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 STRIKE SURPLUSAGE FROM 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, 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 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. The Mantria Ponzi scheme collapsed in November 2009 when the SEC learned of the defendants' fraudulent conduct and filed a motion for a temporary restraining order with the United States District Court in Colorado.

On November 6, 2017, defendant WAYDE MCKELVY filed a motion to strike alleged surplusage from the indictment. Specifically, MCKELVY seeks to strike three categories of allegations: (1) references to the fact that MCKELVY was not licensed to sell securities and MCKELVY explicitly sought to evade SEC scrutiny, (2) the fact that Mantria securities were unregistered, and (3) the fact that many of the victims were not accredited investors. As described below, the conduct charged in the indictment is part and parcel of the fraud scheme and the defendant's motion should be denied.

II. Discussion

A. Standard of Review on a Motions to Strike Surplusage

An indictment must contain "the elements of the offense charged" and enable the defendant "to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Olatunji, 872 F.2d 1161, 1168 (3d Cir.1989). "As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally

violated by the fact that the indictment alleges more crimes or other means of committing the same crime." United States v. Miller, 471 U.S. 130, 136 (1985).

However, upon the defendant's motion, the court may strike surplusage from the indictment or information. Fed.R.Crim.P. 7(d). "This rule introduces a means of protecting the defendant against immaterial or irrelevant allegations in an indictment or information, which may, however, be prejudicial." Fed.R.Crim.P. 7(d) Advisory Committee's Note. United States v. Hedgepeth, 434 F.3d 609, 612 (3d Cir. 2006).

"Motions to strike surplusage are rarely granted." Hedgepeth 434 F.3d at 612. "The standard under Rule 7(d) has been strictly construed against striking surplusage." United States. v. Rezaq, 134 F.3d 1121, 1134 (D.C. Cir. 1998) (citing United States v. Jordan, 626 F.2d 928, 930 n.1 (D.C.Cir.1980)). The court may only strike surplusage from the indictment when it is both irrelevant and prejudicial. Hedgepeth 434 F.3d at 612. "Logic demands the conjunctive standard: information that is prejudicial, yet relevant to the indictment, must be included for any future conviction to stand and information that is irrelevant need not be struck if there is no evidence that the defendant was prejudiced by its inclusion." Id.; see also United States v. Rezaq, 134 F.3d 1121, 1134 (D.C.Cir.1998); United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir.1990); United States v. Poore, 594 F.2d 39, 41 (4th Cir.1979); United States v. Anderson, 579 F.2d 455, 457 n.2 (8th Cir.1978); United States v. Bullock, 451 F.2d 884, 888 (5th Cir.1971). "[I]f evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken." United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990).

B. Scienter Elements

As noted above, defendant MCKELVY is charged with conspiracy to commit wire fraud, wire fraud, conspiracy to commit securities fraud, and securities fraud. In order for the jury to find WAYDE MCKELVY guilty of conspiracy to commit an offense against the United States, the jury must find that the government proved certain scienter elements.

The Third Circuit's Model Jury Instructions provide commentary on how the government proves the scienter elements at trial. The court should instruct the jury:

> Often the state of mind with which a person acts at any given time cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, WAYDE MCKELVY's state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine WAYDE MCKELVY's state of mind (what WAYDE MCKELVY intended or knew) at a particular time, you may consider evidence about what WAYDE MCKELVY said, what WAYDE MCKELVY did and failed to do, how WAYDE MCKELVY acted, and all the other facts and circumstances shown by the evidence that may prove what was in WAYDE MCKELVY's mind at that time. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about WAYDE MCKELVY's state of mind.

Third Circuit Model Jury Instruction 5.01.

