

U.S. MAGISTRATE COURT
DS - SDTX
FILED
DEC 03 2009 IS
CLERK OF COURT
LAREDO DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA §
 §
v. § CRIMINAL NO. L-09-2499-02
 §
FRED LUKACH (2) §

PLEA AGREEMENT

The United States of America, by and through Tim Johnson, United States Attorney for the Southern District of Texas and Sam S. Sheldon, Assistant United States Attorney, and the defendant, FRED LUKACH, and the defendants counsel, pursuant to Rule 11(c)(1)(A) and 11(c)(1)(B) of the Federal Rules of Criminal Procedure, state that they have entered into an agreement, the terms and conditions of which are as follows:

The Defendant's Agreement

1. The defendant agrees to plead guilty to Count 2 of the Criminal Information. Count 2 charges defendant with Illegal Exportation of Goods, in violation of Title 18, United States Code, Section 554. The defendant, by entering this plea and plea agreement agrees that he is waiving any right to have the facts the law makes essential to the punishment either charged in the Criminal Information or proven to a jury.

Punishment Range

2. The statutory maximum penalty for each violation of Title 18, United States

Code, Section 554, is imprisonment of not more than 10 years, and a fine of not more than \$250,000. Additionally, the defendant may receive a term of supervised release after imprisonment of up to 3 years. Title 18, U.S.C. §§ 3559(a) and 3583(b). Defendant acknowledges and understands that if he should violate the conditions of any period of supervised release which may be imposed as part of his/her sentence, then defendant may be imprisoned for the entire term of supervised release, without credit for time already served on the term of supervised release prior to such violation. Title 18, U.S.C. §§ 3559(a) and 3583(e)(3). Defendant understands that he cannot have the imposition or execution of the sentence suspended, nor is he/she eligible for parole.

Mandatory Special Assessment

3. Pursuant to Title 18, U.S.C. § 3013(a)(2)(A), immediately after sentencing, defendant will pay to the Clerk of the United States District Court a special assessment in the amount of one hundred dollars (\$100.00) per count of conviction. The payment will be by cashier's check or money order payable to the Clerk of the United States District Court, c/o District Clerk's Office, P.O. Box 61010, Houston, Texas 77208, Attention: Finance.

Fine and Reimbursement

4. Defendant understands that under the relevant statutes and United States Sentencing Guidelines, the Court is permitted to order the defendant to pay a fine that is sufficient to reimburse the government for the costs of any imprisonment or term of supervised release; if any is ordered.

5. Defendant agrees that any fine or restitution imposed by the Court will be due and payable immediately, and defendant will not attempt to avoid or delay payment. Defendant understands the Court will determine the amount of full restitution to compensate all victim(s).

6. Defendant agrees to make complete financial disclosure to the United States by truthfully executing a sworn financial statement (Form OBD-500), by the deadline set by the United States, or if no deadline is set, no later than sentencing. Defendant agrees to authorize the release of all financial information requested by the United States, including, but not limited to, executing authorization forms for the United States to obtain tax information, bank account records, credit history, and social security information. Defendant agrees to discuss or answer any questions by the United States relating to the Defendant's complete financial disclosure. Further, the Defendant agrees to make full restitution to any and all victim(s) of the offenses the Indictment charges against the Defendant regardless of the count(s) of conviction.

Waiver of Appeal

7. Defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal a conviction and appeal the sentence imposed. The defendant agrees to waive the right to appeal the conviction, the sentence imposed or the manner in which the sentence was determined. Additionally, the defendant is aware that Title 28, U.S.C. § 2255, affords the right to contest or "collaterally attack" a conviction or sentence after the conviction or

sentence has become final. The defendant waives the right to contest his/her conviction or sentence by means of any post-conviction proceeding.

8. In agreeing to these waivers, defendant is aware that a sentence has not yet been determined by the Court. The defendant is also aware that any estimate of the possible sentencing range under the sentencing guidelines that he/she may have received from his/her counsel, the United States or the Probation Office, is a prediction, not a promise, **did not induce his guilty plea**, and is not binding on the United States, the Probation Office or the Court. The United States does not make any promise or representation concerning what sentence the defendant will receive.

9. The Defendant understands and agrees that each and all waivers contained in the Agreement are made in exchange for the concessions made by the United States in this plea agreement.

The United States' Agreements

10. The United States agrees to each of the following:
 - (a) If defendant pleads guilty to Count 2 of the Criminal Information and persists in that plea through sentencing, and if the Court accepts this plea agreement, the United States will move to dismiss any remaining counts of the Criminal Information at the time of sentencing;
 - (b) At the time of sentencing, the United States agrees not to oppose defendant's anticipated request to the Court and the United States Probation Office that he receive a two (2) level downward adjustment pursuant to U.S.S.G. Section 3E1.1(a) should the defendant accept responsibility as contemplated by the Sentencing Guidelines;
 - (c) If the defendant qualifies for an adjustment under U.S.S.G. Section 3E1.1(a),

and the defendant's guideline offense level prior to applying U.S.S.G. Section 3E1.1(a) is 16 or higher, the United States agrees to move the Court grant the defendant an additional one (1) level reduction in the defendant's guideline offense level for acceptance of responsibility pursuant to U.S.S.G. Section 3E1.1(b) based on the defendant timely notifying authorities of defendant's intention to plead guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources effectively.

