UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

REPORT & RECOMMENDATION

- v -

CR 00-1078 (ERK)(VVP)

JOSE PASTRANA,

Defendant.
----------x

POHORELSKY, Magistrate Judge:

The defendant Jose Pastrana has moved to compel the government to file a motion pursuant to § 5K1.1 of the United States Sentencing Guidelines, commonly referred to as a § 5K1.1 letter, or, in the alternative, to withdraw his guilty plea. Judge Korman has referred Pastrana's motion to me for a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1). The motion arises from the government's decision not to file a § 5K1.1 letter on Pastrana's behalf because he failed to fully disclose his knowledge of past crimes before testifying as a government witness in a criminal trial of his former associates. Although Pastrana's assistance, including his testimony, was crucial to the government's success in securing the convictions of his former gang members, his lack of candor in breach of his obligations under his cooperation agreement with the government was deemed to be too serious to warrant a § 5K1.1 letter, and the government accordingly declined to do so. The consequence of the government's decision, if upheld, is that the only sentence the court would be permitted to impose for the crimes to which Pastrana pleaded guilty is life imprisonment. For the reasons discussed below, I respectfully recommend that Pastrana's motion be granted.

FACTS

Pastrana's troubled relationship with the government began with his indictment in October of 2000, along with six co-defendants, on charges of racketeering, racketeering conspiracy, heroin distribution, and multiple violent robberies.[1] *United States v. Wagner et. al.*,

[1]This opinion draws on the Defendant's Memorandum of Law in Support of Motion to Enforce Cooperation Agreement Or to Withdraw Guilty Plea, And For a Hearing ("Def. Mem."); The Government's Opposition to Defendant's Motion to Compel the Government to Submit a § 5K1.1 Motion or In the Alternative to Withdraw His Guilty Plea ("Gov't Mem."); and the Reply Memorandum of Law in Support of Jose Pastrana's Motion to Enforce Cooperation Agreement or to Withdraw Guilty Plea, and For A Hearing ("Def. Reply Mem.").

CR 00-1078 (ERK) (Dkt. # 1). Pastrana and his co-defendants were associated with the Woodbine Crew, a violent Brooklyn gang. (Ltr. from Stacey Richman to AUSA Colleen Kavanagh (Sept. 29, 2005), Ex. 5 to Def. Mem. ("Sept. 29, 2005 Ltr."), 2.) While Pastrana remained at large after the indictment was handed down, several of his co-defendants were tried and found guilty on charges in the indictment, and some were sentenced to life imprisonment. (Gov't Mem. 3; *see also, e.g.*, CR 00-1078 Summary Entries Dkt. ## 234, 261, 295, 307.) Following his apprehension in 2002, Pastrana pleaded guilty to a charge of conspiracy to distribute heroin in violation of 18 U.S.C. § 846, an offense that carries a minimum sentence of ten years, and a maximum sentence of life imprisonment. (Plea Agreement, *United States v. Wagner et. al.*, CR 00-1078 (ERK), Ex. 2 to Def. Mem.) Before entering the guilty plea, however, Pastrana met with the government and subsequently began to cooperate with the government by assisting in the investigation and prosecution of other members of the Woodbine Crew. (Gov't Mem. 3.)

On July 15, 2003, pursuant to a cooperation agreement (the "Agreement"), Pastrana pleaded guilty to a one count superseding information charging him with the murder of two individuals for the purpose of maintaining or increasing his position in a racketeering enterprise, in violation of 18 U.S.C. § 1959(a)(1). (Information, *United States v. Pastrana*, CR 03-814, Ex. 3 to Def. Mem., ¶ 2.) Although this crime carries a mandatory minimum sentence of life imprisonment or death,[2] the Agreement provides that if the government determines that Pastrana has provided substantial assistance and full cooperation, the government would move the court to depart downward from a life sentence by filing a § 5K1.1 letter. (Superseding Cooperation Agreement, *United States v. Pastrana*, CR 00-1078, CR 03-315, Ex. 4 to Def. Mem., ¶¶ 7, 9.) Thus, the bargain struck between Pastrana and the government was full cooperation by Pastrana in exchange for a chance at less than a term of life in prison. Of course, even if the government does file a § 5K1.1 letter, it remains within the court's discretion to sentence Pastrana to the maximum permitted by law. Under the Agreement, the determination of whether Pastrana has

[2]Pastrana observes that the statutory language in 18 U.S.C. § 1959(a)(1), which reads that the sentence for murder is "death or life imprisonment, or a fine under this title, or both," suggests that a "fine in lieu of life imprisonment may be authorized." Def. Mem. 2 n.1. There is at least some Second Circuit authority for such an interpretation. *See United States v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004).

cooperated fully, provided substantial assistance and complied with the terms of agreement, and therefore whether he would receive a § 5K1.1 letter, resides exclusively with the government. (*Id.* ¶ 7.) Among the other provisions of the Agreement, and one of particular significance here, is a waiver of counsel clause, which provides that Pastrana must specifically request counsel's presence at meetings and debriefings with the government or otherwise waives that right. (*Id.* ¶ 6.)

About ten months after signing the Agreement, Pastrana took the stand on May 18 and 19, 2004 to testify as a government witness at the trial of Roderick Soto and Luis Angel Ramos, two former Woodbine Crew associates. *United States v. Soto, et al.*, CR 03-315 (ERK). Although the government ultimately secured the convictions of Ramos and Soto largely because of Pastrana's assistance and testimony, information elicited from Pastrana on cross-examination and in mid-trial debriefings caused the government to become dissatisfied with Pastrana's cooperation. On cross-examination, defense counsel questioned Pastrana about two murders – a murder that occurred at a bodega in 1994, and the murder of a person named "Jeff." (Tr. of Crim. Cause for Jury Trial, *United States v. Soto et. al.*, CR 03-315 (May 18 & 19, 2004) (hereinafter "Trial Tr.") 1341-47.) The bodega murder allegedly occurred in May 1994 in a bodega on the corner of Fulton Street and New Jersey Avenue in the East New York area of Brooklyn. (Def. Mem. 4.) Pastrana testified that he knew the location but did not know about the bodega there. (Trial Tr. 1343-44.) As for the other murder, Pastrana was asked whether he had driven a person named "Jeff" to a location on Linden Street at which Jeff was later murdered. (*Id.* 1344.) Pastrana denied playing a role in the murder, but admitted that he dropped Jeff off at the location prior to the murder. (*Id.* 1344-45.)[3]

