

**FILED**

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CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_  
DEPUTY CLERK

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11

12 IN THE UNITED STATES DISTRICT COURT  
13 FOR THE EASTERN DISTRICT OF CALIFORNIA  
14

15 UNITED STATES OF AMERICA, ) **211 - CR - 0492 MCE**  
16 )  
17 Plaintiff, ) No.  
18 )  
19 v. )  
20 KENNETH A. SWANGER ) PLEA and COOPERATION AGREEMENT  
21 Defendant. )  
22 )

23 I.

24 INTRODUCTION

25 A. **Scope of Agreement:** The Information to be filed in this  
26 case charges the defendant, KENNETH A. SWANGER, with one count of  
27 participating in a conspiracy to suppress and restrain  
28 competition by rigging bids to obtain selected real estate

1 offered at San Joaquin County, California public real estate  
2 auctions in the Eastern District of California in unreasonable  
3 restraint of interstate trade and commerce, in violation of the  
4 Sherman Act, 15 U.S.C. § 1, and with one count of conspiracy to  
5 commit mail fraud, in violation of 18 U.S.C. § 1349. This  
6 document contains the complete Plea and Cooperation Agreement  
7 between the United States Attorney's Office for the Eastern  
8 District of California and the United States Department of  
9 Justice, Antitrust Division (collectively the "government"), and  
10 the defendant regarding this case. This Plea and Cooperation  
11 Agreement is limited to the United States Attorney's Office for  
12 the Eastern District of California and the United States  
13 Department of Justice, Antitrust Division, and cannot bind any  
14 other federal, state, or local prosecuting, administrative, or  
15 regulatory authorities.  
16  
17

18 **B. Court Not a Party:** The Court is not a party to this  
19 Plea and Cooperation Agreement. Sentencing is a matter solely  
20 within the discretion of the Court, the Court is under no  
21 obligation to accept any recommendations made by the government,  
22 and the Court may in its discretion impose any sentence it deems  
23 appropriate, up to and including the statutory maximum stated in  
24 this Plea and Cooperation Agreement. If the Court should impose  
25 any sentence up to the maximum established by the statute, the  
26 defendant cannot, for that reason alone, withdraw his guilty  
27 plea, and he will remain bound to fulfill all of the obligations  
28

1 under this Plea and Cooperation Agreement. The defendant  
2 understands that neither the government, defense counsel, nor the  
3 Court can make a binding prediction or promise regarding the  
4 sentence he will receive.

5  
6 **II.**

7 **DEFENDANT'S OBLIGATIONS**

8 **A. Waiver of Indictment and Guilty Plea:** The defendant  
9 will waive indictment by grand jury, waive venue, and plead  
10 guilty to a two-count Information, substantially in the form  
11 attached hereto as Exhibit B, charging him with conspiring to rig  
12 bids in violation of 15 U.S.C. § 1 and conspiracy to commit mail  
13 fraud in violation of 18 U.S.C. § 1349. The defendant agrees  
14 that he is, in fact, guilty of those charges and that the facts  
15 set forth in the Factual Basis attached hereto as Exhibit A are  
16 true and accurate.

17  
18 **B. Restitution:** The Mandatory Victim Restitution Act  
19 requires the Court to order restitution to the victims of certain  
20 offenses. The government and the defendant agree that should the  
21 Court enter an order of restitution, such order should not exceed  
22 \$344,000. The parties reserve the right to argue for any amount  
23 of restitution up to that limit. If the Court orders the  
24 defendant to pay restitution, the defendant understands that this  
25 Plea Agreement is voidable by the government if he fails to pay  
26 the restitution as ordered by the Court. The defendant further  
27 agrees that he will not seek to discharge any restitution  
28

1 obligation or any part of such obligation in any bankruptcy  
2 proceeding.

3       **C. Special Assessment:** The defendant agrees to pay a  
4 special assessment of \$100 for each count (total of \$200)  
5 immediately before the sentencing hearing by delivering a check  
6 or money order to the United States Probation Office payable to  
7 the United States District Court.  
8

