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8

9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 -oOo-

12 UNITED STATES OF AMERICA,)
13)
Plaintiff,)
14)
v.)
15)
DARRYL SCOTT NICHOLS,)
16)
Defendant.)
17

CASE NO 2:11cr300pmp-PAL
PLEA MEMORANDUM

18 The United States of America, by and through Denis J. McInerney, Chief, U.S.
19 Department of Justice, Criminal Division, Fraud Section, and Charles La Bella, Deputy Chief,
20 Michael J. Bresnick, Assistant Chief, and Nicole Sprinzen and Mary Ann McCarthy, Trial
21 Attorneys, U.S. Department of Justice, Criminal Division, Fraud Section, the defendant, DARRYL
22 SCOTT NICHOLS, and the defendant's attorney, Kalani Hoo, submit this plea memorandum.
23

24 **I. PLEA AGREEMENT**

25 The United States and the defendant have reached the following plea agreement, which is
26 not binding on the court:
27

1 **A. The Plea**

2 1. Defendant will plead guilty to Count One of the information, charging defendant
3 with conspiracy to commit wire and mail fraud, in violation of Title 18, United States Code,
4 Section 1349. Defendant also agrees to pay restitution and to the forfeiture of the property set forth
5 in this Plea Memorandum.

6 **B. Additional Charges**

7 2. The U.S. Department of Justice, Criminal Division, Fraud Section, agrees to bring
8 no additional criminal charges in the District of Nevada against the defendant relating to or arising
9 from the offenses charged in the information, except for any crime of violence and any crime
10 unknown to the Fraud Section before the time the parties sign this Plea .

11 **C. Sentencing Guideline Calculations**

12 3. Defendant understands that the Court is required to consider United States
13 Sentencing Guidelines (“U.S.S.G.” or “Sentencing Guidelines”) among other factors in
14 determining the defendant’s sentence. Defendant understands that the Sentencing Guidelines are
15 advisory, and that after considering the Sentencing Guidelines, the Court may be free to exercise its
16 discretion to impose any reasonable sentence up to the maximum set by statute for the crime of
17 conviction.

18 4. The parties agree that the following calculations of the United States Sentencing
19 Guidelines (2010) apply:

20	Base Offense Level (U.S.S.G. §2B1.1(a):	7
21		
22	Loss Amount of \$400,000 to \$1M (U.S.S.G. §2B1.1(b)(1)(I):	14
23		
24	Sophisticated Means (U.S.S.G. §2B1.1(b)(9)(C):	2
25	TOTAL	23
26		
27		

1 5. Pursuant to U.S.S.G. §3E1.1(a), the United States will recommend that the
2 defendant receive a two (2) level adjustment for acceptance of responsibility unless defendant (a)
3 fails to make a complete factual basis for the guilty plea at the time it is entered; (b) is untruthful
4 with the Court or probation officers in any respect, including, without limitation, financial
5 information; (c) denies involvement in the offense or provides conflicting statements regarding
6 defendant's involvement; (d) attempts to withdraw the guilty plea; (e) engages in criminal conduct;
7 (f) fails to appear in court; or (g) violates the conditions of defendant's pretrial release conditions.

8 6. Pursuant to U.S.S.G. §3E1.1(b), the United States will, in its sole discretion, make
9 a motion for an additional one-level adjustment for acceptance of responsibility prior to sentencing
10 if the defendant timely notifies the United States of the defendant's intention to plead guilty,
11 thereby permitting the United States to avoid preparing for trial and allowing for the efficient
12 allocation of resources.

13 7. Defendant's Criminal History Category will be determined by the court.

14 **D. Other Sentencing Matters**

15 8. The parties agree that the Sentencing Guideline calculations are based on
16 information now known and could change upon investigation by the United States Probation
17 Office. It is possible that factors unknown or unforeseen by the parties to the Plea may be
18 considered in determining the offense level, specific offense characteristics, and other related
19 factors. In that event, the defendant will not withdraw his plea of guilty. Both the defendant and
20 the United States are free to: (a) supplement the facts by supplying relevant information to the
21 United States Probation Office and the Court, and (b) correct any and all factual inaccuracies
22 relating to the calculation of the sentence.

23 9. The stipulations in this do not bind either the United States Probation Office or
24 the Court. Both defendant and the United States are free to: (a) supplement the facts by supplying
25 relevant information to the United States Probation Office and the Court, and (b) correct any and
26 all factual inaccuracies relating to the calculation of the sentence.
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1 **E. Fines and Special Assessment**

2 10. Defendant agrees that the Court may impose a fine due and payable immediately
3 upon sentencing.