Five days after his cross-examination ended, with trial proceedings still under way, the government brought Pastrana to its offices from the Metropolitan Detention Center ("MDC") and questioned him about the two murders. (Def. Mem. 4.) Pastrana's defense counsel was not notified about the meeting, and consequently was not present. (*Id.*) The only contemporaneous account of what took place at the meeting is memorialized in a brief letter dated May 24, 2004 from government to counsel for the two defendants then on trial. (Ltr. from AUSAs Colleen

[3]Apparently, Pastrana's demeanor at one point during cross-examination caused defense counsel to ask him whether he found his questions funny. (Trial Tr. 1341.)

Kavanagh and Bryan J. Rose to Robert Moore, Gary S. Villaneuva, and Joel Cohen (May 24, 2004), Attach. C to Gov't Mem. 1.) In terse language, the government informed defense counsel that they had met with Pastrana that day; that Pastrana had "previously neglected" to tell them about the bodega murder; that the government had never discussed the "Jeff" murder with Pastrana before; and that it was the government's position that Pastrana had provided truthful testimony. (*Id.*) The government indicated it would not be recalling Pastrana to the stand and noted that defense counsel was free to call Pastrana in the defense's direct case. (*Id.* 1-2.)

Defense counsel and the government then exchanged letters over the issue of whether and how Pastrana should be re-called to the stand. (*See* Ltr. from Joel S. Cohen and Robert Moore to AUSAs Colleen Kavanagh and Bryan Rose (May 25, 2004), Attach. D to Gov't Mem.; Ltr. from AUSAs Colleen Kavanagh and Bryan J. Rose to Joel S. Cohen (May 26, 2004), Attach. E to Gov't Mem.) Defense counsel, suggesting that Pastrana's testimony may not have been truthful, rejected the government's proposal that Pastrana be called as a defense witness and requested that, before the government rested its case, Pastrana be returned to the stand for further cross-examination. (May 25, 2004 Ltr., *supra*.) The government maintained that Pastrana's testimony had been truthful and that the government was not obliged to recall him for further testimony. (May 26, 2004 Ltr., *supra.*) The parties brought the dispute before Judge Korman, who indicated that if the government did not return Pastrana to the stand, then the court would call him. (Excerpt of Tr. of Crim. Cause for Jury Trial, *United States v. Soto, et al.*, (May 27, 2004) (pp. 2330-37), Attach. F to Gov't Mem.)[4]

Faced with this choice, the government decided to recall Pastrana. On June 1, five days after the conference before Judge Korman, Pastrana returned to the stand for further examination. (Trial Tr. 2692.) The government's direct examination centered on what Pastrana knew about the two murders, and why he had not previously disclosed them to the government. (*Id.* 2692-2710.) The defense questioned Pastrana's motives for returning to the stand, his truthfulness and the reason he withheld information about the murders from the government, insinuating that Pastrana may have been culpable. (*Id.* 2714:11-2742:8.) Although it is not

[4]Judge Korman also addressed a related issue – whether the government was obligated to produce notes of its meeting with Pastrana to the defense. Judge Korman ultimately ordered the government to turn over the notes.

known how Pastrana's resumed testimony affected the jury's deliberations, they found both Soto and Ramos guilty on charges that carried mandatory life sentences. Both were found guilty of conspiracy to commit racketeering, conspiracy to commit robbery, and the discharge of a firearm; Soto was separately found guilty of murder in aid of racketeering. (Judgment in a Criminal Case CR 03-315 (ERK) Dkt. ## 140, 146.)

Over a year after Pastrana was recalled to the stand, the government sent Pastrana's defense counsel a letter informing her that they were considering holding Pastrana in breach of his cooperation agreement and, therefore, withholding the § 5K1.1 letter. (Ltr. from AUSA Colleen Kavanagh to Stacey Richman (June 15, 2006) ("June 15, 2006 Ltr."), Ex. 1 to Def. Mem. 1.) Pastrana's lawyer affirms that this was the first time she was formally contacted by the government about the mid-trial meeting, but that she learned that Pastrana had testified at trial from another source, and that an AUSA called her a few months after the trial to let her know informally that the government was considering breaching Pastrana. (Aff. of Stacey Richman in Support of Def. Motion (attached to Def. Mem.) ¶ 12.) The stated intent of the letter was to make defense counsel "aware of the problems with Pastrana's cooperation." (June 15, 2006 Ltr. 1.) While the government indicated concern about other aspects of Pastrana's truthfulness, its inclination to deny the § 5K1.1 letter was based solely on the mid-trial revelation that Pastrana had withheld information about two murders. (*Id.* 3.)

The government noted that its purpose in holding that meeting had been, after hearing Pastrana's testimony under cross-examination, "to determine whether [Pastrana] committed perjury at trial or whether he intentionally withheld information from the government." (*Id.* 2-3). The government's letter described how Pastrana detailed his connections to the "bodega" and "Jeff" murders, disclaiming any responsibility for both but admitting he had failed to apprise the government of them as required. (*Id.*) With respect to the bodega murder, Pastrana explained that he had not wanted "to further implicate trial defendant Ramos, who had been one of his closest friends." (*Id.* 4.) As for the Jeff murder, "Pastrana said that he did not remember the murder at first, and that once he remembered it, he did not tell the government about it because he was afraid that agents and prosecutors would not believe that his initial failure to disclose his knowledge of that murder was inadvertent." (*Id.* 4-5.) Apparently, "before the meeting ended, Pastrana was informed that he violated his cooperation agreement by

withholding information about the murders and that the ultimate decision about whether to breach him [sic] would be made at a later date." (*Id.* 3.)

