. We had a nice chat. I didn't say, "Boo." And I don't know how long it was, maybe an hour or something like that, and I left.* And any comments that Mr. Miller wants to draw, or conclusions, from that meeting, I am not going to dispute that. But I am letting you know that is the purpose why I was there, I was on my way back to the airport.

Id. at 99–100 (emphases added). Of course, Bartko's comments to Judge Cromer—made as an officer of the court—contradict Bartko's trial testimony—made under oath—concerning the January 12, 2005 meetings at Gospel Light Baptist Church and at Robin Denny's home. See Bartko Tr. 105–08, 224–32.

At the same July 2008 hearing, Covington—in Bartko's presence—claimed that he, Bartko, and Smith had told Judge Cromer "everything" about their relationship with Hollenbeck and Colvin. [D.E. 220-6] at 86. Specifically, Covington said,

> we told you about all of our relationships with Hollenbeck, Colvin, etc. We disclosed everything to you. And the transcripts of the various hearings that have taken place in this case will reflect that. The letters that I have sent you and that Mr. Bartko has sent you will reflect that.

Id. In fact, however, Bartko had failed to disclose to Judge Cromer the full nature of his various relationships with Colvin, Hollenbeck, Laws, the Caledonian Fund, and the Capstone Fund. See id. at 90–101.

On September 5, 2008, Judge Cromer entered an order approving distribution of settlement proceeds. See [D.E. 220-18]. The victims received refunds of approximately 75 percent of the money that Hollenbeck and Colvin, through Webb Group or Franklin Asset Exchange, had fraudulently obtained and invested in the Bull Mountain project in 2003 and 2004. See id. at 14. Judge Cromer also awarded Bartko and Covington an attorney's fee of over $2 million each. Id. at 10–12. The attorney's fee award came out of the $20 million settlement. See id.

Bartko never used any of his $2 million contingency fee to repay the $701,000 that the Caledonian Fund received from Colvin and Hollenbeck via Franklin Asset Exchange.

D.

On May 10, 2007, a federal grand jury in the Eastern District of North Carolina indicted Hollenbeck, Michael A. Lomas, Michael L. Young, Barry C. Maloney, Laurinda Holohan, Susan Knight, and Arthur J. Anderson, Jr., for fraudulent conduct arising from Mobile Billboards. See United States v. Hollenbeck, No. 5:07-CR-117-BR, [D.E. 3] (E.D.N.C. May 10, 2007). On February 6, 2008, a jury convicted Hollenbeck of one count of conspiracy and twelve counts of mail fraud and aiding and abetting. Id., [D.E. 322]. On May 6, 2008, the court sentenced Hollenbeck to 168 months' imprisonment. Id., [D.E. 373].[44]

On August 6, 2009, a federal grand jury in the Eastern District of North Carolina indicted Colvin for fraudulent conduct arising from Webb Group and Franklin Asset Exchange, including over $17 million invested in various enterprises like the development of the Bull Mountain coal mine near Roundup, Montana, and the Caledonian Fund. See United States v. Colvin, No. 4:09-

[44] The jury in Bartko's trial heard testimony concerning Hollenbeck's conviction and sentence. It did not hear testimony about the trials or sentences of the other Mobile Billboards defendants.

CR-72-D, [D.E. 1] (E.D.N.C. August 6, 2009). On June 11, 2010, a jury convicted Colvin of one count of conspiracy and five counts of mail fraud and aiding and abetting. Id., [D.E. 64]. On January 18, 2011, the court sentenced Colvin to 300 months' imprisonment. Id., [D.E. 92].[45]

On November 4, 2009, a federal grand jury in the Eastern District of North Carolina indicted Bartko and Laws and charged each with conspiracy (count one), mail fraud and aiding and abetting (counts two through four), and false statements and aiding and abetting (counts five and six). See [D.E. 1]. On January 6, 2010, a federal grand jury in the Eastern District of North Carolina issued a superseding indictment charging Bartko, Laws, and Plummer with conspiracy (count one) and mail fraud and aiding and abetting (counts two through five), charging Bartko and Plummer with the sale of unregistered securities and aiding and abetting (count six), and charging Bartko and Laws with false statements and aiding and abetting (counts seven and eight) [D.E. 30].

On February 2, 2010, attorney Wes Covington committed suicide. During the trial, the jury heard that Covington died on February 2, 2010. See Bartko Tr. 195. The jury did not hear that Covington had killed himself. See id.

On June 1, 2010, Plummer pled guilty to the conspiracy count (count one) in the superseding indictment, with the objects of mail fraud and the laundering of monetary instruments [D.E. 67]. On October 18, 2010, Laws pled guilty to count seven of the superseding indictment and to count one of a criminal information charging him with false statements in a tax return [D.E. 118].

On October 28, 2010, the United States moved to dismiss counts seven and eight as to Bartko, and two of the objects alleged in count one of the superseding indictment (i.e., false

[45] In Bartko's trial, the jury heard Colvin's name but did not hear about his indictment, conviction, or sentence. Colvin did not testify at Bartko's trial.

statements and obstructing SEC proceedings) [D.E. 135]. On October 29, 2010, the court granted the motion [D.E. 137].

On November 1, 2010, Bartko's trial began. During the thirteen-day trial, the United States called thirty-one witnesses and introduced 366 exhibits. Bartko called four witnesses, including himself, and introduced forty-eight exhibits. On November 18, 2010, after deliberating approximately four hours, the jury convicted Bartko on all six counts.

II.

Bartko has filed four motions for a new trial under Federal Rule of Criminal Procedure 33. In these four motions, he claims that he was denied a fair trial because the government violated its obligations under Brady and Giglio. Specifically, Bartko alleges that he was denied a fair trial because the government failed to disclose favorable evidence and knowingly permitted government witnesses to testify falsely.

Rule 33(a) provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(1). Ordinarily under Rule 33, when a defendant seeks a new trial based on newly discovered evidence,

> (a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Bales, 813 F.2d 1289, 1295 (4th Cir. 1987). When a Brady or Giglio violation forms the basis of a Rule 33 motion, however, "the proper legal standard is more favorable to the defendant than that identified in Bales." United States v. Cohn, 166 F. App'x 4, 12 (4th Cir.

2006) (per curiam) (unpublished); see also United States v. Sutton, 542 F.2d 1239, 1242 n.3 (4th Cir. 1976).

To prove a Brady violation, Bartko must show three elements: "(1) that the evidence is favorable, either because it is exculpatory or impeaching; (2) that the government suppressed the evidence; and (3) that the evidence was material to the defense." United States v. Higgs, 663 F.3d 726, 735 (4th Cir. 2011). Under Brady and its progeny, a defendant is entitled to a new trial based on the government's non-disclosure of exculpatory or impeachment evidence if the defendant establishes a reasonable probability that with the favorable evidence the defendant would have obtained a different result at trial. Smith v. Cain, No. 10-8145, slip op. at 2–3 (U.S. Jan. 10, 2012); Strickler v. Greene, 527 U.S. 263, 296 (1999); United States v. Robinson, 627 F.3d 941, 951–53 (4th Cir. 2010); United States v. Cargill, 17 F. App'x 214, 227 (4th Cir. 2001) (per curiam) (unpublished). Although less rigid than the defendant's burden under Bales, this is still a challenging standard. See Cargill, 17 F. App'x at 227–31; Sutton, 542 F.2d at 1242 n.3.

To prove a Giglio violation involving false testimony, Bartko must show that the government introduced or failed to correct trial testimony that it knew or should have known was false. United States v. Agurs, 427 U.S. 97, 103–04 (1976); Giglio, 405 U.S. at 154. Giglio provides an even less-demanding standard for motions for a new trial based on the government's use of or knowing failure to correct false testimony. Cargill, 17 F. App'x at 227–31; Sutton, 542 F.2d at 1242 n.3. Under Giglio, "[a] new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." Elmore v. Ozmint, 661 F.3d 783, 830 (4th Cir. 2011) (quotations omitted) (alteration and omission in original); see also Giglio, 405 U.S. at 154; Napue, 360 U.S. at 271.

In accordance with Brady and its progeny, the court will evaluate each item individually,

and then separately evaluate their cumulative effect for purposes of materiality. See, e.g., Kyles v. Whitley, 514 U.S. 419, 436–37 & n.10 (1995); Smith v. Sec'y, Dep't of Corr., 527 F.3d 1327, 1334 (11th Cir. 2009); Campbell v. Polk, 447 F.3d 270, 276 (4th Cir. 2006); McHone v. Polk, 392 F.3d 691, 697 (4th Cir. 2004); United States v. Arias, Nos. 99-6644, 99-6645, 2000 WL 933010, at *6 (4th Cir. July 10, 2000) (per curiam) (unpublished table decision); United States v. Ellis, 121 F.3d 908, 916–18 (4th Cir. 1997). In doing so, the court will keep in mind that the fundamental inquiry under Brady and Giglio is whether the court has confidence in the outcome of the trial. See Smith, slip op. at 3; Kyles, 514 U.S. at 434–35; United States v. Bagley, 473 U.S. 667, 682 (1985); Higgs, 663 F.3d at 735.

A.

Before evaluating the items Bartko contests, the court examines the Supreme Court's decisions in Brady, Brady's progeny, and Giglio. This brief discussion serves an important function. Juxtaposing the circumstances of these cases with the evidence in Bartko's case—recounted, in part, in detail above—provides a most illuminating comparison.

