THE IMPORT OF JUDGE MARK SCARSI'S TRUNCATED KLAMATH QUOTE

I'm still working on a long post on some of the things that may make Judge Mark Scarsi's order denying all eight of Hunter Biden's motions to dismiss vulnerable on appeal.

But I wanted to elaborate on a point I made in comments in this post. In the section of his order ruling that Hunter Biden's diversion agreement had been executed (because it was signed by the only parties to the agreement) but not required to put into effect (because it was not signed by probation), Judge Scarsi truncated a citation to a precedent he relies on.

To justify only doing a close reading of the meaning of "approve" and "execute," Scarsi says the Diversion Agreement is unambiguous. He cites to this 9th Circuit precedent, *Klamath v Patterson*.

> The Court need not consult extrinsic evidence because the Diversion Agreement is unambiguous with respect to the issues for interpretation outlined above.5 But both parties miss the mark with their proffered interpretations in some respects. See Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1210 (9th Cir. 1999) ("The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous . . . .").
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> 5 Accordingly, the 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.

Only, he truncated the quote. Here's what the rest of the sentence he cites says:

> The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous; **it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation**. [my emphasis]

David Weiss also cited to (an earlier sentence in) this very same paragraph.

> As the Ninth Circuit explained in Klamath:
>
> > A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations. Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first.

So both Weiss and Scarsi adopt Klamath as the standard. And Klamath says that if reasonable people could find its terms susceptible to more than one interpretation, then the contract *is* ambiguous.

As a side note: Neither Weiss and Scarsi adhere to their claim the contract is unambiguous. Weiss bitched mightily that Abbe Lowell submitted the discussions of the plea deal (Lowell relies on these for the selective and vindictive argument too, which is important for reasons I'll return to), and told Judge Scarsi

that these submissions are irrelevant.

> Even though the defendant takes the position that the agreement is unambiguous, he nonetheless chose to submit 187 pages of extrinsic or parol evidence, including an affidavit from former counsel and multiple emails and other communications between defense counsel and the former prosecution team. Dkt. 25-5. "The reviewing court must not look towards extrinsic or parol evidence to create an ambiguity in a written agreement that is otherwise clear and unambiguous." In re Zohar III, Corp., 2021 WL 3793895, at *6 (D. Del. Aug. 26, 2021). Because the parties agree the diversion agreement is unambiguous, these submissions are irrelevant.

But then Weiss submitted his own extrinsic submission: a declaration from AUSA Ben Wallace describing how he asked Margaret Bray to sign the diversion agreement after Hunter and Leo Wise did (and using the word "draft" four times, which is patently nonsense), but she did not.

Judge Scarsi *depends on this declaration* in the passage where he argues only a signature from Margaret Bray can represent approval — even while he misrepresents an email from the very same Ben Wallace.

> Even if the Diversion Agreement required approval by the Probation Officer, Defendant argues in the alternative that the Probation Officer's approval of the agreement might be inferred from her publication of a pretrial diversion report that recommends a 24-month term of pretrial diversion. (Immunity Mot. 16–18; see Machala Decl. Ex. 5, ECF No. 25-6.) Defendant's theory of approval of the Diversion Agreement finds no purchase in the text of the agreement. The means by which the Probation Officer might approve the Diversion Agreement

> are not expressly stated, but the agreement provides but one reasonable, obvious method of approval: affixation of the Probation Officer's signature on the "APPROVED BY" signature block set aside for her. (Diversion Agreement 9.) 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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> Defendant's theory is also at odds with uncontroverted facts before the Court. In response to Defendant's motion, the Government submitted a declaration from Assistant United States Attorney Benjamin J. Wallace, who testified that on the morning of July 26, 2023, the Probation Officer declined to sign the Diversion Agreement. (See Wallace Decl., ECF No. 35-1.) Defendant did not dispute this representation in his reply memorandum, and while Defendant's counsel tried to minimize this testimony at the hearing, his arguments were unpersuasive.
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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.)

As noted in my last post, the email in question *doesn't* say the parties altered the diversion agreement. It says that the "**parties and Probation have agreed** to those revisions." Scarsi simply miscites what the extrinsic evidence he relies on says.

> Mark:
> 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.
> Best,

> Benjamin L. Wallace
> Assistant U.S. Attorney

Ben Wallace's declaration — particularly his repetition of the word "draft" — conflicts with the email he sent back in July. In July he said probation "agreed" to the diversion agreement and in March he said Margaret Bray did not approve it. That word "agreed" — the last thing that Hunter Biden would have seen before the plea hearing — is what would have informed his understanding of the status of the diversion agreement.