For the wire fraud offenses, the government must show that the defendant acted "knowingly" and with the "intent to defraud." Third Circuit Model Jury Instruction 6.18.1343. To act with the "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat. Third Circuit Model Jury Instruction 6.18.1341-4. In deciding whether WAYDE MCKELVY acted "knowingly", the jury should consider "evidence about what WAYDE MCKELVY said, what WAYDE MCKELVY did and failed to do, how WAYDE MCKELVY acted, and all the other facts and circumstances shown by the evidence that may prove what was in WAYDE MCKELVY's mind at that time." Id. Furthermore, the

"government is not required to prove that WAYDE MCKELVY knew his acts were against the law." Id.

For the securities fraud offenses, the government must show that the defendant acted "willfully, knowingly and with the intent to defraud." Sand, Modern Federal Jury Instructions Instr. 57-20 (2006). To act "willfully" in the context of securities fraud means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law. Sand, Modern Federal Jury Instructions Instr. 57-24 (2006).

Lastly, the government has to show that the defendant was not acting in good faith. Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt. Sand, Modern Federal Jury Instructions Instr. 57-24 (2006).

C. Relevance

As described below, all of the language which the defendant alleges to be "surplusage" is, in fact, relevant to the charges in the indictment to prove MCKELVY's scienter as required. The standard for relevance to be admissible is quite low. Pursuant to Rule 401 of the Federal Rules of Evidence, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FRE 401. "Thus the rule, while giving judges great freedom to admit evidence,

diminishes substantially their authority to exclude evidence as irrelevant." Blancha v. Raymark Industries, 972 F.2d 507, 514 (3d Cir. 1992).

1. License to Sell Securities/Evade SEC Scrutiny

The first group of items which the defendant seeks to strike from the indictment is any reference that MCKELVY did not possess a license to sell securities or was attempting to evade SEC scrutiny. As the defendant correctly noted in his motion, MCKELVY is not charged with selling securities without a license, he is charged with securities fraud. However, in evaluating MCKELVY's intent under the charged statutes, the jury is obligated to consider "what WAYDE MCKELVY said, what WAYDE MCKELVY did and failed to do, how WAYDE MCKELVY acted, and all the other facts and circumstances shown by the evidence that may prove what was in WAYDE MCKELVY's mind at that time." Third Circuit Model Jury Instruction 5.01. Therefore, the fact that MCKELVY did not seek a license to sell securities and was attempting to evade SEC scrutiny is probative of both his intent and lack of good faith.

In this case, one of the critical false representations and material facts omitted from prospective investors is the fact that MCKELVY received a large percentage of all new investor funds – typically 12.5%. There are several reasons why MCKELVY and his co-conspirators hid this fact from investors. One reason they hid the fact was because MCKELVY was not licensed to sell securities and it was illegal for him to accept such a commission. The fact that MCKELVY's commission was illegal was a point which was regularly discussed between MCKELVY and his co-conspirators. TROY WRAGG and Mantria's attorney, Christopher Flannery, implored MCKELVY to get a license to sell securities so he could receive these commissions legally. MCKELVY refused because he did not want his actions scrutinized by the

SEC. The jury can, and properly should, take these facts into account when evaluating MCKELVY's intent and whether or not MCKELVY acted in good faith.

As an example of the evidence which the government will introduce at trial, on June 12, 2008, TROY WRAGG sent an e-mail to WAYDE MCKELVY in which WRAGG told MCKELVY that he should get licensed to sell securities. In that e-mail WRAGG wrote, "After having some time to seek legal counsel on it and do some investigative research, I came to the conclusion that . . . you taking a Series 65 exam[1] (which is the easiest of the other choices) is a legal necessity to move forward." WRAGG further stated, "This simple RIA license protects us and specifically you from the SEC." MCKELVY replied, "While this seems like the most logical route I could get handcuffed by my marketing efforts trying to meet compliance issues. They [the SEC] really put the squeeze on what you can and cannot say." MCKELVY continued, "I can guarantee you they [the SEC] will take out the most compelling pieces of my marketing material." In other words, MCKELVY intentionally chose not to register with the SEC or obtain the proper licenses because he was afraid that the SEC would learn of and crack down on his fraudulent conduct.

