



U.S. Department of Justice

*Antitrust Division
Chicago Office*

*Rookery Building
209 South LaSalle Street, Ste. 600
Chicago, IL 60604*

312/984-7200

October 26, 2023

Iris Bennett
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(Counsel for Pro-Mark Services, Inc.)

Re: Pro-Mark Services, Inc., Non-Prosecution Agreement

Dear Ms. Bennett:

The United States Department of Justice's Antitrust Division and the United States Attorney's Office for the District of North Dakota (collectively, "the United States") and Pro-Mark Services, Inc. ("Pro-Mark" or "the Company"), a corporation organized under the laws of North Dakota and headquartered in North Dakota, pursuant to authority granted by the Special Committee of the Pro-Mark Board of Directors enter into this Non-Prosecution Agreement (the "Agreement"). Pro-Mark agrees to certain terms and obligations as set forth below.

1. The United States enters into this Agreement based on the individual facts and circumstances presented by this case and the Company, including:
 - a. The nature and seriousness of the offense that, among other things, involved the Company misrepresenting its status and eligibility for certain government contracting programs set aside for socially or economically disadvantaged individuals and/or women, amounting to approximately \$70 million in federal contracts awarded to the Company from 2008 to 2020. This conduct occurred at the direction of Individual A and Individual B who originally managed and owned the Company, respectively (collectively, "the Original Owners"). This conduct is further described in Attachment A, the Statement of Facts;
 - b. The Company cooperated with the Office's investigation, including by making certain key personnel available for interviews, and by providing all non-privileged facts relating to individual involvement in the conduct described in the Statement of Facts, and conduct disclosed to the United States prior to the Agreement;
 - c. Pro-Mark was sold by Individual B, the sole owner of the Company at the time, to its employees via an Employee Stock Ownership Plan ("ESOP") for approximately \$32

million in August 2020, before the United States became aware of the Original Owners' criminal conduct. Under the ESOP, Pro-Mark's current employees will be eligible to draw retirement benefits from Pro-Mark after those benefits vest (five years from the date of the ESOP). None of these employees had a meaningful role in the criminal conduct described in Paragraph 1(a) of this Agreement and in the attached Statement of Facts. Additionally, at least in part because of circumstances arising from the Office's investigation, Pro-Mark was unable to continue to secure bonding, which is critical to performing federal construction contracts. A conviction or a deferred prosecution agreement likely would result in the Company's continued inability to secure bonding as well as potential suspension and debarment from federal contracting, which would likely result in substantial consequences to the Company's employees and customers. This Agreement may allow the Company to preserve its financial viability, remain a viable competitor in the federal construction market, and allow employees to access their retirement benefits which have not yet vested pursuant to the ESOP;

- d. While the Original Owners continued to have a role in the Company through a series of consulting agreements following the ESOP, since at least April 2022, the Original Owners have had no role in managing or operating the Company. The terms of Individual A's consulting agreement effective as of July 2022 confirmed that neither the Original Owners nor a separate company wholly owned by Individual A had any rights, power, or authority to control Pro-Mark or otherwise act on behalf of or bind Pro-Mark. As of March 2023, the Original Owners had no role acting as consultants to the Company;
- e. The Company engaged in extensive remedial measures by taking steps to enhance its governance structure and improve its compliance, ethics, and training program, commensurate with its size. These steps have included: (i) engaging independent outside counsel to advise the Company, (ii) adding an additional outside independent director to its Board of Directors, (iii) establishing a Special Committee of the Board of Directors made up of two outside independent directors to monitor the Company's response to the United States' investigation, (iv) adopting a Code of Ethics applicable to all employees and specific to government contracting, and (v) instituting an annual Company-wide training program that is focused on government contracting;
- f. The Company has no criminal history. In April 2023, the SBA's local Area Office upheld a size protest initiated by a competitor against Pro-Mark and found Pro-Mark to be "other than small" in reliance on allegations concerning the time period when the Original Owners controlled Pro-Mark. Pro-Mark's appeal of that determination was denied by the SBA's Office of Hearings and Appeals on July 18, 2023. Pro-Mark has no other disciplinary history; and
- g. The Company has agreed to continue to cooperate with the United States in any ongoing investigation of the conduct of the Company and its current or former owners, officers, directors, employees, agents, business partners, and consultants relating to violations of relevant laws.

