

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	Case No. 11-138 (RCL)
MICHAEL P.S. SCANLON,	:	
	:	
Defendant.	:	

**Government’s Memorandum Regarding
Defendant’s Motion To Determine Objections To Restitution Obligations**

The United States respectfully submits this memorandum to address whether defendant Michael P.S. Scanlon can raise legal objections to his obligation to reimburse Greenberg Traurig, LLP (“GT”) in the amounts to which the firm has compensated victims in connection with his sentencing in United States v. Michael P.S.Scanlon, No. 05-411(ESH).

I. THE BASIS FOR SCANLON’S RESTITUTION OBLIGATION

A. SCANLON’S PLEA AGREEMENT

1. The Offenses

In November 2004, defendant Scanlon pled guilty to a one-count Information charging a conspiracy with three objects:

- i. Bribery of federal officials, in violation of 18 U.S.C. § 201;
- ii. Money/property mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343; and
- iii. Honest services mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343 and 1346.

DE 6. The federal bribery object involved providing a stream of things of value to various public officials in return for favorable official action. The scheme underlying the other two

objects (money/property mail and wire fraud and the honest services fraud) involved the following set of admitted facts:

- A) Beginning in 2001, Scanlon formed Capital Campaign Strategies LLC (“CCS”) intending to provide grass roots lobbying services working with clients obtained mainly through lobbyist Jack Abramoff. Scanlon Factual Basis at ¶ 2, DE 7.
- B) Abramoff would take advantage of his relationship of trust and confidence with Indian tribes who had hired him generally to provide traditional lobbying services to get them to hire Scanlon, and Scanlon would secretly kick back to Abramoff fifty percent of Scanlon’s net profits. The higher the contract price the client paid, the greater the kickback to Abramoff. Scanlon Factual Basis at ¶ 6, DE 7.
- C) As to three tribes (in Mississippi, Louisiana, and Michigan), it was a pure kickback scheme, and Abramoff’s special relationship of trust and confidence was a critical element of the scheme. Scanlon Information, ¶¶ 8-16 (DE 1).
- D) As to the fourth tribe (in Texas), there was an additional form of deception in that Abramoff also misrepresented to the tribe that he would perform his own lobbying work for free in anticipation of a future lucrative long term contract, when in fact he secretly planned to and received \$1,850,000 from Scanlon. Information ¶ 17 DE 1.
- E) Although lobbying and some grass roots advocacy services were rendered to the clients, Scanlon and Abramoff intended that Abramoff receive kickbacks and that Abramoff’s clients would be deprived of the advice of a neutral consultant, relying on Abramoff’s advice which was tainted by his undisclosed financial

conflict of interest as to whether the clients needed the services and whether CCS was the best company to perform the services at the best price. Factual Basis at ¶ 7, DE 7.

- E) During most of the conspiracy, Abramoff was employed at GT, a law and lobbying firm with offices in Washington, D.C. Scanlon also had a business relationship with GT, primarily through CCS. Factual Basis at ¶¶ 1, 6, DE 7.
- F) In total, Scanlon acknowledged that he paid Abramoff \$19,698,644 as part of this kickback scheme. Factual Basis ¶ 8, DE 7.

2. Sentencing Provisions of the Plea Agreement

Scanlon and the government stipulated and agreed in the plea agreement that Scanlon's sentencing guidelines yielded a 51 - 63 month sentence at level 24, and that the statutory maximum sentence was 60 months imprisonment under 18 U.S.C. § 371. DE 6. In Scanlon's plea agreement, the parties also stipulated and agreed that restitution for these concealed kickback payments is mandatory in the total amount of \$19,698,644 under 18 U.S.C. § 3663A. Plea Agreement ¶ 5, DE 6; Factual Basis ¶ 8, DE 7. The information filed against him specified the specific amounts Scanlon conceded should be paid to specific victims. Scanlon Information ¶ 8-18, DE 1.

