

FILED IN OPEN COURT
ON 8/31/15 JRP
Julie Richards Johnston, Clerk
US District Court
Eastern District of NC

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 5:13-CR-328-1FL(4)

UNITED STATES OF AMERICA)
)
 v.) MEMORANDUM OF PLEA AGREEMENT
)
NIKHIL NILESH SHAH)

The United States of America ("United States"), by and through the United States Attorney for the Eastern District of North Carolina ("USA-EDNC"), the Computer Crime and Intellectual Property Section of the U.S. Department of Justice and the Defendant, with the concurrence of the Defendant's Attorneys, Wes J. Camden and W. Michael Dowling, have agreed that the above-captioned case should be concluded in accordance with this Memorandum of Plea Agreement as follows:

1. This Memorandum constitutes the full and complete record of the Plea Agreement. There are no other agreements between the parties in addition to or different from the terms herein.

2. The Defendant agrees:

a. To plead guilty to the one count Indictment herein.

To make restitution to any victim including any victim with respect to a Count dismissed as part of the agreement in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 3663 and 3663A. Said restitution shall be due and payable immediately.

b. To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal the conviction and whatever sentence is imposed on any ground, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to

contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

- d. To waive all rights, whether asserted directly or through a representative, to request or receive from the United States any records pertaining to the investigation or prosecution of this matter, except as provided in the Federal Rules of Criminal Procedure. This waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.
- e. To provide complete and truthful information to the United States concerning his participation in the offense of conviction.
- f. To assist the United States in the recovery and forfeiture of any assets which facilitated and/or were acquired through unlawful activities, including all such assets in which the defendant has any interest or control.
- g. To pay a special assessment of \$100.00 for each count, pursuant to the provisions of 18 U.S.C. § 3013. The assessment shall be paid by the Defendant at sentencing. The Defendant or Defendant's counsel shall provide a check in payment of the said assessment directly to the Clerk, U.S. District Court/EDNC.
- h. To complete and submit a financial statement under oath to the Office of the USA-EDNC no later than two weeks after the entry of the guilty plea.
- i. To abide by any conditions of release pending sentencing and report timely for service of sentence.

3. The Defendant understands, agrees, and admits:
- a. That as to the one count Indictment to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

Count One:

- (1) Charge: Intentional Damage to a Protected Computer;
- (2) Code sections violated: 18 U.S.C. Sections 1030(a)(5)(A), 1030(c)(4)(B)(i) and 1030(c)(4)(A)(i)(I);
- (3) Elements: On or about June 28, 2012, in the Eastern District of North Carolina and elsewhere,

First: The Defendant knowingly caused the transmission of a program, information, code or command to a protected computer;

Second: the defendant caused the transmission with the intent to damage such computer;

Third: the defendant thereby caused damage without authorization; and

Fourth: the defendant's actions caused loss to Smart Online during any 1-year period totaling at least \$5,000 in value, including any losses resulting from a related course of conduct affecting 1 or more protected computers.

- (4) Maximum term of imprisonment: 10 years
- (5) Minimum term of imprisonment: None
- (6) Maximum term of supervised release: 3 years
- (7) Maximum term of imprisonment upon revocation of supervised release: 2 years

- (8) Maximum fine: \$250,000
 - (9) Restitution pursuant to 18 U.S.C. §§ 3663 and 3663A, and as agreed to in paragraph 2(b) above
 - (10) Special assessment: \$100
 - (11) Other penalties: Forfeiture pursuant to paragraph 2(e) above
- b. That any sentence imposed will be without parole.
 - c. That the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.
 - d. That, unless Defendant is found unable to pay, the Court will impose a fine, and failure to pay it will subject Defendant to additional criminal and civil penalties pursuant to 18 U.S.C. §§ 3611-14.
 - e. That pleading guilty may have consequences with respect to the Defendant's immigration status if the Defendant is not a natural born citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense(s) to which the Defendant is pleading guilty, and some offenses create a presumption of mandatory removal from the United States. Removal and other immigration consequences are the subject of a separate proceeding, however, and the Defendant understands that no one, including the Defendant's attorney and the Court, can predict with certainty the effect of the Defendant's conviction on the Defendant's immigration status. The Defendant nevertheless affirms that Defendant wants to plead guilty, regardless of any immigration consequences that may result from this conviction, including the

Defendant's automatic removal from the United States, denial of citizenship, and denial of admission to the United States in the future.

4. The United States agrees:
 - a. That it reserves the right to make a sentence recommendation.
 - b. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions or objections filed by the Defendant.
 - c. That, pursuant to Fed. R. Crim. P. 11(c)(1)(A), the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Indictment; however, this obligation is limited to the USA-EDNC and the Computer Crime and Intellectual Property Section of the Department of Justice and does not bind any other state or federal prosecuting entities.

5. The parties agree, pursuant to Fed. R. Crim. P. 11(c)(1)(B), to the following positions as to the below-listed sentencing factors only, which are not binding on the Court in its application of the advisory Guideline range; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the United States is no longer bound to its positions as to those factors:


- a. A downward adjustment of 2 levels for acceptance of responsibility is warranted under USSG §3E1.1, unless the offense level determined prior to the operation of USSG §3E1.1(a) is level 16 or greater, in which event a downward adjustment of 3 levels is warranted;
- b. Pursuant to amended USSG §2B1.1(b)(1), the Economic Loss Table, scheduled to take effect on November 1, 2015, the readily provable loss associated with this Defendant is more than \$250,000 but less than \$550,000;
- c. An upward adjustment of 4 levels is warranted

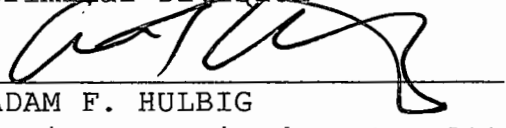
under USSG §2B1.1(b)(18)(A)(ii);


- d. An upward adjustment of 2 levels is warranted under USSG §2B1.1(b)(10)(C) for the use of sophisticated means;
- e. An upward adjustment of 2 levels is not warranted under USSG §3B1.3 for abuse of position of trust or use of special skill.

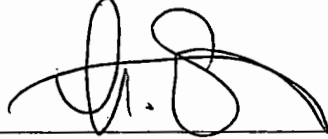
This the 25th day of August, 2015.

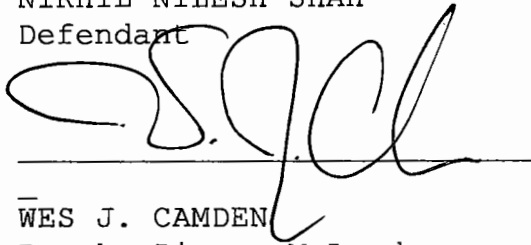
THOMAS G. WALKER
United States Attorney

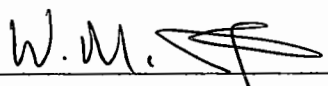

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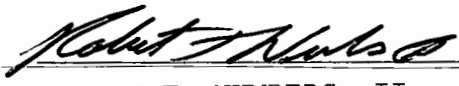
For 
RICHARD D. GREEN
Senior Trial Attorney
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NIKHIL NILESH SHAH
Defendant


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Humphrey & Leonard, LLP
Attorney for the Defendant


W. MICHAEL DOWLING
Brooks Pierce McLendon
Humphrey & Leonard, LLP
Attorney for the Defendant

Approved this 31st day of August, 2015.


ROBERT T. NUMBERS, II
United States Magistrate Judge