

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 14-CR-20573 (UNGARO)

UNITED STATES OF AMERICA

vs.

HECTOR HERNANDEZ,

Defendant.

PLEA AGREEMENT

The United States of America, by and through the Fraud Section of the Criminal Division of the Department of Justice and the United States Attorney's Office for the Southern District of Florida (hereinafter referred to as the "United States") and HECTOR HERNANDEZ (hereinafter referred to as the "defendant") enter into the following Plea Agreement:

1. The defendant agrees to plead guilty to Count 1 of the Indictment, which charges the defendant with conspiracy to commit wire fraud affecting a financial institution, in violation of Title 18, United States Code, Section 1349.

2. The defendant admits the facts in the statement of offense filed with this Plea Agreement and agrees that those facts establish guilt of the offense charged beyond a reasonable doubt. The statement of offense, which is hereby incorporated into this Plea Agreement constitutes a stipulation of facts for purposes of Section 1B1.2(a) of the Sentencing Guidelines.

3. The defendant is aware that the sentence will be imposed by the Court. The defendant understands and agrees that federal sentencing law requires the Court to impose a sentence that is reasonable and that the Court must consider the Federal Sentencing Guidelines

and Policy Statements (hereinafter "Sentencing Guidelines") in effect at the time of the sentencing in determining that reasonable sentence. The defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the Court relying in part on the results of a Pre-Sentence Investigation by the Court's Probation Office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that while the Court is required to consider the advisory guideline range determined under the Sentencing Guidelines, it is not bound to impose that sentence. Defendant understands that the facts that determine the offense level will be found by the Court at the time of sentencing and that in making those determinations the Court may consider any reliable evidence, including hearsay, as well as the provisions or stipulations in this Plea Agreement. The United States and the defendant agree to recommend that the Sentencing Guidelines should apply pursuant to United States v. Booker, that the Guidelines provide a fair and just resolution based on the facts of this case, and that no upward or downward departures to the advisory guideline calculation are appropriate other than the reductions for acceptance of responsibility. The Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

4. The defendant also understands and acknowledges that the Court may impose a statutory maximum term of imprisonment of up to 30 years, followed by a term of supervised release of up to 5 years. In addition to a term of imprisonment and supervised release, the Court also may impose a fine of up to \$1,000,000, and must also order restitution.

5. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 4 of this Agreement, a special assessment in the amount of \$100 will be imposed on the defendant. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

6. The defendant shall provide the Probation Office and counsel for the United States with a full, complete and accurate personal financial statement. If the defendant provides incomplete or untruthful statements in his personal financial statement, his action shall be deemed a material breach of this agreement and the United States shall be free to pursue all appropriate charges against him notwithstanding any agreements to forbear from bringing additional charges otherwise set forth in this agreement.

7. The United States reserves the right to inform the Court and the Probation Office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this Agreement, the Government further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. Provided that the defendant commits no new criminal offenses and provided he continues to demonstrate an affirmative recognition and affirmative acceptance of personal responsibility for his criminal conduct, the United States agrees to recommend at sentencing that

the Court reduce by two (2) levels the sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon the defendant's recognition and affirmative acceptance of personal responsibility. However, the Government will not be required to make this sentencing recommendation if the defendant: (1) fails or refuses to make full, accurate and complete disclosure to the Probation Office of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the Government after the signing of the Plea Agreement; or, (3) commits any misconduct after entering into this plea Agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

9. The United States and the defendant agree that, although not binding on the Probation Office or the Court, they will jointly recommend that the Court make the following findings and conclusions as to the sentence to be imposed:

(a) That the base offense level is 7 under Section § 2B1.1(a) of the Sentencing Guidelines;

(b) Loss: That the loss associated with the properties involved in this fraud scheme is not fully discernible at this time since some of the properties are still in default and have not been foreclosed. The parties agree that the loss for the purposes of this plea shall be \$64,000,000.00, which is a fair assessment of both present and future losses caused by the defendant's conduct as of the date of the Plea Agreement. Therefore, the relevant amount of actual, probable or intended loss under Section 2B1.1(b)(1)(M) of the Sentencing Guidelines resulting from the offense committed in this case is less than \$65,000,000 but more than

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\$25,000,000, resulting in a 22-level enhancement under the more recent guidelines proposed by the Sentencing Commission, *which take effect on November 1, 2015.*

(c) Sophisticated Means: That the defendant's offense level shall be increased by two (2) levels pursuant to Section 2B1.1(10)(C) of the Sentencing Guidelines because the offense involved sophisticated means.