2. Accordingly, after considering (a) through (g) in Paragraph 1 above, as well as other factors, the United States has determined that the appropriate resolution of the case regarding Pro-Mark is a non-prosecution agreement with the Company and requiring a criminal monetary penalty of \$949,000 (“the Penalty”), which represents profits the Company realized from the relevant set-aside contracts that were illegally awarded during the period prior to 2020, when the Original Owners were involved in the Company and that the Company continued performance on following the ESOP.
3. Pro-Mark admits, accepts, and acknowledges that, as a corporate entity, it is responsible under United States law for the acts of its current and former owners, officers, directors, employees, and agents as set forth in the attached Statement of Facts, which are incorporated by reference into this Agreement, and that the facts described therein are true and accurate. Pro-Mark also admits, accepts, and acknowledges that the facts described in the attached Statement of Facts constitute a criminal violation of federal law, including 18 U.S.C. §371 (Conspiracy to Commit Offense or to Defraud United States).
4. Pro-Mark agrees that it shall not, through present or future attorneys, owners, officers, directors, employees, agents or any other persons authorized to speak for Pro-Mark, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by Pro-Mark set forth above or in the attached Statement of Facts. Pro-Mark agrees that if it issues a press release or holds any press conference in connection with this Agreement, Pro-Mark shall first consult the United States to determine (a) whether the text of the release or proposed statements at the press conference are true and accurate with respect to matters relating to this Agreement and (b) whether the United States has any objection to the release or proposed statements.
5. Pro-Mark’s obligations under this Agreement shall have a term of three years from the date on which the Agreement is executed (the “Term”), except for the Cooperation Obligations as set forth in Paragraph 6 below. Pro-Mark agrees, however, that, in the event the United States determines, in its sole discretion, that Pro-Mark has knowingly violated any provision of this Agreement or has failed to completely perform or fulfill each of its obligations under this Agreement, an extension or extensions of the Term may be imposed by the United States, in its sole discretion, for up to a total additional time period of one year, without prejudice to the United States’ right to proceed as provided in Paragraph 10 of this Agreement. Any extension of the Agreement extends all terms of this Agreement for an equivalent period. Conversely, in the event the United States finds, in its sole discretion, that there exists a change in circumstances and that the provisions of this Agreement have otherwise been satisfied, the Agreement may be terminated early. In such event, however, Pro-Mark’s cooperation obligations described in Paragraph 6 below shall continue until the date upon which all investigations and prosecutions are concluded as determined in the sole discretion of the United States.
6. Pro-Mark shall cooperate fully with the United States in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and any other conduct under investigation by the United States at any time during the Term. This cooperation shall continue until the later of (i) the date the Term ends, as the Term may be extended by the United States or (ii) the date upon which all investigations and prosecutions arising out of such

conduct are concluded, as determined in the sole discretion of the United States. At the request of the United States, Pro-Mark shall also cooperate fully with other domestic or foreign law enforcement and regulatory authorities and agencies, including any civil authorities and agencies, in any investigation of Pro-Mark or any of its present or former owners, officers, directors, employees, agents, and consultants, or any other party, in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and any other conduct under investigation by the United States at any time during the Term. Pro-Mark's cooperation pursuant to this Paragraph is subject to applicable law and regulations, as well as valid claims of attorney-client privilege or attorney work product doctrine; however, Pro-Mark must provide to the United States a summary log of any information or cooperation that is not provided based on an assertion of law, regulation, or privilege, and Pro-Mark shall have the burden of establishing the validity of any such assertion. Pro-Mark agrees that its cooperation shall include, but not be limited to, the following:

- a. Pro-Mark represents that it has truthfully disclosed all factual information with respect to its activities and those of its present and former owners, directors, officers, employees, agents, and consultants described in this Agreement and in the attached Statement of Facts. Pro-Mark shall truthfully and in a timely manner disclose all factual information not protected by a valid claim of attorney-client privilege or work product doctrine with respect to its activities, and those of its present and former owners, directors, officers, employees, agents, and consultants, including any evidence or allegations and internal or external investigations, about which Pro-Mark has any knowledge or about which the United States may inquire in its sole discretion in connection with any federal proceeding. This obligation of truthful disclosure includes, but is not limited to, the obligation of Pro-Mark to promptly provide to the United States any document, record, or other tangible evidence in the Company's possession, custody, or control that the United States may request from Pro-Mark, including evidence that is responsive to any requests made prior to the execution of this Agreement.
- b. Upon request of the United States, Pro-Mark shall designate knowledgeable employees, agents, or attorneys to provide the United States the information and materials described above on behalf of Pro-Mark. It is further understood that Pro-Mark and its designees must at all times provide complete, truthful, and accurate information.
- c. Pro-Mark shall use its best efforts to make available for interviews or testimony, as requested by the United States and at the expense of Pro-Mark, present and former owners, officers, directors, employees, agents, and consultants of Pro-Mark. This obligation includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as well as interviews with domestic authorities. Cooperation under this Paragraph shall also include identification of witnesses who, to the best knowledge of Pro-Mark, may have material information regarding the matters under investigation or about which the United States may inquire.
- d. With respect to any information, testimony, documents, records, or other tangible evidence provided to the United States by Pro-Mark pursuant to this Agreement, Pro-

Mark consents to any disclosures by the United States, subject to applicable law and regulations, to other governmental authorities, including any other United States criminal or civil authorities, of such materials as the United States, in its sole discretion, deem appropriate.

