

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

MAY 14 2010

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANDREW J. BARKA,

Defendant.

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MATTHEW J. DYKMAN
CLERK

Cr. No. 10-252 JC

PLEA AGREEMENT

Pursuant to Rule 11, Fed. R. Crim. P., the parties notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the Defendant, **ANDREW J. BARKA**, and the Defendant's counsel, Edward O. Bustamante:

REPRESENTATION BY COUNSEL

1. The Defendant understands the Defendant's right to be represented by an attorney and is so represented. The Defendant has thoroughly reviewed all aspects of this case with the Defendant's attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The Defendant further understands the Defendant's rights:
- a. to plead not guilty, or having already so pleaded, to persist in that plea;
 - b. to have a trial by jury; and
 - c. at a trial:
 - 1) to confront and cross-examine adverse witnesses,
 - 2) to be protected from compelled self-incrimination,

- 3) to testify and present evidence on the Defendant's own behalf, and
- 4) to compel the attendance of witnesses for the defense.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The Defendant agrees to waive these rights and to plead guilty to Count 1 of the indictment, charging a violation of 18 U.S.C. § 1028(a)(3), that being Fraud and Related Activity in Connection with Authentication Features, and Counts 3-5 of the indictment, charging a violation of 18 U.S.C. § 1709, that being Theft of Mail Matter by Officer or Employee..

SENTENCING

4. The Defendant understands that the maximum penalty the Court can impose is:
- a. as to Count 1, imprisonment up to one year, as to each of Counts 3-5, imprisonment for a period of not more than five years;
 - b. as to Count 1, a fine not to exceed \$100,000.00, as to each of Counts 3-5, a fine not to exceed the greater of \$250,000.00 or twice the pecuniary gain to the defendant or pecuniary loss to the victim;
 - c. as to Count 1, a mandatory term of supervised release of not more than one years, as to Counts 3-5, a mandatory term of supervised release of not more than five years that must follow any term of imprisonment. (If the Defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the Defendant's supervised release could be revoked -- even on the last day of the term -- and the Defendant could then be returned to another period of incarceration and a new term of supervised release.);

d. as to Count 1, a mandatory special penalty assessment of \$25.00, as to each of Counts 3-5, a mandatory special penalty assessment of \$100.00; and

e. restitution as may be ordered by the Court.

5. The parties recognize that the federal sentencing guidelines are advisory, and that the Court is required to consider them in determining the sentence it imposes.

6. The Defendant agrees and acknowledges that, as part of the Defendant's sentence, the Court is not limited to ordering restitution only for the amount involved in the particular offense or offenses to which the Defendant is entering a plea of guilty, but may and should order restitution resulting from all of the Defendant's criminal conduct related to this case.

7. The United States reserves the right to make known to the United States Pretrial Services and Probation Office and to the Court, for inclusion in the presentence report to be prepared under Federal Rule of Criminal Procedure 32 any information the United States believes may be helpful to the Court, including but not limited to information about any relevant conduct under U.S.S.G. § 1B1.3.

DEFENDANT'S ADMISSION OF FACTS

8. By my signature on this plea agreement, I am acknowledging that I am pleading guilty because I am, in fact, guilty of the offense(s) to which I am pleading guilty. I recognize and accept responsibility for my criminal conduct. Moreover, in pleading guilty, I acknowledge that if I chose to go to trial instead of entering this plea, the United States could prove facts sufficient to establish my guilt of the offense(s) to which I am pleading guilty beyond a

reasonable doubt. I specifically admit the following facts related to the charges against me, and declare under penalty of perjury that all of these facts are true and correct:

On June 10, 2006, the **Defendant** began duty with USPS as a carrier. Then on April 21, 2007, he became the carrier supervisor at the Academy Station. In this capacity he had access to mail from all Academy routes and Post Office boxes. Supervisors monitor all postal operations at their respective stations. The supervisor's responsibilities include supervision of mail distribution, assignation of employees to cover routes, completion of daily reports, answering customer concerns, dispatching mail, closing out clerks, ensuring that box mail is up on time and securing the building.

