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

Attorneys for Plaintiff
United States of America

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 EXPERT TESTIMONY 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 or limit expert testimony by Sean O'Malley and James Byrne.

Dated: September 9, 2013,

ANDRÉ BIROTTE JR.
United States Attorney
DENNISE D. WILLETT
Assistant United States Attorney
Chief, Santa Ana Branch Office

/S/
LAWRENCE E. KOLE
Assistant United States Attorney

Attorneys for Plaintiff
United States of America

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I.

INTRODUCTION

The court should deny defendant Beata Priore's motion in limine to exclude or limit expert testimony to be presented by the government at the trial in this case. The expert testimony at issue is based on technical and specialized knowledge, not scientific knowledge, therefore, the Daubert criteria used in evaluating scientific experts are inapplicable. The testimony will not be cumulative as the experts have different backgrounds and areas of expertise and will be testifying about different issues (one will address the Federal Reserve and United States banking systems while the other will discuss general market principles of risk and return and will focus on European financial instruments). The experts' testimony will be helpful to the jurors, many of whom are likely to have limited knowledge of investment or economic concepts, European financial instruments, and the operation of the Federal Reserve. In addition, the government will refrain from offering expert testimony regarding defendants' state of mind or characterizing the investments as fraudulent and the experts are permitted to testify regarding ultimate issues and the typical characteristics of high yield investment programs. For all of these reasons, the expert testimony should be admitted and the motion denied.

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II.

ARGUMENT

A. The Government's Expert Disclosures and the Scope of Expert Testimony That it Now Intends to Offer

As Priore correctly states in her motion, the government has provided notice that it intends to present testimony from two expert witnesses, Sean O'Malley, an investigator with the Federal Reserve Bank of New York, and James Byrne, a law professor with a focus on international banking and commercial transactions.[1] In its expert witness disclosures, the government stated that it anticipated presenting expert testimony from Mr. O'Malley regarding the relationship of risk and return in investments, the functions of the Federal Reserve Bank (the "Fed") and its relationship to investments, and the non-existence of investments that are "approved" or "licensed" by the Fed. The government stated that it anticipated presenting expert testimony from Mr. Byrne regarding the functioning of legitimate financial instruments in the United States and Europe, such as currency, foreign exchange, and medium term notes; the possible returns that can be earned on such instruments; and the use of terms in the investment documents in this case that do not correspond to and are not employed in genuine transactions. In addition, the government stated that it anticipated presenting testimony from both witnesses regarding common characteristics of fictitious investment offers, For the reasons set forth below, the

[1]The government also served an expert witness disclosure for a computer forensics examiner at the FBI. However, this examiner's testimony, if offered, would be limited to providing a foundation for files residing on a computer hard drive obtained from one of the defendants and is not a subject of this motion.

foregoing are proper subjects of expert testimony and, as a result, the motion should be denied as to such testimony.

The government also stated that it might offer testimony regarding the fraudulent character of the investments offered in this case. In order to avoid creating an issue as to the admissibility of the experts' testimony, the government does not intend to elicit such testimony from Mr. O'Malley or Mr. Byrne at trial. Accordingly, the motion is moot as to that type of expert testimony and the court need not rule on that aspect of the motion.

B. The Criteria Used to Evaluate Scientific Testimony by an Expert Witness Are Inapplicable Here.

Because Mr. O'Malley and Mr. Byrne will be giving testimony as experts based on "technical" or "specialized knowledge," rather than "scientific" knowledge, Fed. R. Evid. 702(a), the Daubert factors upon which Priore relies are inapplicable. Priore asserts that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) requires the court to find that any expert testimony based upon "scientific, technical, or other specialized knowledge" involves a theory or technique that can and has been tested, has been subjected to peer review and publication, and is generally accepted by the pertinent scientific community, and to consider the actual or potential rate of error of the theory or technique. Motion at 3, citing Daubert, 509 U.S. 579 (although the Motion does not provide a page reference, the cited portion of Daubert is found at 509 U.S. at 593-95). Priore further argues that expert testimony can be excluded if it is deficient in

regard to any of these factors and that the government's experts here do not satisfy these factors.

