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6
7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9

10 UNITED STATES OF AMERICA,)	Case No. CR-04-00016-CJC
)	
11 Plaintiff,)	DEFENDANT'S RESPONSE TO THE
)	GOVERNMENT'S SENTENCING
12 vs.)	POSITION
)	
13 JAMES P. LEWIS, JR.)	Date: May 26, 2006
)	Court: Hon. Cormac J. Carney
14 Defendant.)	
)	


15
16 Defendant JAMES P. LEWIS, JR., through counsel, hereby and
17 herewith submits his Response to the Government's Sentencing
18 Position.

19 Defendant reserves the opportunity to make additional comments
20 through counsel at the time of the sentencing hearing.

21 Dated: May 23, 2006

Respectfully submitted,

LIBERTY LAWYERS, LLP

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24 By 
25 SCOTT M. SCHLEGEL
Attorney for Defendant
26 JAMES P. LEWIS, JR.
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1 I.

2 GENERAL OBSERVATIONS

3 In its sentencing position filed on May 12, 2006, the
4 Government recommends that Defendant James Lewis be sentenced to
5 the statutory maximum term of 30 years of imprisonment. The
6 Government further advocates that Mr. Lewis' advisory guideline
7 sentence should be at the high end of 293 months (24 years, 5
8 months) based on level 38 at a criminal history category of I.

9 In justifying their request for a 30-year statutory maximum
10 sentence, the Government's position paper argues that the fraud
11 "was done by a man who had every advantage life offers."¹ However,
12 as has been set forth in considerable detail in Mr. Lewis'
13 sentencing memorandum and the attached character reference letters
14 and supporting documentation, the truth is far more nuanced and
15 complex. While the Government's attempts to portray Mr. Lewis as
16 a one-dimensional villain are understandable given their role as
17 advocates, such oversimplification can hinder rather than
18 facilitate the search for truth that lies at the heart of the
19 sentencing process.

20 In reality, as reflected in his papers filed on May 15, 2006,
21 Mr. Lewis' childhood was not only spent in relative poverty, but he
22 was consistently abused and lacked parental guidance from either
23 his mother or his father.² Mr. Lewis was reticent to reveal these
24 facts about his childhood out of a desire to protect his elderly
25 parents, who are ailing and have little understanding of the

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27 ¹ See Government's Sentencing Position, Pg. 1, Lines 18-20.

28 ² See Defendant Lewis' Position Re: Sentencing Factors, Pgs. 21-26 and 32-37.

1 troubles their son is facing. The information provided by the
2 defendant's brother and other relatives, however, confirms that his
3 upbringing was difficult and painful.

4 Of course, the fact that Mr. Lewis was abused through much of
5 his childhood in no way excuses the large-scale fraud he has
6 committed. Mr. Lewis has acknowledged the financial devastation he
7 created in the lives of many people. He knows there is nothing he
8 can do to ameliorate the damage. He has expressed remorse
9 repeatedly in his verbal acknowledgments to the Receiver, the
10 Probation Officer, and to his friends and family, as well as in his
11 written statement to this Court. He has also taken responsibility
12 by pleading guilty to this crime without the benefit of a plea
13 agreement, knowing that he is facing years of confinement in
14 Federal prison.

15 Mr. Lewis' background is relevant only to the extent it puts
16 this man's overall life in perspective. Early on in life, Mr.
17 Lewis learned, through necessity, to be totally self-sufficient.
18 He learned to deny pain, shut out problems and assume the role of
19 the strong, competent individual to whom others could turn for help
20 in time of need. Unfortunately, this ingrained behavioral pattern
21 resulted in Mr. Lewis' complete inability, upon experiencing
22 business reversals with FAC, to seek help and guidance from other
23 parties or even admitting his failures. Instead, he spent many
24 years at FAC desperately seeking to stem his financial losses and
25 cover for them with increasingly long-shot, "hail mary"
26 investments, all the while sinking deeper in debt.