In May, and again in July, 2007, the Rio Rancho Police Department (RRPD) received anonymous letters detailing criminal activity involving stolen vehicles at an address in Rio Rancho, New Mexico. The address was the address of the **Defendant** who then resided at 1413 Ducale Drive SE. RRPD detectives observed a BMW motor vehicle parked in the driveway of this residence. This BMW had been reported as stolen.

On August 22, 2007, RRPD detectives arrested the **Defendant** while he was driving the stolen BMW. Then, pursuant to a search warrant, RRPD detectives searched the **Defendant's** residence and the aforementioned BMW. Law enforcement observed U.S. mail in the BMW and in turn contacted postal inspectors who responded to the scene. Postal inspectors observed and recovered from the **Defendant's** residence and vehicle hundreds of pieces of both unopened and rifled first class U.S. mail which included credit-debit cards, credit-debit PIN number notifications, State vehicle registrations, 73 Netflix DVDs, 11 Blockbuster DVDs, and

114 gift cards. Postal inspectors seized these items, made copies, and then had the items delivered to the rightful recipients.

Specifically, a MasterCard #xxxxxxxxxxx 0903 with the PIN number written on it belonging to **S.Y.** was recovered from the trunk of the **Defendant's** stolen BMW. **S.Y.** had not received this mailing and had not given permission for the mailing's interception.

A Visa card #xxxxxxxxxxx 2931 in the amount of \$26.35 belonging to **V.D.** was also found in the trunk of the **Defendant's** stolen vehicle and **V.D.** had not given permission for the mailing's interception.

A Visa card #xxxxxxxxxxx 3342 with the PIN number written on it belonging to **F.T.R.** and a corresponding ATM receipt for \$102.50, dated August 21, 2007, was recovered from the **Defendant's** wallet. The rifled mail piece and PIN notification was secured from the trunk of the **Defendant's** stolen BMW - the mail piece bore **F.T.R.'s** address and **F.T.R.** had not given permission for this mail's interception.

A Visa card #4xxxxxxxxxxx 4000 with the PIN number written on it belonging to **B.S.F.** and an associated ATM balance inquiry, dated August 21, 2007, was found in the **Defendant's** wallet. The corresponding rifled mail piece, with **B.S.F.'s** address on it, was recovered from the trunk of the BMW stolen by the **Defendant.** **B.S.F.** had not given permission for either the mail's interception or two ATM withdrawals on August 22, 2007, for \$102.50 and \$202.50.

A Visa card #xxxxxxxxxxx 5757 with the PIN number written on it belonging to **E.J.J.** was found in the trunk of the BMW stolen by the **Defendant.** **E.J.J.** had not given permission for the interception of the mailing of this Visa card and five withdrawals were made

from it on August 18 and August 19, 2007, in the amounts of \$202.50, \$202.50, \$102.50, \$202.50, and \$142.50 for a total amount of \$852.50.

A Visa card #xxxxxxxxxxxx 2740 with the PIN number written on it belonging to **D.J.R.** was recovered from the trunk of the BMW stolen by the **Defendant**. **D.J.R.** had not given permission for the interception of the mailing of this Visa card. An ATM withdrawal was made on this card on August 18, 2007, in the amount of \$182.50.

A Visa card #xxxxxxxxxxxx 5501 with the PIN number written on it belonging to **P.A.S.** was recovered from the trunk of the BMW stolen by the **Defendant**. **P.A.S.** had not given permission for the interception of the mailing of this Visa card. ATM withdrawals were made on this card on August 17 and August 20, 2007, in the amounts of \$22.20, \$42.50, \$42.40, \$42.50, \$42.50, \$22.50, and \$182.50 for a total amount of \$397.50.

During the course of the August 22nd search, a number of gift cards were recovered from the **Defendant's** residence including one for the Jinja Bistro to **D.L. from J.G.** in the amount of \$50.00 and one for Victoria's Secret to **B.T. from A.S.** in the amount of \$35.00.

