[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11796
Non-Argument Calendar

D.C. Docket No. 0:09-cr-60331-JIC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SCOTT ROTHSTEIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 30, 2019)

Before TJOFLAT, WILLIAM PRYOR and GRANT, Circuit Judges.

TJOFLAT, Circuit Judge:

Scott Rothstein, a federal prisoner, appeals the District Court's grant of the Government's motion to withdraw a prior motion made pursuant to Federal Rule of Criminal Procedure 35, which allows the

Government to recommend a reduction in sentence if the defendant "provided substantial assistance in investigating or prosecuting another person." Rothstein argues (1) that his plea agreement with the Government did not give the Government any discretion to withdraw a Rule 35 motion, and (2) that he should have been entitled to an evidentiary hearing in the District Court on the Government's motion to withdraw. Neither of Rothstein's arguments are meritorious. We affirm the judgment of the District Court.

I.

A criminal information filed on December 1, 2009, charged Scott Rothstein, a former attorney and chairman of a law firm, with using his firm to perpetuate a Ponzi scheme. Rothstein was charged with: racketeering, in violation of 18 U.S.C. § 1962(d); conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); conspiracy to commit mail fraud and wire fraud, in violation of 18 U.S.C. § 1349; and two counts of wire fraud, in violation of 18 U.S.C. § 1343.

Rothstein would eventually plead guilty to all the above counts, but before doing so, he entered into a written cooperation agreement with the Government. In the agreement, Rothstein promised to cooperate by:

> (a) providing truthful and complete information and testimony, and producing documents, records, and other evidence, when called upon by [the Government], whether in

> interviews, before a grand jury, or at any trial or other court proceeding;
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> (b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings, and at meetings, as may be required by [the Government]; and
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> (c) if requested by [the Government], working in an undercover role to contact and negotiate with others suspected and believed to be involved in criminal misconduct under the supervision of, and in compliance with, law enforcement officers and agents.

Rothstein agreed that the Government would have "sole and unreviewable" discretion to determine the "quality and significance" of Rothstein's cooperation in any investigation or prosecution. The agreement stated that, if the Government evaluated Rothstein's cooperation favorably, it "may . . . make a motion . . . [under] Rule 35 of the Federal Rules of Criminal Procedure subsequent to sentencing . . . recommending that the defendant's sentence be reduced," but noting that "nothing in this Agreement may be construed to require [the Government] to file any such motion." Rothstein moved to have the cooperation agreement filed under seal, and stated in his motion that the agreement "is intended to be part of the Plea Agreement in this matter."

On June 9, 2010, the District Court sentenced Rothstein to 600 months' imprisonment and three years of subsequent supervised release. Almost one year later, on June 8, 2011, the Government filed a

motion for reduction of sentence under Rule 35. The motion stated that while Rothstein's "cooperation is not yet complete and will not be complete within one year of [his] initial sentencing," the Government was filing this motion "in an abundance of caution" to "preserve this Court's jurisdiction under Fed. R. Crim. P. 35(b)(1)."[1] Accordingly, the Government asked the Court not to rule on this motion until the Government filed a motion to hold a hearing to "advise the Court of the nature, extent, and value of [Rothstein's] cooperation." Further, the motion indicated that the Government "expressly reserves the right to withdraw this motion if, in the judgment of the [Government],

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[1] A Rule 35(b)(1) motion to reduce a sentence for "substantial assistance" must be made by the government within one year of sentencing. Rule 35 motions can be made after one year, but they must comport with the heightened showing required by 35(b)(2). A judge may only reduce a sentence on a motion made more than one year after sentencing if the defendant's "substantial assistance" involved:

> (A) information not known to the defendant until one year or more after sentencing;
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> (B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or
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> (C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

Fed. R. Crim. P. 35(b)(2). The Government's anticipatory filing under Rule 35(b)(1) within the one-year limit was therefore to prevent the need to satisfy one of these more stringent criteria.

[Rothstein] should fail to comply with the terms of his plea agreement, fail to testify truthfully, or falsely implicate any person or entity." Rothstein's attorney joined in the filing of the motion.

More than six years passed. At some point during this period, the Government concluded that Rothstein "provided false material information to [the Government] and violated the terms of his plea agreement." Accordingly, on September 26, 2017, it moved to withdraw the Rule 35 motion that had not yet been considered by the District Court. The Government reiterated its "sole discretion" to evaluate Rothstein's cooperation and its "expressly reserved . . . right to withdraw" the Rule 35 motion, which it described as a "placeholder motion" intended to prevent the expiration of the one-year time limit after sentencing for Rule 35(b)(1) motions. Rothstein disputed that the Government had the power to withdraw the motion and requested, at a minimum, that the District Court hold an evidentiary hearing on the matter. The District Court granted the Government's request and withdrew the substantial-assistance motion over Rothstein's objections.

Rothstein appealed. He principally contends that the Government breached the cooperation agreement because any discretion that the Government reserved for itself in that agreement ended when the Government filed its "placeholder" Rule 35 motion in June 2011. If the Government wanted to give itself the right to withdraw a Rule 35 motion, Rothstein argues, it "should have included [it]" in the cooperation agreement. He contends that because the word "withdraw"

is not to be found within the language of the cooperation or plea agreements, the Government could not, consistent with the agreement, withdraw an already-filed Rule 35 motion. Without such language, Rothstein says, he was not adequately warned that the Government could withdraw a substantial-assistance motion. Finally, Rothstein argues that the District Court needed to hold an evidentiary hearing to determine whether Rothstein had actually breached the cooperation agreement, in light of his assertion that he provided "extraordinary assistance" to the Government's investigation. Since the Government had no discretion to withdraw the Rule 35 motion, the argument goes, it would have needed to present proof establishing by a preponderance of the evidence that Rothstein had materially breached his plea agreement.

In response, the Government contends that the cooperation agreement made it clear that there was no guarantee that the Government would file a Rule 35 motion – it promised only to consider whether to do so if it determined that Rothstein had provided "complete and truthful information." In its view, Rothstein's argument that language about withdrawal actually had to be included in the cooperation agreement "imposes a rigidly literal approach" that conflicts with "commonsense constructions of contract law [and] with the majority of case law regarding this issue." Further, the Government contends that Rothstein was adequately placed on notice of the possibility of withdrawal because the Government's Rule 35 motion, which was signed by Rothstein's own attorney, "expressly stated

that [the Government] reserved the right to withdraw the motion" under certain circumstances. The Government reiterates, too, that the Rule 35(b)(1) motion was really just a "placeholder motion" to preserve the one-year time limitation, and that the motion explicitly indicated that the substantiality of Rothstein's cooperation could not yet be evaluated at the time of filing. Finally, the Government quickly dispenses with Rothstein's request for an evidentiary hearing, noting that this case presents a "purely legal question" that would only require a hearing if there were an allegation that the Government refused to file, or withdrew, a substantial-assistance motion based on an unconstitutional motive, like race or religion.

