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7 UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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10 UNITED STATES OF AMERICA,)
)
11 Plaintiff,)
)
12 vs.) Case No. 2:06-cr-186-PMP-PAL
)
13 POWER COMPANY, INC., doing business as,)
THE CRAZY HORSE TOO, and)
14 FREDERICK JOHN RIZZOLO,)
)
15 Defendants.)
_____)

16 **GOVERNMENT’S REPLY TO DEFENDANTS POWER COMPANY, INC.’S AND RIZZOLO’S (1)**
17 **REPLY TO INTERESTED PARTIES KIRK AND AMY HENRY’S OPPOSITION TO DEFENDANTS’**
18 **MOTION FOR FINAL ORDER OF SATISFACTION (DOC. #320) and (2) JOINDER IN THE**
19 **PROBATION OFFICE’S REQUEST FOR HEARING TO MODIFY CONDITIONS OF SUPERVISED**
RELEASE AND REQUEST FOR FINAL ORDER OF SATISFACTION (DOC. #302)

20 Comes now the United States of America, by and through DANIEL G. BOGDEN,
21 United States Attorney, and ERIC JOHNSON, Assistant United States Attorney, and replies to
22 Defendants Power Company, Inc.’s and Rizzolo’s (1) Reply to interested parties Kirk And
23 Amy Henry’s opposition to defendants’ motion for final order of satisfaction (Doc. #320),
24 and (2) Joinder in the Probation Office’s Request for Hearing to Modify Conditions of
25 Supervised Release and Request for Final Order of Satisfaction (Doc. #302).
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1 **I. DEFENDANT’S MOTION FOR FINAL SATISFACTION SHOULD BE DENIED AS**
2 **THE GOVERNMENT DID NOT STEP INTO THE SHOES OF THE DEFENDANT FOR**
3 **PURPOSES OF MEETING HIS RESTITUTION AND FORFEITURE OBLIGATIONS FROM**
4 **HIS CONVICTION OR HIS DISTINCT CONTRACTUAL OBLIGATIONS TO THIRD PARTIES.**

5 A. No Privity Of Contract Exists Between The Government And Any Third
6 Party To Step Into The Shoes Of Defendant

7 The Government in its plea agreements with defendants Rizzolo and the Power
8 Company, Inc. made clear that its agreements did not limit or impinge on any third party’s
9 legal claims against defendant. (Doc. #7, at 11; Doc. #8, at 9.) Without some privity of
10 contract, the Government could not step into Rizzolo’s shoes in relation to Kirk Henry’s and
11 his wife’s separate legal rights to seek damages. The Government in its papers asking for
12 forfeiture and substitution of assets related to the Crazy Horse Too at no time suggested
13 that it intended to step into the shoes of defendant Rizzolo or assume responsibility for his
14 debts to the government and private third parties. Indeed, the Court’s order granting the
15 substitute forfeiture of assets relating to the Crazy Horse Too merely indicated that the
16 forfeited assets “shall be sold and applied to defendant Power Company Inc., doing business
17 as The Crazy Horse Too, and Frederick John Rizzolo’s forfeiture and restitution obligations.”
18 (Doc. #62, at 2.) In fact, the Government and the Henrys in their settlement agreement
19 concerning the Henry’s claims against the forfeited Crazy Horse Too property specifically
20 included a clause that provides:
21 included a clause that provides:
22 included a clause that provides:

23 Nothing in this Petition and Settlement Agreement, Stipulation for Entry of Order of
24 Forfeiture, and Order is construed or shall be construed to prevent the Henrys from
25 seeking any and all relief against the POWER COMPANY INC, doing business as THE
26 CRAZY HORSE TOO, FREDERICK JOHN RIZZOLO, and RICRIZ, LLC., which the Henrys
 may be entitled to, with respect to their personal injury case, any judgment entered
 thereon, and/or collection efforts instituted thereon.

(Doc. #70, at 5.)

