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 2 Authority Conferred by 28 U.S.C. § 515
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9 Attorneys for Plaintiff
 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 MICHAEL D. DROBOT,

16 Defendant.

No. SA CR 14-034-JLS

GOVERNMENT'S MOTION TO BREACH
DEFENDANT MICHAEL D. DROBOT'S PLEA
AGREEMENT; DECLARATION OF JON
HABBen; EXHIBITS A-F

Hearing Date: 11/16/18
 Hearing Time: 11:30 a.m.
 Location: Courtroom of the
 Hon. Josephine L.
 Staton

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 20 Plaintiff United States of America, by and through its counsel
 21 of record, the United States Attorney's Office for the Central
 22 District of California and Assistant United States Attorneys Joseph
 23 T. McNally, Scott D. Tenley, and Ashwin Janakiram hereby files its
 24 motion to breach the plea agreement of defendant Michael D. Drobot.

25 This motion is based upon the attached memorandum of points and
 26 authorities, the declaration of Jon Habben and attached

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1 exhibits, the files and records in this case, and such
2 further evidence and argument as the Court may permit. The
3 government met and conferred with defense counsel on October
4 16, 2018. The government intends to writ defendant into
5 Court for the hearing unless otherwise directed by the Court.

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Dated: October 16, 2018

Respectfully submitted,

TRACY L. WILKISON
Attorney for the United States,
Acting Under Authority Conferred by
28 U.S.C. § 515

LAWRENCE S. MIDDLETON
Assistant United States Attorney
Chief, Criminal Division

/s/

JOSEPH T. MCNALLY
SCOTT D. TENLEY
ASHWIN JANAKIRAM
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This Court ordered defendant Michael D. Drobot ("Drobot") to
4 forfeit \$10 million to the United States and to partially satisfy the
5 forfeiture order by selling three of his high-end cars and providing
6 the proceeds to the government. Drobot and the government agreed the
7 cars - with an estimated value of nearly \$2 million - would be sold
8 by July 5, 2018. In June 2018, Drobot told the government that he
9 was trying to sell the cars but needed an extension through the end
10 of August 2018 so that he could sell them at maximum value at the
11 Pebble Beach car auction. The government granted him an extension
12 and provided Drobot written wiring instructions for the proceeds.
13 The parties also made arrangements for the sale proceeds to be
14 transferred directly from the auction house to the government in
15 order to ensure that the proceeds would go to the government.
16 Drobot, through counsel, confirmed that he received the instructions
17 and that the proceeds would be wired after the auction. The proceeds
18 never arrived.

19 The auction house records reveal that Drobot obtained a cash
20 advance on the car proceeds and diverted the money to himself, rather
21 than satisfying his forfeiture obligations as ordered by the Court.
22 Drobot reaped tens of millions of dollars from his fraud and the
23 Court's forfeiture order was intended to disgorge Drobot of criminal
24 proceeds. Drobot has willfully disobeyed the Court's order and in
25 doing so also breached his plea agreement that provides he must obey
26 all court orders. The Court should find Drobot in breach of his plea
27 agreement.

1 **II. STATEMENT OF FACTS**

2 **A. The Plea Agreement**

3 Drobot orchestrated a massive kickback scheme where he paid \$50
4 million dollars in kickbacks to dozens of physicians in order to
5 steer surgeries to his hospital, Pacific Hospital. The kickback
6 scheme was effective and resulted in over \$500 million in kickback
7 induced surgeries being performed at Pacific Hospital. After a
8 cooperating defendant recorded Drobot discussing the payment of
9 kickbacks, the government executed search warrants at Pacific
10 Hospital and Drobot's office in Newport Beach, California.

11 Drobot entered into a pre-indictment cooperation plea agreement
12 with the government where he agreed to plead guilty to conspiracy to
13 commit wire/mail fraud (18 U.S.C. § 371) and a violation of the anti-
14 kickback statute (42 U.S.C. § 1320a-7b(b)(2)(A)), resulting in a ten-
15 year statutory cap. (CR 7 at ¶¶ 9, 13, 16.) The plea agreement
16 provided that the government would forgo any additional charges
17 against defendant that could have been filed based on the kickback
18 scheme as described in the plea agreement.¹ (Id. at ¶ 6.) Without
19 the statutory cap, Drobot's Guidelines range under the plea agreement
20 was 168-210 months' imprisonment.² (Id. at ¶ 23.)

