

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 04-CR-232

MICHAEL FORREST,

Defendant.

**PLEA AGREEMENT**

1. The United States of America, by its attorneys, Steven M. Biskupic, United States Attorney for the Eastern District of Wisconsin, and Matthew L. Jacobs, Assistant United States Attorney, and the defendant, Michael Forrest, who is also known as David Palacio and David Fortune, individually and by attorney Brian P. Mullins, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, enter into the following plea agreement:

**CHARGES**

2. The defendant has been charged in all four counts of a four-count indictment returned in this district on October 5, 2004. The indictment charges the defendant with wire fraud, in violation of Title 18, United States Code, Section 1343 (Count One), mail fraud, in violation of Title 18 United States Code, Section 1341 (Count Two), conspiring to violate the Food, Drug and Cosmetic Act, with the intent to defraud and mislead, in violation of Title 18, United States Code, Section 371 (Count Three), and causing the interstate transportation

of an unapproved medical device, with the intent to defraud or mislead, in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2) (Count Four).

3. The defendant has read and fully understands the charges contained in the indictment and fully understands the nature and elements of the crimes with which he has been charged and the charges and the terms and conditions of the plea agreement have been fully explained to him by his attorney.

4. The defendant voluntarily agrees to plead guilty to Count Four of the indictment, which provides in pertinent part, as follows:

**COUNT FOUR**

(21 U.S.C. §§ 331(a) and 333(a)(2))

**THE GRAND JURY FURTHER CHARGES:**

10. On or about July 12, 2004, in the State and Eastern District of Wisconsin, and elsewhere,

**MICHAEL DAVID FORREST,**  
a/k/a David Palacio and David Fortune,

with the intent to defraud and mislead, caused an adulterated class III device to be introduced and delivered for introduction into interstate commerce, in that the defendant shipped from Asuncion, Paraguay to Milwaukee, Wisconsin, a "Black Box," which was adulterated because the FDA had not approved the marketing of the class III device.

All in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2) and Title 18, United States Code, Section 2.

5. The defendant acknowledges, understands, and agrees that he is, in fact, guilty of the offense described in paragraph 4. The parties acknowledge and understand that if this

case were to proceed to trial, the government would be able to prove the following facts beyond a reasonable doubt. The defendant admits to these facts and that these facts establish his guilt beyond a reasonable doubt:

This prosecution concerns the defendant's marketing and sale of unapproved medical devices. Beginning at least as early as November, 1998, the defendant, Michael David Forrest, who is also known to use the names David Palacio and David Fortune, operated a series of businesses and associated Internet web sites using the names Jaguar Enterprises, Jaguar Enterprises of Santa Anna, Dragonfly Enterprises, and BioElectric, S.A.

Through these businesses, the defendant sold medical devices including a "Black Box," a "Magnetic Pulser," a "Magnetic Multi-pulser," and a "Rife frequency generator." The cost for these devices ranged from \$170 to over \$500. In marketing these devices over the Internet, the defendant represented that these devices could treat a wide variety of serious diseases. For example, on his web site, the defendant represented that a "Black Box" was "an electronic device known to reverse many 'incurable' viral and bacterial conditions, including AIDS, cancer, chronic fatigue syndrome, herpes, hepatitis, lupus, Gulf War syndrome (GWS) & rheumatoid arthritis."

Federal law prohibits the commercial distribution of devices that are used to diagnose, cure or treat diseases in humans unless and until they are approved by the Food and Drug Administration (FDA). Under federal law, medical devices are deemed to be "adulterated" if they have not been formally approved by the FDA for commercial distribution. At no time has the defendant sought or obtained the FDA's approval to market or sell any of the medical devices he marketed and sold over the Internet.

As part of the investigation of the defendant, the FDA purchased two Black Box devices from the defendant. The first was purchased in October, 1999. The second, which forms the basis of the charge contained in Count Four, was ordered in May 2004 and received in July 2004.

Pursuant to the directions on the defendant's web site for Jaguar Enterprises, the FDA paid for the first device using a wire transfer to a bank account the defendant maintained at a branch of Norwest Bank, which is now known as Wells Fargo Bank, in Sheboygan, Wisconsin. The Black Box was

shipped to the FDA by Jaguar Enterprises via Federal Express and reflected a return address in Miami, Florida.

