IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**CRIMINAL NO.:**
	§	
PANALPINA, INC.	§	
	§	
Defendant.	§	

AGREED MOTION TO WAIVE THE PRESENTENCE REPORT

The United States of America, by and through its counsel, the United States Department of Justice, Criminal Division, Fraud Section (the "Department"), and defendant Panalpina, Inc. ("Panalpina U.S."), by its undersigned attorneys, respectfully submit this Agreed Motion to Waive the Presentence Report for the Court's consideration in resolving the corporate plea of guilty in the case captioned above. For the reasons set forth below, the Department and the Defendant respectfully request the Court accept the guilty plea of Panalpina U.S., pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C); consolidate the entry of the plea of guilty and the sentencing into one proceeding; waive the presentence investigation pursuant to Federal Rule of Criminal Procedure 32(c)(1)(A)(ii) and Criminal Local Rule 32.1; and sentence the company in accordance with the terms of the plea agreement (the "Plea Agreement") filed simultaneously herewith. The parties submit that the information contained in the record of this case, together

with the agreed information included herein, are sufficient to enable the Court to exercise its sentencing authority under Title 18, United States Code, Section 3553, without the necessity of the preparation of a presentence investigation report.

I. INTRODUCTION

Federal Rule of Criminal Procedure 32(c)(1)(A)(ii) permits the Court to impose sentence without the preparation of a presentence report if the Court finds that the information in the record is sufficient to enable it to exercise its sentencing authority meaningfully under Title 18, United States Code, Section 3553, and the Court explains this finding on the record. Federal Rule of Criminal Procedure 32(c)(1)(A)(ii); *see also* Criminal Local Rule 32.1. The parties submit that the information contained in the Information, Plea Agreement, and Statement of Facts filed in this matter and the additional information contained herein satisfy the requirements of Rule 32(c)(1)(A)(ii) and provide a basis for the Court to exercise its sentencing authority meaningfully under Title 18, United States Code, Section 3553. The following information is submitted pursuant to Criminal Local Rule 32.1.

A. The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act of 1977 (hereinafter, the "FCPA"), as amended, Title 15, United States Code, Sections 78dd-1, *et seq.*, prohibits certain

classes of persons and entities from corruptly making payments to foreign government officials to assist in obtaining or retaining business.

Pertinent to the charges herein, the FCPA prohibited U.S. companies such as the Defendant from making use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value would be or had been offered, given, or promised, directly or indirectly, to a foreign official for the purpose of obtaining or retaining business for, or directing business to, any person. 15 U.S.C. § 78dd-2(a).

Furthermore, the FCPA required any company with securities traded on a U.S. exchange or otherwise required to file periodic reports with the Securities and Exchange Commission ("SEC"), referred to as "issuers," to make and keep books, records, and accounts that accurately and fairly reflect transactions and disposition of the company's assets and prohibited the knowing falsification of an issuer's books, records, or accounts. 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a). The FCPA's accounting provisions also required that issuers maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to (I) permit preparation

of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals, and appropriate action is taken with respect to any differences. 15 U.S.C. § 78m(b)(2)(B). The FCPA prohibited the knowing circumvention or failure to implement such a system of internal accounting controls. 15 U.S.C. §§ 78m(b)(5) and 78ff(a).

B. The Defendant

Panalpina U.S. is a wholly-owned U.S. subsidiary of Panalpina World Transport (Holding) Ltd. ("PWT"), a Swiss company. At all times relevant to this matter, PWT operated through a network of subsidiaries and affiliates, including Panalpina U.S. (collectively "Panalpina"), as an international freight forwarding and logistics company with business operations throughout the world. Among other things, Panalpina provided end-to-end transportation services for intercontinental air freight and ocean freight shipments. Panalpina also provided customs clearance services, which involved overseeing the import and export of the goods and items it transported. A primary component of Panalpina's operation focused on its oil and gas industry customers that were conducting exploration and drilling operations, on and offshore, in countries around the world. Panalpina

operated on six continents, had offices in over 80 countries and, as of the end of 2007, employed more than 15,000 people. Panalpina served its oil and gas industry customers, among other customers, through this extensive network of subsidiaries and affiliates.

Throughout the relevant time period, Panalpina U.S. was a New York corporation, with its principal place of business in Morristown, New Jersey. Between in or about 2002 and in or about 2007, Panalpina U.S. had 38 branches in several states, including Texas, New Jersey and Michigan. Panalpina U.S.'s primary base of operations for its oil and gas customers was Houston, Texas.