21 Drobot's plea agreement imposed a number of obligations on him.
22 (Id. at ¶¶ 2-3.) Drobot agreed that he would "truthfully [] disclose
23 to law enforcement officials, at a date and time to be set by the

24 _____
25 ¹ A single substantive honest-services mail fraud count has a
26 statutory maximum of twenty-years' imprisonment. See 18 U.S.C. §§
1341, 1346.

27 ² Another significant benefit of the cap was that a substantial
28 assistance motion runs from the statutory cap rather than the
otherwise applicable Guidelines range because when the Guidelines
exceed the statutory cap, the statutory cap is the Guidelines range.
USSG § 5G1.2(b).

1 Office, the location of, defendant's ownership interest in, and all
2 other information known, to defendant about, all monies, properties,
3 and/or assets of any kind, derived from or acquired as a result of,
4 or used to facilitate the commission of, defendant's illegal
5 activities, and to forfeit all right, title, and interest in and to
6 such items." (Id. at ¶ 3.) Further, the agreement required that
7 Drobot obey any "ongoing court order in this matter." (Id. at ¶
8 2(d).)

9 The plea agreement made plain that "all of defendant's
10 obligations are material, a single breach is sufficient for the USAO
11 to declare a breach." (Id. at ¶ 32.) Under the plea agreement's
12 terms, if the Court finds a breach, Drobot cannot withdraw his guilty
13 plea. (Id.) The government is free, should it choose, to, among
14 other things, pursue charges that it did not pursue under the terms
15 of the agreement and use cooperation statements against defendant in
16 any proceeding. (Id.)

17 **B. The Forfeiture Agreement**

18 In November and December 2017, the government reinforced to
19 Drobot that he must comply with paragraph three of his plea agreement
20 that required he preserve and forfeit to the government all criminal
21 proceeds, assets obtained with criminal proceeds, and assets used to
22 facilitate the offense. Drobot failed to respond to the government's
23 demand and on December 26, 2017, the government sent Drobot a "last
24 chance" letter recounting to him his obligations under the agreement
25 and directing him to perform by December 27, 2017. A copy of the
26 letter is attached as Exhibit A. Drobot responded on December 27,
27 2017, stating that he would settle the forfeiture issue with a money
28 judgment stipulation.

1 On January 5, 2018, Drobot signed a forfeiture stipulation
2 providing for a \$10 million forfeiture that would be partially
3 satisfied by: (1) paying \$300,000 cash, (2) selling his properties in
4 Oregon, and (3) selling his 1965 Aston Martin, 1958 Porsche, and 1971
5 Mercedes Benz by dates agreed to with the government (CR 98.) Drobot
6 executed a letter agreement with the government where he agreed to
7 pay the partial forfeiture and sell the cars by July 5, 2018. The
8 letter agreement is attached as Exhibit B.

9 **C. The Court's Forfeiture Order**

10 On January 10, 2018, the Court ordered Drobot to forfeit \$10
11 million to the United States and to partially satisfy the forfeiture
12 order as follows: (1) by a date agreed to with the government, paying
13 \$300,000 to the government; (2) by a date agreed to with the
14 government, selling properties in Oregon and providing the proceeds
15 to the government, and (3) by a date agreed to with the government,
16 selling defendant's 1965 Aston Martin, 1958 Porsche, and 1971
17 Mercedes Benz, and paying the proceeds to the government. (CR 119 at
18 ¶¶ 2-3.) The order further provided that the "personal money
19 judgment of forfeiture is part of the sentence imposed on defendant
20 in this case." (Id.) Drobot and the government agreed that the
21 \$300,000 payment and car sales proceeds would be due to the
22 government by July 5, 2018. See Exhibit B.

23 **D. Forfeiture Performance**

24 On June 23, 2018, the government sent Drobot an email stating
25 that the July 5, 2018 deadline was approaching and recounting
26 Drobot's obligations under the plea agreement. The government
27 recounted that Drobot represented that he was making good-faith
28 efforts to sell the cars and therefore the government would grant him

1 an extension so that the cars could be sold at the Pebble Beach
2 auction that was set for the end of August. The government advised
3 Drobot that the \$300,000 payment would remain due on July 5, 2018. A
4 copy of the email is attached as Exhibit C.

