

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

UNITED STATES OF AMERICA,)	
)	Criminal No. _____
Plaintiff,)	
)	<u>PLEA AGREEMENT</u>
-vs-)	
)	
DAVID KAUFMAN,)	
)	
Defendant.)	

Pursuant to Rule 11(c)(1)(A) of the Federal Rules of Criminal Procedure, the United States of America, by Timothy Q. Purdon, United States Attorney for the District of North Dakota, Denis J. McNerney, Chief, Criminal Division, Fraud Section, United States Department of Justice, and Fraud Section attorneys Robert Zink and Jack B. Patrick (collectively, "the United States"), and defendant, DAVID KAUFMAN, and defendant's attorney, Jason Lamm, hereby agree to the following:

1. Defendant acknowledges the Information charges a violation of Title 18, United States Code, Section 1503.
2. Defendant has read the charge and defendant's attorney has fully explained the charge to defendant.
3. Defendant fully understands the nature and elements of the charged crime.
4. Defendant will voluntarily plead guilty to the Information.
5. The parties agree this Plea Agreement shall be filed and become a part of the Court record and be governed by Federal Rule of Criminal Procedure 11(c). The parties specifically agree that Rule 11(c)(1)(c) does not apply. If the United States makes the non-binding recommendations specified in this Plea Agreement, then defendant acknowledges this agreement will have been

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fulfilled. Except as provided in Rule 11(c)(5), the Court's refusal to accept any or all terms of the Plea Agreement does not give defendant a right to withdraw defendant's guilty plea.

6. Defendant DAVID KAUFMAN will plead guilty because defendant is in fact guilty of the charge contained in the Information. In pleading guilty to the Information, defendant DAVID KAUFMAN acknowledges and admits that if this matter were to proceed to trial, the United States could prove the following facts beyond a reasonable doubt:

a. Defendant KAUFMAN was a certified public accountant licensed to practice in the state of Arizona.

b. Defendant KAUFMAN was the external, independent auditor for AMS from in or about February 2007 through in or about April 2010.

c. AMS, an Arizona corporation headquartered in Mesa, Arizona, was in the business of originating residential real estate mortgage loans to borrowers in Arizona and other states and then selling the loans to institutional investors. AMS obtained funding for the loans by selling participation interests in the loans to financial institutions, including BNC National Bank ("BNC").

d. BNC was a national bank with headquarters in Bismarck, North Dakota and had offices in several states, including Arizona. BNC was a member of the Federal Home Loan Bank of Des Moines, one of twelve regional banks established by Congress to support mortgage lending. BNC's holding company was also a recipient of approximately \$20,000,000 in federal funds from the Troubled Asset Relief Program ("TARP"). The holding company injected approximately \$17,000,000 of the TARP funds into BNC.

e. On or about October 30, 2006, BNC entered into a loan participation agreement with AMS to provide funding for loans originated by AMS. BNC was a 100 percent

participant in any loan in which it participated under the agreement, that is, BNC provided all of the funding for the loan.

f. AMS also was required by its agreements and understandings with BNC to provide financial information to BNC, including periodic financial statements, including audited, annual financial statements.

g. By summer 2011, the Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP"), the Office of the Inspector General for the Federal Housing Finance Agency ("FHFA OIG"), the U.S. Department of Justice, Criminal Division, Fraud Section, and a federal grand jury sitting in Arizona had initiated a criminal investigation into allegations that employees and agents of AMS had defrauded BNC of well over \$20,000,000.

h. On January 10, 2012, defendant KAUFMAN, during a meeting with an executive of AMS, informed the executive of AMS that he, defendant KAUFMAN, had combined two liabilities on AMS's audited financial statements so that BNC would not discover the true nature and extent of AMS's tax liabilities. Specifically, defendant KAUFMAN stated that he combined: (1) monthly payments AMS made that year to the Internal Revenue Service ("IRS") pursuant to a tax settlement between AMS and the IRS for back payroll taxes AMS owed the government; and (2) payments AMS made to the IRS for annual payroll tax obligations incurred in the regular course of business. Defendant KAUFMAN explained to the AMS executive, in substance, that he combined these two liabilities on AMS's audited financial statements in order to preserve AMS's relationship with BNC so that AMS could remain in business.