Panalpina U.S. was a "domestic concern" within the meaning of the FCPA, Title 15, United States Code, Section 78dd-2. Importantly, Panalpina U.S. provided services to numerous U.S. entities that were issuers as defined by the FCPA, Title 15, United States Code, Section 78dd-1(a). Panalpina U.S.'s issuer-customers were required to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflected the transactions and disposition of the issuer's assets.

As described in more detail below, Panalpina's cooperation and remediation in this matter has been exemplary. Panalpina provided substantial assistance to the Department in its investigations relating to these matters. In addition, where Panalpina encountered evidence of new violations in the course of its internal

investigation, it expanded the scope of the investigation accordingly and reported the new findings to the Department. Panalpina acknowledged and accepted responsibility for misconduct, investigated and identified the nature and extent of the misconduct, and undertook comprehensive global remediation and training during the course of the investigation. Panalpina's remediation was global and included a dramatic change in its business model, particularly in higher risk countries.

C. The Charged Conduct

In the case presently before the Court, the Department has filed a two-count criminal Information charging Panalpina U.S. with: (a) conspiracy to commit an offense against the United States, in violation of Title 18, United States Code, Section 371, that is, to falsify books and records of an issuer in violation of the FCPA, Title 15, United States Code, Section 78m(b)(2)(A), 78m(b)(5), and 78ff(a), and (b) aiding and abetting the creation of false books and records of an issuer in violation of the FCPA, Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(5), and 78ff(a). The Defendant has agreed to enter a plea of guilty to both counts of the Information.

In a related case before the Court, the Department has filed a two-count criminal Information charging PWT with: one count of conspiracy to commit an offense against the United States in violation of Title 18, United States Code,

Section 371, that is, to violate the FCPA, as amended, Title 15, United States Code, Sections 78dd-3 (Count One), and a substantive count of violating the anti-bribery provisions of the FCPA, Title 15, United States Code, Section 78dd-3 (Count Two). PWT has agreed to enter into a three-year Deferred Prosecution Agreement with the Department. The Plea Agreement with Panalpina U.S. and the Deferred Prosecution Agreement with PWT are intended to constitute a comprehensive resolution with the Department for the conduct described herein and as further described in the filed criminal Informations and the Statements of Facts attached to the respective agreements.

D. Other Conduct

On September 30, 2010, in an unrelated matter, PWT was charged in a three-count criminal information with fixing prices on surcharges added to air cargo shipments in certain trade lanes, in violation of Title15, United States Code, Section 1. *See United States v. Panalpina World Transport (Holding) Ltd.*, 10-270-RJL (D.D.C.). The Company has agreed to plead guilty and to pay a fine of $11,947,845. No date has yet been set for entry of the plea or sentencing.

II. THE RECORD CONTAINS SUFFICIENT INFORMATION FOR THE COURT TO IMPOSE SENTENCE

Under Federal Rule of Criminal Procedure 32(c)(1)(A)(ii), the Court may proceed to sentencing without the benefit of a presentence report if "the court finds that the information in the record enables it to meaningfully exercise its sentencing

authority under Title 18, United States Code, Section 3553, and the court explains its finding on the record." Fed. R. Crim. P. 32(c)(1)(A)(ii). Courts imposing sentence on corporate defendants for violations of the FCPA have combined the plea and sentencing hearings into one proceeding. *See, e.g., United States v. Siemens Aktiengesellschaft, et al.*, 08-CR-367-RJL (D.D.C. Dec. 15, 2008); *Kellogg Brown & Root LLC,* 4:09-cr-00071 (S.D. Tex. Feb. 11, 2009).

The parties respectfully submit that the record presently before the Court contains sufficient information to allow the Court to impose sentence without additional presentence investigation and a report. The facts described in the Information and Statement of Facts, coupled with this Agreed Motion, detail not only Panalpina U.S.'s violations of law, but also Panalpina's and PWT's timely internal investigation of the violations, their extensive cooperation with the Department and the SEC, and their remedial actions. This information satisfies the requirements of Rule 32(c)(1)(A)(ii) and permits the Court to impose sentence under Title 18, United States Code, Section 3553.

III. FACTUAL BACKGROUND

In approximately 2006, the Department opened an investigation into Panalpina's business practices based on evidence obtained through several Panalpina customers indicating Panalpina had paid bribes to foreign government officials on behalf of its customers. The subsequent investigation into Panalpina's

business practices uncovered a practice of paying bribes to "foreign officials" as that term is defined in the FCPA, for its own benefit and, as an agent, on behalf of its customers.

In total, between in or around 2002 and in or around 2007, Panalpina paid bribes to officials in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan.[1] Approximately $27,000,000 of that total related directly to, and was paid on behalf of, customers that were U.S. issuers or "domestic concerns" within the meaning of the FCPA.

