UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	IP 05- -CR
v.	)	
	)	
FRED R. "PETE" IRVING,	)	
Defendant.	)	

PLEA AGREEMENT

The United States of America and Fred R. "Pete" Irving ("defendant") hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands his rights:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

(c) to plead not guilty to any criminal charge brought against him;

(d) to have a trial by jury, at which he would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for him to be found guilty;

(e) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;

(f) not to be compelled to incriminate himself;

(g) to appeal his conviction, if he is found guilty; and

(h) to appeal the imposition of sentence against him.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(g) above. The defendant also knowingly and voluntarily waives his right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence in Paragraph 9 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b) - (c). Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty to a one-count Information to be filed in the United States District Court for the Southern District of Indiana, Indianapolis Division. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price at which ready mixed concrete was sold in the Indianapolis, Indiana metropolitan area beginning in or before July, 2000 and continuing until May 25, 2004 in violation of the Sherman Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below. The United States agrees that it will stipulate to the release of the defendant on his personal recognizance, pursuant to 18 U.S.C. § 3142, pending the sentencing hearing in this case.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:

(a) For purposes of this Plea Agreement, the "Relevant Period" is that period from July, 2000 until May 25, 2004. During the Relevant Period, the defendant was the President and principal shareholder of Irving Materials, Inc. ("IMI"), an entity organized and existing under the laws of Indiana with its principal place of business in Greenfield, Indiana. During the Relevant Period, IMI was a producer of ready mixed concrete and was engaged in the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area and elsewhere. Ready mixed concrete is a product whose ingredients include cement, aggregate (sand and gravel), water, and, at times, other additives. Ready mixed concrete is made on demand and, if necessary, is shipped to work sites by concrete mixer trucks. During the Relevant Period, IMI's sales of ready mixed concrete to customers in the Indianapolis, Indiana metropolitan area was over $100 million.

(b) During the Relevant Period, the defendant participated in a conspiracy with other persons and entities engaged in the manufacture and sale of ready mixed concrete, the primary purpose of which was to fix the price of ready mixed concrete sold in the Indianapolis, Indiana metropolitan area. In furtherance of the conspiracy, the defendant encouraged lower-level employees of IMI to engage in conversations and attend meetings with representatives of other ready mixed concrete producers in the Indianapolis, Indiana metropolitan area and/or approved of such conversations and meetings. During such meetings and conversations, agreements were reached to fix the price at which ready mixed concrete was to be sold in the

Indianapolis, Indiana metropolitan area.

(c) During the Relevant Period, the corporate conspirators purchased substantial quantities of equipment and supplies necessary to the manufacture and distribution of ready mixed concrete which equipment and supplies were shipped into Indiana from points of origin outside Indiana. During the Relevant Period, the business activities of the corporate conspirators in connection with the manufacture and sale of ready mixed concrete affected by the conspiracy were within the flow of, and substantially affected, interstate trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the Southern District of Indiana. The conspiratorial meetings and conversations described above took place in the Indianapolis, Indiana metropolitan area, and at least one of these meetings occurred in this District. In addition, sales of ready mixed concrete affected by this conspiracy were made by one or more of the conspirators to customers within the Southern District of Indiana.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of Section One of the Sherman Act completed prior to June 22, 2004 is:

(a) a term of imprisonment for three (3) years (15 U.S.C. § 1);

(b) a fine in an amount equal to the greatest of (1) $350,000, (2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18 U.S.C. § 3571(b) and (d)); and

(c) a term of supervised release of one (1) year following any term of

imprisonment. If the defendant violates any condition of supervised release, the defendant could be imprisoned for the entire term of supervised release (18 U.S.C. § 3559(a)(5); 18 U.S.C. § 3583(b)(3) and (e)(3); and Section 5D1.2(a)(3) of the United States Sentencing Guidelines ("U.S.S.G.," "Guidelines," or "Sentencing Guidelines")).

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. § 5E1.1, the Court may order him to pay restitution to the victims of the offense; and

(b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the defendant to pay a $100.00 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on May 25, 2004, along with the other factors set forth in 18 U.S.C. § 3553(a), in imposing sentence. The defendant understands and agrees that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant further understands and agrees that although the Court is not ultimately bound to impose a sentence within the applicable advisory Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or to determine the defendant's applicable Guidelines range, except

to the extent provided in U.S.S.G. § 1B1.8(b).

8. The United States and the defendant agree that the Guidelines calculations relevant to the defendant are as follows: Under U.S.S.G. § 2R1.1, the Base Offense Level is 10. Because the volume of commerce attributable to the defendant is over $100 million, a seven-level increase under U.S.S.G. § 2R1.1(b)(2)(G) is appropriate. The defendant is entitled to a three-level decrease under U.S.S.G. § 3E1.1(a) & (b) for Acceptance of Responsibility. The United States and the defendant agree that no other adjustments under the Sentencing Guidelines are warranted in this case. The Final Offense level is, therefore, Level 14. The Guidelines fine would be $350,000 pursuant to U.S.S.G. § 2R1.1(c)(1). Pursuant to Paragraph 10 of this Plea Agreement, the United States will file a motion for a downward departure under U.S.S.G. § 5K1.1 based on the defendant's substantial assistance to the United States in its investigations, recommending a two-level reduction in the Final Offense Level to Level 12 and a fine of $200,000. Pursuant to U.S.S.G. § 5C1.1(d)(2), the defendant is eligible for a sentence that substitutes home detention for one-half the minimum term of imprisonment. The sentencing range for an Offense Level 12 with a Criminal History Category I is 10 to 16 months.

