

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA	:	Criminal No. 06-cr-920
v.	:	Filed: 10/6/2006
TIMOTHY O'LEARY	:	Violation: 18 U.S.C. § 371
Defendant.	:	

----- x

**PLEA AGREEMENT**

The United States of America and the defendant, Timothy O'Leary, hereby enters into the following Plea Agreement ("Agreement") pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure.

**AGREEMENT TO PLEAD GUILTY**

1. Timothy O'Leary ("O'Leary") will plead guilty in the United States District Court for the Southern District of New York to a one-count Information, in the form attached, in which he is charged with one count of violating 18 U.S.C. § 371 in connection with a conspiracy to commit commercial bribery, mail fraud, and to make false and fraudulent statements in U.S. Income Tax Returns relating to the payment of money to employees or agents of Mount Sinai School of Medicine and The Mount Sinai Hospital ("Mount Sinai"), from approximately January 2001 until approximately September 2003.

2. If O'Leary 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 the following activity, as specified in the attached Information: (a) any agreement to rig bids or allocate contracts to supply Mount Sinai with telecommunication equipment and services; (b) the payment of money to employees or agents of Mount Sinai; and (c) any illegitimate business deductions taken by Broadcom on its federal income tax returns for the tax years 2001 through 2003 relating to such payments to employees or agents of Mount Sinai. 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.

**POSSIBLE MAXIMUM PENALTIES**

4. O'Leary understands and agrees 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 his violation 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 greater of \$250,000, or the greater of twice

his gross pecuniary gain from the offense or twice the victim's gross pecuniary loss from the offense, together with the cost of prosecution; or (c) both such sentences. O'Leary also understands that the Court shall impose an order of restitution, pursuant to 18 USC §§ 3663, 3663A, and 3664. The Court may also impose a term of supervised release of no more than three years, pursuant to 18 U.S.C. § 3583(b)(2) and USSG § 5D1.2(a)(2). In addition, O'Leary understands that, pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court must impose a special assessment of \$100.

### **SENTENCING GUIDELINES**

5. O'Leary understands that United States Sentencing Guidelines ("Sentencing Guidelines") are advisory, not mandatory, but that the Court must consider the Sentencing 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 a reasonable sentence. O'Leary understands that the Sentencing Guidelines determinations will be made by the Court by a preponderance of the evidence standard. O'Leary understands that although the Court is not ultimately bound to impose a sentence within the applicable Sentencing Guidelines range, its sentence must be reasonable based upon considerations of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a).

6. The United States and O'Leary agree and stipulate that, pursuant to USSG § 1B1.11(a), the November 2005 version of the Sentencing Guidelines, the version in effect at the time of sentencing, should be applied.

7. The United States and O’Leary acknowledge that they cannot agree on whether O’Leary should receive an adjustment for his role in the offense, pursuant to USSG § 3B1.1. The United States contends that O’Leary should receive a three-level adjustment, pursuant to USSG § 3B1.1(b), while O’Leary contends that he should not receive any adjustment under USSG § 3B1.1. As a result, the parties cannot now agree on the offense level at which O’Leary should be sentenced, but acknowledge that the combined adjusted offense level applicable to the offenses charged in the attached Information should be either level 18 (27-33 months) or level 15 (18-24 months), depending upon whether the Court applies an adjustment pursuant to USSG § 3B1.1(b). Furthermore, the parties can agree and hereby stipulate to the following:

(a) The base level is 8, pursuant to USSG § 2B4.1;

(b) In accord with the directives of the Second Circuit in 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 fraud and tax losses resulting from the single offense charged be aggregated, and that the offense level for the combined fraud/tax group is the higher of the offense level determined from the instructions in Chapter 2, Part B (Offenses Involving Theft, Fraud Or Deceit) or Chapter 2, Part T (Offenses Involving Taxation) and all appropriate adjustments;

