

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	
	:	
-v.-	:	13 Cr. 616 (VB)
	:	
JOHANNES THALER,	:	
	:	
Defendant.	:	
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GOVERNMENT'S SENTENCING MEMORANDUM

PREET BHARARA
United States Attorney for the Southern
District of New York

Benjamin Allee
Assistant United States Attorney
-Of Counsel-

RAYMOND HULSER
Acting Chief, Public Integrity Section
U.S. Department of Justice

Emily Rae Woods
Trial Attorney
-Of Counsel-

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GOVERNMENT'S SENTENCING MEMORANDUM

The Government respectfully submits this memorandum in connection with the defendant's sentencing scheduled for March 4, 2015. For the reasons set forth below, the Government submits that a sentence within the Sentencing Guidelines range of 63 to 78 months' imprisonment would be sufficient but not greater than necessary to achieve the aims of sentencing.

BACKGROUND

Thaler stands before the Court guilty of a bribery scheme, in which he and his friend and co-conspirator, former Special Agent Robert Lustyik, provided confidential, internal documents and information from the Federal Bureau of Investigation ("FBI") to a third co-conspirator, Rizve Ahmed, in exchange for cash and the promise of additional cash.

During the bribery scheme, which occurred between September 2011 and March 2012, Lustyik was 24-year veteran Special Agent with the FBI assigned to counterintelligence work in the New York Division, White Plains Resident Agency ("White Plains R.A."). Lustyik, as a veteran counterintelligence FBI Special Agent, was in a high-level, sensitive law enforcement position. Thaler was Lustyik's long-time friend and associate, and was in regular, daily contact

with Lustyik. Ahmed, a native of Bangladesh, was an acquaintance of Thaler, the two men having previously worked together at a store in Danbury, Connecticut. Ahmed, moreover, was a devotee of and affiliated with one of the two main rival political parties in Bangladesh, and sought to assist his political allies and harm his political opponents. (PSR ¶¶ 16-18.)

As part of the scheme, in September 2011, Ahmed sought from Thaler confidential, law enforcement information pertaining to a Bangladeshi political figure (hereinafter “Individual 1”), who was the son of the Bangladesh Prime Minister and who belonged to a political party opposing Ahmed’s political views. Ahmed’s goal in obtaining the confidential information was to locate and harm his intended victim, Individual 1, and others associated with the victim. More specifically, Ahmed sought to kidnap and physically harm Individual 1, who was living in Falls Church, Virginia. (PSR ¶ 19.)

In late September 2011, in furtherance of the scheme, Lustyik caused other personnel in FBI’s White Plains R.A. to retrieve confidential records pertaining to Individual 1, including, among other things, an internal memorandum (the “FBI Memo”) that referred to Individual 1 and a sum of \$300 million, and a confidential report, known as a Suspicious Activity Report (the “SAR”) that also referred to Individual 1. (PSR ¶ 20.)

In or around December 2011, Lustyik and Thaler agreed to provide to Ahmed confidential information such as the FBI Memo, the SAR, and other documents in exchange for cash payments. Ahmed likewise agreed to provide cash to Lustyik, indirectly through Thaler, for the documents and information. Ahmed represented to Thaler that he was working with multiple associates who likewise sought the documents and information and were willing to pay for them. (PSR ¶ 21.)

On December 9, 2011, Thaler and Ahmed met at a mall in Danbury, Connecticut,

where Ahmed provided \$1,000 in cash bribes to Thaler who, in exchange, provided to Ahmed the FBI Memo and SAR, among other things, which Thaler had received from Lustyik. During the meeting, Thaler and Ahmed also discussed Ahmed providing additional cash for additional information. (PSR ¶ 22.)

Following the December 9, 2011 meeting, Lustyik and Thaler sent text messages to each other about the bribe money:

LUSTYIK: Hey did u see cezar? Did he pay u?

THALER: Yeah. I got some for you. We need to talk about Bangladesh.

LUSTYIK: Ok. He gave u a grand? And r they ready to play?

THALER: Yes on both

LUSTYIK: Monthly money?

