

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :  
 :  
 - against - : **09 Cr. 471 (WHP)**  
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JOSEPH PREBUL, :  
 :  
 Defendant. :  
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**GOVERNMENT’S SENTENCING SUBMISSION**

PREET BHARARA,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

MARISSA MOLÉ  
JULIAN MOORE  
*Assistant United States Attorneys  
Of Counsel.*

March 2, 2010

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The defendant in the above-referenced case is currently scheduled to be sentenced on March 5, 2010, at 3:00 p.m. The United States Probation Office has prepared a Presentence Investigation Report (“PSR”) calculating the defendant’s United States Sentencing Guidelines (“Guidelines” or “U.S.S.G”) range to be 41 to 51 months’ imprisonment. However, since the maximum term of imprisonment is one year, the PSR recommends that the defendant be sentenced to 12 months’ imprisonment. The Government respectfully submits this letter to urge the Court to impose a sentence of 12 months’ imprisonment, which would be sufficient, but not greater than necessary, to achieve the legitimate purposes of sentencing.

**Background**

**1. Offense Conduct and Plea Agreement**

As Prebul stated unequivocally in his plea allocution, his criminal conduct stems from a larger investigation which involved his direct misrepresentations to Danny Bensusan, and related business partners and entities (hereinafter the “Bensusan Entities”). Prebul was a resident of

Chattanooga, Tennessee, and the president of Prebul Auto Group which owned a number of car dealerships. (PSR ¶ 7.) From at least in or about 2004 through in or about December 2008, Prebul solicited funds from the Bensusan Entities to invest in a cash management program account (a “CMA Account”) at Prebul’s dealership. (PSR ¶¶ 8-11.) Prebul represented that any money sent to him and his business on behalf of the Bensusan Entities would be kept in this separate savings-type account which earned a particularly high rate of interest. (Plea Tr., p.16; PSR ¶ 20). The money sent would remain liquid and, thus, immediately available because it literally would be sitting in this savings account. (Plea Tr., p.16; PSR 19). Based on those representations, the Bensusan Entities sent millions of dollars to Prebul to be placed in this separate account. However, over time, Prebul began to use those funds in connection with his car dealership business and to pay his own personal expenses – contrary to the direct misrepresentations to the Bensusan Entities. (Plea Tr., p.16; PSR 22-23). As a result of Prebul’s fraud, the Bensusan Entities invested over \$12 million in the CMA Account, less than half of which was returned to the Bensusan Entities; the Bensusan Entities ultimately lost approximately \$6.8 million of the money sent. (PSR ¶ 28.)

Thus, as stated in the PSR, Prebul engaged in a scheme to defraud the Bensusan Entities by soliciting millions of dollars under false pretenses, failing to invest the money as promised, falsely claiming that the money would be invested in an account where it would earn an above average interest rate of return and be immediately accessible, failing to inform the Bensusan Entities that the money was going to be used to finance Prebul’s businesses, and misappropriating and converting the money for Prebul’s own benefit without the knowledge and authorization of the Bensusan Entities. (PSR ¶¶ 19-25.)

On November 23, 2009, Joseph Prebul pleaded guilty pursuant to a plea agreement before Your Honor to Count One of the superseding misdemeanor Information, which charged him with a violation of Title 18, United States Code, Section 2113(b). The elements of this crime are as follows: (1) that the relevant bank (here, FSG) was federally insured; (2) that the defendant took and carried away money that had been in the possession or care of the bank; (3) that the defendant intentionally took the money knowing that he was not entitled to it; and (4) that the money the defendant took was less than \$1,000. See Sand, Modern Federal Jury Instructions, Instr. 53-17 (2009).

During his plea allocution, the defendant stated the following:

From at least 2004 to July of 2008, my brother-in-law, Danny Bensusan, periodically transferred funds from the Southern District of New York to the central operating account of Prebul Jeep at FSG, a bank insured by the Federal Deposit Insurance Corporation.

