

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

United States of America,

Plaintiff,

Crim. No. 08-364 (RHK/AJB)
**MEMORANDUM OPINION
AND ORDER**

v.

Thomas Joseph Petters,

Defendant.

John R. Marti, Joseph T. Dixon, III, Timothy C. Rank, John F. Docherty, Assistant United States Attorneys, Minneapolis, Minnesota, for the Government.

Paul C. Engh, Engh Law Office, Minneapolis, Minnesota, Jon M. Hopeman, Eric J. Riensche, Jessica M. Marsh, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota, for Defendant.

This matter is before the Court on defense counsel's "renewed" Motion to Withdraw (Doc. No. 167). For the reasons set forth below, and those expressed by the Court at the April 9, 2009 hearing, the Court will deny the Motion.

BACKGROUND

The timeline of events in this case is important for a full understanding of the instant Motion.

On September 24, 2008, federal agents executed search warrants at Defendant's business offices and personal residence. The following day, Defendant retained attorney Jon Hopeman of the law firm Felhaber, Larson, Fenlon & Vogt, P.A. ("Felhaber") to

represent him in connection with this matter.

On October 2, 2008, Defendant was charged by criminal complaint with engaging in a massive financial fraud lasting more than ten years; he was arrested a short time later. He initially appeared before Magistrate Judge Franklin L. Noel on October 3, 2008, and attorney Hopeman represented him at that hearing. Defendant was ordered held without bail pending a pretrial detention hearing.

Several days later, Defendant and two related corporations – Petters Company, Inc. (“PCI”) and Petters Group Worldwide (“PGW”) – had their assets frozen by the Honorable Ann D. Montgomery in a separate civil action commenced by the Government.¹ By stipulation of the parties, a Receiver was later appointed to oversee and marshal the assets of Defendant, PCI, and PGW. The stipulated receivership Orders, which attorney Hopeman participated in drafting with members of the United States Attorney’s Office, expressly included the understanding that any legal fees incurred by him (or other counsel for Defendant) would require the approval of both the Receiver and Judge Montgomery before being paid out of receivership assets. Nevertheless, attorney Hopeman avers that certain Government attorneys advised him that they would not object to payment of his fees from receivership assets.

On October 7, 2008, with attorney Hopeman again appearing on his behalf, Defendant appeared before Magistrate Judge Jeffrey J. Keyes for a pretrial detention

¹ Civ. No. 08-5348 (ADM/JSM) (the “Receivership Action”).

hearing. Defendant was ordered pretrial detained following that hearing. The next day, attorney Hopeman filed a Notice of “Special” Appearance in this case, with leave to withdraw.² Defendant then appealed the detention Order, which was assigned to Chief Judge Michael J. Davis. Judge Davis held a hearing on October 31, 2008, at which attorney Hopeman entered an unconditional appearance on Defendant’s behalf. Judge Davis denied the appeal and affirmed the detention order.

On December 1, 2008, a grand jury returned a 20-count Indictment against Defendant, PCI, and PGW, charging them with mail fraud, wire fraud, conspiracy, and money laundering. The Indictment also sought forfeiture of “any property, real or personal, which constitutes or is derived from proceeds traceable” to the crimes alleged therein. In other words, as of December 1, 2008, the prospect of forfeiture loomed large in this case.

Attorney Hopeman, along with other attorneys at Felhaber and, later, attorney Paul C. Engh, have undertaken substantial efforts to defend this matter. In December 2008, without objection from the Government, the Receiver sought approval from Judge Montgomery to pay more than \$167,000 in attorneys’ fees incurred by Felhaber in September and October 2008. Judge Montgomery granted that request. Feverish work continued; counsel retained experts to assist with document review and expended hundreds of hours interviewing witnesses, meeting with Defendant, drafting briefs,

² The Local Rules of this Court contain no provision for the entry of a “special” appearance by counsel.

attending Court hearings, and otherwise preparing for trial.

