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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA, **Plaintiff,**	**Case No. CR 09-00670-EJD** **Case No. CR 11-00554-EJD**
vs.	**Statement for Sentencing of Defendant DAVID RUSSELL FOLEY**
DAVID RUSSELL FOLEY, **Defendant.**	

Statement of Facts

On January 2012 I pled guilty to conspiracy to commit mail and wire fraud. My plea was taken pursuant to an agreement which provided for an advisory sentencing guideline range from 0 to 51 months, pending on the calculation of the loss amount involved in the offenses.

The court held an evidentiary hearing with regards to loss calculation and estimated the gross loss be $450,000. We objected to this calculation, and asked for a follow up evidentiary hearing to discuss several unresolved issues with regards to the loss calculation, and evidence not available at the first hearing. The court denied the request.

The Probation Department has used the $450,000 loss amount, and added a 14 level enhancement. The Probation Department further denied the agreed upon deduction in points for acceptance of responsibility, citing my continued argument of loss as granted in my plea agreement, resulting in a suggested guideline range of 31-41 moths. We have objected to this calculation.

The purpose of this memorandum is to urge the Court to:

(a) accept the defense position that the net loss amount is $0;

(b) find the advisory sentencing guideline range to be 0-6 months; and

(c) impose a non-jail sentence based on my history and characteristics, payment in full of the civil settlement, and other factors that are present in this highly unusual case.

Discussion

It was an unlikely journey that took me, a self-made entrepreneur and inventor, from the working class woods of rural Maine to a leading developer in Silicon Valley. I graduated from Windham High School in 1983 and put myself through Northeastern University's College of Computer Science where I started my first software company. In 1990 I moved to the Bay Area. I am a serial entrepreneur, and have been a constant creator of jobs in the Bay Area. I have, even to my own detriment, always taken great care of those around me, including family, friends and employees, as the court can tell from the dozens of supporting letters that it has received.

In this case, as in any case, the Court is required to examine a number of factors in determining an appropriate sentence. Some of those are statutory, others merely human. When all things are considered, I contend that all of the relevant factors support a non-jail sentence.

18 USC §3553(a)

Among other things, 18 USC §3553(a) requires a sentencing judge to consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines...;

(5) any pertinent policy statement issued by the Sentencing Commission...;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

I will address each of these topics individually.

A. The nature and circumstances of the offense of conspiracy to commit bank fraud

In perhaps no case in recent memory have the nature and circumstances of the offense been more important and less understood. This case is centered around a dispute that arose from a business sale that was never completed, and the chain of events that resulted from that dispute. I never set out to commit criminal acts, and until the Indictment was brought forth, I was unaware that I had run afoul of the law in any way. Having reached a settlement agreement in the civil case before the Indictment was brought down; I was shocked and disturbed to be accused of having committed any criminal acts, and that the events from this business deal were not concluded.

In this case, there are two counts to which I pled guilty. The first, involving conspiracy to commit Mortgage Fraud, finds no disagreement. I, following bad advice from his loan broker, closed escrow on my home financing a week after being terminated from Global VR, misrepresenting my employment information at the time of closing. I have admitted to my acts in this count, and have taken full responsibility for these acts. There is no argument by the Government, or Probation, that there is no actual loss or any intended loss. The value of the home is far greater than the outstanding loan balance obtained. I continue to live in this home and continue to make mortgage payments on time. I have made every effort, despite the circumstances of this case driving me into personal bankruptcy, to make payments, including all payments and interest to the mortgage company.

None of the above is intended to suggest that I did not commit conspiracy to commit bank fraud in his obtaining my mortgage with the bank. I did. As I have admitted in his guilty plea, that I did not provide accurate information to the bank prior to closing, and that clearly constituted conspiracy to commit bank fraud. At the same time, in discussing the nature and circumstances of the offense, it is extremely important to note that the bank would have approved the mortgage had I simply changed my employer information as I was receiving greater compensation from my new employment contracts, and was actually taking home a greater amount than my payments from Global VR. It is also extremely important to note that the bank has never requested any action against me in this matter. This case was brought by the Government, and not initiated by a complaint from the bank.

The nature and circumstances of the offense, therefore, are highly unusual in that:

(1) I intended no loss;

(2) I have continually lived in the property financed;

(3) I continue to make regular payments to the bank for this loan;

(4) I intend to pay the loan in full with interest, as agreed upon in the original transaction;

(5) If I am given a non-prison sentence, I will be able to maintain employment and continue to make timely payments, preventing any possible loss to the bank, whereas any lengthy incarceration will inevitably prevent me from being employed and thereby prevent me from continuing to make payments to the bank. Such a sentence would prevent any loss from taking place. The unusual nature and circumstances of the offense mitigate in favor of a non-prison sentence.

B. The nature and circumstances of the offense of conspiracy to commit mail and wire fraud

As in the previous count, this count is centered solely around a dispute that arose from a business sale that was never completed, and the chain of events that resulted from that dispute. As noted previously, I and Global VR have settled our dispute in the civil case, and I have made full payment of the civil settlement. Further, Global VR and I have continued to do business together for the past several years, with me purchasing inventory from Global VR and supplying Global VR with new display technology for development of future products. I have have also purchased back from Global VR the domain name from the original company, ULTRACADE.COM.

The Government has gone to great lengths presenting testimony and victim impact statements from James DeRose, former CEO of Global VR. It should be noted that Mr. DeRose left his position at Global VR prior to the Indictment in this case, and is not a representative of Global VR. His statements, and in particular his submitted "Victim Impact Statement" do not represent Global VR. Mr. DeRose, who is bound by the civil settlement, has repeatedly violated the terms of that agreement, while I and Global VR continue to abide by it. Mr. DeRose has publically stated on many occasions that it is his mission to put me behind bars and is in stark contrast to the wishes and desires of Global VR and its current management, who reached a settlement with me and continues to work with me as both a customer and supplier.

The offense of the instant charge is the mislabeling of games as being sourced from UltraCade Technologies, a company whose operations were shut down in December of 2005. The company was originally to be sold to Global VR, however that sale was ultimately cancelled. A second agreement, for Global VR to purchase certain assets of UltraCade was executed on June 2, 2006, however, that agreement has never been completed.

The record shows that Global VR has failed to pay for more than 50% of the agreed purchase price for the assets. The record is also clear that none of the UltraCade Creditors, including me, have ever received any payment of any kind from the proceeds of the asset purchase agreement.

None of the above is intended to suggest that I did not commit conspiracy to commit mail and wire fraud in his mislabeling of the game packs as coming from UltraCade Technologies. I did. As I have admitted in my guilty plea, I did not know that this was a criminal offense, and I known so, I would have simply relabeled the games as coming from him personally to prevent such a criminal act from taking place. I was aware that my actions were in violation of my employment agreement, however, I did not have any idea that it could be considered a criminal act.

