

**COPY** *RTD*

FILED IN OPEN COURT  
Atlanta

JUL 26 2007

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

By *[Signature]* **UNITED** Clerk  
*[Signature]* Deputy Clerk

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 DENNY'S PAY-LESS GROCERY, INC., )  
 )  
 Defendant. )

Criminal No. 1:07CR213  
Filed:  
Violation: 15 U.S.C. § 1

**PLEA AGREEMENT**

The United States of America and DENNY'S PAY-LESS GROCERY, INC. ("defendant"), a corporation organized and existing under the laws of the State of Florida, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P.):

**RIGHTS OF DEFENDANT**

1. The defendant understands its 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 it;

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(d) to have a trial by jury, at which it 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 it to be found guilty;

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

(f) to appeal its conviction if it is found guilty; and

(g) to appeal the imposition of sentence against it.

**AGREEMENT TO PLEAD GUILTY  
AND WAIVE CERTAIN RIGHTS**

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(f) above. The defendant also knowingly and voluntarily waives the 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, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence in Paragraph 8 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). Nothing in this paragraph,

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however, shall act as a bar to the defendant perfecting any legal remedies it ~~may otherwise have on appeal or collateral attack respecting claims of~~ ineffective assistance of counsel or prosecutorial misconduct. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty to a one-count Information in the form attached to be filed in the United States District Court for the Northern District of Georgia. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by rigging bids on certain lots of merchandise being offered for bid at auction by the United States Postal Service ("USPS") at merchandise auctions held in Atlanta, Georgia, beginning in or about August, 2002 and continuing up to and including October, 2002, in violation of the Sherman Antitrust 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.

**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:

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(a) For purposes of this Plea Agreement, the "relevant period" is that ~~period from August, 2002 through and including October, 2002.~~ During the relevant period, the defendant was a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Jacksonville, Florida. During the relevant period, the defendant was engaged in the business of buying and selling closeout, salvage and surplus merchandise, some of which it had purchased at USPS auctions;

(b) During the relevant period, the defendant, through a long-time senior official, participated in a conspiracy with a major competitor at the USPS auctions in Atlanta, Georgia, the primary purpose of which was to reduce the price the defendant and its major competitor were paying for merchandise purchased at said auctions and to divide lots of merchandise between themselves;

(c) During the relevant period, the defendant and its co-conspirators: traveled into the State of Georgia from other states of the United States to participate in USPS auctions at the mail recovery center in Atlanta, Georgia; bid on lots of merchandise brought into the State of Georgia by the USPS from other states of the United States for said auctions; brought checks and credit cards into the State of Georgia from other states of the United States to

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pay for merchandise bought at said auctions; and took merchandise

~~purchased at said auctions outside of the State of Georgia for resale in other~~  
states of the United States. The business activities of the defendant and its  
co-conspirators that are the subject of the attached Information were within  
the flow of, and substantially affected, interstate trade and commerce; and

(d) During the relevant period, acts in furtherance of this conspiracy  
were carried out within the Northern District of Georgia, Atlanta Division,  
including rigging bids at the Atlanta, Georgia USPS mail recovery center.

#### POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty  
which may be imposed against it upon conviction for a violation of Section  
One of the Sherman Antitrust Act is a fine in an amount equal to the greatest  
of:

- (a) \$10 million (15 U.S.C. § 1);
- (b) twice the gross pecuniary gain the conspirators derived  
from the crime (18 U.S.C. § 3571(c) and (d)); or
- (c) twice the gross pecuniary loss caused to the victims of the  
crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

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6. In addition, the defendant understands that:

~~(a) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a~~  
term of probation of at least one year, but not more than five years;

(b) pursuant to §8B1.1 of the United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or "Guidelines") or 18 U.S.C. § 3563(b)(2) or 3663(a)(3), the Court may order it to pay restitution to the victims of the offense; and

(c) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order the defendant to pay a \$400 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 at the time of the offense given ex post facto considerations, along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines

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range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a).

### SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose a sentence at the low end of the applicable Guidelines range requiring the defendant to pay to the United States a criminal fine, payable in full before the fifteenth (15th) day after the date of judgment, and an order of restitution as described below ("the recommended sentence"). The parties agree that the Court should use the Guidelines in effect at the time of the offense, due to ex post facto reasons. The parties agree to recommend to the Court that the Court order the defendant to make restitution of \$4,880 to the victim, the USPS, pursuant to 18 U.S.C. §§ 3563(b)(2) and 3663(a)(3), also payable in full before the fifteenth (15th) day after the date of judgment or, in the event the Court shall determine that restitution is not appropriate under the circumstances of this case, the parties agree to recommend that the Court should add said \$4,880 to the aforesaid fine, in lieu of the payment of restitution of \$4,880 to the victim. The United States agrees that it will represent to the Court that in its judgment, the offense level in this case under

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Guideline §§ 2R1.1 and 8C2.3 is  $10 + 1$  (non-competitive bids) = 11, yielding a base fine of \$30,000 under Guideline § 8C2.4(d). The United States agrees insofar as the determination of the culpability score under Guideline §8C2.5(g), it will recommend to the Court a two-point deduction. The parties agree that the Probation Office and the Court will need to make a factual determination whether the culpability score should be increased by one or more points, in the event defendant had ten or more employees within the meaning of Guideline §8C2.5. The United States further represents that it presently knows of no other facts which could increase the defendant's culpability score under Guideline § 8C2.5, and that it is its present belief that the culpability score should not exceed a total of four points. The parties also agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0. The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.



