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8 Attorneys for the United States

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

13 UNITED STATES OF AMERICA,) NO. CR 16-281 JD
14 Plaintiff,) PLEA AGREEMENT
15 v.)
16 JOHN FOX,)
17 Defendant.)

18
19 I, John Fox, and the United States Attorney’s Office for the Northern District of California
20 (hereafter “the government”) enter into this written Plea Agreement (the “Agreement”) pursuant to Rule
21 11(c)(1)(A) and 11(c)(1)(B) of the Federal Rules of Criminal Procedure:

22 The Defendant’s Promises

23 1. I agree to plead guilty to the single count of the captioned Information charging me with
24 wire fraud, in violation of 18 U.S.C. § 1343. I agree that the elements of wire fraud are as follows: (1) I
25 knowingly devised or participated in a scheme or plan to defraud, or a scheme or plan for obtaining
26 money or property by means of false or fraudulent pretenses, representations, or promises; (2) the
27 statements made or facts omitted as part of the scheme were material; that is, they had a natural
28 tendency to influence, or were capable of influencing, a person to part with money or property; (3) I

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1 acted with the intent to defraud, that is, the intent to deceive or cheat; and (4) I used, or caused to be
 2 used, a wire communication in interstate or foreign commerce to carry out or attempt to carry out an
 3 essential part of the scheme. I agree that the maximum penalties for wire fraud are as follows:

- | | | | |
|----|----|---------------------------------|---------------------------------------|
| 4 | a. | Maximum prison term | 20 years |
| 5 | b. | Maximum fine | \$250,000 or twice gross gain or loss |
| 6 | c. | Maximum supervised release term | 3 years |
| 7 | d. | Restitution | <u>See ¶ 9</u> |
| 8 | e. | Mandatory special assessment | \$100 |
| 9 | f. | Potential deportation | |
| 10 | g. | Forfeiture | |

11 I acknowledge that pleading guilty may have consequences with respect to my immigration
 12 status if I am not a citizen of the United States. Under federal law, a broad range of crimes are
 13 removable offenses, including the offense to which I am pleading guilty. Removal and other
 14 immigration consequences are the subject of a separate proceeding, however, and I understand that no
 15 one, including my attorney or the district court, can predict to a certainty the effect of this conviction on
 16 my immigration status. I nevertheless affirm that I want to plead guilty regardless of any immigration
 17 consequences that may result from my guilty plea, even if the consequence is my automatic removal
 18 from the United States.

19 2. I agree that I am guilty of the offense to which I am pleading guilty, and I agree that the
 20 following facts are true:

21 I co-founded Premier Cru, with H.O., in 1980 in Oakland, California, moving it to Emeryville,
 22 California, before eventually moving to its final location at 1011 and 1001 University Avenue in
 23 Berkeley in 2010. I caused Premier Cru to file a Chapter 7 bankruptcy petition on January 8, 2016.

24 Premier Cru was in the business of selling wine. Premier Cru generally sold wine in two ways.
 25 First, Premier Cru had a physical retail store where customers could purchase wine that Premier Cru
 26 physically possessed in stock. Second, Premier Cru sold wine for which it did not yet physically have
 27 possession. This wine was referred to as “pre-arrival wine” or “wine futures,” and could be purchased
 28 through a website that Premier Cru maintained or from salespeople who worked in the Premier Cru

1 offices and reported to me. The majority of the revenue of Premier Cru derived from the sale of pre-
2 arrival wine.

3 I was the president of Premier Cru and, on my own, made all significant business decisions. My
4 partner and co-owner, H.O., did not actively participate in running the business. I hired all of the
5 employees. My employees sold wine, managed the purchase of wine for the retail store, and managed or
6 worked in the warehouse. I solely managed the finances of the company, which included the payment
7 of Premier Cru's bills and expenses. I also solely managed obtaining business loans and other financing
8 from banks or individuals to fund Premier Cru's business.

9 I further solely managed the pre-arrival wine business, and I agree that I devised a scheme to
10 defraud, and a scheme for obtaining property by means of false and fraudulent pretenses,
11 representations, and omissions, through Premier Cru's sale of pre-arrival wine. Specifically, Premier
12 Cru's pre-arrival wine business was based on the premise that Premier Cru would contract to buy wine
13 from Europe and then, after having so contracted, would sell it, through Premier Cru's website or
14 salespeople, to customers before it arrived in the United States. Directly or indirectly, I represented to
15 customers that the pre-arrival wines that were listed on Premier Cru's website, contained in my email
16 messages to customers, or sold by salespeople in Premier Cru's offices were wines that Premier Cru had
17 actually already contracted with its suppliers to purchase. I represented to customers, through Premier
18 Cru's website as well as other sources, that Premier Cru would deliver these wines to customers within a
19 time period of approximately six months to two years after customers had paid for the wine.

