IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	**:**	
Defendant	**:**	

DEFENDANT'S MOTION TO STRIKE SURPLUSAGE FROM COUNTS 1-10 OF THE INDICTMENT

Defendant Wayde McKelvy, by his attorneys, Walter S. Batty, Jr. and William J. Murray, Jr., submits McKelvy's Motion to Strike Surplusage from Counts 1-10 of the Indictment, and states as follows:

1. For the reasons stated in his supporting Memorandum, McKelvy moves to strike surplusage from Counts 1-10.

2. Specifically, McKelvy moves to strike the following language:

From Count 1, ¶ 2: "Despite the fact that he routinely sold securities during the duration of the conspiracy, defendant McKelvy has never been licensed to sell securities."

Count 1, ¶ 2, the word "unregistered" from the sentence, "Mantria Financial issued unregistered securities which defendants Wragg, Knorr, and McKelvy sold to investors in Colorado and elsewhere," in the Background section.

From Count 1, ¶ 3, the sentence: "Many of the investors in Mantria were not accredited and were otherwise not suitable to high risk investments."

From Count 1, ¶ 3, the phrase "in an attempt to evade SEC regulations," from the sentence "Defendant Wayde McKelvy advised and assisted investors to pool investment funds in an attempt to evade SEC regulations."

From Count 1, ¶ 4: The word "unregistered" from the sentence "During the duration of the conspiracy, Mantria raised approximately $54.5 million in new investor funds in their unregistered securities offerings," in the Background section.

From Count 1, ¶ 4: The word "unregistered" from the sentence "Most of the investors resided in Colorado and attended seminars or conferences during which defendants Troy Wragg, Amanda Knorr, or Wayde McKelvy sold unregistered securities in Mantria or its subsidiaries," in the Background section.

From Count 1, ¶ 5: The word "unregistered" from the sentence "Mantria Financial issued unregistered securities which defendants Wragg, Knorr, or McKelvy sold to investors in Colorado and elsewhere," in the Background section.

The following sentence in Count 1, ¶ 7: "None of the securities sold by Mantria were registered with the SEC," in the Background section.

From Count 1, ¶ 9: The words "and unregistered" from the sentence "Defendants Troy Wragg, Amanda Knorr, and Wayde McKelvy raised approximately $54 million from more than 300 investors nationwide in twelve fraudulent and unregistered securities offerings for Mantria and its related entities."

To the extent that Counts 2-10 include paragraphs which incorporate by reference the passages referred to above, McKelvy asks that they be stricken also.

WHEREFORE, McKelvy moves to strike surplusage, as set out above, from Counts 1-10 of the Indictment.

Respectfully submitted,

***/s/* Walter S. Batty, Jr.**
Walter S. Batty, Jr., Esq.
101 Columbia Ave.
Swarthmore, PA 19081
(610) 544-6791
PA Bar No. 02530
tbatty4@verizon.net

/s/ William J. Murray, Jr.
William J. Murray, Jr., Esq.
P.O. Box 22615
Philadelphia, PA 19110
(267) 670-1818
PA Bar No.73917
williamjmurrayjr.esq@gmail.com

November 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Motion to Strike Surplusage from Counts 1-10 of the Indictment, upon Assistant U.S. Attorney Robert J. Livermore:

Robert J. Livermore, Esq.
U.S. Attorney's Office
615 Chestnut Street
Philadelphia, Pa 19106
215-861-8505
Fax: 215-861-8497
Email:
robert.j.livermore@usdoj.gov

/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr.

Dated: November 6, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	**:**	
Defendant	**:**	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO STRIKE SURPLUSAGE
FROM COUNTS 1-10 OF THE INDICTMENT

Defendant Wayde McKelvy asks this Court to grant his Motion to Strike Surplusage from Counts 1-10 of the Indictment, as detailed in that Motion.

