

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Civil No. 08-CV-5348 (ADM/JSM)

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
1. THOMAS JOSEPH PETTERS;)
PETTERS COMPANY INC.,)
PCI; PETTERS GROUP WORLDWIDE, LLC;)
2. DEANNA COLEMAN aka DEANNA MUNSON;)
3. ROBERT WHITE;)
4. JAMES WEHMHOFF;)
5. LARRY REYNOLDS dba)
NATIONWIDE INTERNATIONAL RESOURCES)
aka NIR;)
6. MICHAEL CATAIN dba)
ENCHANTED FAMILY BUYING COMPANY;)
7. FRANK E. VENNES JR. dba)
METRO GEM FINANCE,)
METRO GEM INC.,)
GRACE OFFERINGS OF FLORIDA LLC,)
METRO PROPERTY FINANCING, LLC,)
38 E. ROBINSON, LLC,)
55 E. PINE, LLC,)
ORLANDO RENTAL POOL, LLC,)
100 PINE STREET PROPERTY, LLC,)
ORANGE STREET TOWER, LLC,)
CORNERSTONE RENTAL POOL, LLC,)
2 SOUTH ORANGE AVENUE, LLC,)
HOPE COMMONS, LLC,)
METRO GOLD, INC.;)
)
Defendants.)

PLAINTIFF UNITED STATES OF AMERICA'S
RESPONSE TO
APPLICATION FOR ATTORNEY FEES

I. INTRODUCTION AND BACKGROUND

Plaintiff United States of America ("United States") commenced this action under the Anti-Fraud Injunction Act, 18 U.S.C. § 1345, for the benefit of the victims of a massive fraud that took place at Petters Group Worldwide, LLC, and Petters Company, Inc., defendants in this action. The United States moved for injunctive relief to enjoin ongoing fraud, freeze defendants' assets, and appoint receivers to preserve assets for ultimate restitution to victims.

Congress enacted the Anti-Fraud Injunction Act to provide jurisdiction to a federal court to enjoin fraud during an ongoing criminal investigation. The statute authorizes a court to issue orders to prevent the dissipation of assets and to preserve property for either victim restitution or forfeiture to the United States to prevent defendants from retaining any ill-gotten gains. Congress was concerned that innocent people would continue to be victimized during an ongoing criminal investigation without a civil injunction enjoining the fraud and an order freezing the assets of the perpetrators of the fraud. See S. Rep. 225, 98th Cong., 2d Sess. 401-02, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3539-40.

In this case the Court specifically found that there was probable cause to believe that defendants had committed and were continuing to commit, prior to the Court's Temporary Restraining Order of October 3, 2008, mail fraud, wire fraud, and/or banking fraud in violation of Title 18 of the United States Code. This specific finding laid the foundation for the Court's Order freezing defendants' assets and appointing two receivers.

The overriding goal of the United States in commencing this action was to preserve assets for restitution to the victims of this fraud. The United States is concerned that there will be few assets left for victim restitution if payments for attorney fees of defendants are continually authorized from frozen funds without any limitations and without regard for the availability of funds in an individual defendant's receivership account to pay for such fees.

II. PETITIONS FOR APPROVAL OF ATTORNEY FEES

The United States does not oppose the payment of fees of the two receivers and their attorneys and other professionals. The United States sought the appointment of the receivers, and they have performed their functions in a reasonable and proper manner. In addition, the receivership fees have been closely monitored by the Court. The receivers' work in liquidating and preserving assets for ultimate victim restitution is vital

to the overall purpose of this action under the Anti-Fraud Injunction Act.

With regard to the payment of attorney fees for individual defendants, the United States has not been privy to the attorney bills and invoices submitted to the Court. Accordingly, it cannot determine whether the attorney fees in question are reasonable, in terms of (1) the legal work being performed and (2) the assets that are available in the individual receivership accounts of the defendants to pay the fees. That individualized task is for the Court and the receivers.

In completing this task, the Court has broad discretion to limit or cap the payment of attorney fees from frozen funds. The law provides the Court with a number of tools to control the payment of attorney fees from restrained assets, in order to preserve the right of crime victims to restitution.

Indeed, the Eighth Circuit Court of Appeals in Liner v. United States, No.03-3076, 2004 WL 1154627, at *1 (8th Cir. May 25, 2004), upheld a preliminary injunction issued by the U.S. District Court in Minnesota under the Anti-Fraud Injunction Act that restrained all of the assets of the defendant and capped the monthly living expenses and criminal defense attorney fees. The defendant in Liner appealed the asset-freeze order and challenged the amount unfrozen for his

living expenses and attorney fees. The appellate court found that the scope of the allowance for the expenses was "proper" and within the discretion of the district court in issuing the order under the Anti-Fraud Injunction Act. Id.

The Liner decision provides this Court with substantial discretion to limit the payment of attorney fees from funds frozen in a Section 1345 case. The receivership case law 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); 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").

In receivership cases similar to this one, courts have considered the impact the payment of attorney fees will have on the receivership estate and the amount ultimately available for victim restitution. See, e.g., SEC v. Dowdell, 175

F.Supp.2d 850, 855-56 (W.D.Va. 2001) (ordering attorneys to file "reasonable estimates of the fees" necessary to take them through the hearing on the civil injunction, out of fairness to the victims of the fraud); SEC v. Duclaud Gonzalez de Castilla, 170 F.Supp.2d 427, 429 (S.D.N.Y. 2001) (noting "the primary purpose of freezing assets is to facilitate compensation to defrauded investors in the event a violation is established at trial" and granting attorney fees for only the legal work already performed in arguing the civil summary judgment motions); SEC v. Grossman, 887 F. Supp. 649, 661 (S.D.N.Y. 1995) (denying the unfreezing of assets for attorney fees because it would not be in the "interest of the defrauded investors," noting "it is well-established that there is no right to use the money of others for legal services").

In the Justice for All Act (the "Act"), Congress expanded the rights of victims in federal criminal proceedings and explicitly provided that crime victims have "[t]he right to full and timely restitution as provided in law." 18 U.S.C. § 3771(a)(6). The Act defines a victim of a crime as "a person directly and proximately harmed as a result of the commission of a Federal offense...." 18 U.S.C. § 3771(e). 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). The United States commenced this action

to freeze funds and appoint receivers in order to preserve assets for victim restitution and fulfill its obligations under the Justice for All Act.

To the extent a defendant in this case seeks the payment of attorney fees from frozen funds, such funds are no longer available for restitution to the victims of the defendant's fraud - a right afforded crime victims by Congress in the Justice for All Act. The above-referenced case law provides support for this Court to cap or limit the amount of attorney fees paid from frozen assets, in order to preserve as many assets as reasonably possible for victim restitution.

III. RECEIVERSHIP ACCOUNTS IN THE PETERS RECEIVERSHIP

The Court's Order in this case appointed Mr. Kelley receiver over separate individuals and corporate entities. Many of the corporate entities are in bankruptcy, and their assets constitute separate and distinct bankruptcy estates. The assets of a particular defendant are to be preserved, managed, and administered separately, and the expenses authorized to be paid by the Court for a particular defendant should come out of the frozen assets of that defendant.¹

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Whereas the costs of the receivership and the costs incurred by Mr. Kelley in his efforts to find, maintain, and preserve assets may be drawn upon the entire funds of the receivership, as approved by the Court.

Each individual and corporate defendant in this case has a finite number of assets and resources. Personal expenses and attorney fees should be paid on behalf of an individual or corporate defendant only to the extent there are sufficient funds in that defendant's receivership account. 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 until such time as funds are obtained through the liquidation of that specific defendant's available personal or real property.²

The United States is aware that the receiver is continually attempting to obtain additional assets to replenish the receivership estate. One asset previously detailed in court proceedings is a potential recovery under

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For example, the Second Report of Mr. Kelley, filed February 19, 2009 [Docket 201], identifies \$32,054.52 as the balance for Mr. Petters' individual receivership account as of February 13, 2009. The Affidavit of Mr. Kelley, filed on February 17, 2009 [Docket 193], identifies the Felhaber Fee Application to be \$332,910.20 for representation of Mr. Petters through December 31, 2008. Previously, the Felhaber Law Firm was paid \$247,905.35 for their work primarily regarding the Temporary Restraining Order and Preliminary Injunction, as approved by the Court on December 23, 2008. [Docket 162]. Mr. Kelley recently informed the United States that he is in the process of liquidating several luxury cars owned by Mr. Petters, which will apparently replenish Mr. Petters' receivership account, but the exact amount to be received by this liquidation is not known at this time and future requests for attorney fees for Mr. Petters will undoubtedly be made.

the Director and Officer ("D&O") liability policies held by Petters Group Worldwide, LLC, Petters Company, Inc., and Tom Petters, Inc. The D&O Insurer, XL Specialty Insurance Company, has, however, reserved its rights and has not yet made a decision whether the D&O policies will be available to reimburse the receivership for attorney fees and expenses. Such funds will likely be embroiled in litigation for some time and thus will not be available to the receiver for payment of the attorney fees of the defendants.

IV. FORFEITURE OF ASSETS BY THE UNITED STATES

As the United States has indicated in the past, it has broad powers to forfeit assets that constitute proceeds from this fraud. Forfeiture law does not allow a defendant to use restrained assets for payment of criminal defense attorney fees. See Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 853. In interpreting the Comprehensive Forfeiture Act, the Supreme Court held:

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."

United States v. Monsanto, 491 U.S. 600, 613-14 (1989)
(citations omitted).

In Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), the Court explicitly held that the forfeiture provisions that prevent a defendant from using restrained assets for payment of attorney fees does not violate the Sixth Amendment, stating: "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." Id. at 618; see also United States v. Unit No. 7 and Unit No. 8 of Shop in the Grove Condominium, 890 F.2d 82, 84 (8th Cir. 1989) (neither Fifth or Sixth Amendment rights were violated by the Government's restraint and forfeiture of property of defendant that would otherwise be used to pay criminal defense attorney fees).

The United States is currently engaged in the substantial preparations needed to forfeit the assets of the individual defendants that are directly traceable to the fraud or that were involved in or traceable to money laundering. The United States intends to forfeit such assets, in order to maximize the total funds that will ultimately be available for victim restitution. Forfeiture tools are especially needed in those circumstances where the assets are jointly held by a defendant and third parties and where third parties hold a security interest in the property. In circumstances in which the United States determines that the property of an individual

defendant is subject to forfeiture, the United States will file the appropriate forfeiture pleadings, and the forfeiture laws will provide due process to those who may claim an interest in the property to be forfeited.

Forfeited assets are available to crime victims through the remission process in 28 C.F.R. § 9.1 et. seq.; however, any such forfeited property will not be available for the payment of defendants' living expenses and attorneys fees. See Monsanto, 491 U.S. at 611-15; Caplin & Drysdale, 491 U.S. at 618. Thus, forfeited assets cannot be used to replenish the individual receivership accounts of any of the defendants.

V. CONCLUSION

_____The overriding interest in this case must be the preservation and maintenance of assets for restitution to the victims of defendants' massive fraud scheme. The Justice for All Act requires the United States to use its "best efforts" to preserve the "right [of crime victims] to full and timely restitution." 18 U.S.C. § 3771(a)(6). Thus, the United States will be using forfeiture tools to obtain assets for victim restitution that will not be available for defendants to use for living expenses and attorney fees. In addition, the United States, in fulfillment of its duty under the Justice for All Act, highlights to the Court in this Memorandum the case law that provides explicit authority for the Court to limit or cap attorney fees paid from frozen

funds, in order to preserve assets for restitution to victims.

Dated: March 13, 2009

Respectfully submitted,

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S/ Greg Brooker

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