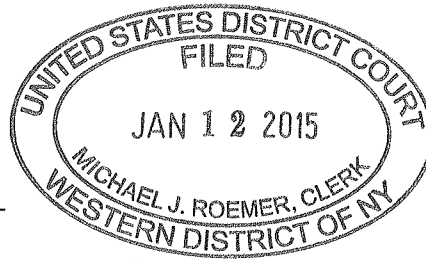


IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA,

v.

10-CR-125

GREGORY MAGNESS, *#1*

Defendant.

PLEA AGREEMENT

The defendant, GREGORY MAGNESS, and the United States Attorney for the Western District of New York (hereinafter "the government") hereby enter into a plea agreement with the terms and conditions as set out below.

I. THE PLEA AND POSSIBLE SENTENCE

1. The defendant agrees to plead guilty to two counts of the Superseding Indictment, that is:

- (a) Count 1 which charges a violation of Title 18, United States Code, Section 371 [conspiracy to smuggle merchandise into the United States] for which the maximum possible sentence is a term of imprisonment of 5 years, a fine of \$250,000, a mandatory \$100 special assessment and a term of supervised release of 3 years; and
- (b) Count 3 which charges a violation of Title 18, United States Code, Section 1956(h) [conspiracy to engage in monetary transactions in violation of Title 18, United States Code, Section 1957] for which the maximum possible sentence is a term of imprisonment of 10 years, a fine of \$250,000 or twice the value of the property involved in the transaction, whichever is greater, a mandatory \$100 special assessment and a term of supervised release of 3 years.

The defendant understands that the penalties set forth in this paragraph are the maximum penalties that can be imposed by the Court at sentencing.

2. The defendant understands that, if it is determined that the defendant has violated any of the terms or conditions of supervised release, the defendant may be required to serve in prison all or part of the term of supervised release, up to 4 years, without credit for time previously served on supervised release. As a consequence, in the event the defendant is sentenced to the maximum term of incarceration, a prison term imposed for a violation of supervised release may result in the defendant serving a sentence of imprisonment longer than the statutory maximum set forth in ¶ 1 of this agreement.

3. The defendant understands that, upon sentencing, the defendant's conviction will be reported to the Department of Justice's Bureau of Justice Assistance pursuant to 10 U.S.C. § 2408 for inclusion in the Defense Procurement Fraud Debarment Clearinghouse database and the System for Award Management of the General Services Administration. The defendant understands that 10 U.S.C. § 2408 provides for a mandatory term of debarment of at least five years, which term may only be waived if the Secretary of Defense determines a waiver is in the interests of national security.

II. ELEMENTS AND FACTUAL BASIS

4. The defendant understands the nature of the offenses set forth in ¶ 1 of this agreement and understands that if this case proceeded to trial, the government would be required to prove beyond a reasonable doubt the following elements of the crimes:

Count 1 - 18 U.S.C. 371

- a. That two or more persons agreed to commit an offense against the United States;
- b. That the defendant was a party to or a member of the agreement;

- c. That the defendant joined the agreement knowing of its objective to commit the offense against the United States and intending to join together with at least one other alleged conspirator to achieve the objective; and
- d. That at some time during the existence of the agreement at least one of its members performed an overt act in order to further the objective of the conspiracy.

Count 3 - 18 U.S.C. 1956(h)

- a. That an agreement was formed between two or more persons to: (1) engage in a financial transaction with the proceeds of a specified unlawful activity, knowing that such transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of such proceeds; and (2) to engage in a monetary transaction in excess of \$10,000 with the proceeds of a specified unlawful activity; and
- b. That the defendant knowingly became a member of the conspiracy.

FACTUAL BASIS

5. The defendant and the government agree to the following facts, which form the basis for the entry of the plea of guilty including relevant conduct:

- a. During the years of 2003 through 2006, the defendant was the president of Superior Metal Powders, Inc., a closely held corporation located in Franklin, Pennsylvania. Superior Metal Powders was in the business of supplying specialty metal powders, including Magnesium.
- b. During the years of 2003 through 2006, the defendant entered into an agreement with ESM Group, Inc. ("ESM"), headquartered in Amherst, New York, to provide ESM pure Magnesium powder for ESM to sell to their customers. The defendant received a portion of the net proceeds from those sales. During this same period, the defendant then entered into an agreement with William Nehill the president of International Technology Group, Inc., located in Orchard Park, New York to import pure magnesium powder from the

People's Republic of China that the defendant would sell to ESM.

