

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
) No. 12 CR 875
) Judge Ronald A. Guzman
)
v.)
)
MICHAEL E. KELLY)

PLEA AGREEMENT

1. This Plea Agreement between the Acting United States Attorney for the Northern District of Illinois, GARY S. SHAPIRO, and defendant MICHAEL E. KELLY, and his attorney, JEFFREY B. STEINBACK, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure. The parties to this Agreement have agreed upon the following:

Charges in This Case

2. The information in this case charges defendant with securities fraud in violation of Title 15, United States Code, Sections 77q(a) and 77x. The information in related case number 06 CR 964 charges defendant with mail fraud in violation of Title 18, United States Code, Section 1341, with wire fraud in violation of Title 18, United States Code, Section 1343 and with securities fraud in violation of Title 15, United States Code, Section 77q(a) and 77x.

3. Defendant has read the charges against him contained in the informations filed in both cases and those charges have been fully explained to him by his attorney.

4. Defendant fully understands the nature and elements of the crimes with which he has been charged in both cases.

Charge to Which Defendant Is Pleading Guilty

5. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the information in this case, which charges defendant with securities fraud, in violation of Title 15, United States Code, Sections 77q(a) and 77x.

Factual Basis

6. Defendant will plead guilty because he is in fact guilty of the charge contained in the information in this case. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt:

Beginning no later than in or about January 1998 and continuing until at least late December 2006, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant MICHAEL E. KELLY, in the offer and sale of securities, that is investments in nine-month promissory notes and in so-called universal leases, directly and indirectly, knowingly and wilfully: employed a scheme to defraud prospective investors and investors in the nine-month promissory notes and in the universal leases; obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and, engaged in transactions and a course of business which operated and would operate as a fraud and deceit upon purchasers of the investments in nine-month promissory notes and in universal leases.

Defendant was the president and sole shareholder of both Yucatan Investment Corporation (“Yucatan”) and Resort Holdings International, Inc. (“Resort Holdings”) and directed the activities of both entities. During the period from January 1998 to approximately June 1999, at defendant’s direction, Yucatan, and other similarly-named entities, offered and sold to the public approximately \$34,000,000 in investments in nine-month promissory notes, purportedly to raise funds for the purpose of purchasing and operating hotels in the Cancun, Mexico area. Defendant and others at defendant’s direction promised to pay investors in the promissory notes substantial interest (an annual rate of return of as much as 10.75% of the purchase price). Although the time period of the investments was only nine months, purchasers of the investments in the promissory notes had the option to reinvest the principal and interest for one or more additional nine-month terms.

In or about 1999, as a result of investigations and actions brought by state and federal securities regulators concerning the offer and sale of investments in the nine-month promissory notes, defendant stopped selling the nine-month promissory notes and, with others, created a successor money-raising vehicle and investment called the universal lease.

The universal lease had a 25-year term. Each universal lease purported to relate to a particular room for a particular time period in a particular Mexican hotel owned or operated by defendant. An investor in a universal lease had three options from which to choose: (1) use the room; (2) rent the room; or (3) allow a purportedly independent third party management company namely World Phantasy Tours, Inc., doing business as Majesty Travel and as Viajes Majesty (“World Phantasy Tours”) or, later, Galaxy Properties

Management, S.A. (“Galaxy Properties”) to rent the room in exchange for guaranteed payments to the investor.

Defendant encouraged persons who sold investments in the universal leases to emphasize to prospective purchasers the purported benefits of allowing World Phantasy Tours or Galaxy Properties to rent the rooms. As a result, almost all of the purchasers of investments in universal leases chose to allow World Phantasy Tours (or, later, Galaxy Properties) to rent their room in exchange for guaranteed payments. Under this option, World Phantasy Tours guaranteed prospective investors as much as an 11% annual return, whether or not the room was actually rented. As promoted by defendant and others at defendant’s direction, World Phantasy Tours took most of the risk out of the investment by promising to buy back the investments in universal leases at any time at a slight discount and further by promising to pay back 100% of the purchase price in as little as two years and later in as little as three years. As defendant knew, many of the investors were retirees who found the promised high fixed rates of return, coupled with the reported safety of the buy out (or repurchase) provision, to be an attractive investment alternative for their IRA and other retirement-type investments.

