

FILED

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA

v.

BARRY HEISNER,

Defendant.

No. CR-12-00084 PJH

PLEA AGREEMENT

The United States of America and Barry Heisner ("defendant") 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 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;

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

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

6 (f) not to be compelled to incriminate himself;

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

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

9 AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

10 2. The defendant knowingly and voluntarily waives the rights set out in Paragraph
 11 1(b)-(g) above. The defendant also knowingly and voluntarily waives the right to file any
 12 appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal
 13 under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the
 14 sentence imposed by the Court if that sentence is consistent with or below the Sentencing
 15 Guidelines range stipulated by the parties in Paragraph 9 of this Plea Agreement, regardless of
 16 how the sentence is determined by the Court. This agreement does not affect the rights or
 17 obligations of the United States as set forth in 18 U.S.C. § 3742(b). Nothing in this paragraph,
 18 however, shall act as a bar to the defendant perfecting any legal remedies he may otherwise have
 19 on appeal or collateral attack respecting claims of ineffective assistance of counsel or
 20 prosecutorial misconduct. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment
 21 at arraignment and will plead guilty to a two-count Information to be filed in the United States
 22 District Court for the Northern District of California. Count One of the Information charges the
 23 defendant with participating in a conspiracy to suppress and restrain competition by rigging bids
 24 to obtain selected properties offered at public real estate foreclosure auctions in Contra Costa
 25 County, in the Northern District of California (“the selected properties”), in unreasonable
 26 restraint of interstate trade and commerce, in violation of the Sherman Act, 15 U.S.C. § 1,
 27 beginning as early as August 2008 and continuing until in or about January 2011 (“relevant
 28 period”). Count Two of the Information charges the defendant with conspiracy to commit mail

1 fraud in violation of 18 U.S.C. § 1349, in Contra Costa County, California during the relevant
2 period.

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

8 FACTUAL BASIS FOR CHARGED OFFENSES

9 4. I agree that I am guilty of the offenses to which I will plead guilty, and I agree
10 that the following facts are true:

11 (a) As to Count One of the Information:

12 During the relevant period, the defendant participated in a conspiracy to rig bids to obtain
13 the selected properties. The primary purpose of this conspiracy was to suppress and restrain
14 competition to purchase the selected properties at non-competitive prices. To carry out their
15 conspiracy, the defendant and his co-conspirators agreed not to compete to purchase the selected
16 properties, designated which conspirator would win the selected properties at the public auctions
17 for the group of conspirators, and refrained from or stopped bidding on the selected properties at
18 the public auctions.

19 During the relevant period, the business activities of the defendant and his
20 co-conspirators were within the flow of, and substantially affected, interstate trade and
21 commerce. For example, mortgage holders located in states other than California received
22 proceeds from the public real estate foreclosure auctions that were subject to the bid-rigging
23 conspiracy.

24 During the relevant period, the conspiratorial activities described above took place in the
25 Northern District of California, and the real estate that was the subject of this conspiracy was
26 located in this District.

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1 (b) As to Count Two of the Information:

2 During the relevant period, the defendant and his co-conspirators willfully and knowingly
3 agreed to devise and intended to devise and to participate in a scheme and artifice to defraud
4 mortgage holders, other holders of debt secured by the selected properties, and in some cases, the
5 defaulting homeowners (collectively, "beneficiaries"), and to obtain money and property from
6 beneficiaries by means of materially false and fraudulent pretenses, representations, and
7 promises. The objects of the conspiracy were to fraudulently acquire title to the selected
8 properties, to make and receive payoffs, and to divert money to conspirators that would have
9 gone to beneficiaries. Among other things, the defendant and his co-conspirators executed a
10 deceptive scheme by purchasing the selected properties at public auctions at suppressed prices;
11 in some instances, negotiating payoffs with one or more conspirators not to compete; in many
12 other instances, holding second, private auctions open only to members of the conspiracy, to bid
13 for title to the selected properties; awarding the selected properties to the conspirators who
14 submitted the highest bids at the second, private auctions; transferring the right to title to the
15 selected properties into the names of the conspirators who submitted the highest bids at the
16 second, private auctions; paying conspirators monies that otherwise would have gone to
17 beneficiaries, using either a predetermined formula based on the bidding at the second, private
18 auction or through direct negotiations among the conspirators; taking steps to conceal the fact
19 that monies were diverted from the beneficiaries to the conspirators; making and causing to be
20 made materially false and misleading statements on records of public auctions that trustees relied
21 upon to distribute proceeds from the public auction to the beneficiaries and convey title to
22 properties sold at the public auction; and causing the suppressed purchase price to be reported
23 and paid to the beneficiaries.

