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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff,</i>)	NO. CR07-187MJP
)	
v.)	DEFENDANT ROBERT SOLOWAY'S
)	SENTENCING MEMORANDUM
ROBERT ALAN SOLOWAY,)	
)	
<i>Defendant.</i>)	
_____)	

I. FACTUAL BACKGROUND.

Beginning in 1997, the Defendant, Robert Soloway, began an internet marketing business known as Newport Internet Marketing ("NIM"). Initially, the primary purpose of the business was to market a product that would allow people to send advertisements for their own product, service, or message over the internet. Electronic mail provides an opportunity to reach a wide audience quickly, at little cost to the sender. The software package ("broadcast email package" herein) consisted of (1) a written instruction manual, addressing frequently asked questions, and general hints on creating successful email advertisements (Exhibit A); and (2) a disc containing the broadcast email sender software with lists of email addresses and instructions for creating and sending email messages (Exhibit B).

1 In or about 2002, Mr. Soloway expanded his business to include a service whereby,
2 for a fee, he would send out email advertisements for people who wanted to advertise by
3 broadcast email on the internet (Exhibit C).
4

5 Prior to the CAN-SPAM Act of 2003 ("Controlling the Assault of Non-Solicited
6 Pornography and Marketing Act"), effective January 1, 2004, there were no federal laws
7 addressing unsolicited bulk commercial email advertisements, which are pejoratively
8 referred to as "spam."¹ Even today, "spam" is not banned, but merely regulated.
9

10 The CAN-SPAM Act applies only to commercial email. Mr. Soloway erroneously
11 believed that by focusing his email on a non-commercial charitable offer, with a separate
12 link to his commercial website, he was not subject to the CAN-SPAM Act.

13 Mr. Soloway marketed his products and services on the internet through several
14 advertising methods, including the use of high volume bulk commercial emails. Examples
15 are attached as Exhibit D. Beginning in 2004, a NIM email typically looked something
16 like this:
17

18 email advertise your charity web site to 8,000,000 people for
19 free

20 <http://www.broadcastemailcorporation.org>

21 this non-commercial offer is solely intended for non-
22 commercial charities only. Press charity info option on site
23 for details. This email offer is not a commercial service for
24 sale/lease/trade.

24 ¹ The term "spam" as applied to unsolicited commercial email derives from a skit
25 performed on the Monty Python's Flying Circus television show. In the skit, a couple attempt to
26 order a meal. All items in the shop came with spam. During the entire sketch, a group of
27 Vikings start singing the refrain "Spam, spam, spam, lovely spam, wonderful spam . . ." The
28 song gets progressively louder during the sketch until it eventually drowns out the conversation.
The term made the jump to the electronic world through chatrooms, and now applies to most forms
of unwanted messages. See, e.g., *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015,
n.1 (S.D. Ohio, 1997).

1 A copy of a sample email is attached hereto as Exhibit D-1.

2 The emails did not contain any attachments, spyware, or malicious codes, nor did
3 they automatically redirect the recipients to Mr. Soloway's website. If an email was
4 opened, the recipient had the option of viewing the NIM website by clicking on the link.
5 If the recipient had no interest in internet advertising, they would presumably close the
6 email or delete it. This could be done with a single keystroke.

7
8 If the recipient did have interest in internet advertising and clicked on the link, they
9 were directed to the NIM website. The NIM website was in a constant state of
10 development, evolving over the years. A copy of the NIM website homepage in use from
11 mid-2006, and which remained in use through May 30, 2007 (when Mr. Soloway was
12 arrested), is attached hereto as Exhibit E-1. A prior version is attached as Exhibit E-2.
13 Prior to 2006, NIM did not make any of the material misrepresentations that form the
14 basis of the mail fraud count (*e.g.*, "opt-in" email addresses and "24/7" technical support)
15 on the NIM website.
16

17
18 As the internet evolved, and Internet Service Providers and email users became
19 more sophisticated, Mr. Soloway realized that much of his NIM website advertising was
20 not getting through to the intended recipients. This was due to a number of factors, but
21 was largely the result of the development and use of more sophisticated "spam" filters.
22 In order to try to prevent his NIM email advertisements from being blocked by spam
23 filters, Mr. Soloway resorted to using a macro feature in an email program, so that both
24 the "to" and the "from" field in the email header displayed the recipient's email address.²
25

26
27 ² Mr. Soloway only used this method when sending his own email advertisements. He
28 never employed this method when providing his email service for customers. The email broadcast
service was sent through leased foreign servers due to their lower cost. See, Exhibit F.

1 Exhibit G-1 is a screenshot of the macro program in use, and Exhibit G-2 is an example
2 of an email in which the "to" and the "from" fields are the same. The use of such
3 "forged" headers was a violation of 18 U.S.C. §1037(a)(3), which establishes penalties for
4 anyone who "materially falsifies header information in multiple commercial electronic mail
5 messages and intentionally initiates the transmission of such messages." Significantly,
6 except in those cases where the "to" and the "from" were the same, Mr. Soloway never
7 sent an email to a third party using someone else's email address.³
8

9 Mr. Soloway derived income from his internet business. Prior to tax year 2005,
10 all of his annual tax returns had been timely filed. Although Mr. Soloway's accountants
11 had obtained an extension to file the 2005 return to September 15, 2006, the 2005 return
12 was not timely filed. There was no lawful justification for the failure to timely file the
13 return, which forms the basis of Count 26. It should be noted, however, that the 2005
14 return had been nearly completed by the accountants, and Mr. Soloway and the
15 accountants were discussing last minute adjustments to the return in a string of emails
16 prior to Mr. Soloway's arrest on May 30, 2007. Exhibit H.
17
18

19 On March 14, 2008, Mr. Soloway pled guilty to Count 8 (Mail Fraud), Count 18
20 (Fraud in Connection with Electronic Mail), and Count 26 (Willful Failure to File Tax
21 Return) of the Second Superseding Indictment. Pursuant to the Plea Agreement, the
22 government has agreed to dismiss the remaining 37 counts of the Second Superseding
23 Indictment at the time of sentencing. The Court has scheduled a two day sentencing
24 hearing, to commence at 9:00 a.m. on July 11, 2008.
25

26 _____
27 ³ Although several people have complained that Mr. Soloway used their email addresses
28 to send email to other people, he did not, and the government has not been able to produce a copy
of a single email that would support this claim.

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II. MAXIMUM STATUTORY PENALTY.

The maximum statutory penalty on Count One (Mail Fraud) is a term of imprisonment of up to twenty (20) years; a fine of up to \$250,000.00; a period of supervised release of up to three (3) years; and a mandatory penalty assessment of \$100. The maximum statutory penalty on Count Two (Fraud in Connection with Electronic Mail) is a term of imprisonment of up to five (5) years; a fine of up to \$250,000.00; a period of supervised release of up to three (3) years; and a mandatory penalty assessment of \$100. The maximum statutory penalty on Count Three (Willful Failure to File a Return, a misdemeanor), is a term of imprisonment of up to one (1) year; a fine of up to \$25,000.00; a period of supervised release of up to one (1) year; and a mandatory penalty assessment of \$25.00.

III. OBJECTIONS TO THE PRESENTENCE REPORT.

On June 30, 2007, the defense submitted its written objections to the draft Presentence Report. The objections comprised twenty pages, single spaced, broken down by page and paragraph of the draft report, and also included exhibits supporting many of the arguments raised in defendant's objections.

The defense received a copy of the final Presentence Report on Monday, July 7. Except for a few minor changes, including one favorable change in the guidelines calculation, the final Presentence Report remained largely unchanged. What is troubling to the defense, however, is the Probation Officer's explanation that he hasn't made any changes to the draft report because he "has utilized the information provided by the case agents in this regard, and it is anticipated that their testimony in the evidentiary hearing will be consistent with the information that they have previously provided." See,

1 Addendum. Thus, it is clear that the Probation Office has considered only the
2 government's version of the facts. Accordingly, our objections follow.

3
4 **Page 1A, Offenses.** The mandatory penalty assessment on Count 26, which is a
5 Class A misdemeanor, is \$25.00 (not \$100.00).

6 **Page 4, Paragraph 9.** Although Mr. Soloway's primary method of marketing
7 involved bulk electronic commercial messages sent over the internet (not the World Wide
8 Web), he also employed a variety of other methods of reaching potential customers,
9 including search engines; forums on the World Wide Web; referrals from other satisfied
10 customers; classified ads; paid search engine advertising; website links; direct mail; and
11 repeat customer orders.
12

13 **Page 5, Paragraph 11.** Although people may have complained to the FTC about
14 "spamming" dating back to 1999, "spamming" was not unlawful, or even federally
15 regulated, prior to January, 2004.