- e. During the Term, should Pro-Mark learn of any evidence or allegation that may constitute a violation of U.S. federal law, Pro-Mark shall promptly report such evidence or allegation to the United States.
 - f. No later than thirty days prior to the end of the Term, Pro-Mark, by the independent members of its Board of Directors, shall certify in writing to the United States that Pro-Mark has met its disclosure obligations pursuant to Paragraph 6(e) of this Agreement. Consistent with Attachment B, that certification shall be deemed a material statement and representation by Pro-Mark and the independent members of its Board of Directors to the United States for purposes of 18 U.S.C. §§ 1001 and 1519 and shall be deemed to have been made in the District of North Dakota. Pro-Mark and the independent members of its Board of Directors understand and acknowledge that this certification constitutes a significant and important component of this Agreement and the United States' determination whether Pro-Mark has satisfied its obligations under the Agreement.
7. Pro-Mark represents that it has implemented and will continue to implement, throughout the Company, a compliance and ethics program, including, but not limited to, a company-wide training program and the adoption of an all-employee Code of Ethics, designed to detect and prevent violations of federal law in connection with government contracting.¹ Pro-Mark agrees that it shall report to the United States in writing within 30 days of the execution of this Agreement, and then annually during the Term thereafter, regarding its progress in implementing this compliance and ethics program. Pro-Mark agrees that it shall promptly answer any questions about its compliance and ethics program asked by the United States and agrees to meet with the United States regarding that program as may be requested by the United States during the Term. Pro-Mark understands and acknowledges that its voluntary adoption of this compliance and ethics program, and Pro-Mark's timely response to inquiries about it from the United States, constitutes a significant and important component of this Agreement and the United States' determination whether Pro-Mark has satisfied its obligations under the Agreement.
8. Pro-Mark agrees to pay the Penalty of \$949,000, plus interest beginning ten business days after the execution of this agreement and computed daily at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date on which the first payment is due, to the U.S. Crime Victims Fund. The Penalty represents profits the Company realized from the illegally awarded set-aside contracts during the period prior to 2020 when the Original Owners were involved in the Company and that the Company continued to perform following

¹ The United States recognizes that pursuant to FAR 52.203-13, small businesses are exempt from having a "business ethics awareness and compliance program and internal control system." Pursuant to this Agreement, the Company will complete development and implementation of its compliance program consistent with its size and structure.

the ESOP and the termination of the Original Owners' involvement. Pro-Mark shall pay the penalty to the United States Treasury payable in installments according to the following schedule: within ten business days of the execution of this Agreement, one-third (1/3) of the penalty amount; at the one-year anniversary of the execution of this Agreement, one-third (1/3) of the penalty amount plus interest; and at the two-year anniversary of the execution of this Agreement, one-third (1/3) of the penalty amount plus interest. The Company may prepay the monetary penalty in full or in part at any time and in one or more installments. There shall be no prepayment fees charged nor any discounts granted for prepayment. All payments made by the Company shall be applied first to interest accrued through the date of payment, and any excess shall be applied to the outstanding principal balance of the monetary penalty, with such excess portion of the payments allocated to principal being applied in chronological order to the scheduled installments described in this Paragraph. Interest shall be calculated hereunder using the rate set forth above on a simple, non-compounding basis.

- a. Pro-Mark acknowledges that no tax deduction may be sought in connection with payment of any part of the Penalty. The Company shall not seek or accept, directly or indirectly, reimbursement or indemnification from any source of the Penalty amount that the Company shall pay pursuant to this Agreement or pursuant to any other agreement entered into by Pro-Mark with any enforcement authority or regulator concerning the facts set forth in the attached Statement of Facts.
 - b. Nothing in this Agreement is intended to preclude Pro-Mark or its current employees from pursuing claims they may have against the Original Owners under any provision of state or federal law or against any party under the Employee Retirement Income Security Act of 1974. Payment of the Penalty set out in this Paragraph, however, is not contingent in any way on any such recovery.
 - c. Nothing in this Agreement shall be deemed an agreement by the United States that the Penalty is the maximum penalty that may be imposed in any future prosecution, and the United States is not precluded from arguing in any future prosecution that a court should impose any type of monetary penalty, including a criminal fine, restitution, disgorgement or civil or criminal forfeiture, or the amount of any such monetary penalty.
9. In exchange for Pro-Mark's good faith performance of its promises and obligations set out in this Agreement, including its full and truthful cooperation as detailed in Paragraph 6, the United States agrees, except as described below, that it will not bring any criminal charges against Pro-Mark relating to any of the conduct described in the attached Statement of Facts.
- a. The United States may use any information related to the conduct described in the attached Statement of Facts against Pro-Mark (a) in a prosecution for subornation of perjury (18 U.S.C. § 1622) or obstruction of justice (18 U.S.C. § 1503 *et seq.*), (b) in a prosecution for making a false statement (18 U.S.C. § 1001), (c) in a prosecution or other proceeding relating to any crime of violence, or (d) contempt, or conspiracy to commit such offenses (18 U.S.C. §§ 401–402). This Agreement also does not apply to civil matters of any kind, any civil or criminal violation of the federal tax or securities laws, or conspiracy to commit such offenses.

