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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-2688

United States of America

Plaintiff - Appellee

v.

Bryan Binkholder

Defendant - Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cr-00247-RLW-1)

JUDGMENT

Before WOLLMAN, KELLY and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 20, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States District Court

Eastern District of Missouri

UNITED STATES OF AMERICA

v.

Bryan Binkholder

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 4:14CR00247-1 RLWUSM Number: 41868-044

Albert S. Watkins

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) one, two, three and four of the indictment on January 8, 2015.

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1343	Wire Fraud	12/2013	1-4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) 5 is dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 15, 2015

Date of Imposition of Judgment



Signature of Judge

Ronnie L. White
United States District Judge

Name & Title of Judge

May 15, 2015

Date signed

DEFENDANT: Bryan BinkholderCASE NUMBER: 4:14CR00247-1 RLWDistrict: Eastern District of Missouri**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 108 months

This term consists of a term of 108 months on each of counts one through four, all such terms to be served concurrently.

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant participate in the Financial Responsibility Program while incarcerated. It is further recommended that the defendant be housed as close as possible to St. Louis, Missouri. Such recommendations are made to the extent they are consistent with the Bureau of Prisons policies.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m./p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal

as notified by the Probation or Pretrial Services Office

MARSHALS RETURN MADE ON SEPARATE PAGE

DEFENDANT: Bryan Binkholder

CASE NUMBER: 4:14CR00247-1 RLW

District: Eastern District of Missouri

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three years

This term consists of a term of three years on each of counts one through four, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment

The defendant shall comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Bryan Binkholder
CASE NUMBER: 4:14CR00247-1 RLW

District: Eastern District of Missouri

ADDITIONAL SUPERVISED RELEASE TERMS

While on supervision, the defendant shall comply with the standard conditions that have been adopted by this Court and shall comply with the following additional conditions. If it is determined there are costs associated with any services provided, the defendant shall pay those costs based on a co-payment fee established by the probation office.

The defendant shall provide the probation office and the Financial Litigation Unit (FLU) of the U.S. Attorney's Office access to any requested financial information. The defendant is advised that the probation office may share financial information with FLU.

The defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without the approval of the probation office so long as there is a balance on the Court imposed financial obligation.

The defendant shall apply all monies received from any anticipated and/or unexpected financial gains, including any income tax refunds, inheritances, or judgments, to the outstanding Court ordered financial obligation.

The defendant shall immediately notify the probation office of the receipt of any indicated monies.

The defendant shall not be self-employed or be employed as a "consultant" without the written permission of the probation office.

The defendant shall submit his person, residence, office, or vehicle to a search conducted by the probation office based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

The defendant shall not create, operate, manage or participate in the creation, operation or management of any business entity, including a family business without the written permission of the probation office.

The defendant shall pay the restitution as previously ordered by the Court.

**All criminal monetary penalties are due in full immediately. The defendant shall pay all criminal monetary penalties through the Clerk of Court. If the defendant cannot pay in full immediately, then the defendant shall make payments under the following minimum payment schedule: During incarceration, it is recommended that the defendant pay criminal monetary penalties through an installment plan in accordance with the Bureau of Prisons' Inmate Financial Responsibility Program at the rate of 50% of the funds available to the defendant. If the defendant owes any criminal monetary penalties when released from incarceration, then the defendant shall make payments in monthly installments of at least \$500, or no less than 10% of the defendant's gross earnings, whichever is greater, with payments to commence no later than 30 days after release from imprisonment. Until all criminal monetary penalties are paid in full, the defendant shall notify the Court and this district's United States Attorney's Office, Financial Litigation Unit, of any material changes in the defendant's economic circumstances that might affect the defendant's ability to pay criminal monetary penalties. The defendant shall notify this district's United States Attorney's Office, Financial Litigation Unit, of any change of mailing or residence address that occurs while any portion of the criminal monetary penalties remains unpaid.

