

FILED
CHARLOTTE, N. C.

JAN 19 2007

U. S. DISTRICT COURT
W. DIST. OF N. C.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 3:06CR151
	)	
v.	)	
	)	PLEA AGREEMENT
DAVID MICHAEL HENNESSEY	)	
	)	

NOW COMES the United States of America, by and through Gretchen C.F. Shappert, United States Attorney for the Western District of North Carolina, and the defendant, **DAVID MICHAEL HENNESSEY**, in person and through counsel, John J. Cacheris, and respectfully inform the Court that they have reached the following Agreement:

I. Plea

1. The defendant agrees to enter a voluntary plea of guilty to Count One charging the defendant with Conspiracy in violation of 18 U.S.C. § 371 and Counts 5 and 6 charging the defendant with Wire Fraud in violation of 18 U.S.C. § 1343 in the Bill of Indictment, and admits to being in fact guilty as charged in the Counts. In exchange for defendant's guilty pleas as set forth below, the Government agrees that it will move to dismiss defendant from the remaining counts of the Bill of Indictment at the time of sentencing.

II. Sentence

2. The defendant is aware that the penalty for Conspiracy is:
- a. a maximum 5 years in prison per count,
 - b. a maximum \$250,000 fine per count,
 - c. a mandatory special assessment of \$100.00 per count,

- d. a term of supervised release of not more than three years, and
- e. an order from the Court pursuant to Title 18, United States Code, Section 3663 that defendant make restitution to the victims of the offense of conviction, or the estate(s) of the victims. Defendant understands that the Court may also order, if agreed to by the parties in this Plea Agreement, restitution to persons other than the victims of the offense of conviction.

The defendant agrees that because the conduct underlying the Conspiracy (18 U.S.C. § 371) count of conviction was committed in connection with the conduct of telemarketing, 18 U.S.C. § 2326 may apply, this may subject the defendant to a term of imprisonment of up to 10 years in addition to the term of imprisonment imposed for the Conspiracy. Defendant acknowledges and agrees that the Government gave notice of this provision in the Bill of Indictment.

- 3. The defendant is aware that the penalty for committing Wire Fraud is:
 - a. a maximum 20 years in prison per count,
 - b. a maximum \$250,000 fine per count,
 - c. a mandatory special assessment of \$100.00 per count,
 - d. a term of supervised release of not more than three years, and
 - e. an order from the Court pursuant to Title 18, United States Code, § 3663 that defendant make restitution to the victim(s) of the offense of conviction, or the estate(s) of the victims(s). Defendant understands that the Court may also order, if agreed to by the parties in this Plea Agreement, restitution to persons other than the victim(s) of the offense of conviction.

The defendant agrees that because the conduct underlying the Wire Fraud (18 U.S.C.

§ 1343) counts of conviction was committed in connection with the conduct of telemarketing, 18 U.S.C. § 2326 may apply, this may subject the defendant to a term of imprisonment of up to 10 years in addition to the term of imprisonment imposed for the Wire Fraud. Defendant acknowledges and agrees that the Government gave notice of this provision in the Bill of Indictment.

4. The defendant understands that supervised release is a term of supervision that runs consecutively to any sentence of incarceration and that if the Court imposes a term of supervised release, the United States Probation Office will supervise him during that term and will require that he make regular reports and visits to its office. The defendant understands that a violation of the conditions of supervised release may subject him to an additional period of incarceration up to the maximum term of years imposed as supervised release.

5. The defendant is aware that the Court will consider the *United States Sentencing Guidelines* [U.S.S.G.] in determining the appropriate sentence and that the sentence will be without parole. The defendant is further aware that the Court has not yet determined the sentence, that any estimate from any source, including defense counsel, of the likely sentence is a prediction rather than a promise, and that the Court has the final discretion to impose any sentence up to the statutory maximum for each count. The defendant further understands that no recommendations or agreements by the United States are binding upon the Court. The defendant and the United States agree that the *United States Sentencing Guidelines* effective November 1, 2004 are applicable to the determination of the total offense level.

