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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. BARTON ALBERT BUHTZ, Defendant.	))))))))))	Case No. CR 05-30047-PA DEFENDANT BUHTZ'S SENTENCING MEMORANDUM

1. INTRODUCTION

The defendant, Barton Buhtz, has been found guilty of one count of conspiracy and five substantive counts of passing a fraudulent document. The pre-sentence writer has recommended a sentence of 78 months; such a sentence is unnecessary and inappropriate.

2. GUIDELINES CALCULATION

In arriving at her recommendation, the pre-sentence writer used an offense level of 28. The defense disagrees with this calculation. The pre-sentence writer has recommended that the base offense level of 6 be enhanced by 18 levels because of the "loss" involved. This figure is derived from intended rather than actual loss and includes alleged relevant, uncharged conduct. The loss in

this case should not be calculated in this manner. Neither should Mr. Buhtz's sentence be increased for a mass marketing enhancement or a leadership or managerial role enhancement.

2.1 Loss Calculation.

The intended loss figure should not exceed $1,118,719.78 resulting in a base level increase not greater than 14 before applying the downward departures.

Mr. Buhtz was acquitted on counts 2, 3, 4, and 8. Count Two references Government Exhibit (GE) 1 for $41,995. Count Three references GE 2 for $46,659. Count Four references GE 3 for $48, 650. Count Eight references GE 4 for $2,772.

None of these bills of exchange should be included in the intended loss figure because Mr. Buhtz was specifically acquitted on these counts by a jury. The sentencing judge is not precluded from taking into account facts relating to charges of which defendant has been acquitted by a jury. *United States v. Watts* 519 U.S. 148 (1997). However, Mr. Buhtz had nothing to do with these Bills of exchange and they should not be included in the loss determination.

Mr. Buhtz was convicted on Counts 1, 9, 10, 11, 12, 13.

The loss determination should not include any Bills of exchange for which the government did not charge a substantive offense. Count 1 lists 28 separate overt acts. A finding that any one of those overt acts occurred would satisfy that element of the conspiracy charge. The jury may have considered all of the charged overt acts or it may have considered only one of the listed acts. There is no way to know whether the jury considered the evidence at trial sufficient to prove Mr. Buhtz's connection to any given Bill of exchange. The government has not proven any connection. Therefore the loss figure should not include any of the Bills of exchange or actions listed in the overt acts of Count One.

Mr. Buhtz was convicted of substantive Counts 9 – 13. Count Nine references GE 13 for $497,800. Count 10 references GE 8 for $536,749. Count 11 references GE 18 for $75,000. Count 12 references GE 5 for $7,500. Count 13 references GE 15 for $1,670.78. The substantive counts on which Mr. Buhtz was convicted total $1,118,719.78. This should therefore be the maximum intended loss determination which corresponds to an increase by 14 levels before downward departures.

The loss enhancement should be no greater than 14 levels.

2.2 Mass Marketing (USSG 2.B.1.b.2.A.ii.)

The two-level mass marketing enhancement under USSG 2.B.1.b.2.A.ii does not apply in this case. Note 4 of the United States Sentencing Guidelines commentary for this section states:

> "For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (I) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies."

This case does not concern an operation involving the purchase of goods or services, participation in a contest or sweepstakes, or investment for financial profit. The mass marketing enhancement is intended and designed to address situations that are not present in this case. Therefore the mass marketing enhancement does not apply.

2.3 Leadership or Managerial Role (USSG 3.B.1.c.).

The two-level leadership or managerial role enhancement does not apply. Note 4 of the United States Sentencing Guidelines commentary for this section states:

> "Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the

> crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.
>
> This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility."

For a two-level role adjustment, the government must show by a preponderance of the evidence that the defendant either exercised some control over others involved in the commission of the offense or was responsible for organizing others for the purpose of carrying out a crime. The enhancement applies if the government proves one incident where the defendant exercised authority over or directed the actions of even one participant. *United States v. Salcido-Corrales*, 249 F.3d 1151, 1154 (9th Cir. 2001), [quoting United States v. Mares-Molina, 913 F.2d 770, 773 (9th Cir. 1990)].

