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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIM. NO. 15-398
WAYDE MCKELVY	:	

GOVERNMENT'S RESPONSE TO DEFENDANT WAYDE MCKELVY'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

The United States of America, by its attorneys LOUIS D. LAPPEN, Acting United States Attorney for the Eastern District of Pennsylvania, and ROBERT J. LIVERMORE, Assistant United States Attorney, respectfully represents as follows:

I. Introduction

On September 2, 2015, a federal grand jury in the Eastern District of Pennsylvania returned a ten-count indictment charging TROY WRAGG, AMANDA KNORR, and WAYDE MCKELVY with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, seven counts of wire fraud, in violation of 18 U.S.C. § 1343, 1 count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371, and one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff and 17 C.F.R. § 240.10b-5. The charges in the indictment stem from the defendants' participation in the Mantria Ponzi scheme which collapsed in November 2009 when the SEC filed a motion for a temporary restraining order with the United States District Court in Colorado.

In his motion, defendant MCKELVY requests the Court to order the government to produce all the e-mails of certain government witnesses. Quite frankly, the government's desire to obtain these e-mails probably surpasses defense counsel's desire to obtain these e-mails,

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because the government believes that these e-mails contain a significant amount of inculpatory evidence. Unfortunately, the government simply does not have and cannot obtain the e-mails requested by defense counsel. All e-mails in the government's possession have been turned over in discovery. For this reason, the defendant's motion must be denied.

II. The Investigations

In order to understand why the government does not have possession of these e-mails, it is necessary to review the investigative process. E-mails are typically obtained in a criminal investigation through the use of a search warrant. The first two government agencies to investigate Mantria were the Colorado Division of Securities and the United States Securities and Exchange Commission ("SEC"). Because the SEC was able to quickly obtain a temporary injunction and, shortly thereafter, a permanent injunction, the SEC's investigation of Mantria was abbreviated. Thus, the SEC did not obtain any of the e-mails at issue here. The FBI in Denver then began a limited investigation of Mantria. This investigation was hampered by the untimely death of the assigned Assistant United States Attorney and the retirement of the FBI case agent. As a result, the FBI in Denver did not obtain the e-mails at issue here. In late 2014, the criminal investigation was transferred to the FBI in Philadelphia. By this point, five years after Mantria collapsed, the government simply could not obtain the necessary search warrants to seize the e-mails at issue here due to the lapse in time, even though there is no question that these e-mails would contain a significant amount of incriminating evidence. Consequently, the government does not have the e-mails requested by the defendant.

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III. Discovery Process

The government has disclosed in discovery all available information. The government has produced all available materials from: (1) the SEC and Colorado Division of Securities investigation, (2) the FBI investigation in Denver, (3) the FBI investigation in Philadelphia, and (4) all materials obtained from any other source.

As noted in the defendant's motion, the amount of discovery is "immense." The government provided the bulk of the data on a hard drive and has supplemented that information with additional information on disk and via e-mail. In addition, the government received approximately 100 boxes of documents from the Mantria receiver. Although these documents have not been scanned, the government notified defense counsel of their existence on October 1, 2015, the government provided a rough table of contents for these boxes, and the government informed defense counsel that they may view these documents at a mutually agreeable time. Based upon the government's cursory review of these materials, it does not appear that any of these boxes contain the e-mails sought by the defendant.

The government and defense counsel have been discussing the issue about these e-mails since at least November 4, 2015, when defense counsel sent government counsel an e-mail inquiring where these e-mails could be found. The parties' discussions have continued since that time. For example, on October 11, 2016, defense counsel sent government counsel an e-mail with an attachment of a Mantria "Daily Sales Report" which defense counsel averred that WRAGG e-mailed to MCKELVY on a regular basis. Pursuant to defense counsel's request, the FBI searched all available materials but was unable to find any additional "Daily Sales Reports" or e-mails between WRAGG and MCKELVY.

