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Attorney for Defendant
DAVID RUSSELL FOLEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID RUSSELL FOLEY,

Defendant.

Case No. CR 09-00670-EJD

Case No. CR 11-00554-EJD

Proffered Statement of David R. Foley
for Allocution or Testimony at Sentencing

Proffered Statement of David R. Foley
for Allocution or Testimony at Sentencing

If Mr. Foley were called to testify or to address the court in exercising his right of allocution with regard to the topics of the sentencing memorandum being submitted for the hearing of December 18, 2013, especially the discussion of guideline calculations, he would state essentially the following in addressing specified points:

- 1) He was granted the right to argue “loss” in his plea agreement. This was a crucial point for him because he believes that the net loss incurred by Global VR must be zero and that Global VR gained far more in value, value for which they did not compensate him, than he ever derived from the sale of game packs.
- 2) Probation officer Flores told him that if he continued to argue loss, that he would face negative consequences for his actions. This was born out in the change in Mr. Flores’ stance between the draft PSR and the final PSR. Flores suggested that Mr. Foley would not only lose his agreed upon downward departure for acceptance of reasonability, but Flores also made

1 recommendations that he receive the maximum penalty available along with a string of other
2 restrictions as punishment. Mr. Foley provided Officer Flores with many supporting documents
3 and invited him to look at the net loss, as set forth in the guidelines, as opposed to gross loss.
4

5 3) While Global VR and Mr. Foley entered into a purchase agreement for the transfer of assets of
6 UltraCade Technologies to Global VR, Global VR never held up its part of the bargain.

- 7 a. Global VR agreed to a total price of \$6,343,315 to purchase UltraCade, which is outlined
8 in the ABC documents supplied by the government as exhibits in the loss hearing
9 conducted by the court.
- 10 b. One portion of the purchase price of \$1,460,000 was secured by a promissory note
11 against Global VR's assets. Global VR had paid only \$660,000 towards this note. This
12 was due to be paid in full by 2008. Global VR completely stopped making these
13 payments. Mr. Foley confirmed this number with the current Chief Executive Officer of
14 Global VR, Ken Bayer. Mr. Foley provided a copy of the confirmation from Mr. Bayer to
15 the probation department as part of the objections to the preliminary PSR, but it was
16 never mentioned in the PSR.
- 17 c. Mr. DeRose testified in the loss hearing that he personally helped move the inventory and
18 assets to GVR, confirming Mr. Foley's assertion that he transferred significant value to
19 Global VR.
- 20 d. The audited value of the inventory was calculated at \$535,958.27 on March 16, 2006.
- 21 e. As part of the ABC, Global VR was required to assume \$375,000 of liabilities with
22 Capcom for a license agreement. Global VR never assumed that liability and left Mr.
23 Foley with that debt.
- 24 f. The adjusted value of the furniture and equipment transferred to Global VR from
25 UltraCade was \$133,777.33, after adjustments and depreciation were calculated on
26 March 13, 2006.
- 27 g. Mr. Foley transferred \$102,532.53 worth of accumulated depreciation to Global VR,
28 which could be used moving forward as a discount against their fixed assets to reduce
their tax liabilities.

- 1 4) While Global VR and Mr. Foley entered into an employment agreement on June 2, 2006, Mr.
 2 Foley was actually hired as Chief Technical Officer on January 16, 2006. Global VR therefore
 3 owes me \$96,153.85 in unpaid wages plus interest.¹
 - 4 a. Mr. Foley filed a labor claim for the unpaid wages in 2007.
 - 5 b. In the General Assignment portion of the ABC documents, it is noted that there is an
 6 outstanding dispute for unpaid wages with Mr. Foley and Cristina Matthews.
 - 7 c. Mr. Foley has previously supplied probation with documentation showing the unpaid
 8 wage claims, as well as emails, org charts, corporate phone lists all showing that he was
 9 the Chief Technical Officer for Global VR in January 2006.
- 10 5) In December 2005, after signing the MOU, Mr. Foley transferred physical assets and intellectual
 11 property assets to Global VR, and Global VR immediately took possession of them and sold
 12 them for their own gain, months prior to the execution of the ABC.
 - 13 a. Global VR sold UltraCade arcade games, game packs, and various other products,
 14 keeping 15% of the revenue for themselves. They claimed it was a commission, but there
 15 was never any reference to such an agreement in any of the documentation provided by
 16 the government allowing them to keep a portion of UltraCade revenue prior to closing.
 - 17 b. Mr. Foley does not know the total amount of value for the sales of physical items by
 18 Global VR, but he does know that he has a report from February 3, 2006, which shows
 19 that number to be \$338,035.51 after two months of GVR selling UltraCade product.
 - 20 c. Global VR licensed the UltraCade Casino Gaming products to Bally Technologies in
 21 January 2006. These licenses were for multiple games, and the signing bonuses alone
 22 were worth \$135,000.
 - 23 d. Jim DeRose instructed Mr. Foley to sign these agreements with Bally on behalf of Global
 24 VR. Mr. Foley has previously submitted emails showing Global VR's instructions to
 25 enter into these agreements.
 - 26 e. Global VR submitted the first three Casino games to Bally on February 16, 2006.
 - 27 f. Jim DeRose knew these contracts were signed by Global VR, and circulated an email to
 28 executive staff at Global VR telling them not to sign any more agreements, until after the

¹ The findings of the court on January 29, 2013, were as follows:'

THE COURT: THEY HIRED YOUR CLIENT TO CONTINUE. THEY OFFERED HIM A JOB. I THINK HE WAS PAID \$250,000 A YEAR, IF I'M NOT MISTAKEN, WAS WHAT THE TRANSCRIPT SAID, AS A CTO OR CFO OR SOMETHING—NOT A CFO, BUT HE WAS SOME TYPE OF A TECHNOLOGY PERSON PERHAPS OVERSEEING THAT PORTION OF THE PRODUCT, THE GAME PRODUCTS. AND THEY MOVED HIS COMPANY, ULTRACADE, AND HIS WORK FORCE. [LHTX 01/29/13; 47:1-25]

1 acquisition was completed. Nobody ever changed the existing contracts and they
2 remained in the name of Global VR. Global VR continued to submit and bill Bally for
3 these games under the original contract signed in January 2006. This email was discussed
4 in the loss hearing and identified by Jim DeRose to be true and correct.

5 6) Global VR had offered continued employment to Cristina Matthews while the acquisition of
6 UltraCade was taking place, but on June 2, 2006, Global VR refused to pay her wages.

7 a. Mr. Foley personally assumed that obligation of \$25,000 and paid it with interest

8 b. The ABC documents noted the existence of this unpaid wage claim.

9 Dated: December 10, 2013
10 at Palo Alto, California

11 /s/ Jerome P. Mullins
12 _____
13 Jerome P. Mullins
14 Attorney for Defendant
15 DAVID RUSSELL FOLEY
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