27 In determining Mr. Lewis' sentence, the Court is asked to take
28 a few relevant factors into consideration. First, there is no

1 arguing or denying that his behavior was unlawful, unethical,
2 deceptive, and led to financial harm for large numbers of people.
3 Mr. Lewis has been forced to acknowledge this painful reality, and
4 he cannot change it.

5 This is a case which obviously calls for substantial
6 incarceration as a means for punishment. But the question is, how
7 much? The Government's proposed term of three decades imprisonment
8 -- essentially amounting to a life term -- would be, to track the
9 language of 18 U.S.C. §3553(a), far "greater than necessary" to
10 achieve the legitimate aims of sentencing. There is a high
11 probability that Mr. Lewis would not survive such a term, and would
12 die in prison. Were he to still be alive at the end, he would be
13 a man well into his eighties with no real reason for coming back
14 into society. He would in every likelihood be debilitated, frail,
15 and in need of medical care. He would essentially be wheeled out
16 of one institution (prison) into another institution (hospital,
17 convalescent home or hospice) where he would exist for a short time
18 as a non-productive and spiritually numb burden to others until he
19 dies.

20 Not only is the Government's recommendation overly harsh and
21 pointless, it also fails to distinguish between this defendant --
22 who has accepted responsibility, pled guilty and expressed remorse
23 -- and otherwise similarly situated defendants who deny their
24 guilt, refuse to take any responsibility or remorse, and proceed to
25 trial.

26 Instead of opting to waste the resources of the Court and
27 Government in what would have undoubtedly been a complex and
28 cumbersome trial, Mr. Lewis has pled guilty and cooperated fully in

1 attempts to help the Receiver locate and account for the missing
2 funds. Although it is somewhat outside the norm in a fraud case
3 for a defendant to help with the recovery process, Mr. Lewis has
4 done so and this is indicative of his desire to make amends. He
5 has been in prison for close to 2½ years during which he has
6 engaged in much soul-searching. His sense of contrition is
7 palpable. Yet despite the fact that Mr. Lewis has acknowledged his
8 wrongdoing to the best of his ability, the Government nevertheless
9 requests the very same sentence it would have sought if Mr. Lewis
10 had gone to trial and lost.

11 The Court is asked to consider this defendant's regret for his
12 actions. This is a man who, though he financially injured many
13 people, did not set out to harm them but got in over his head with
14 FAC and did not know how to get out. While his misdeeds proved
15 disastrous and merit condemnation, the prosecution's efforts to
16 demonize Mr. Lewis are overly simplistic and do not tell the whole
17 story. In his adult life, Mr. Lewis consistently exercised
18 kindness toward fellow church members and other individuals with
19 whom he came in contact. On one occasion, he received the
20 Saddleback High School Volunteer of the Year award for his
21 significant contributions.

22 Mr. Lewis will be 60 years old in June of this year. If he
23 were to receive a prison term along the lines of that suggested by
24 the Government, he would not be released until around the year
25 2029. Such a sentence would be vastly and unduly overpunitive.
26 This is a man who needs to be punished fairly for his offense, not
27 a man who needs to be locked up for the rest of his foreseeable life.

28 Defendant Lewis, through counsel, respectfully reiterates the

1 request in his previously stated position for a sentence of ten
2 years. This would be "sufficient, but not greater than necessary,"
3 to meet the requirements of 18 U.S.C. 3553(a), while at the same
4 time reserving for this defendant at least the possibility that he
5 might be able to spend a few good years with his family before
6 becoming truly elderly.

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II.

