

FILED

JUL 24 2014

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BERND KOWALEWSKI,)
)
Defendant.)
)

Case No. 12-cr-07-GKF

PLEA AGREEMENT

The United States of America, by and through Danny C. Williams, Sr., United States Attorney for the Northern District of Oklahoma, and Kevin C. Leitch, Assistant United States Attorney, together with Jeffrey H. Knox, Chief of the Department of Justice, Criminal Division, Fraud Section, and Daniel S. Kahn, Assistant Chief, and the defendant, Bernd Kowalewski, in person and through counsel, Bart Stapert, respectfully inform the Court that they have reached the following plea agreement.


1. Plea

The defendant agrees to enter voluntary pleas of guilty to the following:

Count 1: Title 18, United States Code, Section 371 (Conspiracy)

Count 6: Title 15, United States Code, Section 78dd-2 (Foreign Corrupt Practices Act)

as set forth in the Indictment in the instant case, Northern District of Oklahoma, and admits to being in fact guilty as charged in the counts to which the defendant is pleading guilty.



Defendant's Initials

2. Waiver of Constitutional Rights

The defendant understands that, by pleading guilty, the following constitutional rights will be relinquished:

- a. the right to plead not guilty;
- b. the right to be tried by a jury, or, if the defendant wishes and with the consent of the Government, to be tried by a judge;
- c. at trial, the defendant has the right to an attorney, and if defendant could not afford an attorney, the Court would appoint one to represent the defendant;
- d. the defendant has the right to assist in the selection of the jury;
- e. during trial, the defendant would be presumed innocent, and a jury would be instructed that the Government has the burden to prove the defendant guilty beyond a reasonable doubt and by a unanimous verdict;
- f. the defendant has the right to confront and cross-examine witnesses against the defendant;
- g. if desired, the defendant could testify on the defendant's own behalf and present witnesses in the defendant's defense;
- h. if the defendant did not wish to testify, that fact could not be used against the defendant, and a jury would be so instructed;
- i. if the defendant were found guilty after a trial, the defendant would have the right to appeal that verdict to determine if any errors had been committed during trial that would require either a new trial or a dismissal of the charges; and
- j. at trial, the defendant would be entitled to have a jury determine beyond a reasonable doubt any facts which may have the effect of increasing the defendant's mandatory minimum or maximum sentence.

By pleading guilty, the defendant will be giving up all of these rights. By pleading guilty, the defendant understands that the defendant may have to answer questions posed

to defendant by the Court, both about the rights that the defendant will be giving up and the factual basis for the defendant's plea.

3. Appellate and Post-Conviction Waiver

In consideration of the promises and concessions made by the United States in this plea agreement, the defendant knowingly and voluntarily agrees to the following terms:

a. The defendant waives the right to directly appeal the conviction and sentence pursuant to 28 U.S.C. § 1291 and/or 18 U.S.C. § 3742(a);

b. The defendant reserves the right to appeal from a sentence which exceeds the statutory maximum;

c. The defendant expressly acknowledges and agrees that the United States reserves all rights to appeal the defendant's sentence as set forth in 18 U.S.C. § 3742(b), and *U.S. v. Booker*, 543 U.S. 220 (2005); and

d. The defendant waives the right to collaterally attack the conviction and sentence pursuant to 28 U.S.C. § 2255, except for claims based on ineffective assistance of counsel which challenge the validity of the guilty plea or this waiver.

The defendant expressly acknowledges that counsel has explained his appellate and post-conviction rights; that defendant understands his rights; and that defendant knowingly and voluntarily waives those rights as set forth above.



Bernd Kowalewski



Defendant's Initials

4. Freedom of Information Act Waiver

The defendant waives all rights, whether asserted directly or by a representative, to request or to receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

5. Rule 11 Rights Waiver

The defendant knowingly and expressly waives all of the rights afforded defendant pursuant to the provisions of Rule 11(f) of the Federal Rules of Criminal Procedure. In other words, after entry of a plea made pursuant to this plea agreement, and in consideration thereof, the following shall be admissible against the defendant:

- a. A plea of guilty which is later withdrawn or which the defendant seeks to withdraw;
- b. Any statement made in the course of any proceeding under Rule 11 regarding said plea of guilty;
- c. Any statement made in the course of plea discussions with an attorney or agent for the Government, or which were made pursuant to a proffer letter agreement, which result in a plea of guilty later withdrawn.