DEFENDANT: Bryan Binkholder
CASE NUMBER: 4:14CR00247-I RLW
District: Eastern District of Missouri

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on sheet 6

<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<u>Totals:</u>	<u>\$400.00</u>	<u>\$3,655,968.89</u>

The determination of restitution is deferred until _____ *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such a determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

Bank of America Attn: Restitution Donna McLaughlin NC4-105-02-11 \$274,000.00

4161 Piedmont Parkway Greensberg, NC 27410

SEE NON-PUBLIC PAGES FOR ADDITIONAL VICTIMS

<u>Totals:</u>	<u>\$3,655,968.89</u>
----------------	-----------------------

Restitution amount ordered pursuant to plea agreement _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

The interest requirement is waived for the. fine restitution.

The interest requirement for the fine restitution is modified as follows:

DEFENDANT: Bryan Binkholder
CASE NUMBER: 4:14CR00247-1 RLW
District: Eastern District of Missouri

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A Lump sum payment of \$400 Special assessment due immediately, balance due
 not later than _____, or
 in accordance with C, D, or E below; or F below; or

B Payment to begin immediately (may be combined with C, D, or E below; or F below; or

C Payment in equal _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., equal, weekly, monthly, quarterly) installments of _____ over a period of _____ e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after Release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

PLEASE SEE PAGE 4 FOR RESTITUTION PAYMENT INSTRUCTIONS.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are made to the clerk of the court.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several
Defendant and Co-defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Under 21 U.S.C. § 853, the defendant has forfeited all of his right, title, and interest in the property previously identified in the Preliminary Order of Forfeiture granted on April 13, 2015. The Court orders a monetary judgment in the amount of \$3,655,968.89 which is equal to the restitution ordered as agreed on in the plea agreement.

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.



DEFENDANT: Bryan Binkholder
CASE NUMBER: 4:14CR00247-1 RLW
USM Number: 41868-044

UNITED STATES MARSHAL
RETURN OF JUDGMENT IN A CRIMINAL CASE

I have executed this judgment as follows:

The Defendant was delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

The Defendant was released on _____ to _____ Probation
 The Defendant was released on _____ to _____ Supervised Release
 and a Fine of _____ and Restitution in the amount of _____

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

I certify and Return that on _____, I took custody of _____
at _____ and delivered same to _____
on _____ F.F.T. _____

U.S. MARSHAL E/MO

Appendix 7
By DUSM _____
A7

RLW

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Case No. 4:14 CR 247 RLW
)
BRYAN BINKHOLDER,)
)
Defendant.)

MEMORANDUM AND ORDER

This matter is before the Court on the Government's Notice regarding "Victim Status Hearing." ("Notice"; ECF No. 96). The Court held an evidentiary hearing on January 27, 2015 at 11:00 a.m. to determine whether Mike Ursch was a "victim" for sentencing purposes. Mr. Ursch and FBI Special Agent Carrie Carlson testified at the hearing. On February 2, 2015, Binkholder filed Defendant's Post-Hearing Brief in Support of Disqualification of MU as Victim for Sentencing Purposes (ECF No. 101). This matter is fully-briefed and ready for disposition.

In its Notice, the Government contends that Ursch was a victim because he was an investor in the "hard money lending program." The Government states that Ursch made "substantial investments" in the hard money lending program, and that substantial amounts of those investments will not be repaid. The Government notes that Ursch's investments were "commingled" with funds from other investors and that Binkholder used these commingled funds to pay personal and business expenses, purchase real estate, pay promised interest to other investors, or to repay certain investors their principle. The Government contends that Ursch, although he was Binkholder's partner, was unaware that Binkholder was using his investor funds

in this manner. Finally, the Government contends that Binkholder made "false representations or material omissions that lulled Ursch into continuing with the hard money lending program and even providing additional funds when, in fact, the hard money lending program was insolvent or experiencing cash shortfalls." The Government notes that Ursch has received immunity based upon his cooperation with Government officials in their investigation of Binkholder.

