

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
) No. 12 CR 510
) Judge Robert M. Dow, Jr.
)
)
THOMAS P. FLANAGAN)

PLEA AGREEMENT

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, GARY S. SHAPIRO, and defendant THOMAS P. FLANAGAN, and his attorney, JOEL R. LEVIN, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure. The parties to this Agreement have agreed upon the following:

Charge in This Case

2. The information in this case charges defendant with securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

3. Defendant has read the charge against him contained in the information, and that charge has been fully explained to him by his attorney.

4. Defendant fully understands the nature and elements of the crime with which he has been charged.

Charge to Which Defendant Is Pleading Guilty

5. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the information, which charges defendant with securities fraud, in violation of Title 15,

United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5.

Factual Basis

6. Defendant will plead guilty because he is in fact guilty of the charge contained in the information. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt and constitute relevant conduct pursuant to Guideline § 1B1.3:

Beginning no later than in or about December 2006, and continuing until in or about May 2008, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant Thomas P. Flanagan, directly and indirectly, by the use of means and instrumentalities of interstate commerce and of the facilities of a national securities exchange, willfully used and employed, in connection with the purchase and sale of securities, manipulative and deceptive devices and contrivances, in contravention of Title 17, Code of Federal Regulations, Section 240.10b-5, by: (a) employing devices, schemes, and artifices to defraud; and (b) engaging in acts, practices, and courses of business which operated and would operate as a fraud and deceit upon other persons.

More specifically, during the time period relevant to this case, defendant was employed as a partner at Deloitte & Touche, LLP (“Deloitte”), a Certified Public Accounting firm that provided auditing and consulting services to a variety of companies, including Best Buy Co., Inc. (“Best Buy”), Walgreen Company (“Walgreens”), Motorola, Inc. (“Motorola”), and Sears Holding Corporation (“Sears”). Defendant was the Advisory Partner on Deloitte’s

engagements with Best Buy, Walgreens, and Sears, and in that capacity, among other things, served as a liaison between the client's audit management team and Deloitte's audit engagement team. Defendant also served as a partner on Deloitte's non-audit engagement team with Motorola. Defendant was a Certified Public Accountant.

During the course of his employment as a Deloitte partner, defendant learned material, nonpublic information about Deloitte audit and consulting clients, including Best Buy, Walgreens, Motorola, and Sears. This material, nonpublic information included things such as quarterly earnings results and possible acquisition targets.

Defendant knew that as a Deloitte partner, he owed fiduciary and other duties of trust and confidence to Deloitte and to its clients to maintain the confidentiality of the material, nonpublic information he obtained during the course of his employment at Deloitte. These duties required that defendant, among other things, obtain no financial interest in any Deloitte audit client and prohibited defendant from disclosing or trading on the basis of inside information.

Defendant also knew of and agreed to abide by Deloitte's written policies and procedures requiring him to not obtain any financial interest in any Deloitte audit client, to report any securities trades, and to maintain the confidentiality of information about Deloitte clients obtained during the course of his work. Defendant knew that these procedures expressly prohibited the misuse and misappropriation of information relating to Deloitte clients obtained during the course of employment, including trading on the basis of that information or tipping that information to others who may use the information to trade.

During the course of his duties at Deloitte, defendant misappropriated material, nonpublic information he obtained during the course of his employment in violation of: (a) the fiduciary and other duties of trust and confidence he owed to Deloitte and to its clients; and (b) Deloitte's express policies regarding the use and safekeeping of confidential information and insider trading. Defendant used this material, nonpublic information to purchase and sell securities, and thereby received substantial illegal profits of at least approximately \$420,000. In making these purchases and sales, defendant used accounts that he owned or controlled, including accounts in his name and jointly with his wife, accounts in the names of two of his sons, and an account in the name of a trust for which defendant served as the trustee (the "Trust"). Defendant also tipped Individual A, a relative, to purchase and sell securities so that Individual A could benefit from trading on the material, nonpublic information that defendant obtained. Based on these securities transactions, Individual A received illegal profits of at least approximately \$58,000.

Walgreens Transactions

During the course of his employment as the Advisory Partner on Deloitte's engagement with Walgreens, defendant received material, nonpublic information concerning Walgreens' earnings results. Defendant misappropriated this material, nonpublic information by using the information to trade in accounts he owned and controlled and by tipping Individual A.

