IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 18-cr-00435-~~RPM~~ RM

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. STEVEN FRITZ KESSLER,

Defendant.

PLEA AGREEMENT

The United States Department of Justice's Consumer Protection Branch and the United States Attorney's Office for the District of Colorado (collectively, "the Government"), by and through Trial Attorneys Ehren Reynolds and Alistair Reader and Assistant United States Attorney Rebecca S. Weber, and the Defendant, Steven Fritz Kessler, personally and by counsel, Troy Eid and John Voorhees, submit the following plea agreement under D.C.COLO.LCrR 11.1.

I. AGREEMENT

The plea agreement is submitted pursuant to Fed. R. Crim. P. 11(c)(1)(A) and (B).

A. Defendant's Obligations:

(1) The Defendant agrees to waive the right to Indictment and plead guilty to a one count Information charging Conspiracy in violation of 18 U.S.C. § 371.

Court's Exhibit

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(2) The Defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal a sentence imposed. Understanding this, and in exchange for the concessions made by the Government in this plea agreement, the Defendant knowingly and voluntarily waives the right to appeal any matter in connection with this prosecution, conviction, or sentence unless it meets one of the following three criteria: (a) the sentence imposed is above the maximum penalty provided in the statute of conviction, (b) the Court, after determining the otherwise applicable advisory sentencing guideline range under the U.S. Sentencing Guidelines (U.S.S.G.), either departs or varies upwardly, or (c) the Court determines that the U.S.S.G. total offense level is higher than 10 and imposes a sentence above the sentencing guideline range calculated for that total offense level. Additionally, if the Government appeals the sentence imposed by the Court, the Defendant is released from this waiver provision.

(3) The Defendant also knowingly and voluntarily waives his right to challenge this prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255. This waiver provision, however, will not prevent the Defendant from seeking relief otherwise available if: (a) there is an explicitly retroactive change in the applicable guidelines or sentencing statute, (b) there is a claim that the Defendant was denied the effective assistance of counsel, or (c) there is a claim of prosecutorial misconduct.

(4) The Defendant agrees that for purposes of calculating his advisory U.S.S.G. sentencing range that the loss and restitution amount for the conspiracy count under U.S.S.G. § 2B1.1(b)(1)(A) is $2,000 which is more than $0 but less than $6,500. The restitution for the conspiracy count is owed to the victims of the offense of conviction, who will be described prior to sentencing. The Defendant agrees that any restitution would be jointly and severally owed with any other co-defendants found criminally liable for restitution related to the same criminal activity.

(5) The Defendant agrees that the projected U.S.S.G. total offense level set forth by the parties below in Part VI is the same position the Defendant will take at the time of sentencing as it relates to calculation of his U.S.S.G. advisory sentencing range.

(6) The Defendant admits to the forfeiture allegation contained within the Information. The Defendant further agrees to forfeit to the Government immediately and voluntarily any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), whether in the possession or control of the United States or in the possession or control of the Defendant or Defendant's nominees, or elsewhere. Specifically, in exchange for the concessions made by the Government described herein, the Defendant agrees to pay a money judgment of $10,000.

The Defendant agrees and consents to the forfeiture of these assets pursuant to any federal criminal, civil, and/or administrative forfeiture

action. Forfeiture of the Defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the Defendant in addition to forfeiture.

B. Government's Obligations:

(1) The Government agrees not to pursue any additional charges against the Defendant based on conduct known to date to the Government.

(2) The Government agrees that the projected U.S.S.G. total offense level set forth below in Part VI is the same position it will take at the time of sentencing as it relates to calculation of the Defendant's U.S.S.G. advisory sentencing range.

(3) The Government agrees at the time of sentencing to recommend a sentence within the applicable advisory U.S.S.G. sentencing range.

C. Breach of the Agreement:

(1) The Defendant understands that if he violates any provision of this plea agreement, or if his guilty plea is vacated or withdrawn, the Government will be free from any obligations of the agreement and free to prosecute the Defendant for all offenses of which it has knowledge. The Defendant specifically waives any statute of limitations defense in the event he violates the terms of this plea agreement.