- c. During the above time period, the United States Department of Commerce had in place an anti-dumping order with respect to pure magnesium powder imported from the People's Republic of China. Under the anti-dumping order, pure magnesium powder imported from China was subject to a 305.56% duty. Magnesium reagent, which consists of 90% or less of pure Magnesium by weight plus one or more non-magnesium granular materials, under the anti-dumping order imported from China was subject to a 5% duty.
- d. The defendant Gregory Magness avoided paying the 305.56% anti-dumping duty by ordering from William Nehill pure Magnesium from China mixed with chunks of Aluminum nuggets. The shipments were sent in the proportion of 90% pure magnesium and 10% aluminum nuggets. The defendant was aware, at the time of the orders, of the dumping duty and the United States Commerce Department ruling which stated that excluded from the anti-dumping duty were mixtures containing 90% or less pure magnesium by weight and one or more of certain non-magnesium granular materials to make magnesium-based reagent mixtures. One of the non-magnesium granular materials of which the Department of Commerce was aware was used to make magnesium based reagent was aluminum. The Department of Commerce ruling further stated that a party importing a magnesium based reagent which includes one or more materials not on the list is required to seek a scope clarification from the department before such mixture can be imported free from dumping duties.
- e. The defendant Gregory Magness did not seek a scope clarification from the Department of Commerce, even though he was aware that the shipments contained chunks of aluminum and not aluminum in granular form thereby consciously avoiding the Department of Commerce ruling which resulted in avoidance of the anti-dumping duty. Invoices presented to United States Customs and Border Protection during the importation of the magnesium falsely stated that the Magnesium being imported into the United States were reagents which resulted in them being assessed only the 5% duty rather than the 305.56% duty required to be paid pursuant to the anti-dumping order.

- f. During the above stated time periods the defendant caused falsely labeled pure Magnesium powder to be imported into the United States from China. As a result the total amount of lost duty to the United States Government was approximately \$6,246,605.
- g. Within the same period as set forth above the defendant was compensated for the Chinese imported Magnesium the defendant sold to ESM. For example in or about November 14, 2005, ESM transferred, by way of wire, from their account in the Western District of New York, to the Superior Metal Powders bank account in National City Pennsylvania \$343,471.60 pursuant to a profit sharing agreement he had with ESM. On or about November 22, 2005, the defendant deposited a check in the amount of \$128,000 received from Superior Metal Powders bank account and deposited into a personal bank account with Northwest savings bank.

III. SENTENCING GUIDELINES

6. The defendant understands that the Court must consider but is not bound by the Sentencing Guidelines (Sentencing Reform Act of 1984).

BASE OFFENSE LEVEL

7. Pursuant to Guidelines §§ 3D1.1(a)(1) and 3D1.2, the parties agree that Guidelines §2T3.1(a) and §2T4.1(J) apply to the offenses of conviction and provide for a base offense level of 24.

SPECIFIC OFFENSE CHARACTERISTICS **U.S.S.G. CHAPTER 2 ADJUSTMENTS**

8. The government and the defendant agree that the following specific offense characteristics do apply:

- a. the 2 level increase pursuant to Guidelines § 2T3.1(b)(1) [the offense involved sophisticated means];

- b. the 1 level increase pursuant to Guidelines § 2S1.1(b)(2)(A)
[count of conviction is 18 U.S.C. §1957]

ADJUSTED OFFENSE LEVEL

9. Based on the foregoing, it is the understanding of the government and the defendant that the combined adjusted offense level for the offenses of conviction is 27.

ACCEPTANCE OF RESPONSIBILITY

10. At sentencing, the government agrees not to oppose the recommendation that the Court apply the two (2) level downward adjustment of Guidelines § 3E1.1(a) (acceptance of responsibility) and further agrees to move the Court to apply the additional one (1) level downward adjustment of Guidelines § 3E1.1(b), which would result in a total offense level of 24.

