

SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into among the United States of America, acting through the United States Department of Justice and on behalf of the United States Department of Agriculture (collectively the “United States”), Patrick Esch (“Esch”), and Relator Holly Fox as Personal Representative for the Estate of Mark Fox (“Relator”) (the United States, Esch, and Relator are hereafter collectively referred to as “the Parties”), through their authorized representatives.

RECITALS

- A. Esch was a farmer and rancher in southeast Colorado.
- B. On December 22, 2020, Mark Fox filed a qui tam action in the United States District Court for the District of Colorado captioned *United States ex rel. Mark Fox v. Esch, et al.*, 20-cv-03744 (D. Colo.), pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the “Civil Action”). Mark Fox died on or about August 12, 2023. On December 1, 2023, Holly Fox was appointed as the Personal Representative of the Estate of Mark Fox. *See In re Estate of Mark Desmond Fox*, 2023PR30008 (Dist. Ct. Crowley Cnty). On December 5, 2023, Holly Fox, in her capacity as the Personal Representative of the Estate of Mark Fox, was substituted as the sole Relator in the Civil Action. Doc. No. 33.
- C. The United States contends that it has certain civil claims against Esch arising from a conspiracy to engage in a scheme to fraudulently obtain insurance indemnities from federally-funded crop insurance programs under the false pretense that there was less rain over the relevant area than was actually the case during the period from July 2016 through June 2017. To carry out that scheme, the members of the

conspiracy, including Esch, Mark Fox, and others, tampered with, damaged, and used other means to prevent rain gauges in southeast Colorado from accurately measuring rainfall. As part of the conspiracy, Esch covered gauges with agricultural devices and used other means as well, such as filling gauges with silicone to prevent them from collecting moisture, cutting wires on the gauges, or detaching and then tipping over the bucket designed to collect precipitation. Esch submitted claims seeking indemnities under federally-funded rainfall index insurance policies under the false pretense that rainfall measurements material to the calculation of the indemnities were accurate when, in fact, Esch had taken steps to ensure that they were not accurate and knew that they were not accurate. The co-conspirators' tampering scheme also affected indemnity payments for rainfall index policies held by other individuals and entities affiliated with Esch that Esch knew participated in the rainfall index crop insurance program. The insurance policies covered by this Agreement are listed in Appendix A. Esch's conduct set forth in this Paragraph is referred to below as the Covered Conduct.

D. This Settlement Agreement is neither an admission of liability by Esch nor a concession by the United States that its claims are not well founded, except to the extent admitted in Esch's guilty plea in *United States v. Esch*, 23-cr-00259-CNS (D. Colo.).

E. Relator claims entitlement under 31 U.S.C. § 3730(d) to a share of the proceeds of this Settlement Agreement and *United States v. Esch*, 23-cr-00259-CNS (D. Colo.), and to reasonable expenses, attorneys' fees and costs incurred in the Civil Action.

To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, and in consideration of the mutual promises and obligations of this Settlement Agreement, the Parties agree and covenant as follows:

TERMS AND CONDITIONS

1. Esch shall pay to the United States \$3,000,000 plus interest at 3% per annum (collectively, the “Settlement Amount”), of which \$676,871.74 is restitution. Esch shall make such payments (or cause such payments to be made on his behalf) in accordance with the schedule attached as Appendix B by electronic funds transfer pursuant to written instructions to be provided by the United States Attorney’s Office for the District of Colorado. The payments specified in Appendix B may be prepaid, in whole or in part, without penalty or premium.

2. Conditioned upon the United States receiving the Settlement Amount payments, the United States agrees that it shall pay to Relator (as the Personal Representative for the Estate of Mark Fox and for the benefit of the Estate of Mark Fox) by electronic funds transfer 14.3% of each such payment received under the Settlement Agreement (“Relator’s Share”) as soon as feasible after receipt of each payment. Relator shall provide all information requested by the United States in order to facilitate the Relator’s Share payments to Relator as the Personal Representative for the Estate of Mark Fox and for the benefit of the Estate of Mark Fox.