Through this transaction, the FDA was able to identify several bank accounts maintained and/or used by the defendant to receive payments and pay expenses for his devices. An analysis of these accounts revealed more than \$150,000 in deposits and transfers to these accounts. The FDA was also able to identify accounts the defendant maintained at commercial shipping businesses, such as Federal Express, that he used to ship devices. An analysis of these accounts revealed more than 400 shipments during the period from November 1998 through September 2001. In addition, the FDA obtained records from Western Union reflecting wire transfers to Forrest totaling approximately \$39,000 during the period from August 2002 through August 2004.

Independent of the government's criminal investigation of Forrest, the Federal Trade Commission ("FTC") initiated a separate civil enforcement action against Forrest in 2001. In July, 2001, pursuant to a consent agreement with Forrest, the FTC entered an order under which Forrest was prohibited from making unsubstantiated medical claims about his devices, including the Black Box.

Forrest was specifically prohibited from misrepresenting that "it has been scientifically proven that the use of the Black Box, Magnetic Pulser and Magnetic Multi-Pulser is effective to kill, deactivate or disable viruses, bacteria, fungi and other parasites in humans. . . ." Forrest was also prohibited from making any representation about the ability of his devices to treat or cure cancer, AIDS, hepatitis, Gulf War Syndrome, chronic fatigue syndrome, rheumatoid arthritis, or herpes, unless he had reliable scientific evidence to substantiate these representations. Finally, Forrest was required to contact all of his customers and offer them a refund.

Despite the terms of this agreement, subsequent checks of the defendant's various web sites from August 2001 through May 2004 revealed that he was continuing to market unapproved medical devices, including the Black Box, claiming that it could treat and cure a wide variety of diseases, including those identified in the FTC's order.

In addition, a check of Forrest's web site revealed the following statement: "With the intuitive sense that the feds may be knocking on my door soon as a result of making claims about unapproved medical devices I moved

from the USA to Costa Rica in 1999.” Forrest further stated that he was then in Paraguay and “out of the reach of the FTC” and that he had “hosted the [web] site in a country that the feds could not shut it down.”

The specific charge to which the defendant will plead guilty concerns the second Black Box the FDA purchased from the defendant in July, 2004. At the time the FDA ordered this unapproved medical device, the defendant continued to advertise on his Internet web site that the device was known to be able to reverse the various “incurable” diseases described above. The device was ordered by the FDA in May, 2004, and delivered here in Milwaukee in July of 2004. When the defendant shipped the device, he understated its value (\$80 versus the \$300 the FDA actually paid) and put a label on the device stating “for veterinary use only.” When the undercover FDA agent, who ordered the device from Forrest, sent Forrest an e-mail questioning why the device indicated it was for veterinary use, Forrest responded, “thats how I safely get it through customs.” Again, Forrest has never sought or obtained the approval of the FDA to market or sell the medical devices he advertised on his various web sites, including the two Black Boxes he sold to the FDA.

This information is provided for the purpose of setting forth a factual basis for the plea of guilty. It is not a full recitation of the defendant’s knowledge of or participation in this offense.

#### **PENALTIES**

6. The parties understand and agree that the offense to which the defendant will enter a plea of guilty carries the following maximum term of imprisonment and fine: three (3) years and \$250,000. This charge also carries a special assessment of \$100 and a maximum of one (1) year of supervised release.

#### **DISMISSAL OF REMAINING COUNTS**

7. The government agrees to move to dismiss Counts One, Two and Three of the indictment at the time of sentencing.

### ELEMENTS

8. The parties understand and agree that in order to sustain the felony charge of causing an unapproved medical device to be transported in interstate commerce, with the intent to defraud or mislead, in violation of 21 U.S.C. §§ 331(a) and 333(a)(2), as set forth in Count Four of the indictment, the government must prove each of the following propositions beyond a reasonable doubt:

First, the defendant caused a device to be introduced or delivered for introduction into interstate commerce;

Second, that at the device was introduced or delivered for introduction into interstate commerce it was adulterated; and .

Third, that the defendant acted with the intent to defraud or mislead, which includes an intent to defraud or mislead the FDA in connection with its responsibility to regulate the commercial distribution of medical devices.

### SENTENCING PROVISIONS

9. The parties agree to waive the time limits in Fed. R. Crim. P. 32 relating to the presentence report, including that the presentence report be disclosed not less than 35 days before the sentencing hearing, in favor of a schedule for disclosure, and the filing of any objections, to be established by the court at the change of plea hearing.

