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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,)
11 Plaintiff,)
12 vs.)
13 FREDERICK JOHN RIZZOLO,)
Defendant.)
14

Case No. 2:06-cr-186-PMP-PAL

15 **GOVERNMENT'S RESPONSE IN OPPOSITON TO DEFENDANT RIZZOLO'S (1)**
16 **REQUEST TO VACATE JUDGMENT DEBTOR EXAMINATION; 2) MOTION TO**
17 **REQUIRE THE GOVERNMENT TO SPECIFICALLY PERFORM THE TERMS OF**
18 **THE PLEA AGREEMENT; and 3) REQUEST TO STRIKE THE ILLEGAL**
MODIFICATION OF SENTENCE (Doc. #372)

19 Comes now the United States of America, by and through DANIEL G. BOGDEN, United
20 States Attorney, and ERIC JOHNSON, Assistant United States Attorney, and responds in
21 opposition to Defendant Rizzolo's (1) REQUEST TO VACATE JUDGMENT DEBTOR
22 EXAMINATION; 2) MOTION TO REQUIRE THE GOVERNMENT TO SPECIFICALLY
23 PERFORM THE TERMS OF THE PLEA AGREEMENT; and 3) REQUEST TO STRIKE THE
24 ILLEGAL MODIFICATION OF SENTENCE (Doc. #372).

25 This Court at the time of defendant's sentence ordered defendant Rizzolo and defendant
26 The Power Company, Inc., to pay Kirk and Amy Henry \$10,000,000 in restitution, plus interest

1 on any unpaid portion of the restitution after the first year. Pursuant to the terms of the plea
2 agreement, the Court ordered defendant to sell the Crazy Horse Too and provided that the
3 defendant would have a year to sell the club. The Court ordered the defendant to pay the
4 restitution owed to the Henrys and restitution owed to other third parties upon the sale of the
5 club. Defendant failed to sell the club within the one year period that he was provided after his
6 plea, choosing instead to engage in a management agreement and sham or reckless sale of the
7 club to Michael Signorelli. Signorelli, on taking over the club, subsequently mismanaged the
8 business to the point where neither the Government nor defendant could find a qualified third
9 party operator willing to manage the club without a multi-year contract which would have
10 delayed any sale of the club. The Government moved for substitute forfeiture of the property and
11 then, after the forfeiture, attempted to sell the property to multiple purchasers, all who failed to
12 ever put significant real money down on the property. The Government is now attempting to sell
13 the club to a third party for approximately 10.5 million dollars. (Doc. #317.)

14 On April 26, 2010, the Court considered a request by the United States Probation Office
15 to modify defendant Rizzolo's conditions of supervised release to require defendant to begin
16 making monthly payments toward the restitution owed to the Henrys. The Court noted that
17 property generally in Las Vegas had decreased substantially in value and any sale of the Crazy
18 Horse Too property possibly would not cover all the restitution obligations of the defendant. The
19 Court correctly noted that the issue of the asset, the Crazy Horse Too, was separate from
20 defendant's restitution obligations (Transcript, at 42). The Court found that by its sentencing of
21 defendant for his criminal conviction in this case the defendant had an obligation of restitution to
22 the Henrys (Transcript at 44). In view of any possible sale of the Crazy Horse Too, the Court
23 concluded that it was appropriate at this time to modify defendant's conditions of supervised
24 release to require monthly payments from defendant Rizzolo to the Henrys toward the restitution
25 owed (Transcript at 44). In making this order the Court did not change or modify defendant's

1 sentence ordering the payment of restitution to the Henrys of \$10,000,000 plus interest after one
2 year.

3 **I. THIS COURT ACTED PROPERLY IN MODIFYING DEFENDANT'S**
4 **CONDITIONS OF SUPERVISED RELEASE TO REQUIRE DEFENDANT TO**
5 **MAKE MONTHLY PAYMENTS TO THE HENRYS**

6 The Court acted properly when it ordered defendant's supervised release conditions be
7 modified to have defendant Rizzolo begin monthly payments toward damages owed to Kirk
8 Henry. The Court had the authority to enter its order on two different bases.

9 A. The Court Had Authority to Modify Defendant's Conditions
10 To Require Defendant To Make Monthly Payments For Restitution
11 as Part of Defendant's Sentence

12 When the Government entered into the plea agreement, it contemplated that the defendant
13 would act in good faith and sell the Crazy Horse Too relatively quickly after his plea for a
14 substantial sum of money. The Court in keeping with the parties' recommendation ordered
15 defendants Rizzolo and the Power Company jointly and severally liable for the \$10,000,000 in
16 restitution to the Henrys to be paid from the sale of the Crazy Horse Too. (Transcript,
17 Sentencing Hearing for Defendants Rizzolo and Power Company, Inc., at 89-90.) However, as
18 described above, defendant failed to timely sell the club and circumstances in the marketplace
19 substantially changed. The Government ultimately moved for substitute forfeiture of the
20 property. As noted above, the Government is now attempting to sell the club to a third party for
21 10.5 million dollars. (Doc. #317.) If that sale is completed, the Henrys (depending on the Court's
22 decision as to priority of other claims in the property) will receive less than the nine million
23 dollars plus interest that defendant currently owes to them both as restitution in this case and as
24 damages which defendant agreed to pay the Henrys in their civil settlement.

