UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CV-5348 (ADM/JSM)
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THOMAS JOSEPH PETTERS,

Defendant.

REPLY REGARDING APPLICATION FOR ATTORNEY FEES

Borrowing from Canetti's historical predicate, the Government seeks control of the entire case—control of this Court's rulings, control of funding, and hence control of Mr. Petters himself, though he is presumed innocent. The question is whether or not the defense of Mr. Petters will be unfettered. Say it shall be. Otherwise, we resign.

BACKGROUND

This case is chronicled in the criminal matter, No. 08-CR-364 ("Petters I"), and parallel civil matter, No. 08-CV-5348 ("Petters II"). Here now is the context to the current dispute.

I. September 2008 Raids and Aftermath

On September 24, 2008, federal law enforcement officers raided the offices of Petters Company, Inc. ("PCI") and Petters Group Worldwide ("PGW"), and also the personal residence of Mr. Petters.

Mr. Petters was contacted immediately by his law firm of over fifteen years, Fredrikson & Byron, as well as David Baer, the in-house counsel. Mr. Petters had always been represented. The legal community was once there for him and his needs. But the Fredrikson firm withdrew, as did Baer. Mr. Petters hired your undersigned and the Felhaber Law Firm.

II. Initiation of Petters I and Petters II

The United States Attorney's Office ("USAO") initiated Petters I by complaint on October 2, 2008. Mr. Petters was taken into custody. There were no allegations of forfeiture. [Petters I, Docket No. 26.]

On the same day, the USAO brought this civil action to freeze assets of PCI and PGW. USAO lawyers informed Felhaber that it should not accept any fees from PCI assets, and Felhaber returned an initial retainer.

III. Special Appearances by Felhaber Law Firm

Without adequate or secure funding, Jon Hopeman and Eric Riensche made special appearances on October 3, October 8, and October 9. But later assurances were given, promises to keep. USAO lawyers represented that the Government would not object to payment of defense fees. Felhaber attorneys entered their appearance in reliance thereon, in good faith, out of respect for the ideal that Mr. Petters might have counsel of choice. Under that same assumption, Paul Engh joined the defense team in late December 2008.

IV. Asset Freeze and Receivership

USAO attorneys drafted a series of stipulations and proposed Orders concerning the Receiver's powers and his obligation to fund Mr. Petters' defense. The first was entered on October 6, 2008. Subsequent versions were filed on October 14, and December 8. Note that the Government drafted each. Note, too, the power given, and the obligations incurred, including the obligation to defend Mr. Petters himself.

> IT IS FURTHER ORDERED that the Receiver is directed and authorized and given all necessary powers to accomplish the following:
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> * * *
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> 3. **Defend, compromise, or settle legal actions wherein the Receiver or any of the Defendants is a party commenced prior to or subsequent to this Order with the authorization of this Court.** The Receiver may waive any attorney-client privilege held by any of the corporate or entity Defendants.

[Petters II, Docket No. 127 at 13, 16 (emphasis added).]

V. Indictment and Forfeiture Notices

An indictment was returned on December 1, 2008, alleging for the first time asset forfeiture. [Petters I, Docket No. 79.] To that end, the Government filed its first forfeiture Bill of Particulars on December 22, 2008, [Petters I, Docket No. 89], its second last week, [Petters I, Docket No. 161]. The former seeks to take the home where the little Petters boys live with their mother.

Both signal an intention only, without time constraint, scope, hence finality and predictability, the twin premises of law. Neither Bill agrees to an exemption for defense fees—even for money that has already been paid out by the Receiver. Even for Mr.

Kelley's fees and his costs, including the PricewaterhouseCoopers audit, which will be used by the Government at trial.

The Government's forfeiture theory is so broad as to encompass the proceeds from any sale of Polaroid. Those monies will be forfeited as well, according to the Government's own pleadings.

VI. Established Procedure re: Payment of Attorney Fees

The Felhaber Firm applied to the Receiver for payment of legal fees and costs, as did the lawyers for the companion defendants. There was no objection, and no indication by the USAO that forfeiture would follow. There was no threat of claw back. [Petters II, Docket Nos. 152, 162, 165.]