In Brady, Brady testified at trial and admitted participating in murdering the victim, but claimed that his co-defendant Boblet actually killed the victim. Brady asked the jury not to impose capital punishment. The jury, however, convicted Brady of murder and sentenced Brady to death. After his trial, Brady learned that Boblet made an admission to the police that he (Boblet) actually killed the victim. Brady cited this new evidence and sought a new trial as to his conviction and sentence. Brady argued that if the jury had known about Boblet's admission, it would not have found Brady guilty or, at a minimum, would not have sentenced Brady to death. The Supreme Court held that Brady was entitled to a new trial only on punishment. Brady, 373 U.S. at 84–85, 88–91. In so holding, the Court declared that the suppression of

evidence that, if made available to the defendant, would tend to exculpate the defendant or reduce the defendant's penalty, violates due process regardless of the good or bad faith of the prosecutor. Id. at 87–88. In reaching this conclusion, the Court also emphasized that the fundamental inquiry is whether the defendant received a fair trial. Id. at 86–87.

In Giglio, the government failed to correct its key witness, Robert Taliento, after he testified that he received no promises from the government in exchange for his testimony. Taliento was Giglio's "alleged coconspirator in the offense and the only witness linking [Giglio] with the crime." Giglio, 405 U.S. at 151. Giglio's defense counsel cross-examined Taliento about whether the government had promised him that, in exchange for his testimony, he would not be prosecuted, but Taliento denied any such promise. See id. at 151–52. In closing argument, the AUSA stated, "[Taliento] received no promises that he would not be indicted." Id. at 152 (quotation omitted) (alteration in original). After his conviction, Giglio learned that another AUSA, who was not trial counsel, had promised Taliento "that if he testified before the grand jury and at trial he would not be prosecuted." Id. Giglio cited the new evidence and sought a new trial. The Supreme Court granted Giglio's motion:

> [Brady] held that suppression of material evidence justifies a new trial . . . . When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." A finding of materiality of the evidence is required under Brady. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ."

Id. at 154 (citations omitted). In finding a violation of due process and granting a new trial to Giglio, the Court noted that the government's case "depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to

the jury." Id.

In Agurs, Agurs was convicted of second-degree murder. Agurs argued at trial that she stabbed the victim in self-defense. Agurs, 427 U.S. at 100. Unbeknownst to Agurs, the victim had a criminal record, which included one assault conviction and two convictions for carrying a deadly weapon (a knife). Id. at 100–01. The prosecutor did not reveal the victim's criminal record to Agurs. Rather, Agurs learned about the victim's criminal record only after Agurs's conviction. Id. Thereafter, Agurs sought a new trial. Id.

Agurs argued that the prosecutor's failure to disclose the victim's criminal record violated Brady and its progeny. The Supreme Court disagreed. Id. at 108–14. The Court again emphasized that Brady concerns a "defendant's right to a fair trial [under] the Due Process Clause of the Fifth Amendment." Id. at 107. The Brady standard does not focus on "[t]he mere possibility that" the non-disclosed evidence "might have helped the defense, or might have affected the outcome of the trial . . . ." Id. at 109–10. Rather,

> [t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.

Id. at 112–13. The Court then stated that after reviewing the nondisclosure "in the context of the entire record[,] the trial judge remained convinced of [Agurs's] guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender [the victim's] record to the defense did not deprive [Agurs] of a fair trial . . . ." Id. at 114.

In Bagley, Bagley was indicted for violating federal narcotic and firearms statutes. The government's principal witnesses were two state law enforcement officers moonlighting as

private security guards. The two state officers assisted federal agents with an undercover investigation of Bagley. Before trial, Bagley sought discovery of "any deals, promises or inducements" made to these two witnesses. Bagley, 473 U.S. at 669 (quotation omitted). In response, the government provided affidavits from the two witnesses in which each denied receiving any rewards or promises of rewards. Id. at 670. After his conviction, Bagley learned that each witness had been paid $300 pursuant to an undisclosed agreement between the witness and the Federal Bureau of Alcohol, Tobacco and Firearms. Id. at 671. Bagley moved to vacate his conviction under 28 U.S.C. § 2255 and sought a new trial. Id. The district court denied the motion. Id. at 672–73.

The Ninth Circuit reversed and held that the government's non-disclosure warranted an automatic reversal of the conviction and a new trial. Id. at 674. The Supreme Court granted certiorari. It confirmed that Brady encompassed impeachment evidence, id. at 676–78, and that Brady's materiality standard focuses on confidence in the outcome of the trial. Id. at 680–82. The Court then announced the applicable materiality standard:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682. The Court then rejected the Ninth Circuit's holding that the government's conduct warranted automatic reversal, and remanded the case to the Ninth Circuit for consideration of materiality. Id. at 683–84.

In Kyles, Kyles was convicted in Louisiana state court of first-degree murder and sentenced to death. During state post-conviction proceedings, Kyles learned that Louisiana had failed to disclose to him certain favorable evidence, including (1) contemporaneous eyewitness statements taken by police following the murder, (2) various statements that a non-testifying

informant named "Beanie" made to the police, and (3) a computer printout of license plate numbers of cars parked at the crime scene on the night of the murder, which did not include the license plate number of Kyles's car. Kyles, 514 U.S. at 428–29, 431.

On appeal, the Supreme Court noted that the materiality standard does not require a defendant to show by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. Id. at 434. Rather, the Court held that Brady requires a defendant to show "that the favorable evidence could *reasonably* be taken to put the *whole case* in such a different light as to undermine confidence in the verdict." Id. at 435 (emphases added). Moreover, the Court held that the materiality standard turns on the cumulative effect of all suppressed evidence favorable to the defendant, not on each piece of evidence considered item by item. Id. at 436–37 & n.10, 451–54.

In reversing Kyles's conviction and death sentence, the Court noted that the eyewitness statements would have resulted in a drastically weaker case for the prosecution and a much stronger case for the defense, and would have substantially destroyed the value of Louisiana's two best witnesses. Id. at 441–45. As for Beanie, his statements were replete with inconsistencies and self-incriminating assertions, and would have permitted the defense to undermine certain crucial physical evidence used to convict Kyles. Id. at 445–49. Finally, the Court held that the list of license plates would have had some value in exculpating Kyles. Id. at 450–51. Ultimately,

> confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion [due to Beanie], that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid.

Id. at 454.

Finally, in Smith, Smith stood trial in Louisiana state court accused of five murders in connection with an armed robbery. Larry Boatner was the government's key witness. In fact, "[n]o other witnesses and no physical evidence implicated Smith in the crime." Smith, slip op. at 1. At trial, Boatner testified "that he had '[n]o doubt' that Smith was the gunman [Boatner] stood 'face to face' with on the night of the crime." Id. at 3 (citation omitted) (first alteration in original). On that evidence, and that evidence alone, the jury convicted Boatner on all five counts. See id.

During state post-conviction proceedings, Smith discovered that the government had withheld certain contradictory statements that Boatner had made to lead investigator Detective John Ronquillo ("Ronquillo") shortly after the crimes occurred. Id. at 1–2. Specifically, Ronquillo's notes from the night of the robbery and murders stated "that Boatner 'could not . . . supply a description of the perpetrators other then [*sic*] they were black males.'" Id. at 2 (citation omitted) (alteration and addition in original). Five days after the crime, moreover, Boatner admitted that "he 'could not ID anyone because [he] couldn't see faces'" and that he "'would not know them if [he] saw them.'" Id. (citation omitted) (alterations in original).

On appeal, the Supreme Court reiterated that "evidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Id. (quotation omitted). Furthermore, the Court stressed that the fundamental inquiry is whether the withheld evidence "undermine[s] confidence in the outcome of the trial." Id. at 3 (quotation omitted).

The Court held that the evidence was material: "Boatner's testimony was the *only* evidence linking Smith to the crime. And Boatner's undisclosed statements directly contradict

his testimony." Id. (emphasis in original). By withholding that evidence, the government violated Brady. "Boatner's undisclosed statements alone suffice to undermine confidence in Smith's conviction." Id. at 3–4.

With these cases in mind, the court now turns to the merits of Bartko's four motions for a new trial based on alleged Brady and Giglio violations.

B.

The court first will review individually each item Bartko contests. See, e.g., Kyles, 514 U.S. at 436–37 & n.10; Smith, 572 F.3d at 1334; Ellis, 121 F.3d at 916.

1.

In his first motion for a new trial, Bartko relies on the September 29, 2009 Judge Cromer Interview Report. See [D.E. 211-1]. IRS Agent Scott Schiller ("Agent Schiller") and AUSA Clay Wheeler ("Wheeler") were present for the interview. Id. The interview concerned the investigation of Bartko, Hollenbeck, Colvin, and Covington. See id. Judge Cromer had presided over the Forsyth County receivership litigation involving Webb Group and Franklin Asset Exchange as plaintiffs versus BMP, Colvin, Colvin Enterprises, Inc., and others as defendants. Id. Bartko did not specifically request discovery about the Forsyth County receivership litigation until after trial. See [D.E. 220] at 11 (citing January 28, 2011 Samuel Letter [D.E. 220-10]).