16 Sometime after mid-2006 (and not before), NIM's websites offered "lifetime 24/7
17 customer and technical support" to purchasers of the broadcast email package (what is
18 described as the "software kit"). It did not make a similar offer with respect to the
19 broadcast email service. Similarly, the money back guarantee was offered only for the
20 broadcast email package, and not the email service. Specifically, the guarantee on the
21 broadcast email package provided:
22

23 If you do not receive at least a 400% increase in sales after
24 using our Broadcast Email Package for 90 days, simply
25 return it to us for a full 100% refund, no questions asked.

26 On the other hand, the guarantee for the broadcast email service provided:

27 Receive at least a 500% increase in sales within 7 days of
28 the start of your ad or we will resend your ad to a new

1 audience of the same amount of emails ordered, 100% free,
2 no questions asked.

3 Although NIM did offer "interest targeted" emailing, that was part of their
4 "custom" emailing service, and was not advertised as being available in the regular
5 package or service. Representations of "permission based opt-in email" addresses were
6 also added as being for sale starting in 2006 on various NIM websites.
7

8 **Page 5, Paragraph 13.** While it would not have been possible to identify the
9 source of the messages without opening the email, once the email was opened it was clear
10 who the source was, as the email linked directly to NIM's website. The email could be
11 deleted with or without opening it with one keystroke. The "from" headers were never
12 left blank, because it is impossible to transmit an email with a blank "from" field. Mr.
13 Soloway denies that he ever intentionally increased the volume of email to people who
14 requested to be removed from his mailing list.
15

16 **Page 6, Paragraph 14.** Fewer than one (1%) percent of Mr. Soloway's more than
17 10,000 customers since 1997 submitted complaints regarding the broadcast email package
18 or email service (fewer than 75 combined). On the other hand, Mr. Soloway has received
19 over 275 unsolicited favorable responses from satisfied customers. Exhibit I.
20

21 There are also a number of customers who eventually requested, and received, a
22 refund because the product didn't provide the anticipated results, but who were
23 nevertheless impressed enough with their experience with NIM that they wrote to Mr.
24 Soloway complimenting him for the quality of the product and support, and thanking him
25 for providing a prompt refund. The overwhelming majority of complaints against Mr.
26 Soloway came not from people who purchased a product or service, but from people who
27 complained because they received unsolicited commercial email messages.
28

1 Only a few people ever complained that the broadcast email software package "did
2 not work at all," and those individuals refused Mr. Soloway's offer to replace the disc
3 with another at no cost. Despite the comprehensive instruction manual, some people are
4 simply unable to follow directions and encountered difficulties. However, in every such
5 case, Mr. Soloway attempted to walk the person through the problems they were
6 encountering.
7

8 As for customers being "blacklisted" by their internet service providers ("ISP"),
9 the government has not produced a single document confirming that a customer was
10 blacklisted as a result of something Mr. Soloway did. But in any event, the NIM website
11 had a very clear disclaimer that the customer needed to comply with the federal CAN-
12 SPAM Act of 2003 and all other applicable laws when utilizing the NIM broadcast email
13 package. If a customer's ISP had a rigid policy against sending commercial email, that
14 was beyond Mr. Soloway's control. The email broadcast package he sold was CAN-
15 SPAM compliant.
16

17 Moreover, as stated above, the refund offered by Mr. Soloway applied only to the
18 broadcast email package. To the best of our knowledge, only three people who purchased
19 the package and later requested a refund after 90 days did not receive either a full refund
20 from Mr. Soloway or a successful chargeback on their credit card. Admittedly, problems
21 did arise when customers requested refunds without using the product for 90 days, as was
22 specified in the guarantee. In those instances when customers requested an early refund,
23 they were typically told to wait until the expiration of 90 days. If they sought, or
24 threatened to seek, without waiting 90 days, a chargeback on their credit card, they were
25 often told that their account would be referred to a collection agency, which could result
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1 in additional collection fees. This also applied to people who purchased the broadcast
2 email service who sought refunds, because they were never guaranteed a refund.

3
4 **Page 6, Paragraph 15.** There is not a scintilla of evidence that Mr. Soloway ever
5 sent emails to third parties using another person's email address. The only time Mr.
6 Soloway ever used another person's email address in the "from" field was to match the
7 address in the "to" field (*e.g.*, from "johndoe@hotmail.com" to "johndoe@hotmail.com").
8 The government has not produced a single email in discovery or in evidence that would
9 support this claim. In fact, the macro program in the Dark Mailer software found on Mr.
10 Soloway's servers during the forensic analysis by the FBI refutes the claims of spamming
11 using email addresses belonging to other people. Unfortunately, there are a lot of people
12 doing bad things on the internet, many of whom use this method of disguising the source
13 of their spam. But Mr. Soloway was not among them. He categorically denies ever
14 knowingly or intentionally sending spam to third parties using someone else's email
15 address. All of the leading publications that keep track of such information report that the
16 volume of spamming did not go down, but fact has significantly increased, since Mr.
17 Soloway's arrest. See, *e.g.*, Symantec, Spam Monthly Report, June 2008, attached hereto
18 as Exhibit J. Absent proof that such emails originated from Mr. Soloway (and there is
19 none), this allegation should be stricken from the report.

20
21
22 **Page 6, Paragraph 18.** While we agree that a program called Dark Mailer was
23 installed on the three servers referenced in Paragraph 18, we do not agree with the
24 description of Dark Mailer contained in this paragraph. This description of Dark Mailer
25 comes from Wikipedia, an on-line "open" reference that can be edited by anyone who
26 chooses to do so. FBI agent Ken Schmutz candidly admitted in his grand jury testimony
27

1 that the definition he was providing (identical to that set forth in Paragraph 18) came
2 straight from Wikipedia. Testimony of Kenneth Schmutz, May 9, 2007, at pp. 36-37.
3 Indeed, virtually all of Agent Schmutz's grand jury testimony regarding zombie computers
4 and botnets was inaccurate, misleading, or just plain wrong. An FBI forensic analysis of
5 the servers used by Mr. Soloway disclosed that there was no evidence of zombies, botnets,
6 or malicious codes, and that the IP addresses listed as proxies on those servers were not
7 part of any botnet. See, FBI report attached hereto as Exhibit K.
8

9 For these reasons, we object to any reference to zombie computers in connection
10 with the Dark Mailer program installed on Mr. Soloway's servers. The reference to
11 "zombie/proxy" network is also misleading, because zombies and proxies are two very
12 different things. Zombies (or botnets) are computers that have been compromised through
13 malicious codes, and which can be remotely operated without the knowledge or consent
14 of the owners of the computers. As stated above, the FBI forensic analysis of the servers
15 found no evidence of zombies, botnets or malicious codes. Proxies, on the other hand,
16 include open computers that are freely available on the internet to anyone who wishes to
17 use them for transmitting email over the internet. Proxy IP addresses are lawfully and
18 openly distributed and traded on the internet. See Exhibit L. Dark Mailer is not a zombie
19 or botnet interface, nor does Dark Mailer have the ability to control zombie computers.
20 Dark Mailer can be configured to be 100% CAN-SPAM compliant. For example, see the
21 attached descriptions of Dark Mailer from leading software companies. Exhibit M.
22
23

24
25 **Page 7, Paragraph 19.** A review of the SENT.TXT files disclosed only a list of
26 approximately 94,000,000 email addresses, nothing more.

27 **Page 7, Paragraph 22.** The FBI forensic review of the Hopone servers did not
28

1 show that 120,000,000 emails had been sent to 79,610,868 unique addresses. It only
2 showed that two servers contained six files each, which each listed 10,000,000 email
3 addresses. The servers did not contain any information whether any emails had actually
4 been sent from the servers.
5

6 **Page 7, Paragraph 25.** The FBI analysis showed that the servers contained 3,148
7 proxy IP addresses. This was not a zombie or botnet "network." These were all
8 independent IP addresses, which were not part of any network.
9

10 **Page 8, Paragraph 29.** The invoices do not show what Mr. Soloway billed for
11 his services. During the relevant time period, most customers did not receive copies of
12 invoices. An invoice was created by Mr. Soloway when an order was placed. The
13 purpose of creating an invoice was to enable him to have a record of everyone who
14 responded to his ad. However, more than ten (10%) percent of the invoices created did
15 not result in an actual sale because credit cards were declined, checks were not received,
16 people changed their minds, etc. In fact, the invoices were never even submitted to Mr.
17 Soloway's accountants. Accordingly, using the total amount of the invoices to calculate
18 sales significantly distorts even the actual gross income (to say nothing of net income).
19

