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 9

10 UNITED STATES DISTRICT COURT
 11 DISTRICT OF NEVADA
 12

13 UNITED STATES OF AMERICA

CASE NO. 2:06-CR-186-PMP/PAL

14 Plaintiff,

15 vs.

16 FREDRICK RIZZOLO aka RICK RIZZOLO

17 Defendant.
 18

19 **OPPOSITION TO MOTION FOR SUPPLEMENTAL PROCEEDINGS AND**
 20 **REQUEST TO VACATE HEARING ON SUPPLEMENTAL PROCEEDINGS;**
 21 **COUNTERMOTION TO REQUIRE THE GOVERNMENT TO SPECIFICALLY**
 22 **PERFORM THE TERMS OF THE PLEA AGREEMENT; and REQUEST TO**
 23 **STRIKE THE ILLEGAL MODIFICATION OF SENTENCE**

24 COMES NOW Defendant, Fredrick Rizzolo, aka Rick Rizzolo, by and through his
 25 attorneys of record, Dominic P. Gentile, Esq., Paola M. Armeni, Esq., and Margaret W.
 26 Lambrose, Esq., of the law firm of Gordon Silver, and hereby brings this Opposition to the
 Motion for Supplemental Proceedings and brings a Countermotion to Require the Government to

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1 Specifically Perform the Terms of the Plea Agreement and requests the Court Strike the Illegal
2 Modification of Sentence.

3 Dated this 10th day of November, 2010.

4 GORDON SILVER

5 /S/ MARGARET W. LAMBROSE
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12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **1.**

14 **RELEVANT FACTS**

15 Fredrick Rizzolo entered into a plea agreement with the United States of America ("the
16 Government") on June 1, 2006. (#8) See "Plea Agreement," attached hereto as Exhibit "1." As a
17 part of the Plea Agreement, Mr. Rizzolo agreed to pay Kirk Henry ten million dollars in
18 restitution "upon the sale of the Crazy Horse Too." See Exhibit "1" p. 7 lines 4-13. After
19 entering into the Plea Agreement, Mr. Rizzolo was sentenced on January 23, 2007. (#39) See
20 "Sentencing Transcript," attached hereto as Exhibit "2." At the time of Mr. Rizzolo's sentence,
21 the court noted that the Plea Agreement was a "very thoroughly structured Binding Agreement."
22 See Exhibit "2" p. 82 lines 2-3.

23 During the sentencing hearing the court expressly incorporated the exact language of the
24 Plea Agreement requiring Mr. Rizzolo to pay ten million dollars in restitution to Mr. Henry upon
25 the sale of the Crazy Horse Too. Specifically, the court sentenced Mr. Rizzolo to "12 months
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1 and one day...followed by a three-year term of Supervised Release under the standard terms and
2 conditions of supervision and the following special conditions: that restitution to Kirk Henry of
3 \$10 million dollars be paid from the proceeds of the sale of the Crazy Horse Too." See Exhibit
4 "2" p. 88 lines 9-14.

5 After Mr. Rizzolo was sentenced, the court forfeited the Crazy Horse Too to the
6 Government. (#68). As the new owner of the Crazy Horse Too, the Government was responsible
7 for selling the property. To date, the Government has failed to sell the Crazy Horse Too.
8 During the time the Government has owned the Crazy Horse Too, its value has gone from
9 approximately thirty three million dollars to merely a fraction of that amount. This diminution in
10 valued is primarily due to the Government's failure to maintain necessary licenses and zoning
11 permits. (#60, #62).

12
13 At some point, the Government realized that due to the devaluation of the Crazy Horse
14 Too as a result of, at a minimum and in kind and ameliorative terms, its ineptitude and
15 negligence, the sale of the club might no longer satisfy the restitution owed to Mr. Henry. As
16 such the Government conjured up a way to deceive the court into allowing the Government to
17 breach the terms of the plea agreement. The Government did so when it filed a request to
18 "modify the terms of supervised release." (#278). This request to modify the terms of supervised
19 release was nothing more than a motion to unilaterally modify the terms of the Plea Agreement.
20 However, the Government knew that motion would not be granted so it simply put a different
21 name on its request.
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24 On April 26th 2010, the court heard argument regarding the request to "modify
25 conditions or terms of supervised release." (#325). At the hearing, the court determined that Mr.
26 Rizzolo's payment of restitution was no longer based "upon the sale of the Crazy Horse Too."
27 The court said "...assuming the Crazy Horse Too asset is never sold for value or never sold for
28

1 sufficient value to satisfy the restitution obligations of Mr. Rizzolo, does not relieve Mr. Rizzolo
2 of the restitution obligations imposed by the Court in the judgment." See "April 26, 2010
3 Hearing Transcript" attached hereto as Exhibit "3." p. 44 lines 14-18. The court went on to order
4 that "Mr. Rizzolo commence -- independent of the sale of the Crazy Horse Too -- commence
5 paying restitution obligations at a rate to be approved by the Court once the financial information
6 is gathered by the Department of Probation." Id. at p. 45 lines 1-5.