THALER: Not sure. C's [associate] is flying to bang[ladesh] today to meet with [another associate]

In December 2011 and early 2012, Lustyik and Thaler further schemed to obtain additional, regular cash bribes from Ahmed in increments of tens of thousands of dollars, in exchange for additional confidential law enforcement information pertaining to Individual 1 and for undertaking other efforts to assist Ahmed's political allies. (PSR ¶ 23.)

On December 16, 2011, Thaler and Ahmed agreed to a contract arrangement whereby Ahmed and his associates would pay Lustyik and Thaler a \$40,000 retainer fee and \$30,000 per month in exchange for additional information on Individual 1 and assistance in having charges dropped in a case that involved Ahmed's political ally (PSR ¶ 24):

THALER: Why don't we just do the contract. 40 up front, 30 monthly and we can give you everything we have plus set up [Individual 1] and get the inside from the party. That would be easier than negotiating every piece of info.

AHMED: That's fine but they have to have some idea what you have They aren't going to sign something not knowingly n give u the money I don't need any documents or anything. Just give me some idea what exactly you have on them . . . The last documents you gave me about \$300 millions. How far that investigation went n what they found. Give me some idea and I will get u that contract!!!

THALER: Ok. I'll let you know.

AHMED: I'm working for u n myself If this works out, I will be the hero to my party!!!

THALER: We can make that happen

AHMED: Get me some info on 3000000 mil file. Thanks.

On December 17, 2011, Thaler sent a text message to Lustyik, describing what Ahmed sought to obtain from Lustyik, and the price Ahmed claimed willingness to pay (PSR ¶ 25):

LUSTYIK: So. How much is this contract w cezar? And what r they expecting from it? And can we get like 20 gs quick?

THALER: Our original terms. \$40 retainer and \$30 monthly. They want everything on [Individual 1] plus getting [a Bangladeshi political figure's] charges dropped. . . .

In January 2012, Lustyik and Thaler sent text messages regarding efforts to arrange a meeting concerning the scheme (PSR ¶ 26):

THALER: [AHMED's associate] wants to meet both of us. Especially you because you're the man.

. . . .
LUSTYIK: Hey we need to push Cezar for this meeting and get that 40 gs quick. . . . Let's just meet them. I will talk us into getting the cash. . . . I will work my magic We r soooooooo close."

On January 29, 2012, Lustyik, Thaler, Ahmed, and three associates of Ahmed's met in person at Ahmed's residence to discuss exchanging additional confidential law enforcement information, to which Lustyik had access to by virtue of his position with the FBI, for

additional cash payments. (PSR ¶ 26.)

Ultimately, to Lustyik and Thaler's frustration, Ahmed did not promptly deliver on the promised tens of thousands of dollars in additional bribes. In late January 2012, Lustyik and Thaler schemed to pressure Ahmed to make payment by withholding additional information until receiving payment. Ahmed responded by, among other things, informing Thaler that Ahmed and his associates would rely on another source for information, a "ret FBI agent." (PSR ¶ 27.)

On January 30, 2012, through text messages, Lustyik and Thaler plotted revenge on Ahmed for his failure to provide them additional cash payments in exchange for confidential government information and for Ahmed's decision to pursue such information through an alternative source (PSR ¶ 28):

LUSTYIK: What? A retired FBI agent? Who is going to be asked about info I showed them?????? I am so screwed

. . . .

LUSTYIK: I was counting on that cash. Feel so fcuked. . . . I'm so fkn pissed at C. I thought all this was worked out. . . . Tell c Bob is just going to go to other side of coin.

THALER: You have [Individual 1's] number. I'm sure he'd be interested in what we talked about. Maybe he actually pays.

. . . .

LUSTYIK: I want to kill C Fcuking C. Let's kick his ass. Show them. I hung my ass out the window n we got nothing? Tell [Ahmed], I've got [Individual 1's] number and I'm pissed. . . . I will put a wire on n get [Ahmed and his associates] to admit they want [a Bangladeshi political figure] offed n we sell it to [Individual 1]

THALER: I know. That's what I was thinking. . . .

. . . .

LUSTYIK: Its ok. No retired guy can get [the information about Individual 1]. They will have to come back n we will double it. That's what u tell them.

. . . .

LUSTYIK: So bottom line. I need ten gs asap. We gotta squeeze C Call him n make him realize no retired guy can help them. Also remind him that I deal w Interpol. . . . [L]et them sweat. They need us more than we need them. Who knows maybe the guys we met with could end up being terrorists or something damaging like that.