In his motion for a new trial, Bartko initially claims that the government improperly withheld Agent Schiller's summary of Judge Cromer's interview. Because the Judge Cromer Interview Report itself was inadmissible hearsay evidence and therefore cannot be material for Brady purposes,[46] Bartko argues that the Judge Cromer Interview Report would have led to

[46] See United States v. Moussaoui, 365 F.3d 292, 308 (4th Cir. 2004) (holding that "obviously inadmissible statements" cannot be the basis of a Brady motion), amended on other

material evidence. See Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) (holding that inadmissible evidence cannot support a Brady motion unless the evidence is likely to lead to discovery of admissible, exculpatory evidence). Specifically, Bartko cites Judge Cromer's statement that Judge Cromer had presided over a hearing in the summer of 2008 concerning distribution of settlement proceeds and that "most of the investors were overjoyed that they were getting a large portion of their money back." See [D.E. 211-1] at 2. Bartko's motion for a new trial also focuses on Judge Cromer's alleged statement that "you don't recover $20 million without a lot of hard work" as Brady material. See id.[47]

The government does not violate Brady "if the evidence in question is available to the defendant from other sources, either directly or via investigation by a reasonable defendant." United States v. Bros. Constr. Co. of Ohio, 219 F.3d 300, 316 (4th Cir. 2000) (quotation and citations omitted); see also Higgs, 663 F.3d at 735; Stockton v. Murray, 41 F.3d 920, 927 (4th Cir. 1994). Such reasonable investigation includes interviewing witnesses in preparation for trial. See United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990). Furthermore, evidence "actually known by the defendant falls outside the ambit of the Brady rule." United States v. Roane, 378 F.3d 382, 402 (4th Cir. 2004); see also Higgs, 663 F.3d at 735.

Although Bartko claims that the government suppressed evidence of Judge Cromer's

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grounds, 382 F.3d 453 (4th Cir. 2004); Hoke v. Netherland, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (acknowledging that inadmissible evidence is, "as a matter of law, immaterial for Brady purposes" (quotation omitted)).

[47] Bartko plucked this statement from its context. After acknowledging that most investors were happy to be getting some of their money back, Judge Cromer immediately stated that "some of the investors were not happy about the amount of attorneys' fees Covington and Bartko had requested. CROMER advised that they had requested to be paid attorneys' fees of between 25%–30% of the recovered money. He added that he thought both lawyers had done a lot of work getting the investors their money back. CROMER advised, 'You don't recover $20 million without a lot of hard work . . . [sic] Covington and Bartko represented that they had been working long and hard with almost 100% recovery.' As a result CROMER ordered that Covington and Bartko be paid all or most of their fees." [D.E. 211-1] at 2.

praise of his legal work in the Forsyth County receivership litigation, [D.E. 211] at 2–3, Judge Cromer's comments to investigators simply restate Judge Cromer's comments at the July 25, 2008 receivership hearing. Bartko was present at the hearing when Judge Cromer praised Bartko's legal work. See [D.E. 220-6] at 1, 62–67, 69–70. A transcript of the hearing was available upon request from the court reporter. See id. at 102–03. Moreover, Bartko knew Judge Cromer's role in the Forsyth County receivership litigation, knew where to locate Judge Cromer, and could have independently interviewed Judge Cromer. Accordingly, the government did not suppress evidence of Judge Cromer's "praise" concerning Bartko's legal work. See, e.g., Higgs, 663 F.3d at 735; McHone, 392 F.3d at 702; Roane, 378 F.3d at 402; Bros. Constr. Co. of Ohio, 219 F.3d at 316.

Bartko's argument that the government suppressed evidence of Judge Cromer's opinion that most of the victims in the Forsyth County receivership litigation were "overjoyed" to get a large portion of their money back from the fraud-induced investment in Bull Mountain fails for similar reasons. Bartko was present at the July 25, 2008 hearing where some victims praised Bartko's legal work and expressed happiness with getting a large portion of their money back. [D.E. 220-6] at 1, 35–39, 77, 79–80, 82–83, 85–86. The court identified each victim before allowing the victim to make a statement at the hearing. See id. Furthermore, a transcript of the hearing was available upon request from the court reporter. See id. at 102–03. Bartko, as counsel for Smith, even had a list of the victims and the ability to interview each one about his or her "happiness" concerning the victim's recovery in the Forsyth County receivership litigation. Cf. [D.E. 220-18] (September 5, 2008 order approving distribution of settlement proceeds). Thus, the government did not suppress information concerning the happiness of the victims involved in the Forsyth County receivership litigation. See, e.g., Higgs, 663 F.3d at 735;

McHone, 392 F.3d at 702; Roane, 378 F.3d at 402; Bros. Constr. Co. of Ohio, 219 F.3d at 316. The government, in short, did not violate Brady.

Even if the government had suppressed the interview report, the government would not have violated Brady. Judge Cromer's interview report, when read in its entirety, is not favorable to Bartko. At the end of the report, Agent Schiller wrote,

> CROMER added that the following information would have aided him during the course of the [Forsyth County receivership litigation]:
>
> –CROMER was not aware, until later, that some of the investors had previously invested in Capstone Partners; that Bartko was associated with Capstone; that Hollenbeck had sent Bartko $700,000 from Capstone investor funds, and that the $700,000 represented proceeds from a possible investor fraud. He advised that upon learning all this, he did not want to take any action that might interfere with an ongoing criminal investigation.
>
> –CROMER was not aware that John Colvin had assisted Hollenbeck in possibly defrauding investors or that Colvin directed Hollenbeck where to send investor contributions.
>
> –CROMER did not know until the summer of 2008 that Covington had been [censured] by the Montana State Bar.
>
> –CROMER was not aware that, prior to the appointment of the Receiver, Bartko had sent letters to investors informing them that he had some ideas about where they could invest their recovered funds.

[D.E. 211-1] at 3. Such evidence would hardly have been favorable to Bartko. In fact, if Judge Cromer had testified about these four issues and the fraud on the court that Bartko perpetrated during the Forsyth County receivership litigation, the testimony would have utterly devastated Bartko's defense. Thus, Judge Cromer's interview report is not favorable. See, e.g., McHone, 392 F.3d at 702 (upholding denial of a Brady motion because "the *unfavorable* portion of the [evidence] would have outweighed any exculpatory value" and "would have been fatal to [defendant's] claim" (quotation omitted) (emphasis in original)).

Finally, even if Bartko cleared the previous two hurdles, his motion would still fail

because Judge Cromer's interview report is not material. Inadmissible evidence is not subject to disclosure under Brady unless it leads to material admissible evidence. See, e.g., Wood, 516 U.S. at 6–8; Moussaoui, 365 F.3d at 308; Banks v. Reynolds, 54 F.3d 1508, 1521 n.34 (10th Cir. 1995) (collecting cases). Here, Bartko agreed before trial that evidence concerning the Forsyth County receivership litigation was irrelevant and therefore inadmissible. See [D.E. 123, 133].[48] Furthermore, this court presided at Bartko's trial and understands the allegations in both the superseding indictment and the record. The court believes that evidence regarding the Forsyth County receivership litigation would have been inadmissible at Bartko's trial under Federal Rule of Evidence 403. Cf. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 (2008) (noting a trial court's "wide discretion" under Rule 403 (quotation omitted)); PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 125 (4th Cir. 2011); United States v. Udeozor, 515 F.3d 260, 265 (4th Cir. 2008); Garraghty v. Jordan, 830 F.2d 1295, 1298 (4th Cir. 1987); United States v. Penello, 668 F.2d 789, 790 (4th Cir. 1982) (per curiam). Evidence concerning the Forsyth County receivership litigation would have done nothing but confuse the issues, mislead the jury, and waste time. Therefore, Judge Cromer's interview report and any information derived from it would have been inadmissible, and "by definition not material, because it never would have

[48] Bartko's post-trial creation of a new trial strategy involving the Forsyth County receivership litigation does not make evidence supporting that new trial strategy material to the trial that actually occurred. See, e.g., United States v. Celestin, 612 F.3d 14, 23 (1st Cir. 2010); Arias, 2000 WL 933010, at *6 (holding that undisclosed evidence was not material because "[n]o matter how much [the defendants] argue about using different trial strategies, the fact remains that the new evidence discovered . . . has nothing to do with the principal players or issues in their case"); United States v. Jones, No. 93-5344, 1994 WL 8118, at *5 (4th Cir. Jan. 14, 1994) (per curiam) (unpublished table decision); accord United States v. Andrews, 532 F.3d 900, 911–12 (D.C. Cir. 2008) (Rogers, J., concurring) (asserting that evidence supporting a new trial strategy is material only when the evidence is actually favorable and only when the government's case "was not overwhelming to begin with"); United States v. Madori, 419 F.3d 159, 169–70 (2d Cir. 2005) (holding that evidence supporting a new trial strategy is not material when there was otherwise substantial evidence of the petitioner's guilt and when the alleged new trial strategy would not have overcome that substantial evidence).

reached the jury and therefore could not have affected the trial outcome." United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983); see also Wood, 516 U.S. at 6; Moussaoui, 365 F.3d at 308; Breedlove v. Moore, 279 F.3d 952, 964 (11th Cir. 2002); Hoke, 92 F.3d at 1356 n.3.

2.

Bartko's second motion for a new trial concerns the government's alleged suppression of the two 2009 Hollenbeck Proffer Agreements. The government concedes that the evidence was favorable to Bartko and suppressed by the government. [D.E. 219] at 6.[49] Bartko argues that the agreements prove Hollenbeck lied while testifying at trial and that the agreements were key impeachment material. See [D.E. 213] at 2–6. In response, the government argues that Hollenbeck did not testify falsely and that the two 2009 Hollenbeck Proffer Agreements were cumulative impeachment evidence. See [D.E. 219] at 7–10. Bartko replies that the two agreements support impeachment based on a different bias or motive, and therefore are not cumulative. See [D.E. 236] at 9–14.

a.

When the government knowingly offers or fails to correct false testimony, it violates due process. See, e.g., Giglio, 405 U.S. at 153–54; Napue, 360 U.S. at 269; Alcorta v. Texas, 355 U.S. 28, 31–32 (1957) (per curiam); Pyle v. Kansas, 317 U.S. 213, 215–16 (1942); Mooney v.

