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

UNITED STATES OF AMERICA v. WAYDE MCKELVY, Defendant.	CRIMINAL ACTION NO. 15-398-3

OPINION

Slomsky, J. **December 18, 2017**

I. INTRODUCTION

On September 2, 2015, a grand jury returned a ten-count Indictment charging Defendant Wayde McKelvy, and co-Defendants Troy Wragg and Amanda Knorr, with Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. § 371 (Count 1), Wire Fraud, in violation of 18 U.S.C. §§ 1342, 1343 (Counts 2-8), Conspiracy to Commit Securities Fraud, in violation of 18 U.S.C. § 371 (Count 9), and Securities Fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2 (Count 10). (Doc. No. 1.) The charges stem from Defendant's alleged participation in a Ponzi scheme involving Mantria Corporation ("Mantria"), a business created by Wragg and Knorr to sell real estate and "green energy" products.

Presently before the Court is Defendant's Motion to Dismiss Counts 1-9 and Motion to Strike Count 10 of the Indictment, for Failure to State an Offense. (Doc. No. 111.) In the first Motion, Defendant argues that Counts 1 to 9 should be dismissed because the Indictment fails to contain the elements of the offenses charged and does not sufficiently apprise him of "what he must be prepared to meet" at trial. (Doc. No. 111-2 at 2.) In the second Motion, Defendant argues that if the Court dismisses Count 9, charging conspiracy to commit securities fraud, then for the same reason that it dismissed Count 9, it should strike the portions of Count 10 that refer

to "fraud." (Id. at 4.) In response, the Government submits that the Indictment sufficiently alleges the elements of the offenses charged, apprises Defendant of what he must be prepared to meet, and enables him to plead an acquittal or conviction in the event of a subsequent prosecution. (Doc. No. 115 at 4.) For reasons that follow, the Court will deny Defendant's Motion to Dismiss. (Doc. No. 111.)

II. BACKGROUND

A. The Scheme

The Indictment alleges that from approximately March 1, 2005 to April 30, 2010, Defendant, along with Troy Wragg and Amanda Knorr,[1] induced more than 300 investors to turn over approximately $54 million to purchase Mantria's unregistered security offerings in reliance on materially false statements and omissions made by Defendant, Wragg, and Knorr. (Doc. No. 1 ¶¶ 9-10.) Wragg and Knorr created Mantria, which was a company that "claimed to earn millions of dollars in earnings from selling real estate and 'green energy' products." (Id. ¶ 1.)

Mantria also owned other affiliated entities, including Mantria Financial, which was a financial institution and mortgage lending business. (Id. ¶¶ 1, 5.) Mantria Financial was licensed in Tennessee to finance real estate mortgages. (Id. ¶ 5.)

As part of the alleged scheme, Mantria Financial raised funds from investors, which it used to finance mortgages on Mantria-controlled real estate. (Id.) Mantria Financial then would issue to the investors unregistered securities in Mantria or its subsidiaries. (Id. ¶¶ 4, 5). Defendant, Wragg, and Knorr also used the investors' funds raised by Mantria Financial "to purchase or finance mortgages for undeveloped real estate in Tennessee owned by Mantria or its subsidiaries in order to generate paper profits for Mantria and inflate the value of the undeveloped land." (Id. ¶ 5.) Mantria then made small improvements to the real estate to "give

[1] Troy Wragg and Amanda Knorr have entered guilty pleas in this case.

the appearance of development to investors." (Id. ¶ 6.) Instead, however, Defendant, Wragg, and Knorr then used the proceeds from the land sales for "other Mantria-related business and for their own personal enrichment." (Id. ¶ 5.) The Indictment alleges that Mantria had "virtually no earnings, no profits, and was merely using new investor money to repay earlier investors." (Id. ¶ 11.)

To procure investors, Defendant McKelvy operated a separate company called Speed of Wealth, LLC. Defendant advertised Speed of Wealth on the radio, the internet, and other media sources to "lure the general public to seminars he offered." (Id. ¶ 12.) At the seminars, Defendant would advise "prospective investors to liquidate other investments" and "obtain the maximum amount of funds in loans from financial institutions" to invest the funds "in Mantria securities." (Id. ¶¶ 2, 12.) Investors would obtain these funds by liquidating retirement accounts and obtaining the maximum amount of funds in loans from financial institutions in the form of credit cards, home equity lines of credit, and other loans. (Id. ¶ 2.)

Defendant McKelvy would advise and assist investors in pooling their investment funds "in an attempt to evade SEC regulations." (Id. ¶ 3.) Investors then would wire the funds to Mantria-controlled banks. (Id. ¶ 4.) After investors wired the money, Mantria Financial would use investors' money to finance mortgages on Mantria-controlled real estate. (Id. ¶ 5.) In return, investors would receive securities in Mantria and its entities. (Id. ¶ 4.) Investors then were told that their investments were secured with the Tennessee real estate as collateral. (Id. ¶ 13(b).)

The Indictment alleges that Defendant made "materially false statements and omitted material facts to mislead investors as to the true financial status of Mantria, including grossly overstating the financial success of Mantria and promising excessive returns" on the money invested. (Id. ¶ 10.) One such materially false statement made by Defendant was that the

Tennessee real estate was worth twice as much as the investments, even though he knew that the value of the real estate "was substantially less and Mantria's interest in this property was contingent." (Id. ¶ 13(b).) Defendant also failed to inform investors that "a substantial portion of the new investor funds" were used to pay old investors and that there were significant problems with the Tennessee real estate. (Id. ¶¶ 14(a), (c).) Most of the individuals who invested in Mantria and related entities had attended Defendant's Speed of Wealth seminars. (Id. ¶ 4.) In return for securing these funds for Mantria from investors, Wragg and Knorr made numerous wire transfers to Defendant, totaling approximately $6.2 million in commissions. (Id. ¶ 15.)

