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**U.S. Department of Justice***United States Attorney  
Southern District of New York**Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007**Criminal Division  
Fraud Section**Bond Building  
1400 New York Avenue, NW 11<sup>th</sup> Floor  
Washington, DC 20005*June 21, 2017

Mark S. DeMarco, Esq.  
3867 East Tremont Avenue  
Bronx, NY 10465

**Re: United States v. Malcolm Harris,**  
16 Cr. 831 (ER)

Dear Mr. DeMarco:

On the understandings specified below, the Office of the United States Attorney for the Southern District of New York and the Fraud Section of the Criminal Division of the United States Department of Justice (collectively, the "Offices") will accept a guilty plea from Malcolm Harris ("the defendant") to Counts Seven and Nine of the above-referenced Indictment. Count Seven charges the defendant with wire fraud, in violation of Title 18, United States Code, Section 1343, and carries a maximum term of imprisonment of 20 years, a maximum term of supervised release of 3 years, a maximum fine, pursuant to Title 18, United States Code, Section 3571 of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, or twice the gross pecuniary loss to persons other than the defendant resulting from the offense, and a \$100 mandatory special assessment.

Count Nine charges the defendant with engaging in monetary transactions in property derived from specified unlawful activity, in violation of Title 18, United States Code, Section 1957, and carries a maximum term of imprisonment of 10 years, a maximum term of supervised release of 3 years, a maximum fine, pursuant to Title 18, United States Code, Sections 1957(b) and 3571, of the greatest of \$250,000, twice the gross pecuniary gain derived from the offense, twice the gross pecuniary loss to persons other than the defendant resulting from the offense, or twice the amount of criminally derived property involved in the transaction(s) underlying the offense, and a \$100 mandatory special assessment. In addition to the foregoing, the Court must order restitution as specified below.

The total maximum term of imprisonment on Counts Seven and Nine is 30 years.

In consideration of the defendant's plea to the above offenses, the defendant will not be further prosecuted criminally by the Offices (except for criminal tax violations, if any, as to which the Offices cannot, and do not, make any agreement) for engaging in a wire fraud scheme to steal money from Joo Hyun Bahn, Ban Ki Sang, and Keangnam Enterprises Co. Ltd. ("Keangnam"), between in or about March 2013 and May 2015, as charged in Count Seven of the Indictment; and for engaging in monetary transactions in criminally derived property, specifically the proceeds of the aforementioned wire fraud scheme, between in or about April 2014 and May 2015, as charged in Count Nine of the Indictment; it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 *et seq.* In addition, at the time of sentencing, the Offices will move to dismiss any open Count(s) against the defendant. The defendant agrees that with respect to any and all dismissed charges he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law.

The defendant hereby admits the forfeiture allegations with respect to Counts Seven and Nine of the Indictment and agrees to forfeit to the United States, pursuant to Title 18, United States Code, Sections 981(a)(1)(C) and 982(a)(1), and Title 28, United States Code, Section 2461, a sum of money equal to \$500,000 in United States currency, representing the amount of proceeds involved in, or traceable to, the commission of those offenses (the "Money Judgment"). It is further understood that any forfeiture of the defendant's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon him in addition to forfeiture. The defendant consents to the entry of the Consent Order of Forfeiture annexed hereto as Exhibit A and agrees that the Consent Order of Forfeiture shall be final as to the defendant at the time it is ordered by the Court.

The defendant further agrees to make restitution in an amount up to \$500,000 to the victim(s) of the wire fraud scheme charged in Count Seven, in accordance with Title 18, United States Code, Sections 3663A(a)(1) and 3663A(c)(1)(A)(ii). Pursuant to 18 U.S.C. § 3663A(a)(3), the defendant further agrees to make restitution to persons other than victims of the offenses charged in Counts Seven and Nine in the following amounts: (i) \$148,211.07 to Erkko Etula; (ii) \$57,500 to David Fredston; and (iii) \$54,437.50 to Brett Nelson. The defendant agrees that the obligation to make restitution shall be made a condition of probation, *see* 18 U.S.C. § 3563(b)(2), or of supervised release, *see* 18 U.S.C. § 3583(d), as the case may be.

