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5
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12
13 DENNIS JACOBS, Chief Judge:

14
15 Defendant-appellant Gary Woltmann pled guilty in the
16 United States District Court for the Eastern District of New
17 York (Platt, J.) to one count of tax fraud. Woltmann filed
18 a notice of appeal challenging the sentence, and the
19 government countered with a motion to dismiss, citing
20 Woltmann's waiver of appeal in the plea agreement ("the
21 Agreement"). We conclude that the waiver is unenforceable,
22 and we vacate and remand to a different district judge for
23 re-sentencing.

24
25 **I**

26 Pursuant to the Agreement, Woltmann pled guilty in
27 September 2007. After signing the Agreement but before
28 sentencing, Woltmann provided substantial assistance to the
29 government in its (ultimately successful) prosecution of

1 another criminal tax fraud case. In exchange for this
2 cooperation, the government submitted a letter to the
3 district court pursuant to U.S.S.G. § 5K1.1 "urg[ing] the
4 Court to consider formulating a sentence below the advisory
5 guidelines" range of 18 to 24 months' imprisonment.¹

6 At a December 11, 2009 hearing ("December 11 Hearing"),
7 defense counsel and the government urged the district court
8 to consider the 5K1.1 letter and the factors enumerated in
9 18 U.S.C. § 3553(a) when imposing sentence. Notwithstanding
10 these prompts, the district court deemed the 5K1.1 letter an
11 improper effort by the parties to repudiate, modify, or
12 amend the Agreement, and ruled that the Agreement
13 constituted Woltmann's consent to any sentence at or below
14 27 months (the upper limit of the appeal waiver provision).
15 Accordingly, the judge discounted the 5K1.1 letter and the
16 other factors enumerated in § 3553(a).

17 At a hearing on January 22, 2010 ("January 22
18 Hearing"), the district court sentenced Woltmann principally
19 to 18 months' imprisonment (the low end of the Guidelines

¹ Section 5K1.1 provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

1 range). In short succession, Woltmann filed a notice of
2 appeal in this Court; the government moved to dismiss on the
3 basis of the appeal waiver provision in the Agreement; and
4 Woltmann moved for bail pending appeal.

5 On April 7, 2010, we granted Woltmann's bail motion.
6 See United States v. Woltmann, 10-0413-cr (Apr. 7, 2010)
7 (order). The government's motion to dismiss was then
8 submitted to this panel. Because the facts, rules, and
9 considerations that bear upon the motion likewise control
10 the merits of the underlying appeal, we heard oral argument
11 on the merits, and we resolve the merits together with the
12 motion: The government's motion is denied, Woltmann's
13 sentence is vacated, and the matter is remanded to a
14 different district court judge for re-sentencing.

16 II

17 Three provisions of the Agreement have bearing
18 on this appeal:

- 19 • Paragraph 2 states that the applicable
20 Guidelines term of imprisonment is 18-24
21 months.
- 22 • Paragraph 2 acknowledges that "the Guidelines
23 are advisory and the court is required to
24 consider any applicable Guidelines provisions
25 as well as other factors enumerated in 18
26

1 U.S.C. § 3553(a) to arrive at an appropriate
2 sentence in this case.”
3

- 4 • Paragraph 4 contains an appeal waiver
5 provision: “The defendant agrees not to . . .
6 appeal . . . the conviction or sentence in the
7 event that the Court imposes a term of
8 imprisonment of 27 months or below. This
9 waiver is binding without regard to the
10 sentencing analysis used by the Court.”
11

12 Provisions like these are common, and their inclusion in the
13 Agreement is unexceptional.

14 At the December 11 Hearing, the government reiterated
15 its position, expressed in the 5K1.1 letter, that the court
16 should impose a below-Guidelines sentence due to Woltmann’s
17 substantial assistance. See, e.g., Tr. of December 11
18 Hearing at 8. The district court refused. It viewed the
19 Agreement as the “governing” or “controlling” instrument,
20 e.g., id. at 4-5, and reasoned that the government’s
21 advocacy of a below-Guidelines sentence on the basis of the
22 5K1.1 letter was an impermissible attempt to “repudiate,”
23 “modify,” or “amend” the Agreement, e.g., id. at 5, 14. The
24 district court felt free to ignore the 5K1.1 letter and the
25 § 3553 factors because Woltmann had ostensibly “consented to
26 such and such a sentence” by agreeing both to the Guidelines
27 calculation in Paragraph 2 and the appeal waiver in
28 Paragraph 4. Id. at 6. In effect, the district court

1 believed that because of the appeal waiver, any sentence at
2 or below 27 months was appropriate, regardless of whether or
3 how the 5K1.1 letter and the § 3553(a) factors--if
4 considered--would bear on the sentence.