In response, Binkholder argues that Ursch was "a sophisticated and successful business man [sic] with a significant degree of education, training, investment history, entrepreneurial understandings, and a licensed real estate agent." (ECF No. 101, ¶47). Binkholder contends that Ursch had intimate knowledge of the underlying criminal scheme, which involved establishing multiple business associations promoting multiple investment opportunities. Binkholder claims that Ursch was a knowledgeable and willing participant in "activities involving the comingling of program funds, the transferring of funds from one program to meet obligations of another program, the ill-fated sale of 32 parcels to Hamilton under significantly non-transparent disclosures, to the detriment of all who participated in all of the programs." (*Id.*) Even though Ursch invested \$1.1 to \$1.2 million, Binkholder maintains that Ursch is not a victim considering that he received \$739,413.00 from various programs and received a salary from Midwest Redevelopment in an amount equal to the mortgage on his personal residence. (ECF No. 101 at ¶¶48-49).

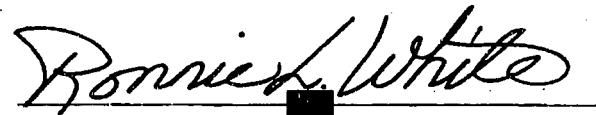
Based upon the evidence, the Court holds that Ursch is not a "victim" for sentencing purposes. First, Ursch was clearly a sophisticated businessperson. Ursch testified that he developed and ran a sales division at Ralston Purina and that he was experienced with real estate even prior to his involvement with Binkholder. In fact, Ursch was even a licensed real estate

agent. Second, Ursch's testimony indicated that he was aware of the commingling of funds, which the crux of this litigation. Ursch admitted using money from one program to fund other programs that had shortfalls. Although Ursch claimed that he relied upon representations made by Binkholder that the financial programs were sound, the Court finds such self-serving statements to be incredulous. Ursch, as a sophisticated businessperson and real estate agent, would have or should have realized the companies were not financially sound and that commingling funds was irregular, if not illegal.¹ Further, although Ursch attempted to distance himself from the programs and refers to his as an "outside role," his own testimony belies his blamelessness. Ursch testified that he handled the insurance claims for the properties, as well as the escrow accounts. Ursch admitted that escrow funds were not always accounted for and that he used funds from escrow accounts of other properties to pay for work performed on other properties. Ursch also helped identify properties to include in their portfolio, managed the properties, and was either a 50% or nearly 50% partner in the entities he and Binkholder created. Finally, Ursch admitted that he proceeded with the closing of the "Hamilton Transaction" even though he knew that material misstatements were made to the buyers, *i.e.*, the buyers were not informed that there were vacant properties and properties were in need of repair. Based upon Ursch's deep knowledge of Binkholder's programs and his admitted participation in commingling of funds and other deceptive tactics, the Court finds that Ursch is not a victim for purposes of sentencing. Although Ursch may have lost some money through his involvement with Binkholder, the Court finds that such loss was due to his own complicit relationship with Binkholder and involvement in

¹ If there were any question in his mind, any doubt should have been removed by the December 16, 2009 email from Lisa Bushur, a tax advisor and accountant, to Bryan Binkholder and Mike Ursch. (ECF No. 96-7).

Binkholder's criminal schemes, which does not make Ursch a victim.

Dated this 9th day of February, 2015.


RONNIE L. WHITE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.) Case No. 4:14 CR 247 RLW
BRYAN BINKHOLDER,)
Defendant.)

MEMORANDUM AND ORDER

This matter is on remand from the Eighth Circuit for this Court to determine whether M.U.

was a victim of Defendant Bryan Binkholder's offenses for sentencing purposes. (ECF No. 197).

