



In paragraph 11, the indictment charges, in essence, that: While defendant Wayde McKelvy, together with co-defendants Troy Wragg and Amanda Knorr, 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.

The government does not have to prove that the alleged conspirators agreed to commit both of these two alleged parts of the conspiracy. The government, however, must prove that they agreed to commit at least one of the object [crimes] parts of the conspiracy, and you must unanimously agree on which [crime] part or parts of the two charged. You cannot find [(name)] Wayde McKelvy guilty of conspiracy unless you unanimously agree that the same [federal crime(s)] part or parts of the conspiracy was or [(were)] the objective(s) of the conspiracy. It is not enough if some of you agree that one or more of the charged [crimes] parts was the objective of the conspiracy and others agree that a different [crime] part or parts was the objective of the conspiracy.[]

Argument. In its Proposed Instruction in this section, which applies to Count 1, the conspiracy count, the government's first paragraph, taken from the model instruction, reads:

The first element of the crime of conspiracy is the existence of an agreement. The government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy, to commit the offense of wire fraud or securities fraud.

Id. at 31 (emphasis added). Although there is no statement of "the overall objective" in the charging paragraph of Count 1, ¶ 8, McKelvy requests that this Court incorporate the language set out above into this 6.18.371C model instruction.

In its proposed instruction under this heading, the government summarized the two conspiracy counts - Count 1 and Count 9<sup>1</sup> - in the following manner:

Count One of the indictment charges that Wayde McKelvy agreed or conspired with one or more other persons to commit an offense against the United States, namely, wire fraud, and that, to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act. Count Nine of the indictment charges that Wayde McKelvy agreed or conspired with one or more other persons to commit an offense against the United States, namely, securities fraud, and that, to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act.

While the government's summary is an accurate one as to the charging paragraphs of each of these two counts, it runs into a problem which is similar to that raised by the McKelvy in his offense motion - that this summary does not contain any "factual orientation" whatsoever for these allegations. See United States v. Stock, 728 F.3d 287, 292 (3d Cir. 2013). As phrased in the government's proposed instruction, the jury could only guess at the meaning of the alleged "wire fraud" - there is no other description of the "overall" offense in the government's proposed instructions.

When this Court denied McKelvy's offense motion, it read the charging language of Count 1 -- and Count 9 by reference - to include some of the language from the manner and means section ("It was a part of the conspiracy that:") of the indictment. As the Court summarized the illegal agreement in more detail, it focused on paragraphs 10 and 11 of Count 1, as does the defendant in his proposed supplemental language:

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

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<sup>1</sup> The Manner and Means section of Count 9 states: "Paragraphs 9 through 16 of Count One are incorporated here."

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.)

Doc. No. 148 at 13. Although the Court did not explicitly say so, McKelvy reads this passage in the Court's opinion set out the only two paragraphs in the Manner and Means section which could arguably constitute descriptions of the overall offense required by this model instruction and by the case law cited by McKelvy in his offense memo. Just as this model instruction does for different crimes charged in a single conspiracy count, McKelvy's requested language is the only way he knows of to instruct the jury that when there is more than one criminal objective spelled out in a particular count, there is a way to ensure unanimity.

Because Counts 2-8 (wire fraud) and Count 9 (conspiracy to commit securities fraud) present the same predicament,<sup>2</sup> McKelvy requests, as noted below, that the instructions on those counts should include similar language.

Page 33 -- 6.18.371E Conspiracy - Mental States

McKelvy requests that the following language in the government's proposed instruction for Count 10, the (substantive) securities fraud count, be incorporated into the 6.18.371E instruction:

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.

Id. at 55-56.

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<sup>2</sup> Counts 2-8 and Count 9 specifically incorporate paragraphs 9-16 of Count 1. As noted above, the generic language in the charging paragraphs of each of these counts cannot be read as describing the overall scheme. Although Counts 2-8 are substantive wire fraud counts, their focus on an alleged "scheme to defraud" is analogous to the charges in Counts 1 and 9.