On October 1, 2007, before the stock market opened, Walgreens publicly announced that it earned \$.40 per share for the fourth quarter 2007, ending on August 31, 2007. This was

14.8% less than the \$.47 earnings per share that stock market analysts had predicted for the fourth quarter 2007, and was Walgreens' first earnings decrease in nearly a decade. On October 1, 2007, Walgreens' stock price closed at \$40.16 per share, a 15% decline from the \$47.24 per share closing price on the previous trading day.

Prior to this public announcement and during the course of defendant's duties as the Advisory Partner on Deloitte's Walgreens engagement, defendant received material, nonpublic information concerning Walgreens' earnings results. Specifically, on the morning of September 25, 2007, defendant learned of Walgreens' earnings results when he received an email from a coworker on Deloitte's Walgreens engagement containing a draft copy of Walgreens' income statement for the fourth quarter of 2007 and fiscal year 2007. This income statement showed that Walgreens had earned \$.40 per share for the fourth quarter of 2007. Later in the evening on September 25, 2007, defendant received a draft earnings release from a Deloitte coworker showing that Walgreens had earned \$.40 per share for the fourth quarter of 2007, which represented a 3.8% decline from the same quarter of the prior year.

After receiving this information, defendant tipped Individual A that Individual A should purchase Walgreens put option contracts, so that Individual A could benefit from trading on the material, nonpublic information that defendant obtained. On September 26, 2007, Individual A purchased 100 out-of-the-money put option contracts with a strike price of \$45 for \$.35 per contract, at a time when Walgreens' stock was trading at approximately \$47.71 per share.

On September 27, 2007, defendant learned additional material, nonpublic information regarding Walgreens' quarterly earnings. On that date, he received an email from Walgreens' controller containing a link to a Walgreens website that allowed defendant to access Walgreens' draft earnings press release and financial statements announcing the \$.40 per share earnings figure and the agenda for Walgreens' upcoming Audit Committee meeting. Defendant accessed the materials and reviewed them prior to attending Walgreens' Audit Committee meeting.

On the next day, September 28, 2007, while in possession of the material, nonpublic information concerning Walgreens' quarterly earnings, defendant purchased in the Trust account 350 in-the-money Walgreens October put option contracts with a strike price of $\$47\frac{1}{2}$ for \$1.079 per contract, at a time when Walgreens' stock was trading at approximately \$47.24 per share. The Trust paid \$39,148 for these contracts. Also on September 28, 2007, Individual A purchased an additional 35 in-the-money Walgreens put option contracts with a strike price of $\$47\frac{1}{2}$ for \$1.10 per contract, at a time when Walgreens' stock was trading at approximately \$47.24 per share.

Between October 1, 2007, and October 5, 2007, after Walgreens issued its earnings press release, defendant sold all 350 of the put option contracts he purchased in the Trust account for anywhere from \$7.10 to \$8.00 per contract. As a result of these transactions, the Trust realized a total profit of approximately \$217,329.

Also on October 1, 2007, Individual A sold all 100 of the put option contracts he purchased for between \$3.60 and \$7.00 per contract. As a result of these transactions, Individual A realized a total profit of approximately \$50,778.

Motorola Transactions

On or about January 23, 2008, before the stock market opened, Motorola announced in an earnings release that sales of mobile devices had declined 38% during the fourth quarter 2007, compared to the fourth quarter 2006. Motorola also announced in the earnings release that it was “aggressively rationalizing the company’s cost structure.” Motorola’s stock price closed at \$10.01 on January 23, 2008, an 18.75% decline from the \$12.32 closing price on the previous trading day.

Prior to this public announcement, on January 3, 2008, a Deloitte partner on the consulting engagement team for Motorola sent an email to defendant and to other members of Deloitte’s Motorola engagement team. The email contained an Associated Press article from that day concerning a report that Motorola’s handset sales had “missed the Christmas window.” The partner wrote in the subject line of the email: “Motorola Inc. Shares Decline – At our mtg yersterday (sic) [the CEO] said [Mobile Device] performance ‘will be significantly worse than anybody imagined’ and a huge across the board cost cutting is in the works.”

On January 14, 2008, defendant purchased in his own account 585 out-of-the-money Motorola February put option contracts with a strike price of \$13 for \$.17 per contract, at a time when Motorola’s stock was trading at approximately \$14.61 per share. On January 23,

2008, shortly after Motorola issued its press release, defendant sold all 585 put option contracts for a total profit of \$134,474.

Option Care Transactions

During the course of his employment as the Advisory Partner on Deloitte's engagement with Walgreens, defendant learned material, nonpublic information concerning Walgreens' agreement to purchase Option Care, Inc. ("Option Care"). Defendant misappropriated this material, nonpublic information by using the information to trade in accounts he owned and controlled and by tipping Individual A so that Individual A could purchase and sell securities.

On July 2, 2007, Walgreens publicly announced that it reached an agreement to acquire Option Care for \$19.50 per share. That day, Option Care's stock price closed at \$19.24 per share, up 25% from its \$15.40 closing price on June 29, 2007, the previous trading day.

Prior to this public announcement and during the course of defendant's employment as the Advisory Partner on Deloitte's Walgreens engagement, defendant received material, nonpublic information concerning Walgreens' agreement to acquire Option Care. Specifically, on or about June 18, 2007, defendant participated in a conference call with members of Deloitte's Walgreens engagement team. During the conference call, Deloitte team members informed defendant that Walgreens' acquisition of Option Care was imminent and that the engagement team was monitoring it. The engagement team also explained and discussed Option Care's business lines with defendant.

On the next day, June 19, 2007, defendant purchased a total of 2,350 shares of Option Care common stock in two of his sons' accounts for \$15.48 per share. Defendant paid a total of \$36,790 for these shares. On the next day, June 20, 2007, defendant purchased 1,900 shares of Option Care common stock in his own account for \$15.54 per share and 1,900 shares of Option Care common stock in the Trust account for \$15.58 per share.

After making these stock purchases, defendant attended meetings with Walgreens executives on June 20, 2007, in advance of Walgreens' Audit Committee meeting scheduled for June 21, 2007. During one of these meetings, Walgreens' Chief Executive Officer told Flanagan and Deloitte's lead audit engagement partner that Walgreens was soon likely to announce an agreement to acquire Option Care.

At some point after receiving the material, nonpublic information about Walgreens' agreement to purchase Option Care, defendant tipped Individual A that Individual A should purchase Option Care common stock. On June 21, 2007, Individual A purchased 1,200 Option Care shares for \$15.40 per share. Individual A paid \$18,494 for these shares.

On July 10, 2007, following public announcement of Walgreens' agreement to purchase Option Care, defendant sold all the Option Care shares he purchased in his own account, in his sons' accounts, and in the Trust account, for between \$19.32 and \$19.33 per share. Defendant's trades resulted in a profit of approximately \$21,233.

Also on July 10, 2007, Individual A sold 800 Option Care shares for \$19.32 per share. Individual A later sold another 200 shares on July 24, 2007, for \$19.39 per share. On or about September 12, 2007, Individual A received a cash settlement for the remaining 200

shares as part of Walgreens' tender offer of \$19.50 per share. In total, Individual A's trades in Option Care generated profits to him of approximately \$4,714.

Sears Transactions

During the course of his employment as the Advisory Partner on Deloitte's engagement with Sears, defendant learned material, nonpublic information concerning Sears' earnings results. Defendant misappropriated this material, nonpublic information by using the information to trade in accounts he owned and controlled and by tipping Individual A so that Individual A could purchase and sell securities.

On May 29, 2008, before the stock market opened, Sears publicly announced an earnings loss of \$.43 per share for the first quarter. Stock market analysts had previously estimated that Sears would report a first quarter profit of \$.21 per share. Sears' stock price closed at \$86.14 per share on May 29, 2008, a 3.6% decline from the \$89.36 closing price on the previous trading day.

Prior to this public announcement and during the course of defendant's employment as the Advisory Partner on Deloitte's Sears engagement, defendant received material, nonpublic information concerning Sears' earnings results. Specifically, defendant learned of Sears' quarterly earnings results for the first quarter on or about May 16, 2008, when the lead engagement partner on Deloitte's Sears engagement team sent defendant an email containing the first draft of Sears' earnings release for the first quarter, which showed the \$.43 per share earnings loss.

