

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	
)	NO. CR07-187MJP
Plaintiff,)	
)	GOVERNMENT'S
v.)	SUPPLEMENTAL
)	SENTENCING MEMORANDUM
ROBERT ALAN SOLOWAY,)	
)	
Defendant.)	

The United States of America, by and through Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, and Kathryn A. Warma and Richard Cohen, Assistant United States Attorneys for said District, files this Supplemental Sentencing Memorandum.

The government is filing this Supplemental Memorandum for two reasons: First, to respond to the Court's request that the parties address specific issues as identified by the Court; and second, to inform the Court and counsel that, in light of the actions and filings of the defense during the sentencing phase of this case, the government now takes the position that Soloway has not accepted responsibility for his crimes, and should not be accorded a two point reduction for acceptance of responsibility as part of the Sentencing Guideline computation process.

I. Issues Identified by the Court for Response

A. Applicability/Appropriateness of Fraud Guideline

The government readily acknowledges the challenges of properly computing a sentencing range in this case. Those difficulties, however, are really due to the fact that the

1 “instrumentalities” (computers and the Internet) that the defendant intentionally chose to use for
2 the very reason that they would maximize his criminal reach to hundreds of millions of people
3 worldwide, also have the concomitant potential to inflict corresponding damages of a hitherto
4 unimaginable scope, to victims in numbers that were impossible and even incomprehensible with
5 the use of “traditional” criminal tools. This is a critical, and elemental point of understanding in
6 these types of “cyber-crime” cases, and one that has yet to be explicitly judicially recognized.
7 Professional cyber-criminals are now adopting and using these tools precisely because they have
8 such an unbounded capacity as tools for criminal profit - the pool of potential victims is not
9 limited by geography, state, or even national boundaries; victims never “see” the perpetrators and
10 their identities can readily be masked through a variety of Internet “forging” techniques; and (as
11 the cyber-criminals well know), law enforcement investigation, and prosecution is hampered by
12 both of those realities.

13 It is the goal of professional cyber-criminals like Robert Soloway intentionally to exploit
14 computers and the Internet to maximize their criminal reach and profits and to exploit, as well,
15 the difficulties of bringing either civil enforcement or criminal cases against them. The scope of
16 the damage they cause should not be diminished or minimized because of the relative “ease” of
17 inflicting it by a single - but very criminally purposeful - “click” of a computer that they have
18 purposefully chosen as the instrumentality of their crime.

19 While there are thus understandably challenges to the computation in this and other like
20 cyber-crime cases as a result of the relative novelty of the instrumentalities chosen to effect the
21 crimes, and in addressing the magnitude of consequences that flow therefrom, there can be no
22 question that the proper guideline to work with in making that computation is the “fraud
23 guideline,” - USSG §2B1.1.

24 What the government has referenced as the “criminal spamming” crimes of the defendant
25 consisted of his intentional transmission of hundreds of millions of commercial electronic e-mail
26 messages, in which Soloway “knowingly and materially falsified header information.” Soloway
27 has admitted to this crime through his plea - and further admitted that he engaged in this crime
28

1 from the very first date that it became a criminal offense - January 1, 2004.¹ The government has
2 referenced this crime as “criminal spamming,” because that is the “popular term” and evokes an
3 instant recognition of the behavior involved.

4 The crime is, however, better and more accurately referenced, in legal terms, as
5 “e-mail fraud” - and indeed, Congress specifically identified it as a fraud crime by the title they
6 explicitly gave to it in the CAN-SPAM Act of 2003. There, in Section 4 of the Act, titled
7 “Prohibition Against Predatory and Abusive Commercial E-mail,” Congress directed that the
8 conduct (including falsifying and forging headers in commercial e-mail) that Congress was newly
9 criminalizing was to be titled “Fraud and related activity in connection with electronic mail”; and
10 further, that the statute was to be codified at 18 U.S.C. §1037 - making it part of Chapter 47 of
11 Title 18, United States Code, which is that portion of the federal criminal statutes titled, “Fraud
12 and False Statements.”

13 The United States Sentencing Commission similarly recognized the crime as one which
14 properly falls under the “fraud” sentencing guideline, by explicitly cross-referencing 18 U.S.C.
15 §1037 to USSG §2B1.1 in both Appendix A to the Sentencing Guidelines, as well as in the
16 “*Commentary*” to Guideline §2B1.1.