Under Rule 7(d), a defendant may file a motion to "strike surplusage from the indictment." Fed.R.Crim.P. 7(d). See, United States v. Hedgepeth, 434 F.3d 609, (3d Cir. 2006). As the Third Circuit stated, to make a claim that an indictment contains surplusage, the defendant must make two showings: "[U]pon the defendant's timely motion, the court may strike surplusage from the indictment or information when it is both irrelevant (or immaterial) and prejudicial." Hedgepeth, 434 F.3d at 612 (citations omitted).[1]

One test for determining if challenged language is relevant to the case is whether such language "describ[es] what is legally essential to the charge in the indictment." United States v. Oakar, 111 F.3d 146, 157 (D.C.Cir. 1997)(citations omitted). Likewise, language in the indictment is not relevant to the case if such language is "superfluous." United States v. Vastola, 899

[1] **It should be noted that the Court in Hedgepeth also stated that "Motions to strike surplusage are rarely granted" (citation omitted); see also United States v. Pharis, 298 F.3d 228, 248 (3d Cir. 2002) (Cowen, J., dissenting) ("[T]he scope of a district court's discretion to strike material from an indictment is narrow" (internal quotation marks omitted)). Id. at 611-12 (other citations omitted).**

F.2d 211, 231 n.25 (3d Cir. 1990), vacated on other grounds, 497 U.S. 1001 (1990). Moreover, the Third Circuit in Vastola gave an added gloss on the prejudice aspect of the surplusage test – it applies to "language which *unfairly* prejudices the accused." Id. (emphasis added). McKelvy asserts that the language which he believes is surplusage, as set out in his Motion to Strike, is both irrelevant and unfairly prejudicial.

Wright & Miller, Federal Practice and Procedure § 127, at 634 (3d ed. 1999), as quoted in Hedgepeth, states that the "purpose of [Fed.R.Crim.P. 7(d)] is to protect the defendant against prejudicial allegations of irrelevant or immaterial facts." Id. at 612–13. The very next sentence in Wright & Miller, after the "purpose" passage, points to the fairness issue presented by the indictment against McKelvy. That next sentence states:

> Prosecutors have been known to insert unnecessary allegations for "color" or "background" hoping that these will stimulate the interest of the jurors.

This passage accurately describes the situation here, as the allegations which McKelvy seeks to strike are not relevant because they are not "legally essential to the charge in the indictment." Oakar, 111 F.3d at 157. Construing the charges in the indictment, Count 1 as charging conspiracy to commit a Ponzi scheme wire fraud, and Counts 2-8 as charging "wire fraud," the passages set out in the attached Motion are not "legally essential" to the conspiracy and wire fraud charges.[2] Likewise, the indictment does not meet a second relevancy test – whether the "background" allegations "help[] to make sense of or establish context for the criminal charges." United States v. Huddleston, 2017 WL 3332757, *7 (E.D. Tenn. 2017), and cases cited there.

---

[2] This motion would, of course, be moot if the Court were to grant McKelvy's contention that because there is no "factual orientation" in the charging paragraphs of Counts 1-9, cf. Offense Memo (Doc. No. 111) at 3ff, these counts should be dismissed for failure to state an offense. Similarly, it is impossible for any of the challenged passages to be relevant here because they are not "legally essential to the [unarticulated] charge in [Count 1 of] the indictment." Id.

As explained more fully below, McKelvy argues that the language he seeks to have stricken as surplusage all concerns civil statutes or regulations on securities issues within the jurisdiction of the SEC. There are two categories of such surplusage: (a) allegations in Counts 1-8 (Background), all charging wire fraud, and (b) a single allegation in the "Manner and Means" section of these counts, which asserts that the three defendants "raised approximately $54 million from … twelve fraudulent *and unregistered* securities offerings for Mantria." Count 1, ¶ 9 (emphasis added).

I. THE LANGUAGE IN THE INDICTMENT CONCERNING THE REQUIREMENT THAT A BROKER-DEALER BE REGISTERED IS SURPLUSAGE.

A. <u>The Court should strike the phrase "McKelvy has never been licensed to sell securities</u>."

As stated in the Motion, McKelvy moves to strike two slightly different types of surplusage in the indictment, as set out in this and the following subsection. Both of these kinds of surplusage relate to the indictment's assertion that McKelvy violated the SEC requirement that anyone in the business of selling securities has to be registered with the SEC.

McKelvy contends that the italicized words in Count 1, ¶ 2 (Background) - "*Despite the fact that he* [McKelvy] routinely sold securities during the duration of the conspiracy, *defendant McKelvy has never been licensed to sell securities*"[3] – are surplusage. As also stated in his Motion, McKelvy requests that the following sentence be stricken from Count 1, ¶ 7 (Background): "Federal securities law also generally required those selling securities to the general public to be licensed." These references to the supposed obligation on McKelvy to be "licensed" before he could sell Mantria securities are surplusage because they are irrelevant and unfairly prejudicial.