B. The Indictment

Based on all this alleged conduct, the Indictment against Defendant, Wragg, and Knorr was returned on September 2, 2015. (Doc. No. 1.) Count 1 of the Indictment, charging conspiracy to commit wire fraud, provides in part:

> **THE CONSPIRACY**
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> 8. From on or about March 1, 2005, through on or about April 30, 2010, in the Eastern District of Pennsylvania, the District of Colorado, and elsewhere, defendants
>
> **TROY WRAGG,**
> **AMANDA KNORR, and**
> **WAYDE MCKELVY**
>
> conspired and agreed together to commit offenses against the United States, that is, wire fraud affecting a financial institution, in violation of Title 18, United States Code, Sections 1343.

(Id. at 4-5 ¶ 8.) Count 1 then lists the Manner and Means in which the conspiracy was carried out (paragraphs 9 to 16), the materially false statements and omissions that were made by Defendant, Wragg, and Knorr (paragraphs 13 to 14), and the Overt Acts committed in

furtherance of the conspiracy (paragraphs 1 to 55), in violation of 18 U.S.C. § 371.[2] (Id. at 5-21.) For example, the Indictment alleges under Manner and Means as follows:

> 10. In order to induce prospective investors to invest in Mantria, defendants TROY WRAGG, AMANDA KNORR, and WAYDE MCKELVY made materially false statements and omitted material facts to mislead investors as to the true financial status of Mantria, including grossly overstating the financial success of Mantria and promising excessive returns.
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> 11. While defendants TROY WRAGG, AMANDA KNORR, and WAYDE MCKELVY claimed that 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.
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> 12. Most of the investors were introduced to Mantria through defendant WAYDE MCKELVY and his company, Speed of Wealth. Defendant MCKELVY caused Speed of Wealth to advertise on the radio, internet, and other media outlets to lure the general public to seminars he offered. During these seminars, defendants WAYDE MCKELVY, TROY WRAGG, and AMANDA KNORR made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria securities. Early investors who received extravagant returns in Mantria securities were used to provide "testimonials" to induce additional investors to invest in Mantria securities.

(Id. ¶¶ 10-12.) And paragraph 31 of the Overt Acts section lists various false statements made by Defendant McKelvy, including the statement: "I'm deeply involved in Mantria. A lot of the things he's [WRAGG] talking about, I'm a partner with. I look at the books. I know where all the money is going." (Id. at 13 ¶ 31(d) (alteration in original).)

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[2] 18 U.S.C. § 371 provides in relevant part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
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> * * * *

§ 371.

Next, Counts 2 to 8 of the Indictment, charging the substantive offense of wire fraud, provide in relevant part:

COUNT TWO THROUGH EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 7 of Count One are incorporated here.

THE SCHEME

2. From on or about March 1, 2005 to on or about April 30, 2010, defendants

TROY WRAGG,
AMANDA KNORR, and
WAYDE MCKELVY

in circumstances affecting a financial institution, devised and intended to devise a scheme to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises.

MANNER AND MEANS

3. Paragraphs 9 through 16 of Count One are incorporated here.

4. On or about each of the dates set forth below, in the Eastern District of Pennsylvania and elsewhere, defendants

TROY WRAGG,
AMANDA KNORR, and
WAYDE MCKELVY

for the purpose of executing the scheme described above, and aiding and abetting its execution, caused to be transmitted by means of wire communication in interstate commerce the signals and sounds described below for each count, each transmission constituting a separate count:

* * * *

(Id. at 22 ¶¶ 1-4.) A chart that is part of Counts 2 to 8 sets forth the dates of the wire communication and a description of the communication that forms the basis of each Count. (Id. at 23.) The dates and descriptions of the wire communication are as follows:

COUNT	DATE	DESCRIPTION
Two	September 18, 2009	Wire transferred $40,625 in new investor funds to pay for "marketing"
Three	September 10, 2009	Wire transferred $37,458.57 in new investor funds to pay for "marketing"
Four	September 3, 2009	Wire transferred $34,375 in new investor funds to pay for "marketing"
Five	July 31, 2009	Wire transferred $200,000 in new investor funds to pay for "marketing"
Six	July 9, 2009	Wire transferred $68,750 in new investor funds to pay for "management fees"
Seven	July 1, 2009	Wire transferred $87,500 in new investor funds to pay for "management fees"
Eight	July 11, 2009	Wire transferred $46,078.43 to pay closing costs on real estate in Tennessee

Each of these alleged wire transfers is alleged to be in violation of 18 U.S.C. §§ 1343, 1342.[3]

[3] 18 U.S.C. § 1343 provides in relevant part:

> Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation . . . affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

§ 1343.

And 18 U.S.C. § 1342 provides:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

§ 1342.

Count 9 of the Indictment, charging conspiracy to commit securities fraud, provides in part:

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 7 of Count One are incorporated here.

THE CONSPIRACY

2. From on or about March 1, 2005 through on or about April 30, 2010, in the Eastern District of Pennsylvania, the District of Colorado, and elsewhere, defendants

TROY WRAGG,
AMANDA KNORR, and
WAYDE MCKELVY

conspired and agreed together, to commit offenses against the United States, that is, securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5.

