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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MOSES ONCIU, BEATA GIZELLA PRIORE, and IRENE PEMKOVA, Defendants.	) Case No. SA CR 08-180-DOC)) OPPOSITION TO DEFENDANT BEATA PRIORE'S MOTION IN LIMINE RE PRIOR TESTIMONY BY DEFENDANT)) Date: September 17, 2013) Time: 2:00 p.m.) Place: Courtroom of the Honorable David O. Carter

The United States submits the following opposition to defendant Beata Priore's motion in limine to exclude her prior trial testimony.

Dated: September 16, 2013,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Priore's Testimony Satisfies All 404(b) Criteria.**

3 Priore's earlier testimony tends to prove knowledge, intent,
4 motive, and absence of mistake, which are material here; it is
5 not remote; there is no question that Priore gave the testimony;
6 and the facts in the Patterson case are similar to the instant
7 case, therefore, it may be admitted pursuant to Rule 404(b).
8 Evidence may be admitted pursuant to Rule 404(b) if (1) the
9 evidence tends to prove a material point; (2) the other act is
10 not too remote in time; (3) the evidence is sufficient to support
11 a finding that defendant committed the other act; and (4) the act
12 is similar to the offense charged. United States v. Romero, 282
13 F.3d 683, 688 (9th Cir. 2002). If the evidence is admissible
14 under this four-part test, the court still must consider pursuant
15 to Rule 403 whether the probative value is substantially
16 outweighed by the prejudicial impact. Id.

17 In her motion, Priore only discusses the similarity prong
18 and alludes to the materiality criterion under Rule 404(b); she
19 also cites Rule 403. Therefore, Priore appears to concede that
20 this evidence is sufficient under the second and third criteria.
21 The second prong is easily satisfied as Priore's earlier
22 testimony occurred less than seven months before the instant
23 offense. See United States v. Houser, 929 F.2d 1369, 1370, 1373
24 (9th Cir. 1991), abrogated on other grounds by Buford v. United
25 States, 532 U.S. 59, 64, 121 S. Ct. 1276, 149 L. Ed. 2d 197
26 (2001) (four-year-old drug distribution conviction not too remote
27 to be admissible under Rule 404(b)); United States v. Ono, 918
28 F.2d 1462, 1463-65 & n.2 (9th Cir. 1990) (seven-year-old

conviction not too remote; noting the Ninth Circuit has found events occurring 13 to 17 years in the past admissible). As the prior "act" at issue here was Priore's own trial testimony, containing her admissions about her prior conduct, there obviously is no issue whether the evidence is sufficient to support a finding that Priore committed the other "act," which is the third prong. See Romero, 282 F.3d at 688.

Priore does not directly mention the first criteria, i.e., whether the evidence tends to prove a material point. Nevertheless, her distinction between being a victim of a high yield fraud previously and a defendant here, and the resulting argument that her prior experience does not make her "an expert," appears to be a contention that the prior testimony does not prove a material point.

However, the government is not asserting that being a victim of a scheme made Priore an expert, nor is that necessary under Rule 404(b). Instead, it is sufficient that Priore's experience gave her knowledge about high yield fraud schemes. Cf. United States v. Redlightning, 624 F.3d 1090, 1120 (9th Cir. 2010) (evidence of defendant's prior experience with police admissible under 404(b) because it showed that he understood later interaction with law enforcement and was not confused or surprised by police tactics); United States v. Rubio-Gonzalez, 674 F.2d 1067, 1074-75 (5th Cir. 1982) (in prosecution for alien smuggling, defendant's earlier illegal entries admissible under 404(b) to show knowledge of immigration officers' practices and procedures and documentation needed for alien workers). In addition, that awareness tends to demonstrate that Priore's false

statements here were not the produce of a mistake about whether high yield programs could work and that her intent when making those statements was to deceive other people, not to honestly represent her beliefs about high yield investments. Cf. Mayoza v. Heinold Commodities, Inc., 871 F.2d 672, 680 (7th Cir. 1989) (investor's decision to open new risky commodities trading account after suffering large loss in such trading with defendant's firm undermined investor's claim that defendants duped him regarding riskiness of original investment). Furthermore, the distinction between Priore's role as victim and perpetrator is immaterial because the government is not seeking to use the evidence to show that Priore acted similarly in the two situations, i.e., to demonstrate modus operandi.

