

## STATEMENT OF THE FACTS

The Appellant Brief submitted by counsel on behalf of Marcusse contains many statements with material errors. Notice of this was filed at the Sixth Circuit in a timely manner on 7/24/06. The prosecution team has engaged in multiple acts of evidence tampering on the trial court's record and has made improper findings or conclusions unsupported by legitimate evidence or that is contrary to the evidence. Notice of this fact has been filed under a FRAP 10(b)(2)&(e) motion. Several FRCP Rule 60(b) fraud motions were filed at the district court (R. 307, 309, 551, 563, 590), allegations which have never been denied by the government).

## BACKGROUND INFORMATION

Sanctuary Ministries was formed in 1998 by George Besser, a Roman Catholic, and Janet Marcusse, a cancer survivor, to help cancer victims and to build an alternative health clinic (Marcusse at TR 80, 3118-20, Exh. B-2). The primary source of initial funding was to come from similar-minded investors like Dan Calkins, who agreed to fund this health ministry by sharing their funds and splitting the returns on investments on a "50/50 basis" (Calkins at TR 2574-75; Exh. B-2).

All investors had a signed contract on file which were

freely signed with "force majeure" stipulations knowing that meaningful returns in any financial venture have inherent risks and are never "guaranteed" as several government investor witnesses confirmed (Stinger at TR 187, Murphy at TR 265, Beemer at 341, Nowak at TR 541, Bannister at TR 650, Pittman at TR 679, Vandenberg at TR 699).

The contracts agreed to diversification and assigned discretion over the choice of investments made on behalf of investors (Exh. E-4, E-5). The contracts also included a separate page disclosing the investments were exempt from securities registration (GX-63b, Exh. E-5), due to 15 U.S.C §77c(a)(4) and §80a-3(c)(10)(B). The first investor newsletter dated 10/99 disclosed the precise bank holding the investments, Suisse Security Bank & Trust (hereafter referred to as SSBT), eliminating "secrecy" (GX-31; Kaczor at TR 3597).

Independent sales associates had their own organizations, which were reflected on the various investor contracts (GX-63b; GX-63c; GX-170; Exh. E-3; TR 3114-15).

For those interested in pursuing full-time ministerial or charitable works, application could be made to be provided with financial support (GX-20). Investor Richard Weaver described the process at the 2004 preliminary/ detention hearing as, "This basically explained how you set up your own church or missionary or mission to help other people". When asked if they charged a

fee for the book, Weaver stated, "no, I don't think they did. They requested a donation" (Weaver at TR 32, 7/28/04, GX-20 at trial was Gov. Exh. 1 at the 7/28/04 hearing). John Beemer was asked by AUSA Gezon if there was a "religious or humanitarian aspect of this program", to which Beemer testified that it was "set up" as such and "myself and my wife were very much involved with our church" (Beemer at TR 50, 7/28/04 hearing).

The investments were structured as a "private placement or joint venture" as disclosed in investor contracts (Def. Exh. M-L; Exh. E-3, E-4, E-5), and as admitted in Agent Moore's 12/5/03 Complaint (R.2). Under 26 U.S.C. §731, distributions would then be not taxable until no original principal was left as calculated by "adjusted basis". The 10/99 investor newsletter, which described the SSBT Bahamas program, also explained the monthly payments or checks to investors as, "current distributions", and as "cash flow", to reflect this tax treatment (GX-33). The presence or "use" of a "church" has no bearing on this type of tax treatment whereas incorporation does. 33 Am Jur 2d, Federal Taxation (2002) states at ¶2001, that a "partnership" includes a "business, financial operation, or venture", but "is not, within the meaning of the Code, a corporation, trust or estate." AUSA Gezon argues that in regards to jury instructions, "Ms. Marcusse seems to suggest she's unincorporated, which really isn't a legal issue" (TR 3447).

The prosecution alleged in the indictment that the name of the "investment company" was Access Financial Group (Item 1, R.24, R.108, R.323), rather than Sanctuary Ministries, which permitted the prosecution to claim that the "defendants also represented to investors that Access operated as a tax-free church and that an investor's return would be non-taxable if the investor purchased a 'church sub-chapter' package from Access (AB-p.12). The prosecution characterized this as a "checkbook church" 19 times in front of the jury, to which defense counsel objected to 4 times and was sustained on the first objection (Court at TR 237), making no comment thereafter (Exh. T-2). In his closing arguments at trial, AUSA Gezon describes this as, "they're promoting this anti-tax message, and they pressured the victims to buy this church chapter for \$6,000" (Gezon at TR 3567).