(Id. at 24 ¶¶ 1-2.) Count 9 then incorporates by reference the Manner and Means listed in paragraphs 9 to 16 and the Overt Acts listed in paragraphs 1 to 55 of Count 1, all in violation of 18 U.S.C. § 371. (Id. at 24 ¶¶ 3-4.)

Finally, Count 10 of the Indictment, charging securities fraud, provides:

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 7 and 9 through 16 of Count One and Overt Acts 1 through 55 of Count Two are incorporated here.

2. From on or about March 1, 2005 through on or about April 30, 2010, in the Eastern District of Pennsylvania, the District of Colorado, and elsewhere, defendants

TROY WRAGG,
AMANDA KNORR, and
WAYDE MCKELVY

willfully and knowingly, by use of the means and instrumentalities of interstate commerce, the mails, and the facilities of national securities exchanges, directly and indirectly, used and employed manipulative and deceptive devices and contrivances, and aided and abetted such use and employment, in violation of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes, and artifices to defraud; (b) making untrue statements of material fact and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (c) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon other persons in connection with sales of securities in Mantria and related entities.

In violation of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5 and Title 18, Section 2.[4]

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[4] 15 U.S.C. § 78j(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> **(b)** To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 78j(b). In addition, 15 U.S.C. §78ff provides the penalties for violations of § 78j(b).

17 C.F.R. § 240.20b-5 provides as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

(Id. at 25.)

On July 24, 2017, Defendant McKelvy filed the Motion to Dismiss Counts 1-9 and the Motion to Strike Count 10 of the Indictment. (Doc. No. 111.) On August 8, 2017, the Government filed a Response to the Motions to Dismiss Counts One Through Nine and to Strike Count Ten of the Indictment. (Doc. No. 115.) On September 7, 2017, Defendant filed a Reply. (Doc. No. 126.) On September 12, 2017, the Court held a hearing on the Motion to Dismiss. The Motions are now ripe for a decision.

III. STANDARD OF REVIEW

Pursuant to Federal Rule of Criminal Procedure 7(c)(1), an indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment is sufficient as 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. Huet, 665 F.3d 588, 595 (3d Cir. 2010) (quoting United States v. Vitillo, 490 F.3d 314, 321 (3d Cir. 2007)).

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in connection with the purchase or sale of any security.

§ 240.20b-5.

Finally, 18 U.S.C. § 2 provides as follows:

> **(a)** Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 2.

"[N]o 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." Id. (quoting United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007)). "And typically, a factual orientation that includes a specification of the time period of the alleged offense is sufficient for the second and third requirements." United States v. Stock, 728 F.3d 287, 292 (3d Cir. 2013) (quoting Huet, 665 F.3d at 595). As such, "detailed allegations" are not necessary. Id. (quoting Huet, 665 F.3d at 594).

Moreover, "a district court must accept as true the factual allegations set forth in the indictment." Id. (quoting United States v. Sampson, 371 U.S. 75, 78-79 (1962)). Additionally, an indictment should be read as a whole. See 6 James Wm. Moore et al., Moore's Federal Practice, ¶ 607.04[2][b] (3d. ed. 2015); see also United States v. Turley, 891 F.2d 57, 59 (3d Cir. 1989) (finding that in reading an indictment in its entirety, it sufficiently alleged a conspiracy to commit mail fraud).

IV. ANALYSIS

Defendant moves to dismiss Counts 1 to 9 and to strike all references to "fraud" in Count 10. As noted, Count 1 charges Defendant with Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. § 371, Counts 2 to 8 charge him with Wire Fraud, in violation of 18 U.S.C. §§ 1342, 1343, Count 9 alleges Conspiracy to Commit Securities Fraud, in violation of 18 U.S.C. § 371, and Count 10 alleges Securities Fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2. (Doc. No. 1.) With respect to Counts 1 to 9, Defendant argues that the Indictment should be dismissed under United States v. Huet, 665 F.3d 588 (3d Cir. 2012) for two reasons. First, he contends that it fails to contain the elements of the offenses charged. Second, Defendant asserts that the Indictment does not sufficiently apprise him of what he must

be prepared to meet at trial. With respect to Count 10, Defendant argues that the Court should strike all references to "fraud" because there is no factual orientation to support those references.

A. Count 1 Sufficiently Alleges the Elements of Conspiracy to Commit Wire Fraud and Apprises Defendant of What He Must Be Prepared to Meet at Trial

With respect to Count 1, charging conspiracy to commit wire fraud under 18 U.S.C. § 371, Defendant argues that the Indictment does not contain the elements of the offense and does not sufficiently apprise him of what he must be prepared to meet at trial. (Doc. No. 111-2 at 16.) First, he asserts that the charging paragraph in Count 1 does not contain all elements of conspiracy because it does not provide sufficient facts to prove the objective of the conspiracy, that there was an agreement among the conspirators, or that Defendant engaged in "witting" participation in the scheme. (Id. at 2, 16-17.) Second, Defendant argues that Count 1 does not sufficiently apprise him of what he must be prepared to meet at trial because there is insufficient "factual orientation" in the charging paragraphs to enable him to draft an appropriate "common scheme" jury instruction or to prepare points for charge. (Id. at 3.)