20 These representations were false, and I knew that they were false at the time that I made them or
21 caused my salespeople to make them. Instead, I knew that I could not or would not obtain many of the
22 pre-arrival wines sold by Premier Cru, primarily for two reasons about which I omitted to inform my
23 customers, lenders, and employees.

24 First, in many instances, I falsified purchase orders for wine that I had not contracted to purchase
25 and entered them into Premier Cru's inventory for sale. These falsified purchase orders took two
26 forms—either purchase orders that were entirely false, wherein I had not contracted to purchase any of
27 the wine, or purchase orders that were partially false, wherein I had contracted to purchase some of the
28 wine but I fraudulently increased the number of bottles covered by the contract. I priced these wines at

1 prices below the market price, knowing that I had not and would not need to actually pay for this wine
2 from any vendors. Once entered into Premier Cru's inventory system, these wines became available for
3 sale on Premier Cru's website or could be sold by salespeople in Premier Cru's offices. I also emailed
4 customer lists advertising these wines for sale. Customers paid Premier Cru for these phantom wines,
5 believing, based on my various representations, that Premier Cru had actually contracted to purchase
6 them and would eventually deliver them. I agree that I sold or attempted to sell approximately \$20
7 million worth of such phantom wine from 2010 to 2015.

8 Second, in other instances, I actually did contract with Premier Cru's foreign suppliers on behalf
9 of Premier Cru to purchase wine, generally with the promise to pay those foreign suppliers within 30
10 days. In many of these instances, I knew that Premier Cru would not be able to make payment within 30
11 days, or ever, because (1) I embezzled money from Premier Cru's business accounts that I should have
12 used to pay Premier Cru's suppliers or (2) I diverted money coming in from current customers to obtain
13 wine for prior customers who had never received their wine.

14 With respect to the embezzlement, in addition to my legitimate salary and partner draw, which
15 was negotiated with H.O. and reported on Premier Cru's books to Premier Cru's lenders, I used Premier
16 Cru's business accounts and American Express card directly to pay various personal expenses. These
17 include, but were not limited to, using Premier Cru's accounts to make mortgage payments on my house
18 in Alamo, Calif.; to pay my wife's personal credit card bill; to pay my personal credit card bill; to pay
19 my daughter's college tuition; to pay for membership to two private golf clubs; and to purchase or lease
20 expensive cars (including Corvettes, Ferraris, a Maserati, and various Mercedes-Benzes). In addition, I
21 also made substantial cash transfers from the Premier Cru business accounts to various personal
22 accounts in my name or in fake names. I used this money to pay other personal expenses, including
23 paying for more expensive cars. I also spent more than \$900,000 on women that I met online. I paid
24 these women through PayPal. I knew at the time that I made these payments or transfers that they made
25 it impossible for Premier Cru to fulfill all of its obligations to customers and obtain the wines it had
26 actually contracted to purchase, yet I continued to sell wine to customers knowing the falsehood of my
27 representations about whether and when the wine would be delivered.

28 With respect to the diversion of funds to purchase wine for prior customers, over time, many

1 customers complained to Premier Cru about not receiving the wine for which they had paid. Directly or
2 indirectly, I lied to these customers, offering various falsified excuses and promises for wine that I knew
3 was not going to be delivered, and I instructed my salespeople or other employees to tell customers
4 things that I knew to be false. When customers complained repeatedly or forcefully, I arranged to
5 deliver wine to them even if I had never actually contracted to buy the wine for which they had paid. I
6 often did this by delivering to those customers wine for which other customers had paid or, in many
7 cases, by purchasing the wine from other suppliers, usually at prices much higher than those for which I
8 had sold the wine in the first place. A substantial amount of money in Premier Cru's bank accounts
9 went to purchase wine in this manner.

10 I took these and other actions to conceal my ongoing fraud, to lull customers into a false sense
11 that Premier Cru was a legitimate business, to cause these customers to continue to purchase wine from
12 Premier Cru, and to prevent them from complaining to law enforcement authorities.

13 I also agree that I concealed all of the above from Premier Cru's lenders, by falsifying Premier
14 Cru's financial records. I agree that Premier Cru's lenders made loans or extended lines of credit to
15 Premier Cru as a result of misrepresentations I made and the falsified records I created.