All investor deposit receipts displayed "Sanctuary" only (Kaczor at TR 3595; GX-63d; E-3), as did every investor check attached to the 39 mail fraud counts. An "Instructions to Make Deposits" form naming Sanctuary Ministries as the recipient for investment deposits was mentioned in the 10/99 investor newsletter as being attached to it (GX-33, p.3). The attachment was contained in the 12/5/03 Complaint (R.2, Att. C), but was removed from the newsletter exhibit (GX-33) before the prosecution submitted it as evidence at trial. This was also

proven by a pre-existing civil case filing in the same court (Exh. B, Doc. 1-2, p.7).

Investor funds raised by the sales associates were to go to Sanctuary Ministries or directly to the investments (GX-31, Hammond at TR 2660-62). It was later discovered that Diane Boss did not comply and the substantial sum of \$1.5 million in investor funds had been embezzled by the Bosses through diverting investor funds to and writing checks directly out of Access Financial Group (Marcusse at TR 3089-91, 3110). Marcusse went to law enforcement on 8/2/01 to report the embezzlement (R.309-3). The Bosses had taken the bank records at the time Diane Boss was removed as a signatory from the accounts (TR 3192). Detective Crumb responded by contacting the IRS (TR 1486). The IRS caused the investigation to turn back around on Marcusse, with the issuance of an improperly sworn search warrant on 12/18/01 (Exh. PP). Marcusse testified in front of the grand jury on 5/19/02, and she served a motion to quash based on this involvement of the IRS.

This first grand jury expired without action on 8/29/03 (R.6, Item 5). A criminal complaint and affidavit signed by FBI Special Agent, Samuel Moore, was entered and sealed on 12/5/03 (R.2, R.6). Marcusse was arrested on 7/1/04 on an expired and sealed warrant (R.6), over a subpoena for a Show Cause hearing, which official documents prove she was never legally served

(R.307, R.309, Exh. EE). Marcusse was detained as a "flight risk" over this sealed warrant, and on 7/29/04, the initial indictment was obtained but no trial date was set.

On 10/27/04, a superseding indictment was entered in which 82 criminal counts were represented to be based on the "scheme to defraud" being that of a "ponzi scheme investment fraud" (R.6), but charging three conspiracies, each including some tax-related offense (Count 40, 41, 42). On 11/4/04, the trial date was first set for 2/7/05, (R.113), but reset several times, eventually starting on 5/16/05, allowing for Marcusse to be held in county jails for over 10 months pretrial. The right to a speedy trial was first asserted on 11/9/04 (R.148).

IRS Special Agent James Flink, chief government witness and "investigator", presented several summary exhibits at trial (GX-170, GX-172), claiming that \$12.1 million was "spent" by the accused on "themselves and others", rather than on any investments. At the detention hearing, however, Agent Flink had testified that \$2.7 million was "spent" on "foreign investments" (TR 22-23, 7/29/04), causing the magistrate to find that while investments had been made (TR 12, 8/4/04), none were of the "prime bank" nature the prosecutor alleged was promised to investors by GX #2 (changed to GX-1 at trial). At trial, Agent Flink concedes under cross that if an investment did not match the criteria of a "prime bank" instrument in GX-1, he did not

count the investment in any of his summary chart exhibits (Flink at TR 2052). GX-1 was "recognized" by only 6 investors out of a group the government alleged totaled 577 (Exh. A). The evidence and testimony further established that GX-1 was only seen by investors for a short time prior to the time of the 39 mail fraud counts (Exh. A). No investors were found which testified that GX-1 was the only type of investment they believed to have been made on their behalf (Exh. A). The first morning of trial, the judge limited the defense to only presenting witnesses and evidence on the government's charge of "prime bank" investments. No evidence or witnesses were permitted on other types of investments or the defense that the accused were deceived by others (TR 8-9). The judge also ruled that "alleged investments" were "irrelevant" to the charges (R.401), establishing intent to defraud prior to any jury-found facts.

Marcusse challenged the IRS's summary exhibits numerous times on the record as her defense was denied vital witnesses and evidence due to the judge's rulings. She testified that four main non-prime bank investments were utilized from 1998 through 2001, totaling \$12.2 million, not counting a number of other small diversifications. Investor testimony further established their awareness of these investments.

SSBT BAHAMAS CD/STOCK TRADING PROGRAM

The "flagship" investment was that of \$4,226,000 placed in a stock program at Suisse Security Bank & Trust (SSBT) in Nassau, Bahamas, called the "Bahamas CD Program" (Def. Exh. M-AA; GX-2, GX-3, GX-31, GX-33). The group initially held smaller C.D.s, but eventually held a \$10 million certificate of deposit at SSBT, used as collateral to trade stocks (TR 2072; R.422-2, p.26). Distributions of 3% per month on this program were paid to investors as credited in the offshore accounts. Notice to investors of this investment was provided in the 10/99 newsletter (GX-33).