The nature and circumstances of the offense, therefore, are highly unusual in that:

(1) I intended no loss;

(2) The customers who ultimately received the game packs from the sales by co-defendant Daddona received what they had bargained for, and the mislabeling of the games in now way affected the operation or performance of the games;

(3) I own and have continually owned the right to reproduce and sell the game packs in question. This was confirmed by several documents submitted to the court including the encumbered assets listing portion of the ABC agreement and many of the royalty reports submitted, showing Global VR making royalty payments to me for these games;

(4) I have agreed in the civil settlement that I will no longer offer the game packs for systems compatible with the units sold by Global VR, and have continued to abide by this agreement which was reached prior to the Indictment;

(5) I have paid in full the civil settlement agreement including interest to Global VR;

(6) I have taken on the burden of paying the creditors of UltraCade personally, since Global VR has refused to abide by the terms of the purchase agreement and has failed to make payments to all but one of the Creditors, who are owed millions dollars;

(7) If I am given a non-prison sentence, I will be able to maintain employment and continue to make payments to the creditors, lenders and former employees of UltraCade, who have only never received any form of payment from the Global VR . I have, as part of my personal Chapter 11 bankruptcy plan, agreed to pay, in full, with interest all unpaid payroll, loans, and royalties that were to be covered by Global VR, but have not been, preventing any possible loss to the anyone involved with UltraCade, whereas any lengthy incarceration will inevitably prevent me from being employed and thereby prevent me from continuing to make payments to the bank, thus preventing any further damage and loss from

taking place out of this failed business deal. The unusual nature and circumstances of the offense mitigate in favor of a non-prison sentence.

C. The history and characteristics of the defendant

In addition to what was chronicled in the Probation Department presentence report regarding my life story, the history and characteristics of me are best summarized by the supporting letters written by my family, friends, employees and business associates. My brother write of the long standing support and devotion that I have offered my family, including my abusive father. My many employees wrote at length about how I, even when not receiving the agreed upon payments by Global VR, used the proceeds from my sales of Gamepacks to support the many employees that were not receiving agreed upon pay from Global VR. Bruce Bean, a disabled World War II veteran wrote about how had it not been for my continued support, both emotionally and financially, he fears he would not be alive today. Frank Happ, an investor in UltraCade wrote describing how Global VR failed to live up to their agreement to pay him and the other UltraCade creditors, and how I have been diligent in making sure that the debts owed by the shutdown company are honored even though its legally the obligation of Global VR. My wife wrote about how I have contributed both my time and money to several bay area charities and fund raisers for charitable organizations, even while going through the financial strains of bankruptcy and the emotional strains of fighting both civil and criminal cases.

These letters, and many more like them, describe a thoughtful, kind, generous, caring person whose many accomplishments in life are actually dwarfed by his contributions to others and to society as a whole.

D. The kinds of sentences available

I contend that for a number of valid reasons, the Court should grant a variance from whatever guideline range it decides is applicable, and sentence me to a non-prison sentence. If the Court agrees with my reasoning, variance which does not add the 2b1 increase from loss calculated by relevant behavior will be necessary to impose such a sentence.

If the Court does not agree with me, and finds that the proper sentencing guideline range falls into Zone D of the sentencing guidelines, and declines to grant a variance, the minimum term may be satisfied by a sentence of imprisonment that includes a term of supervised release that substitutes community confinement or home detention for imprisonment, with a minimal term of incarceration. I believe that the impact on the community, the creditors of UltraCade, my personal creditors , including

the Bank that holds my mortgage, Global VR, the over 30 employees currently reliant on me for jobs, and the public at large is best served if I am allowed to maintain employment and continue to make good on his commitments and mitigate the damage caused by my actions, and the rippling effect of the failed sale of UltraCade Technologies to Global VR.

E. Guidelines are but one factor of consideration in sentencing.

In United States v Booker, 543 US 220 (2005), the United States Supreme Court found those provisions of the Federal Sentencing Reform Act of 1984 that make the guidelines mandatory, or which rely upon the Guidelines' mandatory nature, incompatible with its Sixth Amendment holding in Blakely v Washington, 542 US 296 (2004). Accordingly, the Court severed and excised those provisions, "mak[ing] the Guidelines effectively advisory." Therefore, instead of being bound by mandatory sentencing guidelines, Booker merely required a sentencing judge to first consider the guideline range and then impose a reasonable sentence pursuant to 18 USC §3553(a).

The sentencing guidelines were again discussed by the Court in Gall v United States, 128 S Ct 586 (2007). In Gall, the Court set forth a number of important principles. First, the Court made clear that the sentencing guidelines are merely advisory and that appellate review is limited to the issue of "reasonableness:"

> As a result of our decision [in Booker], the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are "reasonable." Our explanation of "reasonableness" review in the Booker opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.

Second, it is equally clear that the sentencing judge must explain his or her reasons for departing from the guidelines: It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.

Third, the opinion placed certain restrictions on the extent of appellate review of a sentence outside the advisory guideline range, and specifically disapproved of certain criteria that had been utilized since Booker:

> In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires "extraordinary" circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical

formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.

Fourth, while the Court had permitted the circuit courts to adopt a presumption of reasonableness for sentences within the guideline range, it did not follow that those courts could adopt a presumption of unreasonableness for sentences outside the range:

> As an initial matter, the approaches we reject come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.....Even the Government has acknowledged that such a presumption would not be consistent with Booker.

Finally, the Court gave its reasons for its rejection of the "mathematical approach:

> " The mathematical approach also suffers from infirmities of application. On one side of the equation, deviations from the Guidelines range will always appear more extreme -- in percentage terms -- when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years. Moreover, quantifying the variance as a certain percentage of the maximum, minimum, or median prison sentence recommended by the Guidelines gives no weight to the "substantial restriction of freedom" involved in a term of supervised release or probation.

Most importantly, both the exceptional circumstances requirement and the rigid mathematical formulation reflect a practice -- common among courts that have adopted "proportional review" -- of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions -- whether inside or outside the Guidelines range.

With its decision in Gall, the Supreme Court laid to rest any argument whatsoever that trial judges are required to impose sentences within the sentencing guideline range. Sentencing guidelines are merely advisory. Courts are to impose reasonable sentences consistent with the principles set forth in the sentencing statute. And appellate courts are to review sentences using a reasonableness standard. End of story.

Proving that the elevator of sentencing discretion truly moves in both directions, the Second Circuit in United States v. Adelson, 06-2738-cr(L), 2008 WL 5155341 (2d Cir. December 9, 2008) (a summary order), affirmed Judge Rakoff's downward variance from life in prison to 42 months. The defendant had been convicted of securities fraud, and in his opinion explaining the sentencing decision, Judge Rakoff had spotlighted "the utter travesty of justice that sometimes results from the guidelines' fetish

with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense."

