

1 ANDRÉ BIROTTE JR.  
 United States Attorney  
 2 DENNISE D. WILLETT  
 Assistant United States Attorney  
 3 Chief, Santa Ana Branch Office  
 LAWRENCE E. KOLE (Cal. Bar No. 141582)  
 4 Assistant United States Attorney  
 411 West Fourth Street, Suite 8000  
 5 Santa Ana, California 92701  
 Telephone: (714) 338-3594  
 6 Facsimile: (714) 338-3564  
 7 Email: larry.kole@usdoj.gov

8 Attorneys for Plaintiff  
 United States of America  
 9

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA  
 12 SOUTHERN DIVISION  
 13

14 UNITED STATES OF AMERICA,  
 15 Plaintiff,  
 16 v.  
 17 MOSES ONCIU,  
 18 Defendant.  
 19

Case No. SA CR 08-180-DOC  
 DISPUTED PROPOSED JURY  
 INSTRUCTIONS  
 Date Trial Resumes:  
 October 15, 2013  
 Time: 8:00 a.m.  
 Place: Courtroom of the  
 Honorable David O. Carter

20  
 21 The parties respectfully submit the attached proposed jury  
 22 instructions as to which they were unable to agree on a joint  
 23 submission. The parties recently filed a joint set of agreed-upon

24 / / /  
 25 / / /  
 26 / / /  
 27 / / /  
 28 / / /



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DEFENDANT'S PROPOSED INSTRUCTION NO. 1

It is defendant's contention that, although he had a good faith belief in the existence of high yield investment programs, he also believed that most of the high yield investment programs being offered were fraudulent and that he never knowingly entered into a conspiracy to commit wire fraud or committed wire fraud by selling a fraudulent high yield investment program.

1 Defendant's Position Re Defendant's Proposed Instruction No. 1

2 An essential part of the government's case is that the  
3 investment opportunity offered by the defendants in this case --  
4 i.e. a HYIP -- must be fraudulent because all HYIPs are fraudulent.  
5 That was the whole purpose of the testimony of its two experts.  
6 That is what led to the sting operation.

7 Therefore, an essential issue in the case is the defendant's  
8 belief in the existence of HYIPs, as a concept. Since defendant's  
9 theory of defense is that one can believe in HYIPs and still not  
10 commit wire fraud, he is entitled to pinpoint that theory to the  
11 jury.

12 It is hornbook law that a defendant is entitled to a theory of  
13 defense instruction if it is supported by the evidence and the law  
14 and is not argumentative. The instruction offered here comports  
15 with those criteria.

16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Government's Position Re Defendant's Proposed Instruction No. 1

2 Defendant asserts that Defendant's Proposed Instruction No. 1  
3 is intended to present the jury with defendant's theory of the case.  
4 However, the proposed instruction would not provide the jury with a  
5 statement of any pertinent rule of law for the jury to apply.  
6 Instead, it is merely an argumentative summary of defendant's  
7 contention that he is not guilty because he allegedly lacked the  
8 necessary state of mind and allegedly did not commit fraud.  
9 Therefore, it is not appropriate matter for a jury instruction,  
10 rather, if presented, it would properly be raised as part of  
11 defendant's closing argument.

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DEFENDANT'S PROPOSED INSTRUCTION NO. 2

You may determine whether defendant had an honest, good faith belief in the truth of a specific misrepresentation alleged in the indictment in determining whether or not the defendant acted with intent to defraud.

One who expresses an honestly held opinion or an honestly formed belief is not chargeable with fraudulent intent even though the opinion is erroneous or the belief is mistaken; and similarly evidence which established only that a person made a mistake in judgment or was careless in his language does not establish fraudulent intent.

On the other hand, an honest belief on the part of the defendant does not in and of itself constitute good faith as that term is used in these instructions. If, in carrying out a venture, the defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them, he is not acting in good faith.

1 GOVERNMENT'S PROPOSED INSTRUCTION NO. 2

2 You may determine whether defendant had an honest, good faith  
3 belief in the truth of representations made to others in determining  
4 whether or not defendant acted with intent to defraud. However,  
5 defendant's belief that a person to whom one or more representations  
6 were made would be paid in the future or would sustain no economic  
7 loss is no defense to the crimes charged in the indictment.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 Defendant's Position Re Proposed Instruction No. 2

2 The second sentence of the government's proposed instruction  
3 does not apply to the facts of the instant case and is misleading.

