

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 17-CR-092

JAY L. FUSS,

Defendant.

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**PLEA AGREEMENT**

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1. The United States of America, by its attorneys, Gregory J. Haanstad, United States Attorney for the Eastern District of Wisconsin, and William J. Roach, Assistant United States Attorney, and the defendant, Jay L. Fuss, individually and by attorney Tom Phillip, 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 a single-count information, which alleges a violation of Title 18, United States Code, Section 1163.

3. The defendant has read and fully understands the charge contained in the information. He fully understands the nature and elements of the crime with which he has been charged, and the charge and the terms and conditions of the plea agreement have been fully explained to him by his attorney.

4. The defendant voluntarily agrees to waive indictment by Grand Jury in open court and plead guilty to the single count set forth in full in the information as follows:

**THE UNITED STATES ATTORNEY CHARGES:**

1. *Beginning in approximately September 2012, and continuing thereafter until at least May 2013, in the State and Eastern District of Wisconsin,*

**JAY L. FUSS**

*did embezzle, steal and knowingly convert to his use and the use of another, money and property valued at \$1,000 or more which belonged to the Oneida Indian Tribe of Wisconsin (the "Tribe"), and was entrusted to the custody and care of any officer, employee and agent of an Indian tribal organization.*

2. *At all times material to this indictment:*

- a. *The United States Department of Housing and Urban Development ("HUD") provided grant funds, in an amount exceeding \$1 million dollars, to the Tribe for purposes that included the construction of low-income housing. Grant funds are not authorized for non-Tribally authorized privately owned properties.*
- b. *The Tribe assigned its agency, the Oneida Housing Authority ("OHA"), to administer the grant and build the homes for Tribal members.*
- c. *Fuss was employed by the Tribe as a new construction contractor and was authorized to submit purchase orders and approve vendor invoices for payment using Tribal funds for approved properties.*
- d. *Fuss also operated Jay Fuss Construction ("JFC"), a home improvement and remodeling business that Fuss owned and managed in his private capacity. JFC was not authorized to work on Tribal properties or use Tribal grant money to purchase building materials for private remodels.*

3. *Between approximately September 2012 and May 2013, Fuss engaged in the following unlawful acts:*

- e. *Fuss, doing business as JFC, contracted with Adult Female 1 for a home*

*improvement project ("the Project") at her residence located in Green Bay, Wisconsin, to include the installation of a new roof, wooden deck, and garage and service doors, among other things. Adult Female 1 owned her residence, which was not affiliated with any OHA property and thus was not eligible for the use of Tribal funding. Adult Female 1 paid Fuss approximately \$50,000 for materials and labor to complete the Project.*

- f. Fuss utilized OHA purchase orders for the Project and approved vendor invoices for building materials and supplies resulting in the fraudulent use of the Tribes money for payment. Among other things, Fuss listed on purchase orders and invoices for building supplies the address of the Tribes properties when in fact the supplies were ultimately delivered to Adult Female 1's residence.*
- g. One invoice, dated February 7, 2013, detailed the delivery of a garage door and two service doors totaling \$1,051.18, to Powless Dr. Lot XX, a Tribal property, as well as Adult Female 1's residence. The invoice description of the doors matches those doors visible on Adult Female 1's garage.*

*All in violation of Title 18, United States Code, Section 1163.*

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 that these facts are true and correct and establish his guilt beyond a reasonable doubt:

- a. Oneida Housing under tribal government control.

The Oneida Tribe of Indians of Wisconsin (Oneida Tribe) is a federally recognized Indian Tribe that is located on a reservation spanning Brown and Outagamie counties in the Eastern District of Wisconsin. The Oneida Tribe receives HUD Indian Housing Block Grant funding from the Federal government. The terms of the grant indicate funds can be applied to low-income tribal housing and other community based projects. This grant money funds Oneida Housing Authority (OHA) projects, which operate under the auspices of Oneida tribal leadership.

During the time period set forth in the information, Jay Fuss served as the new construction supervisor and was authorized to spend OHA funds with minimal supervisory oversight. As construction supervisor, Fuss hired laborers and contractors and obtained building materials for new construction projects that were paid for by OHA funds. Each project had a corresponding purchase order that set forth a ceiling on the funds that could be spent. Fuss could approve purchases of up to \$10,000 in materials (from vendors such as Wisconsin Building

Supply (WBS), Home Depot, Menards) so long as he did not exceed the amount of the project's purchase order.

