

ORIGINAL

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
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SUE BEITIA, CLERK

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15 UNITED STATES DISTRICT COURT

16 DISTRICT OF HAWAI'I

17 UNITED STATES OF AMERICA,

Criminal Case No. CR17-00335SOM

18 v.

PLEA AGREEMENT

20 DAVID KAPAUN,

21 Defendant.

23 IT IS HEREBY AGREED between UNITED STATES OF AMERICA, through its
24 counsel, and defendant, David Kapaun, with the advice and consent of
25 Victor Bakke, Esq., counsel for defendant, as follows:
26
27
28

I

THE PLEA

A. The Charge

Defendant agrees to waive Indictment and plead guilty to an Information charging defendant as follows:

On or about February 17, 2015, within the District of Hawai'i, defendant David Kapaun knowingly and willfully made material false and fraudulent statements to the U.S. Office of Personnel Management, the U.S. Department of Defense and the U.S. Department of the Navy regarding the nature and extent of his relationship with and his receipt of things of value over the course of years from Leonard G. Francis, all in violation of Title 18, Unites States Code, Section 1001.

B. Prosecution of Additional Counts

In exchange for the defendant's plea of guilty, the United States agrees not to initiate or prosecute any additional criminal charges against the defendant based on information now known to the United States relating to the nature and extent of defendant's relationship with Leonard Francis or Glenn Defense Marine Asia. Nothing in this agreement shields the defendant from prosecution for any act or omission not now known to the United States or committed after the date of this agreement. The United States remains free to prosecute the defendant for perjury or giving a material false statement if the defendant commits such an offense after the defendant signs this plea agreement. Should the defendant commit perjury or give a material false statement, the United States, at its sole discretion, will be free to prosecute the defendant for that offense, move to set aside this plea agreement, and/or be relieved of its obligations under this agreement.

II

NATURE OF THE OFFENSE

A. ELEMENTS EXPLAINED

Defendant understands that the offense to which defendant is pleading guilty has the following elements:

1. Defendant made false statements in a matter within the jurisdiction of United States Office of Personnel Management; the United States Department of Defense and the United States Department of the Navy;
2. Defendant acted willfully; that is, defendant acted deliberately and with knowledge both that the statement was untrue and that his conduct was unlawful;
3. The statements were material to the decisions of the Office of Personnel Management; the Department of Defense and the Department of the Navy; that is, they had a natural tendency to influence, or were capable of influencing, the agencies' decisions or activities.

B. ELEMENTS UNDERSTOOD AND ADMITTED - FACTUAL BASIS

Defendant has fully discussed the facts of this case with counsel. Defendant committed each of the elements of the crime and admits that there is a factual basis for this guilty plea. The following facts are true and undisputed and had this case gone to trial, the United States would have presented evidence to prove them beyond a reasonable doubt:

1. In or about September 2013, defendant became aware that Francis and others had been charged and arrested in connection with fraud and public corruption offenses.
2. On or about February 17, 2015, aware that Leonard Francis, a Malaysian national, and his company, Singapore-based Glenn Defense Marine Asia ("GDMA") were under indictment for various fraud and public corruption offenses, defendant submitted to the U.S. Office of Personnel Management a Standard Form 86 ("SF-86"), seeking to renew his security clearance with the Department of Defense and Department of the Navy. The SF-86 included an admonishment regarding the federal

1 criminal penalties pursuant to 18 U.S.C. § 1001 for a
2 knowing and willful false statement.

3 3. The SF-86 included questions pertaining to contacts with
4 foreign nationals and foreign entities. In answer to
5 those questions, defendant knowingly and willfully failed
6 to disclose contacts with Francis and GDMA, including
7 numerous instances of receiving various things of value
8 from Francis in return for his official acts.

9 4. Specifically, after having disclosed a number of foreign
10 contacts, none of which included Francis, defendant
11 answered "No" to a summary question asking whether, he
12 had any additional contacts with a foreign national with
13 whom he was bound by, among other things, influence and
14 obligation. Defendant knowingly and willfully falsely
15 answered "No" to this question, when in truth and in fact
16 he should have answered "Yes" and listed Francis because
17 of the numerous interactions that defendant and Francis
18 had had in the preceding years, which bound them by
19 influence and obligation, including numerous instances
20 where Francis paid for dinners, entertainment, and the
21 services of prostitutes for defendant.

