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7 United States of America

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9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 ANTHONY POLLINO, JR.,

16 Defendant.

CASE NO. 1:14-CR-00189-AWI-BAM

MEMORANDUM OF PLEA  
AGREEMENT PURSUANT TO RULE  
11(c) OF THE FEDERAL RULES OF  
CRIMINAL PROCEDURE

DATE: July 20, 2015

TIME: 10:00 a.m.

CTRM: ISHII

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18  
19 Pursuant to Rule 11(c) of the Federal Rules of Criminal Procedure, the United States of  
20 America, by and through Benjamin B. Wagner, the United States Attorney for the Eastern  
21 District of California, and Assistant United States Attorneys Michael G. Tierney and Henry Z.  
22 Carbajal III, and Defendant, Anthony Pollino Jr., and his attorney, Michael Aed, have agreed as  
23 follows.

24 This document contains the complete Memorandum of Plea Agreement ("Plea  
25 Agreement") between the United States Attorney's Office for the Eastern District of California  
26 ("Government") and defendant Anthony Pollino regarding this case. This Plea Agreement is  
27 limited to the United States Attorney's Office for the Eastern District of California and cannot  
28

1 bind any other federal, state, or local prosecuting, administrative, or regulatory authorities.

2  
3 1. Charges.

4 The defendant acknowledges that he has been charged in a two count indictment as  
5 follows:

6 Conspiracy to Traffic in Counterfeit Goods and Commit Mail Fraud, in violation of Title  
7 18, United States Code, Section 371; and

8 Trafficking in Counterfeit Goods, in violation of Title 18, United States Code, Section  
9 2320(a)(1).

10 2. Nature, Elements and Possible Defenses.

11 The defendant has read the charges against him contained in the indictment, and those  
12 charges have been fully explained to him by his attorney. Further, the defendant fully  
13 understands the nature and elements of the crime in Count Two of the indictment to which he is  
14 pleading guilty, together with the possible defenses thereto, and has discussed them with his  
15 attorney.

16 COUNT TWO:

17 The elements of the crime of Trafficking in Counterfeit Goods, in violation of Title 18,  
18 United States Code, Section 2320(a)(1) are:

19 (a) The defendant intentionally trafficked in goods;

20 (b) The defendant knowingly used counterfeit marks on and in connection with those  
21 goods, and applied counterfeit marks to packaging and labeling of those goods.

22  
23 3. Agreements by the Defendant.

24 (a) Defendant agrees that this plea agreement shall be filed with the court and  
25 become a part of the record of the case.

26 (b) Defendant agrees to enter a plea of guilty to Count Two of the indictment which  
27 charges him with Trafficking in Counterfeit Goods in violation of Title 18, United States Code,  
28 Section 2320(a)(1).

1 (c) Defendant understands and agrees that he will not be allowed to withdraw his plea  
2 should the Court fail to follow the government's sentencing recommendations.

3 (d) Defendant knowingly and voluntarily waives his Constitutional and statutory  
4 rights to appeal his plea, conviction, restitution imposed, forfeiture order and sentence. This  
5 waiver of appeal includes, but is not limited to, an express waiver of defendant's right to appeal  
6 his plea, conviction, restitution imposed, forfeiture order and sentence on any ground, including  
7 any appeal right conferred by 18 U.S.C. § 3742, and defendant further agrees not to contest his  
8 plea, conviction, restitution imposed, forfeiture order and sentence in any post-conviction  
9 proceeding, including but not limited to a proceeding under 28 U.S.C. § 2255, except for non-  
10 waivable claims.

11 (f) Defendant agrees that his base offense level is eight (8) pursuant to Section  
12 2B5.3(a) of the United States Sentencing Commission Guidelines Manual; plus twelve (12)  
13 levels for infringement amount greater than \$200,000 but not more than \$400,000  
14 (§§ 2B5.3(b)(1)(B)) and 2B1.1(b)(1)(G)); plus two (2) levels because the offense involved  
15 importation of infringing items (§ 2B5.3(b)(3)(A)); plus two (2) levels because the offense  
16 involved counterfeit drugs (§ 2B5.3(b)(5)). The defendant agrees that the applicable offense  
17 level is therefore 24.