The elements of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 are "(1) an agreement between two or more persons to commit [wire fraud], (2) the defendant knowingly joined the conspiracy, and (3) one of the conspirators committed an overt act in furtherance of the conspiracy." United States v. Mitan, Crim. A. Nos. 08-760-1, 2, 3, 2009 WL 1651288, at *8 (E.D. Pa. June 11, 2009) (citing United States v. Gebbie, 294 F.3d 540, 544 (3d Cir. 2002)). To sufficiently allege a conspiracy, "the government must show that the alleged conspirators shared a unity of purpose, the intent to achieve a common goal, and an agreement to work together toward the goal." United States v. Bruno, Crim. A. No. 13-00039-6, 2014 WL 1788910, at *4 (E.D. Pa. May 6, 2014) (quoting United States v. Holmes, 387 F. App'x 242, 245 (3d Cir. 2010)). And "[t]he existence of a conspiracy can be inferred from evidence of related facts and

circumstances from which it appears as a reasonable and logical inference [] that the activities of the participants . . . could not have been carried on except as the result of a preconceived scheme or common understanding." Id. (alterations and omission in original) (quoting Holmes, 387 F. App'x at 245). In addition, "[a]n indictment charging a conspiracy under 18 U.S.C. § 371 need not specifically plead all of the elements of the underlying substantive offense." United States v. Chartock, 283 F. App'x 948, 953-54 (3d Cir. 2008) (quoting United States v. Werme, 939 F.2d 108, 112 (3d Cir. 1991)).

In the instant case, Count 1 alleges that Defendants "conspired and agreed together to commit offenses against the United States, that is, wire fraud affecting a financial institution, in violation of" 18 U.S.C. § 1343, the wire fraud statute. (Doc. No. 1 ¶ 8.) Count 1 then details the Manner and Means of the conspiracy. (Id. at 5.) It provides that Defendants made "materially false misstatements and omitted material facts" to mislead investors as to Mantria's true financial status, knowing that Mantria "had virtually no earnings" and that it used "new investor money to repay earlier investors." (Id. ¶¶ 10-11.) And it alleges that Defendants did so "to induce prospective investors to invest in Mantria." (Id. ¶ 10.) In fact, most of the individuals who invested in Mantria allegedly did so after attending Defendant McKelvy's Speed of Wealth seminars. (Id. ¶ 12.) It then lists 55 paragraphs of Overt Acts done by Defendants in furtherance of the conspiracy. (Id. at 8-21.) Paragraph 31 of the Overt Acts section lists various false statements made by Defendant McKelvy, including the statement: "I'm deeply involved in Mantria. A lot of the things he's [WRAGG] talking about, I'm a partner with. I look at the books. I know where all the money is going." (Id. at 13 ¶ 31(d) (alteration in original).)

The statutory language and factual allegations in Count 1 therefore show that (1) Defendants agreed to commit wire fraud, (2) Defendant joined the conspiracy with knowledge,

and (3) one of the Defendants committed an overt act in furtherance of the conspiracy. See Mitan, 2009 WL 1651288, at *8 (citing Gebbie, 294 F.3d at 544). Based on the alleged facts, "it appears as a reasonable and logical inference" that the actions of Defendant "could not have been carried on except as the result of a preconceived scheme or common understanding." Bruno, 2014 WL 1788910, at *4 (quoting Holmes, 387 F. App'x at 245). Count 1 therefore contains the elements of conspiracy to commit wire fraud.

Count 1 also sufficiently apprises Defendant of what he must be prepared to meet at trial. The Manner and Means section includes materially false statements Defendant made at his Speed of Wealth seminars to procure investors for Mantria. (Doc. No. 1 at 5-8.) It lists 55 paragraphs of Overt Acts allegedly done in furtherance of the conspiracy. (Id. at 8-20.) And it includes multiple wire transfers made by Wragg and Knorr to Defendant McKelvy to compensate him for raising funds for Mantria from investors. (Id. at ¶¶ 12, 26, 29-30, 33, 37, 39-40, 43-45, 49-51.) The Indictment charges that the conspiracy occurred from March 1, 2005 to April 30, 2010 and includes the date of each transfer, specifying the time period for the conspiracy. See Stock, 728 F.3d at 292 (citing Huet, 665 F.3d at 595). Although "detailed allegations" are unnecessary, id., the Indictment does contain detailed factual allegations that sufficiently apprise Defendant of what he must be prepared to meet at trial and to draft appropriate jury instructions. Considering only "the facts alleged within the four corners of the indictment," see Vitillo, 490 F.3d at 321, Count 1 sufficiently charges Defendant with conspiracy to commit wire fraud and will not be dismissed.

B. Counts 2 to 8 Sufficiently Allege the Elements of Wire Fraud and Apprise Defendant of What He Must Be Prepared to Meet at Trial

With respect to Counts 2 to 8, charging wire fraud in violation of 18 U.S.C. § 1343, Defendant argues that the Indictment does not contain a sufficient "factual orientation" to

support the statutory elements of wire fraud. Specifically, he asserts that it does not allege a scheme to defraud nor specific intent to defraud. (Doc. No. 111-2 at 16-17.) He also contends that Counts 2 to 8 do not apprise him of what he must be prepared to meet at trial because they do not include sufficient factual orientation to allow him to instruct the jury that they must agree on a common scheme to convict Defendant. (Id. at 20-21.)