In this case, someone else independently and autonomously initiated each bill of exchange while acting under their own volition. Mr. Buhtz did not exercise authority over anyone. On the contrary, Mr. Buhtz advised Marsha Rasmussen not to submit her bills of exchange and yet she followed through with her plan regardless of his statements. In each incident here, the people who submitted Bills of exchange privately resolved to pursue that course of action and only after making their decision sought Mr. Buhtz's assistance.

Neither did Mr. Buhtz direct the actions of any participant. People sought his advice but they were not compelled to take it. They created, devised, altered and submitted their own forms.

Mr. Buhtz was not handing down orders to the people who submitted bills of exchange. They were acting in their own financial interest and sought Mr. Buhtz's assistance in advancing their private objectives.

Finally, Mr. Buhtz stood to gain no profit from the bills of exchange. According to the Redemption Theory only the person who signs and submits a bill of exchange can have their debt relieved. Mr. Buhtz's name was on none of the bills of exchange and none were submitted on the basis of his debt. Indeed, Mr. Buhtz has no significant debt – he does not have a mortgage, for example – which negates any argument that Mr. Buhtz might have personally gained in the future had someone devised a channel by which a bill of exchange actually worked.

The leadership or managerial role enhancement is directed at organized criminal syndicates and drug cartels. This case does not involve an organization. This case involves one man, Mr. Buhtz, to whom autonomous people individually came for advice after they had already embarked on a course of action. Therefore this enhancement is not applicable.

2.4 Departure

If the court finds that the enhancements discussed above are appropriate, it should depart downward by 18 levels.

2.4.1 Departures Generally.

The court should depart from the sentencing guidelines in this case based on USSG 5K2.0. This section allows the court to impose a sentence outside the range established by the applicable guidelines if the court finds there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that the circumstance should result in a different sentence. A

close look at the circumstances in this case show that it falls outside the "heartland" of cases addressed by the sentencing guidelines, which justifies a downward departure.

The United States Supreme Court has held that sentencing guidelines do not eliminate all of the District Court's discretion. *United States v. Koon*, 518 U.S. 81 (1996). *Koon* allows a departure from the guideline range if the court finds it appropriate to depart based on USSG 5K2.0. The Sentencing Commission formulated each guideline to apply to a heartland of typical cases and the Commission did not adequately consider atypical cases. The Ninth Circuit Court of Appeals has continued to apply this standard despite changes to the statutory landscape. *United States v. Phillip*s, 367 F.3d 846, 861-862 (9th Cir. 2004).

The guidelines provide guidance regarding factors considered in a downward departure in atypical cases by delineating certain factors as "encouraged" or "discouraged" bases for departure. A court may depart on the basis of an encouraged factor if the guideline does not account for it. A court may depart on the basis of a discouraged factor, or an encouraged factor already taken into account, only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case.

The court held that District Court decisions must be reviewed based on the abuse of discretion standard. In creating the guidelines, Congress provided that the Appellant Court shall give due deference to the District Court's application of the guidelines to the facts. Before departing, a court must find that certain aspects of the case are unusual enough for it to fall outside the heartland of cases. The District Court must make a detailed assessment of the many facts bearing on the outcome from its unique vantage point and day-to-day experience in criminal sentencing. District Courts have an institutional advantage over Appellate Courts in making these sorts of determinations because they more routinely handle guidelines cases.

The guidelines place essentially no limit on the number of potential factors that may warrant a departure. A court's determination of the appropriateness of a factor as the basis for a downward departure is only limited by specific proscriptions. If a factor is not prohibited the sentencing court must determine whether it takes the case outside the heartland of the applicable guideline.

In 1997 the Ninth Circuit addressed the issue of applying USSG 5K2.0 to a downward departure. *United States v. Medoza*, 121 F.3d 510 (9th Cir. 1997). The court held that, "A Federal Court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the commission has proscribed consideration of the matter." *Id* at 513. If the Commission has not categorically prohibited the factor, departure is permissible if the factor takes the case outside the heartland of the applicable guideline. "What falls within the heartland of a guideline is within the discretion and special expertise of the District Court in the first instance." *Id* at 515. The court reiterated this rule in *United States v. Mendoza*, 161 F.3d 556 (9th Cir. 1998). After the United States Supreme Court's decision in *Brooker*, the Tenth Circuit Court of Appeals maintained this rule in *United States v. Fonseca*, 473 F.3d 1109, 1112 (10th Cir. 2007).

