

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, ) GOVERNMENT'S RESPONSE  
 ) TO DEFENDANT'S MOTIONS:  
 v. ) (1) STAY MOTIONS HEARING,  
 ) (2) DISMISS FOR MEDDLING,  
 ) (3) DISMISS FOR VIOLATION OF AKE  
 THOMAS JOSEPH PETERS, ) v. OKLAHOMA,  
 ) (4) WITHDRAW AS COUNSEL, AND  
 Defendant. ) (5) 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 following defendant motions filed on March 16, 2009: (1) Stay Motions Hearing Pending Resolution of Governmental Meddling; (2) Dismiss for Reasons of Governmental Meddling with the Funding of the Defense; (3) Dismiss for Violations of Ake v. Oklahoma; (4) Withdraw as Counsel; and (5) Continuance.

At the heart of defendant's latest motion is defense counsel's demand for \$5,000,000 in attorney fees without regard to (i) the source of those funds or (ii) the manner in which such funds were obtained. This demand is made without regard to applicable legal precedent and without even identifying (in any meaningful way) the source of funds from which the fees should be paid. Indeed, they even contend (incorrectly) that the government has promised them

their fees without limitation. They want it. Therefore, they get it. That is not the law, however.

The question - what personal assets are available to the defendant to pay for counsel - is squarely before Judge Montgomery, not the government. If Judge Montgomery determines the defendant's personal assets are sufficient to meet defense counsels' demands, she may approve the fees and direct them paid. If Judge Montgomery determines the defendant's personal assets are insufficient to meet defense counsel's \$5 million demand, there may be an issue regarding the defendant's representation. Given the extensive personal guarantees the defendant executed in exchange for funds, the Court may need to determine if the defendant's personal liabilities far exceed his personal assets (irrespective of whether he is guilty of the fraud).

#### PROCEDURAL BACKGROUND

On March 13, 2009, the government filed a memorandum with the district court judge overseeing the receivership in this case in response to the Receiver's request to approve legal fees. (A copy of the government's memorandum is attached.) The memorandum was filed in response to Judge Montgomery's order that the government submit its position concerning attorney fee requests by all defendants in this case. That memorandum did no more than state the obvious; that the supply of money with which to pay legal fees was not infinite, and that the district court had at its disposal

mechanisms by which to limit fees. It is difficult to understand how these basic propositions could be a surprise to any lawyer. All lawyers must balance the legal needs and desires of their clients against the financial resources available.

Immediately, defense counsel expressed outrage to the media that their attorney fees - which already exceed \$580,000 - might be limited to the defendant's own legitimately obtained assets. On March 16, defense counsel responded with a series of intemperate and melodramatic motions, excoriating government lawyers, other defense lawyers and the Receiver. In essence, the defense attorneys have proclaimed they are ceasing their representation until they receive a guarantee that they will receive at least \$5 million (and more if they want it). The defense makes little effort to explain how they are to be paid. They simply assert that they can be paid with \$9 million of corporate assets from Petters Aviation, LLC, a company that is indirectly owned by the defendant. They fail to mention, however, that Petters Aviation has filed for bankruptcy. They fail to mention that Petters Aviation has reported it has corporate creditors with \$41 million in claims against Petters Aviation. While the defendant may have previously treated corporate assets as his own, his counsel knows better.

In any event, as was expressly set forth in the government's filing: The approval and payment of defense attorney fees is "[an] individualized task . . . for the Court and the receivers."

## FACTUAL BACKGROUND

Given the guilty pleas of five defendants and the bankruptcy filings of the defendant's own companies, Petters Company, Inc. and Petters Group Worldwide, LLC - in which the companies acknowledge billions of dollars in liabilities without corresponding assets - the defendant cannot reasonably deny a massive fraud took place. The government acknowledges that it remains for a jury to determine the defendant's guilt. That said, the defendant, at best, can only contend that he was unaware of the fraud and did not participate (the question a jury will decide).

Irrespective of whether the defendant is guilty, however, the proceeds of the fraud belong to the victims. The defendant is not legally entitled to use stolen money to pay his attorney fees. To the extent the defendant possesses personal assets which are not the proceeds of fraud, he may use those assets to pay his personal expenses (including family expenses) and attorney fees.<sup>1</sup> Personal assets that are not the proceeds of fraud are the defendant's to spend. He may spend those funds on lawyers, on jury consultants, on investigators, indeed (as he apparently seeks to do), on media consultants. He may use those funds to care for his children.

