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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR REASONS OF GOVERNMENTAL MEDDLING WITH THE FUNDING OF THE DEFENSE

BACKGROUND

The background of this matter is chronicled in prior motion papers. United States v. Thomas J. Petters, et al., No. 08-CR-364 (D. Minn.) ("Petters I") (e.g., Docket No. 109, Memorandum of Law in Support of Motion for Transfer of Venue at 1-8). The following provides additional context.

Federal agents raided Mr. Petters' business offices and personal residence on September 24, 2008. A week later he was in the custody of federal authorities, and there he remains.

The Government sought and obtained an injunction freezing the assets of Mr. Petters and those of two companies he owns outright—Petters Company, Inc. ("PCI"), and Petters Group Worldwide ("PGW"). United States v. Thomas J. Petters, et al., No. 08-CV-5348 (D. Minn.) ("Petters II").

Thus Mr. Petters has not only been stripped of his freedom, he cannot access his wealth without the blessing of the receiver, who, it seems to us, is beholden to the approval of United States Attorney's Office ("USAO"). [See Petters II, Docket No. 213, Letter to Honorable Ann D. Montgomery ("Regarding the attorney fees of the Court-Appointed Receivers, Mr. Kelley and Mr. Hanson, and the fees of Lindquist & Vennum in its role as the attorney for Mr. Kelley, the United States does not oppose the immediate payment of these fees. The United States sought the appointment of the receivers, and they have performed their functions in a reasonable and proper manner.").]

At least one USAO lawyer had promised there would be no objection to outright payment of Mr. Petters' defense fees and related costs. The prosecution team has lost its unity, though, and no longer speaks in the singular voice, the new tone miasmic, if not Paulosean.

The case trajectory is revealing. In the initial stages, Mr. Petters was agreeable to a number of concessions: he gave up his passport; he resigned from his companies; he consented to an asset freeze; he did not object to a receivership as to his companies and his personal affairs; he agreed to the specific receiver the Government wanted; he waived an objection to a formal indictment within thirty days; and he did not appeal his detention Orders to the Eighth Circuit.

In the interest of fair play and substantial justice, what did he receive in return? In the early going, Mr. Petters was brought to the Courthouse for interviews. He was given a report or two, heavily redacted as to Reynolds, whose

real name is known to the Government. But that's it. Our calendars have been cleared, and significant new cases (of the trial variety) have been declined in anticipation of our jury.

When counsel hired an additional lawyer to try this case, ergo Mr. Engh, the Government attitude changed for the much worse. Mr. Petters was shackled, even when visiting with his lawyers; he was segregated. The Government announced that Mr. Petters' telephone calls with your undersigned had been inadvertently taped. See Marti Letter of March 2, 2009.

And the promise for compensation for attorneys was withdrawn. In the Government's filing of March 13, 2009, submitted to Judge Montgomery who has jurisdiction over the Receiver, the Government raised an objection to the continued payment of Mr. Petters' defense. [Petters II, Docket No. 212, Response To Application for Attorney Fees at 4 ("The law provides the Court with a number of tools to control the payment of attorney fees from restrained assets . . ."); 8 ("To the extent a particular defendant does not have sufficient available funds in his or her individual receivership account, any personal expenses and attorney fees should not be paid . . . ."); 10 ("The United States is currently engaged in the substantial preparations needed to forfeit the assets of the individual defendants . . . .").]

The size and complexity of this case is breathtaking in scope and personae. The Government alleges a thirteen-year scheme to defraud, involving hundreds of transactions, claiming the largest fraud in the State's history, dispatching agents

here and there, on planes, in cars, wiring co-defendants, listening to telephone calls. It's sadly ironic that, in light of the Government's efforts, there is now an attempt to circumvent Mr. Petters' choice of counsel and his very right to a defense.

The Felhaber Law Firm has not been paid in nearly three months. Mr. Engh has not received a dime. The Government has signaled that the joint effort thus far has been misplaced, for naught.

The status quo is unsustainable. To mount an effective defense, there must be financial certainty going forward. Thus, this motion.

ARGUMENT

Mr. Petters has the right to legal counsel of his choice, free of governmental interference. U.S. Const., Am. 5 & 6. Only with counsel will he ever receive a "fair shake." United States v. Stein, 435 F. Supp. 2d 330, 357 (S.D.N.Y. 2006), aff'd, 541 F.3d 130 (2d Cir. 2008).

Rather than anticipate an even trial, the Government prefers the meddling mode, poking their heads about the corners, viewing the defense in a supervisory capacity as an omnipotent writer of checks. This prosecution has become a pernicious serfdom where attorneys who insist their clients cooperate are paid willy nilly, e.g., representatives of Reynolds and White, while the lawyers who fight are not worthy of a fee. It's a place where disagreement is fiscally forbidden. The Government's condescension to advocates who disagree has become overt and palpable.

