No. 11-1390

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

STEVEN KEITH VANDEBRAKE,

Defendant – Appellant.

GOVERNMENT'S RESPONSE TO APPELLANT'S MOTION
TO ENFORCE THE PLEA AGREEMENT

INTRODUCTION

Appellant Steven VandeBrake, pursuant to a Fed. R. Crim. P. 11(c)(1)(B) plea agreement, pleaded guilty to a three-count information alleging violations of Section 1 of the Sherman Act for his role in price-fixing and bid-rigging conspiracies. The parties agreed to recommend a sentence of 19 months' imprisonment and a $100,000 fine, and they also agreed not to seek or support the imposition of a non-guidelines sentence for any reason not set forth in the plea agreement. Despite the parties' recommendation, the district court imposed an

above-guidelines sentence of 48 months' imprisonment and a fine of $829,715.85. VandeBrake appealed his sentence.

In his 13,766-word opening brief, VandeBrake contended in a two-sentence footnote that the plea agreement precludes the government from defending the district court's above-guidelines sentence on appeal. Opening Br. 23 n.7. The government answered this argument at pages 29-32 of its brief. In his reply brief VandeBrake did not address pages 29-32 of the government's brief. He instead responded to those pages in a motion that he now asserts is the proper vehicle for his rebuttal because it asks the Court to strike parts II, III, and IV of the government's brief. Reply Br. 12 n.3; Motion 2.

ARGUMENT

I. VANDEBRAKE'S MOTION SHOULD BE STRICKEN AS AN IMPROPER ADDITIONAL REPLY TO THE GOVERNMENT'S BRIEF

Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) limits the length of a reply brief to 7,000 words, and VandeBrake did not seek or receive Court permission to exceed that limit or file an additional brief. *See* 8th Cir. Local R. 28A(k); Fed. R. App. P. 28(c). Nevertheless, immediately after filing a 6,982-word reply brief, VandeBrake submitted his 2,006-word "motion" as a point-by-point reply to pages 29-32 of the government's brief. Federal Rule 27(a), the general motions provision of the Rules that VandeBrake relies on (Reply Br. 12

n.3), does not purport to allow the use of motions to avoid the specific word limits on briefs set by Rule 32. Because VandeBrake's 2,006-word "motion" is, in substance, an additional reply brief that puts the word count for his reply well above the limit set in Rule 32, the Court should strike the motion as an improper pleading.

II. IF THE COURT REACHES THE MERITS IT SHOULD DENY VANDEBRAKE'S MOTION BECAUSE THE GOVERNMENT'S PARTICIPATION IN HIS APPEAL DOES NOT VIOLATE THE PLEA AGREEMENT

VandeBrake interprets the plea agreement to permit him to appeal his sentence but to forbid the government from participating in that appeal. The plea agreement says nothing of the sort.

A. The Parties' Agreement Not To Support A Non-Guidelines Sentence Is Limited To Sentencing And Does Not Bind The Government On Appeal

VandeBrake relies on paragraph 9 of the plea agreement which provides:

> **SENTENCING AGREEMENT**
>
> 9. Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose, a sentence requiring the defendant to pay to the United States a criminal fine of $100,000, . . . and a period of imprisonment of nineteen (19) months ("the recommended sentence"). . . . 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. The parties

> further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

App. 80-81.

The word "Sentencing" in the section heading clearly refers to the district court's determination of the sentence. The promises exchanged in paragraph 9 concern the recommendations, requests, and arguments the parties may or may not make to influence the district court's sentencing determination. There is no discussion of an appeal; the word does not even appear in the section, nor would one logically expect it to. When the parties meant to talk about appeals they did so expressly in paragraph 2 of the plea agreement. There, the parties agreed to a limited waiver of VandeBrake's right to appeal but expressed no restriction on the government's appellate rights. *See* Gov't Br. 31.

