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The Honorable Joel H. Slomsky
United States District Court
Eastern District of Pennsylvania

Re: United States v. Wayde McKelvy
15-CR-398-3
Government's Response to Defendant's Proposed Jury Instruction on "Person of Ordinary Prudence" and "Puffing"

Dear Judge Slomsky:

On September 18, 2018, the defendant submitted proposed supplemental jury instructions which, inter alia, discussed adding language to the government's proposed instruction on the definition of a "Fraudulent Act" for securities fraud. Specifically, on page 6 of his pleading, the defendant proposed adding language concerning a "person of ordinary prudence" and "puffing" statements. In summary, the defendant requests that the Court instruct the jury that the victims of the Mantria fraud were to blame for their losses, the victims should have known better, and the victims should have discarded the defendant's false statements to them as "harmless sales puffing." For the following reasons, the Court should reject the defendant's proposed additional language.

The defendant's "person of ordinary prudence" argument formerly was a defense common argument in securities fraud cases and stems from a published Eleventh Circuit opinion in United States v. Brown, 79 F.3d 1550 (11th Cir. 1996). The decision in Brown conflicted with published opinions from several other circuits. See United States v. Brien, 617 F.2d 299, 311 (1st Cir.1980); United States v. Maxwell, 920 F.2d 1028, 1036 (D.C.Cir.1990)); Lemon v. United States, 278 F.2d 369, 373 (9th Cir.1960); United States v. Sylvanus, 192 F.2d 96, 105 (7th Cir.1951). In United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (en banc), the Eleventh Circuit formally overruled their decision in Brown.

Most importantly, the Third Circuit addressed this issue in United States v. Coyle, 63 F.3d 1239, 1244 (3d Cir. 1995). The Third Circuit held that the "negligence of the victim in failing to discover a fraudulent scheme is not a defense to the criminal conduct." Id. (citing United States v. Kreimer, 609 F.2d 126, 132 (5th Cir. 1980)). Coyle is consistent with the government's proposed language: "Once you find that there was a material misrepresentation or omission of a material fact, it does not matter whether the intended victims were gullible buyers

or sophisticated investors, because the securities laws protect the gullible and unsophisticated as well as the experienced investor." Sand, Modern Federal Jury Instructions Instr. 57-21 (2006) (unmodified).

The Eleventh Circuit's en banc opinion in Svete case bears close study because the Eleventh Circuit put a considerable amount of thought into their analysis before overturning Brown. In Svete, the defendants were convicted of fraud for making false statements in the sale of viatical settlements. Citing Brown, the defendants proposed "persons of ordinary prudence" language, very similar to the language proposed by defendant McKelvy. The district court refused to give the instruction. The en banc court in Svete overturned Brown. In so doing, the Eleventh Circuit methodically described the history of fraud statutes in general. The Eleventh Circuit noted "the common law crime of cheat applied only to fraud that would deceive a person of ordinary prudence," however, more modern "statutes that prohibited false pretenses had remedied this deficiency." Id. at 1162. The object of the criminal fraud prohibition is "the intent of malefactor, not the reasonableness of the victim." Id. (citing Durland v. United States, 161 U.S. 306 (1896). The Eleventh Circuit held that Congress has never used any language that would limit prosecution only to schemes that would deceive "only prudent persons." Id. at 1163.

While the statute at issue in Svete was the mail fraud statute, the same analysis applies for securities fraud. See United States v. Tallalo, 380 F.3d 1174, 1191 (9th Cir. 2004) (affirming jury instruction which read: "It is also not a defense to charges of securities fraud and mail fraud that the victim may have been gullible or negligent. The laws against fraud are designed to protect the naive and careless as well as the experienced and careful."); Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123, 126 (7th Cir. 1972) (finding that federal securities laws protect the "uninformed, the ignorant, the gullible"); United States v. Schlisser, 168 Fed. Appx. 483, 486 (2d Cir. 2006) (unpublished) (affirming the jury instruction which read "the securities laws protect the gullible and unsophisticated as well as the experienced investor"); United States v. Ellison, 704 Fed. Appx. 616, 620 (9th Cir. 2017) (unpublished) (holding that "a victim's negligence is not a defense" and affirming a jury instruction which read "investors may have been gullible, careless, naive or negligent.").

