IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO.: 3:16-CR-221-MOC-DCK
	)	
v.	)	
	)	
(1) ROBERT LESLIE STENCIL	)	
(4) LUDMILA O. STENCIL	)	
(7) MICHAEL ALLEN DUKE	)	

GOVERNMENT'S TRIAL BRIEF

The United States of America, by and through its undersigned counsel, respectfully submits this trial memorandum in advance of the trial against defendants Robert Leslie Stencil, Ludmila Stencil, and Michael Allen Duke, which is scheduled to begin before this Court on Monday, January 7, 2018.

I. GOVERNMENT'S STATEMENT OF THE CASE

On October 18, 2017, Robert Leslie Stencil ("Stencil"), Ludmila O. Stencil ("Ludmila"), and Michael Allen Duke ("Duke"), along with their codefendants, were charged in a thirty-eight count indictment arising from their 2012 to 2016 involvement in a high-yield investment fraud scheme whereby defendants sold stock in Niyato to victims based on a number of false and misleading statements. (Docket No. 151.) Among other things, defendants misrepresented that Niyato was a manufacturer of electric vehicles and converted gasoline vehicles to run on compressed natural gas ("CNG"), when, in reality, the company had no facilities, no operations and no capability to manufacture vehicles. (*Id.* ¶ 14.) Defendants also misrepresented that approximately ninety-seven percent of all investor funds would be reinvested in Niyato's business and operations, including to prepare for an initial public offering ("IPO"). (*Id.*) In reality, Duke received fifty percent of the funds "invested" by the victims he solicited. (*Id.*) The

Stencils kept the balance of the investors' money and used nearly all of it for their own personal benefit. (*Id.*) Moreover, Niyato never initiated an IPO for Niyato stock and, as a result of defendants' misuse of their victims' funds, Niyato's stock was worthless. (*Id.*)

II. THE CHARGES

The defendants were charged in a thirty-four count Second Superseding Bill of Indictment charging them in Count 1 with Conspiracy in violation of 18 U.S.C. § 1349; in Counts 2–15 with Mail Fraud in violation of 18 U.S.C. § 1341; in Counts 16-29 with Wire Fraud in violation of 18 U.S.C. § 1343; and in Counts 30-31 and 33-34 with Money Laundering in violation of 18 U.S.C. § 1957(a). In advance of trial, the Government moved to dismiss Count 32.[1]

III. THE DEFENDANTS

Defendant Robert Leslie Stencil is a 61 year-old U.S. citizen. Defendant Ludmila Stencil is a 48 year-old U.S. citizen. Michael Allen Duke is a 50 year-old U.S. citizen. None of the defendants are currently in custody.

IV. THE EVIDENCE

In addition to documentary evidence, the Government will prove its case against the defendants through the testimony of co-conspirators who already pleaded guilty and are cooperating with the Government, including Nicholas Fleming, Martin Lewis, Paula Saccomanno, Kristian Sierp and Dennis Swerdlen. The defendants' co-conspirators are expected to testify about: how they targeted their victims; working with Stencil to sell Niyato stock; using the same promotional materials and *modus operandi* as Duke to pitch victims; and the fifty-fifty arrangement whereby the Stencil and Ludmila paid them around fifty percent of the money that

[1] Counts 35-38 were alleged only against a codefendant, who has since pleaded guilty and been sentenced.

they solicited from each victim. The defendants' co-conspirators are also expected to testify that the amount of commission alone made clear to them that Niyato was a scam because no legitimate business would give its broker-dealers half or nearly half of all the capital it raised from its investors and lie to its investors about it.

The Government will also offer the testimony of several individuals who had personal knowledge about the falsity of the statements that Stencil made to victims about Niyato's business and operations. Stencil repeatedly misrepresented that Niyato was a lead in the field of alternative fuel technology, both as a manufacturer of electric vehicles and as a company capable of converting gasoline vehicles to run on compressed natural gas. Ronnie Oldham and Keith Thompson, who Stencil held out as Niyato's Chief Technical Officers, are expected to testify about Niyato's lack of operational capabilities and inability to manufacture or convert vehicles. James Gaiser, who Stencil represented was Niyato's Chief Marketing Officer, and Frank McKinney, who Stencil represented was Niyato's Chief Financial Officer, are anticipated to testify about numerous misrepresentations that Stencil made about Niyato, and the fact that Stencil continued to tell investors that Mr. Gaiser and Mr. McKinney were involved in Niyato when, in reality, they were not.