17 Aside from these explicit and deliberate directives both by Congress and the Sentencing
18 Commission that § 1037 “fraudulent e-mail” violations are “fraud” crimes, and that the “fraud”
19 guideline is the guideline for computation, this type of crime also fully comports with all that is
20 included in the most basic definition of “fraud” as “[a] knowing misrepresentation of the truth or
21 concealment of a material fact to induce another to act to his or her detriment.”² “Knowing
22 misrepresentation of the truth” and “concealment of material facts” for the purpose of inducing
23 others to act to their detriment was exactly what Soloway’s fraudulent e-mail (“criminal
24 spamming”) conduct was all about - that, and his use of it as an inducement to get others to act

26 ¹Plea Agreement, at paragraphs 1.b., 2.b., 7.j.; Second Superseding Indictment, paragraph 18.

27 ²Black’s Law Dictionary, (8th Ed., 2004).

1 in his benefit, and to their detriment. It was “fraud” in every sense, and the “fraud guideline” is
2 unquestionably the proper guideline for computing a Sentencing Guideline range.

3 That said, the difficulty comes in enumerating the “victims” (individuals who suffer
4 “pecuniary loss”) as a result of the conduct, and also how “loss” is to be calculated.

5 **B. Victim Enhancement**

6 The Guidelines themselves provide, at Specific Offense Characteristic (b)(2)(A) and the
7 corresponding “*Commentary*” at *Note 4.(B)*, that “*for purposes of [the “victim” enhancement*
8 *subsection of §2B1.1], an offense under 18 U.S.C. §1037 . . . shall be considered to have been*
9 *committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level*
10 *enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a*
11 *greater enhancement under the [victim enhancement subsection] if the defendant was convicted*
12 *under, or the offense involved conduct described in 18 U.S.C. §1037.”*

13 The government continues to assert that evidence it has presented in this case regarding
14 the volume, duration, and the unremitting nature of Soloway’s fraudulent e-mailing - fraudulent
15 e-mail that Soloway intentionally transmitted to hundreds of millions of “non” opt-in e-mail
16 addresses that he harvested without notice or permission of the owners; and that he intentionally
17 and fraudulently transmitted repeatedly to those addresses throughout a period of over three years
18 - (from the day it became illegal under federal law until the day Soloway was arrested and thus
19 finally and forcibly shut down); and that he continued intentionally to transmit to unwilling
20 recipients even after they had identified themselves as victims and made multiple requests to stop
21 - is well beyond the preponderance of evidence³ needed to support a finding that more than 250
22 individuals were “victims”⁴ of Soloway’s fraudulent e-mails crimes.

24 ³That evidence includes the testimony of David Reel, Jason Nast, Toby Corbalis, Steven Collins, Tom
25 Ervin, Ken Schmutz, and the over 500 known “junk e-mail” and “spamcop” complaints filed with the
26 Washington Attorney General’s Office (Ex. 110), and the 108 known complaints about Soloway’s spamming
filed with the Better Business Bureau (Ex. 112).

27 ⁴For discussion as to how and why these individuals suffered “pecuniary harm,” see discussion of “loss
28 amount,” below.

1 Under the extreme and egregious facts of this fraudulent e-mail case, a victim
2 enhancement of six points, in recognition of victims numbering more than 250, is clearly
3 warranted. A victim enhancement that is any lower is at odds with the evidence in this case,⁵ and
4 equally at odds with basic Internet reality.

5 **C. Loss Amount**

6 An accurate computation of the total pecuniary harm caused by Soloway's three-plus
7 years of fraudulent e-mailing, (as well as that caused by his fraudulent spam promotion business)
8 would indeed, be impossible. A computation of the actual pecuniary harm is not required for
9 guideline computation purposes, however. Rather, the Court need only make a "reasonable
10 estimate of the loss based on the available information." United States v. Zolp, 479 F.3d 715,
11 719 (9th Cir. 2007).

12 Soloway's fraudulent, criminal e-mail transmissions, alone,⁶ caused pecuniary harm - and
13 therefore "loss" for guideline calculation purposes. The evidence⁷ supports a finding that
14 Soloway intentionally transmitted hundreds of millions of fraudulent e-mails, to hundreds of
15 millions of e-mail addresses that he had harvested over the Internet. The Court has noted, and
16 the government does not disagree, that in some instances these fraudulent e-mails could have
17 been viewed by the victim recipients as no more than an "annoyance," and deleted. Even this
18 "annoyance," however, would necessitate the recipient taking time to assess the message, identify
19 it as worthless fraudulent e-mail, and remove it from the memory of the victim's computer
20 system. At just 25¢ per receipt of a fraudulent e-mail, this would equal \$250,000.00 in loss per
21
22

23
24 ⁵Including the complaints made by hundreds of different victims of Soloway's fraudulent e-mails
(criminal spam).