i. By or before February 1, 2012, defendant KAUFMAN learned of the grand jury's investigation.

j. On February 1, 2012, defendant KAUFMAN was interviewed by federal agents of SIGTARP and FHFA, along with prosecutors from the United States Department of Justice, Criminal Division, Fraud Section. During the interview, defendant KAUFMAN expressly denied having engaged in the conversation more fully described above in paragraph 6(h) of this Agreement. Defendant KAUFMAN admits that he knew full well that he engaged in the conversation described above in paragraph 6(h), but nevertheless falsely denied having engaged in the conversation to federal agents. Defendant KAUFMAN also admits that the likely effect of his false statement to federal agents was to obstruct and/or impede the grand jury's investigation. Defendant KAUFMAN admits that his denial was knowingly and intentionally falsely made at the time it was made and that his statements were material to the grand jury's investigation. Defendant KAUFMAN further admits that, at the time he made his false statement, he knew that the grand jury was conducting a federal investigation.

7. Defendant understands the charge carries the following maximum penalties:

Imprisonment:	10 years
Fine:	\$250,000 or not more than the greater of twice the gross gain or twice the gross loss
Supervised Release:	3 years
Special Assessment:	\$100

Defendant agrees to pay to the Clerk of United States District Court the \$100 special assessment on the day of sentencing.

8. Defendant understands that by pleading guilty defendant surrenders rights, including:

a. The right to a speedy public jury trial and related rights pertaining thereto, as follows:

(i) A jury would be composed of 12 lay persons selected at random.

Defendant and defendant's attorney would help choose the jurors by removing prospective jurors "for cause," where actual bias or other disqualification is shown; or by removing jurors without cause by exercising peremptory challenges. The jury would be instructed that defendant is presumed innocent and that it could not return a guilty verdict unless it found defendant guilty beyond a reasonable doubt.

(ii) If trial were held without a jury then the judge would find the facts and determine whether defendant was guilty beyond a reasonable doubt.

(iii) At a trial, whether by a jury or judge, the United States is required to present witness testimony and other evidence against defendant. Defendant's attorney can confront and examine them. In turn, the defense can present witness testimony and other evidence. If witnesses for defendant refuse to appear voluntarily, defendant can require their attendance through the subpoena power of the Court.

(iv) At trial, defendant has a privilege against self-incrimination; thus, defendant can decline to testify. No inference of guilt can be drawn from defendant's refusal to testify. Defendant can choose to testify, but cannot be required to testify.

b. Defendant has a right to remain silent. However, under terms of the Plea Agreement, the Judge will likely ask defendant questions about defendant's criminal conduct, to ensure that there is a factual basis for defendant's plea.

9. Defendant understands that by pleading guilty defendant gives up all of the rights set forth in the prior paragraph, and there will be no trial. Defendant's attorney has explained these rights, and consequences of defendant's waiver.

10. The Court shall impose a sentence sufficient to comply with purposes set forth in the

Sentencing Reform Act. In doing so, the Court shall consider factors set forth in 18 U.S.C. § 3553(a), and must consult and take into account the United States Sentencing Commission, Guidelines Manual (Nov. 2010) (USSG). Defendant understands that the United States will fully apprise the District Court and the United States Probation and Pretrial Services Office of the nature, scope, and extent of defendant's conduct, including all matters in aggravation and mitigation relevant to the issue of sentencing. The United States expressly reserves the right to appeal from an unreasonable sentence.

11. This Plea Agreement is binding only upon the United States Attorney for the District of North Dakota and the Fraud Section, Criminal Division, United States Department of Justice. It does not bind any United States Attorney outside the District of North Dakota, nor does it bind any state or local prosecutor. They remain free to prosecute defendant for any offenses under their jurisdiction. This Plea Agreement also does not bar or compromise any civil or administrative claim.

12. Defendant understands the United States reserves the right to notify any local, state, or federal agency by whom defendant is licensed, or with whom defendant does business, of defendant's conviction.

13. The parties agree that the base offense level under the Sentencing Guidelines for defendant's conduct is 14 (USSG § 2J1.2).