The Government will also offer the testimony and expert report of Christopher R. Green, an accounting and forensic accounting expert who will trace the receipt and use of victim funds. Mr. Green will testify that the money was split fifty-fifty between the Stencils and Duke, and that most of the money that the Stencil and Ludmila kept for themselves for used for their own

personal benefit and not to manufacture electric vehicles or convert gasoline vehicles to compressed natural gas.[2]

The Government will also prove its case through the testimony of several victims who lost money as a result of the fraudulent scheme. The victims will testify about what they were told about the Niyato "investment" opportunity, including about their belief that Niyato was a real company and that their money was being reinvested to grow Niyato's business and expand its operations. They are further expected to testify that, had they known that the Stencils giving away half or nearly half of their money to the salesperson who solicited that victim, he or she would never had "invested" in Niyato. They are also expected to testify that, had they known the Stencils were using most of their money for their own personal benefit and not to invest in Niyato, they would never have bought Niyato stock.

The Government will support certain witness testimony with documentary evidence, including financial records underlying the victim transfers and Mr. Green's tracing and analysis

[2] Defendant Stencil filed a motion *in limine* to exclude certain aspects of Mr. Green's expert opinion testimony under Rule 702. (Docket No. 302.) Stencil does not dispute Mr. Green's qualifications as an expert in the fields of accounting and forensic accounting. Nor does Stencil dispute that Mr. Green's expert testimony is admissible with respect to his analysis of Niyato's payment of commissions, as well as with respect to Mr. Green's classification of other types of expenses. Rather, Stencil argues only that the Government should be precluded from offering Mr. Green's expert opinion testimony with respect to what constitutes a business-related expense as opposed to a personal benefit to the Stencils. (Docket No. 302 at 2-5.) Stencil's arguments are without factual or legal support, and should be rejected. As explained in the Government's response (Docket No. 312), Mr. Green drew upon his extensive background and experience in forensic accounting to perform a straightforward classification of business-related and personal expenses using, as a benchmark, Niyato's purported business as "an alternative fuel and automobile manufacturer that specializes in Re-powering gasoline vehicles." (Green Report at 3 (quoting Niyato's Private Placement Memorandum).) Mr. Green allocated all expenses that appeared to relate to Niyato's purported business into this category. Mr. Green next identified categories of expenses that are apparently unrelated to Niyato's purported business and placed them into like categories, including, for example "food and dining," "home improvement," "medical and health," "mortgage," "pets," "shopping," and "utilities." To the extent that Stencil disagrees with Mr. Green's classification of specific transactions or otherwise disputes the basis for Mr. Green's classification of particular expenses, such disputes go to the weight of Mr. Green's testimony, not its admissibility, and is the proper subject of cross-examination by Stencil's counsel at trial, not a motion *in limine*. *See, e.g., Price v. Mos Shipping Co.*, 740 F. App'x 781, 784–85 (4th Cir. 2018).

of the money stolen as part of the scheme, as well as email communications containing party-opponent admissions against each of the defendants and statements from their co-conspirators.[3]

The Government estimates that its case-in-chief will last approximately 5-7 trial days.

IV. APPLICABLE LAW

A. Conspiracy, 18 U.S.C. § 1349

The defendants are charged with conspiring with others, in violation of 18 U.S.C. § 1349, which provides in pertinent part:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The Second Superseding Bill of Indictment alleges that the defendants and their conspirators conspired with each other to violate the mail and wire fraud statute, 18 U.S.C. § 1343. The essential elements of the offense of conspiracy are:

(1) an agreement among two or more persons to violate a federal statute; and

(2) that the defendant knowingly joined the agreement.

See Ingram v. United States, 360 U.S. 672, 677–78 (1959); *United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986). Where, as here, a conspiracy statute does not include an express overt-act requirement, Congress intended to exclude that requirement. *See United States v. Pistone*, 177 F.3d 957, 960 (11th Cir. 1999) (holding that a Hobbs Act conspiracy to obstruct commerce, 18 U.S.C. § 1951, does not include an overt-act element). In *United States v.*

[3] The Government submitted motions *in limine* seeking to admit certain bank records (Docket No. 314), for a pre-trial determination of the authenticity of emails obtained by search warrants served on certain Internet Service Providers and to admit certain emails sent by and between defendants and their co-conspirators (Docket No. 315). The Government had asked the defendants to stipulate to authenticity and admissibility and to the admission of certain Government Exhibits, however, counsel for Stencil and Ludmila refused. Accordingly, the Government submitted these motions with the Court.

Chinasa, 489 F. App'x 682 (4th Cir. 2012), the Fourth Circuit held in an unpublished per curiam opinion that section 1349 "does not contain any overt act requirement," *id*. at 685. In so holding, it followed the decision of the Tenth Circuit in *United States v. Fishman*, 645 F.3d 1175, 1195–96 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1046 (2012). *See also United States v. Mbenga*, 513 F. App'x 254, 254–55 (4th Cir. 2013).