A. Panalpina's Business Practice of Bribing Foreign Officials

Panalpina generally made corrupt payments to foreign government officials on behalf of customers in order to circumvent the customs process for imports and exports of goods and items. Panalpina paid these bribes for various reasons, such as to cause officials to overlook insufficient, incorrect, or false documentation and/or to circumvent the local laws and inspections so as to allow the shipment of contraband (mainly unauthorized food and clothing). In a few isolated instances, Panalpina paid bribes for its own pecuniary benefit (*e.g.*, to obtain a government contract, to avoid tax audits).

Panalpina's longstanding practice of paying bribes in violation of the FCPA resulted from a variety of factors, including: (1) pressure from Panalpina's

[1] A small number of improper payments continued into 2008 and 2009.

customers to have services performed as quickly as possible, or to receive preferential treatment in obtaining services; (2) an inadequate compliance structure; (3) a corporate culture that tolerated and/or encouraged bribery; (4) the involvement of management in Switzerland who tolerated the improper payments; and (5) the involvement of management in the U.S. and other countries who encouraged the improper payments.

Knowledge of undocumented payments reached the highest levels of PWT's leadership, including the former Chairman of the Board of Directors ("Chairman"). On various occasions, the Chairman engaged in behavior that exhibited knowledge of and tolerance for improper business practices. For example, in 2001 the Chairman successfully resisted the adoption of a basic "Code of Ethics" program that included anti-bribery provisions, which PWT's outside auditor had recommended after finding that a Panalpina entity in Central Asia was making undocumented payments. PWT eventually implemented a business code known as the Swiss Code of Best Practices and a Code of Business Conduct. It was not until 2007, however, that PWT enforced the Code of Business Conduct, trained its employees on compliance, audited payments made to foreign officials, or otherwise attempted to ensure that Panalpina did not make improper payments.

The general acceptance of paying bribes as "business as usual" permeated the corporate culture until 2007. Dozens of employees throughout the Panalpina organization were involved in various schemes to pay bribes to foreign officials.

B. Panalpina U.S.'s Actions to Assist Customers in Falsifying Their Books and Records

Pursuant to the FCPA, issuers are required to keep accurate books, records, and accounts that reflect fairly the transactions entered into by issuers and the disposition of their assets. Between in or around 2002 and in or around 2007, Panalpina U.S. provided services to over 40 customers that were issuers.

It is a crime for an issuer to falsify any of its books, records, or accounts. Certain Panalpina U.S. issuer-customers knew, or were aware of facts indicating a high probability, that Panalpina was paying bribes on their behalf. Further, those issuer-customers with knowledge of the bribe payments failed to record properly the payments in their books and records.

Many local Panalpina affiliates, with the assistance of Panalpina U.S., knowingly and substantially assisted many of Panalpina U.S.'s issuer-customers in violating the FCPA's books and records provisions by masking the true nature of the bribe payments in final invoices to issuer-customers. If provided an invoice for what appeared to be a legitimate payment, the issuer-customer could use that invoice as support for recording a particular charge as a legitimate service in its corporate books and records when, in fact, the invoice was for a bribe.

Dozens of employees throughout the Panalpina organization were involved in various schemes to bribe foreign officials until 2007. This included some Panalpina U.S. managers and employees with direct responsibility for oil and gas industry customers.

IV. SENTENCING GUIDELINES CALCULATION

In the Plea Agreement, the parties stipulate that the following Guidelines calculation, using the 2009 edition of the Sentencing Guidelines Manual, is the proper application of the Sentencing Guidelines to the criminal charges alleged in the Information. The Sentencing Guidelines analysis in this case results in a Guidelines fine range of $72,000,000 – $144,000,000.

A. Calculation of the Offense Level

Based upon USSG § 2C1.1,[2] the total offense level is 36, calculated as follows:

(a)(2) Base Offense Level	12
(b)(1) Specific Offense Characteristic (More than one bribe)	+2
(b)(2) Specific Offense Characteristic (Value of bribe paid greater than $20 million but less than $50 million)	+22
TOTAL	36

Base Fine. Based upon USSG § 8C2.4(a)(1), the base fine is $45,500,000 (fine corresponding to the Base Offense level as provided in Offense Level Table).

B. Calculation of the Culpability Score

Based upon USSG § 8C2.5, the culpability score is 8, calculated as follows:

(a)	Base Culpability Score	5
(b)(3)	The relevant organization had 5,000 or more employees and tolerance of the offense by substantial authority personnel was pervasive throughout the organization.	+5
(g)	The organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct.	-2
TOTAL		8

[2] Pursuant to USSG § 1B1.2(a), including Application Note 1, the Department and Panalpina U.S. agree that the applicable fine under this Agreement shall be calculated pursuant to USSG § 2C1.1.