II. ELEMENTS OF THE OFFENSE

The parties agree that the elements of the offense to which this plea is being tendered are as follows:

Count 1 – Conspiracy, 18 U.S.C. § 371

First: the Defendant agreed with at least one other person to commit an offense against the United States (in this case, to violate the mail fraud statute, 18 U.S.C. § 1341);

Second: one of the conspirators engaged in at least one overt act furthering the conspiracy's objective;

Third: the Defendant knew the essential objective of the conspiracy;

Fourth: the Defendant knowingly and voluntarily participated;

Fifth: there was interdependence among the members of the conspiracy; that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime," in which each member becomes the agent of every other member.

One may become a member of the conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a Defendant understands the unlawful nature of a plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the Defendant had not participated before and even though the Defendant played only a minor part.

The Government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the Government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of a conspiracy, does not thereby become a conspirator.

§ 2.19 Tenth Circuit Jury Instructions (2018), and
§ 2.15A Fifth Circuit Jury Instructions (2015)

Elements of the Object of the Conspiracy: Mail Fraud 18 U.S.C. § 1341

First: the defendant devised or intended to devise a scheme to defraud, as alleged in the charging document;

Second: the defendant acted with specific intent to defraud;

Third: the defendant mailed or caused another person to mail something through the United States Postal Service for the purpose of carrying out the scheme;

Fourth: the scheme employed false or fraudulent pretenses, representations, or promises that were material.

A "scheme to defraud or obtain money or property by means of false pretenses, representations or promises" is conduct intended to, or reasonably calculated to, deceive persons of ordinary prudence or comprehension.

A "scheme to defraud" includes a scheme to deprive another of money, property, or the intangible right of honest services.

An "intent to defraud or obtain money by false pretenses, representations or promises" means an intent to deceive or cheat someone.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

What must be proved beyond a reasonable doubt is that the defendant devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the mails was closely related to the scheme, in that the defendant either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can

reasonably be foreseen even though the defendant did not intend or request the mails to be used.

§ 2.56 Tenth Circuit Jury Instructions (2018)

III. STATUTORY PENALTIES

Conspiracy – Count 1

The maximum statutory penalty for a violation of 18 U.S.C. § 371 is: not more than 5 years imprisonment; not more than $250,000 fine or twice the pecuniary loss or gain to persons as a result of the Defendant's offense, whichever is greater; not more than 3 years supervised release; $100 special assessment fee; plus restitution.

If probation or supervised release is imposed, a violation of any condition of probation or supervised release may result in a separate prison sentence and additional supervision.

IV. COLLATERAL CONSEQUENCES

The conviction may cause the loss of civil rights, including but not limited to the rights to possess firearms, vote, hold elected office, and sit on a jury. The conviction may also carry with it significant immigration consequences, including removal and deportation depending on the Defendant's status within the United States.

V. STIPULATION OF FACTS

The parties agree that there is a factual basis for the guilty plea that the Defendant will tender pursuant to this plea agreement. That basis is set forth

below. Because the Court must, as part of its sentencing methodology, compute the advisory sentencing guideline range for the offense of conviction, consider relevant conduct, and consider the other factors set forth in 18 U.S.C. § 3553, additional facts may be included below which are pertinent to those considerations and computations. The parties agree, however, that the following facts do not encompass all of the facts that would have been proven or all of the evidence that would have been presented had this case proceeded to trial. To the extent the parties disagree about the facts set forth below, the stipulation of facts identifies which facts are known to be in dispute at the time of the execution of the plea agreement.

This stipulation of facts does not preclude either party from hereafter presenting the Court with additional facts which do not contradict facts to which the parties have stipulated and which are relevant to the Court's guideline computations, to other 18 U.S.C. § 3553 factors, or to the Court's overall sentencing decision.