The agreement to conspire need not be expressly stated or be in writing or cover all the details of how it is to be carried out. *See United States v. DePew*, 932 F.2d 324, 326 (4th Cir. 1991). Moreover, the Government need not prove that the defendant knew or agreed upon every aspect of the conspiracy. It is enough for the Government to show the essential nature of the plan and the defendants' connections with it. *See United States v. Rivera Santiago*, 872 F.2d 1073, 1079 (1st Cir. 1989).

A single conspiracy may have multiple objects that involve a number of sub-agreements to commit each of the specified objectives. *See Braverman v. United States*, 317 U.S. 49, 53 (1942). The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. *See United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988) (quoting *United States v. Bloch*, 696 F.2d 1213, 1215 (9th Cir. 1982)). In order to establish a defendant's membership in a conspiracy, the Government must prove that the defendant knew of the conspiracy and that he or she intended to join it and to accomplish the object of the conspiracy. *See United States v. Norris*, 749 F.2d 1116, 1121 (4th Cir. 1984). No further proof of intent beyond the degree of criminal intent required for the object offense is required. *See United States v. Feola*, 420 U.S. 671, 686–96 (1975).

Although some knowledge of the conspiracy is necessary, complete knowledge is not a prerequisite to a conspiracy conviction. *See United States v. Burgos*, 94 F.3d 849, 858–59 (4th

Cir. 1996); *United States v. Mabry*, 953 F.2d 127, 130 (4th Cir. 1991); *United States v. Roberts*, 881 F.2d 95, 101 (4th Cir. 1989) ("[O]ne may become a member of the conspiracy without full knowledge of all of its details, but if he joins the conspiracy with an understanding of the unlawful nature thereof and willfully joins in the plan on one occasion, it is sufficient to convict him of conspiracy, even though he had not participated before and even though he played only a minor part.")

Under the general rule established by the Supreme Court in *Pinkerton v. United States*, 328 U.S. 640, 645 (1946), "a conspirator may be convicted of substantive offenses committed by coconspirators in the course of and in furtherance of the conspiracy." *United States v. Chorman*, 910 F.2d 102, 111 (4th Cir. 1990); *accord United States v. Aramony*, 88 F.3d 1369, 1379–81 (4th Cir. 1996); *see also, United States v. Cummings*, 937 F.2d 941, 944 (4th Cir. 1991). The Government, however, is not required to prove that the defendant "could *reasonably foresee* the acts of the second conspirator." *Aramony*, 88 F.3d at 1380 (emphasis in original).

Proof that a single act occurred in the charging district is sufficient to establish jurisdiction, even if the bulk of the conspiracy occurred elsewhere. *See United States v. Gilliam*, 975 F.2d 1050, 1057–58 (4th Cir. 1992); *United States v. Martinez*, 901 F.2d 374, 376–77 (4th Cir. 1990); *United States v. Levy Auto Parts of Canada*, 787 F.2d 946, 952 (4th Cir. 1986).

B. Mail and Wire Fraud, 18 U.S.C. §§ 1341 and 1343

Under the mail and wire fraud statutes, the Government must prove: (1) a scheme or artifice to defraud; (2) the use of the mails or a private or commercial interstate carrier (mail fraud), or interstate or foreign wire communications (wire fraud), in furtherance of the scheme; and (3) a material statement (or omission) in furtherance of the scheme. *See Neder v. United States*, 527 U.S. 1, 25 (1999); *United States v. ReBrook*, 58 F.3d 961, 966 (4th Cir. 1995).

Mail and wire fraud are specific-intent crimes. The specific intent required, however, relates only to the intent to defraud, not to the causing of mail or wire transmissions. *See, e.g.*, *United States v. Cusino*, 694 F.2d 185, 188 (9th Cir. 1982). Specific intent may be inferred from misrepresentation, deceitful concealment of material facts, or reckless indifference as to the truth or falsity of material representation. *See United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001); *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1985); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980). Intent also may be shown from the existence of a scheme itself if it was "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Bohonus*, 628 F.2d at 1172 (quoting *Irwin v. United States*, 338 F.2d 319, 329 (D.C. Cir. 1968)).

To be in furtherance of the execution of the scheme, the wire transmission "need not be an essential element of the scheme." *Schmuck v. United States*, 489 U.S. 705, 710 (1989). It is sufficient that the mailing or interstate wiring be "incident to an essential part of the scheme or a step in the plot." *Id.* at 710–11 (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)). The mailing or wire transmission need not invoke any deception but can be "incidental" to an essential element in the scheme. *See United States v. Morrow*, 39 F.3d 1228, 1236–37 (1st Cir. 1994). Nor does the use of the mails or interstate wires need to be intended by the defendant; rather they need only be reasonably foreseeable. *See United States v. Edwards*, 188 F.3d 230, 233–34 (4th Cir. 1999) (holding that the use of the mails need only be *reasonably foreseeable*); *United States v. Carpenter*, 791 F.2d 1024, 1035 (2d Cir. 1986) (mailings and interstate wires are "a normal and customary part" of the business). The use of the mails or wires includes taking acts which cause another person to use such media. It is not necessary that the defendant be the originator of the mailing or wire transmissions, the recipient of the mailing or wire transmissions,

