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**FILED**

APR 24 2003

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

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8 Attorneys for Plaintiff

**SEALED  
BY COURT ORDER**

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

13 UNITED STATES OF AMERICA, )  
14 Plaintiff, )  
15 v. )  
16 JAY GILBERTSON, )  
17 Defendant. )

No. CR-00-0505-MJJ  
PLEA AGREEMENT

18  
19 I, Jay Gilbertson, 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 counts one and five of the captioned-superseding  
24 indictment charging me with conspiracy to commit securities fraud, in violation of 18 U.S.C. §  
25 371, and making false statements in a document required to be filed with the Securities and  
26 Exchange Commission ("SEC"), in violation of Section 32 of the Securities Exchange Act of  
27 1934, 15 U.S.C. § 78ff(a).

28 a. I agree that the elements of conspiracy are: (1) there was an agreement

1 between two or more persons to violate the securities laws of the United States; (2) I became a  
2 member of the conspiracy knowing of its objects and intending to help accomplish them; and (3)  
3 one of the members of the conspiracy performed at least one overt act for the purpose of carrying  
4 out the conspiracy. I agree that the maximum penalties are:

- 5 i. Maximum prison sentence 5 years
- 6 ii. Maximum fine \$ 250,000
- 7 iii. Maximum supervised release term 3 years
- 8 iv. Mandatory special assessment \$ 100

9 b. I agree that the elements of making false statements in a document  
10 required to be filed with the SEC are: (1) My employer, HBO & Company, was required to and  
11 did file a quarterly report (Form 10-Q) with the SEC; (2) I made or caused to be made, directly or  
12 indirectly, a materially false or misleading statement in that report; and (3) I acted knowingly and  
13 willfully. I agree that the maximum penalties are:

- 14 i. Maximum prison sentence 10 years
- 15 ii. Maximum fine \$ 1,000,000
- 16 iii. Maximum supervised release term 3 years
- 17 iv. Mandatory special assessment \$ 100

18 2. I agree that I am guilty of the offenses to which I will plead guilty, and I agree that  
19 the following facts are true:

20 a. Prior to January 12, 1999, HBO & Company ("HBOC") was a corporation  
21 headquartered in Alpharetta, Georgia, an Atlanta suburb. HBOC was in the business of  
22 manufacturing and selling information technology products, primarily software, to customers in  
23 the health care industry. HBOC was the largest health care information technology company in  
24 the United States.

25 b. HBOC was a publicly traded company. HBOC's stock was traded on the  
26 national market of the National Association of Securities Dealers' Automated Quotation System  
27 ("NASDAQ"), an electronic trading system. HBOC had shareholders located throughout the  
28 United States, including in the Northern District of California. As a public company, HBOC was

1 required to comply with rules and regulations of the SEC. I understood that those regulations are  
2 designed to protect members of the investing public by, among other things, ensuring that a  
3 company's financial information is accurately recorded and disclosed to the public.

4 c. I was the Chief Financial Officer ("CFO") of HBOC from 1993 through  
5 November 12, 1998, when I left the company. At all times while employed by HBOC I was a  
6 licensed certified public accountant. From December 1997 until leaving the company, I also was  
7 co-President and co-Chief Operating Officer with Albert Bergonzi.

8 d. Beginning in December 1997 and until I left HBOC in November 1998, I  
9 conspired with other officers of HBOC, including Chief Executive Officer Charles McCall,  
10 Bergonzi, General Counsel Jay Lapine, Senior Vice Presidents Timothy Heyerdahl and Dominick  
11 DeRosa, and others to inflate HBOC's revenue and earnings in violation of rules and regulations  
12 promulgated by the SEC and in violation of Generally Accepted Accounting Principles  
13 ("GAAP").

14 e. The object of the conspiracy was to mislead Wall Street analysts, HBOC  
15 investors, and the SEC about HBOC's true revenue and earnings for the purpose of increasing  
16 and maintaining the price of HBOC's stock.

17 f. In furtherance of the conspiracy, I met with McCall, Bergonzi, and Lapine  
18 for the purpose of devising ways to ensure that HBOC met or exceeded the revenue and earnings  
19 forecasts issued by Wall Street financial analysts. Among the devices we agreed to use, and did  
20 use, to inflate HBOC's reported revenue and earnings for the first three quarters of 1998 were the  
21 following:

22 i. We falsely inflated quarterly software sales revenues by (1)  
23 recording revenue on contracts that were conditioned on "side letters" that permitted customers  
24 to cancel, and which were concealed from outside auditors; (2) backdating contracts to record  
25 revenue in prior quarterly periods; and (3) recording revenue on end-of-quarter "sales" that were  
26 actually exchanges of cash and inventory.

27 ii. We recorded revenue from sales for which HBOC had secretly  
28 guaranteed repayment to a finance company in the event of customer default.

1                   iii.     We made false entries in company books and records at quarter-  
2 end in order to reduce operating expenses and increase net income by whatever amount was  
3 necessary to meet quarterly net income and earnings goals.