In addition to serving as construction supervisor, Fuss was also the owner and operator of Jay Fuss Construction (JFC) – his personal building/remodeling business. JFC worked primarily on Oneida tribal member's private residences. He completed many of the same projects as he did with new construction- poured concrete, assembled decks, put on new roofs, and installed appliances. Fuss also employed many of the same workers for both the new construction and JFC projects. While working as JFC, Fuss fraudulently submitted to the Oneida Tribe for payment expenses generated for private projects that he falsely represented as OHA projects.

b. Adult Female 1 Contract

In October 2012, JFC contracted with Adult Female 1 to renovate her personal residence located at an address located on the Oneida Reservation, at a total cost of \$49,700. The agreement included the following: (1) removing old and installing new shingles; (2) electrical updates; (3) installing a new garage door and garage service doors; (4) replacing a water heater, furnace and air conditioner with new units; (5) installing a new deck; and (6) replacing a shower stall, toilets, cabinet, electrical and bath fan. The residence is owned by Adult Female 1 and not an OHA property.

Over the course of the next several months, Fuss and several assistants completed the project. Adult Female 1 stated that Fuss completed her roofing project sometime around Thanksgiving 2012. Fuss ordered roofing supplies for the project from WBS through two invoices (submitted to OHA for payment) dated November 19, 2012, totaling \$1,144.50. Adult Female 1 also selected plumbing, electrical and kitchen fixtures from Menards that coincides with receipts from Menards that Fuss submitted for payment by OHA.

c. Discovery of Fraud

In January 2013, an OHA employee found several suspicious invoices on Fuss' desk. The invoices detailed the sale of building materials sold to Oneida Housing Authority and shipped to Oneida Housing Authority, care of XXXX Candle Ln for "ReRoof." One of the invoices had a note stating, "call jay when leaving yard and will open house." The OHA employee checked the OHA database and learned that the Candle Lane residence was a private residence owned by Adult Female 1. The Oneida Tribe Purchasing Department determined that between November 19, 2012 and April 25, 2013, Fuss submitted eight invoices to OHA totaling \$16,286. The invoices included, as referenced above, materials for a new roof, but additionally many of the items necessary for Adult Female 1's remodel project including Tyvec house wrap, awning, molding, and patio door. The Oneida Tribe advised WBS that they would not pay for these non-tribal expenses. WBS later billed Fuss who paid the invoices. However, Fuss fraudulently submitted additional invoices to the Oneida Tribe for the Adult Female 1 remodel project totaling \$5,810.10.

Fuss agrees that he voluntarily and intentionally submitted purchase orders and other requests for payment to the Oneida Tribe for private projects that he knew would fraudulently result in the payment to him of Oneida Tribal funds for these private projects.

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: 5 years imprisonment and \$250,000 fine. The count also carries a mandatory special assessment of \$100, and a maximum of 3 years of supervised release. The parties further recognize that a restitution order may be entered by the court.

7. The defendant acknowledges, understands, and agrees that he has discussed the relevant statutes as well as the applicable sentencing guidelines with his attorney.

### **DISMISSAL OF INDICTMENT**

8. The government agrees to dismiss the Indictment at the time of sentencing.

### **ELEMENTS**

9. The parties understand and agree that in order to sustain the charge of Embezzlement and theft from Indian tribal organizations, as set forth in the information, the government must prove each of the following propositions beyond a reasonable doubt:

*First*, the defendant embezzled, stole, converted property to his own use or the use of another;

*Second*, the property belonged to an Indian tribal organization or was entrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization;

*Third*, the property was valued in excess of \$1,000; and

*Fourth*, the defendant did so willfully.

“Embezzle” means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property.

6<sup>th</sup> Cir. Pattern Jury Instruction; *United States v. Aubrey*, 800 F.3d 1115 (9<sup>th</sup> Cir. 2015).

### **SENTENCING PROVISIONS**

10. 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.

11. 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.

12. The parties acknowledge and agree that they have discussed all of the sentencing guidelines provisions which they believe to be applicable to the offense set forth in paragraph 4 . The defendant acknowledges and agrees that his attorney in turn has discussed the applicable sentencing guidelines provisions with him to the defendant’s satisfaction.

13. 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 the guilty plea solely as a result of the sentencing court’s determination of the defendant’s criminal history.

### **Sentencing Guidelines Calculations**

14. 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**

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

### **Base Offense Level**

16. The parties acknowledge and understand that the government will recommend to the sentencing court that the applicable base offense level for the offense charged in the single count set forth in the information is 6 under Sentencing Guidelines Manual §2B1.1(a)(2).

### **Specific Offense Characteristics**

17. The parties acknowledge and understand that the government will recommend to the sentencing court that a four-level increase is applicable under Sentencing Guidelines Manual §2B1.1(b)(1)(C) because the offense involved loss in excess of \$15,000 but less than \$40,000.



**Abuse of Trust**

18. The parties acknowledge and understand that the government will recommend to the sentencing court that a 2-level increase for abuse of position of trust under Sentencing Guidelines Manual § 3B1.3 is applicable to the offense level for the offense charged in the information.