On February 1, 2012, Ahmed sent a text message to Thaler, offering to pay \$10,000 in exchange for confidential government information. Thaler responded to Ahmed's text message, stating, "We can do whatever you guys need. We just can't do it on good faith. Once we see some money you'll get everything you want." (PSR ¶ 29.)

The scheme, including efforts to continue to exchange confidential information for cash, continued through February into March 2012. On February 18, 2012, Lustyik sent an email to Thaler containing confidential government information concerning Individual 1. (PSR ¶ 30.) On March 12, 2012, Ahmed sent an email to Thaler with a photo depicting a handful of cash and inviting Thaler to exchange additional information for the cash. (PSR ¶ 31.) In or about March 2012, after Lustyik and Thaler cease providing information and official assistance to Ahmed because Ahmed had not provided them with additional promised payments. (PSR ¶ 32.)

Ultimately, Ahmed further distributed certain of the documents he received from the bribery scheme, and obtained in return approximately \$30,000. (PSR ¶ 33.)

On August 2, 2013, Thaler was arrested in this case. On August 14, 2013, a grand jury in the Southern District of New York returned an indictment charging Thaler, along with Lustyik and Ahmed, in a total of six counts. The case was assigned to your Honor.

On October 17, 2014, Thaler pleaded guilty to (1) aiding and abetting bribery of a

public official, in violation of Title 18, United States Code, Sections 201(b)(2)(C) and 2 (Count Two); and (2) conspiracy to commit wire fraud and honest services fraud, in violation of Title 18, United States Code, Section 1349.

Thaler pleaded guilty pursuant to a plea agreement with the Government. In the plea agreement, Thaler and the Government agreed upon the following Guidelines analysis: (1) the base offense level is 12, pursuant to U.S.S.G. § 2C1.1(a)(2); (2) two levels are added because the offense involved more than one bribe, pursuant to U.S.S.G. § 2C1.1(b)(1); (3) ten levels are added because the value of the payments to be obtained by Lustyik and Thaler was more than \$120,000 but not more than \$200,000, pursuant to U.S.S.G. §§ 2C1.1(b)(2) and 2B1.1(b)(1)(F); (4) four levels are added because the offense involved a public official in a high-level and sensitive position, pursuant to U.S.S.G. § 2C1.1(b)(3); and (5) two levels are subtracted because Thaler was a minor participant in the criminal activity, pursuant to U.S.S.G. § 3B1.2(b). In the plea agreement, the parties also disagreed whether three levels should be added pursuant to U.S.S.G. § 3A1.2(a), the enhancement when there is an “Official Victim.” In addition, in the plea agreement Thaler and the Government, in anticipation that Thaler would be sentenced to 13 months in his separate, pending case in the District of Utah, agreed that Thaler would be in Criminal History Category II at the time of sentencing. The parties agreed, therefore, that the applicable Guidelines range is 70 to 87 months’ imprisonment if the Official Victim enhancement applies, and 51 to 63 months if it does not. Thaler’s Utah sentencing has been adjourned, however, such that he continues to await sentence there and consequently remains in Criminal History Category I. Therefore, the applicable Guidelines range is 63 to 78 months if the Official Victim enhancement applies, and 46 to 57 months if it does not.

The United States Probation Office, in its Presentence Investigation Report

(“PSR”), calculates the applicable Guidelines range as 63 to 78 months, applying the Official Victim enhancement and placing Thaler in Criminal History Category I. Probation recommends a sentence of 15 months.

DISCUSSION

A sentence within the Guidelines range would achieve the aims of sentencing under Title 18, United States Code, Section 3553(a). Indeed, only a substantial sentence of imprisonment would be commensurate with the seriousness of the offense, would promote respect for the law, and would deter Thaler and other individuals from engaging in similar corrupt activities.