All of the Bensusan's funds were transferred into the FSG account in the name of one of the three businesses, TSE Group, LLC, Alliance Investment Group, LLC, or 117<sup>th</sup> Avenue Property Company, LP, pursuant to the understanding that the funds would be invested on behalf of the relevant entity in the offset account and that Mr. Bensusan or the relevant entity would receive credit for the interest incurred on these deposits.

From 2004 through 2008, a portion of these funds were deposited into the Wachovia and Chrysler Financial offset accounts in accordance with this understanding. The remainder of the Bensusan's funds were left in the FSG account.

On or about 3/17/08, I removed \$743.49 from the Bensusan's fund[s] held by FSG and used the funds in the operation of my automobile dealerships. I did so without the permission and the authority of Mr. Bensusan or the investing entities.

Prebul Plea Transcript, pp. 16-17.<sup>1</sup>

As noted, the defendant pleaded guilty pursuant to a plea agreement in which the parties stipulated that the base offense level was six. (PSR ¶ 4.) Moreover, the parties stipulated that because the loss amount was approximately \$6,783,082.82, an 18-level increase is warranted. Factoring in a three-level decrease for acceptance of responsibility, this resulted in a Total Offense Level of 22, and a recommended Guidelines range of 41-51 months. Because the defendant pled guilty to a misdemeanor information, however, the maximum term of imprisonment is one year.

The defendant further agreed to forfeit \$6,783,082.82, representing the approximate amount of proceeds the defendant obtained as a result of the offense.

## **2. The PSR**

The Probation Office has prepared a PSR that calculates the Guidelines consistent with the stipulation set forth in the plea agreement, of 41-51 months. Moreover, the Probation Office believes “a sentence within the Sentencing Guidelines range of 41 to 51 months would have been more appropriate.” (PSR, p.30). However, since the maximum term of imprisonment is one year, the PSR strongly recommends that the defendant be sentenced to the maximum 12 months’ imprisonment. (PSR, pp. 29-30).

### **A. Bankruptcy Trustee/FSG Bank Objections**

Both the Prebul Bankruptcy Trustee in Tennessee, Jerrold D. Farinash (the “Trustee”),

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<sup>1</sup> Given Prebul’s allocation on these facts, it is curious that Prebul terms the funds sent from the Bensusan Entities as “loans” in his sentencing submission (Def. Br. 4) and letter to Probation dated March 1, 2010 (“Prebul 3/1/10 Let.”); nonetheless, the essential facts as explained in his allocation are not in dispute.

and an attorney representing FSGBank, N.A. (“FSG”), Donald Aho, have objected to certain portions of Prebul’s allocution in letters dated February 17, 2010 and February 10, 2010, respectively. Neither the Trustee, nor FSG is a party or victim in this case and thus, it is unclear what standing, if any, they have to address this Court with respect to Prebul’s criminal allocution or sentencing.<sup>2</sup> Moreover, the points they raise are not directly relevant to this criminal action. Nonetheless, the Government will respond to their comments to clarify the record for the benefit of the Court.

Ultimately, the Trustee and FSG are seeking to use this Court to litigate issues in the Prebul bankruptcy action pending in Tennessee. Specifically, the Trustee has brought suit against the Bensusans in order to “claw back” some of the money (\$5 million) the Bensusan Entities were able to withdraw before Prebul’s misrepresentations were uncovered. FSG is likewise a creditor in the Prebul bankruptcy action and thus, it is in their interest to “claw back” as much in proceeds as possible from the Bensusans so that it is available to satisfy their own bankruptcy claims.