The government's rendition of the events in their letter to Pastrana's counsel is consistent with the trial record, which discloses that when Pastrana was recalled to the stand he testified to the reasons he withheld information as described above. (Trial Tr. 2700, 2708.) He also testified that he understood that by withholding this information from the government he had breached the Agreement, and there was a "possibility" he wouldn't receive a § 5K1.1 letter. (*Id.* 2709.) He acknowledged that no promises had been made about whether the Agreement would be "torn up." (*Id.* 2709-10.) Pastrana expressed, however, that "after all this" he was "still hoping to get [the] 5K letter." (*Id.* 2718.)

Pastrana's counsel attempted to persuade the government to grant Pastrana the § 5K1.1 letter despite the breach. (Sept. 29, 2005 Ltr. 2.) By letter, defense counsel expressed that she was "extremely surprised and frankly a bit shocked" that no attempt was made to contact her in connection with the mid-trial debriefing. (*Id.*) Defense counsel also noted that throughout the course of Pastrana's cooperation there had been many "stumbles," due to the fact that Pastrana had "deep familial" bonds with and "love" for the members of the Woodbine Crew about whom he gave "damning information and testimony" and that "[m]any impasses had to be overcome due to Mr. Pastrana's inability/unwillingness to give information" about these individuals. (*Id.*) The government, the defense asserted, was aware of this tension, "allowed" this "evolution" and even "encourage[d] it where it serve[d] the government." (*Id.*) By the government's own admission, Pastrana had given considerable assistance, both in supplying information regarding unsolved crimes, including murders, and providing trial testimony to secure convictions. (*Id.* 1-2.) Ultimately, defense counsel urged, the "balance" of Pastrana's failings and successes "should be held in favor of Mr. Pastrana." (*Id.* 4.)

By letter dated February 1, 2006, the defense counsel was informed of the government's final decision to withhold the § 5K1.1 letter. (Ltr. from AUSA Kavanagh to Stacey Richman (Feb. 1, 2006), Ex. 6 to Def. Mem.) (In the time between the government's first letter notifying defendant of the possibility that a § 5K1.1 letter would not be written, and their letter indicating their final decision, Soto and Ramos had both been sentenced to life terms. (*See United States v. Soto, et al.*, CR 03-315, Dkt. ## 140, 146). The parties appeared before Judge Korman on June

23, 2006, who, after confirming with defense counsel that there were no objections, adopted Magistrate Judge Pohorelsky's recommendation that Pastrana's guilty plea be accepted. (Tr. of Crim. Cause for Conference in *United States v. Pastrana*, CR 00-1078 (June 23, 2006), Ex. 9 to Def. Mem. ("Conf. Tr."), 2-3). The discussion turned to a compromise sentence, proposed by the Chief of the Probation Department in light of the government's decision to deny the § 5K1.1. letter, that would allow the Court to depart from the statutory mandatory life sentence but not go below a set term of years. (Gov't Mem. 13-14; *see also* Tr. of Crim. Cause for Sentencing in *United States v. Pastrana*, CR 00-1078 (August 7, 2006) ("Sent. Tr."), Ex. 7 to Def. Mem., 7:19-8:3.) The government, while conceding "it would have been nearly impossible to get the convictions . . . without Mr. Pastrana's testimony," remained resistant to a compromise. (Conf. Tr. 12:18-13:6.) The court advised defense counsel to let the Chief Assistant United States Attorney know that the court favored the compromise. (*Id.* 21:10-11.) Through subsequent meetings, however, the government maintained its opposition to both the compromise and submitting a § 5K1.1 letter (Sent. Tr. 2:9-3:4), which has led to the filing of the instant motion.

DISCUSSION

Pastrana makes essentially two arguments in support of the relief he seeks. He contends first that the government should not be permitted to deny him a § 5K1.1 letter on the basis of facts learned during the May 24, 2004 interview because he was not assisted by counsel at the time. He further asserts that the government waived its right to complain of Pastrana's breach when it continued to accept the Agreement's benefits after learning of the breach. The government argues in opposition that Pastrana is not entitled to any relief because he has not established that the government has acted in bad faith. The instant motion requires the court to determine whether, in view of all the circumstances, it ought to compel the government to file a § 5K1.1 letter, or release the defendant from the plea he entered pursuant to the Agreement. Either option is an extraordinary remedy.

I. Legal Principles

A. General Considerations

At threshold, the court's examination of a decision to withhold a substantial assistance motion hinges on whether the defendant had an agreement with the government. Where a defendant has no cooperation agreement, he is only entitled to "assurance that the government's

motion" was "not withheld for some unconstitutional reason." *United States v. Brechner*, 99 F.3d 96, 99 (2d Cir. 1996). By comparison, defendants like Pastrana who have made an agreement with the government are entitled to a " 'more searching' review." *United States v. Kaye*, 65 F.3d 240, 243 (2d Cir.1995) (quoting *United States v. Leonard*, 50 F.3d 1152, 1157 (2d Cir. 1995). In such cases the court must look to see whether, among other things, "the government has lived up to its end of the bargain." *United States v. Knights*, 968 F.2d 1483, 1466 (2d Cir. 1992).

Courts have long recognized that "cooperation agreements . . . may usefully be interpreted with principles borrowed from the law of contract." *United States v. Khan*, 920 F.2d 1100, 1105 (2d Cir. 1990), *cert. denied*, 499 U.S. 969 (1991) (citing *United States v. Alexander*, 869 F.2d 91, 95 (2d Cir.1989); *United States v. Carbone*, 739 F.2d 45, 46 (2d Cir. 1984); *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)); *see also United States v. Riera*, 298 F.3d 128, 133 (2d Cir.2002) ("We review interpretations of plea agreements . . . in accordance with principles of contract law.") The analogy between a cooperation agreement and a civil contract has its limits, of course. *See, e.g., Innes v. Dalsheim*, 864 F.2d 974, 978 (2d Cir. 1988). Cooperation agreements are "unique contracts and we temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards." *United States v. Granik*, 386 G.3d 404, 413 (2d Cir. 2004).