Quoting its landmark en banc ruling in United States v. Cavera, 2008 WL 5102341 (2d Cir. December 4, 2008) (discussed here) – where the Court had acknowledged that certain kinds of crimes, including financial cases, may produce non-Guidelines sentences based on the "wide variety of culpability amongst defendants," which, "if adequately explained, should be reviewed especially deferentially" – the Court held that Adelson was "just such a case." The Court expressly rejected the government's argument that the district court had essentially substituted its "personal view of the seriousness of the offense" for the Guidelines. Rather, the Court concluded, "the record demonstrates that the District Court's decision to impose a below Guidelines sentence was not a failure or refusal to recognize the Guidelines, but rather a carefully considered reliance on the Section 3553(a) factors."

F. The sentencing guideline range

There are two disputed issues with respect to the sentencing guidelines.

1. Acceptance of Responsibility

I have accepted responsibility for my actions. As part of my plea agreement, the government and I agreed that whatever guideline calculations were used, I would be receiving a 2 point credit for my acceptance of responsibility. My plea agreement specifically grants me the right to dispute loss, and contemplates no penalty for my exercising of this right. In the final Probation Department Presentence report, the credit for my acceptance was removed, and noted that because I continued to argue the loss amount, as granted to me in the plea agreement, Probation felt that I longer deserved this credit.

Nothing that I have done has ever indicated that I have not accepted responsibility. Not only in the court documents and my statements provided to the court, but also in public statements and press releases I have continually accepted responsibility for my actions, admitted that I made mistakes and that I am sorry for my actions. There is no record to indicate that I have not, and no reason for me to not receive the agreed upon credits, for which I partially relied on in entering into my plea agreement. If these credits are not be granted to me then I plea should be withdrawn, and the court would have to schedule a trial as to both cases.

2. Deduction from Loss of Civil Settlement.

The appellate courts have upheld sentencing decisions where the amount of payment of a civil settlement in a related civil case should be deducted from any Loss calculations in determining the

Guidelines range to be used. In UNITED STATES of America, Appellant, v. George S. BENNETT, Jr., Defendant, Appellee. No. 95-1051, July 31, 1995 the district court deducted the value of "at least $660,000" based on the settlement agreement in the civil suit, entered into after Bennett's crimes had been discovered. The district court also ruled that Bennett merited a two-level downward adjustment, see U.S.S.G. § 3E1.1, for acceptance of responsibility by agreeing to settle the indictment loans in full. The resulting Total Offense Level ("TOL") of 8, together with a Criminal History Category of I, produced a GSR of from 2 to 8 months' imprisonment, 24 to 36 months' supervised release, and a $5,000 to $50,000 fine. The district court sentenced Bennett to 24 months' probation and six months' home detention, special assessments totaling $450, and no fine.

Second, the civil suit settlement constituted "an extraordinary act that seldom occurs in the criminal courts." Accordingly, the district court granted a six-month downward departure from the recalculated GSR minimum, combined with a further 15-month downward departure for the "extraordinary act" of entering into the civil suit settlement agreement to repay $694,000.

The United States contends that Bennett I foreclosed both a downward adjustment and a downward departure for acceptance of responsibility based on the civil settlement and Bennett's belated expression of contrition at sentencing. See Bennett I, 37 F.3d at 696-98; see also U.S.S.G. § 3E1.1 (permitting two-level downward adjustment for clear demonstration of acceptance of responsibility).

Downward Departure

A sentencing court may depart from the GSR "only in the extraordinary case-the case that falls outside the heartland for the offense of conviction." United States v. Jackson, 30 F.3d 199, 201 (1st Cir.1994); see also United States v. Rivera, 994 F.2d 942, 947-49 (1st Cir.1993). The departure decision is subject to bifurcated review. United States v. Fahm, 13 F.3d 447, 450 (1st Cir.1994). First, all "quintessentially legal" rulings underlying the decision to depart (viz.,whether the guideline language encourages, permits or forbids departure for the kinds of reasons relied upon by the sentencing court) are reviewed de novo. Id. at 450 (quoting Rivera, 994 F.2d at 951). Second, the "heartland" determination itself is reviewed with "full awareness of, and respect for, the trier's superior 'feel' for the case." Rivera, 994 F.2d at 952 (citation omitted); see also Fahm, 13 F.3d at 450.

Extraordinary Act

Following Bennett I, the district court found that the $660,000 settlement agreement constituted "an extraordinary act that seldom occurs in the criminal courts," for which Bennett "should be rewarded" The district court carefully avoided explicit reliance on "acceptance of responsibility," apparently in

deference to Bennett I, 37 F.3d at 698 (stressing that restitution must be " 'genuinely voluntary, rather than motivated primarily by a collateral consideration such as a desire to settle the civil lawsuit' ") (quoting United States v. Miller, 991 F.2d 552, 553 (9th Cir.1993)); cf. United States v. Hendrickson, 22 F.3d 170, 176 (7th Cir.) (rejecting civil forfeiture, in light of its involuntary nature, as basis for finding of "extraordinary acceptance of responsibility"), cert. denied, 513 U.S. 878, 115 S.Ct. 209, 130 L.Ed.2d 138 (1994). Bennett I also held, however, that the civil suit settlement was not "genuinely voluntary," 37 F.3d at 698, and that " 'restitution is relevant to the extent it shows acceptance of responsibility.' " Id. (quoting Miller, 991 F.2d at 553) (emphasis added). Consequently, whether or not the civil suit settlement constituted an "extraordinary act," there has been no showing that it formed a material basis for either a downward adjustment or a downward departure, let alone for establishing restitutionary conduct outside the "heartland." See Rivera, 994 F.2d at 947. As the only ground for the challenged downward departure had been foreclosed by Bennett I, which plainly held that the civil suit settlement was not genuinely "voluntary" within the meaning of U.S.S.G. § 3E1.1, see Bennett I, 37 F.3d at 698, and could not form the basis for a downward adjustment for acceptance of responsibility, it could afford no permissible basis for the 15-month downward departure. See Miller, 991 F.2d at 553 (sentencing court may depart downward on basis of restitutionary conduct only if it evinces an acceptance of responsibility substantially greater than that required for a downward adjustment under U.S.S.G. § 3E1.1).

Overstated Loss and "Multiple Loss Causation"

On appeal, Bennett broaches for the first time the alternative arguments that the 15-month downward departure should be upheld either because the $837,000 total loss recalculation significantly overstates the seriousness of his conduct, see U.S.S.G. § 2F1.1, n. 7(b) (1994), or on the ground of multiple loss causation. See, e.g., United States v. Rostoff, 53 F.3d 398, 405 (1st Cir.1995) (acknowledging that a downward departure may be warranted in the "few instances" where " a misrepresentation is not the sole cause of the loss. ") (citing U.S.S.G. § 2F1.1, n. 11 (1987)); see also United States v. Gregorio, 956 F.2d 341, 345 (1st Cir.1992). Although Bennett contends that the total loss is overstated as a consequence of an economic downturn in the regional economy, insofar as the record on appeal permits assessment it undermines Bennett's claim. The valuation of the property Bennett agreed to surrender under the terms of the civil suit settlement was disputed at the initial sentencing; viz., the government contending for $431,024.16, Bennett $684,000. At that time, Bennett maintained that a slumping economy had reduced the value of the settlement after the banks took title to the improved properties and other assets tendered by Bennett. The district court accordingly rejected the lower valuation propounded by the government,

and found the settlement worth "at least $660,000." Subsequently, at resentencing, it placed the value of Bennett's "extraordinary act" at $694,000.

