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Judge Coughenour

MAR 31 2014

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff

v.

ALEX A. KIBKALO

Defendant.

NO. CR14-0087JCC

PLEA AGREEMENT

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Norman M. Barbosa, Assistant United States Attorney for said District, ALEX A. KIBKALO, and his attorney, Russell Leonard, enter into the following Agreement, pursuant to Federal Rule of Criminal Procedure 11(c):

1. **Waiver of Indictment.** Defendant, having been advised of the right to be charged by Indictment, agrees to waive that right and enter a plea of guilty to the charge brought by the United States Attorney in an Information.

2. **The Charge.** Defendant, having been advised of the right to have this matter tried before a jury, agrees to waive that right and enters a plea of guilty to the following charge contained in the Information: Theft of Trade Secrets, as charged in Count 1, in violation of Title 18, United States Code, Section 1832(a)(2).

PLEA AGREEMENT/KIBKALO (No. CR14-0087) - 1

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WASHINGTON 98101
(206) 553-7970

1 By entering a plea of guilty, Defendant hereby waives all objections to the form of
 2 the charging document. Defendant further understands that before entering his guilty
 3 plea, he will be placed under oath. Any statement given by Defendant under oath may be
 4 used by the United States in a prosecution for perjury or false statement.

5 **3. Elements of the Offense.** The elements of the offense to which Defendant
 6 is pleading guilty are as follows:

7 a. First, the defendant knowingly stole, or, without authorization, took,
 8 carried away, copied, sent, communicated, or conveyed, a trade secret;

9 b. Second, the trade secret was related to or included in a product
 10 produced for or placed in interstate or foreign commerce;

11 c. Third, the defendant had the intent of economically benefiting
 12 someone other than the trade secret's owner; and

13 d. Fourth, the defendant intended or knew that his action would injure
 14 the trade secret's owner.

15 **4. The Penalties.** Defendant understands that the statutory penalties
 16 applicable to the offense to which he is pleading guilty are as follows: a maximum term
 17 of imprisonment of up to ten (10) years, a fine of up to two hundred fifty thousand dollars
 18 (\$250,000.00), a period of supervision following release from prison of up to three (3)
 19 years, and a mandatory special assessment of one hundred dollars (\$100.00). If a
 20 probationary sentence is imposed, the probation period can be for up to five (5) years.
 21 Defendant agrees that the special assessment shall be paid at or before the time of
 22 sentencing.

23 Defendant understands that supervised release is a period of time following
 24 imprisonment during which he will be subject to certain restrictive conditions and
 25 requirements. Defendant further understands that if supervised release is imposed and he
 26 violates one or more of the conditions or requirements, Defendant could be returned to
 27 prison for all or part of the term of supervised release that was originally imposed. This
 28

1 could result in Defendant's serving a total term of imprisonment greater than the statutory
2 maximum stated above.

3 Defendant understands that as a part of any sentence, in addition to any term of
4 imprisonment and/or fine that is imposed, the Court may order Defendant to pay
5 restitution to any victim of the offense, as required by law.

6 Defendant agrees that any monetary penalty the Court imposes, including the
7 special assessment, fine, costs, or restitution, is due and payable immediately and further
8 agrees to submit a completed Financial Statement of Debtor form as requested by the
9 United States Attorney's Office.

10 **5. Rights Waived by Pleading Guilty.** Defendant understands that by
11 pleading guilty, he knowingly and voluntarily waives the following rights:

- 12 a. The right to plead not guilty and to persist in a plea of not guilty;
- 13 b. The right to a speedy and public trial before a jury of his peers;
- 14 c. The right to the effective assistance of counsel at trial, including, if
15 Defendant could not afford an attorney, the right to have the Court
16 appoint one for him;
- 17 d. The right to be presumed innocent until guilt has been established
18 beyond a reasonable doubt at trial;
- 19 e. The right to confront and cross-examine witnesses against Defendant
20 at trial;
- 21 f. The right to compel or subpoena witnesses to appear on his behalf at
22 trial;
- 23 g. The right to testify or to remain silent at trial, at which trial such
24 silence could not be used against Defendant; and
- 25 h. The right to appeal a finding of guilt or any pretrial rulings.