6. With regard to the *United States Sentencing Guidelines*, the defendant and the United States, pursuant to Fed. R. Crim P. 11(c)(1)(B), stipulate and agree that the United States can prove beyond a reasonable doubt:

a. The amount of loss that was known to or reasonably foreseeable by the defendant was in excess of \$1,000,000 but less than \$2,500,000 in fraudulent transactions with over 250 victims. The defendant understands that "loss" under *U.S.S.G. § 2B1.1*, of the *November 1, 2004 United States Sentencing Guidelines* may be different from, greater, or less than "restitution" under 18 U.S.C. § 3556.

b. The offense level for the subject offenses, Conspiracy and Wire Fraud, in violation of 18 U.S.C. §§ 371 and 1343 is as follows:

(i) [*U.S.S.G. § 2B1.1(a)(1)*] Base Offense Level: + 7

SPECIFIC CHARACTERISTICS:

(ii) [*U.S.S.G. § 2B1.1(b)(1)(I)*] Loss +16
(More than \$1,000,000 but less than \$2,500,000)

(iii) [*U.S.S.G. § 2B1.1(b)(2)(C)*] Multiple victims + 6
(More than 250 victims)

(iv) [*U.S.S.G. § 2B1.1(b)(8)(A)*] Misrepresentation + 2
(Acting on behalf of a government agency)

(v) [*U.S.S.G. § 2B1.1(b)(9)(B)*] + 2
(Committed from outside the U.S.)

ADJUSTMENTS

(vi) [*U.S.S.G. § 3A1.1(b)(1)*] Vulnerable Victim + 2

(vii) [*U.S.S.G. § 3B1.1(a)*] Aggravating Role + 4

TOTAL (without acceptance adjustment) 39

Misrepresentation. The parties agree that because the defendant knew that the conspiracy and the scheme to defraud included the misrepresentation that the defendant and his co-conspirators were working on behalf of a government agency, a two-level increase in

offense level under *U.S.S.G. § 2B1.1(b)(8)(A)* applies.

Committed from Outside the United States. The parties agree that because the defendant knew that a substantial part of the conspiracy and the fraudulent scheme was committed outside of the United States, a two-level increase in offense level under *U.S.S.G. § 2B1.1(b)(9)(B)* applies.

Vulnerable Victim Adjustment. The parties agree that because defendant knew or should have known that the victims of the conspiracy and the scheme to defraud were unusually vulnerable due to age, physical or mental condition, or that they were otherwise particularly susceptible to the criminal conduct, a two-level increase in offense level under *U.S.S.G. § 3A1.1(b)(1)* applies. The parties agree further that many of the victims of the conspiracy and scheme to defraud were targeted by the defendant and his co-conspirators because they were particularly susceptible to the fraud scheme.

Aggravating Role Adjustment. The parties agree that because defendant was an organizer and leader of the conspiracy and the scheme to defraud, which involved five or more "participants" and was otherwise extensive, a four-level increase in the offense level under *U.S.S.G. § 3B1.1(a)* applies. The parties further agree that in this conspiracy and scheme to defraud, the defendant was an organizer or leader of five or more "participants."

c. Provided that the defendant clearly demonstrates acceptance of responsibility for his offense, as well as all relevant conduct, the government will recommend a two-level reduction in offense level pursuant to *U.S.S.G. § 3E1.1(a)*.

d. Provided that the defendant qualifies for a decrease under subsection *U.S.S.G. § 3E1.1(a)*, and that the offense level determined prior to the operation of subsection

U.S.S.G. § 3E1.1(a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level. However, the defendant understands that any reduction in offense level is ultimately for the Court's determination.

e. There is no agreement as to the defendant's Criminal History Category. Notwithstanding any recommendations in the Plea Agreement as to the offense level, if the Probation Office determines from the defendant's criminal history that *U.S.S.G. § 4B1.1* (Career Offender) applies, that provision may be used in determining the sentence. Should a statutory minimum sentence apply, the Court shall impose a sentence no lower than that statutory minimum.

