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 19, 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.

Before the Court is Defendant's Motion to Strike Surplusage from Counts 1-10 of the Indictment. (Doc. No. 136.) Defendant argues that certain language related to Defendant's alleged sale of securities should be stricken from the Indictment as surplusage because it is irrelevant and prejudicial. (Id. at 1-2, Doc. No. 136-1 at 2.) The language that he claims is surplusage includes language that he sold securities without a license, that investors were not

accredited,[1] and that the securities were "unregistered." (Doc. No. 136 at 1-2.) He contends that the language is not relevant to proving specific intent to defraud and is prejudicial because it implies that he violated uncharged civil securities statutes.[2] (Doc. No. 136-1 at 7-10.) In

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[1] The Government's Response to the Motion to Strike provides that "[a]ccredited investors typically have an income of $200,000 or more or a net worth exceeding $1 million in assets" and therefore "are more suitable for high risk investments because they can afford to lose money in such an investment." (Doc. No. 137 at 9.)

[2] Defendant contends that language referring to his sale of securities without a license implies that he violated 15 U.S.C. § 78o(a)(1). (Doc. No. 136-1 at 5, 8.) Section 78o(a)(1) provides:

> (1) It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person (other than such a broker or dealer whose business is exclusively intrastate and who does not make use of any facility of a national securities exchange) to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) unless such broker or dealer is registered in accordance with subsection (b) of this section.

§ 78o(a)(1). Defendant further argues that the phrase "unregistered securities" implies that he violated 15 U.S.C. § 77e(a) and (c). (Doc. No. 136-1 at 10.) Section 77e(a) and (c) provide:

> **(a) Sale or delivery after sale of unregistered securities**
>
> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> > **(**1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
> >
> > **(2)** to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.
>
> * * * *
>
> **(c) Necessity of filing registration statement**

response, the Government submits that Defendant's Motion (Doc. No. 136) should be denied because the language is relevant to proving Defendant's intent for each alleged crime[3] and to describing the conduct alleged. (Doc. No. 137 at 5, 8.) The Court agrees, and for reasons that follow, Defendant's Motion to Strike Surplusage (Doc. No. 136) will be denied.

II. BACKGROUND

The Indictment alleges that from approximately March 1, 2005 to April 30, 2010, Defendant, along with Troy Wragg and Amanda Knorr,[4] 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.

> It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

§ 77e(a), (c).

[3] The intent required for a conspiracy is "the intent to commit the underlying offense." United States v. Ferguson, 394 F. App'x 873, 877 (3d Cir. 2010) (quoting United States v. Brodie, 403 F.3d 123, 134 (3d Cir. 2005)). To establish the requisite intent for the wire fraud offenses (Counts 1-8), the Government must prove Defendant's "knowing and willful participation in a scheme or artifice to defraud" and "the specific intent to defraud." United States v. Andrews, 681 F.3d 509, 528 (3d Cir. 2012) (quoting United States v. Antico, 275 F.3d 245, 261 (3d Cir. 2001)).

To establish the requisite intent for the securities fraud offenses (Counts 9-10), the Government must prove that Defendant acted knowingly, willfully, and with the specific intent to deceive or defraud. See United States v. Boyer, 694 F.2d 58, 59-60 (3d Cir. 1982); United States v. McGinn, 787 F.3d 116, 124 (2d Cir. 2015); 2B O'Malley et al., Fed. Jury Prac. & Instr. § 62:07 (6th ed. 2017).

A jury may infer knowledge and intent from circumstantial evidence. See United States v. Chaffo, 452 F. App'x 154, 159-60 (3d Cir. 2011) (citing United States v. Riley, 621 F.3d 312, 333 (3d Cir. 2010)); Third Circuit Model Criminal Jury Instructions 5.01.

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

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 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 from 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 [Securities and Exchange Commission] 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 also alleges that "[d]espite the fact that he routinely sold securities during the duration of the conspiracy, [Defendant] has never been licensed to sell securities." (Id. ¶ 2.) In fact, "[m]any of the investors in Mantria were not accredited and were otherwise not suitable to high risk investment." (Id. ¶ 3.)

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 paid Defendant approximately $6.2 million in commissions. (Id. ¶ 15.) In November 2009, the SEC commenced civil litigation against Mantria. (Id. ¶ 16.)