22 5. Defendant's knowing and willful false statements were
23 material to the decisions and activities of the Office
24 of Personnel Management, the Department of Defense, and
25 the Department of the Navy; in that they had natural
26 tendency to influence the agencies' security clearance
27 decisions and investigative activities.

28 **III**

PENALTIES

Defendant understands that the crime to which defendant is pleading
guilty carries the following penalties:

- A. A maximum 5 years in prison;
- B. A maximum \$250,000 fine;
- C. A mandatory special assessment of \$100; and
- D. A term of supervised release of not more than 3 years. Defendant understands that failure to comply with any of the conditions of supervised release may result in revocation of supervised release, requiring defendant to serve in prison, upon any such revocation, all or part of the statutory maximum

1 term of supervised release for the offense that resulted in
2 such term of supervised release.

3 IV

4 **DEFENDANT'S WAIVER OF TRIAL RIGHTS**

5 Defendant understands that this guilty plea waives the right:

- 6 A. To continue to plead not guilty and require the Government to
7 prove the elements of the crime beyond a reasonable doubt;
- 8 B. To a speedy and public trial by jury;
- 9 C. To the assistance of counsel at all stages of trial;
- 10 D. To confront and cross-examine adverse witnesses;
- 11 E. To testify and present evidence and to have witnesses testify
12 on behalf of defendant;
- 13 F. Not to testify or have any adverse inferences drawn from the
14 failure to testify.
- 15 G. Defendant knowingly and voluntarily waives any rights and
16 defenses defendant may have under the Excessive Fines Clause
17 of the Eighth Amendment to the United States Constitution to
18 the forfeiture of property in this proceeding.
- 19 H. To assert any legal, constitutional, statutory, regulatory,
20 and procedural rights and defense that he may have under any
21 source of federal or common law, including among others,
22 challenges to personal jurisdiction, extraterritoriality,
23 statute of limitations, venue, and the form and substance of
24 the Information, including specifically any claim of
25 multiplicity or duplicity.

26 V

27 **DEFENDANT ACKNOWLEDGES NO PRETRIAL RIGHT TO BE
28 PROVIDED WITH IMPEACHMENT AND AFFIRMATIVE DEFENSE INFORMATION**

29 The United States represents that any information establishing the
30 factual innocence of defendant known to the undersigned prosecutors has
31 been turned over to defendant. The United States will continue to provide
32 such information establishing the factual innocence of defendant.

1 Defendant understands that if this case had proceeded to trial, the
2 United States would be required to provide impeachment information
3 relating to any informants or other witnesses. In addition, if defendant
4 raised an affirmative defense, the United States would be required to
5 provide information in its possession that supports such a defense.
6 Defendant acknowledges, however, that by pleading guilty defendant
7 waives the right to and will not be provided with this information.
8 Finally, defendant agrees not to attempt to withdraw the guilty plea or
9 to file a collateral attack based on the existence of this information.

10 VI

11 **DEFENDANT'S REPRESENTATION THAT GUILTY**
12 **PLEA IS KNOWING AND VOLUNTARY**

13 Defendant represents that:

- 14 A. Defendant has had a full opportunity to discuss all the facts
15 and circumstances of this case with defense counsel and has a
16 clear understanding of the charges and the consequences of
17 this plea. Defendant understands that, by pleading guilty,
18 defendant may be giving up, and rendered ineligible to
19 receive, valuable government benefits and civic rights, such
20 as the right to vote, the right to possess a firearm, the
21 right to hold office, and the right to serve on a jury.
22 Defendant further understands that the conviction on this case
23 may subject defendant to various collateral consequences,
24 including but not limited to deportation, removal or other
25 adverse immigration consequences; revocation of probation,
26 parole, or supervised release in another case; debarment from
27 government contracting; and suspension or revocation of a
28 professional license, none of which will serve as grounds to
withdraw defendant's guilty plea;
- B. No one has made any promises or offered any rewards in return
for this guilty plea, other than those contained in this
agreement or otherwise disclosed to the Court;
- C. No one has threatened defendant to induce this guilty plea;
- D. Defendant is pleading guilty because in truth and in fact
defendant is guilty and for no other reason.

