

INTRODUCTION

The U.S. Department of Justice's ("DOJ") Motion for Immediate Modification of Restitution Order is surprising on a number of levels, but most disturbing is the number of errors and omissions it contains. Based on DOJ's motion, the Court would not know that the issue of a tax refund being provided to Mr. Abramoff has been known to DOJ for years, that notice of such a refund was provided again recently, that the refund, of course, was heavily negotiated with the government itself over several years – and indeed was facilitated by the government officials who are now expressing surprise – and finally, that the notice and expenditures are both completely consistent with the law.

Upon receiving the refund, the Abramoffs proceeded under the perfectly reasonable belief that the government was aware of the tax refund that the government itself provided them. In addition, the Abramoffs have cooperated with the government fully since DOJ first objected to the refund money being spent, and requested that the Abramoffs stop spending the refund on May 19, 2009. This was well before this Court's May 26, 2009 Order to preserve the remainder of the refund money.

In fact, after Mr. Abramoff reported the refund and expenditures to DOJ, Mrs. Abramoff took immediate and affirmative steps to preserve the refund money once she learned of DOJ's initial objections. She actually prevented some of the payments that had been reported to DOJ from being made, despite their legitimacy. In particular, although Mrs. Abramoff had obtained a \$50,000 certified check to the State of Maryland for back-taxes, a \$22,000 certified check to Montgomery County for property taxes and a \$5,000 certified check to Hebrew Academy for continued religious schooling for their daughter, she was able to prevent those checks from being

mailed after DOJ lodged its first objection.¹

These actions were taken although Mr. Abramoff's receipt, use and notification regarding the tax refund were all in complete compliance with applicable Plea Agreement, statutes and Court orders. From the outset, the Abramoffs have acted in good faith and are troubled at the surprising reaction found in DOJ's Motion. Accordingly, Mr. Abramoff sets forth the facts and his reasons for opposing DOJ's requested relief below.

I. FACTUAL BACKGROUND

A. The Government Was Aware Of Mr. Abramoff's Pending Tax Refund

Mr. Abramoff entered a plea agreement in the above action in January 2006. For months before the pleas were entered and months afterwards, there were numerous discussions with DOJ and Internal Revenue Service ("IRS") officials concerning taxes and potential refunds. Because tax counts were included in the plea and there was a requirement that amended tax returns be filed, these were issues that received substantial attention from the government. Indeed, as Mr. Abramoff's accountants explained to DOJ and the IRS, the government erred in its original calculations and DOJ ultimately moved this Court to correct those tax figures in the plea. DOJ was aware that Mr. Abramoff was seeking a tax refund and understood it could be a substantial one.

Further, DOJ assisted Mr. Abramoff on several occasions when he sought help in coordinating process and receipt of the return. Mr. Abramoff repeatedly sought the assistance of the DOJ attorneys and his FBI case agent in helping to obtain this refund. (See, e.g., Email

¹ The Abramoffs seek this Court's permission to go forward with these payments. They are still working with their accountants and the State of Maryland to determine the precise amount owed in back taxes, but the total amount will likely be in excess of \$100,000. The payment to Montgomery County is for the property taxes owed on their home, and that bill comes due in September 2009. The \$5,000 payment to Hebrew Academy is for their daughter's education and is a partial payment toward the \$19,000 tuition that was not paid either last year or this year. The remaining payments identified by the government, and described in further detail below in Section II B, were made.

exchange between J. Abramoff and L. Saler, FBI case agent, of 3/20/09 (Mr. Abramoff requests Agent Saler's assistance with speeding along the payment of the refund and Ms. Saler confirms that she forwarded his request on to Mary Butler at DOJ's Public Integrity Section); Email from L. Ruebelman, CPA, to AUSAs M. Butler and K. Day of 1/27/09 (advising DOJ of the amount of refund being sought from the IRS, requesting DOJ's assistance in expediting the refund, and making it clear the refund would be used in part to pay his accounting firm); Email from M. Butler to L. Ruebelman of 1/27/09 (acknowledging receipt of amended tax returns and indicating they had been forwarded to supervising attorneys in DOJ's Tax Division).²