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(a) The defendant understands that the Court will order it to pay a \$400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), in addition to any fine imposed; and

(b) The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, and the further disclosure described in Paragraph 9, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant's role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553.

9. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 11 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation and its commitment to prospective cooperation with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

10. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence

provided for in Paragraph 8 of this Plea Agreement. The defendant understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose the recommended sentence contained in this Agreement, it nevertheless has no right to withdraw its plea of guilty.

### DEFENDANT'S COOPERATION

11. 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 business of buying and selling closeout, salvage and surplus merchandise, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any 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 to the United States all non-privileged documents, information, and other materials, wherever located, in the possession, custody, or control of the defendant, requested by the United States in connection with any Federal Proceeding; and

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(b) using its best efforts to secure the ongoing, full, and truthful cooperation, as defined in Paragraph 12 of this Plea Agreement, of the current and former directors, officers, and employees of the defendant as may be requested by the United States, including making these persons available, at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

12. The ongoing, full, and truthful cooperation of each person described in Paragraph 11(b) above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

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

(b) making himself or herself 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, without falsely implicating any person or intentionally withholding any information,

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subject to the penalties of making false statements (18 U.S.C. § 1001)

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and obstruction of justice (18 U.S.C. § 1503 *et seq.*);

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

(e) when called upon to do so by the United States in connection with any Federal Proceeding, 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 *et seq.*); and

(f) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under Paragraph 14(c), the statute of limitations period for any Relevant Offense as defined in Paragraph 14(a) will be tolled as to him or her for the period between the date of the signing of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its

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obligations to that person under the Plea Agreement.

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**GOVERNMENT'S AGREEMENT**

13. Upon acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, and subject to the cooperation requirements of Paragraph 11 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant for any act or offense committed before September 29, 2006 that was undertaken in furtherance of an antitrust conspiracy involving the business of buying and selling closeout, salvage and surplus merchandise at USPS auctions in the United States. 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.

14. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence and subject to the exceptions noted in Paragraph 14(c), the United States will not bring criminal charges against any current or former director, officer, or employee of the defendant for any act or offense committed before September 29, 2006 and while that person was acting

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as a director, officer, or employee of the defendant that was undertaken  
~~in furtherance of an antitrust conspiracy involving the business of~~  
buying and selling closeout, salvage and surplus merchandise at USPS  
auctions in the United States ("Relevant Offense");

(b) Should the United States determine that any current or former director, officer, or employee of the defendant may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under Paragraph 14(b) fails to comply with his or her obligations under Paragraph 12, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, shall be rendered void;

(d) Except as provided in Paragraph 14(e), information provided by a person described in Paragraph 14(b) to the United States under the

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terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 12 of this Plea Agreement, the agreement in Paragraph 14(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) 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; and

(g) Documents provided under Paragraphs 11(a) and 12(a) shall be shall be deemed responsive to outstanding grand jury subpoenas issued to the defendant.

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15. The defendant understands that it 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 been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. The defendant has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.



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**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. 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 11 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify counsel by telephone of its intention to void any of 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

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offenses relating to the investigation resulting in this 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 offense referred to in Paragraph 13 of this Plea Agreement, the statute of limitations period for such offense will be tolled for the period between the date of the signing of this 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.

19. The defendant understands and agrees that in any further prosecution of it resulting from the release of the United States from its obligations under this Plea Agreement, because of the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it, or current or former directors, officers, or employees of it to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it in any such further prosecution. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

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**ENTIRETY OF AGREEMENT**

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20. This Plea Agreement constitutes 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 is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached to, and incorporated by reference in, this Plea Agreement.

22. 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.

23. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.

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DATED: 6.26.2007

Respectfully submitted,

DENNY'S PAY-LESS  
GROCERY, INC.By: Roy Dennis Caldreon  
ROY DENNIS CALDREON  
PresidentCraig A. Gillen  
CRAIG A. GILLENGeorgia Bar No. 294838  
cgillen@gcpowlaw.com  
Counsel for Denny's Pay-Less  
Grocery, Inc.Gillen Parker & Withers LLC  
One Securities Centre  
Suite 1050  
3490 Piedmont Road, N.E.  
Atlanta, Georgia 30305  
Tel: (404) 842-9700  
Fax: (404) 842-9750John R. Fitzpatrick  
JOHN R. FITZPATRICK  
Georgia Bar No. 262360  
John.Fitzpatrick@usdoj.govKaren Sampson Jones by JAK  
KAREN SAMPSON JONES  
Member Pennsylvania Bar  
Karen.Sampson-Jones@usdoj.govAttorneys  
U.S. Department of Justice  
Antitrust Division  
75 Spring Street, S.W.  
Suite 1176  
Atlanta, Georgia 30303  
Tel: (404) 331-7100  
Fax: (404) 331-7110