1 VII

2 AGREEMENT LIMITED TO U.S. ATTORNEY'S OFFICE
3 SOUTHERN DISTRICT OF CALIFORNIA AND THE FRAUD SECTION

4 This plea agreement is limited to the U.S. Attorney's Office for
5 the District of Hawai'i, the Southern District of California, and the
6 Department of Justice, Criminal Division, Fraud Section, and cannot bind
7 any other federal, state or local prosecuting, civil, administrative,
8 or regulatory authority, although the United States will bring this plea
9 agreement to the attention of other authorities if requested.

10 VIII

11 APPLICABILITY OF SENTENCING GUIDELINES

12 Defendant understands the sentence imposed will be based on the
13 factors set forth in 18 U.S.C. § 3553(a). Defendant understands further
14 that in imposing sentence, the sentencing judge must consult the United
15 States Sentencing Guidelines ("Guidelines") and take them into account.
16 Defendant has discussed the Guidelines with defense counsel and
17 understands that the Guidelines are only advisory, not mandatory, and
18 the Court may impose a sentence more severe or less severe than otherwise
19 applicable under the Guidelines, up to the maximum in the statute of
20 conviction. Defendant understands further that the sentence cannot be
21 determined until a presentence report has been prepared by the U.S.
22 Probation Office and defense counsel and the Government have had an
23 opportunity to review and challenge the presentence report. Defendant
24 agrees to request that a presentence report be prepared. Nothing in this
25 plea agreement shall be construed as limiting the Government's duty to
26 provide complete and accurate facts to the district court and the
27 Probation Office.

IX

SENTENCE IS WITHIN SOLE DISCRETION OF JUDGE

This plea agreement is made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(B). Defendant understands that the sentence is within the sole discretion of the sentencing judge. The Government has not made and will not make any representation as to what sentence defendant will receive. Defendant understands that the sentencing judge may impose the maximum sentence provided by statute, and is also aware that any estimate of the probable sentence by defense counsel is a prediction, not a promise, and is **not binding on the Court**. Likewise, the recommendation made by the Government is not binding on the Court, and it is uncertain at this time what defendant's sentence will be. Defendant also has been advised and understands that if the sentencing judge does not follow any of the parties' sentencing recommendations, defendant nevertheless has no right to withdraw the plea of guilty.

X

PARTIES' SENTENCING RECOMMENDATIONS

A. SENTENCING GUIDELINE CALCULATIONS

Although the parties understand that the Guidelines are only advisory and just one of the factors the Court will consider under 18 U.S.C. § 3553(a) in imposing a sentence, the parties will jointly recommend the following Base Offense Level, Specific Offense Characteristics, and Adjustments and Departures:

- | | |
|-----------------------|----|
| 1. Base Offense Level | 14 |
| [USSG § 2J1.2(a)] | |
| 2. Uncharged Conduct | +3 |
| [USSG § 5K2.21] | |

3. Acceptance and Responsibility -3
[USSG § 3E1.1]

B. ACCEPTANCE AND RESPONSIBILITY

Notwithstanding paragraph A, the Government will not recommend any adjustment for Acceptance of Responsibility if defendant materially breaches this plea agreement by any of the following:

1. Fails to truthfully admit a complete factual basis for the plea at the time it is entered;
2. Denies involvement in the offense, gives conflicting statements about that involvement, or is untruthful with the Court or probation officer;
3. Falsely denies prior criminal conduct or convictions;
4. Fails to appear in court;
5. Engages in additional criminal conduct;
6. Attempts to withdraw the plea;
7. Fails to abide by any lawful court order; or
8. Contests or assists any third party in contesting the forfeiture of property(ies) seized or forfeited in connection with this case.

C. FURTHER ADJUSTMENTS AND SENTENCE REDUCTIONS INCLUDING THOSE UNDES 18 U.S.C. § 3553

The parties agree that defendant will not request or recommend additional downward adjustments and departures, including criminal history departures under USSG § 4A1.3, pursuant to the United States Sentencing Guidelines. The defendant may, however, request or recommend a sentencing variance pursuant to 18 U.S.C. § 3553(a), and the United States may oppose any such request for a variance.