9       **D. Agreement to Cooperate:** The defendant agrees to  
10 cooperate fully with the government and any other federal, state,  
11 or local law enforcement agency, as directed by the government.  
12 As used in this Agreement, "cooperation" requires the defendant:  
13 (1) to respond truthfully and completely to all questions,  
14 whether in interviews, in correspondence, telephone  
15 conversations, before a grand jury, or at any trial or other  
16 court proceeding; (2) to attend all meetings, grand jury  
17 sessions, trials, and other proceedings at which the defendant's  
18 presence is requested by the government or compelled by subpoena  
19 or court order; (3) to produce voluntarily any and all documents,  
20 records, or other tangible evidence requested by the government;  
21 (4) not to participate in any criminal activity while cooperating  
22 with the government; and (5) to disclose to the government the  
23 existence and status of all money, property, or assets, of any  
24 kind, derived from or acquired as a result of, or used to  
25 facilitate the commission of, the defendant's illegal activities  
26 or the illegal activities of any conspirators.  
27  
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1           If the defendant commits any crimes or if any of the  
2 defendant's statements or testimony prove to be knowingly false,  
3 misleading, or materially incomplete, or if the defendant  
4 otherwise violates this Plea and Cooperation Agreement in any  
5 way, the government will no longer be bound by its  
6 representations to the defendant concerning the limits on  
7 criminal prosecution and sentencing as set forth herein. The  
8 determination whether the defendant has violated the Plea and  
9 Cooperation Agreement will be under a preponderance-of-the-  
10 evidence standard. If the defendant violates the Plea and  
11 Cooperation Agreement, he shall thereafter be subject to  
12 prosecution for any federal criminal violation of which the  
13 government has knowledge, including but not limited to perjury,  
14 false statements, and obstruction of justice. Because  
15 disclosures pursuant to this Agreement will constitute a waiver  
16 of the Fifth Amendment privilege against compulsory self-  
17 incrimination, any such prosecution may be premised on statements  
18 and/or information provided by the defendant. Moreover, any  
19 prosecutions that are not time-barred by the applicable statute  
20 of limitations as of the date of this Agreement may be commenced  
21 in accordance with this paragraph, notwithstanding the expiration  
22 of the statute of limitations between the signing of this  
23 Agreement and the commencement of any such prosecutions. The  
24 defendant agrees to waive all defenses based on the statute of  
25 limitations or delay of prosecution with respect to any

1 prosecutions that are not time-barred as of the date of this  
2 Agreement.

3       If it is determined that the defendant has violated any  
4 provision of this Agreement or if the defendant successfully  
5 moves to withdraw his plea: (1) all statements made by the  
6 defendant to the government or other designated law enforcement  
7 agents, or any testimony given by the defendant before a grand  
8 jury or other tribunal, whether before or after this Agreement,  
9 shall be admissible in evidence in any criminal, civil, or  
10 administrative proceedings hereafter brought against the  
11 defendant; and (2) the defendant shall assert no claim under the  
12 United States Constitution, any statute, Rule 11(f) of the  
13 Federal Rules of Criminal Procedure, Rule 410 of the Federal  
14 Rules of Evidence, or any other federal rule, that statements  
15 made by the defendant before or after this Agreement, or any  
16 leads derived therefrom, should be suppressed. By signing this  
17 Agreement, the defendant waives any and all rights in the  
18 foregoing respects.  
19  
20

21       **E. Payment of Fine:** The defendant agrees to pay a criminal  
22 fine pursuant to United States Sentencing Guidelines (U.S.S.G.)  
23 § 5E1.2(c)(3) or other amount if so ordered by the Court. The  
24 defendant understands that the criminal fine ordered by the Court  
25 may be based upon the defendant's ability to pay a criminal fine  
26 in addition to restitution as agreed upon and set forth in this  
27 Plea and Cooperation Agreement and as determined by the United  
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1 States Probation Office. The government's recommendation with  
2 respect to any such criminal fine is set forth in paragraph III.  
3 D. of this Plea and Cooperation Agreement.

4  
5 III.

6 THE GOVERNMENT'S OBLIGATIONS

7 A. **Incarceration Range:** The government will recommend that  
8 the defendant be sentenced to the bottom of the applicable  
9 Guideline range for his offense, as determined by the United  
10 States Probation Office.

11 B. **Acceptance of Responsibility:** The government agrees  
12 that a three-level reduction in defendant's offense level for his  
13 full and clear demonstration of acceptance of responsibility is  
14 appropriate under U.S.S.G. § 3E1.1, will not oppose such a  
15 reduction, and will so move under § 3E1.1(b), so long as the  
16 defendant pleads guilty, meets with and assists the probation  
17 officer in the preparation of the pre-sentence report, is  
18 truthful and candid with the probation officer and the Court, and  
19 does not otherwise engage in conduct that constitutes obstruction  
20 of justice within the meaning of U.S.S.G. § 3C1.1, either in the  
21 preparation of the pre-sentence report or during the sentencing  
22 proceeding.