Purchasers of investments in universal leases, who chose option three, and purchasers of investments in the nine-month promissory notes made these investments in securities, based on what they were informed by defendant Michael E. Kelly and others at his direction, with the expectation of receiving promised returns solely from the efforts of others. Moreover, defendant intended to and did pool the funds raised from the offer and sale of

these investments and used them in part to make Ponzi-type payments of promised returns to investors.

Beginning in or about July 1999, at defendant's direction, Yucatan began offering and selling the investments in universal leases to the public. Resort Holdings was the successor to Yucatan in offering and selling investments in universal leases in the United States, and sold universal lease investments until at least in or about 2004. In total, defendant sold or caused the sale of approximately \$500,000,000 of these investments in universal leases. The investments in universal leases were offered and sold through a network of salesmen to over 8,000 investors in the United States. Defendant regularly met with salesmen and prospective purchasers to explain the terms of the investments in universal leases, often as part of an all-expenses-paid trip to Cancun.

In the offer and sale of investments in the nine-month promissory notes and in the universal leases, both of which investments constituted securities, defendant and others made and caused to be made material misstatements and omissions about the investments, the returns on the investments, the nature of the returns, the liquidity of the investments, and the risks associated with the investments. More specifically, defendant and others either intentionally failed to advise or concealed from investors that:

- a. World Phantasy Tours and Galaxy Properties were controlled by defendant;
- b. defendant used proceeds raised through the sale of investments in universal leases to make Ponzi-type payments of returns to earlier investors in the nine-month promissory notes and in universal leases;

- c. the ability of World Phantasy Tours and Galaxy Properties to make promised payments on the investments in nine-month promissory notes and in universal leases depended on defendant continually raising funds from new investors and using those funds to make Ponzi-type payments to earlier investors;
- d. defendant paid his salesmen as much as an 18% commission on the initial sales of nine-month promissory notes and universal leases, and an additional commission of as much as 18% on the renewal of an investment in the nine-month promissory notes and in the universal leases; and,
- e. defendant had been involved with a number of failed businesses, had pending judgments against him for failure to pay financial obligations and had liens pending against him from the Internal Revenue Service.

Defendant and others at his direction also made and caused to be made the following misrepresentations regarding the investments:

- f. with respect to the offer and sale of investments in nine-month promissory notes, defendant represented and caused others to represent to investors that Yucatan would pay more than twice as much interest as banks because Yucatan “was willing to share the company’s profitability with investors.” Defendant made and caused this misrepresentation to be made at times when he knew that Yucatan’s business was not profitable and that Yucatan needed to continually raise new funds from the sale of investments in nine-month promissory notes in order to make Ponzi-type payments of returns on earlier promissory note investments.
- g. with respect to the offer and sale of investments in nine-month promissory notes, defendant represented and caused others to represent to investors that “100% of your money goes to work for you.” Defendant knew that as much as 15% of an investor’s funds were paid as commissions to salesmen and that a substantial portion of investors’ funds were used by defendant to pay obligations to earlier investors and to pay defendant’s personal expenses.
- h. defendant represented and caused others to represent to investors that investments in universal leases were not securities. In so doing, the defendant and others attempted to avoid the scrutiny of federal and state securities regulators, who had halted the fraudulent offer and sale of investments in the nine-month promissory notes.