In terms of the defendant's proposed language on "puffing," the proposed language is misleading and legally irrelevant. The published Circuit Court opinions unanimously agree that the instruction on good faith, as proposed by the government, appropriately covers the government's burden of proof regarding the defendant's scienter and that no "puffing" instruction is warranted. See United States v. Santoli, 173 F.3d 427 (4th Cir. 1999); United States v. Cain, 128 F.3d 1249, 1252 (8th Cir.1997); United States v. Shelton, 669 F.2d 446, 465 (7th Cir.1982); United States v. Gay, 967 F.2d 322, 329 (9th Cir.1992).

The case cited by the defendant in his jury instructions, United States v. Hucks, 557 Fed. Appx. 183, 187 (3d Cir. 2014) (unpublished), also bears closer scrutiny because it puts both the "person of ordinary prudence" and "puffing" arguments into context together. In Hucks, the defendant was convicted of mail fraud for selling fake Viagra and Cialis pills. On appeal, the Third Circuit held:

> With respect to the former point, Hucks essentially asserts a theory of caveat emptor: any reasonably prudent individual purchasing these medications on the street from a huckster such as he would know that they were not getting the real thing. Therefore, in his view, he could not have had the intent to defraud. Of course, the fact that a fraud victim has their own gullibility to blame is no defense for the fraudster. See United States v. Hoffecker, 530 F.3d 137, 177 (3d Cir.2008) (quoting United States v. Rennert, 374 F.3d 206, 213 (3d Cir.2004)). The "person of ordinary prudence" language that courts have imputed to the mail fraud statute, see Ciavarella, 716 F.3d at 728, is intended, in part, to police the border between fraud and harmless sales puffing, United States v. Coffman, 94 F.3d 330, 334 (7th Cir.1996). It is not a license for criminals to prey on people of "below-average judgment or intelligence"—those most in need of the law's protection. Id.

By incorporating both "person of ordinary prudence" and "puffing" arguments, Hucks successfully defeats both of the defendant's arguments that additional language should be added to the jury instructions. First, Hucks made clear that the fraud statutes protect people of "below-average judgment or intelligence"—those most in need of the law's protection. Id. Second, in formulating the wire/mail fraud model jury instructions, the Third Circuit naturally incorporated their holdings in Ciavarella and Coffman as suggested by Hucks. Contrary to the defendant's proposal, no additional instructions on this point is required. While Hucks is helpful to the government's legal position, the Court should rely on Third Circuit precedential opinions in formulating the jury instructions – precedent which also confirms the validity of the government's proposed instructions.

The second case cited by the defendant on the "puffing" issue, In re Omnicare, Inc., Securities Litigation, 769 F.3d 455 (6th Cir. 2014) does not address a criminal jury instruction but rather the materiality provision of securities law for a motion to dismiss in a civil lawsuit, not on the definition of a "Fraudulent Act" for securities fraud as the defendant proposed. The defendant is conflating the issues and taking language out of context. In re Omnicare is simply not applicable to the issue before the Court in formulating the "Fraudulent Act" jury instructions for a criminal case. The government urges the Court to reject the defendant's approach. The Court should use the Third Circuit model instructions for the wire fraud counts and the government's proposed instructions for the securities fraud counts which have been previously approved by universal precedent.

For these reasons, the Court should reject the defendant's proposed instructions on "person of ordinary prudence" and "puffing" statements. The government will address the remainder of the defendant's proposed instructions at a later point.

Sincerely,

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/s/
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cc: Walter Batty, Esq.
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