25 ⁶The government will speak here only to the losses caused by the fraudulent e-mail, exclusive of any
26 losses and damages due to Soloway's fraudulent spam promotion scheme.

27 ⁷Including electronic evidence on the server he rented from Liquid Web, as well as that found on the
28 HopOne and Godaddy servers that he rented. Testimony of Steven Collins and Tom Ervin, and Ex. 83.

1 just 1,000,000 fraudulent e-mails. The evidence establishes that, in fact, Soloway transmitted
2 multiple millions of fraudulent e-mails.⁸

3 Even victims who “just” considered the fraudulent e-mails as an “annoyance” to be
4 deleted were forced to waste the time needed to identify, assess, and remove Soloway’s
5 fraudulent e-mails from their systems. That wasted time equals loss of productivity, which
6 equals real pecuniary harm both to individuals, but especially to businesses. The immense
7 productivity loss costs engendered by fraudulent e-mail were one of the concerns explicitly
8 referenced by Congress in its deliberations and adoption of the CAN-SPAM Act.⁹

9 The evidence also proves that for many of Soloway’s victims, the costs were not confined
10 to those of a “small annoyance,” but instead caused significant disruptions - and therefore
11 significant, quantifiable financial losses - to their business operations. Both Toby Corbalis and
12 David Reel, for example, testified about the substantial number of hours they spent in attempting
13 to identify the source of Soloway’s spam, communicate with him in attempts to get him to stop,
14 file complaints with agencies when their requests to stop were denied, and in cleaning the
15 fraudulent e-mail from their systems. These types of costs are costs that Congress specifically
16 mandated were to be included as “loss” for crimes under the fraudulent e-mail statute. See: 18
17 U.S.C. §1037(d)(1), incorporating by reference 18 U.S.C. §1030(e). Toby Corbalis and David
18 Reel, moreover, were not atypical victims - similar complaints have been filed by dozens of
19 others about the impacts on them and their businesses from Soloway’s spamming.

20 Documentation of such complaints is contained in Exhibits 110 and 112, and copies of

22 ⁸See, e.g., Ex. 83 and testimony of Steven Collins, proving that on a single day on which Soloway used
23 the server he had rented (fraudulently) from Liquid Web to send fraudulent e-mails, he was initiating 4,468,306
24 such transmissions, at the rate of 71,882 per hour (and using 3001 proxy computers to do so.) (Copy appended as
Attachment A for Court’s convenience.) As Collins testified, these fraudulent and criminal e-mails were
advertising Soloway’s fraudulent “broadcast e-mail” (spamming) business.

25 ⁹For example, Congress noted that “Ferris Research currently estimates that costs to United States
26 businesses from spam in lost productivity, network system upgrades, unrecoverable data, and increased personnel
27 costs, combined, will top \$10 billion in 2003,” and that a 2001 study by the European Union established that
spam was costing Internet subscribers worldwide \$9.4 billion annually. Sen. Rep. 108-102, 2004 U.S. Code
28 Congressional and Administrative News 2348, 2352 (7/16/2003).

1 | complaints from dozens of other such victims, filed with various other entities, can also be
2 | provided to the Court upon its request.

3 | In addition to the direct recipients of Soloway's fraudulent e-mails, however, there were
4 | also costs and losses incurred by all the various ISPs who necessarily had to deal with the
5 | hundreds of millions of Soloway's fraudulent e-mails by filtering, and other security measures.¹⁰
6 | These costs, too, are real and they are significant, and they were also explicitly cited by Congress
7 | in the CAN-SPAM Act itself, as well as the legislative history of the same.¹¹ The Court herein
8 | heard testimony from Brian Sullivan, Vice President for Communications Operations at AOL on
9 |