3. Deduction from Loss of Returned Collateral

In United States v. Goss, 549 F.3d 1013, 1019 (5th Cir. 2008) the courts determined that loss must be reduced by value of collateral returned. In the instant case, I have identified several thousand game packs, that were sold by UltraCade Technologies and me, to co-defendant Daddona. The value of these game packs far exceeds the loss calculation of $450,000 and should be turned over to Global VR as an offset against any loss, netting a loss of $0.

4. Deduction from Loss for Value of unpaid Assets

Several cases have determined that it is an error to not reduce the 2B1.1 loss calculations by the value of property or assets obtained or retained by the victim. In this instant case, the record clearly shows Global VR obtained the assets of UltraCade Technologies, but failed to pay for over $1.5M of obligated payments for the acquisition of the assets. A payment plan was established in 2006, and was to be completed by 2008. Confirmation from the current CEO of Global VR was given that rougly $660,000 in payments was ever made. Further, I have reduced the amount of liabilities associated with the assets by already paying several of the UltraCade Technologies creditors and employees in my personal bankruptcy. These values should be deducted from the 2B1.1 loss calculations. See United States v. Crandall, 525 F.3d 907, 912 (9th Cir. 2008) (Applying 2B1.1 it is error not to reduce loss by the value of properties); United States v. Leonard, 529 F.3d 83, 92- 93 (2d. Cir. 2008) (error not to reduce "loss" by investment's value to victims); United States v. Staples, 410 F.3d 484, 490 (8th Cir. 2005) (Loss should be reduced by the fair market value of the collateral at the time of sentencing; United States v. Nacchio, 573 F.3d 1062, 10776 (10th Cir. 2009) (error to not subtract from loss amount the value to victims in securities fraud case).

5. Loss Offset of pledged Assets

Just as there are fraud cases in which victims receive something of value, there are also fraud cases in which defendants have no intent to cause financial loss to anyone. For example, a defendant may lie about his debts to obtain a loan which he fully intends to repay. If the defendant then defaults after repaying a portion of the debt, the loss under § 2F1.1 is necessarily the loss the victims actually sustain, since there is no intended loss. This is significant, because the guidelines provide that if the loss a defendant intends to inflict is greater than the loss his victims actually sustain, the sentencing court is to consider the intended loss in setting the offense level. USSG § 2F1.1, Appl. Note 8. If a defendant who

intends no loss had pledged assets to secure the debt, then the loss would be reduced by the value of those assets. USSG § 2F1.1, Appl. Note 8(b). See United States v. Henderson, 19 F.3d 917, 927-28 (5th Cir. 1994) (applying this principle); United States v. Kopp, 951 F.2d 521 (3d Cir. 1991) (same). United States v. Wells, 127 F.3d 739 (8th Cir. 1997) (loss reduced by value of future payments to bank on leases assigned as collateral); United States v. Downs, 123 F.3d 637 (7th Cir. 1997) (loss reduced by value of assets pledged).

Other departures are unique to fraud cases. The fraud guideline suggests the appropriateness of a downward departure where the "loss determined under subsection (b)(1) may overstate the seriousness of the offense." USSG § 2F1.1, Appl. Note 11. See, e.g., United States v. Graham, 146 F.3d 6 (1st Cir. 1998) (loss overstates culpability where lower loss attributed to similarly situated defendants); United States v. Monaco, 23 F.3d 793 (3d Cir. 1994) (loss overstates seriousness where defendant had no intent to steal); United States v. Stuart, 22 F.3d 76 (3d Cir. 1994) (affirming loss calculation based on face value of stolen bonds, but suggesting appropriateness of departure on remand where defendant received little money for participation in offense, causing loss to overstate seriousness of offense).

6. Deduction when defendant had a good faith belief his conduct was lawful

I had no concept that criminal charges would ever be brought against me for my actions. While I willingly hid my actions from Global VR, I never intended that as a criminal act, but merely a disagreement over the execution, or lack thereof, of the terms we agreed to on multiple occasions. With regards to both charges, I understand that I broke the law, and do not dispute that. I did not however, enter into any of the actions with the knowledge or intention of breaking the law. See, e.g., United States v. Jasin, 25 F.Supp.2d 551 (E.D.Pa. 1998), aff'd, 191 F.3d 446 (3d Cir. 1999)

G. The need to reduce the destructive effects that incarceration of a defendant may have on innocent third parties.

The Court also notes that a permissible justification for a downward departure is "the need . . . to reduce the destructive effects that incarceration of a defendant may have on innocent third parties." (Id.) United States v. Milikowsky, 65 F.3d 4 (2nd Cir. 1995) The defendant's business would fold and his innocent employees suffer if he were imprisoned. See, e.g., United States v. Olberes, 99 F.3d 28 (1st Cir. 1996); United States v. Milikowsky, 65 F.3d 4 (2d Cir. 1995); United States v. Somerstein, 20 F.Supp.2d 454 (E.D.N.Y. 1998). But see United States v. Crouse, 145 F.3d 786 (6th Cir. 1998) (rejecting departure); United States v. Morken, 133 F.3d 628 (8th Cir. 1998) (same); United States v.

Rutana, 18 F.3d 363 (6th Cir 1991) (same), cert. denied, 502 U.S. 907 (1991); United States v. Reilly, 33 F.3d 1396 (3d Cir. 1994) (same).

After being terminated by Global VR, I set out to work for multiple companies, namely Streaming Networks, Inc. and Expresso Fitness. Because of threatening letters by Jim DeRose to both of these organizations, my contracts with both were terminated. I then created a new company, NanoTech Entertainment, Inc. I set out to build new products to sell to customers, as well as develop product under contract with Happ Controls. The specific project that I was working on for Happ Controls was to net me hundreds of thousands of dollars in royalties. I also had spent most of 2007 developing a new, next generation UltraCade style product from the ground up. Having invested thousands of hours and hundreds of thousands of dollars in development, my entire ability to work was interrupted in 2008 when the FBI raided my house, dismantled my development equipment and confiscated several hard drives, including ones containing projects unrelated to this case. The refusal to return those drives in a timely fashion caused me further damage by losing the contract with Happ Controls and a complete loss of my investment of time and money in the new game engine. Since 2008, I have worked an average of 80 hours per work to build up NanoTech from nothing to the business that it is today. In 2009, we merged with a public company to raise the money needed to go to market with our products and technology. Since then, we have built up the company with hundreds of investors who have millions of dollars invested in the company. We employ over 30 people in multiple states, and have offices in San Jose, San Francisco and East Bridgewater Massachusetts. While I have had to step down as CEO of my own company, I am responsible for the design and development of the products that we are creating and offering for sale. My case is highly publicized in the investment community, and there is great concern over the ability for NanoTech to sustain operations in my absence. I have great concern that a long incarceration will not only devastate the value of the company, but would start an avalanche of stock sell off resulting in the loss of millions for the investors, followed by the loss of jobs for the people we employ. To date I have invested well over 10,000 hours of my life into this company and well over a million dollars of my own money, along with that of my friends and family.