SSBT was endorsed in writing by FBI Supervisory Special Agent, Gerard Forrester, on 2/11/00 and 1/10/01 (R.392-2, pgs. 15-18, Exh. R). This investment and its returns were compounded offshore as disclosed in the investor flyer attached to GX-33 but removed by the prosecution before submission as evidence (Marcusse at TR 3155). Distributions were made to investors from Sanctuary Ministries as beneficiary on the accounts as was customary (Def. Exh. M-U; Exh. D-2, D-4; R.309-4, p.1; TR 3357-58).

The Central Bank of the Bahamas revoked the license of SSBT on 4/2/01 and all accounts were frozen (Def. Exh. M-Q; R.392-2, p.26). SSBT employees had indicated the problem would be quickly resolved through the courts (Def. Exh M-Q, p.2). It was not until

8/3/02, that the Provisional Liquidator of SSBT, Raymond Winder of Deloitte Touche, disclosed in a report that \$31 million was "missing" due to the "obstructions and interference by the Bank's management" (R.422-4, p.24). It was at this same time, on 7/29/02, that a sealed arrest warrant was issued against Marcusse (R.6). After 4/2/01, only a small amount of checks were handed in person only to those investors claiming a financial emergency (Marcusse at TR 3157), indicating why the last mail fraud count of the 39 charged was dated 3/23/01, thus corresponding to the revocation date of SSBT's license. Three checks released in June and July, 2001, on such a "hardship" basis were alleged to be "promotional" and mislabeled as "profits" in the indictment under money laundering charges (Counts 55, 56, 57).

According to news reports, Agent Forrester from the FBI retired and was seen going to court in the company of SSBT's former owner (R.422-4, pgs. 6-8). After a \$10 million money judgment was approved against the accused on 7/11/05 (R.453), the Nassau Guardian reported on 10/25/05 that the "missing" funds in SSBT were now \$21 million (Exh. QQ).

A 2/10/00 House Report No. 64-363, dated one day before the first Forrester letter, discusses "Operation Dinero" wherein the IRS and DEA operated a Class B bank in Anguilla, in which an "undercover agent promoted the bank's services", and "Operation Juno", which was an undercover stock brokerage (R.563, Att. 19,

p. 5, Rule 60(b) fraud complaint; TR 12, R.639). This was all brought up in pretrial pleadings and at the sentencing hearing, yet the existence of this agent was effectively quashed by the government.

Another 2/5/01 Senate Hearing Report disclosed SSBT had engaged in "possibly fraudulent promises to pay extravagant returns and possibly fraudulent misuse of investor funds" (Exh.UU, p.276), but this report was not discovered until after trial. Marcusse had likewise been convinced the investors had experienced great returns (TR 3358).

In 9/02, shortly after the 8/3/02 report from the SSBT Provisional Liquidator, an investor newsletter disclosed that litigation was being considered against several government agencies (GX-54, p.1). Such investor communication, the first made in 2002, and any filings objecting to the bad faith or unclean hands of the prosecution team in this matter, were used at trial to allege the "guilty intent" of the accused and label them as "anti-government" (Gezon at TR 1131-32; AB-p. 76). AUSA Gezon described it to the jury as, "she's always on the attack. Part of her scheme to put the focus off her is always to go on the attack" (TR 3524).

Investor Beemer was asked what "excuses" he was given for not getting a check. He testified, "I believe the explanation was the program -- something happened to the program in the

Bahamas and the bank failed and they couldn't -- or the bank was not allowing the funds, releasing the funds." Beemer further testified he called between "once" and "three times a month" and the "excuse" was always the same (Beemer at TR 50, 7/28/04).

A defense motion for subpoenas for witnesses, Agent Forrester and Raymond Winder, among several others, was denied (R.385, R.392, R.401). Agent Flink testified that only \$1.4 million went "to the Bahamas", refusing to specifically admit any of it went to SSBT (Flink at TR 3375). Marcusse was not permitted to use any actual bank statements or wire transfers as evidence (Marcusse at TR 14, 3191), instead permitted a summary exhibit only (Def. Exh. M-AA). This allowed AUSA Gezon in rebuttal closing to claim, "Take a look at her stack of papers. See if there's one single bank statement in there. There's nothing" (TR 3721).

