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6
7 UNITED STATES DISTRICT COURT

8 DISTRICT OF NEVADA

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 vs.

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

13 Defendants.
14

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

DEFENDANTS' POWER COMPANY, INC. (1) AND FREDERICK JOHN RIZZOLO aka RICK RIZZOLO (2) REPLY TO INTERESTED PARTIES KIRK AND AMY HENRY'S OPPOSITION #313 TO DEFENDANTS' MOTION FOR FINAL ORDER OF SATISFACTION #302

15 COMES NOW, Defendants POWER COMPANY, INC; and FREDERICK JOHN
16 RIZZOLO aka RICK RIZZOLO, by and through counsel of record KENNETH G. FRIZZELL,
17 III, of the LAW OFFICES OF KENNETH G. FRIZZELL, III, and incorporating Defendants'
18 original Motion for Satisfaction (#302) and the unopposed Motion to Strike (#312) and
19 making a part hereof by reference, respectfully submits Defendants' Power Company, Inc.
20 (1) and Frederick John Rizzolo aka Rick Rizzolo (2) Reply to Interested Parties Kirk and Amy
21 Henry's Opposition #313 to Defendants' Motion for Final Order of Satisfaction #302.

22 DATED: April 22, 2010

23 LAW OFFICES OF KENNETH G. FRIZZELL, III

24 By 

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POINTS AND AUTHORITIES

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The issue pertaining to satisfaction is simple. The Interested Parties agreed to and signed, more than once, documents attesting to the Government ownership of the property and power of distribution of assets once the sale of same was completed.

Privity of contract is established by the Government’s admitted ownership, and:

- ✓ The Government’s complete control since 2007 of the management of the property, collection of rents from tenants (which may have to be remitted under the assignment of rents clause of the Deed of Trust now asserted by Canico and further calculated to offset any perceived amounts due from the Defendants); and by
- ✓ The Government’s complete control of the method and timing of sale of the assets, as well as the distribution of proceeds from sale that relates through its own motion (#58, #58-1) for substitute forfeiture directly back to the original Settlement Agreement and the balance of restitution owed to the Interested Parties, as stated and incorporated in the Plea Agreements and Judgments (#7, #8, #9, #10, #13).

The Government will argue the Defendants will not be entitled to satisfaction if the property value, at the time of sale falls below the threshold of the debt, or if Interested Party Canico is granted leave to foreclose. Unfortunately, the Government must be held to the “reasonable market value of the benefits, measured at the time” of the forfeiture. Republic Savings Bank, 584 F.3d 1369 (Fed. Cir. 2009). 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).

Thus, the Defendants’ debts to the Government and to the Henrys, as Interested Parties, have been satisfied and paid in full by the substitution of assets with a value, at the time of substitution and assertions of ownership, more than twice the amount originally due. Any remaining obligations perceived as due to any other party is now the obligation of the Government through its ownership of the substituted assets and established privity.

1 The Interested Parties’ opposition brings to mind the phrase “silence is deafening.”
 2 The Interested Parties’ opposition fails to cite a single instance of law, code, case or
 3 precedent to support their opposition or their claims that the Defendants have cited a “a
 4 mish-mash of irrelevant and inapplicable law[.]” Defendants are offended, as should be the
 5 Court, to the Interested Parties’ representation that Defendants have provided a “skewed
 6 version of the respective procedural histories.” The clerk and PACER docketed procedural
 7 histories are somewhat difficult to “skew”, no matter who is referring to them.

8 Certainly the underlying facts of this case and procedural history have been
 9 belabored ad infinitum and ad nauseam. While there is no need to further repeat the facts
 10 and procedural history, the Interested Parties should at least cite something real to support
 11 their argument - yet, the Interested Parties continue to rely wholly on disparagement of
 12 the Defendants in absence of any support for the Interested Parties’ opposition.

