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 DISMISS COUNTS ONE THROUGH NINE AND TO STRIKE COUNT TEN OF THE INDICTMENT

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, one 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.

Both defendants WRAGG and KNORR have entered guilty pleas to all ten counts of the indictment. The remaining defendant, WAYDE MCKELVY, has moved to dismiss Counts One

through Nine and to Strike Count Ten of the indictment. In his motion, defendant MCKELVY argued that those counts should be dismissed because the indictment failed to state an offense. For the following reasons, the Court should deny the defendant's motion.

II. Discussion

A. Standard of Review on a Motion to Dismiss

Federal Rule of Criminal Procedure 7(c)(1) requires an indictment to "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." United States v. Bergrin, 650 F.3d 257, 264 (3rd Cir. 2011). It is well-established that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." Costello v. United States, 350 U.S. 359, 363 (1956). The Supreme Court has further explained that "the Federal Rules were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure" and while "detailed allegations might well have been required under common-law pleading rules . . . they surely are not contemplated by Rule 7(c)(1)." United States v. Resendiz–Ponce, 549 U.S. 102, 110, (2007) (quoting United States v. Debrow, 346 U.S. 374, 376 (1953).

The United States Court of Appeals for the Third Circuit has held that an indictment is sufficient so long as it: "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." United States v. Vitillo, 490 F.3d 314, 320 (3rd Cir. 2007). Moreover, "no greater specificity than the statutory language is required so long as there

is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." United States v. Rankin, 870 F.2d 109, 112 (3rd Cir. 1989); accord United States v. Kemp, 500 F.3d 257, 280 (3rd Cir. 2007).

A ruling on a motion to dismiss is not, however, "a permissible vehicle for addressing the sufficiency of the government's evidence." United States v. DeLaurentis, 230 F.3d 659, 660–61 (3rd Cir. 2000). "Evidentiary questions" such as credibility determinations and the weighing of proof should not be determined at this stage. United States v. Gallagher, 602 F.2d 1139, 1142 (3rd Cir.1 979). Rather, in considering a defense motion to dismiss an indictment, the district court must accept as true the factual allegations set forth in the indictment. Bergrin, 650 F.3d at 265; United States v. Besmajian, 910 F.2d 1153, 1154 (3rd Cir.1990).

B. The Indictment

The facts of the case, as alleged by the indictment, are quite simple. Co-defendants TROY WRAGG, AMANDA KNORR, and WAYDE MCKELVY raised $54 million in unregistered securities offerings for a company called Mantria, which they told investors earned substantial income from various real estate and green energy projects. In truth, Mantria was a Ponzi scheme which simply used new investor money to pay "earnings" to earlier investors. In order to raise the $54 million, WRAGG, KNORR, and MCKELVY made false statements to and omitted material facts from prospective investors. The false statements and material omissions are listed in the indictment. One of the key false statements and material omissions is the fact that MCKELVY told prospective investors that he did not make a "dime" off of their investment, when, in truth, WRAGG and KNORR were secretly wire transferring MCKELVY 10-15% of the new investor funds, totaling $6.2 million.

In this case, each count of the indictment alleged: (1) background information concerning the fraud scheme, (2) the elements of the offense charged, (3) the manner and means of the conspiracy, and (4) numerous overt acts committed by the defendants in furtherance of the charged conspiracy. The indictment contained the elements of the offense intended to be charged, sufficiently apprised the defendant of what he must be prepared to meet, and allowed the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. The indictment, therefore, is legally sufficient under the Third Circuit standard set forth by Rankin, Kemp, and DeLaurentis.

In his motion, defendant MCKELVY attempted an old and tired defense attorney tactic of attempting to sew confusion where none exists. His 33-page memorandum of incoherent and legally unsupported rambling is simply an attempt to try to use smoke and mirrors to convince this Court that somehow the indictment is legally insufficient when, by any legal standard, the indictment is beyond sufficient. To further attempt to sew confusion, the defendant adds legal issues irrelevant to the motion to dismiss, such a legal discussion of potential jury instructions. Strikingly, in his motion, defendant MCKELVY *confessed* that he made certain false statements to prospective investors, as alleged in the indictment, to induce them into investing in Mantria. Defendant MCKELVY further *confessed* in his motion that he lied to investors and told them that he did not make a "dime" off their investments in Mantria. This is the exact criminal conduct charged in the indictment. The defendant's motion to dismiss the indictment, therefore, is a legally and factually unsupported effort to evade criminal responsibility for conduct which he freely admits in his motion.

C. Discussion

In his motion, the defendant claims that the indictment is legally insufficient for several reasons. First, the defendant cites to United States v. Huet, 665 F.3d 588 (3d Cir. 2012) to support his contention that the indictment was legally insufficient. However, in Huet, the Third Circuit reversed a district court order dismissing the indictment against the defendant for failure to state an offense. Completely contrary to the defendant's own highly technical and absurdly complex legal arguments as to requirements of an indictment, the Third Circuit in Huet emphasized that the "Federal Rules were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure. Id. at 594. An application of the holdings in Huet to the indictment at bar clearly shows that the indictment of WAYDE MCKELVY is more than sufficient to meet these legal requirements.