10. The parties acknowledge, understand, and agree that any sentence imposed by the court will be pursuant to the Sentencing Reform Act, and that the court will give due regard to the Sentencing Guidelines when sentencing the defendant.

11. The parties acknowledge and agree that they have discussed all of the sentencing guidelines provisions that they believe to be applicable to the offenses to which

the defendant will plead guilty. The defendant acknowledges and agrees that his attorney, in turn, has discussed the applicable sentencing guidelines provisions with him to the defendant's satisfaction.

12. The parties acknowledge and understand that prior to sentencing the United States Probation Office will conduct its own investigation of the defendant's criminal history. The parties further acknowledge and understand that, at the time the defendant enters a guilty plea, the parties may not have full and complete information regarding the defendant's criminal history. The parties acknowledge, understand, and agree that the defendant may not move to withdraw his guilty plea solely as a result of the sentencing court's determination of defendant's criminal history.

#### **Sentencing Guidelines Calculations**

13. The parties acknowledge, understand, and agree that the sentencing guidelines calculations included in this agreement represent the positions of the parties on the appropriate sentence range under the sentencing guidelines. The defendant acknowledges and understands that the sentencing guidelines recommendations contained in this agreement do not create any right to be sentenced within any particular sentence range, and that the court may impose a reasonable sentence above or below the guideline range. The parties further understand and agree that if the defendant has provided false, incomplete, or inaccurate information that affects the calculations, the government is not bound to make the recommendations contained in this agreement.

**Relevant Conduct**

14. The parties acknowledge, understand, and agree that pursuant to Sentencing Guidelines Manual § 1B1.3, the sentencing judge will consider relevant conduct in calculating the sentencing guidelines range, even if the relevant conduct is not the subject of the offense to which defendant is pleading guilty.

15. The parties acknowledge, understand, and agree that pursuant to Sentencing Guidelines Manual § 1B1.3, the sentencing court will consider the total amount of the loss incurred by the victim as a result of the defendant's fraud even if not alleged in the offense of conviction, and will use the total amount in calculating the sentencing guidelines range.

16. For purposes of determining the defendant's offense level under the sentencing guidelines, the parties acknowledge, understand, and agree to recommend to the sentencing court that, based on evidence available to the government and admissible against the defendant, the government is able to establish beyond a reasonable doubt that the value of the medical devices sold and otherwise distributed by the defendant, which were "adulterated" under federal law because the FDA had not approved their commercial distribution, exceeded \$120,000 but was less than \$200,000.

**Base Offense Level**

17. The parties acknowledge, understand, and agree that the applicable base offense level for the offense charged in Count Four is 6 under Sentencing Guidelines Manual § 2N2.1(a).

**Specific Offense Characteristics**

18. The parties agree to recommend to the sentencing court that a 10-level increase under Sentencing Guidelines Manual §§ 2N2.1(b)(1) and 2B1.1(b)(1)(F) is applicable to the offense level for the offense charged in Count Four because the value of the adulterated medical devices sold and otherwise distributed by the defendant exceeded \$120,000 but was less than \$200,000.

19. The parties acknowledge that the government will recommend to the sentencing court that a 2-level increase under Sentencing Guidelines Manual §§ 2N2.1 and 2B1.1(b)(8)(C) is applicable to the offense level for the offense charged in Count Four because the defendant's offense involved a violation of a prior consent agreement the defendant entered into with the Federal Trade Commission (FTC) in July 2001 that prohibited the defendant from claiming that his medical devices had been scientifically proven to be effective to kill, deactivate or disable viruses, bacteria, fungi and other parasites in humans. The defendant has reserved the right to dispute this enhancement.

20. The parties acknowledge that the government will recommend to the sentencing court that a 2-level increase under Sentencing Guidelines Manual §§ 2N2.1 and 2B1.1(b)(9) is applicable to the offense level for the offense charged in Count Four because the defendant relocated his business to Central America to evade law enforcement and regulatory officials and because a substantial part of the defendant's sale of unapproved medical devices was conducted outside the United States. The defendant has reserved the right to dispute this enhancement.

21. The parties agree to recommend to the sentencing court that no other increases or enhancements are applicable to the defendant's offense level.