5 At the January 22 sentencing hearing, the district
6 court stated that it had "considered the [A]greement that
7 was made with the government and the provision that we just
8 read, paragraph four [i.e., the appeal waiver provision],
9 and the court feels that under the circumstances here and
10 the family circumstances that an 18 month sentence is an
11 appropriate one." Tr. of January 22 Hearing at 12. The
12 court also intimated, as it had done at the December 11
13 Hearing, that consideration of the 5K1.1 letter would
14 constitute an impermissible repudiation of the Agreement:

15 [Defense Counsel]: I would just like to point
16 out to the court, judge,
17 first, that all of the
18 guideline calculations were
19 based upon an estimate
20 prior to any cooperation or
21 5K1 letter.

22 The Court: Are you saying he wants to
23 repudiate the plea
24 agreement?
25

26
27 Id. at 4

28 Woltmann filed a notice of appeal, and the government

1 moves to dismiss citing the appeal waiver in Paragraph 4 of
2 the Agreement. Woltmann in turn argues that the district
3 court's treatment of the 5K1.1 letter and the § 3553(a)
4 factors requires us to vacate the sentence and remand for
5 re-sentencing. We agree.

7 III

8 Plea agreements are reviewed "in accordance with
9 principles of contract law." United States v. Vaval, 404
10 F.3d 144, 152 (2d Cir. 2005) (internal quotation marks
11 omitted). We consider "the reasonable understanding of the
12 parties as to the terms of the agreement." United States v.
13 Colon, 220 F.3d 48, 51 (2d Cir. 2000). Moreover, because
14 plea agreements are "unique contracts, . . . we temper the
15 application of ordinary contract principles with special due
16 process concerns for fairness and the adequacy of procedural
17 safeguards." United States v. Granik, 386 F.3d 404, 413 (2d
18 Cir. 2004) (internal quotation marks omitted). Such
19 contracts are narrowly construed. Id.

20 It is a "well-settled legal principle that the
21 sentencing judge is of course not bound by the estimated
22 range in a plea agreement." United States v. Hamdi, 432

1 F.3d 115, 124 (2d Cir. 2005) (internal quotation marks
2 omitted). To the contrary, before imposing sentence, a
3 district court must consider both a 5K1.1 letter (if one is
4 proffered), United States v. Campo, 140 F.3d 415, 418-19 &
5 n.5 (2d Cir. 1998) (per curiam), and the factors enumerated
6 in § 3553(a), Gall v. United States, 552 U.S. 38, 49-51
7 (2007).

8 Ordinarily, appeal waivers are enforced--and for good
9 reason. See United States v. Morgan, 386 F.3d 376, 380 (2d
10 Cir. 2004) (explaining that voiding such waivers "would
11 render the plea bargaining process and the resulting
12 agreement meaningless" (internal quotation marks omitted));
13 United States v. Gomez-Perez, 215 F.3d 315, 318 (2d Cir.
14 2000) ("[T]he benefits of such waivers inure to both
15 government and the defendant alike, with the government
16 receiving the benefit of reduced litigation, and the
17 defendant receiving some certainty with respect to his
18 liability and punishment."); United States v. Yemitan, 70
19 F.3d 746, 747-48 (2d Cir. 1995) ("If this waiver does not
20 preclude a challenge to the sentence as unlawful, then the
21 covenant not to appeal becomes meaningless and would cease
22 to have value as a bargaining chip in the hands of

1 defendants.”). But we will not enforce an appeal waiver
2 where--as here--the “sentencing decision . . . was reached
3 in a manner that the plea agreement did not anticipate,”
4 United States v. Liriano-Blanco, 510 F.3d 168, 174 (2d Cir.
5 2007); see also United States v. Roque, 421 F.3d 118, 123-24
6 (2d Cir. 2005) (suggesting that an appeal waiver would be
7 unenforceable if the defendant failed to “underst[an]d fully
8 the consequences of his bargain, both in terms of what he
9 was gaining and what he was giving up”), or where “the
10 sentencing court failed to enunciate any rationale for the
11 defendant’s sentence, thus amounting to an abdication of
12 judicial responsibility subject to mandamus,” Gomez-Perez,
13 215 F.3d at 319 (brackets and internal quotation marks
14 omitted).

