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DISTRICT OF NEVADA
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# UNITED STATES DISTRICT COURT
# DISTRICT OF NEVADA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>LINDA MACK,<br><br>Defendant. | Case No.: 2:13-cr-83-JCM-CWH<br><br>**PLEA AGREEMENT** |

The United States, by and through Daniel G. Bogden, United States Attorney, and Lisa C. Cartier Giroux, Assistant United States Attorney and Kyle Maurer, Trial Attorney, the defendant, Linda Mack, and the defendant's attorneys, Rachel Korenblat and Brenda Weksler, submit this Plea Agreement under Fed. R. Crim. P. 11(c)(1)(A) and (B).

## I. SCOPE OF AGREEMENT

The parties to this Plea Agreement are the United States of America and Linda Mack. This Plea Agreement binds the defendant and the United States Attorney's Office for the

District of Nevada. It does not bind any other prosecuting, administrative, or regulatory authority, the United States Probation Office, or the Court.

The Plea Agreement sets forth the parties' agreement regarding criminal charges referenced in the Plea Agreement and applicable sentences, fines, restitution and forfeiture. It does not control or prohibit the United States or any agency or third party from seeking any other civil or administrative remedies directly or indirectly against the defendant.

## II. DISPOSITION OF CHARGES AND WAIVER OF TRIAL RIGHTS

A. Guilty Plea. The defendant knowingly and voluntarily agrees to plead guilty to count one of the superseding indictment, charging conspiracy to commit bank fraud, mail fraud, and wire fraud in violation of 18 U.S.C. § 1349, and count seven of the Superseding Indictment charging bank fraud in violation of 18 U.S.C. § 1344.

The defendant also agrees to the imposition of the in personam criminal forfeiture money judgment as set forth in the Plea Agreement and the Forfeiture Allegations of the Superseding Indictment.

B. Waiver of Trial Rights. The defendant acknowledges that she has been advised and understands that by entering a plea of guilty she is waiving -- that is, giving up -- certain rights guaranteed to all defendants by the laws and the Constitution of the United States. Specifically, the defendant is giving up:

1. The right to proceed to trial by jury on all charges, or to a trial by a judge if the defendant and the United States both agree;

2. The right to confront the witnesses against the defendant at such a trial, and to cross-examine them;

3. The right to remain silent at such a trial, with assurance that her silence could not be used against her in any way;

4. The right to testify in her own defense at such a trial if she so chooses;

5. The right to compel witnesses to appear at such a trial and testify in the defendant's behalf; and

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

C. Withdrawal of Guilty Plea. The defendant will not seek to withdraw her guilty plea after she has entered it in court.

D. Additional Charges. The United States agrees not to bring any additional charges against the defendant arising out of the investigation in the District of Nevada which culminated in this Plea Agreement and based on conduct known to the United States, except that the United States reserves the right to prosecute the defendant for any crime of violence as defined by 18 U.S.C. § 16.

**III. ELEMENTS OF THE OFFENSES**

A. The elements of conspiracy under 18 U.S.C. § 1349 are the following:

First: Beginning and ending on the dates set forth in count one of the superseding indictment, there was an agreement between two or more persons to commit the crimes of bank fraud (18 U.S.C. § 1344), mail fraud (18 U.S.C. § 1341), and wire fraud (18 U.S.C. § 1343); and

Second: The defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

*See* Ninth Circuit Manual of Model Jury Instruction, Criminal 8.20 (2010 ed.).

B. The essential elements for the crime of Bank Fraud, in violation of Title 18, United States Code, Section 1344, are the following:

First: The defendant knowingly carried out a scheme or plan to obtain money or property from Pacific Mercantile Bank by making false statements or promises;

Second: The defendant knew that the statements or promises were false;

Third: The statements or promises were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;

Fourth: The defendant acted with the intent to defraud; and

Fifth: Pacific Mercantile Bank was federally insured.

*See* Ninth Circuit Manual of Model Jury Instructions, Criminal 8.127 (2010 ed.).

C. The essential elements for the crime of Mail Fraud, Title 18, United States Code, Section 1341, are the following:

First: The defendant knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second: The statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third: The defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth: The defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

*See* Ninth Circuit Manual of Model Jury Instructions, Criminal 8.121 (2010 ed.).

D. The essential elements for the crime of Wire Fraud, Title 18, United States Code, Section 1343, are the following:

First: The defendant knowingly participated in a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second: The statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third: The defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth: The defendant used, or caused to be used, interstate wire communications to carry out or attempt to carry out an essential part of the scheme.