While federal prosecutors have considerable discretionary control over whether to move, under § 5K1.1, for downward departures by reason of cooperation, that discretion is by no means unlimited. *Brechner*, 99 F.3d at 99. "[M]eticulous standards of performance" are required of the government, because cooperation agreements "require defendants to waive fundamental constitutional rights." *See United States v. Vaval*, 404 F.3d 144, 153 (2d Cir. 2005)(citing *United States v. Lawlor*, 168 F.3d 633, 636 (2d Cir. 1999)). In light of the uneven distribution of bargaining power between the government and a cooperating witness, we construe cooperation agreements "strictly against the government." *Id.* at 152 -153. Courts do not "hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness." *Lawlor*, 168 F.3d at 637. Here, scrutiny of the government's conduct involves the consideration of two principles of contract law in particular: the implied covenant of good faith and fair dealing and the concept of waiver of breach.

B. Implied Covenant of Good Faith and Fair Dealing

Every cooperation agreement carries with it the covenant of good faith and fair dealing implied in all contracts. *Khan*, 920 F.2d at 1105; *United States v. Rexach*, 896 F.2d 710, *United States v. Resto*, 74 F.3d 22, 26 (2d Cir. 1996); *Brechner*, 99 F.3d at 99. Even where by agreement the government has the sole discretion to decide whether it will be filing a substantial assistance motion, the court may inquire into whether the government acted "fairly and in good faith" in reaching its decision. *Resto*, 74 F.3d at 26 (quoting *Khan*, 920 F.2d at 1105); *see also Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1575 (2d Cir. 1994) (finding that the obligation of good faith and fair dealing applies even where one party has absolute discretion over its performance). What generally constitutes breach of this implied obligation, however, escapes easy definition, for "[b]ad faith may be overt or consist of inaction, and fair dealing may require more than honesty." Restatement (Second) of Contracts § 205, comment d ("A complete catalogue of types of bad faith is impossible"). In the context of cooperation agreements, the Second Circuit has held that the government may withhold a substantial assistance motion in good faith if it is "honestly, even though unreasonably, dissatisfied" with the defendant's cooperation. *Rexach*, 896 F.2d at 713 (quoting the Second Restatement § 228 comment a). Proffered reasons that are plainly insufficient to justify denial, however, will not be considered as evidence of good faith. *Knights*, 968 F.2d at 1488.

C. Waiver of Breach

The government may not rely on facts to which it has waived its objections in reaching its determination of a defendant's performance, even where those facts actually cause the government to be "honestly dissatisfied." *See, e.g.*, *Knights*, 968 F.2d at 1488; *Leonard*, 50 F.3d at 1157; *United States v. Roe*, 445 F.3d 202, 207-08 (2d Cir. 2006). "[A] presumption of fairness underlies agreement[s] between the defendant and the prosecutor, so that when a prosecutor makes a promise and obtains in return cooperation from the defendant, the promise must be kept." *Khan*, 920 F.2d at 1105. In *United States v. Roe*, the Second Circuit declared, "the government may not base its dissatisfaction with a defendant's performance of an agreement on facts known to the government at the time the agreement was executed." 445 F.3d at 207-08; *see also Knights*, 968 F.2d at 1488 (government may not withhold § 5K letter based on facts known to it at the time it entered into the agreement). Indeed, it would be "fraudulent to

have induced a defendant's plea with a promise that the government already knew it was not going to keep." *Roe*, 445 F.3d at 207.

Similarly, the government may not rely on facts which become known to them after the cooperation agreement is executed to deny its benefits if they continue to behave as if the cooperation agreement has not been breached. "[T]here are few principles of contract law better established, or more uniformly acknowledged, than the rule that when a contract not fully performed on either side is continued in spite of a known excuse, the right to rely upon the known excuse is waived." Williston on Contracts §39.31 (citing Second Restatement § 246 ("[a]n obligor's acceptance or his retention for an unreasonable time of the obligee's performance, with knowledge of or reason to know of the non-occurrence of the obligor's duty, operates as a promise to perform in spite of that non-occurrence."). The choice of either continuing the contract or terminating it in the face of a breach is termed the power of election, and, under longstanding law in New York and in this Circuit, " '[o]ne course of action excludes the other.' " *Net2Globe Int'l, Inc. v. Time Warner Telecom of New York*, 273 F. Supp. 2d 436, 457 n.13 (S.D.N.Y. 2003) (quoting *Strasbourger v. Leerburger*, 233 N.Y. 55, 134 (N.Y. 1922) (internal cites omitted).)

The above-discussed covenant of good faith and fair dealing dovetails with the doctrine of waiver of breach in that courts will scrutinize the government's offered good faith basis for denial to ensure that the government is not relying on reasons that have been waived in reaching its decision. The "government's conduct towards a cooperating witness after the witness's breach of [an] agreement" may "prevent the government from later relying on that breach to claim that its obligations were nullified." *Brechner*, 99 F.3d at 100 n.1; *see also United States v. Vogt*, 901 F.2d 100 (8th Cir. 1990). It has been found, for example, that the government waives its objections to a breach where, after learning of the breach, it continues to solicit and accept the benefits of the cooperation agreement from the cooperating defendant. *See Brechner*, 99 F.3d at 100, *Vogt*, 901 F.2d at 102; *Knights*, 968 F.2d at 1488. The government may not hide "its intent not to honor the agreement until after inducing [a defendant] to testify." *United States v. Hon*, 17 F.3d 21, 26 (2d Cir. 1994) (comparing *Vogt*, 901 F.2d at 102). And "there may well be [other] circumstances in which the government's conduct towards a cooperating witness after the

witness's breach of the agreement will prevent the government from later relying on that breach to claim that its obligations were nullified." *Brechner*, 99 F.3d at 100.

II. Analysis

The principal benefit to the defendant of the bargain between him and the government, as set forth in their Agreement, was the government's undertaking to make a § 5K1.1 motion that would permit the court to impose a sentence of less than life imprisonment for the offenses to which he pleaded guilty. Pastrana seeks to hold the government to that bargain.

A. The Government's Decision To Withhold a § 5K1.1 Motion

Determining whether "the government has lived up to its end of the bargain," *Knights*, 968 F.2d at 1486, begins with a review of paragraph 7 of the Agreement, which sets out the government's obligation. That paragraph states in relevant part,

> If the Office determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) with the sentencing Court setting forth the nature and extent of his cooperation. . . . In this connection, it is understood that a good faith determination by the Office as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, and the Office's good faith assessment of the value, truthfulness, completeness and accuracy of the cooperation, shall be binding upon him.

