



U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

April 13, 1994

Justin Walder, Esq.
Walder, Sondak & Brogan
5 Becker Farm Road
Roseland, New Jersey 07068
Attorney for Denny J. Herzberg

Re: Plea Agreement with Denny J. Herzberg

12-94-254

Dear Mr. Walder:

1. This letter sets forth the full and complete plea agreement between your client, Denny J. Herzberg, and the United States Department of Justice.

Guilty Plea by Denny J. Herzberg; Scope of Agreement by the Department of Justice Not to Prosecute Further

2. Conditioned upon the understandings specified below, the defendant, Denny J. Herzberg, will waive indictment and plead guilty to a one-count information charging him with making an unlawful payment to a foreign official, in violation of Title 15, United States Code, Section 78dd-2(a)(3) and Title 18, United States Code, Section 2. Mr. Herzberg understands that the above count carries a maximum sentence of five years imprisonment. Further, Mr. Herzberg understands that, pursuant to Title 18, United States Code, Section 3571, the above count carries a maximum fine of (i) \$250,000; or (ii) twice the gross amount of any pecuniary gain that any person derived from the offense. If Mr. Herzberg enters a guilty plea and is sentenced on the above charge, and if in addition he fully complies with the understandings specified below, the United States Department of Justice and the United States Attorney's Office for the District of New Jersey will not prosecute Mr. Herzberg for any other criminal violations relating to or arising out of the subject matters of this investigation.

3. The Information to which Mr. Herzberg will plead guilty is attached as Exhibit A. The parties' stipulation of facts regarding sentencing is attached as Exhibit B. The United States' Statement of Facts in support of the plea agreement is attached as Exhibit C.

Agreement by Mr. Herzberg to Cooperate with the United States

4. Mr. Herzberg agrees to cooperate fully concerning this investigation and to truthfully disclose to the United States all information known to him concerning any activities by himself or others about which the United States may inquire. Further, Mr. Herzberg agrees to make himself available for questioning at all reasonable times requested by the United States and shall testify truthfully in all criminal proceedings including grand jury and trial proceedings, as to any activities about which he is questioned. Mr. Herzberg also agrees to provide to the United States any non-privileged documents or records, whether personal, partnership, corporate or other, which are in his possession, custody or control. Further, Mr. Herzberg agrees to, at all times, give complete, truthful and accurate information and testimony. Should it be established that Mr. Herzberg has intentionally given materially false, incomplete or misleading information or testimony, or should Mr. Herzberg participate or attempt to participate in any criminal act after the date of this plea agreement and prior to the date of his sentencing, the non-prosecution provisions of this Agreement shall be null and void, and Mr. Herzberg shall thereafter be subject to prosecution for any federal criminal violation of which the United States has knowledge, including but not limited to perjury and obstruction of justice.

5. In addition, before the date of sentencing, Mr. Herzberg agrees to cause Vitusa Corporation to complete and file true and accurate amended federal income tax returns for tax years 1992 and 1993 on behalf of Vitusa Corporation, as may be appropriate, and to otherwise cooperate with employees of the Civil Division of the Internal Revenue Service [IRS] in making an assessment of Vitusa Corporation's civil tax liabilities, if any, for the 1992 and 1993 tax years. Further, Mr. Herzberg and Vitusa Corporation specifically authorize the release of information by the Department of Justice to the Civil Division of the IRS for purposes of making an assessment of Vitusa's 1992 and 1993 civil tax liabilities.

6. Should Mr. Herzberg (a) fail to comply with any of the terms of the plea agreement, including the cooperation provisions of this agreement, or (b) attempt to withdraw his guilty plea, the United States shall be released from its obligations under this plea agreement and the agreement shall be null and void. However, if such failure is one that may be cured, Mr. Herzberg shall have a reasonable opportunity to do so. Should he fail to comply with his obligations under this plea agreement, Mr. Herzberg agrees that any statements, documents or information provided by him to the United States Department of Justice, or to

any other federal agency pursuant to this agreement, may be used directly or indirectly against Mr. Herzberg for any purpose, in any and all criminal, civil or administrative proceedings hereafter brought against Mr. Herzberg. Any such prosecutions may be premised upon any information provided by Mr. Herzberg, and all such information may be used against him. Mr. Herzberg also waives any defense he might otherwise be entitled to make that the statute of limitations would bar any prosecution in this matter.