25 The Court has the authority to modify defendant's conditions of supervise release to effectuate
26 the purposes of sentencing for defendant's conviction. Title 18, United States Code, provides:

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

3 . . . (2) extend the term of supervised release if less than the maximum authorized term
4 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
supervised release

5 In view of the inevitable shortfall in sales proceeds from forfeited assets to meet
6 defendant's restitution and forfeiture obligations, the Court properly ordered defendant to begin
7 making monthly payments toward restitution to the Henrys. The plain language of the statute
8 indicates that the district courts have broad discretion to alter the conditions of a defendant's
9 supervised release. *United States v. Miller*, 205 F.3d 1098, 1100 (9th Cir. 2000). The district
10 court retains "authority to ... modify terms and conditions ... in order to account for new or
11 unforeseen circumstances that require a longer term or harsher conditions of supervised
12 release in order to further the general punishment goals of Section 3553(a)." *United States v.*
13 *Lussier*, 104 F.3d 32, 36 (2d Cir.1997)); see also *United States v. Miller*, 205 F.3d at 1101
14 (noting that § 3583(e) "recogniz[es] that the sentencing court must be able to respond to changes
15 in the [defendant's] circumstances"). As explained by the Third Circuit in *United States v. Loy*:

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

21 *United States v. Loy*, 237 F.3d 251, 256 (3d Cir. 2001); see also *United States v. Evans*,
22 155 F.3d 245, 248-49 (3d Cir.1998). Accordingly, district courts traditionally have enjoyed
23 broad discretion to tailor the conditions of supervised release to the particular circumstances of
24 each case, provided that such conditions are reasonably related to the dual goals of rehabilitating
25 the offender and protecting the public. See 21A Am.Jur.2d Probation § 907, at 171-73 (1998); 3

1 Wright, *Federal Practice and Procedure* § 529, at 146.

2 In the context of this case, the Court's modifying of defendant's supervised release
3 conditions to require defendant Rizzolo to begin monthly payments toward restitution is clearly
4 related to the factors enunciated in § 3553(a). Requiring defendant Rizzolo to begin to meet his
5 restitution obligations to pay the Henrys, victims of defendant's racketeering enterprise, related to
6 Rizzolo's personal history and characteristics and recognized the seriousness of the underlying
7 criminal conduct. The Court's modification of defendant's supervised release conditions
8 promoted Rizzolo's respect for his legal obligation to pay the Henrys, deterred Rizzolo from
9 future criminal conduct, and helped meet the Henrys' need for restitution for the harm caused by
10 the offense. *United States v. Lakatos*, 241 F.3d 690, 693 (9th Cir. 2001)(affirming district court
11 requiring as a special condition of supervised released that defendant comply with state child
12 support obligations).

13 B. The Court Had Authority to Modify Defendant's Conditions To Require
14 Defendant To Make Monthly Payments Toward Defendant's Contractual
Civil Settlement Obligation With the Henrys

15 The Court also had authority to modify defendant's conditions of supervised release to
16 require defendant to begin making monthly payments to the Henrys pursuant to defendant's
17 settlement agreement with the Henrys. This Court made a finding in the Henrys' related federal
18 civil matter that:

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

Order, *Henry v. Rizzolo*, 2:08cv635-PMP-GWF (Doc. # 117, at 2.) Consequently, Rizzolo has an
admitted contractual obligation to the Henrys to pay them \$9,000,000 as part of his settlement

1 agreement with the Henrys for the same damages underlying the restitution ordered in the
2 criminal case. Because sale proceeds from the Crazy Horse Too appear highly unlikely to be
3 sufficient to meet defendant's obligations to the Henrys pursuant to his settlement agreement, the
4 Court had the authority to reasonably modify defendant's conditions to begin paying the
5 settlement amount from his personal assets.

6 Courts considering supervised release conditions have approved conditions which have
7 required defendants to pay city fines, restitution orders to victims in other criminal cases and
8 state child support obligations. The courts approving the conditions focus on whether the
9 defendants have an existing obligation to a third party and whether expecting the defendant to
10 meet the obligation to the third party would be consistent with the sentencing factors of Title 18,
11 United States Code, Section 3553. *United States v. A-Abras Inc.*, 185 F.3d 26, 35 (2d Cir.
12 1999)(Court finding it is "well within a federal sentencing court's discretion to impose conditions
13 that would ensure that [defendant] actually pays the City fine" related to defendant's underlying
14 conduct in criminal case.); *United States v. Mitchell*, 429 F.3d 952, 962 (10th Cir. 2005)("We
15 find that the district court properly exercised its authority under 18 U.S.C. § 3583(d) when it
16 required Ms. Mitchell to remain current on her restitution payments from previous criminal
17 convictions as a condition of supervised release."); *United States v. Lakatos*, 241 F.3d at 693
18 (affirming district court requiring as a special condition of supervised released that defendant
19 comply with state child support obligations).