5 Drobot did not tender the \$300,000 payment by the deadline. On
6 July 16, 2018, the government met with Drobot and told Drobot that
7 he needed to obey the Court's order, that his liberty was at stake,
8 and that there would be consequences if he failed to obey the
9 Court's order. The government was especially concerned about his
10 failure to abide by the order given that he had substantial assets -
11 including a \$2 million bond account - at the time of sentencing.
12 Drobot provided the \$300,000 forfeiture payment a few days later.
13 See Declaration of Jon Habben.

14 On August 14, 2018, the government sent Drobot a letter
15 confirming that the government had given him an extension to sell the
16 cars in the Court's order and that the cars must be sold by August
17 25, 2018. The letter instructed Drobot to send the proceeds to the
18 account number listed by August 31, 2018. Drobot, through counsel,
19 confirmed receipt. A copy of the letter is attached as Exhibit D.

20 On August 15, 2018, Drobot, through former United States
21 Attorney General Michael Mukasey, sent a letter to the United States
22 Attorney where Mr. Mukasey requested a meeting with the United States
23 Attorney regarding the case, sought to renegotiate forfeiture issues,
24 and requested that all forfeiture be placed on hold.³ The United
25 States Attorney's Office, on August 29, 2018, and later, the Deputy
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28 ³ Drobot had retained Mr. Mukasey in November 2017 to discuss
Drobot's plea agreement and restitution issues with the government
and apparently retained Mr. Mukasey for this purpose as well.

1 Attorney General's Office, on September 9, 2018, told Drobot, through
2 Mr. Mukasey, that the government would not reconsider the forfeiture
3 issues.

4 On August 31, 2018, Drobot, through his counsel of record,
5 advised the government that the Porsche and Aston Martin sold for
6 \$390,000 and \$1,050,000 respectively and that the auction house had
7 the account number provided by the government. Drobot further
8 advised that the proceeds would be wired 20 business days after the
9 sale of the cars, which would be on or about September 28, 2018. A
10 copy of the email is attached as Exhibit E.

11 **E. Drobot Dissipated the Car Sale Proceeds**

12 The proceeds from the car sales never arrived. According to the
13 auction house records, Drobot diverted the car sales proceeds on June
14 22, 2018 by taking a \$1 million dollar advance on the sale of the
15 cars. And, on September 14, 2018 diverted the remaining \$675,795.89
16 proceeds. In other words, at the time that Drobot was asking the
17 government for good-faith extensions to sell the cars (which the
18 government gave) and was using Mr. Mukasey to lobby the United States
19 Attorney and Deputy Attorney General to amend his forfeiture
20 agreement, Drobot had already violated the Court's order by taking
21 the car sales proceeds and using them for his purposes.⁴ A copy of
22 the records is attached as Exhibit F.

23 **III. DROBOT BREACHED HIS PLEA AGREEMENT**

24 There can be no dispute that Drobot has breached his plea
25 agreement. Plea agreements are contractual in nature and their plain
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28 ⁴ On or about September 6, 2018, Drobot, through Mr. Mukasey,
represented to the government that he had never dissipated any
assets in violation of his plea agreement or any court order.

1 language will generally be enforced if the agreement is clear and
2 unambiguous on its face. United States v. Jeronimo, 398 F.3d 1149,
3 1153 (9th Cir. 2005); United States v. Sandoval-Lopez, 122 F.3d 797,
4 800 (9th Cir. 1997) ("Plea bargains are contractual in nature and
5 subject to contract-law standards."). The plain language of Drobot's
6 plea agreement required that he obey all "ongoing court orders in
7 this matter." Drobot signed and executed the plea agreement with
8 advice of counsel and Drobot certified that he understood each term
9 of the plea agreement. At Drobot's April 24, 2014 change of plea
10 hearing, Drobot confirmed to the Court under oath that he understood
11 each of the provisions of his plea agreement. (CR 42 at 4, 22, 26.)