9

DEFENDANT LEWIS' ADVISORY GUIDELINE LEVEL SHOULD BE 32

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Defendant James Lewis, through counsel, reiterates his

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position that the following guidelines should apply:

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DEFENDANT'S RECOMMENDED GUIDELINE CALCULATION

13

Base Offense Level [§2B1.1] 6

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Specific Offense Characteristics

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Loss Amount: Between \$50 million and

16

\$100 million [§2B1.1(b)(1)(M)] +24

17

50 or More Victims [§2B1.1(b)(2)(B)] + 4

18

Convicted under 18 U.S.C. §1957

19

[§2S1.1(b)(2)(A)] + 1

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Adjustments

21

Role in the Offense/Abuse of Position

22

of Trust: U.S.S.G. Part 3B 0

23

Obstruction of Justice: §3C1.1 0

24

Acceptance of Responsibility: §3E1.1(a)&(b) - 3

25

26

Total Offense Level 32

27

Criminal History Category I

28

Advisory Guideline Sentencing Range 121-151 months

1 Recommended Sentence

10 years

2 A. A TWO-LEVEL ENHANCEMENT FOR AGGRAVATED ROLE IS NOT APPLICABLE
3 SINCE THE DEFENDANT DID NOT SUPERVISE OR DIRECT OTHERS

4 In his sentencing position filed on May 15, 2006, Mr. Lewis
5 set forth his position that since there were no other criminal
6 participants involved in the Ponzi scheme, it is both illogical and
7 incorrect to hold that he should receive the upward adjustment for
8 aggravated role. In fact, it is well-established by the caselaw
9 that an aggravated role enhancement is unwarranted unless the
10 defendant "organizes, leads, supervises, or manages" other
11 criminally liable participants.

12 Although the Government recommends that Mr. Lewis should be
13 awarded a two-level guideline increase for supervisorial role, the
14 Government also unequivocally states that the Mr. Lewis was the
15 sole participant in his scheme. On Pgs. 8-9 of its sentencing
16 position [(ii) Role in Offense] filed on May 12, 2006, the
17 Government asserts:

18 FAC was a one-man operation. Defendant
19 admitted that he owned and operated FAC from
20 1978 until his arrest in January 2004. PSR ¶
21 81... At the time of his arrest, defendant
22 had two employees. Howard Dec. ¶ 2. Those
23 two employees performed clerical functions.
24 ID. There is no evidence that either employee
25 was aware of the fraudulent nature of FAC.
26 ID. Both employees confirmed that defendant
27 was in charge of FAC. ID.

28

1 FAC was a fictitious business name used by
2 defendant. Howard Dec. ¶ 4. A review of the
3 business records seized from FAC, documents
4 provided by the California Department of
5 Corporations, and public database did not
6 reveal any other person who had any interest
7 in, or control over, FAC Id. Interviews with
8 victims confirmed this. The victims
9 interviewed by the FBI all stated that they
10 had dealt with the defendant concerning their
11 investments. Id.

12 After substantiating that FAC was a one-man operation and that
13 there were no other criminal co-conspirators, the Government then
14 observes that "that defendant's fraud was extensive in time, place,
15 and number of victims..." (see Government's Sentencing Position,
16 Pg. 9, Lines 11-12). The Government does not actually state here
17 that the role enhancement should be applied, but seems to imply it
18 based of the extensive nature of the Ponzi scheme.

19 However, the relevant caselaw makes it clear that an extensive
20 scheme without supervision or leadership over at least one
21 criminally culpable co-conspirator is not sufficient to trigger any
22 kind of role enhancement. In United States v. Luca, F.3d 1018 (9th
23 Cir. 1999), the Ninth Circuit, citing United States v. Anderson,
24 942 F.2d 606, 615 (9th Cir. 1991) (en banc), and United States v.
25 Avila, 95 F.3d 887, 889 (9th Cir. 1996),³ specifically overruled a

26
27 ³ The Circuit Court in Avila found: "There must be evidence that the
28 defendant exercised some control over others involved in the commission of the
offense [or was] responsible for organizing others for the purpose of carrying
out the crime."

1 District Court decision that applied the role enhancement based on
2 the rationale that Luca's fraud was "otherwise extensive" in the
3 absence of any evidence that the fraud involved other criminally
4 responsible co-conspirators.

5 The Luca court held:

6 U.S.S.G. §3A1.1(a) cannot apply unless the
7 district court identifies a participant over
8 whom the defendant exercised managerial or
9 organizational control. See Anderson, 942
10 F.2d at 615. Here, the district court chose
11 not to identify any other participant in
12 Luca's scheme. It would be inappropriate for
13 this court to make necessary findings of fact
14 that the district court expressly declined to
15 make. We vacate this enhancement and remand
16 for further proceedings.

17 In United States v. Anderson, 942 F.2d 606, 615 (9th Cir.
18 1991) (en banc), the Ninth Circuit, citing United States v.
19 DeCicco, 899 F.2d 1531, 1535-37 (7th Cir. 1990); United States v.
20 Markovic, 911 F.2d 613, 616-617 (11th Cir. 1990); United States v.
21 Streeter, 907 F.2d 781, 792 (8th Cir. 1990); United States v.
22 Pettit, 903 F.2d 1336, 1341 (10th Cir.), cert. denied, 498 U.S.
23 873, 111 S.Ct. 197, 112 L.Ed.2d 159 (1990); United States v.
24 Fuller, 897 F.2d 1217, 1220 (1st Cir. 1990); and United States v.
25 Williams, 891 F.2d 921, 925 (D.C. Cir. 1989); states:

26 We join those circuits that have squarely
27 addressed the issue and hold that §3B1.1 only
28 applies when the offense is committed by more

1 than one person who is criminally responsible
2 for the commission of the offense. Construing
3 this guideline compatibly with the
4 interpretations given by most other courts
5 will further Congress's purpose of avoiding
6 unwarranted sentencing disparities. See 28
7 U.S.C. §991(b)(1)(B).

8 The plain meaning of the rulings set forth by both the Luca
9 and the Anderson courts clarifies that a role enhancement on the
10 grounds that a criminal scheme was "otherwise extensive" is
11 impermissible in the absence of evidence that the scheme involved
12 at least one other criminally culpable co-conspirator. In its
13 position in the matter at hand, the Government goes to considerable
14 lengths to argue in some detail that Mr. Lewis was the only
15 criminally responsible party in this Ponzi scheme. However, the
16 Government cannot have it both ways. Absent other criminally-
17 minded participants, there is no basis for an upward Role in the
18 Offense adjustment. Thus, a two-level enhancement for aggravated
19 role in this case is unwarranted and inapplicable.

20 B. THE PRESENTENCE REPORT OVERSTATES BY TWO LEVELS THE LOSS
21 AMOUNT FOR WHICH DEFENDANT LEWIS SHOULD BE HELD RESPONSIBLE

22 Based on further investigation by the accounting firm of
23 Semmens and Semmens of San Clemente, California, it has become
24 evident that the loss figures supplied by the Receiver are not
25 entirely reliable.

26 As of this date, the Semmens firm has completed its
27 reconciliation of the accounts of nine representative investors
28 with FAC [appended hereto as Exhibit A]. With respect to these

1 nine accounts, the Semmens firm compared the loss amount claimed by
2 the investors with the FAC account statements which were generated
3 by Mr. Lewis' Access File (from which the investors' monthly
4 account balances were generated). The Semmens firm then compared
5 those figures to the actual source documents provided to defense
6 counsel by the Receiver. The source documents consist of the
7 actual bank deposits made upon receipt of the investors' funds, and
8 thus would appear to be the most accurate reflection of the actual
9 monies received by FAC.

10 The spreadsheet shows that the loss figures claimed by these
11 nine investors are in most instances fairly close to the amounts
12 shown in the Access File statements. These figures, however, do
13 not begin to reconcile with the actual bank deposits. In most
14 instances, the Access File statements are substantially higher than
15 the actual bank deposits. Since the investor records maintained
16 were inflated and generally fraudulent, it would seem that the most
17 reliable source of records for determining the true total amount of
18 money invested are the actual bank deposits.

19 The Semmens firm, upon discovering the discrepancy between the
20 Access File and the source documents (bank deposits), requested
21 more complete information from the Receiver. Although the Receiver
22 did comply in part, the Receiver was largely unable to supply the
23 requested documents which suggests that the documents either do not
24 exist or cannot be found (defense counsel's request for additional
25 information, as well as the additional information actually
26 supplied by the Receiver, are appended as Exhibit B).