In February 2009, Felhaber once again sought fees from the receivership, this time more than \$300,000 for work performed in November and December 2008. The Receiver did not object to the request. While not specifically objecting, the Government submitted a response indicating that fees paid from receivership assets might have to be limited at some point by Judge Montgomery, in order to preserve funds to recompense victims of Defendant's alleged crimes. In addition, the Government advised Judge Montgomery that it intended to seek forfeiture of any assets traceable to the alleged fraud, including the possibility of a "claw back" of fees paid to Defendant's attorneys.³

Ostensibly surprised by the Government's actions, attorney Hopeman ordered all Felhaber attorneys, as well as Defendant's previously retained experts, to immediately cease all "non-essential" work (whatever that means) on this case. On March 16, 2009, counsel moved to withdraw, expressing outrage that the Government had "opposed" the fee request and had raised the specter of a claw back of fees already paid.⁴ Without assurance that they (1) would be paid and (2) need not fear a Government claw back, counsel asserted that they could not continue to represent Defendant in this matter.

On March 18, 2009, Magistrate Judge Arthur J. Boylan held a lengthy hearing on

³ Title in forfeitable assets vests in the United States immediately upon the commission of a crime. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 627 (1989).

⁴ The Motion was unclear as to whether all of Defendant's attorneys sought leave to withdraw or related to only those associated with Felhaber – that is, everyone but attorney Engh. Subsequent filings, however, indicated that all defense counsel sought leave to withdraw.

several pretrial Motions filed by Defendant, including counsel's Motion to Withdraw. Magistrate Judge Boylan denied the Motion to Withdraw without prejudice on the record at that hearing and memorialized the denial in an Order on March 26, 2009 (Doc. No. 163). Meanwhile, on March 25, 2009, Judge Montgomery granted Felhaber's application for attorneys' fees in the Receivership Action and authorized the Receiver to pay slightly more than \$329,000 to the firm, nearly the entire amount that had been requested.

Counsel now seek to "renew" the Motion to Withdraw before the undersigned.

ANALYSIS

Pursuant to District of Minnesota Local Rule 83.7, an attorney may withdraw without substitution of counsel only with leave of Court, "for good cause shown." Neither of the bases asserted in the Motion to Withdraw – failure to obtain payment of fees and fear of a future claw back – constitute "good cause" here. Indeed, each is largely moot.

I. Payment of fees

As set forth above, Felhaber has now been paid nearly every penny that it has sought.⁵ Furthermore, Judge Montgomery made clear in her most recent Order that "in the interest of providing Defendant Petters with the opportunity to a full and fair hearing on the merits in this complex case, and in the absence of other sources available to [him]

⁵ At the hearing on the instant Motion, defense counsel asserted that they had not been paid for work performed after December 2008, despite submitting bills to the Receiver on a monthly basis. But nothing in the record indicates that those bills have been objected to by the Government or the Receiver – rather, it would appear that the bills have not yet been paid due to the (not unexpected) delay in their review by either the Receiver or Judge Montgomery.

to secure counsel, the Court will authorize payment for attorney fees reasonably and necessarily incurred in” this case. (Doc. No. 229 at 9-10 in Receivership Action.)

Accordingly, counsel’s concern that they might not get paid for work performed down the road is purely speculative and does not support withdrawal. See United States v. Heron, 513 F. Supp. 2d 393, 399 (E.D. Pa. 2007) (“Berkowitz Klein does not seek to withdraw on the basis that they have not been paid, but rather because they fear that they will not be paid in the future. We are aware of no precedent for such an extraordinary notion.”).⁶

In any event, even if the failure to obtain fees remained an issue ripe for the Court’s consideration, counsel’s withdrawal would not be warranted under the circumstances here. “Attorneys normally are expected to work through the completion of a case.” FTC v. Intellipay, Inc., 828 F. Supp. 33, 33 (S.D. Tex. 1993); accord Byrd v. Dist. of Columbia, 271 F. Supp. 2d 174, 176 (D.D.C. 2003). “Non-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation.” United States v. Stein, 488 F. Supp. 2d 370, 373 (S.D.N.Y. 2007)