In consideration of the foregoing and pursuant to United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 6B1.4, the parties hereby stipulate to the following:

A. Offense Level

1. The applicable Guidelines manual is the manual effective November 1, 2016.
2. Pursuant to U.S.S.G. § 3D1.2(d), Counts Seven and Nine are grouped into a single Group because the offense level for both offense is determined largely on the basis of the total amount of loss. Pursuant to U.S.S.G. § 3D1.3(b), because Counts Seven and Nine involve offenses of the same general type, but to which different guidelines apply—U.S.S.G. § 2B1.1 and § 2S1.1,

respectively—the guideline that produces the highest offense level applies. The money laundering guideline, *see* U.S.S.G. § 2S1.1, applies because it produces the highest offense level.

3. Pursuant to U.S.S.G. § 2S1.1(a)(1), the base offense level is the offense level for the underlying wire fraud offense determined under U.S.S.G. § 2B1.1 because the defendant committed the underlying wire fraud offense and the offense level for that offense can be determined. The offense level for the wire fraud offense is calculated as follows:

a. Pursuant to U.S.S.G. § 2B1.1(a)(1), the base offense level for the wire fraud offense is 7.

b. Pursuant to U.S.S.G. § 2B1.1(b)(1)(H), 14 levels are added because the loss amount attributable to the wire fraud offense and the defendant's relevant conduct, *see* U.S.S.G. § 1B1.3(a)(2)—which the parties agree include the losses sustained by Erko Etula, David Fredston, and Brett Nelson set forth above—is more than \$550,000, but less than or equal to \$1,500,000.

c. Pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(iii), two levels are added because the wire fraud offense resulted in substantial financial hardship to one or more victims, specifically, Keangnam.

d. Pursuant to U.S.S.G. § 2B1.1(b)(10)(C), two levels are added because the wire fraud offense otherwise involved sophisticated means and the defendant intentionally engaged in and caused the conduct constituting sophisticated means.

e. Accordingly, the offense level for the wire fraud offense is 25.

4. Pursuant to U.S.S.G. § 2S1.1(b)(2)(A), one level is added because the defendant was convicted under 18 U.S.C. § 1957.

5. Pursuant to U.S.S.G. § 3C1.1, two levels are added because the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation prosecution, and sentencing of the offenses of conviction, and the obstructive conduct related to the defendant's offenses of conviction and relevant conduct, to wit, the defendant caused the destruction of evidence, specifically, his laptop computer and cellphone.

6. Assuming the defendant clearly demonstrates acceptance of responsibility, including acceptance of responsibility for the above-described obstructive conduct, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence, a two-level reduction will be warranted, pursuant to U.S.S.G. § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, the Government will move at sentencing for an additional one-level reduction, pursuant to U.S.S.G. § 3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

In accordance with the above, the applicable Guidelines offense level is 25

## B. Criminal History Category

Based upon the information now available to the Offices (including representations by the defense), the defendant has three criminal history points, calculated as follows:

1. On or about July 23, 2002, the defendant was sentenced to 21 months' incarceration as a result of his conviction on four counts of access device fraud, in violation of Title 18, United States Code, Section 1029, and one count of interstate transportation of stolen property, in violation of Title 18, United States Code, Section 2314, in the United States District Court for the Southern District of New York. Pursuant to U.S.S.G. § 4A1.1(a) and § 4A1.2(e)(1), three points are added.

In accordance with the above, the defendant's Criminal History Category is II.

## C. Sentencing Range

Based upon the calculations set forth above, the defendant's stipulated Guidelines range is 63 to 78 months' imprisonment (the "Stipulated Guidelines Range"). In addition, after determining the defendant's ability to pay, the Court may impose a fine pursuant to U.S.S.G. § 5E1.2. At Guidelines level 25, the applicable fine range is \$20,000 to \$200,000.

The parties agree that neither a downward nor an upward departure from the Stipulated Guidelines Range set forth above is warranted. Accordingly, neither party will seek any departure or adjustment pursuant to the Guidelines that is not set forth herein. Nor will either party in any way suggest that the Probation Office or the Court consider such a departure or adjustment under the Guidelines.

The parties agree that either party may seek a sentence outside of the Stipulated Guidelines Range based upon the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a).