20 **Page 8, Paragraph 31.** Although perhaps not meant to do so, this paragraph
21 suggests that Mr. Soloway was somehow trying to conceal his finances. That is not true.
22 All of his accounts were in his name or the company name, and were easily traceable.
23 For the reasons set forth in our objection to Paragraph 29, above, we do not agree that the
24 deposit activity is "entirely" consistent with the invoices. The actual deposits are at least
25 ten to twenty percent lower than the total of the invoices.
26

27 **Page 9, Paragraph 32.** We do not agree with the claim that in the period from
28

1 December, 2003 to May, 2007, "8.04% of the individuals who purchased Mr. Soloway's
2 product successfully completed the chargeback process via their credit card company" or
3 that the total chargebacks during this period was \$73,020.48. These figures likely include
4 not just credit card chargebacks, but all sources of merchant credit card processor fees,
5 debits, and refunds. Credit card chargebacks made up only a very small percentage of
6 these numbers.
7

8 The government has also included in these figures refunds initiated by Mr. Soloway
9 through both checks issued directly to customers and through credits he issued to
10 customers' credit cards. It has mistakenly included these voluntary refunds with the
11 dispute process known as chargebacks. Typically, credit card processors will cancel a
12 merchant account if chargeback ratios exceed one (1%) percent. Exhibit N. Mr. Soloway
13 used AMEX as a processor from 1998 through the date of his arrest. He also used
14 Cardservice International from June, 1997, through December, 2005, when the account
15 was closed following a lien placed on the account by Microsoft. Moreover, the
16 government has not provided us with any documentation regarding credit card
17 chargebacks, and we do not believe that any exists to support the figures in this paragraph.
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20 It is true that Mr. Soloway notified some customers that if they attempted to
21 reverse the charges for the email broadcast product prior to the 90 days required by his
22 guarantee, or if they attempted to reverse the charges for the broadcast email service,
23 which did not have a refund guarantee, he would submit the account for collection. That
24 is a standard business practice followed by any prudent business.
25

26 **Page 9, Paragraph 34.** The complaints alleged by the government cover the entire
27 period of Mr. Soloway's business (more than ten years). These are not 625 separate
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1 individuals, as many people filed multiple complaints with more than one agency. For
2 example, nine individuals are responsible for filing over 125 of 339 complaints received
3 by the Washington Attorney General. Exhibit O-1. The vast majority of these complaints
4 were related to spamming, and not the product or service offered by Mr. Soloway.
5 Moreover, many complaints that have been filed against Mr. Soloway relate to non-
6 commercial messages that are not subject to the CAN-SPAM Act, or matters that are
7 entirely unrelated to Mr. Soloway or NIM. Exhibit O-2. There is also evidence that other
8 people were using the name Newport Internet Marketing in their "spam" operations, so
9 it is possible that some of the complaints against Mr. Soloway originated from the conduct
10 of these other businesses. Exhibit O-3. Finally, only 59 people have filed Victim Impact
11 Statements (most of which refer to spamming), and fewer than 50 of the people who filed
12 Victim Impact Statements claim any monetary loss.
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15 **Page 9, Paragraph 35.** The final total of Victim Impact Statements returned
16 through June 27, 2008 is 59 (Mr. Warma also included two DOJ Questionnaires with the
17 Victim Impact Statements). The total claimed losses are \$2,142,617.06. However, of the
18 61 people who filed Victim Impact Statements (and the two Questionnaires), 12 claimed
19 that they suffered no monetary losses. Thus, only 49 people have claimed any monetary
20 losses, and many of those claims are questionable.
21

22 Moreover, only one or two of the people claiming monetary damages have
23 submitted any documentary support for their claims. Accordingly, we dispute the amount
24 claimed in virtually every single Victim Statement, because there is simply no way to
25 verify most of the claims. People who received a handful of "spam" emails are claiming
26 that they spent up to 100 hours responding to the emails, at an hourly rate of between
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1 \$12.50 per hour to \$228.00 per hour (Toby Corballis). Many of these claims come from
2 people who acknowledge that they are unemployed. At least one individual claims to have
3 spent 1,200 hours dealing with Mr. Soloway's spam (he never purchased either the product
4 or the service).

5
6 More than 90% of the claimed losses are contained in just 12 claims. These twelve
7 claims are for huge amounts of money without any documentary support. For example,
8 Marcia Branum has filed a claim for \$369,500.00 (although Ms. Warma has reported this
9 claim as \$469,500 on her tally sheet). Ms. Branum admits that she was unemployed and
10 that she was just starting a web based business at the time she purchased a product or
11 service (she doesn't state which) from Mr. Soloway. She admits that she was starting an
12 internet business because "I have friends in California and a 3rd cousin in Ohio who are
13 literally making millions for this web based business." Although there is no evidence of
14 any sales by her, she is now claiming that the amount of time she spent addressing spam
15 issues is 80 hours per week times nine months at \$30.00 per hour. She claims this amount
16 is \$70,000 (although doing the math it would be \$86,400.00). She then claims a total loss
17 of \$369,000.00, and then states that the "actual loss of potential in the first year alone was
18 over \$1,000,000.00." She also claims that she paid \$500.00 for the service or product,
19 but according to the government's evidence she paid only \$179.00.

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22 Similarly, Tamra Burgess claims a loss of \$328,000.00, which she attributes to
23 spending 18 hours per day, at \$50.00 per hour, for 365 days "responding to spam."
24 However, in a complaint filed with the BBB (#22061890) she includes a letter in which
25 she states that "I haven't lost any money." Exhibit P-1. She also posted messages on a
26 number of message boards claiming that
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1 "All mail is forwarded to the feds anyway, so I don't have
2 to deal w/it. Its funny how he's spamming himself right to
3 jail," and "The loser's illegal spam goes directly to the feds
4 and those who are suing him. So I don't have to deal w/it.
5 a script automatically sends it out, thanks to the filter. so the
6 loser is spamming his ownself into trouble."

7 Exhibit P-2.

8 Ronald Carter claims to be retired from TWA and does computer consulting.
9 Without any explanation of how he was victimized, he simply claims a loss of
10 \$250,000.00.

11 Craig Hagerty claims a loss of \$3,000.00, which he alleges was the cost of a
12 product or service from Mr. Soloway, but there is no record of him ever being a customer
13 of Mr. Soloway, and Mr. Soloway never sold a service or product exceeding a cost of
14 \$499.00. Mr. Hagerty explains the amount of his loss as a "mortgage payoff."

15 Matthew Hexter claims a loss of \$48,149.00. Of this, \$149.00 is for the purchase
16 of the broadcast email service (for which he is not entitled to a refund), and the balance
17 of \$48,000.00 is based on the fact that he did not receive the "guaranteed minimum 400%
18 increase in sales" which he is apparently claiming would have been \$48,000.00.

19 Mel Hines claims a loss of \$318,084.00, including \$307,584.00 in lost revenue,
20 but does not provide any evidence of past income or why he claims he lost customers.

21 Linda Peiffer claims a loss of \$31,500, but itemizes only \$450.00 for the cost of
22 a product or service (which was actually \$314.00) and \$27,000.00 for other financial loss.
23 However, the \$27,000 loss is nothing more than a lost expectation of revenue from a non
24 existent business.

25 Finally, Eduardo Vanci claims a loss of \$48,740.00 based on a claimed four week
26 interruption of service. In order to support that loss, Mr. Vinci would have to have had
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1 an annual net income of \$588,880.00. However, he has provided no documentation
2 whatsoever.

3
4 These are just a few of the more egregious claims that have been filed. Without
5 some evidentiary support, we simply cannot blindly agree to these claimed losses. This
6 is also true for many of the smaller claims that also have no evidentiary support.

7 **Page 10, Paragraph 38.** Mr. Soloway denies that he ever intentionally increased
8 the volume of email to people who contacted him to request being removed from his
9 mailing lists. More importantly, Mr. Soloway categorically denies that he ever used
10 anyone else's email address to send email to anyone other than that person. While people
11 may have been victimized by that practice, it was not committed by Mr. Soloway. Despite
12 the fact that Mr. Soloway has been the subject of an investigation for many years, the
13 government has not provided a single email that would support this claim (other than four
14 emails involving Richard Middleton and his wife, which are an anomaly that thus far
15 neither the government nor Mr. Soloway can explain).

16
17 **Page 10, Paragraph 39.** We object to the phrase "Mr. Soloway harvested
18 addresses..." There is no evidence that Mr. Soloway harvested these addresses. We also
19 question how it was possible that an IT "professional" could spend up to 20 hours a week
20 for ten weeks to stop one or two spam messages per day. A basic spam filter, properly
21 configured, and costing no more than \$50.00, would have been capable of completely
22 eliminating email sent by Mr. Soloway. Finally, the claim of the California Department
23 of Social Services is \$9,000.00, not \$10,000.00 (20 hours per week for ten weeks at
24 \$45.00 per hour).