4 11. Defendant will pay the special assessment of \$100 per count of conviction at the
5 time of sentencing.

6 **F. Restitution**

7 12. Defendant agrees to make restitution to the lenders that financed his straw
8 purchases in furtherance of the scheme, described below in Section IV. Defendant understands and
9 agrees that this amount could be as much as \$732,490.00, the total purchase price for the
10 properties. The parties further acknowledge, however, that this amount may be reduced at
11 sentencing by any provable down payments and mortgage payments made before February 2009.
12 Defendant understands that any restitution imposed by the Court may not be discharged in whole
13 or in part in any present or future bankruptcy proceeding.

14 **G. Forfeiture**

15 13. In consideration for the government agreeing to the terms of this Plea , defendant
16 knowingly and voluntarily agrees to the abandonment, the civil administrative forfeiture, the civil
17 judicial forfeiture, or the criminal forfeiture money judgment of \$732,490.00 in United States
18 Currency (“property”), in addition to any order of restitution even though the amount of restitution
19 may differ from the amount of forfeiture. Defendant agrees that Defendant will ask the Court to
20 impose an order of forfeiture in the amount stated above and will not ask the Court to adjust the
21 amount in any respect and will sign a consent order of forfeiture to this effect. Defendant admits
22 that if the case were to proceed to trial, the government could prove forfeiture in excess of the
23 amount stated here.

24 14. Defendant knowingly and voluntarily agrees to abandon or to forfeit the property
25 to the United States.

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1 15. Defendant knowingly and voluntarily agrees to relinquish all right, title, and
2 interest in the property.

3 16. Defendant knowingly and voluntarily agrees to waive his right to any
4 abandonment proceedings, any civil administrative forfeiture proceedings, any civil judicial
5 forfeiture proceedings, or any criminal forfeiture proceedings (“proceedings”) of the property.

6 17. Defendant knowingly and voluntarily agrees to waive service of process of any
7 and all documents filed in this action or any proceedings concerning the property arising from the
8 facts and circumstances of this case.

9 18. Defendant knowingly and voluntarily agrees to waive any further notice to the
10 defendant, the defendant’s agents, or the defendant’s attorney regarding the abandonment or the
11 forfeiture and disposition of the property.

12 19. Defendant knowingly and voluntarily agrees not to file any claim, answer,
13 petition, or other documents in any proceedings concerning the property.

14 20. Defendant knowingly and voluntarily agrees to waive the statute of limitations,
15 the CAFRA requirements, Fed. R. Crim. P. 7(c)(2), 32.2(a), and 32.2(b)(3), and the constitutional
16 due process requirements of any abandonment proceeding or any forfeiture proceeding concerning
17 the property.

18 21. Defendant knowingly and voluntarily agrees to waive the defendant’s right to a
19 jury trial on the forfeiture of the property.

20 22. Defendant knowingly and voluntarily agrees to waive (a) all constitutional, legal,
21 and equitable defenses to, (b) any constitutional or statutory double jeopardy defense or claim
22 concerning, and (c) any claim or defense under the Eighth Amendment to the United States
23 Constitution, including, but not limited to, any claim or defense of excessive fine in any
24 proceedings concerning the property.

25 23. Defendant knowingly and voluntarily agrees to the entry of an Order of Forfeiture
26 of the property to the United States.

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1 24. Defendant knowingly and voluntarily agrees and understands the abandonment,
2 the civil administrative forfeiture, the civil judicial forfeiture, or the criminal forfeiture of the
3 property shall not be treated as satisfaction of any assessment, fine, restitution, cost of
4 imprisonment, or any other penalty this Court may impose upon the defendant in addition to the
5 abandonment or the forfeiture.

6 **H. Waiver of Appeal**

7 25. In exchange for the concessions made by the United States in this Plea , defendant
8 knowingly and expressly waives the right to appeal any sentence that is imposed within the
9 applicable Sentencing Guideline range as calculated by the Court, further waives the right to appeal
10 the manner in which that sentence was determined on the grounds set forth in Title 18, United
11 States Code, Section 3742, and further waives the right to appeal any other aspect of the conviction
12 or sentence, including any order of restitution and forfeiture. Defendant reserves only the right to
13 appeal any portion of the sentence that is an upward departure from the applicable Sentencing
14 Guideline range calculated by the Court.

15 26. Defendant also waives all collateral challenges, including any claims under Title
16 18, United States Code, Section 2255, to the defendant's conviction, sentence and the procedure by
17 which the Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective
18 assistance of counsel.