(c) The combined fraud and tax loss is approximately \$172,854, the sum of the fraud loss (approximately \$152,993 in payments made) and the tax loss (approximately \$19,861 in unpaid federal and state, and city income taxes, all of which

have been calculated in accordance with USSG § 2T1.1(c)(1)(A) and are based, when available, on O’Leary’s actual marginal tax rates));

(d) Before any adjustment for role in the offense, pursuant to USSG § 3B1.1, the offense level calculated according to the instructions in Part B is level 18 (base level of 8, pursuant to USSG § 2B4.1(a); plus 10 levels, pursuant to § 2B1.1(b)(1)(F) (loss of more than \$120,000 but less than \$200,000);

(e) Before any adjustment for role in the offense, pursuant to USSG § 3B1.1, the offense level calculated according to the instructions in Part T is level 16 (offense level of 16, pursuant to USSG §§ 2T1.1(a)(1) and 2T4.1(G) (Tax Table) (loss of more than \$80,000 but less than \$200,000); and

(f) Before any adjustment for role in the offense, pursuant to USSG § 3B1.1, assuming O’Leary clearly demonstrates acceptance of responsibility, to the satisfaction of the government, through his allocution and subsequent conduct prior to the imposition of sentence, a 2-level reduction will be warranted, pursuant to USSG § 3E1.1(a). Furthermore, assuming the defendant has accepted responsibility as described in the previous sentence, an additional 1-level reduction is warranted, pursuant to USSG § 3E1.1(b), because the defendant gave timely notice 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.

8. The United States and O'Leary agree and stipulate that the fine range for O'Leary for the offenses charged in the Information is from \$5,000 to \$50,000, pursuant to USSG § 5E1.2(c).

9. The United States further agrees that a sentence range of 27 to 33 months, based on a combined adjusted offense level of 18, (the Government's Stipulated Guidelines Range) would constitute a reasonable sentence in light of all the factors set forth in Title 18, U.S.C. § 3553(a). O'Leary further agrees that a sentence range of 18 to 24 months based on a combined adjusted offense level of 15, (O'Leary's Stipulated Guidelines Range) would constitute a reasonable sentence in light of all the factors set forth in Title 18, U.S.C. § 3553(a). However, either party may seek a sentence outside of the Stipulated Guidelines Range, suggest that the Probation Department consider a sentence outside of the Stipulated Guidelines Range, and suggest that the Court sua sponte consider a sentence outside of the Stipulated Guidelines Range, based on factors to be considered in imposing a sentence pursuant to Title 18, U.S.C. § 3553(a). Further, the United States acknowledges that, pursuant to USSG § 5K2.0, O'Leary intends to move for a departure from the confinement portion of the sentence calculated in accordance with the above stipulations based on his family circumstances. The United States reserves the right to oppose this motion, should it decide that such a departure is not merited under the circumstances, and to respond to any factual inquiries by the Court or the Probation Office.

10. The United States and O’Leary agree that (i) O’Leary will not appeal or otherwise litigate under 28 U.S.C. § 2255 and/or 2241, any sentence within or below O’Leary’s Stipulated Guidelines Range as set forth in this Agreement, and (ii) that the United States will not appeal any sentence within or above the Government’s Stipulated Guidelines Range as set forth above. 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 O’Leary 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 stipulations.

11. Except as provided in any written Proffer Agreement(s) that may have been entered into between the Antitrust Division and the defendant, nothing in this agreement limits the right of the parties (i) to present to the Probation Department or the Court any facts relevant to sentencing; (ii) to make any arguments regarding where within the Stipulated Guidelines Range or stipulated fine range (or such other range as the Court may determine) the defendant should be sentenced and regarding the factors to be considered in imposing a sentence pursuant to Title 18, U.S.C. Section 3553(a); (iii) to seek an appropriately adjusted Sentencing range if it is determined based upon new information that the defendant's criminal history category is other than Category I. Nothing in this Agreement limits the right of the Government to seek denial of the adjustment for acceptance of responsibility, see USSG § 3E1.1, and/or imposition of an adjustment for obstruction of justice, see USSG § 3C1.1, regardless of any stipulation set

forth above, should the defendant move to withdraw his guilty plea once it is entered, or should it be determined that the defendant has either (i) engaged in conduct, unknown to the United States at the time of the signing of this Agreement, that constitutes obstruction of justice or (ii) committed another crime after signing this Agreement.

