JUDGE MARK SCARSI'S QUANTUM THEORY OF MURDERED CONTRACT LAW

As expected, Judge Mark Scarsi has denied Hunter Biden's motions to dismiss.

This post will explain his interpretation of the diversion agreement and his invitation for additional briefing on what even he calls a "Schrödinger's cat-esque construction of Defendant's immunity under the Diversion Agreement."

A follow-up post will show how three errors Scarsi made undermine his otherwise totally defensible decisions on selective and vindictive prosecution and outrageous conduct, in one case in a way that bears on the diversion agreement. Scarsi fails to come close to meeting his own rigorous evidentiary standard on two points, and on a third, Scarsi fails to adopt the legal standard he claims to rely on.

As you read these posts, keep three things in mind.

First, Scarsi issued this order *16 days* before he said he would, which would have been April 17 (as noted, he has invited further briefing on a central point that he has nevertheless already ruled on).

Before he docketed yesterday's order — an order that pointedly refused further briefing — Abbe Lowell filed a motion that addressed two issues Scarsi raised in last week's hearing which are pertinent to Scarsi's ruling. Scarsi hasn't and probably won't accept Lowell's bid to file that motion, but it nevertheless was directly on point and, in my opinion, corrected claims that Scarsi reportedly made in last week's hearing (one of which recurs in this opinion). And it was filed before Scarsi formalized his order

rejecting Hunter's motions.

Even before Judge Scarsi filed yesterday's order 16 days before he said he would, he was (and remains) on a relentless pace to get this to trial quickly. Meanwhile, Judge Maryellen Noreika appears to be frozen in uncertainty about what to do about motions filed by Hunter. Versions of three of these motions to dismiss have been fully briefed in Delaware since January 30. During that period, Lowell submitted a request in Los Angeles asking Scarsi to hold off until Noreika ruled, because the diversion motion would properly be decided by Noreika, a request Scarsi denied. Then, on February 12, Lowell informed Noreika that Scarsi was not waiting on her decisions on MTDs filed first in her district, what I took to be a soft nudge asking her to rule quickly so she would rule first. In a March 13 status hearing, Lowell made the nudge much more directly, asking her to rule on the diversion agreement first, and do so quickly, noting that it was proper for her to rule given that Delaware contract law probably applied. These issues are relevant, among other reasons, because I think they make Scarsi's order more vulnerable on appeal, an appeal that Hunter Biden probably would not, however, be able to make until after he were convicted.

More troubling, I have been wondering whether Noreika's seeming paralysis was an attempt to wait out Scarsi to see what he did with these rulings. So Scarsi's approach may end up influencing her *even though several facts are differently situated before her*, including one Scarsi relied on heavily.

Finally, in one place, Scarsi adopted the colloquial, rather than the formal logic meaning, of "begs the question."

> This observation **begs a question** regarding another provision, the parties' agreement that the United States District Court for the District of Delaware would play an adjudicative role in any alleged material breach of

> the agreement by Defendant. (my emphasis)

I'm normally pretty tolerant of this usage; I occasionally fail to avoid it myself. But given that I think Scarsi has adopted an incorrect meaning of the Schrödinger's cat paradox in an order that adopted a crazy theory to deny Hunter's immunity claim, I find it notable that he also used a term that, in formal logic, describes someone adopting premises that assume a conclusion to be true, to mean something else. Scarsi's misuse of these two terms are badges of someone getting logic wrong.

Now to Scarsi's interpretation that led him to analogize that Hunter Biden's immunity from the prosecution Scarsi is rushing headlong towards trial is both dead and not-dead. In short, Scarsi ruled that the parties to the contract granting Hunter Biden immunity from this prosecution *executed* the agreement, but did not yet put it into effect (or performance). As he describes, "the Diversion Agreement is a binding contract but performance of its terms is not yet required."

To get there, Scarsi first lays out that the legal standards to apply here are uncertain, both as to whether Delaware, US, or California contract law governs, and as to the standard to apply to diversion agreements.

Having rejected Lowell's request to let Noreika rule first, he applies the Ninth Circuit standard for plea agreements, and only in the next paragraph lays out what should come first: an acknowledgment that the Ninth hasn't yet applied the standards used for plea agreements to diversion agreements, but other circuits have and so he will here.