- (d) The United States will recommend a further one (1) level reduction in Defendant's sentencing Guideline range pursuant to § 5K2.0 USSG for waiver of all pre-trial motions, and appeal and any post -conviction collateral attack as set forth in paragraph seven (7) herein.
- (e) The United States will recommend a sentence *not* to exceed one-year and one-day in prison, but may in its discretion recommend a lesser sentence.

United States' Non-Waiver of Appeal

11. The United States reserves the right to carry out its responsibilities under statutory and guidelines sentencing. Specifically, the United States reserves the right:

- (a) to bring its version of the facts of this case, including its evidence file and any investigative files, to the attention of the Probation Office in connection with that office's preparation of a presentence report;
- (b) to set forth or dispute sentencing factors or facts material to sentencing;
- (c) to seek resolution of such factors or facts in conference with defendant's counsel and the Probation Office;
- (d) to file a pleading relating to these issues, in accordance with U.S.S.G. Section 6A1.2 and Title 18, U.S.C. § 3553(a); and,
- (e) to appeal the sentence imposed or the manner in which it was determined.

Sentence Determination

12. Defendant is aware that the sentence will be imposed after consideration of the United States Sentencing Guidelines and Policy Statements, as well as the provisions of Title 18, U.S.C. § 3553(a). Defendant nonetheless acknowledges and agrees that the Court has authority to impose any sentence up to and including the statutory maximum set for the offense(s) to which Defendant pleads guilty, and that the sentence to be imposed is within the sole discretion of the sentencing judge after the Court has consulted the applicable Sentencing Guidelines. Defendant further understands and agrees that the United States Sentencing Guidelines are “effectively advisory” to the Court. *United States v. Booker*, 125 S.Ct. 738 (2005). Accordingly, Defendant understands that, although the Court must consult the Sentencing Guidelines and must take them into account when sentencing Defendant, the Court is not bound to follow the Sentencing Guidelines nor sentence Defendant within the calculated guideline range. Defendant understands and agrees the parties’ positions regarding the application of the Sentencing Guidelines do not bind the Court and that the sentence imposed is within the discretion of the sentencing judge. If the Court should impose any sentence up to the maximum established by statute, or should the Court order any or all of the sentences imposed to run consecutively, Defendant cannot, for any of those reasons alone or in combination, withdraw a guilty plea, and will remain bound to fulfill all of the obligations under this plea agreement.

Rights at Trial

13. Defendant represents to the Court that he is satisfied that his attorney has rendered effective assistance. Defendant understands that by entering into this agreement, he surrenders certain rights as provided in this plea agreement. Defendant understands that the rights of a defendant include the following:

- (a) If defendant persisted in a plea of not guilty to the charges, defendant would have the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States, and the court all agree.
- (b) At a trial, the United States would be required to present witnesses and other evidence against the defendant. Defendant would have the opportunity to confront those witnesses and his attorney would be allowed to cross-examine them. In turn, the defendant could, but would not be required to, present witnesses and other evidence on his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.
- (c) At a trial, defendant could rely on a privilege against self-incrimination and decline to testify, and no inference of guilt could be drawn from such refusal to testify. However, if the defendant desired to do so, he could testify on his own behalf.

Factual Basis for Guilty Plea

14. Defendant is pleading guilty because he is guilty of the charges contained in Count 2 of the Criminal Information, and the facts set forth for by the United States meet the elements of the crime he is pleading guilty to on this date. If this case were to proceed to trial, the United States could prove each element of the offense beyond a reasonable doubt. The following facts, among others would be offered to establish the Defendant's guilt:

Defendant, FRED LUKACH is a freight forwarder in Laredo, TX. Companies based in Mexico would hire Defendant to export textile shipments from the United States to Mexico. These companies, however, did not want to pay duties to the Mexican Government. Therefore, Defendant obtained fraudulent North American Free Trade Agreement (NAFTA) Certificate of Origin documents and fraudulent United States invoices. Defendant used these fraudulent documents to claim that foreign textile shipments were manufactured in the United States in order to exploit NAFTA protections. By using these fraudulent documents, Defendant aided the ultimate consignees of the foreign textile shipments in avoiding paying duties to the Mexican Government because they claimed the textiles were manufactured in the United States.