There was also a fax from Raymond Winder dated 11/11/02 regarding SSBT's liquidation (Def. Exh. M-Q). It was one of only three exhibits Marcusse was permitted to submit to support her testimony she invested in the program. It was dismissed by AUSA Gezon as "one thing that's not signed by anybody and it says, 'Dear Client.' It doesn't have her name on it, doesn't have an account number on it, doesn't have anybody's name on it. Something she could have gotten off the Internet" (TR 3721). The fax is signed by Winder, and clearly shows it was faxed from SSBT

on 11/15/02 to Besser, and forwarded from Besser's fax on 11/19/02. Nevertheless, AUSA Gezon's argument at trial is used as the basis to add an enhancement for perjury at sentencing to Marcusse for "obstruction of justice" by having testified she placed money in an offshore bank that failed (Item 191, PSR).

After over a year's worth of denials of FOIA disclosure on Agent Forrester or SSBT by the Dept. of Justice (Exh. RR), it has since been learned that Mr. Forrester appeared in the Miami police records on 4/18/02 regarding someone breaking into his Ford F-150 truck (Exh. R).

Stock investments, such as the Bahamas CD Program at SSBT, were represented by the prosecution as that of a "prime bank" program to the grand jury, at trial, and now on appeal (AB-p.14-15, R.688, Ex. 1-4). A pre-existing civil case in the same district court contains a filing which proves that GX-3, which represents the Bahamas CD Program, was removed from the 10/99 investor newsletter (GX-33) describing it as a stock or equity program, before the exhibits were submitted at trial. GX-2 and GX-3, both from the Bahamas CD stock program, were then numbered and placed next to GX-1, the "prime bank" booklet. The Nevada Program, GX-4, is included in the grouping made by the Appellee (AB-p.14-15, 26-27) of exhibits represented to the Sixth Circuit Court and submitted in a motion to be "certified" by the trial court clerk (R.688) as that of "prime bank instrument" fraud

investments. At trial, Agent Corcoran testified he had no idea the Nevada Program was a "casino funding" investment (Corcoran at TR 2284-86). It was presented at the May, 2001, investor seminar as an investment planned after the SSBT Bahamas program cashed out.

MLC "BRANSON PROJECT"

Another main investment included \$2 million into MLC Development Int'l Inc., with \$1 million of it purchasing approximately 50% of MLC's available preferred stock beginning in 1999 (Marcusse at TR 3207). A large amount of research and preparation had projected very high returns (Dan Hammond at TR 2651, 2658, 2660-61, 2687-89; Def. Exh. M-J). The other \$1 million went into a Note due on 2/15/02 promising to return \$4 million from the lease income due MLC (Marcusse at TR 3120, 3207; Exh. TT). All investors that are asked, testified to knowing about the Branson Project as an investment and the alternative health clinic as the funding goal for Sanctuary Ministries (Exh. B-2 & F).

Dan Hammond also testifies regarding the projected returns that MLC had represented from Def. Exh. M-J. The income on South Park had been projected at \$63 to \$126 million, with all areas at over a billion dollars, at \$1,210,815,862 (Hammond at TR 2688-89; Exh. C-2, p.3). Hammond also secured financing for MLC from Church Consulting, Inc., the organization which provided the

funding for Bonaventure Adventure Park in California "for in excess of \$98 million" (Hammond at TR 2672-73).

MLC had among its principles, Michael Carney, CEO, and Robert Plaster, CFO, well known as a good friend of John Ashcroft, former Missouri Senator and U.S. Attorney General (Hammond at TR 2674; Richard Williams at TR 2782-83; Barbara Sharpe at TR 503; Def. Exh. WF-A, M-C, M-J, Exh. C-5). The MLC "Showcase Branson Project" was a large joint venture with the LVD (Lac Vieux Desert) Tribe, whose Chairman had been Richard Williams, who was also made a partner in MLC (Williams at TR 2777, 2781; Def. Exh. M-N, Exh. C-2, C-4). It was to be a large theme park, golf courses, hotels, convention center, and several gaming boats on Table Rock Lake (Williams at TR 2775-76; Hammond at TR 2676). It also became the location selected for the alternative health clinic (Exh. B-2).

Investors were informed in a 1/01 newsletter that the office was moving for the project (GX-41, p.8), and a large portion of the 5/01 investor seminar was devoted to the "Branson Project" (GX-58). MLC was located at 16282 MO-13, Suite E, Branson West, Missouri. In 10/01, Marcusse moved her office to Suite K in the same building as MLC (Hammond at TR 2689; R.309-6, p.5; Exh. C-4). Both addresses had been filed with the Bureau of Land Management in preparation for the legislation regarding making the property reservation status for the LVD (Williams at TR 2782;

Marcusse at TR 3121; R.309-6, p.6; Exh. C-4). The prosecution later claimed Marcusse "fled" to Branson in 2002 after their investigation began, using this to claim she had been "on the run" in the newspapers (Exh. BB).

