

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 03-80660

Plaintiff,

Filed: 9/29/03

v.

HONORABLE: NANCY G. EDMUNDS

D-3 DAVID L. WHITT

VIOLATION: 18 U.S.C. §§ 1343, 1346

Defendant.

OFFENSE: Wire Fraud/Theft of Honest Services

STATUTORY MAXIMUM
INCARCERATION: 5 Years

STATUTORY MAXIMUM
FINE: \$250,000

RULE 11 PLEA AGREEMENT

The United States Department of Justice and David L. Whitt (“defendant”) hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure:¹

1. Guilty Plea.

A. Defendant will plead guilty to a one-count Information to be filed in the United States District Court for the Eastern District of Michigan.

¹The word “United States Department of Justice” and the word “government” in this agreement refers only to the Antitrust Division of the United States Department of Justice.

The Information will charge the defendant with violating the wire fraud statute by willfully entering into a scheme to defraud that deprived an audio-visual company, located in Troy, Michigan ("company") of the honest services of one of its employees ("company executive") and permitted the company executive to obtain monies or property by means of false or fraudulent pretenses. Defendant acknowledges that the Court may consider any other relevant conduct in determining the appropriate sentence.

B. The facts or elements that the government would need to prove beyond a reasonable doubt at trial are:

- 1) Defendant knowingly devised or knowingly participated in a scheme to defraud that deprived another of honest services of its employee and permitted the executive to obtain monies by means of false or fraudulent pretenses;
- 2) Defendant did so willfully and with an intent to defraud; and
- 3) Defendant transmitted or caused to be transmitted by wire in interstate commerce some communication for the purpose of executing the scheme to defraud.

C. The parties stipulate to the following, which the United States Department of Justice is prepared to prove, as an accurate factual basis for defendant's guilty plea:

Beginning at least as early as May 2000 and continuing at least until November 2001, an executive ("company executive") of an audio-visual

company (“audio-visual company”) located in Troy, Michigan, which is located in the Eastern District of Michigan, devised a scheme to defraud, the purpose of which was to obtain monies from vendors through false or fraudulent pretenses by conditioning his support in the awarding of contracts for which his employer, the audio-visual company, had solicited quotes from the vendors. Through the scheme to defraud, the company executive obtained or sought to obtain more than two million, five-hundred thousand dollars in monies, commonly referred to as kickbacks. Further, the scheme to defraud deprived the company of the honest services of the company executive.

As part of the scheme to defraud, the defendant and others knowingly acted to further the scheme in various manners. First, the defendant attended and participated in multiple meetings with the company executive and others in Little Rock, Arkansas during which the scheme and its targets were discussed and agreed upon, including a meeting on July 9, 2001. As a result of the July 9, 2001 meeting, an interstate fax to further the scheme was caused to be transmitted from Little Rock, Arkansas to Los Angeles, California on or about July 13, 2001. Second, from at least as early as September 2000 through November 2001, defendant was employed as a financial advisor in Little Rock, Arkansas. As a financial advisor, the defendant managed an Arkansas financial account for the use and benefit of

the company executive to receive multiple interstate wire transfers from a Michigan vendor paying kickbacks and distribute the proceeds to the company executive and others. On behalf of the company executive, the defendant conducted multiple interstate security trades with the kickback proceeds. Third, the defendant, who was located in Little Rock, Arkansas, participated in numerous interstate wire telephone calls with the company executive, who was located in Troy, Michigan and other locations outside of Arkansas from as early as June 6, 2000 through November 2001. During these telephone calls, details of the scheme were discussed. By engaging in the conduct described above, the defendant willfully entered into and furthered the scheme to defraud with the company executive and others.

2. Sentence Agreement.

A. Imprisonment. Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, the United States Department of Justice and the defendant agree that the appropriate offense level under the Sentencing Guidelines is a level 14. The government further agrees that a sentence of no more than 18 months of imprisonment is an appropriate disposition of the case.

B. Fine. Unless the court determines that defendant will not reasonably be able to pay a fine, or that paying a fine will unduly burden any

of defendant's dependents, a fine shall be imposed. There is no agreement as to the amount of the fine. If the Court were to impose a fine, the defendant agrees that the fine will be payable in full before the fifteenth day after the date of judgment. The defendant further understands and agrees that if a fine is imposed by the Court and it is not fully paid within 15 days of sentencing, then the defendant shall pay interest on any unpaid amount as provided under 18 U.S.C. § 3612(f).