26 **6. Ultimate Sentence.** Defendant acknowledges that no one has promised or
27 guaranteed what sentence the Court will impose.
28

1 7. **Restitution.** Defendant shall make restitution to Microsoft Corporation in
2 an amount of twenty-two thousand, five hundred dollars (\$22,500.00), with credit for any
3 amounts already paid. Said amount shall be due and payable immediately and shall be
4 paid in accordance with a schedule of payments as proposed by the United States
5 Probation Office and ordered by the Court.

6 8. **Statement of Facts.** The parties agree on the following facts. Defendant
7 admits he is guilty of the charged offense or offenses:

8 Defendant, ALEX A. KIBKALO, is a former Microsoft employee who previously
9 worked for Microsoft in Lebanon. In July and August 2012, Mr. KIBKALO began
10 accessing proprietary data of Microsoft and providing that data without authorization to a
11 technology blogger in France. Mr. KIBKALO uploaded proprietary software including
12 pre-release software updates for Windows 8 RT and ARM devices, as well as the
13 Microsoft Activation Server Software Development Kit (SDK) to a computer in
14 Redmond, Washington and subsequently to his personal Windows Live SkyDrive
15 account. The SDK is an internal product development kit that was not generally known
16 to or readily ascertainable through proper means by the public. The SDK is used for
17 product key validation and was distributed for internal Microsoft use only. Microsoft
18 product teams use the SDK in customizing their product code to ensure proper validation
19 in the product key activation process. Proper validation of product keys is part of
20 Microsoft's efforts to protect against copyright infringement of its products. After
21 uploading the SDK to his SkyDrive account on August 18, 2012, KIBKALO provided
22 the blogger with links to the file on his SkyDrive account and encouraged the blogger to
23 share the SDK with others who might be able to reverse engineer the software and write
24 "fake activation server" code.

25 The value of the SDK is substantial to Microsoft because it prevents software
26 piracy across the line of Microsoft products. Therefore, the value is significantly greater
27 than the time invested in the SDK's development and creation. However, because there
28 is no external market for the SDK, it is not easily appraised. Microsoft estimates the cost

1 of production of the SDK, including testing costs, was more than \$15,000.00, but less
2 than \$30,000.00.

3 On or about August 18, 2012, within the Western District of Washington and
4 elsewhere, ALEX A. KIBKALO with intent to convert trade secrets belonging to
5 Microsoft, specifically Microsoft's Activation Server Software Development Kit, to the
6 economic benefit of someone other than Microsoft, which trade secrets were related to
7 and included in products that were produced for and placed in interstate and foreign
8 commerce, did knowingly and without authorization download, upload, transmit, deliver,
9 send, communicate, and convey such information from Microsoft's computer system, and
10 did attempt to do so, intending and knowing that such acts would injure Microsoft.

11 9. **United States Sentencing Guidelines.** Defendant understands and
12 acknowledges that the Court must consider the sentencing range calculated under the
13 United States Sentencing Guidelines and possible departures under the Sentencing
14 Guidelines together with the other factors set forth in Title 18, United States Code,
15 Section 3553(a), including: (1) the nature and circumstances of the offense; (2) the
16 history and characteristics of the defendant; (3) the need for the sentence to reflect the
17 seriousness of the offense, to promote respect for the law, and to provide just punishment
18 for the offense; (4) the need for the sentence to afford adequate deterrence to criminal
19 conduct; (5) the need for the sentence to protect the public from further crimes of the
20 defendant; (6) the need to provide the defendant with educational and vocational training,
21 medical care, or other correctional treatment in the most effective manner; (7) the kinds
22 of sentences available; (8) the need to provide restitution to victims; and (9) the need to
23 avoid unwarranted sentence disparity among defendants involved in similar conduct who
24 have similar records. Accordingly, Defendant understands and acknowledges that:

25 a. The Court will determine applicable Defendant's Sentencing
26 Guidelines range at the time of sentencing;

27 b. After consideration of the Sentencing Guidelines and the factors in
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1 18 U.S.C. 3553(a), the Court may impose any sentence authorized by law, up to the
2 maximum term authorized by law;

3 c. The Court is not bound by any recommendation regarding the
4 sentence to be imposed, or by any calculation or estimation of the Sentencing Guidelines
5 range offered by the parties or the United States Probation Department, or by any
6 stipulations or agreements between the parties in this Plea Agreement; and

7 d. Defendant may not withdraw his guilty plea solely because of the
8 sentence imposed by the Court.