---

[3] **The SEC does not use the word "licensed" in this context. Rather, as the SEC stated in its Motion for Summary Judgment in <u>SEC v. Mantria Corporation, et al</u>.("<u>Mantria</u>"), Case No. 09-cv-02676 (D. Colo.), McKelvy and the other defendants were alleged to have been "unregistered broker-dealers." Id. at 2.**

B. The Court should strike the sentence concerning "accredited investors" and the phrase "in an attempt to evade SEC regulations."

McKelvy has moved to strike, from Count 1, ¶ 3 (Background), the sentence, "Many of the investors in Mantria were not accredited and were otherwise not suitable to high risk investments." McKelvy has also moved to strike from that paragraph the phrase "in an attempt to evade SEC regulations," from the sentence "McKelvy advised and assisted investors to pool investment funds in an attempt to evade SEC regulations."

As more fully explained below, the challenged sentence and phrase are both irrelevant to the remainder of Count 1 and their use by the government would unfairly prejudice McKelvy.

C. Statute requiring broker-dealers to be registered with the SEC.

According to one of the arguments made by the Securities and Exchange Commission ("SEC") in its motion for summary judgment in its civil case against Mantria Corp. ("Mantria"), Troy Wragg, Amanda Knorr, McKelvy, and others, as cited at footnote 3 of that motion:

> **Section 15(a)(1)[entitled "Registration and regulation of brokers and dealers"] of the [Securities and Exchange Act of 1934 (the "Exchange Act")] prohibits a broker or dealer from making use of the mails or any means of interstate commerce to effect or attempt to induce transactions in securities unless registered with the SEC in accordance with Section 15(b). 15 U.S.C. § 78o(a)(1).[4]**

---

[4] The SEC also stated in its Motion in Mantria, that "Section 3(a)(4) of the Exchange Act [of 1934] defines 'broker' as 'any person engaged in the business of effecting transactions in securities for the account of others.' 15 U.S.C. § 78c(a)(4). The phrase 'engaged in the business' connotes regular participation in securities transactions; among the activities that indicate a person may be a broker are: solicitation of investors to purchase securities and receipt of transaction-related compensation (citations omitted)." Id. at 15.

Id. at 15.

D. The above-quoted language in the indictment concerning broker-dealers and registration is not relevant to the charges.

For the reasons stated in footnote 3 concerning the SEC's Motion, the indictment's allegations in Count 1, ¶¶ 2, 7 (which were incorporated by Counts 2-8, ¶ 1), that "McKelvy has never been licensed to sell securities" should be rephrased as alleging that "McKelvy has never been [registered as a broker-dealer] to sell securities." As such, this is an implicit allegation, as made explicit in the SEC's Motion, of a violation of Section 78o (a)(1). Section 78o is a civil regulatory statute, which covers, as stated in its title, the "registration and regulation of brokers and dealers."

In the statutory scheme for the SEC, criminal penalties are provided, under 15 U.S.C. § 78ff, as to "any person who willfully violates any provision of this chapter,"[5] including Section 78o (a)(1).

The allegation that McKelvy was not registered to sell Mantria securities, however, is not relevant to the charges in the charging paragraph, Count 1, ¶ 8, or to the charges in the Manner and Means paragraphs, Count 1, ¶¶ 9-16[6], as incorporated into Counts 2-8. The allegation that McKelvy was not registered to sell Mantria securities is not "legally essential" to the charging paragraph or the Manner and Means, under such cases as Oakar, and does not help "make sense of" or provide "context for" the criminal charges, under such cases as Huddleston.

Specifically, the "not [registered]" allegation is irrelevant to what appears to be the central allegations in Counts 1-8 – that

---

[5] It should be noted that section 78ff also provides criminal penalties for "any person who willfully and knowingly makes" false statements within the jurisdiction of the SEC.

[6] Later in this motion, McKelvy will request that the Court strike the words "and unregistered" from Count 1, ¶ 9, because this allegation is also surplusage.

the three defendants "made materially false statements and omitted material facts to mislead investors," Count 1, ¶ 10[7] (or in the other Manner and Means paragraphs at Count 1, ¶¶ 9-16). The above-quoted allegations in Count 1, ¶ 10 - concerning making false statements and material omissions "to mislead investors" - is a part of what is referred to elsewhere in the indictment as "using new investor money to repay earlier investors," ¶ 11, or a fraudulent Ponzi scheme, ¶ 13(g).