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27 **Page 11, Paragraph 40.** Mr. Soloway did offer a free email service for charities,
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1 and many charities benefitted from this free service. Exhibit Q. It is true that Ms. Lynch
2 claims that "the volume of spam increased 'exponentially' after the initial spam messages
3 advertising Soloway's company." However, she made this claim to the government on
4 September 24, 2007, when she was still claiming to be receiving such email:
5

6 I have been receiving it from April, 2007. Since then my
7 spam levels have increased exponentially but I cannot
8 positively link all of that spam to the defendant. (emphasis
supplied)

9 U.S. Dept. of Justice Questionnaire, sent by Ms. Lynch via fax on September 24, 2007.
10 This strongly suggests that she was still receiving spam as of September 24, 2007, three
11 months after Mr. Soloway was detained at FDC SeaTac.

12 Ms. Lynch also complains that her email address was being forged in
13 advertisements being sent to other people, including advertisements for sexual products.
14 However, she has not included copies of any alleged "bounce-back" emails, so it is
15 impossible to determine the source of these emails. We do not doubt that this occurred,
16 but we categorically state that it was not the result of anything that Mr. Soloway was
17 doing. Thus, her statement that Mr. Soloway has "damaged [her] reputation in countless
18 ways, most of which cannot be quantified" simply cannot be attributed to anything that
19 Mr. Soloway did. Consequently, her estimated claim that Mr. Soloway's spam had cost
20 her 5,000 euros worth of time, including IT charges, broadband use, and complaint time"
21 is grossly exaggerated, at least in so far as it is attributed to Mr. Soloway.
22

23
24 To be clear, however, Mr. Soloway does not deny that he may have sent some
25 email messages to her between April, 2007, and the date of his arrest on May 30, 2007,
26 and that some of those emails may have contained forged headers in which the "to" and
27 the "from" were the same. But that is all that he did.
28

1 **Page 11, Paragraph 41.** Despite the fact that Mr. Corballis claims he was
2 receiving up to 200 spam emails a day, he only provided the government with copies of
3 a total of 49 emails he received between August 22, 2005, and July 6, 2006. He also has
4 not provided a single copy of a bounceback message, so there is not a shred of evidence
5 to connect Mr. Soloway to any bouncebacks. This is not surprising, because Mr. Soloway
6 did not forge identities into headers and then transmit email to third parties. Nor has Mr.
7 Corballis provided any evidence to support his claim that he was blacklisted by AOL and
8 Hotmail and, if he was, we have no way of establishing whether that was the result of
9 anything done by Mr. Soloway. In his victim impact statement, Mr. Corballis claims an
10 hourly wage rate of \$228.00, but gives no support for that claim. Finally, when he
11 completed his DOJ Questionnaire on September 24, 2007, he claimed that he was still
12 receiving spam from Mr. Soloway:
13
14

15 "I still get mail that I believe to be from Robert
16 Soloway/Newport Internet Marketing (NIM) but the volume
17 is much reduced as I have taken preventative steps (change
18 of address, disposal of domains, etc.)."

19 Clearly, Mr. Soloway was not sending email after May 30, 2007, as he was incarcerated.

20 **Page 12, Paragraph 43.** Andrew Gaspar is, quite simply, not credible. He
21 moderated several websites, message boards, and mailing lists devoted exclusively to Mr.
22 Soloway, on which he posted vile, vulgar, and twisted messages regarding Mr. Soloway
23 and his family. Exhibit R-1. After Mr. Soloway was arrested, there was a posting of the
24 home address of Mr. Soloway's parents on a website associated with Mr. Gaspar, with
25 Mapquest directions to the Soloway's home. We believe that he was also involved with
26 others in hacking into various NIM websites and initiating denial of service attacks on the
27 NIM websites as well, which he bragged about on several public forums. We also believe
28

1 that he was involved with others in hacking into the Swedish Woman's Educational
2 Association International (SWEA) website, after he learned that Mr. Soloway's mother was
3 a member of that organization, as he had posted a request on a message board seeking a
4 Swedish translator at the same time Ms. Soloway received notice from SWEA that their
5 website was hacked.
6

7 Based on his own handwritten notes which he submitted to the government, it
8 appears Mr. Gaspar was receiving one to four emails a week that he claims to have traced
9 to Mr. Soloway. Exhibit R-2. But he was also claiming that he was receiving "spams for
10 generic Viagra, sexual desire patches, penis enlargement, prescription drugs, Stock Market
11 pump and dump scams, online casinos and fake University diploma scams. See FTC
12 affidavit, attached hereto as R-3. He has also made other wild and unsubstantiated claims
13 that Soloway's emails contained viruses or that he had hacked into government computers,
14 none of which is true.
15

16 Mr. Gaspar's claim that he spent more than 1,200 hours dealing with Mr. Soloway
17 is, quite frankly, absurd, unless one includes the time he spent on various message boards
18 vilifying Mr. Soloway and his family, and ridiculing Mr. Soloway's mental health issues.
19

20 **Page 12, Paragraph 44.** Mr. Braver has filed suits against more than 240
21 individuals, many of which were based on alleged spamming activities pursuant to two
22 Oklahoma statutes that each provides civil penalties of "the greater of Ten Dollars (\$10.00)
23 for each fraudulent electronic email message transmitted in violation of this act, or
24 Twenty-five Thousand Dollar (\$25,000.00) per day." Although Mr. Soloway initially
25 appeared and defended against this action, he was unable to afford the legal expenses
26 involved, and eventually allowed a default judgment to be entered against him. The
27
28

1 motion for default alleged that Mr. Braver had received a total of 557 email messages over
2 a period of "no less than 206 separate dates," between May of 2002 and March, 2005, and
3 thus sought judgment in the sum of \$10,075,000.00 (206 times \$50,000.00 + other
4 damages). What that means is that Mr. Braver received approximately one to four emails
5 per week during that period. Braver also blamed Mr. Soloway in the media for sending
6 him emails advertising pharmaceutical products and pump and dump stock scams which,
7 of course, Mr. Soloway did not do.
8

9 **Page 13, Paragraph 45.** Microsoft filed suit against NIM and Mr. Soloway, and
10 130 other email companies, between 2003 and 2007. The Microsoft judgment was also
11 entered as a default. No court ever addressed the merits of the Microsoft's complaint.
12 In a Declaration filed in support of its Motion for Default, Microsoft alleged that it
13 received "no less than 7,845 commercial email messages . . . that advertise defendant's
14 websites . . ." That was the basis for the default judgment: 7,845 emails at \$1,000.00
15 per email. Exhibit S.
16

17 **Page 14, Paragraph 46.** Mr. Soloway did not represent on the NIM website that
18 (1) the email addresses for sale were "opt-in;" or (2) he offered "24/7" tech support for
19 the broadcast email package, prior to 2006.
20

21 **Page 14, Paragraph 47.** Mr. Soloway does not believe that he ever represented
22 to Mr. Smith that the email addresses were "opt-in." The copy of Mr. Soloway's website,
23 from which Mr. Smith claims to have ordered, does not contain any such representation.
24 Moreover, there was no email address on the website for Mr. Smith to contact NIM to ask
25 about opt-in email addresses. Mr. Soloway did not represent on the NIM website that his
26 email addresses were opt-in prior to 2006. Mr. Smith has not filed a Victim Impact Statement.
27
28

1 **Page 15, Paragraph 48.** Chris Leeds did not file a complaint, a DOJ
2 Questionnaire, or a Victim Statement. His situation was unfortunate, but it does not
3 appear that he suffered any real losses. As soon as he notified NIM by email, as his order
4 confirmation directed him to do if he had questions ("CUSTOMERS: Please email with
5 any & all questions -- Please do not call our sales department as we do not offer phone
6 assistance, only email support -- Thank you") NIM immediately stopped the email ads.
7

8 **Page 15, Paragraph 49.** It is unfortunate that Alice Hoffman did not get a refund.
9 This occurred because she indicated to Mr. Soloway that she was going to reverse the
10 charge with her credit card company, and Mr. Soloway believed that she had done so.
11

12 **Page 15, Paragraph 50.** Thom Miller placed his order with NIM on or about
13 December 7, 2005. The ad of which Doteasy.com complains was not sent by Mr.
14 Soloway. That ad was sent on May 31, 2006, more than six months after Rev. Miller
15 placed his order with NIM. All NIM orders were sent out within 72 hours, and were
16 completed within 15 days.
17