Agreement, ¶ 7. This paragraph clearly sets forth the government's obligation to make a § 5K1.1 motion, but contingent upon its own good faith determination as to whether Pastrana has "cooperated fully," "provided substantial assistance," and "otherwise complied with" the Agreement.

The government does not dispute that Pastrana met his obligation to provide "substantial assistance." By the defendant's estimate, the government and Pastrana met over 30 times in the span of two and a half years, often for hours at a time, placing not only his life but the life of his family at exceptional risk by agreeing to assist the government. After over two years of debriefings and cooperation, Pastrana testified at a trial against two of his former gang members. The government has stated that Pastrana gave "extensive and important testimony [at trial] about the Woodbine crew, the racketeering enterprise of which both he and the trial defendants were members and associates." (June 15, 2006 Ltr.) It also stated that Pastrana gave "valuable

testimony about the trial defendants' racketeering activities, including many violent crimes committed by them and others." (*Id.*) As the government later candidly acknowledged, "it would have been nearly impossible to get the convictions [the government] did without Mr. Pastrana's testimony." (Conf. Tr. 13:3-6.)

The government thus bases its decision to withhold a § 5K1.1 motion *not* on Pastrana's failure to provide substantial assistance, but on his failure "otherwise" to comply with the Agreement. Specifically, the government asserts that he breached the obligation that he "at all times give complete, truthful, and accurate information and testimony," Agreement ¶ 9, primarily by withholding from the government his knowledge of the two murders that became the subject of trial testimony.[5] There is of course little doubt that Pastrana's failure to advise the government about the murders during his many debriefings constituted a breach of that obligation; he admitted that he purposely withheld the information. But there is considerable dispute about whether the government may rely on that breach Pastrana as a basis for withholding their performance under the Agreement, because as Pastrana now argues, he was not assisted by counsel at the May 24, 2004 meeting where the breach was investigated, or prior to returning to the stand at the government's request.

B. The Right to Counsel and the Covenant of Fair Dealing

The Second Circuit determined that a cooperating defendant, such as Pastrana, has a right to counsel during debriefings with the government. *United States v. Ming-He*, 94 F.3d 782, 787 (2d Cir. 1996). The government of course has long used cooperating defendants to assist it in prosecuting its cases. *Ming He*, 94 F.3d 782, 787 (2d Cir. 1996) (citing *Whiskey Cases*, 99 U.S. 594, 595 (1878); *United States v. Locascio*, 6 F.3d 924, 930, 948 (2d Cir.1993), *cert. denied*, 511 U.S. 1070 (1994), and *cert. denied sub nom. Gotti v. United States*, 511 U.S. 1070 (1994)). This is because "[c]ooperating witnesses provide important information for ongoing investigations

[5]The government also cited another instance in which Pastrana was untruthful in support of its decision, but the falsehood had nothing to do with his testimony. Shortly before trial, in an effort to obtain protection for his family he falsely advised the government that his family had become the subject of threats of harm, and he asked another inmate at the MDC to corroborate his story. In fact, there were no such threats, which he admitted after the ruse was exposed by the other inmate. The government concedes that it would not rely on this lie, standing alone, to deny Pastrana a § 5K1.1 motion, and that the May 24, 2004 meeting was the "seminal event" that led the government to its decision. (*See* Tr. of Crim. Cause for Oral Arg., *United States v. Pastrana*, CR 00-1078 (April 11, 2008), Dkt. # 351, at 16.)

and often furnish the most damaging testimony against the accused at trial, that which is key to winning convictions." *Ming He*, 94 F.3d at 787 (citing *Locascio*, 6 F.3d at 930, and *United States v. Gambino*, 59 F.3d 353, 363 (2d Cir.1995)). The Second Circuit in *Ming He* recognized, however, that the advantages the government reaps often comes at a cost to the cooperating defendant when he or she is not assisted by counsel. 94 F.3d at 789-90.

The Second Circuit noted that this is largely a product of the environment in which cooperation is provided. *Id.* The primary means for obtaining information and assistance from a cooperator are debriefing sessions. *Id.* at 788. In such sessions, the cooperating defendant works with the prosecutor to help build a case and prepare for trial by sharing information he knows about the crimes of others. *Id.* at 787. It is a collaborative environment where, as long as the defendant remains truthful, he can fear no criminal consequences for the information he reveals to the government. *Id.* While this arrangement may seem relatively straightforward, the dynamics at work in debriefings are substantially more complex. The government does not share the defendant's interests, but a defendant, working closely with a team of prosecutors and agents for a length of time may lose sight of that. *Id.* at 790. The defendant may wish to tell the truth, but feel compelled to withhold certain information to keep his family from harm. *Id.* Disagreements and personality conflicts may threaten to derail what might otherwise be a fruitful relationship. *Id.* at 789-90.

For these reasons, the Second Circuit in *Ming He* exercised its supervisory authority and ruled that cooperating witnesses are entitled to have counsel present at debriefings, unless they explicitly waive such assistance. The court observed,

> [I]t should be remembered that the government attorney conducting a debriefing is both the defendant's prosecutor and the person who decides whether or not to make a § 5K1.1 motion, a motion that has a critical effect on the amount of time defendant will serve in prison. Most significantly, the refusal by the government to make such a motion is ordinarily unreviewable. The special nature of a § 5K1.1 motion demonstrates that the government debriefing interview is crucial to a cooperating witness. *To send a defendant into this perilous setting without his attorney is, we think, inconsistent with the fair administration of justice*.

Id. at 790 (emphasis added).

The government does not dispute that cooperating defendants are generally entitled to counsel during debriefings. They argue, however, that Pastrana waived his right to counsel at the mid-trial debriefing by virtue of the prospective waiver provision in the Agreement, in accordance with the observation in *Ming He* that a waiver of the right to counsel during debriefings can be set forth expressly in a cooperation agreement. *Id.* at 794. The counsel waiver provision in the Agreement states,

> The defendant agrees that the Office may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel's presence at such debriefings and meetings. Upon request of the defendant, the Office will endeavor to provide advance notice to counsel of the place and time of meetings and debriefings, it being understood that the Office's ability to provide such notice will vary according to time constraints and other circumstances. The Office may accommodate requests to alter the time and place of such debriefings. It is understood, however, that any cancellations or reschedulings of debriefings or meetings requested by the defendant that hinder the Office's ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant's ability to provide substantial assistance. Matters occurring at any meeting or debriefing may be considered by the Office in determining whether the defendant has provided substantial assistance or otherwise complied with this agreement and may be considered by the Court in imposing sentence regardless of whether counsel was present at the meeting or debriefing.