The parties agree that the conduct relevant to the charged offense began on or about April 3, 2017, and continued until on or about September 19, 2017 ("the Relevant Conduct Period").

The parties agree as follows:

Background Information

During the Relevant Conduct Period, the Defendant was employed as Vice President of the Direct to Consumer ("DTC") sales group at a consumer

data analytics company ("the Company"). The Defendant had worked for the Company for approximately twenty years in several roles, all at the Company's corporate offices within the District of Colorado.

The Company sold consumer information to client entities that conducted advertising or promotional campaigns using the United States mail, among other communication channels. The Company used sophisticated computer modeling to identify consumers likely to respond to a specific client's mailed solicitations. Among other things, the Company specifically identified consumer information to sell through use of a proprietary database product comprised of pooled consumer transaction information contributed by the Company's clients combined with demographic data (the "Cooperative Data Product"). The Cooperative Data Product included transactional and demographic information on most United States households and individual consumers.

The DTC unit within the Company focused on assisting direct mail campaigns by selling lists of consumer names and addresses to direct mailers. A direct mailer is an entity that mails solicitations directly to consumers for the purpose of seeking business or payment from those consumers. Employees in the DTC unit, including the Defendant, were compensated in part based on the revenue they generated for the Company by selling lists of consumer names and addresses to direct mailers.

Conspiracy to Commit Mail Fraud

On or about April 3, 2017, a Company employee who worked as a Business Development Manager ("BDM 1") spoke with a representative of a prospective client direct mailer with a business registration and mailing address in Florida (the "Client"). The Client was seeking consumer information from the Company to use for a sweepstakes prize notification mailing campaign. BDM 1 directed the Client's representative to provide BDM 1 and a colleague, Business Development Manager 2 ("BDM 2"), with a sample of the mail solicitation that the Client intended to send to consumers in its mailing campaign. In response, the Client's representative provided BDM 1 and BDM 2 via email with a sample of its mail solicitation and indicated to BDM 1 and BDM 2 that the Client intended to mail the solicitation to up to 75,000 consumers on a monthly basis.

The Client's mail solicitation was designed to resemble an "official" notice that any consumer receiving the solicitation had won a substantial sweepstakes cash prize. Large block text at the top of the page read "Notification of Unclaimed Cash and Prizes" and the first line of the text portion of the document, supposedly written by the "Prize Director" of the Client, stated to the presumed recipient that "it is with great pleasure that I notify you of the unawarded $2,451,768.00 that appears may become yours . . . it's true – your confirmed assignment of folio [number] confirms [recipient's name] of [address] is fully eligible for the total amount reported – $2,451,768.00 and we couldn't be happier for your good fortune!" The remainder of the Client's mail solicitation included

graphics and other design features that appeared to convey the legitimacy of the document, such as a corporate seal, apparently hand-written signatures, and a "Certificate of Authenticity" affirming, in ornate cursive font, by "the powers vested in the Prize Director of [the Client]" the recipient was "eligible for the full amount $2,451,768." The Client's mail solicitation directed each consumer recipient to return a "Sworn Statement of Identity" that was supposedly "nontransferable," along with payment of a "required" $20 fee, to an address in Naples, Florida. The Client's mail solicitation also directed that the recipient must pay immediately, warning, "If you fail to respond in time, even by 1 day, internal regulations dictate that I close your file and this cash notification may become forfeit."

On or about April 13, 2017, BDM 2 informed the Defendant via email that the Client had signed paperwork indicating an interest in purchasing consumer information from the Company. BDM 2 informed the Defendant and other Company employees in the email that the Client "markets a sweeps[stakes] report to consumers in the market: US." BDM 2 reported that the Client purportedly had a list of more than 178,000 existing consumers who previously had sent money in response to its solicitations, and that the Client sought consumer information to mail new solicitations to 600,000 consumers in the next twelve months. BDM 2's email included as an attachment the same sample mail solicitation that the Client's representative had emailed to BDM 1 and BDM 2.