After Scanlon entered into his plea agreement, the United States and Scanlon obtained information that another client of Abramoff's and CCS, the Pueblo of Sandia, was defrauded about the kickback that CCS would pay to Abramoff and Kevin Ring, another lobbyist working with Abramoff for the tribe's business. The Sandia and Scanlon agreed that Scanlon would pay them their uncompensated loss in an amount of \$492,537.31, the same amount reflected in the

Abramoff restitution order. This raised Scanlon's total restitution obligation to \$20,191,537.31. DE 65.

By the time of sentencing, all of the other client victims except the Choctaw (Mississippi Tribe) reported that they had been fully compensated by GT.¹ The Choctaw said they were still owed \$2,000,000 after compensation from GT. All of the clients who were paid by GT had threatened civil litigation or sued GT regarding the same conduct which Scanlon agreed he engaged in, as well as other claims that were based on GT's civil liability alone. GT Sentencing Memo at 3, DE 64. In total, GT and the victim clients represented that the victims were paid at least \$17,699,000 by GT in compensation for and in civil settlement for the victims' losses caused by the fraud scheme entered into by Abramoff and Scanlon.

B. SCANLON'S SENTENCING

1. Scanlon was Sentenced to Twenty Months' Imprisonment

For reasons set forth in its sentencing memorandum, in recognition of Scanlon's substantial assistance to the government in the investigation and prosecution of others, the government recommended that the Court impose a sentence of 24 months in prison.

¹ Abramoff and Scanlon are ordered jointly and severally liable for restitution for the victims of the kickback scheme. The amount of restitution for which Abramoff is liable is higher than Scanlon primarily due to the fact that Abramoff engaged in other fraud offenses in which Scanlon was not involved. Abramoff was required to pay \$23,134,695. *United States v. Jack Abramoff*, No. 06cr01 (ESH), DE 43.

Government's Sentencing Memo at 16, DE 61.² On February 11, 2011, Judge Huvelle sentenced Scanlon to a term of 20 months of imprisonment. DE 68.

2. Scanlon's Restitution Obligations Under the Order of February 11, 2011

On February 11, 2011, when the court sentenced Scanlon, the primary restitution issue before the court was whether Scanlon is obligated to pay restitution only to the direct victims in amounts for which they have not been compensated or, if Scanlon is also obligated to pay GT for GT's compensation of Scanlon and Abramoff's victims pursuant to § 3664(j).

Section 3664(j) establishes two tiers of restitution claimants, first all uncompensated losses of victims are to be compensated, and then insurers or others who compensate victims are to be paid up to the amounts of their compensation to victims. Section 3664(j)(1) provides that:

If a victim has received compensation from insurance or any other source with respect to a loss, the court *shall* order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

18 U.S.C. § 3664(j)(1) (Emphasis added).

Consistent with § 3664(j), on February 11, 2011, the district court entered an order requiring Scanlon to make restitution in the total amount of \$20,191,537.31 with payments of \$2,000,000 to the Choctaw and \$492,537.31 to the Sandia. The order further provided that to the extent that the victims were compensated by GT, Scanlon should pay GT in the amount of \$17,699,000 pursuant to 18 U.S.C. § 3664(j)(1). DE 65 (attached as Ex. A). However, taking

² The government moved to reduce Scanlon's offense level by one additional level pursuant to U.S.S.G. § 3E1.1(b) for timely acceptance of responsibility for a total of three levels off under § 3E1.1, and to reduce his guideline sentence under U.S.S.G. § 5K1.1 from level 24 to Level 17.

into account the legal objections that Scanlon had raised, the Court provided for a procedure that would allow for a resolution of Scanlon's objection to compensating GT under these circumstances. *See* Ex. A.

In connection with his sentencing, Scanlon objected to his being obligated to pay GT under § 3664(j)(1) and argued that GT had the same liability as he did based on GT's contemporaneous knowledge of the referral fees that he was paying to Abramoff. He argued that GT was "*in pari materia*" in the scheme for which the defendant was convicted. Scanlon therefore challenged his legal responsibility to make restitution to GT for almost the entire approximately \$20 million in kickback payments Scanlon had made to Abramoff under § 3664(j). Scanlon's Sentencing Memo. at 12-14, DE 62.