Tribal Resolution No. 99-036 was signed by the LVD on 8/3/99 authorizing the tribe to proceed with the "Showcase Branson Project" (Def. Exh. M-J; R.157-2, p.48; Exh. C-2). On 1/24/00, a formal Letter of Intent was sent to Missouri Gov. Carnahan from LVD Chairman Williams in which Plaster and Carney are named as "principles of MLC" (Williams at TR 2779; Def. Exh. M-O; Exh. C-2). Branson area newspapers and the Associated Press carried a number of headline articles in the summer of 1999 regarding the project and the involvement of the LVD and Plaster as partners (Def. Exh. M-J; Exh. C-3). Concerns over Indian casinos caused politicians, such as Senator Ashcroft and Christopher Bond, to issue statements to reassure the public and help gain public support (Def. Exh. M-J; Exh. C-2, C-3).

At trial, Williams explained the importance of Plaster as part of MLC as necessary to its success, because "with his name on the list, it was kind of assured that we had a chance at this thing" (TR 2783).

The involvement of a man with the political and financial resources of Plaster responsible as CFO of MLC was the primary reason that Marcusse got involved with this investment (Def. Exh.

M-J; Exh. C-2). Marcusse was promised that all that was necessary to obtain the land for reservation status and release this huge stream of lease income, was to "break escrow" with a \$1 million payment going to MLC and from there to Plaster (Plaster at TR 2249, 2256; R.393-2; R.157-2; Exh. C-2). Gurmail Sidhu, an attorney/solicitor in Birmingham, England, for Marcusse handling the accounts of Starbright and City Center (Def. Exh. M-X; Exh. E), along with trustee, Richard Gerry, arranged to send a wire transfer of \$1.2 million in 2001 to MLC (Flink at TR 3374-75; Marcusse at TR 3152). The other \$200,000 was placed into MLC preferred stock. On 4/8/02, Carney, Marcusse, and Randy Scott, V.P. of MLC, traveled to Washington, D.C., to connect with Williams at a MAST (Mid-American Sovereign Tribes) meeting, so that they might attend the appointments with members of Congress as set up by Plaster (Marcusse at TR 3121; Williams at TR 2782; R.275-5).

It was discovered after trial, according to Britain's Sunday Mercury quoting a "National Crime Squad spokesman", Gurmail Sidhu's home and office had been raided on 7/11/04 under a "drug trafficking" search warrant, naming Starbright and City Center, and confiscating computers and records (Exh. E). On 5/12/05, the court denied Marcusse a pretrial request for a subpoena for these bank records (R.342). At trial, another "investigator", IRS Agent Steve Corcoran, testifies that their investigation had not

included Starbright (Corcoran at TR 2292-93). Agent Flink swears he doesn't know about the \$1.2 million transfer to MLC (Flink at TR 21-23, 7/29/04 hearing), claiming that Carney "told us that you did not give him any money" (Flink at TR 19-20).

Carney passed away in 11/02 (Exh. I). Afterwards, in response to a letter from Marcusse, Plaster denies all responsibility, claiming in a 11/15/02 letter that he had never been "involved" within MLC (Plaster at TR 2277-79; R.392-2, p.2). He also admits to keeping all the money placed with him on behalf of the investors (Plaster at TR 2256).

The court denies all defense witnesses, including that of Williams and two large investors, Hubert and Terlesky, who had also been involved with MLC (R.385; R.401; Marcusse at TR 2222). Branson issues, however, were raised so often at trial, totaling over 382 times (Exh. F), that after 10 days into trial, the government announced their intention to call Plaster as a witness (R.397).

Government witness investor Tom Bannister testifies that he had provided documents from Carney to the government in 2003 regarding the funds Plaster received. Bannister even testifies that Carney had been living in a home that "Plaster had owned" (TR 663-65). Plaster testifies on 6/3/05 that he obtained \$1 million for a "non-refundable deposit" on a "one-page" contract for \$45 million for 420 acres of real estate (Plaster at TR

2244). The contract was reportedly signed by Carney, but contained no witnesses, did not contain Marcusse's signature nor indicated she was a party to it, had no notary public attestation, was not filed with the Registrar of Deeds and did not contain a property description (GX-160).

