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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MOSES ONCIU,

Defendant.

Case No. SA CR 08-180-DOC

OPPOSITION TO DEFENDANT MOSES ONCIU'S SUPPLEMENTAL RULE 29(c) MOTION FOR JUDGMENT OF ACQUITTAL

Date: January 27, 2014
Time: 1:30 p.m.
Place: Courtroom of the Honorable David O. Carter

The government submits the following opposition to defendant Moses Onciu's Supplemental Rule 29(c) Motion for Judgment of Acquittal.

Dated: January 13, 2014.

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Defendant Moses Onciu's motion for a judgment of acquittal should be denied for several reasons. First, much of the motion is based on alleged trial errors (such as purportedly incorrect jury instructions) that are not cognizable in a Rule 29 motion, whose only purpose is to test the sufficiency of the evidence. In addition, Onciu waived his duplicity argument by failing to assert it before trial. Even if Onciu's improper arguments could be considered, they lack merit as there was only a single conspiracy, the evidence regarding the investments promoted was a part of that conspiracy and scheme, and the evidence related to the charged offense, not to an "other wrong or act" as contemplated by Rule 404(b). Thus, there was no basis for the court to give a multiple conspiracy or Rule 404(b) jury instruction.

As for matter that is cognizable under Rule 29, there was more than adequate evidence for a rational jury to find that Onciu possessed the required intent. No variance occurred between the evidence presented at trial and the indictment because the indictment alleged a single conspiracy to defraud using high yield investment schemes.

## II. ARGUMENT

### A. Much Of The Motion Is Based on Alleged Trial Errors That Are Not Cognizable In A Rule 29 Motion.

The purpose of a motion for judgment of acquittal under Rule 29(c), like as that advanced by Onciu, is to seek a ruling that no rational jury could convict a defendant based on the evidence presented by the government at trial, viewed in the light most favorable to the prosecution. United States v. Carranza, 289 F.3d 634, 641–42 (9th Cir.2002) (standard on Rule 29 motion is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing evidence in the light most favorable to government). Accordingly, to grant an acquittal pursuant to Rule 29, the court must find that the jury could only have rationally resolved some or all of the factual elements of the charged offense in favor of the defendant because the

evidence was insufficient to sustain a conviction of such offense. See United States v. Affinito, 873 F.2d 1261, 1264 (9th Cir. 1989).

While a portion of Onciu's motion is based on an alleged lack of evidence (e.g., Onciu's argument that there was insufficient evidence of intent), which is a permissible argument under Rule 29, most of the motion instead asserts alleged trial errors that are not cognizable here. Onciu contends that (1) the court "erred" in not granting his prior motion for acquittal, Motion at 1, (2) the court "erred" in not giving Disputed Instruction No. 3, Motion at 3, and (3) the court committed an "abuse of discretion" when it did not give Disputed Instruction No. 4, Motion at 5. Arguments of this type are not cognizable in a Rule 29(c) motion, which is limited to the question of whether there was sufficient evidence to support a conviction and does not provide relief if the evidence was adequate but the proceedings were flawed. Affinito, 873 F.2d at 1265. As the Ninth Circuit explained in Affinito, a Rule 29 motion is the wrong tool to correct alleged defects in an indictment or jury instruction. Id.; see also Burks v. United States, 437 U.S. 1, 15-16; 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)(finding of trial error, rather than evidentiary insufficiency, does not show that the government has failed to prove its case; therefore, it has nothing to do with a finding of guilty or not guilty, but is instead a determination that a defendant has been convicted through a defective process). A Rule 29 motion may not be granted on any grounds other than an insufficiency of evidence to sustain a conviction. See United States v. Gant, 2013 WL 458307 (D. Mont. 2013) (unpublished) (noting impropriety of basing Rule 29 ruling on alleged defects in indictment or jury instructions). Therefore, Onciu's challenges to the indictment and jury instructions are irrelevant to his motion. Accordingly, those portions of the motion should be rejected without the need to reach their merits.

**B. There Was Ample Evidence Of Onciu's Intent For A Rational Jury To Find Him Guilty.**

Contrary to Onciu's contention that there was insufficient evidence of intent, ample evidence was introduced upon which a rational jury could find that he was guilty.