4 As pointed out by the government, Defendant's proposed  
5 instruction is based on the approved language of an Eleventh Circuit  
6 case, United States v. Snipes, 611 F.3d 855, 868 (11th Cir. 2010).

7 As with Defendant's proposed Instruction Number 1, when the  
8 Government spends so much time and effort in painting HYIPs as  
9 fraudulent, per se, Defendant's honestly held belief, if the jury so  
10 finds, deserves more attention than a single ambiguous instruction.

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



1 Government's Position Re Proposed Instruction No. 2

2 Instruction No. 2 relates to a claim of good faith by the  
3 defendant. Such an instruction is only appropriate if defendant has  
4 first presented evidence that could support a finding of good faith.  
5 Assuming that defendant does present such evidence, a good faith  
6 instruction may be given to the jury. See United States v. Bonnano,  
7 852 F.2d 434, 439-40 (9th Cir. 1988) (a defendant is not entitled to  
8 a good faith instruction when the court adequately instructs on  
9 intent); Mathews v. United States, 485 U.S. 58, 63 (1988) (defendant  
10 is entitled to instruction as to a defense for which there exists  
11 evidence sufficient for a reasonable jury to find in his favor);  
12 United States v. Morton, 999 F.2d 435, 437-38 (9th Cir. 1993)  
13 (citing Mathews and stating that defendant is entitled to an  
14 instruction on a theory when there is sufficient evidence upon which  
15 the jury could rationally find for the defendant); United States v.  
16 Spentz, 653 F.3d 815, 818-19 (9th Cir. 2011) (same, also stating  
17 that must be some evidence demonstrating the elements of a defense  
18 before an instruction must be given). Accordingly, this instruction  
19 should only be given if defendant testifies or otherwise presents  
20 evidence showing his "good faith."

21 The Ninth Circuit has on several occasions considered the  
22 appropriate language to use in such an instruction. See United  
23 States v. Molinaro, 11 F.3d 853, 863 (9th Cir. 1993); United States  
24 v. Treadwell, 593 F.3d 990, 996-99 (9th Cir. 2010); United States v.  
25 Benny, 786 F.2d 1410, 1417 (9th Cir. 1986). The government's  
26 proposed instruction is taken directly from those applicable Ninth  
27 Circuit decisions, in particular, Molinaro, which approved an  
28

1 instruction that is identical to the government's proposed  
2 instruction.

3 Defendant's proposed instruction is not derived from Ninth  
4 Circuit law, rather, it was used in a case in the Eleventh Circuit.  
5 See United States v. Snipes, 611 F.3d 855, 868 (11<sup>th</sup>. Cir. 2010). As  
6 a district court in the Ninth Circuit, this court must follow Ninth  
7 Circuit law rather than out-of-circuit law. See Hasbrouck v.  
8 Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981); cf. Guam v. Ibanez,  
9 880 F.2d 108, 112, n.4 (9th Cir. 1989) (even Ninth Circuit panel  
10 must follow prior Ninth Circuit decisions).

11 In addition, there are several problems with defendant's  
12 proposed instruction. It refers to whether defendant had a good  
13 faith belief in a misrepresentation alleged in the indictment.  
14 However, the evidence in a fraud case is not limited to facts that  
15 are alleged in the indictment. The indictment must set forth the  
16 elements of the offense, one of which is that one or more  
17 misrepresentations or material omissions were made. However, that  
18 element may be established by evidence of misrepresentations or  
19 omissions that occurred, regardless of whether those specific  
20 misrepresentations or omissions are described in the indictment. If  
21 defendant made or aided and abetted a false material representation  
22 that was not cited in the indictment, his good faith as to other  
23 matters would be irrelevant and he could still be found guilty.

24 In addition, defendant's proposed instruction would direct the  
25 jury to find defendant not guilty if he had one honestly held, but  
26 erroneous, opinion. However, defendant's mere possession of a  
27 particular good faith but mistaken belief would not prevent him from  
28 being guilty if he nevertheless made or aided and abetted a false

1 representation about a different material matter that defendant did  
2 not believe to be true. For that reason, the government's  
3 instruction, which refers to defendant having an honest, good faith  
4 belief in the truth of all of the material representations made to  
5 others is a more accurate statement of the law.

6 Finally, defendant's proposed instruction would lead to  
7 confusion. In its initial portion, the instruction equates good  
8 faith and an honest belief, referring to "whether defendant had an  
9 honest, good faith belief." This comports with common sense and  
10 customary usage, in which both "good faith" and an "honest belief"  
11 refer to a person's subjective understanding as to a matter. At its  
12 conclusion, however, the instruction appears to make a sharp  
13 distinction between "good faith" and "honest belief," stating that  
14 "an honest belief on the part of the defendant does not in and of  
15 itself constitute good faith as that term is used in these  
16 instructions." The court should avoid this confusion and use the  
17 simpler and clearer language proposed by the government, which has  
18 been approved by the Ninth Circuit.