D. NO AGREEMENT AS TO CRIMINAL HISTORY CATEGORY

The parties have no agreement as to defendant's criminal history.

1 **E. "FACTUAL BASIS" AND "RELEVANT CONDUCT" INFORMATION**

2 The parties agree that the facts in the "factual basis" paragraph
3 of this agreement are true, and may be considered as "relevant conduct"
4 under USSG § 1B1.3 and as the nature and circumstances of the offense
5 under 18 U.S.C. § 3553 (a) (1).

6 **F. PARTIES' RECOMMENDATIONS REGARDING CUSTODY**

7 The parties agree that the United States will recommend that the
8 defendant be sentenced to a term of imprisonment within the advisory
9 guideline range as calculated pursuant to this agreement.

10 **G. SPECIAL ASSESSMENT/FINE/RESTITUTION**

11 1. Special Assessment.

12 The parties will jointly recommend that defendant pay a special
13 assessment in the amount of \$100.00 per felony count of conviction to
14 be paid forthwith at time of sentencing.

15 2. Fine.

16 The defendant agrees to recommend and stipulates to the imposition
17 of a criminal fine in the amount of \$25,000.

18 3. Restitution

19 Pursuant to 18 U.S.C. § 3663(a)(3), the defendant agrees to the
20 entry of a restitution order in the amount of \$50,000, payable to the
21 United States Navy forthwith on the day of sentencing.

22 The defendant agrees that the restitution, restitution judgment,
23 payment provisions, and collection actions of this plea agreement are
24 intended to, and will, survive the defendant, notwithstanding the
25 abatement of any underlying criminal conviction after the execution of
26 this agreement. The defendant further agrees that any restitution
27 collected and/or distributed will survive him, notwithstanding the
28 abatement of any underlying criminal conviction after execution of this

1 agreement. The restitution shall be paid through the Office of the Clerk
2 of the District Court by bank or cashier's check or money order made
3 payable to the "Clerk, United States District Court."

4 **H. SUPERVISED RELEASE**

5 The parties jointly recommend a 24-month period of supervised
6 release, during which time, in addition to any other conditions imposed,
7 defendant will complete 200 hours of community service under the
8 supervision of the U.S. Probation Office.

9 **XI**

10 **DEFENDANT WAIVES APPEAL AND COLLATERAL ATTACK**

11 In exchange for the United States' concessions in this plea
12 agreement, the defendant knowingly and voluntarily waives, to the full
13 extent of the law, any right to appeal or to collaterally attack the
14 conviction and any lawful restitution order, except a post-conviction
15 collateral attack based on a claim of ineffective assistance of counsel.
16 The defendant also knowingly and voluntarily waives, to the full extent
17 of the law, any right to appeal or to collaterally attach his sentence,
18 except a post-conviction collateral attack based on a claim of
19 ineffective assistance of counsel, unless the Court imposes a custodial
20 sentence above the total statutory maximum for the offense of conviction.
21 If the defendant lodges an appeal validly reserved by this plea
22 agreement, the United States will be free to oppose the appeal on any
23 available grounds. If at any time the defendant files a notice of appeal,
24 appeals or collaterally attacks the conviction or sentence in violation
25 of this plea agreement, this violation will be a material breach of this
26 agreement as further defined below.

XII

CRIMES AFTER ARREST OR BREACH OF THE AGREEMENT WILL PERMIT THE GOVERNMENT TO RECOMMEND A HIGHER SENTENCE OR SET ASIDE THE PLEA

This plea agreement is based on the understanding that, prior to defendant's sentencing in this case, defendant has not committed or been arrested for any offense not known to the Government prior to defendant's sentencing. This plea agreement is further based on the understanding that defendant has committed no criminal conduct since defendant's arrest on the present charges, and that defendant will commit no additional criminal conduct before sentencing. If defendant has engaged in or engages in additional criminal conduct during this period, or breaches any of the terms of any agreement with the Government, the Government will not be bound by the recommendations in this plea agreement, and may recommend any lawful sentence. In addition, at its option, the Government any move to set aside the plea.