The Sentence and Other Criminal Penalties That May be Imposed on Mr. Herzberg

7. Mr. Herzberg understands that the sentence to be imposed upon him is within the sole discretion of the sentencing Court, subject to the provisions of the Sentencing Reform Act, Title 18, United States Code, Sections 3551-3742 and Title 28, United States Code, Sections 991-998, and the United States Sentencing Guidelines promulgated thereunder. The sentencing Court will determine, prior to imposing sentence, the guideline range that is applicable to Mr. Herzberg's conduct, and may thereafter be required to sentence him to the minimum term of imprisonment and the minimum fine prescribed by that range. Further, the sentencing Court may, in its discretion, sentence Mr. Herzberg to the maximum term of imprisonment and fine which is consistent with the above Act and guidelines, up to and including the statutory maximum term of imprisonment and the statutory maximum fine set forth in Paragraph 2 of this agreement.

8. Mr. Herzberg agrees that any monetary penalty that the Court imposes, including the special assessment, fine or costs, is due and payable immediately, unless otherwise directed by the Court or probation office. Mr. Herzberg understands that any fine imposed on him will be subject to the payment of interest by him. Mr. Herzberg further understands that, pursuant to Title 15, United States Code, Section 78dd-2(g)(3), any fine imposed upon him individually by the sentencing Court may not be paid or reimbursed in any manner by Vitusa Corporation.

9. Mr. Herzberg understands that in addition to imposing any other penalty on him, the sentencing Court will order him to pay a special assessment of fifty dollars (\$50.00) per count of conviction, pursuant to Title 18, United States Code, Section 3013.

10. Mr. Herzberg understands that the sentencing Court may require him to serve a term of supervised release of up to three

years, to begin at the expiration of any term of imprisonment imposed on him, pursuant to Title 18, United States Code, Section 3583. Should Mr. Herzberg be placed on a term of supervised release and subsequently violate any condition of that release before the expiration of such term, he may be sentenced to up to three years of imprisonment in addition to the prison term previously imposed on him and in addition to the statutory maximum term of imprisonment set forth in Paragraph 2 of this agreement.

Rights and Obligations of the United States at Sentencing

11. Mr. Herzberg is aware that the Court has not yet determined a sentence. Mr. Herzberg is also aware that any estimate of the probable sentencing range under the sentencing guidelines that he may have received from his counsel, the United States or the probation office, is a prediction, not a promise, and is not binding on the United States, the probation office or the Court. The United States makes no promise or representation concerning what sentence Mr. Herzberg will receive, and Mr. Herzberg cannot withdraw a guilty plea based upon the actual sentence imposed by the Court. Both parties understand that, under Title 18, United States Code, Section 3742, they have the right to appeal any sentence that was imposed in violation of law, through an incorrect application of the Sentencing Guidelines or outside the range of the applicable guidelines.

12. The United States reserves the right to take any position or make any recommendation with respect to the applicable guideline range or with respect to the Court's sentence. However, if Mr. Herzberg fully complies with this Agreement and, prior to sentencing, provides what the United States, in its sole discretion, determines to be substantial assistance in the investigation or prosecution of one or more other persons who have committed offenses, the United States will, at the time of sentencing, move pursuant to Title 18, United States Code, Section 3553(e) and United States Sentencing Guideline Section 5K1.1 to so advise the sentencing Court and authorize the Court to impose, in its sole discretion, a sentence lower than the applicable minimum guideline sentence.

13. The United States will inform the sentencing Court and the probation office of: (i) this agreement; (ii) the full nature and extent of Mr. Herzberg's activities with respect to this case; (iii) the full nature and extent of Mr. Herzberg's cooperation and the date on which it commenced; and (iv) all other information, favorable or otherwise, in the possession of the United States relevant to Mr. Herzberg's sentence. The

United States specifically reserves the right to present to the sentencing Court and the probation office its evaluation of the seriousness of Mr. Herzberg's conduct; its assessment of Mr. Herzberg's character; and its view of the weight to be accorded to any other facts and circumstances relevant to sentencing proceedings. At the time of sentencing, if the United States, in its sole discretion, determines that Mr. Herzberg has provided substantial assistance in the investigation or prosecution of one or more other persons who have committed offenses, the United States will not advocate a sentence that would prohibit Mr. Herzberg's workday supervision of Vitusa's continued business activities.