Onciu does not argue that high yield investment programs ("HYIPs") actually exist or that the TSI Consulting Group transaction was a genuine investment in which the astronomical returns promised could be earned. Instead, he contends only that there was insufficient evidence that he intended to defraud.

There was sufficient evidence of Onciu's intent to get "Tom Moore" (Special Agent Thomas Reitz's undercover identity) to invest in HYIPs, including the TSI transaction. Onciu made false statements to "Moore" that he had completed high yield investments before, knew of two $1 million investments that had succeeded, had observed profits of "much more than" 600% in 30 days, that people make "much more" than 100% per month, that he was "intimately" familiar with deals involving $20 to $100 billion, that he was working directly with a "Fed licensee," and that the federal government wants people to invest in HYIPs and actually selects such investors. Exhibit 45T at 12, 14-16, 21 & 23-26. When he was interviewed by the FBI, Onciu acknowledged that someone considering making an initial investment of $1 million would probably be caused to trust Onciu due to these representations, as he claimed to have extensive experience in very large transactions and personal knowledge of successful HYIPs. See SA Thomas Reitz's direct examination regarding interview of Onciu; Exhibit 158. A rational jury could conclude from these statements that Onciu had the intent to cause "Moore" to invest money with TSI. Onciu does not dispute in his motion that TSI or other HYIPs were fraudulent, that he never observed a HYIP pay extraordinary profits, that he never worked on transactions involving tens of billions of dollars, or that there is no federal involvement with HYIPs, and there was ample evidence from the government's witnesses and Onciu's interview statements that these statements were false. Onciu would obviously have known these statements were false because they involved his purported observations and actions. Furthermore, Onciu was not ignorant of the dangers of HYIPs – he admitted to "Moore" that "most of these are scams." Ex. 45T at 20-21. As Onciu knowingly made false statements in an effort to persuade "Moore" to invest, the evidence showed that he had the intent to defraud.

In his motion, Onciu ignores this plethora of evidence and, instead, selectively cites isolated statements, arguing that he was ignorant of the TSI transaction and did not attempt to convince "Moore" to invest in it. Motion at 2. Each of Onciu's contentions are undermined by the trial evidence. Onciu asserts that he said that he knew nothing about the TSI deal, that he had a peripheral role, and that he did not propose the TSI transaction. Id. On the contrary, Onciu himself stated that he was the one who found the TSI investment, who reached out to co-conspirator Beata Priore, and who obtained the investment that was promoted to "Moore" from Priore. Ex. 45T at 4-5, 16-17. Onciu now argues that he did not vouch for the "bona fides" of the TSI deal and, in regard to HYIPs, that he said most of them were not real. Motion at 2. However, in his conversation with "Moore," Onciu said that he had reviewed the TSI contract twice; had calculated the profits to be earned in this deal, that he didn't see "red flags" warning against investing; that "Moore's" money would not be at risk and that the only possible outcomes were earning very high yields or getting the principal back with 5.5% interest; that the TSI deal had built-in safeguards and was a "very strong alternative" to a get-rich-quick scheme; that, to Onciu's knowledge the Europeans had been successful in this program; and that Onciu was confident in it. Ex. 45T at 4-5, 7-9 & 33-34. Furthermore, Onciu did in fact vouch for the legitimacy of HYIPs, making repeated statements that he had seen HYIPs successfully completed, that he had been personally involved in successful HYIPs, and that people had made returns much higher than that promised in the TSI investment. Id. at 12, 14-16, 21 & 23-26. There was ample evidence that Onciu asserted knowledge of HYIPs and the TSI offering, as well as that he wanted to get "Moore" to invest.

Onciu's assertion that he never called "Moore" again after the December 4 conference call is inconsistent with the evidence. Motion at 2. While it is correct that the *first* contact between "Moore" and Onciu following the December 4 call was initiated by "Moore," once that occurred, Onciu repeatedly reached out to "Moore" as he tried to get "Moore" to send hundreds of thousands of dollars for phony HYIPs. On January 17,