- I. defendant represented and caused others to represent to investors that World Phantasy Tours (and, later, Galaxy Properties) was an independent management company capable of guaranteeing the payment of as much as 11% annually to universal lease purchasers, whether or not the rooms were rented. Defendant knew that he controlled World Phantasy Tours and Galaxy Properties, that World Phantasy Tours and Galaxy Properties had insufficient assets to guarantee the annual returns, and that most, if not substantially all, of the payments of money owed to investors in investments in universal leases were made possible by the defendant engaging in a form of Ponzi scheme, that is raising funds from the sale of investments in universal leases to pay returns to earlier investors rather than from funds generated from the rental of hotel rooms.
- j. defendant represented and caused others to represent to investors that World Phantasy Tours was capable of buying back investments in universal leases at a small discount within the first two years following purchase and at 100% of the purchase price thereafter. Defendant knew that neither World Phantasy Tours nor Galaxy Properties had sufficient assets of its own to buy back potentially hundreds of millions of dollars of investments in universal leases, and that most, if not substantially all, of the payments purportedly made by World Tours and later by Galaxy Properties to investors in universal leases were made possible by the proceeds from other sales of investments in universal leases rather than from funds generated from the rental of hotel rooms.
- k. defendant represented and caused others to represent to investors that an investment in a universal lease was, among other things: “safe, flexible and profitable;” “100% liquid;” a “win, win, win;” “guaranteed” return for “25 years;” and could be “redeemed at any time.” Defendant further represented and caused others to represent to investors, among other things, that, “all you have to do is sit home and wait for your income.” Defendant knew that, in order to make good on the guaranteed returns and the promised buy-back provision, funds owed to earlier investors would have to be paid out of funds raised from later investors in Ponzi-type payments, rather than from income generated from the rental of rooms and other business operations.

In or about 1999-2000, in order to maintain the illusion that defendant’s hotel operations were profitable enough to pay the high interest rates guaranteed on the investments in nine-month promissory notes and to avoid complaints and adverse action by

unpaid and dissatisfied nine-month promissory note holders, defendant caused over \$5,000,000 raised through the offer and sale of investments in universal leases to be used to pay interest, principal, and commissions in connection with earlier investments in the nine-month promissory notes. By making these payments, defendant continued the ruse that investments in the nine-month notes were themselves profitable and deterred investors from complaining to authorities or attempting to take legal action against defendant or his companies.

Following sales of universal leases to investors, defendant and others at his direction also sent and caused to be sent to the investors periodic payments of monies due them on account of their contract with World Phantasy Tours, as well as periodic account statements and other correspondence, which payments, statements, and other correspondence were false and misleading. They falsely purported to show that investments in universal leases were economically sound or even increasing in value and that World Phantasy Tours and later Galaxy Properties were independent entities financially able to make the promised payments.

In early 2004, after a number of state and federal securities regulators brought investigations and enforcement actions based on the offer and sale of investments in universal leases, defendant substantially reduced the offer and sale of universal lease-type investments. In or about June 2004, defendant caused World Phantasy Tours, the purportedly independent third party management company, to cease doing business in order to dissuade and mislead complaining investors, and also caused World Phantasy Tours to unilaterally end the guaranteed return and buy-back provisions. Defendant caused others at

his direction to lie to and attempt to lull investors by falsely claiming that missed payments were caused by, among other things, a hurricane or computer problems, when defendant knew that World Phantasy Tours never had sufficient funds to make the payments of principal and interest from the rental of hotel rooms and had instead primarily relied on making payments to earlier investors funded by the sale of investments to later investors in universal leases as part of a Ponzi scheme.

In or about June 2004, defendant and others at his direction, in part to lull universal lease investors who were no longer being paid and whose arrangement with World Phantasy Tours had been curtailed, replaced World Phantasy Tours with another purportedly independent servicing company called Galaxy Properties and thereafter persuaded and induced and attempted to persuade and induce the investors who had entered into agreements with World Phantasy Tours to enter into agreements with Galaxy Properties on terms less favorable to investors than they had under the World Phantasy Tours agreement. Defendant and others at his direction falsely represented and caused others to falsely represent that Galaxy Properties was independent of Resort Holdings and World Phantasy Tours, when in fact defendant controlled it, including the hiring and firing of its employees and the funding of its operations.

In or about June 2004, defendant and others, through their undisclosed operation of Galaxy Properties, unilaterally reduced the returns being paid on investments in universal leases from the original guaranteed rate of as much as 11% to approximately 5% annually.

