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DISTRICT OF NEVADA
BY: _____ DEPUTY

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

-oOo-

UNITED STATES OF AMERICA, Plaintiff, v. BEN KIM, Defendant.	CASE NO. 2:12-CR-114-JCM-VCF **PLEA MEMORANDUM**

The United States of America, by and through Charles G. La Bella, Deputy Chief, and Mary Ann McCarthy, Trial Attorney, U.S. Department of Justice, Criminal Division, Fraud Section, the defendant, BEN KIM, and the defendant's attorney, William Carrico, submit this plea memorandum.

I. PLEA AGREEMENT

The United States and the defendant have reached the following plea agreement, which is not binding on the court:

A. The Plea

1. Defendant will plead guilty to Count One of the information, charging Defendant

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with misprision of a felony, in violation of Title 18, United States Code, Section 4. Defendant also agrees to pay restitution, as well as forfeiture if ordered to do so by the Court.

B. Additional Charges

2. The U.S. Department of Justice, Criminal Division, Fraud Section agrees to bring no additional criminal charges in the District of Nevada against the defendant relating to or arising from the offense(s) charged in the information, except for any crime of violence and any crime unknown to the Fraud Section before the time the parties sign this Plea Memorandum.

C. Sentencing Guideline Calculations

3. Defendant understands that the Court is required to consider United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") among other factors in determining the defendant's sentence. Defendant understands that the Sentencing Guidelines are advisory, and that after considering the Sentencing Guidelines, the Court may be free to exercise its discretion to impose any reasonable sentence up to the maximum set by statute for the crime of conviction.

4. The parties agree that the following calculations of the United States Sentencing Guidelines (2010) apply:

Base Offense Level (U.S.S.G. §2X4.1):	10
TOTAL	10

5. Pursuant to U.S.S.G. §3E1.1(a), the United States will recommend that the defendant receive a two (2) level adjustment for acceptance of responsibility unless Defendant (a) fails to make a complete factual basis for the guilty plea at the time it is entered; (b) is untruthful with the Court or probation officers in any respect, including without limitation, financial information; (c) denies involvement in the offense or provides conflicting statements regarding defendant's involvement; (d) attempts to withdraw the guilty plea; (e) engages in criminal conduct; (f) fails to appear in court; or (g) violates the conditions of defendant's pretrial release conditions.

6. Defendant's Criminal History Category will be determined by the court.

D. Other Sentencing Matters

7. The parties agree that the Sentencing Guideline calculations are based on information now known and could change upon investigation by the United States Probation Office. It is possible that factors unknown or unforeseen by the parties to the Plea Memorandum may be considered in determining the offense level, specific offense characteristics, and other related factors. In that event, the defendant will not withdraw his plea of guilty. Both the defendant and the United States are free to: (a) supplement the facts by supplying relevant information to the United States Probation Office and the Court, and (b) correct any and all factual inaccuracies relating to the calculation of the sentence.

8. The stipulations in this Plea Memorandum do not bind either the United States Probation Office or the Court. Both Defendant and the United States are free to: (a) supplement the facts by supplying relevant information to the United States Probation Office and the Court, and (b) correct any and all factual inaccuracies relating to the calculation of the sentence.

E. Fines and Special Assessment

9. Defendant agrees that the Court may impose a fine due and payable immediately upon sentencing.

10. Defendant will pay the special assessment of $100 per count of conviction at the time of sentencing.

F. Restitution

11. Defendant agrees to make restitution to all victims of his offense. Defendant understands that any restitution imposed by the Court may not be discharged in whole or in part in any present or future bankruptcy proceeding.

G. Forfeiture

12. The parties agree that the government will not request an order for the defendant to pay forfeiture in addition to restitution. The defendant acknowledges that the Court is not bound

by this agreement and may impose forfeiture. In the event of any order by the Court that Defendant shall pay forfeiture, the Defendant knowingly and voluntarily agrees to the following:

13. Defendant knowingly and voluntarily agrees to abandon or to forfeit the property to the United States.

14. Defendant knowingly and voluntarily agrees to relinquish all right, title, and interest in the property.

15. Defendant knowingly and voluntarily agrees to waive his right to any abandonment proceedings, any civil administrative forfeiture proceedings, any civil judicial forfeiture proceedings, or any criminal forfeiture proceedings ("proceedings") of the property.

