

LAW OFFICES OF KENNETH G. FRIZZELL, III
Kenneth G. Frizzell, III, Esq.
Nevada Bar No.: 006303
509 South Sixth Street
Las Vegas, Nevada 89101
(702) 366-1230; (702) 384-9961 (fax)
Email: frizzelllaw@yahoo.com
Attorney for Defendants
POWER COMPANY INC. and
FREDERICK JOHN RIZZOLO, aka RICK RIZZOLO

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

POWER COMPANY INC., dba THE
CRAZY HORSE TOO, and FREDERICK
JOHN RIZZOLO,

Defendants.

Case No.: 2:06-CR-00186-PMP-PAL

DEFENDANTS' POWER COMPANY,
INC., (1) AND FREDERICK JOHN
RIZZOLO aka RICK RIZZOLO (2)
RESPONSIVE MEMORANDUM OF
POINTS AND AUTHORITIES
REQUESTING A FINAL ORDER OF
SATISFACTION OF JUDGMENT

COMES NOW, Defendants POWER COMPANY, INC; and FREDERICK JOHN RIZZOLO
aka RICK RIZZOLO, by and through counsel of record KENNETH G. FRIZZELL, III, of the LAW
OFFICES OF KENNETH G. FRIZZELL, III, and respectfully submits this the following
Responsive Memorandum of Points and Authorities to the United States Probation Office's
Request for Hearing to Modify Conditions or Terms of Supervision (#278), Requesting A
Final Order of Satisfaction of Judgment.

DATED: March 26, 2010

LAW OFFICES OF KENNETH G. FRIZZELL, III

By


KENNETH G. FRIZZELL, III, ESQ.

Nevada Bar #006303

509 South Sixth Street

Las Vegas, Nevada 89101

(702) 366-1230

Attorney for Defendants

POWER COMPANY, INC.

FREDERICK J. RIZZOLO aka RICK RIZZOLO

POINTS AND AUTHORITIES

I. RELEVANT FACTS

On June 1, 2006, Defendant Power Company pled guilty to conspiracy to participate in an enterprise in racketeering activity in violation of 18 U.S.C. §1962(d). (#7, pg. 3; #9; #10, #13).

Mr. Rizzolo executed a *Plea Memorandum* to conspiracy to defraud the Government in violation of 18 U.S.C. §371. (#8, pg. 2, #13).

Defendant Power Company agreed to forfeit \$4,250,000.00 pursuant to 18 U.S.C. §1963(a)(1)-(3), and the Power Company and Mr. Rizzolo agreed to sell the Crazy Horse Too under the terms and conditions as described below. (#7, pg. 7; #10, #13).

The total of all fines, forfeitures and restitution pursuant to a *Settlement Agreement* (providing also for a balance of \$9,000,000.00 to be paid to Kirk and Amy Henry) was \$16,723,840.21.

The *Settlement Agreement* was the: "... result of that certain accident, casualty, incident or event that occurred on or about the 20th day of September 2001, in Clark County, Nevada, which was the basis of Case No. A440740 in District Court Clark, County, Nevada."

The original *Order of Forfeiture* was submitted on June 26, 2006 (#11), and provided only for the \$4,250,000.00 agreed forfeiture for the Power Company, but did not provide for any other fines, forfeiture or restitution.

On January 23, 2007, Mr. Rizzolo was sentenced, and the *Settlement Agreement* was incorporated. (#42, #43).

At the time of sentencing, the Crazy Horse Too was valued at \$58,000,000.00 (#248, 248-1, PSR released, pgs. 23-24 this case); and because of this value, the parties agreed that all fines, restitution and the forfeiture of the \$4,250,000.00 due and owing (#11) as a part of these agreements were to be paid from the sale of the real property, assets and the Crazy Horse Too (#7, #8, #9, #10, #11).

.....

1 Under the *Plea Memorandums and Settlement Agreement*, Mr. Rizzolo was to have
2 one (1) year to run and to sell the Crazy Horse Too - if unsuccessful, Mr. Rizzolo and the
3 Government would agree on a third party operator pending sale. (#7, #8).

4 Whether calculated from the date of the *Plea Memorandum* or *Sentencing*, Mr.
5 Rizzolo was required to self-surrender on May 22, 2007, and was never actually allowed
6 the one (1) year to operate the Crazy Horse Too.

7 With no sale in sight, interested parties Kirk and Amy Henry, sought relief in State
8 Court. Following the State Court denial of relief on June 7, 2007 to reduce the *Settlement*
9 *Agreement* to judgment, the Henrys then sought relief through the assistance of the
10 Government.