I. The Applicable Guidelines Range is 63 to 78 Months’ Imprisonment

The bribery scheme in which Thaler participated had several facets, which result in the application of enhancements under the Guidelines on which Thaler and the Government agree. First, the parties agree that a two-level enhancement for “more than one bribe” applies because the bribery scheme involved a series of transactions and attempted transactions over the course of several months, with Lustyik and Thaler providing confidential and sensitive documents and information on multiple topics to Ahmed, and Ahmed providing cash. See U.S.S.G. § 2C1.1(b). Second, the parties agree that a ten-level enhancement applies because Special Agent Lustyik, Thaler, and Ahmed intended for Ahmed to provide additional bribes, including a \$40,000 retainer payment, plus \$30,000 in monthly payments, in exchange for the continued corrupt provision of valuable FBI documents and information. While Ahmed ultimately provided only approximately \$1,000, the parties agree that the value of the payments to be obtained by Special Agent Lustyik and Thaler nevertheless exceeded \$120,000. See U.S.S.G. §§ 2C1.1(b)(2) and 2B1.1(b)(1)(F). Third, the parties agree that a four-level enhancement applies because Special Agent Lustyik was

an FBI Special Agent in counterintelligence, and therefore held a high-level decision making or sensitive position. See U.S.S.G. § 2C1.1(b)(3). And fourth, Thaler was a minor participant in the criminal activity. U.S.S.G. § 3B1.2(b).

In addition, the Government maintains that the PSR properly applied a three-level enhancement because Thaler, Lustyik, and Ahmed targeted Individual 1 due to his familial relation to the Prime Minister of Bangladesh. U.S.S.G. § 3A1.2(a). Section 3A1.2(a) provides a three-level enhancement “[i]f the victim was a government officer or employee... or a member of the immediate family of [such a] person..., and the offense of conviction was motivated by such status.” U.S.S.G. §3A1.2.

The victim in this case, Individual 1, is the son of the Prime Minister of Bangladesh and an advisor to the Prime Minister on information technology. (PSR ¶ 38.) Both the Prime Minister and Individual 1 are members of the Awami League, a political party that opposes the Bangladesh National Party, the political party to which Ahmed belongs. (PSR ¶ 19; Exhibit A, FD-302 Aug. 2, 2015 Ahmed interview at 2.) As Thaler well knew, Ahmed’s professed reasons for obtaining the information about Individual 1 demonstrate that Individual 1 was plainly targeted because of his political affiliation and familial relation to the Prime Minister. In a voluntary interview with law enforcement agents, Ahmed explained that he intended to publicize the FBI information he obtained concerning investigations involving Individual 1, and in fact Ahmed provided the information to a journalist in Bangladesh. (Exhibit A, at 3; PSR ¶ 19.) Ahmed further admitted that he intended to “scare,” “kidnap,” and “hurt” Individual 1. (Exhibit A at 7; PSR ¶ 19.) During the bribery scheme, Individual 1 lived in Virginia with his wife and child. (PSR ¶ 38.) Individual 1 has been the victim of a prior assassination attempt and, since moving to the United States, he has previously had to relocate his family after political opponents publicized

his home address. (PSR ¶ 39.) The reason Ahmed sought to cause physical and reputation harm to Individual 1 was because of Individual 1's status as the Prime Minister's son and political leader in Bangladesh. Individual 1, therefore, was clearly an Official Victim for purposes of the U.S.S.G. § 3A1.2(a) enhancement.

Thaler argues that this enhancement does not apply because Individual 1 was a family member of a *foreign* government officer, rather than a government officer of the United States. (Thaler Br., at 2-3.) Yet the plain language of Section 3A1.2(a) makes no distinction between United States and foreign officials for purposes of the enhancement. Instead, it reads broadly and does not expressly limit application of the enhancement only to domestic government officers or employees. Nor does common sense support such a distinction. The targeting of an official victim because of his or her status as an official is an aggravating factor at sentencing for good reason, as such targeting threatens not only the individual but the system of government as a whole, and such potential harm is no less simply because the official happens to be the member of a foreign government.

Nor has any Court made the distinction Thaler invents. In the only two cases to have addressed whether the Guideline applies to foreign officials, both times the Court found that it did. See United States v. Kim, 03 Cr. 413 (RAP), 2003 WL 22391190, at *5 (S.D.N.Y. Oct. 20, 2003) (applying the three-level enhancement applicable when the victims were U.N. employees, because even though they were not within the letter of the enhancement, the Sentencing Commission would have included them had they occasion to consider it); United States v. Levario-Quiroz, 161 F.3d 903, 908 (5th Cir. 1998) (finding, in dicta, that Mexican border officers were qualifying victims: "[the defendant] has not presented a valid reason that U.S.S.G. § 3A1.2 cannot apply if the defendant committed an assault upon a person reasonably recognizable as a law

enforcement officer, whether foreign or domestic, during the course of the offense of conviction).