Argument. McKelvy requests that language on good faith as a total defense, as contained in the government's proposed instructions at 55-56 also be used for the intent instruction as to Count 1.

Page 37 -- 6.18.1341-1 Wire Fraud - "Scheme to Defraud or to Obtain Money or Property" Defined

McKelvy requests that the following language be added at the end of the government's proposed instruction quoted below, which applies to Counts 2-8 (the wire fraud counts): "Before you reach the question of whether any of McKelvy's statements were "materially false or fraudulent pretenses, representations or promises," you must first find, unanimously, that he willfully and knowingly participated in one or both of the overall schemes set out in paragraphs 10 and 11 of Count 1, as I instructed you earlier."

The first element that the government must prove beyond a reasonable doubt is that Wayde McKelvy knowingly devised or willfully participated in a scheme to defraud the victims of money or property by materially false or fraudulent pretenses, representations or promises.

Argument. McKelvy adopts the argument made above at 2-3 regarding page 31 -- 6.18.371C Conspiracy - Existence of an Agreement.

McKelvy requests that the following language be added at the end of the government's proposed instruction quoted below: "In other words, if McKelvy acted unwittingly in this regard, you find that he was not guilty of the wire fraud conspiracy charged in Count 1 or of the wire fraud charges in Counts 2-8."

A statement, representation, claim or document is false if it is untrue when made and if the person making the statement, representation, claim or document or causing it to be made knew it was untrue at the time it was made.

Id. at 37.

Source: United States v. Dobson, 419 F.3d 231, 237 (3d Cir. 2005) ("Unwitting participation in a fraudulent scheme is not criminal under § 134[3].")

Page 52 -- No Model Securities Fraud: First Element --  
Fraudulent Act

The government's proposed instructions at pages 51-58 apply to Count 10, the substantive securities fraud count.

McKelvy first requests that the Court add the following to the end of the passage in the sixth paragraph of the government's proposed instructions in this section, which paragraph concerns the definition of a "material fact:" "The distinction between fraud and harmless sales puffing is an important one. A reasonable investor is able to filter out essentially useless information which such an investor would not consider significant, even as part of a larger 'mix' of factors to consider in making his or her investment decisions. Moreover, a reasonable investor would not consider puffing even as part of a larger mix of factors to consider in making his or her investment decision. Statements which are not material include vague, soft, puffing statements or obvious hyperbole' upon which a reasonable investor would not rely."

Sources: "The 'person of ordinary prudence' language ... [concerns], in part, ... the border between fraud and harmless sales puffing." United States v. Hucks, 557 F.App'x. 183, 187, 2014 WL 521244 (3d Cir. 2014) (non-precedential). See generally, In re Omnicare, Inc. Securities Litigation, 769 F.3d 455, 471-72 (6th Cir. 2014).

McKelvy also requests that the following language be added immediately after the third paragraph of the government's proposed instruction quoted below, which applies to Count 10 (the substantive securities fraud count): "Before you reach the question of whether McKelvy's statements constituted a "device, scheme or artifice to defraud," you must first find, unanimously, that he willfully and knowingly participated in one or both of the overall schemes set out in paragraphs 10 and 11 of Count 1, as I instructed you earlier."

A device, scheme or artifice to defraud is merely a plan for the accomplishment of any objective. Fraud is a general term which embraces all efforts and means that individuals devise to take advantage of others. The law which the

defendant is alleged to have violated prohibits all kinds of manipulative and deceptive acts.

Argument. McKelvy adopts the argument made above at 2-3 regarding page 31 -- 6.18.371C Conspiracy - Existence of an Agreement.

Note: The defendant's proposed instructions do not include two instructions which might be appropriate, but only after all the evidence has been heard. Under these circumstances, McKelvy requests leave to submit such proposed instructions at the close of the evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a true and correct copy of the foregoing Defendant's Proposed Supplemental Instructions, upon Assistant U.S. Attorney Robert J. Livermore:

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