11 On August 13, 2007, the Government breached the various plea and settlement
12 agreements and memorandums and filed a motion under seal (#58) citing to 28 U.S.C.
13 §3001, et seq. (Federal Debt Collections Practices Act), 18 U.S.C. §1963(m), and Criminal
14 Rule 32.2(e), to substitute assets and property consisting of the real property and business
15 known as the Crazy Horse Too valued in excess of \$33,000,000.00:

16 and to apply the sale proceeds of the substitute assets
17 as follows: the restitution of \$10,000,000.00, the assessments
18 of \$500.00, the fines of \$750,000.00, the forfeiture personal
19 money judgment of \$4,250,000.00, and the IRS lien of
20 \$1,723,340.31, which are the obligations of both defendant
21 Power Company, Inc., ("Power Company") doing business as
22 the Crazy Horse Too, and defendant Frederick John Rizzolo,
23 under the Order of Forfeiture (Docket #12, #43) and the
24 Judgments In A Criminal Case entered on January 26, 2007
25 (#42, #43).

26 All fines and restitution and the original forfeiture of \$4,250,000.00 totaled
27 \$16,723,840.21, less than the \$33,000,000.00 value of the assets. The Government's
28 motion was granted on August 21, 2007. (#'s 60, 62).

On September 1, 2007, the Henrys personally executed a *Petition and Settlement*
Agreement, Stipulation for Entry of Order of Forfeiture, and Order, placing the
responsibility for the sale and distribution of funds squarely on the shoulders of the
Government. That document was entered as an order on September 7, 2007 (#68/70).

1 To the surprise of the Henrys, and all other interested parties, on May 7, 2008, the
 2 Government filed and distributed a proposed *First Amended Order of Forfeiture*,
 3 changing the order of disbursement of the interested parties and reducing the Henrys
 4 payment from first position to fifth position. (#180/222).

5 Several parties objected, as did the Henrys. The Henrys' objection alleged the
 6 collusive transfer of assets in the State Divorce Case. The Henrys attached as an exhibit in
 7 a subsequent objection dated April 3, 2008, a copy of their original September 1, 2007
 8 agreement. (#191 - although shown as filed on May 22, 2008, the document was actually
 9 signed and served on April 3, 2008).

10 The Henrys' objection admitted the deal with the Government to forfeit the assets
 11 of the Power Company and Mr. Rizzolo and stated (#191, pg. 3, Ins. 19-24):

12 The bargain struck by Docket #68 is simple. In order to clear
 13 the way for the Government's sale of the property and
 14 remove any clear title issues,

15 "The Henrys knowingly and voluntarily agree to the
 16 abandonment, the civil administrative forfeiture, the civil
 17 judicial forfeiture, or the criminal forfeiture of the
 18 property"(p.3, ¶19).

19 What the Henrys receive in return:

20 "After the property is forfeited with the final Order of
 21 Forfeiture . . . the United States knowingly and voluntarily
 22 agrees the Henrys will be the first to receive payment from
 23 the proceeds of the sale . . . (p.4, ¶40)."

24 Unfortunately, by this time it was discovered that the real property and the club
 25 were losing value because the Government, since the August 21, 2007 (#60, 62)
 26 forfeiture, had committed certain errors and omissions that resulted in the failure to
 27 preserve the licensing and zoning necessary for the sale of the assets.

28 In an effort to correct these failures, the Government (while also responding to the
 Henrys' allegations in #191), filed a *Motion to Stay Expiration of Exotic Dance Permit*. In
 that *Motion* (#198, the Government admitted that the real property and the Crazy Horse
 Too were still valued at least approximately \$33,000,000.00. (#198-2, pgs. 2-4).

.....

1 Realizing the gravity of the error in waiving their rights and allowing the
2 Government to collect the settlement, on May 16, 2008, the Henrys filed a separate
3 *Complaint* (Federal Civil Case 2:08-CV-00635-PMP-GWF, "Federal Civil Case") alleging
4 Conspiracy to Defraud, Common Law Fraud and Violation of Uniform Fraudulent Transfer
5 Act.

6 The charging information of the Federal Civil Case did not seek to set aside any
7 provision of the *Settlement Agreement* or subsequent forfeitures, but instead claimed a
8 right to seek payment and right of enforcement of the *Settlement Agreement* by
9 redetermination of the domestic and divorce status of Mr. Rizzolo and his ex-wife and the
10 reallocation of the property and assets awarded in the *Decree of Divorce* in what amounts
11 to "double counting" or double recovery.