Nor is this a situation where the government's left hand, DOJ, did not know what its right hand, the IRS, was doing, as those hands have been clasped together throughout this process. The case against Mr. Abramoff in D.C. was brought, in part, by the Tax Division of DOJ for tax-related offenses. Throughout this process, on both the civil and criminal side, through his legal counsel and tax advisors, Mr. Abramoff has been working directly with the DOJ's Tax Division (primarily AUSA Stephanie Evans, counsel in the D.C. case) and the IRS (primarily Manuel Ferrer) to sort through his various tax issues, including this refund. Consequently, it could not have come as any surprise to DOJ that Mr. Abramoff would be receiving a tax refund DOJ officials repeatedly helped facilitate. At any rate, Mr. Abramoff's counsel notified DOJ verbally on May 15, 2009 that the refund was received, and by email provided a detailed explanation for how the refund had been spent on May 19, 2009.

DOJ did not at any time suggest that Mr. Abramoff would need to seek its permission or the permission of any one else, before spending the money that he overpaid the IRS. Nor did DOJ at any time indicate that the tax refund they were helping him obtain should be paid to

² If the Court wishes, Mr. Abramoff can provide it with copies of these email and other correspondence with DOJ concerning the tax refunds.

creditors in any particular order.

B. Mr. Abramoff Has Honored His Restitution Obligations

Mr. Abramoff has complied with the legal obligations imposed by the Plea Agreement and the restitution orders issued by the federal courts in D.C. and Florida. Pursuant to the Plea Agreement, Mr. Abramoff is required to notify DOJ of the receipt or payment of more than \$2,500. (Plea Agreement of 1/3/06 at ¶ 5.) Regarding expenditures, the agreement also provides that Mr. Abramoff is “not be required to obtain the consent of the United States for property transfers necessary to pay ordinary living expenses, ordinary business expenses and attorneys’ fees.” (Id.) And pursuant to the restitution orders imposed by the D.C. and Florida Courts, a schedule was set for restitution payments and Mr. Abramoff is required to provide the Court notice of any “material change in economic circumstances.” Mr. Abramoff has complied with these provisions by verbally notifying DOJ, through counsel, on May 15, 2009 that the refund was received, and by email provided a detailed explanation for how the refund had been spent on May 19, 2009. In addition, this Court and the Florida court have received notice of the refund, and the schedule for restitution payments set by both courts have been followed.³ There is no requirement in either order for pre-clearing the spending of any money.

Mr. Abramoff has taken his obligation to pay restitution seriously. Although Mr.

³ Counsel for Mr. Abramoff was preparing a formal notification letter for the Courts when DOJ was notified on May 19, 2009. At that time, however, DOJ advised Mr. Abramoff’s counsel that it would notify the Courts of this development. As notification from DOJ satisfies Mr. Abramoff’s notification requirements, see 18 U.S.C. § 3664(k), Mr. Abramoff’s counsel deferred to DOJ. Mr. Abramoff’s counsel, however, anticipated that DOJ would merely be providing the Courts with notice of the refund and how it was spent; counsel was not advised that DOJ would be implying that it had been wronged in some way or that it would be seeking to modify the restitution orders. As explained in more detail below, modification is not warranted and notification was not literally required, because Mr. Abramoff’s financial circumstances have not materially changed in any way with respect to his ability to pay restitution going forward. This tax refund was a one-time rare occurrence and the money received was spent paying long-standing creditors, paying long overdue fees or to provide living expenses for his family. This refund was spent as it was described and is not a source of future income with which he could pay additional restitution. See *United States v. McClamma*, 146 Fed. Appx. 446, 449 (11th Cir. Sept. 2, 2005) (explaining that changes to a restitution schedule is not appropriate unless the new income affects the defendant’s ability to pay restitution).