In the fall of 2008, forced by the overwhelming legal fees incurred in the civil case, the loss of income from the interference by Global VR with my ability to work, the loss of income from the contracts cancelled by the seizure of my work equipment by the FBI, I was forced to enter into a Chapter 11 bankruptcy. Despite the overwhelming odds of success, I asked that I be given a chance to rebuild my life, build my business and specifically asked that none of my debt be forgiven, merely give me time to pay it back, in full, with interest. In filing the Chapter 11 Plan, I also included all of the

creditors of UltraCade that had not been paid by Global VR as it was obvious by this time that Global VR had no intention of paying the debts it agreed to pay as it had stop making payments to the trustee. The bankruptcy filing put an immediate stay on the civil proceedings between me and Global VR. In the spring of 2009, I was attempting to get my bankruptcy plan approved by the court; however Global VR was objecting and demanding that they had claims to the estate. With no money to fight Global VR in the Bankruptcy court, and on advice of Counsel, I decided to enter into a civil settlement and agreed to allow Global VR to make a claim in my bankruptcy as a non-secured creditor. My lawyer felt that I would be better served just paying them, then paying lawyers a similar amount with no guarantee that the issue would be settled, and run the risk of losing my house and having my bankruptcy case thrown out. To date, I have been making payments on my plan, and have been able to pay off a significant portion of my debt, but also have begun to close out all but a few of the creditors. My plan is based primarily on my liquidiation of the stock in NanoTech, which I have earned both as part of my employment agreement and for several years in lieu of a paycheck when the business was not making money. My creditors, as part of my plan, are receiving 100% of the monies owed to them and interest.

In 1991, I was given the fortunate opportunity to hire a retired veteran, Bruce Bean. Mr. Bean has been with me ever since, and we consider him part of our family. With no family of his own, I have taken on the burden of caring for Mr. Bean for over a decade. Whether it was providing employment when he was able bodied, or now paying for over 50% of his monthly housing and medical care, I do it with pleasure. Bruce is a wonderful and loving man. He is a veteran of World War II and is affectionaly known by my son as Grandpa Bruce. In 2012, Bruce suffered from complications from injuries he received in world war two and was no longer able to walk. He was committed to a care facility in San Francisco where he was confined to a bed, sharing a room with two other patients. He was not receiving the level of care that he needed, and in the summer of 2012 indicated to me that he would rather be dead than continue living the existence he was facing. We immediately found him a proper care facility in San Francisco, where he could get the proper housing and care that he needed. Because of bureaucratic red tape he has not been able to get the VA funds needed to cover his expenses at the nursing home he is at. I have been providing the shortfall of roughly $2,000 between his monthly income and the expense for his housing and care.

If I am able to serve a sentence, that does not include incarceration, or at most a minimal amount of time incarcerated, and be allowed to continue to work, I will be able to minimize the negative impact that my sentence would have on the many innocent third parties that would suffer greatly. Namely if I am able to continue to work, hundreds of investors investment will continue to be realized, many

employees will keep their job, creditors will continue to receive payments, and Mr. Bean will continue to be able to afford the care and housing he has today. I wish nothing more than be given the ability to continue to make right, all of my creditors and debtors involved in UltraCade and put an end to the collateral damage that has come out of this case and the events surrounding it.

H. The need to avoid unwarranted sentencing disparities

Codefendant 18 Months' Probation

With regards to the conspiracy to commit bank fraud, the co-defendant in this matter was sentenced to 18 months' probation, and that I should receive a similar sentence.

With regards to the mail and wire fraud the defense asserts that I should receive a similar sentence to those that have been sentenced in similar situations, with similar loss ranges, and in many of those cases, a term of probation only was granted.

Fraud Case - Loss of $450,000, Probation Only Sentence

United States v. Alatsas, No. 06-CR-473 (JBW), 2008 WL 238559 (E.D.N.Y. Jan. 16, 2008). Notwithstanding a loss figure of $450,000 and an advisory Guidelines range of 24 to 30 months imprisonment, the Court imposed a probationary sentence based on:

(1) Alatsas' substantial cooperation with the Government;

(2) the good relationship he had with his wife and three children; and

(3) most significantly from a defense perspective, his status as "an ethical entrepreneur except for this one aberrant offense."

Fraud Case – Loss of $942,101 – 3 Years Probation

United States v. Warren Coman USA v. Coman, 2:12-cr-00031, No. 14 (S.D.Ohio May. 16, 2012) A Dublin man involved with a $900,000 mortgage-fraud scheme in 2006 and 2007 was sentenced today to three years of probation after he pledged to stay out of trouble. U.S. District Judge Peter C. Economus questioned Warren A. Coman II from the bench for about 15 minutes before deciding against a prison sentence. The judge said he would make a decision later about how much restitution he'll order Coman to pay.

Coman recruited buyers and falsified their income, assets and employment history on loan applications. He was involved with some of the 38 properties in the scheme that were on the Near East Side. The estimated loss to lenders was $942,101.

Loss of $667,505 – 60 Days Prison – 6 Months Home Detention – 3 Years Supervised Release

U.S. District Judge Edward J. Lodge sentenced Tiffany Kim Hymas, 38, to 60 days in prison followed by three years of supervised release, beginning with six months of home detention. She also was ordered to pay $667,505 in restitution. (CASE NO. 08-00802-TLM, ADV. NO. 08-06096-TLM. In re: AARON ICHAEL HYMAS and TIFFANY KIM HYMAS)

Fraud Case - $1.5M Loss – 1 Year Home Confinement – 1 Year Probation

United States v. Roland Harper Illinois Northern District Court, Case No. 1:07-cr-00314 – Sentenced 2009 Former Chicago Bear Roland Harper was sentenced to a year of house arrest Tuesday for acting as a front man in a $1.5 million fraud involving a landscaping contract for Chicago public schools. U.S. District Judge John W. Darrah also required the 56-year-old former fullback to perform 200 hours of community service and pay $25,000 in restitution and forfeit $50,000. He'll also serve two years of probation, including the year he is confined to his home.