7. The defendant agrees to pay full restitution. Defendant understands that with respect to restitution, (a) as part of the sentence, the Court may order restitution be paid to any or all of the victims that defendant and the other coconspirators and participants in the scheme defrauded, and (b) if the Court determines that the conduct underlying the conspiracy to commit wire fraud and the wire fraud counts of conviction was committed in connection with the conduct of telemarketing (as defendant has admitted), restitution will be mandatory. Defendant agrees that the amount of restitution ordered by the court shall include defendant's total offense conduct, and is not limited to the counts of conviction. Accordingly, the parties agree and will jointly recommend that defendant pay restitution in the amount of **\$10,000,000** (ten million dollars). The defendant's restitution

obligation shall be joint and several with that of his co-conspirators. The restitution described in this paragraph shall be paid through the Office of the Clerk of the District Court.

The defendant agrees to truthfully complete a financial statement form provided by the United States Attorney. The defendant shall date said form and sign it under penalty of perjury, thereby acknowledging that his financial statement fully and completely discloses his financial condition as of the date it is signed. Defendant shall update the financial statement with any material changes to his financial condition. Defendant shall provide to the United States his signed and dated financial statement within 30 days of his signature on this plea agreement and any updates within seven days of the event changing his financial condition. Defendant understands and agrees that his financial statement will be used for the collection of any fine or restitution ordered by the Court, and the identification of property subject to forfeiture. The parties agree that the defendant's failure to timely and accurately complete and sign a financial statement and any update may, in addition to any other penalty or remedy authorized by law, constitute his failure to accept responsibility under *U.S.S.G. § 3E1.1*.

For the preparation of his Presentence Report, the defendant agrees to cooperate fully with and make a full disclosure of all current and projected assets and property to the United States Probation Office and to the United States. If the defendant is ordered to serve a term of supervised release or probation, he agrees to make a full disclosure of his assets and property to the United States Probation Office and to the United States prior to the termination of his supervised release or probation. If the defendant should fail to make the aforementioned full disclosures, then the United States will be relieved of its obligations under the Plea Agreement, but the defendant will not be allowed to withdraw his guilty plea.

8. The parties agree that if the Court imposes the stipulated amount of mandatory restitution set forth above, then no fine will be appropriate. The parties agree further that in the event that the Court does not impose the recommended restitution, the Court may impose a fine in its discretion.

9. Because more than \$500.00 in restitution, fines, and/or assessment is owed to the United States government, a lien will be filed. The defendant understands that once a lien is filed against his property, his obligation to pay restitution shall last for twenty years after any imprisonment ordered or until his death. 18 U.S.C. § 3613.

10. The defendant hereby agrees to pay the total amount required for special assessments (\$300) to the Office of the Clerk of the District Court, before 5:00 p.m. on the date of sentencing. The defendant further agrees to participate in the Inmate Financial Responsibility Program to the extent necessary to fulfill all financial obligations due and owing under this Agreement and the law.

III. Government's Recommendation Regarding Custody

11. Provided that the defendant complies with all the terms of this plea agreement, the Government will recommend that defendant be sentenced to the low end of the advisory guideline range as calculated by the Government pursuant to this Agreement. However, if the Court adopts an offense level or downward adjustment or departure below the Government's recommendations in this Agreement, the Government may recommend a sentence as near as possible to what the sentence would have been if the Government's recommendations had been followed.

IV. Procedure

12. The defendant agrees that a duly-qualified federal Magistrate Judge may conduct the hearing required by Fed. R. Crim. P. 11.

13. With the Court's permission, the factual basis, as required by Fed. R. Crim. P. 11(b)(3), will be deferred until the time of sentencing. The defendant stipulates that there is a factual basis for the plea of guilty and that the Court may use the offense conduct set out in the Presentence Report, except any facts to which the defendant has objected, to establish a factual basis for the defendant's plea.

V. Waivers

14. The defendant understands and agrees that if he should fail to specifically perform or to fulfill completely each and every one of his obligations under this Plea Agreement, then the United States will be relieved of its obligations under the Agreement, but the defendant will not be allowed to withdraw his guilty plea.

15. The defendant is aware that the law provides certain limited rights to withdraw a plea of guilty. The defendant has discussed these rights with defense counsel and knowingly and expressly waives any right to withdraw the plea once the Magistrate Court has accepted it.