McKelvy also argues that there is no support for any allegation that McKelvy's allegedly being an unregistered seller of securities helps "to make sense of or establish context for the criminal charges," Huddleston, supra at *7, because such an allegation does not permit any inferences as to his guilt on his alleged involvement in the Ponzi wire fraud scheme and/or his making allegedly false statements and material omissions to defraud investors.[8]

To set more concretely his argument that the above-referenced allegations in Count 1, ¶¶ 2,7 (Background) are not relevant to the charged conduct, McKelvy will summarize, in the Supplement attached below at 12-14, the allegations in the charging paragraph and in the Manner and Means section in Count 1, ¶¶ 8-16 (which are incorporated by reference in Counts 2-10). As can be seen from this summary, evidence as to whether or not McKelvy was not properly registered as a broker-dealer is not arguably "legally essential" to any of the words or phrases listed in the allegations in the attached Supplement, with the sole exception

---

[7] McKelvy argues in his Offense Memo (Doc. No. 111) that the charging paragraph of Count 1 does not sufficiently articulate the requisite overarching scheme, but he submits that ¶ 10 is the language in the indictment which best approximates an overarching scheme.

[8] To be guilty of wire fraud, McKelvy would have had to have "the specific intent to defraud" the investors. Cf. CA3 Model Instructions 6.18.1343, as quoted in McKelvy's Offense Memo at 16.

of the "unregistered securities" allegation in ¶ 9, which we contend is also surplusage.[9]

E. The challenged language concerning broker-dealers and registration is not relevant to any of the kinds of charges in ¶¶ 8-16, as summarized here.

In summary, the Supplement demonstrates that there is no known nexus between the "unregistered securities" allegation, on the one hand, and either the necessary fraudulent intent or the conduct in the Ponzi scheme fraud alleged in the Manner and Means, on the other hand, in that:

Whether or not the securities were "unregistered" has nothing to do with the various kinds of specific intent to defraud charged, i.e., (a) "fraudulent … securities," ¶ 9; (b) "to mislead investors as to the true financial status of Mantria," ¶ 10; (c) the defendants "knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors," ¶ 11; and (d) to "mislead prospective investors and induce them to invest in Mantria securities," ¶ 12.

Whether or not the securities were "unregistered" also has nothing to do with the various kinds of conduct McKelvy was alleged to have committed as a part of the charged scheme, that is:

-- Making "false statements to prospective investors concerning Mantria's returns on investments and its profits," ¶ 13(a), and omitting material facts in his representations to investors concerning Mantria's purported business successes, ¶ 14(a).

-- The three defendants' having caused a net loss of approximately $37 million to Mantria's investors, ¶ 15.

---

[9] Unlike the defendants in United States v. Sattar, 314 F.Supp.2d 279, 320 (S.D.N.Y. 2004), McKelvy is not arguing that the government should be precluded from including a background section, but only that the several words and phrases set out in the attached Motion should be stricken.

-- "After the SEC commenced civil litigation against Mantria in November 2009," the defendants "continued to make false statements to investors regarding the economic status of Mantria in order to lull investors into believing that their investments were secure and to encourage new investments in Mantria …," ¶ 16.

F. The challenged words and phrases are unfairly prejudicial.

One of the reasons that McKelvy would be unfairly prejudiced by the above-quoted allegations in Count 1 of the indictment, concerning his not being registered to sell securities, is that these allegations charge what the jury might believe to be a separate criminal violation, even though styled as "Background." Just as the civil regulatory statute underlying these allegations – section 78o(a)(1) – is phrased in straightforward language setting out requirements and prohibitions, these allegations might make it seem to the jury that McKelvy's alleged failure to observe these requirements and prohibitions automatically meant that he had violated the charges in the indictment, without any need to show scienter.

For the government to make relevant showings that McKelvy had violated section 78o(a)(1), (1) the indictment would have had to include language charging a criminal violation of section 78ff and to provide a citation to sections 78o(a)(1) and 78ff, under Rule 7(c)(1); (2) any such charge would have had to include an allegation that such a violation was done "willfully;" (3) and the government would have had to meet its burden of proving any such violation beyond a reasonable doubt.

It is apparent that the government is trying to prove, by means of what might be referred to as a "side door," an allegation of (what sounds like and sometimes is) criminal conduct that could not help but color – and ultimately unfairly prejudice – the jury's view of the case. Cf. Wright & Miller, Federal Practice and Procedure § 127, at 634 (quoted above).