Plaster denies any knowledge of the \$4 million in returns owed on the \$1 million he obtained from MLC (Plaster at TR 2261, Exh. TT). When Marcusse asks William Flynn about this, his defense counsel objects to the Note being placed into evidence (Valentine at TR 2979-81). Plaster denies any knowledge of being named as a "principle" and "founder" of MLC in front-page newspaper articles (Plaster at TR 2247-48, Exh. C-3). He claims he had no idea he was listed as Chief Financial Officer of MLC within the offices of the Missouri Dept. of Corporations (Plaster at TR 2248, 2257-61; Def. Exh. M-C, Exh. C-2).

After being shown the MLC Missouri corporate filing in which he is named, he then admits he is "not sure" about whether or not he knew about the newspaper articles (Plaster at TR 2258). Def. Exh. M-J contains a fax from Plaster to Carney dated 7/22/99 regarding the publicity in the newspapers at the time, but the court denies the newspaper articles as evidence (Court at TR 2251; Exh. C-2, C-3). Plaster does not recall having his picture taken with Williams or as it being "commemorative" of the "Showcase Branson Project" (Plaster at TR 2249-53, Exh. C-2,

p.4), and the government objects to the mention of the Williams letter to Gov. Carnahan (TR 2249-50, Exh. C-2). Plaster admits to having authored the 1/3/02 letter in which he agrees to release the real estate for lease income (Plaster at TR 2253-55; Def. Exh. M-B; Exh. C-2). He admits meeting Marcusse and that he kept all the money (Plaster at TR 2256). Plaster even admits he's seen defense counsel's files, including Marcusse's evidence, to prepare for his testimony (TR 2271).

Richard Williams, who had been denied by the court as a defense witness, appears unexpectedly to testify for Marcusse on 6/7/05. Williams' testimony discredits Plaster's testimony of 6/3/05. Defense exhibits M-N and M-O, the photograph with Plaster, the letter to Gov. Carnahan, are now able to be entered into evidence through this surprise witness (Williams at TR 2778-79; Exh. C-2). Immediately following Williams' testimony, the judge complains about this case going to "Cincinnati...to say what Bell did wrong during this trial" (Court at TR 2804-07).

Agent Flink is recalled to the stand on 6/10/05 to "fix" the government's story. He changes his earlier testimony to now state that funds were sent to a "barrister named Sidhu who set up some companies in England, Starbright Management, City Center Management...it was transferred from Sidhu to MLC, and then from MLC it was given to Robert Plaster as a down payment or a non-refundable deposit on the land" (Flink at TR 3374-75).

In his rebuttal closing argument, AUSA Gezon relies upon Plaster's "contract" to claim that Marcusse "gave" \$1 million to Plaster for a "non-refundable deposit", and this indicated she was "not acting in good faith" with investor funds (Gezon at TR 3721-22). There was no testimony presented that any of the accused had ever seen Plaster's "contract" before the trial (GX-160).

AUSA Gezon also misrepresents the \$87 million contract that the LVD had with MLC in which the LVD assumed responsibility to pay for the land and co-ventures once it was in reservation status (Williams at TR 2786; Def. Exh. M-J; Marcusse/Flink at TR 2063-66, 2070; Flink at TR 36-39, 7/29/04; Exh. C-2, C-3). AUSA Gezon asks only about the financial responsibility the LVD had to MLC prior to the land going into reservation status, which hadn't yet occurred (Williams at TR 2794-2800). This ignores the fact that it had been Plaster reneging on his 1/3/02 agreement to release the land for lease income with the investors \$1 million in hand, causing the entire project to fail (Flynn at TR 2975-92; Hammond at TR 2881; Williams at TR 2799-2800). AUSA Gezon tells the jury that it was Marcusse's "M.O." to blame others, such as Plaster, for her own crimes (TR 3527).

CRAWFORD LTD.

A third main investment was that of Crawford Ltd., an oil partnership. This was another contract, which had been with MLC, in which MLC had agreed to collect \$25.5 million due on one of two foreign government oil storage facility contracts held by Crawford Ltd. A sum of \$4,186,700 had been invested in the oil project (Hammond at TR 2692-93; Maisel at TR 2811; Def. Exh. M-Z). Plaster's experience as founder of Empire Gas & Oil in combination with his top political connections resulted in MLC being given the Power of Attorney to collect the funds. The contract agreed to pay \$16,270,625.20 of the proceeds to the investors (R.309-4, Exh. D-4). After the \$25.5 million wire transfer was sent, Marcusse was informed it did not arrive in MLC's bank account at Union Planters in Branson (Marcusse at TR 3155-56; Exh. D-4), but the court refused to subpoena the bank records to substantiate this claim (R.333; R.342). Richard Gerry and attorney Darwin Kal agreed to pursue litigation against Plaster on contingency (Marcusse at TR 3111, 3122). Kal was denied as a defense witness (R.401), and defense counsel blocked Gerry as a witness (Kaczor at TR 2231; Exh. E-2).