⁶ Judge Montgomery’s determination that Defendant is entitled to receivership assets to pay for his defense does not grant his attorneys *carte blanche* to incur unreasonable or excessive fees. Counsel have been aware since the receivership was created that Court approval was a prerequisite to any fee award. Hence, it was unreasonable at the outset, and it remains so today, for counsel to assume that they may incur any amount of fees with the expectation that the Court will simply rubber stamp them, even if unopposed by the Receiver and the Government. Further, the fact that Judge Montgomery holds the purse strings amply demonstrates why any representations made to defense counsel by the Government are irrelevant to the Court’s analysis. As Judge Montgomery noted, “[a]ny assurances the Government may or may not have made to Petters’ counsel with regard to fee allowances are not dispositive, as the Court has always maintained the discretion to limit attorney fees and costs if they are unreasonable.” (Doc. No. 229 at 10 in Receivership Action.)

(citations omitted); accord, e.g., United States v. Parker, 439 F.3d 81, 104 (2d Cir. 2006); Heron, 513 F. Supp. 2d at 398. This is particularly true where, as here, counsel have invested substantial time and effort on a case, have received significant fees for their work, and the trial date is just over the horizon. See, e.g., Nat'l Career Coll., Inc. v. Spellings, Civ. No. 07-75, 2007 WL 2048776, at *2 (D. Haw. July 11, 2007) (“Before permitting counsel to withdraw, the court should consider: the amount of work remaining in comparison to the amount of work already performed and paid for; the amount of fees already paid; and the effect of withdrawal on the client.”); Hasbro, Inc. v. Serafino, 966 F. Supp. 108, 110 (D. Mass. 1997) (same).

Defense counsel complain that the financial burden they might incur if they are unable to recover fees entitles them to withdraw. Their concerns are largely illusory, as discussed above. But regardless, “there exists an interest beyond that of the . . . attorney, namely, the interest of the Court.” Cabo Holdings, LLC v. Engelhart, Civ. No. 07-3524, 2008 WL 4831757, at *3 (D. Minn. Nov. 3, 2008) (Schiltz, J., adopting Report & Recommendation of Erickson, M.J.) (citations omitted); accord Hasbro, 966 F. Supp. at 110. The Court places “paramount interest in the administration of justice,” Cabo Holdings, 2008 WL 4831757, at *3, which necessarily predominates over counsel’s pecuniary interests. See Parker, 439 F.3d at 104 (“[W]e presume that counsel will continue to execute his professional and ethical duty to zealously represent his client, notwithstanding [a] fee dispute.”) (quoting United States v. O’Neil, 118 F.3d 65, 71 (2d Cir. 1997)); United States v. DiCarlo, 575 F.2d 952, 957 (1st Cir. 1978) (“[T]he lawyer

[must] subordinate his pecuniary interests and honor his primary professional responsibility to his client.”).

Defendant enjoys the right to a speedy trial, and this Court strongly believes in the maxim that “justice delayed is justice denied.” SEC v. First Am. Bank & Trust Co., 481 F.2d 673, 675 n.3 (8th Cir. 1973). It is the Court’s obligation to ensure that this right is protected, even if it results in financial hardship on defense counsel. Indeed, the Court could order counsel to remain in this case *pro bono* if necessary to achieve that end. See Williamson v. Vardeman, 674 F.2d 1211, 1214 (8th Cir. 1982) (“Attorneys may be constitutionally compelled to represent indigent defendants without compensation.”); see also United States v. Accetturo, 842 F.2d 1408, 1412 (3rd Cir. 1988) (“[C]ourts have upheld their inherent power to appoint counsel, sometimes even over counsel’s objection, to represent defendants in need of such representation.”) (citations omitted); Stein, 488 F. Supp. 2d at 374 (lawyers are obligated to undertake representation when ordered to do so “even over their objection and without fee”). But the Court has not yet reached that juncture, as defense counsel have been fully compensated in this case thus far.⁷