13 Before proceeding to further address the Interested Parties’ opposition, the
 14 Defendants must reference the Defendants’ unopposed Motion to Strike (#312), as the
 15 opposition filed by the Interested Parties is also filed in violation of an agreement and
 16 Order (#70, ¶14, pg. 3):

17 The Henry’s knowingly and voluntarily agree not to file any claim, answer,
 18 petition or other documents in any civil administrative forfeiture
 19 proceedings, any civil judicial forfeiture proceedings, or any criminal
 forfeiture proceedings by the United States concerning the property.
 (Emphasis added)

20 If filed in the criminal case, such papers and documents are required to be
 21 withdrawn (#70, ¶15, pg. 4), and the Henrys, as the Interested Parties, are solely limited
 22 to civil collection efforts (#70, ¶25, pg. 5).

23 Moving forward to what appears to be the nexus of the Interested Parties’
 24 argument, the Interested Parties seem to contend that the Order (Civil Case, #73), as filed
 25 only in the civil case, and which granted them only the ability to continue discovery in
 26 their civil case against Defendants, now somehow personally obligates Defendants
 27 financially in the criminal case after the Government ended the obligation by seizure of
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1 assets with a value more than twice in excess of any amounts due from the Defendants
2 to any party.

3 There is no nexus between the Interested Parties' argument and this case. That
4 Order (Civil Case, #73) states in pertinent part:

5 Plaintiffs' claim is contingent, but otherwise viable, and potentially would be
6 frustrated by allegedly wrongful asset transfers. Plaintiffs therefore must be
7 permitted to pursue the discovery at issue in support of their claims for
8 conspiracy to defraud, common law fraud, and violation of the UFTA." (#73 -
9 Order, Page 3, lines 9-12). (Emphasis added)

10 The contingency, to which the Court refers, is directly related to the sale of the
11 Crazy Horse Too by the Defendants - again, a contingency which ended when the
12 property was deemed a substituted asset and forfeited to the Government, with said
13 forfeiture being agreed to by the Interested Parties.

14 By virtue of the Government's oft-admitted position that the Government asserted
15 ownership by unilaterally changing the terms of the original plea memorandums and
16 agreements, and then sought and received forfeiture of property valued in 2006 at
17 \$58,000,000.00, and worth at time of forfeiture in August 2007 at least \$33,000,000.00,
18 to pay \$16,723,840.21 in fines, restitution and forfeitures, the Government erased the debt
19 of the Defendants.

20 Likewise, the Government established privity and stepped into the shoes of the
21 Defendants with respect to contractual obligations of the Settlement Agreement and the
22 Plea Agreement. The Government, is now wholly responsible for the sale of the property
23 and the distribution of proceeds to pay all fines and even the restitution to the Interested
24 Parties, not Mr. Rizzolo:

25 MR. HOLLINGSWORTH: We owned the property from the day this Court
26 substituted and forfeited it to the United States of America so that we are the
27 owner of the property and have been from that date forward.

28 (#227, pg. 15, Ins. 12-15):

MR. HOLLINGSWORTH: But that distribution order is very specific as a settlement
agreement and, in fact, contemplated and said that they would have to submit their
bills justifying the numbers to this Court before the Court and the United States will
say, yes, release it to this. Release it to the Henrys. And so I just want to make sure

1 that was part of their bargain for a deal. Now, they're saying, oh, no, we don't want
that but, in fact, that's what the bargain deal agreement was.

2 (#227, pg. 35, Ins. 14-22):

3 The Interested Parties contend that Defendants reliance on privity and Hardie v.
4 United States, 19 Fed.Appx. 899, 2001 WL 1154557 (C.A.Fed.) (2001), and the "Bicycle
5 Club" cases, is misplaced. This is incorrect. In Hardie the United States Court of Appeals
6 clearly decided that the Government became obligated under privity of contract when the
7 Government forcefully and through forfeiture assumed the role of ownership - as is the
8 case with The Crazy Horse Too.