16. The defendant acknowledges that Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 are rules which ordinarily limit the admissibility of statements made by a defendant in the course of plea discussions or plea proceedings if a guilty plea is later withdrawn. The defendant knowingly and voluntarily waives the rights which arise under these Rules. As a result of this waiver, he understands and agrees that any statements which are made in the course of his guilty plea or in connection with his cooperation pursuant to this Plea Agreement will be admissible against him for any purpose in any criminal or civil proceeding if his guilty plea is subsequently withdrawn.

17. The defendant understands and agrees that by pleading guilty, he is expressly waiving the following rights:

- a. to be tried by a jury,
- b. to be assisted by an attorney at trial,
- c. to confront and cross-examine witnesses, and
- d. not to be compelled to incriminate himself.

18. Defendant and defendant's counsel warrant that they have discussed: (1) defendant's rights pursuant to 18 U.S.C. § 3742, 28 U.S.C. § 2255, and similar authorities to contest a conviction and/or sentence through an appeal or post-conviction after entering into a Plea Agreement; (2) whether or not there are potential issues which might be relevant to an appeal or post-conviction action; and (3) the possible impact of any such issue on the desirability to the defendant of entering into this Plea Agreement.

Defendant, in exchange for the concessions made by the United States in this Plea Agreement, waives all such rights to contest the conviction and/or any sentence within the maximum provided by the statute of conviction except for (1) claims of ineffective assistance of counsel or (2) prosecutorial misconduct.

Also, in exchange for the concessions made by the United States, defendant agrees that the United States preserves all its rights and duties with respect to appeal as set forth in 18 U.S.C. § 3742(b), while the defendant waives all rights to appeal or collaterally attack the sentence of conviction with the exceptions set forth above. This Agreement does not limit the United States in its comments in, or responses to, any post-conviction matters.

19. The defendant waives all rights, whether asserted directly or by a representative, to request or to receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

20. The defendant stipulates that any sentence that falls within the applicable guideline range as determined by the United States Probation Office and pursuant to any departures from the applicable range as recommended by the government is *per se* reasonable. The defendant waives any right to contest such a sentence on the basis that the Court's imposition of such a sentence was unreasonable or an abuse of its discretion.

21. If the Pre-Sentence Investigation (hereinafter "PSI") recommends however an applicable Guidelines range higher than the Guidelines range jointly recommended by the parties in this agreement, the defendant may at his discretion file with the Court a "variance motion" pursuant to 18 U.S.C. § 3553(a) to consider the factors listed therein, not later than seven (7) days prior to sentencing, to adjust the Guidelines range to a level not lower than the level jointly agreed upon by the parties in this plea agreement.

VI. Assistance to Government

22. If requested by the United States, but only if so requested, the defendant agrees to cooperate with the United States, including but not limited to the following:

- a. The defendant will provide truthful information about the subject charges and about any other criminal activity within the defendant's knowledge to any government agent or agency that the United States designates.

b. The defendant will testify truthfully in any trial, hearing, or grand jury proceeding, including, but not limited to, testimony against any co-defendants, as the United States designates.

c. The defendant will truthfully disclose all monies, negotiable instruments, securities, or other things of value that are proceeds of or have been involved in, or have been used or intended to be used to facilitate a violation of state or federal law. The defendant further agrees to voluntarily forfeit said property to the United States.

d. In the event that the defendant's cooperation includes testifying, the defendant hereby waives payment of any witness fees or expenses to which he may be otherwise entitled pursuant to 28 U.S.C. § 1821.

e. The defendant understands that the United States desires only truthful and accurate information and testimony and, in fact, that knowingly giving false information or testimony can be prosecuted as an additional criminal offense.

Further, if the defendant knowingly gives false testimony, the United States will be relieved of its obligations under this Plea Agreement, except that the defendant's plea of guilty and the resulting guilty verdict will stand.

f. The defendant will not violate any federal, state, or local law, or any order of any court, including any conditions of pretrial, pre-sentence, or post-sentence release.