SENTENCING AGREEMENT

9. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring the defendant to pay to the United States a criminal fine of $200,000, payable in full before the fifteenth (15th) day after the date of judgment; and to serve a period of incarceration of five months; a period of home confinement of five months; and no period of supervised release ("Recommended Sentence"). The United States and the defendant

agree that other than the possible motion by the United States for a downward departure pursuant to U.S.S.G. § 5K1.1 as set forth in Paragraph 10 of this Plea Agreement, there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission in formulating the Sentencing Guidelines that should result in a sentence outside of the advisory Guidelines range. The United States and the defendant also agree not to seek or support any sentence outside of the advisory Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The United States and the defendant further agree that the Recommended Sentence set forth in this Plea Agreement is reasonable. The United States and the defendant agree that under U.S.S.G. § 5E1.1(b)(2), restitution is not appropriate in this case because it would complicate or prolong the sentencing process. The defendant understands that the Court will order him to pay a $100.00 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(A) in addition to any fine imposed.

10. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 13 of this Plea Agreement and in the Cooperation Agreement filed separately with the Court, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. § 5K1.1, for a downward departure from the Guidelines sentence in this case and will request that the Court impose the fine and term of imprisonment contained in the Recommended Sentence set out in Paragraph 9 of this Plea Agreement because of the defendant's substantial assistance in the government's investigations and prosecutions of violations of federal criminal law in the ready mixed concrete industry. Both the United States and the defendant agree that a two-level decrease pursuant to U.S.S.G. § 5K1.1 in the offense

level and a departure to a fine of $200,000 are appropriate in this case.

11. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 13 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the United States Probation Office of the fact, manner, and extent of the defendant's cooperation and his commitment to prospective cooperation with the United States' investigations and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. To enable the Court to have the benefit of all relevant sentencing information, the United States may request that sentencing be postponed until his cooperation is complete. The defendant will not oppose that request provided that such postponement is of a reasonable duration.

12. The United States and the defendant understand that the Court retains complete discretion to accept or reject the Recommended Sentence provided for in paragraph 9 of this Plea Agreement.

(a) If the Court rejects the Recommended Sentence, then the Court shall, on the record and in open court (or, for good cause, *in camera*):

(1) Inform the parties that the Court rejects the Plea Agreement;

(2) Advise the defendant that the Court is not required to follow the Plea Agreement and give the defendant an opportunity to withdraw the plea; and

(3) Advise the defendant that if the plea is not withdrawn, the Court may dispose of the case less favorably toward the defendant than the Plea Agreement contemplated.

(b) If the defendant withdraws his guilty plea, this Plea Agreement, except for paragraph 12(c), shall be rendered void.

(c) If the defendant withdraws his plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if he withdraws his guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any Relevant Offense, as defined in Paragraph 14 below, will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.

DEFENDANT'S COOPERATION

13. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area, and any litigation or other proceedings arising or resulting from such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

(a) producing all non-privileged documents, including claimed personal documents, and other materials, wherever located, in the possession, custody, or control of the defendant, requested by attorneys and agents of the United States;

(b) making himself available for interviews, not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding as defined above, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503);

(d) otherwise voluntarily providing the United States with any non-privileged material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding as defined above; and

(e) when called upon to do so by the United States in connection with any Federal Proceeding as defined above, testifying in grand jury, trial, and other judicial proceedings, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503).

GOVERNMENT'S AGREEMENT

14. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 13 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the Recommended Sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed on or before May 25, 2004 that was undertaken in furtherance of an antitrust conspiracy involving the manufacture and sale of ready mixed concrete in the Indianapolis, Indiana metropolitan area ("Relevant Offense"). The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to

any crime of violence.

15. The defendant understands that he may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

16. The defendant has reviewed all legal and factual aspects of this case with his attorneys and is fully satisfied with his attorneys' legal representation. The defendant has thoroughly reviewed this Plea Agreement with his attorneys and has received satisfactory explanations from his attorneys concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with his attorneys and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

VOLUNTARY PLEA

17. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement and the Cooperation Agreement filed separately with the Court under seal. The United States has made

no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

18. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in Paragraph 13 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States may notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant may seek court review of any determination made by the United States under this paragraph to void any of its obligations under the Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant for any Relevant Offense, the statute of limitations will be tolled for the period between the date of the signing of the Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement or the date that the court rules that this Plea Agreement is null and void, whichever is later.

19. The defendant understands and agrees that in any further prosecution of him resulting from the release of the United States from its obligations under this Plea Agreement

based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

20. This Plea Agreement and the Cooperation Agreement, filed separately with the Court under seal, constitute the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

21. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

DATED: 6-14-05

Respectfully submitted,

BY: FRED R. "PETE" IRVING
Defendant

BY: FRANK J. VONDRAK

J. RICHARD KIEFER
Counsel for Fred R. "Pete" Irving

JONATHAN A. EPSTEIN

LARRY A. MACKEY
Counsel for Fred R. "Pete" Irving

MICHAEL W. BOOMGARDEN
Attorneys,
U.S. Department of Justice
Antitrust Division
209 S. LaSalle #600
Chicago, Illinois 60604
Tel: 312.353.7530
Fax: 312.353.1046