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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 UNITED STATES OF AMERICA,)

15 Plaintiff,)

16 v.)

17 BRIAN DUNNING,)

18 Defendant.)

CASE NO. 10-CR-0494 EJD

GOVERNMENT’S SENTENCING
MEMORANDUM

Date: August 4, 2014

Time: 1:30 p.m.

Before The Honorable Edward J. Davila

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21 **INTRODUCTION**

22 Based on information the defense provided to the Probation Officer, the government expects¹
23 Mr. Dunning to argue for a probationary sentence based on (1) the sentence imposed against a
24 defendant in a related case, (2) the allegedly traumatic impact the investigation and prosecution have
25 had on Mr. Dunning and his family, and (3) letters of support from friends and family. The government
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27 ¹ At 6:27 p.m. this evening I received a copy of Mr. Dunning’s Administrative Motion to File
28 Sentencing Memorandum and Exhibits Under Seal, which attaches the memorandum Mr. Dunning
proposes to file. So as not to have the unfair benefit of reading his version before filing, I have not read
Mr. Dunning’s memorandum and will not do so until after this is filed.

1 believes none of these factors justifies a non-custodial sentence for a man who, by his own admission,
2 engaged in a highly sophisticated scheme to steal several hundred thousand dollars. The other sentence
3 is irrelevant; for reasons known to the Court, that defendant earned a substantial downward departure.
4 As for the second factor, it is undeniable that those who commit serious criminal offenses often bring
5 pain to their innocent families; this happens to ordinary “blue-collar” defendants – bank robbers, drug
6 dealers, and the like – and there is no reason in fairness why a sophisticated white-collar criminal and
7 his family should be spared those same consequences. Finally, there are the letters. The government
8 shares the discomfort U.S. Probation Officer Flores expressed at the recurring theme in so many of
9 them, that the FBI “raid” allegedly “traumatized” the defendant’s family,² as if somehow the Dunning
10 family deserved to be insulated from the adverse consequences caused by law enforcement agents
11 simply doing their jobs, executing a search warrant to investigate the crimes that he, Brian Dunning,
12 knowingly, willfully, and fraudulently committed.

13 There is no “Get out of Trauma Free” card for white-collar criminals or, unfortunately, their
14 families. The government respectfully requests the Court to sentence Brian Dunning to a term of 27
15 months’ imprisonment, the low-end of his Sentencing Guidelines range.

16 DISCUSSION

17 The Presentence Report engages in a thoughtful evaluation of the sentencing factors before
18 recommending a sentence that itself represents a substantial reduction from the 27-33 month range
19 called for under the Sentencing Guidelines.³ The PSR recommends 21 months’ imprisonment to be
20 followed by a three year term of supervised release, a \$10,000 fine,⁴ and a mandatory \$100 special
21 assessment. The government does not dispute the reasonableness of that prison recommendation, even
22 though it is six months – or 22 % – lower than the government is seeking; and one must certainly
23 acknowledge that the officer making that recommendation, USPO Flores, is one of, if not the most
24 experienced probation officers in this District.

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27 ² PSR Sentencing Recommendation, at p. 2.

28 ³ The Plea Agreement (¶ 8) caps Mr. Dunning’s exposure at 29 months.

⁴ The Plea Agreement, if accepted by the Court, does not permit any fine to be imposed.

1 18 U.S.C. § 3553(a) directs the Court to consider the following factors in fashioning an
2 appropriate sentence:

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

5 (2) the need for the sentence imposed –

6 (A) to reflect the seriousness of the offense, to promote respect for the
7 law, and to provide just punishment for the offense;

8 (B) to afford adequate deterrence to criminal conduct;

9 (C) to protect the public from further crimes of the defendant; and

10 (D) to provide the defendant with needed educational or vocational
11 training, medical care, or other correctional treatment in the most effective
12 manner;

13 (3) the kinds of sentences available;

14 (4) the kinds of sentence and the sentencing range established for –

15 (A) the applicable category of offense committed by the applicable
16 category of defendant as set forth in the guidelines –

17 * * *

18 (5) any pertinent policy statement[s]

19 * * *

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

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

23 The government respectfully submits that a Guidelines sentence – or certainly a sentence no
24 lower than the one recommended by Probation – best achieves those sentencing objectives.

25 1. Nature and Circumstances of the Offense, Personal Characteristics of the Defendant

26 The crime in this case was motivated by pure greed. As the plea agreement and the excellent
27 factual summary in the PSR both make clear, Mr. Dunning used his technical expertise and programing
28 skills to steal money from eBay. Mr. Dunning tricked eBay, through so-called “cookie stuffing,” into
paying him for traffic to eBay’s website that, in fact, he had done nothing to deliver. This was no “smash
and grab,” motivated by poverty, hunger, or substance abuse, but rather a clever, sophisticated,

1 calculated criminal scheme carried out over several years by a man who certainly had no pressing need
2 for the money.