10 | _____
11 | ¹⁰The Court has suggested a "pollution" analogy might be appropriate, in formulating a sentence herein,
12 | because spam is "spewed out," "has an impact on everybody who has a computer, [a]nd there are some people
13 | who are poisoned by it, and there are others who are merely annoyed." After deliberation and also consultation
14 | with environmental attorneys, the government can not agree that this is an appropriate analogy. First, pollution
15 | crimes typically involve choices/acts in furtherance of the operations/economic interests of an individual or
16 | entity, that incidentally cause a harmful impact to "third parties" consisting of the environment and/or other
17 | living things in it. This may consist, for example, of a failure to comply with environmental regulations that
18 | specify how certain materials must be handled or disposed. Often there is no specific intent requirement as to the
19 | incidental harmful impact. In contrast, fraudulent e-mail crime of the type charged here does require a specific
20 | fraudulent intent, as well as the purposeful initiated transmission of the fraudulent e-mails. The damage that
21 | results is in fact very much part of the intended objective of the action itself, as the fraud is committed for the
22 | very purpose of deceiving the victim recipients of the fraudulent e-mail.

23 | The government agrees that a similarity can exist, as between certain types of pollution cases and in
24 | fraudulent e-mail cases, in that diffuse damages can be inflicted, consequentially, in both, in the form of
25 | widespread damage to entities (such as ISPs) who are not the direct targets of the crime itself. But this
26 | foreseeable, consequential harm to the Internet infrastructure does not alter the essentially fraudulent nature of
27 | the fraudulent e-mail crime - it is intentionally sent directly to the immediate victims for the very purpose of
28 | deceiving and defrauding them.

29 | Note also that the "pollution" sentencing guidelines, contained in Part Q of the Guidelines, §2Q1.1, *et*
30 | *seq.*, are not applicable to the crimes here charged; nor are they instructive in addressing the challenging issues of
31 | victim counts and loss calculation in the fraudulent e-mail or other cyber-crime contexts.

32 | ¹¹"Spam imposes significant economic burdens on ISPs, consumers, and businesses. Left unchecked at
33 | its present rate of increase, spam may soon undermine the usefulness and efficiency of e-mail as a
34 | communications tool. Massive volumes of spam can clog a computer network, slowing Internet service for those
35 | who share that network. ISPs must respond to rising volumes of spam by investing in new equipment to increase
36 | capacity and customer service personnel to deal with increased subscriber complaints. ISPs also face high costs
37 | maintaining e-mail filtering systems and other anti-spam technology on their networks to reduce the deluge of
38 | spam. Increasingly, ISPs are also undertaking extensive investigative and legal efforts to track down and
39 | prosecute those who send the most spam, in some cases spending over a million dollars to find and sue a single,
40 | heavy-volume spammer."
41 | Sen. Rep. 108-102, 2004 U.S.C.A.N. 2348, *supra*, at 2352. See also: Section 2(a)(6), Pub. L. 108-187 (2003),
42 | (emphasis added).

1 this score, generally, and from Robert Braver, about the financial impact of Soloway's spam, in
2 particular, on his smaller "mom and pop" ISP.

3 These diffuse, consequential costs are difficult - if not impossible - to precisely compute.
4 This difficulty in precisely calculating the damages caused by the defendant's conduct, should
5 not, however, be cause for pretending they do not exist. Nor is it cause for shying away from a
6 loss calculation under the guidelines that adequately takes them into account.

7 The government agrees with the proposal by the Probation Office that under the
8 circumstances of this case, "gain" appropriately can be used as a loss figure, for purposes of the
9 necessary guideline computation.

10 U.S. District Court Judge Lewis Babcock of the District of Colorado took this gain
11 approach in the fraudulent e-mail case of United States v. Kim, perceptively noting in doing so,
12 as follows:

13 There is something that is very disquieting to the Court. In the argument
14 that the magnitude of the Internet and spamming is so huge in a minute-by-minute
15 context, magnified exponentially over time, that someone in [the defendant's]
16 position was simply a grain of sand in the Sahara, and that accordingly his
17 acknowledged gain should be totally disregarded under paragraph (B) of
18 Application Note 3, an argument that would run contrary to the intent of Congress
19 in enacting the CAN-SPAM Act, would disregard the nature and the
20 circumstances of the offense and its seriousness, [and] would certainly run totally
21 counter to the concern of the Court to provide adequate deterrence to criminal
22 conduct under 18 U.S.C. Section 3553(a).

23 Reporter's Transcript, Sentencing Hearing, United States v. Min Kim, No. 07-cr-00065-
24 LTB, U.S.D.C., D. Co., (11/19/07), at 23. (Transcript appended to Government's Sentencing
25 Memorandum, as Exhibit M.)