3. Esch shall pay to Relator’s counsel the sum of \$107,313.75 for attorneys’ fees and costs (“Relator Fees”), \$76,491.67 to be paid to The Law Firm of Michael S. Porter LLC by electronic funds transfer pursuant to written instructions to be provided by

Michael Porter, and \$30,822.08 to be paid to Hruby Law Firm LLC by electronic funds transfer pursuant to written instructions to be provided by Jeffrey Hruby.

4. Subject to the exceptions in Paragraph 7 (concerning reserved claims) below, and conditioned upon the United States' receipt of the full Settlement Amount, the United States releases Esch from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. § 1833a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; or the common law theories of breach of contract, payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 7 below, and upon the United States' receipt of the full Settlement Amount and Relator's counsel's receipt of the full amount of Relator Fees, Relator as the Personal Representative for the Estate of Mark Fox, for and on behalf of herself, Mark Fox, the Estate of Mark Fox and their heirs, successors, attorneys, agents, and assigns, releases Esch from any civil monetary claim Relator, Mark Fox, the Estate of Mark Fox, or their heirs, successors, attorneys, agents, and assigns has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733.

6. Further, Relator as the Personal Representative for the Estate of Mark Fox, for and on behalf of herself, Mark Fox, the Estate of Mark Fox and their heirs, successors, attorneys, agents, and assigns (but not for the United States), fully and finally releases Esch, his heirs, successors, attorneys, agents, and assigns, from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Relator, Mark Fox, the Estate of Mark Fox, or their heirs, successors, attorneys,

agents, and assigns, have asserted, could have asserted, or may assert in the future against Esch, his heirs, successors, attorneys, agents, and assigns, for the Covered Conduct and from any and all liability, claims, demands, obligations, judgments, actions, causes of action, liens, indebtedness, and liabilities, whether now known, unknown or suspected, in law or equity, for injuries, losses, or damages, of whatever kind or character, whether personal, property, economic, or noneconomic that Relator, Mark Fox, the Estate of Mark Fox, or their heirs, successors, attorneys, agents, and assigns, have asserted, could have asserted, or may assert in the future against Esch, his heirs, successors, attorneys, agents, and assigns, including but not limited to that arising from the Covered Conduct or Civil Action.

7. Notwithstanding the releases given in Paragraphs 4, 5, and 6 of this Agreement, or any other term of this Agreement, the following claims and rights of the United States are specifically reserved and are not released:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as explicitly stated in this Agreement, any administrative liability or enforcement right, or any administrative remedy, including the suspension and debarment rights of any federal agency;
- d. Any liability to the United States (or its agencies) for any conduct other than the Covered Conduct;
- e. Any liability based upon obligations created by this Agreement;

- f. Any liability of any individuals other than Esch; and
- g. Any liability for personal injury or property damage or for other consequential damages arising from the Covered Conduct.

8. Relator as the Personal Representative for the Estate of Mark Fox, for and on behalf of herself, Mark Fox, the Estate of Mark Fox, and their heirs, successors, attorneys, agents, and assigns shall not object to this Agreement but agrees and confirms that this Agreement is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Conditioned upon Relator's receipt of the Relator's Share, Relator as the Personal Representative for the Estate of Mark Fox, for and on behalf of herself, Mark Fox, the Estate of Mark Fox, and their heirs, successors, attorneys, agents, and assigns fully and finally release, waive, and forever discharge the United States, its agencies, officers, agents, employees, and servants, from any claims arising from the filing of the Civil Action or under 31 U.S.C. § 3730, and from any claims to a share of the proceeds of this Agreement, the Civil Action and/or *United States v. Esch*, 23-cr-00259-CNS (D. Colo.).

9. Esch waives and shall not assert any defenses he may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Agreement bars a remedy sought in such criminal prosecution or administrative action.

10. Esch fully and finally releases the United States, its agencies, officers, agents, employees, and servants, from any claims (including attorneys' fees, costs, and

expenses of every kind and however denominated) that Esch has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers, agents, employees, and servants, related to the Covered Conduct or the United States' investigation or prosecution thereof.