19 **I. Additional Promises, Agreements, and Conditions**

20 27. In exchange for the United States entering into this , defendant agrees that (a) the
21 facts set forth in Section IV of this Plea shall be admissible against the defendant under Fed. R.
22 Evid. 801(d)(2)(A) in the following circumstances: (i) for any purpose at sentencing; and (ii) in any
23 subsequent proceeding, including a trial in the event the defendant does not plead guilty or
24 withdraws the defendant's guilty plea, to impeach or rebut any evidence, argument or
25 representation offered by or on the defendant's behalf; and (b) the defendant expressly waives any
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1 and all rights under Fed. R. Criminal P. 11(f) and Fed. R. Evid. 410 with regard to the facts set
2 forth in Section IV of the Plea to the extent set forth above.

3 28. The parties agree that no promises, agreements, and conditions have been entered
4 into other than those set forth in this plea memorandum, and will not be entered into unless in
5 writing and signed by all parties.

6 **J. Limitations**

7 29. This Plea is limited to the Criminal Division of the United States Department of
8 Justice and cannot bind any other federal, state or local prosecuting, administrative, or regulatory
9 authority. But, this Plea Memorandum does not prohibit the United States through any agency
10 thereof, the Criminal Division of the United States Department of Justice, or any third party from
11 initiating or prosecuting any civil proceeding directly or indirectly involving the defendant,
12 including but not limited to, proceedings under the False Claims Act relating to potential civil
13 monetary liability or by the Internal Revenue Service relating to potential tax liability.

14 **K. Cooperation**

15 30. Defendant agrees, if requested by the United States, to provide complete and
16 truthful information and testimony concerning defendant's knowledge of all other persons who are
17 committing or have committed offenses against the United States or any state, and agrees to
18 cooperate fully with the United States in the investigation and prosecution of such persons.

19 31. In the event the government decides in its sole discretion that the assistance
20 provided by Defendant amounts to "substantial assistance" pursuant to U.S.S.G. § 5K1.1, the
21 United States will timely file a motion for downward departure from the applicable Sentencing
22 Guideline calculation. The Court has the sole discretion to grant such a motion.

23 32. Defendant agrees that a motion for downward departure based on substantial
24 assistance shall not be made under any circumstances unless Defendant's cooperation is deemed to
25 be substantial assistance by the government. The United States has made no promise, implied or
26 otherwise, that Defendant will be granted a departure for substantial assistance. Further, no
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1 promise has been made that such a motion will be made even if Defendant complies with the terms
2 of this Plea in all respects but has been unable to provide substantial assistance as determined in
3 the sole discretion of the government.

4 33. The United States agrees to consider the totality of the circumstances, including,
5 but not limited to, the following factors, in determining whether, in the sole discretion of the
6 government, Defendant has provided substantial assistance which would merit a motion by the
7 United States for a downward departure from the applicable Guideline:

8 a. The United States' evaluation of the significance and usefulness of Defendant's
9 assistance;

10 b. The truthfulness, completeness, and reliability of any information or testimony
11 provided by Defendant;

12 c. The nature and extent of Defendant's assistance;

13 d. The truthfulness and completeness in disclosing and bringing to the attention of
14 the Government all crimes which Defendant has committed and all administrative, civil, or
15 criminal proceedings, investigations, and prosecutions in which he has been or is a subject, target,
16 party, or witness;

17 e. The truthfulness and completeness in disclosing and providing to the Government,
18 upon request, any document, record, or other evidence relating to matters about which the
19 Government or any designated law enforcement agency inquires, including but not limited to,
20 Defendant's personal finances;

21 f. Any injury suffered, or any danger or risk of injury to Defendant or Defendant's
22 family resulting from defendant's assistance; and,

23 g. The timeliness of Defendant's assistance.

24 34. Defendant agrees that in the event the United States files a downward departure
25 motion based upon Defendant's substantial assistance, the United States reserves the right to make
26 a specific recommendation to the Court regarding the extent of such a departure. Defendant
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1 understands and agrees that the final decision as to how much of a departure, if any, is warranted
2 rests solely with the Court.

3 **L. Breach**

4 35. Defendant agrees that if Defendant, at any time after the signature of this and
5 execution of all required certifications by Defendant, Defendant's counsel, and an attorney for the
6 government, knowingly violates or fails to perform any of defendant's obligations under this ("a
7 breach"), the government may declare this breached. All of Defendant's obligations are material,
8 a single breach of this is sufficient for the government to declare a breach, and defendant shall not
9 be deemed to have cured a breach without the express agreement of the government in writing. If
10 the government declares this breached, and the Court finds such a breach to have occurred, then:
11 (a) if Defendant has previously entered a guilty plea pursuant to this, Defendant will not be able to
12 withdraw the guilty plea, and (b) the government will be relieved of all its obligations under this .