The elements of wire fraud in violation of 18 U.S.C. § 1343 are "(1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of . . . interstate wire communications in furtherance of the scheme." Bruno, 2014 WL 1788910, at *8 (omission in original) (quoting United States v. Andrews, 681 F.3d 509, 528 (3d Cir. 2012)). "[A] scheme to defraud 'is any plan, device, or course of action to deprive another of money or property (or the intangible right of honest services) by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.'" United States v. Fumo, Crim. A. No. 06-319, 2009 WL 1688482, at *51 (E.D. Pa. June 17, 2009) (quoting Third Circuit Model Criminal Jury Instructions 6.18.1341-4).

"To act with an 'intent to defraud' means to act knowingly and with the intention or the purpose to deceive or cheat." Andrews, 811 F. Supp. 2d 1158, 1171 (E.D. Pa. 2011), aff'd, at 528 (quoting Third Circuit Model Criminal Jury Instructions 6.18.1341-4). A jury can "consider whether [defendant] acted with a desire or purpose to bring about some gain or benefit to herself or someone else or with desire or purpose to cause some loss to someone." United States v. Brown, Crim. A. No. 12-0367, 2013 WL 3463585, at *8 (E.D. Pa. July 9, 2013) (quoting Third Circuit Model Criminal Jury Instructions 6.18.1341-4). Specific intent can be "inferred from circumstantial evidence" and "may be found from a material misstatement of fact made with

reckless disregard for the truth." Id. (first quoting United States v. Riley, 621 F.3d 312, 333 (3d Cir. 2010); then quoting United States v. Hannigan, 27 F.3d 890, 892 n.1 (3d Cir. 1994)).

In this case, Counts 2 to 8 set forth sufficient factual orientation to support the required elements of § 1343. Counts 2 to 8 allege that Defendants, "in circumstances affecting a financial institution, devised and intended to devise a scheme to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises." (Doc. No. 1 at 22 ¶ 2.) The Indictment then incorporates the Background and the Manner and Means listed in Count 1. (Id. at 22 ¶¶ 1, 3.) The Indictment provides that Defendants "made materially false statements and omitted material facts to mislead investors as to the true financial status of Mantria." (Id. ¶ 10.) Although Defendants "claimed that 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." (Id. ¶ 11.)

It alleges that, as part of the scheme, Defendant McKelvy ran investment seminars through his company, Speed of Wealth. (Id. ¶¶ 2, 12.) There, he would advise prospective clients to liquidate other investments and assets to invest in Mantria securities. (Id.) During the seminars, Defendants "made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria Securities." (Id. ¶ 12.) The Indictment provides that "[e]arly investors who received extravagant returns in Mantria securities were used to provide 'testimonials' to induce additional investors to invest in Mantria securities." (Id.) Investors then would pool their investment funds, wire the funds to Mantria-controlled banks, and would receive Mantria securities in return. (Id. ¶¶ 3-4.) Defendants Wragg and Knorr made numerous wire transfers to Defendant McKelvy as commission payments for securing funds from investors. (Id. ¶ 15.)

Counts 2 to 8 then allege that Defendants "for the purpose of executing the scheme described above, and aiding and abetting its execution, caused to be transmitted by means of wire communication in interstate commerce the signals and sounds described below for each count, each transmission constituting a separate account." (Id. at 22-23 ¶ 4.) The Indictment also lists material misstatements made by Defendant to induce individuals to invest in Mantria. (Id. at 6-8.) Finally, it lists the dates and descriptions of each wire transmission for Counts 2 to 8. (Id. at 23.) By tracking the statutory language of § 1343, quoted above, incorporating the Background and the Manner and Means, and listing the dates and descriptions of each wire transfer, the Indictment contains the elements of wire fraud.

Counts 2 to 8 sufficiently apprise Defendant of what he must be prepared to meet at trial. Counts 2 to 8 incorporate the Background and the Manner and Means, which include material misstatements made by Defendant and other actions done in furtherance of the scheme. The Background, the Manner and Means, and the time period alleged therefore provide factual orientation for Defendant to draft a common scheme instruction.

Counts 2 to 8 also provide the time period for the alleged wire fraud, March 1, 2005 to April 30, 2010, and list in chart form the dates and descriptions of each fraudulent wire transfer. See Stock, 728 F.3d at 292 (citing Huet, 665 F.3d at 595) ("[A] factual orientation that includes a specification of the time period of the alleged offense is sufficient for the second and third requirements."). Thus, accepting as true the factual allegations in the Indictment, Stock, 728 F.3d at 299, Counts 2 to 8 contain the elements of wire fraud and sufficiently apprise Defendant of what he must be prepared to meet. For these reasons, Counts 2 to 8 will not be dismissed.

C. Count 9 Sufficiently Alleges the Elements of Conspiracy to Commit Securities Fraud and Apprises Defendant of What He Must Be Prepared to Meet at Trial

With respect to Count 9, charging conspiracy to commit securities fraud under 18 U.S.C. § 371, Defendant contends that the Indictment fails to contain the elements of the offense because it does not include what Defendants conspired to do and does not contain "factual orientation" of the scheme to defraud. (Doc. No. 111-2 at 2-3, 16-17.) He also asserts that Count 9 does not sufficiently apprise him of what he must be prepared to meet at trial because the language of the Indictment does not provide the information necessary for him to draft a suitable "common scheme" jury instruction. (Id. at 3.)

The elements of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 are "(1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objective, and (3) an intent on the part of the conspirators to agree as well as to defraud the United States." United States v. Rennert, No. Crim. A. 96-51, 1997 WL 597854, at *4 (E.D. Pa. Sept. 17, 1997) (quoting United States v. Rankin, 870 F.2d 109, 113 (3d Cir. 1989)) (reciting the elements of a conspiracy in the context of a conspiracy to commit securities fraud). As the Third Circuit has noted:

> In a conspiracy indictment, the gist of the offense is the agreement and specific intent to commit an unlawful act, and when required by statute, an overt act. Conspiracy indictments need not allege all of the elements of the offense which the defendants are accused of conspiring to commit.