II.

Whether the Government has breached a plea agreement is reviewed *de novo* by this Court. *United States v. Copeland*, 381 F.3d 1101, 1104 (11th Cir. 2004).

Rothstein concedes that the Government would have had the discretion to choose not to file the Rule 35 motion. This Court has not yet determined whether, in the instant set of circumstances, there is any analytical difference between the Government withdrawing a previously filed Rule 35 motion, and the Government refusing to file a Rule 35 motion at all.[2] Rothstein

[2] In an unpublished opinion, we held that the District Court did not err in granting the government's motion to withdraw a previously-filed motion under U.S.S.G. § 5K1.1, the substantial-assistance provision of the federal sentencing guidelines. *United States v. Jackson*, 635 F. App'x 657 (11th Cir. 2015) (unpublished).

points to no authority indicating that we should imply a distinction between the two. Other circuits that have addressed the issue have disagreed with Rothstein's interpretation. *See United States v. Hartwell*, 448 F.3d 707, 718 (4th Cir. 2006) ("We conclude that the language giving the government 'sole discretion' to file a Rule 35(b) motion also includes the discretion to file a motion to withdraw it"); *see also Stropshire v. United States*, 278 F. App'x 520, 526-27 (6th Cir. 2008) (finding that the District Court did not err in granting the government's motion to withdraw a Rule 35 motion because "[t]he government was not in any way obligated by the plea agreement to file a Rule 35(b) motion"); *United States v. Emerson*, 349 F.3d 986, 987-88 (7th Cir. 2003) (affirming the grant of a motion to withdraw a Rule 35(b) motion where the motion had been filed to avoid the one-year deadline, but the government later determined that the defendant's cooperation had not been substantial assistance).

Rothstein claims that *United States v. Padilla*, 186 F.3d 136 (2d Cir. 1999), is the most persuasive authority applicable to this case. *Padilla* found error where a

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Just like Rothstein, the defendant in *Jackson* argued that the government could not withdraw a substantial-assistance motion when no provision of the plea agreement explicitly allowed it to do so. *Id.* at 658-59. We declined to find any distinction "between the government's refusal to file a motion recommending a reduction in sentence and its withdrawal of one." *Id.* at 660. "[E]ither way," we stated, "[t]he government would have fulfilled its obligations under the terms of the plea agreement" to "*consider* whether [defendant's] cooperation warranted a [substantial-assistance motion]." *Id.*

District Court allowed the government to withdraw a substantial-assistance motion, but differs from our facts in three important respects. First, the plea agreement in that case stated that the government "*will*" file a substantial-assistance motion if the defendant provided the requisite cooperation. *Padilla*, 186 F.3d at 141. In our case, the Government provided no such affirmative promise in Rothstein's cooperation agreement, only a promise to consider whether to do so. Second, in *Padilla*, the government advised the District Court that it had concluded that the defendant's assistance had been substantial. *Id.* at 139. Under our facts, the Government explicitly told the District Court that it could not yet evaluate whether Rothstein's assistance was substantial. Finally, *Padilla*'s agreement specifically enumerated the consequences if the defendant breached the plea agreement – and it was integral to the Second Circuit's analysis that withdrawal of a substantial-assistance motion was not listed as a possible consequence. *Id.* at 142. Rothstein's cooperation agreement contained no such specific delineation of potential consequences, aside from the general observation that the Government could choose in its discretion not to file a Rule 35 motion.

Rothstein lists in his brief a variety of plea agreements in other cases that he would have found to be "adequate" in this case. Notably, none of the plea agreements that he cites to expressly list withdrawal as a possibility once the government has made a substantial-assistance motion. Finding the right to withdraw such a motion in the text of these agreements relies on

the same type of inferential analysis of the agreement that Rothstein argues is impermissible here. Furthermore, Rothstein can point to no authority that *requires* the express delineation of any possible consequence of misbehavior in a plea agreement when the defendant is clearly made aware of the government's unfettered discretion to evaluate whether the defendant deserves a lesser sentence.

Rothstein's arguments that in *his* agreement the Government was required to expressly include a "right to withdraw" are unavailing. "A plea agreement is, in essence, a contract between the Government and a criminal defendant." *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999). The terms of a plea agreement are interpreted based on what a defendant "could have reasonably understood the terms of his plea agreement to mean." *United States v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992). In doing so, this court will not apply a "hyper-technical" or "rigidly literal" approach to interpreting the language. *Id.* (quoting *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990)). A strained, artificial reading of the agreement does not comport with a reasonable defendant's expectations when signing a deal with the government.

Rothstein argues that he understood the Government's retention of sole discretion to decide whether to file a Rule 35 motion, without more, to preclude any similar discretion to withdraw a filed Rule 35 motion. This claim is unsupported by a rational interpretation of the agreement and by the record. As a general rule, the government has a "power, not a duty, to file a

motion when a defendant has substantially assisted." *Wade v. United States*, 504 U.S. 181, 185, 112 S. Ct. 1840, 1843 (1992); *see also United States v. McNeese*, 547 F.3d 1307, 1309 (11th Cir. 2008) (applying this principle to a motion under Rule 35(b)). The government's refusal to exercise that power may only be questioned if the government's decision is based on an unconstitutional motive. *United States v. Nealy*, 232 F.3d 825, 831 (11th Cir. 2000).[3] This Court has emphasized its unwillingness to intrude on the prosecutorial discretion provided to the government in making substantial-assistance motions. *See United States v. Forney*, 9 F.3d 1492, 1501 n.4 (11th Cir. 1993).

The cooperation agreement that Rothstein signed fully retains this level of discretion for the Government – that is, "sole and unreviewable." It is true that the agreement says nothing about *withdrawal* of a Rule 35 motion. But we see nothing in the plain language of this agreement that counsels us to limit the Government's discretion when it comes to withdrawing a motion.[4] Holding that the Government had implicitly

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[3] Rothstein makes no allegation that the Government's withdrawal of its Rule 35 motion here was based on any unconstitutional motive, such as race or religion.