Thaler notes that a former version of the enhancement specified that it applied to U.S. officials by making reference to 18 U.S.C. § 1114, “Protection of Officers and Employees of the United States.” Compare U.S.S.G. § 3A1.2 (1990 version), with § 3A1.2 (2014 version). Indeed, the Guideline was amended in about 1992 so as to expand its scope, and the commentary to the amendments did not specify the reason to abandon the distinction between U.S. and foreign officials. See U.S.S.G. § 3A1.2, Historical Notes, 1992 Amendments. Thaler argues, counterintuitively, that the former inclusion of a reference to U.S. officials in the Guideline supports the inference that the Guideline should be construed today as having that limitation. But the former inclusion of the reference, and the express and purposeful deletion of it, supports the opposite inference. The Sentencing Commission expressly rewrote the enhancement such that it applies to foreign officials under any plain reading.

Thaler also argues (by adopting the arguments of Ahmed) that Individual 1 was not a victim. (Ahmed Br., at 18.) Thaler is wrong. The documents and information illegally leaked by Thaler and Lustyik to Ahmed resulted in public dissemination of, among other things, Individual 1’s personal identifying information, including his social security number, residence address, date of birth, home and work phone numbers, height, weight, race; his criminal history; his bank account numbers, balances, and activity; and information pertaining to incidents involving Individual 1 and law enforcement authorities, including Customs and Border Patrol and the FBI. The nature of the information demonstrates clearly that Individual 1 was indeed an intended, and actual, victim of the bribery scheme.¹

¹ Thaler, in adopting the arguments of Ahmed, argues “In this instance, the victim is the Federal Bureau of Investigation. ‘Individual 1,’ was not party to this offense and the information

Indeed, the dissemination of the confidential, sensitive information pertaining to Individual 1 is illegal. There are several common-sense reasons for this prohibition. Among them is that when law enforcement obtains information about an individual during an investigation, and the investigation does not yield a public proceeding (such as a prosecution), it is unfair at least and potentially dangerous at worst to the individual to distribute the information collected in the investigation, and especially to distribute it for profit to those who would seek to do harm to the individual.² Such illegal disclosure victimizes many, including the FBI and the citizens of the United States who rely on FBI agents not to make such disclosures, and the individuals whose information has been collected and disseminated illegally. Individual 1 is such a victim.

II. A Sentence of 63 to 78 Months Would Achieve the Aims of Sentencing

The nature and circumstances of the offense are extraordinarily serious. 18 U.S.C. § 3553(a)(1). The offense in and of itself was a serious crime: Thaler put himself in the middle of a scheme to bribe Lustyik with thousands of dollars in exchange for confidential documents about prominent Bangladeshi individuals, including the son of the current Prime Minister. The scheme

obtained was not owned or created by him. The information obtained was property of the FBI and they are the victim of this offense.” (*Id.*) Each of these matters is beside the point: (1) the FBI was a victim, but there were multiple victims of the crime; (2) a victim is never a party to a criminal prosecution, and there is no requirement that a victim be a party for the enhancement to apply; and (3) Individual 1 was harmed regardless whether he had a property interest in the information, because it was illegal for those who had the information to sell it and, in fact, selling the information created risk to Individual 1’s reputation and safety.

2 The political situation in Bangladesh includes, to this day, violent clashes between the Bangladesh National Party and Awami League. *See, e.g.*, Crisiswatch Database, <http://www.crisisgroup.org/en/publication-type/crisiswatch/crisiswatch-database.aspx?CountryIDs=%7BC3F2C698-4DFE-4548-B5EA-B78C8D53B2BF%7D> (“Political crisis continued, threatening severe destabilisation of country: over 100 killed and hundreds injured since early Jan in violent anti-govt protests and country-wide transport blockade led by opposition Bangladesh National Party (BNP)”).

included secret meetings, secret exchanges, secret disclosures from FBI files, and, ultimately, dissemination of information to Ahmed, who was seeking to harm Individual 1. The offense was an instance of shocking corruption, which was (informationally) lucrative for the corrupter, Ahmed, and nearly (financially) lucrative for the corrupt, Lustyik, and his associate, Thaler.