16. Defendant knowingly and voluntarily agrees to waive service of process of any and all documents filed in this action or any proceedings concerning the property arising from the facts and circumstances of this case.

17. Defendant knowingly and voluntarily agrees to waive any further notice to the Defendant, Defendant's agents, or Defendant's attorney regarding the abandonment or the forfeiture and disposition of the property.

18. Defendant knowingly and voluntarily agrees not to file any claim, answer, petition, or other documents in any proceedings concerning the property.

19. Defendant knowingly and voluntarily agrees to waive the statute of limitations, the CAFRA requirements, Fed. R. Crim. P. 7(c)(2), 32.2(a), and 32.2(b)(3), and the constitutional due process requirements of any abandonment proceeding or any forfeiture proceeding concerning the property.

20. Defendant knowingly and voluntarily agrees to waive Defendant's right to a jury trial on the forfeiture of the property.

21. Defendant knowingly and voluntarily agrees to waive (a) all constitutional, legal, and equitable defenses to, (b) any constitutional or statutory double jeopardy defense or claim concerning, and (c) any claim or defense under the Eighth Amendment to the United States

Constitution, including, but not limited to, any claim or defense of excessive fine in any proceedings concerning the property.

22. Defendant knowingly and voluntarily agrees to the entry of an Order of Forfeiture of the property to the United States.

23. Defendant knowingly and voluntarily agrees and understands the abandonment, the civil administrative forfeiture, the civil judicial forfeiture, or the criminal forfeiture of the property shall not be treated as satisfaction of any assessment, fine, restitution, cost of imprisonment, or any other penalty this Court may impose upon the Defendant in addition to the abandonment or the forfeiture.

H. Waiver of Appeal

24. In exchange for the concessions made by the United States in this Plea Memorandum, Defendant knowingly and expressly waives the right to appeal any sentence that is imposed within the applicable Sentencing Guideline range as calculated by the Court, further waives the right to appeal the manner in which that sentence was determined on the grounds set forth in Title 18, United States Code, Section 3742, and further waives the right to appeal any other aspect of the conviction or sentence, including any order of restitution and forfeiture. Defendant reserves only the right to appeal any portion of the sentence that is an upward departure from the applicable Sentencing Guideline range calculated by the Court.

25. Defendant also waives all collateral challenges, including any claims under 28 U.S.C. § 2255, to the Defendant's conviction, sentence and the procedure by which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.

I. Additional Promises, Agreements, and Conditions

26. In exchange for the United States entering into this Plea Memorandum, Defendant agrees that (a) the facts set forth in Section IV of this Plea Memorandum shall be admissible against the Defendant under Fed. R. Evid. 801(d)(2)(A) in the following circumstances: (i) for any

purpose at sentencing; and (ii) in any subsequent proceeding, including a trial in the event the Defendant does not plead guilty or withdraws the Defendant's guilty plea, to impeach or rebut any evidence, argument or representation offered by or on the Defendant's behalf; and (b) the Defendant expressly waives any and all rights under Fed. R. Criminal P. 11(f) and Fed. R. Evid. 410 with regard to the facts set forth in Section IV of the Plea Memorandum to the extent set forth above.

27. The parties agree that no promises, agreements, and conditions have been entered into other than those set forth in this plea memorandum, and will not be entered into unless in writing and signed by all parties.

J. Limitations

28. This Plea Memorandum is limited to the Criminal Division of the United States Department of Justice and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authority. But, this Plea Memorandum does not prohibit the United States through any agency thereof, the Criminal Division of the United States Department of Justice, or any third party from initiating or prosecuting any civil proceeding directly or indirectly involving the Defendant, including but not limited to, proceedings under the False Claims Act relating to potential civil monetary liability or by the Internal Revenue Service relating to potential tax liability.

K. Cooperation

29. Defendant agrees, if requested by the United States, to provide complete and truthful information and testimony concerning Defendant's knowledge of all other persons who are committing or have committed offenses against the United States or any state, and agrees to cooperate fully with the United States in the investigation and prosecution of such persons.

30. In the event the government decides in its sole discretion that the assistance provided by Defendant amounts to "substantial assistance" pursuant to U.S.S.G. § 5K1.1, the

United States will timely file a motion for downward departure from the applicable Sentencing Guideline calculation. The Court has the sole discretion to grant such a motion.