6. Waiver of Right to Jury Trial on Sentencing Factors

The defendant, by entering this plea, also waives the right to have facts that determine the offense level under the Sentencing Guidelines (including facts that support any specific offense characteristic or other enhancement or adjustment) (1) charged in the Indictment, (2) proven to a jury, or (3) proven beyond a reasonable doubt. The defendant

explicitly consents to have the sentence based on facts to be established by a preponderance of the evidence before the sentencing judge pursuant to *United States v. Crockett*, 435 F.3d 1305 (10th Cir. 2006), and *United States v. Magallanez*, 408 F.3d 672 (10th Cir. 2005), and to allow the Court to consider any reliable evidence without regard to its admissibility at trial. The defendant explicitly acknowledges that his pleas to the charged offenses authorize the Court to impose any sentence up to and including the maximum sentence set forth in the United States Code. The defendant also waives all challenges to the constitutionality of the Sentencing Guidelines.

7. Payment of Monetary Penalties

The defendant understands that the Court may impose a fine pursuant to the Sentencing Guidelines. The defendant agrees, as a part of this agreement, to submit to interviews by the United States Attorney's Financial Litigation Unit regarding the defendant's financial status, and to complete and submit a financial statement, under oath, not later than two weeks after the date of this plea agreement. The defendant understands that, by law, interest accrues on any remaining balance of the debt.

8. Special Assessment

The defendant hereby agrees to pay the total amount required for the Special Monetary Assessment (\$100 per felony count) to the United States District Court Clerk before the time of the sentencing hearing or as directed by the District Court.

9. Factual Basis and Elements

The elements that the United States must prove beyond a reasonable doubt in order to convict under 18 U.S.C. § 371 are as follows:

- a. An unlawful agreement between two or more individuals to violate the Foreign Corrupt Practices Act existed; specifically, to willfully make use of the mails and means and instrumentalities of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, and authorization of the payment of any money, offer, gift, promise to give, and authorization of the giving of anything of value, to a foreign official, and to a person, while knowing that all or a portion of such money and thing of value would be and had been offered, given, and promised to a foreign official, for purposes of: (i) influencing acts and decisions of such foreign official in his or her official capacity; (ii) inducing such foreign official to do and omit to do acts in violation of the lawful duty of such official; (iii) securing an improper advantage; and (iv) inducing such foreign official to use his or her influence with a foreign government and agencies and instrumentalities thereof to affect and influence acts and decisions of such government and agencies and instrumentalities, in order to assist defendant and his co-conspirators in obtaining and retaining business for and with, and directing business to, their employer and others;
- b. The defendant knowingly and willfully entered that conspiracy;
- c. One of the members of the conspiracy knowingly committed at least one of the overt acts charged in the Indictment in the Northern District of Oklahoma;
- d. The overt acts were committed to further some objective of the conspiracy; and
- e. There was interdependence among the members of the conspiracy; that is, the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged.

The elements that the United States must prove beyond a reasonable doubt in order to convict under 15 U.S.C. § 78dd-2 are as follows:

- a. The defendant was a domestic concern, or an officer, director, employee, or agent of a domestic concern;
- b. The defendant acted corruptly and willfully;
- c. The defendant made use of the mails or any means or instrumentality of interstate commerce in the Northern District of Oklahoma in furtherance of conduct that violates the FCPA;
- d. The defendant offered, paid, promised to pay, or authorized the payment of money, or offered, gave, promised to give, or authorized the giving of anything of value;
- e. The payment or gift at issue was to a foreign official, or was to any person while knowing that all or a portion of such money or thing would be offered, given, or promised (directly or indirectly) to a foreign official;
- f. The payment or gift at issue was intended for at least one of four purposes:
 - (1) to influence any act or decision of the foreign official in his or her official capacity;
 - (2) to induce the foreign official to do or omit to do any act in violation of that official's lawful duty;
 - (3) to secure any improper advantage; or
 - (4) to induce that foreign official to use his or her influence with a foreign government or department, agency, or instrumentality thereof to affect or influence any act or decision of such government, department, agency, or instrumentality; and
- g. The payment or gift was intended to assist the defendant in obtaining or retaining business for or with, or directing business to, any person or company.


In regard to the factual basis required by Federal Rule of Criminal Procedure 11(b)(3), the defendant agrees and stipulates that there is a factual basis for the plea of guilty and relieves the United States of any further obligation to adduce such evidence.

