

RYAN M. ARCHER
Assistant United States Attorney
U.S. Attorney's Office
P.O. Box 1478
Billings, MT 59103
2929 Third Ave. North, Suite 400
Billings, MT 59101
Phone: (406) 657-6101
FAX: (406) 657-6989
E-Mail: ryan.archer@usdoj.gov

**ATTORNEYS FOR PLAINTIFF
UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

UNITED STATES OF AMERICA, Plaintiff, vs. MICHAEL JAMES BURNS, JR., Defendant.	CR 10-14 -M-DWM <u>UNITED STATES'</u> <u>RESPONSE TO</u> <u>DEFENDANT'S</u> <u>SENTENCING</u> <u>MEMORANDUM</u>
--	--

The United States, by and through its counsel, Ryan M. Archer, Assistant U.S. Attorney, respectfully submits this response to Michael James Burns, JR.'s (Burns) sentencing memorandum.

Background

In 1998 Burns was convicted in Hawaii for check fraud. PSR ¶ 75. His parole was revoked in 2000 for absconding and engaging in additional check fraud in Colorado. PSR ¶ 75. While on a work furlough program for offenses in Hawaii, Burns orchestrated another scheme to defraud Monster Software, a company in Hawaii. PSR ¶ 76. He was paroled on that offense on July 24, 2008. PSR ¶ 76.

Burns initiated his fraudulent scheme in this case in September 2008 – just over a month after being paroled from his Hawaiian offense. PSR ¶ 6. And in this case Burns pulled off an advanced fee scheme that cheated victims out of \$445,532.48. PSR ¶ 53.

In order to implement the scheme here, Burns set up a web site for “BMJ Capital.” He falsely claimed to have business degrees from the University of Pennsylvania and University of California Berkeley. He made numerous other misrepresentations about his own experience and the company’s experience in financing high-end business projects.

PSR ¶ 16. He also hired Matthew Birdseye as an “employee” to research potential investment “opportunities.” PSR ¶ 17–19. Burns employed John Welch, an attorney and accountant to act as his representative. Burns showed Welch false documentation indicating that Burns possessed over \$120 million to finance projects. PSR ¶ 11.

With Birdseye and Welch in tow, Burns would sell himself as an elite financier of major development projects. He would require up-front fees in order to secure his financing. Victims all over the country were taken in by Burns’ knowledge of the industry and his believability as a “high roller” with money to invest. PSR ¶¶ 5-52. Welch ultimately determined that Burns’ account statements could have been fabricated and both he and Birdseye distanced themselves from Burns when it became clear that Burns collected advanced fees and never provided any funding for the projects he agreed to finance. PSR ¶¶ 23-27.

When dealing with the victims, Burns generated formal loan agreements for millions of dollars and partnership agreements which promised millions in financing. PSR ¶ 8-9. In reality, Burns’ accounts held little to nothing when victims paid their advance fees. And when the fees were deposited, he would move the money out of his “BMJ”

account and into other accounts to be used on personal expenditures, including the purchase of high-end cars. PSR ¶ 9. Burns engaged in no legitimate business and he employed Welch and Birdseye with the proceeds of the fraud.

At the time of Burns' change of plea hearing, the government discovered that he was continuing to engage in the same type of conduct – and continuing to defraud businesses out of advanced fees. After the change of plea hearing Burns was detained, but the government continued to receive calls from other individuals Burns had victimized leading up to his change of plea – including promises to perform and meet with them after he changed his plea. PSR ¶¶ 40-52. Burns engaged in this additional conduct by generating a new business name – IQ Advisors – and continuing with the same type of advance fee scheme. PSR ¶¶ 40-49.

Discussion

I. The government will continue to recommend 3 points for acceptance of responsibility.

The PSR recommends that Burns not receive acceptance of responsibility under U.S.S.G. § 3E1.1 because he continued to engage in the fraudulent scheme up to his change of plea and violated his pre-trial release, and planned to continue the fraud had he not been detained. PSR ¶ 62 & Addendum. Under these facts, the Court does have authority to withhold acceptance. *See United States v. Cooper*, 912 F.2d 344, 348 (9th Cir. 1990).

