Gerald M. Werksman, SBN 145020
30 Wharfside Dr.
Newport Beach, CA 92657
Telephone: 949-675-5179
Facsimile: 949-756-9060

Attorneys for Defendant Moses Onciu

SUPERIOR COURT OF STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MOSES ONCIU, et al., Defendant.	Case No.: SA CR 08-180-DOC ASSIGNED FOR ALL PURPOSES to: Hon. David O. Carter **DEFENDANT ONCIU'S SUPPLEMENTAL RULE 29(c) MOTION FOR JUDGMENT OF ACQUITTAL; POINTS AND AUTHORITIES** **Hearing** **Date:** January 27, 2014 **Time:** 1:30 p.m.

Now comes the Defendants, Moses Onciu, pursuant to Rule 29 (c)(1). United States Code, Rules of Criminal Procedure, and moves this court for a judgment of acquittal after a guilty verdict, and in support thereof, states the following grounds:

Grounds One and Two

1. The court erred in not granting the motion for acquittal on all counts after the government rested its case.

2. The court erred in not granting the motion for acquittal at the end of all the evidence.

Had Agent Reitz not insisted that Defendant Pemkova involve Moses Onciu in their telephone conversations, the single conversation regarding the TSI deal in which Onciu participated, on December 4, 2006, would not have taken place. This is significant because while that conversation is almost the entire case against Onciu, even that conversation does not provide sufficient evidence of criminal intent to sustain sending the case to the jury or not granting subsequent acquittal.

The court has access to Gov. Ex (45T), the conversation of December 4, 2006. Briefly stated, Defendant's first reaction to Reitz's inquiries to say he knows nothing about the deal. (Tr. 4, 30). In the subsequent conversation, Onciu tells Reitz at least a dozen times to consult his own lawyer. (Tr. 9, et. seq.) He cautions Reitz to be careful in investing the family's money, telling him to trust no one but himself, to be prudent and do his due diligence. (Tr. 6, et seq.) On the subject of the bona fides of HYIPs in general, Onciu tells Reitz that most of them are not real and that the area is filled with scams "most of them are" (Tr. 21). He never vouches for the bona fides of the TSI deal.

Defendant Onciu became involved in the instant case only when Pemkova asked him to find someone with a high-yield business opportunity. He referred her to Priore. Onciu did not propose the TSI deal which was done by the other defendants. His peripheral role was as the recipient charitable agency. He used to get paid only if there was a profit to the investor. That his charity existed has never been doubted; he invited the agent to visit it in Phoenix, an invitation not accepted. When he told Reitz he would accept less than the contract called for (25%) it was because he considered himself peripheral to the entire deal and because he was truly interested in funding his charity to any extent possible.

Also significant in determining defendant Onciu's state of mind is the fact that he never called Agent Reitz again. Unlike the other defendants, he never urged Reitz to go ahead with the deal. If Reitz had not called him six weeks after December 4, 2006, (Ex. 79T) the possibility exists that Onciu

would never have spoken to Reitz again. When Onciu did speak to Reitz a second time he had forgotten who Reitz was and had to inquire about whether the deal was still on. His subsequent conversation with Reitz was on his own and not in furtherance of the TYSI conspiracy. In fact, the January telephone call and email were not in furtherance of any conspiracy.

The essential elements of a conspiracy are: (1) an agreement to accomplish an illegal objective; (2) the commission of an act in furtherance of the conspiracy, and -- most importantly -- the requisite intent necessary to commit the underlying offense. United States v. Tara-Palma, 997 F,2d 525, 536(9th Cir. 1993).

Simple knowledge, approval or acquiescence in the object or purpose of a conspiracy, without an intention or agreement to accomplish a specific illegal objective is not sufficient to prove guilt. United States v. Melchor-Lopez, 627F.2d 886,891 (9th Cir. 1980). See also: United States v. Lennick, 18 F.3d 814, 818(9th Cir. 1994).

Moses Onciu wished the TSI deal to succeed. Only if it was real did he have the opportunity to receive money for his charity. He did not vouch for it because he knew nothing about TSI. He never tried to sell TSI to Agent Reitz and gave Reitz the sound advice that an honest person would give, if asked (as he was). He did not have the criminal intent necessary to convict him of conspiracy nor the substantive counts.