or even a participant in the communication. *See United States v. Goldstein*, 532 F.2d 1305, 1315–16 (9th Cir. 1976); *United States v. Auler*, 539 F.2d 642, 648 (7th Cir. 1976); *United States v. Hancock*, 268 F.2d 205, 206 (2d Cir. 1959). Regarding wire transmissions, the Government need not establish the exact content of the communication, because there need only be sufficient evidence from which the jury may find that the transmission was used to execute the scheme to defraud. *See United States v. Sanders*, 893 F.2d 133, 138–39 (7th Cir. 1990).

Here, the parties have stipulated to the use of interstate wire transfers and to the use of the U.S. mails or private or commercial carriers. (Docket Nos. 309 and 310.)

C. Money Laundering, 18 U.S.C. § 1957(a)

Under 18 U.S.C. § 1957(a), the elements for money laundering are that: (1) the defendant engaged in a monetary transaction which had some effect on interstate or foreign commerce; (2) the monetary transaction involved property with a value greater than $10,000 derived from a specific unlawful activity (here, mail and wire fraud); and (3) the defendant did so knowingly. *See United States v. Cherry*, 330 F.3d 658, 668 (4th Cir. 2003). "Monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution, including any transaction that would be a financial transaction which in any way or degree affects interstate or foreign commerce involving the movement of funds by wire or other means or involving one or more monetary instruments, or a transaction involving the use of a financial institution which is engaged in, or the activities affect, interstate or foreign commerce in any way or degree. 18 U.S.C. § 1957(f)(1), § 1956(c)(4). The Government need not prove that all of the money involved in the transaction constituted the proceeds of the criminal activity; it is sufficient if the Government proves that at least part of the money represented such proceeds.

D. Venue

Pursuant to the Federal Rules of Criminal Procedure, venue in federal criminal prosecutions lies in the district in which the alleged crime was committed. *See* Fed. R. Crim. P. 18; *see also Johnston v. United States*, 351 U.S. 215, 220 (1956). If challenged, the Government must prove by a preponderance of the evidence that venue is proper. *See, e.g., United States v. Ebersole*, 411 F.3d 517, 524 (4th Cir. 2005). Here, venue is no doubt proper.

The general venue statute, 18 U.S.C. § 3237, applies to the conspiracy and the mail and wire fraud counts. Section § 3237 states as follows:

> (a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, *may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.* (Emphasis added).

Since there are no special statutory provisions for venue for wire fraud cases, the provisions of § 3237(a) apply, and venue under the mail and wire fraud statutes lies at the place where an individual causes a mailing or wire communication to be sent or received. *See United States v. Ebersole*, 411 F.3d 517, 527 (4th Cir. 2005) (wire fraud); *United States v. Donato*, 866 F. Supp. 288, 292 (W.D. Va. 1994) (mail and wire fraud) (collecting cases).

"[A] conspiracy may be prosecuted in *any* district in which the agreement was formed *or* in which an act in furtherance of the conspiracy was committed." *United States v. Gilliam*, 975 F.2d 1050, 1057 (4th Cir. 1992).

A money laundering offense may be brought in "(A) any district in which the financial or monetary transaction is conducted; or (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the

proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted." 18 U.S.C. § 1956(i)(1)(A)-(B).

V. EVIDENTIARY ISSUES

A. Use of Charts Pursuant to Rules 611(a) and 1006

The Government may offer summary charts pursuant to both Fed. R. Evid. 611(a) and 1006 to aid in the jury's understanding of the voluminous amount of evidence. This will substantially reduce the number of witnesses and the number of exhibits necessary to establish a number of evidentiary points. The Government respectfully submits that it does not plan to qualify this witness as an expert and does not believe that any of his testimony would implicate the Government's expert-disclosure obligations under Federal Rules of Evidence 702, 703, and/or 705 or Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure. The Government has provided the summary charts to defense counsel.