Additionally, a New Mexico motor vehicle registration for license #xxx5AR registered to **S.K.** was discovered rifled in the **Defendant's** utility room. The corresponding forwarding notice on a first class envelope was dated July 9, 2007. **S.K.** had not given permission for the interception of this correspondence.

The **Defendant** began employment with the United States Postal Service (USPS) on June 10, 2006, as a carrier. On April 21, 2007, he was detailed as a carrier supervisor at the Academy Station in Albuquerque. As a result, the **Defendant** had access to mail from all Academy routes and Post Office boxes. The Academy Station box clerk, **Y. V.**, indicated that

she had observed the **Defendant** spending an inordinate amount of time around the post office boxes.

The **Defendant** was terminated from employment with the United States Postal Service on October 22, 2007.

9. By signing this agreement, the Defendant admits that there is a factual basis for each element of the crime(s) to which the Defendant will plead guilty. The Defendant agrees that the Court may rely on any of these facts, as well as facts in the presentence report, to determine the Defendant's sentence, including, but not limited to, the advisory guideline offense level.

STIPULATIONS

10. The United States and the Defendant stipulate as follows:

- a. As of the date of this agreement, the Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the Defendant's criminal conduct. Consequently, pursuant to U.S.S.G. § 3E1.1, so long as the Defendant continues to accept responsibility for the Defendant's criminal conduct, the Defendant is entitled to a reduction of two levels from the base offense level as calculated under the sentencing guidelines. This reduction is contingent upon the Defendant personally providing to the United States Probation Officer who prepares the presentence report in this case an appropriate oral or written statement in which the Defendant clearly establishes the Defendant's entitlement to this reduction. Further, the United States is free to withdraw this stipulation if the Defendant engages in any conduct that is inconsistent with acceptance

of responsibility between the date of this agreement and the sentencing hearing. Such conduct would include committing additional crimes, failing to appear in Court as required, and/or failing to obey any conditions of release that the Court may set.

- b. The Defendant agrees to pay full restitution to all the victims of the Defendant's crimes related to this case.
- c. The Defendant recognizes that this plea agreement has already conferred a benefit on the Defendant. Consequently, in return for the benefit conferred on the Defendant by entering into this agreement, the Defendant agrees not to seek a downward departure or variance from the applicable sentencing guideline range as determined by the Court after the Court resolves any objections by either party to the presentence report. In other words, the Defendant agrees that a sentence within the applicable guideline range is a reasonable sentence. If the Defendant, in violation of this paragraph, should nevertheless seek a downward departure or variance, including a departure or variance from the guideline Criminal History Category, the United States shall have the right to treat this plea agreement as null and void and to proceed to trial on all charges before the Court.
- d. Except under circumstances where the Court, acting on its own, fails to accept this plea agreement, the Defendant agrees that, upon the Defendant's signing of this plea agreement, the facts that the Defendant has admitted under this plea agreement as set forth above, as well as any

facts to which the Defendant admits in open court at the Defendant's plea hearing, shall be admissible against the Defendant under Federal Rule of Evidence 801(d)(2)(A) in any subsequent proceeding, including a criminal trial, and the Defendant expressly waives the Defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 with regard to the facts the Defendant admits in conjunction with this plea agreement.

- e. Apart from the stipulations set forth in this plea agreement, the United States and the Defendant reserve their rights to assert any position or argument with respect to the sentence to be imposed, including but not limited to the applicability of particular sentencing guidelines and adjustments under the guidelines.
- f. The Defendant understands that the above stipulations are not binding on the Court and that whether the Court accepts these stipulations is a matter solely within the discretion of the Court after it has reviewed the presentence report. Further, the Defendant understands that the Court may choose to vary from the advisory guideline sentence. The Defendant understands that if the Court does not accept any one or more of the above stipulations and reaches an advisory guideline sentence different than expected by the Defendant, or if the Court varies from the advisory guideline range, the Defendant will not seek to withdraw the Defendant's plea of guilty. In other words, regardless of any stipulations the parties

may enter into, the Defendant's final sentence is solely within the discretion of the Court.