CRIMINAL HISTORY CATEGORY

11. It is the understanding of the government and the defendant that the defendant's criminal history category is I. The defendant understands that if the defendant is sentenced for, or convicted of, any other charges prior to sentencing in this action the defendant's criminal history category may increase. The defendant understands that the defendant has no right to withdraw the pleas of guilty based on the Court's determination of the defendant's criminal history category.

GUIDELINES' APPLICATION, CALCULATIONS AND IMPACT

12. It is the understanding of the government and the defendant that, with a total offense level of 24 and criminal history category of I, the defendant's sentencing range would be a term of imprisonment of 51 to 63 months, a fine of \$10,000 to \$100,000, and a period of supervised release of 1 to 3 years. Notwithstanding this, the defendant understands that at sentencing the defendant is subject to the maximum penalties set forth in ¶ 1 of this agreement.

13. The government and the defendant agree to the correctness of the calculation of the Sentencing Guidelines range set forth above. The government and the defendant, however, reserve the right to recommend a sentence outside the Sentencing Guidelines range. This paragraph reserves the right to the government and the defendant to bring to the attention of the Court all information deemed relevant to a determination of the proper sentence in this action.

14. The defendant understands that the Court is not bound to accept any Sentencing Guidelines calculations set forth in this agreement or recommended by either party and the defendant will not be entitled to withdraw the pleas of guilty based on the sentence imposed by the Court.

IV. STATUTE OF LIMITATIONS

15. In the event the defendant's pleas of guilty are withdrawn, or convictions vacated, either pre- or post-sentence, by way of appeal, motion, post-conviction proceeding,

collateral attack or otherwise, the defendant agrees that any charges dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government and further agrees not to assert the statute of limitations as a defense to any other criminal offense involving or related to conspiracy to defraud the United States Government, smuggling of goods and merchandise into the United States and money laundering which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the withdrawal of the guilty pleas or vacating of the convictions becomes final.

V. GOVERNMENT RIGHTS AND RESERVATIONS

16. The defendant understands that the government has reserved the right to:
 - a. provide to the Probation Office and the Court all the information and evidence in its possession that the government deems relevant concerning the defendant's background, character and involvement in the offense charged, the circumstances surrounding the charge and the defendant's criminal history;
 - b. respond at sentencing to any statements made by the defendant or on the defendant's behalf that are inconsistent with the information and evidence available to the government;
 - c. advocate for a specific sentence consistent with the terms of this agreement including the amount of restitution and/or a fine and the method of payment;
 - d. modify its position with respect to any sentencing recommendation or sentencing factor under the Guidelines including criminal history category, in the event that subsequent to this agreement the government receives previously unknown information, including conduct and statements by the defendant subsequent to this agreement, regarding the recommendation or factor;

- e. oppose any application for a downward departure and/or sentence outside the Guidelines range made by the defendant.

17. At sentencing, the government will move to dismiss the open counts of the Superseding Indictment in this action pending against the defendant.

18. In exchange for the defendant's plea of guilty, the government agrees to offer Justin Magness a plea agreement whereby Justin Magness would plead guilty to a misdemeanor violation of Title 19, United States Code, Section 1436.

VI. RESTITUTION AND FINANCIAL PENALTY PROVISIONS

19. The defendant understands that the Court must require restitution in the amount of \$6,246,605 to be paid to United States Customs and Border Protection as part of the sentence pursuant to Sentencing Guidelines § 5E1.1 and Title 18, United States Code, Section 3663A.