Rule 611(a) governs the admissibility of summary charts that summarize and show the relationship between (that is, "tie together") other evidence admitted during the trial. This type of chart is demonstrative evidence, and its admissibility and accuracy is totally dependent on the admission in evidence and accuracy of the other evidence it purports to summarize (or "tie together"). The underlying evidence here may include testimonial evidence and graphics depicting relevant players and their relationships. Demonstrative summaries under Rule 611(a) are not necessarily in lieu of voluminous materials. In fact, they are typically used to help the jury process other evidence but are not themselves evidence; thus, a limiting instruction as to this point is required. *See United States v. Bray*, 139 F.3d 1104, 1112 (6th Cir. 1998); *see also United States v. Johnson*, 54 F.3d 1150, 1157–59 (4th Cir. 1995) (organizational chart summarizing witness testimony in light most favorable to Government permissible where jury

properly instructed and chart maker subject to cross examination). There is no requirement that the summary exhibit contain the defendant's version or theory. *See United States v. Radseck*, 718 F.2d 233, 239 (7th Cir. 1983); *United States v. Ambrosiani*, 610 F.2d 65, 68 n.2 (1st Cir. 1979).

Rule 1006 governs the admissibility of summary charts that summarize voluminous records and offered in evidence under Rule 1006. Under Rule 1006, this type of summary chart constitutes substantive evidence, and its admissibility is not dependent on the admission in evidence of the underlying records. Summaries introduced under Rule 1006 are themselves evidence and are, thus, distinct from summaries used for demonstrative purposes and do not require a limiting instruction. *See* 6 Weinstein § 1006.04[5], at 1006–10. *See also Bray*, 139 F.3d at 1112; 1 Edward J. Devitt et al., Federal Jury Practice and Instructions § 14.02 (4th ed. 1992); 1 Leonard B. Sand et al., Modern Federal Jury Instructions (Criminal) § 5.05, at 5–34 (1997); *but see United States v. Winn*, 948 F.2d 145, 158–59 (5th Cir. 1991) (requiring jury instruction on properly admitted Rule 1006 summary). Although the underlying original documents upon which the summaries are based must themselves be admissible, they do not have to actually be received into evidence as a prerequisite for the admission of the summaries. *See* 6 Weinstein § 1006.04[3], at 1006–08.

B. Admissibility of Acts and Declarations of Co-Conspirators

The Government will offer, among other evidence, statements by co-conspirators made during and in furtherance of the alleged scheme, including statements that explain the nature of the scheme, its goals, and its participants. Such evidence of acts or declarations of one co-conspirator, committed or spoken in furtherance of the conspiracy and during its pendency, are admissible and chargeable against all co-conspirators. *See Bourjaily v. United States*, 483 U.S.

171, 175 (1987); *U.S. Gypsum Co.*, 333 U.S. 364, 388–89 (1948); *United States v. Fragoso*, 978 F.2d 896, 899–900 (5th Cir. 1992); *United States v. Federico*, 658 F.2d 1337, 1342 (9th Cir. 1981). A conspiracy is regarded as a "partnership in crime." *Pinkerton*, 328 U.S. at 644. Thus, each member of a conspiracy, whenever he acts or speaks to further the common illegal objective, is considered the agent of all the others and is substantively liable for all acts and declarations of co-conspirators made in furtherance of the conspiracy. *See Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974); *United States v. Saks*, 964 F.2d 1514, 1524–26 (5th Cir. 1992); *United States v. Davis*, 809 F.2d 1194, 1206–07 (6th Cir. 1987).

Statements by co-conspirators made during the course and in furtherance of the conspiracy are not hearsay. *Fed. R. Evid.* 801(d)(2)(E). Before admitting an out-of-court statement pursuant to this exception to the hearsay rule, the Court must find, by the preponderance of the evidence, that there was a conspiracy involving the declarant and the defendant, and that the statement was made during the course and in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987). The Court is to treat the admissibility of a proffered co-conspirator statement as a "preliminary question" under Rule 104(a). Thus, in ruling on the admissibility of a proffered co-conspirator statement, the Court may consider the statement itself and any other form of evidence, "bound only by the rules of privilege." *Bourjaily*, 483 U.S. at 178, 181; *see also* Fed. R. Evid. 104(a); *United States v. Burton*, 126 F.3d 666, 671 (5th Cir. 1997).

Once a conspiracy is found to exist, the requirement that a statement be made "in furtherance" of the conspiracy is construed broadly lest the purpose of the exception be defeated.

See United States v. Cornett, 195 F.3d 776, 782 (5th Cir. 1999). Likewise, once the court has determined that co-conspirator statements are admissible, they should be considered by the jury with all the other evidence and without special instructions. *See United States v. Hagmann*, 950 F.2d 175, 181 n.11 (5th Cir. 1991). Thus, statements designed to keep a co-conspirator informed as to conspiratorial activities are "in furtherance," *United States v. Monroe*, 866 F.2d 1357, 1363 (11th Cir. 1989); *United States v. Pool*, 660 F.2d 547, 562 (5th Cir. 1981); *United States v. Goodman*, 605 F.2d 870, 878 (5th Cir. 1979), as are statements aimed at encouraging a co-conspirator's continuing participation. *United States v. Lujan*, 936 F.2d 406, 411 (9th Cir. 1991). Further, statements made by co-conspirators prior to the time the defendant joined the conspiracy are admissible against the defendant. *See United States v. Lampley*, 68 F.3d 1296, 1301 (11th Cir. 1995); *United States v. Lokey*, 945 F.2d 825, 835 (5th Cir. 1991); *United States v. Saavedra*, 684 F.2d 1293, 1300–01 (9th Cir. 1982); *United States v. Traylor*, 656 F.2d 1326, 1337 (9th Cir. 1981); *United States v. Holder*, 652 F.2d 449, 451 (5th Cir. 1981) ("An otherwise admissible declaration of one coconspirator is admissible against members of the conspiracy who joined after the statement was made."); *United States v. Anderson*, 532 F.2d 1218, 1230 (9th Cir. 1976).