Ground Three

3. The court erred by not giving Disputed Instruction number 3 (attached hereto as Exhibit 1) regarding the existence of two conspiracies and the necessity of the jury determining which conspiracy existed, if at all, and the one to which defendant belonged, if at all.

Defendant's attempt to defend himself was thwarted from the onset by a fatal error in the drafting of the indictment --the inclusion of two separate conspiracies in one count. The first count of

the indictment alleges two conspiracies. The first is the attempt by the three defendants to involve agent Reitz in the TSI deal. The second alleges a conspiracy by the three defendants to sell HYIPS in general.

Unable to persuade the court of this error at the end of the government's case and at the conclusion of all the evidence, counsel offered an instruction (Defendant's Instruction No. 3, document 185, filed 10/11/13) which would mitigate the adverse effects of the variance by: (1) focusing the jury's attention on the separate nature of the two conspiracies and (2) allowing the parties to know which conspiracy, if any, the defendant was convicted of, if convicted at all. That instruction was rejected.

Whether viewed as a duplicitous count, a variance or multiple conspiracies, Count One was prejudicial to the defendant, because the government introduced evidence not related to the TSI deal to convict the defendant on that aspect. It used the same evidence to prove the allegation of selling HYIPS in general. We are referring to the phone call and email in January 17, 2007 (Ex. 79T) from Defendant Onciu to Agent Reitz, which had nothing to do with the TSI deal but did relate to the selling of HYIPS in general.

In United States v. Morse, 785 F.2d 771, 775(9th Cir. 1986) the court addressed the three ways in which a variance may constitute grounds for reversal, if sufficiently prejudicial. The third --exposure to prejudicial evidentiary spillover -- applies in the instant case.

Had the court concluded, as it should have, that there exist multiple conspiracies due to the evidence it should have given an instruction regarding multiple conspiracies. See United States v. Anguiano, 873 F. 2d 1314, 1317-18 ((9th Cir. 1989) and cases cited therein. See also United States v. Fernandez, 388 F. 2d 1199, 1247-48 (9th Cir. 2004) and United States v. Varelli, 407 F.2d 735, 746 (7th Cir. 1969).

Not having addressed the issue and not granting defendant's motions for acquittal, the Court should have, at a minimum, given Defendant's instruction Number 3.

Ground Four

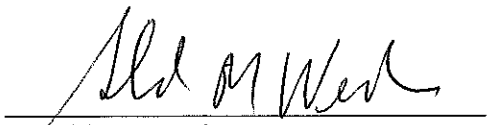
Having unsuccessfully argued that two conspiracies were set forth in the conspiracy count, defense counsel sought some explanation of the January telephone conversation (Ex. 45T) that would limit its effect on the jury's considerations in the appropriate manner. The basis for proposed instruction number 4 is set forth in "Parties Position Re Proposed Instruction No. 4" attached hereto as exhibit 2); the proposed instruction is set forth as Exhibit No. 3.

Counsel's notes and memory indicate that the court, believing that only one conspiracy existed and only one had been alleged, did not give the instruction.

If the evidence indicates that two or more conspiracies may exist, a multiple conspiracies instruction must be given. United States v. Tara-Palma, 997 F.3d 525, 530((9th Cir. 1993).A trial judge is given substantial latitude in actually constructing the instructions, but they must fairly and adequately cover the issues presented. United States v. Marabelles, 724 F.2d1374, 1382-83. The standard for review of a particular instruction is for an abuse of discretion. United States v. Miller, 771F.2d 1219, 1238(9th Cir. 1985. See also: United States v. Marabelles, cited supra at p. 1383.

Giving the proposed instruction in the instant case would have alerted the jury to the significance of the January conversation and email. That is, it was introduced not because Onciu was acting in conjunction with the other two defendants to sell HYIPs in general, but rather to show that he knew the criminal nature of what he was doing. Standing as it did with no explanation for its introduction in evidence; the jury may well have believed that it was not part of the TSI conspiracy proof but rather in furtherance of a second conspiracy. We will never know how the jury treated this; piece of evidence because it was not sufficiently explained in the jury instructions.

Respectfully submitted,



Gerald M. Werksman,
Attorney for Moses Onciu

EXHIBIT "1"

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 the 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 HYPs 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.

EXHIBIT "2"

Parties' Position Re Proposed Instruction No. 4

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

EXHIBIT TWO

EXHIBIT "3"

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.

EXHIBIT THREE