(d) Aggravating Role: That the defendant's offense level shall be increased by four (4) levels pursuant to Section 3B1.1(a) of the Sentencing Guidelines because the defendant was an organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive.

(e) Abuse of Position of Trust: That the defendant's offense level shall be increased by two (2) levels pursuant to Section 3B1.3 of the Sentencing Guidelines because he abused a position of trust in that he was certified as a direct endorsement lender under the Federal Housing Administration's direct endorsement program.

TOTAL OFFENSE LEVEL – UNADJUSTED 37

(g) Acceptance of Responsibility: That the defendant's offense level shall be decreased by two (2) levels pursuant to Section 3E1.1(a) because the defendant has clearly demonstrated acceptance of responsibility for his offense.

TOTAL OFFENSE LEVEL – ADJUSTED 35

10. The defendant and the United States further agree that both sides, at sentencing, may argue whether the defendant's unadjusted total offense level should be increased by two (2) levels pursuant to Section 2B1.1(b)(2)(A)(ii) because the offense was committed through mass marketing. The defendant and the United States agree that, aside from this enhancement, no other

reduction or enhancement in the Sentencing Guidelines other than those enumerated in paragraph 9 applies.

11. The defendant agrees to pay restitution as determined by the Court. The Government is not limited by the loss figure above when arguing for restitution. The government may request up to a 90 day extension for the final determination of loss for restitution purposes under Title 18, United States Code, Section 3664(d)(5). The defendant also agrees to the forfeiture as stated in the Statement of Offense in the amount of \$8,000,000.00.

12. The defendant is aware that the sentence has not yet been determined by the Court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, the Government, or the Probation Office, is a prediction, not a promise, and is not binding on the Government, the Probation Office or the Court. The defendant understands further that any recommendation that the Government makes to the Court as to sentencing, whether pursuant to this Agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the defendant may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the defendant, the Government, or a recommendation made jointly by both the defendant and the Government.

13. Defendant agrees that if he fails to comply with any of the provisions of this agreement, including the failure to tender such agreement to the Court, makes false or misleading statements before the Court or to any agents of the United States, commits any further crimes, or attempts to withdraw the plea (prior to or after pleading guilty to the charges identified in paragraph one (1) above), the Government will have the right to characterize such conduct as a breach of this

agreement. In the event of such a breach: (a) the Government will be free from its obligations under the agreement and further may take whatever position it believes appropriate as to the sentence and the conditions of the defendant's release (for example, should the defendant commit any conduct after the date of this agreement that would form the basis for an increase in the defendant's offense level or justify an upward departure – examples of which include but are not limited to, obstruction of justice, failure to appear for a court proceeding, criminal conduct while pending sentencing, and false statements to law enforcement agents, the probation officer, or Court – the Government is free under this agreement to seek an increase in the offense level based on that post-agreement conduct); (b) the defendant will not have the right to withdraw the guilty plea; (c) the defendant shall be fully subject to criminal prosecution for any other crimes which he has committed or might commit, if any, including perjury and obstruction of justice; and (d) the defendant waives any protections afforded by Section 1B1.8(a) of the Sentencing Guidelines, Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, and the Government will be free to use against the defendant, directly and indirectly, in any criminal or civil proceeding any of the information, statements, and materials provided by him pursuant to this agreement, including offering into evidence or otherwise using the statement of offense filed with this Plea Agreement.

14. The defendant also agrees that the defendant shall assist the United States in all proceedings, whether administrative or judicial, involving the forfeiture, disgorgement, transfer or surrender of all right, title, and interest, regardless of their nature or form, in the assets which the defendant has agreed to forfeit, disgorge, transfer or surrender, and any other assets, including real and personal property, cash and other monetary instruments, wherever located, which the defendant or others to his knowledge have accumulated as a result of illegal activities. Such

assistance will involve an agreement on defendant's part to the entry of an order enjoining the transfer or encumbrance of assets which may be identified as being subject to forfeiture, disgorgement, transfer or surrender, including but not limited to those specific real and personal properties set forth in the forfeiture count of the Information. Additionally, defendant agrees to identify as being subject to forfeiture all such assets, and to assist in the transfer of such property by delivery to the United States upon the United States' request, all necessary and appropriate documentation with respect to said assets, including consents to forfeiture, quit claim deeds and any and all other documents necessary to deliver good and marketable title to said property. To the extent the assets are no longer within the possession and control or name of the defendant, the defendant agrees that the United States may seek substitute assets within the meaning of 21 U.S.C. § 853.

