

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	S3 02 Cr. 649 (TPG)
v.	:	Filed: 4/8/03
MITCHELL E. MOSALLEM,	:	Violations: 15 U.S.C. § 1
	:	18 U.S.C. § 371
Defendant.	:	26 U.S.C. § 7206(1)

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PLEA AGREEMENT

The United States of America and the defendant, Mitchell E. Mosallem, hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure.

1. Mitchell E. Mosallem ("Mosallem") will plead guilty to each count of the 11-count Superseding Indictment, United States v. Mitchell E. Mosallem, et al., S3 02 Cr. 649 (TPG), in which he is charged with one count of violating 15 U.S.C. § 1 in connection with a conspiracy to rig bids and allocate contracts, four counts of violating 18 U.S.C. § 371 in connection with separate conspiracies to commit mail fraud, one count of violating 18 U.S.C. § 371 in connection with a conspiracy to defraud the Internal Revenue Service, and five counts of violating 26 U.S.C. § 7206(1) in connection with his filing of false and fraudulent income tax returns.

2. If Mosallem fully complies with the understandings specified in this Agreement, he will not be further prosecuted criminally by the Antitrust Division of the Department of Justice, and with respect to tax offenses, he will not be further prosecuted criminally by the Tax Division of the Department of Justice, for crimes committed prior to the date of this Agreement arising from: (a) the overbilling of clients of Grey Global Group, Inc. ("Grey") from 1990 to

2001; (b) his receipt of kickbacks in the form of cash and goods and services from vendors from 1990 to 2001; (c) his failure to report those kickbacks as income on his federal income tax returns from 1990 to 2001; (d) his failure to report as income on his federal income tax returns from 1990 to 2001 compensation he received from Grey in the form of reimbursement for personal travel expenses; and (e) the rigging of bids on contracts awarded by Grey for work on behalf of Brown & Williamson Tobacco Corp. ("B&W") from late 1994 to 2001. This Agreement does not provide any protection against prosecution for any crimes except as set forth above. This Paragraph does not apply to civil matters of any kind, any violations of federal securities laws, or crimes of violence.

3. It is understood that this Agreement does not bind any federal, state, or local prosecuting authority other than the Antitrust Division and, to the extent set forth above, the Tax Division of the Department of Justice.

4. The United States and Mosallem agree and stipulate that, pursuant to USSG § 1B1.11(b)(1), the Nov. 2000 version United States Sentencing Commission Guidelines Manual (Nov. 2000) ("USSG"), the version in effect at the time of the offenses, should be applied because application of a later version (now the Nov. 2002 edition) would lead to a higher adjusted offense level.

5. Mosallem understands and agrees that, pursuant to 15 U.S.C. § 1 and 18 U.S.C. § 3571, the maximum sentence provided by law to which he is subject for his violation of 15 U.S.C. § 1, a class E felony, is (a) a term of imprisonment of not more than three years; (b) a fine of not more than the greater of \$350,000, twice the gross pecuniary gain from the offense, or twice the victim's gross pecuniary loss from the offense; or (c) both such sentences. Mosallem also understands that, pursuant to 18 U.S.C. §§ 3563(b)(2) or 3583(d) and USSG § 5E1.1, the Court may impose an order of restitution as a condition of probation or supervised release. The Court may also impose a term of supervised release of no more than one year, pursuant to 18 U.S.C. § 3583(b)(3) and USSG § 5D1.2(a)(3). In addition, Mosallem understands that, pursuant

to 18 U.S.C. § 3013(a)(2)(A) and USSG § 5E1.3, the Court must impose a special assessment of \$100.

6. Mosallem understands that, pursuant to 18 U.S.C. § 371 and 18 U.S.C. § 3571, the maximum sentence provided by law to which he is subject for each of his violations of 18 U.S.C. § 371, a class D felony, is (a) a term of imprisonment of not more than five years; (b) a fine of not more than the greatest of \$250,000, twice the gross pecuniary gain from the offense, or twice the victim's gross pecuniary loss from the offense; or (c) both such sentences; and for Count Six (d) the costs of prosecution. Mosallem also understands that, pursuant to 18 U.S.C. § 3663A and USSG § 5E1.1, the Court shall impose an order of restitution. Mosallem also understands that, pursuant to 18 U.S.C. § 3583(b)(2) and USSG § 5D1.2(a)(2), the Court may also impose a term of supervised release of no more than three years for each count. In addition, Mosallem understands that, pursuant to 18 U.S.C. § 3013(a)(2)(A) and USSG § 5E1.3, the Court must impose a special assessment of \$100 for each count.

