

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FEB 5 2008

U. S. DISTRICT COURT
W. DIST. OF N. C.

UNITED STATES OF AMERICA)
)
 v.)
)
 NEIL O'ROURKE)
 _____)

DOCKET NO. 3:08 CR21 FOW

PLEA AGREEMENT

NOW COMES the United States of America, by and through Gretchen C.F. Shappert, United States Attorney for the Western District of North Carolina, and the defendant, NEIL O'ROURKE, in person and through counsel, David S. Rudolf, Esq. and Christopher C. Fialko, Esq., and respectfully inform the Court that they have reached the following agreement:

I. Plea

1. The defendant agrees to enter a voluntary plea of guilty to Count One as set forth in the Bill of Information, and admits to being in fact guilty as charged in that Count.
2. If the Court finds the defendant's plea to be voluntary and knowingly made, and accepts the plea, then the United States will not prosecute the defendant for additional offenses arising from the conduct that is the subject of the Bill of Information so long as such offenses are known to the Government by the date this plea agreement is executed.
3. The defendant agrees that the Court may consider all pertinent information as "relevant conduct," *United States Sentencing Guidelines* [U.S.S.G.] §1B1.3.

II. Sentence

4. The defendant is aware that the statutory maximum sentence is as follows:

Count One (Conspiracy to commit securities, mail, wire, and bank fraud): a \$250,000 fine, no more than five (5) years imprisonment, or both, and no more than three years supervised release.
5. The defendant understands that supervised release is a term of supervision that runs consecutively to any sentence of incarceration and that if the Court imposes a term of supervised release, the United States Probation Office will supervise him during that term and will require that he make regular reports and visits to its office. The defendant understands that a violation of the conditions of supervised release may subject him to an additional period of incarceration up to the maximum term of years imposed as supervised release.

6. The defendant is aware that the Court will consider the *United States Sentencing Guidelines [U.S.S.G.]* in determining the appropriate sentence and that the sentence will be without parole. The defendant is further aware that the Court has not yet determined the sentence, that any estimate from any source, including defense counsel, of the likely sentence is a prediction rather than a promise, and that the Court has the final discretion to impose any sentence up to the statutory maximum for each count. The defendant further understands that no recommendations or agreements by the United States are binding upon the Court. Knowing these facts, the defendant understands and acknowledges that the defendant may not withdraw the plea solely as a result of the sentence imposed.

7. With regard to the *United States Sentencing Guidelines*, the defendant and the United States, pursuant to Fed. R. Crim. P. 11(c)(1)(B), stipulate and agree that, although not binding on the probation office or the court, they will jointly recommend that the court make the following findings and conclusions as to the sentence to be imposed:

- a. The November 1, 2006, version of the Sentencing Guidelines applies.
- b. The amount of loss that was known to or reasonably foreseeable by the defendant was in excess of \$20,000,000 but less than \$50,000,000.

The defendant understands that "loss" under U.S.S.G. § 2B1.1, 2F1.1, or 2T4.1 of the *United States Sentencing Guidelines* may be different from, greater, or lesser than "restitution" under 18 U.S.C. § 3556.

- c. The offense level for the subject offense is as follows:

Base Offense Level [U.S.S.G. § 2B1.1(a)(1)]:	7
Specific Characteristics:	
• Loss [U.S.S.G. §2B1.1]	+22
• Victims [U.S.S.G. §2B1.1(2)(A)(ii)]	+2
• Sophisticated Means [U.S.S.G. §§2B1.1(9)]	<u>+2</u>
Adjusted Offense Level:	33

d. As of the date of this plea agreement, the Government does not have sufficient information, independent of the information provided by the defendant pursuant to U.S.S.G. §1B1.8, to determine whether: (a) the losses from the fraud that were foreseeable to the defendant exceeded \$50,000,000; or (b) there were fifty or more victims. In addition, the Government does not believe that a role enhancement under U.S.S.G. §3B1.1 or an abuse of trust enhancement pursuant to U.S.S.G. §3B1.3 are warranted.

e. Provided that the defendant clearly demonstrates acceptance of responsibility for his criminal conduct by, among other things, acknowledging to the Government, the Probation Office, and the Court the nature and extent of all relevant criminal conduct, the government will recommend a two-level reduction in offense level pursuant to U.S.S.G. §3E1.1(a).