However, the government has agreed to recommend a 3-level reduction in its plea agreement with Burns. While the government was unaware of the scope of his additional fraud while on pre-trial release, it has been incorporated as loss and restitution to the offense he plead guilty to. Therefore, the government feels it necessary in the scope of its agreement with Burns to continue to recommend acceptance.

II. The enhancement for sophisticated means is appropriate under the facts of this case.

Burns objects to the PSR because it applies two levels for sophisticated means. He argues that deception is innately a part of fraud, but his scheme was not sophisticated. PSR Addendum.

The sophisticated means enhancement applies to “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” USSG § 2B1.1 App. Note 8(B). It includes conduct such as hiding assets or transactions through fictitious entities or corporate shells, or locating a main office in one jurisdiction while completing the fraud in another. *Id.* The use of corporate shells and misleading and confusing documents can support the sophisticated means enhancement. *United States v. Garro*, 517 F.3d 1163, 1168 (9th Cir. 2008).

In this case the sophisticated means enhancement is appropriate because Burns was only able to pull off the fraud by engaging in a dynamic web of trickery and deceit. He fabricated bank records to induce an attorney and accountant to represent and vouch for him. He created BMJ Capital as a fictitious business and induced Matthew

Birdseye to become his employee. And he created a technical web site misrepresenting his education and experience in the business. He generated complex loan and partnership agreements to bilk his victims out of hundreds of thousands of dollars. And when the up-front fees were paid, he transferred them out of the BMJ accounts into other personal accounts to spend the money from there. BMJ Capital was, in essence, a “shell corporation” all of its own since it conducted no legitimate business and was only used to convince investors to give Burns money which he directly funneled out of the company.

And when Burns was caught and charged with his offenses related to BMJ Capital, he continued the fraud up until the day he changed his plea. He accomplished this by changing his business name to avoid detection, and bringing in a new “partner.” PSR ¶ 42. And he set up new bank accounts to receive the fraud proceeds under the IQ Advisors in New York. PSR ¶ 44.

Burns was engaged in a crime of high finance. He was dealing with sophisticated businessmen in multi-million dollar contracts. He could not have pulled the fraud off without the levels of sophistication he employed to deceive the unwitting victims. He used false documents

and operated across the country, including bank accounts in California and New York. This conduct meets the definition of sophisticated means under § 2B1.1(b)(9)(C).

III. Burns should receive a high-end sentence

As Burns' record reflects, he has been a professional con-man since his first conviction in Hawaii in 1998. Since then when he has not been in prison he has been committing fraud. He committed fraud while on work furlough in Hawaii. He committed this fraud while on parole from his second conviction in Hawaii. And he committed fraud in the days leading up to his change of plea here, and had meetings set to continue the fraud after his change of plea. PSR ¶ 46.

Burns has demonstrated that he is a danger to society. And when he is out of prison on any conditions he commits fraud with impunity and has the ability to victimize citizens across the country. The nature of the offense, his history and characteristics, and the damage he has done and is capable of warrant a high-end sentence in this case.

The government's recommendation of 3-levels for acceptance of responsibility results in a total offense level of 20. And with a criminal history category IV results in a Guideline range of 51-63. The

government will advocate for a sentence of 63 months at the time of sentencing.

DATED this 4th day of October 2010.

MICHAEL W. COTTER
United States Attorney

/s/ Ryan M. Archer
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response Memorandum is in compliance with Local Rule 7.1(d)(2). This brief is double spaced with 14 point font and contains less than 6500 words.

DATED this 4th day of October 2010

MICHAEL W. COTTER
United States Attorney

/s/ Ryan M. Archer
Assistant U.S. Attorney