12 On June 23, 2008, a hearing was held on the Government's motions. At the time
13 of the hearing, the assets had already lost \$25,000,000.00 in value - from \$58,000,000.00,
14 down to \$33,000,000.00 - and there was a reasonable and foreseeable consequence as
15 the recession was growing, that the real property and The Crazy Horse Too would
16 continue to lose sales value because the licenses and zoning were not maintained by the
17 new owner, the Government.

18 At the hearing, the Government again admitted its position and stated (#227, pg.
19 15, Ins. 12-15):

20 We owned the property from the day this Court substituted
21 and forfeited it to the United States of America so that we are
22 the owner of the property and have been from that date
23 forward.

24 The Court and the City of Las Vegas agreed (#227, pg. 223, Ins. 1-5):

25 **THE COURT:** Do you agree with the Government at this point
26 the owner is the United States?

27 **MR. FRED GIBSON:** That's correct and we've made this
28 agreement in good faith in an effort to satisfy obligations that
have stemmed from years of proceedings.

The Government also acknowledged, that the Government, as the new owner, had
fully stepped into Mr. Rizzolo's shoes and was now wholly and 100% responsible for the

1 sale of the real property and club and the distribution of proceeds to pay all fines and even
 2 the restitution to the Henrys, not Mr. Rizzolo (#227, pg. 35, Ins. 14-22):

3 MR. HOLLINGSWORTH: But that distribution order is very
 4 specific as a settlement agreement and, in fact, contemplated
 5 and said that they would have to submit their bills justifying
 6 the numbers to this Court before the Court and the United
 7 States will say, yes, release it to this. Release it to the Henrys.
 8 And so I just want to make sure that was part of their bargain
 9 for a deal. Now, they're saying, oh, no, we don't want that
 10 but, in fact, that's what the bargain deal agreement was.

11 The Court expressed its dismay at the manner in which the Government had
 12 handled the forfeiture to that date, including allowing the licensing and zoning to lapse
 13 (#227, p. 93, ln. 25; pg. 94, Ins. 1-7):

14 THE COURT: Let me just hypothetically then, because I want
 15 to make sure I understand how this would play out. Let's say
 16 that three months from now, I mean, June 30th comes and
 17 goes; the United States is the owner of the property; they're
 18 not having any luck finding a buyer; they decide to revisit
 19 their policy about operating businesses, and they come in for
 20 licensure, and the city considers that and says, 'Look, there's
 21 been the expiration of a year, non-conforming use' –

22 On June 24, 2008, the Court overruled the various objections and entered the
 23 order (#222), which was again amended on October 15, 2008 (#242).

24 In all of the federal forfeiture orders, #'s 11, 62, 70, 222, and finally 242, the Court
 25 discusses, and eventually confirms that the Government had forfeited property worth
 26 \$33,000,000.00 to pay \$16,723,840.21 in fines, restitution and forfeitures, had stepped
 27 into the shoes of the owner, and was now responsible for the sale of the property and the
 28 distribution of proceeds (#227, pg. 35, Ins. 14-22):

29 II. LEGAL ANALYSIS

30 By virtue of the Government's admitted position that the Government changed the
 31 terms of the original plea memorandums and agreements, the Government sought and
 32 received forfeiture of property worth \$33,000,000.00 to pay \$16,723,840.21 in fines,
 33 restitution and forfeitures, the Government has stepped into the shoes of the owner, and
 34 is now responsible for the sale of the property and the distribution of proceeds (#227, pg.
 35 35, Ins. 14-22).

1 This Court cannot continue to hold the Power Company and Rick Rizzolo
2 responsible for any of the outstanding obligations, because those obligations are paid by
3 virtue of the substitute forfeiture, and the Power Company and Mr. Rizzolo are entitled to
4 a final order of satisfaction.

5 Additionally, there is a serious Eighth Amendment, if not a Double Jeopardy,
6 question. By forfeiting assets valued at \$33,000,000.00 to satisfy obligations of
7 \$16,723,840.21, and then by continuing to hold the Power Company and Mr. Rizzolo
8 responsible, both as to the criminal judgment, and the civil case pending before this Court,
9 the excessive fines clause has been triggered.

10 The question goes to many multiples do the Defendants have to continue to pay
11 the same fines and obligations over and over again. The fines and obligations were
12 \$16,723,840.21, and the substitute forfeiture was twice that amount. The breached
13 agreements indicate more payments after sale, and a civil action is pending from which yet
14 another amount can be assessed on the same predicate facts. United States v. Bajakajian,
15 524 U.S. 321, 337 (1998), cited in Casellas, Stefan, Criminal Forfeiture Procedure in 2008;
16 An Annual Survey of Developments in the Case Law.

