

FILED
AT LAS CRUCES

NOV 04 2014

MATTHEW J. DYKMAN
CLERK



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	CRIMINAL NO. <u>14-CR-3274 WPL</u>
)	
vs.)	
)	
MOHAMED BASEL ASWAD, M.D.,)	
)	
Defendant.)	

PLEA AGREEMENT

Pursuant to Federal Rule of Criminal Procedure 11, the parties hereby notify the Court of the following agreement between the United States Attorney for the District of New Mexico, the defendant, **MOHAMED BASEL ASWAD, M.D.**, and the defendant's counsel, Nancy Hollander and Molly Schmidt Nowara:

REPRESENTATION BY COUNSEL

1. The defendant understands the defendant's right to be represented by an attorney and is so represented. The defendant has thoroughly reviewed all aspects of this case with the defendant's attorney and is fully satisfied with that attorney's legal representation.

RIGHTS OF THE DEFENDANT

2. The defendant further understands the following rights:
- a. to be prosecuted by indictment;
 - b. to plead not guilty, or having already so pleaded, to persist in that plea;
 - c. to have a trial by jury; and
 - d. at a trial:

- 1) to confront and cross-examine adverse witnesses,
- 2) to be protected from compelled self-incrimination,
- 3) to testify and present evidence on the Defendant's own behalf, and
- 4) to compel the attendance of witnesses for the defense.

WAIVER OF RIGHTS AND PLEA OF GUILTY

3. The defendant hereby agrees to waive these rights and to plead guilty to an Information charging violations of 21 U.S.C. §§ 331(a) and 333(a)(1): Introduction or Delivery for Introduction into Interstate Commerce of any Food, Drug, Device, Tobacco Product or Cosmetic that is Adulterated or Misbranded.

SENTENCING

4. The defendant understands that the minimum and maximum penalty the Court can impose is:

- a. imprisonment for a period of not more than one (1) year;
- b. a fine not to exceed \$1,000.00;
- c. a mandatory term of supervised release of not more than one (1) year that must follow any term of imprisonment. (If the defendant serves a term of imprisonment, is then released on supervised release, and violates the conditions of supervised release, the defendant's supervised release could be revoked--even on the last day of the term--and the defendant could then be returned to another period of incarceration and a new term of supervised release);
- d. probation for a period of not more than five (5) years; and
- e. a mandatory special penalty assessment of \$25.00.

5. The parties recognize that the Sentencing Guidelines are advisory, and that the Court is required to consider them in determining the sentence it imposes.

6. The defendant understands that the agreement in this document determines the sentence in this case. The parties are aware that the Court may accept or reject this plea agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report. Pursuant to Federal Rule of Criminal Procedure 11(c)(5), if the Court rejects this plea agreement, the defendant shall have the right to withdraw his plea of guilty.

7. Regardless of any other provision in this agreement, the United States reserves the right to provide to the United States Pretrial Services and Probation Office and to the Court any information the United States believes may be helpful to the Court, including but not limited to information about the recommendations contained in this agreement and any relevant conduct under U.S.S.G. § 1B1.3.

DEFENDANT'S ADMISSION OF FACTS

8. By my signature on this plea agreement, I am acknowledging that I am pleading guilty because I am, in fact, guilty of the offense(s) to which I am pleading guilty. I recognize and accept responsibility for my criminal conduct. Moreover, in pleading guilty, I acknowledge that if I chose to go to trial instead of entering this plea, the United States could prove facts sufficient to establish my guilt of the offense(s) to which I am pleading guilty beyond a reasonable doubt, including any facts alleged in the Information that increase the statutory minimum or maximum penalties. I specifically admit the following facts related to the charges against me, and declare under penalty of perjury that all of these facts are true and correct:

I am a Medical Doctor and the President, Director, and sole medical practitioner of Mohamed Basel Aswad, M.D., P.C., a Domestic Professional Corporation in good standing in Deming, New Mexico since on or about August 16, 2007. I am Board Certified in oncology, hematology and internal medicine. Part of my practice includes medical oncology. I diagnose and assess the various stages of cancer, recommend and implement treatment plans, and monitor patients' progress. I also provide critical care at the local hospital and treat patients as a hematologist and as an internist.

As the sole medical practitioner of Mohamed Basel Aswad, M.D., P.C., I also order and purchase all prescription drugs, to include chemotherapy drugs administered to patients at my clinic. On March 7, 2012, in connection with the treatment of cancer patients at my clinic, I ordered 400 mg/16 ml of the drug Bevacizumab, under the trade name ALTUZAN, from what I later learned from the Food and Drug Administration was a Canadian on-line company named NonRx, and received the ALTUZAN a couple of days later. I placed the order by calling a 1-866 number and believed I was ordering from a United States-based company. After I placed the order, NonRX shipped the ALTUZAN to me and I received it at my clinic in Deming.