24 The defendant and others, for the purpose of executing the conspiracy described above
25 and attempting to do so, knowingly used and caused to be used the United States Postal Service
26 and private or commercial interstate carriers. For example, trustees used the United States mail
27 and private or commercial interstate carriers to transmit Trustee's Deeds Upon Sale and other
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1 title documents to participants in the conspiracy. These mailings were foreseeable to the
2 defendant in the ordinary course of business.

3 The defendant earned no less than \$524,039 in illegally derived proceeds as a result of his
4 participation in the conspiracy to defraud as discussed above.

5 During the relevant period, the real estate that was the subject of this conspiracy was
6 located in the Northern District of California.

7 POSSIBLE MAXIMUM SENTENCE

8 5. The defendant understands that the statutory maximum penalty that may be
9 imposed against him upon conviction for a violation of Count One, 15 U.S.C. § 1, is:

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

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

15 (c) a term of supervised release of not more than three years following any
16 term of imprisonment. If the defendant violates any condition of supervised release, the
17 defendant could be required to serve up to an additional two years in prison (18 U.S.C.
18 § 3559(a)(3); 18 U.S.C. § 3583(b)(2) and (e)(3); and United States Sentencing Guidelines
19 (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”) § 5D1.2(a)(2)).

20 6. The defendant understands that the statutory maximum penalty that may be
21 imposed against him upon conviction for a violation of Count Two, 18 U.S.C. § 1349, is:

22 (a) a term of imprisonment for thirty years (18 U.S.C. § 1349);

23 (b) a fine of not more than \$1 million;

24 (c) a term of supervised release of not more than five years following any
25 term of imprisonment. If the defendant violates any condition of supervised release, the
26 defendant could be required to serve up to an additional three years in prison (18 U.S.C.
27 § 3559(a)(2); 18 U.S.C. § 3583(b)(1) and (e)(3); and U.S.S.G. § 5D1.2(a)(1)); and
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(d) forfeiture of any property constituting or derived from proceeds obtained as the result of the violation (18 U.S.C. § 981(a)(1)(C) & 28 U.S.C. § 2461(c)).

7. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. § 5E1.1 or 18 U.S.C. § 3663(a)(3), 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 special assessment upon conviction for each charged crime, totaling \$200.

SENTENCING GUIDELINES

8. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing, 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 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 or loss attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).

SENTENCING AGREEMENT

9. The United States and the defendant agree that the following Sentencing Guidelines apply:

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1	(a)	For Count One (15 U.S.C. § 1):	
2	i.	Base Offense Level, U.S.S.G. § 2R1.1(a):	12
3	ii.	Conduct involved agreement to submit non-competitive	
4		bids, U.S.S.G. § 2R1.1(b)(1):	+1
5	iii.	Volume of Commerce (stipulated to be \$11 million),	
6		U.S.S.G. § 2R1.1(b)(2)(A):	+4
7	iv.	Fine calculated as one to five percent of the volume	
8		of commerce (stipulated to be \$11 million), but not	
		less than \$20,000, U.S.S.G. § 2R1.1(c)(1):	\$110,000 to \$550,000
9		Total:	17
10	(b)	For Count Two (18 U.S.C. § 1349):	
11	i.	Base Offense Level, U.S.S.G. § 2B1.1(a)(1):	7
12	ii.	Loss > \$400,000, U.S.S.G. § 2B1.1(b)(1)(H):	+14
13	iii.	10 or more victims, U.S.S.G. § 2B1.1(b)(2)(A):	+2
14	iv.	Aggravating Role, U.S.S.G. § 3B1.1(c):	+2
15	v.	Fine, U.S.S.G. § 5E1.2(c)(3):	\$10,000 to \$100,000
16		Total:	25

17 Pursuant to U.S.S.G. § 3D1.3(a), the most serious of the counts determines the offense level to
 18 be applied.

19 10. The United States agrees that it will make a motion, pursuant to U.S.S.G. § 3E1.1,
 20 for a downward adjustment of three levels for acceptance of responsibility due to the defendant's
 21 timely notification of his intention to enter a guilty plea. Therefore, the ultimate Guidelines
 22 calculations result in a combined offense level of 22, for a jail term of 41 to 51 months and a fine
 23 of \$7,500 to \$75,000.

24 11. The defendant understands that the Court will order him to pay a special
 25 assessment of \$100 per count (\$200 total) pursuant to 18 U.S.C. § 3013(a)(2)(A) in addition to
 26 any fine imposed. The parties agree that there exists no aggravating or mitigating circumstance
 27 of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing
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1 Commission in formulating the Sentencing Guidelines justifying a departure pursuant to
2 U.S.S.G. § 5K2.0.

3 12. The Mandatory Victim Restitution Act requires the Court to order restitution to
4 the victims of certain offenses. The government and the defendant agree to recommend that the
5 Court order the defendant to pay restitution in the amount of \$76,143 pursuant to U.S.S.G.
6 § 5E1.1(a). The defendant agrees that within 60 days of the execution of this plea agreement, he
7 will deposit \$76,143 in liquid assets in an escrow account controlled by his attorney. The United
8 States and the defendant agree to recommend to the Court that the funds in the escrow account
9 be used only to satisfy any fine or restitution that the defendant is sentenced to pay. The
10 defendant acknowledges, however, that the Court may sentence him to pay a fine and restitution
11 in excess of the amount in the escrow account. The United States and the defendant also agree
12 that if the funds in the escrow account exceed the amount of the fine and restitution that the
13 defendant is sentenced to pay, they will seek the Court's permission to return the remainder to the
14 defendant. The defendant understands that this Plea Agreement is voidable by the government if
15 he fails to pay the restitution as ordered by the Court. The defendant further agrees that he will
16 not seek to discharge any restitution obligation or any part of such obligation in any bankruptcy
17 proceeding.

18 13. The defendant agrees that the illegally derived proceeds discussed above are
19 subject to forfeiture. The defendant agrees to pay a forfeiture money judgment in the amount of
20 \$524,039 in United States Currency (the "Forfeiture Money Judgment"). The defendant further
21 agrees to make payment to the United States, as set forth in the STIPULATION AND
22 PRELIMINARY FORFEITURE ORDER, which is attached hereto and incorporated herein by
23 reference.

24 14. The defendant agrees to fully assist the government in effectuating the payment of
25 the Forfeiture Money Judgment. The defendant affirms that he has fully disclosed all of his
26 assets to the United States in the Financial Statement. The defendant agrees that before or after
27 sentencing, he will, upon request of the Court, the government, or the U.S. Probation Office,
28 provide accurate and complete financial information, submit sworn statements and give

1 depositions under oath concerning his assets and his ability to pay, surrender assets he obtained
2 as a result of his crimes, and release funds and property under his control in order to pay any
3 fine, forfeiture, or restitution. If the United States discovers that the defendant has failed to
4 disclose in the Financial Statement assets in which he has any interest, the defendant consents to
5 the forfeiture of such undisclosed assets to the United States in order to satisfy the Forfeiture
6 Money Judgment.

7 15. The defendant agrees that the Forfeiture Money Judgment constitutes proceeds as
8 defined in 18 U.S.C. § 981(a)(2) and/or are substitute assets as defined in 21 U.S.C. § 853(p),
9 that the defendant obtained directly or indirectly as a result of a violation of 18 U.S.C. § 1349,
10 and thus are subject to forfeiture to the United States upon his guilty plea pursuant to this
11 Agreement.

12 16. The United States and the defendant are not aware of any information that would
13 affect the defendant's Criminal History Category. If no other information were discovered, the
14 defendant's Criminal History Category would be I. The parties understand that the defendant's
15 Criminal History Category is determined by the Court.

16 17. The defendant understands that the sentence to be imposed on him is within the
17 sole discretion of the sentencing judge. The United States cannot and does not make any
18 promises or representations as to what sentence the defendant will receive. However, the United
19 States will inform the Probation Office and the Court of (a) this Agreement; (b) the nature and
20 extent of the defendant's activities in this case and all other activities of the defendant that the
21 United States deems relevant to sentencing; and (c) the nature and extent of the defendant's
22 cooperation with the United States. In so doing, the United States may use any information it
23 deems relevant, including information provided by the defendant both prior and subsequent to
24 the signing of this Agreement. The United States reserves the right to make any statement to the
25 Court or the Probation Office concerning the nature of the criminal violations charged in the
26 attached Information, the participation of the defendant therein, and any other facts or
27 circumstances that it deems relevant. The United States also reserves the right to comment on or
28 to correct any representation made by or on behalf of the defendant and to supply any other

1 information that the Court may require.