**Acceptance of Responsibility**

22. The government agrees to recommend a two-level decrease for acceptance of responsibility, as authorized by Sentencing Guidelines Manual § 3E1.1(a), and an additional one-level decrease, as authorized by Sentencing Guidelines Manual § 3E1.1(b), but only if the defendant exhibits conduct consistent with the acceptance of responsibility.

**Sentencing Recommendations**

23. Both parties reserve the right to apprise the district court and the probation office of any and all information that might be pertinent to the sentencing process including, but not limited to, any and all conduct related to the offenses as well as any and all matters that might constitute aggravating or mitigating sentencing factors.

24. The government agrees to recommend that a sentence be imposed at the low end of the applicable sentencing guideline range, as determined by the court. Recognizing that the Guidelines are advisory rather than mandatory, counsel for the defendant reserves the right to argue for a sentence that is less than the sentence which might otherwise be imposed under the Guidelines.

25. Both parties reserve the right to make any recommendation regarding the defendant's custodial status pending the sentencing and any other matters not specifically addressed by this agreement.

**Court's Determinations at Sentencing**

26. The parties acknowledge, understand, and agree that neither the sentencing court nor the United States Probation Office is a party to or bound by this agreement. The United States Probation Office will make its own recommendations to the sentencing court. The sentencing court will make its own determinations regarding any and all issues relating to the imposition of sentence and may impose any sentence authorized by law up to the maximum penalties set forth in paragraph 6 above. The parties further understand that the sentencing court will be guided by the sentencing guidelines but will not be bound by the sentencing guidelines and may impose a reasonable sentence above or below the calculated guideline range.

27. The parties acknowledge, understand, and agree that the defendant may not move to withdraw his guilty pleas solely as a result of the sentence imposed on him by the court.

**FINANCIAL MATTERS**

28. The defendant acknowledges and understands that any and all financial obligations imposed by the sentencing court are due and payable upon entry of the judgment of conviction. The defendant agrees not to request any delay or stay in payment of any and all financial obligations.

**Special Assessment**

29. The defendant agrees to pay the special assessment in the amount of \$100 prior to or at the time of sentencing.

**DEFENDANT'S COOPERATION**

30. The defendant, by entering into this agreement, further agrees to fully and completely cooperate with the government in its investigation of this and related matters, and to testify truthfully and completely before the grand jury and at any subsequent trials or proceedings, if asked to do so. The government agrees to advise the sentencing judge of the nature and extent of the defendant's cooperation. The parties acknowledge, understand, and agree that if the defendant provides substantial assistance to the government in the investigation or prosecution of others, only the government, in its discretion, may move for and recommend a downward departure from the applicable sentencing guidelines range. The defendant acknowledges and understands that the court will make its own determination with regard to the appropriateness and extent of a downward departure.

**DEFENDANT'S WAIVER OF RIGHTS**

31. In entering this agreement, the defendant acknowledges and understands that, in so doing, he surrenders any claims he may have raised in any pretrial motion, as well as certain rights, which include the following:

- a. If the defendant persisted in a plea of not guilty to the charges against him, he would be entitled to a speedy and public trial by a court or jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.
- b. If the trial is a jury trial, the jury would be composed of twelve citizens selected at random. The defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause, where actual bias or other disqualification is shown, or without cause

by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of guilty. The court would instruct the jury that the defendant is presumed innocent until such time, if ever, as the government establishes guilt by competent evidence to the satisfaction of the jury beyond a reasonable doubt.

- c. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not he was persuaded of defendant's guilt beyond a reasonable doubt.
- d. At such trial, whether by a judge or a jury, the government would be required to present witnesses and other evidence against the defendant. The defendant would be able to confront witnesses upon whose testimony the government was relying to obtain a conviction and he would have the right to cross-examine those witnesses. In turn the defendant could, but is not obligated to, present witnesses and other evidence on his own behalf. The defendant would be entitled to compulsory process to call witnesses.
- e. At such trial, the defendant would have a privilege against self-incrimination so that he could decline to testify and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify on his own behalf.

32. The defendant acknowledges and understands that by pleading guilty he is waiving all the rights set forth above. The defendant further acknowledges the fact that his attorney has explained these rights to him and the consequences of his waiver of these rights.