Abramoff's retirement accounts were protected assets that he was not required to liquidate, Mr. Abramoff voluntarily liquidated those accounts in 2005 and used that money to pay \$325,000 toward the restitution victims in the Florida case. While the amount of money Mr. Abramoff continues to owe in restitution remains substantial, he has met the Court-imposed schedule of payments to his restitution victims and hopes that, when he is free, he will find the means to repay those victims.

Unfortunately, the restitution victims are not Mr. Abramoff's sole creditors. Pursuant to governing law, Mr. Abramoff's creditors are entitled to equal weight and none of the creditors is entitled to funds the Abramoffs need to pay ordinary living expenses. See 18 U.S.C. §§ 3613(c) & (d) (restitution orders permit a lien to be filed and, when properly filed, to act as a federal tax lien with respect to other creditors). In accordance with these principles, the tax refund was used (or attempted to be used) to pay creditors and living expenses. The accountants used to obtain this refund were paid roughly half of what they are owed and his legal counsel were paid less than one-fourth of what they are owed (and he still owes over \$2 million in legal fees for the negotiations, pleas, debriefing, and cooperation the government has used to its advantage). Some of these debts (e.g. legal and accounting fees) are four-years-old and pre-date his plea and any restitution order, and other debts, such as credit card payments, were made for ordinary living expenses. In addition, the refund was used to repay funds used so that his wife and children have food, clothing and housing, and so that they might seek such help in the future if needed. Most of these loans were made long before the sentencing in this case. (See, e.g., PSR ¶ 178 (noting that Mr. Abramoff's retired, elderly father had loaned the Abramoff's roughly \$100,000 for living expenses since Mr. Abramoff had to post bail).)

This tax refund was not a windfall that was obtained through luck, and it was not a source

of new income. The refund represents money and tax credits from losses incurred prior to Mr. Abramoff's incarceration. The money had mistakenly been paid to the IRS, and it took years of work by lawyers, and especially accountants, to recover. It is in the interest of all creditors that this work continue.

C. The Abramoff Family's Financial Situation Is Dire

Mr. Abramoff made a great deal of money as a lobbyist during a few years when he saved virtually none of those earnings and, indeed, gave a majority of it to charitable causes. It was not long before Mr. Abramoff's funds were depleted. Mr. Abramoff has been unemployed since March of 2004, representing more than five years that the family has gone without any income from Mr. Abramoff. Mrs. Abramoff has done her best to support herself and their children, but on her salary of less than \$38,000 per year that has been exceedingly difficult. Indeed, for a family their size, the Abramoffs are living just above the poverty line. See Dep't of Health & Human Servs. 2009 Poverty Guideline Computations (Jan. 2009) (setting the poverty line for a family of 7 at \$33,270). In addition to the ordinary costs of raising a family, the Abramoffs have gone into significant debt retaining attorneys and accountants to assist them with Mr. Abramoff's two criminal trials, sorting out his numerous civil and criminal tax issues, facilitating his cooperation with DOJ, and working to obtain the tax refunds the family is entitled to receive.

Financially, the Abramoffs have been in distress for some time. The family lives in a house it cannot afford to live in, but given the depressed price of the home and their debt on it, they cannot afford to sell it either. (And with the house's leaking roof, it is not now in a sellable condition and the value of the home will further deteriorate from water damage if it is not repaired.) The Abramoff's mortgage is \$2,500 per month, which comes to \$30,000 per year, and

their property taxes are \$22,000. Thus, the annual cost of the home, without even considering utilities or the cost of repairs, is \$52,000 per year – a cost well-above Mrs. Abramoff’s annual income of less than \$38,000. This is why she has had to borrow money. Obviously, the family must incur all of the other ordinary expenses any other family must face – utilities, food, clothes, gasoline, etc. – and, consequently, with each passing month, the family slides further and further into debt.