17 Comparing the gravity of respondent's crime with the
18 \$357,144 forfeiture the Government seeks, we conclude that
19 such a forfeiture would be grossly disproportional to the
20 gravity of his offense. It is larger than the \$5,000 fine imposed
by the District Court by many orders of magnitude, and it
bears no articulable correlation to any injury suffered by the
Government.

21 The Federal Debt Collection Procedures Act of 1990 (FDCPA), 28 U.S.C. §3001-
22 3308, sets forth the exclusive procedures for the United States to recover a judgment on
23 an amount that is owing on account of fines and restitution. 28 U.S.C. §3001(a)(1),
24 3002(3)(B). The FDCPA was enacted to give the Justice Department uniform federal
25 procedures and post-judgment remedies to collect debts.

26 Six years after passing the Federal Debt Collection Procedures Act of 1990,
27 Congress enacted the Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-
28 132, 110 Stat. 1227 (1996) (codified in part at 18 U.S.C. §3663A-3664), which makes

1 restitution mandatory. 18 U.S.C. §371, 1341, 3663A(a)(1), 3663A(c)(1)(A)(ii). MVRA is a
2 criminal statute that expressly provides that the FDCPA may be used to enforce orders of
3 restitution.

4 The Government, with the consent and agreement of the Henrys and other
5 interested parties, knowingly breached the original agreements and cited to 28 U.S.C.
6 §3001, et seq., for the purpose of obtaining "assets owned by defendants for the payment
7 of forfeiture, restitution, assessments, fines, etc." (#58-1, pg. 2, Ins. 15-16), and obtained
8 property valued in excess of \$33,000,000.00 for payments due of \$16,723,840.21.

9 The Power Company and Mr. Rizzolo correctly argue that the Government, by its
10 own action, initiated a series of federal procedures and orders where the Government
11 stepped into the shoes of the Power Company and Mr. Rizzolo as to ownership of the real
12 property and Crazy Horse Too, as well as the sale and distribution of assets.

13 Thus, the Government is in privity of contract through the *Settlement Agreement*
14 with the Henrys and all other interested parties which stand to be paid. See *Hardie v.*
15 *United States*, 19 F. App'x 899, 900 (Fed. Cir. 2001), and progeny of the "Bicycle Club
16 Cases."

17 In *Hardie*, the court held that privity of contract was established because "the
18 United States has elected to step into the shoes of the general partner of LCP, and PPA
19 had no choice but to accept its new 'partner.' " *Id.* at 905. It made no difference "that the
20 United States happened to obtain its 'interest' in the Bicycle Club through forfeiture, as
21 opposed to any other means." *Id.*

22 This privity, established by the admissions of the Government in open court, when
23 taken in context that the value of the assets forfeited exceed the value of the obligations,
24 constitutes a full and complete offset, satisfaction and release of the Power Company and
25 Mr. Rizzolo of any further financial obligation to the Government or to any other party.

26 The Government is expected to argue that the diminished value of the real
27 property and club must be considered as a factor. However, the Government is in the
28 exact same position of many homeowners, stuck with property that failed to hold its value

(primarily through the acts and omissions of the Government failing to maintain the licenses and zoning) - but which was, on August 21, 2007, valued at \$33,000,000.00 and forfeited as payment for all fines and restitution existing at the time of entry of the orders. (#'s 60/62, 68/70, 222, 242). See also *Republic Savings Bank, et al. v. United States*, 584 F.3d 1369 (Fed. Cir. 2009), citing to *Bluebonnet Savings Bank, F.S.B. v. United States*, 339 F.3d 1341, 1345 (Fed. Cir. 2003).

On remand, *Republic Savings Bank*, 584 F.3d at 1369, a civil case involving forfeiture, the Court of Federal Claims was instructed to offset the judgment award by the "reasonable market value of the benefits, measured at the time" of the forfeiture. See also *Hansen Bancorp, Inc. v. United States*, 367 F.3d 1297, 1314-1316 (Fed. Cir. 2004), *Landmark Land Co. v. FDIC*, 256 F.3d 1365, 1372, 1373 (Fed. Cir. 2001).