Nothing that the defendant discloses pursuant to this Plea Agreement will be used against him in any other criminal proceeding, subject to the following exceptions:

- (i). the United States or other jurisdiction may use any and all relevant information regarding crimes of violence;

(ii). the United States may use any and all information as necessary in a prosecution for perjury, or in any trial for impeachment or rebuttal;

(iii). if the defendant withdraws his plea of guilty, the United States may use any and all disclosures in any subsequent trials or criminal proceedings;

(iv). if the defendant violates any of the terms of this Plea Agreement, including the obligation to provide truthful information, then the United States may use any and all disclosures in subsequent trials or criminal proceedings; and

(v). the United States may make indirect use of any information that the defendant provides, including investigative leads or other witnesses.

g. The defendant's obligation under this section is a continuing one, and will continue after sentencing until all investigations and/or prosecutions to which the defendant's cooperation may be relevant have been completed. This provision is a material condition of this Plea Agreement and of all benefits that accrue to the defendant pursuant to this Agreement.

In the interests of fulfilling all obligations under this section, the defendant agrees to waive all rights under Chapters 213 and 208 of Title 18 until such time as the United States determines that all relevant investigations and/or prosecutions have been completed.

h. The defendant fully understands that any breach of this Agreement, including but not limited to withholding information, misleading the United States or any law enforcement officer, or failing to testify truthfully at any trial, grand jury, or other judicial proceeding, will allow the government, in its sole discretion, to withdraw from its obligations under this Plea Agreement. In such event, the United States will be free to

proceed on any properly-filed pending, superseding, or additional charges, including any charges dismissed pursuant to this Agreement.

23. When and if the defendant assists the government as described above:

a. The United States, in its sole discretion, will determine whether said assistance has been substantial.

b. Upon a determination that the defendant has rendered substantial assistance, the government may make a motion pursuant to *U.S.S.G. § 5K1.1* for imposition of a sentence below the applicable Sentencing Guidelines. The United States may also, within its sole discretion, move the Court pursuant to 18 U.S.C. § 3553(e) to impose a sentence below any applicable statutory mandatory minimum.

The defendant recognizes that, even if the United States makes a recommendation pursuant to *U.S.S.G. § 5K1.1*, the Court cannot depart below the statutory minimum unless the United States also includes a specific recommendation pursuant to 18 U.S.C. § 3553(e).

c. Regardless of the nature and extent of any substantial assistance that the defendant renders, the United States will not move for a downward departure if the defendant also knowingly furnishes information that is materially false.

d. Any determination that the defendant has failed to provide substantial assistance or has knowingly provided false information is within the sole discretion of the United States, and the defendant waives all objections and rights of appeal or collateral attack of such a determination.

e. The defendant understands that if the United States makes a motion for downward departure, the motion is not binding on the District Court. The Court will

determine in its discretion whether to grant or deny such departure and the extent of the departure.

VII. Conclusion

24. The defendant understands that if he breaches this Plea Agreement, or violates any federal, state or local law, or any order of any court, including any condition of pre-trial or pre-sentence, or post-sentence release, the United States will be relieved of its obligations under this Plea Agreement, but the defendant will not be allowed to withdraw his guilty plea. The United States will be free to proceed on any properly-filed dismissed, pending, superseding, or additional charges.

25. There are no agreements, representations, or understandings between the parties in this case, other than those explicitly set forth in this Plea Agreement and none will be entered into unless executed in writing and signed by all parties.

SO AGREED:

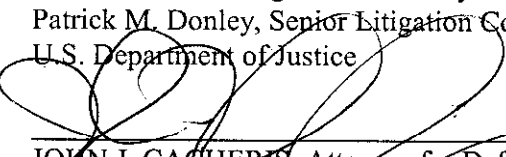
GRETCHEN C.F. SHAPPERT
United States Attorney
Western District of North Carolina

STEVEN A. TYRELL
Acting Chief, Fraud Section, Criminal Division



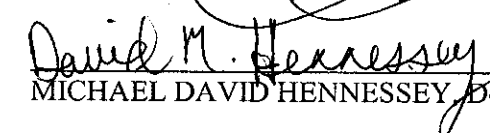
Peter B. Loewenberg, Trial Attorney
Patrick M. Donley, Senior Litigation Counsel
U.S. Department of Justice

DATED: 1/18/07



JOHN J. CACHERIS, Attorney for Defendant

DATED: 1/19/07



MICHAEL DAVID HENNESSEY, Defendant

DATED: 1/19/07

DMH