In summary, unless the language McKelvy challenges was "legally essential" to the conspiracy and wire fraud charges, under Oakar, or unless the "background" allegations help "to

make sense of or establish context for the criminal charges," under Huddleston, the government would not be able to overcome McKelvy's defense that he would be prejudiced at trial, for the reasons stated above.

II. THE LANGUAGE IN THE INDICTMENT CONCERNING THE REQUIREMENT THAT PUBLIC OFFERINGS OF SECURITIES BE REGISTERED WITH THE SEC SHOULD BE STRICKEN.

A. The Court should strike the word "unregistered" from the six paragraphs describing the Mantria investments.

As stated in the Motion to Strike, McKelvy also moves to strike the word "unregistered" from several paragraphs in the Background section of Count 1, ¶¶ 2, 4 (twice), 5, 7, and 9, concerning (public) offerings of securities.

B. Statutes requiring public offerings of securities to be registered with the SEC.

According to one of the arguments made by the SEC in its motion for summary judgment against Mantria and others, Wragg, Knorr, and McKelvy were engaged in the business of selling securities and, as such, were required to register such securities with the SEC before offering to sell them:[10]

> **To establish a violation of the registration requirements of Section 5 of the Securities Act [of 1933], the SEC must prove that Defendants directly or indirectly offered or sold securities (publicly) without a registration statement (case citations omitted); see also 15 U.S.C. §§ 77e(a) and 77e(c).**

Id. at 14-15.

Accordingly, as stated above, the SEC in its motion for summary judgment identified the civil regulatory statute which gave rise

---

[10] The SEC, as noted above, filed its Motion for Summary Judgment in SEC v. Mantria Corporation, et al.("Mantria"), Case No. 09-cv-02676 (2009 D. Colo.).

to these requirements as Section 5 of the 1933 Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c).

C. The references in the indictment to "unregistered" securities should be stricken for the same kinds of reasons argued above.

McKelvy argues that the word "unregistered" should be stricken from the several references in the indictment to "unregistered" securities, as set out in the attached Motion to Strike. As in the prior sections of this Memo, the challenged language is both not relevant to the charges in Count 1 and its use by the government would unfairly prejudice McKelvy. Also as with the prior sections, the word "unregistered" does not inform the jury as to any other aspect of the Ponzi scheme fraud, as alleged in Counts 1-8, and does not permit any inferences about the nature of the fraud charged there. In short, the above-cited uses of "unregistered" are not "legally essential" to the Ponzi scheme fraud charges. Oakar, supra, at 157. Moreover, these uses of "unregistered" do not help "to make sense of or establish context for the criminal charges." Huddleston, supra, at *7. McKelvy adopts his other arguments in the prior sections.

The above-cited references to "unregistered" securities in Count 1 are implicit allegations, as made explicit in the SEC's Motion, of a violation of sections 77e(a), 77e(c), and/or 77x. Sections 77e(a) and 77e(c) are civil regulatory statutes, which cover, as stated in their title, the "prohibitions relating to interstate commerce and the mails."

In the statutory scheme for the SEC, criminal penalties are provided, under 15 U.S.C. § 77x, as to "any person who willfully violates any provision of this sub-chapter,"[11] including sections 77e(a) and 77e(c).

D. The "and unregistered" language in ¶ 9 appears to be a stray reference to the allegations in the Background section discussed above.

---

[11] **It should be noted that section 78ff also provides criminal penalties for "any person who willfully and knowingly makes" false statements within the jurisdiction of the SEC.**

The "and unregistered" language in ¶ 9 (Manner and Means) appears to be a stray reference to the allegations in the Background section of the indictment, discussed above. As such, this reference should be analyzed as part of the discussion of the above-quoted passages in the Background section and not given special treatment just because it is in the Manner and Means section.

McKelvy recognizes that if the indictment had articulated an overarching fraud scheme in the charging paragraph and if the indictment had also included an explicit assertion that there were two objects of the overarching fraud – wire fraud and securities fraud – then the government might have had a colorable position that the above-challenged passages on the requirement that the offerings of Mantria securities were "unregistered," would be relevant to the charges in the indictment. If and when the government argues that the "and unregistered" language in ¶ 9 (Manner and Means) was a shorthand form of including a second object of the conspiracy, McKelvy will respond at that point. For now, suffice it to say that if this were articulated as a second object of the conspiracy, it would run afoul of the requirement in Fed.R.Crim.P 7(c)(1) that "For each count, the indictment … must give [a] … citation of the statute … that the defendant is alleged to have violated." The only such statutes in the indictment are 18 U.S.C. §§ 371, 1343.

