

**IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(KANSAS CITY DOCKET)**

FILED IN OPEN COURT
8/4/2014
TIMOTHY M. O'BRIEN, CLERK
BY [Signature]
DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY P. FITZGERALD,

Defendant.

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Case No.:14-20042-CM/DJW

PLEA AGREEMENT

The United States of America, by and through Assistant United States Attorney, Jabari Wamble, and the defendant, by and through defendant's counsel, Daniel O. Herrington, hereby enter into the following plea agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure.

1. Defendant's Guilty Plea. The defendant agrees to plead guilty to Count 1 of the Information charging a violation of Title 18, United States Code, Section 1349, that is, Conspiracy to Commit Bank Fraud. By entering into this plea agreement, the defendant admits to knowingly committing this offense, and to being guilty of this offense. The defendant understands that the maximum sentence which may be imposed as to Count 1 of the Information to which the defendant has agreed to plead guilty is imprisonment of not more than 30 years and not more than a \$1,000,000 fine, and a \$100 mandatory special assessment.

2. Factual Basis for the Guilty Plea. The parties agree the facts constituting the offense to which the defendant is pleading guilty are as follows:

In November 2008, Defendant Timothy P. Fitzgerald was the Chief Financial Officer of KC United, LLC ("KC United"), a holding company for five construction services companies that was located in Kansas City, Kansas. KC United was owned by C.J. and K.J., and it was a loan customer of Bank of Blue Valley, a financial institution the deposits of which were insured by the Federal Deposit Insurance Corporation ("FDIC").

In 2008, K.J. knew that KC United was losing money from its operations. K.J. told Defendant Fitzgerald that KC United needed to show a profit in order to maintain its banking and bonding relationships. K.J. instructed Defendant Fitzgerald to manipulate the company's quarterly financial statements to falsely reflect a profit. Defendant Fitzgerald told K.J. that such manipulation would constitute fraud. K.J. directed Fitzgerald to do it anyway and that K.J. would take responsibility. Defendant Fitzgerald adjusted figures on the financial statements in order to make it appear that KC United was operating at a profit rather than a loss.

In November 2008, KC United had several business loans held by Bank of Blue Valley. The business loan agreements entered by the owners of KC United required the company to submit to Bank of Blue Valley quarterly balance sheets and profit and loss statements, as well as annual financial statements reviewed by a certified public accountant satisfactory to the bank. Defendant Fitzgerald was in part responsible for providing these materials to Bank of Blue Valley on behalf of KC United.

On or about November 7, 2008, Defendant Fitzgerald delivered to Bank of Blue Valley a quarterly balance sheet and profit and loss statement for the period ending September 30, 2008, that contained falsified information.

On or about January 31, 2009, KC United obtained a renewal of its business line of credit from Bank of Blue Valley and an increase in the credit limit to \$2,800,000. In deciding to renew the line of credit, Bank of Blue Valley relied on the falsified financial statement provided by KC United.

In or about December 2008, Defendant Fitzgerald and K.J. determined that if KC United had its outside accounting firm, review the company's annual financial statement, the accountants would easily discover the alterations that had been made to the quarterly financial statements. Defendant Fitzgerald and K.J. agreed that Defendant Fitzgerald would prepare an annual financial statement that incorporated the previously falsified profits, as well as a cover letter stating that the accounting firm had reviewed the annual financial statement. They agreed that the cover letter would be placed on the letterhead of the outside accounting firm without the accounting firm's review.

On or about March 23, 2009, Defendant Fitzgerald delivered to Bank of Blue Valley the falsified financial statement, accompanied by a letter on the letterhead of the outside accounting firm stating that the firm had reviewed the financial statement. In reality, the outside accounting firm did not review the 2008 financial statement of KC United and did not prepare the cover letter.

On or about May 27, 2009, Bank of Blue Valley consolidated and renewed several outstanding loans of KC United totaling \$1,097,294. In deciding to consolidate and renew the loans, Bank of Blue Valley relied on the falsified financial statements of KC United.

Defendant Fitzgerald again prepared falsified KC United financial statements and delivered them to Bank of Blue Valley on or about August 14, 2009, December 4, 2009,

February 17, 2010, May 18, 2010, August 12, 2010, November 16, 2010, and March 9, 2011.

On or about May 28, 2010, Bank of Blue Valley renewed KC United's line of credit with a limit of \$2,800,000. In making this decision, Bank of Blue Valley relied on the falsified financial statements of KC United.

On or about July 16, 2010, Defendant Fitzgerald prepared a 2009 year end financial statement for the company and K.J falsified a cover letter from the outside accounting firm. Defendant Fitzgerald delivered these documents to Bank of Blue Valley.

In or about April 2011, Defendant Fitzgerald's employment at KC United ended.

As KC United continued to fail to report and pay payroll taxes, its financial condition worsened. On or about April 28, 2011, three of the companies owned by KC United filed Chapter 11 bankruptcy.

On or about March 29, 2012, Bank of Blue Valley sold its position in its remaining outstanding loan to KC United and sustained a loss of \$877,382.95.