Stipulations and Other Provisions

14. The United States and Mr. Herzberg agree to stipulate, for purposes of sentencing, to the stipulation of facts set forth in the attached Exhibit B, which is hereby made a part of this plea agreement. The above agreement to stipulate cannot and does not bind the sentencing Court, which may make independent factual findings and reject any or all factual stipulations entered into by the parties. Further, this agreement to stipulate on the part of the United States is based on the evidence and information the United States possesses as of the date of the plea agreement, and is subject to the proviso that, if the United States obtains any additional evidence or information prior to sentencing (other than information provided by Mr. Herzberg during his cooperation pursuant to this agreement) which conflicts materially with the stipulations agreed to herein, the United States shall no longer be bound by such stipulation. No determination that a stipulation is not binding shall release either Mr. Herzberg or the United States from any other portion of this plea agreement, including any other stipulation agreed to herein.

15. This plea agreement binds only the United States Department of Justice, the United States Attorney's Office for the District of New Jersey and the defendant, Denny J. Herzberg, and does not bind any other state, federal or local prosecuting authorities, although the United States will bring this agreement and Mr. Herzberg's cooperation to the attention of other prosecuting authorities or other agencies, if requested. In addition, this agreement does not prohibit the United States, any agency thereof, or any third party from initiating or prosecuting any civil proceedings directly or indirectly involving Mr. Herzberg, nor does it prohibit the United States or any agency thereof from initiating or prosecuting proceedings relating to any individual's or corporation's potential civil tax liability. The United States Department of Justice and the United States

Justin Walder, Esq.
April 13, 1994

Page 7

16. No additional promises, agreements or conditions have been entered into with respect to Mr. Herzberg's criminal liability other than those set forth in this letter, and none will be entered into unless in writing and signed by both parties.

Very truly yours,

Michael Chertoff
United States Attorney
District of New Jersey

By:


Eric Tunis
Deputy Chief, Fraud & Public
Protection Division
U.S. Attorney's Office
District of New Jersey

Gerald E. McDowell
Chief, Fraud Section
Criminal Division
U.S. Department of Justice

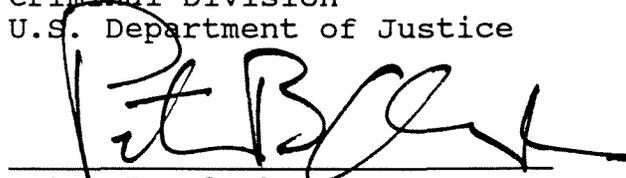
By:


Nicole M. Healy
Trial Attorney, Fraud Section
Criminal Division
U.S. Department of Justice

By:


James A. Baker
Trial Attorney, Fraud Section
Criminal Division
U.S. Department of Justice

Approved:


Peter B. Clark
Deputy Chief, Fraud Section
Criminal Division
U.S. Department of Justice

Justin Walder, Esq.
April 13, 1994

Page 8

I have received this letter from my attorney, Justin Walder, Esq., and have read it. I hereby acknowledge that it fully sets forth my agreement with the United States. I state that there have been no additional promises or representations made to me by any officials or employees of the United States Government or by my attorney in connection with this matter.



Denny J. Herzberg

Dated: April 15, 1994

WITNESSED:


Justin Walder, Esq.
Counsel for Denny J. Herzberg

Dated: 4/15/94

EXHIBIT A

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

UNITED STATES OF AMERICA,)	
)	Criminal No.
v.)	
)	Count One
DENNY J. HERZBERG)	15 U.S.C. § 78dd-2
)	(Foreign Corrupt
_____)	Practices Act)

INFORMATION

THE UNITED STATES CHARGES THAT:

At all times material herein:

A. Introduction

1. The defendant DENNY J. HERZBERG [HERZBERG] was the president and sole shareholder of Vitusa Corporation. HERZBERG was a naturalized United States citizen and resided in Cresskill, New Jersey, within the District of New Jersey. Vitusa Corporation was a New Jersey corporation engaged in the business of selling commodities and other goods in the United States and elsewhere.