- g. The Defendant agrees that he will not seek employment with the United States in any capacity and that he will not seek employment with any entity in a capacity that would give him access to clients' personal or financial information.

DEFENDANT'S ADDITIONAL OBLIGATIONS

11. The Defendant understands the Defendant's obligation to provide the United States Pretrial Services and Probation Office with truthful, accurate, and complete information. The Defendant represents that the Defendant has complied with and will continue to comply with this obligation.

12. If requested to do so by the United States Attorney's Office, the Defendant will submit a personal financial statement under oath and/or submit to interviews by the United States Attorney's Office regarding the Defendant's capacity to satisfy any fines and/or restitution.

WAIVER OF APPEAL RIGHTS

13. The Defendant is aware that 28 U.S.C. § 1291 and 18 U.S.C. § 3742 afford a Defendant the right to appeal a conviction(s) and the sentence imposed. Acknowledging that, the Defendant knowingly waives the right to appeal his conviction(s) and any sentence, including any order of restitution, within the applicable advisory guideline range as determined by the Court. The Defendant specifically agrees not to appeal the Court's resolution of any contested sentencing factor in determining the advisory sentencing guideline range. In other words, the Defendant waives the right to appeal both the Defendant's conviction(s) and the right to appeal

any sentence imposed in this case except to the extent, if any, that the Court may depart or vary upward from the advisory sentencing guideline range as determined by the Court. In addition, the Defendant agrees to waive any collateral attack to the Defendant's conviction(s) pursuant to 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel.

GOVERNMENT'S AGREEMENT

14. Provided that the Defendant fulfills the Defendant's obligations as set out above, the United States agrees that:

- a. Following sentencing, the United States will move to dismiss Count 2 of the above-captioned Indictment..
- b. The United States will not bring additional criminal charges against the Defendant arising out of the facts forming the basis of the present indictment.
- c. The United States does not oppose a sentence at the low end of the United States Sentencing Guidelines.

15. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

VOLUNTARY PLEA

16. The Defendant agrees and represents that this plea of guilty is freely and voluntarily made and is not the result of force, threats, or promises (other than the promises set forth in this agreement). There have been no promises from anyone as to what sentence the

Court will impose. The Defendant also represents that the Defendant is pleading guilty because the Defendant is in fact guilty.

VIOLATION OF PLEA AGREEMENT

17. The Defendant agrees that if the Defendant violates any provision of this agreement, the United States may declare this agreement null and void, and the Defendant will thereafter be subject to prosecution for any criminal violation, including but not limited to any crime(s) or offense(s) contained in or related to the charges in this case, as well as perjury, false statement, obstruction of justice, and any other crime committed by the Defendant during this prosecution.

SPECIAL ASSESSMENT

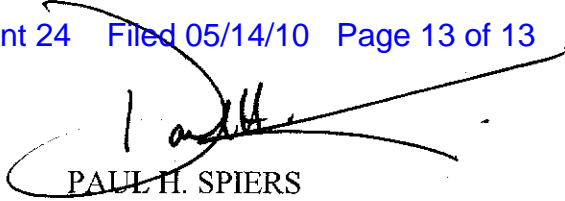
18. At the time of sentencing, the Defendant will tender to the United States District Court, District of New Mexico, 333 Lomas Blvd. NW, Suite 270, Albuquerque, New Mexico 87102, a money order or certified check payable to the order of the **United States District Court** in the amount of \$325.00 in payment of the special penalty assessment described above.

ENTIRETY OF AGREEMENT

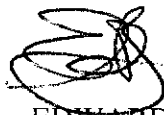
19. This document is a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties.

AGREED TO AND SIGNED this 14th day of May, 2010.

GREGORY J. FOURATT
United States Attorney




PAUL H. SPIERS
Assistant United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87102
(505) 346-7274



EDWARD O. BUSTAMANTE
Attorney for the Defendant

I have read this agreement and carefully reviewed every part of it with my attorney. I understand the agreement and voluntarily sign it.



ANDREW J. BARKA
Defendant