IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>STEVEN KEITH VANDEBRAKE,<br><br>Defendant/Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case No. 11-1390<br><br><br><br>**MOTION TO ENFORCE THE PLEA AGREEMENT** |

The Appellant, Steven Keith VandeBrake, by and through his undersigned counsel, submits this Motion to Enforce the Plea Agreement.

## INTRODUCTION

Mr. VandeBrake pleaded guilty to a three-count Information alleging that he conspired to fix prices and rig bids for ready-mix concrete in northwest Iowa. The district court accepted Mr. VandeBrake's guilty plea pursuant to a plea agreement entered into under Fed. R. Crim. P. 11(c)(1)(B), App. 74-84 (the "Plea Agreement").[1] In the Plea Agreement, the government agreed not to "seek or support" any sentence outside the range specified by the applicable United States Sentencing Guidelines. Pursuant to U.S.S.G. § 2R1.1, Mr. VandeBrake's Guidelines range was 21 to 27 months imprisonment and a fine of between

[1] References to "App." are to the Appellant's Appendix in this matter.



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$56,663.48 and $283,317.43.[2] Add. 51; PSR ¶ 130. Despite the government's recommendation for a within-Guidelines sentence, the district court varied upward, imposing a prison sentence of 48 months and a criminal fine of $829,715.85. Add. 143.

In his opening brief to this Court, Mr. VandeBrake asserted that the district court erred in imposing the term of imprisonment and the fine.[3] The government's brief was filed on July 8, 2011. It urges this Court to affirm on both issues. As explained below, the government's support for the district court's sentence on appeal breaches its promise in the Plea Agreement not to "support" an above-Guidelines sentence. To remedy this breach, Mr. VandeBrake requests that the Court strike Parts II, III, and IV of the argument section of the government's brief.

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[2] The plea agreement specified a Guidelines prison range of 18 to 24 months. At sentencing, however, Mr. VandeBrake conceded that a 4-level role enhancement under U.S.S.G. § 3B1.1 was appropriate, bringing the range to 21 to 27 months.

[3] Mr. VandeBrake also asserts in this appeal that the district court abused its discretion when it rejected a plea agreement under Fed. R. Crim. P. 11(c)(1)(C). That issue is not implicated by this Motion.



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## ARGUMENT

### I. The Government Has Breached the Plea Agreement.

Plea agreements are "contractual in nature and generally governed by ordinary contract principles." *United States v. Van Thournout*, 100 F.3d 590, 594 (8th Cir. 1996) (quotation omitted). Unlike typical contracts, however, plea agreements "must be attended by constitutional safeguards to ensure a defendant receives the performance he is due." *United States v. Britt,* 917 F.2d 353, 359 (8th Cir. 1990). As such, "[w]here a plea agreement is ambiguous, the ambiguities are construed against the government." *Margalli-Olvera v. I.N.S.*, 43 F.3d 345, 353 (8th Cir. 1994). Federal appeals courts routinely entertain motions to enforce plea agreements when the breach occurs as part of the appellate process. *See United States v. Lovelace*, 565 F.3d 1080 (8th Cir. 2009) (entertaining government's motion to dismiss predicated on defendant's appeal waiver in plea agreement); *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004) (en banc) (requiring government to file a "Motion for Enforcement of the Plea Agreement" to raise appeal waiver).

Both parties to the Plea Agreement agreed, without exception, "not to seek or support any sentence outside of the Guidelines range." App. 80. The parties thus committed themselves not to "support" a sentence below *or above* the range



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provided by the United States Sentencing Guidelines. Yet that is precisely what the government has done in this Court. Merriam-Webster's defines "support" as to "defend as valid or right." Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/support. The overt objective of Parts II, III, and IV of the government's argument is to "defend" the district court's above-Guidelines sentence "as valid or right." Because the government thus "support[s]" an above-Guidelines sentence, it breaches the plea agreement.

In Part II of its argument section, the government contends that the Plea Agreement does not bar it from urging this Court to affirm the district court's sentence. The government marshals four arguments in support: (i) that *United States v. Winters*, 411 F.3d 967 (8th Cir. 2005), authorizes it to defend the district court's sentence, (ii) that the "actions of the parties" demonstrate no intent "to bar the government from VandeBrake's appeal," (iii) that the government's promise not to "support" an above-Guidelines sentence applied only in the district court, and (iv) that the "non-support" provision is modified by other provisions in the Plea Agreement. Appellee's Br. 30-32. None of these arguments withstands scrutiny.[4]

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[4] The government also suggests that the Court need not consider this issue because Mr. VandeBrake failed to develop it in his opening brief. Appellee's Br.



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First, the government contends that *Winters* authorizes its support of the district court's sentence. *Winters* does no such thing. Unlike the Plea Agreement here, the two plea agreements in *Winters* did not bar the government from "support[ing]" a particular sentence. Rather, they required only that the government "recommend concurrent sentences to the court." 411 F.3d at 975. The government fully discharged that obligation in the district court, leaving it free to argue that this Court should affirm the district court's imposition of consecutive sentences. Because the *Winters* plea agreement lacks the "non-support" obligation that is the basis for this Motion, it gives no aid to the government's position.[5]

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29-30. At the time Mr. VandeBrake filed his opening brief, however, the government had not yet breached the Plea Agreement. There was, therefore, no issue for Mr. VandeBrake to develop. Indeed, shortly *after* Mr. VandeBrake filed his opening brief, the government asked this Court for a 30-day extension of the deadline to file its brief in part because it needed time to consider its obligations under the plea agreement. *See* Unopposed Motion for an Extension of Time to File Appellee's Brief at 2 (filed May 18, 2011). Mr. VandeBrake can hardly be faulted for not developing an argument about a breach that might never have happened.