2. HERZBERG was a domestic concern as that term is defined in the Foreign Corrupt Practices Act of 1977, as amended [FCPA], 15 U.S.C. § 78dd-2(h)(1)(A).

3. Servio Tulio Mancebo [Mancebo], a citizen of the Dominican Republic, was the president and owner of Horizontes Dominicanos, C. por A. [Horizontes], a business entity with its principal place of business in Santo Domingo, Dominican Republic.

4. In October 1989, Vitusa entered into a lawful contract to sell milk powder to the Government of the Dominican Republic.

Mancebo.

5. Although Vitusa delivered the milk powder to the Government of the Dominican Republic, the Dominican government did not pay Vitusa promptly for the milk powder received and, in fact, maintained an outstanding balance due for an extended period of time. Vitusa, therefore, made various efforts to collect the outstanding balance due, including contacting officials of the United States and Dominican Governments to obtain their assistance in securing payment in full.

6. During the pendency of the contract, Mancebo communicated to Herzberg a demand made by a foreign official which called for the payment of a "service fee" to that official in return for the official using that official's influence to obtain the balance due to Vitusa for the milk powder contract from the Dominican Government.

7. The intended recipient of the corrupt payment was a senior official of the Government of the Dominican Republic and a foreign official as that term is defined in 15 U.S.C. § 78dd-2(h)(2).

8. In or about August 1992, Herzberg agreed to Mancebo's proposal that Vitusa would pay a "service fee" indirectly to the foreign official.

9. On or about August 11, 1992, HERZBERG caused a letter to be transmitted by facsimile from Vitusa in New Jersey to Banco de Reservas de la Republica Dominicana [Banco de Reservas] in Santo

HERZBERG CRIMINAL INFORMATION

de Reservas de la Republica Dominicana [Banco de Reservas] in Santo Domingo. In that letter, HERZBERG authorized Banco de Reservas to withhold a specified portion of the Dominican Government's payment and transfer those withheld funds to Mancebo.

10. On or about September 3, 1992, the Government of the Dominican Republic made a payment of \$63,905.12 to Vitusa. Following HERZBERG's prior written instructions, Mancebo retained \$20,000 from that payment, and the Banco de Reservas transferred the balance of \$43,905.12 by wire to Vitusa's bank account in New Jersey.

11. On or about September 3, 1992, HERZBERG authorized, promised and offered the payment of all or a portion of the \$20,000 "service fee" through Mancebo to the senior foreign official, while knowing that all or a portion of the money would be given to the foreign official for the purpose of inducing the official to use that official's position and influence with the Government of the Dominican Republic in order to obtain and retain business, that is, full payment of the balance due for Vitusa's prior sale of milk powder to the Government of the Dominican Republic.

B. Corrupt Payment to Foreign Official

On or about September 3, 1992 in the District of New Jersey and elsewhere the defendant, HERZBERG, unlawfully, corruptly and willfully used and caused the use of interstate and foreign wire

HERZBERG CRIMINAL INFORMATION

transmissions to transfer funds in the amount of \$20,000, in furtherance of an offer, promise to pay and authorization of the payment of money, that is a "service fee" of \$20,000, to an associate of the foreign official, while knowing that all or a portion of such money would be offered, given, and promised indirectly to the foreign official, for the purpose of inducing the official to use that official's position and influence with the Government of the Dominican Republic, to wit: HERZBERG caused Mancebo to transfer \$20,000, which transfer was made by wire from Banco de Reservas in Santo Domingo, Dominican Republic into an account at the First Union National Bank of Florida in Miami, Florida, while knowing that some portion of those funds were to be delivered indirectly to the foreign official, in order

/

/

/

/

/

/

/

/

/

/

/

/

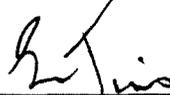
/

/

to obtain and retain business with the Dominican Government, that is, full payment of the balance due for Vitusa's prior sale of milk powder to the Government of the Dominican Republic.