*See* Ninth Circuit Manual of Model Jury Instructions, Criminal 8.121 and 8.124 (2010 ed.).

## IV. FACTS SUPPORTING GUILTY PLEA

A. The defendant will plead guilty because she is, in fact and under the law, guilty of the crimes charged.

B. The defendant acknowledges that if she elected to go to trial instead of pleading guilty, the United States could prove her guilt beyond a reasonable doubt and establish its right to the forfeiture money judgment. The defendant further acknowledges that her admissions and declarations of fact set forth below satisfy every element of the charged offenses.

C. The defendant waives any potential future claim that the facts she admitted in this Plea Agreement were insufficient to satisfy the elements of the charged offenses.

D. The defendant admits and declares under penalty of perjury that the facts set forth below are true and correct:

1. From in or about August 2003, to in or about November 2006, in the State and Federal District of Nevada, Linda Mack, did knowingly and willfully combine, conspire, and agree with Derrick Phelps, Cynthia Phelps, and others:

a. To devise a scheme and artifice to defraud and to obtain money and property under the custody and control of federally insured financial institutions, by means of materially false and fraudulent pretenses, representations and promises that would cause a bank to part with money and property, in violation of Title 18, United States Code, Section 1344;

b. To use the United States Postal Service and commercial interstate carriers to send and deliver mortgage loan applications and other supporting documentation, for purposes of executing a scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1341; and

c. To transmit and cause to be transmitted by means of wire communications in interstate commerce funds and documents, for purposes of executing a scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1343.

The Objectives of the Conspiracy and Scheme To Defraud

2. The objective of the conspiracy and scheme was to obtain mortgage loans from lenders by causing materially false information to be placed in the buyers' mortgage loan applications and supporting documentation. Through approximately 233 transactions, the defendant and her coconspirators obtained money and property from lenders by causing money from the mortgage loans to be disbursed to their own use and benefit.

Manner and Means

3. The manner and means by which the objectives of the conspiracy were accomplished include, but were not limited to, the following:

a. The defendant's coconspirators solicited persons with good credit ratings to purchase real estate. In some instances, the conspirators caused buyers to purchase multiple houses at or about the same time. By purchasing multiple houses in a short period of time, the prior purchases would not show up on the buyer's credit report and lenders would not be aware of the other purchases. The conspirators knowingly and intentionally concealed buyers' earlier purchases from lenders, when the conspirators then and there well knew that the earlier purchases were material to the lenders' lending decisions.

b. The conspirators made offers to purchase properties above the sellers' asking prices.

c. The conspirators caused the sellers to agree that part of the excess funds would be redirected to the buyers under the pretense of making upgrades and repairs to the properties. The defendant and her coconspirators knowingly and intentionally concealed from lenders the identities of the recipients of these disbursements and the true purpose of the disbursements, when the defendant and her coconspirators then and there well knew that the representations made to lenders were false and fraudulent.

d. The conspirators caused buyers to apply for mortgage loans from lenders to purchase properties. Through these transactions, the conspirators obtained money from lenders by causing money from the mortgage loans to be paid to the conspirators in the form of commissions and fees.

e. The conspirators caused buyers' loan applications and supporting documentation to contain materially false and fraudulent representations about buyers'

qualifications, including but not limited to one or more of the following: the buyers' income and intended occupancy status, when the conspirators then and there well knew that the representations were false and fraudulent.

f. The conspirators caused lenders and escrow companies to transmit money and documents by means of U.S. mail, interstate commercial carriers, and interstate wire communications to complete the transactions.

g. The conspirators defaulted on the mortgage loans which caused the properties to go into foreclosure.

h. Some of the lenders, including Pacific Mercantile Bank, were federally insured financial institutions.

i. The defendant's conspiracy to violate Title 18, United States Code, Sections 1341 and 1343 affected at least one federally insured financial institution.

4. From on or about March 8, 2005, to on or about April 2, 2005, in the State and Federal District of Nevada, for the purpose of executing and attempting to execute the scheme to defraud and to obtain money and property, the defendant and her coconspirators did knowingly cause to be submitted to Pacific Mercantile Bank, a federally insured financial institution, loan applications and supporting documents containing materially false and fraudulent pretenses, representations and promises in order to cause Pacific Mercantile Bank to loan money to fund the purchase of 5600 Windy Gorge St., Las Vegas, Nevada.