[4] Consider the Rule 35 motion's language: "Upon completion of the defendant's cooperation, the government will file a motion for a hearing at which time the government will advise the Court of the nature, extent, and value of the defendant's cooperation." Suppose, hypothetically, that instead of withdrawing the Rule 35 motion, the Government informed the Court that, in the Government's discretion, Rothstein's "assistance" was not at all useful to the Government's investigation and no downward variance in sentencing was warranted. Surely this would be permitted by the

relinquished the power to withdraw a placeholder motion would use a technicality to intrude on prosecutorial discretion in this field in a manner that this Court has continually refused to do. *See, e.g.*, *Forney*, 9 F.3d at 1501 n.4; *McNeese*, 547 F.3d at 1309; *Nealy*, 232 F.3d at 831.

Rothstein's argument claiming that he was not "warned" of the Government's discretion to withdraw the motion is likewise unavailing. The Government's Rule 35 motion, which was joined by Rothstein through the assent of his attorney, specifically stated that the Government "expressly reserve[d] the right to withdraw this motion" if Rothstein breached his plea agreement, falsely testified, or falsely implicated any person. Second, that same motion indicated that Rothstein's "cooperation is not yet complete," "[s]ome of the information provided . . . has not yet become useful to the government," and requested that the District Court "stay any ruling on the instant motion" until the Government informed the Court that Rothstein's cooperation was complete. These reservations by the Government would have put Rothstein on notice that the Government was *not* relinquishing all further discretion with respect to the future of this motion. Rothstein

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cooperation agreement, which gives the Government the "sole and unreviewable" discretion to evaluate the substantiality of Rothstein's assistance and to communicate that evaluation to the District Court. Rothstein's implicit argument that the Government was permitted to do the latter but not the former relies on technicality and evinces an untenable, "rigidly literal" interpretation of the cooperation agreement, one that this Court refuses to endorse. *See Rewis*, 969 F.2d at 988.

cannot credibly claim that he had no idea that withdrawal was a possibility.

III.

A district court's denial of an evidentiary hearing is reviewed for abuse of discretion. *United States v. Brown*, 441 F.3d 1330, 1349-50 (11th Cir. 2006). "An evidentiary hearing is not required where none of the critical facts are in dispute and the facts as alleged by the defendant if true would not justify the relief requested." *United States v. Smith*, 546 F.2d 1275, 1279-80 (5th Cir. 1977) (quoting *United States v. Poe*, 462 F.2d 195, 198 (5th Cir. 1972)).[5]

An evidentiary hearing to allow Rothstein to present evidence that he complied with the cooperation agreement, as he requests, is unwarranted. We are faced with the purely legal question of whether the Government had full discretion to withdraw its Rule 35 motion based on its own unreviewable evaluation of Rothstein's assistance to the investigation – and we concluded that the Government did have this discretion. No facts that Rothstein can allege regarding his *actual* level of cooperation would disturb the Government's unilateral conclusion that his help was insufficient to warrant a substantial-assistance motion. *See also Wade*, 504 U.S. at 185, 112 S. Ct. at 1844 ("[A]

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[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the creation of the Eleventh Circuit on September 30, 1981.

claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing.") Therefore, the District Court did not abuse its discretion in denying Rothstein's request for an evidentiary hearing.

IV.

For the foregoing reasons, the District Court's order is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60331-CR-COHN

UNITED STATES
OF AMERICA,

v.

SCOTT W. ROTHSTEIN,

Defendant. /

ORDER

(Filed Apr. 16, 2018)

THIS CAUSE is before the Court upon the Government's Motion to Withdraw its Motion for Reduction of Sentence [DE 938] (the "Motion"). The Court has considered the Motion, Defendant Scott Rothstein's Response [DE 948], the Government's Reply [DE 949], and Defendant's Sur-Reply [DE 952],[1] and is otherwise advised in the premises. As the Motion presents a question of law, an evidentiary hearing is unwarranted. Therefore, for the reasons stated herein, the Court will grant the Motion, permit the Government to withdraw its Motion for Reduction of Sentence,

[1] In light of the special security conditions of Defendant's confinement and the effect of same on his ability to confer with his counsel, the Court will grant Defendant's Motion for Leave to File Sur-Reply in Excess of 10 pages [DE 953] and deny the Government's Motion to Strike Defendant's Sur-Reply and Motion for Leave to File Sur-Reply in Excess of 10 Pages [DE 954] so that Defendant may fully present his position.

and deny Defendant's request for an evidentiary hearing.

I. BACKGROUND

On January 27, 2010, Defendant Scott Rothstein pled guilty to RICO conspiracy, conspiracy to commit money laundering, conspiracy to commit mail and wire fraud, and two counts of wire fraud. DE 67. Prior to entry of his guilty plea, Rothstein entered into a plea agreement with the Government. DE 69. That plea agreement incorporated by reference a Cooperation Agreement executed by the parties. DE 75. Pursuant to the Cooperation Agreement, Rothstein was to fully cooperate with the Government by, *inter alia*, "providing truthful and complete information and testimony." DE 75-1. The Cooperation Agreement specifically states that "[i]f in the sole and unreviewable judgment" of the Government, Rothstein's "cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the court's downward departure from *the advisory sentence* calculated under the Sentencing Guidelines," the Government may move the Court to reduce Rothstein's sentence based upon his cooperation. Id. (emphasis in original). Rothstein, however, expressly acknowledged and agreed in the Cooperation Agreement that the Government was not required to file any such motion, and that the Government's "assessment of the nature, value, truthfulness, completeness, and accuracy of [Rothstein's] cooperation shall be binding" with respect to the determination of whether to file any such

motion. Id. On June 9, 2010, this Court sentenced Rothstein to a fifty year term of imprisonment. DE 290.