The offense was also extraordinarily serious in a broader way, such that a serious sentence is needed to promote respect for the law. 18 U.S.C. § 3553(a)(2)(A). By working with Special Agent Lustyik to exchange confidential information for cash bribes, Thaler seriously undermined the criminal justice system which depends upon its law enforcement agents to act in the public interest, uphold the law, and safeguard sensitive information. The public trust is the most sacred possession of a democratic society. When that trust is violated because of corruption like the sort brought about by Ahmed's crimes, it breeds cynicism, apathy, and distrust among the public. It has the potential to make citizens lose respect and trust in the very individuals who are supposed to serve and protect them.

Indeed, bribery especially "cannot properly be seen as a victimless crime, for in a sense it threatens the foundation of democratic government. . . . [B]ribery tears at the general belief of the citizenry that government officials will carry out their duties honestly, if not always competently. And that harm, though it may at times appear intangible, is real." United States v. Hayes, 762 F.3d 1300, 1309 (11th Cir. 2014).

Citizens have the absolute right to expect that the conduct of their law enforcement agents, especially those working in counterintelligence for the FBI, would be above reproach, would be a model of rectitude, would enforce the laws and would, importantly, punctiliously and scrupulously obey those laws themselves. Thaler, however, worked against that principle, and assisted Special Agent Lustyik in abusing his authority, violating his oath, and exhibiting contempt

for the trust placed in him. Moreover, as a counterintelligence law enforcement agent with Top Secret security clearance, the corruption of Special Agent Lustyik posed a fundamental threat to national security, which Thaler well knew.

Importantly, too, imposing a significant prison sentence for Thaler would serve the important purpose of deterring future individuals and law enforcement agents in this district and beyond from engaging in similar misconduct. 18 U.S.C. § 3553(a)(2)(B). General deterrence has its greatest impact in white-collar cases, like this one, because these crimes are committed in a more rational and calculated manner than sudden crimes of passion or opportunity. United States v. Peppel, 707 F.3d 627, 637 (6th Cir. 2013) (quoting United States v. Martin, 455 F.3d 1227, 1240 (11th Cir. 2006)). As one court noted,

We need not resign ourselves to the fact that corruption exists in government. Unlike some criminal justice issues, the crime of public corruption can be deterred by significant penalties that hold all offenders properly accountable. The only way to protect the public from the ongoing problem of public corruption and to promote respect for the rule of law is to impose strict penalties on all defendants who engage in such conduct, many of whom have specialized legal training or experiences. Public corruption demoralizes and unfairly stigmatizes the dedicated work of honest public servants. It undermines the essential confidence in our democracy and must be deterred if our country and district is ever to achieve the point where the rule of law applies to all – not only to the average citizen, but to all elected and appointed officials.

United States v. Spano, 411 F. Supp. 2d 923, 940 (N.D. Ill. 2006).

Moreover, where corruption is exposed, “[i]t is important...for the public to realize that white collar criminals will not be dealt with less harshly than are those criminals who have neither the wit nor the position to commit crimes other than those of violence.” United States v. Brennan, 629 F. Supp. 283, 302 (E.D.N.Y.) aff’d, 798 F.2d 581 (2d Cir. 1986); see also United States v. Davis, 537 F.3d 611, 617 (6th Cir. 2008) (noting that “[o]ne of the central reasons for creating the sentencing guidelines was to ensure stiffer penalties for white-collar crimes and to eliminate disparities between white-collar sentences and sentences for other crimes”).

Thaler, through the submission of his counsel, emphasizes his personal history and characteristics, in seeking a sentence less more than 75% below the bottom of the applicable Guidelines range. The Government submits that Thaler's personal circumstances do not weigh so heavily in his favor, as they include an absence of mitigating factors often present for other defendants. First, while this is his first sentence, his conduct was not isolated or aberrational. As the Court is aware, Thaler faces sentencing in the District of Utah for another corruption scheme with Lustyik. In that scheme, Thaler and Lustyik pursued another criminal plan to get rich, by selling Lustyik's status and influence as an FBI agent to obstruct the investigation and prosecution of their business partner Michael Taylor. In the instant case, Thaler's conduct spanned approximately six months, from September 2011 through March 2012, and involved hundreds of communications over text, phone, email, and in person. In the Utah case, Thaler's criminal efforts were also lengthy, and at times daily. Thaler's crimes were not errant misjudgments; they were reflective of a thorough and complete willingness to break the law in a manner that deeply offends our justice system itself.