The question the Government raises in their March 13th filing is a dialectic. On the one hand, White's lawyer is authorized $150,000.00 for a guilty plea tendered within a week after the search. Reynolds' lawyer received $74,700.00 and there is no evidence the Government gave him a report to even read. Whatever the hourly rates charged, the time per hour billing is generous. But the Government received what they wanted in exchange: a cooperating witness and a lawyer made happy and the hours continue to float by.

We, on other hand, have started on the task of defending a life, and all that necessarily entails. This is not work for the fainthearted.

But while watching dollars, the Government has forgotten what due process means, what the Sixth Amendment actually provides. "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him." United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006). Improper deprivation of this right is "structural" error. Id. at 150-152.

The Constitution and our courts insist that the Government not interfere with Mr. Petters' defense. Stein, 435 F. Supp. 2d at 356-360. "[F]airness in criminal proceedings requires that the defendant be firmly in the driver's seat, and that the prosecution not be a backseat driver." Id. at 358.

This should be immutable, but the Government views Mr. Petters as an exception. He is presumptively guilty in their myopic view (just as everyone else is who is charged). So the Government, with that odd conceit, dallies, ships documents to the east coast (there is no budget), pretends generosity by providing

1.5 million documents that are difficult to read and organize, knowing full well that the defense team will not be able to keep up with the plethora of agents waiting to put on their resumes that they were part of the Government's onslaught.

Perhaps this Court might change the paradigm if only a little. Ask the Government how many hours its attorneys and agents have put into the case? How about starting there? And then turn the attention to our claims, for the sake of balance. For the Government's Petters II filing last Friday is rather chilling, but not ambiguous. Here is what it says:

- Fees and costs cannot be paid because Mr. Petters' "individual receivership account"–worth $32,000.00–does not contain sufficient funds. The Government ignores that Petters Aviation is profitable, that the Receiver, early in this case, cancelled a $9,000,000.00 payment for airplanes, and took those designated funds and spent them elsewhere. That money was Mr. Petters'.

This is a remarkable assertion—that only limited funds should be spent—for which the Government provides no authority. It's as if the Receiver could not exercise its authority to include in Mr. Petters' "individual receivership account" the assets of his wholly-owned companies, including PCI and PGW. Indeed, the Government leans on the Receiver to use the Government's ad hoc accounting system.

This alone is a kind of meddling—the Government's attempt to control Mr. Kelley and how he spends funds—that the Courts have not permitted. See, e.g., D.B. Zwirn Special Opportunities Fund v. Tama Broadcasting, Inc., 550 F. Supp.

2d 481, 492 (S.D.N.Y. 2008) ("The temporary receiver-an officer of the court tasked with the 'duty to preserve and protect the property pending the outcome of the litigation'-will work to discharge that duty without deference to either party and with preservation of the property as its sole objective."); In re Indian Motorcycle Co., 266 B.R. 243, 259 (Bankr. D. Mass. 2001) ("Sound administration of a receivership demands that assets of a company under receivership be viewed as under the exclusive control of the receivership court (i.e., in custodia legis) and that there be no unwarranted interference with the receiver's actions or with the property which the receiver is charged to administer.").

- The Government intimates that this District Court should "cap" the defense fees. The Court should ascertain first the Government's budget, paid by the taxpayer, and whether it is "capped." What would be the response? The Government would say it's none of your business, we have a separation of powers, how could you even ask such a question and so forth.

- In its submission, the Government announces that, even if defense costs and fees are paid, it may, after the acquittal we fully expect, come back and later forfeit the fees paid. There will be a claw back, the Government implies, and we'll tie up Felbaber's fees for now and later, and forever after. Announcing justice will be mine alone and throughout time.

In Stein, a similar case and issue, Judge Kaplan sharply criticized federal prosecutors for interfering with the defendants' access to funds for attorney fees

and defense costs—money that in the normal course would have been paid by the defendants' employer. Judge Kaplan attempted to cure the improper interference, secure funding for the defense, but he was thwarted by the United States at every turn, every brief, every appearance until the end came. In the silence caused, in the absence of counsel, the Government read an Order dismissing all counts. The Second Circuit affirmed. United States v. Stein, 541 F.3d 130 (2d Cir. 2008).

There is no substantive difference here. USAO lawyers are involved in all receivership proceedings, the civil division sits next to the criminal, the criminal next to the civil, the suits and ties indistinguishable. Greg Brooker is Joe Dixon is John Marti and so on. Their office signs the pleadings. The stationery looks the same to us. [Petters II, Docket No. 212, Response To Application for Attorney Fees.]