18 (g) Defendant agrees not to move for any downward adjustments in his offense level  
19 under Chapters Two, Three, Four and/or Five of the United States Sentencing Guidelines, except  
20 as specifically set forth below at paragraph 3(h). The defendant also agrees not to move for a  
21 downward variance of his sentence under the factors set forth in 18 U.S.C. § 3553. The  
22 defendant understands and agrees that this agreement by him includes, without limitation, not  
23 moving for a downward departure and/or variance of his offense level, criminal history category  
24 or criminal history points as defined by the Sentencing Guidelines. Additionally, the defendant  
25 agrees that the application of the U.S. Sentencing Guidelines to his case results in a reasonable  
26 sentence and that the defendant will not request that the court apply the sentencing factors under  
27 Section 3553 of Title 18, United States Code, to arrive at a sentence different than that called for  
28 under the Sentencing Guidelines. The defendant acknowledges that, if the defendant requests or

1 suggests in any manner a different sentence than what is called for under the Sentencing  
2 Guidelines, the Government, at its sole discretion, may withdraw from this plea agreement and  
3 continue with its prosecution of the defendant as if the parties had not entered into this Plea  
4 Agreement.

5 (h) Notwithstanding paragraph 3(g), the defendant retains a right to argue for no more  
6 than a two-level downward departure under § 2B5.3, Application Note 5(C) that the offense level  
7 substantially overstates the seriousness of his offense because the infringement amount is based  
8 upon a formula or extrapolation that results in an estimated amount that may substantially exceed  
9 the actual pecuniary harm to the copyright or trademark owner. The defendant understands that  
10 the government does not concede that any departure is warranted.

11 (i) Defendant understands that the Court must consult the Federal Sentencing  
12 Guidelines (as promulgated by the Sentencing Commission pursuant to the Sentencing Reform  
13 Act of 1984, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, and as modified by United  
14 States v. Booker and United States v. Fanfan, 543 U.S. 220 (2005)), and must take them into  
15 account when determining a final sentence. Defendant understands that the Court will determine  
16 a non-binding and advisory guideline sentencing range for this case pursuant to the Sentencing  
17 Guidelines. Defendant further understands that the Court will consider whether there is a basis  
18 for departure from the guideline sentencing range (either above or below the guideline  
19 sentencing range) because there exists an aggravating or mitigating circumstance of a kind, or to  
20 a degree, not adequately taken into consideration by the Sentencing Commission in formulating  
21 the Guidelines. Defendant further understands that the Court, after consultation and  
22 consideration of the Sentencing Guidelines, must impose a sentence that is reasonable in light of  
23 the factors set forth in 18 U.S.C. § 3553(a).

24 (j) Defendant agrees to waive all rights under the "Hyde Amendment," Section 617,  
25 P.L. 105-119 (Nov. 26, 1997), to recover attorneys' fees or other litigation expenses in  
26 connection with the investigation and prosecution of all charges in the above-captioned matter  
27 and of any related allegations (including without limitation any charges to be dismissed pursuant  
28 to this Agreement and any charges previously dismissed).

1 (k) Defendant agrees the conduct to which he is pleading requires mandatory  
2 restitution pursuant to Sections 3663A(c)(1)(A)(ii) and (c)(1)(B) of Title 18, United States Code,  
3 and agrees to pay restitution to the victim for the total loss to the victim as a result of the criminal  
4 conduct and in an amount determined by the court at sentencing, including losses covered in  
5 those counts to be dismissed as part of the plea agreement.

6 (l) Defendant agrees to pay a special assessment of \$100 at the time of sentencing by  
7 delivering a check or money order payable to the United States District Court to the United  
8 States Probation Office immediately before the sentencing hearing.

9 (m) Defendant agrees to make a full and complete disclosure of defendant's assets and  
10 financial condition, and will complete the United States Attorney's Office's "Authorization to  
11 Release Information" and "Financial Affidavit" within five (5) weeks from the entry of the  
12 defendant's change of plea. The defendant also agrees to have the court to enter an order to that  
13 effect.

