

FILED

NOV 14 2003

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 KEVIN V. RYAN (CASBN 118321)
United States Attorney

2 ROSS W. NADEL (CASBN 87940)
3 Chief, Criminal Division

4 CHRISTOPHER P. SONDERBY (CASBN 166574)
Assistant United States Attorney

5 280 S. First Street, Room 371
6 San Jose, California 95113
7 Telephone: (408) 535-5037

8 Attorneys for Plaintiff

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12
13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 MALINDA CHAN,

17 Defendant.

No. CR 02-20043 RMW

PLEA AGREEMENT

18
19 I, Malinda Chan, and the United States Attorney's Office for the Northern District of
20 California (hereafter "the government") enter into this written plea agreement (the "Agreement")
21 pursuant to Rules 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 a Superseding Information charging me with Trafficking in
24 Counterfeit Goods, in violation of 18 U.S.C. § 2320(a). I agree that the elements of the offense
25 of trafficking in counterfeit goods are that: (1) I trafficked in goods or services; (2) the trafficking
26 was intentional; (3) I used a counterfeit mark on or in connection with the goods or services; and
27 (4) I knew the mark was counterfeit. I am further aware that the maximum penalties for this
28 offense are as follows:

PLEA AGREEMENT [CHAN]
CR 02-20043 RMW

NO. 58
CSA'S INITIALS
DISTRICT COURT
CRIMINAL CASE PROCESSING

- | | | | |
|---|----|---------------------------------|---------------------|
| 1 | a. | Maximum prison sentence | 10 years |
| 2 | b. | Maximum fine | \$2,000,000 |
| 3 | c. | Maximum supervised release term | 3 years |
| 4 | d. | Mandatory special assessment | \$100 |
| 5 | e. | Restitution | Determined by Court |
| 6 | f. | Possible Deportation | |
| 7 | g. | Criminal Forfeiture | Determined by Court |

8

9 2. I agree that I am guilty of the offense to which I will plead guilty, and I agree that the

10 following facts are true:

11 (a). From at least April 2000 to April 2002, I operated a software distribution

12 business known as Marlin Trading, located at 43008 Christy Street, Fremont, California. During

13 that time period, I intentionally trafficked in counterfeit software programs and documentation

14 bearing counterfeit marks of Microsoft Corporation, including marks for the following Microsoft

15 products: Windows 98, Windows NT Server, and Office 2000 Professional Edition. I purchased

16 and distributed the counterfeit copies of these software products for personal financial gain. The

17 transactions in counterfeit software bearing counterfeit marks included a sale on April 11, 2000,

18 when I purchased for resale 10 counterfeit copies of Microsoft Windows 98 for a total of \$290.

19 (b). I agree the Court shall include as relevant conduct under the Sentencing

20 Guidelines all of the transactions in counterfeit software and counterfeit End User License

21 Agreements ("EULAs") and other documentation listed in Exhibit A to this Agreement. I agree

22 that I sold counterfeit products with counterfeit marks worth approximately \$29,654. Further, I

23 agree that the value of the counterfeit products found at my business during the execution of a

24 search warrant is approximately \$22,453. Accordingly, I agree that the sum of these two

25 amounts, \$52,107, is the amount that should be used to determine the loss amount pursuant to

26 sections 2B5.3 and 2F1.1 of Sentencing Guidelines (incorporating amendments effective

27 November 1, 1998).

28 3. I agree to give up all rights that I would have if I chose to proceed to trial, including

1 the rights to a jury trial with the assistance of an attorney; to confront and cross-examine
2 government witnesses; to remain silent or testify; to move to suppress evidence or raise any other
3 Fourth or Fifth Amendment claims; to any further discovery from the government; and to pursue
4 any affirmative defenses and present evidence.

5 4. I agree to give up my right to appeal my conviction, the judgment, and orders of the
6 Court. I also agree to waive any right I may have to appeal my sentence.

7 5. I agree not to file any collateral attack on my conviction or sentence, including a
8 petition under 28 U.S.C. §2255, at any time in the future after I am sentenced, except for a claim
9 that my constitutional right to the effective assistance of counsel was violated.

10 6. I agree not to ask the Court to withdraw my guilty plea at any time after it is entered.

11 7. I agree to relinquish to the government any right I may have in any capacity, including
12 as an individual and as owner of Marlin Trading, to any of the computer software products,
13 software manuals and software packaging materials seized by law enforcement agents from me
14 and Marlin Trading in connection with the investigation of this action. In addition, I agree not to
15 file or cause to have filed any motion pursuant to Fed. R. Crim. P. 41(g) for return of such
16 property.