Second, throughout his motion, the defendant repeatedly made reference to Court's instructions to the jury at trial, citing to cases such as United States v. Dobson, 419 F.3d 213 (3d Cir. 2005). The issue of which jury instructions might be appropriate is not presently before the Court. The defendant has filed a motion to dismiss the indictment. Dobson and the other cases cited by the defendant which discuss jury instructions are not germane to the issue at hand. Therefore, all of the defendant's arguments on jury instructions should be denied as premature without prejudice for the defendant to propose jury instructions on these issues at the appropriate time.

Third, in his motion, the defendant frequently argued with the facts as alleged in the indictment and what evidence the government had at the time of indictment. Along with his motion to dismiss, the defendant submitted a 22-page proposed findings of fact which proposed

that the Court make findings of fact contrary to the facts alleged in the indictment. The defendant reviewed, in detail, the discovery provided and the government's anticipated evidence at trial. The defendant also provided a summary of his expected testimony. The defendant then argued that the government's evidence was insufficient. For example, the defendant argued, "the support for any fraud allegations against McKelvy was so remote . . . ." The defendant also argued, "there was no evidence that McKelvy knowingly participated in any scheme with Wragg and Knorr." As noted above, a ruling on a motion to dismiss is not "a permissible vehicle for addressing the sufficiency of the government's evidence." United States v. DeLaurentis, 230 F.3d 659, 660–61 (3rd Cir. 2000). The defendant's factual arguments should be denied. These arguments are more appropriate to be presented to a jury. These arguments are not appropriate when considering a motion to dismiss the indictment.

Notably, in his motion, the defendant *admitted* that he made numerous false statements to prospective investors to induce them to invest in Mantria. The defendant also *admitted* that he lied to prospective investors when he told them he did not make a "dime" off their investments, as the indictment alleged that the defendant made $6.2 million which was secretly wired to him by co-defendants and co-conspirators TROY WRAGG and AMANDA KNORR. In his motion, the defendant conceded that these statements to investors were "materially false." This is exactly the conduct for which the defendant is charged in the indictment. In making these admissions, the defendant admits that he is in fact guilty of the crimes charged. To suggest that the indictment should be dismissed when the defendant appears ready to admit the charged conduct is farcical.

Finally, the defendant argues that the government erred in Counts Two through Nine of the indictment by incorporating the facts alleged in Count One by reference. The government suggests that defense counsel read the cases cited in his motion which repeatedly and emphatically reject this kind of formality in indictments. Cutting and pasting all of the allegations from the 21-page Count One in each of the next nine counts does not confer any substantive rights or additional knowledge to the defendants – it is just a matter of killing more trees by turning a lengthy and descriptive 27-page indictment into an unwieldy and repetitive indictment in excess of 200 pages.

The defendant's argument also conveniently ignores the long-established legal procedure that incorporating facts by reference has been routinely used in indictments across the United States stretching back to at least the 1940's. See, e.g., United States. v. Harmon, 409 F.3d 701, 703 (6th Cir. 2005) ("Count 30 of the indictment, after realleging and incorporating by reference the indictment's "General Allegations" regarding the scheme to defraud"); United States v. Turino, 978 F.2d 315, 316 (7th Cir. 1992) ("Counts Six and Thirty, although incorporating by reference the general fraudulent scheme outlined in Count One"); Edgerton v. United States, 143 F.2d 697, 698 (9th Cir. 1944) ("Each of the fourteen substantive counts of the indictment set forth a separate such letter, after incorporating by reference all of the charges of the first count."); Perry v. United States, 136 F.2d 109, 110 (10th Cir. 1943) ("Count 5, after incorporating by reference the scheme to defraud alleged in count 4"); Mitchell v. United States, 126 F.2d 550, 553 (10th Cir. 1942) ("Each count in the indictment (except count 7), after incorporating by reference the scheme as alleged in the first count, charges a separate mailing."); United States v. Lindh, 212 F. Supp. 2d 541, 575–76 (E.D. Va. 2002) ("Each two-paragraph

count of the Indictment begins by realleging and incorporating by reference all ten paragraphs of the general allegations and all 21 overt acts alleged in Count One."); United States v. Yonan, 623 F. Supp. 881, 882 (N.D. Ill. 1985) ("Counts Three through Ten in the second superseding indictment were mail fraud charges. All except the first of those counts followed the customary drafting form of incorporating by reference (rather than repeating in haec verba) the general allegations of Count Three.") No case anywhere has ever suggested any impropriety in this procedure. The defendant's argument that this procedure is improper completely lacks any legal foundation and is contrary to established Third Circuit precedent concerning the formality of an indictment.

III. Conclusion

For the reasons described above, the defendant's amended motion to dismiss Counts One through Nine and to strike Count Ten of the indictment should be denied.

Respectfully submitted,

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/s/
ROBERT J. LIVERMORE
Assistant United States Attorney

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
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