⁷ If need be, the Court can ameliorate (at least in part) the concerns raised by Defendant’s lawyers by appointing them as CJA counsel. Attorney Engh suggests that the Court has no authority to require his (and, apparently, Felhaber’s) representation of Defendant at CJA rates, contending that Rule 6.2 of the Minnesota Rules of Professional Conduct “prohibits a Court appointment ‘likely to result in an unreasonable financial burden on the lawyer.’” (3/30/09 Letter from Paul Engh to the undersigned at 2.) Counsel, however, selectively (mis)quotes Rule 6.2. That Rule in no way constrains *the Court* from making appointments imposing financial burdens on lawyers. Rather, the Rule states that “[a] lawyer shall not seek to avoid appointment by a tribunal . . . except for good cause, such as: representing the client is likely to result in an unreasonable financial burden on the lawyer.” Comment 2 to Rule 6.2 confirms this interpretation. See id. (“A lawyer may also seek to decline an appointment if acceptance would

Furthermore, permitting withdrawal would do a great disservice to the receivership. Defendant is constitutionally entitled to representation; if his lawyers were permitted to withdraw, the Court would have to appoint new counsel to represent him. That would require duplication of much (if not most) of the work already performed by Defendant's attorneys, which by their own reckoning comprises thousands of hours of attorney time. That would lead to one of two results: if new counsel were paid out of receivership funds, then the receivership would have paid twice for the same work; and if not – say, because Defendant were to be represented by the Federal Defender's Office or a CJA attorney – then the sums already paid to Defendant's attorneys would have significantly diminished receivership assets without materially advancing the defense. The Court will not countenance either result.⁸

Defense counsel also contend that they need funding to pay defense experts and without a guarantee that such funding is forthcoming, they should be permitted to withdraw. This argument is just as speculative as the arguments over attorneys' fees – to date, no requests for expert fees have been challenged or denied and there is no reason at

be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.”) (emphasis added). Attorney Engh also avers that he would simply “decline” a CJA appointment were the Court to make one, but that choice is not his to make. See id. cmt. 1 (“A lawyer may . . . be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.”); see also Powell v. Alabama, 287 U.S. 45, 73 (1932) (“Attorneys are officers of the court, and are bound to render service when required by such an appointment.”).

⁸ Of course, these outcomes could be avoided if counsel were willing to return to the receivership all of the fees received to date.

this juncture to presume that they will be in the future. Regardless, Defendant is not entitled to unlimited expert funding. See Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (“This is not to say . . . that the indigent defendant has a constitutional right to choose a[n expert] of his personal liking or to receive funds to hire his own.”). If Defendant cannot afford his own chosen experts, he can seek CJA funding for them. If the experts are unwilling to accept CJA funding, he can attempt to find other experts who are. That is all due process requires. See United States v. Lefkowitz, 125 F.3d 608, 620 (8th Cir. 1997) (defendant must only be provided “the basic tools of an adequate defense”; affirming \$169,000 cap on CJA fees for expert accountant).

At bottom, the delay engendered by permitting counsel to withdraw at this late stage, given the amount of time and effort already invested by them, would harm the administration of justice and cannot be permitted. Heron, 513 F. Supp. 2d at 399. The Court will not require Defendant to sit in pretrial detention while new counsel comes “up to speed” in this case simply because of his current lawyers’ concern for their bottom lines.

II. Claw back

Defense counsel next argue that they should be permitted to withdraw because they fear, if Defendant is convicted, that the Government might seek to claw back fees paid to them. At the hearing, however, the Government represented that it would entertain a request from defense counsel to trace the source of any funds that might be paid to them out of receivership assets. Following that tracing, the Government will

inform defense counsel (and the Receiver) whether the funds are “clean” – that is, not traceable to fraud – or tainted. And the Government specifically averred that it will not seek to claw back any “clean” funds paid to defense counsel. Because all parties appear to agree that only untainted funds will be paid out by the Receiver, defense counsel need not fear that future payments are subject to Government claw back. The issue is moot.⁹

Even if this were not the case, however, withdrawal out of a fear of claw back would be inappropriate. From the outset, defense counsel – experienced criminal attorneys – had to know that the prospect of forfeiture and claw back could rear its head. Indeed, the potential for forfeiture exists in nearly all criminal cases involving financial frauds, where the taint of funds paid to an attorney cannot be fully known. Despite these concerns, counsel voluntarily undertook the defense here. “It is most assuredly not the job of this Court to protect [defense counsel] from [their] free decision to accept representation of a client whose financial situation happens to be under a cloud.” Heron, 513 F. Supp. 2d at 399.