Accordingly, the primary objection of the Trustee and FSG is they do not believe that the FSG account was a “trust account,” an issue that has specific ramifications for the bankruptcy actions. (See, e.g., Letter from FSG dated February 10, 2010 (“FSG Let.”), at pp. 2, 5-7). First, all parties are agreed that the FSG account was the primary checking account of Prebul’s business entities and not a specific trust account for the Bensusans and, thus, this may be a moot point. (See Prebul Plea Transcript at p. 18; Prebul 2/1/10 Let. at 2). Second, although the

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<sup>2</sup> Although the funds were technically in the possession of FSG, because the funds were deposited on behalf of the Bensusan Entities, the Bensusan Entities are the true victims of this crime. Defense counsel agrees and specifically stated as much at the plea allocution. Prebul Plea Transcript, pp. 18-20.

question of whether the FSG account may be termed a “trust account” may be an issue in the bankruptcy action, it has no impact on Prebul’s plea here. The only question here is whether Prebul knew that he was not entitled to those funds when he withdrew them from FSG. See 18 U.S.C. 2113(b). And, as Prebul stated in his allocution, he was not entitled to the specific funds he withdrew from FSG because he had promised to hold funds from the Bensusan Entities in a type of trust, i.e., a savings-type “CMA” account,” a portion of which was being held at FSG. Thus, Prebul’s allocution was correct that certain funds in the FSG account were attributable to amounts sent by the Bensusan Entities and thus, were funds to which Prebul knew he was not entitled. See 18 U.S.C. Section 2113(b).<sup>3</sup>

**B. Prebul’s Objections**

Although none of the objections raised in the defendant’s March 1, 2010 letter to Probation are material here, the Government writes to correct the record as follows:

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<sup>3</sup> The Trustee and FSG raise additional points in their letters, none of which are relevant here, including the following. First, they assert that FSG Bank was never owned by Bank of America. (FSG Let. at 4-5). Neither the Government nor the defense disagree and, in fact, this point was corrected by Mr. Sercarz by letter to the Court dated November 24, 2009.

Second, they claim that the Bensusan funds were not transferred to FSG in any particular business name. (FSG Let. at 3). While irrelevant here, the wire transfers sent on behalf of the Bensusan entities to Prebul for deposit in the CMA account did specify the business entity to which the funds related.

Third, they claim that none of the funds in the FSG account could rightfully be attributed to the Bensusan entities because the account operated on the basis of a line of credit and maintained no positive balance. (FSG Let. at pp. 3-4). However, neither the trustee nor FSG has any basis of knowledge for how Prebul accounted for the funds going in and out of the FSG account. Moreover, the fact that large sums of money were going into and out of the FSG account on a daily basis does not preclude the fact that funds were attributable to specific sources.

### **Paragraph 20**

As noted above, Prebul insists that the money sent by the Bensusan Entities were loans. This is irrelevant here and the subject of dispute between the parties in the bankruptcy action. The only relevant point here is whether or not Prebul had the right to use the money from the Bensusan Entities in the way that he did. Prebul has admitted that he had no such right.

### **Paragraph 21**

Prebul notes that he never purposely deceived the Bensusan Entities into believing that the statements he sent, which outlined the Bensusan investments and interest earned, were from a financial institution. This is not in dispute. However, what is undeniable is the fact that Prebul regularly sent the Bensusan Entities spreadsheets that purported to show how much money each entity had in the CMA account and the interest earned.

### **Paragraph 22**

Prebul asserts that his use of the funds from the Bensusan Entities is irrelevant to his crime. To the extent that those funds were not used as promised, i.e., were not placed into the CMA account as expressly promised, but rather used for personal and business expenses, that fact is directly relevant to his crime.

### **Paragraph 26**

As stated earlier, although there is a dispute as to whether the funds from the Bensusan Entities can be termed “loans,” the use of that term is irrelevant to the crime here. Moreover, Prebul’s attempts to sign a forbearance agreement after his crime was discovered does not change the fact that he unlawfully took and used the Bensusan funds without permission.

### **Paragraphs 34, 35, 37-38**

Prebul claims that 1) he never discussed the gross revenues of his business with the

Bensusans; 2) he did not regularly accompany Bensusan to the Mayo Clinic; 3) Danny Bensusan failed to inform his partners about certain business dealings involving B.B. Kings; 4) Prebul did not contact Bensusan in 1990 regarding the CMA investment; and 5) he never traveled to New York in 2004 to advise Bensusan to refinance a property in order to invest more money in the CMA and discuss the financial soundness of Chrysler Financial.

