

**FILED**

OCT 26 2016

SUSAN Y. SOONG  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

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11 Attorneys for the United States

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 OAKLAND DIVISION

15 UNITED STATES OF AMERICA )

16 v. )

17 BRIAN MCKINZIE, )

18 Defendant. )

No. CR 11-00424 PJH

**PLEA AGREEMENT**

19 The United States of America and BRIAN MCKINZIE (“defendant”) hereby enter into  
20 the following Plea Agreement pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal  
21 Procedure (“Fed. R. Crim. P.”):

**RIGHTS OF DEFENDANT**

22 1. The defendant understands his rights:

23 (a) to be represented by an attorney;

24 (b) to be charged by Indictment;

25 (c) to plead not guilty to any criminal charge brought against him;

26 (d) to have a trial by jury, at which he would be presumed not guilty of the

27 charge and the United States would have to prove every essential element of the charged offense  
28 beyond a reasonable doubt for him to be found guilty;

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

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

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

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

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

7 2. The defendant knowingly and voluntarily waives the rights set out in Paragraph  
8 1(b)-(g) above. The defendant also knowingly and voluntarily waives the right to file any  
9 appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal  
10 under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or § 2255, that challenges the  
11 sentence imposed by the Court if that sentence is consistent with or below the United States  
12 Sentencing Guidelines range stipulated by the parties in Paragraph 9 of this Plea Agreement,  
13 regardless of how the sentence is determined by the Court. This Agreement does not affect the  
14 rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b). Nothing in this  
15 paragraph, however, will act as a bar to the defendant perfecting any legal remedies he may  
16 otherwise have on appeal or collateral attack respecting claims of ineffective assistance of  
17 counsel or prosecutorial misconduct. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive  
18 indictment and plead guilty to Counts One and Three of the Information filed in this case. Count  
19 One of the Information charges the defendant with participating in a conspiracy to suppress and  
20 restrain competition by rigging bids to obtain selected properties offered at public real estate  
21 foreclosure auctions in Alameda County in the Northern District of California, in unreasonable  
22 restraint of interstate trade and commerce, in violation of the Sherman Antitrust Act, 15 U.S.C.  
23 § 1, beginning as early as November 2008 and continuing until in or about January 2011. Count  
24 Three of the Information charges the defendant with participating in a conspiracy to suppress and  
25 restrain competition by rigging bids to obtain selected properties offered at public real estate  
26 foreclosure auctions in Contra Costa County in the Northern District of California, in  
27 unreasonable restraint of interstate trade and commerce, in violation of the Sherman Antitrust  
28

1 Act, 15 U.S.C. § 1, beginning as early as November 2008 and continuing until in or about  
2 November 2009.

3 3. The defendant will plead guilty to the criminal charges described in  
4 Paragraph 2, above, pursuant to the terms of this Plea Agreement and will make a factual  
5 admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph  
6 4 below.

7 **FACTUAL BASIS FOR OFFENSES CHARGED**

8 4. The defendant agrees that he is guilty of the offenses to which he will plead guilty  
9 and agrees that the following facts are true:

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

11 Beginning as early as November 2008 and continuing until in or about January 2011 (the  
12 “relevant period”), the defendant participated in a conspiracy to rig bids to obtain selected real  
13 estate at public real estate foreclosure auctions held in Alameda County, California, located in  
14 the Northern District of California. The primary purpose of this conspiracy was to suppress and  
15 restrain competition and obtain selected real estate offered at Alameda County public real estate  
16 foreclosure auctions at non-competitive prices. During the relevant period, the defendant and his  
17 co-conspirators agreed not to bid against one another and to allocate selected real estate among  
18 themselves. To carry out their conspiracy, the defendant and his co-conspirators refrained from  
19 bidding on or refrained from bidding up the price for selected auctioned real estate. In many  
20 instances, the defendant and his co-conspirators held private auctions, open only to members of  
21 the conspiracy, to rebid this real estate. The defendant and his co-conspirators awarded this real  
22 estate to the conspirator who submitted the highest bid at the private auctions. The defendant  
23 and his co-conspirators distributed the proceeds of the private auctions as payoffs to the other,  
24 unsuccessful bidders in the private auctions, based upon a predetermined formula agreed upon by  
25 the members of the conspiracy, for refraining from bidding on these properties at the public  
26 auction.