The President of Crawford Ltd., Robert Rydberg, passes away in 1/05, just a few months before trial (Flink at TR 2121). The repeated delays to trial caused Marcusse to permanently lose this vital witness. Plaster denies any knowledge of the POA and

contract at trial (Plaster at TR 2256), which permits the Crawford Ltd. investment to be repeatedly ridiculed and misconstrued by the prosecution as just a "Nigerian 419 scam" (Exh. J). The court does not permit Def. Exh. M-Z to be entered as evidence as a summary exhibit showing all investment amounts and dates because the underlying records were not "proffered" (Court at TR 3127), even though it is based on "stipulated" bank records (Court at TR 629-30). These were the original bank records, held by the government as given to them by the Bosses, on display at trial (Gezon at TR 2649), but not permitted by the judge to be used by the accused.

MOON/ GERRY/ KRAMER-WILT

The fourth main investment involved \$1.8 million placed with Winfield Moon and Richard Gerry in Las Vegas beginning in 1/01 (Marcusse at TR 3145; Def. Exh. M-U; Exh. D-2). Gerry had as his friend and investment advisor, James Kramer-Wilt, an attorney with the Department of Treasury's Bureau of Public Debt, and considered a top government expert on "prime bank" investment fraud (R.392-2, pgs.11-13; Marcusse at TR 3131-32). Most of the content regarding investments, other than the "Branson Project", at the 5/01 investor seminar came from these advisors.

Both Agent Flink and "expert" witness, IRS Agent Goeman, testify that \$600,000 which had been transferred for investments

to Worldwide "E" Capital, LLC, a corporation formed and owned by Moon (GX-219 & GX-219a; Flink at TR 1736, 1923, 3374), was instead "income" to Marcusse in 2001 merely because she was a signatory on a sub-account (Flink at TR 3208, Goeman at TR 2370). Under cross, Agent Flink admits that he added this \$600,000 to Marcusse's "income" after his first grand jury testimony (Flink at TR 2098). Agent Goeman admits she knows "pass through" funds are not "income" (TR 2350). The prosecutor and defense counsel would not permit any bank account statements or account opening forms to be used from bulk exhibit GX-219, the Wells Fargo "Worldwide" account to which Marcusse had "stipulated", conditioned on the fact that she be able to use the bank records for her own evidence as well (TR 629-30; 3141-42; Kaczor at TR 3163-64). Bank records and account opening forms from GX-219 would have established that Moon owned Worldwide as a limited liability corporation registered at the Nevada Secretary of State, with withdrawal receipts signed by Moon proving that he transferred all of these funds and more to his main account for investments (R.551, Rule 60(b) fraud filing; Exh. D-2).

Moon did not perform as agreed, causing Gerry to send a 6/29/01 fax instructing Moon to return the \$1.8 million in funds (Def. Exh. M-U; Exh. D-2; TR 3145). A total of \$1,320,000 from this amount is transferred to MLC, beginning in September, 2001 (9/17/01 Sidhu letter, Exh. E), with \$125,000 retained by Gerry,

and the balance returned to investors. Defense counsel prevents the appearance of both Moon and Gerry as witnesses (Kaczor at TR 2220-23, 2231; Exh. E-2). Kramer-Wilt reportedly could not be located, yet he was under government supervision at the time (Kaczor at TR 2644, Exh. L).

AUSA Gezon attests in his closing argument that the return of funds from Moon is "in 2002 at a time in 2002 when the investors are screaming, the place has folded" (Gezon at TR 3721). He further attests to the jury that after the funds are returned from Moon, they are transferred to Plaster (Gezon at TR 3721-22).

Investments in the four main choices totaled \$12,274,030, negating the government's "classic ponzi scheme" allegation (Def. Exh. M-AA for \$4,226,000 with SSBT; Def. Exh. M-U for \$1,861,330 with Moon; Def. Exh. M-Z for \$4,186,700 with Crawford Ltd.; \$2 million into MLC, TR 3120). The profits represented to Marcusse from Suisse Security Bank on its stock market investment prior to collapsing, negate the "ponzi investment fraud" charge, both as to a "classic" type, referring to no investments made, or as to a "prime bank" type, referring to the state of "nonexistent" investments. Notice provided to investors in newsletter negate "investment fraud" or "deceit" as to the nature of investments. Evidence tampering by the prosecution team combined with the refusal of the court to permit Marcusse to make objections at

trial (Court at TR 31; Exh. A) or cross examine most investor witnesses prevented a fair trial. \$1.5 million was lost to the Boss embezzlement and reported to law enforcement by Marcusse. Civil litigation against the Bosses was impeded by the prosecution, interfering with a Motion to Adjourn in 7/02 at the time the judgment stage had been reached for investors (Exh. GG).