19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DEFENDANT'S PROPOSED INSTRUCTION NO. 3

I have already instructed you on the elements of conspiracy and what you must determine to find that one existed.

In this case you must determine whether more than one conspiracy existed, the nature of the conspiracy, and whether the defendant was a member of it.

In order to assist you in that respect, the parties have submitted interrogatories for you to sign, if necessary.

If you find the defendant not guilty of Count One, you do not have to answer the interrogatories, just fill out the verdict form.

If you find the defendant guilty on Count One, you must fill out and sign the interrogatories. Your decision must be unanimous.

To simplify your task, the parties have designated Conspiracy Number One as the TSI conspiracy and Conspiracy Number Two as the HYIPs conspiracy.

If you find a conspiracy existed regarding TSI and the defendant was a member thereof, state "Yes" to Interrogatory #1. If you find that a conspiracy existed as to TSI and the defendant was not a member state "No" to #1.

If you find a conspiracy existed regarding HYIPs and the defendant a member thereof, state "Yes" to Interrogatory #2. If you find that a conspiracy existed as to HYIPs and defendant was not a member thereof, state "No" to Interrogatory #2.

Remember that your answers to these questions must be unanimous and arrived at in compliance with the other instructions in this case.

1 Defendant's Position Re Defendant's Proposed Instruction No. 3

2 If the court concludes that there is the possibility of the  
3 existence of multiple conspiracies due to the evidence it must give  
4 an instruction regarding multiple conspiracies. See United States  
5 v. Anguiano, 873 F.2d 1314, 1317-18 ((9th Cir. 1989) and cases cited  
6 therein. See also United States v. Fernandez, 388 F.2d 1199, 1247-  
7 48 (9th Cir. 2004) and United States v. Varelli, 407 F.2d 735, 746  
8 (7th Cir. 1969).

9 At the end of the government's case the defendant will argue  
10 for an acquittal based on the fact that the conspiracy count is  
11 duplicitous, setting forth two separate conspiracies -- the TSI  
12 venture and the sale of HYIPS in general. Should that motion be  
13 denied, the defendant is entitled to a unanimous verdict from the  
14 jury as to the existence of the conspiracy on which he is being  
15 judged and a unanimous verdict regarding the outcome. This  
16 instruction assures such a result.

1 Government's Position Re Defendant's Proposed Instruction No. 3

2 Defendant's Proposed Instruction No. 3 is unnecessary and  
3 inconsistent with the evidence and the indictment, therefore, it  
4 should not be used. The indictment describes the conspiracy alleged  
5 in Count One as an agreement to commit wire fraud between November  
6 29, 2006 and March 7, 2007 in connection with the promotion of  
7 fraudulent high yield investment schemes promising extremely high  
8 returns at little or no risk to principal. The indictment expressly  
9 refers to high yield schemes in the plural, thereby encompassing  
10 more than just the promotion of the investment related to TSI  
11 Consulting Group, and to a time period continuing into March 2007,  
12 which includes the additional programs promoted by defendant and co-  
13 conspirator Priore in January through March 2007. These allegations  
14 and the supporting evidence involve only a single conspiracy. Thus,  
15 there is no basis to assert the existence of a "TSI conspiracy" and  
16 a "HYIP conspiracy" as defendant does in his proposed instruction.  
17 Furthermore, this characterization itself does not make sense as the  
18 TSI deal was, in fact, a high yield investment program, or "HYIP."

19 Defendant has contended here and during trial that this is a  
20 multiple conspiracy case and that a multiple conspiracy instruction  
21 may be needed. That argument is premised on a misunderstanding of  
22 the law and the nature of the evidence here. As discussed in United  
23 States v. Fernandez, 388 F.3d 1199, 1248 n.34 (9<sup>th</sup> Cir. 2004), a  
24 multiple conspiracy situation can exist where the evidence shows  
25 other conspiracies that were unrelated to or separate from the  
26 conspiracy charged. Similarly, United States v. Anguiano, 873 F.2d  
27 1314, 1317 (9<sup>th</sup> Cir. 1989) explained that a multiple conspiracy  
28 instruction is used where the indictment charges several defendants

1 with one overall conspiracy, but the proof at trial indicates that  
2 some of the defendants were only involved in separate conspiracies  
3 unrelated to the overall conspiracy charged in the indictment.