The Government took the position at Scanlon's sentencing that the objections raised two issues to be resolved for which there was very little authority, but did not opine on the validity of either of the issues:

- 1) whether Scanlon could pursue his objection as a matter of law; and
 - 2) if he prevailed on the legal question, then the factual question of whether GT should not be compensated for its payments for the losses suffered by victims of the fraud scheme.
- Government Sentencing Memo at 20, DE 61.

The Government also noted that it was unclear whether Scanlon must assert such a claim about the entitlement to reimbursement of GT at this time and in this manner, or if he may do so as a collateral attack at the time of collection of the restitution in question. Government Sentencing Memo at 21, DE 61. Section 3664(e) seems to provide that claims and amounts of restitution are to be determined at the time the restitution order is entered:

Any disputes as to the proper amount or type of restitution shall be resolved by the court by the preponderance of evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the government. . . . The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

18 U.S.C. § 3664(e).

Certain provisions of § 3664 significantly limit a defendant's ability to collaterally attack a court's restitution order, but do not specifically foreclose a later challenge. *See e.g.*, 18 U.S.C. § 3664(d)(5)(providing that if victims' losses are not ascertainable 10 days before sentencing, the court may set a hearing within 90 days to determine the amount of restitution, and *victims* can petition the court upon a showing of good cause within 60 days of the restitution order to notify the court of additional losses); § 3664(m)(1)(B) (providing that the clerk may issue victims abstracts of judgments that function as liens on defendant's property which they may use to collect the restitution owed them); § 3664(l) (estopping a defendant from denying any of the essential elements of the offense in any subsequent proceeding brought by a victim).

The United States suggested that the Court sentence the defendant and then resolve these two issues under 18 U.S.C. § 3664(a)(5) and 3664(e), which provide that within 90 days of sentencing there should be the final determination of the victims' losses and to whom restitution should be paid. Government's Sentencing Memo at 21-22, DE 61. The Court incorporated in its order this procedure for resolving Scanlon's claims. *See* Ex. A¶ 2, DE 65. The Government also advised the Court that it believed that GT should be designated to represent its interests in resolving these issues under § 3664(e) rather than the United States. Government Sentencing Memo at 22, DE 61.

GT filed objections at the time of sentencing denying that GT had any criminal liability and urging the court to deny Scanlon's objections and order that GT be fully compensated for its payments to victims up to the amounts of their losses due to Scanlon and Abramoff's criminal conduct, totaling \$17,698,644. GT's arguments were based on the following: 1) there is no statutory provision for Scanlon to challenge payments to entities who compensate victims in the statutes; 2) GT has no criminal liability and paid victims of the fraud scheme only to resolve its civil liability for Scanlon and Abramoff's criminal wrongdoing; and 3) if Scanlon were not required to reimburse GT for the payments it made to the same victims, he would effectively get to keep the majority of the fraud proceeds (approximately \$17,000,000), thereby undermining an important purpose of the restitution statutes: to disgorge illegal profits. GT Sentencing Memo at 1-3, DE 64.

II. PENDING ISSUES REGARDING SCANLON'S OBLIGATION TO REIMBURSE GT.

A. Can Scanlon Challenge His Legal Obligation to Reimburse GT For Payments GT Made to Victims of Scanlon and Abramoff's Fraud ?

The text of the restitution statutes provides little direct guidance as to whether a party ordered to pay restitution can object to the requirement that he pay any party who compensated victims for the loss. As noted, 18 U.S.C. §§ 3664 (j)(1) and (2) provide that persons or entities who compensate victims are entitled to be reimbursed with any money left over after victims are fully paid, and that victims' claims should be reduced by compensation received to prevent double recoveries. Section 3664(e) provides that the court should resolve "any dispute as to the proper amount or type of restitution. . . ." Accordingly, a challenge to the amount, if any, to be paid to an insurer or other party to be reimbursed for compensation paid to victims appears to be

required. However, the United States has found no reported cases on this point. The legislative history is also silent as to whether anyone anticipated this problem in drafting and enacting the legislation. The clear focus of the legislation was on making sure that victims were compensated promptly, and not discouraging insurers or others from compensating victims promptly.