On June 8, 2011—the eve of the one-year anniversary of Rothstein's sentencing—the Government filed a Motion for Reduction of Sentence and for Stay of Ruling pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure (the "Rule 35 Motion"). DE 767. In the Rule 35 Motion, the Government sought a reduction of Rothstein's sentence "based upon [Rothstein] having provided substantial assistance to the government in the investigation and/or prosecution of others," but because Rothstein's cooperation was still ongoing, the Government requested that the Court stay any ruling on the Rule 35 Motion until the completion of Rothstein's cooperation. Id. The Government explained that while Rule 35(b)(2)(B) allows a motion for reduction of sentence to be made more than one year after sentencing with regards to information provided by the defendant to the Government within one year of sentencing but which did not become useful to the Government until later, the Rule 35 Motion was "filed in an abundance of caution to preserve this Court's jurisdiction under Fed.R.Crim.P. 35(b)(1), and to permit the Court to consider all of [Rothstein's] cooperation in order to determine the appropriateness of a reduction of [Rothstein's] sentence." Id. ¶ 5. Critically, in the Rule 35 Motion, the Government stated that it "expressly reserves the right to withdraw this motion if, in the judgment of the United States, [Rothstein] should fail to comply with the terms of his plea agreement, fail to testify truthfully, or falsely implicate any person or

entity." Id. ¶ 7. Rothstein's counsel joined in the filing of the Rule 35 Motion. Id. ¶ 8.

On September 26, 2017, the Government filed the instant Motion seeking to withdraw the previously filed Rule 35 Motion because, "[i]n the judgment of the United States, [Rothstein] provided false material information to the government and violated the terms of his plea agreement." DE 938 at 2. The Government argues that its discretion as to whether or not to file the Rule 35 Motion also includes the discretion to withdraw the Rule 35 Motion, and that in the plea agreement and the Rule 35 Motion it expressly retained its absolute discretion to determine the truthfulness and completeness of Rothstein's cooperation and to decide whether to seek a reduction of his sentence on the basis of his cooperation. Rothstein denies that the Government's discretion to file the Rule 35 Motion includes the discretion to withdraw it. He argues that the Government cannot withdraw the Rule 35 Motion because the plea agreement does not expressly state that the Government may withdraw any such motion once it is filed. Rothstein also argues that the Government has failed to sufficiently allege facts demonstrating a breach of the plea agreement, and that he is entitled to an evidentiary hearing on the question of his alleged breach.

II. DISCUSSION

The issue before the Court is whether the Government may withdraw its previously filed Rule 35 Motion

when (a) the Government indisputably had sole discretion as to whether to file it in the first instance; and (b) the Rule 35 Motion—which Rothstein's counsel joined in filing—expressly reserved for the Government the right to withdraw it if, in the Government's sole judgment, Rothstein provided false information to the Government or violated the terms of his plea agreement. To state the issue is essentially to resolve it. The Government clearly may withdraw the Rule 35 Motion.

As the Government notes, several courts have held that the discretion to file a Rule 35 motion includes the discretion to later withdraw that motion. See, e.g., United States v. Hartwell, 448 F.3d 707, 718 (4th Cir. 2006); Shropshire v. United States, 278 Fed. Appx. 520, 527 (6th Cir. 2008). The Eleventh Circuit itself has refused to draw a distinction between the Government's decision not to file a substantial-assistance motion and its withdrawal of a previously filed motion. See United States v. Jackson, 635 Fed. Appx. 657, 660 (11th Cir. 2015). The defendant in Jackson, like Rothstein, executed a plea agreement in which the Government expressly retained its discretion to decide whether it would file a motion for downward departure pursuant to U.S.S.G. §5K1.1. The Government made the motion and then, upon learning that the defendant had committed additional criminal conduct, moved to withdraw the motion. Like Rothstein, the Jackson defendant argued that while the Government could have declined to make a motion in the first instance, nothing in the plea agreement permitted it to withdraw a motion

already made. The Eleventh Circuit rejected the defendant's argument, declaring that:

> Mr. Jackson's position . . . hinges on demonstrating that the language of the plea agreement draws (or at a minimum implies) a distinction between the government's refusal to file a motion recommending a reduction in sentence and its withdrawal of one. Mr. Jackson points to no language in the agreement creating such a distinction, fails to identify what practical purpose such a distinction would serve, and cites no legal authority for his position. Needless to say, we find his argument unpersuasive.
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> The conditional language of the plea agreement only obliges the government to *consider* whether Mr. Jackson's cooperation warranted recommending a downward departure in sentence. It imposes no limitation on how the government may choose to exercise that discretion and draws no distinction between filing a motion for downward departure and later withdrawing a motion so filed. Indeed, it is difficult to imagine what would form the basis for such a distinction. In both situations the government would have considered whether Mr. Jackson's cooperation warranted a reduced sentence and decided that—as a direct result of Mr. Jackson's subsequent criminal activity—it did not. The government would have fulfilled its obligations under the terms of the plea agreement either way.

Id. at 660 (citation omitted).

The Eleventh Circuit's reasoning in Jackson applies equally here. Nothing in Rothstein's plea agreement or the Cooperation Agreement draws or implies a distinction between the Government's refusal to file a Rule 35 motion and its withdrawal of one. Moreover, in the Rule 35 Motion itself, the Government expressly reserved the right to withdraw the motion if, in its judgment, Rothstein "should fail to comply with the terms of his plea agreement, fail to testify truthfully, or falsely implicate any person or entity." DE 767 ¶ 7. While Rothstein argues that he did not agree to that language, he cannot overcome the fact that his attorney expressly joined in the filing of the Rule 35 Motion. This adequately put Rothstein on notice of the potential consequences of his untruthfulness. See, e.g., Link v. Wabash R. Co., 370 U.S. 626, 634 (1962) (explaining that in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'") (quotation omitted). Accordingly, as Rothstein does not allege that the Government is acting with an unconstitutional motive,[2] the Government is clearly entitled to withdraw its Rule 35 Motion.

Rothstein's arguments to the contrary are unavailing. First, Rothstein claims that the Government is

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[2] See United States v. Nealy, 232 F.3d 825, 831 (11th Cir. 2000) (stating that the government's Rule 35(b) decision can be questioned "only to the extent that the government . . . exercise[d] that power, or fail[ed] to exercise that power, for an unconstitutional motive").

attempting to unilaterally declare a breach of the plea agreement by Rothstein in order to relieve itself of its own obligations under that agreement. He contends that this is improper, since the Government can only void the agreement if it proves a breach by a preponderance of the evidence. DE 948 at 3 (citing United States v. Titus, 547 F. App'x 464 (5th Cir. 2013)). But where Rothstein errs is in assuming that the Government is in fact attempting to relieve itself of its obligations. It is not. The Government is instead acting pursuant to discretionary authority which the Cooperation Agreement, incorporated into the plea agreement, expressly grants. Under the clear terms of the Cooperation Agreement, the Government retained sole, unfettered discretion to decide whether or not to make a Rule 35 motion. Declining to make the motion—or withdrawing a previously filed motion, which has the same effect—is thus a valid discretionary choice and cannot constitute a breach of the Agreement. Accordingly, the Government need not prove that Rothstein breached the plea agreement to justify its withdrawal of the Rule 35 Motion.