18 The email which is attached to the materials provided to us by the government was
19 obviously not sent by NIM, because it is in a format never used by NIM. For example,
20 (1) it includes a lengthy header unlike anything ever used by NIM; (2) it originated from
21 in2net.com, a dedicated server company, which was a service provider for doteasy.com,
22 and doteasy.com is the service provider for Rev. Miller's website; (3) in2net.com was
23 never used by Mr. Soloway; (4) it includes the website "www.specialvisit.org" in the
24 subject line, something NIM never did; (5) it includes the individual's name ("Rev. Thom
25 Miller") and email address ("thom@specialvisit.org.") in the "from" field, which are
26 things NIM never did; (6) it was sent to a list of people ("Undisclosed Recipients"), which
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1 again is something NIM never did (NIM sent out individual emails, not lists with blind
2 cc's); and (7) NIM has never sent out an ad without including "http://" before the client's
3 website link, something Rev. Miller's email ad does not have. Exhibit T.
4

5 We believe that Rev. Miller's problems occurred entirely as the result of an email
6 campaign initiated by himself, or another company, or another individual, six months after
7 NIM completed its mailing for Rev. Miller. It would make no sense that in December of
8 2005, Rev. Miller would send out an email campaign informing people to watch a
9 television commercial that would not air for another six months. Indeed, it is unlikely that
10 when he placed the order with NIM he even knew about this commercial.
11

12 **Page 16, Paragraph 56.** We do not agree with the government's theory of loss
13 based on mail fraud in violation of 18 U.S.C. §1341, which appears to be that because the
14 original emails sent by Mr. Soloway contained forged headers, anyone who purchased his
15 product or service through such emails suffered a loss, regardless of whether there were
16 any material misrepresentations with respect to the product or service advertised, and
17 regardless of whether the customer was satisfied with the product or service. We do not
18 believe that there is any support for such a theory, either in law or common sense, and at
19 least one court has clearly rejected this approach in a recent "spamming" case. *United*
20 *States v. Kilbride*, 2007 WL 2774487 (D.Az. September 21, 2007).
21

22 In *Kilbride*, all of the defendants' bulk commercial emails contained forged
23 headers. The emails directed the recipients to pornographic websites if opened. If the
24 recipients of the emails chose to sign on to the websites and pay a fee, a portion of the fee
25 went to the defendants as a commission. Even though all of the emails contained forged
26 headers in violation of 18 U.S.C. §1037(a)(3), the court did not find that the recipients
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1 who signed on to the pornographic website and paid a fee were victims, or that the
2 commissions received by defendants constituted gain. So too, here, unless the government
3 can independently prove that material misrepresentations induced the purchases of the
4 email packages and services offered by Mr. Soloway, the mere fact that the initial email
5 contained forged headers does not render the products fraudulent.
6

7 Moreover, customers purchased NIM's products through a variety of sources.
8 Many were repeat customers; many were referrals from satisfied customers; many located
9 Mr. Soloway's products and services on search engines; paid search engine ads; and some
10 purchased through direct mail ads; online bulletin boards; website links; or classified ads.
11 In order to support its loss theory, the government would have to establish which products
12 or services were purchased through an unlawful email ad, which it cannot do.
13

14 On the other hand, we agree that for purposes of determining loss based on the
15 violation of 18 U.S.C. §1037(a)(3), the loss, if proven, would flow from emails sent with
16 forged headers.
17

18 **Page 17, Paragraph 57.** We believe that the losses must be broken down into two
19 separate categories: (1) losses stemming from the mail fraud violation; and (2) losses
20 stemming from the fraud in connection with electronic mail violation. As to the former,
21 we believe that there is very little loss, as fewer than one (1%) percent of the people who
22 purchased the broadcast email product or service complained. As to those individuals, we
23 believe that only three people who purchased the broadcast email package did not receive
24 a refund after 90 days if one was requested. No refund was offered for purchasers of the
25 broadcast email service, but Mr. Soloway did, if requested, resend the customers' ads to
26 a different audience at no additional charge. The proper measure of loss for such
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1 customers would be the price of the package or service (if the government can establish
2 fraud in the service), and any direct collateral consequences that are both provable and
3 measurable in monetary losses due to material misrepresentations by Mr. Soloway.
4

5 As to those people who claim to be victims of spam, we agree that the appropriate
6 measure of loss is

7 any reasonable cost to any victim, including the cost of
8 responding to an offense, conducting a damage assessment,
9 and restoring the data, program, system, or information to
10 its condition prior to the offense, and any revenue lost, cost
incurred, or other consequential damages incurred because
of interruption of service.

11 18 U.S.C. §1037(d)(1) and 18 U.S.C. §1030(e).

12 However, the government bears the burden of proving these losses, and there must
13 be more than bare claims of inflated hours; inflated hourly "wages"; and inflated lost
14 revenues. Despite the fact that it may require effort to determine the amount of loss, the
15 loss is measurable in monetary terms. U.S.S.G. §2B1.1, Application Note 3(A)(iii)
16 provides as follows:
17

18 (iii) Pecuniary Harm.-- "Pecuniary harm" means harm that
19 is monetary or that is otherwise readily measurable in
20 money. Accordingly, pecuniary harm does not include
21 emotional distress, harm to reputation, or other non-
economic harm.

22 The application notes also make clear that the court need only make a reasonable
23 estimation of the loss. U.S.S.G. §2B1.1, Application Note 3(C).

24 For these reasons, we respectfully disagree with the conclusion that gain is the
25 appropriate measure in this case. We acknowledge that U.S.S.G. §2B1.1, Application
26 Note 3(B) provides that gain is an alternative measure of loss, but that it true only if there
27 is a loss and that it cannot reasonably be determined. We do not believe that is the case
28

1 here. Gain would not provide an appropriate measure of loss because there is simply no
2 rational relationship between gain and loss in this case. There was no gain whatsoever
3 from people who did not purchase either the broadcast email package or the broadcast
4 email service. Gain only accrued from people who purchased the package or service and,
5 as stated above, fewer than one percent of those purchasers complained. But that gain has
6 no rational relationship to damages for people who claim losses simply because they
7 received spam, without purchasing a product or service. Moreover, it would be manifestly
8 unfair to use gross deposits, rather than net profit, as a measure of gain. Mr. Soloway's
9 net profit in 2004 was \$87,086.00, and in 2005 it was approximately \$120,957.00. The
10 net figures for 2006 and 2007 are not available, because the government seized all of Mr.
11 Soloway's records at the time of his arrest. However, the combined net income for the
12 years 2004 through 2007 is less than \$400,000.00.

13 We again direct the Court's attention to *United States v. Kilbride, supra*. In ruling
14 on the defendant's objections to the loss amount in the PSR in that case, the court
15 observed:

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19 The touchstone for the guideline enhancement remains loss,
20 and it follows that gain may be used only when it represents
21 a reasonable approximation of the loss. If there is reason to
22 believe that the gain from an offense greatly exceeds the
23 amount of loss, the gain does not represent a reasonable
24 alternative measure of the loss.

25 The court has found no cases specifically addressing this
26 issue under §2B1.1, but cases addressing a predecessor
27 section--2F1.1--make clear that gain may be used only when
28 it reasonably reflects the amount of the loss. *See United States v. Van Brocklin*, 115 F.3d 587, 600 (8th Cir. 1997) ([D]etermining loss according to a defendant's profit is [not] necessarily erroneous, so long as the evidence indicates that such a method provides a reasonable estimate of the actual loss."); *United States v. Anderson*, 45 F.3d 217, 221 (7th

1 Cir. 1995) (gain cannot be used as a reasonable estimate of
2 loss "where the relationship between defendant's gain and
3 any loss suffered by consumers or competitors is, at best,
4 extremely tenuous"); *United States v. Haddock*, 12 F.3d
5 950, 961 (19th Cir. 1993) ("If gain to the defendant does not
6 correspond to any actual, intended, or probable loss, the
7 defendant's gain is not a reasonable estimate of loss.").
8 Moreover, the Ninth Circuit "has refused to mechanically
9 apply U.S.S.G. §2B1.1, and has held that in calculating loss
10 in fraud cases, the sentencing court should take a realistic,
11 economic approach to determine cause, rather than the use
12 of some approach which does not reflect the monetary loss."
13 *United States v. Allison*, 86 F.3d 940, 943 (9th Cir.1996)
14 (citing *United States v. Harper*, 32 F.3d 1387, 1392 (9th
15 Cir. 1994)).

16 *United States v. Kilbride*, *supra*, 2007 WL at page 4. So too, here, gain is not a
17 reasonable approximation of loss, and thus should not be used in this case.

18 **Page 17, Paragraph 58.** We believe that after careful consideration of the Victim
19 Impact Statements, the combined losses attributable to both the mail fraud violations and
20 the fraud in connection with electronic mail will be less than \$200,000.00.

21 **Page 18, Paragraph 60.** We submit that the loss amount in this case is less than
22 \$200,000.00. Pursuant to U.S.S.G. §2B1.1(b)(1)(F), the offense level should be increased
23 by no more than 10 levels.