20. The defendant agrees to disclose fully and completely all assets in which the defendant either has any property interest or over which the defendant exercises control, directly or indirectly, including those held by a spouse, nominee or other third party. The defendant agrees to make complete financial disclosure to the United States by truthfully executing a sworn financial statement by the deadline set by the United States, or if no deadline is set, no later than two weeks prior to the date of sentencing. The defendant agrees to authorize the release of all financial information requested by the United States, including, but not limited to, executing authorization forms for the United States to obtain

tax information, bank account records, credit history, and social security information. The defendant agrees to discuss or answer any questions by the United States relating to the defendant's complete financial disclosure. The defendant will submit to an examination under oath and/or a polygraph examination conducted by an examiner selected by the U.S. Attorney's Office on the issue of the defendant's financial disclosures and assets, if deemed necessary by the U.S. Attorney's Office. The defendant certifies that the defendant has made no transfer of assets in contemplation of this prosecution for the purpose of evading or defeating financial obligations that are created by the agreement and/or that may be imposed upon the defendant by the Court. In addition, the defendant promises that the defendant will make no such transfers in the future.

21. The defendant agrees that any financial records and information provided by the defendant to the Probation Office, before or after sentencing, may be disclosed to the United States Attorney's Office for use in the collection of any unpaid financial obligation.

22. The defendant understands and agrees that the Court, at the time of sentencing, may order that all monetary penalties imposed at that time (including any fine, restitution, or special assessment imposed in accordance with the terms and conditions of this plea agreement) are to be due and payable in full immediately and subject to immediate enforcement by the United States. The defendant understands and acknowledges that any schedule of payments imposed by the Court at the time of sentencing is merely a minimum schedule of payments and does not, in any way, limit those methods available to the United States to enforce the judgment.

23. The defendant agrees that any funds and assets in which the defendant has an interest, which have been seized or restrained by the government or law enforcement as part of the investigation underlying this plea agreement, and not subject to forfeiture, will be used to satisfy any debts owed by the defendant to the United States and/or agencies thereof.

VII. APPEAL RIGHTS

24. The defendant understands that Title 18, United States Code, Section 3742 affords a defendant a limited right to appeal the sentence imposed. The defendant, however, knowingly waives the right to appeal and collaterally attack any component of a sentence imposed by the Court which falls within or is less than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶ 12, above, notwithstanding the manner in which the Court determines the sentence. In the event of an appeal of the defendant's sentence by the government, the defendant reserves the right to argue the correctness of the defendant's sentence. The defendant further agrees not to appeal a restitution order which does not exceed the amount set forth in Section IV of this agreement.

25. The defendant understands that by agreeing not to collaterally attack the sentence, the defendant is waiving the right to challenge the sentence in the event that in the future the defendant becomes aware of previously unknown facts or a change in the law which the defendant believes would justify a decrease in the defendant's sentence.

26. The government waives its right to appeal any component of a sentence imposed by the Court which falls within or is greater than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶ 12, above, notwithstanding the manner in which the Court determines the sentence. However, in the event of an appeal from the defendant's sentence by the defendant, the government reserves its right to argue the correctness of the defendant's sentence.

VIII. COOPERATION

27. The defendant will cooperate with the government by providing complete and truthful information regarding the defendant's knowledge of any and all activity, in any criminal or civil proceeding whether undertaken by the defendant or others, in any way involving or related to the unlawful importation or smuggling of goods and merchandise into the United States, defrauding the United States government or money laundering. The defendant's cooperation shall also include submitting to interviews by government attorneys and agents, as well as testifying truthfully and completely before grand juries, at depositions and at such pre-trial and trial proceedings as the government shall deem necessary.

28. The defendant's cooperation shall also be provided to any local, state or federal authorities designated by the government and who have agreed to abide by the terms of the "Cooperation" section of this agreement. The defendant's obligation to testify truthfully and completely shall extend to proceedings in local, state and federal courts in jurisdictions which have agreed to abide by this agreement.

29. In exchange for the defendant's plea of guilty and cooperation as set forth in this agreement, the defendant will not be prosecuted by the Office of the United States Attorney for the Western District of New York for any other federal criminal offenses committed in the Western District of New York in any way involving or related to the unlawful importation or smuggling of goods and merchandise into the United States, defrauding the United States government or money laundering committed up to the date of this agreement and about which the defendant provides complete and truthful information.

30. Further, no testimony, statements or tangible objects provided by the defendant in compliance with this agreement (or any information directly or indirectly derived therefrom) will be used against the defendant in any criminal case, except a prosecution for perjury or making false statements.