The defendant, Bernd Kowalewski, admits knowingly, willfully and intentionally committing or causing to be committed the acts constituting the crimes alleged in Counts One and Six in the instant case, and confesses to the Court that the defendant is, in fact, guilty of such crimes.

I, Bernd Kowalewski, admit the following facts:

- a. From December 2004 through March 2010, I was the President and Chief Executive Officer of BizJet International Sales and Support, Inc. (“BizJet”) which was based in Tulsa, Oklahoma and incorporated under the laws of Oklahoma. BizJet was a subsidiary of Lufthansa Technik AG (“LHT”).
- b. At all relevant times, BizJet was in the business of providing maintenance, repair and overhaul (“MRO”) services to customers in the United States and to foreign customers. BizJet provided services to a number of customers in Latin America, including in Mexico and Panama. These foreign customers included aircraft owned and operated by the government. For example, BizJet provided MRO services to the air fleet for the Mexican President (the “Mexican President’s Fleet”), the federal police in Mexico (the “Mexican Federal Police”), the air fleet for the Governor of the Mexican State of Sinaloa (“Sinaloa”), and the aviation authority in Panama (the “Panama Aviation Authority”).
- c. From December 2004 through March 2010, I joined an ongoing conspiracy with, among others, Peter DuBois, the Vice President of Sales and Marketing at BizJet, Neal Uhl, the Chief Financial Officer at BizJet, and Jald Jensen, a regional sales manager at BizJet, to make payments to third party agents knowing that at least a portion of that money was going to be passed on to employees of existing and potential customers in order to obtain and retain MRO business with those customers. Those customers included foreign government agencies and instrumentalities, including the Mexican President’s Fleet and the Mexican Federal Police.

- d. I discussed in person, via telephone, and via electronic mail (“e-mail”) with DuBois, Uhl, Jensen and others the competitive need to make bribe payments.
- e. I understood and reasonably foresaw that my co-conspirators would make payments to third party agents for the purpose of passing on money to employees of customers, including a wire transfer in the amount of \$210,000 from BizJet’s bank account in New York to Avionica’s bank account in California on October 15, 2009 for use to pass on at least in part as bribes to foreign officials employed by the Mexican Federal Police in return for those officials’ assistance in securing business for BizJet.
- f. In addition, we discussed the payments to employees of customers at meetings of the Board of Directors, including at a Board meeting on or about November 16, 2005. At that Board meeting, DuBois stated, in response to a question by an LHT executive who sat on the Board of BizJet about who the decision-maker was at a particular customer, that a director of maintenance or chief pilot was normally responsible for decisions on where an aircraft went for maintenance work. I responded to DuBois’s statement by explaining that these directors of maintenance and chief pilots in the past received “commissions” of \$3,000 to \$5,000 but were now demanding \$30,000 to \$40,000 in “commissions.”


 Bernd Kowalewski
 Defendant

7/24/2014
 Date

10. Further Prosecution

The United States shall not initiate additional criminal charges against the defendant in the Northern District of Oklahoma or elsewhere that, as of the date of the defendant’s acceptance of this agreement, arise from its investigation of the defendant’s actions and conduct giving rise to the instant Indictment, save and except crimes of


 Defendant's Initials

violence and criminal acts involving violations investigated by the United States Internal Revenue Service. The defendant understands, however, that this obligation is subject to all “Limitations” set forth below, and that the United States Attorney’s Office for the Northern District of Oklahoma is free to prosecute the defendant for any illegal conduct (*i.e.*, violation of federal criminal laws) not discovered by or revealed to the Government during its investigation or occurring after the date of this agreement.

11. Dismissal of Remaining Counts

If the Court finds the defendant’s pleas of guilty to be freely and voluntarily made and accepts the pleas, then the United States will move, at the appropriate time, to dismiss the remaining counts in the instant case, if any, as to this defendant.

If the defendant’s guilty pleas are rejected, withdrawn, vacated, or reversed at any time, the United States will be free to prosecute the defendant for all charges of which it then has knowledge, and any charges that have been dismissed will be automatically reinstated or may be re-presented to a grand jury with jurisdiction over the matter. In such event, the defendant hereby waives any objections, motions or defenses based upon the applicable statute of limitations, the Speedy Trial Act, or constitutional restrictions as to the time of bringing such charges.