14. If the defendant demonstrates a genuine acceptance of responsibility for this offense up to and including the time of sentencing, consistent with USSG § 3E1.1, the United States agrees to recommend at sentencing a 2-level downward adjustment for acceptance of responsibility pursuant to USSG § 3E1.1(a). If the defendant qualifies for a decrease under USSG § 3E1.1(a) and the offense level determined prior to the operation of USSG § 3E1.1(a) is level 16 or greater, the United

States further agrees to move for an additional 1-level downward adjustment pursuant to USSG § 3E1.1(b) for timely notifying the United States of defendant's intention to enter a guilty plea, thereby permitting the government to avoid preparing for trial and permitting the Court and the United States to allocate their resources efficiently.

15. Neither the Court nor the Probation Office are parties to the Plea Agreement. Neither the Court nor the Probation Office are bound by the Plea Agreement as to determining the guidelines range. The Court may impose a reasonable sentence anywhere within the statutory range. The Court may depart from the applicable guidelines range if the Court, on the record, states factors not contemplated by the Sentencing Guidelines Commission to justify the departure. Both parties reserve the right to object to any departure. See USSG § 1B1.1, comment.(n.1) (defines "departure"). There may be other adjustments the parties have not agreed upon.

16. At sentencing, the United States may recommend that defendant be ordered to pay a fine in an amount not inconsistent with an applicable advisory Guidelines (fine) range.

17. Defendant acknowledges and understands that if defendant violates any term of this Plea Agreement, engages in any further criminal activity, or fails to appear for sentencing, the United States will be released from its commitments. In that event, this Plea Agreement shall become null and void, at the discretion of the United States, and defendant will face the following consequences: (1) all testimony and other information defendant has provided at any time to attorneys, employees, or law enforcement officers of the government, to the Court, or to the Federal grand jury, may be used against defendant in any prosecution or proceeding; and (2) the United States will be entitled to reinstate previously dismissed charges and/or pursue additional charges against defendant and to use any information obtained directly or indirectly from defendant in those additional prosecutions.

Nothing in this agreement prevents the United States from prosecuting defendant for perjury, false statement, or false declaration if defendant commits such acts in connection with this agreement or otherwise.

18. Defendant acknowledges the provisions of Title 18, United States Code, Sections 2259 and 3663A, which require the Court to order restitution to any victim of the offense, unless the Court determines that restitution would not be appropriate. Defendant agrees to pay restitution upon such terms as may be ordered by the Court. Defendant further agrees to grant the United States a wage assignment, liquidate assets, or complete any other tasks the Court finds reasonable and appropriate for the prompt payment of any restitution or fine ordered by the Court.

19. The United States agrees that USSG § 1B1.8 is applicable to defendant. Any information provided by the defendant, other than that charged in the Information, in connection with defendant's assistance to the United States, including debriefing and testimony, will not be used to increase defendant's Sentencing Guideline level or used against defendant for further prosecution, if in the opinion of the United States Attorney defendant has met all of defendant's obligations under the Plea Agreement and provided full, complete, and truthful information and testimony. However, nothing revealed by the defendant during defendant's debriefings and testimony would preclude defendant's prosecution for any serious violent crimes.

20. Defendant's Waiver of Appeal. Defendants have a right to appeal their conviction and sentence (Judgment), unless they agree otherwise. Appeals are taken to the United States Court of Appeals for the Eighth Circuit (appellate court), pursuant to Title 18, United States Code, Section 3742(a). The appellate court has ruled that defendants can waive (give up) their right to appeal. Defendants often waive their right to appeal as part of a plea agreement and in exchange for

concessions by the United States. The appellate court will enforce such waivers.

Defendant and defendant's attorney acknowledge they have fully reviewed and fully discussed the record in this case and all issues that may be raised on appeal. They have fully discussed defendant's right of appeal and the consequences of waiver. Defendant has decided to waive any right of appeal, except as may be provided herein.

By signing this agreement, defendant voluntarily waives defendant's right to appeal the Court's Judgment against defendant; and, absent a claim of ineffective assistance of counsel, defendant waives all rights to contest the Judgment in any post-conviction proceeding, including one pursuant to Title 28, United States Code, Section 2255. Defendant reserves only the right to appeal from a sentence that is greater than the upper limit of the Court-determined Sentencing Guidelines range.