- b. This Agreement does not provide any protection (a) against prosecution for any future conduct by Pro-Mark or (b) against prosecution of Pro-Mark for conduct that is not set forth in the attached Statement of Facts, such conduct will not be exempt from prosecution and is not within the scope of or relevant to this Agreement.
 - c. This Agreement does not provide any protection against prosecution of any individuals, regardless of their present or past affiliation with Pro-Mark, including any of Pro-Mark's present or former owners, officers, directors, employees, and agents.
10. If, during the Term, Pro-Mark (a) commits any felony under U.S. federal law; (b) knowingly provides in connection with this Agreement any false, incomplete, or misleading information, including in connection with its disclosure of information about individual culpability; (c) fails to cooperate as set forth in this Agreement; (d) fails to implement or maintain a compliance and ethics program as set forth in Paragraph 7 of this Agreement; or (e) otherwise fails specifically to perform or to fulfill completely each of Pro-Mark's obligations under this Agreement, regardless of whether the United States becomes aware of such a breach after the Term is complete, Pro-Mark shall thereafter be subject to prosecution for any federal crime of which the United States has knowledge, including, but not limited to, the conduct described in the attached Statement of Facts, which may be pursued by the United States in the United States District Court for the District of North Dakota or any other appropriate venue.
- a. Determination of whether Pro-Mark has breached the Agreement and whether to pursue prosecution of Pro-Mark shall be in the United States' sole discretion. Any such prosecution may be premised on information provided by Pro-Mark or any individual affiliated with Pro-Mark.
 - b. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the United States prior to the date on which this Agreement was executed that is not time-barred by the applicable statute of limitations on the date of the execution of this Agreement may be commenced against Pro-Mark, notwithstanding the expiration of the statute of limitations, between the execution of this Agreement and the expiration of the Term plus one year. Accordingly, by signing this Agreement, Pro-Mark agrees that the statute of limitations with respect to any such prosecution that is not time-barred on the date of the execution of this Agreement shall be tolled for the Term plus one year. In addition, Pro-Mark agrees that the statute of limitations as to any violation of federal law that occurs during the Term will be tolled from the date upon which the violation occurs until the earlier of the date upon which the United States is made aware of the violation or the duration of the Term plus five years, and that this period shall be excluded from any calculation of time for purposes of the application of the applicable statute of limitations.
 - c. In the event the United States determines that Pro-Mark has breached this Agreement, they agree to provide Pro-Mark with written notice of such breach prior to instituting any prosecution resulting from the breach. Within thirty days of receipt of such notice, Pro-Mark shall have the opportunity to respond to the United States in writing to explain the nature and circumstances of the breach, as well as actions Pro-Mark has

taken to address and remediate the situation, which explanation the United States shall consider in determining whether to pursue prosecution of Pro-Mark.

- d. In the event the United States determines that Pro-Mark has breached this Agreement, Pro-Mark agrees (a) that all statements made by or on behalf of Pro-Mark to the United States, including those statements made in the attached Statement of Facts, information the United States obtained through interviews of current or former employees, and any testimony given by Pro-Mark, its current or former employees before a grand jury, a court, or any tribunal, whether prior or subsequent to the execution of this Agreement, and any leads or evidence derived from such statements or testimony, shall be admissible in evidence in any criminal proceeding brought by the United States against Pro-Mark and (b) that Pro-Mark shall not assert any claim under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule that any such statements or testimony made by or on behalf of Pro-Mark, or any leads or evidence derived therefrom, should be suppressed or are otherwise inadmissible. The decision whether conduct or statements of any current director, officer or employee, or any person acting on behalf of, or at the direction of, the Company, will be imputed to the Company for the purpose of determining whether the Company has violated any provision of this Agreement shall be in the sole discretion of the United States. Further, in the event the United States determines that Pro-Mark has breached this Agreement, Pro-Mark, having been advised by counsel, waives its right to indictment and agrees that criminal proceedings under Paragraph 10 of this Agreement may be by information, rather than indictment.
11. Except as may otherwise be agreed by the United States and Pro-Mark in connection with a particular transaction, Pro-Mark agrees that in the event that, during the Term, it undertakes a change in corporate form, including if it sells, merges, or transfers business operations as they exist as of the date of the execution of this Agreement, whether such change is structured as a sale, asset sale, merger, transfer, or any other change in corporate form, including dissolution, Pro-Mark shall include in any contracting document for such change a provision binding the purchaser, or any successor in interest thereto, to the obligations described in this Agreement. Pro-Mark shall obtain prior approval from the United States at least thirty days prior to undertaking any such sale, merger, transfer, or other change in corporate form, including dissolution, in order to give the United States an opportunity to determine if such change in corporate form would affect the terms or obligations of the Agreement. If such a change in corporate form has the effect of circumventing or frustrating the enforcement purposes of this Agreement, as determined in the sole discretion of the United States, it shall be deemed a breach of this Agreement and the provisions of Paragraph 10 of this Agreement shall apply.
12. This Agreement is binding on Pro-Mark and the United States, but it does not bind any other component of the Department of Justice, other federal agencies, or any state, local, or foreign law enforcement or regulatory agency, including any civil agencies such as, but not limited to, any agency charged with assessing Pro-Mark's fitness to be a government contractor. The Company understands that it may be subject to suspension or debarment action by state or federal agencies based upon this Agreement, and that this Agreement in no way controls what action, if any, other agencies may take. However, the United States agrees that, if requested