Mr. Buhtz's situation falls outside the heartland of cases meant to be addressed by the sentencing guidelines because due to the economic reality principal.

2.4.2. Economic Reality.

The nature of this loss merits a downward departure of 14 levels.

In cases where the loss determination results in an offense level that substantially overstates the severity of the offense, the court may depart. Application note 15(B) of the United States Sentencing Guidelines Manual §2B1.1. This is an encouraged basis for departure. *United*

States v. McBride, 362 F.3d 360, 374 (6th Cir. 2004). Regarding loss determination, there are four basic situations in which a departure on this basis may be appropriate. *Id*. The first is the "multiple causation" scenario, in which the amount of loss is determined to be the product of several sources in addition to the defendant's conduct. *Id*. The second scenario, logically related to the first, is when the defendant plays a limited or inferior role in the scheme that bore little relationship to the amount of loss determined under the guideline. *Id*. The third situation occurs when the defendant's effort to remedy the wrong merits consideration, as, for example, where he makes extraordinary restitution or, in a fraudulent loan case, where he had sufficient unpledged assets to cover the loss. *Id*. The fourth arises when the court adopts a figure based largely or solely on intended loss. A departure in this situation is based on the so-called "economic reality" principle. In some cases it may be unfair to sentence the defendant based on the intended (but highly improbable) loss determination from the U.S. Sentencing Guidelines Manual § 2B1.1 table because the intended loss bears no relation to "economic reality." *Id*.

Where sentencing is based largely or solely on intended loss, a downward departure may be warranted under the "economic reality" principle. *Id*. The underlying theory behind this principle is that, where a defendant devises an ambitious scheme obviously doomed to fail and which causes little or no actual loss, it may be unfair to sentence based on the intended (but highly improbable) loss determination from the U.S. Sentencing Guidelines Manual § 2B1.1 table. *Id*. A court should therefore consider whether there was any reasonable possibility that the scheme could have caused the loss the defendant intended. *Id*. This is so because the Sentencing Commission is using intended loss as a proxy for the defendant's degree of culpability. U.S. Sentencing Guidelines Manual § 2B1.1, Commentary, Background.

Two factors are relevant in considering a downward departure motion on the basis of "economic reality". The first is whether there was any reasonable possibility that the scheme could have caused the loss the defendant intended. This analysis is consistent with the Sentencing Commission's theory of punishment in fraud cases. Those who devise ridiculous schemes (1) do not ordinarily have the same mental state and (2) do not create the same risk of harm as those who devise cunning schemes. In short, they are not as dangerous. Thus, it is entirely proper to mitigate their sentences by a departure. The second factor is whether the intended loss is grossly disproportionate to any actual loss. Of course, the best evidence of a scheme's probable success is its actual success.

This is a case in which the loss determination under the guidelines substantially overstates the severity of the offense. The U.S. Sentencing Guidelines encourage the court to depart downward in this case for three of the four possible reasons.

Regarding the first, or “multiple causation” scenario, Mr. Buhtz did not devise the redemption theory. Several witnesses testified that they learned about the theory and process form other sources, including other individuals and the book *Cracking the Code*. Mr. Buhtz also did not personally submit or handle any of the Bills of exchange. Every one of them was initially conceived and ultimately passed by another autonomous person. In every situation there were at least two participants and no single source of conduct.

Regarding the second, or limited role, scenario, Mr. Buhtz not only submitted none of the bills of exchange but also stood to gain nothing in the event that they succeeded. Mr. Buhtz was a passenger, not a driver, in every situation and never initiated an attempted purchase. Moreover, every person who passed a bill of exchange sought out Mr. Buhtz’s assistance only after that person had independently decided on that course of action. Mr. Buhtz did not control or coerce

anybody to submit a bill of exchange. On the contrary, in the case of Marsha Rasmussen Mr. Buhtz even attempted to dissuade her from carrying through on her plan. For that reason, as well as the other reasons, the intended loss determination should be reduced by at least the $75,000 represented by Count Eleven.

The third scenario does not apply to this case.