One way or another, *both* Judge Scarsi and David Weiss adhere to Klamath, which says, "if reasonable people could find its terms susceptible to more than one interpretation," then it is ambiguous. And both Judge Scarsi and David Weiss — who themselves find the terms of the diversion agreement susceptible to more than one interpretation — include and rely on extrinsic evidence to try to make that signature line a condition precedent to either formation or performance of the contract.

You don't need to get to Abbe Lowell's differing interpretation of this. Even Scarsi and Weiss have found the diversion agreement susceptible to different interpretations and therefore, under Klamath, ambiguous.

And if the diversion agreement is ambiguous — which no one is arguing, but which under the terms of Klamath and by the repeated reliance *by everyone* on extrinsic evidence, it seems to be — then both the 9th and 3rd Circuits say that Hunter Biden's beliefs about the diversion agreement hold.

> Not only is it clear from the face of the Diversion Agreement signed by all parties that it is in effect—as all parties told the Delaware court at the July 26, 2023 hearing—any effort by the prosecution to search out some ambiguity in the contract in an effort to

> manufacture an excuse to renege on the deal it struck would fail. There is no explicit language in the Diversion Agreement that would allow the prosecution to nullify the Agreement, and nothing less will do.
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> If the prosecution must search out some ambiguity in the Diversion Agreement to exploit in support of its argument, the prosecution has already lost. Like the Third Circuit, the Ninth Circuit explains: "Courts construe ambiguities in the plea agreement against the government and will use the defendant's reasonable beliefs at the time of pleading to construe the agreement." United States v. Wingfield, 401 F. App'x 235, 236 (9th Cir. 2010); see United States v. Jackson, 21 F.4th 1205, 1213 (9th Cir. 2022) ("Our task is to determine what the defendant reasonably believed to be the terms of the plea agreement at the time of his plea."); Franco-Lopez, 312 F.3d at 989 (explaining the court "construe[s] ambiguities in favor of the defendant" (citation omitted) and that, "[i]n construing the agreement we must determine what Franco-Lopez reasonably believed to be the terms of the plea agreement at the time of the plea."). Indeed, the Ninth Circuit has "steadfastly applied the rule that any lack of clarity in a plea agreement should be construed against the government as drafter." United States v. Spear, 753 F.3d 964, 968 (9th Cir. 2014) (citations omitted). "Construing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise." United States v. De La Fuente, 8 F.3d 1333, 1338 (9th Cir. 1993). The prosecution does not dispute that this is the law; it claims the contract unambiguously gave Probation

> veto power over the Agreement between the parties despite being unable to point to any provision of the Agreement that says so. (DE 69 at 8-10.)

As noted, Hunter Biden was privy to the email where Ben Wallace said that Probation had agreed to the changes in the diversion agreement. He was not privy to Wallace's actions at the beginning of the plea hearing. So his belief could only come from Wallace's use of that word, "agreed." If he believes Probation approved the diversion agreement, then if the diversion agreement is ambiguous, then that should hold sway.

Weiss pretty aggressively wants to avoid the conclusion that this diversion agreement is ambiguous (which may be why he, like Scarsi, did not include that part of the paragraph saying that conflicting interpretations is a good way to tell that a contract is ambiguous). He calls Lowell's citation to this binding precedent on ambiguous agreements a strawman (even while submitting and relying on his own extrinsic evidence).

> 4 The defendant spends three pages on a strawman argument that if the Government were to take the position that the diversion agreement was ambiguous, any ambiguity should be construed against the government. Motion at 9. The government does not take the position that the diversion agreement is ambiguous and never has.

One thing this entire discussion excludes, but should not, is the scope of the immunity language in the diversion agreement. Because *that's* where David Weiss clearly reneged on a signed contract, as proven by the undisputed assurances given to Hunter Biden on June 19 that there was no ongoing investigation that Weiss then reneged on to chase Russian disinformation offered by Alexander Smirnov (who

is not mentioned in Scarsi's opinion at all).

There's another, very significant problem created by Scarsi's weird opinion.

If the diversion agreement is binding (but not yet in effect) then the withdrawal of Judge Noreika's briefing order from last July was improper.

When David Weiss moved to vacate her order, he stated that "there is no longer a … diversion agreement for the Court to consider."

> As a result, the Government respectfully requests that the Court vacate its briefing order since there is no longer a plea agreement or diversion agreement for the Court to consider.

And Weiss relied heavily on the claim that the diversion agreement it is not binding when responding to Hunter's claim that the diversion agreement was in effect.