7. Mosallem understands and agrees that, pursuant to 26 U.S.C. § 7206(1) and 18 U.S.C. § 3571, the maximum sentence provided by law to which he is subject for each of his violations of 26 U.S.C. § 7206(1), a class E felony, is (a) a term of imprisonment of not more than three years; (b) a fine of not more than the greater of \$250,000, twice the gross pecuniary gain from the offense, or twice the victim's gross pecuniary loss from the offense; or (c) both such sentences, together with (d) the costs of prosecution. Mosallem also understands that, pursuant to 18 U.S.C. §§ 3563(b)(2) or 3583(d) and USSG § 5E1.1, the Court may impose an order of restitution as a condition of probation or supervised release. The Court may also impose a term of supervised release of no more than one year for each count, pursuant to 18 U.S.C. § 3583(b)(3) and USSG § 5D1.2(a)(3). In addition, Mosallem understands that, pursuant to 18 U.S.C. § 3013(a)(2)(A) and USSG § 5E1.3, the Court must impose a special assessment of \$100 for each count.

8. The United States and Mosallem agree and stipulate that the combined adjusted

offense level applicable to the offenses with which he is charged in the Superseding Indictment is level 26 (63-78 months), which is derived from the following calculations:

(a) The adjusted offense level for the conspiracy charged in Count One of the Superseding Indictment is level 21 (base level of 10 pursuant to USSG § 2R1.1, plus one level pursuant to USSG § 2R1.1(b)(1) (agreement to refrain from submitting competitive bids), plus four levels pursuant to USSG § 2R1.1(b)(2)(D) (volume of commerce between \$6.25 million and \$15 million), plus two levels pursuant to USSG § 3B1.3 (abuse of position of trust), plus four levels pursuant to USSG § 3B1.1 (aggravating role));

(b) In accord with United States v. Fitzgerald, 232 F.3d 315 (2d Cir. 2000), and United States v. Petrillo, 237 F.3d 119 (2d Cir. 2000), USSG §§ 3D1.2(d) and 3D1.3(b) require that the offenses charged in Counts Two through Eleven (fraud and tax offenses) be grouped and the losses aggregated, and that the offense level for the combined fraud and tax group is the higher of the offense level determined from the instructions in Chapter 2, Part F (Offenses Involving Fraud Or Deceit) or Part T (Offenses Involving Taxation), including all appropriate adjustments;

(c) The combined loss from the fraud and tax offenses is approximately \$2.4 million (a combined fraud loss of \$1.65 million and a tax loss of \$750,000);

(d) The offense level for the fraud and tax group calculated according to the instructions in Part F is level 26 (base offense level of 6, pursuant to USSG §§ 2F1.1(a), plus 12 levels, pursuant to USSG § 2F1.1(b)(1)(M) (Fraud Table) (loss of more than \$1.5 million but less than \$2.5 million), plus 2 levels, pursuant to USSG § 2F1.1(b)(2)(A) and (B) because the offenses charged in those counts involved more than minimal planning and defrauded more than one victim, plus two levels pursuant to USSG § 3B1.3 (abuse of position of trust), plus four levels pursuant to USSG § 3B1.1 (aggravating role); and

(e) The offense level for the fraud and tax group calculated according to the instructions in Part T is level 28 (offense level of 20, pursuant to USSG §§ 2T1.1(a)(1) and

2T4.1(O) (Tax Table) (loss of more than \$1.5 million but less than \$2.5 million), plus two levels pursuant to USSG § 2T1.1(b)(1) (failure to report more than \$10,000 from criminal activity), plus two levels pursuant to USSG § 3B1.3 (abuse of position of trust), plus four levels pursuant to USSG § 3B1.1 (aggravating role));

(f) The antitrust offense does not involve substantially the same harm as the fraud and tax offenses, nor is it of the same general type as the fraud and tax offenses. Therefore, pursuant to USSG § 3D1.2, the antitrust offense is not grouped with the fraud and tax offenses charged in Counts Two through Eleven;

(g) The antitrust offense, with an offense level of 21, is between five and eight levels less serious than the fraud/tax group, and thus, pursuant to USSG § 3D1.4(b), counts as ½ Unit. Because there are 1½ Units, one offense level is added to the fraud and tax group offense level, yielding a combined offense level of 29; and

(h) Mosallem has demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct, thereby reducing the adjusted offense level by 3 levels to level 26, pursuant to USSG § 3E1.1(a) and (b).