The ALTUZAN that I ordered and received did not bear adequate directions for use because the packaging inserts were in the Turkish language. The drug also did not bear the symbol "Rx only." It is now my understanding that the drug came from a foreign drug establishment and the drug was not annually listed with the Food and Drug Administration by the establishment as one of the drugs which was being manufactured for commercial distribution in the United States at the drug establishment. In other words, the drug was "misbranded" as that term is defined in the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399.

On April 10, 2012, the FDA seized from my clinic additional ALTUZAN, as well as other similarly misbranded chemotherapy drugs. Due to my acts or omissions, ALTUZAN, and other misbranded chemotherapy drugs, were introduced into interstate commerce on or about March 7, 2012, and those drugs have been transferred or sold to or deposited with a third party.

The sale of the ALUTZAN, and the other misbranded chemotherapy drugs amounted to approximately \$1,298,543 in proceeds.

9. By signing this agreement, the defendant admits that there is a factual basis for each element of the crime(s) to which the defendant will plead guilty. The defendant agrees that the Court may rely on any of these facts, as well as facts in the presentence report, to determine whether to accept this plea agreement.

STIPULATIONS

10. The United States and the defendant stipulate as follows:
- a. The Defendant and the United States agree, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) and USSG § 6B1.2(c), that the appropriate sentence in this case is a three (3) year term of probation. This agreement takes into account the Defendant's acceptance of responsibility, with no further reduction to occur.
 - b. If the Court accepts the plea agreement, it must inform the Defendant that the agreed upon disposition will be included in the judgment, and the Court is bound by the terms of the plea agreement once the Court accepts the plea agreement.
 - c. If the Court rejects the plea agreement, the Court must do the following on the record and in open court (or, for good cause, in camera):
 - 1) Inform the parties that the Court rejects the plea agreement;
 - 2) Advise the Defendant personally that the Court is not required to follow the plea agreement and give the Defendant the opportunity to withdraw the plea; and
 - 3) Advise the Defendant personally that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the Defendant than the plea agreement contemplated.

- d. The parties agree that the Defendant shall pay a fine in the amount of \$1,000.00, due and payable immediately at the time of sentencing.
- e. Pursuant to USSG § 3E1.1(a), the Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the defendant's criminal conduct. Consequently, so long as the defendant continues to accept responsibility for the defendant's criminal conduct, the defendant is entitled to a reduction of two (2) levels from the base offense level as calculated under the sentencing guidelines. This reduction is contingent upon the defendant providing an appropriate oral or written statement to the United States probation officer who prepares the presentence report in this case in which the defendant clearly establishes the defendant's entitlement to this reduction.
- f. Provided the Defendant meets the requirements of USSG § 3E1.1(b), the government agrees to move for a reduction of one (1) additional level from the base offense level as calculated under the sentencing guidelines.

DEFENDANT'S ADDITIONAL AGREEMENT

11. The Defendant understands the Defendant's obligation to provide the United States Pretrial Services and Probation Office with truthful, accurate, and complete information. The Defendant represents that the Defendant has complied with and will continue to comply with this obligation.

12. Except under circumstances where the Court, acting on its own, fails to accept this plea agreement, the Defendant agrees that, upon the Defendant's signing of this plea agreement, the facts that the Defendant has admitted under this plea agreement as set forth

above, as well as any facts to which the Defendant admits in open court at the Defendant's plea hearing, shall be admissible against the Defendant under Federal Rule of Evidence 801(d)(2)(A) in any subsequent proceeding, including a criminal trial, and the Defendant expressly waives the Defendant's rights under Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 with regard to the facts the Defendant admits in conjunction with this plea agreement.

RESTITUTION

13. The parties agree that as part of the Defendant's sentence, the Defendant shall pay restitution in the amount of **\$1,298,543**, this amount being due on December 31, 2014, or at the time of the Defendant's sentencing, whichever is later, to the "United States District Court Clerk," for the following victims:

<u>Victim #1</u>	<u>Amount</u>
Center for Medicare and Medicaid Services Division of Accounting Operations 7500 Security Blvd. Mailstop C3-11-03 Baltimore, MD 21244	\$1,277,589.00
<u>Victim #2</u>	<u>Amount</u>
United Healthcare Military & Veterans Tricare West Regional Privacy Office Post Office Box 105661 Atlanta, GA 30348	\$20,954.00

14. Interest and penalties will not accrue upon the restitution amount provided the Defendant pays it in full by December 31, 2014, or at sentencing, whichever is later.

15. If the Defendant fails to pay the restitution amount in full as agreed above, the Defendant understands that any payment schedule the Court may impose at sentencing or after sentencing 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. The United States Probation Office, or, after the Defendant completes any term of supervised release the Court

imposes, the United States Attorney's Office for the District of New Mexico, may revise the monthly payment amount depending on the Defendant's financial circumstances. No later than July 1 of each year after sentencing, until restitution is paid in full, the Defendant shall provide the Asset Recovery Unit, United States Attorney's Office, P.O. Box 607, Albuquerque, NM 87103, (1) a completed and signed financial statement provided to the Defendant by the United States Attorney's Office and/or the United States Probation Office, and (2) a copy of the Defendant's most recent tax returns.

