UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 08-364(RHK/AJB)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	GOVERNMENT'S RESPONSE
	)	TO DEFENDANT'S RENEWED MOTIONS:
v.	)	
	)	(1) DISMISS FOR MEDDLING,
	)	(2) DISMISS FOR VIOLATION OF AKE
THOMAS JOSEPH PETTERS,	)	v. OKLAHOMA,
	)	(3) WITHDRAW AS COUNSEL, AND
Defendant.	)	(4) CONTINUANCE
	)	

The United States of America, by and through its attorneys Frank J. Magill, United States Attorney for the District of Minnesota, and Joseph T. Dixon, III and John R. Marti, Assistant United States Attorneys, submits its response to the defendant's renewed motions filed on March 30, 2009.

PROCEDURAL BACKGROUND

On January 8, 2009, this Court declined the defendant's request for a trial in late fall, and the government's request for an April trial, and gave the parties a firm trial date of June 9, 2009.

On March 9, 2009, defense counsel advised the Court that they would be seeking a continuance of the trial date.

On Friday, March 13, 2009, defense counsel notified the media that they would "halt all work," purportedly in response to their outrage at a government filing on March 13, 2009 before Judge Montgomery (a filing Judge Montgomery has described as merely

outlining "possible options and the law supporting judicial discretion in the disbursement of receivership funds.")

On Monday, March 16, 2009, the defendant filed a series of motions, including a motion for a continuance, a motion to withdraw as counsel and motions to dismiss the indictment.

At a hearing on March 18, 2008, Magistrate Judge Boylan denied the motion to withdraw and the motions to dismiss. Nevertheless, defense counsel did not resume trial preparation.

On March 25, 2009, Judge Montgomery issued an opinion and order, approving $329,365.20 for defense counsel's fees (approving all but $3,545 for which defense counsel provided no explanation). Nevertheless, defense counsel did not resume trial preparation. Instead, unsatisfied with Judge Montgomery's order, defense counsel renewed the instant motions.

LEGAL ANALYSIS

I. MOTIONS TO DISMISS

The defendant's motions to dismiss the indictment are frivolous.

A. Ake v. Oklahoma

Defendant relies on Ake v. Oklahoma, 105 U.S. 68 (1985), as a basis for his motion. The defendant would lead this Court to believe Ake entitles him to the experts he wants at the rates those experts demand. The Supreme Court and the Eighth Circuit plainly

say otherwise. Although the defendant miscasts the holding of Ake, the case is instructive.

Ake was indigent. 105 U.S. at 68. Prior to trial, the trial judge sua sponte ordered a psychiatric evaluation of the defendant and declared him incompetent to stand trial. Id. Weeks later, the defendant was declared competent to stand trial. When defense counsel requested a psychiatric examination at state expense to support an insanity defense, however, it was denied. The defendant was convicted and sentenced to death. Id. The Supreme Court reversed, holding that when a preliminary showing has been made that the defendant's "sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance." Id. at 74.

Contrary to defendant's assertions, Ake does not hold that the government must fund the experts of defendant's choosing at the rates demanded by those experts. To the contrary, the Supreme Court specifically held that "[t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." 470 U.S. at 83; see also United States v. St. John, 851 F.2d 1096, 1098 (8th Cir. 1988) (defendants do not have "carte blanche" to retain any expert); United States v. Lefkowitz, 125 F.3d 608, 620 (8th Cir. 1998) (affirming $169,000 expert cap).

In this case, if the defendant does not have sufficient funds to retain counsel or constitutionally necessary expertise, let him say so and request assistance from this Court. This Court may then evaluate that request and determine if it should approve the expenditure of C.J.A. funds on behalf of the defendant. To date, for whatever reasons, the defendant has not requested appointment of C.J.A. counsel, and the Court has not found defendant Petters to be indigent, although it could.[1]

At the motions hearing on March 18, 2009, Magistrate Judge Boylan suggested that the Court may need to conduct a C.J.A. assessment. Since then, defense counsel has repeatedly represented to the government that the defense has "no funds" with which to do legal work required by the Federal Rules of Criminal Procedure and the Court. See Letter from Jon Hopeman to John Marti dated Mar. 30, 2009 (attached hereto); Letter from Jon Hopeman to John Marti dated Apr. 2, 2009 (attached hereto). That being the case, this Court may now make a C.J.A. assessment so as to avoid future, recurring issues regarding attorney fees, which will likely lead to delays and work stoppages.

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[1]In a letter to Judge Ann Montgomery dated October 13, 2008, defense counsel acknowledged that "Mr. Petters personally guaranteed many of Petters Company's corporate obligations." In fact, the defendant has extraordinary, pre-existing personal liabilities that exist irrespective of the defendant's guilt and appear to exceed his assets. To date, defendant Petters has elected not to file for, and has not been forced into, bankruptcy.