2007, Onciu called "Moore," asked which TSI principals "Moore" had spoken with, said that he was glad to hear that "Moore" had the opportunity to talk with them and to get questions about the deal answered, and told "Moore" that Onciu had a new program that had just become available about which "Moore" "needed to know" as it was a "smoking deal." Exhibit 79T at 1-4. Onciu called "Moore" again later that day and asked "Moore" for his email address so that Onciu could engage in further outreach and marketing to "Moore," and told "Moore" that he had an "excellent program" that he could put together quickly for "Moore." Exhibit 80T at 1-2. Two days later, Onciu again contacted "Moore" by sending him an email message regarding a HYIP. Exhibit 125. Onciu once more called "Moore" three days later to make sure that "Moore" had received his email message and to urge "Moore" to proceed with the HYIP. Exhibit 83T. On February 20, 2007, Onciu called "Moore" to ask him about the status of TSI investment. Exhibit 89T at 1. Onciu sent "Moore" an additional email to pitch yet another HYIP to "Moore." Exhibit 127. As is apparent from this review of the record, Onciu's assertion that "he never called Agent Reitz again" after December 4 seriously mischaracterizes the evidence. Motion at 2. Onciu is correct that his communication with "Moore" is significant in determining his statement of mind – and that communication provided ample basis for the jury to conclude that Onciu had the intent that "Moore" invest in a fraudulent transaction. Thus, there is no basis for an acquittal.

**C. Onciu's Challenge to the Indictment as Duplicitous Was Waived by his Failure to Assert it Before Trial.**

Onciu has waived his argument that the indictment was duplicitous by failing to raise it before trial. In his Rule 29 motion, Onciu asserts that Count One of the indictment was duplicitous because it purportedly sets forth two different conspiracies. Motion at 4. However, alleged defects in an indictment must be asserted prior to trial. Fed. R. Crim. P. 12(b)(3)(B). If not asserted timely, such a challenge is waived. Fed. R. Crim. P. 12(e). As Onciu never raised a duplicity objection prior to trial, he is barred

from doing so now and that portion of his motion should be denied. See United States v. Klinger, 128 F.3d 705, 708 (9th Cir. 1997).

**D. The Indictment Only Contained A Single Conspiracy And Only One Conspiracy Was Introduced At Trial, Thus, No Variance Occurred. Additionally, Even if the Issue Had Not Been Waived, the Indictment Was Not Duplicitous.**

There was no variance between the evidence presented at trial and the indictment because the indictment alleged a single conspiracy to defraud using high yield investment schemes. Count One of the indictment did not allege multiple conspiracies. Rather, it described a single conspiracy consisting of an agreement to commit wire fraud between November 29, 2006 and March 7, 2007 in connection with the promotion of fraudulent high yield investment schemes promising extremely high returns at little or no risk to principal. The indictment expressly refers to high yield schemes in the plural, thereby encompassing more than just the promotion of the investment related to TSI, and to a time period continuing into March 2007, which includes the additional programs promoted by defendant Onciu and Priore in January through March 2007. These allegations and the supporting evidence involve only a single conspiracy.

Thus, there is no basis to assert the existence of a "TSI conspiracy" and a "HYIP conspiracy" as defendant does in his motion. Motion at 4. Furthermore, this characterization itself does not make sense as the TSI deal was, in fact, a high yield investment program, or "HYIP." The communications about HYIPs other than the TSI deal were just a part of the conspiracy charged in the indictment. They were merely additional ways in which the same promoters offered the same type of get-rich-quick schemes to the same victim at the same time. The mere fact that conspirators use various means and multiple programs to carry out a scheme does not result in the existence of multiple conspiracies. See United States v. Morse, 785 F.2d 771, 774-75 (9th Cir. 1986), (four different programs offered to investors involving oil and gas drilling, video games, heavy equipment, and oil recovery found to be a single scheme even though defendants

defrauded different people over an extended period of time, using different means and representations); United States v. Simons, 119 F.2d 539, ,545-46 (9th Cir. 1941) (where indictment charged a general scheme to defraud investors, the scheme to defraud is differentiated from the means adopted to effectuate the same and the existence of several fraudulent ventures does not multiply the number of schemes to defraud). Furthermore, as the indictment alleged the promotion of high yield schemes, the presentation of evidence showing several such schemes was consistent with indictment, not a variance from it. Accordingly, the presentation of evidence regarding other HYIPs at trial did not cause the proof to vary from the indictment. As a result, there is no basis for a judgment of acquittal.

