**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Criminal Action No. 00-67 GMS |
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| HENRY SONOWO, a/k/a Sonowo Babatunde Henry, a/k/a Kareem Bello | ) | |
| | ) | |
| Defendant. | ) | |

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Henry B. Sonowo, Philadelphia, Pennsylvania
*Pro Se.*

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Attorneys for the Government.

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**MEMORANDUM OPINION**

June 4, 2002

Wilmington, Delaware

**SLEET, District Judge**

## I. INTRODUCTION

On April 13, 2001, the defendant, Henry Sonowo, pled guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371. The court held a sentencing hearing on April 15, 2002.[1] The defendant, who elected to represent himself, made several motions before the sentencing, including a motion for a downward departure, a motion in opposition to the sentence enhancements, a motion to disqualify the judge, and a motion for subsidiary counsel.[2] [3] During the sentencing hearing, the court denied each of the defendant's motions. Additionally, the court *sua sponte* upwardly departed three levels and determined that sentencing enhancements for the amount of the loss, representing an affiliation with a religious organization, and conduct outside of the United States were appropriate under United States Sentencing Guidelines § 2F1.1. Although the court set forth some of the rationale for its decisions on the record, this memorandum opinion will provide a more thorough explanation of the court's reasoning.[4] [5]

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[1] The sentencing was delayed for various reasons, including the defendant's two requests to proceed *pro se*.

[2] On February 26, 2002, the court held a hearing to determine whether the defendant's Motion to Appear *Pro Se* would be granted. During the colloquy, the defendant demonstrated that he had the capacity and competence to represent himself. After advising him of the perils of self-representation, the court granted the motion.

[3] The rationale for denying the motion to disqualify and the motion for "subsidiary" counsel was set forth at length during the sentencing hearing and will not be recounted here.

[4] The court's opinion will only address those issues raised in the defendant's written submissions. The opinion will not address the arguments or objections presented orally by the defendant for the first time at the sentencing hearing. The court's rationale for denying those motions and overruling those objections can be found in the transcript of the sentencing hearing.

[5] The 2001 Guidelines were in effect at the time of sentencing. Those Guidelines provide harsher penalties than the 1998 Guidelines. The 1998 Guidelines were used in this case to avoid the *ex post facto* prohibition of art. I § 9 of the U.S. Constitution. *See* U.S.S.G. § 1B1.11.

## II. FACTS [6]

### A. The Defendant's Offense Conduct

The defendant was one of several persons involved in what has been termed a "black money" or "419" scheme. In or around October 1999, a church in Southern Delaware received an unsolicited electronic mail message to help a person identified as DAK raise a fee needed to release millions of dollars which were being held by a third party.[7] Jeffrey L. Premo, a Delaware resident and an accountant, did some accounting work for the church and was instructed by the pastor to look into the opportunity. The pastor explained that he had contacted the persons involved and that he believed they were Christians who would not take advantage of the church.

Premo was approached by DAK who proposed an investment opportunity. According to DAK, $41,000,000 would be transferred by wire from Nigeria to the United States. DAK also told Premo that the money would be used to further the "Kingdom of God" ministry in America. Premo was eventually convinced to travel to South Africa to open an account to permit the wire transfer. Premo was asked to pay $22,500 for insurance related to the money transfer.

While in South Africa, Premo met with several other persons. One of the persons showed Premo a footlocker that was filled with United States currency. Each "packet" of bills contained $50,000 in $100 bills. One of the persons removed a packet of bills. The money was stamped

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[6] This statement of facts is taken from the Pre-Sentence Report ("PSR"). At sentencing, the defendant objected to certain portions of the report. All but two of the defendant's objections to the report were overruled and the court adopted the factual findings of the PSR. Therefore, with the exception of the two facts to which objections were sustained, this statement of facts does not contradict the facts found in the PSR.

[7] DAK is an unindicted co-conspirator of the defendant. All other references to unnamed persons are also references to other unindicted co-conspirators. For simplicity, the court will not identify each co-conspirator.

"CBN" in black ink. Premo was told that CBN stood for Central Bank of Nigeria. He was also told that unless the black stamp was removed, the money could not be negotiated. Those present told Premo that the money could be cleaned only with a special cleaning chemical. One of the persons "cleaned" approximately $1,000. After this demonstration, however, the chemical congealed and would no longer work. Premo was told that it would cost $21,000 to obtain more cleaner. He was asked to pay the cost to replace the cleaner. Premo secured a $21,000 cash advance on a credit card to acquire the funds. Premo tendered the $21,000 to the persons and returned to the United States. After he returned to the states, he received a fax telling him that more money was required to obtain the chemical. Premo was asked for $66,900 to cover the additional cost. Premo wired $66,900 from his bank account in Delaware to the account of Prime Chemical Company.

In June 2000, another person contacted Premo and told him that he had $35,000,000 that had already been cleaned and was being held in a storage facility in Chicago. The person told Premo that if he would help him retrieve the $35,000,000 from Chicago, he would help Premo retrieve the $41,000,000 from South Africa. Premo was told that the money would be used to establish a church in Chicago. Premo agreed to help. He was then advised by the Chicago contact that $120,000 was needed to release the $35,000,000 from storage in Chicago. Premo agreed to raise $82,000. In July 2000, he traveled to Lansing, Illinois where he met with James Hughes-Irabor, Sonowo's co-defendant, and gave him $82,000 in cash. Hughes-Irabor then left the hotel where he had met with Premo.