31. The defendant understands that, notwithstanding the defendant's obligation to cooperate with the government as set forth in this agreement, the government will not file a motion pursuant to Guidelines § 5K1.1 or Title 18, United States Code, Section 3553(e) for a downward departure from the defendant's sentencing range or pursuant to Rule 35(b) for a reduction of the defendant's sentence.

32. This agreement does not preclude the prosecution of the defendant for perjury or making false statements in the event the defendant testifies falsely or provides false information to the government. This agreement is not contingent upon the filing of charges

against, the return of an Indictment against, or the successful prosecution of, any person or entity.

33. It is a condition of this agreement that, up through the date of the defendant's sentencing, the defendant shall commit no further crimes. It is also a condition of this agreement that the defendant must, at all times, give complete, truthful and accurate information and testimony and not withhold information from the government or refuse to testify truthfully and completely. Should the defendant be sentenced prior to the completion of the defendant's cooperation with the government, the defendant's obligation to comply with the cooperation provisions of this agreement extends past sentencing.

34. In the event the government believes the defendant has violated any of the conditions of the "Cooperation" section of this agreement, the government, in addition to its other rights as set forth in the "Cooperation" section of this agreement, reserves the right: to petition the Court, before or after sentencing, for an order declaring that the defendant has breached the "Cooperation" section and relieving the government of its obligations under this section.

35. In the event the government petitions the Court to declare that the defendant has breached the "Cooperation" section of this agreement, whether the defendant has violated any of the conditions of the "Cooperation" section shall be determined by the Court in an appropriate proceeding at which any disclosures and documents provided by the defendant shall be admissible and at which the government shall be required to establish

any violation by a preponderance of the evidence. In order to establish any violation by the defendant, the government is entitled to rely on statements and information given by the defendant pursuant to this agreement.

36. If the "Cooperation" section of this agreement is declared breached by the Court:

- a. the defendant shall thereafter be subject to prosecution for any federal criminal violations of which the government has knowledge, including but not limited to, perjury and obstruction of justice;
- b. the government may withdraw any motion filed pursuant to Sentencing Guidelines § 5K1.1, Title 18, United States Code, Section 3553(e) and/or Rule 35(b);
- c. the defendant has no right to withdraw the plea of guilty;
- d. the defendant shall waive all rights under Fed. R. Crim. P. 11(f), Fed. R. Evid. 410 and Sentencing Guidelines § 1B1.8 and the defendant expressly agrees that all statements, testimony and tangible objects provided by the defendant (with the exception of statements made in open court during guilty plea proceedings), whether prior or subsequent to this agreement, can be used directly and indirectly in any and all criminal proceedings against the defendant; and
- e. the defendant agrees that any charges that were dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government. Furthermore, the defendant agrees not to assert the statute of limitations as a defense to any criminal offense involving or related to the unlawful importation or smuggling of goods and merchandise into the United States, defrauding the United States government or money laundering which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the Court's order declaring the agreement breached by the defendant becomes final.

37. At the time of sentencing, the government will make the nature and extent of the defendant's compliance with this agreement known to the Court. In the event the defendant is sentenced prior to the completion of the defendant's cooperation with the government, the government reserves the right to modify any recommendation to be made by the government at sentencing pursuant to Guidelines § 5K1.1 and/or Title 18, United States Code, Section 3553(e).

38. The defendant's attorney is expressly permitted to be present at any time the defendant is questioned or interviewed by government agents regarding the matters set forth in this agreement.

IX. FORFEITURE PROVISIONS

39. Based upon his plea of guilty to Counts 1 and 3 of the Superseding Indictment, the defendant, GREGORY MAGNESS, agrees to criminally forfeit all of his right, title and interest in the following property 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(c):

MONIES AND CONTENTS FORMERLY CONTAINED WITHIN CERTAIN FINANCIAL INSTITUTIONS

- a. The sum of \$222,000.00 United States currency seized from Fidelity Investment account number HTK 047 112;
- b. The sum of \$7,000.00 United States currency seized from Fidelity Investment account number HTK 047 090; and
- c. The sum of \$58,943.23 United States currency seized from National City Bank of Pennsylvania account number 967054690.