United States v. Wander, 601 F.2d 1251, 1259 (3d Cir. 1979) (citation omitted). The required intent is "intent to commit an unlawful act, combined with intent to commit the underlying offense." Rennert, 1997 WL 597854, at *4 (quoting United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir. 1986)). "[K]knowledge and intent may be inferred from conduct that furthered the

purpose of the conspiracy." United States v. Taylor, 232 F. Supp. 3d 741, 751 (W.D. Pa. 2017) (quoting United States v. Park, 505 F. App'x 186, 189 (3d Cir. 2012)).

In Count 9, the Indictment alleges that Defendants "conspired and agreed together, to commit offenses against the United States, that is securities fraud, in violation of" 15 U.S.C. § 78j(b), 78ff, and 17 C.F.R. § 240.10b-5. (Doc. No. 1 at 24 ¶ 2.) Count 9 contains the elements of conspiracy to commit securities fraud, tracking the language of § 371. See Huet, 665 F.3d at 595. It incorporates the Background, the Manner and Means, and the Overt Acts done in furtherance of the conspiracy, providing sufficient factual orientation for a scheme to defraud. See id.; United States v. Stevenson, 832 F.3d 412, 425 (3d Cir. 2016) (explaining that a count may incorporate by reference an allegation made in another count as long as it is done expressly).

As part of the scheme, the Indictment alleges that Defendant operated the company Speed of Wealth to "lure the general public to seminars he offered." (Doc. No. 1 ¶ 12.) At the seminars, he would advise investors to liquidate their assets to invest in unregistered Mantria securities. (Id. ¶¶ 2, 9, 12.) The investors then would receive securities in Mantria and its entities. (Id. ¶ 4.) The Indictment then lists numerous false statements and omissions made by Defendants to prospective investors. (Id. ¶¶ 10, 13, 14.) In the Overt Acts section, it specifically includes false statements made by Defendant McKelvy to prospective investors at his seminar. (Id. ¶ 31.) From the factual allegations in the Background, the Manner and Means, and the Overt Acts incorporated into Count 9, Defendant's knowledge and intent can be inferred. See Taylor, 232 F. Supp. 3d at 751. For these reasons, Count 9 contains the elements of conspiracy to commit securities fraud.

Count 9 sufficiently apprises Defendant of what he must be prepared to meet at trial. In the Manner and Means section, the Indictment provides that Defendants raised approximately $54 million through "twelve fraudulent and unregistered securities offerings for Mantria and its related entities." (Doc. No. 1 ¶ 9.) It lists materially false statements and omissions made by Defendants to potential investors in those unregistered securities. (Id. ¶¶ 13-14.) And like Count 1, Count 9 provides the time period for the conspiracy and expressly incorporates the Overt Acts in paragraphs 1 to 55. (Id. at 24 ¶ 4.) As in the preceding Counts, the factual allegations in Count 9 sufficiently apprise Defendant of what he must be prepared to meet at trial and will not impinge on Defendant's ability to prepare appropriate jury instructions. Because Count 9 is sufficiently alleged in the Indictment, it will not be dismissed.[5]

D. Additional Arguments Made by Defendant Regarding the Indictment Are Unpersuasive

Defendant makes three additional arguments in the Motion to Dismiss, which he urges the Court to consider when evaluating the sufficiency of the Indictment. Each argument is unpersuasive.

1. Defendant's Proffers of Evidence Will Not Be Considered at the Motion to Dismiss Stage

First, in the instant Motion, as he did in his Motion to Dismiss Based on the Statute of Limitations (Doc. No. 105), Defendant submits proffers of evidence to convince the Court that Defendant did not know that Mantria was a fraud and that when the Indictment was filed, "support for any fraud allegations against" him was remote. (Doc. No. 111-2 at 6-9.) Defendant urges the Court to consider his proffers of evidence when ruling on the Motion to Dismiss. The

[5] In his Motion, Defendant argues that for the same reasons that Counts 1 to 9 should be dismissed, all references to "fraud" in Count 10, charging securities fraud, should be stricken. (Doc. No. 111-2 at 33.) Because the Court finds that Counts 1 to 9 are sufficiently alleged in the Indictment, the Court will not strike the references to "fraud" in Count 10 of the Indictment.

Government does not agree that the proffers contain an accurate recitation of the totality of the evidence it will present at trial on Defendant's knowledge of the overarching fraud. (Doc. No. 115 at 5-6.)

The Court, however, is bound to decide Defendant's Motion "based on the facts alleged within the four corners of the indictment, not the evidence outside of it." United States v. Vitillo, 490 F.3d 314, 321 (3d Cir. 2007). And as such, a pretrial motion to dismiss an indictment, "is not a permissible vehicle for addressing the sufficiency of the government's evidence." United States v. Huet, 665 F.3d 588, 595 (quoting United States v. DeLaurentis, 230 F.3d 659, 660 (3d Cir. 2000)). Therefore, the Court will not consider Defendant's proffers of evidence in reaching its decision. (Doc. No. 111.) Instead, the Court has decided the Motion to Dismiss only "based on the facts alleged within the four corners of the indictment." Vitillo, 490 F.3d at 321.