Upon review of the Client's sample mail solicitation attached to BDM 2's email, the Defendant knew that the solicitation was designed to deceive consumers into paying a $20 fee under the false pretense of having won a substantial sweepstakes cash prize of $2,451,768.00. The Defendant knew that each consumer recipient of the solicitation could not really have won $2,451,768.00 in exchange for only $20 if the Client was planning to send the solicitation to hundreds of thousands of consumers.

In response to the April 13, 2017 email from BDM 2 with the sample mail solicitation attached, the Defendant responded: "Congrats [BDM 2] . . . sounds like a great signing." BDM 2 responded by noting concerns about the Client, stating "Thanks! We have to be careful, but I think they will mail aggressively." BDM 2 listed several reasons the Client seemed suspicious, including that all email accounts associated with it were "@gmail handles" (indicating that the Client had no corporate email address), the Client's listed physical address was only a private mail box, and the corporate name the Client was "doing business as" was registered with the [State] secretary of state within the last 60 days and yet the Client claimed already to have more than 178,000 customers. BDM 2 also relayed to the Defendant, in response to the Defendant's requests, information regarding the number of consumers about whom the Client anticipated seeking information per year from the Company. BDM 2 specifically informed the Defendant that the Company could expect an "80%+ share" of the 600,000 mail solicitations which the Client intended to mail each year, i.e., the

Company could expect to sell lists of information for at least 480,000 consumers annually to the Client.

After corresponding with BDM 2, and despite knowing that the Client's mail solicitation was deceptive, the Defendant—consistent with practices known to, and authorized by, senior managers at the Company—agreed to accept the Client for receipt of consumer information from the Company. As a result, on April 13, 2017, the Defendant assigned an employee under his supervision in the Company's DTC unit to manage the Client's account and respond to the Client's request for new consumer information. In assigning the employee, the Defendant emailed the Client's sample mail solicitation to the employee. After assigning the employee, the Defendant confirmed with BDM 2 that the assigned employee would manage the Client's account and the Defendant exchanged further information with BDM 2 about the Client.

Once the Defendant had assigned an employee to the Client's account, a Company executive who had received the Client's sample mail solicitation executed a contract between the Company and the Client later in April 2017. The Company then sold approximately 5,000 consumers' information to the Client on or about May 10, 2017. The information was derived from the Company's Cooperative Data Product, which identified the associated consumers most likely to respond to the Client's mail solicitation.

On or about July 19, 2017, a representative of the Client informed BDM 2 that the Client had stopped mailing solicitations. BDM 2 sent an email that

another employee forwarded to the Defendant indicating that the Client was "dead as a doornail." In response, the Defendant responded via email: "Crazy they wanted to join so recently!" BDM 2 replied to the Defendant that "[t]hat first mailing must have really 'not met their [Return on Investment] expectations.' Or they went to jail. It's all the same."

Shortly thereafter, a representative of the Client requested additional consumer data from the Company, and the Company transmitted another list of information for new consumers to the Client on or about July 28, 2017. The Company also thereafter sent to the Client another list of information for additional new customers on or about September 19, 2017.

The Defendant and others at the Company listed the Client as an active account for purposes of collecting payment for the Company and calculating the Defendant's and other employees' compensation.

The Defendant, together with the Company, BDM 1, BDM 2, and other Company employees, knowingly and willfully conspired to facilitate the Client's mail fraud scheme for the purpose of benefiting the Company and thereby enriching themselves. The Defendant also acted purposefully to further the conspiracy. At all times during the Relevant Conduct Period, the Defendant acted within the authority and scope of his employment as Vice President of the Company's DTC unit. During the Relevant Conduct Period, approximately 100 people were victimized by the Client's scheme, causing approximately $2,000 in loss.