33. The defendant acknowledges and understands that he will be adjudicated guilty of the offenses to which he will plead guilty and thereby may be deprived of certain rights including, but not limited to, the right to vote, to hold public office, to serve on a jury, to possess firearms, and to be employed by a federally insured financial institution.

34. The defendant knowingly and voluntarily waives all claims he may have based upon the statute of limitations, the Speedy Trial Act, and the speedy trial provisions of the Sixth Amendment. The defendant agrees that any delay between the filing of this agreement and the entry of the defendant's guilty plea pursuant to this agreement constitutes excludable time under the Speedy Trial Act.

**Further Civil or Administrative Action**

35. The defendant acknowledges, understands, and agrees that the defendant has discussed with his attorney and understands that nothing contained in this agreement is meant to limit the rights and authority of the United States of America or any other state or local government to take further civil, administrative, or regulatory action against the defendant including, but not limited to, any listing and debarment proceedings to restrict rights and opportunities of the defendant to contract with or receive assistance, loans, and benefits from United States government agencies.

**GENERAL MATTERS**

36. The parties acknowledge, understand, and agree that this agreement does not require the government to take, or not to take, any particular position in any post-conviction motion or appeal.

37. The parties acknowledge, understand, and agree that this plea agreement will be filed and become part of the public record in this case.

38. The parties acknowledge, understand, and agree that the United States Attorney's office is free to notify any local, state, or federal agency of the defendant's conviction.

39. The defendant understands that pursuant to the Victim and Witness Protection Act and the regulations promulgated under the Act by the Attorney General of the United States, the victim of a crime may make a statement describing the impact of the offense on the victim and further may make a recommendation regarding the sentence to be imposed. The defendant acknowledges and understands that comments and recommendations by a victim may be different from those of the parties to this agreement.

**Further Action by Internal Revenue Service**

40. Nothing in this agreement shall be construed so as to limit the Internal Revenue Service in discharging its responsibilities in connection with the collection of any additional tax, interest, and penalties due from the defendant as a result of the defendant's conduct giving rise to the charges alleged in the information.

**EFFECT OF DEFENDANT'S BREACH OF PLEA AGREEMENT**

41. The defendant acknowledges and understands if he violates any term of this agreement at any time, engages in any further criminal activity prior to sentencing, or fails to appear for sentencing, this agreement shall become null and void at the discretion of the government. The defendant further acknowledges and understands that the government's agreement to dismiss any charge is conditioned upon final resolution of this matter. If this

plea agreement is revoked or if the defendant's conviction ultimately is overturned, then the government retains the right to reinstate any and all dismissed charges and to file any and all charges that were not filed because of this agreement. The defendant hereby knowingly and voluntarily waives any defense based on the applicable statute of limitations for any charges filed against the defendant as a result of his breach of this agreement. The defendant understands, however, that the government may elect to proceed with the guilty plea and sentencing. If the defendant and his attorney have signed a proffer letter in connection with this case, then the defendant further acknowledges and understands that he continues to be subject to the terms of the proffer letter.

**VOLUNTARINESS OF DEFENDANT'S PLEA**

42. The defendant acknowledges, understands, and agrees that he will plead guilty freely and voluntarily because he is, in fact, guilty. The defendant further acknowledges and agrees that no threats, promises, representations, or other inducements have been made, nor agreements reached, other than those set forth in this agreement, to induce the defendant to plead guilty.

ACKNOWLEDGMENTS

I am the defendant. I am entering into this plea agreement freely and voluntarily. I am not now on or under the influence of any drug, medication, alcohol, or other intoxicant or depressant, whether or not prescribed by a physician, which would impair my ability to understand the terms and conditions of this agreement. My attorney has reviewed every part of this agreement with me and has advised me of the implications of the sentencing guidelines. I have discussed all aspects of this case with my attorney and I am satisfied that my attorney has provided effective assistance of counsel.

Date: 8-1-05 Michael Forrest  
MICHAEL FORREST  
Defendant

I am the defendant's attorney. I carefully have reviewed every part of this agreement with the defendant. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.

Date: 8/1/05 Brian Mullins  
BRIAN P. MULLINS  
Attorney for Defendant

For the United States of America:

Date: August 2, 2005 Steven M. Biskupic  
STEVEN M. BISKUPIC  
United States Attorney

Date: 8/2/2005 Matthew L. Jacobs  
MATTHEW L. JACOBS  
Assistant United States Attorney