[49] In opposing Bartko's second and third motions for a new trial, the government submitted a declaration from former AUSA Wheeler. [D.E. 227-7]. Wheeler was the lead prosecutor in this case and failed to produce the two 2009 Hollenbeck Proffer Agreements. Id. at ¶¶ 2, 7. The declaration explains how Wheeler placed the two 2009 Hollenbeck Proffer Agreements in the pleading and correspondence file in 2009, instead of in a discovery file. When the government produced or made available the discovery in the Bartko case in 2010, Wheeler failed to review the correspondence file, assuming that it did not have discoverable material in it. Id. at ¶¶ 1–2, 7. In addition, in 2010, Wheeler simply failed to recall the proffer agreements that had been made with Scott and Crystal Hollenbeck. Id. at ¶ 7. The court credits the explanation and finds that the mistakes were made in good faith. Nonetheless, under Brady and its progeny, a prosecutor's good faith is not relevant to determining whether a defendant is entitled to relief. See, e.g., Brady, 373 U.S. at 87.

Holohan, 294 U.S. 103, 112–13 (1935) (per curiam); Basden v. Lee, 290 F.3d 602, 614 (4th Cir. 2002). False testimony can violate Brady and Giglio—thereby necessitating a new trial—"if 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Basden, 290 F.3d at 614 (quoting Agurs, 427 U.S. at 103); see also Elmore, 661 F.3d at 830; Daniels v. Lee, 316 F.3d 477, 493 (4th Cir. 2003); Boyd v. French, 147 F.3d 319, 329–30 (4th Cir. 1998); United States v. Kelly, 35 F.3d 929, 933 (4th Cir. 1994). However, a defendant asserting a false-testimony claim must meet "the heavy burden of showing" that the witness in question actually testified falsely. See, e.g., United States v. Griley, 814 F.2d 967, 971 (4th Cir. 1987).

To put Bartko's motion in context, the court notes the following background information. In early 2009, the United States Attorney for the Eastern District of North Carolina was investigating the sale of numerous investments, including sales involving Webb Group, Franklin Asset Exchange, Disciples Trust, and the Capstone Fund. As part of that investigation, the United States Attorney's Office for the Eastern District of North Carolina wanted to interview Hollenbeck. As mentioned, in 2008, a jury in the Eastern District of North Carolina had convicted Hollenbeck of numerous fraud counts in connection with Mobile Billboards, and Hollenbeck was serving a 168-month sentence in a federal prison in Florida. His wife, Crystal, was also living in Florida.

On February 2, 2009, AUSA Wheeler, who was leading the investigation, spoke with attorney Curtis Scott Holmes ("Holmes"), who had represented Scott Hollenbeck at Hollenbeck's trial. See [D.E. 227-7] at ¶ 4. Holmes asked Wheeler if Scott Hollenbeck was a target of the on-going government investigation. Id. Wheeler responded that the government did not consider Scott Hollenbeck a target at that time. Id.

On February 26, 2009, Wheeler sent draft proffer agreements to Holmes. Id. at ¶ 5. One agreement was for Scott Hollenbeck and one was for Crystal Hollenbeck. The purpose of each agreement was to facilitate interviews with the Hollenbecks. See id. at ¶¶ 5–6.

Crystal Hollenbeck signed the proffer agreement sent to her husband's counsel. See id. at ¶ 5; [D.E. 213-1] at 3–4. It stated as follows:

> As you have indicated, Ms. Hollenbeck is interested in meeting with federal agents currently investigating the sale of numerous investments, including Webb Group, Franklin Asset Exchange, Disciples Trust, and Capstone. I have informed you that Ms. Hollenbeck is not a target of this investigation. The parties will schedule an interview of Ms. Hollenbeck to take place either in the vicinity of the Federal Correctional Institution in Coleman, Florida or in Orlando, Florida.
>
> Ms. Hollenbeck, you, and the United States Attorney's Office (USAO) agree as follows concerning the "ground rules" for this interview:
>
> 1. In any trial in this matter, the USAO will not offer into evidence in its case-in-chief or at sentencing any statements made by Ms. Hollenbeck at the interview; provided, however, this Paragraph 1 shall not apply to any prosecution for false statements, obstruction of justice, or perjury that is based in whole or in part on statements made by Ms. Hollenbeck at the interview.
>
> 2. Notwithstanding Paragraph 1 above:
>
> a. the USAO may use information derived directly or indirectly from statements made by Ms. Hollenbeck at the interview for the purpose of obtaining other evidence, and that evidence may be used in the prosecution and sentencing of Ms. Hollenbeck by the USAO;
>
> b. in any trial of this matter or at sentencing, the USAO may use statements made by Ms. Hollenbeck at the interview to cross-examine her if she testifies or to rebut any evidence offered by or on behalf of her.
>
> 3. This agreement is limited to statements made by Ms. Hollenbeck at the interview and does not apply to any other statements made by Ms. Hollenbeck at any other time. No understandings, promises, or agreements exist with respect to the meeting other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties.

4. The USAO will not share the statements made by Ms. Hollenbeck during the interview with any other state or federal prosecuting entity unless the prosecuting entity agrees to be bound by the terms of this agreement. Please return the original signed copy of this letter agreement prior to the interview.

[D.E. 213-1] at 3–4. Scott Hollenbeck also signed a proffer agreement that was substantively identical to, but in a different format from, the one that AUSA Wheeler had actually sent. See [D.E. 227-7] at ¶ 5; [D.E. 213-1] at 2.[50]

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[50] It stated the following:

As you have indicated, your client, Mr. Hollenbeck, is interested in meeting with federal agents currently investigating the sale of numerous investments, including Webb Group, Franklin Asset Exchange, Disciples Trust, and Capstone. I have informed you that Mr. Hollenbeck is not a target of this investigation. The parties will schedule an interview of Mr. Hollenbeck to take place at the Federal Correctional Institution in Coleman, Florida. Mr. Hollenbeck, you, and the United States Attorney's Office (USAO) agree as follows concerning the "ground rules" for this interview:

1. In any trial in this matter, the USAO will not offer into evidence in its case-in-chief or at sentencing any statements made by Mr. Hollenbeck at the interview; provided, however, this Paragraph 1 shall not apply to any prosecution for false statements, obstruction of justice, or perjury that is based in whole or in part on statements made by Mr. Hollenbeck at the interview.

2. Notwithstanding Paragraph 1 above:

   a. the USAO may use information derived directly or indirectly from statements made by Mr. Hollenbeck at the interview for the purpose of obtaining other evidence, and that evidence may be used in the prosecution and sentencing of Mr. Hollenbeck by the USAO; in any trial of this matter or at sentencing, the USAO may use statements made by Mr. Hollenbeck at the interview to cross-examine him if he testifies or to rebut any evidence offered by or on behalf of him.

3. This agreement is limited to statements made by Mr. Hollenbeck at the interview and does not apply to any other statements made by Mr. Hollenbeck at any other time. No understandings, promises, or agreements exist with respect to the meeting other than those set forth in this agreement, and none will be entered into unless memorialized in writing and signed by all parties.

After each Hollenbeck had signed the respective proffer agreement, each was interviewed separately in Florida. The interviews occurred on April 21 and 22, 2009. See [D.E. 227-7] at ¶ 6.

The investigation of Webb Group, Franklin Asset Exchange, Disciples Trust, and the Capstone Fund, which was referenced in the two 2009 Hollenbeck Proffer Agreements, led to John Colvin's indictment on August 6, 2009. Likewise, the investigation led to the indictment of Bartko and Laws on November 4, 2009, and the superseding indictment of Bartko, Laws, and Plummer on January 6, 2010.

In response to Bartko's motion for a new trial, Wheeler, who signed the two Hollenbeck Proffer Agreements, executed the following declaration on July 15, 2011:

> 1. I was an Assistant United States Attorney with the Eastern District of North Carolina from September 3, 2002 until May 31, 2011.
>
> 2. In that position, I was lead counsel on the criminal investigation and prosecution of Gregory Bartko.
>
> 3. When I ended my employment with the U.S. Attorney's Office on May 31, 2011, I did not take any documents relating to the investigation and prosecution of Greg Bartko with me. I do not have any such documents in my possession.
>
> 4. On February 2, 2009, I had a phone conversation with attorney [Curtis] Scott Holmes. He asked me for the first time whether Scott Hollenbeck was a target of our investigation. I told him we did not consider him a target at that time.
>
> 5. On February 26, 2009, I sent, by e-mail and regular mail, draft proffer agreements to Mr. Holmes for Scott and Crystal Hollenbeck. Mr. Holmes

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> 4. The USAO will not share the statements made by Mr. Hollenbeck during the interview with any other state or federal prosecuting entity unless the prosecuting entity agrees to be bound by the terms of this agreement.
>
> Please return the original signed copy of this letter agreement prior to the interview.

[D.E. 213-1] at 2.

later gave me signed versions of these agreements. While Crystal Hollenbeck signed the exact proffer agreement I sent to Mr. Holmes, Scott Hollenbeck signed an agreement that was substantively identical but in a different format from the one I had sent. In particular, it did not contain U.S. Attorney's Office letterhead.

6. The purpose of these proffer agreements was to facilitate interviews with Scott and Crystal Hollenbeck in Florida. Those interviews occurred on April 21 and 22, 2009.

7. These proffer agreements were placed in the pleadings and correspondence file I kept for Mr. Bartko. In 2010, when the government produced or made available discovery in the Bartko case, my best memory is that I did not review this file, assuming that it did not have discoverable material in it. At that time, I simply did not remember the proffer agreements that had been made with Scott and Crystal Hollenbeck.

