In the United States District Court 1. Addle District of Georgia Athens Division 04 NOV 29 Pit 7: 31

United States of America,)	MACTION ROLL
Plaintiff,)	No. 3:04 CV-81 (CDL)
)	
vs.)	
)	
)	
Dwight D. York a/k/a Malachi Z. York)	
and YF Limited Partnership,)	
Defendants.)	

AMMENDED MOTION TO DISMISS AND MEMORANDUM OF LAW TO SUPPORT

COMES NOW YF Limited Partnership through its President, Elizabeth Westbrook, and Vice President and Registered Agent, Richelle Davis, one of the defendants in the above-styled action, files this Memorandum of Law in support of the Answer and Defenses in response to Plaintiff's Complaint and shows the Court as follows:

Case law and US Code supports the dismissal of the Complaint against the defendants. In the Criminal Case against Defendant York an order for restitution was filed in an amount of \$566,066.00. Under the terms of 18 U.S.C. § 3663 (f)(2), restitution judgments are required to be satisfied within five years of the end of any imposed incarceration. The defendant is in the 30th month of his sentence of 1,620 months. The plaintiff's complaint is premature as well as bordering on malicious prosecution, as funds in excess of \$600,000.00 has already been seized by the government from defendant York. Judicial integrity requires the fashioning of restitution judgments, which defendants can reasonably and probably satisfy. United States v. Copple, 74 F.3d 479 (3rd Cir. 1996) For York to satisfy the present restitution order within five years of his imprisonment, he would not only have to have his life sentence modified, he would have to generate an income of over \$100,000 each year in addition to the income required to support himself and his dependants, which the PSI list is over 100.

The imposition of restitution orders which are, in effect and in logic, impossible to satisfy is against both the intent and the expression of the statute. Fashioning a restitution order to which a defendant could not possibly be expected to comply threatens respect for judicial orders generally. <u>United States v. Bailey</u>, 975 F.2d 1028 (4th Cir. 1992) "An impossible order of restitution...is nothing but a sham, for the defendant has no chance of complying with the same, thus defeating any hope of restitution and impending rehabilitation." <u>United States v. Mahoney</u>, 859 F.2d 47, 52 (7th Cir. 1988)

A restitution order, which mandates a payment of over \$500,000 coupled with a life sentence, is exactly the type or order found improper by the Supreme Court in <u>Hughey v. United States</u>, 495 U.S. 411 (1990) when the Court stated that "Congress plainly did not intend that...a defendant's dependants to be forced to bear the burden of the restitution order..." <u>Id</u>. At 417.

Under § 3663, though, a sentencing court's imposition of a restitution order is discretionary. In order to impose such a sentence order of restitution, a court must first examine certain statutory factors. The court, the statute outlines, shall consider:

- (I) the amount of the loss...and
- (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, such other factors as the court deems appropriate. 18 U.S.C. § 3663(B)(i).

The case law support for the requirement of an affirmative review of these statutory factors crosses all circuits, as the prevailing view is that a sentencing court is obligated to at least consider these factors prior to imposing restitution as a part of a sentence. See <u>United States v. Siegel</u>, 153 F.3d 1256 (11th Cir. 1998)(district court erred in ordering restitution even though the court had "considered" the meager financial condition of the defendant as reflected in the presentence investigative report.) <u>United States v. Conahaim</u>, 160 F.3d 893 (2nd Cir. 1998), <u>United States v. Sanders</u>, 95 F.3d 449 (6th Cir. 1996);

The United States Government has seized over \$1 million dollars in assets by the defendant. To continue in prosecuting this case in an effort to obtain real property is malicious prosecution, which is an effort to further punish the defendant and his dependants.

In the restitution order the Court stated that the defendant could pay this amount of restitution on the basis that over \$400,000.00 had been seized from the defendants properties, thus the Courts decision to order restitution was developed from the basis of § 3663 and to settle the amount of restitution pending the defendants appeal should be satisfied from the \$400,000.00 seized and the surplus funds in the amount of \$237,770.99, claimed from civil action 1:04-CV-0434, which totals \$637,770.99, well over the amount of restitution. Therefore this action should be dismissed against the defendants on the basis of the laws cited above.

zatbeth Westbrook President

Richelle Davis Vice President Registered Agent

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing Memorandum of Law to Support Dismissal of Plaintiff's Complaint upon the following individuals via certified mail.

This 364 day of November 2004

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