8 After the court determined that restitution was no longer contingent upon the sale of the
9 Crazy Horse Too, the Government brought a motion for supplemental proceedings. (#363). The
10 hearing on the motion is currently set for December 17, 2010.

11 2.

12 **ARGUMENT**

13 **HOLDING A JUDGMENT DEBTOR EXAM IS PREMATURE AS MR.**
14 **RIZZOLO IS NOT REQUIRED TO PAY RESTITUTION UNTIL THE**
15 **CRAZY HORSE TOO IS SOLD.**

16 The Plea Agreement between Mr. Rizzolo and the Government explicitly states that Mr.
17 Rizzolo is required to pay restitution "upon the sale of the Crazy Horse Too." See Exhibit "1" p.
18 7 lines 4-13. As the Plea Agreement is binding, the Government must be required to specifically
19 perform pursuant to its terms. Additionally, the court is also bound by the terms of the Plea
20 Agreement as the court incorporated the Plea Agreement into the oral pronouncement of
21 sentence. The oral pronouncement of sentence is controlling and cannot be modified, except
22 under certain circumstances, none of which are present in this case. Accordingly, the illegal
23 modification of Mr. Rizzolo's sentence must be struck from the record. The Government's
24 motion for supplemental proceedings should be denied as premature because Mr. Rizzolo's
25 sentence to pay restitution to Mr. Henry does not commence until the Crazy Horse Too is sold.

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1 **1. THE GOVERNMENT MUST PERFORM PURSUANT TO THE TERMS OF THE**
2 **PLEA AGREEMENT.**

3 The Government entered into a binding Plea Agreement with Mr. Rizzolo. Now that the
4 terms of the Agreement are no longer advantageous to the Government, the Government is
5 attempting to unilaterally modify the terms of the binding Agreement. An attempt to unilaterally
6 modify of a plea agreement is a breach of the agreement. In cases where the government
7 breaches a plea agreement, and circumstances exist such that the court is unable to put the parties
8 back into the position they were in prior to entering into the agreement, the court must order that
9 the government specifically perform under the agreement.
10

11 **a. The Government cannot unilaterally modify the terms of the plea agreement.**

12 "Plea agreements are contractual by nature and are measured by contract law standards. "
13 In re Ellis, 356 F.3d at 1227 (quoting United States v. Franco-Lopez, 312 F.3d 984, 989 (9th Cir.
14 2002)). Similar to any other contract, a plea agreement is binding the when the parties agree to
15 its terms. See generally United States v. Sandoval-Lopez, 122 F.3d, 800 (9th Cir. 1997) ("a
16 negotiated guilty plea is a bargained-for quid pro quo.") (internal quotes and citation omitted).
17 Any ambiguities must be construed "in favor of the defendant." United States v. Quach, 302 F.3d
18 1096, 1100-01 (9th Cir. 2002). The government is responsible "for any lack of clarity." United
19 States v. Anderson, 970 F.2d 602, 607 (9th Cir. 1992), as amended 990 F.2d 1163 (9th Cir.
20 1993). Once the court accepts the plea agreement, the terms of the agreement are binding on the
21 parties and "the government is held to the literal terms of the agreement." United States v.
22 Baker, 25 F.3d 1452, 1458 (9th Cir. 1994); In re Morgan, 506 F.3d 705, 709 (9th Cir. 2007).
23 Additionally, "the government gets what it bargains for but nothing more." United States v.
24 Pruitt, 32 F.3d 431,433 (9th Cir. 1994).
25
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27 Here, the terms of the Plea Agreement are clear; Mr. Rizzolo is required to pay the Mr.
28 Henry restitution "upon the sale of the Crazy Horse Too." Through its "request to modify the

1 terms of supervised release," the Government attempted to unilaterally modify the terms of the
2 Agreement. Any such modification would deprive Mr. Rizzolo of the full benefit of the bargain
3 and is not permitted under controlling law.