27 During the relevant period, the business activities of the defendant and his  
28 co-conspirators were within the flow of, and substantially affected, interstate trade and

1 commerce. For example, mortgage holders located in states other than California received  
2 proceeds from the public real estate foreclosure auctions that were subject to the bid-rigging  
3 conspiracy.

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

7 (b) As to Count Three of the Information:

8 Beginning as early as November 2008 and continuing until in or about November 2009  
9 (the “second relevant period”), the defendant participated in a conspiracy to rig bids to obtain  
10 selected real estate at public real estate foreclosure auctions held in Contra Costa County,  
11 California, located in the Northern District of California. The primary purpose of this conspiracy  
12 was to suppress and restrain competition and obtain selected real estate offered at the Contra  
13 Costa County public real estate foreclosure auctions at non-competitive prices. During the  
14 second relevant period, the defendant and his co-conspirators agreed not to bid against one  
15 another and to allocate selected real estate among themselves. To carry out their conspiracy, the  
16 defendant and his co-conspirators refrained from bidding on or refrained from bidding up the  
17 price for selected auctioned real estate. In many instances, the defendant and his co-conspirators  
18 held private auctions, open only to members of the conspiracy, to rebid this real estate. The  
19 defendant and his co-conspirators awarded this real estate to the conspirator who submitted the  
20 highest bid at the private auctions. The defendant and his co-conspirators distributed the  
21 proceeds of the private auctions as payoffs to the other, unsuccessful bidders in the private  
22 auctions, based upon a predetermined formula agreed upon by the members of the conspiracy,  
23 for refraining from bidding on this real estate at the public auctions.

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

1 During the second relevant period, the conspiratorial activities described above took  
2 place in the Northern District of California, and the real estate that was the subject of this  
3 conspiracy was located in this District.

4 **POSSIBLE MAXIMUM SENTENCE**

5 5. The defendant understands that the statutory maximum penalty which may be  
6 imposed against him upon conviction for a violation of Section One of the Sherman Antitrust  
7 Act, 15 U.S.C. § 1, is:

- 8 (a) a term of imprisonment for ten (10) years (15 U.S.C. § 1);  
9 (b) a fine in an amount equal to the greatest of (1) \$1 million, (2) twice the  
10 gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross pecuniary  
11 loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18 U.S.C. § 3571(b)  
12 and (d)); and  
13 (c) a term of supervised release of three (3) years following any term of  
14 imprisonment. If the defendant violates any condition of supervised  
15 release, the defendant could be required to serve up to an additional two  
16 (2) years in prison (18 U.S.C. § 3559(a)(3); 18 U.S.C. § 3583(b)(2) and  
17 (e)(3); and United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing  
18 Guidelines,” or “Guidelines”) §5D1.2(a)(2)).

19 6. In addition, the defendant understands that:

- 20 (a) pursuant to U.S.S.G. §5E1.1 or 18 U.S.C. § 3663(a)(3), the Court may  
21 order him to pay restitution to the victims of the offense; and  
22 (b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the  
23 defendant to pay a \$100 special assessment upon conviction for each charged crime, totaling  
24 \$200.