31. Defendant agrees that a motion for downward departure based on substantial assistance shall not be made under any circumstances unless Defendant's cooperation is deemed to be substantial assistance by the government. The United States has made no promise, implied or otherwise, that Defendant will be granted a departure for substantial assistance. Further, no promise has been made that such a motion will be made even if Defendant complies with the terms of this Plea Memorandum in all respects but has been unable to provide substantial assistance as determined in the sole discretion of the government.

32. The United States agrees to consider the totality of the circumstances, including but not limited to, the following factors, in determining whether, in the sole discretion of the government, Defendant has provided substantial assistance which would merit a motion by the United States for a downward departure from the applicable Guideline:

a. The United States' evaluation of the significance and usefulness of Defendant's assistance;

b. The truthfulness, completeness, and reliability of any information or testimony provided by Defendant;

c. The nature and extent of Defendant's assistance;

d. The truthfulness and completeness in disclosing and bringing to the attention of the Government all crimes which Defendant has committed and all administrative, civil, or criminal proceedings, investigations, and prosecutions in which he has been or is a subject, target, party, or witness;

e. The truthfulness and completeness in disclosing and providing to the Government, upon request, any document, record, or other evidence relating to matters about which the Government or any designated law enforcement agency inquires, including but not limited to, Defendant's personal finances;

f. Any injury suffered, or any danger or risk of injury to Defendant or Defendant's family resulting from defendant's assistance; and,

g. The timeliness of Defendant's assistance.

33. Defendant agrees that in the event the United States files a downward departure motion based upon Defendant's substantial assistance, the United States reserves the right to make a specific recommendation to the Court regarding the extent of such a departure. Defendant understands and agrees that the final decision as to how much of a departure, if any, is warranted rests solely with the Court.

L. Breach

34. Defendant agrees that if Defendant, at any time after the signature of this Plea Memorandum and execution of all required certifications by Defendant, Defendant's counsel, and for the government, knowingly violates or fails to perform any of Defendant's obligations under this Memorandum ("a breach"), the government may declare this Memorandum breached. All of Defendant's obligations are material, a single breach of this Plea Memorandum is sufficient for the government to declare a breach, and Defendant shall not be deemed to have cured a breach without the express agreement of the government in writing. If the government declares this Memorandum breached, and the Court finds such a breach to have occurred, then: (a) if Defendant has previously entered a guilty plea pursuant to this Memorandum, Defendant will not be able to withdraw the guilty plea, and (b) the government will be relieved of all its obligations under this agreement.

II. PENALTY

35. The maximum penalty for a violation of Title 18, United States Code, Section 4, is imprisonment for not more than three (3) years, a $250,000 fine, or both. Defendant is also subject to supervised release for a term of not greater than one (1) year.

36. Supervised release is a period of time following imprisonment during which Defendant will be subject to various restrictions and requirements. Defendant understands that if Defendant violates one or more of the conditions of any supervised release imposed, Defendant

may be returned to prison for all or part of the term of supervised release, which could result in Defendant serving a total term of imprisonment greater than the statutory maximum stated above.

37. Defendant is required to pay for the costs of imprisonment, probation, and supervised release, unless the Defendant establishes that the Defendant does not have the ability to pay such costs, in which case the court may impose an alternative sanction such as community service.

III. ELEMENTS

38. The essential elements for the offense of misprision of a felony, in violation of 18 U.S.C. § 4, are as follows:

(1) First, between in or around October 2008 and in or around July 2009 a federal felony was committed, to wit: conspiracy to commit bank fraud;

(2) Second, the Defendant had knowledge of the commission of that felony;

(3) Third, the Defendant failed to notify an authority as soon as possible;

(4) Fourth, the Defendant did an affirmative act, as charged, to conceal the crime.

IV. FACTS

39. Defendant is pleading guilty because Defendant is guilty of the charged offenses.

40. Defendant specifically admits and declares under penalty of perjury that all of the facts set forth below are true and correct:

41. On or about September 10, 2004, Defendant became a one-third owner, along with D.A. and L.B., in the Courthouse Café LLC ("CHC").

42. On or about September 21, 2004, the CHC was awarded a contract from the Clark County Commission to operate the cafeteria in the Regional Justice Center in Las Vegas, Nevada. This service contract prohibited the CHC from assigning its rights or duties or subcontracting any of its services without Clark County approval.

43. On or about April 13, 2005, CHC borrowed $990,000 to effect the required improvements to operate the café. However, due to several unscheduled delays the CHC experienced financial difficulties.