4 The Government is not entitled to any more than that for which it bargained. Here, the
5 Government bargained for an asset worth thirty three million dollars. The Government received
6 the asset. Now, due to the Government's negligence in maintaining the value of the asset, it
7 wants more. However, as Mr. Rizzolo has fulfilled his end of the bargain, the Government is not
8 entitled to any more. Therefore, the Government cannot unilaterally modify the terms of the
9 Plea Agreement under the guise of a "request to modify the terms of supervision."
10

11 **b. The Government must be required to specifically perform the plea agreement.**

12 When parties enter into a plea agreement, the district court may accept or reject it but
13 may not modify it, and once accepted, the agreement dictates the defendant's sentence. U.S. v.
14 Green, 595 F.3d 432 (2nd Cir. 2010). The court is prohibited from accepting the plea agreement
15 on "a piece meal basis" and once the court accepts the plea agreement, the plea agreement
16 becomes binding on the court." In Morgan, 506 F.3d, 709. The court enforces the literal terms of
17 the plea agreement. Johnson, 187 F.3d at 1134. "A criminal defendant has a due process right to
18 enforce the terms of his plea agreement." Buckley v. Terhune, 441 F.3d 688, 694 (9th Cir. 2006);
19 (citing Santobello v. New York, 404 U.S. 257 (1971)). In cases where the government breaches
20 the terms of the plea agreement, the defendant has two available remedies- the agreement can be
21 rescinded or specifically enforced.
22

23
24 Courts require specific performance of plea agreements in cases where rescinding the
25 agreement would lead to an inequitable result. United States v. Transfiguracion,
26 442 F.3d 1222 (9th Cir. 2006). In Transfiguracion, the defendants entered into a plea agreement
27 with the government. As a part of the agreement, the defendants pled to a lesser charge in
28

1 exchange for their cooperation. After the defendants were sentenced pursuant to the plea
2 agreement, the government moved to modify its terms, effectively breaching the plea agreement.
3 In determining whether to rescind the plea agreement or require specific performance, the court
4 held:

5 [w]hen confronted with a situation such as this, where the government is pursuing a
6 course of action that is tantamount to a breach, the defendants are entitled to one of two
7 available remedies-either rescission of the agreement or specific performance. We need
8 not pause long in consideration of this question, however, as tossing the defendants' plea
9 agreements aside would lead to an inequitable result. The defendants have not only given
10 up their right to remain silent, they have already tendered their best bargaining chip. This
11 court cannot fashion relief to undo the current state of affairs. As the government's
12 request that we return the parties to the status quo ante is impossible, the only permissible
13 remedy is to order specific performance of the plea agreements-that is, of the
14 government's promise not to prosecute for the conspiracy charges if the defendants fulfill
15 their promise to cooperate. Id.

16 Mr. Rizzolo's case is analogous to the issues presented in Transfiguracion. Here, Mr.
17 Rizzolo has given up his best bargaining chip- The Crazy Horse Too. As the court cannot undo
18 the events that have taken place from the time that Mr. Rizzolo forfeited the Crazy Horse Too,
19 any attempt to put the parties back in the positions they held prior to entering into the Plea
20 Agreement is impossible and would undoubtedly lead to inequitable results.

21 Mr. Rizzolo lived up to his end of the bargain, he forfeited a property worth thirty three
22 million dollars. Given the Government's failure to maintain licenses and permits for the Crazy
23 Horse Too, the Government cannot refund the value of the property forfeited by Mr. Rizzolo;
24 thus, the Court is unable to repair the harm caused by the Government's breach. For these
25 reasons, recession of the plea agreement is not a viable remedy. Therefore, the Government
26 must be required to specifically perform the terms of the Plea Agreement.

27 **2. THE COURT DOES NOT HAVE JURISDICTION TO MODIFY THE SENTENCE**
28 **AFTER THE PRONOUNCEMENT OF SENTENCE.**

During Mr. Rizzolo's sentencing hearing in this case, the court adopted the terms of the

1 Plea Agreement into the pronouncement of sentence. Specifically, the court ordered Mr. Rizzolo
2 pay restitution to Mr. Henry from the proceeds of the sale of the sale of the Crazy Horse Too.
3 See Exhibit "2" p. 88 lines 9-14. As the oral pronouncement of sentence is binding on the court,
4 it cannot now be modified.

5 Sentence is defined as "the oral announcement of sentence." Federal Rule of Criminal
6 Procedure 35(c). Rule 35 allows for a sentence to be modified only in circumstances where the
7 modification is based on a result of an "arithmetical, technical, or other clear error" and the
8 change is made within fourteen days of the pronouncement of sentence. Federal Rule of
9 Criminal Procedure 35(a). "The court must correct a sentence within seven days¹ after orally
10 pronouncing it *or else it loses its jurisdiction to modify the sentence.*" United States v. Penna,
11 319 F.3d 509, 512 (9th Cir. 2003); (citing United States v. Aguirre, 214 F.3d 1122, 1123 (9th
12 Cir. 2000)).