11. Esch and his heirs, successors, attorneys, agents, and assigns fully and finally releases Relator, Mark Fox, and the Estate of Mark Fox, and their heirs, successors, attorneys, agents, and assigns from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Esch or his heirs, successors, attorneys, agents and assigns have asserted, could have asserted, or may assert in the future against Relator, Mark Fox, the Estate of Mark Fox, or their heirs, successors, attorneys, agents, and assigns, related to the Covered Conduct and Relator's investigation and prosecution thereof.

12. Further, Esch, and his heirs, successors, attorneys, agents, and assigns releases Relator as the Personal Representative for the Estate of Mark Fox, for and on behalf of herself, Mark Fox, the Estate of Mark Fox and their heirs, successors, attorneys, agents and assigns from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Esch, and his heirs, successors, attorneys, agents, and assigns, have asserted, could have asserted, or may assert in the future against Relator as the Personal Representative for the Estate of Mark Fox, for and on behalf of herself, Mark Fox, the Estate of Mark Fox and their heirs, successors, attorneys, agents and assigns, for the Covered Conduct and from any and all liability, claims, demands, obligations, judgments, actions, causes of action, liens, indebtedness, and liabilities, whether now known, unknown or suspected, in law or equity, for injuries, losses, or

damages, of whatever kind or character, whether personal, property, economic, or noneconomic that Esch, and his heirs, successors, attorneys, agents, and assigns, have asserted, could have asserted, or may assert in the future against Relator as the Personal Representative for the Estate of Mark Fox, for and on behalf of herself, Mark Fox, the Estate of Mark Fox and their heirs, successors, attorneys, agents and assigns, including but not limited to that arising from the Covered Conduct or Civil Action.

13. a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Esch, in connection with:

- 1) the matters covered by this Agreement and his plea agreement in *United States v. Esch*, 23-cr-00259-CNS (D. Colo.);
- 2) the United States' audit(s) and civil and criminal investigation(s) of the matters covered by this Agreement;
- 3) Esch's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil and criminal investigation(s) in connection with the matters covered by this Agreement (including attorneys' fees);
- 4) the negotiation and performance of this Agreement and his plea agreement in *United States v. Esch*, 23-cr-00259-CNS (D. Colo.);

5) the payment Esch makes to the United States pursuant to this Agreement and any payments that Esch may make to Relator, including costs and attorneys' fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. Future Treatment of Unallowable Costs: Unallowable Costs will be separately determined and accounted for by Esch, and Esch shall not charge such Unallowable Costs directly or indirectly to any contract with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Agreement, Esch shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Esch from the United States. Esch agrees that the United States, at a minimum, shall be entitled to recoup from Esch any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Esch's books and records and to disagree with any calculations submitted by Esch regarding any Unallowable Costs included in payments previously sought by Esch, or the effect of any such Unallowable Costs on the amount of such payments.

14. The Settlement Amount represents the amount the United States is willing to accept in compromise of its civil claims against Esch arising from the Covered Conduct pursuant to the terms and conditions in this Agreement.

a. Esch shall be in default of this Agreement (Default) if he fails to pay the Settlement Amount as provided in Paragraph 1 above and Appendix B hereto.

b. If Esch fails to pay the Settlement Amount as provided in Paragraph 1 above and Appendix B hereto, the United States will provide a written Notice of Default, and Esch shall have an opportunity to cure such Default within seven (7) calendar days from the date of delivery of the Notice of Default by making the payment due and paying any additional interest accruing under the Settlement Agreement up to the date of payment. Notice of Default will be delivered by email to Esch's counsel Gregory Goldberg and John Sullivan, Holland & Hart, 555 17th Street, Suite 3200, Denver, CO 80202, ggoldberg@hollandhart.com; jdsullivan@hollandhart.com. If Esch fails to cure the Default within seven (7) calendar days from delivery of the Notice of Default to his representative (an "Uncured Default"), and in the absence of an agreement with the United States to a modified payment schedule, the remaining unpaid balance of the Settlement Amount shall become immediately due and payable, and interest on the remaining unpaid balance shall thereafter accrue at the rate of 12% per annum, compounded daily from the date of Default, on the remaining unpaid total (principal and interest balance).