This evidence, and other similar evidence that the government intends to introduce at trial, demonstrates that MCKELVY intentionally chose not to obtain the proper licenses to sell securities and actively evaded SEC scrutiny because he knew that his marketing tactics were in violation of the law. This evidence proves that MCKELVY acted with the requisite intent under the charged conduct and demonstrates that MCKELVY did not act in good faith. Under Federal

[1] The Uniform Investment Adviser Law Examination, also called the Series 65 exam, is a test taken by individuals in the United States who seek to become licensed investment adviser representatives. The exam covers topics necessary to provide investment advice to clients.

Rule of Evidence 401, since the evidence in question makes a fact in consequence, i.e., MCKELVY's scienter, more or less probable than it would be without the evidence, the evidence is properly admissible and should not be stricken from the indictment.

2. Mantria Securities Unregistered

The second group of items the defendant wishes to strike is any reference in the indictment that the Mantria securities were unregistered. To be clear, there is no requirement that securities be registered with the SEC. There is a legal and very robust market for unregistered securities in the United States, commonly known as the "over-the-counter" market. Mantria sought and received legal advice on how to sell securities and raise funds through this market. The indictment notes that the securities are "unregistered" merely as a descriptive term to distinguish these securities from listed securities. Many government witnesses, including Mantria's attorney Christopher Flannery, will testify about the manner in which unregistered securities such as Mantria's securities were sold. Therefore, the "unregistered" description is clearly relevant to the offense conduct.

In addition to failing the relevance prong of the Hedgepeth test, the defendant's motion to strike also fails the second requirement of the test – prejudice. There is no prejudice in the defendant performing a common and legal transaction, which is, selling unregistered securities. Striking the "unregistered" description and suggesting to the jury that the Mantria securities were registered, is very misleading to the jury. There is a whole panoply of SEC reporting requirements which registered securities are required to undertake, requirements which were neither met nor required to have been met in this case. Many jurors could mistakenly take their common experience with registered securities and expect Mantria to operate in the same fashion.

For these reasons, it would be prejudicial for both parties to remove the "unregistered" description and that description should not be stricken from the indictment.

3. Accredited Investors

The third group of items the defendant wishes to strike from the indictment is any reference to the fact that the vast majority of Mantria investors were not "accredited investors." Generally speaking, accredited investors are investors who are financially sophisticated and have a reduced need for the protection provided by regulatory disclosure filings. Accredited investors typically have an income of $200,000 or more or a net worth exceeding $1 million in assets. In this manner, accredited investors are more suitable for high risk investments because they can afford to lose money in such an investment.

In this case, the government's evidence will show that Mantria's attorney advised WRAGG, KNORR, and MCKELVY that all investors in Mantria should be accredited investors because of the high risk nature of the Mantria securities. The government's evidence will further show that WRAGG and MCKELVY ignored the Mantria attorney's advice and sold the securities to anyone willing to invest. This is a critical piece of evidence to prove MCKELVY's scienter and lack of good faith. WRAGG, KNORR, and MCKELVY purposefully and intentionally targeted widows, the elderly, and other unsophisticated investors in order to dupe them into investing in Mantria with their outrageous promises. More seasoned investors would have been more likely to see through Mantria's false promises and realize that no legitimate company could continue to pay the returns which Mantria promised. MCKELVY's actions in specifically targeting unsophisticated investors is deeply probative of MCKELVY's intent and

certainly incongruous with MCKELVY acting in good faith. For these reasons, his motion to strike this language from the indictment should be denied.

III. Conclusion

As described above, the conduct charged in the indictment is part and parcel of the fraud scheme and relevant to prove MCKELVY's scienter and lack of good faith. Therefore, the defendant's motion to strike that language from the indictment should be denied.

Respectfully submitted,

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/s/
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CERTIFICATE OF SERVICE

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

Walter Batty, Esq.
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/s/
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