The Government need not establish the conspiracy or the defendants' membership before co-conspirator statements are presented to the jury. Rather, co-conspirator statements may be admitted against the defendant before the conspiracy has been established and before the defendant has been connected to it by sufficient evidence. Thus, the district court may admit such evidence subject to a later ruling that the Government has met its burden of proving by a preponderance of the evidence the connection of the defendant. *See United States v. Moss*, 9 F.3d 543, 549 (6th Cir. 1993) (citing *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979)); *United States v. Boling*, 869 F.2d 965, 973–74 (6th Cir. 1989); *United States v. Eubanks*,

591 F.2d 513, 519 (9th Cir. 1979); *United States v. Watkins*, 600 F.2d 201, 204 (9th Cir. 1979). Once the court has determined that such statements are admissible, all the evidence should go to the jury. *See Boling*, 869 F.2d at 973–74.

1. A Co-conspirator May Testify to His State of Mind Regarding Any Conspiratorial Agreement or Understanding

The central issue in any conspiracy is whether a defendant was a member of the conspiracy. Accordingly, a witness is permitted to testify as to whether an agreement was reached in any particular transaction or conversation, and whether a particular individual was a participant in the conspiracy. *See United States v. MMR Corp.*, 907 F.2d 489, 495–96 (5th Cir. 1990). Such testimony is proper because it describes a critical fact in the case and is based upon the witness' own personal observations, knowledge, and inferences. *See* Fed. R. Evid. 602, 701. It is not excludable on the theory it invades the province of the jury or calls for a conclusion on the ultimate issue. *See* Fed. R. Evid. 701, 704; *United States v. Smith*, 550 F.2d 277, 281 (5th Cir. 1977); Weinstein's Federal Evidence § 701.06[2] (2d ed. 2000). Furthermore, testimony on whether an agreement or understanding was reached does not raise hearsay concerns, as the relevant statements are admissible as non-hearsay verbal acts or, in the alternative, co-conspirator declarations. *See* Fed. R. Evid. 801(c), advisory committee's note to subdivision (c); Fed. R. Evid. 801(d)(2)(E); *United States v. Lim*, 984 F.2d 331, 335–36 (9th Cir. 1993); *United States v. Wolfson*, 634 F.2d 1217, 1219–20 (9th Cir. 1980).

2. The Co-Conspirators May Offer Their Lay Opinion About the Significance to Them of the Amount of Commission They Received

At trial, the Government intends to offer testimony from defendants' co-conspirators about the nature and illegality of the scheme, based on their own illegal conduct. The Government anticipates that, based on their firsthand experience selling Niyato stock, they will testify that, from the start, they believed Niyato was a scam because, among other things, Niyato

paid extraordinary commissions and that they nevertheless agreed to look the other way and join defendant Stencil and others to sell Niyato stock because the money was so good. Such testimony readily satisfies the standard for the admission of lay opinion under Rule 701 and should be allowed.

Stencil filed a motion *in limine* seeking to exclude this testimony (Docket No. 303). As the Government explained in its response (Docket No. 308), such testimony is based on firsthand knowledge and personal perception as Stencil's co-conspirators, and thus admissible. *See, e.g., United States v Offill*, 666 F.3d 168, 178 (4th Cir. 2011) (affirming trial court's decision to admit lay opinion evidence relating to co-conspirators' statements "about their understanding of the term 'underwriter,' of the requirements of security registration provisions, and of the conspiracy's compliance with them, because the testimony was relevant to the nature and illegality of the conspiracy and [the co-conspirators] testified to their understanding of various securities law requirements in describing their involvement in the conspiracy and their interactions with [the defendant]"); *U.S. v. Thomson*, 634 Fed. App'x. 100, 105 (4th Cir. 2016) (affirming trial court's decision to admit co-conspirator's lay opinion that the defendant knew he was "knew he was transporting marijuana" because "you don't get paid $40,000 if you don't know," and "[Y]ou wouldn't get paid that if you weren't delivering something"); *United States v. Baraloto*, 535 Fed. App'x. 263, 271 (4th Cir. 2013) (affirming trial court's decision to admit co-conspirators' lay opinion about the stolen nature of goods where the co-conspirators had participated in the defendant's business and witnessed known drug addicts selling certain types and quantities of goods to the defendant's store for pennies on the dollars).