f. Provided that the defendant has timely provided information to the government concerning his involvement in the offense charged, or has timely notified authorities of an intention to plead guilty, the government will make a motion requesting an additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b).

g. The United States, however, will not be required to make this recommendation and this motion if the defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the government prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official. Furthermore, the defendant understands that any reduction in offense level is ultimately for the Court's determination.

h. The defendant and the United States agree that neither party will seek a departure from "the applicable guideline range" (U.S.S.G. § 5C1.1), and that no other Chapter 2, 3, 4, or 5 enhancements or reductions apply. However, neither the Government nor the defendant is precluded from arguing that a "non-guidelines sentence" is the appropriate sentence under 18 U.S.C. § 3553(a).

i. The defendant understands and acknowledges as previously acknowledged in paragraph 6 above, that the defendant may not withdraw the plea based on the court's decision not to accept sentencing recommendations made by the defendant, the government, or a recommendation made jointly by both the defendant and the government.

j. Subject to paragraph 8 below, the United States reserves the right to inform the court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, the United States reserves the right to make any recommendation as to quantity and quality of punishment.

8. The defendant and the Government agree, in accordance with U.S.S.G. §1B1.8, that any information the defendant provides pursuant to this agreement, that was previously unknown to the Government, shall not be used against him as an admission or to increase his sentence. However, such information may be used (a) as proof of the charges to which he shall plead guilty, (b) to determine the amount of restitution due; or (c) in connection with any federal,

state, or local prosecution of other persons or for investigative leads. Notwithstanding the above, the defendant understands and agrees that if he should fail to fulfill completely each and every one of his obligations under this Plea Agreement, then the Government will be free from its obligations under the plea agreement and the defendant shall be fully subject to criminal prosecution as if this Plea Agreement had never existed. In any such prosecution, the prosecuting authorities, whether federal, state, or local, shall be free to use against him, without limitation, any and all information, in whatever form, that he has provided pursuant to this Plea Agreement or otherwise. The defendant shall not assert any claim under the United States Constitution, any statute, Fed. R. Crim. P. 11(f), Fed. R. Evid. 410, or any other provision of law, to attempt to bar such use of the information.

In the event any other federal or state jurisdiction attempts to prosecute defendant for any conduct related to the conspiracy set forth in Count One of the Bill of Information, or indicates an intent to do so, the Government agrees that it will inform such jurisdiction of the full extent and value of defendant's cooperation, and will request that jurisdiction to exercise its discretion not to prosecute defendant for such conduct. No law enforcement agency or prosecutor in the United States (federal, state or local) will be provided with any information derived from the defendant unless that agency or prosecutor agrees to be bound by the terms of the plea agreement executed between the defendant and the United States Attorneys' Office for the Western District of North Carolina.

9. The defendant agrees to pay restitution as determined by the Court, regardless of the resulting loss amount, which restitution will be included in the Court's Order of Judgment. The defendant agrees that such restitution will include all victims directly or indirectly harmed by the defendant's "relevant conduct," including conduct pertaining to any dismissed counts or uncharged conduct, as defined by U.S.S.G. § 1B1.3, regardless of whether such conduct constitutes an "offense" under 18 U.S.C. §§ 3663 or 3663A. The defendant consents to a civil judgment in state or federal court concerning a claim filed by a "victim" as defined in 18 U.S.C. §§ 3663(a)(2) and 3663A(a)(2). The defendant understands that with a Judgment and Commitment Order that requires the payment of restitution, a lien will be filed on his property. Defendant also understands that his obligation to make restitution shall last for twenty years after the entry of the judgment, release from imprisonment, or until his death. 18 U.S.C. § 3613.

The defendant has truthfully completed a financial statement form provided by the United States Attorney that fully and completely discloses his financial condition as of the date of this Plea Agreement. Defendant shall update the financial statement with any material changes to his financial condition thirty days prior to sentencing. Defendant understands and agrees that his financial statement will be used for the collection of any fine or restitution ordered by the Court, and the identification of property subject to forfeiture.

For the preparation of his Presentence Report, the defendant agrees to cooperate fully with and make a full disclosure of all current and projected assets and property to the United States Probation Office. If the defendant is ordered to serve a term of supervised release or probation, he agrees to make a full disclosure of his assets and property to the United States Probation Office prior

to the termination of his supervised release or probation. If the defendant should fail to make the aforementioned full disclosures, then the United States will be relieved of its obligations under the Plea Agreement, but the defendant will not be allowed to withdraw his guilty plea.

