

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : S2 02 Cr. 649 (TPG)
v. : Filed: 11/26/02
HALUK K. ERGULEC and : Violations: 15 U.S.C. § 1
THE COLOR WHEEL, INC., : 18 U.S.C. § 371
: Defendants.
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PLEA AGREEMENT

The United States of America and the defendants, Haluk K. Ergulec and The Color Wheel, Inc., hereby enter into the following Plea Agreement pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure.

1. Haluk K. Ergulec (“Ergulec”) will plead guilty to Counts Two, Three, Four, and Five of the attached Superseding Information, United States v. Haluk K. Ergulec and The Color Wheel, Inc., S2 02 Cr. 649 (TPG), in which he is charged with three counts of violating 18 U.S.C. § 371 in connection with separate conspiracies to commit mail fraud, and one count of violating 18 U.S.C. § 371 in connection with a conspiracy to defraud the Internal Revenue Service. The United States agrees to move to dismiss Ergulec from the pending Superseding Indictment, United States v. Mitchell Mosallem et al., S1 02 Cr. 649 (TPG), immediately following the imposition of the sentence.

2. The Color Wheel, Inc. (“Color Wheel”) will plead guilty to Counts One, Two, Three, and Four of the attached Superseding Information, United States v. Haluk K. Ergulec and The Color Wheel, Inc., S2 02 Cr. 649 (TPG), in which it is charged with one count of violating

15 U.S.C. § 1 in connection with a conspiracy to rig bids and allocate contracts, and three counts of violating 18 U.S.C. § 371 in connection with separate conspiracies to commit mail fraud. The United States agrees to move to dismiss Color Wheel from the pending Superseding Indictment, United States v. Mitchell Mosallem et al., S1 02 Cr. 649 (TPG), immediately following the imposition of the sentence.

3. If Ergulec and Color Wheel fully comply with the understandings specified in this Agreement, Ergulec will not be further prosecuted criminally by the Antitrust Division of the Department of Justice, and with respect to tax offenses, Ergulec will not be further prosecuted criminally by the Tax Division of the Department of Justice, for crimes committed prior to the date of this Agreement arising from: (a) the overbilling of clients of Color Wheel from 1990 to 2000; (b) the payment of kickbacks to employees of customers of Color Wheel, and the failure of those employees to report the kickbacks as income on their federal tax returns, from 1990 to 2001; and (c) Ergulec's failure to report as income on his federal income tax returns all of the income he received from Color Wheel. This Agreement does not provide any protection against prosecution for any crimes except as set forth above. This Paragraph does not apply to civil matters of any kind, any violations of federal securities laws, or crimes of violence.

4. If Ergulec and Color Wheel fully comply with the understandings specified in this Agreement, Color Wheel will not be further prosecuted criminally by the Antitrust Division of the Department of Justice for crimes committed prior to the date of this Agreement arising from: (a) the overbilling of clients of Color Wheel from 1990 to 2000; and (b) the payment of kickbacks to employees of customers of Color Wheel, from 1990 to 2001. This Agreement does not provide any protection against prosecution for any crimes except as set forth above. This

Paragraph does not apply to civil matters of any kind, any violations of federal securities laws, or crimes of violence.

5. It is understood that this Agreement does not bind any federal, state, or local prosecuting authority other than the Antitrust Division and, to the extent set forth above, the Tax Division of the Department of Justice.

6. The United States and Ergulec and Color Wheel agree and stipulate that pursuant to USSG § 1B1.11(b)(1), the Nov. 2000 version United States Sentencing Commission Guidelines Manual (Nov. 2000) (“USSG”), the version in effect at the time of the offenses, should be applied because application of a later version (now the Nov. 2001 edition) would lead to a higher adjusted offense level.

7. Color Wheel understands that, pursuant to 15 U.S.C. § 1 and 18 U.S.C. § 3571, the maximum sentence provided by law to which it is subject for its violation of 15 U.S.C. § 1, a class E felony, is a fine of not more than the greatest of \$10 million, twice the gross pecuniary gain from the offense, or twice the victim’s gross pecuniary loss from the offense. Color Wheel also understands that, pursuant to 18 U.S.C. §§ 3551 and 3561 and USSG § 8D1.2, the Court may sentence it to a term of probation of between one and five years. Color Wheel also understands that, pursuant to 18 U.S.C. § 3563(b)(2) and USSG § 8B1.1, the Court may impose an order of restitution. In addition, Color Wheel understands that, pursuant to 18 U.S.C. § 3013(a)(2)(B) and USSG § 8E1.1, the Court must impose a special assessment of \$400.