This Court approved the first application. Felhaber received $247,905.00 for work done in September and October; the Receiver over $600,000.00; White's attorney $150,000.00, and so on. We relied—as did all applicants—that the money distributed by the Receiver was non-forfeitable. The process worked, or so we believed. [Petters II, Docket Nos. 152, 162, 165.].

In early January, Judge Kyle conferred with counsel, set a rigorous trial date, and again there was no mention of any Governmental concern vis-à-vis Mr. Petters' defense, or whether it would be worthy of the cost, or how it would be paid.

As instructed by Judge Kyle, the defense moved with alacrity, continued to investigate the Government's claims, interviewed witnesses, took on the task of breaking down the thousands of transactions, hired investigators and experts, conferred with Mr. Petters, and filed detailed motions. All of which took hundreds of hours. The

Government did nothing to discourage the intensity of our effort. Their daily faxes kept coming. Letters, pleadings, discovery, discs, phone calls, e-mails—it all just kept coming.

The Government has seven lawyers on the civil and criminal actions, and we've learned that at least eight federal agents are working this case full time.

In response to the Government's effort and budget (which is running in the millions if the Court would care to ask), significant defense work was accomplished in December, January, February, and into March. This is what Judge Kyle told us to do, in haste, with urgency, and we did so in order to meet his deadlines. We dropped cases, did not accept new work, and emptied our calendars.

By the end of February, our bill ran near $560,000.00, still a fraction of what the Government is spending, and less than what the Receiver himself has claimed.

We applied again for payment and expected compensation. But as the criminal motions hearing approached, the Government filed a pleading which implied, if not explicitly argued, our fees would be clawed back through forfeiture. [Petters II, Docket No. 212.] Note the timing: six months into the preparation, less than three months before trial.

In response we filed a series of motions, [Petters I, Docket Nos. 148-156], to dismiss (for interfering with Mr. Petters' choice of counsel and a lack of funding for experts), and to withdraw. Magistrate Judge Boylan denied them without prejudice, deferring to Judge Montgomery for resolution of our funding concerns. We ask for clarity and certainty. The Government prefers ambiguity and latent power.

We have stopped work pending this Court's ruling. Whether we will pause forever is the issue.

ARGUMENT

I. Government's Thesis: Vague and Foreboding

We begin with the purported reasons for non-payment, set out on March 13, 2009. The Government says: (1) receivership assets are to be reserved for "victims"; (2) there could be a "cap" on defense fees; (3) fees are limited to amounts in the "individual receivership account"; and (4) even if fees are paid, the Government reserves the right to claw back. [Petters II, Docket No. 212 at 1, 4, 8, 10.] We respond in turn.

A. Purpose of Section 1345 Receivership

The Government's scholarship is suspect, for a Section 1345 asset freeze is not imposed "for either victim restitution or forfeiture." To the contrary:

> 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).

The Government cannot take control of all an accused's assets based on the mere accusation—and yet deny him the means to defend. In United States v. Riley, 78 F.3d 367 (8th Cir. 1996), as here, the Government obtained an indictment, made forfeiture allegations, and imposed a broad asset freeze and receivership. The Eighth Circuit held that such an extreme step requires the Government to specify what assets are allegedly forfeitable. Id. at 370-372; see also United States v. Field, 62 F.3d 246, 249 (8th Cir. 1995) (in mail fraud action, district court's pretrial authority to restrain assets is limited to assets directly associated with alleged crime; district court has no authority for pretrial restraint of substitute assets).

The Government has no answer to Payment Processing Ctr.; that case is not even cited. [Petters I, Docket No. 157.] Instead, its favored technique is declaring victory before the first witness is sworn—"we'll win so how can you argue with us." [Petters I, Docket No. 157 at 4.] We do have juries for a reason. The Government skips a rather important step of allowing Mr. Petters his trial. Payment Processing Ctr., 439 F. Supp. 2d at 440-441 ("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 also CFTC v. Noble Metals Int'l, Inc., 67 F.3d 766, 775 (9th Cir. 1995) ("We do not, however, intimate that attorney fee applications may always be denied where the assets are insufficient to cover the claims. Discretion must be exercised by the district court in light of the fact that wrongdoing is not yet proved when the application for attorney fees is made.").