2. Factual Details from the Body of the Indictment Are Properly Incorporated into Each Count Pursuant to United States v. Panarella

Second, Defendant argues that based on United States v. Panarella, 277 F.3d 678 (3d Cir. 2002),[6] the charging paragraphs of the Indictment should not be read to incorporate the factual details from other parts of the Indictment to set out an overarching scheme. (Doc. No. 111-2 at 23.) He argues that the charging paragraphs "simply track[] the statutory terms" but contain no factual orientation, and therefore cannot be read to incorporate details from other parts of the Indictment. (Id.)

Panarella, however, is inapposite to Defendant's argument. In Panarella, the Third Circuit found that a superseding information charging honest services fraud included detailed facts alleged in the body of the superseding information. 277 F.3d at 690 n.7. There, Defendant contended that the Court should consider only the facts included in the charging paragraph and

[6] United States v. Panarella, 277 F.3d 678 (3d Cir. 2002), was abrogated on other grounds by United States v. Willis, 844 F.3d 155 (3d Cir. 2016).

should not incorporate by reference facts alleged in the body of the superseding information. Id. He argued that based only on the facts alleged in the charging paragraph, the Indictment did not sufficiently charge a scheme to deprive the public of his "honest services." Id. at 689. The Court disagreed and read the charging paragraph as "incorporating by reference the other facts specifically alleged in the body of the information," even though the information did not explicitly allege that these facts constituted the scheme. Id. Based on the charging paragraph and the facts in the body of the superseding information, the Court concluded that the indictment sufficiently alleged honest services fraud. Id. at 690-91.

Similar to Panarella, this Court has incorporated the facts in the body of the Indictment into the charging paragraphs to determine whether each Count was sufficiently pled. See also Stevenson, 832 F.3d at 425 (explaining that a count may incorporate by reference an allegation made in another count as long as it is done expressly); United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007) (concluding that indictment adequately charged defendants with a bribery theory of honest services wire fraud where the specific factual allegations that were incorporated by reference were sufficient to alert defendant to theories the Government planned to pursue); United States v. Werme, 939 F.2d 108, 111 (3d Cir. 1991) ("[T]he charging portion of a conspiracy count may not rely upon other counts within the indictment to cure deficiencies, unless those counts too are expressly incorporated by reference.").

Here, factual allegations are listed in Count 1 and are then expressly incorporated by reference into each subsequent Count in the Indictment. Because Panarella stands for a proposition at odds with Defendant's position, the Court is not persuaded by his argument. As such, for each Count, the Court has considered factual allegations in the body of the Indictment

together with the statutory language in the charging paragraph in determining that the Indictment is sufficient.[7]

3. Defendant's Reliance on United States v. Dobson in Determining the Sufficiency of the Indictment Is Without Merit

Third, Defendant argues that the Court should apply the reasoning of United States v. Dobson, 419 F.3d 231 (3d Cir. 2005) in determining whether the Indictment sufficiently alleges Defendant McKelvy's requisite intent. (Doc. No. 111-2 at 28.)

In Dobson, defendant was convicted of mail fraud and argued on appeal that the district court did not properly charge the jury on the "culpable participation" component of the alleged fraudulent scheme. 419 F.3d at 233. The "culpable participation" charge noted in Dobson was based on a prior Third Circuit decision, United States v. Pearlstein, 576 F.2d 531 (3d Cir. 1978). As the Court noted in Dobson,

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[7] Defendant further asserts that incorporation of language from the body of the Indictment into the charging paragraphs would result in an impermissible "constructive amendment" to the offenses charged. (Doc. No. 111-2 at 26-27). In United States v. Sanders, the Third Circuit explained a constructive amendment as follows:

> A constructive amendment occurs when a defendant is deprived of his "substantial right to be tried only on charges presented in an indictment returned by a grand jury." United States v. Syme, 276 F.3d 131, 148 (3d Cir. 2002) (quoting United States v. Miller, 471 U.S. 130, 140, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985)). An indictment is constructively amended when "the evidence and jury instructions at trial modify essential terms of the charged offense [such] that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." United States v. Daraio, 445 F.3d 253, 259-60 (3d Cir. 2006).

683 F. App'x 122, 123-24 (3d Cir. 2017). Here, incorporating facts alleged in the body of the Indictment into each Count does not create a constructive amendment. To the contrary, a charging paragraph may rely on facts alleged in other counts as long as the facts are expressly incorporated. See Werme, 939 F.2d at 111. And a constructive amendment occurs when "the evidence and jury instructions at trial modify essential terms of the charged offenses." Sanders, 683 F. App'x at 123-24. It does not occur where, as here, facts alleged in the body of the Indictment are incorporated into subsequent Counts.

> In Pearlstein, we held that in a mail fraud case it is not sufficient for the United States to prove merely that a defendant participated in a fraudulent scheme; rather, it must show that the defendant did so knowingly and "in furtherance of the illicit enterprise." Id. at 545; see also Genty v. Resolution Trust Corp., 937 F.2d 899, 908-09 (3d Cir. 1991) ("When . . . liability is premised on violations of the federal mail fraud statute, 18 U.S.C. § 1341, the defendants must have knowledge of the illicit objectives of the fraudulent scheme and willfully intend that those larger objectives be achieved."). Unwitting participation in a fraudulent scheme is not criminal under § 1341. Moreover, the relevant inquiry is not whether the defendant acted knowingly in making any misstatement, but whether she did so with respect to the overarching fraudulent scheme-that is, the particular "illicit enterprise" charged in the indictment. 576 F.2d at 537.