3 Mr. Dunning did quite well. As the PSR notes (§ 40), he was able to pay off his mortgage in
4 2007 using the proceeds of commissions paid to him by eBay.⁵ It is therefore ironic that one of the
5 arguments Mr. Dunning may be expected to make in an effort to avoid prison is that, if he is sent to
6 prison, he and his family might be forced to sell the house (*see* PSR § 42) – although, since there are no
7 bank liens, it is unclear exactly who the Dunnings are expecting to force a sale: Mr. Dunning’s
8 attorneys? His step-father? Regardless, like the “trauma” theme discussed earlier, the government would
9 submit that any risk that Mr. Dunning might have to sell or refinance his home to pay legal fees falls into
10 the category of a self-inflicted wound.

11 2. Seriousness of the Offense, Deterrence (General and Specific), Rehabilitation

12 This was a serious crime, motivated solely by greed, and one that cost the victim several hundred
13 thousand dollars in losses. The sentence imposed, the government respectfully submits, should reflect
14 this hard truth. In addition, the deterrent value of a custodial sentence is generally thought to be greater
15 for white-collar defendants:

16 The potential value for deterrence in the punishment of white-collar and
17 corporate crime is much higher than it is for blue-collar crimes. [footnote]
18 It is very difficult to deter crimes of passion, which tend to be
19 spontaneous, and other crimes with very little or no premeditation because
20 most of these offenders simply do not formulate a cost-benefit analysis
21 through which deterrence plays a role. [footnote] On the other hand, many
22 white-collar and corporate criminals are very sophisticated, and their
23 crimes generally take much planning, thought, and deliberation. As a
24 result of this sophistication and the nature of their crimes, they have far
25 more time to contemplate what they are doing and the likely consequences
26 if caught. Further, these are generally very educated people who pay
27 attention to current events, and thus, they will receive the deterrence
28 messages and warnings when they are reported in the news. [footnote]⁶

23 The enhanced deterrence value of a prison term would be all the greater in Mr. Dunning’s case,
24 as he is at least somewhat of a “public figure” by virtue of his podcast, “Skeptoid: Critical Analysis of
25
26

27 ⁵ To be clear, the government does not allege that every dime used to pay off that mortgage was
28 obtained fraudulently.

⁶ J. Scott Dutcher, Comment, *From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 Ariz. St. L.J. 1295, 1308 (2005)

1 Pop Phenomena,” which he claims has a weekly audience of 179,000 listeners (PSR ¶48). Mr. Dunning
2 has written five books based on the podcast (*id.*), and he even has a “rap” video.⁷

3 3. The Kinds of Sentences Available, Sentencing Range Under the Guidelines

4 As USPO Flores notes in his sentencing recommendation, the Guidelines range has been
5 calculated using a loss range to which the parties have stipulated: a loss between \$200,000 and
6 \$400,000. Mr. Dunning should therefore not be heard to argue that this is a case in which the Sentencing
7 Guidelines range is unfairly high, overstates his culpability, or is otherwise unreasonable. As noted
8 previously, the PSR correctly calculates the sentencing range to be between 27 and 33 months, while the
9 plea agreement limits Mr. Dunning’s exposure to a maximum of 29 months. A prison term is certainly
10 appropriate here.

11 4. The Need to Avoid Unwarranted Sentencing Disparities

12 As mentioned in the introduction, the government expects Mr. Dunning to argue that his sentence
13 should be no greater than that imposed upon the defendant in a related case. It is true that the sentence
14 the government seeks here is greater than it sought for that defendant, and greater still than the sentence
15 the Court ultimately decided to impose. The government would respectfully submit, however, that the
16 other sentence is beside the point: Section 3553(a) directs the sentencing court to avoid *unwarranted*
17 sentencing disparities. Any discrepancy here is justified by the fact that, unlike Mr. Dunning, the other
18 defendant benefitted from a government motion for a substantial and well-earned departure. It is not an
19 apples to apples (or “cookies to cookies”) comparison between him and Mr. Dunning.

20 5. Restitution is Not a Sentencing Factor

21 Mr. Dunning has reached a separate settlement with eBay for an undisclosed figure (the
22 government does not know the amount) that dispenses with any requirement that this Court address
23 restitution.. As a result, however, the argument that many white-collar defendants raise (“I need to be out
24 and working so I can pay restitution”) does not apply here.

25 **CONCLUSION**

26 The government submits that a prison term is needed to reflect the seriousness of the offense,
27 achieve the goal of general deterrence, and to punish Brian Dunning appropriately for a crime he

28 _____
⁷ <http://skeptoid.com/episodes/4400>