Fraud Case - $300,000 - Five Years' Probation plus Restitution

United States v. Scott Schuriemen – A U.S. District Court judge spent 20 minutes Tuesday discussing the reasons why Scott Schuhriemen should be sent to prison for his role in one of the biggest flipping-fraud conspiracies in Florida history.

But, in the end, Judge Steven D. Merryday sentenced the former Sarasota mortgage banker to five years' probation and ordered him to pay slightly more than $300,000 in restitution to his former employer.

I. Extraordinary Self Rehabilitation

Since the time of this case I have gone out of my way to make amends, not only with Global VR, but also with all of the investors and creditors of UltraCade. Further, I have gone to extraordinary lengths to pay back my personal creditors, including the bank that provided my mortgage, in full, with interest. Rather than ask for my overwhelming pile of debt to be forgiven and start fresh, I have chosen the path to make everyone whole. I have continued to abide by the terms of my civil settlement with Global VR, and have re-established a business relationship with Global VR, as both a customer and vendor. I have been on supervised release for four and a half years, without incident. Rather than wallow in self-pity, or blame others for my situation, I have taken on the responsibility for my actions and have been rebuilding my life and making amends to those affected by the case at hand. I am continually attacked on a daily basis on internet forums for classic games and investments, and have to live not only with the fact that I am a convicted felon, but that there are those people out there that will never let me forget, and will let everyone that I do business with know it.

Rehabilitation in Prison

United States v. Blake, 89 F.Supp.2d 328 (E.D.N.Y. 2000) In this case District Judge Weinstein refused to sentence a young woman bank robber to prison because he concluded that incarceration would "debilitate" rather than "rehabilitate" her. Pointing to a number of factors, including the defendant's diminished capacity, the aberrant nature of her criminal act, her family responsibilities, her potential for rehabilitation, and an abusive relationship with her former boyfriend, Judge Weinstein granted a downward departure of 21 levels from her Guidelines sentencing range of 87 to 108 months, resulting in a sentence of "time served" - which equated to about one month in custody.

At sentencing, the defendant never challenged her Guidelines sentencing range, arguing, instead, that she should be granted a downward departure on the basis of the various grounds noted above.

Interestingly, the Government declined to take a position on the downward departure motion, stating that the fact of the case were "so complex" that the sentence should be left to the discretion of the Court. However, the assistant bank manager who was stabbed submitted "a powerful victim impact statement" in which she implored the Court to impose "the maximum penalty available."

In his decision, Judge Weinstein patiently explored each of the cited grounds for departure. He concluded that a departure based on the defendant's diminished capacity at the time of the crime was appropriate under U.S.S.G. § 5K2.3; that a departure based on the ground that the crime was a single act of aberrant behavior was appropriate under U.S.S.G. Ch.1, pt. A, Intro. Comment § 4(d); and that a departure based on the emotional trauma that the defendant's three year old child would suffer was appropriate under U.S.S.G. § 5H1.10. He also noted that a number of courts have recognized that a defendant's potential for rehabilitation provided a separate ground for a downward departure - a position with which he agreed, stating "incarceration seems ill suited to facilitate rehabilitation of someone like her. Instead of being surrounded by her loving family and church, she would be placed in an atmosphere fetid with crime. Rehabilitation outside of incarceration is increasingly the only practicable way of dealing with individuals who are still ethically malleable."

The most interesting aspect of this lengthy decision was its detailed and erudite discussion of two topics: the impossible goal of rehabilitation in the modern prison setting; and the recent advent of the use of victim impact statements at sentencing.

On the impossibility of achieving any rehabilitation in prison, Judge Weinstein wrote: ""Instead of reforming its inmates, too often a prison converts them into 'hardened enem[ies] of society.' . . . Not only do American prisons today contain on a pro rata basis more prisoners than any other industrialized nation, . . . , the conditions of the prisons are 'often undisciplined, dangerous, and degrading.' . . .

"This atmosphere makes debilitation much more likely than rehabilitation. Whether by introducing petty criminals to more violent offenders, forcing prisoners into racist gangs, or subjecting them to violence and rape, too often the prison system serves merely to exacerbate the criminal tendencies of its inhabitants. . . .

"It has become increasingly clear that utilization of non-incarcerative sentences needs to be increased. Due in part to harsher sentences required by increased statutory penalties, harsh guidelines, and mandatory minimum sentences, the federal population of prisons has multiplied exponentially in the past few decades. . . . The total United States prison population is now some two million; when added to

those in jails and on bail, parole, probation, and supervised release, the total of 'non-free' defendants must be in the order of three million...

"Prison conditions encouraging rehabilitation have deteriorated as educational and drug programs, space per prisoner, and library and other facilities have decreased relative to the number of prisoners. In addition, state and federal laws have reduced opportunities for higher education of prisons and their access to libraries and the courts. Increased numbers of prisoners with AIDS, tuberculosis, and other diseases add to the risks prisoners face, as does the threat of sexual attacks and racially controlled gang and individual violence. Somewhat ironically, this trend has occurred at the same time as the nation has made enormous expenditures for new prisons, not to improve them but simply to handle the growing population."

J. The need to provide restitution

As the Court knows from its experience, it is highly unusual for defendants to ever pay restitution in full, let alone prior to the date of sentencing. And that is another reason why the Court should sentence me to a non-prison sentence. I have demonstrated extra-ordinary remorse and a deep desire to “make things right” not only with Global VR, but with anyone involved in the UltraCade Technologies transaction. I have recently made payment in full to Global VR, in the amount of the civil settlement with interest, an amount which was recommended in the Presentence Report as my restitution. I still however have to complete my bankruptcy, most notably the Mortgage Company and Frank Happ, UltraCade’s largest creditor. A non-prison sentence where I can continue to work, collect a paycheck and create value in my stock, would allow me to continue to make payments to these people.

Sentencing Variance

18 USC §3553(a) requires a sentencing judge to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." (Emphasis added). Subsection (2) states that such purposes are:

Sentencing Variances (to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense)

With respect to subsection (A), this offense, while admittedly serious, there has been no indication that I willfully violated the law, and the record is clear that upon the initial investigation by the FBI, I halted any and all sales of the game packs in question. I have demonstrated during the past 5 years that I not only understand and respect the law, but I have suffered severe punishment already just from the existence of this case.

Sentencing Variances ((B)to afford adequate deterrence to criminal conduct)

I have been on Pre-Trial release for over 4 years, and has demonstrated law abiding behavior. I have been the subject of supervision by several different Pre-Trial officers, and have had shown lawful conduct. There is no suggestion that I have not already been deterred from further criminal conduct.

Sentencing Variances ((c) to protect the public from further crimes of the defendant;)

There has been no indication that my behavior was but an isolated aberration. My record prior to this incident is completely void of any criminal law enforcement contact, and that since the initial contact with the FBI in during their investigation in 2008, I have demonstrated no indication of further criminal activity.