4                   g.     With our knowledge that HBOC's revenue and earnings had been  
5 improperly inflated and recorded in the books and records of the company, I, along with McCall,  
6 Bergonzi, Lapine, and others, caused false statements to be made to:

- 7                   i.     HBOC's outside auditors in connection with their quarterly  
8 reviews;
- 9                   ii.    the SEC in Form 10-Qs and other required filings; and
- 10                  iii.   financial analysts and the investing public in press releases and oral  
11 statements regarding HBOC's past and future financial performance.

12                  h.     On October 28, 1998, I signed HBOC's SEC Form 10-Q for the third  
13 quarter of 1998. It was filed with the SEC and made available to the investing public. I knew  
14 that the financial statements included in this Form 10-Q were false because they included  
15 revenue from software sales to Staff Builders, Inc., and Computer Associates, Inc., totaling  
16 approximately \$40 million. At the time I signed the Form 10-Q, I knew that the revenue from the  
17 Staff Builders contract should not have been recognized in the third quarter because the purchase  
18 was financed by a third party and secretly guaranteed by HBOC and that the revenue from the  
19 Computer Associates contract should not have been recognized because the purchase was an  
20 exchange of cash and inventory rather than a legitimate sale. Both transactions violated GAAP  
21 regarding the recognition of revenue.

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

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

1 appeal any sentence (a) greater than the 15 year statutory maximum or (b) based on a total  
2 offense level higher than level 29. I do not have a joint defense agreement with any current or  
3 former employee of McKesson, HBOC, or McKessonHBOC and I have not been interviewed by  
4 an attorney for any such employee.

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

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

10 7. I have reviewed the Sentencing Guidelines with my attorney and I agree that the  
11 following Guidelines provisions, adjustments, and enhancements, contained in the Guidelines  
12 Manual effective November 1, 1998, apply in my case:

13	a. Base offense level, USSG §2F1.1(a):	6
14	b. Specific offense characteristics, 15 Loss amount, USSG §2F1.1(b)(1)(S), more than \$80 million:	+18
16	c. More than minimal planning/multiple victims, 17 USSG §2F1.1(b)(2):	+2
18	d. Adjustment for aggravating role, USSG §3B1.1(a):	+4
19	e. Adjustment for abuse of position of trust, 20 USSG §3B1.3:	+2
21	f. Adjustment for acceptance of responsibility, USSG §3E1.1:	<u>-3</u>
22	Total:	29

23 8. I agree that I will pay restitution as follows: I will liquidate all of my McKesson  
24 stock holdings, a total of 166,208 shares, and pay the entire proceeds, less cost of sales, to the  
25 Court Registry Investment System maintained by the Clerk of Court to be distributed as directed  
26 by the Court in the future. I agree that I will do this within three weeks of entering my plea. I  
27 agree that I will make a good faith effort to pay any other fine, forfeiture or restitution I am  
28 ordered to pay. Before or after sentencing, I will, upon request of the Court, the government, or

1 the U.S. Probation Office, provide accurate and complete financial information, submit sworn  
2 statements and give depositions under oath concerning my assets and my ability to pay, and  
3 release funds and property under my control in order to pay any fine, forfeiture, or restitution. I  
4 agree to pay the special assessment at the time of sentencing.

5 9. I agree not to sell, transfer to others, pledge or otherwise dispose of or encumber  
6 any property or other assets valued at more than \$10,000 that I own, directly or indirectly and in  
7 whole or in part, or in which I have any financial interest, either before sentencing without  
8 notifying the government or after sentencing until any restitution has been paid or the Court  
9 orders otherwise, except for payments of bona fide (a) legal fees and expenses, (b) school tuition,  
10 room, board, and books in connection with my children's education, and (c) state and federal  
11 taxes.

12 10. I agree to cooperate with the U.S. Attorney's Office before and after I am  
13 sentenced. My cooperation will include, but will not be limited to, the following:

- 14 a. I will respond truthfully and completely to any and all questions put to me,  
15 whether in interviews, before a grand jury or at any trial or other  
proceeding;
- 16 b. I will provide all documents and other material asked for by the  
17 government;
- 18 c. I will testify truthfully at any grand jury, court or other proceeding as  
19 requested by the government;
- 20 d. I will request continuances of my sentencing date, as necessary, until my  
21 cooperation is completed;
- 22 e. I will tell the government about any contacts I may have with any  
23 co-defendants or subjects of investigation, or their attorneys or individuals  
employed by their attorneys; and
- 24 f. I will not reveal my cooperation, or any information related to it, to anyone  
25 without prior consent of the government.

26 11. I agree that the government's decision whether to file a motion pursuant to USSG  
27 §5K1.1 and/or Fed. R. Crim. P. 35, as described in the government promises section below, is  
28 based on its sole and exclusive decision of whether I have provided substantial assistance and  
that decision will be binding on me. I understand that the government's decision whether to file  
such a motion, or the extent of the departure recommended by any motion, will not depend on

1 whether convictions are obtained in any case. I also understand that the Court will not be bound  
2 by any recommendation made by the government.