12. Acceptance of Responsibility

Provided the defendant clearly demonstrates acceptance of responsibility, the United States agrees to recommend a two-level reduction in offense level pursuant to U.S.S.G. § 3E1.1. The United States agrees to file a motion recommending that the

defendant receive an additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b) if the defendant is otherwise eligible therefor. The sentencing judge is in a unique position to evaluate the acceptance of responsibility, and the Court's determination will provide the final approval or disapproval of any Section 3E1.1 point level reduction for timely acceptance of responsibility.

The obligations of the Government herein, relative to acceptance of responsibility are contingent upon the defendant's continuing manifestation of acceptance of responsibility as determined by the United States. If the defendant falsely denies, or makes conflicting statements as to, his involvement in the crimes to which he is pleading, falsely denies or frivolously contests relevant conduct that the Court determines to be true, willfully obstructs, or attempts to obstruct or impede the administration of justice as defined in U.S.S.G. § 3C1.1, or perpetrates or attempts to perpetrate crimes while awaiting sentencing, or advances false or frivolous issues in mitigation, the United States expressly reserves the right to withdraw any recommendation regarding acceptance of responsibility without breaching the agreement.

13. Waiver of Challenge to Plea Based on Immigration Consequences

The defendant understands that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offenses to which the defendant is pleading guilty. Removal and other immigration consequences are the subject of a separate proceeding, however, and the defendant understands that no one,

including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. The defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his pleas may entail, even if the consequence is automatic removal from the United States.

14. Sentence

a. Imprisonment

The defendant acknowledges that, with respect to Count One of the Indictment (18 U.S.C. § 371), the maximum statutory sentence is imprisonment for a term of not more than five years and a fine of not more than \$250,000, or twice the gross pecuniary gain to the defendant or loss to the victim(s), whichever is greater. The defendant acknowledges that, with respect to Count Six of the Indictment (15 U.S.C. § 78dd-2), the maximum statutory sentence is imprisonment for a term of not more than five years and a fine of not more than \$250,000, or twice the gross pecuniary gain to the defendant or loss to the victim(s), whichever is greater.

b. Supervised Release

Additionally, the defendant is aware, if imprisonment is imposed, that the Court shall include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment not to exceed 3 years.

If the term of supervised release for any count of conviction is revoked, the defendant may be imprisoned for an additional term not to exceed the term of imprisonment authorized in 18 U.S.C. § 3583(e)(3) for the offense of conviction, with no

credit being given for any time served while on supervised release. Further, the Court may impose another term of supervised release following any term of imprisonment imposed for a violation of supervised release conditions, and this term of supervised release may not exceed the term of supervised release originally authorized by statute for the offense of conviction less any term of imprisonment that was imposed upon revocation of supervised release (18 U.S.C. § 3583(e) and (h)). If a second or subsequent term of supervised release is revoked, the Court may impose another term of imprisonment not to exceed the difference between any imprisonment imposed for a prior revocation of supervised release for the offense of conviction and the term of imprisonment authorized pursuant to 18 U.S.C. § 3583(e)(3). Accordingly, the original term of imprisonment when combined with any term of imprisonment arising from revocations of supervised release, may result in a total amount of imprisonment greater than the statutory maximum term for the offense of conviction.

c. Guidelines

The defendant is aware that the Sentencing Guidelines promulgated pursuant to the Sentencing Reform Act of 1984 at 18 U.S.C. § 3551 through § 3742, and 28 U.S.C. § 991 through § 998, are advisory. The district courts, while not bound to apply the Sentencing Guidelines, must consult those Guidelines and take them into account when sentencing. See 18 U.S.C.A. § 3553(a).

The sentence imposed in federal court is without parole. The defendant is further aware that the sentence has not yet been determined by the Court, that any estimate of the

likely sentence received from any source is a prediction, not a promise, and that the Court has the final discretion to impose any sentence up to the statutory maximum. The defendant further understands that all recommendations or requests by the United States pursuant to this agreement are not binding upon the Court.

If the sentencing Court should impose any sentence up to the maximum established by statute, the defendant cannot, for that reason alone, withdraw defendant's guilty plea, but will remain bound to fulfill all of defendant's obligations under this agreement.

Nothing in this plea agreement, save and except any stipulations contained herein, limits the right of the United States to present to the Court or Probation Office, either orally or in writing, any and all facts and arguments relevant to the defendant's sentence that are available to the United States at the time of sentencing. The defendant acknowledges hereby that relevant conduct, that is, conduct charged in any dismissed count and all other uncharged related criminal activities, will be used in the calculation of the sentence. The United States reserves its full opportunity to speak pursuant to Rule 32(i)(4)(A)(iii) of the Federal Rules of Criminal Procedure.