While certain of Prebul's arguments are self-serving or simply incorrect, they are nevertheless irrelevant to the crime to which Prebul allocuted and his sentence here.

#### **Paragraphs 39 and 40**

Prebul implies that the bankruptcy was caused by his arrest. However, the Government notes that witnesses have informed us that, at the time of Prebul's arrest, bankruptcy was already being planned.

#### **Discussion**

The Guidelines still provide strong guidance to the Court in light of United States v. Booker, 543 U.S. 220 (2005) and United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), although they are no longer mandatory. “[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range” — that “should be the starting point and the initial benchmark.” Gall v. United States, 128 S. Ct. 586, 596 (2007). The Guidelines’ relevance throughout the sentencing process stems in part from the fact that, while they are advisory, “the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives,” Rita v. United States, 127 S. Ct. 2456, 2463 (2007), and the Guidelines are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions,” Gall, 128 S. Ct. at 594; see also Rita v. United States, 127 S. Ct. at 2464. After making the initial Guidelines

calculation, a sentencing judge must then consider seven factors outlined in Title 18, United States Code, Section 3553(a), and “impose a sentence sufficient, but not greater than necessary, to comply with the purposes” of sentencing outlined in Section 3553(a)(2). Gall, 128 S. Ct. at 596-97.

In this case, the Government respectfully submits that a sentence of 12 months’ imprisonment would be sufficient, but not greater than necessary, to achieve the purposes of sentencing. As an initial matter, the bank larceny misdemeanor charge to which Prebul pled guilty was a blatant offense. On March 17, 2008, Prebul removed \$743.49 from the Bensusan Entities’ funds held in the FSG Account, and used it in the operation of Prebul’s automobile dealerships. Prebul did so without the permission or authority of Bensusan, or the relevant investing entities. These deposited funds in the FSG Account were held in trust on Bensusan’s behalf purportedly for interest earning purposes. At the time the \$743.49 was withdrawn by Prebul, he did not have permission or authorization to remove the funds from the FSG Account.

Accordingly, in light of the defendant’s blatant theft, and egregious relevant conduct, the Government believes a sentence of 12 months’ imprisonment is appropriate here.

#### **Order of Forfeiture**

The Government respectfully requests that the Court enter an Order of Forfeiture imposing a personal money judgment in the amount of \$6,783,082.82 against the defendant at sentencing. The defendant has agreed to the entry of the proposed Order of Forfeiture, a copy of which is enclosed herein.

Pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure, once a criminal defendant pleads guilty to the offenses giving rise to the forfeiture allegations in an indictment, the district court must determine what property is subject to forfeiture and the amount of money

the defendant should be ordered to pay.<sup>4</sup> See Fed. R. Crim. P. 32.2(b)(1)(A) (“As soon as practicable . . . after a plea of guilty . . . is accepted . . . the court must determine what property is subject to forfeiture under the applicable statute. . . . If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.”). “The court’s determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable.” Fed. R. Crim. P. 32.2(b)(1)(B). After making its determination, the court must then “promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment [and] directing the forfeiture of specific property.” Fed. R. Crim. P. 32.2(b)(2)(A). This preliminary order of forfeiture must be entered “without regard to any third party’s interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).” Id.

In this case, as part of his plea agreement with the Government, the defendant agreed to forfeit \$6,783,082.82 in United States currency, representing proceeds obtained directly or indirectly as a result of the offense alleged in the Information and related conduct. Thus, the defendant has agreed to the entry of the Government’s proposed Order of Forfeiture, which mirrors the terms of the plea agreement. Accordingly, the Government requests that the Court enter the Order of Forfeiture at the defendant’s sentencing and include the forfeiture order as part

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<sup>4</sup> Rule 32.2 was amended effective December 1, 2009. The new version of the Rule “govern[s] in all proceedings thereafter commenced, and insofar as just and practicable, all proceedings then pending.” Order of the Supreme Court dated Mar. 26, 2009 adopting and amending Rule 32.2.