14 (n) Defendant agrees to forfeit to the United States voluntarily and immediately all  
15 right, title, and interest to any and all assets seized pursuant to 18 U.S.C. §§ 981(a)(1)(C), 2323;  
16 and 28 U.S.C. § 2461, and Fed. R. Crim. P. 32.2(b)(1). Defendant agrees to fully assist the  
17 government in the forfeiture of any seized assets or assets later determined to be forfeitable and  
18 to take whatever steps are necessary to pass clear title to the United States. Defendant shall not  
19 sell, transfer, convey, or otherwise dispose of any assets found to be connected to the criminal  
20 events charged in the Indictment.

21 Defendant agrees not to file a claim to any of the seized property in any criminal  
22 proceeding or civil proceeding, administrative or judicial, which is or may be initiated.  
23 Defendant agrees to waive right to notice of any forfeiture proceeding involving such property,  
24 and agrees to not file a claim or assist others in filing a claim in such a proceeding.

25 The defendant waives the notice provisions of Fed. R. Crim. P. 7(c) and 32.2(a), waives  
26 oral pronouncement of forfeiture at the time of sentencing and any defects in such  
27 pronouncement that pertain to forfeiture, and waives any defenses to forfeiture, including any  
28 defense predicated on the Ex Post Facto, Double Jeopardy, and Excessive Fines Clauses of the

1 United States Constitution. The defendant knowingly and voluntarily waives any right to jury  
2 trial in any criminal or civil forfeiture proceeding.

3 (o) If the defendant's conviction on the count to which he is pleading is ever vacated  
4 at the defendant's request, or his sentence is ever reduced at his request, the government shall  
5 have the right to: (1) prosecute the defendant on any of the counts to which he pleaded guilty; (2)  
6 reinstate any counts that may be dismissed under this agreement; and (3) file any new charges  
7 that would otherwise be barred by this agreement. The decision to pursue any or all of these  
8 options is solely in the discretion of the United States Attorney's Office. By signing this  
9 agreement, the defendant agrees to waive any objections, motions, and defenses he might have to  
10 the government's decision, including Double Jeopardy. In particular, he agrees not to raise any  
11 objections based on the passage of time with respect to such counts including, without limitation,  
12 any statutes of limitation or any objections based on the Speedy Trial Act or the Speedy Trial  
13 Clause of the Sixth Amendment.

14 (p) If it is determined that the defendant has violated any provision of this Agreement  
15 or if the defendant successfully moves to withdraw his plea: (1) all statements made by the  
16 defendant to the government or other designated law enforcement agents, or any testimony given  
17 by the defendant before a grand jury or other tribunal, whether before or after his Agreement,  
18 shall be admissible in evidence in any criminal, civil, or administrative proceedings hereafter  
19 brought against the defendant; and (2) the defendant shall assert no claim under the United States  
20 Constitution, any statute, the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules  
21 of Evidence, or any other federal rule, that statements made by the defendant before or after this  
22 Agreement, or any leads derived therefrom, should be suppressed. By signing this Agreement,  
23 the defendant waives any and all rights in the foregoing respects.

24 4. Agreements by the Government.

25 (a) The government will recommend a two-level reduction (if the offense level is less  
26 than 16) or a three-level reduction (if the offense level reaches 16) in the computation of his  
27 offense level if the defendant clearly demonstrates acceptance of responsibility for his conduct as  
28 defined in Section 3E1.1 of the United States Sentencing Commission Guidelines Manual.

1 (b) The government agrees that the defendant's base offense level is eight (8)  
2 pursuant to Section 2B5.3(a) of the United States Sentencing Commission Guidelines Manual;  
3 plus twelve (12) levels for infringement amount greater than \$200,000 but not more than  
4 \$400,000 (§§ 2B5.3(b)(1)(B)) and 2B1.1(b)(1)(G)); plus two (2) levels because the offense  
5 involved importation of infringing items (§ 2B5.3(b)(3)(A)); plus two (2) levels because the  
6 offense involved counterfeit drugs (§ 2B5.3(b)(5)). The government agrees that the resulting  
7 offense level is 24.