24 **Page 18, Paragraph 62.** There is no explanation in the PSR as to how email
25 addresses were obtained through improper means. Nor has the government provided us
26 with any evidence supporting this adjustment. Absent some explanation, we object to this
27 adjustment.

28 **Page 18, Paragraph 63.** We do not object to this two level adjustment, but for
the sake of clarity, the injunction prohibited Mr. Soloway from violating the CAN-SPAM
Act. It did not prohibit him from "spamming," which is not unlawful, but regulated.

1 **Page 18, Paragraph 67.** Based on the above objections, the Adjusted Offense
2 Level (subtotal) is no more than 21 (Base offense level of 7, plus 10 additional levels for
3 loss, plus 2 levels for mass marketing, plus 2 levels for violation of a prior court order).
4

5 **Page 19, Paragraph 75.** Based on our objection to Paragraph 67, we submit that
6 the greater adjusted offense level is no more than 21.

7 **Page 20, Paragraphs 78 and 80.** Based on the above objections, we submit that
8 the Offense Level Subtotal is 19, and the Total Offense Level is no more than 19.

9 **Page 24, Paragraph 107.** The Wells Fargo account has less than \$1.00 dollar in
10 the account. Mr. Soloway has been unable to collect the \$2,500 security deposit from
11 Joan Clark. The IRA account has approximately \$30,600.00 remaining.
12

13 **Page 26, Paragraph 121.** Based on the objections set forth above, we submit that
14 the Total Offense Level is no more than 19, Criminal History Category I, with a
15 guidelines range of 30-37 months.
16

17 **Page 27, Paragraph 128.** The fine range at Level 19 is \$6,000.00 to \$60,000.00.

18 **Page 28, Paragraph 133.** The aggravated identity theft counts were dismissed
19 because the government could not have met its burden of proof at trial. Mr. Soloway did
20 not commit aggravated identity theft. Those counts were based on Mr. Soloway sending
21 emails in which the "to" and the "from" fields in the header contained the same email
22 address. That is not identity theft. The money laundering counts were dismissed because,
23 as a matter of law, they did not state a criminal offense. Even had we proceeded to trial,
24 the money laundering counts would have been dismissed.
25

26 **IV. GUIDELINES OFFENSE LEVEL AND SENTENCING RANGE.**

27 For the reasons set forth above, we submit that the Total Offense Level is no more
28

1 than 19 (based on a loss of no more than \$200,000) and, depending on the Court's
2 conclusions with respect to loss, it could be less. All parties agree that Mr. Soloway is
3 in Criminal History Category I. With a Total Offense Level of 19, Criminal History I,
4 the sentencing guidelines range, before any departures or variances, is 30-37 months.
5

6 In addition to a higher loss figure (\$400,000.00 to \$1,000,000.00), the government
7 argues that there should be a six level upward adjustment pursuant to U.S.S.G. §2B1.1(b)
8 (2)(C). The Probation Office considered this argument, and rejected it in favor of a two
9 level adjustment pursuant to U.S.S.G. §2B1.1(b)(2)(A).
10

11 U.S.S.G. §2B1.1, Application Note 1, provides that "victim" means (A) any person
12 who has sustained any part of the actual loss determined under subsection (b)(1); or (B)
13 any individual who sustained bodily injury as a result of the offense. Pursuant to
14 Application Note 3(A)(iii) loss under subsection (b)(1) includes only harm that is monetary
15 or that otherwise is measurable in money. The government has provided the defendant
16 with what purport to be 61 Victim Impact Statements. Two of these "statements" are
17 actually DOJ Questionnaires (Lynch and Smith). Of these 61 potential victims, the
18 government agrees that 12 allege no monetary loss at all. Thus, even if all of the
19 remaining statements were valid, which we dispute (see, *e.g.*, Craig Hagerty), there would
20 still only be 49 victims for purposes of U.S.S.G. §2B1.1.
21

22 The government's reliance on U.S.S.G. §2B1.1, Application Note 4(B), is
23 misplaced. In order to harmonize Application Note 4(B) with the preceding notes quoted
24 above, the only fair reading of that note is that in all cases under 18 U.S.C. §1037, a
25 minimum upward adjustment of at least two levels for "mass-marketing" shall apply, even
26 if there were fewer than 10 "victims." However, if the evidence also supports a finding
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1 of more than 50 victims, or more than 250 victims--as defined in Application Note 1--then
2 an additional two or four levels might also apply. That is not the case here.

3
4 Accordingly, Probation has correctly concluded that the victim enhancement
5 pursuant to U.S.S.G. §2B1.1(b)(2)(A) (more than 10 victims or committed through mass-
6 marketing), is 2 levels. See also, *United States v. Kilbride, supra*, 2007 WL at page 5.

7 **V. SENTENCING FACTORS.**

8 In order to uphold the constitutionality of the Sentencing Reform Act, the remedial
9 decision in *United States v. Booker*, 543 U.S. 220 (2005), severed 18 U.S.C. §3553(b)(1)
10 (the provision making application of the guidelines mandatory) from the SRA. Thus, after
11 *Booker*, a sentence within the guidelines range may not be necessary to achieve the
12 Congressionally defined purposes of sentencing. A district court's job is to impose "a
13 sentence *sufficient, but not greater than necessary*, to comply with the purposes" of section
14 3553(a)(2). The United States Supreme Court has made clear that reasonableness is the
15 *appellate* standard of review in judging whether a district court has accomplished that task.
16 *Rita v. United States*, 551 U.S. ___, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). However,
17 the Supreme Court has also rejected the notion that a sentence that amounts to a substantial
18 variance from the Guidelines needs to be justified by extraordinary circumstances, holding
19 instead that appellate courts must review all sentences, both within and without the
20 Guidelines range, under a differential abuse-of-discretion standard. *Gall v. United States*,
21 ___ U.S. ___, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007).
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25 In determining the particular sentence to be imposed, the Court *shall* consider the
26 nature and circumstances of the offense, and the characteristics of the defendant. The
27 Court shall also consider the need for the sentence (1) to reflect the seriousness of the
28

1 offense, to promote respect for the law, and to provide just punishment for the offense;
2 (2) to afford adequate deterrence to criminal conduct; (3) to protect the public from further
3 crimes of the defendant; (4) to provide the defendant with needed educational or vocational
4 training, medical care, or other correctional treatment in the most effective manner; and
5 (5) to avoid unwarranted sentence disparities among defendants with similar records who
6 have been found guilty of similar offenses. Of paramount importance to any sentencing
7 determination, however, is that all of these factors are subservient to the §3553(a) mandate
8 to impose a sentence sufficient, but not greater than necessary, to comply with the
9 statutory purposes of sentencing. And as *Rita* makes clear, traditional departure analysis
10 under the guidelines survives post-*Booker*.

13 Prior to *Booker*, many of these factors were largely ignored, because they were
14 incompatible with the Guidelines. As one Court observed,

15 For example, under §3553(a)(1) a sentencing court must
16 consider the "history and characteristics of the defendant."
17 But under the guidelines, courts are generally forbidden to
18 consider the defendant's age, U.S.S.G. §5H1.1, his
19 education and vocational skills, §5H1.2, his mental and
20 emotional condition, §5H1.3, his physical condition
21 including alcohol or drug dependence, §5H1.4, his
22 employment record, §5H1.5, his family ties and
23 responsibilities, §5H1.6, his socio-economic status,
24 §5H1.10, his civic and military contributions, §5H1.11, and
his lack of guidance as a youth, §5H1.12. The guideline's
prohibition of considering these factors cannot be squared
with the §3553(a)(1) requirement that the court evaluate the
"history and characteristics" of the defendant. The only
aspect of a defendant's history that the guidelines permit
courts to consider is criminal history.

25 *United States v. Ranum*, 353 F.Supp.2d 984 (E.D.Wis. 2005). Following *Booker*,
26 however, courts must once again consider these factors along with the Guidelines and their
27 policy statements.

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VI. SENTENCING RECOMMENDATION.

For the reasons set forth below, we submit that a sentence of twenty-four (24) months would be a sufficient--but not greater than necessary--sentence in this case.

A. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE CHARACTERISTICS OF THE OFFENDER.

1. The Offense.

Despite the government's repeated attempts to vilify Mr. Soloway in court documents and in the press, this is basically a "spam" case. Without question, Mr. Soloway has been a nuisance to internet users, but the Court should keep his offense in perspective. And despite the government's attempts to include conduct going back as far as 1997, the offense of fraud in connection with electronic mail (18 U.S.C. §1037) did not exist prior to 2004, so no matter how "offensive" his past conduct was in that regard, it was not a violation of federal law. Importantly, Mr. Soloway did not engage in conduct that harmed people's computers or that caused them to lose data, such as by sending viruses, worms, spyware, trojan-horses, and other malicious codes, nor did he ever send pornographic images to unsuspecting internet users, or direct them unwittingly to objectional websites. What he did do was send huge amounts of email over the internet advertising his product and service, often using forged headers, to people who did not want to receive it.