Rothstein relies primarily upon United States v. Padilla, 186 F.3d 136 (2d Cir. 1999), a case addressing a situation where the Government, after learning that the defendant had committed additional crimes during the pendency of his cooperation, attempted to withdraw a previously submitted motion for a downward departure pursuant to U.S.S.G. § 5K1.1. Id. at 138-39. The Second Circuit held that the defendant's plea agreement did not permit such a withdrawal. Id. at

140-41. The relevant language in the Padilla plea agreement directed that "if [the Government] determines that Mr. Padilla has provided substantial assistance. . . . [it] ***will*** file a motion pursuant to Section 5K1.1." Id. (emphasis added). The Agreement was silent on the issue of whether the Government could withdraw a motion that it had already filed. Id. at 141. The Second Circuit determined that the agreement should be construed strictly against the Government, and that, given the mandatory nature of the Government's obligation to file a 5K1.1 motion upon a finding that the defendant had sufficiently cooperated, it could not withdraw the motion it had offered after initially making such a finding. Id.

Padilla is factually inapposite, since the Cooperation Agreement made the decision to file a motion for reduced sentence explicitly discretionary—rather than mandatory—regardless of the sufficiency of Rothstein's cooperation. This distinction also disposes of another of Rothstein's contentions: that once the Government asserted in the Rule 35 Motion that Rothstein had (to date) rendered substantial assistance, the Government became permanently locked into that position. DE 948 at 6-7. That argument does not help Rothstein, since, even if the Government were to believe (presently and at all times past) that Rothstein has substantially cooperated, it still has no obligation to make a motion on his behalf.

The other case that Rothstein primarily relies upon, In re Arnett, 804 F.2d 1200 (11th Cir. 1986), stands for the unremarkable propositions that a plea

agreement must involve a defendant's "voluntary, knowing, intelligent" waiver of his constitutional rights,[3] and that the Government must adhere strictly to the terms of the plea agreement. Id. at 1203-04. Both conditions are met here. Rothstein's waiver of rights was knowing, since the Government's discretion to decide whether or not to make a motion on his behalf was explicitly provided for in the clear, unambiguous language of the Cooperation Agreement which he executed. And, by withdrawing the Rule 35 Motion, the Government merely exercised that discretion in full compliance with the terms of the Cooperation Agreement.

III. CONCLUSION

For the foregoing reasons, it is **ORDERED and ADJUDGED** as follows:

1. The Government's Motion to Withdraw its Motion for Reduction of Sentence [DE 938] is **GRANTED**. The Government's Motion for Reduction of Sentence and for Stay of Ruling [DE 767] is hereby withdrawn.

2. Defendant's Motion for Leave to File Sur-Reply in Excess of 10 pages [DE 953] is **GRANTED**.

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[3] Rothstein also cites United States v. Hunter, 835 F.3d 1320, 1324 (11th Cir. 2016), for the related proposition that, since a plea agreement involves the waiver of substantial constitutional rights, it must adequately warn the defendant of the consequences of his plea. While a clearly correct statement of law, Hunter does not advance Rothstein's position.

3. The Government's Motion to Strike Defendant's Sur-Reply and Motion for Leave to File Sur-Reply in Excess of 10 Pages [DE 954] is **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 16th day of April, 2018.

/s/ James I. Cohn
JAMES I. COHN
United States District Judge

Copies provided to counsel of record via CM/ECF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-60331-CR-COHN

UNITED STATES
OF AMERICA,

Plaintiff,

v.

SCOTT W. ROTHSTEIN,

Defendant. /

PLEA AGREEMENT

(Filed Jan. 27, 2010)

The United States of America and SCOTT W. ROTHSTEIN (hereinafter referred to as "the defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to the five count Information, which charges the defendant in Count 1 with a Racketeering Conspiracy, in violation of Title 18, United States Code, Section 1962(d); in Count 2 with Conspiracy to Commit Money Laundering, in violation of Title 18, United States Code, Section 1956(h); in Count 3 with Conspiracy to Commit Mail Fraud and Wire Fraud, in violation of Title 18, United States Code, Section 1349; and in Counts 4 and 5 with Wire Fraud, in violation of Title 18, United States Code, Section 1343.

2. The defendant is aware that the sentence will be imposed by the Court after considering the Federal

Sentencing Guidelines and Policy Statements (hereinafter "the Sentencing Guidelines") in an advisory capacity. The defendant acknowledges and understands that the Court will compute an advisory sentence under the Sentencing Guidelines and that the applicable advisory guidelines will be determined by the Court relying in part on the results of a Pre-Sentence Investigation by the Court's probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the Court may depart from the applicable advisory guideline range and impose a sentence that is either more severe or less severe than the advisory guidelines range. The Court is permitted to tailor the ultimate sentence in light of other statutory concerns. Knowing these facts, the defendant understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

3. The defendant also understands and acknowledges that the Court may impose a statutory maximum term of imprisonment of up to twenty years for each of the offenses set forth in Counts 1 through 5, for a total of up to one hundred years, followed by a term of up to three years of supervised release for each offense. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to $250,000.00 with respect to the offenses set forth in

Counts 1, 3, 4, and 5, and may impose a fine with respect to the offense set forth in Count 2 of the greater of $500,000.00 or twice the value of the property involved in the money laundering transactions.

4. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 3 of this agreement, a special assessment in the amount of $100.00 with respect to each of the offenses set forth in counts 1 through 5, for a total of $500.00, will be imposed on the defendant, which will be paid by the defendant at the time of entry of this plea.

5. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraphs 3 and 4 of this agreement, that restitution may be imposed as part of that sentence. The defendant agrees that for purposes of triggering the mandatory restitution provisions of Title 18, United States Code, Section 3663A, the offenses to which the defendant is pleading guilty under this agreement in this case are "offenses against property" and were "committed by fraud and deceit," as those terms are understood within Title 18, United States Code, Section 3663A(c)(1)(A)(ii). The defendant accordingly understands and acknowledges that as a result of his plea of guilty pursuant to the terms of the plea agreement in this case the Court may order that he pay restitution pursuant to the provisions of Title 18, United States Code, Sections 3663A and 3664. Promptly following the entry of his guilty plea, the defendant agrees to take all necessary steps to make the following

property available, as partial satisfaction of any restitution order entered in this case: (a) all property subject to the post-Information Protective Order in this matter; and (b) all property identified in the Bill of Particulars for Forfeiture.

6. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraphs 3, 4 and 5 of this agreement, forfeiture may be imposed as part of that sentence. The defendant agrees to the forfeiture of all of his right, title and interest to all assets listed in the Information and listed in the Bill of Particulars, and/or their substitutes (hereinafter "the assets"), whether controlled individually or through defendant's wholly owned or partially owned corporations or third-parties, which are subject to forfeiture pursuant to Title 18, United States Code, Sections 1963, 982(a)(1) and/or 981(a)(1)(C). The defendant agrees to assist the United States in achieving forfeiture of the assets and agrees to assist the United States with forfeiture of same, such assistance to include truthful testimony, especially to the extent that the assets are in the names of corporations or other entities or individuals. The defendant knowingly and voluntarily waives any right to a jury trial or any other adversarial proceeding regarding the assets and waives any notification about forfeiture proceedings, whether administrative or judicial. The defendant further waives any statute of limitations with respect to the commencement of such forfeiture proceedings, whether administrative or judicial. The defendant also waives any defenses to the forfeiture, including any claim of

excessive fine or penalty under the Eighth Amendment. The defendant also agrees to waive any appeal of the forfeiture. The defendant further acknowledges that the property forfeited cannot, either in whole or in part, be used to satisfy any obligation the defendant may have for any federal, state or local taxes, interest and/or other penalties which may now exist or which may come into existence.

7. The Office of the United States Attorney for the Southern District of Florida (hereinafter "this Office") reserves the right to inform the Court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

8. The United States agrees that it will recommend at sentencing that the Court reduce by three levels the advisory sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon the defendant's recognition and affirmative and timely acceptance of personal responsibility. However, the United States will not be required to make this sentencing recommendation if the defendant: (1) fails or refuses to make full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant

offense conduct; (2) is found to have misrepresented facts to the government prior to entering this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense or making false statements or misrepresentations to any governmental entity or official.

9. The defendant is aware that the sentence has not yet been determined by the Court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office or the Court. The defendant understands further that any recommendation that the government makes to the Court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 2 above, that the defendant may <u>not</u> withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by the defendant, the government, or a recommendation made jointly by both the defendant and the government.

10. In the event that the applicable offense level is deemed by the Court to be 43 or above (life), the government agrees to not oppose a variance; however, the

Government reserves the right to oppose any sentence recommended by the defendant.

11. This agreement resolves the defendant's federal criminal liability in the Southern District of Florida growing out of any criminal conduct by the defendant known to the United States Attorney's Office for the Southern District of Florida as of the date of this plea agreement. Said provision does not prohibit potential prosecution for any acts of violence presently unknown to the United States.

12. The United States agrees that it will not oppose defendant's request that the Court recommend to the Bureau of Prisons that the defendant be designated to the lowest security level facility deemed appropriate by the Bureau of Prisons.

13. The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, and in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or a variance from the guideline range that the court establishes at sentencing. The defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18,

United States Code, Section 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that he has discussed the appeal waiver set forth in this agreement with his attorney. The defendant further agrees, together with the United States, to request that the district court enter a specific finding that the defendant's waiver of his right to appeal the sentence to be imposed in this case was knowing and voluntary.

14. The defendant further waives any right to file any motion or make any claim, whether under 28 U.S.C. §§2255, 2254, 2241, or any other provision of law, to collaterally attack his conviction, his sentence, or the manner in which sentence was imposed, unless the sentence exceeds the maximum permitted by statute.

15. The defendant confirms that he is guilty of the offenses to which he is pleading guilty; that his decision to plead guilty is the decision that he has made; and that nobody has forced, threatened, or coerced him into pleading guilty. The defendant affirms that he has discussed the matter of pleading guilty in the above-referenced cases thoroughly with his attorney. The defendant further affirms that his discussions with his attorney have included discussion of possible defenses that he may raise if the case were to go to trial, as well as possible issues and arguments that he may raise at sentencing. The defendant additionally affirms that he is satisfied with the representation provided by his

attorney. The defendant accordingly affirms that he is entering into this agreement knowingly, voluntarily, and intelligently, and with the benefit of full, complete, and effective assistance by his attorney. The defendant accordingly agrees that by entering into this agreement he waives any right to file any motion or make any claim, whether under 28 U.S.C.§§2255, 2254, 2241, or any other provision of law, that contests the effectiveness of counsel's representation up to the time of the entry of his guilty plea.

16. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings, unless contained in a letter from the United States Attorney's Office executed by all parties and counsel prior to the change of plea.

JEFFREY H. SLOMAN
UNITED STATES ATTORNEY

Date: 1/25/10 /s/ Paul F. Schwartz
PAUL F. SCHWARTZ
ASSISTANT UNITED
STATES ATTORNEY

Date: 1/25/10 /s/ Jeffrey N. Kaplan
JEFFREY N. KAPLAN
ASSISTANT UNITED
STATES ATTORNEY

Date: 25 Jan 10 /s/ Lawrence D. LaVecchio
LAWRENCE D. LaVECCHIO
ASSISTANT UNITED
STATES ATTORNEY

Date: 1/25/10 /s/ Marc Nurik
MARC NURIK
ATTORNEY FOR DEFENDANT

Date: 1/25/10 /s/ Scott W. Rothstein
SCOTT W. ROTHSTEIN
DEFENDANT

STATEMENT OF FACTS

The United States of America and SCOTT W. ROTHSTEIN enter into the following stipulated statement of facts in support of the defendant's plea of guilty:

Had this case proceeded to trial, the government would have presented evidence which would have established beyond a reasonable doubt that from in or about 2005, through in or about November 2009, Defendant ROTHSTEIN conspired with persons known and unknown to the United States Attorney, to use the law firm, Rothstein, Rosenfeldt and Adler P.A. (hereinafter referred to as "RRA") as a criminal Enterprise in order to conduct a pattern of racketeering activity. Such pattern of racketeering activity included criminal acts which violated mail fraud, wire fraud, money laundering and conspiracy statutes.