c. In the event of Uncured Default, Esch agrees that the United States, at its sole discretion, may (i) retain any payments previously made, rescind this Agreement, and bring any civil and/or administrative claim, action, or proceeding against Esch for the claims that would otherwise be covered by the releases provided in Paragraph 4 above, with any recovery reduced by the amount of any payments previously made by Esch to the United States under this Agreement; (ii) take any action to enforce

this Agreement in a new action; (iii) offset the remaining unpaid balance from any amounts due and owing to Esch by any department, agency, or agent of the United States at the time of Default or subsequently; and/or (iv) exercise any other right granted by law, or under the terms of this Agreement, or recognizable at common law or in equity. The United States shall be entitled to any other rights granted by law or in equity by reason of Default, including referral of this matter for private collection. In the event the United States pursues a collection action, Esch agrees immediately to pay the United States the greater of (i) a ten percent (10%) surcharge of the amount collected, as allowed by 28 U.S.C. § 3011(a), or (ii) the United States' reasonable attorneys' fees and expenses incurred in such an action. In the event that the United States opts to rescind this Agreement pursuant to this Paragraph, Esch waives and agrees not to plead, argue, or otherwise raise any defenses of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims that (i) are filed by the United States against Esch within one hundred twenty (120) days of written notification that this Agreement has been rescinded, and (ii) relate to the Covered Conduct, except to the extent these defenses were available on the Effective Date. Esch agrees not to contest any offset, recoupment, and/or collection action undertaken by the United States pursuant to this Paragraph, either administratively or in any state or federal court, except on the grounds of actual payment to the United States.

15. This Agreement is intended to be for the benefit of the Parties only.

16. Upon the United States' receipt of the first payment described in Paragraph 1, above, in accordance with the schedule attached as Appendix B, the Parties shall promptly sign a Joint Stipulation for Dismissal of Esch from the Civil Action with

prejudice, pursuant to Rule 41(a)(1), which the United States shall file in the Civil Action. The dismissal shall be with prejudice as to the United States' claims against Esch as to the Covered Conduct, without prejudice to the United States as to any other claims against Esch in the Civil Action, and shall not be a dismissal of any claims of the United States against any of the other defendants in the Civil Action. The dismissal shall be with prejudice as to Relator's claims against Esch, and shall not be a dismissal of any of Relator's other claims against any of the other defendants in the Civil Action. The stipulation of dismissal shall state that the action against Esch is being dismissed "subject to the terms of the settlement agreement with Esch" and that the Parties agree that the Court retains jurisdiction over the Parties to the extent necessary to enforce the terms and conditions of the settlement agreement.

17. Each Party shall bear its own legal and other costs incurred in connection with this matter, except as provided in Paragraph 3 (Relator's Fees), including the preparation and performance of this Agreement.

18. Each Party and signatory to this Agreement represents that it freely and voluntarily enters into this Agreement without any degree of duress or compulsion.

19. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the District of Colorado. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

20. This Agreement constitutes the complete agreement between the Parties. This Agreement may not be amended except by written consent of the Parties.

21. The undersigned counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

22. This Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Agreement.

23. This Agreement is binding on Esch's successors, transferees, heirs, and assigns.

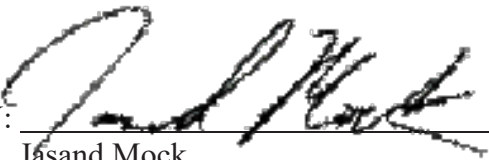
24. This Agreement is binding on Relator, Mark Fox, the Estate of Mark Fox, and their successors, transferees, heirs, and assigns. For the avoidance of doubt, Relator's representations, releases, agreements, and covenants in this Agreement are intended to be binding on behalf of herself, Mark Fox (deceased), the Estate of Mark Fox, and her own and Mark Fox's heirs, successors, attorneys, agents, and assigns.