12 The Court's forfeiture order expressly required that Drobot sell
13 the 1965 Aston Martin, 1958 Porsche, and 1971 Mercedes Benz by the
14 date agreed to with the government. The letter agreement provided
15 that Drobot sell the cars by July 5, 2018. Drobot fully understood
16 the Court's order as evidenced by his signature on the forfeiture
17 stipulation and letter agreement that provided the basis for the
18 Court's order. The Court referenced the forfeiture order and
19 incorporated it into Drobot's sentencing proceedings. Drobot fully
20 understood the Court's order as he asked for extensions on the sale
21 of the cars. The government also advised Drobot in a meeting on July
22 16, 2018 that Drobot needed to comply with the Court's forfeiture
23 order - Drobot never disclosed that he had violated the Court's order
24 by obtaining an advance on the car sales proceeds three weeks
25 earlier. While a breach finding does not require a showing of bad
26 faith, Drobot's bad faith is further underscored by his retention of
27 Mr. Mukasey - who sent a letter to the United States Attorney and
28 later contacted the Deputy Attorney General's Office seeking to stay

1 forfeiture proceedings - a day after the government provided Drobot
2 wiring instructions for the car proceeds. Drobot, through Mr.
3 Mukasey, did not reveal that he had already violated the Court's
4 forfeiture order and affirmatively represented that Drobot never
5 dissipated any assets in violation of his plea agreement or a court
6 order on September 14, 2018 when he instructed the auction house to
7 wire him the remaining \$675,000 in proceeds - while at the same time
8 representing to the government that it should expect the proceeds by
9 the end of September. Drobot willfully violated the Court's order.⁵

10 The government is entitled to enforce its rights under the plea
11 agreement. Indeed, Drobot agreed in the plea agreement that if he
12 fails to perform "any of [his] obligations under this agreement, the
13 USAO may declare this agreement breached." Drobot's violation of the
14 Court's order, designed to disgorge him of his criminal proceeds, was
15 an especially significant breach of his obligations under the plea
16 agreement. In any event, Drobot agreed that the violation of any of
17 his obligations under the agreement would constitute a material
18 breach.

19 Drobot will undoubtedly suggest that he will come up with money
20 from another source to pay the forfeiture - but that does not cut it
21 and in any event, Drobot's word is plainly of little value. Any
22 attempt to pay the car proceeds or equivalent amount to the
23 government at this point would not cure Drobot's breach, as the plea
24 agreement provides that a breach is cured only with the express
25 written agreement of the government. No such agreement exists here.
26 Moreover, Drobot cannot simply try to do now what he was already

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28 ⁵ He also has made false statements to the government in direct violation of his plea agreement.

1 required to do under the Court's order and his plea agreement because
2 there may now be imminent consequences. Once the Court finds breach,
3 Drobot is not relieved from his obligations under the plea agreement.
4 The government will determine an appropriate course moving forward
5 consistent with Drobot's plea agreement.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the government respectfully requests
8 that this Court issue an order finding that Drobot breached his plea
9 agreement and authorizing the government to exercise its rights under
10 the plea agreement.

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DECLARATION OF JON HABBEN

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2 1. I am a Special Agent with the Federal Bureau of
3 Investigation. I am one of the investigating agents assigned to the
4 Michael D. Drobot criminal prosecution.
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6 2. On October 10, 2018, Assistant United States Attorney Joseph
7 T. McNally and I spoke to John Sulman at RM Auctions. Mr. Sulman
8 told us that on or about June 22, 2018 Michael D. Drobot took an
9 advance on the sale of the Aston Martin.

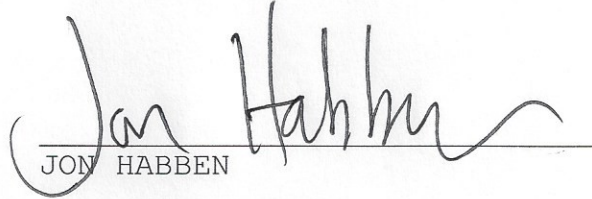
10 3. On or about October 11, 2018, I reviewed records from RM
11 Auctions confirming that on or about June 22, 2018, Michael D. Drobot
12 took a \$1 million advance on the sale of the 1965 Aston Martin. The
13 records show that the Aston Martin sold on September 7, 2018 for
14 \$1,500,000. According to the records, the 1958 Porche sold on August
15 25, 2018 for \$390,000. I reviewed wire instructions where Drobot
16 directed that the funds be wired into a Mickey Motors account. I
17 know from the investigation that Mickey Motors is an entity
18 controlled by Drobot. I also reviewed wire records that show the
19 \$1,000,000 was transferred to the Mickey Motors account on or
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1 about June 29, 2018 and \$675,795.89 was transferred to the Mickey
2 Motors account on or about September 14, 2018. Attached is a true
3 and correct copy of RM Auction records.

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5 I swear under penalty of perjury the foregoing is true and
6 correct to the best of my knowledge.

7 Dated: October 11, 2018

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JON HABBEN