Except as provided in any written Proffer Agreement that may have been entered into between the Offices and the defendant, nothing in this Agreement limits the right of the parties (i) to present to the Probation Office or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, United States Code, Section 3553(a); (iii) to seek an appropriately adjusted Guidelines range if it is determined based upon new information that the defendant's criminal history category is different from that set forth above; and (iv) to seek an appropriately adjusted Guidelines range or mandatory minimum term of imprisonment if it is subsequently determined that the defendant qualifies as a career offender under U.S.S.G. § 4B1.1. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, regardless of any stipulation set forth above, if the defendant fails clearly to demonstrate acceptance of responsibility, to the satisfaction of the Government, through his allocution and subsequent conduct prior to the imposition of sentence. Similarly, nothing in this Agreement limits the right of the Government to seek an enhancement

for obstruction of justice, *see* U.S.S.G. § 3C1.1, on grounds other than those described above, regardless of any stipulation set forth above, should it be determined that the defendant has either (i) engaged in conduct, unknown to the Government at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

It is understood that pursuant to U.S.S.G. § 6B1.4(d), neither the Probation Office nor the Court is bound by the above Guidelines stipulation, either as to questions of fact or as to the determination of the proper Guidelines to apply to the facts. In the event that the Probation Office or the Court contemplates any Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the Stipulated Guidelines Range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is further understood that the Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to Counts Seven and Nine authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. The Government cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Guidelines range set forth above.

It is agreed (i) that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 63 to 78 months' imprisonment, and (ii) that the Government will not appeal any sentence within or above the Stipulated Guidelines Range. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation. The parties agree that this waiver applies regardless of whether the term of imprisonment is imposed to run consecutively to or concurrently with the undischarged portion of any other sentence of imprisonment that has been imposed on the defendant at the time of sentencing in this case. The defendant further agrees not to appeal any term of supervised release that is less than or equal to the statutory maximum. The defendant also agrees not to appeal any fine that is less than or equal to \$200,000, any forfeiture amount that is less than or equal to \$500,000, or any aggregate restitution amount that is less than or equal to \$760,148.57; and the Government agrees not to appeal any fine that is greater than or equal to \$20,000, any forfeiture amount that is greater than or equal to \$500,000, and any aggregate restitution amount that is greater than or equal to \$760,148.57. Notwithstanding the foregoing, nothing in this paragraph shall be construed to be a waiver of whatever rights the defendant may have to assert claims of ineffective assistance of counsel, whether on direct appeal, collateral review, or otherwise. Rather, it is expressly agreed that the defendant reserves those rights.

The defendant hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks* Act material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

The defendant recognizes that, if he is not a citizen of the United States, his guilty plea and conviction make it very likely that his deportation from the United States is presumptively mandatory and that, at a minimum, he is at risk of being deported or suffering other adverse immigration consequences. The defendant acknowledges that he has discussed the possible immigration consequences (including deportation) of his guilty plea and conviction with defense counsel. The defendant affirms that he wants to plead guilty regardless of any immigration consequences that may result from the guilty plea and conviction, even if those consequences include deportation from the United States. It is agreed that the defendant will have no right to withdraw his guilty plea based on any actual or perceived adverse immigration consequences (including deportation) resulting from the guilty plea and conviction. It is further agreed that the defendant will not challenge his conviction or sentence on direct appeal, or through litigation under Title 28, United States Code, Section 2255 and/or Section 2241, on the basis of any actual or perceived adverse immigration consequences (including deportation) resulting from his guilty plea and conviction.

It is further agreed that should the convictions following the defendant's pleas of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against the defendant, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

It is further understood that this Agreement does not bind any federal, state, or local prosecuting authority other than the Office of the United States Attorney for the Southern District of New York and the Fraud Section of the Criminal Division of the United States Department of Justice.


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Apart from any written Proffer Agreement that may have been entered into between the Offices and defendant, this Agreement supersedes any prior understandings, promises, or conditions between the Offices and the defendant. No additional understandings, promises, or conditions have been entered into other than those set forth in this Agreement, and none will be entered into unless in writing and signed by all parties.


Very truly yours,


JOON H. KIM  
Acting United States Attorney  
Southern District of New York

SANDRA MOSER  
Acting Chief, Fraud Section  
Criminal Division


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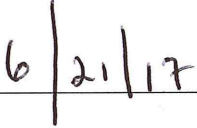
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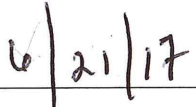
AGREED AND CONSENTED TO:

  
Malcolm Harris

  
DATE

APPROVED:

  
Mark DeMarco, Esq.  
Attorney for Malcolm Harris

  
DATE