Hughes-Irabor and another man eventually returned to the hotel with a foot-locker filled with money. Hughes-Irabor introduced the other person as Henry Sonowo. Sonowo claimed to be the representative for Global Offshore Services, the company that allegedly had possession of the

$35,000,000. Sonowo and Hughes-Irabor met with Premo and opened the foot-locker of money. To their "surprise," the money was covered in ink. Sonowo performed a money washing demonstration with the cleaning chemical. After washing approximately $1,000, the chemical would no longer pour. Sonowo and Hughes-Irabor told Premo that the chemical was under warranty and could be replaced at no cost.

Premo left Illinois and returned to Delaware. Sonowo and Hughes-Irabor contacted him and told him that the manufacturer of the chemical would not honor the warranty and that it would cost $273,000 to obtain more of the chemical. Premo agreed and returned to Illinois with his son. Premo brought $273,000 with him. However, one of the persons Premo had met with in South Africa called him at the hotel and told him that he and his son were not safe, and that he would be calling hotel security and the local police. When the police arrived, they checked the driver's licenses of the defendants but made no arrests. Premo and his son left and took the money with them.

On July 19, 2000, DAK called Premo and told him that the $41,500,000 had been shipped from South Africa. DAK then gave Premo the telephone number for the person that he should deal with from that point. Premo recognized the telephone number as Sonowo's.

On July 20, 2000, Hughes-Irabor traveled to Delaware and met with Premo and two others whom Premo had recruited. Hughes-Irabor told them that it would still cost $273,000 to purchase the chemical. The investors agreed. After the meeting, Sonowo called Premo and told him that a 75% deposit was required before the chemical could be obtained. Premo gave Hughes-Irabor $205,000 in cash. Hughes-Irabor again expressed the "ministry's" gratitude for their support. Indeed, at various points, Hughes-Irabor had sent electronic mail messages to Premo stating that the money would be used to support a ministry organized in the United States.

Three days later, Sonowo again contacted Premo and told him that the balance of $68,000 was needed before the chemical could be released. On July 24, 2000, Premo's son took $68,000 in cash to Illinois. On July 26, Sonowo told Premo that the chemical company had filed a petition in South Africa that disputed the ownership of the chemical. Sonowo stated that he and Premo would have to produce a certificate of ownership in order to claim the chemical. Sonowo claimed that investors in Europe held the certificate, and that it would take several weeks to obtain it from them. However, Sonowo promised to look for excess chemical from other sources in the interim.

On July 27, 2000, Premo contacted the Wilmington office of the Federal Bureau of Investigation. Premo began recording conversations with Sonowo and Hughes-Irabor. They continued their attempts to solicit money from Premo. In one conversation, Premo suggested that he had a new investor. The new investor was an FBI agent.

On August 2, 2000, Hughes-Irabor told Premo that he and Sonowo needed $200,000 from Premo to purchase the chemical from a new source. Premo and his investor agreed to travel to Illinois and deliver the money to Sonowo and Hughes-Irabor. On August 10, 2000, Premo and the "investor" met with Sonowo and Hughes-Irabor in Harvey, Illinois. Hughes-Irabor confirmed that Premo had already given him $353,000 to purchase the chemical, and that including the money spent in South Africa, Premo and his investors had given approximately $1,100,000. Sonowo and Hughes-Irabor were arrested by the FBI at this meeting.[8]

[8] In total, Premo solicited six other persons to participate in the scheme. These persons will not be named in order to protect their privacy.

**B. Other Conduct Relevant to the Offense**

Facts obtained during pre-sentence investigation indicate that Sonowo's involvement in the "black money" scheme began as early as 1998. In December 1998, customs officers in the United Kingdom intercepted a DHL package that was shipped from Lagos, Nigeria to Kareem Bello (Sonowo) in Calumet City, Illinois. The package contained 2,500 fee solicitation letters that were addressed to be mailed in the United States. The address on the package matched one of the defendant's former addresses.

The pre-sentence investigation also revealed that Premo was not Sonowo's only victim. Richard Powelson, a Kansas City, Missouri resident, was solicited for funds via letter in December 1997. The letter requested assistance in obtaining the release of $25,000,000. In February 1998, Powelson paid $35,000 to facilitate the transfer, and was then told that it would cost $550,000 to complete the transaction. He was subsequently told that there would be no further fees if he paid a sum of $144,392. Powelson paid the $144,392 fee, and then paid an additional $65,000. He then traveled to the Ivory Coast to meet with the solicitors, where he tendered an additional $59,000. He was then taken to a room where he was shown a trunk of money filled with United States currency. Each note was stamped in black ink with Powelson's name - a "special security feature" to ensure that only he could get the money. A cleaning demonstration was performed at this meeting. Powelson was told that he would need to pay a fee to buy the chemical to clean the ink.

Powelson returned to the United States. On December 4, 1998, he sent $3,500 to Nigeria to cover a "storage fee" for the money. During January and February of 1999, Powelson was told that the money was in London, the Netherlands, New York, and Chicago. On March 12, 1999, he was contacted by Sonowo who told him that he could help him get the $25,000,000 for a $16,000

fee. Sonowo told Powelson to contact him at (312) 217-1576. Powelson then contacted the Secret Service to set up a meeting with Sonowo but the meeting never occurred. Powelson had no contact with Sonowo after that point.

The Secret Service also investigated Sonowo's connection to Don Brice, a resident of Shreveport, Louisiana. Brice received an e-mail stating that there was $15,000,000 available to invest in his business, but the money was located in Madrid, Spain. In July 1999, Brice traveled to Madrid at the solicitors' request and was also shown money that was coated in ink and needed to be cleaned before it could be negotiated. He was told that it would cost $570,000 to purchase the chemical to clean the money. Between July and October 1999, Brice paid $350,873 for the "cleaning and storage" of the money.