1 None of the motions or orders defendant cites or hearing discourse defendant
2 quotes suggest that the Government has stepped into the shoes of defendant in regard to
3 any Government or third party obligations. These documents only recognize certain claims
4 to the proceeds from the sale of the forfeited assets and provide for an order of priority of
5 distribution of sale proceeds to the extent the proceeds are sufficient to cover recognized
6 claims. The orders in no way extinguish any third party or government agencies claims
7 against defendant or limit the Government's or third parties' recovery on their claims to the
8 extent of any sale proceeds from forfeited assets. The Government only assumed
9 ownership of certain property to sell it (after Rizzolo tried and failed or simply failed to do
10 so) and apply any proceeds resulting from the sale to outstanding court ordered restitution
11 and forfeiture obligations of the defendant. If after the sale of the assets and application of
12 the proceeds, outstanding obligations remain, defendant continues to be responsible for the
13 outstanding restitution and forfeiture obligations and separate obligations owed to third
14 parties, such as the Henrys.
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18 *Hardie v. United States*, 19 Fed. Appx. 899, 900 (Fed. Cir. 2001), is not applicable to
19 the circumstances of the instant case. In *Hardie v. United States*, plaintiff had entered into a
20 joint venture agreement with the partnership of a card playing club. The United States
21 through forfeiture proceedings assumed the partnership's interest in the club and then
22 operated the club for a period of years, receiving millions of dollars in disbursements.
23 Significantly, in *Hardie*, the court found that during the time the United States operated the
24 club, it had repeatedly acknowledged to the plaintiff that the joint venture agreement
25 continued in existence, and the United States was bound by that agreement.
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1 The Court explained that the Government is generally immune “for the
2 consequences of ‘its public and general acts as a sovereign,’” citing *Horowitz v. United*
3 *States*, 267 U.S. 458, 461 (1925) (holding that where the government places embargo on
4 shipments of silk by freight, damage to a silk shipper resulting from the embargo cannot be
5 charged to the United States). However, while the Government’s initial act of seizing the
6 general partnership in the club by forfeiture may have been a sovereign act, the court
7 concluded that the Government subsequently operated the club in “a decidedly nonpublic
8 and nongeneral manner” pursuant to the terms of plaintiff’s contract with the original
9 partnership. The *Hardie* court concluded that the United States’ assumption of the
10 partnership position and operation of the club under the joint venture agreement was
11 sufficient to establish privity of contract between the plaintiff and the United States.
12 Additionally, while the *Hardie* court found that a legal basis existed for plaintiff to sue the
13 United States, the court at no time found or suggested that plaintiff was limited in its
14 remedies to only the United States and could not also seek redress if it wanted against the
15 original partnership.
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19 In the instant case, the Government merely forfeited assets for the purpose of sale
20 and distribution of proceeds and did not operate the Crazy Horse Too or assume any
21 contractual obligations of defendant for operation of the club. In the forfeiture proceedings
22 in the case, the Government merely followed statutory procedure and gave
23 notice of the forfeiture to allow third parties with possible claims to file against the
24 property. The Government then resolved those claims either by settlement or litigation and
25 the Court entered final orders of forfeiture recognizing certain claims and prioritizing
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1 payment of the claims. Neither Title 18, United States Code, Section 1963(l), nor Rule 32.2
2 of the Federal Rules of Criminal Procedure, concerning the forfeiture of substitute assets,
3 suggest by their language that the United States steps into the shoes of the defendant upon
4 a forfeiture, absolving defendant of all responsibility to any third party claimants and
5 becoming such claimants only means of recourse. The forfeiture action in the instant case
6 only resolved the claims as against the forfeited property and did not affect the rights of the
7 government or third parties against the defendant. The forfeiture action did not create
8 some contractual right between third parties and the Government for claims of third parties
9 against the defendant. The Court's orders provide only for the application of proceeds from
10 the sale towards the restitution and forfeiture judgment previously entered herein.