The prosecutor withdrew his "ponzi" scheme allegation in rebuttal closing arguments (Gezon at TR 3713), replacing it with a "failure to file" scheme (Gezon at TR 3455, 3744, Court at TR 3772-3776, 3778) as aided by the way the indictment was crafted. Defense counsel, on behalf of their clients, assist the prosecution by agreeing to this "failure to file" allegation they attest in closing arguments had not been a charge in the indictment (Dunn for Besser at TR 3642-43; Kaczor for Marcusse at TR 3589, 3607), in contradiction to the finding of the court (TR 3456). At the jury instruction conference, after the defense rested, "failure to file" was submitted as a new charge to the jury (Gezon at TR 3453-55). The trial judge denies the defense the requests to instruct the jury that "gross income" did not include "pass through" funds, gifts, and loans (Valentine at TR 3457), or to include the phrase, "unless excluded by law" (Garthe at TR 3456; Valentine at TR 3457-59), the reason being the court's concession, "if I give that instruction with that in it, there would be no criminal prosecution of them because it

wouldn't be income" (Court at TR 3465). IRS "expert" witness, Agent Goeman, had agreed with the defense that "any relevant or any usable definition of gross income must include some sort of a phrase unless excluded by law" (Goeman at TR 2373).

After trial, the government quietly concedes, for the Bosses only, to reduce their unreported income by \$142,377 based on the amount of "pass through" funds that was placed into the Crawford Ltd. investment (PSR Items 147, 171; R.501-1, p.6). There were no unreported income allegations made against Marcusse or Besser in the indictment (Count 40, Items 3-17).

The prosecution team has represented to the grand jury, the petit jury, the accused, the investors, the media, and now the Sixth Circuit, ever-varying theories and conclusions throughout this case, specific to the audience, and all attested to be based on "overwhelming evidence". Bank record evidence could have resolved many of the disputed issues, but it could not be used by the defense on the record of the trial court.

Just after verdicts were in, AUSA Gezon tells the Grand Rapids Press he was "pleased" the jury had found the accused guilty of a "ponzi scheme" (Exh. A-3). The court refused to grant a motion for acquittal because it found the crime to have been a "ponzi scheme" (R.492).

In his rebuttal closing, AUSA Gezon claims, "quite frankly, ladies and gentlemen of the jury, we'll never know what she did

with all that money she sent over there", referring to the "foreign wire transfers" (Gezon at TR 3718). He concludes with, "These folks didn't lose their money. They made money. They made millions" (Gezon at TR 3744). Besser had been detained pretrial because the court opined findings of a "Ponzi scheme that forms the basis for this prosecution" and on the "millions of dollars unaccounted for and secreted in foreign banks" (R.193).

At Besser's sentencing when referring to a "sophisticated ponzi", the trial judge expresses his "perverse pleasure" that others had "basically scammed Mr. Besser and Ms. Marcusse and their people" yet, he also claims, "The money is unaccounted for at this point. I don't know whether Mr. Besser buried it in his backyard" (Court at TR 31-32, 10/13/05). A witness at trial indicated Besser had sold his home, containing "his backyard" three years prior to trial (McGuire at TR 2150).

Just 2 weeks after Besser's sentencing, but 4 years after the start of the government's investigation, this purported mystery over "unaccounted" funds was reported to be solved. According to a 10/28/05 Press Release issued from the Office of U.S. Attorney targeted to investors, "Approximately \$7.4 million was spent by the accused to promote the scheme and to make it appear to be a legitimate investment venture" (Exh. FF, p.4). No mention is made of the role Plaster or Agent Forrester and the SSBT management had in the affair. The government now changes

tack again for the audience of the Sixth Circuit to claim \$5 million of this \$7.3 million was "removed" and "transferred to entities and financial institutions (domestic and foreign) and never returned to the investors" (AB-p.25).

Marcusse at 49 years old, with no prior arrests, was sentenced as a Category I to 25 years after a "downward departure" from a "guidelines" calculation of 14,520 months (Exh. 0, p.45, Item 261, original PSR). Besser at 67 years old, also a Category I, who had refused a 3 year plea bargain shortly before trial (TR 43, 5/5/05 hearing), had similar "guidelines" applied and received a 20 year sentence. For the media audience, the sentence was described by AUSA Schipper as "really off the charts. There's nothing even close" (Exh. 0), but for the Sixth Circuit, the "court fashioned a very substantial downward departure from the sentence range, to reach a reasonable sentence" (AB-p.86).