In late 2005, defendant and others stopped paying monies owed to investors in universal leases, shut down Galaxy Properties, and fired most of Galaxy Properties's employees.

Beginning in or about July 2006, defendant and others caused the repurchase of investments in universal leases at substantial discounts through a company defendant controlled called "CVP" (*Comercializadora Vacacional Panama S.A.*). In offering to repurchase these investments for as little as 50% of the original purchase price, defendant caused CVP to misrepresent CVP's independence from Resort Holdings and Yucatan, and made sellers agree to keep the transactions secret and to give up any claims they had against Resort Holdings or any affiliated party.

Defendant and others often used the mails, and means and instruments of transportation and communication in interstate commerce in employing the scheme to defraud, including Federal Express deliveries to, among other things, lull and attempt to lull investors about the status of the investments and the source of interest payments.

As a result of the scheme to defraud, defendant Kelly and others acting at his direction, through various companies in the United States, Mexico, and Panama, fraudulently raised about \$500,000,000 through the offer and sale of securities that is, investments in nine-month notes and in universal leases. Defendant and others associated with him used a significant portion of funds raised from investors for their own personal benefit, including the purchase of hotels, businesses, homes, boats, automobiles, an airplane, a nightclub and an interest in a development project known as *Puerto Cancun*. Defendant also used and caused the use of funds raised from investors to make Ponzi-type payments of

purported returns to investors. After making these Ponzi-type payments as part of the scheme, defendant still caused losses of over \$340,000,000 to more than 8,000 victim-investors.

With respect to charge set forth in this information, on or about June 16, 2003, in the Northern District of Illinois, defendant, for the purpose of employing the scheme to defraud, knowingly and wilfully, directly and indirectly, caused the use of the means and instruments of transportation and communication in interstate commerce, specifically, the interstate delivery from Cancun, Mexico to Morton Grove, Illinois by Federal Express of correspondence and an interest payment check purportedly from World Phantasy Tours to Investor A on an investment in universal leases.

All in violation of Title 15, United States Code, Sections 77q(a) and 77x.

Maximum Statutory Penalties

7. Defendant understands that pursuant to Title 15, United States Code, Section 77x, the charge to which he is currently pleading guilty carries the following statutory penalties:

a. A maximum sentence of 5 years imprisonment. This offense also carries a fine of the greater of \$250,000 or the greater of twice the gross gain or loss. Defendant further understands that the judge also may impose a term of supervised release of not more than three years.

b. Defendant further understands that the Court, based on defendant's agreement to be ordered to pay restitution in this plea agreement, may order restitution to the

victims of the offense in an amount determined by the Court pursuant to Title 18, United States Code, Section 3663(a)(3).

c. In accord with Title 18, United States Code, Section 3013, defendant will be assessed \$100 on the charge to which he has pled guilty, in addition to any other penalty or restitution imposed.

Sentencing Guidelines Calculations

8. Defendant understands that in imposing sentence the Court will be guided by the United States Sentencing Guidelines. Defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in determining a reasonable sentence.

9. For purposes of calculating the Sentencing Guidelines, the parties agree on the following points:

a. **Applicable Guidelines.** The Sentencing Guidelines to be considered in this case are those in effect at the time of sentencing. The following statements regarding the calculation of the Sentencing Guidelines are based on the Guidelines Manual currently in effect, namely the November 2012 Guidelines Manual.

b. **Offense Level Calculations.**

i. The base offense level for the charge in the information is 6, pursuant to Guideline Section 2B1.1(a)(2).

ii. Pursuant to Guideline Section 2B1.1(b)(1)(O), the offense level is increased by 28 levels because the total amount of loss resulting from the offense is greater than \$200 million, but less than \$400 million.

iii. Pursuant to Guideline Section 2B1.1(b)(2)(C), the offense level is increased by 6 levels because the offense involved 250 or more victims.