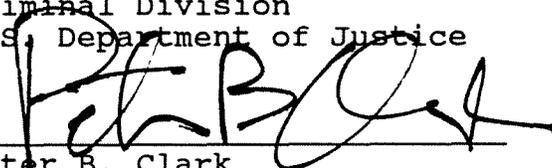
All in violation of Title 15, United States Code, Section 78dd-2(a)(3), and Title 18, United States Code, Section 2.

Michael Chertoff
United States Attorney
District of New Jersey



Eric Tunis
Deputy Chief, Fraud & Public
Protection Division
U.S. Attorney's Office
District of New Jersey

Gerald E. McDowell
Chief, Fraud Section
Criminal Division
U.S. Department of Justice



Peter B. Clark
Deputy Chief, Fraud Section
Criminal Division
U.S. Department of Justice



Nicole M. Healy
Trial Attorney, Fraud Section
Criminal Division
U.S. Department of Justice



James A. Baker
Trial Attorney, Fraud Section
Criminal Division
U.S. Department of Justice

EXHIBIT B

Stipulated Facts and Application of the United States Sentencing Guidelines

With regard to sentencing and the application of the United States Sentencing Guidelines, Mr. Herzberg and the United States agree as follows (except where otherwise noted):

1. Vitusa entered into a lawful contract to sell milk powder to the Government of the Dominican Republic.

2. Vitusa's agent for the sale was Horizontes Dominicanos [Horizontes], through its principal, Servio Tulio Mancebo [Mancebo]. Vitusa paid Horizontes a commission rate comparable to that paid to its other brokers in similar commodities transactions. This was the first and only occasion on which Vitusa had any business dealings with Horizontes or Mancebo.

3. Although not required to do so under the terms of the agreement, Vitusa released three shipments of the milk powder to the Dominican Government at its request, without immediate payment, on the promise that payment would be made without delay.

4. Vitusa performed its obligations under the agreement with the Government of the Dominican Republic, however, the Dominican government did not pay Vitusa promptly for the goods received and, in fact, maintained an outstanding balance due for an extended period of time.

5. Beginning in the Fall of 1990, Vitusa undertook a series of communications with officials of the Government of the Dominican Republic in an effort to collect the overdue receivable. Later, in May of 1991, Mr. Herzberg contacted various American governmental officials and entities, including the United States Embassy in Santo Domingo, in an effort to obtain their assistance in obtaining full payment from the Dominican government.

6. At Mancebo's request, Mr. Herzberg agreed to pay a "service fee" to a senior official of the Government of the Dominican Republic, in order to obtain full payment of the balance due. In addition, at Mancebo's request, Mr. Herzberg faxed a letter to the Banco de Reservas on August 11, 1992 authorizing it to transfer a portion of the payment expected from the Dominican government to Mancebo, from which funds Mr. Herzberg further authorized Mancebo to pay the "service fee" to the foreign official.

7. The unlawful payments to the foreign official were made in order to obtain payment of a legitimate and lawful obligation owed by the Government of the Dominican Republic to Vitusa. There was no loss to any party and no individual victim exists.

8. The applicable guidelines appropriate to the particular facts of this case are:

(a) The sentencing guideline for this offense is U.S.S.G. § 2B4.1. Under that guideline, Mr. Herzberg's base offense level is 8. U.S.S.G. § 2B4.1(a).

(b) Because the payment at issue involved an amount over \$2,000, the offense level is increased by reference to the table in § 2F1.1. U.S.S.G. § 2B4.1(b)(1).

(c) The parties agree that, because Mr. Herzberg is pleading guilty to this offense before indictment and has truthfully acknowledged the conduct comprising the offense of conviction and additional relevant conduct, a downward adjustment of 2 levels is appropriate. U.S.S.G. § 3E1.1.

(d) Mr. Herzberg has no prior criminal record, and his criminal history is Category I.

(e) Mr. Herzberg has agreed to cooperate with the United States in this matter. In advance of the date of sentencing, if the government, in its sole discretion, determines that Mr. Herzberg has provided substantial assistance in the investigation or prosecution of one or more other persons who have committed offenses, pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, the government will file a motion so advising the sentencing Court and will ask that the Court impose, in its sole discretion, a sentence lower than the applicable minimum guideline sentence.