However, Daubert stated that its discussion of the factors pertinent to admissibility was "limited to the scientific context," while Rule 702 of the Federal Rules of Evidence also permits expert testimony based on "technical, or other specialized knowledge." Id. at 590 n.8. In its subsequent opinion in Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-51 (1999), the Supreme Court explained that, although a district court does need to act as a gatekeeper for all types of expert testimony, the factors mentioned in Daubert do not apply to every type of expert witness and that there is no requirement that a particular expert meet any, not to mention all, of the factors listed in Daubert. The gatekeeper role merely requires the court to decide that an expert's testimony is relevant and reliable. Id. at 147. Kumho stated that the none of the particular factors listed in Daubert must be used in evaluating expert testimony. Id. at 150-51. Instead, the analysis is a flexible one and the court should choose the factors that are relevant in view of the specific case and the particular type of expert testimony involved. Id. The specific factors in Daubert are used only "where they are reasonable measures of the reliability of expert testimony." Id. at 152.

The expert testimony at issue here involves financial systems, instruments, and transactions, not science, therefore, the Daubert factors cited by Priore are largely inapplicable. In American Gen. Life Ins. Co. v. Schoenthal Family, 555 F.3d 1331, 1338-39 (11th Cir. 2009), the court affirmed the admission of

testimony regarding insurance industry financial underwriting standards and risk management issues although it was based on personal knowledge and experience, rather than scientific principles. American Gen. Ins. Co. did not require the use of the Daubert factors that involve scientific testing. Instead, the court pointed out that standards of scientific reliability such as testability and peer review do not apply to all forms of expert testimony. Id. at 1338. Nonscientific expert testimony can be found to be sufficiently reliable to be admitted if it is based on personal knowledge or experience. Id.

Similarly, in Simo v. Mitsubishi Motors North America, Inc., 245 Fed. Appx. 295, 300-01 (4th Cir. 2007) (unpublished), the court affirmed the admission of testimony by a sports agent expert regarding plaintiff's earning potential as a soccer player despite the fact that the trial court did not apply the scientific criteria from Daubert. The court stated that the Daubert factors are not "a definitive checklist or test . . . the inquiry into the reliability of an expert's methodology must be flexible and case-specific." Id. at 301. The court observed that it was sufficient that the expert estimated a player's value using personal observations and experience from his job, which required him to evaluate players' abilities and determine their value, so it was unnecessary to consider criteria applicable to scientific work, such as theoretical testing, peer review, and evaluation of error rates. See id. at 300-01. The "'relevant reliability concerns may focus upon personal knowledge or experience' because 'there are many different kinds of experts.'" Id. at 301, citing Kumho Tire, 526 U.S. at 150.

In Mathis v. Exxon Corp., 302 F.3d 448, 460 (5th Cir. 2002), the court affirmed the admission of testimony by an economist expert. The expert discussed whether a price was commercially reasonable. Id. The court found this testimony to be sufficiently reliable to be admitted as it was based on "general business and economic principles." Id. That was adequate to "satisfy the Daubert factors" without requiring the testimony to be evaluated using the scientific criteria. Id.

The testimony of Mr. O'Malley will be based on his knowledge of the operation of the American banking system, acquired while working for the Fed, and the testimony of Mr. Byrne will be based on his knowledge of laws and regulations applicable to international commercial transactions and instruments developed through study, teaching, conferences, and publications regarding such matters. As demonstrated in the cases cited above, expert testimony regarding the nature of financial transactions and instruments, and the economic and market principles that apply to such matters, may be based on personal knowledge and experience. Such knowledge and experience are sufficient to cause the testimony to be reliable without consideration of factors normally applicable to experimental science, such as theoretical testing, peer review, and evaluation of error rates.

C. The Jury Will Be Assisted by the Testimony and the Experts Are Not Cumulative.

Mr. O'Malley and Mr. Byrne will provide testimony regarding technical and specialized matters that will help the jury understand the issues and determine the facts. Without addressing the difference in their backgrounds, experience, or

reports, Priore conclusorily asserts that the experts will be duplicative and cumulative. Motion at 2, 5-6. However, their testimony will not be cumulative because each of them will testify about different matters. Mr. O'Malley will address the activities of the Fed and the U.S. government, while Mr. Byrne will discuss European investment vehicles, normal rates of return, and the relationship of risk and return. See Motion Exhibits A and B.