5. As a result of this fraud, the lenders suffered an aggregate loss of more than $9,500,000.00.

6. In all of the aforementioned actions the defendant acted with the intent to defraud.

7. The defendant admits that the in personam criminal forfeiture money judgment amount listed in Section X is (1) any property, real or personal, which constitutes or is derived from proceeds traceable to violations of Title 18, United States Code, Sections 1341, 1343, and 1344, specified unlawful activities as defined in Title 18, United States Code, Sections 1956(c)(7)(A) and 1961(1)(B) or Title 18, United States Code, Section 1349, conspiracy to commit such offenses and (2) any property constituting, or derived from, proceeds obtained directly or indirectly, as the result of violations of Title 18, United States Code, Sections 1341, 1343, and 1344, or Title 18, United States Code, Section 1349, conspiracy to violate such offenses, and is subject to forfeiture pursuant to Title 18, United States Code, Section 981(a)(1)(C) with Title 28, United Code, Section 2461(c); Title 18, United States Code, Section 982(a)(2)(A); and Title 21, United States Code, Section 853(p).

## V. COLLATERAL USE OF FACTUAL ADMISSIONS

The facts set forth in Section IV of this Plea Agreement shall be admissible against the defendant under Fed. R. Evid. 801(d)(2)(A) at sentencing for any purpose. If the defendant does not plead guilty or withdraws her guilty plea, the facts set forth in Section IV of this Plea Agreement shall be admissible at any proceeding, including a trial, for impeaching or rebutting any evidence, argument or representation offered by or on the defendant's behalf. The defendant expressly waives all rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 regarding the use of the facts set forth in Section IV of this Plea Agreement.

## VI. APPLICATION OF SENTENCING GUIDELINES PROVISIONS

A. Discretionary Nature of Sentencing Guidelines. The defendant acknowledges that the Court must consider the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines") in determining the defendant's sentence, but that the Sentencing Guidelines are

advisory, not mandatory, and the Court has discretion to impose any reasonable sentence up to the maximum term of imprisonment permitted by statute.

B. Offense Level Calculations. The parties stipulate to the following calculation of the defendant's offense level under the Sentencing Guidelines, and acknowledge that these stipulations do not bind the Court:

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| Base Offense Level (USSG § 2B1.1): | 7 |
| Loss Amount: $9,500,000 - $25,000,000 (USSG § 2B1.1(b)(1)(K)): | 20 |
| Reduction for Acceptance of Responsibility (USSG § 3E1.1) | (3) |
| Total | 24 |

The defendant acknowledges that the statutory maximum sentence and any statutory minimum sentence limit the Court's discretion in determining the defendant's sentence notwithstanding any applicable Sentencing Guidelines provisions.

C. Reduction of Offense Level for Acceptance of Responsibility. Under USSG § 3E1.1(a), the United States will recommend that the defendant receive a two-level downward adjustment for acceptance of responsibility unless she (a) fails to truthfully admit facts establishing a factual basis for the guilty plea when she enters the plea; (b) fails to truthfully admit facts establishing the amount of restitution owed when she enters her guilty plea; (c) fails to truthfully admit facts establishing the forfeiture allegations when she enters her guilty plea; (d) provides false or misleading information to the United States, the Court, Pretrial Services, or the Probation Office; (e) denies involvement in the offense or provides conflicting statements regarding her involvement or falsely denies or frivolously contests conduct relevant to the offense; (f) attempts to withdraw her guilty plea; (g) commits or attempts to commit any crime; (h) fails to appear in court; or (i) violates the conditions of pretrial release.

Under USSG § 3E1.1(b), the United States will move for an additional one-level downward adjustment for acceptance of responsibility before sentencing because the defendant communicated her decision to plead guilty in a timely manner that enabled the United States to avoid preparing for trial and to efficiently allocate its resources.

D. Criminal History Category. The defendant acknowledges that the Court may base her sentence in part on the defendant's criminal record or criminal history. The Court will determine the defendant's Criminal History Category under the Sentencing Guidelines.

E. Relevant Conduct. The Court may consider all relevant conduct, whether charged or uncharged, in determining the applicable Sentencing Guidelines range and whether to depart from that range.

F. Additional Sentencing Information. The stipulated Sentencing Guidelines calculations are based on information now known to the parties. The parties may provide additional information to the United States Probation Office and the Court regarding the nature, scope, and extent of the defendant's criminal conduct and any aggravating or mitigating facts or circumstances. Good faith efforts to provide truthful information or to correct factual misstatements shall not be grounds for the defendant to withdraw her guilty plea.

The defendant acknowledges that the United States Probation Office may calculate the Sentencing Guidelines differently and may rely on additional information it obtains through its investigation. The defendant also acknowledges that the Court may rely on this and other additional information as it calculates the Sentencing Guidelines range and makes other sentencing determinations, and the Court's reliance on such information shall not be grounds for the defendant to withdraw her guilty plea.