9. The United States and Mr. Herzberg disagree as to the application of certain guidelines, which disagreements are limited to the following:

(a) Pursuant to § 2B4.1(b)(1), the offense level is increased by reference to the table in § 2F1.1, based upon "the greater of the value of the bribe or the improper benefit to be conferred." According to the United States, the increase should be 7 levels, based on Vitusa's receipt of \$163,905.12 from the Dominican Government in return for the payment of the service fee to the senior Dominican official. U.S.S.G. § 2F1.1(b)(1)(H). According to the defendant, the \$163,000 was not an "improper benefit" conferred on Vitusa, but was rather the payment of a legitimate and lawful obligation by the Dominican Republic to Vitusa. Consequently, according to the defendants, the increase should be 3 levels, based upon the "value of the bribe," i.e., Vitusa's unlawful payment of \$20,000 as charged in the criminal information. U.S.S.G. § 2F1.1(b)(1)(D). Thus, according to the United States, Mr. Herzberg's adjusted offense level is 13.

HERZBERG STIPULATED FACTS and SENTENCING CALCULATIONS

According to the defendants, Mr. Herzberg's adjusted offense level is 9.

(b) Under the government's analysis, the guidelines sentencing range is 12-18 months' imprisonment and a fine of \$3,000 to \$30,000. Under Mr. Herzberg's analysis, the guidelines sentencing range is 4-10 months' imprisonment and a fine of \$1,000 to \$10,000.

(c) Mr. Herzberg owns 100% of the stock in Vitusa. It is the defendant's position, therefore, that the amount of the fine imposed upon Vitusa should be reduced by the full amount of the fine imposed upon Mr. Herzberg, pursuant to U.S.S.G. § 8C3.4. It is the position of the United States, however, that U.S.S.G. § 8C3.4 is superseded by 15 U.S.C. § 78dd-2(g)(3) which provides that any fine imposed upon an officer, director or shareholder of a domestic concern may not be paid, directly or indirectly, or reimbursed in any manner by the domestic concern, in this case, Vitusa Corporation. See 15 U.S.C. § 78dd-2(g)(3).

EXHIBIT C

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

UNITED STATES OF AMERICA,)	
)	Criminal No.
v.)	
)	15 U.S.C. § 78dd-2
DENNY J. HERZBERG)	(Foreign Corrupt
)	Practices Act)
_____)	

GOVERNMENT'S STATEMENT OF FACTS

The information charges the defendant, Denny J. Herzberg, with one count of violating the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. § 78dd-2(a)(3) [FCPA], by offering, promising and authorizing a payment to an official of the Government of the Dominican Republic in connection with the sale of milk powder to that government. Had this matter gone to trial, the United States would have proven the following facts beyond a reasonable doubt through the testimony of witnesses, authenticated documents and other competent and admissible evidence.

The government's evidence would show that Vitusa Corporation [Vitusa] was a New Jersey corporation engaged in the sale of commodities and other goods in the United States and elsewhere. Denny J. Herzberg [Herzberg] was the President and sole shareholder of Vitusa, and a resident of New Jersey. Both Vitusa and Herzberg were domestic concerns as defined by the FCPA.

The evidence would further show that during or before October 1989, Vitusa entered into an agreement with Horizontes Dominicanos [Horizontes], a broker located in Santo Domingo, Dominican Republic, which was owned and operated by Servio Tulio

Mancebo [Mancebo], a resident of the Dominican Republic. The agreement provided that Horizontes would act as Vitusa's broker for the sale of milk powder to the Government of the Dominican Republic. This relationship between Horizontes and Vitusa was initiated by Mancebo and is the only occasion on which Vitusa dealt with Horizontes to perform services related to a sale in the Dominican Republic or elsewhere.

The evidence would show that in early October 1989, Vitusa contracted to sell 1,500 metric tons of milk powder to an agency of the Government of the Dominican Republic at \$2,200 per metric ton, for a total price of \$3.3 million. Vitusa and Horizontes agreed that Vitusa would pay Horizontes a commission of \$102.00 per metric ton for all milk powder purchased and paid for by the Dominican Government. The commission rate was comparable to that paid by Vitusa to its other brokers in similar commodities transactions elsewhere. Vitusa's contract with the Dominican Republic provided that, if the Government of the Dominican Republic failed to pay for any milk powder within 60 days of delivery by Vitusa, the Dominican Government would pay interest at a rate of the United States prime rate plus one percent on any overdue balance.