9 10. **Acceptance of Responsibility.** At sentencing, *if* the district court
10 concludes Defendant qualifies for a downward adjustment acceptance for acceptance of
11 responsibility pursuant to USSG § 3E1.1(a) and the defendant's offense level is 16 or
12 greater, the United States will make the motion necessary to permit the district court to
13 decrease the total offense level by three (3) levels pursuant to USSG §§ 3E1.1(a) and (b),
14 because Defendant has assisted the United States by timely notifying the United States of
15 his intention to plead guilty, thereby permitting the United States to avoid preparing for
16 trial and permitting the Court to allocate its resources efficiently.

17 11. **Sentencing Factors.** The parties agree that the following Sentencing
18 Guidelines provisions apply to this case:

19 a. The appropriate version of the United States Sentencing Guidelines
20 Manual is the 2012 version.

21 b. The appropriate section of the United States Sentencing Guidelines
22 is Section 2B1.1, which specifies a base offense level of 6;

23 c. The base offense level should be increased by 4 levels because the
24 loss amount was more than \$10,000.00, but less than \$30,000.00 pursuant to Section
25 2B1.1(b)(1);

26 d. The base offense level should be increased by 2 levels because the
27 offense was committed from outside the United States pursuant to Section 2B1.1(b)(10).
28

1 The parties believe that these are the only Sentencing Guidelines provisions that
2 govern Defendant's offense level, except for a possible adjustment for acceptance of
3 responsibility, discussed in Paragraph 12. Defendant understands, however, that at the
4 time of sentencing, the Court is free to reject these stipulated adjustments, and is further
5 free to apply additional downward or upward adjustments in determining Defendant's
6 Sentencing Guidelines range.

7 12. **Acceptance of Responsibility.** The United States acknowledges that if
8 Defendant qualifies for an acceptance of responsibility adjustment pursuant to Section
9 3E1.1(a) of the United States Sentencing Guidelines, his total offense level should be
10 decreased by two (2) levels pursuant to Section 3E1.1(a).

11 13. **Sentencing Recommendation.** The parties agree to recommend a sentence
12 of three (3) months' imprisonment. Defendant understands this recommendation is not
13 binding upon the Court, and the Court may impose any sentence up to the maximum
14 penalty allowed.

15 14. **Non-Prosecution of Additional Offenses.** As part of this Plea Agreement,
16 the United States Attorney's Office for the Western District of Washington agrees not to
17 prosecute Defendant for any additional offenses known to it as of the time of this
18 Agreement that are based upon evidence in its possession at this time, and that arise out
19 of the conduct giving rise to this investigation. In this regard, Defendant recognizes the
20 United States has agreed not to prosecute all of the criminal charges the evidence
21 establishes were committed by Defendant solely because of the promises made by
22 Defendant in this Agreement. Defendant agrees, however, that for purposes of preparing
23 the Presentence Report, the United States Attorney's Office will provide the United
24 States Probation Office with evidence of all conduct committed by Defendant.

25 Defendant agrees that any charges to be dismissed before or at the time of
26 sentencing were substantially justified in light of the evidence available to the United
27 States, were not vexatious, frivolous or taken in bad faith, and do not provide Defendant
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1 with a basis for any future claims under the "Hyde Amendment," Pub.L. No. 105-119
2 (1997).