Realizing that the maximum statutory penalty for a violation of the CAN-SPAM Act is five years, the government dressed up its indictment to include counts of mail and wire fraud, and Mr. Soloway pled guilty to one count of mail fraud in violation of 18 U.S.C. §1341. He acknowledged in his plea that beginning in 2006 he began to include representations about his product and service on his website that he knew were not true,

1 such as offering "24/7" technical support, and that his email addresses were what is known
2 as "opt-in." But what is important to note here is that although over 10,000 people
3 purchased his product or service in the last ten years, fewer than 75 people ever
4 complained about the product or service. That is an enviable record for any business. Of
5 all of the complaints the government has alleged receiving, fewer than 50 involve the
6 product or service, and this is over the last ten years. In fact, Mr. Soloway has received
7 five times more favorable feedback from clients than complaints. So the government's
8 effort to portray Mr. Soloway's entire business over the last ten years as a giant fraud is
9 wildly overstated.

10 **2. History and Characteristics of the Defendant.**

11 At age 28, this is Mr. Soloway's first and only contact with the criminal justice
12 system. He has never before been charged with a criminal offense. As explained in the
13 letters from his mother, father (submitted with the PSR), uncle, and Robert's own letter
14 to the Court, Robert had a very difficult childhood, and has sometimes had a difficult time
15 dealing with the mores of society.⁴

16 From an early age, Robert was diagnosed with Tourette Syndrome, Attention
17 Deficit Disorder, and Oppositional Defiant Disorder. These afflictions, and the
18 medications he takes to control them, certainly help to explain some of his erratic and anti-
19 social behavior, especially as it pertains to some of his interactions with unhappy recipients
20 of his email. Dr. David Comings, Department of Medical Genetics, City of Hope
21 National Medical Center, is one of the leading experts in the world on Tourette Syndrome,
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27 ⁴ These letters are being submitted to the Court under separate cover, and are not for
28 filing.

1 and is the author of the leading treatise, TOURETTE SYNDROME AND HUMAN BEHAVIOR,
2 Hope Press, 1990. Dr. Comings initially diagnosed Robert in 1988. In his letter to the
3 Court (submitted with the PSR), Dr. Comings has stated that in his professional opinion
4 Robert's "genetic impulse disorders, Tourette Syndrome and attention deficit hyperactivity
5 disorder, have contributed to his disinhibited behavior and affected his judgment." He
6 further describes how these disorders affect the brain:
7

8 Both of these organic disorders affect the function of the
9 frontal lobes, especially the dorsolateral and orbitofrontal
10 portions. . . . These portions of the brain are responsible for
11 attention span, impulsivity, poor self-control, reason,
12 inhibiting inappropriate behavior, social judgment,
13 preservation (inability to change a course of behavior),
14 empathy, obsessive-compulsive behavior, and many other
15 "civilizing" behaviors.

16 Robert has been prescribed Klonopin to help control his Tourette Syndrome. One
17 of the recognized side effects of Klonopin is a condition known as "disinhibition," which
18 is described as a process which results in an individual having a reduced capacity to edit
19 or manage their immediate impulsive response to a situation. Exhibit U.

20 While in Oregon in 2003, Mr. Soloway and his neighbor, who was a psychiatrist,
21 formed a group called the Moody Blues Stress Stop, the purpose of which was to improve
22 the lives of people living with mood disorders. In addition to helping form the group,
23 Robert set up the on-line website for the group, and there were bi-monthly meetings at the
24 Ashland, Oregon Community Hospital. Exhibit W. This group was an independent
25 chapter of the National Depression and Bipolar Support Alliance.

26 The combination of Robert's Tourette Syndrome, attention deficit hyperactivity
27 disorder, and oppositional defiant disorder, all of which have been clinically diagnosed,
28 coupled with the disinhibition resulting from the Klonopin, go a long way towards

1 explaining and helping to understand the etiology of Robert's behavior, particularly his
2 sometimes inappropriate responses to people and situations. We believe that because these
3 afflictions clearly affected Robert's behavior, a departure or variance from the sentencing
4 guidelines is clearly warranted.
5

6 **3. Cooperation.**

7 Shortly after his arrest, Mr. Soloway explored the possibility of cooperation with
8 the government. However, despite the fact that he has a wealth of knowledge in this area
9 which could have been valuable to law enforcement, the government turned him down flat,
10 making it clear that it had absolutely no interest in talking to him, and that it was their
11 intent to prosecute him to the fullest extent of the law and to seek the most severe penalty
12 possible.
13

14 **B. THE SERIOUSNESS OF THE OFFENSE; PROMOTING RESPECT FOR THE LAW;
15 AND JUST PUNISHMENT.**

16 To be sure, the offenses to which Mr. Soloway has pled guilty are serious offenses.
17 However, as stated above, they must be kept in perspective. Robert was without question
18 a major nuisance to users of the internet, and his constant barrages of "spam" irritated
19 thousands of people, and even caused some people financial losses. But the sentence
20 recommended by the government is wholly disproportionate to the crimes. It equates to
21 a guideline sentence for an armed bank robbery in which a firearm was discharged. See,
22 *e.g.*, U.S.S.G. §2B3.1(b)(2)(A), or to the distribution of up to 15 kilograms of cocaine
23 or 1,000 to 3,000 kilograms of marijuana. U.S.S.G. §2D1.1.
24

25 Looking at this case from a different perspective, in the Enron corporate scandal,
26 the conduct of the various defendants resulted in the evaporation of more than \$60 billion
27 in market value, which decimated the life savings of thousands of people; wiped out \$2.1
28

1 billion in pension plans; and eliminated over 5,600 jobs. To date, the Court in that case
2 has handed down the following sentences:

<u>Name:</u>	<u>Position:</u>	<u>Charges:</u>	<u>Sentence:</u>
Kenneth Lay	Chairman, CEO	Fraud, Conspiracy, Insider Trading	Died before Sentencing
Jeffrey Skilling	President, CEO	Fraud, Conspiracy, Insider Trading	24 years ⁵
Andrew Fastow	Chief Financial Officer	Fraud, Conspiracy, Money Laundering, Insider Trading	72 months
Richard Causey	Chief Accounting Officer	Fraud, Conspiracy, Money Laundering, False Statements, Insider Trading	66 months
Ben Gilson, Jr.	Treasurer	Fraud, Conspiracy, Money Laundering	60 months
Michael Kooper	Assistant Chief Financial Officer	Conspiracy	37 months
David Delainey	CEO of Enron NA	Fraud, Insider Trading	30 months
Mark Koenig	Investor Relations Chief	Securities Fraud	18 months
Lea Fastow	Assistant Treasurer	Conspiracy, Money Laundering, Filing False Tax Returns	12 months
Timothy DeSpain	Assistant Treasurer	False Statements	4 years Probation
Paula Rieker	Investor Relations	Insider Trading	2 years Probation

24 We submit that imposing the sentence recommended by the government would not
25 be just punishment, nor would it promote respect for the law. It would simply show the
26 government's over-reaching. Given the actual nature of the offenses, and Mr. Soloway's

27 _____
28 ⁵ Skilling went to trial, and continues to deny any personal responsibility.

1 mental health issues, an analysis of all of the sentencing factors and sentencing policies
2 under §3553(a) strongly suggests that a sentence below the guidelines range adequately
3 recognizes the true nature of the offenses in this case.
4

5 **C. THE NEED FOR THE SENTENCE TO AFFORD ADEQUATE DETERRENCE TO**
6 **CRIMINAL CONDUCT.**

7 We submit that a prison sentence, any prison sentence, will serve as an adequate
8 deterrent in this case. It is unlikely that others will be inclined to engage in this type of
9 conduct if they realize that it will result in a prison sentence.

10 **D. THE NEED TO PROTECT THE PUBLIC FROM FURTHER CRIMES BY MR. SOLOWAY.**

11 The likelihood of recidivism by Mr. Soloway is low. On the contrary, given the
12 positive steps towards rehabilitation that he has made since his arrest, it appears that Mr.
13 Soloway will remain law abiding.

14 **E. THE NEED TO PROVIDE THE DEFENDANT WITH REQUIRED MEDICAL CARE.**

15 The main medications that Robert takes to control his Tourette Syndrome are
16 clonazepam (Klonopin) and venlafaxine (Effexor). Unfortunately, Klonopin is not on the
17 BOP formulary. During the first 45 days of his incarceration at the FDC, the medical
18 staff weaned him off of the Klonopin (which is an addictive drug). The results were
19 predictable. On August 1, 2007, Robert was seen by the medical staff, who noted:
20

21 "[Robert] appears miserable, c/o shaking, cold sweats,
22 vomiting, trembling, racing heart, twitching, runny nose."