13 **II. PENALTY**

14 36. The maximum penalty for a violation of Title 18, United States Code, Section
15 1349, is imprisonment for not more than thirty (30) years, a \$1,000,000 fine, or both. Defendant is
16 subject to supervised release for a term of not greater than five (5) years.

17 37. Supervised release is a period of time following imprisonment during which
18 Defendant will be subject to various restrictions and requirements. Defendant understands that if
19 Defendant violates one or more of the conditions of any supervised release imposed, Defendant
20 may be returned to prison for all or part of the term of supervised release, which could result in
21 Defendant serving a total term of imprisonment greater than the statutory maximum stated above.

22 38. Defendant is required to pay for the costs of imprisonment, probation, and
23 supervised release, unless the defendant establishes that the defendant does not have the ability to
24 pay such costs, in which case the court may impose an alternative sanction such as community
25 service.

1 **III. ELEMENTS**

2 39. The essential elements of the offense of conspiracy to commit mail and wire
3 fraud, in violation of 18 U.S.C. § 1349, are as follows:

4 a. First, from at least as early as in or about August 2003 through at least in or
5 about February 2009, there was an agreement between two or more persons to commit mail fraud
6 and wire fraud; and

7 b. Second, the defendant became a member of the conspiracy knowing of at least one
8 of its objects and intending to help accomplish it.

9 **IV. FACTS**

10 40. Defendant is pleading guilty because Defendant is guilty of the charged offense.

11 41. Defendant specifically admits and declares under penalty of perjury that all of the
12 facts set forth below are true and correct:

13 42. From at least as early as in or about August 2003 through at least in or about
14 February 2009, Defendant knowingly participated in a scheme to control various Homeowner
15 Association (HOA) boards of directors so that the HOA boards would award the handling of
16 construction defect lawsuits and remedial construction contracts to a law firm and construction
17 company designated by Defendant's co-conspirators.

18 43. In order to accomplish this scheme, Defendant agreed to act as a straw purchaser
19 of properties in three Nevada HOA communities: Chateau Versailles, Sunset Cliffs, and Palmilla.
20 In fact, Defendant's co-conspirators provided the down payments and monthly payments, including
21 HOA dues and mortgage payments, for these properties and were the true owners of the properties.
22 Defendant signed and submitted false and fraudulent loan applications and closing documents to
23 financial institutions in order to finance and close on these properties on behalf of his co-
24 conspirators.

25 44. Once the Defendant purchased the properties for his co-conspirators, and thus
26 purported to become a member of the HOA communities, he ran for election to the respective HOA
27 boards of directors. Defendant then breached his statutory fiduciary duty to the homeowners by

1 the defendant by law and by the Constitution of the United States. Specifically, defendant is giving
2 up:

3 a. The right to proceed to trial by jury on the original charges, or to a trial by a judge
4 if Defendant and the United States both agree;

5 b. The right to confront the witnesses against Defendant at such a trial, and to
6 cross-examine them;

7 c. The right to remain silent at such trial, with such silence not to be used against
8 Defendant in any way;

9 d. The right, should Defendant so choose, to testify in Defendant's own behalf at
10 such a trial;

11 e. The right to compel witnesses to appear at such a trial, and to testify in
12 Defendant's behalf; and,

13 f. The right to have the assistance of an attorney at all stages of such proceedings.

14 50. Defendant acknowledges that defendant is, in all respects, satisfied by the
15 representation provided by Defendant's attorney and that Defendant's attorney has discussed with
16 defendant the burdens and benefits of this and the rights that Defendant has waived herein.

17 51. Defendant, Defendant's attorney, and the attorney for the United States
18 acknowledge that this Plea Memorandum contains the entire agreement negotiated and agreed to by
19 and between the parties, and that no other promise has been made or implied by either the
20 Defendant, Defendant's attorney, or the attorney for the United States.

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MAY 31, 2011
DATED

DENIS J. McINERNEY
Chief
United States Department of Justice,
Criminal Division, Fraud Section

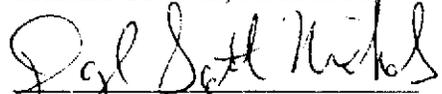

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6-8-2011
DATED

6/13/2011
DATED

NICOLE SPRINZEN
MARY ANN McCARTHY
Trial Attorneys
United States Department of Justice
Criminal Division, Fraud Section


DARRYL SCOTT NICHOLS
Defendant


KALAM HOO
Counsel for Defendant