8. Other than my February 2, 2009 conversation with Scott Holmes and the proffer agreements, I do not recall making any statements to Scott Hollenbeck, Crystal Hollenbeck, or any attorney for either of them about their status as a target. I never assured Scott or Crystal Hollenbeck that they would not become targets. The statement I made on February 2, 2009 and in the proffer agreements was strictly limited to their current status.

9. The proffer agreements were the only agreement of any kind between the Government and Scott Hollenbeck or Crystal Hollenbeck. There were no other proffer or immunity agreements.

10. I did not make any other promises to Scott or Crystal Hollenbeck or any attorney for either of them regarding their interviews or testimony at trial.

11. I did not make any statements, oral or written, to Scott or Crystal Hollenbeck or any attorney for either of them regarding a Rule 35 motion or any other sentencing benefit prior to the jury beginning its deliberations at the *Bartko* trial.

12. I never made any promises to Crystal Hollenbeck, Scott Hollenbeck, or any attorney for either of them regarding whether Crystal Hollenbeck would or would not be prosecuted.

13. On December 7, 2009, Scott Holmes sent me an e-mail requesting that I ask the Bureau of Prisons to move Scott Hollenbeck to Butner for the convenience of facilitating his cooperation.

14. On December 28, 2009, I responded to this e-mail by telling him that we

would think through his suggestion.

15. The Government decided not to make a request to the Bureau of Prisons to move Scott Hollenbeck to Butner. Scott Hollenbeck was not moved to Butner.

16. Other than this request, I do not recall any other benefit that Hollenbeck requested or that I discussed as a result of his cooperation with the government in connection with the prosecution of Greg Bartko.

. . .

I declare under penalty of perjury that the foregoing is true and correct.

[D.E. 227-7].

On November 3, 2010, at the beginning of Scott Hollenbeck's direct examination, Wheeler asked Hollenbeck "what if any promises has the government made to you about your testimony here today?" Hollenbeck Tr. 5. Hollenbeck replied "None." Id. On November 5, 2010, near the end of Hollenbeck's lengthy cross-examination, defense counsel asked Hollenbeck: "Now, one of the things that you said when you took the stand was that the government has made you no promises, correct? You said that?" Id. 298. Hollenbeck replied: "That is exactly right." Id. Defense counsel then asked Hollenbeck, "And the government has not, as of this time, made you any promises, have they?" Id. Hollenbeck replied: "They have not." Id.

"Precise questioning is imperative as a predicate for . . . perjury." United States v. Hairston, 46 F.3d 361, 375 (4th Cir. 1995) (quotation omitted). A finding of perjury "cannot be based upon evasive answers or even misleading answers so long as they are literally true. In the face of evasion or misleading answers, it is the lawyer's duty to bring the witness back to the mark . . . ." Id. (quotation omitted). Here, Hollenbeck's answer to the government's question on direct examination was true. The government had made no promise to him regarding his

November 2010 trial testimony against Bartko. Hollenbeck's March 8, 2009 proffer agreement covered only statements made at his April 2009 debriefing, not statements made at any other time, including Bartko's November 2010 trial. See [D.E. 213-1] at 2. Furthermore, defense counsel's initial focus on Hollenbeck's testimony on direct examination obviously led Hollenbeck to believe that the questioning pertained to promises about Hollenbeck's November 2010 trial testimony, not promises in his March 8, 2009 proffer agreement granting use immunity for statements that Hollenbeck made during his April 2009 debriefing. Cf. United States v. Bryan, 58 F.3d 933, 960 (4th Cir. 1995), abrogated on other grounds by United States v. O'Hagan, 521 U.S. 642 (1997). Thus, Hollenbeck did not testify falsely or misleadingly.

Alternatively, even if the court assumed that Hollenbeck's testimony was false, there is no reasonable likelihood that Hollenbeck's false testimony on this point could have affected the jury's judgment. See, e.g., Agurs, 427 U.S. at 103; Basden, 290 F.3d at 614; Kelly, 35 F.3d at 933. Defense counsel thoroughly impeached Hollenbeck on the subject of bias in favor of the government and on Hollenbeck's motive to lie to please the government. See Hollenbeck Tr. 301–08. Defense counsel thoroughly impeached Hollenbeck concerning his desire to avoid prosecution for his fraud involving Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, the Caledonian Fund, and the Capstone Fund. Id. Defense counsel thoroughly impeached Hollenbeck about his desire to receive a cooperation-based reduction in his 168-month prison sentence stemming from the Mobile Billboards fraud. Id. 299–308.[51] Furthermore, defense counsel explored at great length and with absolutely devastating effect Hollenbeck's character for untruthfulness. Defense counsel recounted the many lies Hollenbeck had told and the many frauds he had committed throughout his life. E.g., id. 176–78, 182, 201, 211–12, 214–224,

[51] See Fed. R. Crim. P. 35.

227–32, 234–45, 249–50, 253–54, 258–62, 277–78, 281–82, 288–98, 309–10, 337. In fact, this court has never seen a witness more thoroughly impeached than Hollenbeck. In the face of such blistering impeachment and the other evidence in the trial, one more false statement by Hollenbeck could not have possibly affected the jury's judgment.

b.

Next, Bartko argues that even if Hollenbeck did not testify falsely, the government's failure to disclose the proffer agreements violates Brady. See, e.g., Smith, slip op. at 2–3. To violate Brady, however, the agreements must be material, in that they are not merely cumulative of the existing impeachment evidence against Hollenbeck. See, e.g., McHone, 392 F.3d at 700; Ellis, 121 F.3d at 917–18 & n.10. Bartko contends that impeachment based on the two agreements would have been different in character from the countless other statements, actions, and motives used to impeach Hollenbeck. Therefore, according to Bartko, the agreements were not cumulative. See [D.E. 236] at 9 (citing United States v. Kohring, 637 F.3d 895 (9th Cir. 2011)). In making this argument, Bartko relies on Kohring, a case in which the Ninth Circuit determined that evidence suppressed by the government "would have added an entirely new dimension to the jury's assessment." Kohring, 637 F.3d at 905. The chief witness against Kohring was impeached at trial for the lenient treatment he received from the government on public corruption charges. See id. at 904. After trial, Kohring learned that the government also had intervened on the chief witness's behalf to prevent the witness from being charged with completely different crimes the witness had committed: sexual exploitation of minors and attempts to conceal sexual exploitation behavior by soliciting perjury from the minors and by arranging for one of the minors to make herself unavailable to testify against him. See id. The Ninth Circuit found that the new impeachment information concerning the government's chief

witness was not cumulative. Id. The Ninth Circuit noted that the evidence of sexual misconduct and obstruction of justice "would have shed [new] light on the magnitude of [the chief witness's] incentive to cooperate with authorities and would have revealed that he had much more at stake than was already known to the jury." Id.

Here, in contrast, Bartko's impeachment of Hollenbeck was devastatingly thorough and thoroughly devastating. It included (1) Hollenbeck's desire to avoid prosecution for fraud involving Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, the Caledonian Fund, and the Capstone Fund, (2) Hollenbeck's desire to obtain a reduction in his 168-month sentence for Mobile Billboards's fraud, and (3) Hollenbeck's repeated admissions concerning the numerous lies told and numerous frauds committed throughout his life. Scott Hollenbeck's 2009 proffer agreement had nothing to add and would not have shed any new light on the depth of Hollenbeck's wrongdoing, the magnitude of his incentive to cooperate with the government, or the absence of his credibility.

Crystal Hollenbeck's 2009 proffer agreement is similarly distinguishable from the evidence in Kohring. Crystal Hollenbeck's role in assisting Scott Hollenbeck with paperwork in his business activities was known to the jury. Indeed, defense counsel asked Scott Hollenbeck on cross examination about Crystal Hollenbeck's involvement in his business, including questions concerning an email from Crystal Hollenbeck to Bartko about the newly formed "finder," CMH Enterprises, in which Crystal Hollenbeck expressed concerns about her liability. Hollenbeck Tr. 285–87. In light of this and other evidence of Crystal Hollenbeck's involvement in Scott Hollenbeck's business, Crystal Hollenbeck's 2009 proffer agreement would have added nothing to Bartko's defense. It would have been merely cumulative, and thus is also distinguishable from the suppressed evidence in Kohring.

In opposition to this conclusion, Bartko argues that Crystal Hollenbeck's proffer agreement would have provided for a different avenue of impeachment, specifically, that "Hollenbeck was told that his wife was not a target . . . ." [D.E. 236] at 8.[52] In support, Bartko cites LaCaze v. Warden La. Corr. Inst. for Women, 645 F.3d 728 (5th Cir. 2011), amended on other grounds, 647 F.3d 1176 (5th Cir. 2011) (per curiam), for its holding that "the State's failure to disclose an agreement not to prosecute the son of the main testifying witness was material . . . ." [D.E. 236] at 11. In LaCaze, Meryland Robinson killed Princess LaCaze's husband at Princess LaCaze's request. See 645 F.3d at 730–31. Robinson's fourteen-year-old son accompanied him to and from the murder scene, but did not participate in the murder. Id. During the murder investigation, Robinson told the police that he wished to provide a statement to the police, but did not want to have his statement used to prosecute his son. Id. at 731–33. The police agreed not to use Robinson's statement to prosecute his son. See id. Thereafter, Robinson stated that he spoke expressly with Princess LaCaze before the murder and expressly agreed with her that he would kill LaCaze's husband. Robinson reiterated this statement at trial. See id. at 731.

From the prosecution's opening statement through the prosecution's final rebuttal argument, the state built its entire case against LaCaze on Robinson's credibility. See id. at 732. Indeed, Robinson's testimony was the only direct evidence of LaCaze's criminal intent to have her husband killed. Id. at 731, 737–38. Prosecutors never disclosed to LaCaze Robinson's agreement with police. Id. at 731.