> Fifth, as noted above, the proposed diversion agreement never took effect. And the Defendant misstates the record when he claims that the Government made statements to the contrary during the July 26 hearing. The Defendant claims, in a footnote, that the "Government stated in open court that the Diversion Agreement was a 'bilateral agreement between the parties' that 'stand[s] alone' from the Plea Agreement, and that it was 'in effect' and 'binding,'" citing various parts of the transcript. But those cobbled together snippets do not add up to a statement that the proposed diversion agreement was in effect. The Government never said the proposed diversion agreement was in effect because it is not.
>
> [snip]
>
> To reiterate, the now-withdrawn diversion agreement, by its own terms,

> is not in effect. Paragraph one of the agreement expressly provides that, "The term of this Agreement shall be twenty-four (24) months, beginning on the date of approval of this Agreement, unless there is a breach as set forth in paragraphs 13 and 14." ECF 29-1 at 1 (emphasis added). Paragraph two further provides that, "The twenty-four (24) month period following the execution and approval of this Agreement shall be known as the 'Diversion Period.'" Id. (emphasis added). Ms. Bray, Chief United States Probation Officer for the District of Delaware, declined to approve the agreement at the hearing on July 26, 2023. Indeed, the version of the agreement that the Defendant docketed on August 2, 2023, has an empty signature line for Ms. Bray, immediately below the text "APPROVED BY." Id. at 9. In sum, because Ms. Bray, acting in her capacity as the Chief United States Probation Officer, did not approve the now-withdrawn diversion agreement, it never went into effect and, therefore, **none of its terms are binding on either party**. [my emphasis]

Scarsi's order also creates problems for claims Weiss made in a status report submitted to Judge Noreika in September

> 2 In its June 20, 2023 letter, the Government stated that "executed copies of the Memorandum of Plea Agreement related to the tax Information, and the Pretrial Diversion Agreement related to the firearm Information," would be submitted at or in advance of the hearing. An executed copy of the plea agreement was provided to the Court at the July 26, 2023 hearing. U.S. Probation declined to approve the proposed diversion agreement and so **an executed copy was never provided to the**

> **Court**. [my emphasis]

Notably, Weiss did not contest that the diversion agreement was executed when Chris Clark submitted what he claimed was an executed copy on August 2. This is a claim he only made after the fact.

Though he reviewed all the motions to dismiss submitted in Delaware, Scarsi may not have reviewed the rest of the docket, so he may not understand that he has bolloxed Judge Noreika's docket.

Judge Scarsi's order is fundamentally inconsistent with the basis by which Weiss moved to dodge briefing on what has since been demonstrated to be an ambiguous agreement. If he's right that the diversion agreement remains binding on the parties, then the withdrawal of the diversion agreement before Judge Noreika becomes uncertain. By rushing to rule before Judge Noreika did, Scarsi has effectively thrown a dead not-dead cat into Noreika's lap and created problems with the order she signed vacating her briefing order back in August. By rushing to rule before Noreika did, Scarsi has made a mess of Noreika's docket and created legal uncertainty about an order Noreika issued last year.

Update: First, I fixed the date of the Ben Wallace email reporting that Probation had approved of changes to the diversion agreement; it was in July, not June. ~~I also realized that while the declaration Chris Clark submitted in the Delaware docket is in evidence, the email itself is not~~. Nevertheless, Scarsi does miscite what it says.

Update: I take that back: All the exhibits are in the Chris Clark declaration.

Update: I note that Ben Wallace's declaration was not submitted with any attestation. He has not filed a notice before Scarsi.

Update: I'm comparing what Weiss said in the

Delaware response to Hunter's immunity argument with this Los Angeles one. Interestingly, Weiss retained this paragraph from the Delaware response, though it was introduced in Delaware stating, "even **if the defendant actually believed** that the agreement **he negotiated** did not require U.S. Probation's approval."

> Furthermore, defendant's subjective belief that the agreement did not require U.S. Probation's approval, is not controlling. "Delaware adheres to the 'objective' theory of contracts, i.e., a contract's construction should be that which would be understood by an objective, reasonable third party." Iron Branch, 559 F. Supp. 3d at 378; Osborn ex rel. Osborn, 991 A.2d 1153 at 1159; NBC Universal v. Paxson Commc'ns, 2005 WL 1038997 at *5 (Del. Ch. Apr. 29, 2005)). An objective, reasonable third party would understand that U.S. Probation would have to approve the agreement for it to go into effect, given the language in paragraphs 1 and 2 and the construction of the signature page.

But elsewhere they adopt US v. Clark, a Ninth Circuit case that says,

> 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.