in writing by Pro-Mark, they will advise the appropriate officials of any governmental agency considering such action of the fact, manner, and extent of the cooperation and remediation of the Company as a matter for that agency to consider before determining what action, if any, to take. By agreeing to provide this information to such agencies, the United States is not agreeing to advocate on behalf of the Company, but rather is agreeing to provide facts to be evaluated independently by such agencies.

13. Pro-Mark represents that the undersigned independent members of its Board of Directors are authorized to execute this Agreement and has the authority, granted by the Special Committee of the Pro-Mark Board of Directors, to bind Pro-Mark to its terms, as certified by counsel in Attachments C and D. Likewise, the undersigned representatives of the United States represent that they have the authority to bind the United States to this Agreement's terms.
14. This Agreement, including all attachments thereto, sets forth all of the terms of the agreement between the United States and Pro-Mark and, except as set forth in the Agreement, there are no promises, understandings, or agreements of any kind between the United States and Pro-Mark or Pro-Mark's counsel. No amendments, modifications, or additions to the Agreement may be entered into unless they are in writing and signed by the United States, Pro-Mark, and Pro-Mark's counsel.
15. This Agreement is covered by the laws of the United States. Pro-Mark agrees that exclusive jurisdiction and venue for any dispute arising under it is in the United States District Court for the District of North Dakota.
16. It is understood that Pro-Mark and the United States may disclose this Agreement to the public.
17. All notices and reports to the United States required or permitted under this Agreement shall be in writing and sent by overnight mail and e-mail, addressed to the United States as follows:

United States Department of Justice, Antitrust Division
Chicago Office
Attn: M. Claire Nicholson, Trial Attorney
209 South LaSalle Street, Suite 600
Chicago, IL 60604
Mary.Nicholson2@usdoj.gov

United States Attorney's Office for the District of North Dakota
Attn: Matthew Greenley, Assistant United States Attorney
655 First Avenue North, Suite 250
Fargo, ND 58102
Matthew.Greenley@usdoj.gov

18. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same agreement. Faxed or electronically-submitted signatures are acceptable and binding signatures for purposes of this Agreement.

Date: _____

BY: **MARY NICHOLSON**  Digitally signed by MARY NICHOLSON
Date: 2023.10.26 16:33:15 -05'00'

M. Claire Nicholson
Trial Attorney
United States Department of Justice
Antitrust Division

BY: **MATTHEW GREENLEY**  Digitally signed by MATTHEW GREENLEY
Date: 2023.10.26 16:35:31 -05'00'

Matthew Greenley
Assistant United States Attorney
United States Attorney s Office for the District of
North Dakota

AGREED AND CONSENTED TO:

Pro-Mark Services, Inc.


Date: _____

BY: _____
Mark Kragnes
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

Date: _____

BY: _____
Jack Carroll
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

Date: 10/30/2023

BY:  _____
Iris Bennett
Steptoe & Johnson LLP

Date: _____

BY: **MARY NICHOLSON** Digitally signed by MARY NICHOLSON
Date: 2023.10.26 16:33:15
-05'00'

M. Claire Nicholson
Trial Attorney
United States Department of Justice
Antitrust Division

BY: **MATTHEW GREENLEY** Digitally signed by MATTHEW GREENLEY
Date: 2023.10.26 16:35:31
-05'00'

Matthew Greenley
Assistant United States Attorney
United States Attorney's Office for the District of
North Dakota

AGREED AND CONSENTED TO:

Pro-Mark Services, Inc.

Date: 10/30/23

BY: 
Mark Kragnes
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

Date: _____

BY: _____
Jack Carroll
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

Date: _____

BY: _____
Iris Bennett
Steptoe & Johnson LLP

Date: _____

BY: **MARY NICHOLSON** Digitally signed by MARY NICHOLSON
Date: 2023.10.26 16:33:15 -05'00'

M. Claire Nicholson
Trial Attorney
United States Department of Justice
Antitrust Division

BY: **MATTHEW GREENLEY** Digitally signed by MATTHEW GREENLEY
Date: 2023.10.26 16:35:31 -05'00'

Matthew Greenley
Assistant United States Attorney
United States Attorney's Office for the District of
North Dakota

AGREED AND CONSENTED TO:

Pro-Mark Services, Inc.