15 Applying these principles, we hold that vacatur is
16 required because the district court: (1) improperly “relied”
17 on the Agreement to the exclusion of the 5K1.1 letter and
18 the § 3553(a) factors; and (2) misread the Agreement as
19 manifesting Woltmann’s enforceable concession that any
20 sentence at or below 27 months obviated the need to consider
21 the 5K1.1 letter and the § 3553(a) factors. In so doing,
22 the district court failed to give effect to the parties’

1 expectations and deprived Woltmann of the benefit that he
2 (and the government) agreed he would receive from signing
3 the Agreement (i.e., a weighing of the 5K1.1 letter and the
4 § 3553 factors). At the same time, the court also
5 “abdicated” its judicial responsibility in the way posited
6 by Gomez-Perez, 215 F.3d at 319.

7
8 **A**

9 As the transcript of the December 11 Hearing
10 unambiguously shows, the district court felt itself entitled
11 to rely on the Agreement notwithstanding our law that such
12 reliance is misplaced. See Hamdi, 432 F.3d at 124. For
13 example, when the government raised the 5K1.1 letter at the
14 outset of the hearing, the court responded: “[T]his is all
15 very good, but we have--starting this case off, with an
16 agreement that you and counsel for the defendant made, and
17 signed by the defendant, and as far as I’m concerned, that
18 is still the governing instrument here. . . . The plea
19 agreement is the controlling instrument.” Tr. of December
20 11 Hearing at 4-5. Other examples abound. See, e.g., id.
21 at 5 (“[The government], the defendant, and the defense
22 lawyer made an agreement, and that agreement has been, in my

1 book, controlling right from the start here."); id. at 7
2 ("[A]s I see it at the moment, [the Agreement] overrides all
3 else in this picture."); id. at 11 ("[Y]ou made an agreement
4 and I'm entitled to rely on it."); id. at 15 ("I'm troubled
5 by the government's position that I may ignore this
6 agreement, which I don't think that I can or I may, I can,
7 but I may not."); id. at 20 ("What is controlling in my book
8 is the agreement. . . .").

9 This (improper) reliance caused the district court to
10 misread the Agreement and, as a result, to impose a sentence
11 inconsistent with the parties' expectations in signing the
12 Agreement. The Agreement--by its own terms, as it was
13 unambiguously understood by both parties, and as it was
14 initially understood by the district court--contemplated
15 that sentence would be imposed only *after* the district court
16 considered the 5K1.1 letter and the § 3553(a) factors. See
17 Agreement ¶ 2 ("The defendant understands that . . . the
18 Guidelines are advisory and the court is required to
19 consider any applicable Guidelines provisions [i.e.,
20 § 5K1.1] as well as other factors enumerated in 18 U.S.C.
21 § 3553(a) to arrive at an appropriate sentence in this
22 case."); id. ¶ 3 ("The Guidelines estimate set forth in

1 [P]aragraph 2 is not binding on . . . the Court.");
2 Transcript of Plea Colloquy at 15 (September 18, 2007)
3 (district court summarizing Paragraph 2 of the Agreement and
4 ensuring that Woltmann understood that his sentence would be
5 based on "any applicable guidelines together with the
6 factors contained in 18 U.S.C. [§] 3553(a)"); December 11
7 Hearing at 8 (government urging the court to impose a below-
8 Guidelines sentence pursuant to the 5K1.1 letter); see also
9 Tr. of January 22 Hearing at 4 (defense counsel emphasizing
10 to the court "that all of the guideline calculations were
11 based upon an estimate prior to any cooperation or 5K1[.1]
12 letter").

13 Moreover, the government explained to the district
14 court that although some plea agreements preclude both
15 parties from making any motions, this Agreement did not:

16 This agreement does not preclude motions by any
17 party. Occasionally we will insert in these
18 agreements that the parties agree that no motions
19 will be filed in connection with the sentencing.
20 That sentence is not in this agreement. And since
21 the signing of the agreement, Mr. Woltmann has
22 cooperated, and I was--the government was simply
23 trying to bring that to the Court's attention in
24 formulating a sentence.