8. Color Wheel understands that, pursuant to 18 U.S.C. § 371 and 18 U.S.C. § 3571, the maximum sentence provided by law to which it is subject for each of its violations of 18 U.S.C. § 371, a class D felony, is a fine of not more than the greatest of \$500,000, twice the

gross pecuniary gain from the offense, or twice the victim's gross pecuniary loss from the offense. Color Wheel also understands that, pursuant to 18 U.S.C. §§ 3551 and 3561 and USSG § 8D1.2, the Court may sentence it to a term of probation of between one and five years for each count. Color Wheel also understands that, pursuant to 18 U.S.C. § 3663A and USSG § 8B1.1, the Court shall impose an order of restitution. In addition, Color Wheel understands that, pursuant to 18 U.S.C. § 3013(a)(2)(B) and USSG § 8E1.1, the Court must impose a special assessment of \$400 for each count.

9. Ergulec understands that, pursuant to 18 U.S.C. § 371 and 18 U.S.C. § 3571, the maximum sentence provided by law to which he is subject for each of his violations of 18 U.S.C. § 371, a class D felony, is (a) a term of imprisonment of not more than five years; (b) a fine of not more than the greatest of \$250,000, twice the gross pecuniary gain from the offense, or twice the victim's gross pecuniary loss from the offense; or (c) both such sentences; and for Count Five (d) the costs of prosecution. Ergulec also understands that, pursuant to 18 U.S.C. § 3663A and USSG § 5E1.1, the Court shall impose an order of restitution. Ergulec also understands that, pursuant to 18 U.S.C. § 3583(b)(2) and USSG § 5D1.2(a)(2), the Court may also impose a term of supervised release of no more than three years for each count. In addition, Ergulec understands that, pursuant to 18 U.S.C. § 3013(a)(2)(A) and USSG § 5E1.3, the Court must impose a special assessment of \$100 for each count.

10. The United States and Ergulec agree and stipulate that the combined adjusted offense level applicable to the offenses with which he is charged in the attached Superseding Information is level 21 (37-46 months), which is derived from the following calculations:

(a) In accord with United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000), and United States v. Petrillo, 237 F.3d 119 (2d Cir. 2000), USSG §§ 3D1.2(d) and 3D1.3(b) require that the offenses charged in Counts Two, Three, Four, and Five (fraud and tax offenses) be grouped and the losses aggregated, and that the offense level for the combined fraud and tax group is the higher of the offense level determined from the instructions in Chapter 2, Part F (Offenses Involving Fraud Or Deceit) or Part T (Offenses Involving Taxation), including all appropriate adjustments;

(b) The combined loss from the fraud and tax offenses is between \$1.5 million and \$2.5 million;

(c) The offense level for the fraud and tax group calculated according to the instructions in Part F is level 24 (base offense level of 6, pursuant to USSG §§ 2F1.1(a), plus 12 levels, pursuant to USSG § 2F1.1(b)(1)(M) (Fraud Table) (loss of more than \$1.5 million but less than \$2.5 million), plus 2 levels, pursuant to USSG § 2F1.1(b)(2)(A) and (B) because the offenses charged in those counts involved more than minimal planning and defrauded more than one victim, plus 4 levels, pursuant to USSG § 3B1.1(a) (aggravating role); and

(d) The offense level for the fraud and tax group calculated according to the instructions in Part T is level 24 (offense level of 20, pursuant to USSG §§ 2T1.1(a)(1) and 2T4.1(O) (Tax Table) (loss of more than \$1.5 million but less than \$2.5 million), plus 4 levels, pursuant to USSG § 3B1.1(a) (aggravating role)); and

(e) Ergulec has demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, thereby reducing the adjusted offense level by 3 levels to level 21, pursuant to USSG § 3E1.1(a) and (b).

11. The United States and Color Wheel agree and stipulate that the combined adjusted offense level applicable to the offenses with which it is charged in the attached Superseding Information is level 21, which is derived from the following calculations:

(a) The offense level for the antitrust conspiracy charged in Count One of the Superseding Information is 15, calculated as follows: Pursuant to USSG § 2R1.1(a), the base level for the antitrust conspiracy is level 10; pursuant to USSG § 2R1.1(b)(1), the base level is increased by 1 level to level 11, because the conduct involved participation in an agreement to submit non-competitive bids; and pursuant to USSG § 2R1.1(b)(2)(D), the offense level is further increased by 4 levels to level 15, because the volume of commerce attributable to Color Wheel is more than \$6.5 million but less than \$15 million;