Notwithstanding the agreement to recommend a sentence, the United States reserves its right to defend any lawfully imposed sentence on appeal or in any post-conviction litigation.

## VII. APPLICATION OF SENTENCING STATUTES

A. Maximum Penalty. The maximum penalty for conspiracy under 18 U.S.C. § 1349 is a thirty-year prison sentence, a fine of $1,000,000, or both. The maximum penalty for bank fraud under 18 U.S.C. § 1344 is a thirty-year prison sentence, a fine of $1,000,000, or both.

B. Factors Under 18 U.S.C. § 3553. The Court must consider the factors set forth in 18 U.S.C. § 3553(a) in determining the defendant's sentence. However, the statutory maximum sentence and any statutory minimum sentence limit the Court's discretion in determining the defendant's sentence.

C. Parole Abolished. The defendant acknowledges that her prison sentence cannot be shortened by early release on parole because parole has been abolished.

D. Supervised Release. In addition to imprisonment and a fine, the defendant will be subject to a term of supervised release not greater than five years. 18 U.S.C. § 3583(b)(1). Supervised release is a period of time after release from prison during which the defendant will be subject to various restrictions and requirements. If the defendant violates any condition of supervised release, the Court may order the defendant's return to prison for all or part of the term of supervised release, which could result in the defendant serving a total term of imprisonment greater than the statutory maximum prison sentence of 30 years.

E. Special Assessment. The defendant will pay a $100.00 special assessment per count at the time of sentencing.

## VIII. POSITIONS REGARDING SENTENCE

The parties agree and stipulate to a downward departure pursuant to USSG §5K2.0(a)(1)(A); or, a downward variance pursuant to 18 U.S.C. §3553(a) and (b), to the extent required to achieve a guideline offense level of 18. The downward departure is based on the

fact that the defendant's actual conduct and role in the overall scheme was more limited than the conduct of the lead conspirators and she received little personal gain relative to the total loss amount from the scheme. Further the downward variance is based on the need for the sentence to 1) reflect the seriousness of the offense and to provide just punishment for the offense; 2) afford adequate deterrence to criminal conduct; and 3) protect the public from further crimes of the defendant. The parties agree that the downward departure is reasonable and sufficient, but not greater than necessary to achieve the goals of sentencing.

The United States will recommend that the Court sentence the defendant to a period of confinement at the low end of the Sentencing Guidelines range as determined by the Court unless the defendant commits any act that could result in a loss of the downward adjustment for acceptance of responsibility. The defendant acknowledges that the Court does not have to follow that recommendation. Notwithstanding its agreement to recommend a low-end sentence, the United States reserves its right to defend any lawfully imposed sentence on appeal or in any post-conviction litigation.

The defendant may request a sentence below the Sentencing Guidelines range as calculated in this Plea Agreement pursuant to 18 U.S.C. § 3553 from any sentence the Court may impose.

## IX. RESTITUTION

In exchange for benefits received under this Plea Agreement, the defendant agrees to make restitution in the amount of $20,127,450 to lenders and other entities to be determined at sentencing. The defendant cannot discharge her restitution obligation through bankruptcy proceedings. The defendant acknowledges that restitution payments and obligations cannot offset or reduce the amount of any forfeiture judgment imposed in this case.

## X. FORFEITURE

The defendant knowingly and voluntarily:

A. Agrees to the District Court imposing an in personam criminal forfeiture money judgment of $661,477.41 not to be held jointly and severally liable with any codefendants;

B. Waives her right to any abandonment proceedings, any civil administrative forfeiture proceedings, any civil judicial forfeiture proceedings, or any criminal forfeiture proceedings of the in personam criminal forfeiture money judgment (proceedings);

C. Waives service of process of any and all documents filed in this action or any proceedings concerning the in personam criminal forfeiture money judgment arising from the facts and circumstances of this case;

D. Agrees not to file any claim, answer, petition, or other documents in any proceedings concerning the in personam criminal forfeiture money judgment;

E. Waives the statute of limitations, the CAFRA requirements, Fed. R. Crim. P. 7, 11, and 32.2, all constitutional requirements, including, but not limited to, the constitutional due process requirements of any proceedings concerning the in personam criminal forfeiture money judgment;

F. Waives all constitutional, legal, and equitable defenses to the in personam criminal forfeiture money judgment in any proceedings, including, but not limited to, (1) constitutional or statutory double jeopardy defenses and (2) defenses under the Excessive Fines or Cruel and Unusual Punishments Clauses of the Eighth Amendment to the United States Constitution;