26 Soloway's gain can readily be ascertained and quantified, and it bears a direct relationship
27 to the crimes of conviction as all of Soloway's fraudulent e-mail consisted either of the
28 fraudulent e-mail that he transmitted illegally to promote his own fraudulent spam promotion

1 business, or constituted fraudulent e-mail that he sent illegally, for pay, on behalf of his
2 “distribution e-mail service” customers.¹²

3 **D. Maximum Statutory Sentence for E-Mail Fraud Should be Imposed**
4 **Under the Circumstances of this Case**

5 Another of the issues over which the Court expressed concern was how to deal with the
6 discrepancy between the maximum statutory sentences for e-mail fraud and mail fraud, given that
7 the defendant is convicted of both of these crimes.

8 The government has taken the very unusual position in this case of asking for “allocation”
9 of sentence to include, explicitly, the imposition of the full statutory maximum sentence of 60
10 months for the fraudulent e-mail crimes, with the balance of its requested sentence of 108 months
11 assigned to the mail fraud and willful failure to file tax return crimes. The government believes
12 that it is important uniquely in this unprecedented e-mail fraud case to recognize and pronounce
13 publically, and emphatically, that fraud in e-mail is a serious crime, that the financial and societal
14 costs of this crime are immense, and that, in circumstances where this crime is committed so very
15 deliberately and maliciously, over such a long period of time and despite the pleas of so very
16 many people that it be stopped; where the perpetrator is malicious and even vindictive towards
17 victims who are only trying to have the crime stopped; and in which the perpetrator has refused
18 to stop, even after he was enjoined by a United States District Court Judge - in those
19 circumstances, the maximum statutory penalty for fraud in e-mail should be very explicitly
20 imposed. Congress provided that a five year term of imprisonment be the maximum penalty
21 under the statute, and the government respectfully suggests that there is no conceivable set of
22

23 ¹²The United States, moreover, is seeking forfeiture of all proceeds of Soloway’s fraudulent e-mail
24 crimes, pursuant to 18 U.S.C. §1037(c), which provides in pertinent part that:

25 (1) . . . The court, in imposing sentence on a person who is convicted of an offense under
26 this section, shall order that the defendant forfeit to the United States -

27 (A) any property, real or personal, constituting or traceable to gross proceeds obtained
28 from such offense.

1 | circumstances that could warrant the intended maximum penalty more than those which exist
2 | herein.

3 | There was, however, also significant criminal conduct beyond that of fraudulent e-mail,
4 | that should also recognizably result in punishment. To that end, the government is urging that
5 | the balance of the guideline level, and fully “reasonable” sentence of 108 months imprisonment
6 | that it seeks in this case be imposed in relation to the commission of those additional crimes.

7 | **E. Restitution**

8 | Restitution is mandatory in this case. 18 U.S.C. §3663A(a)(1). The victims of the crime
9 | also have a statutory right to make claims for it. 18 U.S.C. §3771(a)(6). Consistent with the
10 | terms of 18 U.S.C. §3664, identified victims were provided with notice and the opportunity to
11 | submit a claim for restitution. Approximately 60 victims have elected to file victim impact
12 | statements, and of those, approximately 45 have also made claims of financial loss and restitution
13 | that total well over \$1.5 million dollars.

14 | Before the sentencing hearing in this case, government counsel invited defense counsel to
15 | meet and review the claims for restitution in the hopes that agreement could be reached as to
16 | most, if not all, of the claims. Government counsel believes, for example, that some of the claims
17 | may be seeking reimbursement for categories of costs not compensable under the restitution
18 | statutes and rules, or that some might simply be too speculative. At the meeting, however,
19 | defense counsel took the blanket position that none of the restitution claims were supported by
20 | “documentation,” and that none of them, therefore, could be a basis for restitution. Given that
21 | position, there was no point in continuing the discussion.

22 | As several victims have now testified, there was no reason to have obtained, nor was
23 | there any mechanism in place that would have generated contemporaneous “documentation” of
24 | the kind of losses suffered by the victims in this case. The victims seeking restitution have,
25 | however, all submitted statements signed under penalty of perjury, itemizing their losses. The
26 | categories of expenses they have identified for recompense are explicitly mandated by Congress
27 | to be recognized as “loss” for purposes of fraudulent e-mail crimes. 18 U.S.C. §§1037(d)(1) and
28 |

1 1030(e). The government submits that there is no authority for the proposition that each of the
2 items of loss claimed must have been contemporaneously “documented” by a third party. If each
3 of these victims must be called to testify, so that each may be subject to cross-examination, a
4 hearing should be scheduled for that purpose in order that these victims can be accorded their
5 statutory right to claim restitution.