25 **SENTENCING GUIDELINES**

26 7. The defendant understands that the Sentencing Guidelines are advisory, not  
27 mandatory, but that the Court must consider, in determining and imposing sentence, the  
28 Guidelines Manual in effect on the date of sentencing unless that Manual provides for greater

1 punishment than the Manual in effect on the last date that the offense of conviction was  
 2 committed, in which case the Court must consider the Guidelines Manual in effect on the last  
 3 date that the offense of conviction was committed. The Court must also consider the other  
 4 factors set forth in 18 U.S.C. § 3553(a) in determining and imposing sentence. The defendant  
 5 understands that the Guidelines determinations will be made by the Court by a preponderance of  
 6 the evidence standard. The defendant understands that although the Court is not ultimately  
 7 bound to impose a sentence within the applicable Guidelines range, its sentence must be  
 8 reasonable, based upon consideration of all relevant sentencing factors set forth in 18 U.S.C.  
 9 § 3553(a). Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating  
 10 information that the defendant provides to the United States pursuant to this Plea Agreement will  
 11 not be used to increase the volume of affected commerce attributable to the defendant or in  
 12 determining the defendant's applicable Guidelines range, except to the extent provided in  
 13 U.S.S.G. §1B1.8(b).

14 **SENTENCING AGREEMENT**

15 8. The United States and the defendant agree that the following Sentencing  
 16 Guidelines apply to Counts One and Three (15 U.S.C. § 1). Counts One and Three are grouped  
 17 under U.S.S.G §3D1.2(d) by aggregating the volume of commerce attributable to the defendant  
 18 in both counties, for a total of \$10.9 million.

19	(a)	Base Offense Level, U.S.S.G. §2R1.1(a):	12
20			
21	(b)	Conduct involved agreement to submit non-competitive bids, U.S.S.G. §2R1.1(b)(1):	+1
22			
23	(c)	Volume of commerce (stipulated to be \$10.9 million), U.S.S.G. §2R1.1(b)(2)(B):	+4
24			
25		Total:	17

26 Fine calculated as one to five percent of the volume  
 27 of commerce (stipulated to be \$10.9 million), but not  
 less than \$20,000, U.S.S.G. §2R1.1(c)(1): \$109,000 to \$545,000

28 //

1           9.       The United States agrees that it will make a motion, pursuant to U.S.S.G. §3E1.1,  
2 for a downward adjustment of three levels for acceptance of responsibility due to the defendant's  
3 timely notification of his intention to enter a guilty plea. Therefore, the total Guidelines  
4 calculations result in an adjusted offense level of 14 and a fine of \$109,000 to \$545,000. The  
5 United States agrees to recommend a fine between \$10,000 to \$100,000.

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

11           11.      The government and the defendant agree to recommend that the Court order the  
12 defendant to pay restitution in the amount of \$662,140 pursuant to U.S.S.G. §5E1.1(a). The  
13 defendant understands that this Plea Agreement is voidable by the government if he fails to pay  
14 the restitution as ordered by the Court. The defendant further agrees that he will not seek to  
15 discharge any restitution obligation or any part of such obligation in any bankruptcy proceeding.

16           12.      The parties understand that the defendant's Criminal History Category is  
17 determined by the Court.

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

1 The United States also reserves the right to comment on or to correct any representation made by  
2 or on behalf of the defendant and to supply any other information that the Court may require.

3 14. If the United States determines that the defendant has provided substantial  
4 assistance in any Federal Proceeding, as defined in Paragraph 17 of this Plea Agreement, and has  
5 otherwise fully complied with all of the terms of this Plea Agreement, it will file a motion,  
6 pursuant to U.S.S.G. §5K1.1, advising the sentencing judge of all relevant facts pertaining to that  
7 determination and requesting the Court to sentence the defendant in light of the factors set forth  
8 in U.S.S.G. §5K1.1(a)(1)-(5). The defendant acknowledges that the decision whether he has  
9 provided substantial assistance in any Federal Proceeding and has otherwise complied with the  
10 terms of this Plea Agreement is within the sole discretion of the United States. It is understood  
11 that, should the United States determine that the defendant has not provided substantial  
12 assistance in any Federal Proceeding, or should the United States determine that the defendant  
13 has violated any provision of this Plea Agreement, such a determination will release the United  
14 States from any obligation to file a motion pursuant to U.S.S.G. §5K1.1, but will not entitle the  
15 defendant to withdraw his guilty plea once it has been entered. The defendant further  
16 understands that, whether or not the United States files a motion pursuant to U.S.S.G. §5K1.1,  
17 the sentence to be imposed on him remains within the sole discretion of the sentencing judge.