FORFEITURE

16. The Defendant agrees to the imposition of a money judgment against the Defendant in the amount of **\$750,000**, representing a portion of the net profit the Defendant derived from the offense charged in the information, this amount being due at the time of the Defendant's sentencing.

DEFENDANT'S OBLIGATIONS

17. The defendant understands the defendant's obligation to provide the United States Probation Office with truthful, accurate, and complete information, including, but not limited to defendant's true identity, citizenship status, and any prior criminal convictions. The defendant hereby represents that the defendant has complied with and will continue to comply with this obligation. The defendant understands that any misrepresentation with respect to the above obligations may be considered a breach of this plea agreement.

IMMIGRATION REMOVAL AND OTHER IMMIGRATION CONSEQUENCES

18. Defendant recognizes that pleading guilty may have consequences with respect to defendant's immigration status if defendant is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses. Removal and other immigration

consequences are the subject of a separate proceeding and defendant understands that no one, including defendant's attorney or the district court, can predict to a certainty the effect of defendant's conviction on defendant's immigration consequences that defendant's plea may entail, even if the consequences include defendant's automatic removal from the United States.

WAIVER OF APPEAL RIGHTS

19. The defendant is aware that 28 U.S.C. § 1291 and 18 U.S.C. § 3742 afford a defendant the right to appeal a conviction and the sentence imposed. Acknowledging that, the defendant knowingly waives the right to appeal this conviction and any sentence, including any fine, at or under the maximum statutory penalty authorized by law. In addition, the defendant agrees to waive any collateral attack to this conviction and the sentence imposed, including any fine, pursuant to 28 U.S.C. §§ 2241, 2255, or any other extraordinary writ, except on the issue of counsel's ineffective assistance in negotiating or entering this plea or this waiver.

GOVERNMENT'S AGREEMENT

20. Provided that the defendant fulfills the defendant's obligations as set out above, the United States agrees not to bring additional criminal charges against the defendant arising out of the facts forming the basis of the present Information.

21. This agreement is limited to the United States Attorney's Office for the District of New Mexico and does not bind any other federal, state, or local agencies or prosecuting authorities.

VOLUNTARY PLEA

22. The defendant agrees and represents that this plea of guilty is freely and voluntarily made and is not the result of force, threats or promises (other than the promises set forth in this plea agreement and any addenda). There have been no representations or promises from anyone as to whether to court will accept or reject this agreement.

VIOLATION OF PLEA AGREEMENT

23. The defendant understands and agrees that if the defendant or the defendant's attorney violates any provision of this plea agreement, the United States may declare this plea agreement null and void, and the defendant will thereafter be subject to prosecution for any criminal violation including, but not limited to, any crime(s) or offense(s) contained in or related to the charges in this case, as well as perjury, false statement, and obstruction of justice, and any other crime committed by the defendant during prosecution of this case.

SPECIAL ASSESSMENT

24. At this time of sentencing, the defendant will tender a money order or certified check payable to the order of the United States District Court, District of New Mexico, 333 Lomas Boulevard, NW, Albuquerque, New Mexico 87102, in the amount of \$25.00 in payment of the special penalty assessment described above.

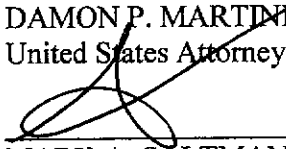
ENTIRETY OF AGREEMENT

25. This document and any addenda is a complete statement of the agreement in this case and may not be altered unless done so in writing and signed by all parties. The parties agree and stipulate that this agreement will be considered part of the record of defendant's guilty plea hearing as if the entire agreement had been read into the record of the proceeding. This

agreement is effective upon signature by the defendant and an Assistant United States Attorney, and upon entry of a guilty plea by the defendant pursuant to this agreement.

AGREED TO AND SIGNED this 4 day of November, 2014.


DAMON P. MARTINEZ
United States Attorney


MARK A. SALTMAN
Assistant U.S. Attorney
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This agreement has been read to me in the language I understand best, and I have carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant sentencing guidelines provisions, and of the consequences of entering into this agreement. No promises or inducements have been given to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.


MOHAMED BASEL ASWAD, M.D.,
Defendant

I am the attorney for MOHAMED BASEL ASWAD, M.D., and I have carefully discussed every part of this agreement with my client. Further, I have fully advised my client of his rights, of possible defenses, of the sentencing factors set forth in 18 U.S.C. § 3553(a), of the relevant sentencing guidelines provisions, and of the consequences of entering into this agreement. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.


Molly Schmidt Nowara
Attorney for Defendant