Second, Thaler's crimes cannot be explained away by youthful indiscretion. Thaler is 51 years old, and presumably whatever he was able to learn in the way of upright living he would have learned already, particularly when among his best friends was an FBI agent. He apparently learned nothing, other than that the time would come, as Lustyik was nearing retirement, when he and Lustyik could try to cash in on his status and access.

Third, Thaler's background has none of the hardships or depravity present for so many other defendants who come before the Court for sentencing. Thaler had a solid upbringing, employment for himself and his wife, and had a supportive, loving family. While Thaler points somewhat vaguely to financial hardship as the reason for his crimes, this of course is no excuse.

Moreover, Thaler's claimed financial hardship resembles the same financial hardship faced by lots of ordinary Americans – being laid off, kids in college, struggling to make mortgage payments, costly care for aging parents – who nevertheless manage not to participate in extravagant bribery schemes to make ends meet.

The Government submits that the Probation Office, which recommends a sentence of 15 months' imprisonment, concurrent with any sentence imposed in Utah, misapprehended the gravity of the offense and Thaler's role in it. Probation compared the instant offense to the offense in Utah, where Thaler, pursuant to a plea agreement, is expected to be sentenced to 13 months' imprisonment, and further characterized Thaler as a "conduit" in the instant case. Probation does not precisely explain the significant disparity between its recommendation and the Guidelines range, but it appears in part based on Thaler's "financial difficulties." The Guidelines in this case, however, are not 13 months, but are 63 to 78 months, which reflects in part the gravity of the offense. It's true that Thaler was a "conduit," and was less culpable than Lustyik whose willingness to break his oath was the most shocking and harmful aspect of the scheme. Indeed, the Guidelines range includes a reduction to account for Thaler's minor role. But Thaler was not some replaceable pipe, used merely as a convenient vessel through which Lustyik and Ahmed flowed bribes and confidential information. Thaler was a critical, irreplaceable participant, without whom the bribery scheme would never have hatched, let alone grown. Thaler alone had the trust of and access to Lustyik to accomplish the crime, and to put Lustyik together with those who would and did bribe him.

III. The Sentence Should Be Consecutive to the Anticipated Sentence of Thaler in a Separate Case for a Separate Offense

The sentence the Court imposes should also be ordered to run consecutively to the anticipated sentence in the District of Utah. This Court has the discretion to order that the sentence in this case run consecutively to the as-yet unimposed sentence in Utah. See Setser v. United States, 132 S.Ct. 1463 (2012). In deciding whether to do so, the Court should consider the Section 3553(a) factors as to each offense. 18 U.S.C. § 3584(b); see also U.S.S.G. § 5G1.3(d), and App. Note 4(A). Here, simply, the sentence the Court imposes for the instant offense will not reflect the offense conduct for which the defendant is being sentenced in Utah. The Utah offense conduct is not relevant conduct here, nor is the defendant accountable for it here in his Criminal History Category. See U.S.S.G. § 5G1.3 (describing that when conduct giving rise to an undischarged term of imprisonment is relevant conduct to the instant offense, the instant sentence may be ordered to run concurrently). To impose a concurrent sentence in this case would essentially give Thaler a free pass for the instant bribery scheme, and would neither generally deter others from persisting in multiple attempts at corruption nor promote respect for the law.

Conclusion

For the foregoing reasons, the Court should impose a sentence within the range of 63 to 78 months.

Dated: March 2, 2015
White Plains, New York

Respectfully submitted,

Preet Bharara
United States Attorney

By: /s/ Benjamin Allee
Benjamin Allee
Assistant United States Attorney
(914) 993-1962

Raymond Hulser
Acting Chief, Public Integrity Section
Department of Justice

By: /s/ E. Rae Woods
Emily Rae Woods
Trial Attorney
(202) 616-2691