44. On or about October 1, 2008, in an attempt to alleviate the financial problems, D.A. signed a joint venture agreement between the CHC and S.K., which allowed S.K. to operate the café for a period of three years. S.K. agreed to pay $35,000 down and $8,000 per month in rent to the CHC. Under this agreement, S.K. retained the profits from operating the café. The CHC did not inform Clark County officials of this arrangement, contrary to the requirements of the lease terms.

45. While S.K. operated the café, in or around October 2008, the owners attempted to refinance their original loan at Bank A. However, they were not able to do so.

46. On or about February 17, 2009, the CHC attempted to obtain a Small Business Association loan from Bank B, another Las Vegas federally insured bank.

47. On or about March 24, 2009, Defendant and D.A. signed and submitted a loan application, requesting approximately $1,000,000, on behalf of the CHC. The loan application did not disclose the sublet contract or financial arrangement that CHC had with S.K.

48. On or about April 23, 2009, Defendant acknowledged that S.K. operated the café but agreed to hide it from the bank and to provide altered financial statements to Bank B to support the loan request.

49. The CHC owners and others, including L.K., Defendant's wife, agreed to conceal from the bank that S.K. operated the café on a day-to-day basis, that he paid a monthly fee of $8,000 to the principals of the CHC, and that under the joint venture agreement he retained any profits from the operation of the café. The CHC owners also agreed to enhance S.K.'s financial statements as CHC's financial statements, because they would report a greater monthly income than the monthly rental payment the owners received from S.K. The owners concealed these facts for the purpose of making it appear that the CHC was eligible for a larger loan than it would be otherwise, and knowing that the bank would not issue a loan if the bank knew the true state of affairs. Defendant knew these representations to the bank were fraudulent.

50. On or about June 15, 2009, Defendant agreed to ask D.A. to supply the altered

financial statements to the bank. D.A. sent the financial statements to the bank representative, but did not alter them; they still referenced S.K. and not the CHC. The bank representative told the defendant that he could not use the financial documents referring to S.K.

51. On or about June 23, 2009, Defendant called L.K. and asked her to alter S.K.'s financial statements so they appeared to be CHC's financial statements. The financial statements were altered and Defendant then emailed the altered financial statements to the bank.

52. Defendant failed to disclose these false representations to the bank or other authorities, when he knew he had an obligation to do so. The loan was never obtained by CHC's owners.

V. ACKNOWLEDGMENT

53. Defendant acknowledges by the Defendant's signature below that Defendant has read this Plea Memorandum, that Defendant understands the terms and conditions and the factual basis set forth herein, that Defendant has discussed these matters with Defendant's attorney, and that the matters set forth in this memorandum, including the facts set forth in Part IV above, are true and correct.

54. Defendant acknowledges that Defendant has been advised, and understands, that by entering a plea of guilty the Defendant is waiving, that is, giving up, certain rights guaranteed to the Defendant by law and by the Constitution of the United States. Specifically, Defendant is giving up:

a. The right to proceed to trial by jury on the original charges, or to a trial by a judge if Defendant and the United States both agree;

b. The right to confront the witnesses against the Defendant at such a trial, and to cross-examine them;

c. The right to remain silent at such trial, with such silence not to be used against Defendant in any way;

d. The right, should Defendant so choose, to testify in Defendant's own behalf at such a trial;

e. The right to compel witnesses to appear at such a trial, and to testify in Defendant's behalf; and,

f. The right to have the assistance of an attorney at all stages of such proceedings.

55. Defendant acknowledges that Defendant is, in all respects, satisfied by the representation provided by Defendant's attorney and that Defendant's attorney has discussed with the defendant the burdens and benefits of this agreement and the rights he waives herein.

56. Defendant, Defendant's attorney, and the attorney for the United States acknowledge that this Plea Memorandum contains the entire negotiated and agreed to by and between the parties, and that no other promise has been made or implied by either the Defendant, Defendant's attorney, or the attorney for the United States.

DENIS J. McINERNEY
Chief
United States Department of Justice,
Criminal Division, Fraud Section

3/21/2012
DATED

CHARLES LA BELLA
Deputy Chief

MARY ANN McCARTHY
Trial Attorney
United States Department of Justice
Criminal Division, Fraud Section

3-18-12
DATED

BEN KIM
Defendant

March 19, 2012
DATED

WILLIAM CARRICO
Defense Counsel