G. Agrees to the entry of an Order of Forfeiture for the in personam criminal forfeiture money judgment to the United States;

H. Waives the right to appeal any Order of Forfeiture;

I. Agrees that the in personam criminal forfeiture money judgment is immediately due and payable and is subject to immediate collection by the United States;

J. Agrees and understands the in personam criminal forfeiture money judgment shall not be treated as satisfaction of any assessment, fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to the forfeiture;

K. Acknowledges that the amount of the forfeiture may differ from, and may be significantly greater than or less than, the amount of restitution; and

L. Agrees to take all steps as requested by the United States to pass clear title of any forfeitable assets which may be used to satisfy the in personam criminal forfeiture money judgment to the United States and to testify truthfully in any judicial forfeiture proceedings. The defendant understands and agrees that the in personam criminal forfeiture money judgment amount represents proceeds and/or facilitating property of illegal conduct and is forfeitable. The defendant acknowledges that failing to cooperate in full in the disclosure of assets constitutes a breach of this Plea Agreement.

## XI. FINANCIAL INFORMATION AND DISPOSITION OF ASSETS

Before or after sentencing, upon request by the Court, the United States, or the Probation Office, the defendant will provide accurate and complete financial information, submit sworn statements, and/or give depositions under oath concerning her assets and her ability to pay. The defendant will surrender assets she obtained directly or indirectly as a result of her crimes, and will release funds and property under her control in order to pay any fine, forfeiture, or restitution ordered by the Court.

## XII. THE DEFENDANT'S ACKNOWLEDGMENTS AND WAIVERS

A. Plea Agreement and Decision to Plead Guilty. The defendant acknowledges that:

1. She has read this Plea Agreement and understands its terms and conditions;

2. She has had adequate time to discuss this case, the evidence, and this Plea Agreement with her attorney;

3. She has discussed the terms of this Plea Agreement with her attorney;

4. The representations contained in this Plea Agreement are true and correct, including the facts set forth in Section IV; and

5. She was not under the influence of any alcohol, drug, or medicine that would impair her ability to understand the Agreement when she considered signing this Plea Agreement and when she signed it.

The defendant understands that she alone decides whether to plead guilty or go to trial, and acknowledges that she has decided to enter her guilty plea knowing of the charges brought against her, her possible defenses, and the benefits and possible detriments of proceeding to trial. The defendant also acknowledges that she decided to plead guilty voluntarily and that no one coerced or threatened her to enter into this Plea Agreement.

B. Waiver of Appeal and Post-Conviction Proceedings. The defendant knowingly and expressly waives: (a) the right to appeal any sentence imposed within or below the applicable Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and (c) the right to appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

The defendant also knowingly and expressly waives all collateral challenges, including any claims under 28 U.S.C. § 2255, to her conviction, sentence, and the procedure by which the

Court adjudicated guilt and imposed sentence, except non-waivable claims of ineffective assistance of counsel.

The defendant reserves only the right to appeal any portion of the sentence that is an upward departure from the Sentencing Guidelines range determined by the Court.

The defendant acknowledges that the United States is not obligated or required to preserve any evidence obtained in the investigation of this case.

C. Removal/Deportation Consequences. The defendant understands and acknowledges that if she is not a United States citizen, then it is highly probable that she will be permanently removed (deported) from the United States as a consequence of pleading guilty under the terms of this Plea Agreement. The defendant has also been advised if her conviction is for an offense described in 8 U.S.C. § 1101(a)(43), she will be deported and removed from the United States and will not be allowed to return to the United States at any time in the future. The defendant desires to plead guilty regardless of any immigration consequences that may result from her guilty plea, even if the consequence is automatic removal from the United States with no possibility of returning. The defendant acknowledges that she has specifically discussed these removal/deportation consequences with her attorney.

**XIII. ADDITIONAL ACKNOWLEDGMENTS**

This Plea Agreement resulted from an arms-length negotiation in which both parties bargained for and received valuable benefits in exchange for valuable concessions. It constitutes the entire agreement negotiated and agreed to by the parties. No promises, agreements or conditions other than those set forth in this agreement have been made or implied by the defendant, the defendant's attorney, or the United States, and no additional promises,

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agreements or conditions shall have any force or effect unless set forth in writing and signed by all parties or confirmed on the record before the Court.

DANIEL G. BOGDEN,
United States Attorney

DATE 8-12-16

Lisa C. Cartier Giroux
Assistant United States Attorney
Kyle Maurer
Trial Attorney

DATE 8-9-16

Rachel Korenblat
Brenda Weksler
Counsel for the Defendant

DATE 8/8/16

Linda Mack
Defendant