16 I agree that as a result of my misrepresentations and omissions, customers paid Premier Cru for
17 wine that I knew Premier Cru could not deliver to them and which they never received. I agree that the
18 various false statements and omissions described above were material, in that they had a natural
19 tendency to influence Premier Cru's customers to part with money, and I made them knowing that they
20 were false, with the intent to defraud Premier Cru's customers.

21 I also agree that I used, or caused to be used, interstate and foreign wire communications to carry
22 out or attempt to carry out an essential part of the scheme. For example, as described in the single count
23 of the Information, on February 25, 2013, I caused H.W.M.L., a customer, to use a foreign wire transfer
24 to send \$100,271.28 from Hong Kong, outside of the United States, to Premier Cru's account at
25 Community Bank of the Bay, in the Northern District of California. I agree that this wire was sent to
26 purchase wine based on misrepresentations described above, and that H.W.M.L. never received the wine
27 for which he paid.

28 I agree that thousands of customers purchased pre-arrival wine from Premier Cru based on my

1 fraudulent misrepresentations or omissions, and that, at the time of Premier Cru's bankruptcy,
2 approximately 4,500 customers had not received pre-arrival wine for which they had paid. I agree that
3 these individuals are victims of my scheme. I agree that, at the time of Premier Cru's bankruptcy,
4 customers had paid at least approximately \$45 million for wine that they had not received. I agree that
5 this is the loss amount for Sentencing Guidelines purposes for my scheme. I further agree that, from
6 2010 onward, my total gain from the scheme was approximately \$5 million, and I made additional
7 money in the years prior to 2010. I agree that I first began creating fraudulent purchase orders for pre-
8 arrival wine in approximately 1993 or 1994, and that the percentage of the purchase orders that I entered
9 for pre-arrival wine that were entirely or partially fraudulent increased over time, such that by 2010 it
10 constituted a significant portion of the business.

11 3. I agree to give up all rights that I would have if I chose to proceed to trial, including the
12 rights to a jury trial with the assistance of an attorney; to confront and cross-examine government
13 witnesses; to remain silent or testify; to move to suppress evidence or raise any other Fourth or Fifth
14 Amendment claims; to any further discovery from the government; and to pursue any affirmative
15 defenses and present evidence.

16 4. I agree to give up my right to appeal my conviction, the judgment, and orders of the
17 Court, as well as any aspect of my sentence, including any orders relating to forfeiture and/or restitution,
18 except that I reserve my right to claim that my counsel was ineffective.

19 5. I agree not to file any collateral attack on my conviction or sentence, including a petition
20 under 28 U.S.C. § 2255 or 28 U.S.C. § 2241, except that I reserve my right to claim that my counsel was
21 ineffective. I also agree not to seek relief under 18 U.S.C. § 3582.

22 6. I agree not to ask the Court to withdraw my guilty plea at any time after it is entered. I
23 understand that by entering into this Agreement: (a) I agree that the facts set forth in Paragraph 2 of this
24 Agreement shall be admissible against me under Fed. R. Evid. 801(d)(2)(A) in any subsequent
25 proceeding, including at trial, in the event I violate any of the terms of this Agreement, and (b) I
26 expressly waive any and all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 with regard to the
27 facts set forth in Paragraph 2 of this Agreement in such subsequent proceeding. I understand that the
28 government will not preserve any physical evidence obtained in this case.

1 7. I understand that the Court must consult the United States Sentencing Guidelines and
2 take them into account when sentencing, together with the factors set forth in 18 U.S.C. § 3553(a). I
3 also understand that the Court is not bound by the Guidelines calculations below; the Court may
4 conclude that a higher Guidelines range applies to me, and, if it does, I will not be entitled, nor will I ask
5 to withdraw my guilty plea. I further agree that regardless of the sentence that the Court imposes on me,
6 I will not be entitled, nor will I ask, to withdraw my guilty plea. I agree that the Sentencing Guidelines
7 offense level should be calculated as set forth below. The parties have reached no agreement regarding
8 my Criminal History Category.