The government would have presented evidence at trial which would have involved witness testimony and documentary and electronic evidence seized pursuant to a search warrant. The government's trial evidence would have established the following:

Defendant ROTHSTEIN was an attorney admitted to practice law in Florida. He was the Chief Executive Officer and Chairman of RRA. In or about 2005, Defendant ROTHSTEIN and other co-conspirators initiated a scheme to generate criminal proceeds through fraudulent acts. Defendant ROTHSTEIN induced investors through the use of false statements to loan money to himself and fictitious borrowers in return for promissory notes. He solicited bridge loans on behalf of purported clients of RRA, that is, he would falsely inform individuals that clients of RRA desired to borrow funds for undisclosed business deals and in return would agree to pay high rates of interest. Defendant ROTHSTEIN was aware that no such clients or requests for business financing actually existed.

Defendant ROTHSTEIN and co-conspirators also solicited investors to purchase purported confidential settlement agreements. Such settlement agreements were falsely presented as having been reached between putative defendants based upon claims of sexual harassment and/or whistle-blower actions. The investors were falsely informed that such settlement agreements were pre-litigation and therefore there was no pending litigation or court oversight. Defendant ROTHSTEIN and other co-conspirators relied upon the purported success of RRA, the existence of actual RRA

civil matters and his standing in the community to lure potential investors in order to convince them to make such investments. The investors were falsely informed that the confidential settlement agreements were available for purchase. The purported settlements were allegedly available in amounts ranging from hundreds of thousands of dollars to millions of dollars and could be purchased at a discount and repaid to the investors at face value over time. For instance, in or about late 2009, a potential investor was solicited by Defendant ROTHSTEIN and/or co-conspirators to purchase a purported settlement in the amount of $450,000. The settlement was alleged to be paid to the purported plaintiff in three installments of $150,000 each, over the course of three months. The payment schedule was alleged to insure the confidentiality of the settlement. The purported plaintiff allegedly had agreed to accept an immediate payment of $375,000 in satisfaction of the settlement agreement. In order to facilitate the scheme, the investor received a fraudulent settlement agreement which set forth the terms of the civil settlement, but the names of the purported plaintiff and defendant were excised due to the alleged confidentiality of the settlement.

The government would further establish that in order to facilitate and perpetrate the scheme, Defendant ROTHSTEIN and co-conspirators created false and fraudulent settlement agreements, bank statements, assignments of settlement agreements, sale and transfer agreements and personal guarantees, among other documents.

Defendant ROTHSTEIN and other co-conspirators falsely informed investors that the purported confidential settlements were either negotiated on behalf of clients of RRA or had been referred by other law firms. The investors were falsely informed that the purported settlements were based upon sexual harassment and/or whistle-blower (qui-tam) actions against corporate defendants.

Defendant ROTHSTEIN and other co-conspirators established and maintained trust accounts at several financial institutions in order to receive the investor funds and to give the appearance of legitimacy and security. False and fictitious trust account bank balance statements were created along with purported "lock letters." Such letters allegedly reflected that the funds in the trust accounts would be disbursed only to specific investors. Instead funds were disbursed among and between the various trust accounts and elsewhere by interstate wire transfers and other means in order to facilitate, promote and conceal the fraud, to launder the proceeds derived therefrom, and to enrich ROTHSTEIN and his co-conspirators. ROTHSTEIN and his co-conspirators created fraudulent on-line banking documents to further mislead investors and to facilitate the fraud.

Defendant ROTHSTEIN and co-conspirators also initiated and conducted a separate scheme to defraud clients of RRA in order to perpetuate the "Ponzi" scheme. Such clients had retained RRA to institute and file a civil lawsuit. Unknown to the clients, RRA settled the lawsuit and had obligated the clients to pay $500,000

to the defendant. In order to perpetrate the fraud and deceive the clients, defendant ROTHSTEIN created a false and fraudulent court order purportedly signed by a Federal District Court Judge which falsely alleged that the clients of RRA had prevailed in the lawsuit and were owed a judgement of approximately $23 million. The fraudulent court order also falsely stated that the defendant had transferred funds to the Cayman Islands for the purpose of secreting the assets.

Defendant ROTHSTEIN and other co-conspirators falsely advised the clients on several occasions that in order to recover the defendant's funds, they had to post bonds to be held in the RRA trust account. Defendant ROTHSTEIN and other co-conspirators fraudulently caused the clients to wire transfer a total of approximately $57 million over several years to a trust account controlled by defendant ROTHSTEIN, purportedly to satisfy the bonds. Defendant ROTHSTEIN and other co-conspirators were questioned by the clients as to the progress of the alleged lawsuit. In order to delay the return of funds to the clients, defendant ROTHSTEIN fraudulently created a false Federal court order purportedly issued by a United States Magistrate Judge ordering RRA to return the transmitted funds by a later date.

Defendant ROTHSTEIN and other co-conspirators utilized funds obtained through the "Ponzi" scheme to supplement and support the operation and activities of RRA, to expand RRA by the hiring of additional attorneys and support staff, to fund salaries and bonuses, and to acquire larger and more elaborate office space

and equipment in order to promote the ongoing scheme and to enrich the personal wealth of persons employed by and associated with RRA.

Defendant ROTHSTEIN and other co-conspirators engaged in the below described conduct in order to facilitate the activities of the Enterprise and to conceal and promote the scheme to defraud investors.

Defendant ROTHSTEIN and other co-conspirators utilized funds illegally obtained through the "Ponzi" scheme to make political contributions to local, state and federal political candidates, in a manner designed to conceal the true source of such funds and to circumvent state and federal laws governing the limitations and contribution of such funds.

Defendant ROTHSTEIN and other co-conspirators distributed lavish gifts, including exotic cars, jewelry, boats, loans, cash and bonuses, to individuals and to members of RRA in order to engender goodwill and loyalty and to create the appearance of a successful law firm.

Defendant ROTHSTEIN and other co-conspirators made large charitable contributions to public and private charitable institutions, including hospitals and other legitimate charitable and nonprofit organizations, using funds derived from the "Ponzi" scheme. "Ponzi" scheme funds were also used to provide gratuities to high-ranking members of police agencies in order to curry favor with such police personnel and to deflect law enforcement scrutiny of RRA.

Defendant ROTHSTEIN and other co-conspirators utilized funds obtained through the "Ponzi" scheme in order to purchase controlling interests in restaurants located in the Southern District of Florida. Such restaurants were used in part as a mechanism to give gratuities to individuals, including politicians, business associates and attorneys, in order to foster goodwill and loyalty, as locations to solicit potential investors and as secure locations for conspiratorial meetings.