On October 24, 1999, Brice was contacted by Sonowo. Sonowo told Brice that the $15,000,000 was being sent to the United States from South Africa by a diplomatic courier named Global World. He indicated that he would inform Brice of further developments. Brice had previously contacted the Secret Service. In November 1999, a meeting was held with Brice, Sonowo, and an undercover agent. The undercover agent offered to pay the $17,000 shipping fee Sonowo had requested from Brice. Sonowo told them to contact him at (312) 217-1576. Further attempts to meet with Sonowo proved unsuccessful, however.

Michael Scalera of Atlanta, Georgia, was also contacted by the solicitors in Fall 1999. He was told that $25,000,000 was being held, and would only be released upon the payment of a $25,000 fee. He was also told that he would receive a portion of the money for his efforts. Scalera traveled to New York and helped the solicitor obtain the ink stained money. However, the cleaner that had been enclosed with the money did not work. Scalera was told that the cost to activate the

chemical was $800,000, and that the machine to clean the money would cost $250,000. A cleaning demonstration was performed. Scalera returned to New York and another money cleaning demonstration occurred. He was told that it would cost $375,000 to $400,000 to obtain more cleaner.

Scalera was then contacted by Sonowo. Sonowo told him that he was aware of the problem with the cleaner and wanted to help. Sonowo told Scalera that he could clean the money, but needed to take it to Chicago. Sonowo took a packet of bills with him to Chicago. The serial numbers of the ink-stained bills were recorded; Sonowo returned the same bills unmarked. Sonowo then told Scalera that he needed $600,000 to obtain more chemical and that the fee could be paid in two installments of $400,000 and $200,000. Scalera embezzled $400,000 from his employer and wired the money to Sonowo. When Sonowo requested the second payment, he embezzled an additional $200,000 and wired it as well. Sonowo requested an additional $415,000, which Scalera also sent. On February 1, 2000, Sonowo called Scalera and told him that his bank account was frozen, and that he needed his assistance. Scalera contacted Sonowo at (312) 217-1576 in the presence of FBI agents. Sonowo was interviewed by the FBI, but no arrest was made. The FBI did confirm that Sonowo's account was frozen for suspicious activity because he had received over $1,000,000 in wire transfers over a one month period. The money was returned to the originating account after Sonowo's account was closed.

Khalid Hassan of San Jose, California, was solicited via electronic mail in February 2000. He was told that if he helped to release $21,500,000 from the Nigerian government, he would receive thirty percent of the money. Similar to the others, Hasan was told that a fee had to be paid to release the money. Hasan eventually paid $6,250. On April 19, 2000, Hasan was told to travel

to Chicago to receive his portion of the money. He was also told to contact H. Sonowo at (312) 217-1576 to coordinate his trip. Sonowo told Hasan that he would have to pay an additional $6,000 to receive his money. Hasan contacted the Secret Service, but no meeting with Sonowo ever took place. However, the San Jose Secret Service verified that calls from Sonowo's phone were made to persons who participated in the Brice, Powelson, and Scalera schemes.

Steve Adams, the executive vice-president of Christian Associates International, was also solicited. On July 24, 2000, he received an e-mail from a "Deacon Olatunji" who indicated that he represented Demonstration Ministry Nigeria, Inc., a worldwide prayer and deliverance ministry. The deacon said he had received a divine revelation to invest in Christian Associates. He then provided a similar story about money being held in Nigeria. The deacon instructed Adams to contact another individual in Nigeria, who advised Adams to contact "Mr. Harry" at (312) 217-1576. When Adams requested clarification on the contact's name, he was given the name Henry Sonowo. Adams was told to appear in Chicago with a cashier's check for $35,000. The meeting never materialized.

Betty and Gerald Edwards met with Sonowo several times in Lansing, IL in late 1999. He showed them the stained black money, and again offered to provide cleaner. The Edwards paid Sonowo $7,000 on their first visit and subsequently wired him $5,000. When agents investigated the account to which the Edwards wired the money, it was discovered that Sonowo had sent approximately 75 wire transfers of approximately $298,050 to other co-conspirators in Texas, Spain, Nigeria, the Ivory Coast, Benin and the United Kingdom.

Jean Benton also received a facsimile transmission soliciting her assistance in securing $56,000,000. The fax was signed by Sonowo and listed (312) 217-1576 as the number to call.

Benton did not give the defendant any money.

### C. Procedural Facts

Sonowo pled guilty to one count of wire fraud on April 13, 2001. The portion of the memorandum of plea agreement that is most relevant for sentencing purposes is paragraph six. Paragraph six of the plea agreement states, in pertinent part, "[o]ther than an enhancement under USSG §2F1.1(b)(1)(2) for more than minimal planning, the United States agrees that there exists no other sentencing guideline enhancement or aggravating circumstance of any kind, or to any degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Therefore, the United States will not seek any other enhancement to and/or departure from the guidelines." Plea Agr. at ¶ 6.

The pre-sentence investigation revealed that Sonowo had no prior criminal history. Therefore, he was assigned to Criminal History Category I. The base offense level for his crime is 6. The defendant disputes whether any specific offense characteristics should awarded. In particular, he disputes the enhancements under U.S.S.G. § 2F1.1 for the amount of the loss, misrepresenting that he was affiliated with a religious organization, and conduct committed outside the United States or conduct involving sophisticated means. In addition, the defendant asserts that the court does not have the power to consider any sentencing enhancements because it is bound by the terms of the plea agreement.

After receipt of the pre-sentence report, the court notified the parties that it was considering a *sua sponte* upward departure pursuant to U.S.S.G. § 5K2.0. The defendant filed a motion for a downward departure.

## III. DISCUSSION

The court will first address the defendant's objections to the specific offense characteristics. The court will then address the upward and downward departure issues.