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13 B. Defendant Is Not Entitled To Claim His Contended Market Value Of
14 Forfeiture To Settle His Restitution And Forfeiture Obligations

15 Defendant suggests that he should be credited with having paid \$33,000,000 toward
16 his forfeiture and restitution obligations, claiming the market value of the Crazy Horse Too
17 was \$33,000,000 at the time it was forfeited to the Government and that unspecified acts
18 and omissions by the Government have caused the property to diminish in value. However,
19 defendant's valuation of the property is simply that, defendant's valuation. Despite
20 defendant's lofty projections, the marketplace—the final arbiter of the pecuniary value of
21 property—has not born out defendant's estimation. Both before and since forfeiture, the
22 Government has engaged in an ongoing effort to sell the assets, making application to the
23 Court on multiple occasions to approve potential buyers and terms. Unfortunately, all
24 potential buyers have failed to complete purchase of the business. The Government
25 continues to market the property.
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1 None of the cases defendant cites even relate to forfeiture and none stand for the
2 proposition that in forfeiture matters the defendant should be able to offset any forfeiture
3 or restitution judgments by the reasonable market value of the assets at the time of
4 forfeiture. The language quoted from *Republic Savings Bank v. United States*, 584 F.3d 1369,
5 1374 (Fed. Cir. 2009), references the determination of a plaintiff's loss in a breach of
6 contract action against the Government, not the application of forfeited assets to
7 outstanding restitution and forfeiture obligations. Neither Section 1963(l), nor Rule 32.2
8 provide or implicitly suggest that an estimated valuation of property be done in some
9 manner at the time of its forfeiture and that the estimated valuation of the forfeited
10 property be applied against a defendant's outstanding forfeiture judgment, regardless of the
11 Government's ability to sell the property for the estimated value.
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15 **II. THIS COURT SHOULD USE ITS AUTHORITY TO MODIFY DEFENDANT'S**
16 **CONDITIONS OF SUPERVISED RELEASE TO REQUIRE DEFENDANT TO MAKE MONTHLY**
17 **PAYMENTS TO THE HENRYS**

18 The Government's petition, filed by the Office of Probation, seeks to modify
19 defendant's supervised release conditions to have defendant Rizzolo begin monthly
20 payments toward damages owed to Kirk Henry. The Court can enter such an order on two
21 different bases.

22 A. The Court Can Modify Defendant's Conditions To Require Defendant
23 To Make Monthly Payments For Restitution as Part of Defendant's Sentence

24 When the Government entered into the plea agreement, it contemplated that the
25 defendant would act in good faith and sell the Crazy Horse Too relatively quickly after his
26 plea for a substantial sum of money. The Court in keeping with the parties'
recommendation ordered defendants Rizzolo and the Power Company jointly and severely

1 liable for the \$10,000,000 in restitution to the Henrys to be paid from the sale of the Crazy
2 Horse Too. (Transcript, Sentencing Hearing for Defendants Rizzolo and Power Company,
3 Inc., at 89-90.) However, defendant failed to timely sell the club and circumstances in the
4 marketplace substantially changed. Defendant failed to sell the club within the one year
5 period that he was provided after his plea, choosing instead to engage in a management
6 agreement and sham or reckless sale of the club to Michael Signorelli. Signorelli on taking
7 over the club subsequently mismanaged the business to where neither the Government nor
8 defendant could find a third party operator willing to manage the club without a multi-year
9 contract which would have delayed any sale of the club. The Government moved for
10 substitute forfeiture of the property and then, after the forfeiture, attempted to sell the
11 property to multiple purchasers all who failed to ever put significant real money down on
12 the property. The Government is now attempting to sell the club to a third party for
13 approximately 10.5 million dollars. (Doc. #317.) If that sale is completed, the Henrys (after
14 all other recognized priority claims in the property) will receive substantially less than the
15 nine million dollars plus interest that defendant currently owes to them both as restitution
16 in this case and as damages which defendant agreed to pay the Henrys in their civil
17 settlement. The Court has the authority to modify defendant's conditions of supervise
18 release to effectuate the purposes of sentencing for defendant's conviction. Title 18, United
19 States Code, provides:

24 The court may, after considering the factors set forth in section 3553(a)(1),
25 (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6) and (a)(7)—

26 . . . (2) extend the term of supervised release if less than the maximum authorized
term was previously imposed and may modify, reduce or enlarge the conditions of
supervised release, at any time prior to the expiration or termination of the term of

1 supervised release

2 In view of the inevitable shortfall in sales proceeds from forfeited assets to meet
3 defendant's restitution and forfeiture obligations, the Court could order defendant to begin
4 making monthly payments toward restitution to the Henrys. The plain language of the
5 statute indicates that the district courts have broad discretion to alter the conditions of a
6 defendant's supervised release. *United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000).

7 The district court retains "authority to ... modify terms and conditions ... in order to account
8 for new or unforeseen circumstances that require a longer term or harsher conditions of
9 supervised release in order to further the general punishment goals of Section 3553(a)."

10 *United States v. Lussier*, 104 F.3d 32, 36 (2d Cir.1997)); see also *United States v. Miller*, 205
11 F.3d at 1101 (noting that § 3583(e) "recogniz[es] that the sentencing court must be able to
12 respond to changes in the [defendant's] circumstances"). As explained by the Third Circuit
13 in *United States v. Loy*:

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17 A condition is within the court's discretion if two criteria are met. First, the condition
18 must be reasonably related to the factors set forth in 18 U.S.C. § 3553(a)(1) & (2)(B)-
19 (D). Accordingly, in imposing conditions of supervised release, the sentencing court
20 may consider: (1) the nature and circumstances of the offense and the history and
21 characteristics of the defendant; and (2) the need for the condition to deter future
22 criminal conduct, protect the public, and provide the defendant with necessary
23 training, medical care, or other correctional treatment Second, a condition must
24 involve no greater deprivation of liberty than is reasonably necessary to achieve the
25 deterrence, public protection and/or correctional treatment for which it is imposed.

26 *United States v. Loy*, 237 F.3d 251, 256 (3d Cir. 2001); see also *United States v. Evans*, 155 F.3d
245, 248-49 (3d Cir.1998). Accordingly, district courts traditionally have enjoyed broad
discretion to tailor the conditions of supervised release to the particular circumstances of each
case, provided that such conditions are reasonably related to the dual goals of rehabilitating the

1 offender and protecting the public. See 21A Am.Jur.2d *Probation* § 907, at 171-73 (1998); 3
2 Wright, *Federal Practice and Procedure* § 529, at 146.

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4 In the context of this case, modifying defendant's supervised release conditions to
5 require defendant Rizzolo to begin monthly payments toward restitution would reasonably
6 relate to the factors enunciated in § 3553(a). Requiring defendant Rizzolo to begin to meet
7 his restitution obligations to pay the Henrys, victims of defendant's racketeering enterprise,
8 would be clearly related to Rizzolo's personal history and characteristics and would
9 recognize the seriousness of the underlying criminal conduct, promote Rizzolo's respect for
10 his legal obligation to pay the Henrys, deter Rizzolo from future criminal conduct, and meet
11 the Henrys' need for restitution for harm caused by the offense. *United States v. Lakatos*,
12 241 F.3d 690, 693 (9th Cir. 2001)(affirming district court requiring as a special condition of
13 supervised released that defendant comply with state child support obligations).
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16 B. The Court Can Modify Defendant's Conditions To Require Defendant
17 To Make Monthly Payments Toward Defendant's Contractual Civil Settlement
18 Obligation With the Henrys

19 The Court could also modify defendant's conditions of supervised release to require
20 defendant to begin making monthly payments to the Henrys pursuant to defendant's
21 settlement agreement with the Henrys. This Court made a finding in the Henrys' related
22 federal civil matter that:

23 Although the settlement agreement expressly provides that the parties anticipate
24 the \$9 million will be paid from the proceeds of the sale, the agreement further
25 provides that obligation to make payment upon the closing is not contingent upon
26 the realization of net proceeds from the sale sufficient to make the \$9 million
payment. Plaintiffs argue, and Defendants agree, that in the event proceeds from the
sale of the CRAZY HORSE TOO are insufficient to satisfy the \$9 million settlement
obligation payable to the Henrys, Plaintiffs would be entitled to seek relief for the
balance from other assets of Defendant Rick Rizzolo.