Defendant ROTHSTEIN and other co-conspirators associated with well known politicians, in public forums and elsewhere, in order to gain greater notoriety and to create the appearance of wealth and legitimacy. Such acts were calculated in part to enhance defendant ROTHSTEIN and other co-conspirators' ability to solicit potential investors in the "Ponzi" scheme.

Defendant ROTHSTEIN and other co-conspirators used funds derived from the "Ponzi" scheme to maintain the appearance of affluence and wealth, by purchasing expensive real and personal property, in order to convince potential investors of the legitimacy of RRA and of the purported investment opportunities. Defendant ROTHSTEIN purchased expensive real property, personal property, business interests, vessels, vehicles and other indicia of success and wealth.

The government's evidence would establish that Defendant ROTHSTEIN and co-conspirators, through the use of RRA as the criminal Enterprise, knowingly and intentionally engaged in the above-described pattern of racketeering activity in order to generate

proceeds for their enrichment through various criminal activities, including mail fraud, wire fraud and money laundering. The government's evidence would establish that the activities of the Enterprise affected interstate commerce through the transmission of funds among and between financial institutions and across state boundaries, among other means.

The Enterprise maintained offices in Broward County, Florida, and elsewhere and the pattern of racketeering activity emanated from the Southern District of Florida. Investors were solicited through wire and mail transmissions through the United States and elsewhere. In order to further the fraud scheme, Defendant ROTHSTEIN and other co-conspirators caused to be transmitted wire communications, in interstate and foreign commerce, including an interstate wire transfer sent from TD Bank to Gibraltar Bank on or about December 2, 2008 and an interstate wire transfer sent to TD Bank from JP Morgan Chase on or about October 16, 2009. The proceeds derived from the "Ponzi" scheme were laundered through the accounts maintained at several financial institutions in order to promote, carry on and conceal the criminal activities of RRA.

Had the forfeiture portion of the case proceeded to trial, the government would have established, at least by a preponderance of the evidence, the standard of proof required for sentencing, that the properties listed for forfeiture in the forfeiture allegations of the Information and in the Bill of Particulars for Forfeiture, were properly sought for forfeiture because the

defendant acquired or maintained an interest therein or were derived from proceeds obtained directly and indirectly through the commission of the above-described racketeering activity. The government would have further established that the properties were involved in and/or were traceable to the money laundering activity described above, and that such properties were also the proceeds of, or were derived from, the mail and wire fraud activity described above.

The undersigned hereby stipulate and agree that the aforesaid facts are true and correct and that they encompass all of the necessary elements to establish the guilt of the defendant to the charges of Conspiracy to Violate the RICO Act, in violation of Title 18, United States Code, Section 1962(d); Conspiracy to Commit Money Laundering, in violation of Title 18, United States Code, Section 1956(h); Conspiracy to Commit Mail Fraud and Wire Fraud, in violation of Title 18, United States Code, Section 1349; and Wire Fraud, in violation of Title 18, United States Code, Section 1343.

JEFFREY H. SLOMAN
UNITED STATES ATTORNEY

Date: 1/25/10 /s/ Paul F. Schwartz
PAUL F. SCHWARTZ
ASSISTANT UNITED
STATES ATTORNEY

Date: 1/25/10 /s/ Jeffrey N. Kaplan
JEFFREY N. KAPLAN
ASSISTANT UNITED
STATES ATTORNEY

Date: 25 Jan 10 /s/ Lawrence D. LaVecchio
LAWRENCE D. LaVECCHIO
ASSISTANT UNITED
STATES ATTORNEY

Date: 1/25/10 /s/ Marc Nurik
MARC NURIK
ATTORNEY FOR DEFENDANT

Date: 1/25/10 /s/ Scott W. Rothstein
SCOTT W. ROTHSTEIN
DEFENDANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. . 09-60331-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SCOTT W. ROTHSTEIN,

Defendant.

_____/

MOTION FOR REDUCTION OF SENTENCE AND FOR STAY OF RULING

(Filed Jun. 8, 2011)

COMES NOW the United States of America, by and through its undersigned Assistant United States Attorney and, pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, moves the Court for a reduction of the sentence of defendant Scott W. Rothstein, based upon the defendant having provided substantial assistance to the government in the investigation and/or prosecution of others, and further moves the Court to stay any ruling on this motion until the defendant's cooperation is complete. In support the government states the following:

1. On January 27, 2010, defendant Scott W. Rothstein pled guilty to charges of RICO Conspiracy, in violation of 18 U.S.C. §1962(d); Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. §1956(h);

Conspiracy to Commit Mail and Wire Fraud, in violation of 18 U.S.C. §1349; and two counts of Wire Fraud, in violation of 18 U.S.C. §1343. The defendant was sentenced to 50 years' imprisonment on June 9, 2010.

2. The instant motion is filed timely within one year of the defendant's sentencing.

3. Prior to the defendant's guilty plea, the defendant began cooperating with the United States in the investigation of others. The defendant has continued to cooperate with federal law enforcement authorities in its criminal investigation. However, that cooperation is not yet complete and will not be complete within one year of the defendant's initial sentencing.

4. Some of the information provided by the defendant to the government within one year of the sentencing has not yet become useful to the government as the investigation is ongoing and has not yet reached fruition.

5. While Rule 35(b)(2), Fed.R.Crim.P., allows a Rule 35 motion to be made more than one year after sentencing in such a case, the instant motion is filed in an abundance of caution to preserve this Court's jurisdiction under Fed.R.Crim.P. 35(b)(1), and to permit the Court to consider all of the defendant's cooperation in order to determine the appropriateness of a reduction of the defendant's sentence.

6. Upon completion of the defendant's cooperation, the government will file a motion for a hearing at

which time the government will advise the Court of the nature, extent, and value of the defendant's cooperation. It is requested, however, that the Court stay any ruling on the instant motion until the government files the motion for such a hearing.

7. The United States expressly reserves the right to withdraw this motion if, in the judgment of the United States, the defendant should fail to comply with the terms of his plea agreement, fail to testify truthfully, or falsely implicate any person or entity.

8. Marc S. Nurik, attorney for the defendant, joins in the filing of this motion.

WHEREFORE, for the reasons stated herein, the government requests this Court to grant the motion for reduction of sentence and to stay any ruling as to sentence reduction until the government moves for a hearing once the defendant's cooperation is complete or such earlier time, within the discretion of the government.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

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[Certificate Of Service Omitted]