12. It is understood that pursuant to Sentencing Guidelines § 6B1.4(d), neither the Probation Department nor the Court is bound by the above Sentencing Guidelines stipulations, either as to questions of fact or as to the determination of the proper Sentencing Guidelines to apply to the facts. In the event that the Probation Department or the Court contemplates any Sentencing Guidelines adjustments, departures, or calculations different from those stipulated to above, or contemplates any sentence outside of the Stipulated Guidelines Range, the parties reserve the right to answer any inquiries and to make all appropriate arguments concerning the same.

13. It is understood that the sentence to be imposed upon the defendant is determined solely by the Court. It is understood that the Sentencing Guidelines are not binding on the Court. The defendant acknowledges that his entry of a guilty plea to the charged offense authorizes the sentencing court to impose any sentence, up to and including the statutory maximum sentence. The United States cannot, and does not, make any promise or representation as to what sentence the defendant will receive. Moreover, it is understood that the defendant will have no right to withdraw his plea of guilty should the sentence imposed by the Court be outside the Stipulated Guidelines Range set forth above.

14. O'Leary 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.

15. O'Leary agrees that 60 days prior to the date of sentencing, he shall file accurate amended tax returns for the tax years 2001, 2002, and 2003, and will pay, or will enter into an agreement to pay, past taxes due and owing by himself and his spouse to the Internal Revenue Service, including interest and applicable civil fraud penalties, on such terms and conditions as will be agreed on by the Internal Revenue Service and the company. O'Leary will cooperate fully, completely, and truthfully with the IRS in determining the accuracy and completeness of all such amended returns.

16. O'Leary understands and agrees that should his conviction following his plea of guilty pursuant to this Agreement be vacated for any reason, then any prosecution that is not time-barred by the applicable statute of limitations on the date of the signing of this agreement (including any counts that the Government has agreed to dismiss at sentencing pursuant to this Agreement) may be commenced or reinstated against him notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement or reinstatement of such prosecution. It is the intent of this Agreement to waive all defenses based on the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed.

**REPRESENTATION BY COUNSEL**

17. O'Leary has been represented by counsel and is fully satisfied that his attorney has provided competent legal representation. O'Leary has thoroughly reviewed this Agreement and acknowledges that counsel has advised him of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.

### **VOLUNTARY PLEA**

18. O'Leary hereby acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the United States has failed to produce any discovery material, Jencks Act material, exculpatory material pursuant to Brady v. Maryland, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to Giglio v. United States, 405 U.S. 150 (1972), that have not already been produced as of the date of the signing of this Agreement.

19. O'Leary's decision to enter into this 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 Agreement. The United States has made no promises or representations to O'Leary as to whether the Court will accept or reject the recommendations contained within this Agreement.

### **ENTIRETY OF AGREEMENT**

20. This Agreement constitutes the entire agreement between the United States and O'Leary concerning the disposition of the charge contained in the attached Information. The United States has made no other promises to or agreements with O'Leary. This Agreement cannot be modified other than in a writing signed by the parties .

Dated: 10/6/2006

/s/ \_\_\_\_\_  
TIMOTHY O'LEARY

/s/ \_\_\_\_\_  
REBECCA MEIKLEJOHN

/s/ \_\_\_\_\_  
JOHN F. KALEY, ESQ.  
Counsel for Timothy O'Leary

/s/ \_\_\_\_\_  
ELIZABETH B. PREWITT

Attorneys  
Department of Justice, Antitrust Division  
26 Federal Plaza, Room 3630  
New York, NY 10278  
Phone: (212) 264-6884