VandeBrake's argument that the parties' *sentencing* agreement should extend beyond the very proceeding to which it was directed runs afoul of *United States v. Winters*, 411 F.3d 967 (8th Cir. 2005), where this Court rejected a nearly identical argument.[1] As in *Winters*, nothing in the text of the plea agreement "limit[s] the government's response to issues on appeal." 411 F.3d at 975. Rather, "[t]he only provisions in the plea agreement[] discussing appeals" are, as in *Winters*, provisions concerning the defendant's right—and limited waiver of that

[1] The Second and Ninth Circuits rejected similar arguments in *United States v. Colon*, 220 F.3d 48 (2d Cir. 2000), and *United States v. Howard*, 894 F.2d 1085 (9th Cir. 1990).

right—to appeal. *See id.* Thus, as in *Colon*, the plea agreement here "did not obligate the government to advocate a position on *any* issue on appeal, nor to abstain from doing so." 220 F.3d at 53 (emphasis added). VandeBrake's attempt to distinguish *Winters*, *Colon*, and *Howard*, on the ground that only his agreement has a "not to seek or support" clause (Motion 5 & n.5), misses the thrust of those decisions—that the government's promises, unless expressly applied to appeals, deal only with district court proceedings. VandeBrake agrees that the government fully performed its promises in the district court.

The policy behind the principle of not barring the government from participating on appeal absent a clear intent to do so is that it is not in the public interest for an appeals court to decide an appeal "without the benefit of full briefing on both sides of an issue." *Howard*, 894 F.2d at 1091. "To hold otherwise would deprive this Court of the Government's frank assessment of the legal issues before it and negatively affect the full exposition of views on criminal appeals." *Colon*, 220 F.3d at 53. Because the plea agreement contains no explicit limitation on the government's ability to assess the legal issues presented in VandeBrake's appeal, the government did not violate the plea agreement by doing so.

B. In Any Event The Government's Defense Of The District Court's Sentence Is Not "Support" Within The Plea Agreement's Meaning

Even if paragraph 9's "non-support" language applies to this appeal, the government's defense of the lawfulness of VandeBrake's sentence cannot be construed, in the context of the plea agreement as a whole, as "support[ing]" a non-guidelines sentence. The plea agreement considered in its entirety shows that the parties understood the district court's discretion to sentence outside the guidelines range, and restricted their ability only to *ask for* (seek) or *argue for* (support) such a sentence.[2] Defending such a sentence as a lawful exercise of the district court's discretion, therefore, does not violate that commitment.

VandeBrake does not read the word "support" in context with the rest of the plea agreement, and instead claims "support" means to "defend as valid or right." Motion 4. On VandeBrake's reading of the plea agreement, the parties could never "defend as valid" (here, defending as within the district court's discretion) a sentence outside the guidelines range. But in the same plea agreement the parties explicitly *acknowledge* that the district court may lawfully impose a non-guidelines sentence. App. 79. According to VandeBrake, then, although the parties expressly acknowledge the validity of the court's discretion to sentence outside the

[2] These definitions of seek ("to ask for") and support ("to argue for") are also found in the same source of VandeBrake's definition of support, the Merriam-Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary.

guidelines range, neither could defend the validity of the court's exercise of that discretion on appeal. The implausibility of this reading illustrates that VandeBrake's definition of "support" does not comport with the plea agreement as a whole.

A more natural and contextual reading of the non-support promise is that it simply forbids the parties from arguing that the court *should* impose a sentence outside of the guidelines. This is precisely the same sort of promise that was made in *Winters*, where the government twice agreed that the sentences for two counts "should run concurrently," but this Court found proper the government's defense of consecutive sentences on appeal. 411 F.3d at 975. Here the plea agreement presents an even stronger case that the promise does not bar the government's participation on appeal, for the parties also codified in it their understanding that "the Court is not ultimately bound to impose a sentence within the applicable Guidelines range." App. 79. Thus, while neither party could argue below that the court should impose a non-guidelines sentence, it is entirely within-bounds to recognize on appeal that the court lawfully has done so.

CONCLUSION

The motion should be stricken as an unauthorized pleading. Alternatively, the motion should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2011, I electronically filed the foregoing government's response with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/
John P. Fonte
Attorney