23 C. **Reduction of Sentence for Cooperation:** The government  
24 agrees to recommend at the time of sentencing that the  
25 defendant's sentence of imprisonment be reduced to reflect his  
26 substantial assistance to the government in the investigation and  
27  
28

1 prosecution of others, pursuant to U.S.S.G. § 5K1.1. The  
2 defendant understands that he must comply with paragraph II. D.  
3 of this Plea and Cooperation Agreement. The defendant  
4 understands that the government's recommended reduction in his  
5 sentence will depend upon the level of assistance the government  
6 determines that the defendant has provided. The defendant  
7 further understands that a motion pursuant to U.S.S.G. § 5K1.1 is  
8 only a recommendation and is not binding on the Court.  
9

10 Other than as set forth above, the government agrees that  
11 any incriminating information provided by the defendant during  
12 his cooperation will not be used in determining the applicable  
13 Guideline range in his case, pursuant to U.S.S.G. § 1B1.8.  
14

15 **D. Fine:** The government agrees to recommend that the  
16 defendant be ordered to pay a fine pursuant to U.S.S.G.  
17 § 5E1.2(c)(3) or other amount as recommended by the United States  
18 Probation Office.

19 **IV.**  
20 **ELEMENTS OF THE OFFENSE**

21 Had this case gone to trial, the government would have to  
22 prove beyond a reasonable doubt the following elements:

23 For Count One, Sherman Act:

24 First, that the defendant entered into a conspiracy;

25 Second, that the conspiracy was an unreasonable restraint of  
26 trade; and

27 Third, that the conspiracy was in or affected interstate  
28 commerce in the United States.



1 For Count Two, Conspiracy to Commit Mail Fraud:

2 First, that the defendant knowingly devised or participated  
3 in a conspiracy to defraud or to obtain money or property by  
4 means of materially false pretenses, representations, or  
5 promises;

6  
7 Second, the defendant knew that the scheme was deceptive or  
8 that the pretenses, representations, or promises were false;

9 Third, that the defendant did so with the intent to defraud;  
10 and

11 Fourth, for the purpose of carrying out the scheme or  
12 attempting to do so, the defendant knowingly used and caused to  
13 be used the United States mails or private or commercial carrier  
14 in the manner charged.

15  
16 V.  
MAXIMUM SENTENCE

17 A. **Maximum Penalty:** For Count One, the maximum sentence the  
18 Court can impose for a violation of 18 U.S.C. § 1 is ten years  
19 incarceration; a fine in an amount equal to the greatest of (1)  
20 \$1,000,000, (2) twice the gross pecuniary gain the conspirators  
21 derived from the crime, or (3) twice the gross pecuniary loss  
22 caused to the victims of the crime by the conspirators; a three-  
23 year period of supervised release; and a special assessment of  
24 \$100. For Count Two, the maximum sentence the Court can impose  
25 for a violation of 18 U.S.C. § 1349 is 30 years incarceration; a  
26 fine of \$1,000,000; a five-year period of supervised release; and  
27 a special assessment of \$100.  
28



1 reasonable in light of the factors set forth in 18 U.S.C.

2 § 3553(a).

3       **B. Stipulations Affecting Guidelines Calculations:** The  
4 government and the defendant agree that there is no material  
5 dispute as to the following Sentencing Guidelines variables and  
6 therefore stipulate and agree to the following:  
7

8 For Count One:

9	§ 2R1.1(a)	Base Offense Level	12
10	(b) (1)	Bid Rigging	+1
11	(b) (2) (B)	Volume of Commerce > \$10 million	+4
12	Total		17
13	(c) (1)	Fine 1 - 5% of \$11.0 million	

14 For Count Two:

15	§ 2B1.1(a) (1)	Base Offense Level	7
16	(b) (1) (G)	Loss > \$200,000	+12
17	Total		19

19 The Guidelines calculation results in an offense level of 19 for  
20 a jail term of 30 to 37 months and a Guidelines fine range, under  
21 § 5E1.2(c) (3), of \$5,000 to \$50,000.

22       **1. Acceptance of Responsibility:** Pursuant to U.S.S.G.  
23 § 3E1.1 and as described in more detail in paragraph III.B.  
24 above, the defendant's total offense level is decreased by three  
25 levels because of his acceptance of responsibility. The Adjusted  
26 Total Offense Level is therefore 16.  
27

28

1           **2. Criminal History:** The parties agree that the  
2 defendant's criminal history is to be determined by the United  
3 States Probation Office.