4 None of those circumstances exist here. First, as discussed  
5 above, the communications about HYIPs other than the TSI deal were  
6 just a part of the conspiracy charged in the indictment. They were  
7 merely additional ways in which the same promoters offered the same  
8 type of get-rich-quick schemes to the same victim at the same time.  
9 In United States v. Morse, 785 F.2d 771, 774-75 (9<sup>th</sup> Cir. 1986),  
10 defendants offered four different programs to investors involving  
11 oil and gas drilling, video games, heavy equipment, and oil  
12 recovery. Nevertheless, pointing out that a broad view is taken of  
13 the scope of a single scheme, the Ninth Circuit rejected an argument  
14 that these various investment offers constituted multiple schemes.  
15 Id. Instead, the court explained that "'the defrauding of different  
16 people over an extended period of time, using different means and  
17 representations, may constitute but one scheme.'" Id. at 774.

18 Similarly, in United States v. Simons, 119 F.2d 539, 545-46  
19 (9<sup>th</sup> Cir. 1941), defendants solicited investments first in oil  
20 leases, and subsequently in shares of stock in a royalty company,  
21 stock in an oil drilling company, and "participations" in a gas and  
22 oil development company. Like Onciu does here, the Simons  
23 defendants argued that this constituted multiple schemes to defraud.  
24 Id. at 547. The Ninth Circuit rejected their argument, stating  
25 that:

26 The indictment charged that the defendants devised a general  
27 scheme to defraud investors. The scheme was alleged to have  
28 consisted of various plans to attract investors. . . "[I]t is

1 necessary to differentiate between the scheme to defraud and  
2 the means adopted to effectuate the same. . . . The existence  
3 of several fraudulent ventures, into one of which an  
4 unsuspecting victim may be led, does not necessarily multiply  
5 the number of schemes to defraud. One possessed of a  
6 fraudulent scheme may set numerous traps into one of which he  
7 hopes and expects the unwary to walk. . . . [T]he fraudulent  
8 scheme of the entrapper may be a single one, yet means to  
9 accomplish the fraud may be many."

10 As Simons explained, the investments offered in the instant  
11 case were merely various means used to effectuate a single scheme.  
12 AS a result, Onciu cannot show either a separate conspiracy or an  
13 unrelated conspiracy. Therefore, the proposed instruction is  
14 unnecessary and inappropriate.

15 Furthermore, as explained in Anguiano, a multiple conspiracy  
16 instruction is only applicable if there are multiple defendants and  
17 the defendant seeking the instruction might be found guilty of a  
18 conspiracy involving the co-defendants but in which he was  
19 uninvolved. 873 F.2d at 1317-18. No such circumstances are present  
20 here. Defendant is proceeding at trial alone, without any co-  
21 defendants. The evidence that defendant seeks to characterize as a  
22 separate conspiracy was not carried out by other conspirators  
23 without his involvement. On the contrary, it involved other HYIPs  
24 that were offered by defendant himself. For all of these reasons,  
25 the proposed instruction should not be given.



POSSIBLE PROPOSED INSTRUCTION NO. 4

You have heard evidence that the defendant committed other acts not charged here, namely, the telephone conversations and email messages occurring in January and February 2007 related to investments other than TSI. You may consider this evidence only for its bearing, if any, on the question of the defendant's intent, motive, knowledge, and absence of mistake. You may not consider this evidence as evidence of guilt of the crime for which the defendant is now on trial.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Parties' Position Re Proposed Instruction No. 4

2       The parties propose that this instruction be used in the event  
3 that the Court accepts defendant's argument that the indictment only  
4 charged a conspiracy and scheme related to the TSI investment and  
5 that conduct related to other investments constituted separate  
6 conspiracies and schemes. The proposed instruction is based on  
7 Ninth Circuit Model Instruction No. 2.10, Other Crimes, Wrongs Or  
8 Acts Of Defendant (i.e., a Federal Rules of Evidence 404(b)  
9 instruction). In that event, it would be appropriate to give this  
10 404(b) instruction to direct the jury how to consider the evidence  
11 that has been presented in regard to the other investments. While  
12 the parties disagree as to whether the different investments  
13 constituted different conspiracies and schemes, as they have  
14 discussed above, they are in agreement that this instruction should  
15 be used if the Court were to accept defendant's position that there  
16 were multiple conspiracies and schemes.