2 18. If the United States determines that the defendant has provided substantial
3 assistance in any Federal Proceeding, as defined in Paragraph 21 of this Plea Agreement, and has
4 otherwise fully complied with all of the terms of this Plea Agreement, it will file a motion,
5 pursuant to U.S.S.G. § 5K1.1, advising the sentencing judge of all relevant facts pertaining to
6 that determination and requesting the Court to sentence the defendant in light of the factors set
7 forth in U.S.S.G. § 5K1.1(a)(1)-(5). The defendant acknowledges that the decision whether he
8 has provided substantial assistance in any Federal Proceeding and has otherwise complied with
9 the terms of this Plea Agreement is within the sole discretion of the United States. It is
10 understood that, should the United States determine that the defendant has not provided
11 substantial assistance in any Federal Proceeding, or should the United States determine that the
12 defendant has violated any provision of this Plea Agreement, such a determination will release
13 the United States from any obligation to file a motion pursuant to U.S.S.G. § 5K1.1, but will not
14 entitle the defendant to withdraw his guilty plea once it has been entered. The defendant further
15 understands that, whether or not the United States files a motion pursuant to U.S.S.G. § 5K1.1,
16 the sentence to be imposed on him remains within the sole discretion of the sentencing judge.

17 19. Subject to the ongoing, full, and truthful cooperation of the defendant described in
18 Paragraph 21 of this Plea Agreement, and before sentencing in the case, the United States will
19 fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's
20 cooperation and his commitment to prospective cooperation with the United States' investigation
21 and prosecutions, all material facts relating to the defendant's involvement in the charged
22 offenses, and all other relevant conduct. To enable the Court to have the benefit of all relevant
23 sentencing information, the United States may request, and the defendant will not oppose, that
24 sentencing be postponed until his cooperation is complete.

25 20. The United States and the defendant understand that the Court retains complete
26 discretion to accept or reject either party's sentencing recommendation. The defendant
27 understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose a
28 sentence consistent with either party's sentencing recommendation, he nevertheless has no right

1 to withdraw his plea of guilty.

2 DEFENDANT'S COOPERATION

3 21. The defendant will cooperate fully and truthfully with the United States in the
4 prosecution of this case, the conduct of the current federal investigation of violations of federal
5 antitrust and related criminal laws involving the purchase of properties at public real estate
6 foreclosure auctions in the Northern District of California, any other federal investigation
7 resulting therefrom, and any litigation or other proceedings arising or resulting from any such
8 investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full,
9 and truthful cooperation of the defendant shall include, but not be limited to:

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

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

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

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

22 (e) when called upon to do so by the United States in connection with any
23 Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings fully, truthfully,
24 and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or
25 declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C.
26 §§ 401-402), and obstruction of justice (18 U.S.C. § 1503, *et seq.*).

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GOVERNMENT'S AGREEMENT

22. Subject to the full, truthful, and continuing cooperation of the defendant described in Paragraph 21 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy or in violation of any related criminal law involving the purchase of properties at public real estate foreclosure auctions in the Northern District of California ("Relevant Offenses"). The non-prosecution 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.

23. 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

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

VOLUNTARY PLEA

25. 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

26. 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 21 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify the defendant or his counsel in writing by personal or overnight delivery or facsimile transmission, and may also notify his 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 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 Offenses, the statute of limitations period for such offense shall be tolled for the period between the date of the signing of this Plea Agreement and six months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

27. 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

28. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charges in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

29. 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.

30. 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.



BARRY HEISNER
Defendant

Dated: 3/12/12



PETER A. FITZPATRICK
Counsel for Defendant Barry Heisner
The Law Firm of Peter A. Fitzpatrick
1500 20th Street
San Francisco, CA 94107

Dated: 3/12/12



ALBERT B. SAMBAT
JEANE HAMILTON
DAVID J. WARD
CHRISTINA M. WHEELER
MANISH KUMAR
Trial Attorneys
U.S. Department of Justice
Antitrust Division

Dated: 2-24-12