Date: _____

BY: _____
Mark Kragnes
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

Date: 10/30/23

BY: 
Jack Carroll
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

Date: _____

BY: _____
Iris Bennett
Steptoe & Johnson LLP

STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the non-prosecution agreement entered into by the United States Department of Justice's Antitrust Division and the United States Attorney's Office for the District of North Dakota and Pro-Mark Services, Inc. ("Pro-Mark" or "the Company") dated October 26, 2023, (the "Agreement"). Pro-Mark hereby agrees and stipulates that the following information is true and accurate. Pro-Mark also admits, accepts, and acknowledges that it is responsible for the acts of its current and former owners, officers, directors, employees, and agents as set forth in this Statement of Facts.

Background and Relevant Entities and Individuals

The SBA Programs

1. The United States Small Business Administration's ("SBA") Section 8(a) Business Development Program ("the 8(a) Program") was designed to help socially and economically disadvantaged business owners gain access to and succeed in the marketplace for federal government contracts. A means by which the SBA achieved this goal was by creating a set of reserved, or set-aside, federal contracting opportunities for participants in the 8(a) Program. The federal government's goal is to award at least 5% of all federal contracting dollars to small disadvantaged businesses each year through its 8(a) Program.
2. To be eligible for the 8(a) Program, a small business was required, among other things, to be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals. An 8(a) Program participant was required to maintain its eligibility throughout its tenure in the program and to inform the SBA of any changes that would alter its eligibility for the 8(a) Program. Once admitted, a small business was eligible to participate in the 8(a) Program for nine years, after which it was deemed to have graduated from the program.
3. Similar to the program for businesses owned by economically and socially disadvantaged individuals, the SBA also allowed small businesses that were owned by women to compete for certain set-aside contracts. Until October 2020, a women-owned small business ("WOSB") could self-certify to the SBA that it met the criteria to participate in the WOSB program. Among other criteria, to be eligible to receive contracts set aside for WOSBs, the business had to certify that it was unconditionally owned and controlled by one or more women and to inform the SBA of any changes that would alter its eligibility to compete for federal contracts set aside for WOSBs. The federal government's goal is to award at least 5% of all federal contracting dollars to WOSBs each year.

Pro-Mark Services, Inc.

4. Pro-Mark was incorporated in North Dakota in 2001 for the purpose of engaging in specialty and retail sales. Pro-Mark was originally owned by husband (Individual A) and wife (Individual B) (collectively, "the Original Owners"), with Individual B serving as the president of the Company. In August 2007, Individual A transferred his 49% share in Pro-Mark to Individual B, making her both the president and sole owner.

5. In December 2007, Individual B and Pro-Mark applied to the 8(a) Program for economically and socially disadvantaged individuals on the basis of gender bias. In the 8(a) Program application submitted on behalf of Pro-Mark, Individual B represented that Pro-Mark earned 100% of its revenue in the field of specialty and retail sales and that Pro-Mark was established to furnish clothing and promotional items to area businesses, organizations, and colleges. The business plan further provided that these promotional items could be customized through logos, screen-printing, and/or embroidery. Individual B also represented to the SBA that she was Pro-Mark's only director, officer, management member, key employee, or owner; that she worked 40 hours per week for Pro-Mark; and that she was responsible for "all control, management, and business decisions relating to Pro-Mark." Based on its application, Pro-Mark was accepted into the 8(a) Program in 2008.
6. After being accepted into the 8(a) Program, Pro-Mark submitted annual forms from 2008 to 2017 to the SBA certifying that it remained eligible for the program. These forms were signed and submitted by Individual B, who represented that she remained Pro-Mark's president; continued to dedicate 40 hours per week to Pro-Mark's business; and that no one other than a socially or economically disadvantaged individual held the highest position at Pro-Mark and that the individual holding that highest position at Pro-Mark worked full time at Pro-Mark. Pro-Mark continued to participate in the 8(a) Program until it graduated in 2017.
7. Beginning in 2015 and continuing until 2020, Pro-Mark, through Individual B, also began to self-certify annually to the SBA that Pro-Mark was a WOSB. In these certifications, Individual B, on behalf of Pro-Mark, represented that "management and daily business operations of [Pro-Mark] are controlled by one or more women;" that a "woman holds the highest officer position in [Pro-Mark] and her resume evidences that she has the managerial experience of the extent and complexity needed to run [Pro-Mark];" and that she "manages [Pro-Mark] on a full-time basis and devotes full-time to [Pro-Mark] during working hours."
8. Individual A held the title of Vice President of Pro-Mark from 2007 until July 2019. From 2019 through at least 2022, Individual A maintained similar roles and responsibilities as he did while Vice President of Pro-Mark in his role as a "consultant" to Pro-Mark, the terms of which were set out in a series of written consulting agreements between Pro-Mark and Company A, a company wholly owned by Individual A. Through this consulting agreement, Individual A was paid at least \$30,000 more than what Individual B was making at Pro-Mark annually in 2019. In July 2019, after Individual A nominally stepped down as Pro-Mark Vice President, Employee A became Pro-Mark's Vice President and Employee B another long-time Pro-Mark employee, became its Secretary and Treasurer. Following a change in ownership of Pro-Mark effected by an Employee Stock Ownership Plan ("ESOP") in August 2020, Employee A became President of Pro-Mark in September 2020 and Employee B became Vice President of Pro-Mark in October 2022.
9. From the time it was accepted into the 8(a) Program and despite what it had represented to the SBA in its application, the majority of Pro-Mark's business was in the construction field, not the specialty and retail sales field. In June 2008, in a business plan submitted to the SBA on behalf of Pro-Mark by Individual B, Pro-Mark told the SBA that the Company, in addition to its retail and specialty sales business, had begun, in 2007, engaging in and bidding on contracts for "construction activity" to "make the most of [Individual A's] 14 years of experience." In