**Acceptance of Responsibility**

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

**Sentencing Recommendations**

19. Both parties reserve the right to provide the district court and the probation office with any and all information which might be pertinent to the sentencing process, including but not limited to any and all conduct related to the offense as well as any and all matters which might constitute aggravating or mitigating sentencing factors.

20. Both parties reserve the right to make any recommendation regarding any and all factors pertinent to the determination of the sentencing guideline range; the fine to be imposed; the amount of restitution and the terms and condition of its payment; the length of supervised release and the terms and conditions of the release; the defendant's custodial status pending the sentencing; and any other matters not specifically addressed by this agreement.

21. The government agrees to recommend a sentence within the applicable sentencing guideline, as determined by the Court.



### **Court's Determinations at Sentencing**

22. 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.

23. The parties acknowledge, understand, and agree that the defendant may not move to withdraw the guilty plea solely as a result of the sentence imposed by the court.

### **FINANCIAL MATTERS**

24. The defendant acknowledges and understands that any and all financial obligations imposed by the sentencing court are due and payable in full upon entry of the judgment of conviction or upon further order of the court. The defendant agrees not to request any delay or stay in payment of any and all financial obligations. If the defendant is incarcerated, the defendant agrees to participate in the Bureau of Prisons' Inmate Financial Responsibility Program, regardless of whether the Court specifically directs participation or imposes a schedule of payments.

25. The defendant agrees to provide to the Financial Litigation Unit (FLU) of the United States Attorney's Office, at least 30 days before sentencing, and also upon request of the FLU during any period of probation or supervised release imposed by the court, a complete and sworn financial statement on a form provided by FLU and any documentation required by the

form. The defendant further agrees, upon request of FLU whether made before or after sentencing, to promptly: cooperate in the identification of assets in which the defendant has an interest, cooperate in the liquidation of any such assets, and participate in an asset deposition.

#### **Special Assessment**

26. The defendant agrees to pay the special assessment in the amount of \$100 prior to, at the time of sentencing, or at a time ordered by the court.

#### **Restitution**

27. The defendant agrees to pay restitution as ordered by the court at, before the time of sentencing or upon further order of the court. The government will argue that the correct amount of restitution is \$5,810. The defendant retains the right to contest this amount. The defendant understands that because restitution for the offense is mandatory, the amount of restitution shall be imposed by the court regardless of the defendant's financial resources. The defendant agrees to cooperate in efforts to collect the restitution obligation. The defendant understands that imposition or payment of restitution will not restrict or preclude the filing of any civil suit or administrative action.

#### **DEFENDANT'S WAIVER OF RIGHTS**

28. 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 is 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, 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.

29. 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. The defendant further acknowledges that as a part of the guilty plea hearing, the court may question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant intends to plead guilty. The defendant further understands that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

30. The defendant acknowledges and understands that he will be adjudicated guilty of the offense 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.

31. 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**

32. The defendant acknowledges, understands, and agrees that the defendant has discussed with his attorney and understands that nothing contained in this agreement, including any attachment, 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**

33. 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.

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

35. 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.

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

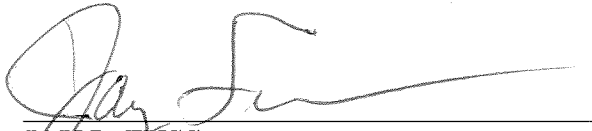
36. The defendant acknowledges and understands if he violates any term of this agreement at any time, engages in any further criminal activity prior to sentencing, or fails to appear for sentencing, this agreement shall become null and void at the discretion of the government. The defendant further acknowledges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

**VOLUNTARINESS OF DEFENDANT'S PLEA**

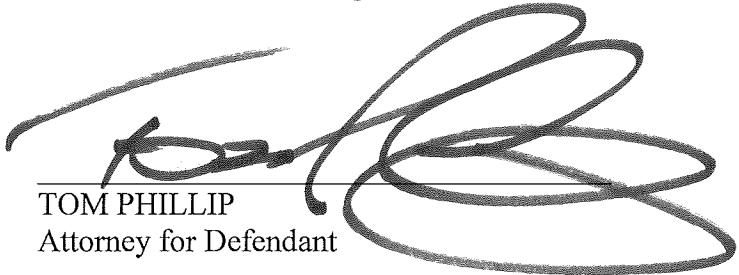
37. The defendant acknowledges, understands, and agrees that he will plead guilty freely and voluntarily because he is in fact guilty. The defendant further acknowledges and agrees that no threats, promises, representations, or other inducements have been made, nor agreements reached, other than those 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: Sept 27 2017   
JAY L. FUSS  
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: 9/27/2017   
TOM PHILLIP  
Attorney for Defendant

For the United States of America:

Date: 9/27/17   
GREGORY J. HAANSTAD  
United States Attorney

Date: 9/27/17   
WILLIAM J. ROACH  
Assistant United States Attorney