Regarding the fourth, or intended loss, scenario the determination here is based entirely on intended loss. The economic reality principal dictates that it would be unfair to apply the guidelines calculation in this case based solely on the intended, and highly improbable, loss. That is because the intended loss bears no relation to economic reality. None of the bills of exchange bore any likelihood of succeeding. Mr. Buhtz's own expert witness, Dr. Walker F. Todd, testified in essence that the bills of exchange were doomed to fail because UCC Trust Accounts do not exist. The government's expert, Matthew Johnson, testified that the government was aware of that information. Thus there was never a possibility that any of the bills of exchange could have caused the loss that their authors intended.

Count Nine is based on GE 13 which was passed from one unindicted coconspirator (Vickie Clifford) to another (Nelda Bischoff nka Nelda Handke). There was no traditional outside victim on this count and absolutely no possibility that this bill of exchange could have led to a loss. According to her testimony, Ms. Bischoff was an informed party regarding the subject of bills of exchange and harbored some doubts as to their effectiveness. If and when the bank inevitably failed to honor Ms. Clifford's bill of exchange, Ms. Bischoff would simply not transfer title to her property, which is exactly what happened. This intended loss represented by Count Nine bore no economic reality whatsoever and the loss determination should be reduced by $487,800 accordingly.

In the case of Count Ten, Nelda Bischoff presented a bill of exchange to Siskiyou RV but refused to pick up the vehicles until she knew the document had cleared. Even after the dealership asked her to come and pick up the vehicles, Ms. Bischoff declined to do so until she received positive confirmation that her debt had been discharged. There was therefore zero possibility that this bill of exchange would ever have inflicted an actual loss. For that reason Mr. Buhtz's loss determination should be reduced by at least $536,749.

Count Eleven was discussed above.

Count Twelve references GE 5 which was sent by Steven Kelton to the Internal Revenue Service (IRS). The testimony of Latanya Wilson and Delores Douglas was the that IRS receives tens of thousands of these types of documents annually and automatically disposes of most of them. This bill of exchange had absolutely no chance of ever being honored by the IRS and could never have actually inflicted a loss. Because the $7500 intended loss represented by this bill of exchange bears no relation to economic reality the amount reflected by this count should not be included in the loss determination.

Count Thirteen is similar to Count Twelve in that it was sent to a tax collection agency, in this case the Coos County Treasurer. Though that agency does not deal with the same volume of bills of exchange as the IRS, the chance that such a document would be honored to discharge taxes was equally remote – zero. The $1,670.78 cited in this count was not economically realistic and therefore should not be included in the loss determination.

The court should depart to eliminate any enhancement for loss amounts.

3. SECTION 3553(a) FACTORS.

Even if the court finds that the guidelines have been correctly calculated and that Mr. Buhtz's circumstances do not fall outside the heartland of the guidelines and therefore merit a departure, the court must still consider the factors set forth in 18 U.S.C. 3553.

3**.1 Generally.**

After *United States v. Brooker*, 125 S.Ct. 738 (2005), a court must consider the factors listed in 18 U.S.C. § 3553(a) as an expression of "congressional goals of sentencing" to determine a defendant's sentence. *United States v. Ameline*, 400 F.3d 646, 656 (9th Cir. 2005). Sentences are now reviewed for unreasonableness under these factors. *United States v. Rogers*, 400 F.3d 640, 642 (8th Cir. 2005). A court may impose a sentence below the guideline range as long as the court considered these factors in determining a sentence. *United States v. Collington*, 461 F.3d 805, 808 (6th Cir. 2006).

A sentencing judge must consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) just punishment (retribution), (b) deterrence, © incapacitation, and (d) rehabilitation; (3) the sentences legally available; (4) the U.S. Sentencing Guidelines Manual; (5) U.S. Sentencing Commission policy Statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. *United States v. Rita*, 127 S. Ct. 2456, 2463 (2007). A sentencing judge is to impose a sentence sufficient, but not greater than necessary, to comply with the basic aims of sentencing as set out in the statute. *Id.*

The statute also requires a sentencing judge, at the time of sentencing, to state in open court the reasons for its imposition of the particular sentence. *Id*, at 2468. A sentencing judge

should set forth enough to satisfy an appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority. *Id*.