Defendant understands that the United States was motivated by defendant's willingness to waive any right of appeal when the United States chose to offer defendant terms of a plea agreement. In other words, the United States was willing to offer certain terms favorable to defendant in exchange for finality. Defendant understands and agrees this case will be over once defendant has been sentenced by the Court. Defendant agrees that it will be a breach of this agreement if defendant appeals in violation of this agreement. The United States will rely upon defendant's waiver and breach as a basis for dismissal of the appeal. Moreover, defense counsel may reasonably conclude and inform the appellate court that an appeal is wholly frivolous. Defense counsel may then move to withdraw, citing Anders v. California, 386 U.S. 738, 744 (1967), and Smith v. Robbins, 528 U.S. 529 (2000). Defendant agrees an appeal in violation of this agreement should be dismissed.

By signing this agreement, the defendant further specifically waives defendant's right to seek

to withdraw defendant's plea of guilty, pursuant to Federal Rules of Criminal Procedure 11(d), once the plea has been entered in accordance with this agreement. The appellate court will enforce such waivers. The defendant agrees that any attempt to withdraw defendant's plea will be denied and any appeal of such denial should be dismissed.

21. The defendant waives any challenge to venue in the District of North Dakota. The defendant understands that Federal Rule of Criminal Procedure 18 affords the defendant the right to have his offense prosecuted in the district in which the offense was committed. The defendant knowingly consents to have the offense set forth in the criminal information prosecuted in the District of North Dakota.

22. The Fraud Section and the Criminal Division of the United States Attorney's Office for the District of North Dakota will not contact any other state or federal prosecuting jurisdiction and voluntarily turn over truthful information that the defendant provides under this agreement to aid a prosecution of the defendant in that jurisdiction. Should any other prosecuting jurisdiction attempt to use truthful information the defendant provides pursuant to this agreement against the defendant, the Fraud Section and the Criminal Division of the United States Attorney's Office for the District of North Dakota agree, upon request, to contact that jurisdiction and ask that jurisdiction to abide by the immunity provisions of this plea agreement. Prior to turning over any information, the Fraud Section or United States Attorney's Office for the District of North Dakota will contact undersigned counsel for the defendant in order to permit the defendant the opportunity to contact the requesting jurisdiction and speak with that jurisdiction about its request. The parties understand that the prosecuting jurisdiction retains the discretion over whether to use such information.

23. The undersigned attorneys for the United States and the attorney for defendant agree to abide by the provisions of Rule 32(f) of the Federal Rules of Criminal Procedure. The attorneys acknowledge their obligation to use good-faith efforts to resolve any disputes regarding the Presentence Investigation Report (PSIR) through a presentence conference or other informal procedures.

24. Defendant acknowledges reading and understanding all provisions of the Plea Agreement. Defendant and defendant's attorney have discussed the case and reviewed the Plea Agreement. They have discussed defendant's constitutional and other rights, including, but not limited to, defendant's plea-statement rights under Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure.

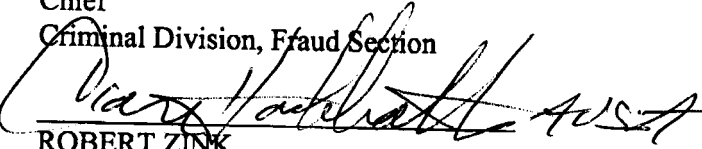
AGREED:

TIMOTHY Q. PURDON
United States Attorney

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

Dated: 10-23-12

BY:

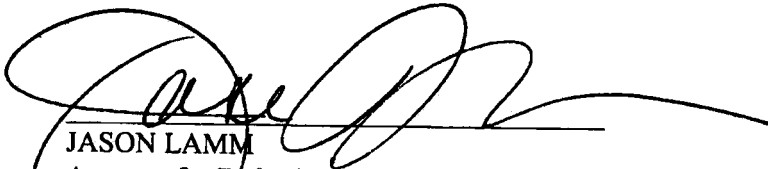

ROBERT ZINK
Trial Attorney
JACK B. PATRICK
Senior Litigation Counsel
Criminal Division, Fraud Section


Dated: 8/31/12


DAVID KAUFMAN
Defendant

10-19-12

Dated: 8/31/12


JASON LAMM
Attorney for Defendant


10-19-12