Agreement, ¶ 6.

The *Ming He* court, however, took care to express "no view on the precise extent of what can be waived" in advance in a cooperation agreement, *id*. at 794, a rather clear suggestion that there may be outer limits on how far the government may rely on such a waiver to shield its interactions with an uncounseled defendant from scrutiny. The question, therefore, is whether this court should find that Pastrana waived, in advance, his right to counsel at the May 24, 2004 meeting under the Agreement.

There are a number of considerations that inform the court's evaluation of the waiver clause, including the relationship between this cooperating defendant and the government, the significance of the rights the clause purports to waive, and the circumstances surrounding the

May 24, 2004 meeting. In addition, cooperation agreements are to be construed "strictly against the government," *Vaval*, 404 F.3d at 152 -153, with "ambiguities . . . resolved in favor of the defendant," *United States v. Hamdi*, 432 F.3d 115, 123 (2d Cir. 2005) (*quoting United States v. Lenoci*, 377 F.3d 246, 258 (2d Cir. 2004). Waivers must be construed narrowly, and courts are counseled to 'indulge in every reasonable presumption against waiver,' of counsel. *Ming He*, 94 F.3d at 794 (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977).)

Given these considerations, and the Second Circuit's suggestion in *Ming He* that there are outer limits to waivers of counsel made prospectively in cooperation agreements, the court questions how much weight should be given to the waiver at issue here. The waiver's purpose, it seems, is to streamline the process of cooperation by relieving the government of any obligation to give advance notice to the defendant's counsel and to advise the defendant of his right to counsel before every debriefing. The waiver is not intended to deprive him of necessary legal counsel, but to smooth to process of cooperation so that the government has ready access to the defendant. Furthermore, the waiver contemplates that the meetings and debriefings between the government and the defendant will serve to further the investigation and prosecution – not of the defendant – but of other parties. Thus, when a meeting with the defendant has as its sole object a purpose different from that of furthering the defendant's cooperation, as it did here, the court may properly question whether the government has some greater obligation to reinforce the defendant's awareness of his right to counsel and not merely rest on a waiver given almost a year earlier when he signed his cooperation agreement.

As detailed above, the May 24, 2004 meeting was certainly not for the purpose of furthering Pastrana's cooperation or to prepare him for testimony. His testimony was concluded as far as the government was concerned. The sole purpose of the meeting, as the government's attorneys acknowledge, was to determine whether Pastrana had withheld information from them and had committed perjury. It was only he who was the subject of investigation at that point, no one else. And the stakes at that point were very high. If the government attorneys determined that Pastrana had committed perjury or withheld information, they knew that he would be deemed guilty of serious breaches of the Agreement, breaches which would place him in precisely the jeopardy he now finds himself, a mandatory sentence of imprisonment for the rest of his life. This was an adversarial meeting where Pastrana, as a criminal defendant, should have

had a lawyer. In the circumstances, fairness required the government to have taken more care to insure that his attorney was aware of the extreme jeopardy that he was facing and that Pastrana was aware of his right – indeed his need – to have counsel assist him in dealing with his precarious situation.

The presence of counsel at the meeting would have benefitted Pastrana in at least two ways. First, it would have provided Pastrana with an advocate who could facilitate the discussion and provide perspective and balance to the government's assessment of his failure to disclose information. Counsel would have served to deflect some of the government's rightful indignation at what they considered a betrayal by Pastrana. Counsel had served that function previously when Pastrana had been less than candid in other debriefings. This was, after all, not the first time that Pastrana had withheld important information from the government. The jury at the trial had already heard from Pastrana about various instances when he had breached the Agreement prior to trial by not disclosing information and by outright lying to the government. Counsel might well have reminded the government of the fact that the government had not abandoned the Agreement because of those breaches, and that this additional failure to disclose information would not have as dramatic an effect on the jury as the government apparently believed it would.[6]

---

[6]In justifying their decision not to make a § 5K1.1 motion, the government argues that "as a result of Mr. Pastrana's conduct, the government was stripped of the argument that the jury could rely on his testimony because he had voluntarily disclosed all of the crimes that he knew about, and . . .he knew that if he breached his cooperation agreement he would spend the rest of his life in jail." Gov't Mem. 12. The trial record discloses that even without Pastrana's newly discovered omissions, the government would have had a difficult time making that argument because Soto's defense counsel successfully established during cross-examination that Pastrana had lied to the government multiple times without penalty. For example, Pastrana acknowledged that he received a cooperation agreement despite the fact that the government knew he lied about a major robbery during proffer sessions. (Trial Tr. 1276-79). The government did not void the agreement even when they learned that Pastrana had also lied during proffer sessions about his participation in the murder and dismemberment of two people. (Trial Tr. 1280, 1283-84). Pastrana admitted that he continued to lie to the government and minimize his participation in crimes after he entered into the Agreement. (Trial Tr. 1280, 1285-87, 1294-95, 1297-98). He further admitted that he made up a story about getting slashed at the MDC. (Trial Tr. 1308-09). When asked "despite the fact that you lied to [the government] and left things out and minimized your role and they told you that if you did these things you would get no agreement. . .you still have that agreement as you sit here today, right?" he responded, "Yes." (Trial Tr. 1298.) Pastrana summed it up when he testified, "I lied throughout my whole life in there [and didn't stop when I started meeting with the government]," even after he signed the Agreement. (Trial Tr. 1433-1434, Tr. 1444). In light of that testimony, the government would have had a hard time convincing any reasonable jury that they could trust Pastrana