2014, the specialty retail sales component of Pro-Mark's business accounted for less than 1% of its annual revenue.

10. Based on its participation in the 8(a) Program and its claimed status as a WOSB, between 2008 and 2020, Pro-Mark was awarded approximately \$70 million in federal government 8(a) and WOSB set-aside contracts. All of these contracts were in the field of general contracting and construction, not specialty and retail sales.

The Criminal Scheme

11. From 2008 through 2020 Pro-Mark, along with Individual A and Individual B voluntarily and intentionally reached an agreement to defraud the United States, including through interfering with and obstructing in one of the United States' lawful government functions through false and fraudulent pretenses to obtain 8(a) and WOSB contracts to which they were not entitled, including by falsely claiming Individual B controlled Pro-Mark and therefore that Pro-Mark was qualified for such contracts, when Pro-Mark was not eligible to receive such contracts because it was controlled by Individual A. Pro-Mark, through false representations made or directed by the Original Owners between 2008 and 2020, misrepresented its status and eligibility for those programs and set-aside contracts to the SBA and to the government agencies administering the relevant contracts.
12. Between 2008 and 2020, Individual B was held out as the President of Pro-Mark who ran and controlled the business, when in reality she did not control or manage Pro-Mark. She was not the decision-maker at Pro-Mark with regard to federal construction projects or one of its key officers or employees. She did not manage or work 40 hours per week for Pro-Mark. In sum, Individual B did not exercise strategic or day-to-day control over Pro-Mark and had no role in making operational decisions for the Company pertaining to its federal construction business. For example, she had no role in selecting, estimating, or structuring the bids that Pro-Mark submitted for federal construction contracts, engaging in substantive discussions with the contracting officers responsible for awarding, evaluating, or overseeing bids or subsequent contracts, or in hiring or directing Company employees or subcontractors.
13. During that same period, Individual A, who is a non-disadvantaged man, was the individual in control of Pro-Mark who made or delegated all the strategic and day-to-day decisions concerning Pro-Mark and its federal construction business. From 2008 through 2020, Pro-Mark was not eligible for either the 8(a) or WOSB Programs because Individual A, not Individual B, controlled and managed Pro-Mark. Individual A selected which set-aside contracts Pro-Mark would bid on (including 8(a) and WOSB contracts), and he was extensively involved in structuring those bids, estimating their costs, and routinely directed the hiring of, activity, and work of Pro-Mark employees, subcontractors, and suppliers. Finally, he managed the Company's financials, including its bank accounts.
14. Individual B's background, as reflected in her past experience and resumes submitted to the SBA and uploaded to SAM.gov, was in screen-printing fabric and clothing and that she was responsible for Pro-Mark's *de minimis* "Retail Sales and Marketing Division." To the extent she had any meaningful business experience or managerial experience, it was for companies engaged in making custom promotional products or clothing sales. She lacked the expertise to

operate, manage, or control a construction company, especially one that was able to complete multi-million-dollar construction contracts for the U.S. government successfully. In sum, she had no control of or meaningful role in Pro-Mark's construction business.

