

Hon. Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	No. CR12-00070RSM
Plaintiff,)	
v.)	GOVERNMENT’S JOINT SENTENCING MEMORANDUM
ALLEN J. CHIU and ANDREW S. CHIU,)	
Defendants)	

I. INTRODUCTION

On April 9, 2012, Defendants, Allen J. Chiu and Andrew S. Chiu, pled guilty to one count of Wire Fraud, in violation of 18 U.S.C. § 1343. For nearly two years, the Chiu brothers worked together to perpetrate a unique scheme whereby they defrauded Nordstrom, Inc. into paying them more than half a million dollars in cash that they knew they were not entitled to. Sentencing is scheduled for August 10, 2012. For the reasons stated below, the United States respectfully recommends a sentence of incarceration of 24 months for each of the brothers.

II. OFFENSE CONDUCT

The Chiu brothers’ scheme exploited a relationship Nordstrom had with a company known as FatWallet. Nordstrom operates an online, retail website at Nordstrom.com. FatWallet operates a shopping community website that promotes and generates sales for online retailers by providing cash back incentives, coupons and deals for its members. During the relevant time period, Nordstrom and FatWallet had entered

1 into an agreement whereby FatWallet would receive a commission based on a percentage
2 of all purchases made by FatWallet members at Nordstrom.com. FatWallet, in turn,
3 returned a portion of those commission payments to the FatWallet members that made the
4 Nordstrom purchases. Both Allen and Andrew Chiu were longtime FatWallet members.

5 Between October 2007 and September 2008, prior to embarking on the current
6 offense of conviction, Allen and Andrew Chiu made repeated purchases on
7 Nordstrom.com. The brothers then claimed to Nordstrom that they did not receive the
8 merchandise they ordered, and demanded the charges be removed from their credit cards.
9 In October 2008, when the repeated nature of these claims were deemed unreasonable,
10 Nordstrom identified the brothers as a fraud risk and informed them in writing that
11 Nordstrom.com could no longer do business with them.

12 Nordstrom's warning, however, did nothing to deter the Chiu brothers. The two
13 simply continued, unabated, to place orders at Nordstrom.com. Moreover, in January
14 2009, when the Chius discovered a glitch in Nordstrom's fraud detection system, they
15 dramatically escalated their victimization of Nordstrom. By January 2009, Nordstrom's
16 fraud detection system successfully blocked all Chiu brothers' website purchases by
17 simply reversing all attempted charges on the Chius' credit cards. As a result, no
18 Nordstrom merchandise was ever shipped to the Chius after January 2009 and the Chius
19 did not incur any charges. However, the Chius discovered that FatWallet continued to
20 credit them with the cash back awards for these reversed purchases. While Nordstrom
21 had blocked the final sales to the Chius, Nordstrom continued to count these attempted
22 purchases for purposes of calculating the commission payments to FatWallet. In other
23 words, although the Chius never actually received or paid for any Nordstrom
24 merchandise, Nordstrom unwittingly continued to pay FatWallet as if those purchases had
25 been finalized and FatWallet, in turn, continued to pay the Chius their share of the cash
26 back awards.

27 When the Chius realized Nordstrom's mistake, they sought to exploit it for all it
28 was worth. Beginning in January 2009 and continuing through October 2011, the Chiu

1 brothers worked together to submit over 4,000 online orders for approximately \$24
2 million worth of Nordstrom merchandise. In an effort to avoid arousing the suspicion of
3 FatWallet and Nordstrom by the sheer volume of their orders, the Defendants created
4 numerous different user accounts on FatWallet, and took care not to order more than a
5 certain amount on any one user name. The scheme succeeded for a time. Although no
6 goods were ever shipped and no charges were ever incurred by the Chius, Nordstrom
7 nevertheless paid out more than \$1.4 million in commission payments and fees as a result
8 of the Chius' fraudulent orders. The brothers then extracted over \$600,000 in cash back
9 awards from FatWallet before the companies finally realized what was happening and
10 stopped all further payments. Amazingly, even when FatWallet refused to issue the Chius
11 further cash back award payments, rather than desist in their activities, the brothers
12 repeatedly attempted to circumvent the blocks put forth by FatWallet. For example, the
13 Chiu brothers attempted to submit additional Nordstrom.com orders through an alternate
14 shopping community website that offered a similar cash back program. The scheme
15 failed only because the alternate website was affiliated with FatWallet, and the company
16 was able to recognize the Chius. The Chiu brothers finally ceased their ordering activity
17 when it became clear law enforcement were investigating their actions.

18 III. SENTENCING GUIDELINES CALCULATIONS

19 The Sentencing Guidelines are advisory. *United States v. Booker*, 543 U.S. 220,
20 245-46 (2005). However, "the district courts still must consult [the] Guidelines and take
21 them into account when sentencing. . . ." *United States v. Cantrell*, 433 F.3d 1269, 1279
22 (9th Cir. 2006) (internal citations omitted, internal quote omitted). "The appropriate
23 guidelines range, though now calculated under an advisory system, remains the critical
24 starting point for the imposition of a sentence under § 3553(a)." *United States v. Mashek*,
25 406 F.3d 1012, 1016 n.4 (8th Cir. 2005) (quoted approvingly in *Cantrell*, 433 F.3d at
26 1279).