The second and more important benefit that counsel would have afforded Pastrana was to insure that he understood all of his rights and options, not only during the meeting but in the events that followed. Given the history of Pastrana's cooperation and the number of times that breaches had been forgiven already, it is unlikely that Pastrana fully understood the gravity of his situation. Experienced counsel, on the other hand, would have certainly recognized that, since his testimony had concluded and the government's need for his cooperation was at an end, the government's willingness to overlook his most recent breach was now substantially reduced. Experienced counsel would also have recognized that Pastrana still retained his Fifth Amendment right against self-incrimination, a right upon which he could properly rest to refuse to testify further. This recognition would have provided not inconsiderable leverage to Pastrana. An assertion of the privilege could have led to an adverse inference instruction, placing the entire prosecution in jeopardy, or even an order striking Pastrana's entire testimony, which would undoubtedly have meant the acquittal of Soto and Ramos given the government's open acknowledgment that they could not have been convicted without it. Counsel could have used that leverage to obtain some concessions from the government about how Pastrana's mid-trial disclosures would be used in evaluating his cooperation, and Pastrana could well have chosen to withhold testimony based on his Fifth Amendment privilege if he was not given assurances that the Agreement would be honored. As it was, however, Pastrana was under the impression that he had no choice but to testify and provide the government with the benefit of his further cooperation without taking advantage of the opportunity to clarify his own situation.[7]

There is little doubt, then, that Pastrana was seriously disadvantaged by the absence of counsel at this critical juncture in his relationship with the government. Given the nature of the interview the government wished to conduct after Pastrana had completed his testimony, the seriousness of the potential consequences to him, and the utter inequality between him and the government in appreciating the legal terrain, fairness demanded that the interview where the non-disclosures were revealed not be conducted without advising his attorney of the meeting and

---

because he feared that lying would cause him to lose the benefit of the Agreement and result in a life sentence.

[7]As Pastrana testified, in response to a question from the defense about why he had returned to the stand, "The fact is, the government asked me back, so I have no choice in the matter." (Trial Tr. 2722:2-3).

its purpose, and without making absolutely certain that Pastrana understood the gravity of his situation and was prepared to proceed with the interview without his attorney. The government compounded the unfairness inherent in his being uncounseled at this sensitive juncture by calling him to testify about the matters he had revealed under the illusion that he had no choice but to do so. In so doing, they extracted the benefit of further cooperation from him, taking advantage of his lack of understanding of the array of options available to him. Although I would not characterize the government's conduct as bad faith, it does fail to meet the standards required by the covenant of fair dealing implied in their cooperation agreement with Pastrana.

C. Waiver of Breach

After determining that Pastrana did in fact breach the Agreement by withholding information about two murders, the government did not then repudiate it, although it had ample grounds to do so. Moreover, it did not contact Pastrana's counsel. Instead, the government chose to take further advantage of the cooperative relationship. Given the choice between recalling Pastrana as a government witness, or having the court call Pastrana as the court's witness, the government made a deliberate decision after five days of consideration to continue to use Pastrana as a cooperating witness. While the government argues that this was no choice at all, it is clear that they pursued the course of action that would put the best face possible on Pastrana's testimony. Because Pastrana returned as a government witness, the government had the opportunity, at the outset, to conduct a direct examination and explain Pastrana's testimony before the defense cross-examined. The government then had an additional opportunity on re-direct to end the testimony to their advantage. These significant advantages – the opportunity to frame the events, the opportunity to appear as if they were disclosing all they knew to the jury, and the opportunity to have the last word – came at a significant cost to Pastrana, a cost he was not obligated to incur.

The government's deliberate decision to call Pastrana back to the stand under these circumstances – the significant advantages that accrued to the government at significant cost to the defendant, the government's continuing failure to notify his counsel – can be considered a waiver of their right to rely on his breach of the agreement. Although the court does not believe that the government went so far as to hide "its intent not to honor the agreement until after inducing [Pastrana] to testify," *United States v. Hon,* 17 F.3d 21, 26 (2d Cir. 1994), this

constitutes one of those "circumstances in which the government's conduct towards a cooperating witness after the witness's breach of the agreement . . . prevent[s] the government from later relying on that breach to claim that its obligations were nullified," *Brechner*, 99 F.3d at 100 (finding government's refusal to move for downward departure justified where government sought no further cooperation from defendant after learning he had lied).

The Eighth Circuit was presented with a situation analogous to Pastrana's in *United States v. Vogt*, 901 F.2d 100 (8th Cir. 1990), and its opinion is instructive here. In *Vogt*, the government moved to vacate a plea agreement on the grounds that the defendant had breached the agreement by not being truthful. *Id.* Like the Agreement here, the determination of whether the defendant was truthful was left to the sole discretion of the government. *Id.* at 101. The district court found, however, that the government "continued to solicit and accept the benefit of the plea agreement" *after* learning of the breach. *Id.* at 102. The "benefit accepted" in *Vogt* was that the defendant was summoned to appear before a grand jury three times, and gave testimony two of those times. The Eighth Circuit affirmed the district court's finding, stating that, "[i]n view of the government's delay in complaining of Vogt's breach and its continued acceptance of the plea agreement's benefits . . . the district court did not abuse its discretion in concluding that the government waived its right to complain of Vogt's breach." *Id.* at 102-03 (citing Restatement (Second) of Contracts § 246(1)).

The contract principles relied on in *Vogt* are equally applicable here. As in *Vogt*, the government continued to solicit and accept the benefit of the Agreement in the face of the breach. The government interviewed Pastrana and decided to return Pastrana to the stand as their witness without notifying his counsel as if the Agreement was still operative. While no promises were made, Pastrana was led to believe that there was hope for his future if he returned to the stand. Once recalled, Pastrana testified truthfully in an effort to redeem himself and to undo any damage. In the circumstances, the court is justified to conclude that by affirmatively seeking further cooperation from Pastrana with full knowledge of his breach, the government waived any right to rely on his breach as a basis for withholding their own performance. *See also United States v. Almodovar*, 100 F. Supp. 2d 301 (E.D. Pa. 2000) (directing filing of § 5K1.1 motion and re-sentencing by different judge where although defendant violated plea

agreement, government agreed to permit him to cooperate further but thereafter did not provide defendant the opportunity to cooperate again).