20 By requiring defendant Rizzolo to begin to meet his civil settlement obligations to pay the
21 Henrys, this Court acted to promote the sentencing factors of Section 3553. By modifying
22 defendant's conditions of release to require him to begin paying toward his settlement agreement
23 with the Henrys, the Court forced Rizzolo to begin to take responsibility for his and his club's
24 criminal conduct, appreciate the seriousness of his crime and deter him from future criminal
25 conduct. Modifying his conditions also helped the Henrys meet obvious significant financial

1 needs resulting from the criminal injury done to Kirk Henry and forced Rizzolo to begin to
2 appreciate the need to meet rather than avoid his legal obligations. Finally, modifying
3 defendant's conditions in view of the damages in this case promoted public respect for the law
4 generally.

5 Additionally, the Henrys in various court filings concerning their civil litigation with
6 defendant have demonstrated that defendant is spending lavish amounts in various restaurant and
7 entertainment establishments, hiding substantial funds offshore, disposing of expensive assets to
8 family members and friends and claiming falsely that he is a man of very limited means in
9 responding to all efforts to identify assets potentially attachable for meeting his obligations (Doc.
10 #286, Doc. #357). Defendant in depositions has admitted that his conduct is designed to avoid
11 meeting his obligations to the Henrys and liabilities to other third parties, including the Internal
12 Revenue Service (Deposition of Rizzolo, at 293-95, Doc.#357, Exh. 3). Consequently, this
13 Court's modification of defendant's conditions was a reasonable response to force defendant to
14 begin to meet his financial obligations to the victims of his club's crime.

15 Defendant essentially seeks in his motion for the Court to hold in abeyance any
16 modification of his supervised release conditions concerning payment of restitution until after the
17 Crazy Horst Too is sold. Defendant notes at the time of sentencing the Court provided that the
18 defendant would pay restitution to the Henrys from the proceeds of his sale of the Crazy Horse
19 Too. Defendant Rizzolo argues that the Court was precluded from ordering any modification of
20 his conditions of supervised release because the Court was modifying his sentence and Rule
21 35(a) precludes modification of a sentence after seven days (Doc. #372, at 8-11). However, the
22 Court did not modify its sentence against defendant Rizzolo of restitution to the Henrys of
23 \$10,000,000 plus interest after one year. The Court only modified defendant's conditions of
24 supervised release to require monthly payments toward the defendant's restitution obligation. As
25 discussed above, both statutes and rules permit the Court to modify supervised release conditions
26

1 and restitution collection procedures under certain circumstances at any time after sentencing.¹

2 As discussed above, the Court had the authority to modify defendant's sentence to require
3 monthly restitution payments to the Henrys.

4 Defendant also contends that the Government is unilaterally seeking to modify
5 defendant's conditions of supervised release in breach of its plea agreement with the defendant.
6 The Government has not sought to modify defendant's restitution obligation of \$10,000,000 plus
7 interest after one year to the Henrys. The Court, not the Government, modified defendant's
8 supervised release conditions to require monthly payments to the Henrys. As noted above, at the
9 time defendant pled in this matter, the Government contemplated that the defendant would act in
10 good faith and sell the Crazy Horse Too relatively quickly after his plea for a substantial sum of
11 money sufficient to cover defendant's restitution obligations. Defendant did not sell the property
12 within the one year time period provided him and the Government forfeited the property in an
13 effort to get it sold. Probably largely because of the recession, the property has not sold despite
14 numerous offers and sales contracts for the property. At this point the Government is attempting
15 to sell the property to a third party for \$10.5 million dollars. Even if this Court gives the Henrys'
16 restitution claim priority over other claims to the property, the proceeds from any sale at this
17 point would not meet the defendant's restitution obligation of \$10,000,000 plus interest after one
18 year. Consequently, defendant's circumstances have changed since his plea and the Court has the
19 authority to modify defendant's payment obligations toward his restitution. Additionally,
20 defendant's admitted efforts to place other assets beyond the reach of third parties to whom he

21
22 1. As is neatly summarized by Title 18, United States code, Section 3664(0), concerning the finality of sentences of restitution:

23 (o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that-

(1) such a sentence can subsequently be-

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235
of this title;

(B) appealed and modified under section 3742;

(C) amended under subsection (d)(5); or

(D) adjusted under section 364(k), 3572, or 361A; or

(2) the defendant may be resentenced under section 3565 or 3614.