27 The United States anticipates that the only point of disagreement between the
28 parties as to the Sentencing Guidelines calculations is the amount of loss. The relevant

1 Guideline provision in this case is USSG § 2B1.1. “Loss” for purposes of USSG § 2B1.1
2 (b)(1) is defined as “the greater of actual loss or intended loss.” USSG § 2B1.1,
3 Application Note 3(A). “Actual loss,” in turn, is defined as the “reasonably foreseeable
4 pecuniary harm” that resulted from the offense. USSG § 2B1.1, Application Note
5 3(A)(i).

6 In this case, as a result of the Defendants’ fraudulent orders, Nordstrom actually
7 paid \$1,468,486 in commissions and fees to FatWallet and another company that
8 processed these commission payments. Attached as Exhibit A is a spreadsheet provided
9 by Nordstrom detailing the payments it made to FatWallet and the company LinkShare to
10 process the commission payments. Of the more than \$1.4 million that Nordstrom paid out
11 of pocket, the Defendants personally reaped \$652,869.90. Now, Defendants argue that
12 for purposes of calculating the Guidelines range, they should not be held responsible for
13 amounts beyond what they personally received or were due to receive, because it was not
14 reasonably foreseeable to them that Nordstrom would also pay FatWallet or other parties
15 to the commission arrangement. The facts, however, demonstrate otherwise.

16 Defendants explicitly admitted as part of the plea agreement that they understood
17 that Nordstrom and FatWallet had a contractual arrangement whereby Nordstrom would
18 pay FatWallet a commission based on sales and that FatWallet would pass on only a
19 portion of what Nordstrom paid. The stipulated statement of facts in each of the brothers’
20 plea agreement states that the brothers were “aware that when [they] made purchases on
21 Nordstrom.com...Nordstrom paid FatWallet a commission based on a percentage of [the
22 brother’s] sales” and that “Fat Wallet, in turn, returned to [the brothers] a portion of
23 that commission payment” *See* Plea Agreement at paragraph 8. Even though the
24 Defendants may not have known the exact terms of any contractual arrangement
25 Nordstrom had with FatWallet or others, they well understood the reality that Nordstrom
26 was paying out of pocket more than what they personally received. In other words, the
27 business model would not make sense unless others, like FatWallet, was also profiting
28 from the cash back incentives. Therefore, the amounts that Nordstrom paid other parties

1 as part of the commission arrangement was “reasonably foreseeable” to the Chiu brothers.

2 As such, the actual loss amount in this case is \$1,468,486.00.

3 With the correct loss amount, the United States recommends the following
4 Sentencing Guidelines calculations:

5	Base Offense Level, pursuant	7
6	to USSG § 2B1.1(a)(1)	
7	Specific Offense Characteristic	
8	USSG § 2B1.1(b)(1)(H), because this offense	
9	involved more than \$1 million but less than	
10	\$2.5 million in loss	+16
11	<hr/>	
12	Adjusted Offense Level	23
13	Acceptance of Responsibility	-3
14	pursuant to USSG § 3E1.1(a) and (b)	
15	<hr/>	
16	Total offense Level	20

17 Because neither Allen nor Andrew Chiu have any criminal history, the applicable
18 sentencing range consistent with the above calculation is 33-41 months.

19 **IV. SENTENCING RECOMMENDATION**

20 In the plea agreements, the United States agreed and stipulated that it will not seek
21 a sentence higher than 30 months, while the Defendants promised to not seek a sentence
22 lower than 24 months. Upon consideration, the United States recommends a sentence of
23 24 months incarceration. This sentence is sufficient but not greater than necessary to
24 satisfy the § 3553 factors.

25 **A. Nature of the Offense and Characteristics of the Defendant.**

26 Section 3553(a)(1) requires the Court to consider “the nature and circumstances of
27 the offense and the history and characteristics of the defendant” in formulating an
28 appropriate sentence. The United States submits that a 24 month term of incarceration
appropriately balances the seriousness of the offense with the individual characteristics of
the defendants.

1 The crime committed by Allen and Andrew Chiu and the manner in which they
2 committed it was egregious. While it is true that a temporary technical glitch at
3 Nordstrom unfortunately created the situation where payments of unearned commissions
4 were possible, it is equally true that no one forced the Chiu brothers to exploit that
5 weakness; and no one certainly forced them to exploit it to the scale that they did. The
6 actions of the Chiu brothers are equivalent to someone discovering that a back door to a
7 Nordstrom store had been accidentally left open, and then walking in through that door to
8 steal \$1.4 million from the till. The open door does not in anyway excuse or mitigate the
9 conduct of the thief in such a case. Likewise, the glitch that continued the commission
10 payments does not excuse the Chiu brothers here. Moreover, it is clear from the facts that
11 the Chiu brothers only discovered the “open door” while attempting to continue their
12 previous “missing merchandise” scam.