iv. Pursuant to Guideline Section 2B1.1(b)(10), the offense level is increased by 2 levels because a substantial part of the fraudulent scheme was committed from outside the United States and the offense involved sophisticated means.

v. Pursuant to Guideline Section 3B1.1(a), the offense level is increased by 4 levels because defendant was an organizer and leader of a criminal activity that was extensive;

vi. Pursuant to Guideline Section 3A1.1(b), the offense level would be increased 4 levels because the defendant knew that many of the victims of this offense were vulnerable victims due to, among other things, their age; however, pursuant to the Application Note for Guidelines Section 2B1.1(b)(2), this enhancement does not apply since the enhancement for 250 or more victims also applies.

vii. Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this provision, and if defendant continues to accept responsibility for his actions within the meaning of Guideline Section 3E1.1(a), including by furnishing the United States Attorney's Office with all requested financial

information relevant to his ability to satisfy any fine or restitution that may be imposed in this case, a two-level reduction in the offense level is appropriate.

viii. In accord with Guideline Section 3E1.1(b), defendant has timely notified the government of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently. Therefore, as provided by Guideline Section 3E1.1(b), if the Court determines the offense level to be 16 or greater prior to determining that defendant is entitled to a two-level reduction for acceptance of responsibility, the government will move for an additional one-level reduction in the offense level.

c. **Criminal History Category.** With regard to determining defendant's criminal history points and criminal history category, based on the facts now known to the government, defendant's criminal history points equal zero and defendant's criminal history category is I.

d. **Anticipated Advisory Sentencing Guidelines Range.** Therefore, based on the facts now known to the government, the anticipated offense level is 43, which, when combined with the anticipated criminal history category of I, results in an anticipated advisory Sentencing Guidelines range of life imprisonment, in addition to any supervised release, fine, and restitution the Court may impose. Pursuant to Guideline Section 5G1.1(a), because the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutory maximum sentence of five years' imprisonment shall be the guideline sentence.

e. Defendant and his attorney and the government acknowledge that the above Guideline calculations are preliminary in nature, and are non-binding predictions upon which neither party is entitled to rely. Defendant understands that further review of the facts or applicable legal principles may lead the government to conclude that different or additional Guideline provisions apply in this case. Defendant understands that the Probation Office will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final Guideline calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations, and defendant shall not have a right to withdraw his plea on the basis of the Court's rejection of these calculations.

Agreements Relating to Sentencing

10. Both parties agree to recommend the statutory maximum of 60 months imprisonment and restitution in an amount to be determined by the Court.

11. Both parties also agree that this plea agreement resolves only the charge set forth in the information filed in case number 12 CR 875 and that defendant remains liable on all counts of the information in case number 06 CR 964 other than Count Thirteen. The defendant agrees to waive any right he has under the Speedy Trial Act or under the Constitution of the United States to a resolution of the charge in this case and the charges in case number 06 CR 964 in a specific period of time. Defendant further waives any defense or claim to the continued prosecution of the charges set forth in the information filed in case number 06 CR 964 based upon the double jeopardy clause of the Fifth Amendment. The

government agrees that at the time of sentencing in this case, it will move to dismiss Count Thirteen of the information filed in case number 06 CR 964.

12. The parties agree that there exist no aggravating or mitigating circumstances of any kind or to any degree that should result in a sentence outside the applicable advisory Guidelines range as to the charge in this case. Accordingly, the parties agree not to seek or support, directly or indirectly, any variance from or sentence outside of the applicable Guidelines range as to the charge in this case. Nothing in this Plea Agreement is intended to preclude either party from taking a different position as to counts charged in the information in case number 06 CR 964.

13. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Plea Agreement and may impose a sentence up to the maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, defendant will have no right to withdraw his guilty plea.

14. Regarding restitution, defendant agrees, pursuant to Title 18, United States Code, Section 3663(a)(3) to be ordered by the Court at time of sentencing to pay restitution to the victims of defendant's scheme to defraud in amounts and to victims as determined by the Court. Defendant further acknowledges that the total amount of restitution owed to investor victims is at least approximately \$342,143,221.14, minus any credit for funds repaid by the Special Master appointed with defendant's consent in case number 06 CR 964 prior to sentencing.