[5] Likewise, the two out-of-circuit cases cited by the government do not involve plea agreements containing the "non-support" obligation on which this Motion relies. In both cases, as in *Winters*, the government's obligations under the plea agreements were limited to activities in the district court. *See United States v. Colon*, 220 F.3d 48, 51-52 (2nd Cir. 2000); *United States v. Howard*, 894 F.2d 1085, 1090-91 (9th Cir. 1990).



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Second, the government contends that "the parties amended the [Plea] Agreement to clarify that VandeBrake had the right to appeal an above-guidelines sentence without mentioning any limitation on the government's ability to participate in such an appeal." Appellee's Br. at 31. Here, the government states a conclusion, not an argument. Contrary to the government's insistence, its agreement not to "support" an above-Guidelines sentence *is* a "limitation on the government's ability to participate" in an appeal. That limitation existed in the Plea Agreement in the same form both before and after the amendment on which the government relies. It was by no means necessary for the parties to *restate* the "non-support" language at the time of the amendment to give that language effect.

Third, the government urges that its agreement not to support an above-Guidelines sentence "must be read as restricting the government only in the district court" because "[t]hat language was contained in the original [Rule 11](c)(1)(C) agreement under which VandeBrake had no right to appeal his sentence." Appellee's Br. at 31. The government's logic is opaque. It may be suggesting that its prosecutor *should have* removed the "support" limitation when he converted the earlier Rule 11(c)(1)(C) agreement to a Rule 11(c)(1)(B) agreement.[6] But the

[6] If that is indeed the government's suggestion, it is belied by the fact that the Antitrust Division's model plea agreement uses the "seek or support" language



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prosecutor *did not* remove that language, so it remained part of the Plea Agreement. Paragraph 9 of the Plea Agreement nowhere hints that the government's agreement not to support an above-Guidelines sentence applied only in the district court.

Fourth, the government claims that the Plea Agreement "expressly allows the government" to support the district court's sentence on appeal. Appellee's Br. 32. The government's reasoning takes two steps. First, the government says that it is allowed to support non-Guidelines sentences that are imposed for reasons "set forth" in the Plea Agreement. Second, the government contends it may defend the district court's sentence because the Plea Agreement "sets forth" that the district court would ultimately impose a sentence based on 18 U.S.C. § 3553(a). The government's reasoning fails at both steps.

At the first step, the government misreads the Plea Agreement. In full, the controlling sentence provides that: "The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement." App. 80. The government

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for both Rule 11(c)(1)(B) and Rule 11(c)(1)(C) agreements. *See* Model Annotated Individual Plea Agreement, available at http://www.justice.gov/atr/public/guidelines/indl_plea_agree.htm.



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suggests that the final phrase – "for any reason not set forth in this Plea Agreement" – modifies the agreement not to seek or support a non-Guidelines sentence. This is semantically implausible. A natural reading of the sentence is that it prohibits the parties from seeking or supporting two things: (1) "any sentence outside of the Guidelines range" and (2) "any Guidelines adjustment for any reason that is not set forth in this Plea Agreement."

As for the second step, even if "any reason that is not set forth in this Plea Agreement" modifies "any sentence outside the Guidelines range," the government's reasoning still fails. The government claims that it may defend the sentence because the Plea Agreement provides that the district court would ultimately impose sentence under § 3553(a). But the Plea Agreement's recital of sentencing procedure is not, under any plausible understanding, a "reason" supporting an above-Guidelines sentence. It is, rather, a description of how sentencing works. Thus, even if the government may support an above-Guidelines sentence for reasons "set forth in th[e] Plea Agreement," it has not identified any "reasons" justifying its support for the sentence imposed on Mr. VandeBrake.

## II. The Court Should Grant Specific Performance By Striking The Offending Portions of the Government's Brief.

Two potential remedies exist to cure the government's breach of a plea agreement: specific performance and withdrawal of the guilty plea. *Margalli-*



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*Olvera*, 43 F.3d at 354-55. Under the circumstances of the government's breach, Mr. VandeBrake requests specific performance in the form of an order striking Parts II, III, and IV of the argument section of the government's brief. In this Circuit, specific performance is the "preferred remedy." *Id.* at 355. "In determining whether to grant specific performance," courts consider three factors: "(1) the possible prejudice to the defendant, (2) the conduct of the government, and (3) the public interest." *Id.*

Each of the *Margalli-Olvera* factors militates for specific performance here. The first factor, prejudice to the defendant, is satisfied where a defendant waived rights in exchange for the government's promises. *Id.* As consideration for the government's promise not to support an above-Guidelines sentence, Mr. VandeBrake waived six specific rights, enumerated in paragraph 1 of the Plea Agreement. These included the right to be charged by indictment, the right to trial by jury, and the right to confront and cross-examine witnesses. Prejudice is thus clear. The second factor – the government's conduct – is equally clear, as the government bears sole responsibility for the breach.[7] Finally, the public interest

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[7] The government cannot claim that the breach was inadvertent given Mr. VandeBrake's statement in his opening brief that "[t]he government cannot, without breaching this agreement, defend the district court's above-Guidelines sentence in this appeal." Appellant's Br. 23 n.7.



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favors specific performance, as "[e]nforcement of plea agreements is necessary for their effective functioning as a tool for disposing of criminal cases, and plea bargaining is an important part of the criminal justice system." *Id.* As in *Margalli-Olvera* itself, "all three . . . factors and the preference for specific performance counsel in favor of specific performance." *Id.*

**WHEREFORE**, Mr. VandeBrake requests that this Court enforce the parties' Plea Agreement by striking Parts II, III, and IV of the argument section of the government's brief.



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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on July 22, 2011 by

- ☐ U.S. Mail
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- ☐ FedEx/ Overnight Carrier
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