Sentencing Variances ((D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.)

There are a number of §3553(a) factors that might lead the Court to conclude that a sentencing variance is appropriate in this case. Based on all known studies of recidivism, both by the United States sentencing committee and external third parties, based on my age, lack of criminal history, physical and mental stability, educational background, and employment record there is little possibility of recidivism or violent behavior, and no need for educational or vocational training. Those are certainly things that the Court may consider pursuant to §3553(a)(1) and (a)(2) in granting a variance from the sentencing guidelines.

Extent of variance from the guidelines

When a trial judge grants a variance at sentencing, an issue may arise at times as to the permissible extent of the variance. One case that is helpful as to this issue is United States v Husein, 478 F 3d 318 (6th Cir. 2007), an appeal of a sentencing decision by Judge Roberts of the Eastern District of Michigan. Although Husein presents a different set of facts, the Sixth Circuit's language rings true in the instant case as well:

> We also recognize that, as in Fuson, this case "approach[es] the boundary of the district court's broader sentencing discretion under Booker." But the plain import of Booker is that a 1-day, below-the- Guidelines sentence, no less than a 7,300-day, above-the-Guidelines sentence, is now a viable sentence for a district court to impose so long as it is authorized by statute and reasonable within the meaning of 18 U.S.C. § 3553(a). Cf. United States v. Booker, 543 U.S. 220, 264 (2005) individualized sentences where warranted."). Because Husein's sentence both falls within the statutory range and survives reasonableness review as defined by the law of this circuit..., we find no abuse of the district court's Booker discretion under the unique facts of this case.
>
> ("[T]he [Sentencing Reform] Act without its mandatory provision . . . remains consistent with Congress' initial and basic sentencing intent[:] to provide certainty and fairness . . . avoid unwarranted sentencing disparities . . . and [yet] maintain sufficient flexibility to permit

Ms. Husein was convicted of distribution of ecstasy. Her sentencing guideline range was 37-46 months. She did not cooperate nor was a §5K1.1 motion filed by the government. Judge Roberts sentenced her to one day in custody, three years supervised release, and 270 days home confinement. The Husein case was decided after Booker, but before Gall.

The same logic should apply in the instant case. While there well may be a "boundary" of this Court's sentencing discretion under Booker and Gall, that boundary is determined under a reasonableness standard. And given my history and characteristics, as well as the other factors discussed in this memorandum, this Court has wide latitude to impose a sentence that is both fair and reasonable under all the circumstances and consistent with the law.

Sentencing alternatives

In the bad old days of sentencing, courts were basically forced to choose between sending a defendant to prison or placing him on straight probation. Fortunately, those days are long gone and

sentencing judges now have a variety of alternatives available to them. In the instant case, the societal value of sending me to prison is dubious at best. There is no reason that I cannot continue to be an asset to society through community service that would utilize his talents in a positive way.

For instance, I had submitted to Probation an outline for two community service programs, that I could perform while under home-retention or probation, that would provide great value to the field in which this case revolves, namely classic arcade gaming, applying my unique skills and knowledge in helping prevent hundreds of thousands of dollars in illegal unlicensed games from being sold.

Another alternative method of community service that I suggested was to leverage my current work in digital media, in providing for free, to the Bay Area community, children's stories based on my nanoTales television channel that provides help in reading. I suggested ways in which I could empower low income families with a variety of children's stories that he publishes through my television channels at no cost to the families or community in an effort to help promote literacy.

In addition to my ability to remain employed and continue to create jobs (I have created multiple new businesses and over 35 new jobs in the past two years), finding alternative sentences whereby I can continue to enhance the community while reducing the governments cost of incarceration and continuing to make payments to my and UltraCade Technologies creditors is at the heart of why the option of Alternative Sentences are allowed.

Jail vs. non-jail sentence

At the end of the day, what would be gained by a lengthy prison sentence for me? And who would benefit? The argument has been made by Probation that the only way to prevent me from committing future crimes is to give me the maximum sentence allowable under the law. While the report offers no evidence or studies to back up this suggestion, it is completely contradictory to all studies including those by the US sentencing committee. Would it be fair to deny me a variance that is clearly justified by the facts and circumstances of the case for that reason alone?

For one thing, that argument ignores the punishment that I have already received from the existence of this case. I had to step down as CEO of my own company, and have to deal with the public humiliation and questioning of his character, literally on a daily basis. Investment forums run abuzz with daily documenting of this case, and constantly question my person. My life, both personally and professional remain under a microscope and will continue to do so for the rest of my career.

Several Companies refuse to do business with me because of his criminal acts. I have lost several projects worth millions of dollars of revenue to me because of this case. I have been publicly humiliated, and subjected to social outcast, with many people refusing to ever be associated with me.

Finally, I have suffered most and longest because of the damage to my previously unblemished reputation. For all the good that I have done throughout my forty eight years on this earth, I will always be remembered as a convicted felon. Me and my family will live with that for years to come.

This Court has a well-deserved reputation for fairness in sentencing. Although the Government is clamoring for a prison sentence, a non-prison sentence would be more consistent with the facts and circumstances of the case and the interests of justice than sending me to prison. A non-prison sentence would also satisfy the purposes of 18 USC §3553(a). It would be difficult, for instance, to argue that a sentence that included electronic monitoring, community service, a fine, and the already made payment of restitution in the form of the civil settlement to Global VR did not "reflect the seriousness of the offense" or "provide just punishment for the offense." Nor could it be said that such a sentence would not "afford adequate deterrence to criminal conduct."

Any Term of Imprisonment Deters the White Collar Criminal

United States v. Adelson involved Richard Adelson, the Chief Operating Officer of a publicly traded company specializing in cancer diagnosis testing, who was convicted by a jury of conspiracy, securities fraud, and filing false reports with the U.S. Securities and Exchange Commission. Adelson was not the architect of the conspiracy (which involved overstating the company's financial performance), but upon learning of his subordinate's misconduct he joined the conspiracy and took steps to conceal it. The district court calculated Adelson's Guidelines offense level to be 46 (primarily due to the large monetary loss involved), which equated to a life sentence capped only by an 85-year statutory maximum. In a colorful opinion lamenting the "utter travesty of justice that sometimes results from the Guidelines' fetish with abstract arithmetic," the court granted Adelson a downward variance and sentenced him to 42 months' imprisonment, plus $50 million in restitution and an immediate forfeiture of $1.2 million.43 In justifying this massive downward variance in light of the government's deterrence objection, the district court explained that "there is considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders."44 The court cited several law journal articles for this proposition, as well as the Sentencing Commission's statement that the Guidelines were written in part to ensure a "short but definite" period of confinement for white collar defendants.45 The court also noted that Adelson's sentence of three-and-a-half years was not