10. The parties agree that the Court shall set the amount of fine and shall consider the Fine Table in U.S.S.G. § 5E1.2 as advisory.

11. If more than \$500.00 in restitution, fines, and/or assessment is owed to the United States government, a lien will be filed. The defendant understands that if a lien is filed against his property, his obligation to pay restitution shall last for twenty years after any imprisonment ordered or until his death. 18 U.S.C. § 3613.

12. The defendant hereby agrees to pay the total amount required for assessment (\$100) to the Clerk, United States District Court, before 5:00 p.m. on the date of pleading guilty. The defendant further agrees to participate in the Inmate Financial Responsibility Program to the extent necessary to fulfill all financial obligations due and owing under this agreement and the law.

III. Procedure

13. The defendant agrees that a duly-qualified federal Magistrate Judge may conduct the hearing required by Fed. R. Crim. P. 11.

14. With the Court's permission, the factual basis, as required by Fed. R. Crim. P. 11(b)(3), will be deferred until the time of sentencing. The defendant stipulates that there is a factual basis for the plea of guilty and that the Court may use the offense conduct set out in the Presentence Report, except any facts to which the defendant has objected, to establish a factual basis for the defendant's plea.

IV. Waivers

15. The defendant understands and agrees that if he should fail to specifically perform or to fulfill completely each and every one of his obligations under this Plea Agreement, then the United States will be relieved of its obligations under the agreement, but the defendant will not be allowed to withdraw the guilty plea.

16. The defendant is aware that the law provides certain limited rights to withdraw a plea of guilty. The defendant has discussed these rights with defense counsel and knowingly and expressly waives any right to withdraw the plea once the Magistrate Judge has accepted it.

17. The defendant acknowledges that Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 are rules which ordinarily limit the admissibility of statements made by a defendant in the course of plea discussions or plea proceedings if a guilty plea is later withdrawn. The defendant knowingly and voluntarily waives the rights which arise under these Rules as specified in this Plea Agreement. As a result of this waiver, he understands and agrees that

any statements which are made in the course of his guilty plea or in connection with his cooperation pursuant to this plea agreement will be admissible against him for any purpose in any criminal or civil proceeding if, but only if, his guilty plea is subsequently withdrawn or in any post-conviction proceeding if the defendant challenges the voluntary nature of the guilty plea.

18. The defendant understands and agrees that by pleading guilty, the defendant is expressly waiving the following rights:

- a. to be tried by a jury;
- b. to be assisted by an attorney at trial;
- c. to confront and cross-examine witnesses; and,
- d. not to be compelled to incriminate himself.

19. Defendant and defendant's counsel warrant that they have discussed: (1) defendant's rights pursuant to 18 U.S.C. § 3742, 28 U.S.C. § 2255, and similar authorities to contest a conviction and/or sentence through an appeal or post-conviction after entering into a plea agreement; (2) whether or not there are potential issues which might be relevant to an appeal or post-conviction action; and (3) the possible impact of any such issue on the desirability to the defendant of entering into this plea agreement.

20. Defendant, in exchange for the concessions made by the United States in this plea agreement, waives all such rights to contest the conviction and/or the sentence except for: (1) claims of ineffective assistance of counsel or (2) prosecutorial misconduct.

21. Also, in exchange for the concessions made by the United States, defendant agrees that the United States preserves all its rights and duties with respect to appeal as set forth in 18 U.S.C. § 3742(b), while the defendant waives all rights to appeal or collaterally attack the sentence of conviction with the two exceptions set forth above. This agreement does not limit the United States in its comments in or responses to any post-conviction matters.

22. The defendant waives all rights, whether asserted directly or by a representative, to request or to receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

V. Assistance to Government

23. The defendant already has provided assistance to the Government. The defendant understands and agrees that his future cooperation with the Government is a material term of this Plea Agreement, and that the Government has recognized the value of such past and future cooperation, in advance, by using its discretion to charge the defendant only with a violation of 18 U.S.C. §371. The defendant further agrees that, although the Government is not prohibited from making a motion in its sole discretion for a downward departure pursuant to U.S.S.G. § 5K1.1, it is

the defendant's expectation that his past and future cooperation will be recognized solely by the Government's decision to charge the defendant only with a violation of 18 U.S.C. §371.