Defense counsel has suggested that defendant Petters' case should receive special treatment and that C.J.A. funding would be unworkable, in part, because the C.J.A. rates would not permit hiring their preferred expert at the rates he demands. Of course, that is not relevant to the Ake analysis or the C.J.A. analysis. The defense cannot have it both ways. If the defendant requires government guaranteed funding for his defense, he is entitled to C.J.A. rates. If the defendant wants to engage defense counsel and experts paid at substantially higher rates, then they will be subject to economic realities and the limits of the defendant's available assets.

B. Purported Government "Meddling"

The defendant also miscasts United States v. Stein, 541 F.3d 130 (2d Cir. 2008) to support his motion to dismiss for government meddling.[2] In Stein, which involved a tax prosecution with no identifiable victims other than the government, the Second Circuit found that the government interfered with employees' Sixth Amendment rights when the government coerced an employer to "cut off all payments of legal fees and expenses to anyone who was

[2]It is ironic that defense counsel complain of government meddling with their fees while simultaneously basing their claims to millions of dollars on purported "USAO promises." The claims of promises are inaccurate. Indeed, defense counsel's own actions, namely his "special appearances" in this case, and his statements to magistrate judges plainly demonstrate that promises were neither made nor relied upon.

indicted." Id. at 146. Stein does not support the defendant's arguments.

First, the Stein court found that the government coerced the corporation, rendering it a government agent, to cut off its employees' attorney fees. In sharp contrast, in her Order dated March 25, 2009, Judge Montgomery made plain that she, and not prosecutors, would determine what assets are available for the defendant's attorneys.

Second, in this case, in contrast to Stein, numerous investors stand defrauded. In Stein, the attorney funds at issue were not stolen funds. Both Congress and the Supreme Court have recognized the government's duty to protect the rights of victims to restitution from stolen funds.[3]

Moreover, the defendant's argument is premised upon a fiction. The defense claims the government "told" Judge Montgomery that defense fees should be "clawed back." Motion to Renew, ¶ 8. That

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[3]A defendant may not use stolen funds to pay for his defense. United States v. Monsanto, 491 U.S. 600, 613-16 (1989) ("We find no evidence that Congress intended to modify that nostrum to read, 'crime does not pay, except for attorney fees.'"); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 618, (1989) ("A criminal defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the attorney of his choice."); United States v. Stein, 541 F.3d 130, 155 (2nd Cir. 2008)("the Sixth Amendment does not prevent the government from reclaiming its property from a defendant even though the defendant had planned to fund his legal defense with it").

assertion is untrue. In the submission to Judge Montgomery, the government advised her (i) forfeiture law does not permit the use of "restrained assets" for attorney fees, (ii) if an asset is traced to the fraud, the government will restrain the asset by filing forfeiture pleadings as to the particular asset (thereby notifying the Court that the asset may not be used to pay expenses), and (iii) forfeiture law protects the rights of third parties. See Gov't Response to Application to Atty Fees dated Mar. 13, 2009 (attached as an exhibit to Gov't Response dated Mar. 17, 2009). The filing says nothing regarding a "claw back." To the contrary, the government has previously advised this Court as follows: "If Judge Montgomery determines the defendant's personal assets are sufficient to meet defense counsel's demands, she may approve the fees and direct them paid." See Gov't Response dated Mar. 17, 2009.

Defendant's motions to dismiss are frivolous and a waste of judicial resources.

II. MOTION FOR A CONTINUANCE

On January 8, 2009, this Court rejected both parties' requests for trial dates. Noting the public interest in a speedy trial, the Court struck a balance and scheduled the trial for June 2009.

This case is certainly the largest fraud based on dollar loss in the history of the State of Minnesota, and one of the largest in the country. Yet, the fraud scheme itself is conceptually simple:

repeatedly selling non-existent merchandise. As the defendant well knows, Sams Club, Walmart, BJ's, CostCo, and Boscov's have no records of these fictitious transactions. Furthermore, for over two weeks in September 2008, the defendant was captured on hours of audio recordings personally directing the fraud scheme. Many co-conspirators have pleaded guilty and implicated the defendant under oath. Company records also confirm the defendant's knowledge, participation and direction of the scheme.

The Court acknowledged that the public has an interest in a speedy trial. The public should not be penalized by the defense's self-proclaimed continuances and work stoppages.

III. MOTION TO WITHDRAW

The government takes no position regarding defense counsel's request to withdraw.

Based on defendant's various submissions, defense counsel imply that the Court cannot permit them to withdraw. They assert that no other attorneys will represent the defendant without government guarantees to millions of dollars in attorney fees. See Mem. of Law in Support of Motion To Withdraw dated Mar. 16, 2009. They also assert that defendant Petters' case should receive special consideration, because "the CJA funding mechanism wasn't designed for a case like this one." In other words, according to defense counsel, the Court is stuck, and must accede to their demands. Defense counsel's refusal to abide by their obligations

and court directives is untenable, see Gov't Response to Objections dated Apr. 6, 2009, and should be brought to halt.

Dated: April 6, 2009

Respectfully submitted,

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