9 By the Government's own actions, or lack thereof, concerning the ownership,
10 management, and operation of The Crazy Horse Too, and by virtue of the substitute
11 forfeiture of said assets by Defendants, it is the Government that is both the owner, and
12 the obligated party who is now responsible for the outstanding obligations outlined in the
13 original plea agreements and judgements.

14 This privity was clearly established on August 13, 2007, when the Government
15 breached the various plea and settlement agreements and memorandums and filed a
16 motion under seal (#58, #58-1) citing to 28 U.S.C. §3001, et seq. (Federal Debt Collections
17 Practices Act), 18 U.S.C. §1963(m), and Criminal Rule 32.2(e), to substitute assets and
18 property consisting of the real property and business known as the Crazy Horse Too
19 valued in excess of \$33,000,000.00 (#58-1, pg. 1, Ins. 23-26; pg. 2, Ins. 1-2):

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

25 All fines and restitution and the original forfeiture of \$4,250,000.00 totaled
26 \$16,723,840.21, less than the \$33,000,000.00 value of the assets. The Government's
27 motion was granted on August 21, 2007. (#'s 60, 62), and one month later, on September
28 1, 2007, the Henrys personally executed their Petition and Settlement Agreement,

1 Stipulation for Entry of Order of Forfeiture, and Order, agreeing to place the responsibility
2 for the sale and distribution of funds squarely on the shoulders of the Government in
3 exchange for first position for distribution of the proceeds (#68/70).The Henrys' later
4 admitted this deal with the Government (#191, Page. 3, Lines 19-24).

5 By forfeiting assets valued at \$33,000,000.00 to satisfy obligations of
6 \$16,723,840.21, and then by continuing to hold the Power Company and Mr. Rizzolo
7 responsible, both as to the criminal judgment, and the civil case pending before this Court,
8 the excessive fines and double jeopardy clauses are triggered and must be addressed.

9 United States v. Bajakajian, 524 U.S. 321, 337 (1998), cited in Casellas, Stefan, Criminal
10 Forfeiture Procedure in 2008: An Annual Survey of Developments in the Case Law:

11 Comparing the gravity of respondent's crime with the \$357,144 forfeiture
12 the Government seeks, we conclude that such a forfeiture would be grossly
13 disproportional to the 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.

14 CONCLUSION

15 It is clear that Defendants are no longer the owners of the substituted and forfeited
16 assets, including RICRIZ and The Crazy Horse Too. It is equally clear that the Government
17 is undeniably the owner of The Crazy Horse Too. The Interested Parties agreed to and
18 signed, more than once, documents attesting to and granting the Government ownership
19 of the property and power of distribution of assets once the sale of same was completed.
20 Privity of contract relating back to the original Settlement Agreement and the restitution
21 owed to the Interested Parties, as incorporated in the Plea Agreements and Judgments
22 (#7, #8, #9, #10, #13), has been established by the Government's own admissions, in
23 documents, and in open court.

24 The Defendants no longer have any rights to, access, control, interest in, or the
25 ability to sell the assets and pay any obligations - as all of those aspects of contract,
26 ownership, control and obligation relating to the substituted and forfeited assets, now are
27 the sole province of the Government.

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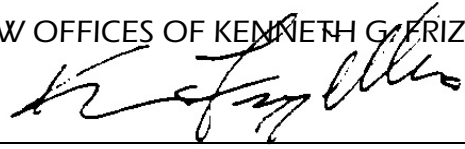
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By virtue of the substitution of \$33,000,000.00 in property and assets, the Defendants' debts have been paid in full, and the final order of satisfaction must be granted.

DATED: April 22, 2010

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By




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CERTIFICATE OF SERVICE

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I certify that I am an employee of the LAW OFFICES OF KENNETH G. FRIZZELL, and on the 22nd day of April, 2010, service of a true and correct copy of the foregoing Notice of Appearance was made via CM/ECF to the following:

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