C. Supervised release. The Court will impose a term of supervised release to follow imprisonment. The supervised release term that the Court chooses will be at least two years and at most three years. If defendant violates a condition of release, the Court will then be able to impose an additional prison sentence that could be as long as the original term of release. This agreement does not limit the sentence the Court could impose in that situation.

D. Special Assessment. Defendant must pay a special assessment of \$100 and must bring the receipt to Court on the day of sentencing.

E. Restitution. Defendant agrees that the Court shall order restitution, pursuant to any available provision of law, for any loss caused to: (1) the victims of any offense charged in this case (including dismissed counts), and (2) the victims of any criminal activity that were part of the

same course of conduct or same scheme or plan as defendant's charged offenses.

F. Facility Assignment and Self-Surrender. The government will not object to defendant's request that the Court recommend to the U.S. Bureau of Prisons that the defendant be assigned to a facility in proximity to Little Rock, Arkansas to serve his sentence of imprisonment, and that the Court order that the defendant be released following imposition of sentence to allow him to self-surrender to the assigned facility on a specified date. The government agrees that it will recommend the release of the defendant on his personal recognizance, under 18 U.S.C. § 3142, with travel restricted to within the United States.

3. Determining the appropriate sentence.

A. Factors affecting the sentence. Sentencing for the offense to be charged will be conducted pursuant to the 2000 U.S.S.G. Manual. The attached worksheets represent the stipulation of the parties with respect to all of the sentencing guideline provisions that they believe apply in this case. The Court may reject these calculations. Despite these stipulations, attorneys for the United States Department of Justice are not restricted from presenting any evidence or other factual information to the Court. The government may also defend the court's determinations on appeal or in any

other proceeding. The United States Department of Justice may recommend against giving defendant credit for acceptance of responsibility if, after making this plea offer, the United States Department of Justice learns of information inconsistent with that adjustment.

B. Rejection of agreement. If the Court rejects a part of the sentence agreement found only in paragraphs 2.A or 2.B. of this agreement, including a rejection because the court's determination of the criminal history category or offense level conflicts with the stipulation by the parties, defendant may: (1) withdraw the guilty plea, or (2) continue with the plea and risk receiving a sentence higher than that agreed to by the parties. The United States Department of Justice may also withdraw from the agreement if it learns prior to sentencing of information inconsistent with the stipulated guidelines calculations. The parties agree that any delay prior to either side's withdrawal from the agreement is excludable under the Speedy Trial Act.

4. Defendant's Obligations. Defendant agrees to assist the United States Department of Justice in the investigation and prosecution of others involved in criminal activities, as specified below.

A. Truthful Information and Testimony. Defendant will provide truthful and complete information concerning the acquisition of vendor rights

for the duplication or replication of video units at the company, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States Department of Justice is a party (“Federal Proceeding”). Defendant will provide full debriefings as requested by the United States Department of Justice, and federal, state, and local law enforcement agencies. Defendant will respond fully and truthfully to all inquiries of the United States Department of Justice in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or Court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503). Testimony may include, but is not limited to, grand jury proceedings, trials, and pretrial and post-trial proceedings. Defendant agrees to be available for interviews in preparation of all testimony. Defendant further agrees to submit, upon request, to government-administered polygraph examinations to verify defendant's full and truthful cooperation. Defendant understands that this obligation to provide cooperation continues after sentencing and that failure to follow through constitutes a breach of this agreement.

B. Nature of Cooperation. The defendant agrees to cooperate in good faith, meaning that the defendant will not only respond truthfully and completely to all questions asked, but will also volunteer all information that is reasonably related to the subjects discussed in the debriefing. In other words, the defendant may not omit facts about crimes, participants, or defendant's involvement, and then claim not to have breached this agreement because defendant was not specifically asked questions about those crimes, participants, or involvement. Defendant will notify the United States Department of Justice in advance if defendant intends to offer a statement or debriefing to other persons other than defendant's attorney. Defendant is not prevented in any way from providing truthful information helpful to the defense of any person. Any actions or statements inconsistent with continued cooperation under this agreement, including but not limited to criminal activity, or a statement indicating a refusal to testify, or any other conduct which in any way undermines the effectiveness of defendant's cooperation, constitutes a breach of this agreement.