(b) Pursuant to USSG §§ 3D1.2(d) and 3D1.3(b), the offenses charged in Counts Two, Three, and Four should be grouped and the losses aggregated. The fraudulent conduct charged in those counts resulted in an aggregated loss of between \$1.5 million and \$2.5 million;

(c) The offense level for the fraud conspiracies charged in Counts Two, Three, and Four is 20, calculated as follows: pursuant to USSG § 2F1.1(a), the base offense level for the fraud group is level 6; pursuant to USSG § 2F1.1(b)(M) (loss of more than \$1.5 million but less than \$2.5 million), the offense level is increased by 12 levels; pursuant to USSG § 2F1.1(b)(2)(A) and (B), and the offense level is further increased by 2 levels because the offenses charged in those counts involved more than minimal planning and defrauded more than one victim;

(d) The antitrust offense does not involve substantially the same harm as the fraud offenses, nor is it of the same general type as the fraud offenses. Therefore, pursuant to USSG §

3D1.2, the antitrust offense is not grouped with the fraud offenses charged in Counts Two, Three, and Four; and

(e) The antitrust offense, with an offense level of 15, is between five and eight levels less serious than the fraud group, and thus, pursuant to USSG § 3D1.4(b), counts as $\frac{1}{2}$ Unit. Because there are $1\frac{1}{2}$ Units, one offense level is added to the fraud group offense level, yielding a combined offense level of 21.

12. The United States and Ergulec agree that neither a downward nor an upward departure from a sentence consistent with offense level 21 is warranted, other than an ability to pay departure pursuant to 18 U.S.C. § 3572(b) and USSG §§ 5E1.1(c) and 5E1.2(d)(4) and (e). Accordingly, neither party will seek such a departure nor seek any adjustment not set forth herein. Neither party will suggest that the Probation Office consider such a departure or adjustment, nor suggest that the Court sua sponte consider such a departure or adjustment.

13. The United States and Color Wheel agree that neither a downward nor an upward departure from a sentence consistent with the stipulated fine range contained in Paragraph 17 of this Plea Agreement is warranted, other than an ability to pay departure pursuant to 18 U.S.C. § 3572(b) and USSG §§ 8C2.2 and 8C3.3. Accordingly, neither party will seek such a departure nor seek any adjustment not set forth herein. Neither party will suggest that the Probation Office consider such a departure or adjustment, nor suggest that the Court sua sponte consider such a departure or adjustment.

14. The United States and Ergulec agree that Ergulec will not appeal, or otherwise litigate under 28 U.S.C. § 2255, any sentence within or below the stipulated Guidelines range set forth in this Agreement, and that the government will not appeal any sentence within or above

the stipulated Guidelines range. This provision is binding on the parties even if the Court employs a Sentencing Guidelines analysis different from that set forth in this Agreement. Furthermore, it is agreed that any appeal regarding the sentence of Ergulec that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation.

15. The United States and Color Wheel agree that Color Wheel will not appeal, or otherwise litigate under 28 U.S.C. § 2255, any sentence within or below the stipulated Guidelines range set forth in this Agreement, and that the government will not appeal any sentence within or above the stipulated Guidelines range. This provision is binding on the parties even if the Court employs a Sentencing Guidelines analysis different from that set forth in this Agreement. Furthermore, it is agreed that any appeal regarding the sentence of Color Wheel that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation.

16. The United States and Ergulec agree and stipulate that the fine range for Ergulec for the offenses charged in the attached Superseding Information is from \$7,000 to \$75,000, pursuant to USSG § 5E1.2(c)(3).

17. The United States and Color Wheel agree and stipulate that the fine range for Color Wheel for the offenses charged in the attached Superseding Information is from \$4.62 million to \$9.24 million, calculated as follows:

(a) Pursuant to USSG § 8C2.4(a)(3) and § 2R1.1(d)(1), the base fine is \$3.3 million;

(b) Pursuant to USSG § 8C2.5, Color Wheel has an organizational culpability score of 7, calculated as follows: The base level is 5 pursuant to USSG § 8C2.5(a), with a three-point increase pursuant to USSG § 8C2.5(b)(3) because the organization had 200 or more (but fewer than 1,000) employees and an individual within substantial authority personnel participated in the offenses, and a one-point deduction pursuant to § 8C2.5(g) because the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct;

(c) Pursuant to USSG § 8C2.6, a culpability score of 7 leads to a minimum multiplier of 1.40 and a maximum multiplier of 2.80; and

(d) Pursuant to USSG § 8C2.7(a) and (b), the fine range is \$4.62 million to \$9.24 million.