> The parties have not identified, and the Court has not uncovered, binding circuit authority extending these interpretation principles to pretrial diversion agreements. But several other circuit

> courts have found diversion agreements analogous to plea agreements and construed them according to similar contract principles. E.g., United States v. Harris, 376 F.3d 1282, 1287 (11th Cir. 2004) ("[T]his court interprets a pretrial diversion agreement applying the same standards we would use to interpret a plea agreement."); Aschan v. Auger, 861 F.2d 520, 522 (8th Cir. 1988) (applying contract principles, reasoning that "[t]he pre-trial diversion agreement is analogous to a plea agreement"); cf. Garcia, 519 F.2d at 1345 & n.2 (similarly analogizing a deferred prosecution agreement to a plea bargaining agreement). The Court perceives no meaningful distinction between plea and diversion agreements relevant to the application of these interpretation principles.

These contract law standards may actually matter; they may matter a lot, not least because Scarsi misrepresents the uncontested record about the plea deal that failed (which I'll get to in my follow-up).

In any case, however, Scarsi claims to be adopting a standard that holds the government responsible for any imprecisions in a plea agreement.

> Given concerns about the defendant's constitutional rights at play, "the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government," courts "hold[] the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements" than they would a drafting party to a commercial contract. Clark, 218 F.3d at 1095 (internal quotation marks omitted). "As a defendant's

> liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made, so that the government gets what it bargains for but nothing more."

Having adopted that standard but then having claimed that the diversion agreement is unambiguous, Scarsi then comes up with an interpretation that neither the government nor Hunter Biden have adopted, *telling* the parties to a contract that he knows better than them what they entered into.

> [T]he Court does not reach Defendant's argument that the Government should be estopped from denying the validity of the agreement or the Probation Officer's approval. (Immunity Mot. 18–19.) The Diversion Agreement is unambiguous, and the Government's position on its interpretation cannot change its meaning.

We now have three different interpretations of a diversion agreement that everyone claims is unambiguous. Schrödinger's cat had just two states of being: dead and not-dead. Scarsi has given this diversion agreement three.

Scarsi's version says the words "approval" and "execute" are doing different things in the diversion agreement, and while the agreement was executed by the only parties to it, because someone not a party to it did not approve it, the government is not yet required to fulfill the contract.

> *Approval* and *approved* together appear in three places in the agreement: the provision defining the agreement's term, (Diversion Agreement § II(1)); the provision defining the diversion period, (id. § II(2)); and the signature block designated for the Probation Officer, (id. at 9). Outside of definition

> provisions, the only place the agreement uses the *approve* word stem is in the signature block inviting a formal sanction by the Probation Officer. And obtaining the *approval* of the Probation Officer makes sense in the context of the agreement, as the parties contemplated as a term of Defendant's performance his subjection to her supervision. (Id. § II(10)(a).) In other words, the supervision provision would be nugatory if the Probation Officer refused to supervise Defendant.6 The definition provisions require an *approval*, and the only place in the agreement to which the Court can look to divine the meaning of *approval* is the signature block for the Probation Officer, compelling an interpretation that ties *approval* to an act by the Probation Officer.
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> In contrast, the term *execution* appears twice in the Diversion Agreement: in the provision defining the diversion period, (id. § II(2)), and in a provision authorizing execution of the agreement in counterparts, (id. § II(18)). Consistent with the definition of execute, the counterparts provision circumscribes the acts of signing the agreement that might validate it; in other words, the parties agreed that signing the same copy of the agreement would have the same effect as signing different copies. Notably, the provision defining the diversion period uses both *execution* and *approval* together, indicating each has its own meaning: "The twenty-four (24) month period following the *execution* and *approval* of this Agreement shall be known as the 'Diversion Period.'" (Id. § II(2) (emphases added).) As Defendant's counsel admitted at the hearing, Defendant's proffered interpretation would render the phrase "execution and

> approval" redundant in part. The contrast between sections II(1) and II(2) supports an interpretation that gives each word its own meaning; while "approval" triggers the agreement's term, the diversion period begins only "following the execution and approval" of the agreement.

Having ruled that the government is wrong that Probation's approval was precedent to approval to the contract, Scarsi then argued that her approval was precedent to performance, something that had to happen before the agreement went into effect. Prosecutors are wrong that the contract isn't binding, Scarsi argues, but because probation didn't also sign the diversion agreement, prosecutors are not yet required to grant Hunter the immunity the agreement grants him.

For this interpretation to end up with Hunter being fucked, Scarsi also has to reject Hunter's argument that probation already did agree to supervise the diversion agreement before, unbeknownst to Hunter and Judge Noreika, after he and Leo Wise signed the diversion agreement, Delaware head of probation Margaret Bray refused to sign the diversion agreement itself.