6 If the Court finds that the victims’ written statements, signed under penalty of perjury, are
7 sufficient “documentation” to support the victims’ restitution claims, the government remains
8 willing to meet with defense counsel in a further attempt to come to agreement as to the
9 allowability of certain of the claims, or specific components thereof. The parties could then
10 make a report to the Court of the results of their meeting, and identify which, if any, individual
11 claims continue to be in dispute.

12 Based on the defendant’s past record of success in totally evading money judgments
13 against him, there is little reason to expect that any restitution awards ordered will ever be paid.
14 The right of the victims to make those claims, and have them recognized by the Court, however,
15 should be respected. That is especially true in this case, because Soloway consistently harassed,
16 threatened, bullied and demeaned every victim who had the courage and persistence to stay the
17 course, notwithstanding his threats and abuse and the knowledge that, in the end, they are
18 unlikely to see even a penny in restitution.

19
20 **II. Defendant Has Not Accepted Responsibility for His Crimes and Should Not**
21 **Receive a Reduction in His Guideline Computation for Acceptance of Responsibility**

22 A defendant who resolves his case with a guilty plea may be eligible for a two point
23 reduction for purposes of his guideline sentence computation. USSG §3E1.1.
24 The Guidelines themselves provide, and the Courts equally well recognize, however, that “[a]
25 defendant who enters a guilty plea is not entitled to an adjustment under [§3E1.1] as a matter of
26 right,” and that the reduction is only appropriate “if the defendant clearly demonstrates
27 acceptance of responsibility for his offense. . .” USSG §3E1.1(a), and *Commentary, Application*
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1 *Note 3*, (emphasis added). “While a guilty plea may provide some evidence of the defendant’s
2 acceptance of responsibility , . . . it does not, by itself, entitle a defendant to a reduced sentence.”
3 United States v. Rosales, 917 F.2d 1220, 1223 (9th Cir. 1990), rev’d on other grounds, United
4 States v. Nordby, 225 F.3d 1053 (9th Cir. 2000).

5 The *Commentary* to the Guideline enumerates several criteria which, among other factors,
6 can properly be considered in determining whether a defendant should be allowed the
7 adjustment. The enumerated criteria include, “*but are not limited to*”:

8 (a) *truthfully admitting the conduct comprising the offense(s) of*
9 *conviction, and truthfully admitting or not falsely denying any additional relevant*
10 *conduct for which the defendant is accountable under §1B1.3. . . Note that a*
11 *defendant is not required to volunteer, or affirmatively admit relevant conduct . . .*
12 *However, a defendant who falsely denies, or frivolously contests, relevant conduct*
13 *that the court determines to be true has acted in a manner inconsistent with*
14 *acceptance of responsibility;*

15 (c) *voluntary payment of restitution prior to adjudication of guilt;*

16 (h) *the timeliness of the defendant’s conduct in manifesting the acceptance*
17 *of responsibility.*

18 *Commentary*, USSG §3E1.1, *Application Note 1*, (emphasis added).

19 Applying any one of these criteria, Soloway should not be accorded acceptance of
20 responsibility. He has, irrefutably, clearly used the sentencing hearing for the purpose of denying
21 and frivolously contesting relevant conduct. This includes his patently false assertion that
22 “[t]here is no evidence that Mr. Soloway harvested . . . addresses.” (Defendant’s Sentencing
23 Memorandum, at Page 10.) The evidence already presented, (with more to come), that Soloway
24 harvested e-mail addresses for use in transmitting his fraudulent e-mails, and also that he
25 employed “dictionary attack” addressing methods for them, is simply overwhelming.¹³ Attacking
26 witnesses who produce that evidence, and using Court time for that end, is not consistent with
27 acceptance of responsibility. “The goals of the acceptance of responsibility provision would not
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¹³Testimony of Dr. Levine, Steven Collins, Tom Ervin, and Ken Schmutz, with exhibits.