short "in any practical sense," and in any event was considerably longer than the sentence imposed "on such high visibility 'white collar' offenders as Martha Stewart."46 The court also pointed out that the government had not "presented any evidence or cited to any studies indicating that a sentence of more than three and- a-half years was necessary to achieve the retributive and general deterrence objectives applicable to a case like this one."47 The Second Circuit affirmed on appeal, holding that the district court had carefully and appropriately considered the requisite § 3553(a) factors.48 The district court in Thurston, discussed above, was also receptive to the defendant's argument that "white collar defendants typically are more concerned about whether they will go to prison than with the actual length of imprisonment." 49 The district court addressed the deterrence factor by explaining that "the most significant decision in sending a message to potential white collar criminals is the decision to send the defendant to prison. It's not so much the amount of time, it's whether you go away."50 In the First Circuit's initial post-Booker, pre-Gall opinion, it conceded that the "district court is not alone in viewing long prison sentences as unnecessary to deter white collar crimes."51 Nevertheless, it found the district court's rationale to be "problematic," in large part because it read post-Booker jurisprudence as prohibiting sentencing variances based on a court's "general disagreement with the broad-based policies enunciated by Congress or the Commission."52 On appeal following the Supreme Court's decision in Gall, however, the First Circuit affirmed Thurston's three month sentence without voicing any objection to the district court's treatment of the deterrence factor. The First Circuit's silence on this issue was likely due to the Supreme Court's recent ruling in Kimbrough v. United States53 that judges do have the discretion to impose non- Guidelines sentences based on a policy disagreement with the Guidelines. Thus, the door remains open for defense attorneys to advocate for below-Guidelines terms of incarceration (or perhaps even non-incarceration restrictions on liberty) based on the deterrent effect that any term of imprisonment (or restriction)— short or long—has on prospective white collar criminals.

Given the Governments Desire to have a term of incarceration, I would ask, that if the court disagrees with our view of the sentencing guidelines calculation, and sees it necessary to have some time of incarceration, that the above facts show that a short period of incarceration, say 3 days, followed by a term of home-retention, followed by a term of probation is more than enough to meet the goals of the sentencing committee while still sending a strong message.

§5K2.10. Victim's Conduct

Section 5K2.10 allows the court to reduce the sentence below the guideline range "to reflect the nature and circumstances of the offense" if the victim's wrongful conduct contributed significantly to provoking the offense behavior.

See, United States v. Mussayek 338 F.3d 245 (3d Cir. 2003) (holding that, for a downward departure under this policy statement, the victim's misconduct must have significantly contributed to provoking the defendant's offense behavior, and the provoked offense must be proportional to the provoking conduct). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

In this case, were it not for the continued, deliberate, actions of Global VR to systematically dismantle UltraCade, cause financial stress by failing to live up to agreements, shutting down operations of the company, then again, failing to live up to the terms of a second agreement, I would not have found myself in the circumstances that led me to break the law.

Documents discovered during the loss hearing revealed that Global VR had identified UltraCade as a target of acquisition but never intended to actually purchase, the company, but rather push it into insolvency and pick up the assets once the company was distressed. Global VR then entered into a purchase agreement to buy UltraCade on December 5, 2005. Upon execution of the agreement, Global VR dismantled UltraCade, firing some staff, hiring other key employees to join Global VR, diverting UltraCade product sales to Global VR bank accounts. All of this was verified by testimony by James DeRose and Bob Giovanatonne of Global VR during the hearing. While I was executing under the terms of the agreement, Global VR was not, and eventually notified me that they had no intention of honoring the agreement, knowingly and intentionally pushing me into further financial chaos. Global VR then offered me a full time position, starting in January of 2006, but refused to pay my weekly salary stating that I would be paid upon completion of a second deal whereby they would purchase the assets of UltraCade and cover substantially all of the debts of UltraCade. This subsequent agreement reduced the amount they would pay from the first agreement by roughly $2M. During this time, I continued to sell the game packs as it was my only means of generating much needed revenue for his personal expenses, as well as continuing to cover the payroll of the remaining UltraCade employees, and cover the ongoing expense obligations of UltraCade that Global VR was refusing to pay.

Finally after six months of operating on promises of Global VR, and not receiving income, I consummated a second agreement on June 2, 2006. Upon closing of that deal, I was expecting to receive over $100,000 in back pay and expenses that were due to me as I had been working full time accruing pay as the CTO of Global VR, over $120,000 in back royalties, along with over $50,000 in

back expenses that he was promised would be paid. Immediately after closing, I was informed that I would not be receiving the funds that I was promised, in writing from Global VR. I had been stretched to the limit, and my only relief was the funds that I was lead to believe I would get upon closing of the June 2 deal. At this point, instead of ceasing to sell the game packs, I decided to continue manufacturing and selling the game packs.

In order to get several of the large creditors to agree to the June 2 deal, Global VR made promises that creditors and licensers would be receiving approximately 90% of the debt owed to them by UltraCade. Global VR signed over to the trustee handling the transaction for UltraCade, a promissory note giving UltraCade creditors a secured interest in Global VR assets should Global VR fail to make the payments as agreed upon. Global VR was obligated, in total, to over $5M of debt, including over $1,460,000 of payments to be made to the UltraCade creditors. Global VR has defaulted on that agreement, and the now current CEO of Global VR has estimated they have only ever made payments of $660,000 to the trustee.

Because:

- I had given the UltraCade creditors personal assurances and guarantees of payment;

- Global VR had failed to consummate the purchase of the UltraCade assets;

- and unlike Global VR, I felt an obligation to make the creditors whole, I took on the responsibility of the creditors in my personal bankruptcy.

While it does not excuse my behavior, the repeated conduct by Global VR, in not paying the agreed upon amounts, on multiple occasions to me was the primary force in causing me to continue to sell the game packs after the June 2 contract.

Extraordinary Family Situation and Responsibilities

As previously noted, I am the sole provider for Bruce Bean, a disabled World War II veteran. Mr. Bean has lost the ability to walk or care for himself. Mr. Bean requires constant care and his retirement benefits only cover approximately 50% of his monthly expenses. I have been providing the GAP in his benefits and his expenses on a monthly basis for several years. Without my contributions, Mr. Bean would no longer be able to afford the care that is required to keep him in good health. A sentence that mitigates my time away from work, and allows me to continue employment will allow him to continue to provide care for Mr. Bean who otherwise is without the means to afford it.

I am a father and husband, and sole provider for my family. My wife has not had a career for over 20 years. A sentence that mitigates my time away from work, and allows me to continue employment will allow me to continue to provide for my family, which otherwise is without the means to afford monthly expenses.

Conclusion

Therefore, based upon consideration of the factors set forth in §3553(a) , coupled with the statutory directive of §3553(a) that "the court shall impose a sentence, sufficient but not greater than necessary to comply with the purposes set forth in 18 U.S.C. §3553(a)(2), I request that this Court impose a non-prison sentence on me.

Dated: December 10, 2013

DAVID RUSSELL FOLEY
Defendant