Under *Rita*, the U.S. Sentencing Guidelines are only one of seven factors for the court to consider when handing down a sentence. Although a court does not have to articulate each factor individually, it must at least consider factors other than the sentencing guidelines. *United States v. Carty*, 453 F.3d 1214, 1220 (9th Cir. 2006). In *Carty*, a sentence was overturned because the only 18 U.S.C. § 3553(a) factor considered by the court was the sentencing guidelines. *Id*, at 1221. Conversely, the court affirmed an Oregon District Court decision where the judge did consider some factors beyond the sentencing guidelines. *United States v. Williamson*, 439 F.3d 1125, 1140-1141 (9th Cir. 2006).

3.2 The Nature and Circumstances of the Offense and the History and Characteristics of the Offender

Mr. Buhtz is a good husband and father. He has no prior criminal history. In fact, he has a long history of trying to help people, no matter how misguided his attempts may have been in this case. He did not seek to profit from this situation; he neither charged for his "services" nor had a financial stake in the successful redemption of any of the bills of exchange. He had no intention to cheat anyone; like many others, he was drawn into a hopeless, unrealistic dream.

3.3. Basic Aims of Sentencing Are Not Met.

A prison sentence of 78 months in this case does not reflect the basic aims of sentencing. Mr. Buhtz is 68 years old. A prison sentence of that duration would probably be a life sentence. Indeed, a prison sentence of any duration will include a firm likelihood that Mr. Buhtz will die in custody given the physical and mental rigors of a prison existence. A 78-month prison sentence for this offense is excessive for even a young and healthy person. But a life sentence under the

circumstances is entirely inappropriate. None of the purposes of retribution, deterrence, incapacitation or rehabilitation will be served by imposing a prison sentence in this case.

To focus on deterrence, the government may be inclined request a harsh sentence for Mr. Buhtz with the intent of sending a message to other people regarding this kind of conduct. The government's ambition is misguided. Many of the persons who have followed this case through the independent press are sympathetic to Mr. Buhtz and highly suspicious of the government. Rather than viewing this case as an ordinary example of crime and punishment, such persons are likely to see this case a story of government persecution. A harsh sentence for Mr. Buhtz will turn him into a public martyr. Moreover, many people will conclude that he must have been onto something big or else the government would not have locked him away.

Rather than having a deterrent effect, sentencing Mr. Buhtz to prison will probably inspire others to pursue and present bills of exchange. Detracting further from the deterrent effect is that unlike Rebecca Shollenburg, Steven Kelton and Richard Acuilla, for whom the government did not request a prison sentence, Mr. Buhtz was never either charged with or convicted of actually presenting a bill of exchange. To the extent that the government will launch a message by sending only Mr. Buhtz to prison, that message will say, "we don't mind very much if you attempt to pass a bill of exchange, just don't talk about them with other people."

Even observers who would never be inclined to believe in the Redemption theory will receive the message that nowadays speech is far more punishable than action.

3.4 Equal Application of Justice.

Factor number six requires the court to avoid unwarranted sentencing disparities. If the court follows Mr. Buhtz's pre-sentence report and the terms of his co-defendants' plea negotiations, then between the ten people implicated in this case there will be five non-

indictments, three sentences of supervised probation, one acquittal, and one sentence of 78 months confinement. Of Mr. Buhtz's co-defendants, Steven Shollenburg was acquitted on all counts, while Rebecca Shollenburg, Richard Acquila, and Steven Kelton each pled guilty in exchange for the government's offer of supervised probation. Additionally, Mr. Buhtz's uncharged co-conspirators, Nelda Bischoff, Vickie Clifford, Douglas Grabinski, Steven Hughes and Marsha Rasmussen were never even indicted despite the fact that they conceived of, drafted, signed, submitted, followed up on, and stood to singularly benefit from the Bills of exchange in which Mr. Buhtz was implicated merely by association.

Thus by adhering strictly to the pre-sentence report, the court will be assigning the singular prison sentence of this case to the only person who never conceived, signed, submitted or stood to gain from any of the bills of exchange. By that standard Mr. Buhtz will become the least culpable and most severely punished out of all who were involved.

Defendants in other jurisdictions charged with similar offenses have not received sentences nearly this lengthy. One of the original proponents of the redemption theory received a significantly shorter sentence despite the fact that his loss figure was substantially higher.

4. PROPOSED SENTENCE

Mr. Buhtz should receive a probationary sentence in this matter.

DATED this 14th day of December, 2007.

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