25. All Parties consent to the United States' disclosure of this Agreement, and information about this Agreement, to the public.

26. This Agreement is effective on the date of signature of the last signatory to the Agreement (Effective Date of this Agreement). Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

THE UNITED STATES OF AMERICA


DATED: 2/14/2024

BY: 

Jasand Mock
Assistant United States Attorney

UNITED STATES DEPARTMENT OF AGRICULTURE

DATED: 2/14/2024


BY: **ROBERT BONNIE** 

Robert Bonnie
Under Secretary of Agriculture for
Farm Production and Conservation
United States Department of Agriculture

Digitally signed by ROBERT BONNIE
Date: 2024.02.14 16:58:37 -05'00'


PATRICK ESCH

DATED: 1-19-24 BY: Patrick Esch
Patrick Esch

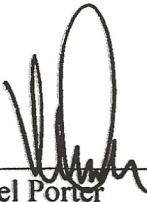
DATED: 1/20/24 BY: 
Gregory Goldberg
John Sullivan
Counsel for Patrick Esch

RELATOR

DATED: 1-19-24

BY:  _____
Holly Fox
Personal Representative for the Estate of Mark Fox

DATED: 1-19-24

BY:  _____
Michael Porter
Counsel for Mark Fox and for Holly Fox, as Personal
Representative for the Estate of Mark Fox

DATED: _____

BY: _____
Jeffrey Hruby
Counsel for Mark Fox and for Holly Fox, as Personal
Representative for the Estate of Mark Fox

RELATOR

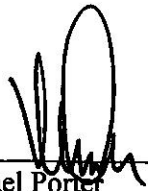
DATED: _____

BY: _____

Holly Fox
Personal Representative for the Estate of Mark Fox

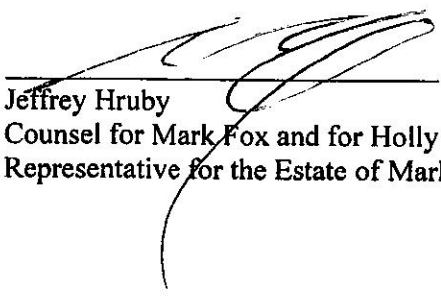
DATED: 1-19-24

BY: _____


Michael Porter
Counsel for Mark Fox and for Holly Fox, as Personal
Representative for the Estate of Mark Fox

DATED: 1/19/24

BY: _____


Jeffrey Hruby
Counsel for Mark Fox and for Holly Fox, as Personal
Representative for the Estate of Mark Fox

APPENDIX A – Covered Policies

Policy Number

1017508
1017543
1017556
1017560
1017564
1017565
1017568
1017569
1017573
1017580
1017581
1024404
1024536
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APPENDIX B – Payment Schedule

Pay Period	Date	Payment	Principal	Interest	Balance
1	2/15/2024	\$25,000	\$17,500	\$7,500	\$2,982,500
2	3/15/2024	\$25,000	\$17,544	\$7,456	\$2,964,956
3	4/15/2024	\$25,000	\$17,588	\$7,412	\$2,947,369
4	5/15/2024	\$25,000	\$17,632	\$7,368	\$2,929,737
5	6/15/2024	\$75,000	\$67,676	\$7,324	\$2,862,061
6	7/15/2024	\$75,000	\$67,845	\$7,155	\$2,794,217
7	8/15/2024	\$100,000	\$93,014	\$6,986	\$2,701,202
8	9/15/2024	\$300,000	\$293,247	\$6,753	\$2,407,955
9	10/15/2024	\$500,000	\$493,980	\$6,020	\$1,913,975
10	11/15/2024	\$500,000	\$495,215	\$4,785	\$1,418,760
11	12/15/2024	\$500,000	\$496,453	\$3,547	\$922,307
12	1/15/2025	\$500,000	\$497,694	\$2,306	\$424,613
13	2/14/2025	\$425,674	\$424,613	\$1,062	\$0