The Eighth Circuit has previously held in its April 30, 2015 Judgment that Michael Ursch ("M.U.") was a crime victim pursuant to the Crime Victim's Rights Act (CVRA), 18 U.S.C. sec. 3771. (ECF No. 129, 130, 131; *see also* ECF No. 197 at 10). The Eighth Circuit, however, did not pass judgment on whether M.U. was a "victim" under §2B1.1 of the Sentencing Guidelines. *See* ECF No. 197 at 10.

Background

On January 8, 2015, Defendant Bryan Binkholder pleaded guilty to Counts One through Four of the Indictment. In the Guilty Plea Agreement, the parties agreed the loss suffered by the victims from Binkholder's criminal conduct was "at least approximately \$2,332,969." The parties disagreed whether M.U. was a victim of Binkholder's scheme. If M.U. was determined to be a victim, the parties agreed that the loss to M.U. was equal to the funds he provided to Binkholder, approximately \$1,075,000. In such a case, the parties agreed that the total loss would

have been greater than \$2,500,000 but not more than \$7,000,000.

On January 27, 2015, this Court held a hearing regarding M.U.'s status as a victim. At the hearing, both M.U. and Special Agent Carrie Carlson testified that M.U. lost more than \$1,000,000 as a result of Binkholder's scheme. Special Agent Carlson also testified that M.U. did not know about or participate in Binkholder's fraud.

On February 9, 2015, this Court issued an Order finding that M.U. was not a victim of Binkholder's operation. (ECF No. 102). The Eighth Circuit later granted M.U.'s Petition for Writ of Mandamus on that issue. The Eighth Circuit recognized M.U. as a "crime victim pursuant to the Crime Victims' Rights Act, 18 U.S.C. sec. 3771." (ECF No. 129).

On May 15, 2015, Binkholder appeared before this Court for sentencing. (ECF No. 146). The Court adopted the PSR as its findings of fact and conclusions of law. The PSR included M.U. as a victim for purposes of calculating both the Sentencing Guidelines range and imposing restitution. The Court sentenced Binkholder to a term of 108 months imprisonment, followed by three years' supervised release. The Court ordered Binkholder to pay restitution in the amount of \$3,655,968.89 to 22 victims, including \$1,205,000 to M.U. (ECF Nos. 146, 147).

Binkholder appealed his sentence. The Eighth Circuit remanded the action to this Court to determine "whether M.U. was a victim under the Guidelines." (ECF No. 197 at 10). The Eighth Circuit further upheld the restitution amounts, including the amount of restitution owed to M.U., as well as the Court's denial of acceptance of responsibility points to Binkholder. (ECF No. 197 at 5-7, 10-12).

Several of the individual Binkholder's victims ("Binkholder Victims") moved to be heard at re-sentencing. (ECF No. 206). The Binkholder Victims also moved for a modified restitution

sentencing order, setting the priorities of M.U. and Bank of America behind those of the individual victims. (ECF No. 210). Ultimately, M.U. did not oppose the relief sought by the Binkholder Victims. (ECF No. 222). On April 4, 2017, the Court agreed to the prioritization proposed by the Binkholder Victims, including having M.U.'s and Bank of America's claims prioritized below those of the individual victims. (ECF No. 227).

Discussion

Under the CVRA, a victim is "a person directly and proximately harmed as a result of the commission of a Federal offense." 18 U.S.C. §3771(e)(2)(A). In turn, Application Note 1(A) to §2B1.1 of the Sentencing Guidelines defines a victim as "any person who sustained any part of the actual loss[.]"