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15 In cases where there is a conflict between the judgment and the pronouncement of
16 sentence, the pronouncement of sentence controls. U.S. v. Munoz-Dela Rosa, 495 F.2d 253,
17 256 (9th Cir. 1974). "The only sentence that actually controls is the oral pronouncement in the
18 presence of the defendant." Id. (citing United States v. Jarratt, 471 F.2d 226 (9th Cir. 1972);
19 United States v. Hicks, 455 F.2d 329 (9th Cir. 1972)).

20 The Advisory Committee Notes to Federal Rule of Criminal Procedure 35 states "the rule
21 is not intended to afford the court the opportunity to reconsider the application or interpretation
22 of the sentencing guidelines or for the court to simply change its mind about the appropriateness
23 of the sentence." Barragan-Mendoza, 174 F.3d 1024, 1028 (9th Cir. 1999); (citing Fed.R.Crim.P.
24 35(c) advisory committee's notes (West 1998)). "A court's modification of a sentence outside of
25 this seven day period is an action taken without the requisite jurisdiction, and is a legal nullity."
26

27
28 ¹ After this case was published the rule was amended to permit fourteen days to modify the sentence.

1 United States of America v. Diaz-Clark, 292, F.3d 1310, 1317 (11th Cir. 2002). District courts
2 do not have inherent authority to reconsider sentencing orders. The court's "authority to do so
3 must either flow from the court of appeals mandate under 28 U.S.C. §§ 2106 (1982) or from
4 Federal Rule of Criminal Procedure 35." Barragan-Mendoza, 174 F.3d at 1028.

5
6 The Courts strictly interpret the time limit imposed by Federal Rule of Criminal
7 Procedure 35(c). See Barragan-Mendoza, 174 F.3d at 1028 (vacating a sentence modified two
8 months after the original sentence was imposed, holding the party seeking modification must
9 meet the conditions of Rule 35 otherwise the district court cannot modify the sentence). United
10 States v. Weber, 51 F.3d 342, 348 (2nd Cir. 1995) ("because the district court modified the
11 defendants' original sentences more than seven days after they were imposed, the court had no
12 jurisdiction to enter the corrected judgments under Rule 35..."); United States v. Fahm, 13 F.3d
13 447, 453 (1st Cir. 1994) ("Since the narrow window of opportunity allowed under Rule 35 closed
14 long before the district court reconsidered its original sentence, and the court lacked inherent
15 power to do so, the original sentence must be reinstated.")

16
17 Here, Mr. Rizzolo was sentenced on January 23, 2007. In the pronouncement of
18 sentence, the court unambiguously stated that Mr. Rizzolo's was required to pay restitution to
19 Mr. Henry "from the proceeds of the sale of the Crazy Horse Too." See Exhibit "2" p. 88 lines 9-
20 14. Any changes to Mr. Rizzolo's sentence were required to occur fourteen days after the oral
21 pronouncement of sentence, February 13, 2007. The court did not take action to modify Mr.
22 Rizzolo's sentence until April 26, 2010, over three years after Mr. Rizzolo was sentenced. As the
23 court failed to modify the terms of Mr. Rizzolo's sentence within the fourteen days proscribed in
24 Federal Rule of Criminal Procedure 35, the court lacked jurisdiction to modify Mr. Rizzolo's
25 sentence when it did so on April 26, 2010.

26
27 Additionally, if there is any question as to whether Mr. Rizzolo's sentence was modified
28

1 during the April 26, 2010 hearing (which there is not) that doubt is alleviated based on the fact
2 the Government acknowledged during the hearing that Mr. Rizzolo's sentence was being
3 modified. When discussing whether the Henrys should have a right to be heard at the hearing,
4 United States Attorney Eric Johnson stated "I think [the Henrys] have a right to be heard since
5 essentially the modification of his conditions of supervised release is part of his sentence." See
6 Exhibit "3" p. 14 lines 4-6.
7

8 For these reasons, it is respectfully requested that the illegal modification of the sentence
9 must be struck from the record.

10 **3.**

11 **CONCLUSION**

12 Based on the forgoing it is requested that the Court deny the Motion for Supplemental
13 Proceedings and vacate the hearing on said proceedings. It is further requested that the Court
14 require the Government to specifically perform under the terms of the Plea Agreement and that
15 the Court strike the illegal modification of Mr. Rizzolo's sentence from the record.
16

17 Dated this 10th day of November, 2010.

18 GORDON SILVER

19
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