There are no "victims" until the crime is proved.[1] Mr. Petters does have a presumption of innocence. We anticipate not guilty verdicts.

B. "Cap" on Defense Fees and Costs

The Government asks the Court to "cap" defense fees without suggesting that their own budget be restrained, their lawyers limited. They send e-mails at errant times, print constant letters so as to remind the defense that the United States is forever watching, a Cyclops.

The Government's suggestion lacks a respect for the Sixth Amendment. An arbitrary "cap" would violate Mr. Petters' right to due process and to counsel of choice. Even the Government's cases permit defense fees to be paid and in full. SEC v. Dowdell, 175 F. Supp. 2d 850, 856 (W.D. Va. 2001) ("This court does not believe that it could achieve a fair result at the preliminary injunction hearing were it to deny defendants the ability to retain counsel."); SEC v. Duclaud Gonzalez de Castilla, 170 F. Supp. 2d 427, 430 (S.D.N.Y. 2001) ("Both J. Duclaud and Banrise have incurred substantial expenses as a consequence of this action. Under these circumstances, it is appropriate to modify the freeze as to both J. Duclaud and Banrise to permit the payment of legal fees and disbursements.").

[1]In a recent Petters I filing, the Government claims, regardless of whether Mr. Petters is guilty or not, it has proved fraud at PCI and PGW; at least some of the assets of those entities constitute "stolen money." [Petters I, Docket No. 157.] Neither entity has pleaded guilty. As for the individuals who have pleaded guilty and whose lawyers have been paid handsomely, those guilty pleas have no bearing on the guilt or innocence of Mr. Petters, PCI, or PGW. Eighth Circuit Manual of Model Jury Instructions—Criminal, Instruction No. 2.19, at 56 (2007) (jury "must not consider [such] guilty pleas as any evidence of [the] defendant's guilt").

C. "Individual Receivership Account"

The Government posits a plethora of "individual receivership account[s]." Nothing in the previous Orders authorizes the concept.

By law the Receiver (with the Court's blessing) determines, alone, where the assets go. 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 . . .").

In drafting the eventual Orders, the Government itself contemplated that the Receiver would have broad discretion:

> IT IS FURTHER ORDERED that **the Receiver is directed and authorized and given all necessary powers to accomplish the following**:
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> 1. Take exclusive immediate custody, control, and possession of all the property, assets, and estates belonging to or in the possession, custody, or under the control of Defendants, wherever situated, except those assets seized by the United States pursuant to valid orders of a court. **The Receiver shall have full power to** divert mail and to sue for, collect, receive, **take in possession, hold, liquidate or sell and manage all assets of Defendants** and other persons or entities whose interests are now held by or under the direction, possession, custody, or control of Defendants;
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> * * *

> 4. **Make payments and disbursements from the receivership estate that are necessary or advisable for carrying out the directions of or exercising the authority granted by this Preliminary Injunction and Order.** The Receiver shall apply to the Court for prior approval of any payment of any debt or obligation incurred by Defendants, **including reasonable living expenses and/or attorneys fees** . . .

[Petters II, Docket No. 127 at 13-14, 16 (emphases added).]

There is no "individual receivership account" in the Government's Court-accepted verbiage. It is a fiction, will Mr. Kelley say. Made up.

D. Forfeiture/Claw Back

In its March 13th submission, the Government signals a claw back. All fees paid, to anyone, and certainly any lawyer, are at risk of forfeiture at a later date. When asked at the criminal motions hearing for clarification or promise that the Government would not claw back, their lawyer demurred, his silence Melvillian. The Government is a highwayman lurking under a bridge, waiting for us to cross.

Though we have worked to adhere to Judge Kyle's command of constant preparation, and abandonment of other work, other clients, the Government tells us now that we shouldn't have. That suggestion should have been made to Judge Kyle in 2008. In January when he set the Court date. In February. Surely before March 13th.

The Government's tactic is unfair. After Felhaber has incurred many thousands of dollars in expenses and over one thousand hours of lawyer time, the Government's position is nothing short of unconscionable. Some would call it a rip off, but we're told to temper our language. It is difficult to do when one feels misled. The Government has

the temerity to say, "Oh, you should have figured out what we meant when we didn't tell you, any lawyer would." The argument is rooted in preciousness and condescension.

The Government is estopped in any event. See Asa-Brandt, Inc. v. ADM Investor Services, Inc., 344 F.3d 738, 745 (8th Cir. 2003) ("The doctrine of judicial estoppel is intended to prohibit a party from taking inconsistent positions in the same or related litigation."). Moreover, we wonder why no other targets are subject to the Government's claw-back threat. What of the fees paid to the attorneys for White and Coleman? We think we know. They have both pleaded guilty. Their cooperation is needed, and a fee to a lawyer is small cost to pay, from whatever the source.

The rule proposed by the Government is that those who fight are fiscally condemned. That is the message we read on March 13th. So it is that we have stopped our work. We are running a skeleton operation, as we must given the uncertainty the Government has caused. The Government suggests a full-time CJA rate will suffice. Taking into account overhead, and taxes, that rate comes to a negative net. We decline appointment, and we invite the Court to consult with Ms. Katherian Roe on the attendant difficulties in funding this case, either in her office or by another lawyer. Experts charge what the market will bear, not what the Eighth Circuit will authorize. The enormity of the case requires the full focus and effort of defense attorneys. We do seek a workable solution, as follows.

II. Defense Proposal: Search for Clarity

A. Non-Forfeitable Assets Paid Out by Independent Receiver

The Government must first list all assets it seeks to forfeit, right now. The United States Attorneys' Manual suggests that approach. USAM § 9-119.203 (2009). That way, all parties will know from whence the funding came. We also want to know, for example, whether the Government considers the proceeds of any D&O policy to be forfeitable.

The Government must assure that monies paid out of the receivership estate will not be pursued as forfeitable or substitute assets. The Second Bill of Particulars filed in the criminal case suggests otherwise. Under the current Government theory, our fees are considered substitute assets. As are the fees of other attorneys, the proceeds from a Polaroid sale, and on and on. Such theories need refutation by Court Order.

The Receiver must be permitted to operate freely. If Mr. Kelley deems it appropriate to use liquid receivership assets to pay Mr. Petters' attorneys (provided, of course, that the Court approves), then so be it.

Payment of fees must be timely. The Felhaber Law Firm and Mr. Engh have not been compensated in nearly three months—the balance due is over $560,000.00, and over $100,000.00 is more than 90 days past due. Thousands of that amount consists of out-of-pocket defense costs, including fees for investigators and computer experts. Our help have stopped their efforts.

The Government must resolve—expressly, and in certain terms—that there will be no attempt to claw back monies paid to the Felhaber Law Firm and/or Paul Engh by the

Receiver—whether by forfeiture or by other means. The Government has no authority for its view that private lawyers must work for free and pay defense costs. If the Receiver funds attorney fees and the Court approves, that must end the matter.

B. Alternative: Payment for Services Rendered and Defense by Receiver

If the above conditions cannot be met (although we see no reason why not, and any law firm would want them), then we ask for approval of payment for services rendered at least through March 12. The services were provided in reliance upon the Government's representations and its acquiescence in the attorney fee application procedure.

After payment, we'll exit as the Government prefers. It will be with utter sadness to leave Mr. Petters after six months of intense work, a trust and friendship developed and a mutual decision, made early-on, that we should attempt to save the sanctity of his life to the best our abilities. He deserves no less.

Thereafter, the defense of Mr. Petters must be tendered to the Receiver, pursuant to this Court's Order that he "[d]efend . . . legal actions wherein the . . . Defendant[] is a party. . ."

The current course is unacceptable. It is that, at the late behest of the Government, his lawyers be subject to involuntary servitude.

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Dated: March 23, 2009

s/ Jon M. Hopeman

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