The government would distinguish the situation here from *Vogt* by arguing that they had no choice but to recall Pastrana in light of Judge Korman's statement that he would call Pastrana if the government did not. To be sure, there is some measure of ambiguity about whether Pastrana was being called as a witness by the government or by the court during his resumed testimony. But the government had the opportunity to eliminate any ambiguity by renouncing Pastrana's cooperation before he testified. The conference at which Judge Korman announced the options available to the court occurred on May 27. Pastrana did not reappear for further testimony until June 1. The government therefore had five days in which to weigh their position, ample time to consider whether to distance themselves entirely from Pastrana and from any suggestion that they would continue to rely on his cooperation. If they did not want to be ambiguous about their own further use of Pastrana, it was incumbent on the government to state clearly to the court, and to him, that they considered his cooperation at an end before he testified further.

The contrast between the approach taken here, and that taken by the government in *United States v. Hon*, 17 F.3d 21 (2d Cir. 1994), informs this conclusion. In that case, the cooperating defendant Hon balked at giving testimony shortly after being called to the stand. Following an adjournment to the following day to permit Hon to consult with his attorney, who was not present at the time, Hon continued to refuse to testify, forcing the government to obtain an immunity order to overcome any possible assertion of privilege by Hon when he was recalled to the stand. Upon learning that he would be ordered to testify under a grant of statutory immunity, Hon informed the government through his attorney that he was willing to testify pursuant to the agreement after all. The government immediately replied that Hon had breached the agreement and the government would not honor it. Thus, even though Hon returned to the stand and ultimately testified without invoking his privilege, the government's decision not to make a § 5K1.1 motion was upheld on appeal because the government had announced its intention not to honor the agreement as soon as the breach had occurred. Rejecting the argument that the government's repudiation of the agreement constituted bad faith, the court observed,

> To the contrary, the government would have truly shown bad faith had it hidden its intent not to honor the agreement until after inducing Hon to testify. *Cf. United States v. Vogt*, 901 F.2d 100, 102 (8th Cir.1990). Instead, the government acted in good faith by announcing its intent not to honor the agreement as soon as it had determined that a breach had been committed.

Hon, 17 F.3d at 26. It also bears noting that Hon's counsel was advised promptly after it appeared that he was breaching his cooperation agreement.

Here, by contrast, the government did not announce its intention to repudiate the contract when they learned of Pastrana's breach, nor did it notify Pastrana's counsel. Although it did not hide the fact that it considered him to be in breach of his agreement, it nevertheless sought and expected him to continue the performance of his obligations under the agreement. Doing so, without clearly announcing that it had no intention of honoring its own obligations under the agreement, should have consequences, particularly where the government has failed to insure that Pastrana's counsel was aware of the situation and had the opportunity to advise him about how to proceed. The midtrial revelations certainly created an unexpected situation requiring decisions to be made more quickly than the government may have liked. But the government had enough time to consider its options, more than the government was afforded in *Hon*, and the choice that was made should be deemed a waiver of Pastrana's breach.

D. Specific Performance

The above analysis leads the court to conclude that, although Pastrana's non-disclosures constituted a breach of the Agreement, the government may not rely on that breach as grounds for withholding the performance of its obligations under the agreement. Conducting the interview at which the government learned of the breach without notifying Pastrana's counsel and without obtaining an express waiver of his right to counsel from him was a breach of their duty of fair dealing. Moreover, their continued use of Pastrana in the circumstances here operated as a waiver of his breach. Since the government cannot rely on Pastrana's breach to withhold performance, its refusal to submit a § 5K1.1 letter on his behalf on that ground is a failure to live up to its obligation under the agreement.

In general, "[t]he remedy for a breached . . . agreement is either to permit the plea to be withdrawn or to order specific performance of the agreement." *United States v. Brody*, 808 F.2d 944, 947 (2d Cir. 1986); *see also Santobello*, 404 U.S. at 262. "The choice between these

remedies is generally 'a discretionary one guided by the circumstances of each case.' " *United States v. Palladino*, 347 F.3d 29, 34 (2d Cir. 2003) (citing *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 297 (2d Cir. 1976)). Where appropriate, courts have not hesitated to mandate specific performance of the agreement. *Palermo*, 545 F.2d at 297; *see, e.g.*, *Santobello*, 404 U.S. at 262 (finding specific performance to be appropriate remedy for breach of plea agreement).

Specific performance is the only meaningful remedy here. There is no dispute that Pastrana has provided substantial assistance to the government, and thus qualifies for a § 5K1.1 motion absent his breach of the agreement. When faced with similar circumstances, courts have ordered specific performance. In *Almodovar*, for example, the court found that specific performance was appropriate where the government denied the defendant a § 5K1.1 letter after failing to give the defendant a promised opportunity to redeem himself from breach. 100 F. Supp. 2d at 308-09. In *Vogt*, the Eighth Circuit ordered specific performance where the government denied a § 5K1.1 letter because the government continued to utilize defendant's cooperation after they learned of his breach. 901 F.2d at 102.

The alternative relief Pastrana seeks – the withdrawal of his guilty plea – is no real relief. Under the terms of the Agreement, the government would be permitted to indict Pastrana on any and all of the crimes he has confessed to committing, and could use his own sworn testimony to prove those crimes. Included among those crimes would be the crimes to which he has already pleaded guyilty and for which a life sentence would be mandatory. The task might take some additional effort, but given the government's unwillingness to make a § 5K1.1 motion to permit something less than a life sentence on the crimes to which he has pleaded guilty, it would doubtless pursue a complete prosecution of Pastrana if the plea were withdrawn, and would not agree to any resolution of the case that would permit anything less than a life sentence.

CONCLUSION

For the foregoing reasons, I recommend that the defendant's motion be granted, and that the government be ordered to make a motion pursuant to § 5K1.1 of the Sentencing Guidelines and section 3553(e) of title 18, United State Code, granting the court the authority to impose a sentence below the mandatory minimum otherwise required by law.

* * * * * *

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court within 10 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see, e.g.*, *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298 (2d Cir.), *cert. denied*, 113 S. Ct. 825 (1992); *Small v. Sec'y of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

Viktor V. Pohorelsky

VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
July 25, 2008