8 (c) The defendant understands that if the defendant violates any of his conditions of  
9 pre-trial release the government may, in addition to the agreements set forth above and  
10 irrespective of its agreement in paragraph 4(c), request imprisonment for his violation of any pre-  
11 trial conditions.

12 (d) The defendant acknowledges and understands that the government is free to  
13 recommend that the defendant be sentenced to imprisonment at any point within the applicable  
14 guideline range as determined by the Court, or may recommend a sentence constituting an  
15 upward variance or departure from the applicable guideline range up to and including the  
16 statutory maximum sentence stated in this Plea Agreement.

17 (e) The defendant acknowledges and understands that the government makes no other  
18 representations to him regarding fines, whether any other specific offense characteristics apply to  
19 his conduct under Chapters Two or Three of the Sentencing Guidelines, the restitution owed, his  
20 criminal history or criminal history points under Chapter Four or whether additional  
21 enhancements or reductions under Chapter Three or Five of the United States Sentencing  
22 Guidelines apply and defendant understands that the government is free to comment and to make  
23 recommendations to the court and the probation office regarding those matters.

24 (f) The government agrees to dismiss Count One of the indictment as to this  
25 defendant at the time of sentencing.

26 5. Factual Basis.

27 Defendant will plead guilty because he is in fact guilty of the crime set forth in Count  
28 Two of the indictment. Defendant also agrees that the following are the facts of this case,

1 although he acknowledges that, as to other facts, the parties may disagree:

2 From approximately February 2012 to February 2014, the defendant,  
3 together with co-defendants John Gitmed, Holly Gitmed, and Felicia  
4 Gitmed, intentionally trafficked in counterfeit goods, specifically  
5 counterfeit erectile dysfunction drugs and associated packaging.

6 The defendant and co-defendants obtained counterfeit erectile-dysfunction  
7 medication from overseas manufacturers in China and India. The  
8 defendant and co-defendants knew that the medication they obtained was  
9 not genuine and that they were not authorized to sell genuine prescription  
10 medication. The counterfeit drugs were then imported into the United  
11 States to addresses controlled by the defendant and co-defendants John  
12 and Felicia Gitmed.

13 The defendant and co-defendants caused advertisements to be placed on  
14 Craigslist and other websites offering the counterfeit drugs for sale and  
15 claiming that the merchandise they sold was genuine. The advertisements  
16 displayed contact information for the defendant. When customers  
17 responded to the advertisements, defendant negotiated sale prices and  
18 quantity, then completed the sales by meeting in person to exchange  
19 counterfeit drugs for money or shipped the counterfeit drugs to customers  
20 in exchange for payment.

21 The defendant knowingly used counterfeit marks on and in connection  
22 with these goods, including the spurious marks of Pfizer, Eli Lilly, and  
23 Bayer. The counterfeit marks included, but were not limited to, the pill  
24 designs of Viagra and Cialis, the words "Viagra" and "Cialis," and the  
25 logos of Viagra and Cialis. The counterfeit marks used by the defendant  
26 and co-defendants were identical with and substantially indistinguishable  
27 from the genuine marks for the pill designs, brand names, and logos.  
28 These genuine marks were in use by Pfizer and Eli Lilly during the time of  
the offense were registered on the principal register of the United States  
Patent and Trademark Office.

The counterfeit drugs sold by the defendant appeared to reasonably  
informed purchasers to be identical or substantially equivalent to the  
infringed item. The amount of infringement attributable to the defendant  
was \$351,600.

6. Potential Sentence.

The following is the maximum potential sentence which defendant faces:

(a) Imprisonment.

Maximum: 20 years

(b) Fine.

Maximum: \$5,000,000

(c) Both such fine and imprisonment.

1 (d) Restitution

2 (e) Term of Supervised Release:

3 Maximum: 3 years

4 (Should the defendant violate any of the terms of his supervised release, he can be  
5 returned to prison for the period of supervised release actually imposed by the  
Court or 2 years, whichever is less.)