LaCaze is distinguishable in at least three important ways. First, Bartko has not shown

[52] Crystal Hollenbeck did not testify at trial. Thus, the government's February 2009 proffer agreement with Crystal Hollenbeck can be material only in relation to Scott Hollenbeck's testimony. Generally, evidence that merely impeaches those who do not testify lacks relevance, much less materiality. See United States v. Sanchez, 118 F.3d 192, 196–97 (4th Cir. 1997).

that Scott Hollenbeck "was told that his wife was not a target." [D.E. 236] at 12. In 2009, the government entered two separate proffer agreements, one with Crystal Hollenbeck on February 26, 2009, and one with Scott Hollenbeck on March 8, 2009. See [D.E. 213-1] at 2–4. Neither agreement references the other, and Scott Hollenbeck's proffer agreement contains neither promises regarding Crystal Hollenbeck nor statements concerning her status. Id. In no other way did the government suggest to Scott Hollenbeck that his wife was not a target.[53]

Second, and more importantly, even if the court assumes that the government told Scott Hollenbeck in March 2009 that his wife was not a target, both 2009 proffer agreements clearly state that they provide only use immunity for statements that the speaker made at the 2009 debriefings, and that the government could still prosecute both Scott and Crystal Hollenbeck using information derived from the statements. See id.[54] In fact, unlike LaCaze, the government could have used Scott Hollenbeck's statements at his 2009 debriefing to prosecute Crystal Hollenbeck, and vice versa.

Third, unlike LaCaze, the government did not build its case against Bartko on Scott Hollenbeck's credibility and never presented (not even through Hollenbeck) direct evidence of Bartko's criminal intent. Stated differently, unlike Robinson's direct testimony in LaCaze that he had had a conversation with Princess LaCaze before the murder and had expressly agreed with her to murder her husband, Hollenbeck provided no such direct testimony that he and Bartko expressly agreed to commit the crimes charged in the superseding indictment. Rather, the government presented a mountain of circumstantial evidence of Bartko's criminal intent in

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[53] Although the same attorney represented both Scott Hollenbeck and Crystal Hollenbeck, even if that attorney shared Crystal Hollenbeck's proffer agreement with Scott Hollenbeck, this fact would not support a finding that the *government* told Scott Hollenbeck that his wife was not a target.

[54] The plain text of these agreements, alone, shows that they are far from the "free pass" Bartko claims they are. [D.E. 212] at 6.

the form of documents (such as correspondence, emails, bank records, telephone records), and witness testimony (exclusive of Hollenbeck). Accordingly, LaCaze does not help Bartko.

Bartko also argues that he could have impeached Scott Hollenbeck using the government's 2009 statement to Hollenbeck that it would not prosecute him. Specifically, Bartko asserts that had he known that the government had told Scott Hollenbeck in February 2009 that he was not a target of the on-going investigation concerning Webb Group, Franklin Asset Exchange, Disciples Trust, or the Capstone Fund, that information "would have been the high point of any cross-examination." [D.E. 213] at 5. In making this argument, Bartko suggests that a person who is told that he is not a target generally assumes he will never be prosecuted.

The court doubts that any competent lawyer ever would advise a client that a prosecutor's statement during an on-going investigation that a client is or is not a target, subject, or witness is irrevocable, and no evidence suggests that Scott Hollenbeck's lawyer or anyone else ever provided such advice to Hollenbeck. Moreover, Bartko has not shown that Scott Hollenbeck believed that either he or his wife were immune from prosecution for crimes involving Webb Group, Franklin Asset Exchange, Disciples Trust, or the Capstone Fund because the government had told him in February 2009 that he was not a target. In fact, the plain language in the 2009 proffer agreements states that each Hollenbeck was told he or she was not a target, but also states that each could still be prosecuted. See [D.E. 213-1] at 2–4; see also [D.E. 227-7] at ¶¶ 8–10, 12. Furthermore, given the volume of devastating impeachment material that defense counsel had and used during Hollenbeck's cross-examination, the February 2009 non-target status comment would have been only an immaterial blip in an already exhaustive and devastating impeachment.

In sum, both 2009 Hollenbeck Proffer Agreements are cumulative impeachment evidence that Scott Hollenbeck was biased in favor of cooperating with the government in the hopes of, not in exchange for, lenient treatment. At Bartko's trial, defense counsel used a plethora of other evidence to demonstrate that same bias. The two 2009 Hollenbeck Proffer Agreements simply do not belong to an additional category of impeachment evidence. See Ellis, 121 F.3d at 917–18; United States v. Hoyte, 51 F.3d 1239, 1243 (4th Cir. 1995) (holding that additional impeachment evidence was not material because the witness "was impeached in so many other ways"); United States v. Rawle, No. 90-6255, 1991 WL 22836, at *4 (4th Cir. May 6, 1991) (per curiam) (unpublished table decision) ("The actions of [the] witnesses[, which the defense used for impeachment,] were of such an unlawful and immoral magnitude that an agreement with the government would only provide cumulative [impeachment] evidence.").

Alternatively, even if the court assumed that both 2009 Hollenbeck Proffer Agreements were not cumulative impeachment evidence, there is no reasonable probability that, had the agreements been disclosed, the jury would have reached a different verdict. See, e.g., Smith, slip op. at 2–3; Banks v. Dretke, 540 U.S. 668, 700–03 (2004). Materiality of impeachment evidence hinges both on the importance of a particular witness to the case and on the government's reliance on the witness's testimony. See, e.g., Smith, slip op. at 3; Banks, 540 U.S. at 700–03; Strickler, 527 U.S. at 292–96; Giglio, 405 U.S. at 154. Scott Hollenbeck was not critical to the government's case, and the government did not rely on his credibility in prosecuting Bartko. Defense counsel's devastating cross examination of Hollenbeck impeached Hollenbeck with multiple categories of impeachment evidence, including (1) Hollenbeck's felony convictions, (2) his bias in favor of the government due to his desire to receive a Rule 35 motion and a reduction in his 168-month prison sentence for his involvement in Mobile Billboards's fraud, (3) his bias

in favor of the government due to his desire to avoid being prosecuted for the fraud that he committed with Colvin, Webb Group, Franklin Asset Exchange, Disciples Trust, and others, (4) his bias in favor of the government due to his desire to avoid being prosecuted for the fraud he committed while raising money for the Caledonian Fund and the Capstone Fund, (5) myriad specific instances of lying, fraud, and forgery throughout Hollenbeck's adult life, (6) prior inconsistent statements to prosecutors, (7) contradictions within his trial testimony, and (8) his inability to recall certain facts. After all this, the government could not have relied on Hollenbeck's credibility, for Hollenbeck had none left.

The government's approach in its closing corroborates this conclusion. In its initial closing argument, the government described Hollenbeck as a man who had told hundreds of lies hundreds of times. The government then reiterated that the case against Bartko was built on the other evidence presented at trial, including a mountain of documents, the testimony of other witnesses, and Bartko's own incredible testimony. In response, the defense attempted to make the whole case turn on Hollenbeck's credibility and urged the jury to remove Hollenbeck's entire testimony from its consideration. In its rebuttal argument, the government espoused a similar approach, explicitly—and quite properly—arguing that Hollenbeck's testimony was not needed at all to return a guilty verdict on any count. Rather, the government argued that the mountain of evidence arising from the documents, the testimony of other witnesses, and Bartko's own contradictory testimony proved Bartko's guilt beyond a reasonable doubt.

Having presided at this trial and having thoroughly reviewed the entire record, the court finds that had the two 2009 Hollenbeck Proffer Agreements been disclosed to the defense and then been used to impeach Hollenbeck, there is no reasonable probability that the withheld impeachment evidence would have altered at least one juror's assessment of Bartko's

culpability. See, e.g., Smith, slip op. at 3; Banks 540 U.S. at 700–03; Strickler, 527 U.S. at 292–96; United States v. Bodkins, 274 F. App'x 294, 299–301 (4th Cir. 2008) (per curiam) (unpublished); Ellis, 121 F.3d at 917–18; Hoyte, 51 F.3d at 1243; compare Brown v. French, 147 F.3d 307, 312–13 (4th Cir. 1998) (holding that undisclosed impeachment evidence was not material because the government had built its case on "overwhelming physical evidence tying [the defendant] to the crime"), with Monroe v. Angelone, 323 F.3d 286, 315–16 (4th Cir. 2003) (holding that undisclosed impeachment evidence was material because the witness's "trial testimony was not only relevant to [the defendant's] conviction, it was crucial").

3.

Bartko's third motion alleges that the government failed to disclose tolling agreements the government had entered into with Leamon in 2010. See [D.E. 225]. Those agreements tolled the statute of limitations "for potential federal criminal violations regarding Ms. Leamon's involvement in the fraudulent sale of investments during the year 2005, including conspiracy, mail fraud, the sale of unregistered securities, and money laundering . . . ." [D.E. 225-1] at 2–3, 4–5. The parties agreed to toll the statute of limitations "to allow additional time for the parties to present facts and discuss the matter . . . [and] to evaluate and discuss potential resolutions to [the] case." Id. at 2, 4. The first agreement, entered into on January 5, 2010, tolled the statute of limitations on Leamon's crimes until July 5, 2010. The second agreement, entered into on July 2, 2010, tolled the statute of limitations until December 5, 2010. Without these agreements, the five-year statute of limitations for some of Leamon's alleged crimes apparently would have run before her testimony in Bartko's case was complete.