The tax refund that the Abramoffs have received, and any future refund they hope to obtain, provide the lifeline for the family to live on until Mr. Abramoff is released from prison, which is still a long way off. The current refund has been used to pay substantial short-term bills and appropriate living expenses. The Abramoff’s only desire with respect to the tax refund they received, and any additional funds to which they might receive, is that they be allowed enough to live on and that the rest of these limited resources be equitably distributed among the many they owe. They have done their best to accomplish those goals with respect to the tax refund already received, and subject to the existing Court orders as they understand them. What should be emphasized is that, while Mr. Abramoff has pled guilty and has been making the restitution he can, his family did nothing wrong, are not part of any agreement with the government, and his spouse and children are finding ways to take care of themselves the best way they can.

II. **ARGUMENT**

A. **Mr. Abramoff Has Complied With His Restitution Obligations**

Although Mr. Abramoff does not object to the Court modifying its restitution order to clarify its terms, such a modification is unnecessary. First, the government has asked that Mr. Abramoff cease spending what remains of the IRS refund, which he has done. DOJ knows that a good deal of the funds were spent on real debts and real living expenses, and the Abramoffs were

not planning to make any substantial purchases with the remainder of that money. Mr. Abramoff foresaw two additional expenditures he believes are necessary – to pay for roof repairs and to pay back-taxes to the State of Maryland.

Second, DOJ asked for an accounting of the payments he has made, but that already has been provided through Mr. Abramoff's counsel's May 19, 2009 email to DOJ and that accounting is listed in DOJ's own Motion at page 2. What additional information the DOJ wanted, if there is any, could have been requested and it would have been provided. In response to this Court's Order of May 26, 2009, additional details of those expenses are provided below.

Third and fourth, DOJ asks that Mr. Abramoff provide notice of any additional assets or debts he or his immediate family receives or incurs valued at \$2,500 or more, and asks that they seek Court permission before spending \$2,500 or more. This micromanaging is not warranted or appropriate. Notifying the Court of any "material changes in economic circumstances" properly allows Mr. Abramoff's schedule for restitution payments to be modified, if appropriate, and such a standard notice provision exists in this Court's current restitution order. Moreover, DOJ's request is overbroad as it applies to Mr. Abramoff's wife and children who are not parties before this Court and who never have been convicted of any crime. The only foreseeable income Mr. Abramoff may receive while incarcerated would be his interest in any future joint tax refund he and his wife may recover, and additional notice for the refunds DOJ helped arrange, is more than sufficient.

The DOJ filing does not ask for it explicitly but its motions seems to request some sort of pre-clearance provision requiring judicial approval before certain sums of money could be spent in the future. Despite the confusion in its request, there is no confusion that such conditions are not in place now. Indeed, there would be no reason for the government now to seek such a new

provision if one already existed.

In making its requests, the government misunderstands the difference between a defendant's obligation to pay restitution in full under the Mandatory Victim's Restitution Act and the schedule set by the Court for making such restitution payments. Under the statute, the order of restitution should fully state the amount of loss "without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A). By contrast, the schedule for making those payments is set by the Court based on the defendant's existing assets, projected income, and "any financial obligations of the defendant; including obligations to dependents." 18 U.S.C. § 3664(f)(1)(B). Thus, while the defendant is obligated to make restitution victims whole in the end, the schedule for making those payments acknowledges that a defendant must continue to meet his financial obligations to other creditors and to provide for his family as well.

Congress, of course, recognized that a defendant's financial circumstances may change and provided sentencing courts with jurisdiction to modify restitution orders when that is warranted. Restitution orders must provide that the sentencing court be notified of "any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution." 18 U.S.C. § 3664(k). Modification of a restitution order may be warranted when a defendant receives substantial resources after the judgment has been entered and while the defendant is incarcerated. 18 U.S.C. § 3664(n). Section 3664(n) is not – and cannot be – self-enforcing, however, because the sentencing court must first decide whether a modification of the restitution schedule is warranted in light of the defendant's other financial obligations and then modify its judgment. See, e.g., United States v. Albert, 2004 WL 2931269, at * 2 (E.D. Pa. Dec. 15, 2004) (explaining that income received subject to Section 3664(n) "should be included in calculating the amount of restitution [defendant] owes each month"); United States v.