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

26 16. The United States and the defendant understand that the Court retains complete  
27 discretion to accept or reject either party's sentencing recommendation. The defendant  
28 understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose a



1 sentence consistent with either party's sentencing recommendation, he nevertheless has no right  
2 to withdraw his plea of guilty.

3 **DEFENDANT'S COOPERATION**

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

11 (a) producing all documents, including claimed personal documents, and  
12 other materials, wherever located, not protected under the attorney-client privilege or the work-  
13 product doctrine in the possession, custody, or control of the defendant, that are requested by  
14 attorneys and agents of the United States in connection with any Federal Proceeding;

15 (b) making himself available for interviews, not at the expense of the United  
16 States, upon the request of attorneys and agents of the United States in connection with any  
17 Federal Proceeding;

18 (c) responding fully and truthfully to all inquiries of the United States in  
19 connection with any Federal Proceeding, without falsely implicating any person or intentionally  
20 withholding any information, subject to the penalties of making a false statement or declaration  
21 (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*), or conspiracy to  
22 commit such offenses;

23 (d) otherwise voluntarily providing the United States with any material or  
24 information not requested in (a) - (c) of this paragraph and not protected under the attorney-client  
25 privilege or work-product doctrine that he may have that is related to any Federal Proceeding;  
26 and

27 (e) when called upon to do so by the United States in connection with any  
28 Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings fully, truthfully,

1 and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making a false statement  
2 or declaration in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§  
3 401-402), and obstruction of justice (18 U.S.C. § 1503, *et seq.*).

4 **GOVERNMENT'S AGREEMENT**

5 18. Subject to the full, truthful, and continuing cooperation of the defendant, as  
6 defined in Paragraph 17 of this Plea Agreement, and upon the Court's acceptance of the guilty  
7 plea called for by this Plea Agreement and the imposition of sentence, the United States agrees  
8 that it will not bring further criminal charges against the defendant for any act or offense  
9 committed before the date of signature of this Plea Agreement that was undertaken in furtherance  
10 of an antitrust conspiracy or in violation of any related criminal law involving the purchase of  
11 properties at public real estate foreclosure auctions in the Northern District of California  
12 ("Relevant Offenses"). The nonprosecution terms of this paragraph do not apply to (a) any acts  
13 of perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or  
14 declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. § 1503, *et seq.*),  
15 contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses; (b) civil matters of  
16 any kind; (c) any violation of the federal tax or securities laws or conspiracy to commit such  
17 offenses; or (d) any crime of violence.

18 19. The defendant understands that he may be subject to administrative action by  
19 federal or state agencies other than the United States Department of Justice, Antitrust Division,  
20 based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in  
21 no way controls whatever action, if any, other agencies may take. However, the United States  
22 agrees that, if requested, it will advise the appropriate officials of any governmental agency  
23 considering such administrative action of the fact, manner, and extent of the cooperation of the  
24 defendant as a matter for that agency to consider before determining what administrative action,  
25 if any, to take.

26 **REPRESENTATION BY COUNSEL**

27 20. The defendant has reviewed all legal and factual aspects of this case with his  
28 attorney and is fully satisfied with his attorney's legal representation. The defendant has

1 thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory  
2 explanations from his attorney concerning each paragraph of this Plea Agreement and  
3 alternatives available to the defendant other than entering into this Plea Agreement. After  
4 conferring with his attorney and considering all available alternatives, the defendant has made a  
5 knowing and voluntary decision to enter into this Plea Agreement.