Based on all this alleged conduct, the Indictment was returned on September 2, 2015, naming Defendant Mckelvy, Wragg, and Knorr as Defendants. (Doc. No. 1.) On November 6, 2017, Defendant filed the Motion to Strike Surplusage from Counts 1-10 of the Indictment. (Doc. No. 136.) On November 13, 2017, the Government filed a Response. (Doc. No. 137.) The Motion is now ripe for review.

III. STANDARD OF REVIEW

Rule 7(d) of the Federal Rules of Criminal Procedure provides that, "[u]pon the defendant's motion, the court may strike surplusage from the indictment or information." Fed. R. Crim. P. 7(d). Motions to strike surplusage, however, are rarely granted. United States v. Hedgepeth, 434 F.3d 609, 611 (3d Cir. 2006) (citations omitted). And "the scope of a district court's discretion to strike material from an indictment is narrow." United States v. Pharis, 298 F.3d 228, 248 (3d Cir. 2002) (quoting United States v. Oakar, 111 F.3d 146, 157 (D.C. Cir. 1997)). They may only be granted if it is clear that the allegations in the indictment are both irrelevant to the charge and prejudicial. Hedgepeth, 434 F.3d at 612. In Hedgepeth, the Third Circuit explained: "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.

Moreover, language is properly included in an indictment if it pertains to matters that the government will prove at trial. See United States v. Schweitzer, Crim. A. 03-451-1, 2004 WL

1535793, at *3 (E.D. Pa. Feb. 26, 2004); United States v. Abuhouran, Crim. Nos. 01-239-01, 03, 2002 WL 31681976, at *6 (E.D. Pa. Nov. 26, 2002); United States v. Bulei, Crim. No. 98-267-1, 1998 WL 544958, at *3 (E.D. Pa. Aug. 26, 1998). These matters need not be essential elements of the offense if they are generally relevant to the overall scheme that is being charged or contain relevant background information. United States v. Yeaman, 987 F. Supp. 373, 376-77 (E.D. Pa. 1997) (citations omitted). Language that describes information that "the government hopes to properly prove at trial . . . cannot be considered surplusage no matter how prejudicial it may be." Id. at 377 (internal quotation marks omitted).

IV. ANALYSIS

Defendant moves to strike three categories of language from the Indictment. In the first category, he moves to strike the sentence, "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, paragraph 2); 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" (Count 1, paragraph 3); and the sentence "Federal securities law also generally required those selling securities to the general public to be licensed" (Count 1, paragraph 7). (Doc. No. 136 at 1, Doc. No. 136-1 at 3.) In the second category, he moves to strike the sentence, "Many of the investors in Mantria were not accredited and were otherwise not suitable to high risk investments" (Count 1, paragraph 3). (Doc. No. 136 at 1.) In the third category, he moves to strike the word "unregistered" (Count 1, paragraphs 2, 4, 5, 9); and the sentence, "None of the securities sold by Mantria were registered with the SEC" (Count 1, paragraph 7). (Id. at 1-2.) Defendant also moves to strike each of these passages where they are incorporated by reference in Counts 2 to 10. (Id. at 2.)

A. Language in the Indictment that Defendant Was Not Licensed to Sell Securities and that He Attempted to Evade SEC Regulations Are Relevant to Proving Intent and Lack of Good Faith

Defendant argues that language in the Indictment that he was not licensed to sell securities and that he attempted to evade SEC regulations should be stricken because they are irrelevant and prejudicial. He contends that the language does not describe "what is legally essential to the charge in the indictment," (Doc. No. 136-1 at 2 (quoting United States v. Oakar, 111 F.3d 146, 157 (D.C. Cir. 1997)), or help "to make sense of or establish context for the criminal charges," (Id. (quoting United States v. Huddleston, No. 3:16-CR-61, 2017 WL 3332757, at *7 (E.D. Tenn. Aug. 3, 2017)). Defendant also argues that these phrases are unfairly prejudicial because they imply that he violated uncharged civil securities statutes. (Id. at 8.) In response, the Government argues that the phrases are relevant to proving the intent required for each Count, as well as a lack of good faith. (Doc. No. 137 at 6-7.) Acting in good faith may be a defense to the crimes alleged.[5] (Id.); see also Third Circuit Model Criminal Jury Instructions 5.01.