McMahon, 2000 WL 1039473, at *4 n.3 (4th Cir. July 28, 2000) (noting that if there has been a change in circumstances subject to Section 3664(n) either party “may move for a modification of the restitution order”); United States v. Tencer, 986 F. Supp. 361, 364 (E.D. La. 1997) (explaining that Section 3664(n) authorizes the court to modify the restitution order); United States v. Dean, 949 F. Supp. 782, 787 (D. Or. 1996) (same). In addition, Section 3664(n) allows the government to seek other remedies to obtain resources received post-sentencing. See, e.g., United States v. Yalincak, 2008 WL 3833713, at *1 (D. Conn. Aug. 14, 2008) (obtaining liens); United States v. Cooper, 2006 WL 3512936, at *3 (D. Kan. Nov. 1, 2006) (obtaining garnishment). In this case, however, the government did not seek any priority system in the plea or restitution order. It did not seek to impose any limits on how a refund would be spent when it knew that a refund was being sought. It did not ask for one even as it was helping achieve the refund. And, now it seems to be asking for one retroactively. If it is seeking some new requirement, certainly it can ask and has to follow the law that that modifications to restitution orders apply only to “the schedule of future payments.” United States v. Boal, 534 F.3d 965, 968 (8th Cir. 2008) (emphasis in original) (reversing modification of restitution order as to payments already made).

The existing restitution orders require that Mr. Abramoff provide the Courts with notice of a change in economic circumstance. Both Courts now have received notice of the IRS tax refund, and both Courts have set schedules for restitution, which no one claims have not been met. Accordingly, Mr. Abramoff has complied with his restitution obligations and there is no need for the existing requirements to be modified.

B. The Payments Made Were Justified

In accordance with this Court’s May 26, 2009 Order, Mr. Abramoff provides the

following explanation for the monies spent:

Mendelson & Mendelson

This is the accounting firm that, among other things, did the work to help create his plea agreement and then to obtain this tax refund and continues to work on the Abramoff's behalf to obtain additional refunds. Obviously, it is in the interest of the Abramoffs and all of their creditors that this work continue and it is only fair that the accounting firm be paid for its work. In addition to working on the refund, the firm has been working since July 2005 – without getting paid until the funds were received from the IRS tax refund – on filing tax returns for the Abramoffs for the years 2001, 2002, 2003, 2004, 2005 and 2006; working with DOJ and the IRS to correct the erroneous tax losses stated in the original plea agreement; and in resolving civil tax issues with DOJ and the IRS. The firm also is working to resolve still pending audits and other controversies with the IRS which, if not satisfactorily resolved, could result in substantial additional tax liabilities being assessed and which the IRS could then apply to offset or reduce future refund entitlements of the Abramoffs. The Abramoffs inability to pay for this work over the course of the past four years has been a substantial financial burden on this small tax firm, and it cannot afford to continue its representation without some assurance of payment. Prior to this payment from the tax refund, Mendelson & Mendelson was owed in excess of \$210,000. In accordance with its agreement with the Abramoffs, Mendelson & Mendelson is entitled to apply 20% of this and future refunds to satisfy this debt. The \$104,000 payment to Mendelson & Mendelson around May 11, 2009 is 20% of the \$520,000 tax refund – that is less than half of what the firm is owed.