15. The defendant agrees that he shall cooperate fully with the Government by:

(a) providing truthful and complete information and testimony, and producing documents, records and other evidence, when called upon by the Government, whether in interviews, before a grand jury, or at any trial or other court proceeding;

(b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings, and at meetings, as may be required by the Government.

16. The Government reserves the right to evaluate the nature and extent of the defendant's cooperation and to make the defendant's cooperation, or lack thereof, known to the court at the time of sentencing. If in the sole and unreviewable judgment of the Government, the defendant's cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the court's downward departure from the sentence required by the Sentencing Guidelines, the Government may at or before sentencing make a motion pursuant

to Section 5K1.1 of the Sentencing Guidelines, 18 U.S.C. §3553(e), or a Rule 35 motion subsequent to sentencing, reflecting that the defendant has provided substantial assistance and recommending sentence reduction. The defendant acknowledges and agrees, however, that nothing in this Agreement may be construed to require the Government to file such a motion and that the Government's assessment of the nature, value, truthfulness, completeness, and accuracy of the defendant's cooperation shall be binding on the defendant.

17. In the event the defendant withdraws from this Agreement prior to or after pleading guilty to the charges identified in paragraph 1 above or otherwise fails to fully comply with any of the terms of this Plea Agreement, the Government will be released from its obligations under this Agreement, and the defendant agrees and understands that: (a) he thereby waives any protection afforded by any proffer letter agreement between the parties, Section 1B1.8 of the Sentencing Guidelines, Rule 11(f) of the Federal Rules of Criminal Procedure, and Rule 410 of the Federal Rules of Evidence, and that any statements made by him as part of plea discussions, any debriefings or interviews, or in this Agreement, whether made prior to or after the execution of this Agreement, will be admissible against him without any limitation in any civil or criminal proceeding brought by the Government; and, (b) the defendant stipulates to the admissibility and authenticity, in any case brought by the United States in any way related to the facts referred to in this Agreement, of any documents provided by the defendant or his representatives to any state or federal agency and/or the Government.

18. The defendant understands and acknowledges that the Court is under no obligation to grant a Government motion pursuant to Title 18, United States Code, Section 3553(e), 5K1.1 of the Sentencing Guidelines or Rule 35 of the Federal Rules of Criminal Procedure, as referred to in

paragraph 11 of this Agreement, should the Government exercise its discretion to file such a motion.

19. The Defendant is aware that Title 18, United States Code, Section 3742 affords the Defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the Government in this plea agreement, the Defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, or to collaterally attack the conviction, any sentence imposed, or the manner in which sentence was imposed, including any restitution order, pursuant to Title 28, United States Code, Sections 2241, 2254, 2255 or any other applicable provision, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the Guideline range that the Court establishes at sentencing. Provided, however, that, the Defendant does not waive the right to challenge the sentence to the extent that it is the result of a violation of the Defendant's Constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct. The Defendant further understands that nothing in this plea agreement shall affect the Government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the Government appeals the Defendant's sentence pursuant to Section 3742(b), the Defendant shall be released from the above waiver of appellate rights. By signing this plea agreement, the Defendant acknowledges that he has discussed the appeal and collateral attack waiver set forth in this plea agreement with Defendant's attorney. The Defendant further agrees, together with the Government, to request that the Court enter a specific finding that the Defendant's waiver of the right to appeal the sentence to be imposed in this case was knowing and voluntary.

20. This is the entire Agreement and understanding between the Government and the defendant. There are no other agreements, promises, representations, or understandings.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

ANDREW WEISSMANN
Chief, Fraud Section
U.S. Department of Justice

Date: 7-13-15

By: 

DAVID A. BYBEE
Senior Litigation Counsel
MICHAEL O'NEILL
WILLIAM JOHNSTON
Trial Attorneys

Date: July 13, 2015

By: 

LEE STAPLETON
Attorney for Defendant Hernandez

Date: 7/13/2015

By: 

HECTOR HERNANDEZ
Defendant