Courts in the Third Circuit hold that allegations in an indictment are not surplusage if they are relevant to proving intent. See, e.g., United States v. Savage, Crim. A. No. 07-550-06, 2013 WL 420333, at *2-3 (E.D. Pa. Feb. 4, 2013) (refusing to strike details regarding defendant's purchase of a gun because they were relevant to proving his intent to retaliate against witnesses); United States v. Johnson, 262 F.R.D. 410, 413-14 (D. Del. 2009) (denying motion to reconsider

[5] Good faith may be a complete defense to a specific intent offense because a finding of good faith would be inconsistent with the required mental state for that charge. Third Circuit Model Criminal Jury Instructions 5.01.

In United States v. Gross, the Third Circuit held: "While it was not reversible error for the district court to refuse to give the good faith instruction in this case, we commend to the district judges in the exercise of their discretion its use as a supplement to the 'knowing and willful' charge in future cases." 961 F.2d 1097, 1103 (3d Cir. 1992). If supported by evidence at trial, a jury instruction on the good faith defense may be appropriate in this case.

denial of motion to strike surplusage, explaining that language relating to defendant's role at his employer was relevant to fraudulent scheme and his fraudulent intent to commit mail and wire fraud); United States v. Bortnick, Crim. A. No. 03-414, 2004 WL 2861868, at *4-5 (E.D. Pa. Nov. 30, 2004) (holding that defendant's activities after procuring financing were relevant to proving scope of scheme to defraud and intent for charge of bank fraud and therefore were not surplusage); United States v. Eisenberg, 773 F. Supp. 662, 667, 700-01 (D.N.J. 1991) (refusing to strike language that defendant promoter was barred by SEC from associating with any brokerage firm because it was relevant to motive and intent, especially defendants' motive in failing to disclose in registration statements defendant's role as a promoter).

In United States v. Georgiou, the court held that paragraphs in the indictment showing evidence of loss were relevant to proving specific intent to defraud. Crim. A. No. 09-88, 2009 WL 4641719, at *7 (E.D. Pa. Dec. 7, 2009). There, defendant was charged with leading an international securities fraud conspiracy involving manipulation of the stock of four publicly-traded companies. Id. at *1. Defendant moved to strike paragraphs of the indictment describing the loss suffered by two brokerage firms from which defendants obtained loans. Id. at *6. He argued that these paragraphs were irrelevant because loss was not an element of the offense and because they were prejudicial. Id. The Court held that evidence of loss was relevant to show defendant's specific intent to defraud and denied defendant's motion to strike surplusage in those paragraphs. Id. at 7.

In the instant case, language stating that Defendant was not licensed to sell securities, that he attempted to evade SEC regulations, and that federal securities laws generally require a license to sell securities to the general public is relevant to proving the required intent for each charge in the Indictment. Defendant's lack of a license to sell securities, like loss, is relevant to

proving his specific intent to defraud. See Georgiou, 2009 WL 4641719, at *7. Moreover, this language is relevant to proving that Defendant "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." (Doc. No. 137 at 7.) In this regard, the Government claims that Defendant intentionally sought to remain undetected by the SEC. The Government submits that it will use this evidence at trial to prove that Defendant knew his tactics were in violation of law and that his actions were not taken in good faith.

Because the Government plans to use the evidence noted to prove Defendant's requisite intent for each charge at trial, the Court will not strike this language as surplusage. See Yeaman, 987 F. Supp. at 376-77 ("[I]f the language is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be." (quoting United States v. Hill, 799 F. Supp. 86, 88-89 (D. Kan. 1992))).

B. Language in the Indictment that Many of the Investors Were Not Accredited Is Relevant to Proving Intent

Defendant contends that the language that many of the investors were not accredited should be stricken from the Indictment because it is irrelevant and unfairly prejudicial. (Doc. No. 136-1 at 4.) In response, the Government submits that its evidence will show that Mantria's attorney advised Defendants that all Mantria investors should be accredited because of the high-risk nature of the securities. (Doc. No. 137 at 9.) The Government claims that it will prove that Defendants purposely targeted unsophisticated investors to "dupe them into investing in Mantria." (Id.) It asserts that this evidence will be used to show Defendant McKelvy's intent and lack of good faith in targeting these investors. (Id.)