13 Finally, the sheer scale of their offense and the length of time they kept at it
14 justifies sentencing these men to a significant time of incarceration. This was not a quick
15 and hasty crime, done with any agonizing guilty conscience. The Chius methodically
16 submitted orders, day after day, for nearly two years until they had ordered an eye
17 popping \$24 million worth of merchandise. In order to try and avoid detection and
18 suspicion, they had to constantly create new user names at FatWallet, and make sure not
19 to order too much merchandise at once on any one user name. This was a crime
20 committed in a calculating, careful manner over a long period of time. The Chius only
21 stopped their activity when they believed they may be caught. This is behavior that
22 requires meaningful punishment.

23 The United States acknowledges that its recommendation of 24 months is also
24 significantly below the applicable Sentencing Guidelines range. While the crime and the
25 manner in which the crime was committed was serious, the United States submits that the
26 defendants’ background and, most importantly, their conduct when confronted with their
27 crime, deserve consideration. Neither Allen nor Andrew Chiu have any criminal
28 histories. Both have also otherwise led exemplary lives, completing high levels of

1 education and maintaining steady and lucrative employment. In January 2012, FBI
2 special agents confronted the brothers about their activities and the two immediately
3 confessed. The government at that time had also seized certain retirement accounts
4 belonging to the brothers. The investigation confirmed that nearly all of the proceeds of
5 the Chius' scheme had been deposited into these retirement accounts and commingled
6 with other funds that the brothers had earned from legitimate sources. As part of their
7 acceptance of responsibility, the brothers have agreed to apply the entirety of the seized
8 accounts, and not merely the amount of the proceeds traceable to the fraud, toward their
9 restitution obligations. As a result, Nordstrom will recover immediately more than
10 \$970,000, making up a substantial portion of their loss. Given their acceptance of
11 responsibility and cooperation post confrontation, the United States believes that 24
12 months is a sufficient sentence.

13 **B. Deterrence.**

14 Section 3553(a)(2)(A) requires the Court to impose a sentence that reflects the
15 "seriousness of the offense, to promote respect for the law, and to provide just
16 punishment for the offense. The Defendants do not present a high risk of re-offending
17 The United States also believes that two years in jail, along with the forfeiture of nearly
18 all of the Defendants' life savings, provides sufficient general deterrence for this crime.

19 **C. Kinds of Sentences Available.**

20 No mandatory minimums apply in this case. The offense carries a maximum
21 statutory penalty of twenty years.

22 **D. Sentencing Guidelines Range.**

23 As indicated above, the applicable guidelines range according to United States's
24 calculation is 33-41 months. The government's recommendation of 24 months is a
25 variance from the applicable range.

26 **E. Recommended Sentence in Line with Other Sentences.**

27 Section 3553(a)(6) cautions the Court to avoid unwarranted sentencing disparities
28 among similarly situated defendants. Given the nature of the Defendants' cooperation

1 and acceptance of responsibility, the United States believes a sentence of 24 months does
2 not create any unwarranted disparities.

3 **F. Restitution.**

4 The Mandatory Victims Restitution Act (“MVRA”) requires restitution to victims
5 of specified crimes, including crimes involving fraud and deceit. See 18 U.S.C.
6 § 3663A(c)(1)(A)(ii). “The MVRA requires a defendant to pay restitution to a victim
7 who is ‘directly and proximately harmed as a result of’ the fraud.” *United States v.*
8 *Berger*, 473 F.3d 1080, 1104 (9th Cir.2007)(quoting 18 U.S.C. § 3663A(a)(2)).

9 The United States seeks restitution on behalf of Nordstrom, Inc. in the amount of
10 \$1,468,486. The amount represents the amount of commission and fees Nordstrom has
11 determined it paid to FatWallet and another affiliate company that processed the
12 commission payments as a proximate result of the Chius’ fraudulent orders. Attached as
13 Exhibit A is the spread sheet detailing the amounts paid by Nordstrom during the time
14 period of the Chius’ offense. Defendants do not contest this accounting.

15 At the time of sentencing, the United States will also present to the Court a
16 preliminary order of forfeiture in which the Defendants will agree to forfeit a money
17 judgment totaling the amount of proceeds they personally pocketed as a result of the
18 fraud. In addition, pursuant to the plea agreement, the Defendants have agreed and will
19 turn over a total of \$971,810.86 to the Court for the purpose of meeting their restitution
20 obligations.

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V. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court sentence Allen J. Chiu and Andrew S. Chiu each to 24 months incarceration, followed by three years of supervised release.

DATED this 6th day of August, 2012.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2012, 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 U.S. Mail.

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CERTIFICATE OF SERVICE