6 **VOLUNTARY PLEA**

7 21. The defendant's decision to enter into this Plea Agreement and to tender a plea of  
8 guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises,  
9 or representations other than the representations contained in this Plea Agreement. The United  
10 States has made no promises or representations to the defendant as to whether the Court will  
11 accept or reject the recommendations contained within this Plea Agreement.

12 **VIOLATION OF PLEA AGREEMENT**

13 22. The defendant agrees that, should the United States determine in good faith,  
14 during the period that any Federal Proceeding is pending, that the defendant has failed to provide  
15 full, truthful, and continuing cooperation, as defined in Paragraph 17 of this Plea Agreement, or  
16 has otherwise violated any provision of this Plea Agreement, the United States will notify  
17 counsel for the defendant in writing by personal or overnight delivery, email, or facsimile  
18 transmission and may also notify counsel by telephone of its intention to void any of its  
19 obligations under this Plea Agreement (except its obligations under this paragraph), and the  
20 defendant will be subject to prosecution for any federal crime of which the United States has  
21 knowledge, including, but not limited to, the substantive offenses relating to the investigation  
22 resulting in this Plea Agreement. The defendant may seek Court review of any determination  
23 made by the United States under this paragraph to void any of its obligations under this Plea  
24 Agreement. The defendant agrees that, in the event that the United States is released from its  
25 obligations under this Plea Agreement and brings criminal charges against the defendant for any  
26 Relevant Offense, the statute of limitations period for such offense will be tolled for the period  
27 between the date of signature of this Plea Agreement and six (6) months after the date the United  
28 States gave notice of its intent to void its obligations under this Plea Agreement.

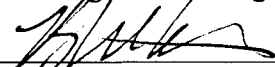
1 23. The defendant understands and agrees that in any further prosecution of him  
2 resulting from the release of the United States from its obligations under this Plea Agreement  
3 because of the defendant's violation of this Plea Agreement, any documents, statements,  
4 information, testimony, or evidence provided by him to attorneys or agents of the United States,  
5 federal grand juries, or courts, and any leads derived therefrom, may be used against him. In  
6 addition, the defendant unconditionally waives his right to challenge the use of such evidence in  
7 any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

8 **ENTIRETY OF AGREEMENT**

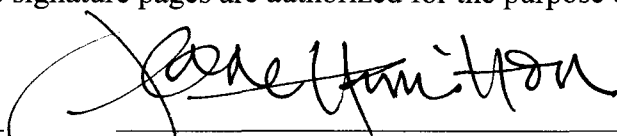
9 24. This Plea Agreement constitutes the entire agreement between the United States  
10 and the defendant concerning the disposition of the criminal charges in this case and supersedes  
11 and replaces in its entirety any prior plea agreement between the parties concerning the  
12 disposition of the criminal charges in this case. This Plea Agreement cannot be modified except  
13 in writing, signed by the United States and the defendant.

14 25. The undersigned attorneys for the United States have been authorized by the  
15 Attorney General of the United States to enter this Plea Agreement on behalf of the United  
16 States.

17 26. A facsimile or PDF signature will be deemed an original signature for the purpose  
18 of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of  
19 executing this Plea Agreement.

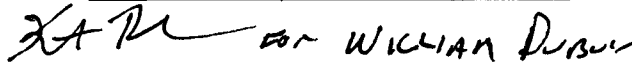
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21 BRIAN MCKINZIE  
22 Defendant

20 

21 JEANE HAMILTON  
22 ALBERT B. SAMBAT  
23 MICHAEL A. RABKIN  
24 Trial Attorneys,  
25 U.S. Department of Justice  
26 Antitrust Division

23 Dated: OCT 25, 2016

24 

25 WILLIAM H. DUBOIS  
26 Counsel for Defendant Brian McKinzie

27 Dated: 10.26.16

27 Dated: OCT 25, 2016  
28