23 He was also complaining of severe anxiety, with suicidal thoughts, and involuntary
24 body twitching that was keeping him awake night. It was noted that his Tourette's had
25 previously been successfully treated with Klonopin, and those symptoms were once again
26 prominent in the absence of the Klonopin. Dr. Grant Haven, the contract psychiatrist at
27

1 the FDC put in a request for non-formulary drug authorization, providing as reasons:

2 Patient has extensive treatment history with many failures for
3 his Tourette's and anxiety. Clonopin helps both. Tics
4 prevent him from sleeping. Now 72 hours without sleep.
5 No substance abuse history.

6 Dr. Haven also listed the other drugs that are on the BOP formulary that were tried
7 without effect. These included Prozac, Paxil, Zoloft, Luvox, Effexor, Buspar, Haldol,
8 Orap, and others. On August 17, a chart note confirms that the BOP denied the non-
9 formulary request.

10 Upon receiving notice that the BOP had denied the doctor's request for non-
11 formulary drug authorization, Robert J. Palmquist, the warden at FDC SeaTac, personally
12 contacted the appropriate individuals at BOP headquarters in Washington, DC, with a
13 request that the FDC be allowed to provide Robert with Klonopin. That request was also
14 denied, without explanation.

15 As a result of the BOP's refusal to prescribe Klonopin, or any other generic drug
16 from the same family of drugs, Robert's Tourette's symptoms returned with a vengeance,
17 particularly the uncontrollable body tics. His anxiety level increased dramatically, even
18 reaching the point where he was experiencing suicidal ideation.

19 Just prior to the hearing on Mr. Soloway's motion for review of the detention
20 order, the Bureau of Prisons ("BOP" herein) reversed itself with respect to prescribing
21 Klonopin for Robert after being confronted with the allegations raised in Mr. Soloway's
22 motion for review of the detention order. Because the FDC was concerned that the Court
23 might order the BOP to prescribe proper medication if Robert was not released, District
24 Counsel for the BOP finally prevailed upon the appropriate authorities to reverse their
25 position. While it is commendable that the BOP finally agreed to prescribe Klonopin for
26
27
28

1 Robert, it is lamentable that they did so only because they feared judicial intervention, and
2 that Robert had to needlessly suffer for two months. We are justifiably concerned that
3 Robert will not be able to get Klonopin, or some similar medication, without judicial
4 intervention if he is sentenced to a term of imprisonment.
5

6 **F. THE NEED TO AVOID UNWARRANTED SENTENCING DISPARITY.**

7 As the government notes in its Sentencing Memorandum, very few "spamming"
8 cases have been prosecuted in this district or elsewhere. There are, however, some recent
9 prosecutions that involve related, if not identical, computer conduct. Coincidentally, two
10 of those cases have been in this Court.
11

12 In Case No. CR03-379-MJP, this Court sentenced Jeffrey Lee Parson to eighteen
13 (18) months incarceration. Mr. Parson pled guilty to Intentionally Causing and Attempting
14 to Cause Damage to a Protected Computer in violation of 18 U.S.C. §1030(a)(5)(A)(i),
15 §1030(a)(5)(B)(i), §1030(b), and §1030(c)(4)(A). Mr. Parson's admitted unleashing a
16 series of "distributed denial of service attacks on the internet" (variations of the "Blaster"
17 worm). The government conservatively estimated damages in that case as being over
18 \$1,225,000, and that Mr. Parson's attack had infected no less than 48,000 computers with
19 a malicious virus that completely disabled those computers. Microsoft provided the
20 government with information supporting \$20,749,885.00 in direct losses caused by the
21 worms at issue in that case (not all of which were launched by Parsons). Pursuant to the
22 Plea Agreement in that case, the government recommended a sentence of 37 months.
23

24 In Case No. CR06-042-MJP, this Court sentenced Christopher Maxwell to 37
25 months imprisonment (Ms. Warma was requesting a sentence of 72 months). Mr.
26 Maxwell pled guilty to Conspiracy to Commit Computer Fraud in violation of 18 U.S.C.
27
28

1 §371, and Intentionally Causing and Attempting to Cause Damage to a Protected Computer
2 in violation of 18 U.S.C. §1030(a)(5)(A)(i), §1030(a)(5)(B)(i), §1030(a)(5)(B)(ii),
3 §1030(b), and §1030(c)(4)(A). The government in that case alleged that Mr. Maxwell had
4 created a network of over 440,000 "zombie" computers that had been hacked into and
5 contaminated with malicious code that enabled Maxwell to remotely control those
6 computers. The complicated facts of that case are set forth in the Plea Agreement, a copy
7 of which is attached as Exhibit W. Suffice it to say here that Maxwell admitted in his Plea
8 Agreement that he compromised computers belonging to Northwest Hospital as well as "at
9 least 407 computer hosts (distinct IP addresses) belonging to the United States Department
10 of Defense, including computer hosts that were part of the Headquarters, 5th Signal
11 Command in Manheim, Germany, and others that were part of the Directorate of
12 Information Management, Fort Carson, Colorado."⁶

15 We are also aware of two recent "spam" cases in the District of Colorado. One
16 is referenced in the government's sentencing exhibits (Exhibit M). United States District
17 Court for the District of Colorado, CR07-065-LTB, *United States v. Min Kim*. There, the
18 defendant was convicted of a violation of 18 U.S.C. §1037, and unlawful possession of
19 a destructive device. The total sentence on both counts was 30 months.

21 In a second "spam" case from the same district, the defendant pled guilty to one
22 count of violation of 18 U.S.C. §1037 (Falsifying Header Information to Send Spam
23 Electronic Mail), and one count of Tax Evasion in violation of 26 U.S.C. §7201. CR07-

25 ⁶ We also note that Adam Sweaney, a government witness who has pled guilty to charges
26 of conspiracy (18 U.S.C. §371) and Fraud in Connection with Electronic Mail (18 U.S.C.
27 §1037(a)(1) and (b)(2)) in a case pending in the United States District Court for the District of
28 Columbia, has entered into a plea agreement in which the parties agreed that the Total Offense
Level under the Sentencing Guidelines in 13. Mr. Sweaney, like Mr. Maxwell, controlled botnets,
which he leased to other people.

1 257-MSK, *United States v. Eddie Davidson*. Mr. Davidson admitted to sending out a
2 large volume (the total amount was not disclosed) of unsolicited emails with forged
3 headers touting penny stocks. The content of the emails often contained material false
4 statements that were designed to induce investors to purchase the touted stock. Davidson
5 was sending these emails on behalf of 19 separate companies, and between 2003 and 2006
6 he received no less than \$3,500,000.00 from his spamming activities. The details are set
7 forth in the Plea Agreement, which is attached as Exhibit X-1. Mr. Davidson, who
8 cooperated in the investigation, received a sentence of 21 months. Exhibit X-2.
9

10 We acknowledge that no two cases are exactly alike, and that there are many
11 variables from case to case, but the examples provided above suggest that a sentence of
12 twenty-four months would be consistent with similar cases of this nature.
13

14 **VII. CONCLUSION.**

15 For all of the reasons hereinabove set forth, we submit that a sentence of twenty-
16 four (24) months, is a sufficient, but not greater than necessary, sentence in this case. We
17 also request the Court to recommend to the Bureau of Prisons that Mr. Soloway be
18 designated to serve his sentence at the Federal Prison Camp at Sheridan, Oregon ("FPC
19 Sheridan"), and that he be allowed to self-report as directed by Probation. U.S. Pre-trial
20 Services concurs in the latter request.
21

22 DATED this 9th day of July, 2008.

23 RICHARD J. TROBERMAN, P.S.

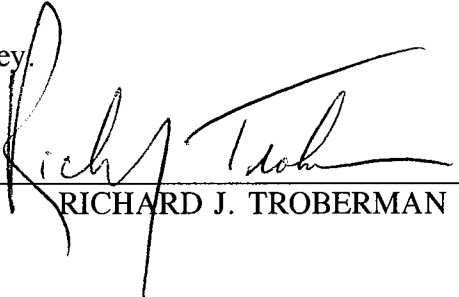
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25 By: 

26 RICHARD J. TROBERMAN
27 WSBA #6379
28 Attorney for Defendant
Robert Alan Soloway

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CERTIFICATE OF SERVICE

I hereby certify that on July 9th, 2008, I electronically filed the foregoing "Defendant Robert Soloway's Sentencing Memorandum" with the Clerk of Court, using the CM/ECF system which will send notification of such filing to the attorneys of record in this case. On the same date, a copy of the Motion was hand delivered to Kathryn Warma, Assistant United States Attorney.


RICHARD J. TROBERMAN