3 12. I agree not to commit or attempt to commit any crimes before sentence is imposed  
4 or before I surrender to serve my sentence; violate the terms of my pretrial release; intentionally  
5 provide false information or testimony to the Court, the Probation Office, Pretrial Services, or the  
6 government; or fail to comply with any of the other promises I have made in this Agreement. I  
7 agree that, if I fail to comply with any promises I have made in this Agreement, then the  
8 government will be released from all of its promises, but I will not be released from my guilty  
9 plea.

10 13. If I am prosecuted after failing to comply with any promises I made in this  
11 Agreement, then (a) I agree that any statements I made to any law enforcement or other  
12 government agency or in Court, whether or not made pursuant to the cooperation provisions of  
13 this Agreement, may be used in any way; (b) I waive any and all claims under the United States  
14 Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal  
15 Rules of Evidence, or any other federal statute or rule, to suppress or restrict the use of my  
16 statements, or any leads derived from those statements; and (c) I waive any defense to any  
17 prosecution that it is barred by a statute of limitations, if the limitations period has run between  
18 March 26, 2003, and the date I am indicted.

19 14. I agree that this Agreement contains all of the promises and agreements between  
20 the government and me, and I will not claim otherwise in the future.

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

23 The Government's Promises

24 16. The government agrees to move to dismiss any open charges pending against the  
25 defendant in the captioned-superseding indictment at the time of sentencing.

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

28 18. The government agrees not to use any statements made by the defendant pursuant

1 to this Agreement against him, unless the defendant fails to comply with any promises in this  
2 Agreement. The government may, however, tell the Court and the U.S. Probation Department  
3 about the full extent of the defendant's criminal activities in connection with the calculation of  
4 the Sentencing Guidelines, including any information learned from the defendant through his  
5 cooperation.

6 19. If, in its sole and exclusive judgment, the government decides that the defendant  
7 has cooperated fully and truthfully, provided substantial assistance to law enforcement authorities  
8 within the meaning of USSG §5K1.1, and otherwise complied fully with this Agreement, it will  
9 file with the Court a motion under §5K1.1 and/or Fed. R. Crim. P. 35 that explains the nature and  
10 extent of the defendant's cooperation and recommends a downward departure or sentence  
11 reduction.

12 20. The government agrees to recommend the offense level calculation set forth in  
13 paragraph 7, above, including, based on the information now known to it, a downward  
14 adjustment of three levels for acceptance of responsibility under USSG §3E1.1. If defendant  
15 fails to satisfy the requirements of USSG §3E1.1, the government is released from its promise to  
16 recommend this adjustment.

17 21. Based on the defendant's agreement to pay a \$1,000,000 civil penalty to the SEC,  
18 his agreement to liquidate his holdings of McKesson stock to pay restitution, and information  
19 provided to the government regarding his assets and liabilities, the government will not request  
20 or recommend a criminal fine or additional restitution.

### 21 The Defendant's Affirmations

22 22. I confirm that I have had adequate time to discuss this case, the evidence, and this  
23 Agreement with my attorney, and that he has provided me with all the legal advice that I  
24 requested.

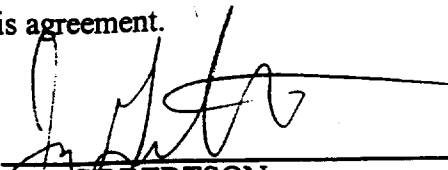
25 23. I confirm that while I considered signing this Agreement and, at the time I signed  
26 it, I was not under the influence of any alcohol, drug, or medicine.

27 24. I confirm that my decision to enter a guilty plea is made knowing the charges that  
28 have been brought against me, any possible defenses, and the benefits and possible detriments of




1 proceeding to trial. I also confirm that my decision to plead guilty is made voluntarily, and no  
2 one coerced or threatened me to enter into this agreement.

3  
4 Dated: 4/23/03

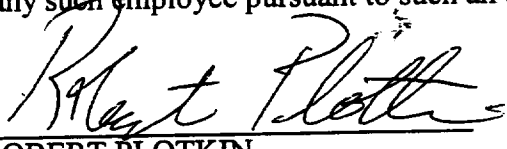
  
\_\_\_\_\_  
JAY GILBERTSON  
Defendant

5  
6  
7  
8 Dated: 4/23/03

KEVIN V. RYAN  
United States Attorney  
  
\_\_\_\_\_  
JOHN H. HEMANN  
Assistant United States Attorney

9  
10  
11  
12 I have fully explained to my client all the rights that a criminal defendant has and all the  
13 terms of this Agreement. In my opinion, my client understands all the terms of this Agreement  
14 and all the rights he is giving up by pleading guilty, and, based on the information now known to  
15 me, his decision to plead guilty is knowing and voluntary. I am not aware of any joint defense  
16 agreement between my client and any current or former employee of McKesson, HBOC, or  
17 McKessonHBOC, and I have not interviewed any such employee pursuant to such an agreement.

18  
19 Dated: 4/23/03

  
\_\_\_\_\_  
ROBERT PLOTKIN  
Attorney for Defendant

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