3 **15. Breach, Waiver, and Post-Plea Conduct.** Defendant agrees that if
4 Defendant breaches this Plea Agreement, the United States may withdraw from this Plea
5 Agreement and Defendant may be prosecuted for all offenses for which the United States
6 has evidence. Defendant agrees not to oppose any steps taken by the United States to
7 nullify this Plea Agreement, including the filing of a motion to withdraw from the Plea
8 Agreement. Defendant also agrees that if Defendant is in breach of this Plea Agreement,
9 Defendant has waived any objection to the re-institution of any charges in the Indictment
10 that were previously dismissed or any additional charges that had not been prosecuted.

11 Defendant further understands that if, after the date of this Agreement, Defendant
12 should engage in illegal conduct, or conduct that violates any conditions of release or the
13 conditions of his confinement, (examples of which include, but are not limited to,
14 obstruction of justice, failure to appear for a court proceeding, criminal conduct while
15 pending sentencing, and false statements to law enforcement agents, the Pretrial Services
16 Officer, Probation Officer, or Court), the United States is free under this Agreement to
17 file additional charges against Defendant or to seek a sentence that takes such conduct
18 into consideration by requesting the Court to apply additional adjustments or
19 enhancements in its Sentencing Guidelines calculations in order to increase the applicable
20 advisory Guidelines range, and/or by seeking an upward departure or variance from the
21 calculated advisory Guidelines range. Under these circumstances, the United States is
22 free to seek such adjustments, enhancements, departures, and/or variances even if
23 otherwise precluded by the terms of the plea agreement.

24 **16. Waiver of Appeal.** In addition to the right to appeal any pretrial rulings
25 which are waived by a plea of guilty, as part of this Plea Agreement and on the condition
26 that the Court imposes a custodial sentence that is within or below the Sentencing
27 Guidelines range (or the statutory mandatory minimum, if greater than the Guidelines
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1 range) that is determined by the Court at the time of sentencing, Defendant waives to the
2 full extent of the law:

3 a. any right conferred by Title 18, United States Code, Section 3742 to appeal
4 the sentence, including any restitution order imposed; and

5 b. any right to bring a collateral attack against the conviction and sentence,
6 including any restitution order imposed, except as it may relate to the effectiveness of
7 legal representation.

8 This waiver, however, does not preclude Defendant from bringing an appropriate
9 motion pursuant to 28 U.S.C. 2241, to address the conditions of [HIS OR HER]
10 confinement or the decisions of the Bureau of Prisons regarding the execution of his or
11 her (4) sentence.

12 If Defendant breaches this Plea Agreement at any time by appealing or collaterally
13 attacking (except as to effectiveness of legal representation) the conviction or sentence in
14 any way, the United States may prosecute Defendant for any counts, including those with
15 mandatory minimum sentences, that were dismissed or not charged pursuant to this Plea
16 Agreement.

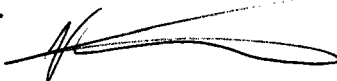
17 17. **Voluntariness of Plea.** Defendant agrees that [HE OR SHE] has entered
18 into this Plea Agreement freely and voluntarily and that no threats or promises, other than
19 the promises contained in this Plea Agreement, were made to induce Defendant to enter
20 his plea of guilty.

21 18. **Statute of Limitations.** In the event this Agreement is not accepted by the
22 Court for any reason, or Defendant has breached any of the terms of this Plea Agreement,
23 the statute of limitations shall be deemed to have been tolled from the date of the Plea
24 Agreement to: (1) thirty (30) days following the date of non-acceptance of the Plea
25 Agreement by the Court; or (2) thirty (30) days following the date on which a breach of
26 the Plea Agreement by Defendant is discovered by the United States Attorney's Office.

27 19. **Completeness of Agreement.** The United States and Defendant
28 acknowledge that these terms constitute the entire Plea Agreement between the parties.

1 This Agreement binds only the United States Attorney's Office for the Western District
2 of Washington. It does not bind any other United States Attorney's Office or any other
3 office or agency of the United States, or any state or local prosecutor.

4 Dated this 31st day of March 2014.



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6 ALEX A. KIBKALO
7 Defendant



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9 RUSSELL LEONARD
10 Attorney for Defendant



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12 NORMAN M. BARBOSA
13 Assistant United States Attorney
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