Vahram Aynilian is the President of N.Y. Aynilian & Co. located in New Jersey. On numerous occasions, Aynilian sold Defendant fraudulent NAFTA Certificate of Origin documents and fraudulent United States invoices. Defendant paid Aynilian \$1,000 per each set of a fraudulent NAFTA Certificate of Origin and a fraudulent United States invoice.

On March 31, 2009, Immigrations and Customs (ICE) conducted a search warrant on Aynilian's business location. At the same time agents were conducting the search, Defendant sent by facsimile transmission to Aynilian a fraudulent NAFTA Certificate of Origin and a fraudulent United States invoice. Aynilian admitted to agents that the facsimile he had just received from Defendant contained a fraudulent NAFTA Certificate of Origin and a fraudulent United States invoice. Based on this information, Mexican Customs was able to

seize this shipment when it arrived in Mexico.

In total, from 2005-2009, Defendant obtained fraudulent NAFTA Certificate of Origin documents and fraudulent United States invoices with respect to several hundred shipments. This includes the fraudulent transaction that is set forth in Count 2 of the Criminal Information. Specifically, on February 18, 2009, Defendant paid for a NAFTA Certificate of Origin document asserting that the fabric rolls were manufactured in the United States when he knew that such assertion was false.

Accordingly, Defendant admits that he fraudulently facilitated the transportation of merchandise from the United States to Mexico by paying for fraudulent NAFTA Certificate of Origin documents and fraudulent United States invoices.

Breach of Plea Agreement

15. If defendant should fail in any way to fulfill completely all of the obligations under this plea agreement, the United States will be released from its obligations under the plea agreement, and the defendant's plea and sentence will stand. If at any time defendant retains, conceals or disposes of assets in violation of this plea agreement, or if defendant knowingly withholds evidence or is otherwise not completely truthful with the United States, then may move the Court to set aside the guilty plea and reinstate prosecution. Any information and documents that have been disclosed by defendant, whether prior to or subsequent to this plea agreement, and all leads derived therefrom, can and will be used against defendant in any prosecution. Additionally, all statements made pursuant to this plea

agreement will be admissible against defendant who hereby waives the provisions of Rule 11(f) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence.

16. Whether the defendant has breached any provision of this plea agreement, if contested by the parties, shall be determined by the Court in an appropriate proceeding during which the defendant's disclosures and documentary evidence shall be admissible and during which the United States shall be required to establish a breach of the plea agreement by a preponderance of the evidence.

Forfeiture

17. This plea agreement is being entered into by the United States on the basis of Defendant's express representation that he will make a full and complete disclosure of all assets over which he exercises direct or indirect control, or in which he has any financial interest. Defendant agrees to forfeit whatever interest he may have in proceeds related to the commission of the offense to which he is pleading guilty. In addition, Defendant agrees to waive any and all interest in any asset which is the subject of any related administrative or judicial forfeiture proceeding, whether such proceeding is criminal or civil, or based on state or federal law.

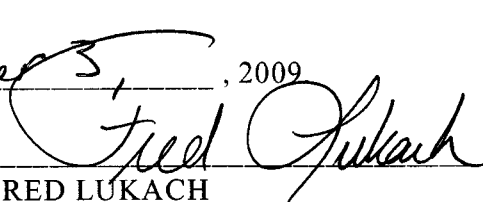
18. Defendant consents to any agreed order of forfeiture or judgment, and further Defendant agrees to take all steps necessary to pass clear title to forfeitable assets, if any, to the United States and to assist fully in the collection of restitution and fines, including, but

not limited to, surrendering title, executing a warranty deed, signing a consent decree, stipulating to facts regarding the transfer of title and basis for the forfeiture, and signing any other documents necessary to effectuate such transfer. Defendant also agrees to direct any banks which have custody of Defendant's assets to deliver all funds and records of such assets to the United States. Defendant agrees to forfeit whatever interest Defendant has in assets related to this case. Defendant further stipulates and agrees that the property, if any, listed in the Criminal Information is subject to forfeiture. Defendant consents to the order of forfeiture becoming final as to the Defendant immediately following Defendant's sentencing pursuant to Fed.R.Crim. P. 32.2(b)(3). Defendant further waives any right to challenge the forfeiture of property, in any manner, including by direct appeal or in a collateral proceeding.

Complete Agreement


19. This written plea agreement, consisting of 14 pages, including the attached addendum of defendant and his attorney, constitutes the complete plea agreement between the United States, defendant and his counsel. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. Defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

20. Any modification of this plea agreement must be in writing and signed by all parties.

Filed at Laredo, Texas, on December 3, 2009

FRED LUKACH
Defendant


Subscribed and sworn to before me on Dec. 03, 2009.


UNITED STATES DISTRICT CLERK

By: 
Deputy United States District Clerk

APPROVED:

TIM JOHNSON
United States Attorney

By: 
SAM S. SHELDON
Assistant United States Attorney


HORACE HALL
Attorney for Defendant