VI. ADVISORY GUIDELINE COMPUTATION AND 3553 ADVISEMENT

The parties understand that the imposition of a sentence in this matter is governed by 18 U.S.C. § 3553. In determining the particular sentence to be imposed, the Court is required to consider seven factors. One of those factors is the sentencing range computed by the Court under advisory Sentencing Guidelines issued by the United States Sentencing Commission. In order to aid the Court in this regard, the parties set forth below their estimate of the advisory guideline range called for by the Sentencing Guidelines. To the extent that the parties disagree about the guideline computations, the recitation below identifies the matters which are in dispute.

Conspiracy Guideline Calculation

(1) The base guideline for Count 1 is U.S.S.G. § 2B1.1(a)(1), with a base offense level of 6.

(2) Specific Offense Characteristics: Because the loss was less than $6,500, no increase in offense level is applied. *See* U.S.S.G. § 2B1.1(b)(1)(A). The stipulated loss amount for Count 1 is $2,000.

(3) Because the offense involved more than 10 victims and was committed through mass-marketing, a two-level enhancement is applied. *See* U.S.S.G. § 2B1.1(b)(2)(A)(i) and § 2B1.1(b)(2)(A)(ii).

(4) Because the offense involved a large number of victims who were identified as being particularly susceptible to the offense conduct, a four-level adjustment is applied. *See* U.S.S.G. § 3A1.1(b)(2).

(5) There are no other victim-related, obstruction of justice, or role-in-the-offense adjustments.

(6) The adjusted offense level for Count 1, prior to any calculus for acceptance of responsibility, is 12.

(7) The Defendant should receive a total reduction of two levels for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a). The resulting total offense level therefore would be **10**.

(8) The parties understand that the Defendant's criminal history computation is tentative. The criminal history category is determined by the Court based on the Defendant's prior convictions. Based on information currently available to the parties, it is estimated that the Defendant's criminal history category would be I as the Defendant has no known criminal history.

(9) The advisory guideline range resulting from these calculations is 6 to 12 months imprisonment.

(10) Under guideline § 5E1.2, assuming the estimated offense level above, the advisory fine range for this offense would be $4,000 to $40,000 plus applicable interest and penalties. The parties recommend assessment of a $40,000 fine.

(11) Pursuant to guideline § 5D1.2, if the Court imposes a term of supervised release, that term is at least 1 year but not more than 3 years.

(12) The Defendant agrees to pay restitution as set forth above in Section I.

The parties understand that, although the Court will consider the parties' estimate, the Court must make its own determination of the applicable Sentencing Guideline range. In doing so, the Court is not bound by the position of any party.

No estimate by the parties regarding the guideline range precludes either party from asking the Court, within the overall context of the Sentencing Guidelines, to depart from that range at sentencing if that party believes that a departure is specifically authorized by the guidelines or that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission in formulating the advisory guidelines. Similarly, no estimate by the parties regarding the guideline range precludes either party from asking the Court to vary entirely from the advisory guidelines and to impose a non-guideline sentence based on other 18 U.S.C. § 3553 factors.

The parties understand that the Court is free, upon consideration and proper application of all 18 U.S.C. § 3553 factors, to impose that reasonable sentence which it deems appropriate in the exercise of its discretion and that such sentence may be less than that called for by the advisory guidelines (in length or form), within the advisory guideline range, or above the advisory guideline range up to and including imprisonment for the statutory maximum term, regardless of any computation or position of any party on any 18 U.S.C. § 3553 factor.

VII. ENTIRE AGREEMENT

This document (including any supplements) states the parties' entire agreement. There are no other promises, agreements (or "side agreements"), terms, conditions, understandings, or assurances, express or implied. In entering this plea agreement, neither the Government nor the Defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this plea agreement.

Date: Oct. 3, 2018

Steven Fritz Kessler
Defendant

Date: Oct. 3, 2018

Troy Eid, John Voorhees
Attorneys for the Defendant

Date: 10/3/18

Ehren Reynolds, Alistair Reader
Trial Attorneys

Rebecca S. Weber
Assistant United States Attorney