### A. Specific Offense Characteristic Enhancements under § 2F1.1

As an initial matter, the defendant argues that the language of the plea agreement prevents the court from considering enhancements for the specific offense characteristics. Paragraph six of the plea agreement states that "[o]ther than an enhancement under USSG §2F1.1(b)(1)(2) for more than minimal planning, the United States agrees that there exists no other sentencing guideline enhancement or aggravating circumstance of any kind, or to any degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. Therefore, the United States will not seek any other enhancement to and/or departure from the guidelines." Plea Agr. at ¶ 6.

Pleas under Federal Rule of Criminal Procedure 11(e)(1)(C) are binding upon the court, whereas pleas under Rule 11(e)(1)(B) are not. *Compare* FED. R. CRIM. P. 11(e)(1)(B) ("Any such reccomendation or request is not binding on the court"); *with* FED. R. CRIM. P. 11(e)(1)(C) ("Such a plea agreement is binding on the court once it is accepted by the court."). The defendant asserts since his plea agreement does not specifically state that it is governed by Rule 11(e)(1)(B), it is governed by Rule 11(e)(1)(C). Thus, Sonowo argues that the government's statement that there are

no further enhancements is binding on this court.

The court rejects this argument for three reasons. First, the court never stated on the record that it was bound by the agreement. Second, the language in paragraph 6 of the plea agreement is not language sufficient to create a plea that is binding on the court. The plea agreement does not state - in paragraph six or elsewhere - that the court is bound by the terms of the agreement. *See United States v. Dellorfano*, Crim.A.Nos. 92-27-1, 93-315, 1996 WL 153527, at * 5 (E.D. Pa. Apr. 2, 1996) (refusing to be bound where "court never stated that Criminal History Category I was 'binding.'"). Moreover, pleas under 11(e)(1)(C) usually contain a provision allowing the defendant to withdraw his plea if the court rejects it. *See United States v. Gilchrist*, 130 F.3d 1131, 1133 (3d Cir. 1997) (noting that plea agreement contained language permitting defendant to withdraw plea if sentencing court rejected plea agreement). Such language may make the plea agreement binding upon the court. *See id.* at 1135 ("[T]he inclusion of a provision allowing the defendant corporation the opportunity to withdraw its plea if it court did not follow the government's recommendation, in effect, converted the plea contract into an 11(e)(1)(C) agreement."). However, Sonowo's plea agreement contains no such language. Furthermore, although the defendant cites *United States v. Veri*, 108 F.3d 1311 (10th Cir. 1997), in support of his contention, in that case, the plea agreement specified an offense level of sixteen. *See id.* at 1313. The plea agreement in this case contains no reference to a definite offense level or guideline range. The face of the plea agreement therefore does not require the court to accept the government's recommendation. Thus, the court need not accept the government's conclusion that there are no additional grounds for enhancement.

Finally, although Sonowo argues that he understood the plea agreement to mean that the court was bound by the government's recommendation, the record contradicts this argument. During the plea colloquy, Sonowo clearly acknowledged that the court was free to reject any recommendations made by the government. *See Dellorfano*, 1996 WL 153527, at * 5 (rejecting similar argument where court had previously notified defendant during plea colloquy that plea stipulation was not binding on court). The court asked Sonowo if he understood that the terms of the plea agreement are merely recommendations and not binding on the court. *See* Plea Hrg. Tr. at 18. His answer was affirmative. *See id.* Therefore, he was on notice that the court was not bound. Sonowo's assertion that he believed this question did not apply to paragraph six is disingenuous. If he had reservations about the meaning or scope of the question, he could have and should have raised them during the plea colloquy, rather than at sentencing. *See United States v. Sedwards*, 879 F.Supp. 502, 508-09 (E.D. Pa. 1995) (noting that during a plea agreement "the representations of the defendant . . . as well as any findings made by the judge in accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity.")(citing *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977)). Moreover, although Sonowo asserts that the plea agreement must be viewed in light of the all of the negotiations, he does not disclose any facts that would permit the court to find that the government promised him that the court would be bound by the agreement in order to induce him to plead guilty.

For all of these reasons, the court finds that it is not bound by the recommendations listed in the plea agreement and will now consider whether any enhancements for specific offense characteristics are appropriate in this case.

**1. Loss Calculation under § 2F1.1(b)(1)**[9]

The defendant objects to the twelve level enhancement pursuant to U.S.S.G. § 2F1.1 (b)(1) because the amount of the loss was more than $1,500,000 but less than $2,500,000. He disputes the loss amount by contending that the government has failed meet its burden of proof that, to a preponderance of the evidence, the loss is between $1,500,000 and $2,000,000. He further contends that the court should reduce the loss pursuant to U.S.S.G. § 2F1,1, App. Note 8(a) because some of the money was returned to the victims.

The court finds that the value of loss in this offense is between $1,500,000 and $2,500,000. The loss for the offense of conviction is $555,000. This amount is comprised of $355,000 in actual loss and $200,000 in intended loss. It does not appear that this portion of the value of loss is contested. Therefore, the court must determine whether the government has established that the value of loss is at least an additional $945,001 ($1,500,001 - $555,000 = $945,001).