> The agreement is not reasonably susceptible to an interpretation that the Probation Officer could manifest her approval by issuing a pretrial diversion recommendation consistent with the Diversion Agreement, let alone by any means other than signature on the line reserved for her.9
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> 9 Defendant's argument would fail on its merits even if the Probation Officer could have manifested her approval by issuing a pretrial diversion report. Defendant submits that the Probation Officer provided a "letter to counsel . . . enclosing her recommendation in favor of the Diversion Agreement and

> copy of the Agreement." (Immunity Mot. 18.) The report filed with this Court does not reference or attach a copy of the agreement at all. (See generally Machala Decl. Ex. 5.) That said, the report filed with the motion is incomplete and apparently redacted. Although some of the recommended conditions of pretrial diversion align with the conditions discussed in the Diversion Agreement, they do not mirror each other perfectly. (See, e.g., Machala Decl. Ex. 5 § 38(5) (requiring as a condition of pretrial diversion Defendant's consent to entry into a criminal background check system, a condition not discussed in the Diversion Agreement).) Further, another document in the motion record indicates that **the parties** modified the Diversion Agreement after the Probation Officer issued her report in an effort to "more closely match" the report. (Clark Decl. Ex. T (providing July 20, 2023 revisions to Diversion Agreement); cf. Machala Decl. Ex. 5 (dated July 19, 2023).) The Court resists Defendant's ouroboric theory that the Probation Officer manifested approval of an agreement **the parties changed** in response to the purported approval. Further, the Court doubts the Probation Officer manifested approval of the revised version of the Diversion Agreement **passively by being party to an email** circulating the updated draft. (See Clark Decl. Ex. T.) [my emphasis]

In doing so, Scarsi misrepresents the exhibit he relies on.

> The parties **and Probation** have **agreed** to revisions to the diversion agreement to more closely match the conditions of pretrial release that Probation recommended in the pretrial services report issued yesterday. Attached,

> please find clean and redline versions of the diversion agreement.

The parties didn't modify the diversion agreement after probation issued its report; the parties *and probation* did. And that agreement *didn't happen* on that email thread. Scarsi simply invents probation's passive participation in an email.

That is, to dismiss Hunter's argument that probation gave approval for the agreement, Scarsi misstates the evidence before him. That's pretty telling, because if probation did approve the deal (and Hunter had no indication until the same AUSA who wrote an email saying probation had approved it that Bray refused to sign it after Hunter and Wise had), then the immunity deal is in place. Scarsi doesn't address something he did in the hearing, which is that it made sense for tax crimes to be immunized given the expectation that Hunter would soon plead guilty to misdemeanors (which is one of the two things Lowell addressed in his filing and which was obviously wrong when Scarsi said it), so he seems to cede that if the agreement did go into effect, he can't be charged with tax felonies.

More importantly, there are several aspects of Scarsi's interpretation he doesn't address, having nevertheless denied the motion while inviting further briefing and misusing the term, "begs the question."

Having severed the execution of the contract from its performance, Scarsi doesn't consider what those two terms apply to, even though prosecutors can only perform one part of the agreement — the immunity — and probation can only perform another — the diversion supervision. Margaret Bray cannot perform the part that matters here, conferring immunity, but Scarsi has given her veto power over the government fulfilling a contract they entered.

It would seem that if Scarsi were applying the

standard he claims to be using — "the government is ordinarily held to the literal terms of the plea agreement [in this case, diversion agreement] it made" — then those who executed the diversion agreement, the prosecutors, should be required to recognize the immunity they agreed to and which they are uniquely situated to deliver.

More importantly, the main reason why probation never revisited approving the diversion agreement is because prosecutors failed to go get her signature. They failed to do so because Hunter did not agree to the terms of the separate plea agreement after Leo Wise changed the terms of the immunity it offered in the hearing itself. As we'll see, that's a part of the factual record that Scarsi simply disappears, ignoring it even though prosecutors waived contest to it.

Mark Scarsi rushed to interpret this contract in a way neither party to it agrees with, but did so in such a way that frees prosecutors from the obligation Scarsi himself says they agreed to give. He did so while misusing the term "begs the question" and invoking a metaphor, Schrödinger's cat, designed to describe an absurd state, while calling Hunter's correct description of events he misrepresented an ouroboric theory.

Mark Scarsi may be right that the diversion agreement uses two terms to depict two different things, but in doing so, he has upended the authority over prosecutions and arguably misapplied the standard he claims to adhere to.