C. Advising Court of Cooperation. Subject to the ongoing, full, and truthful cooperation of the defendant and before sentencing in the case, the United States Department of Justice will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's

cooperation and his commitment to prospective cooperation with the investigation and prosecutions of the United States Department of Justice, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

D. Use of Information Against Defendant. In exchange for defendant's agreement to cooperate with the government, as outlined above, the government agrees not to use new information that defendant provides pursuant to this agreement about defendant's own criminal conduct against defendant at sentencing in this case. Such information may be revealed to the Court but may not be used against the defendant in determining defendant's sentence range, choosing a sentence within the range, or departing from the range. There shall be no such restrictions on the use of information: (1) previously known to law enforcement agencies; (2) revealed to law enforcement agencies by, or discoverable through, an independent source; (3) in a prosecution for perjury or giving a false statement; or (4) in the event there is a breach of this agreement.

5. Government's Authority Regarding Substantial Assistance.

It is exclusively within the government's discretion to determine whether defendant has provided substantial assistance through his cooperation in the investigation or prosecution of others. Upon the government's determination that

defendant's cooperation amounts to substantial assistance in the investigation or prosecution of others, the government will either seek a downward departure at sentencing under U.S.S.G. § 5K1.1, or a reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, as appropriate. If the government makes such a motion, the amount of the reduction, if any, will be determined by the Court.

6. Government's Obligations.

Subject to the full, truthful, and continuing cooperation of the defendant, as described in this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States Department of Justice will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of any mail fraud, wire fraud or money laundering scheme involving the acquisition of vendor rights from the company for the duplication or replication of video units ("Relevant Offense"). The non-prosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

7. Subsequent challenges to conviction or breach of agreement.

A. If at any time the defendant tries to withdraw the guilty plea to any count; attacks the validity of the conviction on any count; or fails to

comply with the terms of the agreement, the government is released from its promises under this agreement and, in particular, may prosecute defendant on any charge that it agreed to dismiss or not to bring. In addition, if defendant's conviction on any count is vacated, the government may request resentencing on any remaining count.

B. Defendant waives a double jeopardy defense as to any charges the government brings or pursues under the previous paragraph. Defendant waives any speedy trial or statute of limitations defense for the period of time between the date defendant signed this agreement and (a) the date an order permitting withdrawal of the plea, vacating the plea, or reversing the conviction on any count becomes final, or (b) the date the United States Department of Justice notifies defendant in writing of defendant's failure to comply with the agreement; whichever is later.

C. The defendant understands and agrees that in any further prosecution of him resulting from the release of the United States Department of Justice from its obligations under this Plea Agreement based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States Department of Justice, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any

such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

8. Defendant's waiver of appeal rights. If the Court imposes a sentence equal to or less than the maximum sentence described in paragraph 2 of this agreement, defendant waives any right he may have to appeal his conviction or sentence, including any right under 18 U.S.C. § 3742 to appeal on the grounds that the sentence was imposed as a result of an incorrect application of the sentencing guidelines. Nothing in this paragraph shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct.

9. Voluntary Plea. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement and the representations contained in the proffer letter dated May 13, 2003. The United States Department of Justice has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

10. No other terms. This document and the proffer letter dated May 13, 2003 constitute the entire agreement between defendant and the United States Department of Justice with respect to the charges noted above in this criminal case. This Plea Agreement cannot be modified except in writing, signed by the United States Department of Justice and the defendant. The defendant understands that he may be subject to administrative action by federal or state agencies other than the United States Department of Justice, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States Department of Justice agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.

JEFFREY G. COLLINS
United States Attorney
Eastern District of Michigan

"/s/"
ALAN GERSHEL
Criminal Chief, E.D. Michigan

Dated: September 29, 2003

"/s/"
KEVIN C. CULUM
[3460--MT]

BRIAN J. STACK
[069796--OH]
ANTOINETTE E. THOMAS
[474696-DC], [MD]
Attorneys
Antitrust Division
U.S. Department of Justice
Plaza 9 Building
55 Erieview Plaza, Suite 700
Cleveland, OH 44114-1836
Telephone: (216) 522-4070
Fax: (216) 522-8332

By signing this document, the defendant acknowledges that he has read this entire document, understands it and agrees to its terms; and also acknowledges that he is satisfied with his attorney's advice and representation.

Dated: September 29, 2003

"/s/"
DAVID L. WHITT
Defendant

"/s/"
DRAKE MANN
Attorney for David L. Whitt