18. Ergulec agrees that on the date of sentencing he will have \$1.5 million in liquid assets in an escrow account controlled by his attorney. Ergulec further agrees that within three days of the execution of this agreement he will transfer title to his home at 4310 NE 24th Avenue, Lighthouse Point, Florida, 33064, and title to his 1985 Bertram Sports Fisherman boat, into the escrow account, with instructions that those properties be sold before the date of sentencing. Ergulec acknowledges that he may also have to transfer additional assets into the escrow account if, on the date of sentencing, the account does not have a balance of \$1.5 million. The United States and Ergulec agree to recommend to the Court that the funds in the escrow account be used only to satisfy any fines or restitution that Ergulec or Color Wheel are sentenced to pay. Ergulec acknowledges, however, that the Court may sentence them to pay fines and restitution totaling more than the amount in the escrow account. The United States and Ergulec also agree that if

the funds in the escrow account exceed the amount of fines Ergulec and Color Wheel are sentenced to pay, they will seek the Court's permission to return the remainder to Ergulec.

19. In accordance with USSG §§ 5E1.1(a)(2), the United States and Ergulec agree to recommend to the Court that Ergulec pay \$1.5 million in restitution to victims of his offenses, to be allocated as follows: \$1.1 million to Grey Global Group, Inc.; \$200,000 to Impact Communications, Inc.; \$100,000 to Brouillard Communications; and \$100,000 to Viacom, Inc. The United States and Ergulec also agree to recommend to the Court that Ergulec pay no fine, pursuant to 18 U.S.C. § 3572(b) and USSG §§ 5E1.1(c) and 5E1.2(d)(4) and (e), because the payment of a fine would impact on Ergulec's ability to pay restitution to the victims of his offenses, as jointly recommended by the parties.

20. The United States and Color Wheel agree to recommend to the Court that Color Wheel pay no fine or restitution, based on an analysis of the company's ability to pay, pursuant to 18 U.S.C. § 3572(b) and USSG §§ 8C2.2 and 8C3.3.

21. Ergulec agrees that prior to the date of sentencing, he shall file accurate amended tax returns for the tax years 1999, 2000, and 2001, and will pay, or will enter into an agreement to pay, past taxes due and owing by him to the Internal Revenue Service, on such terms and conditions as will be agreed on by the Internal Revenue Service and him. Ergulec will cooperate fully, completely, and truthfully with the IRS in determining the accuracy and completeness of all such amended returns.

22. Ergulec and Color Wheel understand that the sentences to be imposed on each of them will be determined solely by the sentencing judge. The United States cannot and does not make any promises or representations as to what sentences Ergulec or Color Wheel will receive.

Ergulec and Color Wheel understand that, as provided in Rule 11(e)(2) of the Federal Rules of Criminal Procedure, if the Court does not impose sentences consistent with the stipulations contained in this Agreement, they nevertheless have no right to withdraw their pleas of guilty. The United States reserves the right to make any statements to the Court or the Probation Office concerning the nature of the criminal violations charged in the Superseding Information, Ergulec's and Color Wheel's participation therein, and any other facts or circumstances that it deems relevant, to make a recommendation of a sentence, including a recommendation of any specific sentence consistent with the stipulations set out in this Agreement and with any applicable provision of the Guidelines, to comment on or correct any representation made by or on behalf of the defendants, and to supply any other information that the Court may require.

23. Ergulec and Color Wheel understand that this Agreement does not in any way affect or limit the right of the United States to respond to and take positions on post-sentencing motions or requests for information that relate to reduction or modification of sentence.

24. Ergulec and Color Wheel understand and agree that should either of them fail in any way to fulfill any of the obligations set out in this Agreement, the United States will be released from its obligations and each of them will be subject to prosecution for any federal criminal violation of which the United States has knowledge. In addition, Ergulec and Color Wheel agree that, should the United States be released from its obligations under this Agreement, and should the United States prosecute either of them, neither will assert a defense that any such prosecution is time-barred based on a statute of limitations that expired after the signing of this Agreement.

25. This Agreement constitutes the entire agreement between and among the United States and Ergulec and Color Wheel concerning the disposition of the charges contained in the Superseding Information. The United States has made no other promises to, or agreements with, Ergulec or Color Wheel. This Agreement cannot be modified other than in a writing signed by the parties.

Dated: 11/26/02

/s/ _____
HALUK K. ERGULEC

/s/ _____
THE COLOR WHEEL, INC.
By Haluk K. Ergulec, Owner

/s/ _____
KENNETH KAPLAN, ESQ.
Counsel for Haluk K. Ergulec and
The Color Wheel, Inc.

/s/ _____
REBECCA MEIKLEJOHN

/s/ _____
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