C. Calculation of the Fine Range

Base Fine	$45,500,000
Multipliers (USSG § 8C2.6):	1.6 – 3.2
Fine Range (USSG § 8C2.7):	$72,800,000 – $145,600,000

D. Agreed-Upon Sentence

The parties agree that in light of (a) the complexity of the overall disposition with PWT, and (b) the interrelationship among the charges and conduct underlying that disposition, attempting to determine the pecuniary gain from each of the thousands of transactions underlying the conduct of Panalpina U.S. and PWT would unduly complicate or prolong the sentencing process. For purposes of calculating the fine, the parties have agreed that the pecuniary gain to Panalpina is at least $27 million, the amount of the bribes paid on behalf of Panalpina's issuer-customers or other domestic concerns, and reimbursed by the issuer-customers to Panalpina.

Pursuant to the Plea Agreement, and consistent with Fed. R. Crim. P. 11(c)(1)(C), the parties have agreed that Panalpina U.S. will pay a criminal fine of $70,560,000.

V. THE AGREED-UPON FINE IS THE APPROPRIATE DISPOSITION

The parties submit that the imposition of a criminal penalty of $70,560,000 is the appropriate disposition of this case based upon the following:

- Panalpina's conduct was pervasive and long-running;

- Panalpina did not voluntarily disclose its violations to the government and did not initially cooperate with the Department's investigation;

- After its initial reluctance to cooperate, however, Panalpina U.S. and PWT exhibited exemplary cooperation during the remainder of the investigation, as discussed below, and Panalpina U.S. has demonstrated recognition and affirmative acceptance of responsibility of its criminal conduct by entering a guilty plea and fulfilling the obligations under the Agreement;

- PWT has similarly accepted responsibility for its criminal conduct by entering into a Deferred Prosecution Agreement and PWT has, among other things, agreed to: implement a compliance and ethics program designed to detect and prevent violations of the FCPA, other anti-corruption laws, and all applicable foreign bribery laws throughout its operations, including those of Panalpina U.S., subsidiaries, affiliates, and successors as described in Attachment C of the Plea Agreement and Attachment C of the Deferred Prosecution Agreement; and provide annual written reports to the Department as described in Attachment D of the Plea Agreement and Attachment D of the Deferred Prosecution Agreement; and

- Panalpina U.S. and PWT engaged in substantial remedial efforts, as discussed below.

A. Cooperation and Assistance

The Department initiated its investigation of Panalpina in or around mid-2006 based on conduct disclosed by Panalpina customers. Panalpina learned of the investigation in or around late-2006 from its customers. Despite knowledge of the investigation, Panalpina did not voluntarily disclose the conduct to the Department and did not stop the illegal payment of bribes that was occurring on multiple continents. In or about early-2007, the Department requested documents and information from Panalpina; however, at that time, Panalpina exhibited a reluctance to cooperate with the investigation.

Thereafter, Panalpina engaged and instructed its legal counsel ("Counsel") to conduct a comprehensive internal investigation, and ultimately authorized Counsel to report the findings to the Department and SEC. Thereafter, Panalpina exhibited exemplary cooperation with the Department and SEC, and conducted a comprehensive internal investigation that fully supported and paralleled the Department's investigation. Specifically, Panalpina engaged Counsel to lead investigations encompassing 46 jurisdictions and hired an outside audit firm to perform forensic analysis and other support tasks.

Panalpina's internal investigation included a comprehensive review of operations in nine countries – the United States, Switzerland, Nigeria, Brazil, Angola, Russia, Kazakhstan, Turkmenistan, and Azerbaijan – and a detailed

review of 102 additional issues in another 36 countries. Panalpina expanded the scope of its internal investigation where necessary, and promptly and voluntarily reported its findings from all investigations to the Department and SEC in over 60 meetings and calls. When potential issues were identified in countries not subject to a full investigation, Panalpina thoroughly investigated and remediated those issues.

Panalpina voluntarily supplied to the Department and the SEC information from interviews and documentary evidence regarding potential violations by Panalpina customers and third parties used as conduits for improper payments and for facilitating improper transactions. Panalpina provided substantial assistance to the Department and SEC in the investigation of its own directors, officers, and employees, mandated employee cooperation from the top down, and made over 300 current and former employees available for interviews to Counsel, the Department, and the SEC during and after the internal investigation. Panalpina also adopted a limited employee amnesty program to encourage employee cooperation with the internal investigation.