Onciu also argues that he was prejudiced by the purported variance due to evidentiary spillover, citing Morse. Motion at 4. While the preceding discussion demonstrates that no variance occurred, even if it were assumed *arguendo* that there was a variance, no prejudicial spillover took place. In United States v. Anguiano, 873 F.2d 1314, 1318 (9th Cir. 1989), the court, after citing Morse, explained that spillover occurs when one co-defendant argues he was involved only in a separate, unrelated, and uncharged conspiracy and evidence of the other co-defendants' participation in the charged conspiracy causes inference of guilt to "spill over" to the first defendant. In view of this, prejudicial spillover is obviously impossible in a situation, such as Onciu's here, where there are no co-defendants at trial. As the Anguiano court stated, "[T]here is no problem of spillover when, as in this case, the defendant stands trial alone." Id. Therefore, Onciu's argument that he suffered prejudicial spillover from a variance lacks merit.

Furthermore, even if it were assumed *arguendo* that Onciu had not waived his duplicity challenge to the indictment, his argument should be rejected nevertheless because the indictment was not duplicitous. An indictment that charges two or more distinct offenses in a single count is duplicitous. See Morse, 785 F.2d at 774. However, as discussed above, the use of different means and representations to carry out a fraud

does not create multiple schemes and such conduct is not duplicitous if alleged in a single count. Id.; see also Simons, 119 F.2d at 547-48. Therefore, defendants' promotion of multiple HYIPs did not cause the indictment to be duplicitous.

**E. There Was No Basis To Give A Multiple Conspiracy Instruction Or A 404(b) Instruction.**

Even if it were assumed *arguendo* that Onciu's challenge to the court's jury instructions could be raised in a Rule 29(c) motion, his contentions should nevertheless be rejected because the court's instructions were proper. As discussed in United States v. Fernandez, 388 F.3d 1199, 1248 n.34 (9th Cir. 2004), a multiple conspiracy situation can exist where the evidence shows other conspiracies that were unrelated to or separate from the conspiracy charged. Similarly, Anguiano explained that a multiple conspiracy instruction is used where the indictment charges several defendants with one overall conspiracy, but the proof at trial indicates that some of the defendants were only involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment. 873 F.2d at 1317.

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

Similarly, in Simons, 119 F.2d at 545-46, defendants solicited investments first in oil leases, and subsequently in shares of stock in a royalty company, stock in an oil

drilling company, and "participations" in a gas and oil development company. Like Onciu does here, the Simons defendants argued that this constituted multiple schemes to defraud. Id. at 547. The Ninth Circuit rejected their argument, stating that:

> The indictment charged that the defendants devised a general scheme to defraud investors. The scheme was alleged to have consisted of various plans to attract investors. . . "[I]it is necessary to differentiate between the scheme to defraud and the means adopted to effectuate the same. . . . The existence of several fraudulent ventures, into one of which an unsuspecting victim may be led, does not necessarily multiply the number of schemes to defraud. One possessed of a fraudulent scheme may set numerous traps into one of which he hopes and expects the unwary to walk. . . . [T]he fraudulent scheme of the entrapper may be a single one, yet means to accomplish the fraud may be many."

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

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

Onciu's citation to United States v. Tara-Palma, 997 F.2d 525, 530 (9th Cir. 1993) overruled on other grounds by United States v. Shabani, 513 U.S. 10, 115 S. Ct. 382, 130 L. Ed. 2d 225 (1994) is not to the contrary. While Tara-Palma did state the general rule

that a multiple conspiracy instruction should be given if the evidence shows more than one conspiracy, the facts and result in that case support the government here. Although the defendant was involved with three different transactions that took place at different times and involved different people, who were not linked, the court nevertheless found that there was only a single conspiracy. Where, as in the instant case, evidence of more than one conspiracy was lacking, the court is correct in refusing to give a multiple conspiracy instruction, Tara-Palma held. Id.

For similar reasons, the court acted properly by not giving the proffered Rule 404(b) instruction (Disputed Instruction No. 4). As described in the cases cited above, the different investments that were discussed did not constitute different conspiracies or schemes. Instead, they were merely various means of carrying out the single conspiracy and scheme alleged. Because they were a part of the conspiracy and scheme, evidence regarding those investments related to the charged offense, not to an "other wrong or act" as contemplated by Rule 404(b). Thus, there was no reason for the court to give the jury Disputed Instruction No. 4.