- 9 a. Base Offense Level, U.S.S.G. § 2B1.1(a)(1): 7
- 10 b. Loss > \$25 million, U.S.S.G. § 2B1.1(b)(1)(L): +22
- 11 c. 10 or more victims, U.S.S.G. § 2B1.1(b)(2)(A): +2
- 12 d. Acceptance of Responsibility: If I meet the requirements of
13 U.S.S.G. § 3E1.1, I may be entitled to a three-level reduction
14 for acceptance of responsibility, provided that I forthrightly
15 admit my guilt, cooperate with the Court and the Probation Office
16 in any presentence investigation ordered by the Court, and continue
17 to manifest an acceptance of responsibility through and including
18 the time of sentencing: -3
- 19 e. Adjusted Offense Level: 28

17 I agree to request a sentence that includes a term of imprisonment of no less than 78 months of
18 imprisonment in the custody of the Bureau of Prisons.

19 8. I agree that regardless of any other provision of this Agreement, the government may and
20 will provide the Court and the Probation Office with all information relevant to the charged offense and
21 the sentencing decision. I agree that, based on the nature of my offense, the Court should impose the
22 following special condition of supervised release which is reasonably related to deterrence and
23 rehabilitation:

24 Special Condition (Searches)

25 The defendant shall submit his person, residence, office, vehicle, electronic devices and
26 their data (including cell phones, computers, and electronic storage media), and any
27 property under defendant's control to a search. Such a search shall be conducted by a
28 United States Probation Officer or any federal, state, or local law enforcement officer at
any time, with or without suspicion. Failure to submit to such a search may be grounds
for revocation; the defendant shall warn any residents that the premises may be subject to
searches.

1 9. I agree to pay full restitution for all losses caused by all the schemes or offenses with
2 which I was charged in this case, and I understand that the amount of restitution will not be limited to
3 the loss attributable to the count to which I am pleading guilty, pursuant to 18 U.S.C. § 3663(a)(3). I
4 understand that the Court will not consider my economic circumstances in determining the restitution
5 amount. In consideration of the government's agreement not to charge me with the offense of bank
6 fraud for actions relating to defrauding the various lenders of Premier Cru, an offense for which
7 restitution could be ordered under 18 U.S.C. § 3663A(c)(1)(A), I agree to the imposition of restitution as
8 if I were convicted of defrauding the various lenders of Premier Cru and I agree that the various lenders
9 are considered victims that are owed restitution for my actions.

10 I agree to pay restitution in an amount to be set by the Court at the time of sentencing. I agree
11 that this amount shall include any money paid by customers to Premier Cru for wine that those
12 customers never received. I agree that, in total, this number shall be in no event less than \$45 million to
13 customers of Premier Cru. I also agree that this restitution amount shall include any money owed by
14 Premier Cru to its lenders after any collateral is applied against money loaned. I agree that these lenders
15 include but may not be limited to the individual S.G., Community Bank of the Bay, the individual B.N.,
16 the United States Small Business Administration, the Taylor Trust, Trans Bay Investment Group, and
17 Advanced Restaurant Financial. I agree that the total amount owed to these lenders before subtracting
18 the value of any collateral that they may recover is no less than \$6.5 million. I also agree that the
19 restitution amount shall include any claims made by customers in Premier Cru's Chapter 7 bankruptcy
20 case, Northern District of California bankruptcy case number 16-40050, that were not satisfied at the
21 conclusion of the case, and any claims made by customers of Premier Cru as part of victim impact
22 statements in the instant case. I understand that the full amount of each victim's losses may not be
23 known until after completion of the presentence report and a sentencing hearing and I agree to pay the
24 final determined amount of victim's losses, even if it is significantly greater than \$45 million.

25 As part of my efforts to make restitution, I agree to cooperate with the bankruptcy trustee and the
26 bankruptcy court in Northern District of California bankruptcy case number 16-40050, including by
27 identifying all possible assets of Premier Cru and by participating and aiding in the recovery of all
28 assets. As part of such cooperation, I agree to waive any Fifth Amendment rights against self-

1 incrimination that I have asserted or could assert in connection with that bankruptcy case.

2 Any restitution payments shall be paid through the Office of the Clerk of the District Court by
3 bank or cashier's check or money order made payable to the "Clerk, United States District Court."

4 I understand that the restitution described above creates a lien in favor of the United States on all
5 property and rights to property I may possess upon entry of judgment and continues for 20 years or until
6 the debt is paid in full. I further understand the government will record a notice of the lien in any county
7 where I reside or have property. I further understand that this order of restitution cannot be discharged
8 in bankruptcy and that if I default on the payment of a fine or restitution, the Court may revoke
9 probation or a term of supervised release, modify the terms or conditions of probation or supervised
10 release, resentence me, hold me in contempt of court, order the sale of property, enter or adjust a
11 payment schedule, or take any other action necessary to obtain compliance.