1 be fulfilled if a defendant were eligible to receive the reduction even though he falsely denied
2 relevant conduct. United States v. Rutledge, 28 F.3d 998, 1002 (9th Cir. 1994).

3 Since his release from detention in 2007, Soloway has continued to live comfortably in
4 the same “high end” apartment complex in which he has lived (and where he committed his
5 crimes) since moving to Seattle in 2004. There, he has unlimited access to amenities that include
6 “indoor lap pool, jet lap pool, Spas (3), Exercise rooms (3), Sports court, TV room, Theater
7 room, Library with Kitchenette, Entertainment room with kitchen (2), Conference room, Decks,
8 terraces and gardens.¹⁴ At almost 30 years of age, Soloway doesn’t work to pay for those
9 luxurious accommodation; he doesn’t need to because his parents pay all his bills. The
10 government notes that during the same 14 month period since his arrest, Soloway has made not
11 one penny of payment in restitution to any of his victims - many of whom are known to the
12 government, and clearly will never have the financial wherewithal to even dream of living a
13 lifestyle like that continued to be enjoyed by Robert Soloway. Those victims include people who
14 are working hard at trying make an honest living, and for many of them those efforts were
15 jeopardized when they lost money in amounts that were very significant to them, however
16 insignificant those amounts might be to Robert Soloway and his parents.

17 Indeed, Soloway’s only “manifestations” of “acceptance of responsibility” have been:
18 1) the fact that he resolved his case by a plea (that was to substantially fewer, and lesser charges
19 than had been originally filed against him) before his case was tried, and 2) that on the eve of
20 sentencing, he has now submitted a letter in which he expresses regret for the chain of events
21 leading up to his conviction and arrest.

22 “Pleading to a reduced charge does not necessarily demonstrate an acceptance of
23 responsibility. It is at least equally possible that the defendant has made a clever bargain . . . [and
24 without] express remorse for his conduct. . .” the “acceptance” adjustment should not be made.
25 United States v. Rosales, *supra*, at 1223.

26
27 ¹⁴Exhibit A to Government’s Sentencing Memorandum (Harbor Steps Lease).

1 Regretting “getting caught . . . [and regretting] the way things had gone,” is not the type
2 of “regret” sufficient to constitute the acceptance of responsibility required by U.S.S.G.
3 §3E1.1(a).” United States v. Gallant, 136 F.3d 1246, 1248 (9th Cir. 1998).
4 “ . . . [I]mplicit in acceptance of responsibility is an admission of moral wrongdoing . . . [T]his
5 moral element is satisfied by the expression of contrition and remorse. . .” Gallant, supra, at
6 1248. See also: United States v. Cruzado-Laureano, 527 F.3d 231, 237 (1st Cir. 2008), (lack of
7 remorse is a proper consideration in sentencing, and judge did not erroneously “double count”
8 lack of remorse by refusing to allow reduction for acceptance of responsibility and also
9 sentencing defendant at high end of guideline range).

10 Soloway has never expressed any, much less “true” remorse for his crimes, nor has he
11 ever even acknowledged the existence of his victims, except to attack and deride them. Rather,
12 Soloway continues now, as he always has, to cast himself as the victim,¹⁵ with the apparent plan
13 of exploiting the Court’s sympathies for him. “Although a district court may not punish a
14 defendant for failing to participate in fact-gathering at a presentence interview or for not pleading
15 guilty, the defendant must carry the burden of demonstrating the acceptance of responsibility.”
16 United States v. Nielsen, 371 F.3d 574, 582 (9th Cir. 2004), citing United States v. Innis, 7 F.3d
17 840, 848 (9th Cir. 1993). Robert Soloway has failed utterly to carry that burden. He has not

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23 ¹⁵In his eleventh hour letter to the Court, for example, Soloway bemoans the emotional pain he suffered
24 because of the “emptiness” of his value system, references the dismay he experienced when his spamming
25 business suffered because others had moved into criminal spamming, too; and relates that he suffered greatly and
26 became more “destitute, depressed and scared” as he continued to (defraud creditors) by spending lavishly on
27 himself and a lifestyle he could not honestly afford. (Defendant’s Letter, exhibit 1 to Supplemental Sentencing
28 Exhibits by Robert Soloway).

1 | accepted responsibility for his criminal conduct, and no reduction should be made on that basis
2 | as part of the sentencing guideline computation.

3 | Dated this 21st day of July, 2008.

4 | Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

/s/ Lissette Duran-Leutz
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