B. Substantial Remediation

In addition to conducting the internal investigation and cooperating with the Department and SEC investigations, Panalpina also dedicated substantial resources

to remediate its unlawful conduct. PWT replaced most of its top leadership, as well as directors and managers at Panalpina U.S. implicated in improper conduct.

Panalpina undertook comprehensive and significant steps to improve its compliance infrastructure, including through the creation of a compliance department, with a reporting line to the Board of Directors and the authority and resources required to assess global operations and to recommend and implement necessary changes. Panalpina also conducted systematic risk assessments in high-risk countries and developed review mechanisms to evaluate the legality of hundreds of global business processes to ensure compliance. Panalpina coordinated its compliance and internal audit functions to ensure thorough implementation of policies and procedures and diligent monitoring of the company's global remediation progress.

As a global service provider that relies extensively on third parties, Panalpina changed the way it interacts with intermediaries. In particular, the company implemented an enhanced due diligence policy that includes checks on prospective third parties, and is in the midst of a global review of existing third parties, starting with third parties operating in high-risk countries. Panalpina has also terminated commercial relationships with numerous third parties that refused to sign compliance certifications or act compliantly, or did not meet the company's heightened compliance standards.

Panalpina also closed operations of subsidiaries in three countries where compliance risks were too pervasive and significant to be mitigated. Panalpina suspended its Nigerian operations in September 2007 and subsequently wound up and sold its Nigerian business. Panalpina worked with outside counsel to conduct due diligence on potential buyers of its Nigerian operations and to ensure that the sale was appropriately handled and documented from a compliance standpoint. Panalpina has also ceased operations in Equatorial Guinea and Turkmenistan due to its determination that it could not compliantly continue those operations.

Despite PWT's and Panalpina U.S.'s extensive efforts to transform its compliance program, during the course of the investigation, PWT uncovered a few instances in which employees were continuing to pay bribes to foreign officials. This improper conduct, although limited, continued to occur into 2008 and early 2009. Upon discovery, PWT took swift action to stop the payments, to disclose the conduct to the Department, to terminate and/or reprimand the employees implicated in the conduct, and to retrain employees in the relevant countries regarding the importance of adhering to PWT's compliance rules and regulations.

C. Ongoing Compliance Reviews and Oversight

As described in Attachment C to the Plea Agreement and Attachment C to the Deferred Prosecution Agreement, Panalpina U.S. and PWT have agreed to continue to conduct appropriate reviews of their existing internal controls, policies,

and procedures and, where appropriate, to adopt new or to modify existing internal controls, policies, and procedures in order to ensure that they maintain: (a) a system of internal accounting controls designed to ensure that Panalpina makes and keeps fair and accurate books, records, and accounts; and (b) a rigorous anti-corruption compliance code, standards, and procedures designed to detect and deter violations of the FCPA and other applicable anti-corruption laws.

In addition, as described in Attachment D to the Plea Agreement and Attachment D to the Deferred Prosecution Agreement, Panalpina U.S. and PWT have agreed to report to the Department annually regarding their compliance activities. These compliance activities will include: the Panalpina "Remaining Countries Investigations Plan" dated December 2, 2009 ("Panalpina Countries Investigation Plan") and the 2010 Panalpina Compliance Work Plan. The Panalpina Remaining Countries Investigation Plan contemplates the completion of investigations by PWT, in coordination with counsel, in four countries. The 2010 Panalpina Compliance work plan contemplates compliance assessments to be conducted in 23 countries in 2010, and compliance assessments in approximately 12 to 20 additional countries in both 2011 and 2012.

Panalpina has agreed that, in order to aid in the internal oversight of these compliance undertakings, the Legal Committee of the Panalpina Board of Directors will be restructured as the Legal and Compliance Committee of the

Board, and granted specific authorization to oversee the compliance activities. The Legal and Compliance Committee will consist of three members of the Board of Directors, none of whom will be Panalpina executives. In addition, Panalpina has appointed a compliance consultant to aid in the compliance activities and to assist with the reporting obligations to the Department.

VI. CONCLUSION

For the foregoing reasons, the Department and the Defendant respectfully recommend that the Court accept the Plea Agreement of Panalpina U.S. pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), waive the presentence investigation pursuant to Federal Rule of Criminal Procedure 32(c)(1)(A)(ii) and Criminal Local Rule 32.1, approve the disposition of this matter, and impose sentence according to the terms of the Plea Agreement.

FOR THE DEPARTMENT OF JUSTICE:

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Houston, Texas, on this 4th day of Nov, 2010.