17 8. I agree that the Sentencing Guidelines should be calculated as follows under the
18 Sentencing Guidelines incorporating amendments effective November 1, 1998, and that I will not
19 ask for any other adjustment to or reduction in the offense level or for a downward departure of
20 any kind:

21	a. Base Offense Level, U.S.S.G. § 2B5.3	6
22	b. Specific Offense Characteristic	+5
23	(Loss amount between \$40,000 and \$70,000 pursuant to U.S.S.G. § 2F1.1)	
24	c. Acceptance of responsibility:	<u>-2</u>
25	(If I meet the requirements of U.S.S.G. § 3E1.1)	
26	d. Adjusted offense level	9

27 I agree that, regardless of any other provision in this agreement, the government may and will
28 provide to the Court and the Probation Office all information relevant to the charged offenses or

1 the sentencing decision. I also agree that the Court is not bound by the Sentencing Guidelines
2 calculations above, the Court may conclude that a higher guideline range applies to me, and, if it
3 does, I will not be entitled, nor will I ask, to withdraw my guilty plea.

4 9. I agree to the Court's entry of an order of forfeiture pursuant to 18 U.S.C. §§
5 981(a)(1)(C) (as incorporated by 28 U.S.C. § 2461 (c)), and Federal Rule of Criminal Procedure
6 32.2 at or before sentencing for the amount of \$29,634, which represents proceeds I received
7 from the sale of counterfeit computer software and End User License Agreements. Accordingly,
8 I stipulate and agree that as part of his sentence the Court shall, pursuant to Fed. R. Crim. P.
9 32.2(b), order a forfeiture money judgment against me in the amount of \$29,634. Further, I agree
10 that this money judgment shall be satisfied by: (a) forfeiture of the \$21,718 in cash seized from
11 defendant's place of business in April 2002; and (b) payment of \$7,936 payable to the United
12 States Marshal's Service, delivered to the attention of Assistant U.S. Attorney Robert Ward, 450
13 Golden Gate Avenue, San Francisco, California 94102, in a manner and time as prescribed by the
14 Court. I agree to execute all documents necessary to effectuate the entry and enforcement of the
15 above-described money judgment.

16 10. In return for the government's promises set out below, I agree to pay restitution for all
17 the losses caused by all the offenses with which I was charged in this case, and I agree that the
18 amount of restitution will not be limited to the loss attributable to the count to which I am
19 pleading guilty, pursuant to 18 U.S.C. § 3663(a)(3). I agree that I will make a good faith effort to
20 pay any fine, forfeiture or restitution I am ordered to pay. Before or after sentencing, I will, upon
21 request of the Court, the government, or the U.S. Probation Office, provide accurate and
22 complete financial information, submit sworn statements and give depositions under oath
23 concerning my assets and my ability to pay, surrender assets I obtained as a result of my crimes,
24 and release funds and property under my control in order to pay any fine, forfeiture, or restitution.
25 I agree to pay the special assessment at the time of sentencing.

26 11. I agree not to commit or attempt to commit any crimes before sentence is imposed or
27 before I surrender to serve my sentence; violate the terms of my pretrial release (if any);
28 intentionally provide false information or testimony to the Court, the Probation Office, Pretrial

1 Services, or the government; or fail to comply with any of the other promises I have made in this
2 Agreement. I agree not to harass, annoy, or intimidate any victims or witnesses. This includes,
3 but is not limited to, harassment, annoyance or intimidation by personal contact, telephone, mail
4 email, or any other written or oral form of communication. I agree that the Court should include
5 this agreement as a condition of my supervised release term. I agree that, if I fail to comply with
6 any promises I have made in this Agreement, then the government will be released from all of its
7 promises, but I will not be released from my guilty plea.

8 12. If I am prosecuted after failing to comply with any promises I made in this
9 Agreement, then (a) I agree that any statements I made to any law enforcement or other
10 government agency or in Court, whether or not made pursuant to the cooperation provisions of
11 this Agreement, may be used in any way; (b) I waive any and all claims under the United States
12 Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal
13 Rules of Evidence, or any other federal statute or rule, to suppress or restrict the use of my
14 statements, or any leads derived from those statements; and (c) I waive any defense to any
15 prosecution that it is barred by a statute of limitations, if the limitations period has run between
16 the date of this Agreement and the date I am indicted.