McKelvy adopts by reference his arguments at sections I.E., I.F., and I.G., concerning the allegations in the indictment that McKelvy was not registered as a broker-dealer to sell securities; these arguments – except for substituting the references to the companion civil regulatory statutes, 15 U.S.C. §§ 77e(a) and 77e(c), and the companion criminal statute is 15 U.S.C. § 77x - are fully applicable to the allegations in the indictment that McKelvy sold unregistered securities. In addition, McKelvy notes that, unlike the multiple allegations in the indictment regarding the false material representations, ¶ 13, and the material omissions, ¶ 14, allegedly made by the three defendants as a part of the Ponzi wire fraud scheme, there are no such allegations as to allegedly unregistered securities

or offerings of securities in the misrepresentations and omissions paragraphs of ¶¶ 13, 14.

E. The above-quoted passages concerning "unregistered securities" would unfairly prejudice McKelvy.

McKelvy adopts by reference his argument on unfair prejudice at section I.H., above.

F. Language incorporated into Counts 2-10.

To the extent that Counts 2-10 include paragraphs which incorporate the passages referred to above, McKelvy asks that such language also be stricken.

III. SUPPLEMENT.

To set more concretely his argument that the above-referenced allegations in Count 1, ¶¶ 2,7 (Background)are not relevant to the charged conduct, McKelvy will first summarize the essential allegations in Count 1:

(a) the charging paragraph alleges (in language which McKelvy has described in his Offense Memo as facially insufficient) that the three defendants conspired to commit "wire fraud affecting a financial institution," ¶ 8; from the Manner and Means section:

(b) the defendants "raised approximately $54 million from more than 300 investors nationwide in twelve fraudulent and unregistered securities offerings for Mantria," ¶ 9;

(c) the defendants "made materially false statements and omitted material facts to mislead investors as to the true financial status of Mantria," ¶ 10;

(d) while the defendants "claimed Mantria made millions of dollars selling real estate and 'green energy' products, they knew that Mantria had virtually no earnings, no profits, and was merely using new investor money to repay earlier investors," ¶ 11; and

(e) the defendants "made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria securities," ¶ 12.

Also from the Manner and Means section:

(f) the defendants made false statements, as specified below, to prospective investors concerning Mantria's returns on investments and its profits, ¶ 13(a);

(g) the defendants made false statements that Mantria "investments were secured by real estate in Tennessee which was worth twice as much as the investments," even though they knew that the value of the land had been inflated, ¶ 13(b);

(h) the defendants made false statements "that Mantria was currently producing large quantities of biochar, although they knew that Mantria was not producing large amounts of biochar," ¶ 13(c);

(i) the defendants made false statements "that Mantria had large amounts of 'pre-orders' or imminent sales of biochar, although they knew that Mantria had no such imminent sales," ¶ 13(d);

(j) the defendants made false statements "that Mantria built a carbon diversion systems factory in Carlsbad, New Mexico which had a substantial number of sales contracts to sell the finished systems, although they knew that no such factory was built and no such sales contracts were signed," ¶ 13(e);

(k) the defendants made false statements "that Mantria intended to turn consumer waste from the Tennessee real estate developments into biochar, well knowing that consumer waste lacked sufficient amounts of carbon to be turned into biochar," ¶ 13(f); and

(l) the defendants made false statements "that Mantria was "not a Ponzi scheme," although they knew that Mantria was just such a scheme paying investors' "earnings" with money raised from misled new investors," ¶ 13(g).

Also from the Manner and Means section:

(m) the defendants omitted material facts in their representations to investors concerning Mantria's having "used a

substantial portion of the new investor funds to make payments to old investors, all the while making the claim that these new investments were 'earnings' of Mantria," ¶ 14(a);

(n) the defendants omitted material facts concerning Mantria's having "used a substantial portion of the new investor funds to pay 'marketing' commissions to [the three] defendants … ," ¶ 14(b);

(o) the defendants omitted material facts concerning there being "significant undisclosed problems with the real estate in Tennessee, which served as the most significant asset of Mantria and [which] was represented to investors as collateral for their investments," ¶ 14(c);

(p) the defendants omitted material facts concerning Mantria's not having "a patent … for the biochar process," ¶ 14(d); and

(q) the defendants omitted material facts concerning Mantria's being "under SEC investigation," ¶ 14(e).