Furthermore, the experts will testify about matters with which many jurors likely have limited experience. Priore argues that the experts' testimony is not needed as she asserts that it will not assist the jury here. See Motion at 4. In support of this contention, Priore states that the experts will testify that high yield investment programs ("HYIPs") are secretive, that the victim is kept uninformed of many HYIP features including the business purpose of the alleged investment, and that the identities of the HYIP operators are not disclosed. Motion at 4. In contrast to those typical characteristics, Priore asserts, the HYIP offered in this case was not secretive because the names of the people involved were revealed, those individuals were made available to the "victim," and review by his attorney was suggested. Id. She also argues that jurors can easily recognize whether misrepresentations occurred.

These contentions fail to support the argument made by Priore for inadmissibility because they ignore many other aspects of the experts' testimony that will be helpful to the jury. During the course of the offense, defendants made a number of assertions about the involvement in and authorization of the

purported investment by the Fed and other federal government entities and actors. It is likely that some or most jurors will not have much familiarity with the operation of the Fed or whether it or other federal agencies authorize, license, or get involved with private investments. Mr. O'Malley's testimony will be useful in understanding such issues. The investments offered in this case promised extremely high returns over very short periods of time, while at the same time being guaranteed against risk. The jurors may have some experience with and understanding of simple investment concepts. However, it is probable that many or most of the jurors will not have knowledge of the types of investment vehicles available in Europe, where the investment program being marketed in this case was claimed to have been offered. Mr. Byrne's testimony will be useful to the jury in understanding the character of available investments in Europe. In addition, Mr. Byrne will provide necessary information regarding the levels of return that correspond to various investments and the degree of risk involved in such investments, about which many jurors are likely to lack substantial training or knowledge. See First Marblehead Corp. v. House, 541 F.3d 36, 41-43 (1st Cir. 2008) (affirming admission of economics consultant's testimony regarding stock options and financial considerations in exercising them as helpful to jury because such topics are not ordinarily within a juror's knowledge). Priore's motion does not address, much less refute, the utility of testimony regarding these issues.

Priore's argument that the jury will easily be able to recognize misrepresentations on its own ignores the fact that the

matters that were misrepresented relate to the existence of investments that generate very high returns with little risk, the nature of European investments, and the purported involvement of federal entities with HYIPs. As discussed above, many jurors are likely to have limited experience regarding these matters, therefore, they will lack the knowledge necessary to determine whether defendants' statements were misrepresentations. United States v. Chaika, 695 F.3d 741, 745-46 (8th Cir. 2012) rejected an argument similar to Priore's that financial experts' testimony was unnecessary. Chaika affirmed the admission of expert testimony regarding mortgage loan transactions. The court stated that expert testimony regarding the relationships and documents common in legitimate mortgage transactions were "obviously relevant to [the jurors'] understanding of the evidence." Id. at 746. The court also approved of expert testimony regarding "how fraud can be perpetuated within that lending structure" because it illustrated "'the modus operandi of [criminals] [sic] in areas concerning activities which are not something with which most jurors are familiar.'" Id.

Priore's challenge to the expert testimony based on the degree of secrecy involved in the transaction is largely unsupported by the evidence. While Priore argues that the HYIP offered here was not secretive because the names of the people involved were revealed, those individuals were made available to the "victim," and review by his attorney was suggested, she ignores many aspects of the deal that were kept hidden or vague and she misconstrues the type of secrecy mentioned by the experts. The documents and statements about the HYIP here fail

to disclose any detail about the purported real estate transaction that it was claimed to facilitate -- no information was provided to the people who were to invest $1,000,000 or more as to the type of property involved, the location of it, the purchase price, the identity of the seller or buyer. The astronomical and guaranteed returns in this particular deal were variously claimed to be derived from currency trading (by Priore), a real estate transaction (in the contract documents), and through medium term note trading (by TSI). Furthermore, no explanation was given of the identity of the purported notes, their issuer, duration, interest rate, or sales price. This actually is consistent with hallmarks of HYIPs, which Mr. Byrne stated included vague references to trading. Motion, Ex. B at 2.

In addition, the discussion of secrecy by the experts to which Priore refers primarily involved secrecy from the outside world, not from the investor/victim -- Mr. O'Malley stated that the trading is said to be done on a secret market of which bankers are not aware, that the investor is told that s/he is among only a few special people who were invited to invest, and that the investor cannot reveal information about the program. Motion, Ex. A at 2-3. Therefore, in addition to ignoring many respects in which the experts' testimony will be helpful, Priore's arguments concerning those portions of the testimony that she does address are inconsistent with the facts and evidence here. Accordingly, the court should find that the experts will assist the jury and allow them to testify.