24. The defendant agrees that his future obligation to cooperate with the United States shall include, but shall not be limited to, the following:

a. The defendant will provide truthful information about the subject charges and about any other criminal activity within the defendant's knowledge to any government agent or agency that the United States designates.

b. The defendant will testify truthfully in any trial, hearing, or grand jury proceeding, including, but not limited to, testimony against any co-defendants, as the United States designates.

c. The defendant will truthfully disclose all monies, negotiable instruments, securities, or other things of value that are proceeds of or have been involved in, or have been used or intended to be used to facilitate a violation of state or federal law.

d. In the event that the defendant's cooperation includes testifying, the defendant hereby waives payment of any witness fees or expenses to which he may be otherwise entitled pursuant to 28 U.S.C. § 1821.

e. The defendant understands that the United States desires only truthful and accurate information and testimony and, in fact, that knowingly giving false information or testimony can be prosecuted as an additional criminal offense.

Further, if the defendant knowingly gives false testimony, the United States will be relieved of its obligations under this Plea Agreement, except that the defendant's plea of guilty and the resulting guilty verdict will stand.

f. The defendant will not violate any federal, state, or local law, or any order of any court, including any conditions of pretrial, pre-sentence, or post-sentence release.

Nothing that the defendant discloses pursuant to this Plea Agreement will be used against him in any other criminal proceeding, subject to the following exceptions:

1. the United States or other jurisdiction may use any and all relevant information regarding crimes of violence;

2. the United States may use any and all information as necessary in a prosecution for perjury, or in any trial for impeachment or rebuttal;

3. if the defendant withdraws his plea of guilty, the United States may use any and all disclosures in any subsequent trials or criminal proceedings;

4. if the defendant violates any of the terms of this Plea Agreement, including the obligation to provide truthful information, then the United States may use any and all disclosures in subsequent trials or criminal proceedings; and,

5. the United States may make indirect use of any information that the defendant provides, including investigative leads or other witnesses, except as limited by U.S.S.G. §1B1.8.

g. The defendant's obligation under this section is a continuing one, and will continue after sentencing until all investigations and/or prosecutions to which the defendant's cooperation may be relevant have been completed. This provision is a material condition of this Plea Agreement and of all benefits that accrue to the defendant pursuant to this agreement.

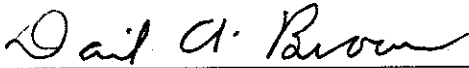
h. The defendant fully understands that any breach of this agreement, including but not limited to withholding information, misleading the United States or any law enforcement officer, or failing to testify truthfully at any trial, grand jury, or other judicial proceeding, will allow the government, in its sole discretion, to withdraw from its obligations under this Plea Agreement. In such event, the United States will be free to proceed on any properly-filed pending, superseding, or additional charges, including any charges dismissed pursuant to this agreement.

VII. Conclusion

25. The defendant understands that if he breaches this Plea Agreement, or violates any federal, state or local law, or any order of any court, including any condition of pre-trial or pre-sentence, or post-sentence release, the United States will be relieved of its obligations under this Plea Agreement, but the defendant will not be allowed to withdraw his guilty plea. The United States will be free to proceed on any properly-filed dismissed, pending, superseding, or additional charges.

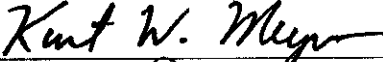
26. There are no agreements, representations, or understandings between the parties in this case, other than those explicitly set forth in this Plea Agreement and none will be entered into unless executed in writing and signed by all parties.

SO AGREED:



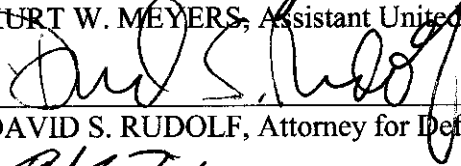
DAVID A. BROWN, Assistant United States Attorney

DATED: 2/5/08



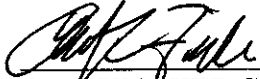
KURT W. MEYERS, Assistant United States Attorney

DATED: 2/5/08



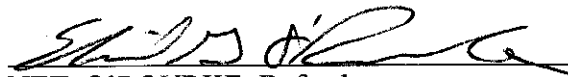
DAVID S. RUDOLF, Attorney for Defendant

DATED: 2/1/08



CHRISTOPHER C. FIALKO, Attorney for Defendant

DATED: 2/1/08



NEIL O'ROURKE, Defendant

DATED: 2/1/08