Also from the Manner and Means section:

(r) "By their false statements," the three defendants "raised … a net loss of approximately $37 million. Defendants Wragg and Knorr paid Defendant McKelvy approximately $6.2 million in commissions for raising investor funds for Mantria," ¶ 15.

Also from the Manner and Means section:

(s) "After the SEC commenced civil litigation against Mantria in November 2009," the three defendants "continued to make false statements to investors regarding the economic status of Mantria to lull investors into believing that their investments were secure and to encourage new investments in Mantria," ¶ 16.

WHEREFORE, McKelvy moves to strike surplusage, as set out above, from Counts 1-10 of the Indictment.

Respectfully submitted,

/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr., Esq.
101 Columbia Ave.
Swarthmore, PA 19081
(610) 544-6791
PA Bar No. 02530
tbatty4@verizon.net

/s/ William J. Murray, Jr.
William J. Murray, Jr., Esq.
P.O. Box 22615
Philadelphia, PA 19110
(267) 670-1818
PA Bar No.73917
williamjmurrayjr.esq@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Motion to Strike Surplusage from Counts 1-10 of the Indictment, upon Assistant U.S. Attorney Robert J. Livermore:

Robert J. Livermore, Esq.
U.S. Attorney's Office
615 Chestnut Street
Philadelphia, Pa 19106
215-861-8505
Fax: 215-861-8497
Email:
robert.j.livermore@usdoj.gov

/s/ Walter S. Batty, Jr.
Walter S. Batty, Jr.

Dated: November 6, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL No. 15-398-3**
WAYDE MCKELVY,	**:**	
Defendant	**:**	

ORDER

AND NOW, this day of , 2017, after consideration of McKelvy's Motion to Strike Surplusage from Counts 1-10 of the Indictment, and of the government's Response, enters the following Order:

The Court grants McKelvy's Motion to Strike surplusage from Counts 1-10 of the Indictment, as follows:

From Count 1, ¶ 2, the following sentence is stricken: "Despite the fact that he routinely sold securities during the duration of the conspiracy, defendant McKelvy has never been licensed to sell securities."

Count 1, ¶ 2, the word "unregistered" is stricken from the sentence, "Mantria Financial issued unregistered securities which defendants Wragg, Knorr, and McKelvy sold to investors in Colorado and elsewhere," in the Background section.

From Count 1, ¶ 3, the following sentence is stricken: "Many of the investors in Mantria were not accredited and were otherwise not suitable to high risk investments."

From Count 1, ¶ 3, the phrase "in an attempt to evade SEC regulations" is stricken from the sentence "Defendant Wayde McKelvy advised and assisted investors to pool investment funds in an attempt to evade SEC regulations."

From Count 1, ¶ 4: The word "unregistered" is stricken from the sentence "During the duration of the conspiracy, Mantria raised approximately $54.5 million in new investor funds in

their unregistered securities offerings," in the Background section.

From Count 1, ¶ 4: The word "unregistered" is stricken from the sentence "Most of the investors resided in Colorado and attended seminars or conferences during which defendants Troy Wragg, Amanda Knorr, or Wayde McKelvy sold unregistered securities in Mantria or its subsidiaries," in the Background section.

From Count 1, ¶ 5: The word "unregistered" is stricken from the sentence "Mantria Financial issued unregistered securities which defendants Wragg, Knorr, or McKelvy sold to investors in Colorado and elsewhere," in the Background section.

The following sentence in Count 1, ¶ 7 is stricken: "None of the securities sold by Mantria were registered with the SEC," in the Background section.

From Count 1, ¶ 9: The words "and unregistered" are stricken from the sentence "Defendants Troy Wragg, Amanda Knorr, and Wayde McKelvy raised approximately $54 million from more than 300 investors nationwide in twelve fraudulent and unregistered securities offerings for Mantria and its related entities."

To the extent that Counts 2-10 include paragraphs which incorporate by reference the passages referred to above, they are also stricken.

Accordingly, as set out above in detail, it is ORDERED that Motion to Strike Surplusage from Counts 1-10 of the Indictment, be and hereby is GRANTED.

BY THE COURT:

_____

JOEL H. SLOMSKY, J.