4           **3. Departures or Other Enhancements or Reductions:**  
5 The parties stipulate and agree that they will not seek or argue  
6 in support of any other specific offense characteristics, Chapter  
7 Three adjustments, departures, or cross-references, other than  
8 those contemplated in the foregoing stipulations. Defense  
9 counsel may argue for a variance or deviation from the Sentencing  
10 Guidelines under 18 U.S.C. § 3553(a). The government reserves  
11 its right to oppose such deviation or variance. If either party  
12 breaches this provision, the other party shall be relieved of all  
13 of its obligations under this Plea and Cooperation Agreement.  
14

15  
16                                   **VII.**  
17                                   **WAIVERS**

18           **A. Waiver of Constitutional Rights:** The defendant  
19 understands that by pleading guilty he is waiving the following  
20 constitutional rights: (a) to plead not guilty and to persist in  
21 that plea if already made; (b) to be tried by a jury; (c) to be  
22 assisted at trial by an attorney, who would be appointed if  
23 necessary; (d) to subpoena witnesses to testify on his behalf;  
24 (e) to confront and cross-examine witnesses against him; and  
25 (f) not to be compelled to incriminate himself.  
26

27           **B. Waiver of Appeal and Collateral Attack:** The defendant  
28 understands that the law gives him a right to appeal his

1 conviction and sentence. He agrees as part of his plea, however,  
2 to give up the right to appeal the conviction and the right to  
3 appeal any aspect of the sentence imposed in this case so long as  
4 his sentence is no longer than the top of the Sentencing  
5 Guidelines range determined by the Court, consistent with the  
6 stipulations set forth above about the Sentencing Guidelines  
7 variables.  
8

9       Regardless of the sentence he receives, the defendant also  
10 gives up any right he may have to bring a post-appeal attack on  
11 his conviction or his sentence. He specifically agrees not to  
12 file a motion under 28 U.S.C. § 2255 or § 2241 attacking his  
13 conviction or sentence.  
14

15       If the defendant ever attempts to vacate his plea, dismiss  
16 the underlying charges, or reduce or set aside his sentence on  
17 any of the counts to which he is pleading guilty, the government  
18 shall have the right to: (1) prosecute the defendant on any of  
19 the counts to which he pleaded guilty; (2) reinstate any counts  
20 that may be dismissed pursuant to this Plea and Cooperation  
21 Agreement; and (3) file any new charges that would otherwise be  
22 barred by this Plea and Cooperation Agreement. The decision to  
23 pursue any or all of these options is solely in the discretion of  
24 the United States Attorney's Office and the Department of  
25 Justice, Antitrust Division. By signing this Plea and  
26 Cooperation Agreement, the defendant agrees to waive any  
27 objections, motions, and defenses he might have to the  
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1 government's decision. In particular, he agrees not to raise any  
2 objections based on the passage of time with respect to such  
3 counts, including, but not limited to, any statutes of limitation  
4 or any objections based on the Speedy Trial Act or the Speedy  
5 Trial Clause of the Sixth Amendment.  
6

7 **C. Waiver of Attorneys' Fees and Costs:** The defendant  
8 agrees to waive all rights under the "Hyde Amendment," Section  
9 617, P.L. 105-119 (Nov. 26, 1997), to recover attorneys' fees or  
10 other litigation expenses in connection with the investigation  
11 and prosecution of all charges in the above-captioned matter and  
12 of any related allegations.  
13

14 **VIII.**  
**ENTIRE PLEA AND COOPERATION AGREEMENT**

15 Other than this Plea and Cooperation Agreement, no  
16 agreement, understanding, promise, or condition between the  
17 government and the defendant exists, nor will such agreement,  
18 understanding, promise, or condition exist unless it is committed  
19 to writing and signed by the defendant, counsel for the  
20 defendant, and counsel for the government.  
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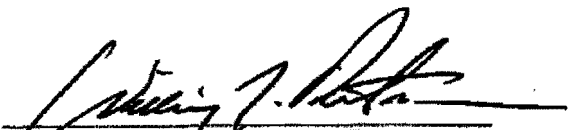
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IX.  
APPROVALS AND SIGNATURES


A. Defense Counsel: I have read this Plea and Cooperation Agreement and have discussed it fully with my client. The Plea and Cooperation Agreement accurately and completely sets forth the entirety of the agreement. I concur in my client's decision to plead guilty as set forth in this Plea and Cooperation Agreement.