McDermott, Will & Emery LLP

Since leaving their predecessor firm, Chadbourne & Parke LLP, which the Abramoff's

still owe in excess of \$3 million, for McDermott, Will & Emery LLP (“McDermott”) in April 2007, Mr. Abramoff’s attorneys have handled his sentencing in D.C., resentencing in Florida, represented him in related civil proceedings, aided him in his extensive cooperation with DOJ, and have assisted him with various lesser matters ranging from gaining admission to the prison programs he is entitled to participate in to reporting his financial disclosures. McDermott is owed in excess of \$300,000 for its fees and expenses over the past two years, and received \$75,000 of the tax refund around May 11, 2009 – less than one-fourth of what it currently is owed. See also 26 U.S.C. § 6323 (providing super-priority to attorney’s fees); United States v. Brosseau, 446 F. Supp. 2d 659, 661 (N.D. Tex. 2006) (providing super-priority to attorney’s fees, and the remaining priority is determined by first in time); United States v. Murray, 963 F. Supp. 52, 56 (D. Mass. 1997) (explaining attorney’s fees receive priority ahead of restitution victims). Prior to this payment, McDermott had not been compensated by Mr. Abramoff in any manner.

Zuckerman Spaeder LLP

From 2001-2006, Zuckerman Spaeder LLP (“Zuckerman”) represented Mr. Abramoff primarily with respect to creditor-debtor rights. Mr. Abramoff owed the firm in excess of \$100,000 in fees and expenses for that work, and the firm received \$25,000 toward those fees and expenses from the IRS tax refund around May 11, 2009. As with McDermott, Zuckerman has received less than one-fourth of what it was owed.

Bank of America (Credit Card)

Given that Mr. Abramoff has been unemployed for five years and that Mrs. Abramoff’s income does not cover her ordinary living expenses, Mrs. Abramoff ran up her credit card balance to pay for ordinary living expenses, such as groceries and utilities, with the hope that the

IRS tax refunds would be paid.⁴ That balance grew to \$47,000, which Mrs. Abramoff paid in full with the proceeds from the tax refund around May 11, 2009.

Frank Abramoff

Since Mr. Abramoff lost his job five years ago and needed to marshal substantial resources for bail and to pay lawyers and accountants for his defense, his father – Frank Abramoff – has loaned the Abramoff family in excess of \$100,000. This is money Frank Abramoff, who is in his eighties, had saved for his retirement. On August 15, 2005, Frank Abramoff loaned the Abramoffs \$37,500 to pay the Florida bail bondsman, Ace Bonding Company. Frank Abramoff loaned the Abramoff family an additional \$50,000 in late 2005/early 2006 for their ordinary living expenses. Around May 11, 2009, Mrs. Abramoff repaid Frank Abramoff \$87,500 of the money that he is owed. Frank Abramoff is owed an additional roughly \$75,000 for subsequent loans to the family for ordinary living expenses.

Michael Herson

Michael Herson loaned Mrs. Abramoff \$5,000 on January 16, 2009, to help her pay her mortgage and other ordinary living expenses. Around May 11, 2009, Mrs. Abramoff repaid him the \$5,000 from the IRS tax refund that was received.

Franco Foundation

This charity sent Mrs. Abramoff \$1,500 roughly two months ago, which Mrs. Abramoff decided to return. As she had cashed the check she had received, she repaid that money by issuing a check of her own. She views this as a return of the Franco Foundation's money, rather than a payment from the IRS tax refund.

⁴ Given the short period of time Mr. Abramoff had to respond to the Court's Order, he was not able to obtain and review all of the credit card statements, but believes the vast majority of charges would be for that variety of purchases that are commonly made with credit cards, such as the purchase of groceries, clothes, gasoline and other day-to-day needs.

CONCLUSION

Mr. Abramoff did not try to avoid any restitution requirement, he did not seek to hide the fact that he was getting a refund from past taxes, and he did not try to do anything but comply with all the applicable legal requirements. Nonetheless, Mr. Abramoff has agreed to resolve such disputes should they arise in the future by providing DOJ with additional notice of any substantial funds he receives. Consequently, there is no need for the existing restitution order to be modified.

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Respectfully submitted,

Abbe David Lowell, Esq. (#358651)
Pamela J. Marple, Esq. (#462921)
Christopher D. Man, Esq. (#453553)
McDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 2005
(202) 756-8000