On May 19, 2008, the first trading day after defendant received the email containing the earnings information, defendant purchased in the Trust account 85 out-of-the-money Sears June put option contracts with a strike price of \$90 for \$3.60 per contract, at a time when Sears' stock was trading at approximately \$94.51 per share. The Trust paid \$31,020 for these contracts.

Defendant also received an email on or about May 22, 2008, from Sears' Controller, which email contained an attachment including Sears' draft press release, financial statements for the quarter, and draft Form 10-Q to be filed with the U.S. Securities and Exchange Commission. All of these documents contained the \$.43 per share earnings loss figure. After this email was sent, defendant attended Sears' Audit Committee meeting held on May 28, 2008.

At some point after he received this information, defendant tipped Individual A that Individual A should purchase Sears put option contracts. On May 28, 2008, Individual A purchased 40 out-of-the-money Sears June put option contracts with a strike price of \$85 for \$3.40 per contract, at a time when Sears' stock was trading at approximately \$94.91 per share. Individual A paid \$13,639 for these contracts.

On May 30, 2008, after Sears issued its earnings press release, defendant sold all 85 of the Trust's put option contracts for \$7 each, resulting in a profit of approximately \$27,946. In addition, from between May 29, 2008 and June 6, 2008, Individual A sold his Sears put option contracts for a total profit of approximately \$1,204.

Best Buy Transactions

During the course of his employment as the Advisory Partner on Deloitte's engagement with Best Buy, defendant learned material, nonpublic information concerning Best Buy related to a third quarter 2007 earnings release, a first quarter 2008 earnings release, and a February 15, 2008 press release announcing reductions to earnings forecasts and lower revenue growth. Defendant misappropriated material, nonpublic information related to these announcements by using the material, nonpublic information to trade in accounts he owned and controlled and by tipping Individual A so that Individual A could purchase and sell securities.

Best Buy's Third Quarter 2007 Earnings Press Release

On or about December 12, 2006, before the stock market opened, Best Buy publicly announced that it earned \$.31 per share for the third quarter 2007, ending on November 25, 2006. This was 11.4% less than the \$.35 earnings per share that stock market analysts had forecasted. Best Buy's stock price closed at \$51.30 on December 12, 2006, a 4.9% decline from the \$53.92 closing price on the previous trading day.

During the course of his duties as the Advisory Partner on Deloitte's Best Buy engagement, defendant learned of the material, nonpublic information concerning Best Buy's earnings results. For example, defendant learned of Best Buy's earnings results before that information was made public through a December 8, 2006, email he received from the assistant to Best Buy's Vice President of Finance, Planning and Reporting Management. The

email, which was sent in advance of Best Buy's Audit Committee's pre-earnings release conference call scheduled for December 11, 2006, contained as an attachment drafts of Best Buy's Third Quarter Performance Summary, Consolidated Statement of Earnings, and Consolidated Condensed Balance Sheets. Through these documents, defendant learned that Best Buy's quarterly earnings results were \$.31 per share and that analysts had forecasted \$.35 per share. After receiving this material, nonpublic information, defendant tipped Individual A that Individual A should purchase Best Buy put option contracts.

On December 11, 2006, defendant purchased in the Trust account 40 in-the-money Best Buy December put option contracts with a strike price of \$55 for \$2.38-\$2.40 per contract, at time when Best Buy's stock was trading at approximately \$53.92 per share. The Trust paid \$9,871 for these contracts.

Also on December 11, 2006, Individual A bought 35 out-of-the-money Best Buy December put option contracts with a strike price of \$52.50 for \$1.25 per contract when the stock price was trading at approximately \$53.92 per share. He also purchased 15 out-of-the-money Best Buy December put option contracts with a strike price of \$55 for \$2.50 per contract.

On or about December 12, 2006, shortly after Best Buy issued its press release announcing its earnings, the Trust and Individual A sold all of their put option contracts. Defendant sold the Trust's put option contracts for \$4.01 per contract, resulting in a total profit of approximately \$5,836. Individual A sold his put option contracts for a profit of approximately \$2,270.

Best Buy's First Quarter 2008 Earnings Release

On or about June 19, 2007, before the stock market opened, Best Buy publicly announced that it earned \$.39 per share for the first quarter 2008, ending on June 2, 2007. This represented an 18% decline from the prior year's first quarter earnings per share and was 22% lower than stock market analysts' estimate of \$.50 per share. Best Buy's stock price closed at \$45.18 per share on June 19, 2007, a 5.9% decline from the \$48.01 closing price on the previous trading day.

During the course of his duties as the Advisory Partner on Deloitte's Best Buy engagement, defendant learned of the material, nonpublic information concerning Best Buy's earnings results for the First Quarter 2008. For example, on June 15, 2007, defendant learned of Best Buy's earnings results before that information was made public when he received an email from the assistant to Best Buy's Vice President of Finance, Planning and Reporting Management. The email, which was sent in advance of Best Buy's pre-earnings release conference call scheduled for June 18, 2007, contained as an attachment drafts of Best Buy's First Quarter Performance Summary, Consolidated Statement of Earnings, and Consolidated Condensed Balance Sheets. Through these documents, defendant learned that Best Buy's earnings results were \$.31 per share and that analysts had forecasted earnings results of \$.35 per share.

On June 18, 2007, the first trading day after defendant received this material, nonpublic information about Best Buy, defendant bought in his own account 210 out-of-the-money Best Buy August put option contracts with a strike price of \$45 for \$.95 per contract,

at a time when Best Buy's stock was trading at approximately \$48.01 per share. Defendant also bought 315 of the same contracts for the Trust account. The Trust paid a total of \$51,479 for these 525 contracts.

On June 19, 2007, after Best Buy publicly issued its earnings release, defendant sold 150 of the put option contracts in the Trust account for \$1.15 per contract, resulting in a profit of approximately \$2,029. Defendant sold the remaining 165 put option contracts in the Trust account on June 20, 2007, for \$1.35 per contract, resulting in a profit of approximately \$5,538. Also on June 20, 2007, defendant sold the 210 put option contracts in his account for \$1.35 per contract, resulting in a profit of approximately \$7,025.

Best Buy's February 2008 Press Release

On or about February 15, 2008, before the stock market opened, Best Buy issued a press release announcing: (1) a reduction to its fiscal year 2008 earnings forecast from a previous range of \$3.10 to \$3.20 per share to a range of \$3.05 to \$3.10 per share; (2) weaker-than-expected revenue growth from January sales in several major categories; (3) a lowering of its anticipated annual stores sales gains from approximately 4% to a range of 2.5% to 3%; and (4) that its fourth quarter revenue would fall short of its internal targets. Best Buy's stock price closed at \$44.62 on February 15, 2008, a 2.5% decline from the \$45.77 closing price on the previous trading day.

During the course of his employment as Deloitte's Advisory Partner on the Best Buy engagement, defendant learned of the material, nonpublic information contained in Best Buy's press release. For example, on February 12, 2008, defendant learned of the

information contained in Best Buy's press release when he received an email from Deloitte's lead engagement partner. The email attached a draft of Best Buy's February 15, 2008, press release and included the same information regarding Best Buy's weaker-than-expected revenue growth from January sales, lower anticipated annual stores sales gains, and predicted fourth quarter revenue shortfall.

On the next day, February 13, 2008, defendant purchased in the Trust account 100 out-of-the-money Best Buy March put option contracts with a strike price of \$45, at a time when Best Buy's stock was trading at approximately \$46.58 per share. He also purchased for his own account 50 Best Buy March put option contracts with a strike price of \$45 for \$1.95 per contract. Defendant and the Trust paid a total of \$28,850 for these 150 contracts.

On March 5, 2008, defendant sold all 100 put contracts he purchased in the Trust account for between \$2.30 and \$2.34 per contract, resulting in a profit to the Trust of approximately \$2,823. Also on March 5, 2008, defendant sold all 50 put option contracts in his own account for between \$2.65 and \$2.72 per contract, resulting in a profit to him of approximately \$3,011.

In an effort to hide his trading in restricted Deloitte clients such as Walgreens, Best Buy, and Sears noted above, defendant submitted to Deloitte personnel who prepared his personal federal and state income taxes false information regarding his trading activities. While defendant accurately reported the gains on all transactions, he listed trades in other companies in place of Walgreens, Best Buy, and Sears, so that defendant could hide that he had interest in, and was trading based on inside information of, restricted Deloitte clients.

On or about October 5, 2007, for the purpose of executing the above-described scheme to defraud, defendant, in connection with the purchase and sale of securities, specifically option contracts, knowingly and willfully used and caused the use of the facilities of a national securities exchange, namely the Chicago Board of Options Exchange, in order to sell in the Trust account ninety put option contracts with a strike price of \$47½ at a price of \$8 per contract, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a) and Title 17, Code of Federal Regulations, Section 240.10b-5.

As a result of the trades listed above, and based on defendant's receipt of the material, nonpublic information described above, defendant received illegal profits of at least approximately \$420,000, and Individual A received illegal profits of at least \$58,000, all to the financial detriment of those persons or entities on the other side of the transactions.

Maximum Statutory Penalties

7. Defendant understands that the charge to which he is pleading guilty carries the following statutory penalties:

a. A maximum sentence of 20 years' imprisonment. This offense also carries a maximum fine of \$5,000,000. Defendant further understands that the judge also may impose a term of supervised release of not more than three years.

b. Defendant further understands that the Court must order restitution to the victims of the offense in an amount determined by the Court unless it determines that restitution is not applicable because determining complex issues of fact related to the cause or amount of the victim losses would complicate or prolong the sentencing process to a

degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

c. In accord with Title 18, United States Code, Section 3013, defendant will be assessed \$100 on the charge to which he has pled guilty, in addition to any other penalty or restitution imposed.

Sentencing Guidelines Calculations

8. Defendant understands that in imposing sentence the Court will be guided by the United States Sentencing Guidelines. Defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in determining a reasonable sentence.

9. For purposes of calculating the Sentencing Guidelines, the parties agree on the following points:

a. **Applicable Guidelines.** The Sentencing Guidelines to be considered in this case are those in effect at the time of sentencing. The following statements regarding the calculation of the Sentencing Guidelines are based on the Guidelines Manual currently in effect, namely the November 2011 Guidelines Manual.

b. **Offense Level Calculations.**

i. The base offense level is 8, pursuant to Guideline § 2B1.4(a).

ii. Pursuant to Guideline § 2B1.4(b)(1) and § 2B1.1(b)(1)(H), the base offense level is increased by 14 levels because the total gain to defendant and to

Individual A as result of the instant offense was \$478,000, which is greater than \$400,000 but less than \$1,000,000.

iii. Pursuant to Guideline § 3B1.3, the base offense level is increased by 2 levels because defendant abused a position of private trust.

iv. Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this provision, and if defendant continues to accept responsibility for his actions within the meaning of Guideline § 3E1.1(a), including by furnishing the United States Attorney's Office and the Probation Office with all requested financial information relevant to his ability to satisfy any fine or restitution that may be imposed in this case, a two-level reduction in the offense level is appropriate.

v. In accord with Guideline § 3E1.1(b), defendant has timely notified the government of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently. Therefore, as provided by Guideline § 3E1.1(b), if the Court determines the offense level to be 16 or greater prior to determining that defendant is entitled to a two-level reduction for acceptance of responsibility, the government will move for an additional one-level reduction in the offense level.

c. **Criminal History Category.** With regard to determining defendant's criminal history points and criminal history category, based on the facts now known to the

government, defendant's criminal history points equal zero and defendant's criminal history category is I.

d. **Anticipated Advisory Sentencing Guidelines Range.** Therefore, based on the facts now known to the government, the anticipated offense level is 21, which, when combined with the anticipated criminal history category of I, results in an anticipated advisory Sentencing Guidelines range of 37 to 46 months' imprisonment, in addition to any supervised release, fine, and restitution the Court may impose.

e. Defendant and his attorney and the government acknowledge that the above Guideline calculations are preliminary in nature, and are non-binding predictions upon which neither party is entitled to rely. Defendant understands that further review of the facts or applicable legal principles may lead the government to conclude that different or additional Guideline provisions apply in this case. Defendant understands that the Probation Office will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final Guideline calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations, and defendant shall not have a right to withdraw his plea on the basis of the Court's rejection of these calculations.

f. Both parties expressly acknowledge that this Agreement is not governed by Fed. R. Crim. P. 11(c)(1)(B), and that errors in applying or interpreting any of the Sentencing Guidelines may be corrected by either party prior to sentencing. The parties may

correct these errors either by stipulation or by a statement to the Probation Office or the Court, setting forth the disagreement regarding the applicable provisions of the Guidelines. The validity of this Agreement will not be affected by such corrections, and defendant shall not have a right to withdraw his plea, nor the government the right to vacate this Agreement, on the basis of such corrections.