We're not talking about the inconsequential. USAO lawyers initially promised the Felhaber Law Firm that there would be no objection to reasonable legal defense fees and costs. Given that assurance, the Felhaber Law Firm assumed representation with the vigor the law demands and Mr. Petters has the right to expect. The Felhaber firm and Mr. Engh are not bankers. No payment has been received since last year. Over $560,000.00 is due and owing. Our experts fees are running over $20,000.00 per month, with many bills more than 90 days past due. Mr. Fisher has stopped working as of last Friday.

Judicial notice has already been given as to how much a case like this one costs to defend. Our rates are consistent with those awarded in this District for

civil rights litigation. Criminal trials are no different in terms of complexity and effort. Judge Kaplan suggests that "substantial resources" need be expended on a complex white collar case; that fees exceeding $1,000,000.00 are often required and without question. Stein, 435 F. Supp. at 362 n.163.

The Government knew as much when it assured your undersigned that he would be paid in full. Our costs include the essential—the deconstructing of what happened at PCI and PGW, the review of millions of documents, and the interviews of hundreds of witnesses. See United States v. Stein, 495 F. Supp. 2d 390, 420 (S.D.N.Y. 2007).

The specter of estoppel should be considered as well. There has already been one distribution from the receivership estate to pay defense fees and costs (in late December 2008). The Felhaber Firm and Mr. Engh continued on in reliance that this procedure would be used going forward. Had we known of the Government's position of March 13, 2009, work would have been halted three months ago, at least.

There isn't a law firm in Minneapolis/St. Paul that would accept Mr. Petters' representation without assurances of an adequate budget. We now have none in the present tense. And none in the future.

The United States claims that the receivership estate is set aside for the "victims." This, however, skips a rather important step—Mr. Petters has not had the opportunity to defend himself first:

> Releasing restrained funds to pay attorney's fees is premised on the fact that wrongdoing is not yet proven when the fee application is made. See CFTC v. Noble Metals Int'l, 67 F.3d 766, 775 (9th Cir. 1995). Although the Supreme Court has set forth reasons why criminal defendants have no constitutional right to legal fees from forfeited or forfeitable funds, see [Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989)], that rationale does not merit denying a defendant in a § 1345 action a reasonable claim for fees from restrained property upon the appropriate showing before the § 1345 complaint has been resolved on the merits. Moreover, the analysis in Caplin & Drysdale rested on the premise that Congress declared that title to forfeitable property vests with the government at the time the underlying crime was committed (the "relation back" doctrine). [Caplin & Drysdale, 491 U.S. at 627.] Section 1345 features no such title reversion and instead focuses on preventing further injury to victims until a criminal investigation is completed. United States v. Payment Processing Center, LLC, 2006 WL 1719593 at 463-64, 466 (citing legislative history and goals of § 1345).

United States v. Payment Processing Ctr., LLC, 439 F. Supp. 2d 435, 440-441 (E.D. Pa. 2006).

Judge Kaplan continues:

> The innocent need able legal representation in criminal matters perhaps even more than the guilty. In addition, defense costs in investigations and prosecutions arising out of complex business environments often are far greater than in less complex criminal matters. Counsel with the skills, business sophistication, and resources that are important to able representation in such matters often are more expensive than those in less complex criminal matters. Moreover, the need to review and analyze frequently voluminous documentary evidence increases the amount of attorney time required for, and thus the cost of, a competent defense. Thus, even the innocent need substantial resources to minimize the chance of an unjust indictment and conviction.

Stein, 435 F. Supp. 2d at 338 n.12.

CJA funding is not a recognized option in our setting. Stein, 495 F. Supp. 2d at 422.

Our funding concerns aren't just about money. What the Government prevents is Mr. Petters exercising his choice of counsel. Gonzalez-Lopez holds that "[d]eprivation of the right [to counsel] is complete when the defendant is erroneously prevented from being represented by the lawyer he wants." Id. at 148. Mr. Petters alone decides, by his own standards. Id. at 146. We his lawyers are not "fungible." Stein, 435 F. Supp. at 358 n.130 (quoting United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979) (Higginbotham, J.)). He will say so when asked.

What the Government suggests is unseemly if not corrupt and illegal, a form of kickback: cooperate with us and we'll see that your lawyer is handsomely paid. Otherwise, best wishes.

And this, the Government will add, represents a "paragon of justice." An Order of Dismissal will say that it does not. Stein, 495 F. Supp. 2d. at 429.

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Dated: March 16, 2009

s/ Jon M. Hopeman

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