Binkholder argues that M.U. is not a victim under the Sentencing Guidelines. Binkholder notes that the definition of "victim" under the CVRA is designed to protect the rights of victims, whereas the definition of "victim" under the Sentencing Guidelines is designed to assess the culpability of the defendant. (ECF No. 203 at 3). Binkholder argues that the Court must determine whether M.U.'s "hard-money" scheme was part of the actual loss in order to determine whether he is a "victim" under the Sentencing Guidelines.¹ Binkholder claims that M.U.'s involvement in and knowledge of the crime means that any "loss" M.U. experienced was not a result of the offense, but rather a result of the discovery of and prosecution related to the offense. (ECF No. 203 at 4). Binkholder claims that "[b]ecause M.U.'s culpability exempts his losses, he is not a 'victim.'" (ECF No. 203 at 4). Thus, exempting M.U.'s losses, the proper loss

¹ "Generally speaking, hard money loans are a high-risk, high-interest type of loan secured by real property." *United States v. Binkholder*, 832 F.3d 923, 925 (8th Cir. 2016).

calculation under the Guidelines should be a loss greater than \$1 million, but less than \$3.5 million.²

In turn, the Government asserts that if M.U. is a victim under the CVRA, then he is likewise a victim under the Sentencing Guidelines. (ECF No. 204 at 3-4). The Government cites to the definitions of “victims” in both the CVRA and the Sentencing Guidelines to support its argument. As noted the Eighth Circuit’s dissent,

to the extent that the two definitions vary, the CVRA appears to provide the narrower definition: the Guidelines only require that a victim “sustain[] any part of the actual loss,” USSG § 2B1.1 cmt. n. 1, whereas the CVRA requires “direct[] and proximate[] harm[] as a result of the commission of a Federal offense,” 18 U.S.C. § 3771(e)(2)(A). Thus, even if there are different standards for making an initial victim-status determination, a finding that a person is a victim under the CVRA’s narrower definition necessarily requires finding that the person is also a victim under the apparently broader definition in the Guidelines.

United States v. Binkholder, 832 F.3d 923, 933 (8th Cir. 2016).

The Government further argues that, even if M.U. could be a victim under the CVRA and not the Sentencing Guidelines, M.U. is nevertheless a victim as defined in the Application Note 1(A) of the Sentencing Guidelines. (ECF No. 204 at 4). The Government contends that M.U.’s funds were misused by Binkholder just like the funds of the other victims in the case. The Government claims that there was no evidence adduced that Binkholder was complicit in Binkholder’s scheme. (ECF No. 204 at 4). The Government states that M.U. was responsible for managing the properties, had no access to certain accounts, and was unaware of Binkholder’s

² Finally, Binkholder asserts that M.U. is not entitled to restitution under the Mandatory Restitution to Victims Act (MVRA), 18 U.S.C. §3663A, because, although he experienced harm, he fits within the “co-conspirators exception,” whereby federal courts do not redistribute funds among guilty co-conspirators. The Government notes that “[w]hether M.U.’s loss is included for purposes of calculating the Sentencing Guidelines only effects whether two points should or should not be added to Binkholder’s Sentencing Guidelines calculation. It should have no effect on the amount of restitution owed to M.U. by Binkholder.” (ECF No. 204 at 5, n.1 (citing *United States v. Niebuhr*, 456 F. App’x 36, 39 (2d Cir. 2012)).

scheming with respect to the obtained funds. (ECF No. 204 at 4). The Government asks the Court to “make a finding that M.U. is a victim pursuant to the Sentencing Guidelines [and] include M.U.’s loss as part of the loss generated by the scheme.” (ECF No. 204 at 5).

The Court holds that M.U. is a “victim” under the definition in the Sentencing Guidelines. The evidence presented shows that M.U.’s money was used to further Binkholder’s scheme, without the knowledge of M.U. Based upon testimony adduced at the hearing before the Court, M.U. sustained a loss in excess of a million dollars. Clearly, this amount of loss makes M.U. a “person who sustained any part of the actual loss.” Moreover, the Eighth Circuit has already determined that M.U. is a “victim” under the CVRA, which requires “direct[] and proximate[] harm[] as a result of the commission of a Federal offense.” 18 U.S.C. § 3771(e)(2)(A). Given the CVRA’s narrower definition of a victim, the Court holds that M.U. must be a victim under the broader definition of a victim in the Sentencing Guidelines.