27 Accordingly, it appears that the loss figures adopted by the
28 Government may not be founded on reliable documentation. In making

1 its decision with respect to loss, the Court is asked to be mindful
2 of the very significant difference in advisory guideline
3 computations that would result from a 26-level enhancement
4 (stemming from a loss amount of more than \$100 million), as opposed
5 to a 24-level enhancement (resulting from a loss amount of less
6 than \$100 million).

7 Mr. Lewis feels extreme contrition for his criminal conduct
8 and the harm to the victims that he has caused. In view of the
9 lengthy prison term he is facing, however, he should not be
10 sentenced for losses that are speculative and not subject to a
11 reasonable standard of proof.

12 The most reasonable and accurate estimate of the total
13 monetary loss in this case is between \$50 million and \$100 million.
14 This figure corresponds to an increase from the guideline Loss
15 Table of 24 levels,⁴ precipitating a truly significant boost in Mr.
16 Lewis' advisory offense level by any yardstick. Given the various
17 other enhancements and adjustments that may apply, there is no need
18 to exaggerate the actual dollar loss to achieve a very substantial
19 punishment in Federal prison for this nearly 60-year-old man.

20 C. THE PROPOSED TWO-LEVEL ENHANCEMENT FOR ABUSE OF A POSITION
21 OF TRUST SHOULD NOT APPLY

22 Defendant Lewis reiterates his previously articulated position
23 that the two-level enhancement for abuse of a position of public or
24 private trust should not apply. His relationship with the
25 investors did not fall into the category of what is normally
26 considered to be a "fiduciary" relationship. Mr. Lewis never

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28 ⁴ See §2B1.1(b)(1)(M).

1 discussed his financial decisions with his investors, even those
2 that he knew personally. Although the Government points out that
3 Mr. Lewis did send out monthly newsletters to his clients, the
4 content of these newsletters was extremely broad and general and
5 never contained specifics with respect to any actual companies that
6 FAC was purportedly investing in, how much money FAC was investing
7 in the unnamed companies, or any other specific information.

8 Even on those somewhat uncommon occasions when an investor
9 contacted Mr. Lewis personally, his advice was rarely if ever
10 specific in terms of recommendations as to how the investor's money
11 should be invested. Rather, Mr. Lewis would simply talk in broad
12 platitudes about how much money his funds were earning and how he
13 expected continued substantial earnings in the future. The essence
14 of the fiduciary relationship is specific, privileged advice, not
15 vague generalities such as those in which Mr. Lewis invariably
16 engaged.

17 For these reasons, as well as all the grounds previously cited
18 in Defendant's Position Re: Sentencing filed on May 15th, the two-
19 level increase for abuse of a position of trust should not be
20 applied here. Simply defrauding the victim is insufficient grounds
21 to apply the enhancement as it constitutes an essential element of
22 the crime. Rather, the fraud must be perpetrated through more
23 specific, detailed advice by an individual holding a special status
24 or position in the organization which normally would entitle
25 him/her to great deference and freedom from oversight within the
26 organization or relationship (e.g. bank president or vice-
27 president; administrator of a labor union pension fund; corporate
28 officer or lawyer; physician in an abusive or coercive doctor-

1 patient relationship; elected officeholder or government official,
2 etc.). Mr. Lewis had none of these special entitlements, nor did
3 he hold himself out or falsely represent that he held such a
4 position. The adjustment does not apply.

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III.

CONCLUSION

James Lewis is fully aware that he has committed a serious crime. He feels deep remorse and recognizes that he will be going to prison. But he should not die there.

A proper analysis of Mr. Lewis' advisory guidelines indicates that his sentencing range should be 121 to 151 months, based on a guideline offense level of 32 and a Criminal History Category of I. It would seem appropriate and reasonable for the sentence to preserve some hope for Mr. Lewis of returning to his family before he is debilitatedly old. A term of 10 years custody would satisfy society's need for retribution and deterrence, without totally destroying what remains of James Lewis' life.

Dated: May 23, 2006

Respectfully submitted,
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