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D. The Expert Testimony Does Not Violate the Hearsay Rule or *Crawford*.

In presenting their testimony, the experts may refer to the evidence concerning the investments offered in this case or to other investments without offending the hearsay rule or Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Priore makes a brief, non-specific assertion that the experts' testimony about facts related to the instant investment offerings or to other investments may be inadmissible hearsay or violate Crawford. Motion at 5. The first contention plainly fails because an expert witness is permitted to base on opinion on inadmissible hearsay. Fed. R. Evid. 703. The Crawford argument suffers from at least two fatal flaws. First, the experts would not be proffering any such evidence for admission. Instead, they would be opining on evidence that will have been admitted previously through other witnesses in conformity with Crawford and other rules of evidence. Crawford obviously has no bearing on a witness's testimony concerning facts that have already been admitted in evidence.

In addition, the facts upon which Priore bases her argument are non-testimonial matters that are not subject to the Crawford rule in the first place. Those facts will be offered in evidence through documents that are either business records or written statements by co-conspirators carrying out the offense, as well as through oral co-conspirator statements. Business records and co-conspirator statements are considered to be non-testimonial matters that are outside of the scope of Crawford. United States v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005) (co-conspirator

statements are non-testimonial and so are outside of Crawford rule); United States v. Hagege, 437 F.3d 943, 958 (9th Cir. 2006) (business records are non-testimonial and not subject to Crawford). Therefore, even if it were assumed *arguendo* that such matters were to be offered in evidence through the experts' testimony, Crawford would not apply.

E. The Experts Will Not Testify Regarding State of Mind or Characterize the Investments as Fraudulent and May Discuss Ultimate Issues and Typical Characteristics of HYIPs.

The experts are permitted to testify regarding ultimate issues, may present opinions as to whether the investments offered were fictitious, and can describe the typical characteristics of HYIPs. Priore asserts that the experts should not be permitted to give legal opinions, such as testimony that the defendants' conduct was illegal or fraudulent, or an opinion regarding the defendants' state of mind. The government concurs with this and will not present testimony from the experts as to the legality of defendants' conduct or their mental states. See Fed. R. Evid. 704(b).

However, Priore also correctly concedes that an expert witness may opine on an ultimate issue. Motion at 6, citing Fed. R. Evid. 704(a). Furthermore, as courts have held in the cases discussed below, the experts can present opinions as to whether the investments offered actually exist or are merely fictitious, as that is a matter based on facts such as the investments that are available in the market and the statements made in the documents and recordings in this case, and does not involve defendants' mental states or characterize the legal status of

their conduct.

In United States v. Liner, 435 F.3d 920, 924 (8th Cir. 2006), the court affirmed the admission of testimony by an expert witness from the Fed that a prospectus provided to investors contained characteristics typical of HYIPs. As the expert did not express an opinion on the defendant's mental state or whether the investment was, in fact, fraudulent, his testimony was permissible, even though it "might imply or otherwise cause a jury to infer this ultimate conclusion." United States v. Pansier, 576 F.3d 726, 731, 738 (7th Cir. 2009) approved of the testimony given by a bank examiner with the Office of the Comptroller of the Currency that financial instruments were fictitious, even though that involved an ultimate issue, because he did not opine as to the defendant's state of mind or intent to defraud. In United States v. Kalaycioglu, 210 Fed. Appx. 825, 829-31 (9th Cir. 2006) (unpublished, but may be cited as persuasive authority per 11th Cir. Rule 36-2), a Fed official was permitted to testify about common hallmarks of fictitious HYIPs, because experts may "testify regarding the modus operandi of a certain category of criminals where those criminals' behavior is not ordinarily familiar to the average layperson." The court noted that the expert needed to refrain from testimony regarding the defendant's mental processes or characterizing the defendant's conduct as "fraud." Id. at 831. It was proper, though, for the expert to state that the transactions contained hallmarks of illegitimate HYIPs. Id. Accordingly, Mr. O'Malley and Mr. Byrne should be permitted to testify about the fictitious nature of the investments here and the common characteristics of

HYIPs, as well as to compare typical HYIPs to the instant investment offerings.

IV.

CONCLUSION

For all of the foregoing reasons, there is a proper basis for the court to admit the experts' testimony. Therefore, Priore's motion should be denied.