40. The defendant agrees to the entry of a Preliminary and Final Order of Forfeiture forfeiting the defendant's interest in the properties identified above. The defendant further consents and agrees that the Order of Forfeiture shall become final as to the defendant prior to sentencing and agrees that it shall be made part of the defendant's sentence and included in the Judgment pursuant to Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure.

41. In consideration for the agreement to forfeit the above referenced properties, the government agrees not to pursue the forfeiture of the following property and agrees to return the following property to the defendant, through his attorney:

- a. The sum of \$75,000.00 United States currency seized from Northwest Savings Bank insured money fund account number 2226005995;
- b. The sum of \$7,000.00 United States currency seized from Fidelity Investment account number HTK 047 104;
- c. The sum of \$18,000.00 United States currency seized from Fidelity Investment account number HTK 047 112;
- d. No forfeiture proceedings will be instituted against the premises and real property located at 289 Palm Hill Road, Polk, Pennsylvania; and
- e. The government also agrees to release any restitution judgment liens arising from Gregory Magness' plea agreement against the real property known as 289 Palm Hill Road, Polk, Pennsylvania.

42. The defendant's spouse, Norma J. Magness, acknowledges that she has been informed of the terms of this plea agreement and understands the return of property as noted above is conditioned upon her not making any further claim to the assets that are subject to

forfeiture in this agreement. Pursuant to that agreement, Norma Magness will execute a separate Stipulation agreeing to these conditions and promises.

43. Defendant acknowledges that he understands that the criminal forfeiture of property is part of the sentence that may be imposed in this case and waives any failure by the court to advise him of this, pursuant to Rule 11(b)(1)(J), at the time the guilty plea is accepted.

44. The defendant knowingly, intelligently, and voluntarily waives his right to a jury trial on the forfeiture of the assets. Defendant knowingly, intelligently, and voluntarily waives all constitutional, legal and equitable defenses to the forfeiture in any proceeding, including any jeopardy defense or claim of double jeopardy, whether constitutional or statutory, as to this criminal proceeding or any related civil or administrative proceeding. Defendant further agrees to waive any claim or defense under the Eighth Amendment to the United States Constitution, including any claim of excessive fine regarding the forfeiture of assets by the United States.

45. The defendant further agrees that the forfeiture of the aforementioned funds as authorized herein shall not be deemed an alteration of the defendant's sentence. Forfeiture of the defendant's property shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to forfeiture. However it is understood by the defendant that the government may, in its discretion, recommend to the Attorney General that any of the

forfeited proceeds be remitted or restored to eligible victims of the offense, pursuant to 18 U.S.C. § 981(e), 28 C.F.R. Pt. 9, and other applicable law, it being understood that the United Attorney's Office has authority only to recommend such relief and that the final decision of whether to grant relief rests with the Department of Justice, which will make its decision in accordance with applicable law.

46. The defendant freely, voluntarily, knowingly, and intelligently waives any right to appeal or collaterally attack any matter in connection with the forfeiture of assets as provided above.

X. TOTAL AGREEMENT AND AFFIRMATIONS

47. This plea agreement represents the total agreement between the defendant, GREGORY MAGNESS, and the government. There are no promises made by anyone other than those contained in this agreement. This agreement supersedes any other prior agreements, written or oral, entered into between the government and the defendant.

WILLIAM J. HOCHUL, JR.
United States Attorney
Western District of New York

BY: Michael DiGiacomo
Michael DiGiacomo
Assistant United States Attorney

Dated: January 12th, 2015

I have read this agreement, which consists of 20 pages. I have had a full opportunity to discuss this agreement with my attorney, Herbert Greenman, Esq. I agree that it

represents the total agreement reached between myself and the government. No promises or representations have been made to me other than what is contained in this agreement. I understand all of the consequences of my plea of guilty. I fully agree with the contents of this agreement. I am signing this agreement voluntarily and of my own free will.



GREGORY MAGNESS
Defendant

Dated: January 12, 2015



HERBERT GREENMAN, ESQ.
Attorney for the Defendant

Dated: January 12, 2015