25
26 Tr. of December 11 Hearing at 15-16. This omission was
27 intentional: The government intended to preserve its

1 ability to offer a 5K1.1 letter for the court's
2 consideration at sentencing.

3 Notwithstanding all this, the court concluded that, in
4 urging consideration of the 5K1.1 letter, the parties were
5 improperly attempting to repudiate or modify the Agreement--
6 and repeatedly rebuked them for doing so. See, e.g., id. at
7 9 ("[T]he government is changing its position here with
8 respect to this waiver."); id. at 11 (sparring with the
9 government and finding it necessary to "read [the Agreement]
10 to you again because you apparently have not been reading
11 it"); id. at 11-12 ("I never had a case where the government
12 has made a firm agreement and then goes out and tries to
13 modify it, in effect."); id. at 13 ("[The government is]
14 trying to modify that agreement."); id. at 14 ("[The
15 government] can't amend it this way, as I see it."); id. at
16 15 ("And to attempt to modify that agreement in this fashion
17 I find very troubling."); id. at 16 ("I don't think that you
18 can modify this agreement that you made here").

19 In effect, the court refused to consider the 5K1.1
20 letter and the § 3553(a) factors on the ground that the
21 appeal waiver and the sentencing range in the Agreement
22 obviated anything else. This erroneous conclusion denied

1 the parties their bargain and reasonable expectations. In
2 this way, the district court erred, and the appeal waiver
3 provision is unenforceable. Liriano-Blanco, 510 F.3d at
4 174; Roque, 421 F.3d at 123-24.

6 **B**

7 The district court misconstrued the Agreement as an
8 enforceable concession by Woltmann that any sentence at or
9 below 27 months was appropriate--without regard to any 5K1.1
10 letter and the § 3553(a) factors. For example, the
11 following colloquy took place at the December 11 hearing:

12 [Prosecutor]: [T]he government does not
13 believe that [the 5K1.1 letter]
14 affects the plea agreement in
15 any way. However, when the
16 Court moves to set a sentence
17 under 3553(a), we ask the Court
18 to consider a sentence below the
19 guidelines in part because of
20 the cooperation of Mr. Woltmann.
21 So I think it plays a role in
22 the second step, when you get to
23 the 3553(a) factors.

24
25 The Court: *What need do I have to get to*
26 *that level when I have a plea*
27 *agreement where he has consented*
28 *to such and such a sentence?*

29
30 [Prosecutor]: Well, what's been consented to
31 and agreed to is the guidelines.

32
33 The Court: No. No.

1 December 11 Hearing at 6-7 (emphasis added). Similarly:
2

3 [Prosecutor]: [P]aragraph 4 of the plea
4 agreement . . . is simply a
5 waiver of appeal or challenge to
6 the sentence. All it does is
7 set a ceiling below which there
8 cannot be any appeal. . . . It
9 is not an agreement to a
10 sentence of that length. It is
11 simply a waiver of appeal. What
12 the parties have agreed within
13 the agreement is that the
14 guidelines are 18 to 24 months,
15 and then if the Court accepts
16 that and moves from the
17 agreement to 3553, and considers
18 the factors under 3553, the
19 government believes one of the
20 factors is Mr. Woltmann's
21 cooperation, which the
22 government believes warrants a
23 sentence below the 18 to 24
24 month guideline.

25
26 The Court: That is a lot of double-talk
27 when you get right down to [it].
28

29 Id. at 8. And again:
30

31 [Prosecutor]: There's an appeal waiver up to
32 27 months. That was never a
33 sentencing recommendation of the
34 government. There's a guideline
35 of 18 to 24 months. Those two
36 facts come out of the plea
37 agreement. At that point when
38 the Court enters its 3553
39 analysis, the guidelines [are]
40 one of the things that the
41 Court--one of the items that the
42 Court looks at in formulating a
43 sentence. So there's a
44 guideline of 18 to 24 months,

1 and then one of the things the
2 Court considers--

3
4 The Court: What you're saying is that this
5 is, I'm not entitled to rely on
6 the agreement that the defendant
7 has made.