3. Application of the Sentencing Guidelines. The parties request that the United States Sentencing Guidelines ("Guidelines") be applied by the Court to calculate the applicable sentence in this case and that a sentence consistent with the Guidelines be imposed by the Court. The defendant further waives any right to have facts that determine the offense level under the Guidelines alleged in an indictment and found by a jury beyond a reasonable doubt; agrees that facts that determine the offense level will be found by the Court at sentencing by a preponderance of the evidence and agrees that the Court may consider any reliable evidence, including hearsay; and the defendant agrees to waive all constitutional challenges to the validity of the Guidelines.

4. Relevant Conduct. The parties have agreed to the application of the Guidelines and therefore both the United States and the defendant understand that the conduct charged in any dismissed counts of the indictment is to be considered as well as all other uncharged related criminal activity as relevant conduct for purposes of calculating the offense level for Count 1, in accordance with United States Sentencing Guidelines (U.S.S.G.) § 1B1.3.

5. Government's Agreements. In return for the defendant's plea of guilty as set forth herein, the United States Attorney for the District of Kansas agrees:

- a. To not file any additional charges against the defendant arising out of the facts forming the basis for the present information.
- b. To recommend the defendant receive a two (2) level reduction in the applicable offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility. In addition, if the defendant's offense level is 16 or greater, the United States will move at the time of sentencing for the defendant to receive an additional one (1) level reduction for acceptance of responsibility because the defendant timely notified the government of his intention to enter a plea of guilty.

The government's obligation concerning its agreements listed in Section 5 are contingent upon the defendant's continuing manifestation of acceptance of responsibility as determined by the United States. If the defendant denies or gives conflicting statements as to his involvement, falsely denies or frivolously contests relevant conduct that the court determines to be true, willfully obstructs or impedes the administration of justice as defined in U.S.S.G. § 3C1.1 (or willfully attempts to do so), or engages in additional criminal conduct, the United States reserves the right to request a hearing to determine if the defendant has breached this agreement.

In the event the Court finds the defendant has breached this plea agreement or otherwise failed to adhere to its terms, the United States shall not be bound by this section and may pursue any additional charges arising from the criminal activity under investigation as well as any perjury, false statement, or obstruction of justice charges which may have occurred. The defendant understands and agrees that in the event the defendant violates this plea agreement, all statements made by the defendant subsequent to the execution of this plea agreement, any testimony given by defendant before a grand jury or any tribunal or any leads from such statements or testimony shall

be admissible against the defendant in any and all criminal proceedings. The defendant waives any rights which might be asserted under the United States Constitution, any statute, Federal Rule of Criminal Procedure 11(f), Federal Rule of Evidence 410, or any other federal rule that pertains to the admissibility of any statements made by the defendant subsequent to this plea agreement.

6. **Sentence to be Determined by the Court.** The defendant understands that the sentence to be imposed will be determined solely by the United States District Judge. The United States cannot and has not made any promise or representation as to what sentence the defendant will receive.

7. **Information Provided by Defendant.** The United States agrees not to use new information the defendant provides about the defendant's own criminal conduct except as specifically authorized by U.S.S.G. § 1B1.8. As such, this information may be revealed to the Court but may not be used against the defendant in determining the defendant's applicable guideline range or departing above its guideline range. Defendant understands and agrees, however, that under U.S.S.G. § 1B1.8, there shall be no such restrictions on the use of the information: (1) previously known to the United States; (2) revealed to the United States by, or discoverable through, an independent source; (3) in a prosecution for perjury or giving a false statement; (4) in the event there is a breach of this agreement; or (5) in determining whether and to what extent a downward departure as a result of a government motion pursuant to Title 18, U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 is warranted.

8. Identification of Assets & Agreements Concerning Monetary

Penalties. The defendant agrees to cooperate fully with the United States Attorney's Office and specifically:

A) Provide a financial statement on a form approved by the USAO that discloses all assets in which defendant has any interest or over which the defendant exercises control, directly or indirectly, including those held by a spouse, nominee, or other third party, as well as any transfer of assets that has taken place within 3 years preceding the entry of this plea agreement.

B) Submit to an examination, which may be taken under oath and may include a polygraph examination.

C) Acknowledges that any waivers, consents, or releases signed by the defendant for purposes of the Presentence Investigation Report extends to the USAO.

D) Will not encumber, transfer, or dispose of any monies, property, or assets under his custody or control, without written approval from the USAO.

E) The defendant understands and agrees that, pursuant to Title 18, United States Code, Section 3613, whatever monetary penalties are imposed by the court will be due and payable immediately and subject to immediate enforcement by the United States. If the Court imposes a schedule of payments, the defendant understands that the schedule of payments is merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment. If the defendant is incarcerated, the defendant agrees to participate in the Bureau of Prisons' Inmate Financial Responsibility Program, regardless of whether the Court specifically directs participation or imposes a schedule of payments.

F) The defendant authorizes the U.S. District Court to release the funds posted as security for his appearance bond in this case to be applied to satisfy the financial obligations of the defendant, pursuant to the judgment of the Court.