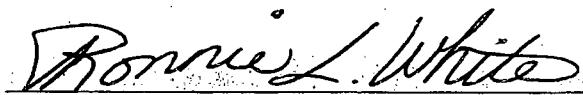
Moreover, the Court holds that Binkholder has provided no evidence to rebut the evidence adduced at the hearing that M.U. was a victim. At the hearing, the Government presented evidence that M.U. was unaware of Binkholder’s scheme and suffered a loss in excess of a million dollars as a result of that scheme. In his papers, Binkholder cites to no evidence to support his contention that M.U. was not a victim.³ Thus, based upon the unrebutted evidence presented by the Government, the Court holds that M.U. is a victim under the Sentencing Guidelines.

In sum, based upon the Court’s review of the definition of a “victim” under the Sentencing Guidelines and applying the facts of this case to that definition, the Court holds that M.U. is a

³ Binkholder cites only to this Court’s February 9, 2015 Order (ECF No. 102), which was vacated by this Court’s subsequent Order (ECF No. 131). Thus, this Court’s February 9, 2015 Order cannot constitute evidence to support Binkholder’s position.

victim under the Sentencing Guidelines. The Court holds that M.U.'s loss constitutes loss generated by Binkholder's scheme and should be included for purposes of calculating the Sentencing Guidelines.

Dated this 3rd day of May, 2017.


RONNIE L. WHITE
UNITED STATES DISTRICT JUDGE

Subject: FW: Kyle Sprysa Canada

Date: Wednesday, March 4, 2015 at 9:36:43 AM Central Standard Time

From: bryan binkholder

To: Lisa Binkholder

From: Michael Ursch <mikeursch@yahoo.com>

Reply-To: Michael Ursch <mikeursch@yahoo.com>

Date: Thursday, January 1, 2015 at 9:44 AM

To: bryan binkholder <bryan@binkholder.com>

Subject: Re: Kyle Sprysa Canada

Thanks for update. Have a better new year.

On Wednesday, December 31, 2014 6:56 PM, bryan binkholder <bryan@binkholder.com> wrote:

FYI, Kyle and his Canadian group (who own 4 props) contacted Ray Bartle and they want to purchase the 32 props of Hamilton/starbucks that has been in limbo since the sale/indictment.

They are offering right now around \$1.96M with 20% down. Same terms as others....7.5% IO with 5 yr balloon.

Kyle has always given us advanced checks for payments (meaning he sends a 6 month supply) so he's been good.

I'm going finalize it and give it to Stephen Casey and see if he'd approve it (doubtful but will try).....

I'll forward the info once I get it from Ray/Kyle

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-2688

United States of America

Appellee

v.

Bryan Binkholder

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cr-00247-RLW-1)

ORDER

Attorney, Joel J. Schwartz is hereby appointed to represent appellant in this appeal under the Criminal Justice Act. Information regarding the CJA appointment and vouchering process in eVoucher will be emailed to counsel shortly.

August 08, 2017

Order Entered under Rule 27A(a):
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix 19

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2688

United States of America

Appellee

v.

Bryan Binkholder

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cr-00247-RLW-1)

ORDER

The motion to withdraw as appointed counsel is granted. Mr. Joel J. Schwartz is hereby granted leave to withdraw from this case.

The motion for extension of time to file a pro se petition for rehearing is granted. Petition for rehearing is due January 4, 2019.

Electronically-filed petitions for rehearing must be received in the clerk's office on or before the due date.

The three-day mailing grace under Fed.R.App.P. 26(c) does not apply to petitions for rehearing.

December 07, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-2688

United States of America

Appellee

v.

Bryan Binkholder

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cr-00247-RLW-1)

ORDER

The petition for rehearing by the panel is denied.

January 25, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans