

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

BARRY POTICHA

No. 18 CR 208

Judge Gary Feinerman

**PLEA AGREEMENT**

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, JOHN R. LAUSCH, JR., and defendant BARRY POTICHA, and his attorney, MICHAEL L. SIEGEL, 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 conspiracy to defraud the United States by impeding, impairing, and obstructing the Internal Revenue Service in the correct determination and collection of revenue and income taxes and by avoiding the payment of taxes due and owing by Company A, Company B, Shareholder A and Shareholder B, in violation of Title 18, United States Code, Section 371.

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.

**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 2000 and continuing through at least December 19, 2011, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant BARRY POTICHA did willfully and knowingly conspire with Individual A, and with others known and unknown, to defraud the United States by impeding, impairing, and obstructing the Internal Revenue Service in the correct determination and collection of revenue and income taxes, and by avoiding the payment of taxes due and owing by Company A, Company B, Shareholder A and Shareholder B, in violation of Title 18, United States Code, Section 371.

Throughout the period of the charged conspiracy, defendant was employed as the office manager and bookkeeper for Company A and Company B. Company A and Company B were temporary staffing companies operating in the Chicago area that shared office space and administrative personnel. Companies A and B were

headquartered in Chicago until 2009, when the headquarters for both companies moved to Northbrook, Illinois.

Company A was an S corporation, and as such, was required to annually file a U.S. Income Tax Return for an S Corporation (Form 1120S) that reported the ordinary income or loss and amount of tax owed. As an S corporation, the ordinary income and losses of the business flowed through and were reported on its shareholders' federal income tax returns (Form 1040). Shareholder A was president of Company A and owned 60 percent of the shares of Company A. Shareholder B was the secretary of Company A and owned 40 percent of the shares of Company A. Company B was required to annually file a U.S. Corporation Income Tax Return (Form 1120) and pay taxes based upon the amount of income reported.

For the duration of the charged conspiracy, defendant prepared and filed with the IRS the Employer's Quarterly Federal Tax Return (Form 941) for Company A and Company B, and prepared and issued Forms W-2 (Wage and Tax Statement) for employees of both companies. Defendant conspired with Individual A, an independent contractor employed by Company A and acting at defendant's direction, to impede the lawful functions of the IRS and avoid the payment of taxes due and owing by falsifying information reported in quarterly Forms 941 of Companies A and B and in the Forms W-2 of employees of Company A and Company B for the duration of the charged conspiracy.

Specifically, defendant avoided the assessment and payment of tax by falsely inflating the amount of advance Earned Income Credit (EIC) payments reported on Forms 941 filed by Company A and Company B. The IRS treated advance EIC payments by an employer as deposits of income tax withholding and of employee and employer social security and Medicare taxes. By falsifying the amount of advance EIC reported on Company A and Company B's Forms 941, defendant intended to fraudulently reduce or eliminate the employment tax liability of Company A and Company B. The amount of falsified advance EIC varied over the course of the conspiracy, but a majority of the advance EIC reported for at least most of the quarters was false.

In addition, by falsifying the advance EIC payments in the Forms 941 of Company A and Company B, defendant intended to and did cause the underreporting of annual ordinary business income in Company A's U.S. Income Tax Return for an S Corporation (Form 1120S) and in Company B's U.S. Corporation Income Tax Return (Form 1120). The intended purpose and effect of this was to impede, impair, and obstruct the payment of taxes due and owing by Company A, Company B, Shareholder A and Shareholder B. Because Company A was a Subchapter S corporation, corporate income and losses were passed through to Shareholder A and Shareholder B, resulting in a reduction in individual tax liability by Shareholder A and Shareholder B.

To conceal the existence of the conspiracy, each year defendant directed Individual A, and Individual A agreed to falsify and inflate the advance EIC payments reported on Forms W-2s issued to employees of Company A and Company B to match the amounts of advance EIC payments that defendant falsified and inflated on the Forms 941 for Company A and Company B.

It was the practice of Company A and Company B to make employee Forms W-2 available for pick-up at their offices. Defendant was aware that a majority of employees of Company A and Company B did not pick up their Forms W-2 from the offices of Companies A and B and did not file individual income tax returns (Forms 1040) with the IRS. Defendant knew that for this reason a majority of employees of Company A and Company B never learned that the advance EIC payments on their Forms W-2 were falsified and inflated by defendant, which furthered the conspiracy by making it less likely that the IRS would discover what defendant and Individual A had fraudulently agreed to do.

Of the employees who picked up their Forms W-2 from Company A or Company B, each year multiple employees notified defendant, either directly or through an employee of Company A or Company B, that the advance EIC amount listed on their Form W-2 did not reflect the actual amount of advance EIC, if any, paid to the employee. Defendant issued these employees a “corrected” Form W-2 reflecting the actual amount of advance EIC, if any, that the employee had received the previous calendar year. Each year, multiple employees who filed their Form 1040

based on the amount of advance EIC in the “corrected” Form W-2 received a notice from the IRS informing them that the amount of advance EIC reported in the employee’s Form 1040 income tax return did not match the amount of advance EIC reported in the Form W-2 filed by Company A and/or Company B. Defendant provided these employees with letters—written on Company A or Company B letterhead, addressed to the IRS and signed by defendant—stating that the earnings reported by the employee were correct and that the Form W-2 filed by Company A or Company B was inaccurate due to a computer error and/or that the employee did not receive advance EIC payments during the previous year. Defendant intended the letters to conceal from the IRS the existence of the underlying conspiracy, and caused these letters to be sent to the IRS knowing that the IRS would rely on the information in the letters.

For tax years 2006 through 2011, the defendant’s falsification of advance EIC payments on the Forms 941 caused a loss of at least approximately \$2,722,601 in income tax that was not assessed against Shareholder A, at least approximately \$1,795,960 in income tax that was not assessed against Shareholder B, at least approximately \$1,650,498 in income tax that was not assessed against Company B, at least approximately \$13,250,355 in employment taxes that were not assessed against or paid by Company A, and at least approximately \$5,031,195 in employment taxes that were not assessed against or paid by Company B.

For tax years 2006 through 2011, the total federal tax loss caused as a result of the conspiracy to impede, impair, and obstruct the Internal Revenue Service in the correct determination and collection of revenue and income taxes is therefore at least approximately \$24,450,609.

In addition, while an employee of Company A and Company B, defendant willfully filed materially false individual income tax returns (Forms 1040) for tax years 2010 through 2015 in which he underreported his income and falsely overreported the amount of income withheld by his employers. This conduct resulted in a federal tax loss of approximately \$83,859 for 2010, approximately \$93,023 for 2011, approximately \$58,458 for 2012, approximately \$37,774 for 2013, approximately \$10,312 for 2014, and approximately \$58,195 for 2015, resulting in a total federal tax loss of approximately \$341,621. This conduct also resulted in a Illinois State tax loss amount of approximately \$6,134 for 2010, approximately \$11,926 for 2011, approximately \$5,731 for 2012, approximately \$3,543 for 2013, approximately \$1,775 for 2014, and approximately \$3,495 for 2015, resulting in a total Illinois State tax loss of approximately \$32,604.

Therefore, as a result of the charged and relevant conduct, the total federal tax loss is at least approximately \$24,792,230, and a total Illinois State tax loss of approximately \$32,604.

The above loss figures for the charged and relevant conduct are based on the government's calculations. The defendant is relying on the above figures in entering his plea of guilty and does not contest their accuracy.

### **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 5 years' imprisonment. This offense also carries a maximum fine of \$250,000, or twice the gross gain or gross loss resulting from that offense, whichever is greater. 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.

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 determining a sentence, the Court is obligated to calculate the applicable Sentencing Guidelines range, and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a), which include: (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii)



the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, afford adequate deterrence to criminal conduct, protect the public from further crimes of the defendant, and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (iii) the kinds of sentences available; (iv) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (v) the need to provide restitution to any victim of the offense.

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 2016 Guidelines Manual.

b. **Offense Level Calculations.**

i. The base offense level is 26 pursuant to Guidelines §§ 2T1.4(a)(1) and 2T4.1(K) because the actual tax loss was at least \$24,824,834, which is greater than \$9,500,000 but less than \$25,000,000.

ii. Pursuant to Guideline § 2T1.1(b)(2), the offense level is increased two levels because the offense involved sophisticated means.

iii. 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.

iv. 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 25, which, when combined with the anticipated criminal history category of I, results in an anticipated advisory sentencing guidelines range of 57 to 71 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 guidelines 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 guidelines 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.