17 13. I agree that this Agreement contains all of the promises and agreements between the
18 government and me, and I will not claim otherwise in the future.

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

21 The Government's Promises

22 15. The government agrees to move to dismiss any open charges pending against the
23 defendant in the captioned indictment at the time of sentencing.

24 16. The government agrees not to file or seek any additional charges against the
25 defendant that could be filed as a result of the investigation that led to the pending indictment.

26 17. The government agrees to recommend the Guidelines calculations and forfeiture
27 amount set out above.

28 ///

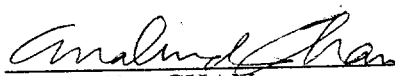
1 The Defendant's Affirmations

2 18. I confirm that I have had adequate time to discuss this case, the evidence, and this
3 Agreement with my attorneys, and that they have provided me with all the legal advice that I
4 requested.

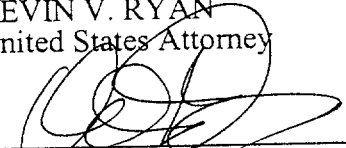
5 19. I confirm that while I considered signing this Agreement and, at the time I signed it, I
6 was not under the influence of any alcohol, drug, or medicine.

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

11
12 Dated: 11.10.03



MALINDA CHAN
Defendant

13
14
15
16 Dated: 11/10/03

KEVIN V. RYAN
United States Attorney

CHRISTOPHER P. SONDERBY
Assistant United States Attorney

17
18
19 I have fully explained to my client all the rights that a criminal defendant has and all the
20 terms of this Agreement. In my opinion, my client understands all the terms of this Agreement
21 and all the rights he is giving up by pleading guilty, and, based on the information now known to
22 me, his decision to plead guilty is knowing and voluntary.

23
24 Dated: 11-10-03


N.A. TONY CHRISTENSEN, JR.
Attorney for Defendant

25
26 ///
27 ///
28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTERPRETER CERTIFICATION

I, C. J. Phillips, hereby certify that I am a ^{registered} ~~certified~~ mandarin interpreter and that I accurately translated this plea agreement to the defendant, she told me that she understood it, and I believe her answer was true and correct.