XII

BREACH OF THE PLEA AGREEMENT

The defendant acknowledges, understands, and agrees that if defendant violates or fails to perform any of defendant's obligations under this agreement, such violation or failure to perform may constitute a material breach of this agreement.

The defendant acknowledges, understands, and agrees further that the following non-exhaustive list of conduct by Defendant unquestionably constitutes a material breach of this plea agreement:

1. Failing to plead guilty pursuant to this agreement,
2. Failing to fully accept responsibility as established in Section X, paragraph B, above,
3. Failing to appear in court,

- 1 4. Attempting to withdraw the plea,
- 2 5. Failing to abide by any lawful court order related to this case,
- 3 6. Appealing or collaterally attacking the sentence or conviction
- 4 in violation of Section XI of this plea agreement, or
- 5 7. Engaging in additional criminal conduct from the time of
- 6 arrest until the time of sentencing.

7 In the event of Defendant's material breach of this plea agreement,
8 Defendant will not be able to enforce any of its provisions, and the
9 United States will be relieved of all its obligations under this plea
10 agreement. For example, the United States may pursue any charges
11 including those that were dismissed, promised to be dismissed, or not
12 filed as a result of this agreement. The defendant agrees that any
13 statute of limitations relating to such charges is tolled as of the date
14 of this agreement. The defendant also waives any double jeopardy defense
15 to such charges, in the event that charges are brought following a breach
16 of this agreement by the defendant. The United States may move to set
17 aside the defendant's guilty plea. The defendant may not withdraw the
18 guilty plea based on the government's pursuit of remedies for the
19 defendant's breach.

20 Additionally, the defendant agrees that in the event of the
21 defendant's material breach of this plea agreement: (i) any statements
22 made by the defendant, under oath, at the guilty plea hearing (before
23 either a Magistrate Judge or a District Judge); (ii) the stipulated
24 factual basis statement in this agreement; and (iii) any evidence derived
25 from such statements, are admissible against the defendant in any
26 prosecution of or action against the defendant. This includes the
27 prosecution of the charges that the United States agreed to dismiss or
28 not to file as part of this agreement, but later pursues because of a

1 material breach by the defendant. Additionally, the defendant knowingly
2 and voluntarily waives any argument under the United States
3 Constitution, any statute, Rule 410 of the Federal Rules of Evidence,
4 Rule 11(f) of the Federal Rules of Criminal Procedure, and/or any other
5 federal rule, that the statements or any evidence derived therefrom
6 should be suppressed or are inadmissible.

7 **XIV**

8 **ENTIRE AGREEMENT**

9 This plea agreement embodies the entire agreement between the
10 parties and supersedes any other agreement, written or oral.

11 **XV**

12 **MODIFICATION OF AGREEMENT MUST BE IN WRITING**

13 No modification of this plea agreement shall be effective unless
14 in writing signed by all parties.

15 **XVI**

16 **DEFENDANT AND COUNSEL FULLY UNDERSTAND AGREEMENT**

17 By signing this agreement, defendant certifies that defendant has
18 read it (or that it has been read to defendant in defendant's native
19 language). Defendant has discussed the terms of this agreement with
20 defense counsel and fully understands its meaning and effect.


XVII

DEFENDANT SATISFIED WITH COUNSEL

Defendant has consulted with counsel and is satisfied with counsel's representation. This is defendant's independent opinion, and its counsel did not advise him about what to say in this regard.

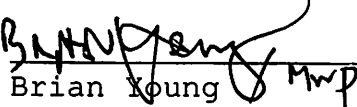
FLORENCE NAKAKUNI
United States Attorney

5/1/17
DATED

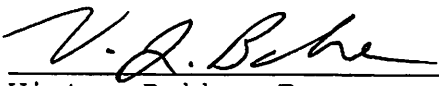

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ANDREW WEISSMANN
Chief, Fraud Section

5/1/17
DATED



Brian Young
Assistant Chief
Fraud Section

DATED


Victor Bakke, Esq.
Defense Counsel

IN ADDITION TO THE FOREGOING PROVISIONS TO WHICH I AGREE, I SWEAR UNDER PENALTY OF PERJURY THAT THE FACTS IN THE "FACTUAL BASIS" SECTION ABOVE ARE TRUE.

15 Feb 2016
DATED


David Kapaun
Defendant