6 (f) Penalty Assessment.

7 One Hundred dollars (\$100.00).

8 7. Waiver of Rights.

9 Defendant understands that by pleading guilty he surrenders certain rights, including the  
10 following:

11 (a) If defendant persisted in a plea of not guilty to the charges against him, he would  
12 have the right to be represented by an attorney at all stages of the proceedings, and would have a  
13 right to a public and speedy trial. The trial could be either a jury trial or a trial by a judge sitting  
14 without a jury. Defendant has a right to a jury trial. However, in order that the trial be  
15 conducted by the judge sitting without a jury, defendant, the government and the judge all must  
16 agree that the trial be conducted by the judge without a jury.

17 (b) If the trial were a jury trial, the jury would be composed of twelve lay persons  
18 selected at random. Defendant and his attorney would have a say in who the jurors would be by  
19 removing prospective jurors for cause where actual bias or other disqualification is shown, or  
20 without cause by exercising peremptory challenges. The jury would have to agree unanimously  
21 before it could return a verdict of either guilty or not guilty. The jury would be instructed that  
22 defendant is presumed innocent and that it could not convict him unless, after hearing all the  
23 evidence, it was persuaded of his guilt beyond a reasonable doubt.

24 (c) If the trial were held before a judge without a jury, the judge would find the facts  
25 and determine, after hearing all the evidence, whether or not he was persuaded of the defendant's  
26 guilt beyond a reasonable doubt.

27 (d) At a trial, whether by a jury or a judge, the government would be required to  
28

1 present its witnesses and other evidence against defendant. Defendant would be able to confront  
2 those government witnesses and his attorney would be able to cross-examine them. In turn,  
3 defendant could present witnesses and other evidence on his own behalf. If the witnesses for  
4 defendant would not appear voluntarily, he could require their attendance through the subpoena  
5 power of the Court. At trial, the defendant would also have the right to assistance of legal  
6 counsel. If he could not afford legal counsel, one would be appointed for him by the court at no  
7 expense to him.

8 (e) At a trial, defendant would have a privilege against self-incrimination so that he  
9 could decline to testify, and no inference of guilt could be drawn from this refusal to testify.

10 Defendant understands that by pleading guilty he is waiving all of the rights set forth  
11 above and defendant's attorney has explained those rights to him and the consequences of his  
12 waiver of those rights.

13 8. Questions by Court.

14 Defendant understands that if the court questions him under oath, on the record and in the  
15 presence of counsel, about the offense to which he has pleaded guilty, his answers, if false, may  
16 later be used against him in a prosecution for perjury.

17 9. Entire Agreement.

18 This plea of guilty is freely and voluntarily made and not the result of force or threats or  
19 of promises apart from those set forth in this plea agreement. There have been no  
20 representations or promises from anyone as to what sentence this Court will impose.

21 10. Court not a Party.

22 It is understood by the parties that the sentencing court is neither a party to nor bound by  
23 this agreement and the sentencing judge is free to impose the maximum penalties as set forth in  
24 paragraph 6. Further, in making its sentencing decision, the Court may take into consideration  
25 any and all facts and circumstances concerning the criminal activities of defendant, including  
26 activities which may not have been charged in the indictment.

27 //

28 //

11. Presentence Report.

Defendant understands that the United States Probation Office is not a party to this agreement and will conduct an independent investigation of defendant's activities and his background. It will then prepare a presentence report which it will submit to the Court as its independent sentencing recommendation. In addition, the government will fully apprise the Probation Office, as well as the Court, of the full and true nature, scope and extent of the defendant's criminal activities, including information on his background and criminal history.

Dated:

BENJAMIN B. WAGNER  
United States Attorney

By:

\_\_\_\_\_  
MICHAEL G. TIERNEY  
Assistant U.S. Attorney

Dated:

\_\_\_\_\_  
ANTHONY POLLINO JR.  
Defendant

Dated:

\_\_\_\_\_  
MICHAEL AED  
Attorney for Defendant