The defendant further understands that the sentence to be imposed upon the defendant will be determined solely by the sentencing judge, and that the sentencing judge is not bound by the following stipulations. The United States cannot and does not make any promise or representation as to what sentence the defendant will receive.

15. Stipulations

The defendant and the United States agree and stipulate that the applicable Sentencing Guidelines range exceeds the statutory maximum sentence of ten years imprisonment. Therefore, pursuant to U.S.S.G. Section 5G1.2, the applicable guideline sentence is ten years imprisonment.

It is understood that neither the Court nor the United States Probation Office is bound by the foregoing stipulations, either as to questions of fact or as to determination of the correct advisory sentencing guideline calculation.

Having been fully apprised by defense counsel of defendant's right to seek compensation pursuant to Public Law 105-119, the defendant **WAIVES** any and all such right, and stipulates that defendant is not a "prevailing party" in connection with this case.

16. Limitations

This plea agreement shall be binding and enforceable upon the Office of the United States Attorney for the Northern District of Oklahoma and the Department of Justice, Criminal Division, Fraud Section, but in no way limits, binds or otherwise affects the rights, powers, duties or obligations of any state or local law enforcement agency, administrative or regulatory authorities, civil or administrative enforcement, collection, bankruptcy, adversary proceedings or suits which have been or may be filed by any governmental entity, including without limitation, the Internal Revenue Service, the Tax Division of the Department of Justice and the trustee in bankruptcy.

17. Breach of Agreement

In the event either party believes the other has failed to fulfill any obligations under this agreement, then the complaining party shall, in its discretion, have the option of petitioning the Court to be relieved of its obligations herein. Whether or not a party has completely fulfilled all of its obligations under this agreement shall be determined by the Court in an appropriate proceeding at which any disclosures and documents provided by either party shall be admissible and at which the complaining party shall be required to establish any breach by a preponderance of the evidence. The defendant hereby WAIVES any right under Rule 11(d) and (e) of the Federal Rules of Criminal Procedure to withdraw from defendant's plea and this agreement, save and except under circumstances where the Court rejects the plea agreement under Rule 11(c)(5) and except for the limited reasons outlined above in this paragraph.

In the event that Bernd Kowalewski, after entry of a plea of guilty, unsuccessfully attempts to withdraw the defendant's pleas of guilty, the United States may continue to enforce the agreement but will no longer be bound by any particular provision in this agreement. This provision will not have any continued vitality if it is determined by the Court that the United States acted in bad faith to bring about the attempted withdrawal of plea.

18. Conclusion

No agreements, representations or understandings have been made between the parties in this case, other than those which are explicitly set forth in this plea agreement

and the Plea Agreement Supplement that the United States will file in this case (as is routinely done in every case, even though there may or may not be any additional terms) and none will be entered into unless executed in writing and signed by all of the parties.

SO AGREED:

JEFFREY H. KNOX
CHIEF, DEPARTMENT OF JUSTICE
CRIMINAL DIVISION, FRAUD SECTION




Daniel S. Kahn
Assistant Chief

7/24/14

Dated


DANNY C. WILLIAMS, SR.
UNITED STATES ATTORNEY



Kevin C. Leitch
Assistant United States Attorney

7.24.14


Dated



Bart Stapert
Attorney for Defendant

7/24/2014


Dated



Bernd Kowalewski
Defendant


7/24/2014

Dated



Defendant's Initials

I have read this agreement and carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to it. Further, I have consulted with my attorney and fully understand my rights with respect to sentencing which may apply to my case. No other promises or inducements have been made to me, other than those contained in this pleading. In addition, no one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.




Bernd Kowalewski
Defendant

7/24/2014

Dated


I am counsel for the defendant in this case. I have fully explained to the defendant the defendant's rights with respect to the pending Indictment. Further, I have reviewed the provisions of the Sentencing Guidelines and Policy Statements and I have fully explained to the defendant the provisions of those Guidelines which may apply in this case. I have carefully reviewed every part of this plea agreement with the defendant. To my knowledge, the defendant's decision to enter into this agreement is an informed and voluntary one.



Bart Stapert
Counsel for the Defendant

7/24/2014

Dated



Defendant's Initials