Like the language related to Defendant's sale of securities without a license and attempted evasion of the SEC, the language that many of the investors were not accredited is

relevant to proving the required intent for each charge. Because the Government intends to use this evidence to prove Defendant's requisite intent to defraud, it is relevant to the charges in the Indictment. See United States v. Walker, Crim. No. 11-381, 2014 WL 36635, at *6-7 (D. Minn. Jan. 3, 2014) (refusing to strike language from indictment that defendant violated the "Accredited Investors Rule" even when defendant was not charged with securities fraud because evidence was relevant to proving that defendant "intentionally and voluntarily devised a scheme" to defraud). The Court therefore will deny Defendant's Motion to strike as surplusage the language that investors were not accredited.

C. The Phrase "Unregistered Securities" Is Relevant Because It Is a Term Used to Describe the Type of Securities Sold

Defendant argues that the phrase "unregistered securities" should be stricken from the Indictment because it is not "legally essential" to, and does not establish context for, the crimes charged. (Doc. No. 136-1 at 10.) He also contends that this phrase implies that he violated civil regulatory statutes not charged in the Indictment. (Id.) In response, the Government submits that the phrase is relevant as a "descriptive term to distinguish these securities from listed securities,"[6] (Doc. No. 137 at 8), and argues that the jury may be misled if these words were stricken because the jury may assume that the securities should have been sold in accordance with requirements for registered securities, (Id.) The Government also submits that this phrase is not prejudicial because it is legal to sell unregistered securities under certain circumstances. (Id.)

The phrase "unregistered securities" is relevant to the charges in the Indictment because it describes the conduct alleged. "[M]atters need not be essential elements of the offense if they are 'in a general sense relevant to the overall scheme charged,' . . . or 'contain relevant

[6] A listed security is "[a] security accepted for trading on a securities exchange." Listed Security, Black's Law Dictionary (10th ed. 2014). "The issuing company must have met the SEC's registration requirements and complied with the rules of the particular exchange." Id.

background information.'" Yeaman, 987 F. Supp. at 376-77 (first quoting United States v. Wecker, 620 F. Supp. 1002, 1006 (D. Del. 1985); then quoting Hill, 799 F. Supp. at 88-89).

In United States v. Ding, defendant was indicted for wire fraud stemming from his alleged scheme to defraud NASA. Crim. A. No. 15-35, 2015 WL 4111715, at *1 (E.D. Pa. July 8, 2015). Defendant moved to strike language from the indictment relating to his concealment of information from a third party not the target of the fraud. Id. He argued that it was irrelevant to any effort to defraud NASA. Id.

The court refused to strike the language, agreeing with the Government that defendant's concealment of information from the third party was "integral to the overall scheme to defraud NASA." Id. Defendant's deception of the third-party was "done in furtherance of the overall scheme to defraud NASA and [was] clearly relevant." Id. at *2; see also United States v. Caruso, 948 F. Supp. 382, 385, 392 (D.N.J. 1996) (declining to strike language relating to defendant's $1.7 million home and contributions to Seton Hall University from an indictment charging defendant with mail fraud because the language related "in a general sense" to the overall scheme alleged and the Government would provide evidence at trial related to the language); United States v. Giampa, 904 F. Supp. 235, 272 (D.N.J. 1995) (refusing to strike language related to a prior weapons charge because it was relevant to the overall scheme charged in the indictment).

Here, like the concealment in Ding, the phrase "unregistered securities" is "integral to the overall scheme to defraud." 2015 WL 4111715, at *1. The sale of unregistered securities was "done in furtherance of the overall scheme." Id. at *2. The Government states that Mantria's attorney will testify about the manner in which the securities were sold, making the fact that they were unregistered relevant to the alleged conduct. (Doc. No. 137 at 8.) In addition, this

descriptive term will clarify for the jury the type of securities sold and the specific conduct alleged. See Wecker, 620 F. Supp. at 1006 (declining to strike descriptive words because, while not essential to the charges, they were "in a general sense relevant to the overall scheme"). Because this phrase is relevant to the Government's case at trial, the Court need not decide whether the phrase also is prejudicial. See Hedgepeth, 434 F.3d at 612 ("[I]nformation that is prejudicial, yet relevant to the indictment, must be included.). Accordingly, Defendant's Motion to strike the phrase "unregistered securities" will be denied.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Strike Surplusage from Counts 1-10 of the Indictment (Doc. No. 136) will be denied. An appropriate Order follows.