The Pre-Sentence Report ("PSR") and its addendum contain information regarding other individuals that the defendant solicited or from whom he received money in schemes similar to the

[9] The court notes at the outset that the amount of the loss, as well as the other specific offense characteristics, must be proved by a preponderance of the evidence. *See United States v. Frierson*, 945 F.2d 650, 652 (3d Cir. 1991) ("Specific offense characteristics . . . must be proved by a preponderance of the evidence."). Thus, when the court states that a certain specific offense characteristic is applicable, the court has found that the preponderance of the evidence demonstrates that the enhancement is warranted.

one in this case. It does not appear that the parties contest that the individuals named in the PSR gave or were solicited to give the defendant these amounts. Rather, the issue is whether the defendant's relevant conduct (his interactions with other victims) should be counted toward the value of loss in this case. U.S.S.G. § 1B1.3 states that in determining the appropriate guideline range, the court should include "all acts and omissions committed, aided, abetted, counseled, commended, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3 (a)(1)(A) (1998). This includes acts committed as part of the same course of conduct as the offense of conviction. *See* U.S.S.G. § 1B1.3, app. n. 9(B). To determine whether prior conduct is conduct relevant to the offense of conviction, the court must consider the similarity of the offenses, their regularity (repetition), and the time interval between offenses. *See id*. A strong showing of one factor may overcome the absence of another. *See id.*

The court concludes that all three factors are present in this case. First, the defendant's prior conduct was very similar to his conduct in the instant offense. Like the instant offense, all of the previous schemes involved a person being solicited in some manner (usually letter or e-mail) to participate in a plan to get a large sum of money released from an overseas government agency. In each scheme, the targeted person was asked to pay a fee to release the money. If the target agreed to pay the fee, he or she was shown the stained currency and was taken through a demonstration on how to clean the money. The chemical used to clean the money would invariably run out or congeal, and then the demonstrator would ask the target for more money. Additionally, in each scheme, the defendant would not appear until the person had already given some sum. Thus, all of the schemes were similar.

Second, the schemes were repeated regularly. The PSR outlines the defendant's participation

in at least seven other schemes. Third, the time interval between offenses is rather close. The seven schemes the defendant participated in took place between December 1997 and August 2000. A close look at the facts reveals that there was usually less than six months separating one offense from the next. Additionally, each of the other offenses is temporally close to the Premo conviction. The Premo offense - which spanned from October 1999 to August 2000 - is less than fifteen months apart from all but one of the prior offenses. In fact, the Premo scheme overlapped some of the other offenses. For instance, Adams was solicited in the summer of 2000 while Premo was still being solicited. Thus, the court finds that the time interval is sufficiently short. The court therefore concludes that the previous seven offenses may be considered for relevant conduct purposes. When considered together, the entire actual and intended loss is approximately $1,674,250.

Furthermore, Application Note 8(a) would not make a difference in the enhancement. Although it is true that the court must reduce the loss by the return of any genuine currency, *see* U.S.S.G. § 2F1.1, app. n. 8(b), the information in the PSR establishes that less than $1,500 was returned to the victims of Sonowo's crimes. Further, since the loss, for sentencing purposes, is at least $1,674,250, the defendant would have had to return more than $174, 250 to qualify for the next lowest specific offense characteristic category. Since there has not been any evidence adduced to suggest the amount of money returned is anywhere near this amount, any error in the calculation would be harmless. The defendant's objection to this sentencing enhancement is, therefore, overruled.[10] According to U.S.S.G. § 2F1.1, because the loss was between $1,500,000 and

[10] The court also notes that even if the defendant's conduct toward all of the victims is not included, the government meets its burden merely by making the link between the offense in this case and Michael Scalera (the PSR states that the loss attributed to Scalera is $1,015,000). Not only was the scheme in Scalara's case strikingly similar to the instant offense, it was also less than a year apart. Since Sonowo participated in both solicitations, the court finds that there is a connection sufficient to link the previous loss to the loss suffered in the instant offense.

$2,500,000, the court must add twelve (12) levels to the base offense level.

**2. Religious Agency Enhancement - § 2F1.1(b)(4)**

The court turns next to the defendant's objection to the two level enhancement under U.S.S.G. § 2F1.1(b)(4) for representing that he was affiliated with a religious organization. The defendant argues that this enhancement is inappropriate because he himself did not make the religious statements or send the religious e-mails.

The court finds that the evidence proves that the defendant misrepresented that he was acting on behalf of a religious agency. Sonowo and James Hughes-Irabor were co-conspirators in this offense. Where there is jointly undertaken criminal activity, the court may consider "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" for relevant conduct purposes. U.S.S.G. § 1B1.3(a)(1)(B).

It is not disputed that Sonowo and Hughes-Irabor both participated in the solitication of Jeffery Premo. Premo was solicited under the guise that his contributions would help start a ministry in Chicago. Despite Premo's initial reservations, he agreed to invest in the opportunity after a third party indicated his belief that the defendants were Christians who would not deceive them. Indeed, Hughes-Irabor sent Premo at least one email message with religious overtones. A discussion of religion also appears in transcripts of telephone conversations. In his victim statement, Premo wrote: "Under the guise of Christianity and armed with a well-developed plan to benefit many faith-based organizations, these men went to work. They used a "pastor" who did not just claim to believe in God, but who knew intimately the Scriptures and the basic aspects of Christianity.

Through what they perceived in us as a genuine commitment to Christ and humanitarian work, they gained our trust . . . . How could James come to my house, sleep under my roof, eat with my family and pray and confess his belief in Christ knowing full well what he was planning for us?" Although Sonowo argues that he should not be held accountable for Hughes-Irabor's conduct, given the close working relationship the two shared, it should have been completely foreseeable to Sonowo that Hughes-Irabor would use any means necessary to persuade potential victims, including telling them that he represented a religious organization. Sonowo himself did not make the religious statements, but he did not refute them, and he passively relied upon them to further the goals of the scheme.

Steve Adams was also solicited under the guise of helping a ministry. Although someone identified as "Deacon Charles Olatunju" made this representation, the "deacon" referred Adams to another person who referred him to Sonowo. Therefore, Sonowo was again closely linked to the persons who made the religious references or allusions.

The court finds that the evidence establishes that religious overtones were such a significant part of this scheme that it would not be unfair to impute knowledge of their use to Sonowo. The court thus overrules the defendant's objection to the enhancement under U.S.S.G. § 2F1.1(b)(4). Accordingly, the court must add two levels to the base offense level.