The evidence would further show that between October 1989 and January 1990, Vitusa caused approximately 870 metric tons of milk powder to be shipped in three separate lots from a supplier in the Netherlands to a bonded warehouse in the Dominican

Republic. Pursuant to Vitusa's contract with the Government of the Dominican Republic, Vitusa was not required to release the milk powder from the warehouse to the Dominican Government until Vitusa received a wire transfer credit for the amount due at its bank in New Jersey -- United Jersey Bank.

The evidence would show that Vitusa issued three invoices to the Dominican Government for payment corresponding to each of the three shipments. The three invoices totalled approximately \$1,914,000. Between December 1989 and May 1990, the Government of the Dominican Republic paid approximately \$1,762,750 on these first three invoices. Vitusa shipped the final three lots of 630 metric tons of milk powder between March 1990 and May 1990. Vitusa issued three invoices for payment corresponding to each of the final three shipments. These three invoices totalled approximately \$1,386,000.

The United States would prove that in or about May 1990, just prior to elections held in the Dominican Republic, officials of the Government of the Dominican Republic contacted Herzberg, in his capacity as president of Vitusa, and asked him to release the balance of the milk powder without the immediate payment required by the agreement. Notwithstanding that Vitusa was entitled to immediate payment, Herzberg agreed to release the balance of the milk powder stored in the warehouse to the Dominican Government, on the promise that payment would be made without delay.

HERZBERG STATEMENT OF FACTS

The evidence would show that, although the Dominican Government took delivery of the final three shipments of the milk powder in May 1990, it did not pay Vitusa promptly for the goods received and, in fact, maintained an outstanding balance due for an extended period of time. As of November 1990, the Government of the Dominican Republic paid Vitusa approximately \$2,384,580 of the \$3,300,000 contract price and owed Vitusa approximately \$1 million in principal and interest for late payments on the milk powder. The Government of the Dominican Republic did not make any further payments on any of the outstanding balances until July 1991. Throughout the course of its contractual relationship with Vitusa, the Government of the Dominican Republic did not dispute that it had purchased \$3.3 million of milk powder, for which it owed payment in full including accrued interest on late payments.

Beginning in the Fall of 1990, Vitusa undertook a series of communications with officials of the Government of the Dominican Republic in an effort to collect the overdue receivable. As time passed, interest continued to accrue and the balance due increased. A series of letters followed in early 1991 from Mr. Herzberg, addressed to officials in various agencies of the Government of the Dominican Republic, requesting payment on the balance due.

When his direct efforts with the Dominican government failed to bring about the payment of the past-due balance, Mr. Herzberg

HERZBERG STATEMENT OF FACTS

began contacting various American entities and officials, including his Congressman, the United States Ambassador to the Dominican Republic, and officers of the American Chamber of Commerce in the Dominican Republic. The Congressman in turn also contacted the United States Embassy in Santo Domingo.

The government's evidence would show that in July and September 1991, the Government of the Dominican Republic paid Vitusa approximately \$400,000. During this period, and until the summer of 1992, Mr. Herzberg continued his correspondence with the American and Dominican officials who might appropriately intercede with the Government of the Dominican Republic on his behalf. Herzberg also wrote a letter directly to Dr. Joaquin Balaguer, President of the Dominican Republic and sent a copy to the United States Embassy.

Further, the government's evidence would show that, during this time, Mancebo and Herzberg discussed various methods by which they might obtain the balance due from the Dominican Government. At some point in these discussions, Mancebo communicated to Herzberg a demand made by a senior official in the Dominican Government. This demand called for the payment of a "service fee" to a senior official of the Government of the Dominican Republic in return for the official using that official's influence to obtain the balance due to Vitusa for the milk powder contract from the Dominican Government.