419 F.3d at 237 (omission in original) (footnote omitted).

The defendant in Dobson was a salesperson for a company which represented that it could purchase discounted merchandise and sell it to third parties at a profit. Id. at 233. As a salesperson, defendant recruited individuals to become brokers for the company. Id. at 234. She represented to potential brokers what the company was falsely stating: that the brokers could purchase merchandise at the discount and then resell it. Id. To do so, they had to pay a one-time fee to become brokers. Id. The company, however, had no relationships with merchandisers, and defendant was not truthful with the potential brokers about her involvement with the company. Id. at 235.

A jury convicted defendant of mail fraud. Id. Defendant challenged the jury instructions on the elements of mail fraud and the sufficiency of the evidence. Id. at 236. She argued that the jury instruction on the elements of mail fraud failed to include the "culpable participation" requirement. Id. As noted, relying on Pearlstein, she argued that the government must prove that defendant participated in the fraudulent scheme knowingly and "in furtherance of the illicit enterprise." Id. at 237 (quoting Pearlstein, 576 F.2d at 545). She asserted that "[u]nwitting participation in a fraudulent scheme is not criminal." Id.

The Third Circuit agreed:

> [T]he controlling question is whether the District Court's jury instruction required a determination of whether Dobson knowingly participated in [the] broader scheme to defraud.
>
> The charge did not convey this essential aspect of the knowledge element of the fraud charged in the Indictment. The District Court's instruction nowhere advised the jury that it could convict only on finding that Dobson in fact knew of [the] fraudulent scheme.

Id. at 238. The Court noted that there were two potential layers of fraud in Dobson: defendant's sale practices, and the company's fraudulent scheme. Id. The district court's instruction failed to make the necessary legal distinction between the two layers. Id. The Third Circuit therefore vacated defendant's conviction. Id. at 241.

In this case, Defendant asserts that the Indictment does not contain sufficient facts to support the allegation that Defendant knowingly participated in the scheme to defraud. (Doc. No. 111-2 at 30, 32.) He argues that this deficiency does not leave him "qualified for a 'culpable participation' instruction" at trial because the Indictment does not contain "a factually oriented description of the scheme in the charging paragraphs." (Id. at 32.) Therefore, Defendant argues that the language in the Indictment puts him in the same position as defendant in Dobson and that he has no way to draft an appropriate jury instruction. (Id.)

In this regard, Defendant argues that the instant case is analogous to Dobson because this case also presents two potential layers of alleged fraud: (1) the conduct of Wragg and Knorr, and (2) and the conduct of Defendant McKelvy. (Id.) Defendant claims that his alleged conduct constitutes a separate layer of fraud from his co-Defendants because he denies knowing about the overall fraud regarding the Mantria investments. (Id.) Defendant alleges that since the Indictment is devoid of factual allegations of a single overarching scheme, he is unable to construct the "culpable participation" jury instruction to which he is entitled. (Id. at 33.)

The Court is not persuaded. Here, the Indictment charges Defendant with knowledge of

the overall scheme to defraud. The Indictment provides detailed allegations in the Background, the Manner and Means, and the Overt Acts sections, which are incorporated into each Count. The Indictment alleges:

> 10. In order to induce prospective investors to invest in Mantria, defendants TROY WRAGG, AMANDA KNORR, and WAYDE MCKELVY made materially false statements and omitted material facts to mislead investors as to the true financial status of Mantria, including grossly overstating the financial success of Mantria and promising excessive returns.
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> 11. While defendants TROY WRAGG, AMANDA KNORR, and WAYDE MCKELVY claimed that 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.
>
> 12. Most of the investors were introduced to Mantria through defendant WAYDE MCKELVY and his company, Speed of Wealth. Defendant MCKELVY caused Speed of Wealth to advertise on the radio, internet, and other media outlets to lure the general public to seminars he offered. During these seminars, defendants WAYDE MCKELVY, TROY WRAGG, and AMANDA KNORR made materially false statements and omitted material facts to mislead prospective investors and induce them to invest in Mantria securities. Early investors who received extravagant returns in Mantria securities were used to provide "testimonials" to induce additional investors to invest in Mantria securities.

(Doc. No. 1 ¶¶ 10-12.) And paragraph 31 of the Overt Acts section lists false statements made by Defendant McKelvy, including the statement: "I'm deeply involved in Mantria. A lot of the things he's [WRAGG] talking about, I'm a partner with. I look at the books. I know where all the money is going." (Id. at 13 ¶ 31(d) (alteration in original).) Based on the allegations in the Indictment, Defendant will be able to draft a "culpable participation" charge for the jury.

An indictment is sufficient as long as it contains the elements of the offenses, "sufficiently apprises the defendant of what he must be prepared to meet, and . . . 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." Huet, 665 F.3d at 595 (citation omitted). "[T]he

Government is not required to set forth its entire case in the indictment." Id. And any challenge to the sufficiency of the evidence based on Defendant's lack of knowledge of the overarching scheme to defraud must await the Government's presentation of evidence at trial. See DeLaurentis, 230 F.3d at 660 ("Unless there is a stipulated record, or unless immunity issues are implicated, a pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence."). Therefore, Defendant's reliance on Dobson in determining the sufficiency of the Indictment is without merit.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Counts 1-9 and Motion to Strike Count 10 of the Indictment, for Failure to State an Offense (Doc. No. 111) will be denied. An appropriate Order follows.