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2 Order, *Henry v. Rizzolo*, 2:08cv635-PMP-GWF (Doc. # 117, at 2.) Consequently, Rizzolo has
3 an admitted contractual obligation to the Henrys to pay them \$9,000,000 as part of his
4 settlement agreement with the Henrys for the same damages underlying the restitution
5 ordered in the criminal case. Because sale proceeds from the Crazy Horse Too appear highly
6 unlikely to be sufficient to meet defendant's obligations to the Henrys pursuant to his
7 settlement agreement, the Court could reasonably modify defendant's conditions to begin
8 paying the settlement amount from his personal assets.
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10 Courts considering supervised release conditions have approved conditions which
11 have required defendants to pay city fines, restitution orders to victims in other criminal
12 cases and state child support obligations. The courts approving the conditions focus on
13 whether the defendants have an existing obligation to a third party and whether expecting
14 the defendant to meet the obligation to the third party would be consistent with the
15 sentencing factors of Title 18, United States Code, Section 3553. *United States v. A-Abras*
16 *Inc.*, 185 F.3d 26, 35 (2d Cir. 1999)(Court finding it is "well within a federal sentencing court's
17 discretion to impose conditions that would ensure that [defendant] actually pays the City
18 fine" related to defendant's underlying conduct in criminal case.); *United States v. Mitchell*,
19 429 F.3d 952, 962 (10th Cir. 2005)("We find that the district court properly exercised its
20 authority under 18 U.S.C. § 3583(d) when it required Ms. Mitchell to remain current on her
21 restitution payments from previous criminal convictions as a condition of supervised
22 release."); *United States v. Lakatos*, 241 F.3d at 693 (affirming district court requiring as a
23 special condition of supervised released that defendant comply with state child support
24 obligations).
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1 Requiring defendant Rizzolo to begin to meet his civil settlement obligations to pay
2 the Henrys would clearly promote the sentencing factors of Section 3553. Modifying
3 defendant's conditions of release to require him to begin paying toward his settlement
4 agreement with the Henrys would force Rizzolo to begin to take responsibility for his and his
5 club's criminal conduct, appreciate the seriousness of his crime and deter him from
6 future criminal conduct. Modifying his conditions would also help the Henrys meet obvious
7 significant financial needs resulting from the criminal injury done to Kirk Henry and force
8 Rizzolo to begin to appreciate the need to meet rather than avoid his legal obligations.
9
10 Finally, modifying defendant's conditions in view of the damages in this case would promote
11 public respect for the law generally.

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13 Additionally, the Henrys in their joinder in the request for hearing regarding
14 defendant's conditions of release provide details from their civil litigation with defendant
15 which suggests that defendant is spending lavish amounts in various restaurant and
16 entertainment establishments, hiding substantial funds offshore, disposing of expensive
17 assets to family members and claiming falsely that he is a man of very limited means in
18 responding to all efforts to identify assets potentially attachable for meeting his obligations.
19 (Doc. #286.) Defendant's conduct appears designed to avoid meeting his obligations to the
20 Henrys. Consequently, modifying defendant's conditions would be a reasonable response to
21 force defendant to begin to meet his financial obligations to the victim of his club's crime.

22 The Government asks the Court to deny defendant's motion for final satisfaction and
23 to modify defendant's conditions of supervise release to require defendant to make
24 monthly payments to the Henrys for his restitution obligation or settlement obligation or
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both.

DATED this 23rd day of April 2010.

Respectfully submitted,
DANIEL G. BOGDEN
United States Attorney

/s/ Eric Johnson

ERIC JOHNSON
Assistant United States Attorney