Moreover, the co-conspirators' testimony is clearly helpful to determine a fact in issue because it is directly relevant as to nature and purpose of the conspiracy alleged against the

defendants. *See, e.g.*, *Offhill*, 666 F.3d at 178 ("Relevant to the question about whether [the defendant] *intentionally* participated in the conspiracy, [the co-conspirator's] testimony about the conspiracy's fraudulent nature and illegality would be helpful to the jury because it shed light, based on [the co-conspirator's] personal knowledge of his own illegal conduct, on the nature and purpose of the conspiracy and [the defendant's] interaction with [the co-conspirator] in furthering its illegal aims").

3. A Co-conspirator May Testify as to the Common Meaning of Terms Used by Co-Conspirators and His Understanding of Their Statements

A related matter concerns a co-conspirator's understanding of certain terms used by other co-conspirators in various conspiratorial conversations. In this case, the Government may ask witnesses what they understood certain words or phrases used by a co-conspirator to mean. The Government also may ask such witnesses whether the co-conspirator shared that understanding. Such testimony is specifically authorized by Federal Rule of Evidence 701. *See, e.g., United States v. Hassan*, 742 F.3d 104, 136 (4th Cir. 2014) (holding that lay opinion testimony is particularly useful when, as in that case, the terms and concepts being discussed, such as "kuffar," "best brothers," finding "the battlefield," and "shahid," were likely to be unfamiliar to the jury); *Parente v. United States*, 249 F.2d 752, 754 (9th Cir. 1957) ("There was no error in permitting [the witness] to testify as to what he understood appellant to mean when he used the word 'stuff.'").

The lay opinion testimony to be offered in this case will be based on the witnesses' personal observations, will facilitate an understanding of the factual issues, and will therefore be admissible under Rule 701. In describing conspiratorial conversations concerning, for example, how a high-yield investment fraud scheme operated, witnesses may recount the use of terms not familiar to the jury or phrases whose meanings are not facially clear. The witnesses may then be

asked to explain to the jury what those terms or phrases meant and their belief regarding whether the declarant understood them the same way. It will be clear from the testimony that the witnesses' opinions or inferences on these points are rationally based upon personal observation and knowledge and will help clarify the meaning of the recounted conversations. Accordingly, the testimony meets the requirements of Rule 701 and is admissible.

C. Evidence Relating to the Stocks Defendant Duke Also Pitched to the Victims Who Purchased Stock in Niyato From Him Is Admissible

At trial, the United States intends to introduce, in its case-in-chief, evidence showing that: (i) from 2012 to 2016, Duke targeted a group of victims to whom he solicited and sold a number of stocks, including Green Automotive Company ("GACR"), Intertech Solutions, Inc. ("ITEC"), New Global Energy ("NGEY"), and Niyato, among others; (ii) Duke had a particular way or method of pitching and selling these stocks, which included using the alias "Mike West," working with Daniel Thomas Broyles Sr. ("Broyles") (a codefendant who remains a fugitive) to prepare the pitch and share written promotional materials to use when selling victims, and contacting victims by telephone and email; (iii) like Niyato, GACR, ITEC, and NGEY were scams; and (iv) Duke, Broyles and other promoters treated these stocks as a fungible part of a broader, ongoing scheme to defraud.

The Government believes this evidence to be intrinsic to the charged offenses, outside the scope of Rule 404(b), and thus independently admissible under Rule 402. In an abundance of caution, and in the alternative, the Government provided notice that it believed that certain of this evidence is admissible under 404(b). Defendant Duke filed a motion *in limine* to exclude this evidence and the Government responded. (Docket Nos. 295, 300, 313.) A summary of the Government's arguments is provided below.

1. Evidence Relating to Other Stocks Duke and Other Co-Conspirators Sold to Niyato Victims Is Admissible Under Rule 402

Duke's solicitation and sale of GACR, NGEY and ITEC is a part of a series of transactions as the charged offenses and are also "inextricably intertwined" and therefore admissible under Rule 402. *See Siegel*, 536 F.3d 306, 316 (4th Cir. 2008). The charged offenses relating to Duke's sale of Niyato stock were not isolated acts, but rather, were part of a fraudulent scheme involving many of the same principal actors, in the same roles, targeting the same victims, employing the same *modus operandi*, in exchange for approximately the same amount of commission. *See, e.g.*, *United States v. Otuya*, 720 F.3d 183, 187-88 (4th Cir. 2013) (district court properly concluded evidence of uncharged fraudulent conduct was intrinsic where uncharged and charged acts both involved the same victim financial institution, defrauded under the same basic scheme, by the same conspirators).

Evidence relating to the other stocks Duke sold to Niyato victims is also "inextricably intertwined" with the evidence regarding the charged offense because "it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." *Lighty*, 616 F.3d 321, 352 (4th Cir. 2010). As explained above, the Government intends to offer as part of it case-in-chief testimony from Duke's victims. These witnesses' relationship with Duke was not limited to Niyato, but included the sale of GACR and ITEC stock. These facts are an "integral and natural part" of these victims' accounts. Similarly, the facts and circumstances concerning their involvement in promoting GACR, NGEY and ITEC are an "integral and natural part" of Duke's co-conspirators' testimony about how they became involved in the Niyato fraud and the knowledge and experience promoting high-yield investment fraud schemes that they had developed by the time they engaged in the charged offenses to which they pled guilty.

In addition, evidence relating to Duke's involvement in soliciting and selling GACR, NGEY and ITEC to Niyato victims "is necessary to complete the story of the crime on trial." *Siegel*, 536 F.3d at 316. As explained above, during the time when Duke conspired with his codefendants to sell Niyato stock, and specifically engaged in the conduct underlying the substantive mail and wire fraud and money laundering counts, Duke also had been selling GACR, NGEY and ITEC stock. The Fourth Circuit has repeatedly held that, where, as here, evidence of uncharged conduct provides such critical context, it is admissible as intrinsic and thus not subject to Rule 404(b). *See, e.g.*, *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994). For all of the foregoing reasons, the evidence relating to GACR, NGEY and ITEC should be admitted pursuant to Rule 402.

2. The Evidence is Also Admissible Under Rule 404(b)

The evidence relating to the other stocks Duke solicited and sold to Niyato victims is offered not to prove character, but rather to show that Duke used a common *modus operandi* and thus to show knowledge, intent, and lack of mistake or accident. Such evidence is particularly relevant here because, based on his counsel's prior representations, Duke is likely to argue that he relied in good faith on Mr. Stencil's representations. (Docket No. 282, at 3-4.) It is well established that Rule 404(b) does not bar the introduction of evidence to demonstrate a defendant's *modus operandi*, which can serve to demonstrate the defendants' knowledge, intent, motive, and lack of mistake or accident, among other matters. *See, e.g.*, *United States v. Hornsby*, 666 F.3d 296, 307-08 (4th Cir. 2012).

In his submissions on this issue, Duke argues that this evidence should be excluded under Rule 403 on the grounds that the sheer volume of evidence required would be so significant that it would necessitate a trial within a trial. (Docket Nos. 295 at 5-8.) According to Duke, this additional evidence would potentially extend trial by one full week, confuse the jury by shifting

the focus of the trial, and otherwise consume judicial resources. Duke's argument misconstrues the evidence that the Government intends to offer. The majority of the evidence is in the form of testimony from witnesses who the Government otherwise planned to call. Moreover, to the extent that the Government intends to offer documentary evidence relating to GACR, NGEY or ITEC in its case-in-chief, that documentary evidence is anticipated to be limited to the documents described in the Government's submission (Docket No. 300). The evidence is therefore sufficiently discrete that it should neither shift the focus of the trial nor consume judicial resources.

3. The Government Is Not Seeking to Admit Evidence Relating to Stocks Other Than Niyato Against Defendants Stencil or Ludmila

Stencil filed a motion *in limine* seeking to exclude testimony relating to the sale of GACR, NGEY and ITEC stocks as against him and arguing that, were the evidence to be admitted against only Duke, that severance from Duke is appropriate. (Docket No. 304.) As explained in the Government's response, at trial, the Government intends to introduce intrinsic evidence regarding the sale of fraudulent stocks for companies other than Niyato only against Duke, and thus the Court need not decide whether the same evidence is admissible against defendant Stencil. Moreover, there is ample evidence from which a reasonable jury could find defendant Stencil guilty of all the charges in the Second Superseding Bill of Indictment without considering evidence admitted solely against Duke, and Stencil fails to provide a single reason why a limiting instruction is insufficient to cure any risk of prejudice from the introduction of the intrinsic evidence against Duke. Accordingly, the Court should deny Stencil's motion to sever. *See United States v. Nolberto Pena*, 213 F.3d 634 (4th Cir. 1992) (unpublished) (denial of motion to sever proper where intrinsic evidence was admitted against the appellants' co-defendant, there was "more than sufficient evidence to support [the appellants'] convictions,"

and “the district court gave a limiting instruction to the jury at the time the physical evidence was introduced”).

Respectfully submitted, on this 5th day of January 2019.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on the above date this document was filed via ECF and, thereby, all parties were served.

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