Dated: 11/10/03 C. J. Phillips

Date of Purchase	No. of Units	Description of Product	Price Per Unit	Total Cost	Total Operation Cost	Counterfeit		Paid By		Disposition	Retail - Per Item		Combined Retail Value
						Yes	No	Cash	Check		Ck. No.	\$ per Unit	
Chan, Malinda - Owner of Marlin Trading													
06-16-00	100	MS Windows 98 2nd Edt CD-Rom Set	\$38.00	\$3,800.00			Yes						
	100	MS Windows NT Server 4.0 Cartons W/Stickers	\$15.00	\$1,500.00			Yes	\$5,300.00		Unknown			
06-16-00	131	MS Windows NT Server 4.0 Cartons No Stickers	\$14.00	\$1,834.00			Yes						
	335	Yellow Stickers for MS Windows NT Server Pk.	\$0.75	\$251.25			Yes						
	1	MS Office 2000 Pro Edition - CD ROM Set	\$41.00	\$41.00			Yes	\$2,126.25		Unknown			
07-11-00	50	MS Office 97 Pro Edt CD Only	\$29.00	\$1,450.00			Yes	\$1,450.00		Unknown			
07-19-00	25	MS Office 2000 Pro - CD Only	\$41.00	\$1,025.00			Yes						
	1	MS Office 2000 Pro - Retail Box	\$135.00	\$135.00			Yes	\$1,160.00		Unknown			
08-03-00	6	MS Office 2000 Pro - Retail Box	\$138.00	\$828.00			Yes	\$828.00		Unknown			
08-22-00	12	MS Office 2000 Pro - Retail Box	\$138.00	\$1,656.00			Yes	\$1,656.00					
09-01-00	10	MS Windows NT Workstation V4.0	\$36.00	\$360.00			Yes	\$360.00		Unknown			
09-19-00	10	MS Windows NT Workstation V4.0 - Retail Box	\$50.00	\$500.00			Yes						
	20	MS Windows 98 2nd Edt OEM - CD & Manual	\$40.00	\$800.00			Yes	\$1,300.00		Unknown			
09-28-00	50	MS Windows 98 2nd Edt CD-Rom Set (A)	\$36.50	\$1,825.00			Yes						
	10	MS Windows NT Workstation V4.0 (A)	\$37.00	\$370.00			Yes	\$2,195.00		Unknown			
10-31-00	10	MS Windows 98 2nd Edt - CD & Manual	\$45.00	\$450.00			Yes	\$450.00		Unknown			
10-31-00	1	MS Windows EULA	\$6.50	\$6.50			Yes						
	1	MS License Agreements	\$2.50	\$2.50			Yes	\$9.00		Unknown			
11-19-01	10	MS Office 2000 Pro Edition - Retail Box	\$165.00	\$1,650.00			Yes	\$1,650.00		Unknown			
12-27-01	100	MS Windows 98 2nd Edition - CD & Manual	\$40.00	\$4,000.00			Yes						
	50	MS Office 2000 Pro - CD, Manual & EULA	\$48.00	\$2,400.00			Yes	\$6,400.00		Unknown			
11-17-02	20	MS Windows 98 2nd Edition CD Only	\$13.00	\$2,600.00			Yes	\$2,600.00		Unknown			
13-14-02	50	MS Windows ME OEM	\$43.00	\$2,150.00			Yes	\$2,150.00		Unknown			
TOTAL UNDERCOVER EXPENITURES								\$29,634.25				Total - Undercover Purchases	\$29,654.25
Search Warrant: Recovered Microsoft Counterfeit Products													
Media:													
FBI Ref	No. of Units	43008 Christy St., Fremont, CA			FBI Evidence Number								
20	50	Office 2000 Pro CD			1 B 630					\$35.00	\$1,750.00		
21	2	Office 2000 Pro CD			1 B 637					\$35.00	\$70.00		
34	13	Office 97 Pro CD								\$9.00	\$117.00		
33	51	Office 97 Pro CD			1 B 648					\$9.00	\$459.00		
2 & 3	100	Windows ME CD			1 B 618 & 619					\$32.00	\$3,200.00		
35	12	Windows 98 SE OEM - CD/Manual/W-Stickers			1 B 650					\$37.00	\$444.00		
	228												
												Total - Software	\$6,040.00
Number: EULAs, COAs													
FBI Ref	No. of Units				FBI Evidence Number								
	100	Windows 2000 Pro - COAL			1 B 617					\$9.00	\$900.00		
	100	Windows 98 2nd Edition - COAL			1 B 617					\$9.00	\$900.00		
	700	Office 2000 Pro - EULA			1 B 634					\$5.00	\$3,500.00		
	57	Windows NT Server V4.0 - EULA (5 CAL)			1 B 647 - A					\$29.00	\$1,653.00		
	54	Office 2000 Pro - EULA (1 CAL)			1 B 647 - B					\$5.00	\$270.00		
	20	Office 97 Pro W/Bookshelf - EULA (1 CAL)			1 B 647 - C					\$9.00	\$180.00		
	20	Office 2000 Pro - EULA (1 CAL)			1 B 647 - D					\$5.00	\$100.00		
	75	Windows NT Server V4.0 - EULA (5 CAL)			1 B 647 - E					\$29.00	\$2,175.00		
	6	Windows NT Server V4.0 - EULA (10 CAL)			1 B 647 - F					\$35.00	\$210.00		
	12	Office 97 Pro W/Bookshelf - EULA (1 CAL)			1 B 649					\$9.00	\$108.00		
	500	Office 97 Pro W/Bookshelf - EULA (1 CAL)			1 B 651					\$9.00	\$4,500.00		

Date of Purchase	No. of Units	Description of Product	Price Per Unit	Total Cost	Total Operation Cost	Counterfeit		Cash	Paid By		Disposition	Retail - Per Item		Combined Retail Value
						Yes	No		Check	Ck. No.		\$ per Unit	Total Value	
	66	Project 2000 - EULA			1 B 656							\$17.00	\$1,122.00	
Con't on next Page														
	1	Office 97 Pro W/Bookshelf - EULA (1 CAL)			1 B 662 - 674							\$9.00	\$9.00	
	5	Office 97 Pro W/Bookshelf - EULA (1 CAL)			1 B 665							\$9.00	\$45.00	
	5	Office 2000 Pro - EULA (1 CAL)			1 B 672 - A							\$5.00	\$25.00	
	9	BackOffice SB Server V4.5 - EULA (5 CAL)			1 B 672 - B						*	\$29.00	\$261.00	
	13	BackOffice Server V4.5 - EULA (25 CAL)			1 B 672 - C						*	\$35.00	\$455.00	
	1743										Total - Paper			\$16,413.00
											Total Value of Counterfeit Products			\$52,107.25
	*	No known unit sales price - Estimated for Computation Purposes												