Agreements Relating to Sentencing

10. The government agrees to recommend that sentence be imposed at the low-end of the applicable guidelines range.

11. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and may impose a sentence up to the maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, defendant will have no right to withdraw his guilty plea.

12. Regarding restitution, the parties agree that restitution is not applicable because determining complex issues of fact related to identifying particular victims and the amount of those victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

13. Defendant agrees to pay the special assessment of \$100 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

14. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 12 CR 510.

15. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

Waiver of Rights

16. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

a. **Right to be charged by indictment.** Defendant understands that he has a right to have the charge prosecuted by an indictment returned by a concurrence of twelve or more members of a grand jury consisting of not less than sixteen and not more than twenty-three members. By signing this Agreement, defendant knowingly waives his right to be prosecuted by indictment and to assert at trial or on appeal any defects or errors arising

from the information, the information process, or the fact that he has been prosecuted by way of information.

b. **Trial rights.** Defendant has the right to persist in a plea of not guilty to the charge against him, and if he does, he would have the right to a public and speedy trial.

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge sitting without a jury, defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

ii. If the trial is a jury trial, the jury would be composed of twelve citizens from the district, selected at random. Defendant and his attorney would participate in choosing the jury by requesting that the Court remove prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges.

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of proving defendant guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing all the evidence, it was persuaded of his guilt beyond a reasonable doubt. The jury would have to agree unanimously before it could return a verdict of guilty or not guilty.

iv. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, whether or not the judge was persuaded that the government had established defendant's guilt beyond a reasonable doubt.

v. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them.

vi. At a trial, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

vii. At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

c. **Appellate rights.** Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial, and may only appeal the validity of this plea of guilty and the sentence imposed. Defendant understands that any appeal must be filed within 14 calendar days of the entry of the judgment of conviction.

d. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraphs, with the exception of the appellate rights specifically preserved above. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights.

Presentence Investigation Report/Post-Sentence Supervision

17. Defendant understands that the United States Attorney's Office in its submission to the Probation Office as part of the Pre-Sentence Report and at sentencing shall fully apprise the District Court and the Probation Office of the nature, scope, and extent of defendant's conduct regarding the charge against him, and related matters. The government will make known all matters in aggravation and mitigation relevant to sentencing.

18. Defendant agrees to truthfully and completely execute a Financial Statement (with supporting documentation) prior to sentencing, to be provided to and shared among the Court, the Probation Office, and the United States Attorney's Office regarding all details of his financial circumstances, including his recent income tax returns as specified by the probation officer. Defendant understands that providing false or incomplete information, or refusing to provide this information, may be used as a basis for denial of a reduction for acceptance of responsibility pursuant to Guideline § 3E1.1 and enhancement of his sentence for obstruction of justice under Guideline § 3C1.1, and may be prosecuted as a violation of Title 18, United States Code, Section 1001 or as a contempt of the Court.

19. For the purpose of monitoring defendant's compliance with his obligations to pay a fine and restitution during any term of supervised release or probation to which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions, correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of

supervised release or probation to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

20. Defendant agrees to cooperate with the United States Attorney's Office in collecting any unpaid fine and restitution for which defendant is liable, including providing financial statements and supporting records as requested by the United States Attorney's Office.

Conclusion

21. Defendant understands that this Agreement will be filed with the Court, will become a matter of public record, and may be disclosed to any person.

22. Defendant understands that his compliance with each part of this Agreement extends throughout the period of his sentence, and failure to abide by any term of the Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government, at its option, may move to vacate the Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute

defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

23. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

24. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

25. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: _____

GARY S. SHAPIRO
Acting United States Attorney

THOMAS P. FLANAGAN
Defendant

JASON A. YONAN
Assistant U.S. Attorney

JOEL R. LEVIN
Attorney for Defendant