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<sup>1</sup> The defendant notes the Receiver's accounting that defendant has \$32,054.52 of readily available funds in his account. Defense counsel's latest invoice is for \$332,910.20. Without any explanation as to how the invoice is to be paid, the defendant baldly asserts that the Sixth Amendment requires full and immediate payment.

That is his choice. It is black-letter law, however, that he may not spend money stolen from other people (whether or not the defendant is responsible for the fraud).

While accusing the government again of "meddling," the defendant fails to advise the Court that the government is not opposing the Receiver's efforts to liquidate certain personal property of the defendant which, to date, have not been traced to the fraud (such as several Bentley automobiles) for the very purpose of paying the defendant's personal expenses and attorney fees. Indeed, on March 9, 2009, with notice to the defendant, the government delivered to the Receiver eleven luxury watches that belonged to the defendant, to be credited to the defendant's receivership account. The government believes the Receiver will obtain between \$500,000 and \$1 million from the sale of the defendant's personal property.

Trumpeting the Sixth Amendment, defense counsel contend that their fees must not be constrained by the economic reality that the defendant's assets are limited. Instead, defense counsel look to spend funds that are not the defendant's to spend. Implicit in defense counsel's demand is that the Sixth Amendment gives them entitlement to: (i) proceeds of a fraud; (ii) the assets of individual co-defendants (who have their own restitution obligations to victims); and (iii) assets of bankrupt corporate entities (essentially allowing the defendant to bypass corporate

creditors and the bankruptcy priority scheme). The defendant's claims are presumptuous and without merit. Indeed, the claims are shocking.

To date in this case, five separate attorneys have appeared as part of the defendant's criminal defense team; at least two investigators have been engaged; a media consulting firm has also been retained. The defendant anticipates fees of \$5 million for their services. The Constitution does not guarantee a defense at such expense. The defendant may spend \$5 million for his defense to the extent he has these funds, but he should not be permitted to do so on the backs of the victims of the fraud scheme.

#### LEGAL ANALYSIS

##### **I. The Defendant Is Not Entitled to Funds Stolen From Investors.**

A defendant may not use stolen funds to pay for his defense. 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"); United States v. Farmer, 274 F.3d 800, 804 (4th Cir. 2001) ("there is no Sixth Amendment right for a defendant to obtain

counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice.”).

As the Supreme Court has expressly stated:

Permitting a defendant to use assets for his private purposes that, under this provision, will become the property of the United States if a conviction occurs, cannot be sanctioned.

\* \* \*

Congress decided to give force to the old adage that “crime does not pay.” We find no evidence that Congress intended to modify that nostrum to read, “crime does not pay, except for attorney fees.”

\* \* \*

Respondent contends that both the nature of the Government's property right in forfeitable assets, and the nature of the use to which he would have put these assets (i.e., retaining an attorney), require some departure from our established rule of permitting pretrial restraint of assets based on probable cause. We disagree.

United States v. Monsanto, 491 U.S. 600, 613-16 (1989) (citations omitted).

Each defendant deserves and is entitled to zealous representation of counsel. “[T]he Sixth Amendment guarantees the defendant the right to be represented by an otherwise qualified attorney *whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.*” Caplin & Drysdale, Chartered, 491 U.S. at 624-25 (emphasis added); United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). This principle is a cornerstone of our system of justice. Maine v. Moulton, 474 U.S. 159, 170-71 (1985). However, the government does not impede

on that right by ensuring that funds stolen from victims are preserved for restitution, and not used by a defendant to pay attorney fees.

The defendant is entitled to counsel of his choice, but this choice is at his expense. He may pay his counsel from his own assets to the extent they were not fraudulently obtained (by the defendant or others). If he cannot afford counsel, the Court may appoint the defendant counsel at the taxpayers' expense (at C.J.A. rates), but not the victims' expense.