Even if it were assumed *arguendo* that Priore's experience as a victim was insufficient to demonstrate knowledge, intent, or absence of mistake, it would still be admissible because it tends to show motive. Someone who, like Priore, has recently suffered severe financial difficulties and an unexpected and unusual worsening of her finances has a motivation to commit improper acts to get money she desperately needs. United States v. Feldman, 788 F.2d 544, 556-57 (9th Cir. 1986) (evidence showing defendant living beyond his means and owed substantial sums admissible under 404(b) to show motive in case involving crime seeking financial gain); United States v. Snow, 529 F.2d 224, 226 (9th Cir. 1976) (evidence of notice to defendant that state tax deficiency assessment had been issued relevant to show motive for subsequent federal tax offense). Therefore, the prior testimony satisfies the first prong as it tends to prove material points.

In arguing that the cases are dissimilar, Priore narrowly focuses on the type of investment and ignores many other, and more important, shared features. Most significantly, both cases involved promises to provide extremely high returns within a month -- Priore had been promised a 100% return on her money in 30 days in the Patterson case; here, Priore said that investors in her program could obtain a 650% return in 30-45 days. The high yield schemes shared many other aspects as well. In both, those soliciting money said that the victims' funds would be grouped into large, multi-million dollar bundles, which would facilitate the high returns. Both claimed to provide regular, repeated cycles of high yield returns (twice a year in Patterson, every month here). Priore even called the Patterson scheme a "high yield investment program." Motion, Exhibit at transcript page 85. When Priore tried to convince the Patterson defendant that she had a $1 million investment program of her own to offer, she said that she was doing that to try to be like him. Id. at transcript page 186.

Furthermore, the defendant in Patterson claimed to be a minister and that he would use some of the huge profits to fund a charitable endeavor (i.e., Priore's foundation), id. at 36, 38; in the instant case, defendant Onciu said that he was a minister and 25% of the high yield proceeds were allocated to Onciu's charity work with orphanages. In both cases, those soliciting investments were not employed by any actual financial institution but, rather, were freelancers who pitched deals to random individuals who they happened to encounter. In addition, the interactions between the defendants and the victims was similar,

as they met through mutual contacts, rather than normal channels of commerce, and the defendants tried to get the victims to deliver large sums based on telephone conversations, without in-person meetings, visits to offices, or other normal investment activity. Id. at 73.

All of these indicia as to how the high yield investment programs were operated are much more significant in determining similarity than are differences in the businesses in which the investments were supposedly made. That is particularly true in view of the fact that high yield investments do not actually exist. Because the defendants are attempting to get victims to put money into a non-existent investment, the "business" to which it was claimed the investment would be given was of little significance. This is apparent from the evidence in the instant case, where the European investment was described variously as being in currency trading (by Priore), a real estate transaction (in the contract documents), and through medium term note trading (by TSI representatives). As is demonstrated by Rubio-Gonzalez, 674 F.2d at 1074-75, the prior act can be sufficiently similar to the current crime under 404(b) even if it is not the same type of criminal conduct, as long as it provided experience and knowledge that is relevant to the defendant while engaging in the instant offense. For all of these reasons, the similarity prong is met here.

B. Impeachment of Priore in Her Prior Testimony Can Be Omitted in the Government's Case.

Any potential prejudice to Priore from parts of the transcript in which she was impeached during the prior trial can

be easily avoided by omitting those portions during the government's case here. Therefore, the possibility of such prejudice does not support exclusion of the entire transcript.

C. The Testimony Is More Probative than Prejudicial.

For the reasons discussed above, Priore's testimony is highly probative of important issues in this case, such as her knowledge, intent, lack of mistake, and motive. In arguing that this significant probative value is outweighed by prejudice, Priore does not point out any particular manner in which she would be prejudiced by specific testimony being introduced. Her only contention in that regard is a conclusory assertion that the other defendants might be "impacted indirectly." Motion at 2. However, Priore lacks standing to assert prejudice that might be incurred by other parties. See Alderman v. United States, 394 U.S. 165, 172, 89 S. Ct. 961, 22 L. Ed.2d 176 (1969) (co-defendant lacked standing to assert objection based on impact on co-conspirator's rights). As a result, Priore presents nothing beyond conjecture that she would be prejudiced. Furthermore, it is counterintuitive to assert that a person's status as a victim of a fraud would be prejudicial to her. Therefore, the testimony should not be excluded under Rule 403.

D. There Are Portions of the Testimony That Are Admissible as Direct Evidence, Not Just as Other Acts under 404(b).

Even if it were assumed *arguendo* that Rule 404(b) did render parts of the testimony inadmissible, it should not be entirely excluded because there are other portions that provide direct evidence of facts relevant here, such as the falsity of statements made by Priore to the undercover agent. For instance,

Priore said to the agent that she was a medical doctor and that she had made much money from her fees on the high yield investments. In her testimony, Priore admitted that she was not a medical doctor and that she was impecunious, having been foreclosed on and declared bankruptcy. Motion, Ex. at transcript page 55. For this reason as well, the testimony should not be excluded in its entirety.