**3. Conduct Committed Outside the United States/Sophisticated Means - 2F1.1(b)(5)**

Finally, the court turns to Sonowo's objection to the two level enhancement under U.S.S.G. § 2F1.1(b)(5). This section of the Guidlines provides for an enhancement where a "substantial part" of the offense was committed outside the United States or the offense involved sophisticated means. The basis for the defendant's objection is that the scheme was not sophisticated, or in the alternative,

a substantial part of it was not committed outside of the United States.

The language of U.S.S.G. § 2F1.1(b)(5) requires that *either* a substantial part of the scheme occurred outside the United States ***or*** that the offense involved sophisticated means. *See* U.S.S.G. § 2F1.1(b)(5) (employing disjunctive "or" language in discussing the three enhancements available under that section). Thus, a finding of either one would require a two point enhancement.

The court agrees with Sonowo that the offense itself was not complicated. It was a simple "bait and switch" scheme. However, a substantial part of the offense did occur outside of the United States.

To determine whether a substantial part of the offense occurred outside of the United States, the court looks to U.S.S.G. § 1B1.1, App. Note 1(l) which defines "offense" to include the offense of conviction and all relevant conduct under § 1B1.3, unless the guideline uses or implies a different meaning. *See* U.S.S.G. § 1B1.1, app. n.1(l). Upon examining the language of § 2F1.1(b)(5), the court finds that the guideline section does not an alternate definition of the term "offense." Therefore, the court will examine all of Sonowo's relevant conduct.[11]

The court concludes that substantial portions of the offense occurred outside the United States. First, three of the victims traveled abroad. Premo traveled to South Africa. Don Brice, who lost more than $300,000, traveled to Madrid, Spain. Richard Powelson traveled to the Ivory Coast twice. Second, while abroad Premo, Brice, and Powelson were shown money cleaning demonstrations which helped build and maintain their confidence in the scheme. Third, a review

[11] The court has already addressed the issue of relevant conduct under U.S.S.G. § 1B1.3. See III.A.1., *supra*.

of Sonowo's phone records by the Secret Service noted that there were hundreds of calls placed to Nigeria, the United Kingdom, and Spain during the course of the relevant conduct offenses. Fourth, the relevant conduct included numerous wire transfers to accounts throughout the world. Fifth, authorities seized a DHL package in the United Kingdom which contained more than 2,000 pre-addressed letters soliciting participation in the fraudulent scheme. The package was addressed to Sonowo's address in Illinois. Thus, the court finds that the record evidence establishes that a substantial part of the offense occurred outside the United States. The defendant's objection to the enhancement is, therefore, overruled. As a result, pursuant to U.S.S.G. § 2F1.1(b)(5)(C), the court will add two more levels to the defendant's base offense level.

Since the court has overruled all objections to the sentencing enhancements, it will now consider the applicable guideline range in light of these enhancements. Guidelines sections 2X1.1 and 2F1.1(a) set Sonowo's base offense level at six (6). The court will add twelve (12) levels pursuant to U.S.S.G. § 2F1.1(b)(1) because the value of the loss was between $1,500,000 and $2,000,000. The court will also add two (2) levels pursuant to U.S.S.G. § 2F1.1(b)(4)(A) because the defendant represented that he was affiliated with a religious organization. A two (2) level enhancement under U.S.S.G. § 2F1.1(b)(5)(B) is also appropriate because a substantial portion of the offense conduct took place outside of the United States. The court will also add a two (2) point enhancement for more than minimal planning pursuant to 2F1.1(b)(2)(A).[12] The court will also deduct three (3) levels for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. The result of these calculations is that Sonowo's total adjusted offense level is twenty-one (21). Since Sonowo has zero (0) criminal history points, his Criminal History Category is I. A total offense level of 21

[12] The defendant did not object to this enhancement.

and a Criminal History Category of I places Sonowo's range of imprisonment at 37 - 46 months, with no upward or downward departures.

**B. Departure Issues.**

**1. Defendant's Motion for a Downward Departure Pursuant to U.S.S.G. § 5K2.0**

The defendant's *pro se* submission requests a downward departure pursuant to U.S.S.G. § 5K2.0. The court will not grant the defendant's motion for a downward departure because Sonowo's personal circumstances do not place his case outside the "heartland" of the Guidelines.

As an initial matter, the court recognizes that it has the power to grant such a motion and that it has the discretion to decide whether it should be granted. *See* U.S.S.G. § 5K2.0 (noting that sentencing court "may" impose a sentence outside the applicable guideline range). In *Koon v. United States*, the Supreme Court announced a four part test for a sentencing court to use in determining whether a departure is appropriate. First, the sentencing court should determine what, if any, features of the case potentially take it out of the Guideline's "heartland" and make it a special or unusual case. *See Koon v. United States*, 518 U.S. 81, 95 (1996). Once a special factor is identified, the next question for the court is how the Sentencing Commission treated that factor. If the Commission has forbidden the consideration of a factor, the sentencing court cannot use it as a basis to depart. *See id.* at 95-96. If the Commission has encouraged that the factor be considered as a basis for departure and the applicable guideline does not take it into consideration, the factor may be used as a basis to depart. *See id.* at 96. If the factor is an encouraged factor but is already taken into account in the applicable guideline, the factor may be used as a basis to depart only if it is present in an "exceptional degree" or in some other way makes the case different from the

ordinary case where the factor is present. *See id.* When the Commission is silent on a factor, the sentencing court must consider the structure of the Guidelines as a whole, as well as the individual guideline applicable to the offense at issue, and determine whether the factor is sufficient to take the case out of the Guidelines heartland. *See id.* The Supreme Court has cautioned that departures based on factors not mentioned in the Guidelines should be highly infrequent. *See id.*

The defendant asks the court to review his circumstances in their entirety. However, his motion is based primarily on the following: (1) the defendant will be deportable after the judgment is entered in the offense; (2) he is in poor physical health; and (3) the charges misstate the seriousness of the offense conduct. The court will review each of these circumstances in turn.

The Sentencing Guidelines state that a defendant's national origin is not relevant to determining a sentence. *See* U.S.S.G. § 5H1.10. Therefore, the court cannot depart on that basis. Nonetheless, to the extent that the defendant relies on the fact that he will be deported separate and apart from the fact of his national origin, the court recognizes that it has the discretion to depart.[13] Since the Guidelines are silent on deportability as a ground for departure, the court can only depart

[13]Although the Third Circuit has not squarely addressed this issue, the court notes that other circuits have permitted a downward departure based on the defendant's deportable status in extraordinary circumstances. *See United States v. Farouil*, 124 F.3d 838, 847 (7th Cir. 1997) (noting that district court had discretion to depart downward based on defendant's deportability where it presented an "unusual or exceptional hardship"); *United States v. Smith*, 27 F.3d 649, 655 (D.C. Cir. 1994) ("[I]f a deportable alien is assigned to a more drastic prison than otherwise solely because his escape would have the extra consequence of defeating his deportation, then the defendant's status as a deportable alien would have clearly generated increased severity and thus might be the proper subject of a departure."). *But see United States v. Restrepo*, 999 F.2d 640, 645-47 (2d Cir. 1993) (holding that deportability was not an acceptable ground for an downward departure).

after considering whether the defendant's circumstances are sufficient to take his case outside of the "heartland" of cases contemplated by the applicable Guidelines. There is nothing extraordinary about Sonowo's case that would make his deportation any more unusual or exceptional that that of any other defendant. Therefore, the court declines to use its discretion to downwardly depart on this basis.

The Sentencing Guidelines also state that a defendant's medical history is not ordinarily relevant to a defendant's sentence. *See* U.S.S.G. § 5H1.4. If there is an extraordinary physical impairment, however, the court may depart below the applicable range. *See id.* The court has considered all the evidence on this issue, including the confidential information provided to the court regarding the defendant's health condition. The court realizes that it has the authority to depart on this ground but declines to do so for two reasons. First, although such a departure may be warranted where the defendant is in the advanced stages of his illness, *see United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995); *United States v. DePew*, 751 F.Supp. 1195, 1199 (E.D.Va.1990), the most recent Bureau of Prisons report indicates that despite his illness, Mr. Sonowo is in relatively good health. He has not presented the court with any facts to the contrary, although it is his burden to do so. *See U.S. v. Woody,* 55 F.3d 1257, 1275 (7th Cir. 1995) (noting that the defendant "presented no 'sound factual foundation' which would support a downward departure" for his health condition). Moreover, the probation officer's report indicates that the defendant committed the current offense after being diagnosed with his illness. *See United States v. Hernandez,* 218 F.3d 272, 281 (3d Cir. 2000) (upholding district court's refusal to depart downward where defendant committed crime after being diagnosed with terminal illness). All of these factors weigh against a downward departure.

In a previous *pro se* motion, Sonowo states that his offense level overstates the seriousness

of his offense. The court disagrees, and will exercise its discretion to decline to depart on this basis for several reasons. First, the losses in this offense resulted from money obtained by – and attempted to be obtained by – fraud. The losses in this offense were not merely "paper losses" since the vast majority of the loss is money that was actually turned over to the defendants by the victims. Second, the extensive nature of the scheme belies any argument that the loss overstates the seriousness of the offense. Sonowo was already under investigation by the Chicago Office of the Secret Service Organized Crime Task Force (the lead investigation agency) when the FBI field office in Wilmington became involved in the investigation of the instant offense. Other Secret Service Officers in Louisiana and California had already reported losses from victims in their districts to the Chicago Task Force. The facts of this offense demonstrate that Sonowo was involved in this scheme continuously from at least December, 1998 (when a parcel of solicitation letters addressed to him was intercepted) until his arrest in Chicago in August, 2000. Upon considering all of the defendant's arguments, the court declines to exercise its discretion to downwardly depart under § 5K2.0.

**2. Upward Departure**

The court previously notified the parties that it was considering an upward departure under U.S.S.G. §§ 2F1.1, app. n. 11 and 5K2.0. After having considered the revised PSR, the parties' submissions, the Sentencing Guidelines, and the relevant case law, the court has decided to upwardly depart on this basis. The court will discuss a few of the special circumstances that bring this case outside the heartland of this type of offense.[14]

[14] The court has already outlined the analysis it must undertake to consider whether to downwardly depart under U.S.S.G. § 5K2.0. *See* Section III.B, *supra*. Since the analysis is identical when determining whether to upwardly depart, the court will not repeat it.

First, the court believes that this case presents an unusual degree of harm to the victims that is not contemplated by the Guidelines. In making this assessment, the court has reviewed the victim impact statement in the PSR as well as the letters the court has received from the victims. Because of this scheme, one victim was compelled to take a mortgage out on a home that was previously unencumbered. Having been defrauded, he must now repay the mortgage rather than assisting his children to defray the expenses of their education or putting money away for retirement. According to the victim, this scheme took away what took 20 years for him to accomplish. Another victim's "contribution" was from a line of credit used by his newly created business. The fraud resulted in the business growing more slowly than anticipated and it will be burdened with this loan for a long time. Aside from monetary impact not taken into account by the Guidelines, the court believes that the harm to the reputation of the victims also takes this offense outside the heartland of the Guidelines. One of the victims, Mr. Premo, is a CPA. Trust and judgment are a large part of his business. After this fraud was uncovered, he was the subject of numerous news stories. The resulting damage to his reputation has placed his livelihood in jeopardy. The PSR also lists other victims who feel that their reputations either have been or might be diminished as a result of Sonowo's crime.

Second, the court finds that the sheer number of the victims in this offense (both the instant offense and the relevant conduct) is another basis upon which the court can conclude that this crime is outside the heartland of the Guidelines. Taken together, there are 14 victims of Sonowo's actions – according to the PSR there were 7 victims in the offense of conviction and 7 relevant conduct victims. U.S.S.G. § 2F1.1(b)(2) allows for a two level increase if the scheme involved defrauding more than one victim *or* if the offense involved more than minimal planning. Indeed, the court

applied the two point enhancement for more than minimal planning, but not for more than one victim. The number of victims in this case is separate and distinct from the court's assessment of more than minimal planning. The court's two point enhancement for more than minimal planning was directed toward the character of the instant offense, not the number of victims involved. Further, the court's enhancement was not based on the number of victims included in the relevant conduct. Thus, the number of victims is a factor that the court could not and did not take into account in applying the Guidelines.

Perhaps the best way to understand the structure of § 2F1.1(b)(2) in the 1998 Guidelines is by comparison to the new 2001 Guidelines. Under the 2001 Guidelines, the Sentencing Commission consolidated several forms of property offenses in U.S.S.G. § 2B1.1. In so doing, the Commission eliminated the two point enhancement for more than minimal planning. Among the Commission's reasons was that "in practice, more than minimal planning [is] so closely linked with [an enhancement for the number of victims]." U.S.S.G. Supp. App. C, amend. 617, p. 181 (2001). Rather, the Commission folded more than minimal planning into other parts of the sentencing calculation while keeping an adjustment for the number of victims. This conjunctive understanding from the 2001 Guidelines is missing from the 1998 Guidelines. Given this, the court is confident that, in this case, a departure based on the number of victims is not contemplated under the 1998 Guidelines and is, therefore, an appropriate basis for an upward departure.

The defendant correctly argues that it is incorrect for a court to apply a two level enhancement for both more than minimal planning and more than one victim.[15] However, although the court cannot provide an additional enhancement for the number of victims, the Sentencing

[15] *See United States v. Copple*, 24 F.3d 535 (3d Cir. 1994) (cited by defendant).

Guidelines *do* permit the court to consider this as a basis for an upward departure. Indeed, in the commentary to section 2F1.1 of the Guidelines, the Commission notes that although section 2F1.1(b)(4) - which is similar to section 2F(b)(2) - is alternative, rather than cumulative, "[if] in a particular case, both of the enumerated factors appl[y], an upward departure might be warranted." U.S.S.G. § 2F1.1. cmt. 1. Based on this guidance from the Sentencing Commission, the court is satisfied that it has the authority to use the number of victims as a basis for upward departure.

Third, the relevant conduct to this offense - the seizure of approximately 2,000 pre-addressed solicitation letters sent to Sonowo's address - indicates the potential use of mass-marketing. The court did not apply the adjustment under U.S.S.G. § 2B1.1(b)(3) in calculating the offense level since the mass marketing was not completed (i.e. the letters were seized before they reached Sonowo's address or were mailed to the addressees). The intended use of mass marketing is, therefore, not adequately contemplated by the Guidelines. This is an additional basis upon which the court can upwardly depart.

Fourth, this offense (including the relevant conduct) is noteworthy for its duration and extensive planning and execution. This conduct seems to go beyond what the Sentencing Commission considered sufficient to trigger the "sophisticated means" enhancement of § 2F1.1(b)(5). *See* 2F1.1, app. n.15 (stating factors for sophisticated means but not considering duration and multiple schemes simultaneously). The evidence demonstrates that Sonowo was involved in this scheme for approximately three years prior to his arrest. During his interaction with the Delaware victims, he was also involved in similar schemes all over the country as part of a well established pattern – he was the "closer." The schemes involved a exceedingly complex web of relationships, involving banks all over the world. Although Mr. Sonowo asserts that the court must

find that he was the "manager"or leader of the scheme to depart upward on this basis, this is incorrect. The court is not departing upward based on Mr. Sonowo's role in the scheme as the cases he cites contemplate.[16] Rather, the court has focused on the nature of the scheme itself.

Having concluded that the characteristics of the offense take it outside the heartland of the Guidelines, the court will upwardly depart three offense levels. In so doing, the court is guided in part by the 2001 Guidelines which call for a two level adjustment. Even if the court were not guided by the 2001 Guidelines, the court believes that the aforementioned circumstances, and others, are sufficient to merit a three level upward departure.

Departing three levels places Sonowo's offense level at 24. Given his criminal history category of I, the appropriate guideline range is 57-61 months. The statutory maximum for a violation of 18 U.S.C. § 1343 is 60 months. Therefore, the court will sentence Sonowo to the custody of the Federal Bureau of Prisons for a period of 60 months.

**V. CONCLUSION**

For all of the foregoing reasons, the court has determined that the defendant's offense level should be increased because the preponderance of the evidence proves that the value of the loss was between $1,500,000 and $2,000,000, the defendant represented that he was affiliated with a religious organization, a substantial portion of the offense conduct took place outside of the United States, and there was more than minimal planning. The court further found that given the unusual circumstances of the case, a three level upward departure is warranted. Conversely, the court found

[16] *See United States v. Zagari*, 11 F.3d 307, 330 (2d Cir. 1997) (cited by defendant).

that there were no circumstances extraordinary enough to justify a downward departure. With the upward departure, Sonowo's appropriate guideline range is 57-61 months. Therefore, Sonowo is sentenced to the custody of the Federal Bureau of Prisons for a period of 60 months, which is the statutory maximum for this crime.