The government is charged by statute and caselaw with preserving and maintaining assets for restitution to the victims of the defendants' massive fraud scheme. The Act requires the United States to use its "best efforts to see that crime victims are notified of, and accorded, the rights described" in the Act, including the right to restitution. 18 U.S.C. § 3771(c)(1). That is all the government is doing here. As the Supreme Court has made clear, actions by the United States under this authority do not deprive the defendant of his Sixth Amendment Constitutional rights.<sup>2</sup>

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<sup>2</sup> Receivership case law also provides similar support. See, e.g., Commodity Futures Trading Commission v. Noble Metals International, Inc., 67 F.3d 766, 775 (9th Cir. 1995) ("[a] district court may, within its discretion, forbid or limit payment of attorney fees out of frozen assets"); SEC v. Quinn, 997 F.2d 287, 288 (7th Cir. 1993) (denying defendant's request in a fraud case to unfreeze assets to pay for attorney fees); SEC v. Cherif, 933 F.2d 403, 416-17 (7th Cir. 1991) (placing a cap on the amount defendant could withdraw from frozen funds for attorney fees);



## II. Defendant's Motions

### A. Motion to Withdraw

The government takes no position regarding defense counsel's request to be let out of their representation.<sup>3</sup>

The Court will need to determine whether it will oblige defense counsel's demand for \$5 million. The Court will determine what assets are available for personal expense and attorney fees. The Court will determine whether a C.J.A. appointment should be made.<sup>4</sup>

### B. Motions to Dismiss the Indictment

The defendant's motions to dismiss the indictment are frivolous and are based on a gross mis-characterization of the Government's Memorandum to Judge Montgomery.

The defendant cites to Stein, 541 F.3d 130, as support for his claim that the government's submission of a memorandum to Judge Montgomery is improper "meddling." In Stein, a tax prosecution

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Federal Trade Commission v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989) ("Courts regularly have frozen assets and denied attorney fees or limited the amount for attorney fees").

<sup>3</sup>Under Local Rule 83.7, counsel may withdraw without substitution "only by a motion made before the Court, for good cause shown. Notice of the motion shall be provided to the client, and the motion shall be scheduled in accordance with LR 7.1." Rule 1.16 of the Minnesota Rules of Professional Conduct (Declining or Terminating Representation) also applies.

<sup>4</sup>The court may also order the defendant to contribute to the cost of his public defense. Lefkowitz v. United States, 446 F.3d 788, 791 (8th Cir. 2006).

with no identifiable victims other than the government, the Court found that the government interfered with employees' Sixth Amendment rights when the government pressured an employer to "cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government." Id. at 146. In doing so, the Court noted that the government transformed the employer into a government agent. When the government conditioned the employer's payment of its employees' attorney fees, the Court found that the government had impermissibly intruded into the employees' Sixth Amendment Rights.

Despite finding, under the facts unique to that case, that the government had intruded into employees' Sixth Amendment rights, the Stein court recognized that "the Sixth Amendment protects against unjustified governmental interference with the right to defend oneself *using whatever assets one has or might reasonably and lawfully obtain.*" Id. at 156 (emphasis added). If assets are not lawfully obtained, a defendant has no right to use those assets for attorney fees.

Stein is factually distinguishable in two respects. First, the Stein court found that the government, through its authority to seek indictments or grant immunity, controlled and coerced the corporation's decisions on whether to pay its employees' attorney fees. In this case the approval and payment of attorney fees is

solely within the province of Judge Montgomery.<sup>5</sup> Defense counsel cannot claim she is subject to government coercion.

Secondly, in this case and in contrast to Stein, numerous investors stand defrauded. In Stein, the attorney funds were not paid from stolen funds, but were the voluntary payments of an employer indemnifying its employees. Such is not the case here.

Lastly, both Congress and the Supreme court have recognized the government's duty to protect the rights of victims to restitution. of stolen funds. As the Stein court recognized, this responsibility takes precedence over a defendant's interest in spending stolen funds.

C. Motion to Stay/Continuance

The government opposes this motion. It stands ready to proceed.

The defendant has already sought to delay the trial, an effort that was rejected by Judge Kyle.

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<sup>5</sup> To the extent the defendant is unable to retain necessary experts because of a lack of funding, the defendant may seek court funded experts.

The government concurs with defense counsel that the issue of legal representation and attorney fees should be addressed in the near future by the Court.

Dated: March 17, 2009

Respectfully Submitted,

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*s/ John R. Marti*

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