DATED: 11/17/11   
William J. Portanova, Esq.  
Attorney for Defendant

B. Defendant: I have read this Plea and Cooperation Agreement and carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to it. Further, I have consulted with my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines that may apply to my case. No other promises or inducements have been made to me, other than those contained in this Plea and Cooperation Agreement. In addition, no one has threatened or forced me in any way to enter into this Plea and

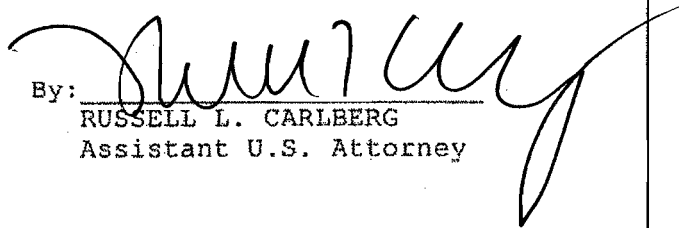
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1 Cooperation Agreement. Finally, I am satisfied with the  
2 representation of my attorney in this case.


3  
4 DATED: 11/12/11   
5 KENNETH A. SWANGER,  
6 Defendant

7  
8 C. Attorneys for the Government: The undersigned accept and  
9 agree to this Plea and Cooperation Agreement on behalf of the  
10 government.  
11

12  
13 DATED: Nov 22, 2011 BENJAMIN B. WAGNER  
14 United States Attorney

15  
16 By:   
17 RUSSELL L. CARLBERG  
18 Assistant U.S. Attorney

19  
20 SHARIS A. POZEN  
21 Acting Assistant Attorney  
22 General

23 By:   
24 ANNA TRYON PLETCHER  
25 TAI S. MILDER  
26 RICHARD B. COHEN  
27 Trial Attorneys  
28 U.S. Department of Justice  
Antitrust Division



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**EXHIBIT "A"**  
**Factual Basis for Plea**

**Bid Rigging**

At trial, the government would prove the following facts beyond a reasonable doubt:

Beginning in or about June 2009 and continuing until in or about October 2009 (relevant period), defendant participated in a conspiracy to rig bids at public real estate auctions held in San Joaquin County, California, located in the Eastern District of California. The primary purpose of this conspiracy was to suppress and restrain competition and obtain selected real estate offered at San Joaquin County public auctions at non-competitive prices. During the relevant period, defendant, acting as an agent for another co-conspirator, and his co-conspirators reached agreements not to bid against one another and to allocate properties among themselves. To carry out their agreements, defendant and his co-conspirators refrained from bidding or refrained from bidding up the price for auctioned properties. In many instances, defendant and his co-conspirators held private auctions, open only to members of the conspiracy, to rebid the property. Defendant and his co-conspirators awarded the property to the conspirators who submitted the highest bid at the private auctions. Defendant and his co-conspirators distributed the proceeds of the private auctions as payoffs to the other, unsuccessful bidders in the private auction, based upon a predetermined formula agreed upon by the members of the conspiracy, for refraining from bidding on the property at the public auction. Defendant agreed to accept payoffs and agreed to distribute payoffs on behalf of another co-conspirator.

During the relevant period, the business activities of the defendant and co-conspirators were within the flow of, and substantially affected, interstate trade and commerce. For example, mortgage holders located in states other than California held mortgages, appointed trustees, and received proceeds from the public auctions that were subject to the bid-rigging agreement.

**Conspiracy to Commit Mail Fraud**

Beginning in or about June 2009 and continuing until in or about October 2009 (relevant period), defendant, acting as an agent for another co-conspirator, knowingly devised or participated in a conspiracy to defraud or to obtain money or property by means of materially false pretenses, representations, or promises from the mortgage holders and owners of properties

1 that were being sold at public real estate foreclosure auctions  
2 in the Eastern District of California. That conspiracy to  
3 defraud consisted of suppressing competition at the public  
4 auction of properties by agreeing not to bid against one another  
5 at the public auction, by acquiring the property at a lower price  
6 than would have resulted from a fully competitive auction, and by  
7 holding a second, private auction and dividing the profits of the  
8 scheme (the difference between the public and private auction  
9 prices) among themselves. In other words, the participants  
10 intentionally manipulated the sales price of properties, causing  
11 false, artificially low sales prices to be reported and paid to  
12 victims of the scheme.

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The defendant and others, for the purpose of executing the  
conspiracy described above and attempting to do so, knowingly  
used and caused to be used the United States mails or private or  
commercial carrier. For example, trustees and government  
agencies used the United States mail to transmit grant deeds and  
other title documents to participants in the conspiracy to  
defraud. These mailings were foreseeable to defendant in the  
ordinary course of business.