G) The defendant waives any requirement for demand of payment of any fine, restitution, or assessment the District Court announces on the record the day of sentencing.

9. **Withdrawal of Plea Not Permitted.** The defendant understands that if the court accepts this plea agreement but imposes a sentence with which the defendant does not agree, the defendant will not be permitted to withdraw this plea of guilty.

10. **Payment of Special Assessment.** The defendant understands that a mandatory special assessment of \$100.00 per count of conviction will be entered against the defendant at the time of sentencing. The defendant agrees to deliver payment to the clerk of the court in the appropriate amount no later than the day of plea. If the defendant fails to make full payment of the special assessment the United States will no longer be bound by the provisions contained in Section 5(b) of this agreement. The burden of establishing an inability to pay the required special assessment lies with the defendant.

11. **Waiver of Appeal and Collateral Attack.** The defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution, the defendant's conviction, or the components of the sentence to be imposed herein including the length and conditions of supervised release. The defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal the conviction and sentence imposed. By entering into this agreement, the defendant

knowingly waives any right to appeal a sentence imposed which is within the guideline range determined appropriate by the court. The defendant also waives any right to challenge a sentence or otherwise attempt to modify or challenge his sentence or manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, U.S.C. § 2255 [except as limited by *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001)], a motion brought under Title 18, U.S.C. § 3582(c)(2) and a motion brought under Federal Rule of Civil Procedure 60(b). In other words, the defendant waives the right to appeal the sentence imposed in this case except to the extent, if any, the court departs upwards from the applicable sentencing guideline range determined by the court. However, if the United States exercises its right to appeal the sentence imposed as authorized by Title 18, U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence received as authorized by Title 18, U.S.C. § 3742(a). Notwithstanding the forgoing waivers, the parties understand that the defendant in no way waives any subsequent claims with regards to ineffective assistance of counsel or prosecutorial misconduct.

12. FOIA and Privacy Act Waiver. The defendant waives all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of the case, including, without limitation, any records that may be sought under the Freedom of Information Act, Title 5, U.S.C. § 552 and the defendant waives any rights conferred under the Privacy Act of 1974, Title 5, U.S.C. § 552a to prevent or object to the disclosure of records or materials pertaining to this case.

13. **Waiver of Claim for Attorney's Fees.** The defendant waives all claims under the Hyde Amendment, Title 18, U.S.C. § 3006A, for attorney's fees and other litigation expenses arising out of the investigation or prosecution of this matter.

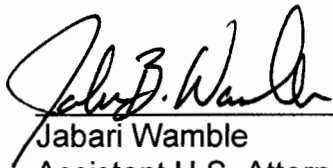
14. **Full Disclosure by the United States.** The defendant understands the United States will provide to the court and the United States Probation Office all information it deems relevant to determining the appropriate sentence in this case. This may include information concerning the background, character, and conduct of the defendant including the entirety of the defendant's criminal activities. The defendant understands these disclosures are not limited to the count to which the defendant has pled guilty. The United States may respond to comments made or positions taken by the defendant or defendant's counsel and correct any misstatements or inaccuracies. The United States further reserves its right to make any recommendations it deems appropriate regarding the disposition of this case, subject only to any limitations set forth in this plea agreement. The defendant also has the right to provide information concerning the offense and to make recommendations to the court and the United States Probation Office.

15. **Deportation Consequences.** The defendant recognizes that pleading guilty may have consequences with respect to his immigration status if he is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offense to which the defendant is pleading guilty. Removal and other immigration consequences are the subject of a separate proceeding, however, and the defendant understands that no one, including his attorney or the district court, can predict to a certainty the effect of his conviction on his immigration status. The

defendant nevertheless affirms that he wants to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States.

16. Parties to the Agreement. The defendant understands this plea agreement binds only the defendant and the United States Attorney for the District of Kansas, and that it does not bind any other federal, state, or local prosecution authority.

17. No Other Agreements. The defendant has had sufficient time to discuss this case, the evidence, and this agreement with the defendant's attorney and the defendant is fully satisfied with the advice and representation provided by the defendant's counsel. Further, the defendant acknowledges that he has read the plea agreement, understands it, and agrees it is true and accurate and not the result of any threats, duress, or coercion. The defendant further understands that this plea agreement supersedes any and all other agreements or negotiations between the parties, and that this agreement embodies each and every term of the agreement between the parties. The defendant acknowledges that the defendant is entering into this agreement and is pleading guilty because the defendant is guilty and is doing so freely and voluntarily.



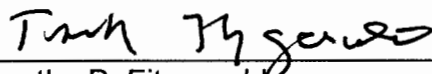
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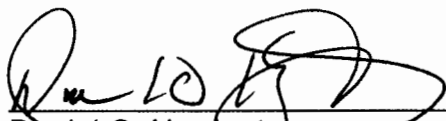
Kim Martin
Criminal Coordinator

Date: 8-4-14



Timothy P. Fitzgerald
Defendant

Date: 8-4-14



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