The government concedes that this evidence was suppressed and that it had limited impeachment value. Thus, the issue becomes materiality. See Smith, slip op. at 2–3; Giglio,

405 U.S. at 154; Higgs, 663 F.3d at 735. The government argues that the 2010 Leamon Tolling Agreements are not material. [D.E. 227] at 7–8. In response, Bartko argues that Leamon's testimony was "vital" to a finding of his guilt on the conspiracy count in count one because the jury returned a general verdict. See [D.E. 236] at 15. Bartko argues that the verdict could have been based solely on activity related to Plummer, Leamon, and Legacy. Id.

First, in arguing this motion before the court on July 25, 2011, Bartko contended that this trial really was a three-witness trial and that the three witnesses were Hollenbeck, Plummer, and Leamon. Bartko's contention is preposterous. At the outset of this order, the court recounted at great length some of the evidence presented during this thirteen-day trial.[55] The court's description does not even come remotely close to recounting all of the evidence presented in this trial. The court utterly and completely rejects any notion that this trial—under any stretch of the imagination—was, or could be fairly characterized as, a three-witness trial.

Second, "[t]he materiality of Brady material depends almost entirely on the value of the evidence relative to the other evidence" in the case. Rocha v. Thaler, 619 F.3d 387, 396 (5th Cir. 2010) (quotations omitted), cert. denied, 132 S. Ct. 397 (2011). "Undisclosed evidence that is merely cumulative of other evidence is not material," nor is possible impeachment evidence regarding "a witness whose account is strongly corroborated by additional evidence supporting a guilty verdict . . . ." Id. at 396–97 (quotations omitted); see also Wood, 516 U.S. at 8 (holding that undisclosed impeachment evidence was not material because even without the witness's testimony, the physical evidence and testimony of other witnesses "overwhelming[ly]" demonstrated the defendant's guilt); United States v. Walters, 350 F. App'x 826, 830–31 (4th

[55] The court did so because Brady and its progeny require the court to review omitted evidence "in the context of the entire record." Agurs, 427 U.S. at 112–14; see Kyles, 514 U.S. at 460.

Cir. 2009) (per curiam) (unpublished) (rejecting a Brady motion based on undisclosed impeachment evidence because the witness's testimony was corroborated by other evidence in the case), cert. denied, 130 S. Ct. 2121 (2010); Ellis, 121 F.3d at 918 (holding that withheld impeachment evidence was not material because the witness's testimony was corroborated by other evidence in the case).

Here, Leamon's testimony involved her personal background, the formation of Legacy, her role with Legacy as the person involved in the community, and Plummer's role with Legacy as the person in charge of the books. Leamon's testimony also included Leamon's introduction to Bartko as part of the Mobile Billboards lawsuit in which Covington and Bartko were her lawyers, Legacy's dire financial status following the collapse of Mobile Billboards and the related adverse publicity, Bartko's use of Legacy's office for a January 11, 2005 meeting, the process Legacy used to receive money from the Capstone Fund's and Hollenbeck's other clients and then to send the money to the Capstone Fund, and Legacy's receipt of a 6 percent commission from the Capstone Fund. Finally, Leamon discussed Legacy's mailing of statements and letters to victims, the closing of Legacy's account at TriStone Bank and the switch to Wachovia, and Legacy's mailing of corrected statements and letters to investors. This testimony served primarily as summary evidence of Legacy's bank activity, mailings, and meetings, which was corroborated by substantial documentary evidence, the testimony of victims, the testimony of Plummer, and the testimony of Bartko.

Moreover, Leamon's testimony was not probative of Bartko's knowledge, intent, or good faith, all of which were the key elements that Bartko contested in connection with counts one through six. The only portions of Leamon's testimony possibly pertinent to Bartko's mental state were that both Hollenbeck and Bartko told her and Plummer to pool the investors' refunded

money and send the pooled money back to Bartko, Leamon Tr. 141–42, and that after the TriStone account was closed, Bartko told her, "[D]on't deal with a small bank, this time go to a larger bank like Wachovia." Id. 147. At trial, however, Bartko's own testimony corroborated his knowledge and intent on these points. Bartko admitted (1) that he told Leamon that he was refunding money from Hollenbeck's non-accredited investors, Bartko Tr. 125–26, (2) that he spoke with Plummer and Leamon in January 2005 about forming an "investment club" to pool money and then about investing in the Capstone Fund, id. 121, 248, 304–05, (3) that, at the time, he "assumed that some of [the refunded money from the non-accredited investors] would be the same as [that] later pooled through Legacy," id. 249, (4) that he agreed to pay a 6 percent finder's fee to Legacy, id. 251, (5) that, at the time, he "would not have [been] surprised" that Hollenbeck and Legacy had an arrangement whereby Legacy paid Hollenbeck, id. 252, and, (6) that, at the time, he knew that "[m]aybe ten" rejected non-accredited investors had reinvested in the Capstone Fund through Legacy. Id. 265. Furthermore, Bartko testified that although he did not tell Leamon or Plummer to open a new bank account at TriStone, id. 126, 246, he was aware that Legacy had done so shortly after Legacy had opened the account. Id. 246. Bartko also recalled "having a conversation . . . when [Leamon and Plummer] were having problems with the bank account and they asked me about a bank . . . so I said I've had good luck with Wachovia." Id. 126.

In short, Bartko's admissions and a mountain of other evidence independently corroborate Leamon's testimony. Such extensive corroboration of Leamon's testimony from documentary evidence, victim testimony, Plummer's testimony, and Bartko's testimony obliterates Bartko's materiality argument. See, e.g., Wood, 516 U.S. at 8 (holding that undisclosed impeachment evidence was not material because even without the witness's

testimony, the physical evidence and testimony of other witnesses "overwhelming[ly]" demonstrated the defendant's guilt); Rocha, 619 F.3d at 396; Walters, 350 F. App'x at 830–31; United States v. Jackson, 345 F.3d 59, 74–75 (2d Cir. 2003); Ellis, 121 F.3d at 918; United States v. Fankhauser, No. 93-5288, 1994 WL 66088, at *4 (4th Cir. Mar. 1, 1994) (per curiam) (unpublished table decision).

Bartko also contends that because he believed that the five-year statute of limitations had run on Leamon's potential crimes, "there was almost no viable material in hand to impeach Ms. Leamon, or to attempt to show the jury that she had a motive to curry favor with the government." [D.E. 225] at 4–5. The court disagrees. First, even though the five-year statute of limitations apparently had run on prosecuting Hollenbeck at the time of Bartko's November 2010 trial, defense counsel still asked Hollenbeck about his fear concerning such a criminal prosecution and his desire to avoid it. Defense counsel cannot now reasonably argue that its mistaken belief that the statute of limitations had run on Leamon's alleged crimes somehow prevented Bartko from exploring Leamon's understanding about whether she could still be prosecuted for the crimes set forth in the superseding indictment (or for her other conduct) and about her desire to avoid such prosecution.

Second, it is not at all clear that defense counsel *wanted* to impeach Leamon using her fear of prosecution for the charged crimes. The defense and the jury both knew that Plummer, Leamon's business partner, had pleaded guilty to the conspiracy count and was awaiting sentencing. Nonetheless, during cross-examination of Plummer, the defense did not attack Plummer based on her plea agreement or based on her desire to receive a reduced sentence. It is not clear that the defense would have treated Leamon—whose conduct the defense concedes had "[n]o discernible difference" from Plummer's—differently. Id. at 4.

Third, the defense had other evidence it could have used to impeach Leamon. During its cross of Plummer, the defense attacked Plummer's credibility by exploring her role in a Ponzi scheme that took place after Bartko closed the Capstone Fund. See Plummer Tr. 69–71. That scheme involved Leamon, Hollenbeck, and real estate investments.[56] In fact, Plummer expressly implicated Leamon in that scheme. Id. 70. But when Leamon took the stand, the defense did not use this impeachment evidence.

Finally, and perhaps most tellingly, the government and the defense barely mentioned Leamon in closing argument. Thus, although the defense could have impeached Leamon by exploring several sources of potential bias, it simply chose not to. The defense will not now be heard to complain about it.

In opposition to this conclusion, Bartko argues that the rules of evidence governing wrongful acts would have prevented the defense from exploring Leamon's bias arising from her desire to avoid prosecution. See Fed. R. Evid. 608, 609. Rules 608 and 609, however, do not govern bias impeachment. See, e.g., United States v. Abel, 469 U.S. 45, 50–51 (1984); Taylor v. Molesky, 63 F. App'x 126, 133 (4th Cir. 2003) (per curiam) (unpublished); Quinn v. Haynes, 234 F.3d 837, 845 (4th Cir. 2000);[57] Hafner v. Brown, 983 F.2d 570, 576 (4th Cir. 1992); United States v. McNatt, 931 F.2d 251, 255–56 (4th Cir. 1991). Moreover, because of the mountain of documentary evidence, the testimony of victims, the testimony of Plummer, the testimony of Bartko, and the testimony of other witnesses corroborating Leamon's testimony, the court finds no "reasonable probability that the jury would have returned a different verdict if [Leamon's] testimony had been either severely impeached or excluded entirely." Strickler, 527 U.S. at 296;

[56] Interestingly, this scheme also involved Bartko. Plummer Tr. 126–29. Bartko drafted the promissory note and reviewed the documents that were integral to that scheme. Id.

[57] This case actually analyzed West Virginia Rules of Evidence 608 and 404, but the Fourth Circuit noted that those rules are identical to their federal counterparts. Quinn, 234 F.3d at 845 n.9.

see also Wood, 516 U.S. at 8; Rocha, 619 F.3d at 396; Walters, 350 F. App'x at 830–31; Jackson, 345 F.3d at 74–75; Ellis, 121 F.3d at 918; Fankhauser, 1994 WL 66088, at *4.