12 Within thirty days of the execution of this Plea Agreement, I agree to complete, under penalty of
13 perjury, a financial statement provided by the U.S. Attorney's Office and to update that statement with
14 material changes within seven days of the change. I understand that I must identify all assets and
15 financial interests valued at more than \$1,000. I further understand that these assets and financial
16 interests include all assets and financial interests in which I have an interest, direct or indirect, whether
17 held in my own name or in the name of another, in any property, real or personal.

18 I agree to surrender assets I obtained as a result of my crimes, and release funds and property
19 under my control in order to pay any fine, forfeiture, or restitution. I further agree to notify the Financial
20 Litigation Unit, United States Attorney's Office ("FLU") before transferring any interest in property
21 owned directly or indirectly by me, including any interest held or owned under any other name or entity,
22 including trusts, partnerships, and/or corporations. I also agree to notify the FLU of any interest in
23 property I may obtain, directly or indirectly, including any interest obtained under any other name, or
24 entity, including a trust, partnership, or corporation, after the execution of this Plea Agreement until the
25 fine or restitution is paid in full.

26 I agree that any fine, forfeiture, or restitution imposed by the Court against me will be due
27 immediately and subject to immediate enforcement by the government as authorized by 18 U.S.C.
28 § 3613. I further understand that the government may seek immediate collection of the entire fine,

1 forfeiture, or restitution from any assets without regard to any schedule of payments imposed by the
2 Court or established by the Probation Office and that monetary penalties imposed by the Court will be
3 submitted to the Treasury Offset Program so that any federal payment or transfer of returned property I
4 receive may be offset and applied to federal debts.

5 10. I agree not to commit or attempt to commit any crimes before sentence is imposed or
6 before I surrender to serve my sentence. I also agree not to violate the terms of my pretrial release; not
7 to intentionally provide false information to the Court, the Probation Office, Pretrial Services, or the
8 government; and not to fail to comply with any of the other promises I have made in this Agreement. I
9 agree that if I fail to comply with any promises I have made in this Agreement, then the government will
10 be released from all of its promises in this Agreement, including those set forth in the Government's
11 Promises Section below, but I will not be released from my guilty plea.

12 11. I agree that this Agreement contains all of the promises and agreements between the
13 government and me, and I will not claim otherwise in the future. No modification of this Agreement
14 shall be effective unless it is in writing and signed by all parties.

15 12. I agree that the Agreement binds the U.S. Attorney's Office for the Northern District of
16 California only, and does not bind any other federal, state, or local agency.

17 The Government's Promises

18 13. The government agrees not to file any additional charges against the defendant that could
19 be filed as a result of the investigation that led to the captioned Information.

20 14. The government agrees to recommend the Guideline calculations set out above, unless
21 the defendant violates the terms of the Agreement above or fails to accept responsibility.

22 15. The government agrees to recommend a sentence that includes a term of imprisonment of
23 no greater than 78 months in the custody of the Bureau of Prisons.

24 The Defendant's Affirmations

25 16. I agree that my participation in the District Court's Conviction Alternative Program is not
26 appropriate and that I will not request to be considered for and will not participate in that program as a
27 result of my conviction for this offense.

28 17. I confirm that I have had adequate time to discuss this case, the evidence, and the

1 Agreement with my attorney and that my attorney has provided me with all the legal advice that I
2 requested.

3 18. I confirm that while I considered signing this Agreement, and at the time I signed it, I
4 was not under the influence of any alcohol, drug, or medicine that would impair my ability to understand
5 the Agreement.


6 19. I confirm that my decision to enter a guilty plea is made knowing the charges that have
7 been brought against me, any possible defense, and the benefits and possible detriments of proceeding to
8 trial. I also confirm that my decision to plead guilty is made voluntarily, and no one coerced or
9 threatened me to enter into this Agreement.

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11 Dated: 8/11/16



JOHN FOX
Defendant


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15
16 Dated: 8/11/16

BRIAN J. STRETCH
United States Attorney


BENJAMIN KINGSLEY
Assistant United States Attorney

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20 20. I have fully explained to my client all the rights that a criminal defendant has and all the
21 terms of this Agreement. In my opinion, my client understands all the terms of this Agreement and all
22 the rights my client is giving up by pleading guilty, and, based on the information now known to me, my
23 client's decision to plead guilty is knowing and voluntary.

24
25 Dated: 8/11/16



ROBERT BREAKSTONE
Attorney for Defendant John Fox