15. In contrast, Individual A had an extensive background in general contracting, government contracting, and construction, including through employment prior to Pro-Mark as a vice president and project manager at a different construction company engaged in federal construction contracts. When Pro-Mark began doing work in construction in 2007, Individual A had 14 years of construction experience.
16. Nothing in Individual A's regular direction to Pro-Mark employees indicates that Individual B had a role in any of the decision-making at Pro-Mark, and employees were not aware that Individual B was ever the source, directly or indirectly, for the directions he gave.
17. Employees at Pro-Mark, including senior employees as well as construction project managers, recognized that Individual A, not Individual B, was in control of the Company. They considered Individual A to be their immediate or ultimate supervisor, and they looked to Individual A for direction and answers about issues that arose during the course of their employment. Employees never sought guidance from Individual B regarding Pro-Mark's construction business.
18. Unlike Individual A or other Pro-Mark employees, Individual B did not have a Pro-Mark-sponsored e-mail address. To the extent she communicated with Pro-Mark employees at all, Individual B used a personal e-mail address, and the subjects of her infrequent communications rarely, if ever, the performance of the construction contracts that made up the vast majority of Pro-Mark's business.
19. In contrast, Individual A sent thousands of e-mails from his Pro-Mark sponsored e-mail address to Pro-Mark employees, subcontractors, suppliers, and others concerning the strategic and day-to-day construction work of Pro-Mark, and he received thousands of e-mails from those individuals and entities regarding Pro-Mark's business at that same e-mail address.
20. In August 2020, Individual B sold her entire ownership interest in Pro-Mark to Pro-Mark's employees via an ESOP for approximately \$32 million. While Individual B was the sole owner of Pro-Mark on paper, Individual A was the primary point of contact for all aspects of the ESOP transaction.

ATTACHMENT B

CERTIFICATION OF PRO-MARK

To: United States Department of Justice
Antitrust Division
Attention: Kalina Tulley, Chief, Chicago Office

Re: Non-Prosecution Agreement Disclosure Certification

The undersigned certifies, pursuant to Paragraph 6(f) of the Non-Prosecution Agreement (the "Agreement") executed on October 26, 2023, by and between the United States Department of Justice's Antitrust Division and the United States Attorney's Office for the District of North Dakota (collectively, "the United States") and Pro-Mark Services, Inc. ("Pro-Mark" or "the Company"), that the undersigned is aware of Pro-Mark's disclosure obligations under Paragraph 6(e) of the Agreement and that Pro-Mark has disclosed to the United States any and all evidence or allegations of conduct required pursuant to Paragraph 6(e) of the Agreement, which includes evidence or allegations that may constitute a violation of the U.S. laws ("Disclosable Information"). The obligation to disclose information extends to any and all Disclosable Information that has been identified through Pro-Mark's compliance and ethics program, whistleblower channels, internal audit reports, due diligence procedures, investigation process, or other Company sources and processes. The undersigned further acknowledges and agrees that the reporting requirement contained in Paragraph 6(e) and the representations contained in this Certification constitute a significant and important component of the Agreement and the United States's determination whether Pro-Mark has satisfied its obligations under the Agreement.

The undersigned hereby certifies that they are current independent members of Pro-Mark's Board of Directors, that they have been duly authorized by the Company's Board of Directors to sign this Certification on behalf of Pro-Mark, and that they do so, having been advised by counsel, pursuant to Paragraph 6(f) of the Agreement.

This Certification shall constitute a material statement and representation by the undersigned and by, on behalf of, and for the benefit of, Pro-Mark to the executive branch of the United States for purposes of 18 U.S.C. § 1001, and such material statement and representation shall be deemed to have been made in the District of North Dakota. This Certification shall also constitute a record, document, or tangible object in connection with a matter within the jurisdiction of a department and agency of the United States for purposes of 18 U.S.C. § 1519, and such record, document, or tangible object shall be deemed to have been made in the District of North Dakota.

Date: _____

BY: _____
Mark Kragnes
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

Date: _____

BY: _____
Jack Carroll
Independent member of
Pro-Mark Services, Inc.'s
Board of Directors

CERTIFICATE OF COUNSEL
FOR THE SPECIAL COMMITTEE OF THE PRO-MARK BOARD OF DIRECTORS

1. The undersigned is counsel for the Special Committee of the Board of Directors of Pro-Mark Services, Inc. ("Pro-Mark" or "the Company") in the matter covered by the Non-Prosecution Agreement (the "Agreement").
2. On May 3, 2022, the Board of Directors of Pro-Mark assigned to the Special Committee responsibility for addressing and supervising, on behalf of the Company, any and all issues relating to the investigation being conducted by the United States Department of Justice's Antitrust Division and the United States Attorney's Office for the District of North Dakota (collectively, "the United States").
3. I have reviewed relevant Company documents and discussed the terms of this Agreement with the Special Committee. Further, I have carefully reviewed the terms of this Agreement with the Special Committee and have fully advised them of the rights of the Company, of possible defenses, and of the consequence of entering into this Agreement.
4. The Special Committee, having conferred with me, has voted to authorize the Company to execute the Agreement. To my knowledge, the decision of the Special Committee to authorize the Company to enter into the Agreement is an informed and voluntary one.



Joel Bertocchi

Akerman LLP

71 South Wacker Drive, 47th Floor

Chicago, IL 60606

(Counsel to the Special Committee of the Pro-Mark Board of Directors)

Dated: 10/27/23