4.

In Bartko's fourth amended motion for a new trial [D.E. 237], Bartko alleges that the government, through witness Gary Mlot, used false demonstrative exhibits and presented false testimony concerning the $701,000 that Colvin and Hollenbeck, through Franklin Asset Exchange, wired to Bartko in 2004 for investment in the Caledonian Fund. Cf. Giglio, 405 U.S. at 153–54; Napue, 360 U.S. at 265; Mooney, 294 U.S. at 112–13; Roane, 378 F.3d at 400–01.

The government may not knowingly elicit perjured or misleading testimony, and may not knowingly fail to correct unsolicited but still false or misleading testimony by government witnesses. Otherwise, the government violates due process. See Giglio, 405 U.S. at 153–54; Napue, 360 U.S. at 269; Mooney, 294 U.S. at 112–13; Basden, 290 F.3d at 614. The defendant bears the burden of proving knowledge and falsity. See King, 628 F.3d at 701–02; Roane, 378 F.3d at 401; Griley, 814 F.2d at 971. Even if the defendant meets this burden, his claim does not automatically prevail, for the false testimony must also have been material. See Agurs, 427 U.S. at 103 ("[T]he Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (footnotes omitted)); Elmore, 661 F.3d at 830; Basden, 290 F.3d at 614.[58] Stated differently, "[a] new trial is required [only] if the false testimony could . . . in any reasonable likelihood have affected the

[58] Bartko argues that "[u]nder Mooney-Napue [sic], proof of the requisite prosecutorial knowledge would establish on its own that the falsified evidence was material, thereby requiring reversal of a conviction without further inquiry into the effect of the false evidence on the outcome or the strength of the government's other evidence." [D.E. 237] at 12 n.5. Bartko misunderstands the applicable Supreme Court and Fourth Circuit case law.

judgment of the jury . . . ." Giglio, 405 U.S. at 154 (quotation omitted) (omissions in original); see also Agurs, 427 U.S. at 103; Napue, 360 U.S. at 271; Elmore, 661 F.3d at 830; Basden, 290 F.3d at 614; Kelly, 35 F.3d at 933.

According to Bartko, Mlot, a CPA and financial analyst employed in the United States Attorney's office, falsely testified that money that Hollenbeck received from victims George D. Brown, Leon Woodruff, Pastor Michael Lamb, Hayden M. Furrow, and Barry M. Singletary ended up in the Caledonian Fund account. Bartko also alleges that Mlot presented misleading charts that erroneously conveyed to the jury that the money of those five victims flowed directly from Hollenbeck to the Caledonian Fund. When Bartko made the motion, Bartko did not have a copy of the transcript of Mlot's testimony. On November 21, 2011, the court reporter filed a copy of that transcript [D.E. 242].

The court has reviewed the Mlot testimony, the exhibits discussed during Mlot's testimony, and the underlying exhibits referenced in the exhibits discussed during the Mlot testimony (to the extent admitted at trial). The court also has reviewed the government's opposition [D.E. 238] and supplemental opposition [D.E. 243], and Bartko's reply [D.E. 244–45]. Based on this review, Bartko clearly fails to demonstrate falsity.

The Mlot transcript and exhibits demonstrate that Mlot never falsely testified that the money of the five testifying victims was the same money transferred to Bartko's bank accounts for the Caledonian Fund. See Govt. Exs. 658 (George D. Brown's investment), 662 (Hayden M. Furrow's investment), 673 (Landmark Baptist Church's investment), 683 (Barry M. Singletary's investment); Mlot Tr. 25–40. Indeed, Mlot testified that the money Hollenbeck obtained from all victims in early 2004 went into "one big pot" in Hollenbeck's bank account. See Mlot Tr. 30. Mlot also testified that government exhibits 658, 662, 673, and 683 do not reflect all deposits

into Hollenbeck's account or transfers out of it. See id. 31–35, 40. In short, Mlot did not testify falsely and the exhibits discussed during his testimony were not false. Mlot's testimony and the exhibits likewise were not misleading. Alternatively, the evidence was not material. See, e.g., Agurs, 427 U.S. at 103; Giglio, 405 U.S. at 154.

C.

Having analyzed individually the evidence on which Bartko based his motions, the court must now assess the cumulative effect of that evidence on Bartko's conviction. The suppressed evidence is considered collectively for purposes of materiality. Kyles, 514 U.S. at 436 n.10, 454. Evidence that would have been excluded at trial is "by definition not material," and is therefore not considered. Ranney, 719 F.2d at 1190; see also Wood, 516 U.S. at 6; Agurs, 427 U.S. at 105–06; Moussaoui, 382 F.3d at 472. Likewise, because the court finds that the testimonies of Hollenbeck and Mlot were not perjurious or misleading, the court does not include their allegedly false testimony in the cumulative materiality analysis. See Ellis, 121 F.3d at 927–28; see also Smith, 572 F.3d at 1334–37. Thus, the court considers the collective materiality only of the suppressed impeachment evidence involving Hollenbeck and Leamon.

After a painstakingly careful and thorough review of the entire record and a reflection on the entire trial, the court finds that the cumulative effect of the suppressed impeachment evidence does not "undermine[] confidence in the outcome of the trial." Kyles, 514 U.S. at 434 (quotation omitted). Simply put, the cumulative effect of further impeachment of Hollenbeck with the proffer agreements and the impeachment of Leamon with the tolling agreements "could [not] reasonably be taken to put the whole case into such a different light as to undermine confidence in the verdict." Id. at 435; see Smith, slip op. at 2–3; Strickler, 527 U.S. at 296; Hoyte, 51 F.3d at 1243. Therefore, the evidence is not material. See Smith, slip op. at 2–3;

Kyles, 514 U.S. at 434–35, 454; Agurs, 427 U.S. at 111–13; Higgs, 663 F.3d at 735.

The same conclusion holds true even if the court were to have considered, in addition to the suppressed impeachment evidence, the allegedly omitted evidence from Judge Cromer and the allegedly false or misleading testimonies of Hollenbeck and Mlot.[59] In so finding, the court stresses that Bartko's case was not a close one. The trial record reveals overwhelming evidence of Bartko's guilt. The jury carefully heard the evidence over a three-week period. The jury received detailed jury instructions. After deliberating approximately four hours, the jury unanimously convicted Bartko on all six counts.

In opposition to this conclusion, Bartko contends that "[t]he evidence against Mr. Bartko was not overwhelming." [D.E. 211] at 4. He is wrong. He also asserts that "the case against Mr. Bartko was circumstantial and tenuous." Id. Wrong again. Circumstantial this case was; tenuous, it absolutely was not. The mountain of evidence marshaled against Bartko demonstrated his guilt beyond any shadow of a doubt. Moreover, if the jury had had any doubts, Bartko's testimony destroyed them. The jury was permitted not only to disbelieve Bartko's testimony, but to believe the opposite. See United States v. Griffin, 391 F. App'x 311, 320 (4th Cir. 2010) (unpublished) (acknowledging, in the Brady context, that "[i]t has long been established that when a defendant testifies, the trier of fact may consider his or her testimony in

[59] As stated, the materiality standard for the government's knowing use of false or misleading testimony is different from the materiality standard for suppressed evidence (whether impeachment evidence or non-impeachment evidence). Compare Giglio, 405 U.S. at 154 ("the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." (quotation omitted)), with Smith, slip op. at 2 ("there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different" (quotation omitted)). Here, when deciding whether the cumulative effect of both the allegedly false testimonies and suppressed evidence is material, the court employed Giglio's *lower standard for materiality*. See Smith, 572 F.3d at 1334; Arias, 2000 WL 933010, at *4–6 (recognizing the conflicting standards and concluding that the false testimony and suppressed evidence collectively was not material "even if we employ [Giglio's] lower materiality standard"). In doing so, the court remains very "confident that the jury's verdict would have been the same." Kyles, 514 U.S. at 453.

determining whether it shows guilt if it finds that the testimony was false"), cert. denied, 131 S. Ct. 1058 (2011); cf. Wright v. West, 505 U.S. 277, 296 (1992) (plurality opinion) ("As the trier of fact, the jury was entitled to disbelieve [the defendant's] uncorroborated and confused testimony . . . [and] to discount [the defendant's] credibility . . . and to take into account [the defendant's] demeanor when testifying . . . [;] [a]nd if the jury did disbelieve [the defendant], it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt."); Wilson v. United States, 162 U.S. 613, 620–21 (1896) ("[I]f the jury were satisfied . . . that false statements in the case were made by defendant, . . . they had the right . . . to regard [the] false statements . . . as in themselves tending to show guilt."); United States v. Burgos, 94 F.3d 849, 867 (4th Cir. 1996) (en banc) ("Relating implausible, conflicting tales to the jury can be rationally viewed as further circumstantial evidence indicating guilt."); United States v. Mejia, 82 F.3d 1032, 1038 (11th Cir. 1996) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true."), abrogated on other grounds by Bloate v. United States, 130 S. Ct. 1345 (2010).

In sum, Bartko "received a fair trial . . . resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. No Brady or Giglio violations occurred.

III.

Bartko received a fair trial in compliance with due process. The verdict is worthy of confidence. Accordingly, the court DENIES Bartko's motions for a new trial [D.E. 211–13, 225, 237]. Furthermore, the court DENIES Bartko's motion to unseal [D.E. 221]. The court is prepared to proceed with sentencing. Counsel shall confer and submit a proposed term of court in which to schedule the sentencing.

SO ORDERED. This 17 day of January 2012.

JAMES C. DEVER III
Chief United States District Judge