In August 1992, Herzberg had agreed to Mancebo's proposal

HERZBERG STATEMENT OF FACTS

that Vitusa would pay a "service fee" to the senior official of the Dominican Government. As of that month, the balance due to Vitusa was \$163,000. On August 11, 1992, Vitusa transmitted a letter by facsimile to Banco de Reservas de la Republica Dominicana [Banco de Reservas] in Santo Domingo providing instructions on the disposition of the final payments due from the Government of the Dominican Republic. Vitusa's directives to Banco de Reservas authorized the bank to withhold a total of \$50,000 from the payment or payments, which funds the bank was authorized to give to Mancebo, and the balance of which the bank was directed to remit to Vitusa's account at United Jersey Bank.

The evidence would further show that on or about August 11, 1992, the Dominican Government made a payment of \$100,000 to Vitusa and, following Herzberg's directions, Banco de Reservas withheld \$30,000, which it gave to Mancebo. Banco de Reservas transferred the balance of \$70,000 from the \$100,000 payment by wire to Vitusa's account at United Jersey Bank in Hackensack, New Jersey on August 12, 1992.

On August 17, 1992, Herzberg spoke with Foreign Agricultural Service Counselor Michael T. Henney at the United States Embassy in Santo Domingo by telephone. During that conversation, Herzberg told Mr. Henney that a senior official had withheld authorization for the Dominican Government to release the balance due until the final payments had been renegotiated, including the payment of "service fees" to the same unnamed senior official.

HERZBERG STATEMENT OF FACTS

Herzberg further stated to Mr. Henney that Mancebo had related to him that the senior official had proposed that Vitusa would be paid the full balance due in two installments, less "service fees" totalling \$50,000.

On August 18, 1992, after speaking with Embassy officials, Mr. Henney sent a letter to Herzberg by facsimile reiterating the substance of their August 17th telephone conversation and advising Herzberg that the payment of the "service fees" would violate the FCPA. In his letter, Mr. Henney urged Herzberg not to pay the "service fees." On August 24, 1992, Herzberg responded by facsimile and stated that he agreed with Mr. Henney's recommendation and had already made a decision.

The government's evidence would show that on September 3, 1992, the Dominican Government made a payment of \$63,905.12 to Vitusa and, following Herzberg's directions, Banco de Reservas withheld \$20,000, which it gave to Mancebo.

The government would establish that, through Mancebo, Herzberg authorized, promised and offered the payment of money, that is, "service fees" totalling all or a portion of the \$50,000 to the senior foreign official, indirectly, through an associate, while knowing that all or a portion of the money would be given to the foreign official for the purpose of inducing the official to use that official's position and influence with the Government

of the Dominican Republic in order to obtain and retain business, that is, full payment of the balance due for Vitusa's prior sale of milk powder to the Government of the Dominican Republic.

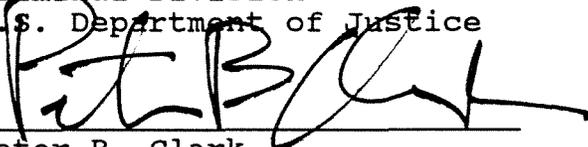
Respectfully submitted,

Michael Chertoff
United States Attorney
District of New Jersey

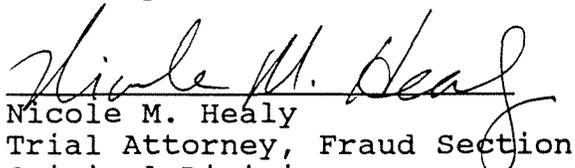


Eric Tunis
Deputy Chief, Fraud & Public
Protection Division
U.S. Attorney's Office
District of New Jersey

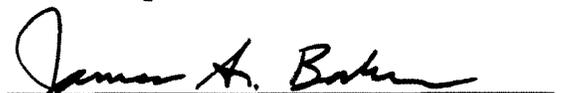
Gerald E. McDowell
Chief, Fraud Section
Criminal Division
U.S. Department of Justice



Peter B. Clark
Deputy Chief, Fraud Section
Criminal Division
U.S. Department of Justice



Nicole M. Healy
Trial Attorney, Fraud Section
Criminal Division
U.S. Department of Justice



James A. Baker
Trial Attorney, Fraud Section
Criminal Division
U.S. Department of Justice