9. The United States and Mosallem agree that neither a downward nor an upward departure from a sentence consistent with offense level 26 is warranted. Accordingly, neither party will seek such a departure nor seek any adjustment not set forth herein. Neither party will suggest that the Probation Office consider such a departure or adjustment, nor suggest that the Court sua sponte consider such a departure or adjustment.

10. The United States and Mosallem agree that Mosallem will not appeal, or otherwise litigate under 28 U.S.C. § 2255, any sentence within or below the stipulated Guidelines range set forth in this Agreement, and that the government will not appeal any sentence within or above the stipulated Guidelines range. This provision is binding on the parties even if the Court employs a Sentencing Guidelines analysis different from that set forth in this Agreement. Furthermore, it is agreed that any appeal regarding the sentence of Mosallem

that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation.

11. The United States and Mosallem agree and stipulate that the fine range for Mosallem for the offenses charged in the Superseding Indictment is from \$130,000 to \$650,000, pursuant to USSG §§ 2R1.1(c)(1) and 5E1.2(b).

12. Mosallem agrees that 30 days prior to the date of sentencing, he shall file accurate amended tax returns for the tax years 1996, 1997, 1998, 1999, and 2000, and will pay, or will enter into an agreement to pay, past taxes due and owing by him to the Internal Revenue Service, on such terms and conditions as will be agreed on by the Internal Revenue Service and him. Mosallem will cooperate fully, completely, and truthfully with the IRS in determining the accuracy and completeness of all such amended returns.

13. Mosallem understands that the sentence to be imposed on him will be determined solely by the sentencing judge. The United States cannot and does not make any promises or representations as to what sentence Mosallem will receive. Mosallem understands that, as provided in Rule 11(c)(3)(B) of the Federal Rules of Criminal Procedure, if the Court does not impose a sentence consistent with the stipulations contained in this Agreement, he nevertheless has no right to withdraw his pleas of guilty. The United States reserves the right to make any statements to the Court or the Probation Office concerning the nature of the criminal violations charged in the Superseding Indictment, Mosallem's participation therein, and any other facts or circumstances that it deems relevant, to make a recommendation of a sentence, including a recommendation of any specific sentence consistent with the stipulations set out in this Agreement and with any applicable provision of the Guidelines, to comment on or correct any representation made by or on behalf of the defendant, and to supply any other information that the Court may require.

14. Mosallem agrees to provide to the United States, on request, all documents, records or other tangible evidence in his possession, custody, or control, relating to any matters

about which he may be asked, if any such documents or other materials exist.

15. Mosallem understands that this Agreement does not in any way affect or limit the right of the United States to respond to and take positions on post-sentencing motions or requests for information that relate to reduction or modification of sentence.

16. Mosallem understands and agrees that should he fail in any way to fulfill any of the obligations set out in this Agreement, the United States will be released from its obligations and he will be subject to prosecution for any federal criminal violation of which the United States has knowledge. In addition, Mosallem agrees that, should the United States be released from its obligations under this Agreement, and should the United States prosecute him, he will not assert a defense that any such prosecution is time-barred based on a statute of limitations that expired after the signing of this Agreement.

17. This Agreement constitutes the entire agreement between the United States and Mosallem concerning the disposition of the charges contained in the Superseding Indictment. The United States has made no other promises to, or agreements with, Mosallem. This Agreement cannot be modified other than in a writing signed by the parties.

Dated: 4/8/03

/s/ _____
MITCHELL E. MOSALLEM

/s/ _____
PAUL B. BERGMAN, ESQ.
Counsel for Mitchell E. Mosallem

/s/ _____
REBECCA MEIKLEJOHN

/s/ _____
DOUGLAS M. TWEEN

/s/ _____
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