10. 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**

11. Each party is free to recommend whatever sentence it deems appropriate.

12. 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.

13. Pursuant to Title 18, United States Code, § 3663(a)(3) and 3664, defendant agrees to pay restitution to the Internal Revenue Service and Illinois Department of Revenue, arising from the criminal and relevant conduct set forth above. The restitution due to the Internal Revenue Service is approximately \$341,621, minus any credit for funds repaid prior to sentencing. This restitution to the IRS consists of the following amounts:

Tax Year	To Be Credited to Tax	Amount
2010	Defendant's Form 1040	\$83,859
2011	Defendant's Form 1040	\$93,023

2012	Defendant's Form 1040	\$58,458
2013	Defendant's Form 1040	\$37,774
2014	Defendant's Form 1040	\$10,312
2015	Defendant's Form 1040	\$58,195

The restitution due to the Illinois Department of Revenue is approximately \$32,604, minus any credit for funds repaid prior to sentencing.

14. Defendant understands that the amount of tax loss as calculated by the IRS may exceed the amount of tax due as calculated for restitution in the criminal case. Defendant understands that the IRS may use the restitution order as a basis for civil assessment pursuant to Title 26, United States Code, Section 6201(a)(4).

15. Defendant agrees that restitution is due and payable immediately after the judgment is entered and is subject to immediate enforcement, in full, by the United States. If the Court imposes a schedule of payments, Defendant agrees that the payment schedule is a schedule of the minimum payment due, and that the payment schedule does not prohibit or limit the methods by which the United States may immediately enforce the judgment in full.

16. 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.

17. Defendant agrees that the United States may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613, and 3664(m), notwithstanding any payment schedule set by the Court.

### **Acknowledgments and Waivers Regarding Plea of Guilty**

#### **Nature of Agreement**

18. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 18 CR 208.

19. 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.

20. Defendant understands that nothing in this Agreement shall limit the Internal Revenue Service in its collection of any taxes, interest or penalties from defendant and his spouse. Defendant understands that the amount of tax as

calculated by the IRS may exceed the amount of tax due as calculated for the criminal case.

### **Waiver of Rights**

21. 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.

22. Defendant understands that he has the right to have the criminal charge in the information brought within five years of the last of the alleged acts constituting the specified violation. By signing this document, defendant knowingly waives any right to have the charge in the information brought against him within the period established by the statute of limitations. Defendant also knowingly waives any defense or claim based upon the statute of limitations or upon the timeliness with which the charge in the information was brought.

**Presentence Investigation Report/Post-Sentence Supervision**

23. 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.

24. 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.

25. 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**

26. 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.

27. Regarding matters relating to the Internal Revenue Service, defendant agrees to cooperate with the Internal Revenue Service in any tax examination or audit of defendant and his spouse which directly or indirectly relates to or arises out of the course of conduct that defendant has acknowledged in this Agreement, by transmitting to the IRS original records or copies thereof, and any additional books and records that the IRS may request.

28. Defendant will not object to a motion brought by the United States Attorney's Office for the entry of an order authorizing disclosure of documents, testimony and related investigative materials which may constitute grand jury

material, preliminary to or in connection with any judicial proceeding, pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i). In addition, defendant will not object to the government's solicitation of consent from third parties who provided records or other materials to the grand jury pursuant to grand jury subpoenas, to turn those materials over to the Civil Division of the United States Attorney's Office, or an appropriate federal or state agency (including but not limited to the Internal Revenue Service), for use in civil or administrative proceedings or investigations, rather than returning them to the third parties for later summons or subpoena in connection with a civil or administrative proceeding involving, or investigation of, defendant and his spouse. Nothing in this paragraph or the preceding paragraph precludes defendant and his spouse from asserting any legal or factual defense to taxes, interest, and penalties that may be assessed by the IRS.

29. Defendant understands that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

30. Defendant understands that the government has the right to seek defendant's truthful testimony before a grand jury or a district court.

### **Conclusion**

31. 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.

32. 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.

33. 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.

34. 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.

35. 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: \_\_\_\_\_

\_\_\_\_\_  
JOHN R. LAUSCH, JR.  
United States Attorney

\_\_\_\_\_  
BARRY POTICHA  
Defendant

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KATHRYN E. MALIZIA  
Assistant U.S. Attorney

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MICHAEL L. SIEGEL  
Attorney for Defendant