15. Restitution shall be due immediately, and paid pursuant to a schedule to be set by the Court at sentencing. Defendant acknowledges that his intent in pleading guilty and entering this agreement at this time is to enable the Court to enter an order of restitution that is final and will not abate. Defendant acknowledges that he has agreed to the Court's appointment of the Special Master in case number 06 CR 964 for the purpose of liquidating defendant's asset and distributing the proceeds to the victims of defendant's fraud as restitution. Defendant agrees to the appointment of the Special Master in this case under the same terms as in case number 06 CR 964 including the same claims procedure. Defendant agrees that the claims procedure conducted to date in 06 CR 964 shall apply to this case, and shall continue as a restitution mechanism in this case.

16. Defendant acknowledges that the Special Master now appointed in case number 06 CR 964 and soon to be appointed in this case will provide a detailed listing to the Court of the victims and the amount of restitution owed to each victim under applicable law. Defendant further understands and agrees that the precise amount of restitution distributed by the Special Master to each victim will be determined in accordance with the victim claims procedure previously established by the Court with defendant's consent.

17. Although defendant acknowledges that his plea of guilty is a knowing and voluntary admission and plea to an offense he knowingly and intentionally committed, defendant intends for his plea to be considered by the Court in determining his request for release on bond on conditions solely for purposes of his medical treatment for his diagnosed cancer. If the court denies defendant's request for release for purposes of medical treatment,

this agreement shall be null and void, and the government agrees that defendant may withdraw his guilty plea.

18. Defendant acknowledges that pursuant to Title 18, United States Code, Section 3664(k), he is required to notify the Court and the United States Attorney's Office of any material change in economic circumstances that might affect his ability to pay restitution.

19. Defendant agrees to pay the special assessment of \$100 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

20. Defendant agrees that the United States may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613, and 3664(m), notwithstanding any payment schedule set by the Court.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

21. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case number 12 CR 875.

22. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District

of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

23. Defendant understands that his plea of guilty to the charge in this case does not resolve all the charges pending against him in the information filed in case number 06 CR 964, and that thirteen counts will remain pending. By pleading guilty to the charge in this case under this agreement, defendant intends to facilitate the restitution efforts that have been undertaken with defendant's agreement. It is defendant's intention that an order of restitution will be entered in this case, will become final and will not abate. Defendant acknowledges that all of defendant's assets, including property and rights to property, traceable to the proceeds of defendant's fraudulent scheme have been and continue to be transferred to the Special Master, appointed with defendant's agreement in case number 06 CR 964. The Special Master has created the Restitution Trust to take title, custody, and control of the assets and that the Restitution Trust is irrevocable. Defendant further acknowledges it is his intent that the administration of the Restitution Trust by the Special Master continue until all assets have been transferred, liquidated and distributed to victims and that the Restitution Trust will not be subject to abatement. Defendant understands that he continues to be subject to the jurisdiction of the Court in this case and case number 06 CR 964, including the Court's authority to require that he be detained.

Waiver of Rights

24. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

a. **Right to be charged by indictment.** Defendant understands that he has a right to have the charges prosecuted by an indictment returned by a concurrence of twelve or more members of a grand jury consisting of not less than sixteen and not more than twenty-three members. By signing this Agreement, defendant knowingly waives his right to be prosecuted by indictment and to assert at trial or on appeal any defects or errors arising from the information, the information process, or the fact that he has been prosecuted by way of information.

b. **Trial rights.** Defendant has the right to persist in a plea of not guilty to the charges against him, and if he does, he would have the right to a public and speedy trial.

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge sitting without a jury, defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

ii. If the trial is a jury trial, the jury would be composed of twelve citizens from the district, selected at random. Defendant and his attorney would participate in choosing the jury by requesting that the Court remove prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges.