III. CONCLUSION

The Government has cited to 28 U.S.C. §3001, et seq. (Federal Debt Collections Practices Act), 18 U.S.C. §1963(m), and Criminal Rule 32.2(e), to substitute assets and property to pay the existing fines and obligations. See for example, *United States v. Mays*, 430 F.3d 963 (9th Cir. 2005), cert. denied, *Mays v. United States*, 546 U.S. 1207, 126 S. Ct. 1416, 164 L. Ed. 2d 113 (2006) (i.e., federal trial court could issue an order in a criminal case for the enforcement and satisfaction of fines and a restitution order without the need of a separate civil action). See also *United States v. Coluccio*, 19 F.3d 1115 (6th Cir. 1993) (i.e., Government may use FDCPA to satisfy both fines and forfeitures). *United States v. Phillips*, 303 F.3d 548 (5th Cir. 2002) (i.e., satisfaction of private restitution through the FDCPA where the plain language of the FDCPA and MVRA authorized the Government to seize and garnish accounts for victim restitution to be paid to private individuals). See also *United States v. Genova*, 333 F.3d 750, 762 (7th Cir. 2003) (disallowing double counting).

Accordingly, any financial obligations in this case must be offset by the value of the benefits derived at the time of the substitute forfeiture.

.....

1 To do otherwise would subject the Defendants to "double counting", double
2 judgment and a violation of the excessive fines clause of the Eighth Amendment. United
3 States v. Bajakajian, supra.

4 For the reasons stated herein, Mr. Rizzolo prays that the Court issue an order of
5 satisfaction of all outstanding fines, restitution and forfeiture obligations.

6 DATED: March 26, 2010

7 LAW OFFICES OF KENNETH G. FRIZZELL, III

8 By 

9 KENNETH G. FRIZZELL, III, ESQ.

10 Nevada Bar #006303

11 509 South Sixth Street

12 Las Vegas, Nevada 89101

13 (702) 366-1230

14 Attorney for Defendants

15 POWER COMPANY INC

16 FREDERICK JOHN RIZZOLO aka RICK RIZZOLO
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that I am an employee of the LAW OFFICES OF KENNETH G. FRIZZELL, and on the 26TH day of March, 2010, service of a true and correct copy of the foregoing Responsive Memorandum of Points and Authorities to the United States Probation Office's Request for Hearing to Modify Conditions or Terms of Supervision (#278), Requesting A Final Order of Satisfaction of Judgment. was made via CM/ECF to the following:

Daniel D. Hollingsworth, Esq.
Assistant United States Attorney
333 Las Vegas Blvd. South #5000
Las Vegas, NV 89101
Attorney for United States of America

Kim D. Price, Esq.
3275 S. Jones Blvd., #105
Las Vegas, NV 89146
Attorney for James C. Barrier

Michael M. Edwards, Esq.
Tracey L. Heinhold, Esq.
Jodi Conetta Lowry, Esq.
Lewis, Brisbois, Bisgaard & Smith, LLP
400 South 4th St., #500
Las Vegas, NV 89101
Attorneys for Nevada Receivership, LLC

Kimberly A. Arguello, Esq.
Deputy Attorney General
555 E. Washington Avenue
Las Vegas, NV 89101
Attorney for Clark County

Fred D. Gibson, III, Esq.
Jennifer Braster, Esq.
Lionel, Sawyer & Collins
300 South 4th St., #1700
Las Vegas, NV 89101
Attorneys for RICRIZ, LLC

David J. Pope, Esq.
Deputy Attorney General - Civil Taxation
555 E. Washington Avenue, #3900
Las Vegas, NV 89101
Attorney for Clark County

Dominic P. Gentile, Esq.
Karen L. Hanks, Esq.
Gordon & Silver, Ltd.
3960 Howard Hughes Pkwy, 9th Floor
Las Vegas, NV 89169
Attorneys for Bart Rizzolo

Laura Rehfeldt, Esq.
Deputy District Attorney - Civil Division
500 S. Grand Central Pkwy., 5th Floor
Las Vegas, NV 89155
Attorney for Clark County

C. Stanley Hunterton, Esq.
Hunterton & Associates
333 S. 6th Street
Las Vegas, NV 89101
Attorney for Amy Henry

Donald J. Campbell, Esq.
Phillip R. Erwin, Esq.
700 South 7th Street
Las Vegas, NV 89101
Attorneys for Kirk Henry

Anthony Sgro, Esq.
Mark C. Hafer, Esq.
Patti Sgro & Lewis
720 South 7th St., #300
Las Vegas, NV 89101
Attorneys for Power Company, Inc., and
Rick Rizzolo

Michael R. Mushkin, Esq.
Michael R. Mushkin & Associates
4475 South Pecos Road
Las Vegas, Nevada 89121
Attorneys for Canico Capital Group


Employee of Kenneth G. Frizzell, III, Esq.