8
9 [Prosecutor]: You are entitled to rely on it.
10 He has waived his appeal and any
11 challenge to it for a sentence
12 up to 27 months. He agrees that
13 the guidelines are 18 to 24
14 months. Those two things are
15 agreed. But then the Court is
16 required to move under Gall,
17 G-A-L-L, over to the 3553.

18
19 The Court: *I don't have to do anything if I*
20 *have this agreement. Because*
21 *it's not challengeable according*
22 *to you, the agreement itself.*

23
24 [Prosecutor]: But the agreement doesn't
25 contain any sentencing
26 recommendation.

27
28 The Court: The agreement says he may not
29 challenge anything that the
30 Court does . . . in the event
31 the Court imposes a term of
32 imprisonment of 27 months or
33 below. This waiver is binding
34 without regard to the sentencing
35 analysis used by the Court. The
36 defendant waives all defenses
37 You're trying to modify
38 that agreement.

39
40 [Prosecutor]: No. The fact--

41
42 The Court: I don't think you may.

43
44 [Prosecutor]: The fact that nobody can

1 challenge it does not mean that
2 it's the appropriate sentence or
3 that anybody--
4

5 The Court: *It's not a question of an*
6 *appropriate sentence. It is*
7 *appropriate by both sides[']*
8 *agreement if it's 27 months or*
9 *below.*

10
11 [Prosecutor]: Well, not that it's appropriate,
12 but that no one will appeal it
13 or challenge it in any way.
14

15 Id. at 12-14 (emphases added).

16 The district court's actions "amount[ed] to an
17 abdication of judicial responsibility," Gomez-Perez, 215
18 F.3d at 319, requiring us to deem the appeal waiver
19 unenforceable. The mandate of Campo, 140 F.3d at 418-19 &
20 n.5, and Gall, 552 U.S. at 49-51, is that a district court
21 must consider a 5K1.1 letter and the § 3553(a) factors when
22 formulating the appropriate sentence. Refusal to consider
23 these things is an error categorically different from a
24 misapplication of a guideline, or a mistake of law, or a
25 dubious finding of fact. What happened here is in the
26 category of error contemplated in Gomez-Perez, 215 F.3d at
27 319, which states that an appeal waiver is unenforceable
28 when the district court abdicates its duties in imposing
29 sentence.

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IV

On remand, Woltmann's re-sentencing should proceed before a different district court judge.

Three considerations guide our analysis: "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." United States v. Hernandez, 604 F.3d 48, 55-56 (2d Cir. 2010) (internal quotation marks, brackets, and ellipses omitted). These considerations favor reassignment.

1. In light of the scorn with which Judge Platt approached the matters pertaining to sentencing, we have considerable doubt as to whether on remand he would give fair consideration to the 5K1.1 letter and the § 3553(a) factors. Our doubt is reinforced by events at the December 11 Hearing, when the district court considered itself to be (in terms or effect) a party to the Agreement, or a

1 beneficiary of the appeal waiver. For example, the court
2 declared: "I am entitled to rely on an agreement. I want to
3 make that abundantly clear that's my position." Tr. of
4 December 11 Hearing at 22; see also id. at 11 ("[The
5 government] made an agreement and I'm entitled to rely on
6 it."). And: "[The government] made an agreement *with*
7 *respect to all three of us. . . ,*" id. at 14 (emphasis
8 added).

9 The district court's strange misconception of its role
10 vis-a-vis the parties and the Agreement may explain the
11 court's asserted right to "rely" on the Agreement, and its
12 conspicuous frustration at what the court viewed
13 (erroneously) as the parties' attempt to repudiate or modify
14 the Agreement. It also casts doubt on the ability of the
15 judge on remand to suppress a view of the Agreement premised
16 on his own claim of right.

17 2. In considering the appearance of justice, we must
18 consider Judge Platt's pattern of error regarding 5K1.1
19 letters. See United States v. Doe, 348 F.3d 64 (2d Cir.
20 2003) (per curiam); Campo, 140 F.3d 415.

21 3. Finally, reassignment would not waste substantial
22 judicial resources, because all the district court must do

1 on remand is what district courts do as a matter of routine:
2 consider the 5K1.1 letter and the § 3553(a) factors, and
3 impose sentence accordingly.

4

5

CONCLUSION

6 For the foregoing reasons, we vacate the sentence and
7 remand for re-sentencing before a different district court
8 judge.