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of proving defendant guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing

all the evidence, it was persuaded of his guilt beyond a reasonable doubt and that it was to consider each count of the information separately. The jury would have to agree unanimously as to each count before it could return a verdict of guilty or not guilty as to that count.

iv. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count separately, whether or not the judge was persuaded that the government had established defendant's guilt beyond a reasonable doubt.

v. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them.

vi. At a trial, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

vii. At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

c. **Waiver of appellate and collateral rights.** Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial. Defendant is aware that Title 28, United States Code, Section

1291, and Title 18, United States Code, Section 3742, afford a defendant the right to appeal his conviction and the sentence imposed. Acknowledging this, defendant knowingly waives the right to appeal his conviction, any pre-trial rulings by the Court, and any part of the sentence (or the manner in which that sentence was determined), including any term of imprisonment, and fine within the maximums provided by law, and including any order of restitution or forfeiture, in exchange for the concessions made by the United States in this Agreement. In addition, defendant also waives his right to challenge his conviction and sentence, and the manner in which the sentence was determined, and (in any case in which the term of imprisonment and fine are within the maximums provided by statute) his attorney's alleged failure or refusal to file a notice of appeal, in any collateral attack or future challenge, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation, nor does it prohibit defendant from seeking a reduction of sentence based directly on a change in the law that is applicable to defendant and that, prior to the filing of defendant's request for relief, has been expressly made retroactive by an Act of Congress, the Supreme Court, or the United States Sentencing Commission.

25. Defendant understands that he has the right to have the criminal charges in the information brought within five years of the last of the alleged acts constituting the specified violations of Title 15, United States Code, Section 77q(a). By signing this document, defendant knowingly waives any right to have the charges in this case brought against him

within the period established by the statute of limitations. Defendant also knowingly waives any defense or claim based upon the statute of limitations or upon the timeliness with which the charges have been brought.

Presentence Investigation Report/Post-Sentence Supervision

26. Defendant agrees that the information in the record of this case enables the Court to meaningfully exercise its sentencing authority under Title 18, United States Code, Section 3553 without the preparation of a presentence investigation report. Pursuant to Guidelines 6A1.1(a), defendant and the government will request that no presentence investigation report be prepared and that defendant be sentenced in this case as soon as possible after his plea of guilty.

27. For the purpose of monitoring defendant's compliance with his obligations to pay a fine and restitution during any term of supervised release or probation to which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions, correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of supervised release or probation to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

28. Defendant agrees to cooperate with the United States Attorney's Office in collecting any unpaid fine and restitution for which defendant is liable, including providing financial statements and supporting records as requested by the United States Attorney's Office.

29. Defendant will not object to a motion brought by the United States Attorney's Office for the entry of an order authorizing disclosure of documents, testimony and related investigative materials which may constitute grand jury material, preliminary to or in connection with any judicial proceeding, pursuant to Fed. R. Crim. P. 6(e)(3)(E)(I). In addition, defendant will not object to the government's solicitation of consent from third parties who provided records or other materials to the grand jury pursuant to grand jury subpoenas, to turn those materials over to the Civil Division of the United States Attorney's Office, or an appropriate federal or state agency, for use in civil or administrative proceedings or investigations, rather than returning them to the third parties for later summons or subpoena in connection with a civil or administrative proceeding involving, or investigation of, defendant.

Conclusion

30. Defendant understands that this Agreement will be filed with the Court, will become a matter of public record, and may be disclosed to any person.

31. Defendant understands that his compliance with each part of this Agreement extends throughout the period of his sentence, and failure to abide by any term of the Agreement is a violation of the Agreement. Defendant further understands that in the event

he violates this Agreement, the government, at its option, may move to vacate the Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

32. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

33. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

34. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

35. AGREED THIS DATE: December 12, 2012.

GARY S. SHAPIRO
Acting United States Attorney

MICHAEL E. KELLY
Defendant

EDWARD G. KOHLER
Assistant U.S. Attorney

JEFFREY B. STEINBACK
Attorney for Defendant

DANIEL W. GILLOGLY
Assistant U.S. Attorney