Attorney Hopeman suggests that he was misled by early Government promises in this case. But nothing in his recently filed Affidavit or in any of the other materials submitted to the Court suggests that the Government stated unequivocally that it would not seek to claw back fees paid out of receivership assets. And even if such representations had been made, defense counsel certainly should have been aware as of

⁹ The Government also represented that all funds paid to counsel to date have not been linked to Defendant’s alleged fraud.

December 1, 2008 – the date Defendant was indicted – that claw back had become a real possibility, notwithstanding the representations. The Indictment made clear that the Government would seek to forfeit “any property, real or personal, which constitutes or is derived from proceeds traceable” to the crimes alleged therein. If, as counsel suggest, the Government had previously represented that it would not seek to claw back attorneys’ fees, then in the Court’s view the Indictment obligated defense counsel to promptly inquire regarding the Government’s intent, because of the obvious inconsistency between the alleged representations and the forfeiture allegations in the Indictment. Instead, counsel ignored the elephant in the room, continued (in silence) to work on this case, and expended hundreds of hours (and hundreds of thousands of dollars) over more than three months before expressing any concern regarding the claw-back issue. Under these facts, withdrawal is unwarranted.

The Court finds Heron to be particularly instructive on this point. There, the defendant was charged with securities fraud and insider trading and retained private counsel to represent him. Counsel later sought leave to withdraw “out of a concern that the Government’s notice of forfeiture represents a ‘sword of Damocles’ hanging over their representation that will likely result in their not being paid for their services.” 513 F. Supp. 2d at 398. The Heron court denied the motion for several reasons, including that defense counsel should have been aware of the prospect of forfeiture when it accepted the case. Id. (“By the time Heron approached [defense counsel] about possible representation, the Indictment containing the notice of forfeiture had already been filed.”).

While the Indictment here was not returned by the grand jury until *after* attorney Hopeman first appeared on Defendant’s behalf, the clear import of Heron is that the Indictment should have put him on notice that the prospect of forfeiture (and claw back) loomed in the distance. He could have sought leave to withdraw at that time, but he did not. Instead, he waited for more than three months, investing substantial time and effort – at substantial cost to the receivership – to prepare for a rapidly approaching June trial date. To permit withdrawal under these facts, with the trial just around the corner, would unjustifiably reward these actions. See also Stein, 488 F. Supp. 2d at 374 (“Given the fact that [counsel] undertook this representation, knowing that his prospects for full payment were unsecured and inherently somewhat uncertain, the Court has a heightened interest in his finishing what he started.”).

CONCLUSION

The Court pauses to address one final matter. When the Motion to Withdraw was first filed, counsel unilaterally decided to stop working on this case and directed other defense attorneys at Felhaber to do the same. These actions violated the spirit, if not the letter, of District of Minnesota Local Rule 83.7, which permits withdrawal only with leave of the Court. While technically speaking, counsel did not “withdraw” from the case at that time, the decision to stop working (and instructing others to do so) achieved the same result – but without judicial imprimatur.

Counsels’ conduct following Magistrate Judge Boylan’s denial of the Motion to Withdraw continued in the same vein – they refused to resume working on this case,

running afoul of *both* Local Rule 83.7 *and* Magistrate Judge Boylan's Order. Their clear displeasure with that Order did not grant them license to simply ignore it at their fancy. Notwithstanding their financial concerns, their obligations to their client and to the Court remained, unless and until told by the Court that they did not. Their actions disregarded Defendant's interests and demonstrated disrespect and contempt for those of the Government, the Court, and most importantly, for the administration of justice.

With the "renewed" Motion to Withdraw having now been denied (again), the Court expects counsel to re-engage themselves with all due speed and best efforts in this case. The Court trusts that it will not be called upon to consider the imposition of sanctions for the continuation of the aforementioned conduct.

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that the "renewed" Motion to Withdraw (Doc. No. 167) is **DENIED**.

Dated: April 13, 2009

s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge