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18
19 **UNITED STATES DISTRICT COURT**
20
21 **DISTRICT OF NEVADA**

22 KIRK and AMY HENRY,)
23)
24 Plaintiffs,)
25)
26 vs.)
27)
28 FREDRICK RIZZOLO aka RICK RIZZOLO,)
an individual; LISA RIZZOLO, individually)
and as trustee of The Lisa M. Rizzolo Separate)
Property Trust and as successor trustee of)
The Rick J. Rizzolo Separate Property Trust;)
THE RICK AND LISA RIZZOLO FAMILY)
TRUST; THE RICK J. RIZZOLO SEPARATE)
PROPERTY TRUST; THE LISA M. RIZZOLO)
SEPARATE PROPERTY TRUST; THE RLR)
TRUST; and THE LMR TRUST,)
Defendants.)

Case No. 2:08-CV-635-PMP-GWF

**PLAINTIFFS' REPLY TO
DEFENDANT RICK RIZZOLO
ET AL.'S OPPOSITION TO
PLAINTIFFS' APPLICATION
FOR RELEASE OF RICK
RIZZOLO'S PRESENTENCE
INVESTIGATION REPORT
AND SUPERVISION RECORDS**

1 COMES NOW Plaintiffs KIRK and AMY HENRY, by and through their attorneys of
2 record, DONALD J. CAMPBELL, ESQ. and JACK F. DEGREE, ESQ., of the law firm
3 CAMPBELL & WILLIAMS, and C. STANLEY HUNTERTON, ESQ., of the law firm
4 HUNTERTON & ASSOCIATES, and hereby respectfully request the release of requested
5 information pertaining to Defendant Fredrick Rizzolo's financial condition which is presently
6 in possession of United States Department of Parole and Probation.
7

8 This Reply is made and based upon all the pleadings and papers on file herein, together
9 with the exhibits attached hereto.

10 DATED this 29th day of October, 2009.

12 CAMPBELL & WILLIAMS

HUNTERTON & ASSOCIATES

14 By /s/
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Attorneys for Plaintiff Amy Henry

POINTS AND AUTHORITIES

I. Introduction

Plaintiffs seek an order compelling the release of financial information contained Defendant Rick Rizzolo’s presentence investigation report (“PSI”) and supervision records. This information is maintained as part of Case No. 2:06-cr-186-PMP-PAL in the United States District Court – District of Nevada. To be clear, this information consists of representations Rizzolo made to this Court through an arm of its jurisdiction – The United States Department of Parole and Probation. In Plaintiffs’ view, Rizzolo’s Opposition (#223) demonstrates yet another attempt to conceal highly relevant financial information from discovery in this case.

II. Reply Argument

A. The General Rule Does Not Apply In This Matter.

Plaintiffs do not dispute the general rule that prohibits disclosure of these documents. This rule, however, is not absolute and there is ample authority allowing a third party access to the information. In fact, the Ninth Circuit holds “[w]hile it is true that a pre-sentence report is a confidential document, disclosure of pre-sentence reports is warranted in some cases.” *Abreu-Reyes v. INS*, 292 F.3d 1029, 1033 (9th Cir. 2002) (overruled on other grounds); *see also, United States v. Watkins*, 623 F.Supp.2d 514, 516 (S.D. N.Y. 2009) (financial information in a PSI report ordered to be produced to counter defendant’s “seemingly inconsistent” representations made in a separate case); *United States v. Gomez*, 323 F.3d 1305, 1308 (11th Cir. 2003) (“...a party to ‘pending or contemplated litigation,’ who requires access to a presentence report ‘to impeach a witness, or to establish an affirmative proposition,’ would normally meet the [sufficient need] requirement.”) (citations omitted). As such, there is clearly authority for the position taken by Plaintiffs. Here, this Application hinges not on the general

1 rule, but rather, on the fact that this case presents precisely the situation in which disclosure
2 must be compelled. Rick's Opposition only addresses the general rule.

3 The plain language of Local Criminal Rule ("LCR") 32-2 recognizes a detailed
4 procedure for a requesting party to seek the release of a PSI report and supervision records.
5 Plaintiffs followed these protocols by filing the Application with the Court along with a
6 supporting Affidavit, which set forth examples demonstrating a "compelling need for
7 disclosure" and why this "is necessary to serve the ends of justice." This showing meets the
8 test to support disclosure over confidentiality. *See United States v. Preate*, 927 F.Supp. 163,
9 169 (M.D. Pa. 1996) (disclosure of the PSI report required since there was "only a limited
10 interest in confidentiality" and the requesting party met the particularized showing necessary to
11 order disclosure). To be sure, this "ends of justice" test is recognized in nearly every one of
12 the cases cited by Defendants.¹ Rick has neither provided nor demonstrated any particularized
13 need for confidentiality that would outweigh the specialized need set forth by Plaintiffs. He
14 relies solely on general case law on the issue without any analysis to the instant case. He
15 clearly omitted this analysis because it would require him to address his many false responses
16 and deceptive conduct throughout discovery in this action. Simply put, this is not the type of
17 case where disclosure should be prohibited.
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21 Disclosure of Rick's PSI Report and Supervision records is necessary to serve the ends
22 of justice. One could hardly imagine a more misleading and deceitful litigant than Rick
23 Rizzolo, who has consistently shunned his discovery obligations in an effort to conceal his
24

25
26 ¹ *See, e.g., United States v. Schlette*, 842 F.2d 1574, 1579 (9th Cir. 1988) ("In general most
27 courts explain that disclosure to a third party is appropriate if disclosure is necessary to serve
28 the ends of justice."); *In re Kenna*, 453 F.3d 1136, 1137 (9th Cir. 2006) (same); *United States*
v. Anzalone, 886 F.2d 229, 233 (9th Cir. 1989) (same); *Beller ex rel. Beller v. United States*,
221 F.R.D. 674, 678 (D. N.M. 2003) (same).

1 assets. For this reason, Plaintiffs seek financial records in possession of the United States
2 Department of Parole and Probation to reveal the true nature of his financial holdings. Rick
3 admitted he disclosed this information to his probation officer, yet he refuses to produce the
4 same information in discovery. Instead, he is evidently relying on his probation officer's
5 representation that this information is not discoverable in civil litigation. *See* Application at
6 3:18-26.
7

8 Information in possession of the U.S. Department of Parole and Probation and
9 particularly Rick's Probation Officer, Eric Christensen, is becoming increasingly relevant in
10 these proceedings. As the Court is well aware, Rick admittedly formed a working relationship
11 with a serial convicted felon, James Kimsey, to author pleadings in these proceedings for a
12 nearly three-month period. This undeniably places Rick in violation of the conditions of his
13 probation as he is not to have contact with any felons. However, at the hearing on Plaintiffs'
14 Motion to Reveal Ghost Writer and for Contempt Sanctions (#184) on October 2, 2009, Rick's
15 counsel, Kenneth Frizzell, III, Esq. proclaimed:
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17

18 When this was first – when the relationship was first established between Mr. Rizzolo
19 and Mr. Kimsey, Mr. Rizzolo specifically contacted his Parole Officer, Eric
20 Christensen. Eric okayed it himself. Likewise, when Mr. Rizzolo contacted him again
because they were going to be filing some more motions, Mr. Kimsey's status was fully
disclosed.

21 * * * *

22 The Department of Parole and Probation is fully aware of this relationship; fully agreed
23 with it, just asked that Mr. Rizzolo keep them apprised of what's happening, the kind of
the status of that relationship, which he has been doing and would testify with this
Court that he's been doing that.

24 *See* October 7, 2009 Hearing Transcript, excerpts of which are attached hereto as Exhibit "1" at
25 26:5-11, 13-18. Plaintiffs will explore in further detail the nature and extent of these
26 representations concerning the U.S. Department of Parole and Probation as discovery
27 progresses. In the meantime, however, the financial documents contained in the PSI Report and
28

1 related supervision records should be produced. These documents need to be compared to the
2 false, misleading, and evasive information Rick has produced in discovery thus far.

3 **B. Rick Rizzolo Never Disputes That He Has Made Misrepresentations**
4 **Throughout Discovery.**

5 The Court must compare the facts cited in the Application with Rick's failure to
6 address the same. In the Application for disclosure, the Plaintiffs explained to the Court:

7 *[Rick's] evasive responses have forced Plaintiffs to file numerous Motions to Compel*
8 *with the Court. Plaintiffs prevailed on each one.*

9 * * * *

10 *This information needs to be analyzed in comparison with the false and misleading*
11 *representations Rick has made to the Plaintiffs throughout discovery in this action.*

12 * * * *

13 *The discovery conducted thus far is laced with inconsistencies....*

14 See Application at 9:11-12, 14-16; 10:18-20.

15 Rick never once disputes these assertions in his Opposition. He cannot and will not,
16 because they are true. This is not the first time Rick failed to rebut these contentions. On
17 August 27, 2009, Plaintiffs opposed Rick's Motion to Dismiss (#177) wherein Plaintiffs
18 informed the Court of his misleading and untruthful responses throughout discovery. With
19 respect to Rick's interests held in various trusts, excerpts from Plaintiffs' Opposition state as
20 follows:

21 The RLR Trust was named as a defendant in a timely manner. Both Rick and Lisa had
22 steadfastly maintained that The RLR Trust did not exist. Moreover, they repeatedly
23 insisted in *both* written discovery responses and deposition testimony that this trust was
24 never funded with assets. Plaintiffs relied on Defendants' sworn representations. Now,
25 Defendants attempt to use their false and misleading responses as a shield against
26 Plaintiffs' timely effort to add the RLR Trust as a named defendant.

27 * * * *

28 Defendants had successfully evaded revealing the substance of this trust despite written
discovery requests, demand letters requesting additional information, multiple motions
to compel, third party subpoenas, and inquiry at deposition.

1 See Opposition (#177) at 33:18-24; 34-13-15. Rick never disputed these assertions in his
2 Reply (#188) then nor did he or his substituted counsel ever rebut these facts at oral argument
3 on September 15, 2009. Moreover, he does not dispute similar assertions concerning his
4 conduct in discovery in this Opposition. Rizzolo simply and unpersuasively cites cases in
5 which the Court elected to prohibit disclosure of the PSI Report or supervision records for
6 entirely different reasons completely unrelated to this case. Not one of these cases is
7 representative of the rationale Rick asserts, *i.e.*, that an untruthful, misleading civil litigant can
8 wholly prohibit disclosure of a PSI report based solely on a general presumption of
9 confidentiality. See, *e.g.*, *Hancock Bros., Inc., v. Jones*, 293 F.Supp. 1229, 1232 (D.C. Cal.
10 1968) (court prohibited disclosure because the requesting party relied solely on the argument
11 that the “avoidance of expense and additional work” is enough to compel disclosure); *United*
12 *States v. Krause*, 78 F.R.D. 203, 204 (D.C. Wis. 1978) (state court judgment creditor sought
13 intervention to obtain PSI report to try and collect damages but was not pursuing any
14 independent action). The court’s rationale for denying a party’s request for disclosure of a PSI
15 report in the foregoing cases is clearly based on far different facts.
16
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18

19 Here, permitting Rick to conceal documents and mislead Plaintiffs on an ongoing basis
20 and then take refuge behind the generality of LCR 32-2 results in prejudice to the Plaintiffs. It
21 is presumed this rule was never intended to permit a defendant in civil litigation to throw
22 veracity and candor out the window and then fight disclosure of relevant records which reveal
23 representations previously made to this Court through its agents at the United States
24 Department of Parole and Probation.
25
26
27
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III. Conclusion

Accordingly, Plaintiffs request an Order compelling the production of the requested documents presently in possession of the United States Department of Parole and Probation.

DATED this 29th day of October, 2009.

CAMPBELL & WILLIAMS

HUNTERTON & ASSOCIATES

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CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b), I certify that I am an employee of Campbell & Williams and on the 29th day of October, 2009, service of a true and correct copy of the foregoing Plaintiffs' Reply to Defendant Rick Rizzolo Et. Al.'s Opposition to Application for Disclosure of Rick Rizzolo's Presentence Investigation Reports or Supervision Records was made via CM/ECF to the following:

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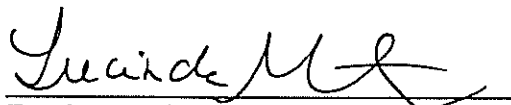
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Lisa Rizzolo, The Lisa M. Rizzolo
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The Rick and Lisa Rizzolo Family Trust, and
The Rick J. Rizzolo Separate Property Trust*

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Employee of Campbell and Williams

1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS DIVISION

KIRK HENRY, ET AL.,)	CASE NO: 2:08-CV-635-PMP-GWF
)	
Plaintiffs,)	CIVIL
)	
vs.)	Las Vegas, Nevada
)	
FREDRICK RIZZOLO, ET AL.,)	Wednesday, October 7, 2009
)	(2:03 p.m. to 2:41 p.m.)
Defendants.)	(2:50 p.m. to 3:19 p.m.)

HEARING ON PLAINTIFFS' [184] MOTION TO REVEAL
PRO SE LITIGANT RICK RIZZOLO'S GHOST WRITER

BEFORE THE HONORABLE GEORGE W. FOLEY, JR.,
UNITED STATES MAGISTRATE JUDGE

Appearances: See Next Page

Courtroom Administrator: Donna Smith

Court Reporter: Recorded; FTR

Transcribed by: Exceptional Reporting Services, Inc.
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Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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Defendants:

KEN FRIZZELL, ESQ.
(No address provided)

1 don't want to make this about Mr. Kimsey, because it really
2 isn't about Mr. Kimsey at all. Mr. Kimsey is just another
3 reason. But Mr. Kimsey was no different. Mr. Kimsey was only
4 involved with Mr. Rizzolo for approximately, I would say two
5 and a half months, roughly; give or take maybe a couple of
6 weeks. Maybe a couple of weeks more or less. And for
7 basically for that amount of time, for Mr. Hunterton's firm,
8 Mr. Campbell's firm to run up attorney's fees of \$260,000, I'm
9 doing something wrong, I guess, Judge. However, and moving on,
10 your Honor, where we're at as we stand here right now, I'm
11 involved. I'm an attorney duly licensed in the state of
12 Nevada, licensed in the state of Utah, licensed before the
13 Ninth Circuit, licensed in federal courts in Arizona.

14 THE COURT: Let me just ask you this.

15 MR. FRIZZELL: Sure.

16 THE COURT: Step a little closer to the mike to make
17 sure we're picking you up/

18 MR. FRIZZELL: Oh, I'm sorry. I'm involved in the
19 case from here on out until -- in the foreseeable future, I'm
20 involved in the case. There isn't going to be any more issues
21 about Mr. Rizzolo signing a document that -- that he did not
22 prepare. Notwithstanding, and speaking with Mr. Rizzolo, he
23 reviewed every document before he signed it. There were
24 documents that were prepared for him that he edited; he took
25 out, he added to, he changed wording. It wasn't like he was a

1 passive participant and Mr. Kimsey was just drafting a document
2 and Mr. Rizzolo was just simply signing on the dotted line and
3 letting Mr. Kimsey do all of the footwork.

4 Your Honor, for lack of a better term, I think a lot
5 of why we're here today is simply red herring. When this was
6 first -- when the relationship was first established between
7 Mr. Rizzolo and Mr. Kimsey, Mr. Rizzolo specifically contacted
8 his Parole Officer, Eric Christensen (phonetic). Eric okayed
9 it himself. Likewise, when Mr. Rizzolo contacted him again
10 because they were going to be filing some more motions, Mr.
11 Kimsey's status was fully disclosed. Mr. Kimsey's -- all of
12 his legal rights were restored by an order dated back in 2003
13 for felonies that were approximately 20 - plus years ago. The
14 Department of Parole and Probation is fully aware of this
15 relationship; fully agreed with it, just asked that Mr. Rizzolo
16 keep them apprised of what's happening, the kind of the status
17 of that relationship, which he has been doing and would testify
18 with this Court that he's been doing that. So there really is
19 no issue there. Your Honor, we've struck pleadings, we've
20 disclosed Mr. Kimsey's status. We've disclosed the existence
21 and identity of Mr. Kimsey; and not merely because there was
22 nowhere else to run, as Counsel would like to put it. I was
23 contacted. I've been a member of this Bar for a good many
24 years. I've been here for a long time. There is just simply,
25 at this point, no reason, at least on these little types of

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



October 22, 2009

Signed

Dated

TONI HUDSON, TRANSCRIBER