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On October 31, 2016, government counsel e-mailed defense counsel and stated, "It is clear that the e-mails between Mr. Wragg and Mr. McKelvy are a focal point in this case. Therefore, I am going to ask the agents to keep digging to make sure that we (all of us) have them." The FBI thereafter sent additional electronic storages devices provided by the receiver to the FBI laboratory ("RCFL") for analysis. Unfortunately, a forensic review of these devices did not uncover any of the requested e-mails. On January 10, 2017, government counsel sent defense counsel an e-mail which stated:

Pursuant to your request to search for e-mails, the FBI sent one of the hard drives we recovered from Mantria's storage unit (namely s/n 9SZ34B4Q) marked with RCFL barcode 28181 to the RCFL for processing. The RCFL referred to this exam as request #17-111. A search of this hard drive did not reveal any e-mails. In fact, there was very little data on it at all. The RCFL report is attached.

We have several other devices currently being processed at the RCFL. I will let you know what they find.

I note that there was a folder of e-mails and text messages turned over on the hard drive you provided in folder 17 labeled "Mantria Storage Unit Media Cellphone And Email Folders For Multiple Devices". The e-mails can be accessed by clicking on the Report.html file for each searched device.

On February 24, 2017, government counsel alerted defense counsel that the FBI was able

to retrieve some e-mails from the storage devices provided by the receiver. The government

placed those e-mails on a disk and sent it to defense counsel. However, as defense counsel noted

in the motion, most of these e-mails concerned communications by a Mantria employee named

Jadah Hill, not the persons identified in the defendant's motion. On June 28, 2017, government

counsel sent an e-mail to defense counsel providing further information on e-mails in the

discovery materials by stating:

Disks 8-10 contained the forensic image of the Mantria computer server provided to the FBI by the receiver who took possession of all Mantria property. I was

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looking through the files. The .eml files can be opened by Microsoft Outlook. The files marked .eml.txt are also Outlook files. However, you may need to import those files into Outlook before they can be opened. Looking at the size of some of those files, it is possible that they may not contain any actual text.

The government's search for responsive e-mails was not limited to items in the government's physical possession. Pursuant to his cooperation agreement, the government requested that TROY WRAGG produce any e-mails in his possession. WRAGG, through counsel, stated that he maintained possession of his Mantria laptop until approximately 2011 when the battery died on that computer. After the battery died, WRAGG discarded the laptop. Therefore, WRAGG currently does not possess any Mantria-related e-mails.

The government also asked AMANDA KNORR to provide any Mantria-related e-mails in her possession. Through counsel, KNORR stated that she does not possess any Mantriarelated e-mails.

The FBI investigators contacted Christopher Flannery who stated that he does not possess any Mantria-related e-mails.

The government contacted the attorneys for Daniel Rink and requested that they provide any Mantria-related e-mails in Mr. Rink's possession. Counsel for Mr. Rink from the law firm of Conrad O'Brien, PC, are currently searching for any Mantria-related e-mails. If they are able to find any e-mails, the government obviously will provide copies to the defendant.

Finally, the government is open to exploring any other avenue available to obtain these emails. If the government successfully finds any such e-mails, the government surely will provide copies to the defendant.

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IV. Discussion

In the defendant's motion, he concedes that Rule 16 requires the government must permit the defendant to inspect and to copy documents and other data *"if the item is within the government's possession, custody or control.*" There is no question that if the government had possession of these e-mails, the government would be obligated to disclose them to the defendant as part of discovery. Since those e-mails likely contain inculpatory evidence, it is in the government's interest to obtain them. Unfortunately, in this instance, the government does not possess the e-mails and has no apparent means of obtaining the e-mails. If the government does obtain all or some of the requested e-mails in the future, the government certainly will provide those to the defendant in discovery.

III. Conclusion

For the reasons described above, the defendant's motion to compel the production of documents should be denied.

Respectfully submitted,

LOUIS D. LAPPEN Acting United States Attorney

/s/

ROBERT J. LIVERMORE Assistant United States Attorney Case 2:15-cr-00398-JHS Document 112 Filed 08/01/17 Page 7 of 7

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the

following:

Walter Batty, Esq. William Murray, Esq. Counsel for WAYDE MCKELVY

> /s/ ROBERT LIVERMORE Assistant United States Attorney