Courts in other circuits have allowed parties who are civilly liable for the same losses which are the subject of the criminal liability, to be compensated for the losses of victims they compensated. We found no reported cases on this point in this Circuit. *See .e.g., United States v. Romine*, 37 Fed. Appx. 583, 584 (3d Cir. 2002) (upholding award of reimbursement under 3664(j)(1) to two parties for whom the defendant may have acted as an agent who compensated victims in civil settlements); *United States v. Rhodes*, 201 F. Supp. 2d 906, 908, 913 (C.D. Ill. 2006), *aff'd* 330 F.3d 949 (7th Cir. 2002) (upholding award of reimbursement to employer for defendant convicted of embezzling and defrauding customers for payments made to victims even though it was civilly liable for conduct of its agent under theory of *respondeat superior*); and *United States v. Mintz*, No. 5:09-CR-194, 2010 WL 3075477, 1 - 3 (E.D.N.C. Aug. 5, 2010) (defendant's former employer was entitled to reimbursement for payments to clients defrauded by the defendant, but noting that the amounts of civil settlements are not necessarily determinative of the amounts defendant will be ordered to reimburse because they have to reflect the losses stemming from the offense of conviction). These opinions do not specify any particular authority for consideration of objections to paying insurers or others who compensate victims under § 3664(j) or the legal standards that apply to such claims. However, these issues appear to have been taken up in connection with the sentencing and not at collateral collections proceedings.

Section 3664(e) provides that the normal standard for determining a “dispute as to the proper amount and type of restitution shall be resolved by the court by the preponderance of the evidence.”

While there are a few cases in which courts appear to disallow restitution to parties who were involved in the underlying criminal scheme, there is little discussion of 1) the legal basis for the decisions, 2) the legal standard the court applied for disallowing the claims, or 3) whether any particular procedure was followed. *See e.g., United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), *United States v. Ojeikere*, 545 F.3d 220 (2d Cir. 2008); *United States v. Koonce*, 991 F.2d 693 (11th Cir. 1993) and *United States v. Martinez*, 978 F. Supp. 1442 (D. NM 1997).

In these cases, the courts appear to decide to preclude compensation to parties cast as victims (not compensators) based on findings that the claimant-victim was criminally liable along with the defendant. The courts appear to have reached this conclusion merely by taking judicial notice of the liability of the victim from the public record, or the evidence at trial preceding the sentencing.³ Additionally, the issue appears to have been resolved by the court before the restitution order was entered and not as part of any collateral collection proceeding, but the timing issue was not squarely addressed. For example in *Martinez*, the defendant had been convicted of armed robbery of a gambling casino. In refusing to order mandatory or discretionary restitution to the casino in what appears to be the sentencing hearing, the court

³ The Government notes that according to the Attorney General’s Guidelines for Victim and Witness Assistance, “A person who is culpable for or accused of the crime being investigated or prosecuted should not be considered a victim for purposes of the rights and services described in these *AG Guidelines*.” www.justice.gov/olp/pdf/ag_guidelines.pdf at 10.

noted that it would be “patently absurd” to do so where the operation of the casinos was deemed to be illegal after extensive litigation independent of the *Martinez* case. 978 F.2d at 1448-1449.

In *Reifler*, the Second Circuit vacated the restitution order entered by the district court because it included losses in stocks held by co-conspirators whose guilt was adjudicated at trial. The court noted that in including losses for people who were not “victims” the order was “beyond the authority of the MVRA.” In reversing, the court held “[a]s the federal courts have no inherent authority to order restitution [citations omitted], the amended judgment entered against Reifler must be vacated.” 446 F.3d at 126-127.

In *Objeikere*, relying on *Reifler*, the Second Circuit rejected the defendant’s claim that the victims of his advance fee scheme should not be entitled to restitution to recover their losses because they were involved in a fraud scheme involving money in Nigeria when the defendant stole their money. The court said the defendant’s victims were not involved in the scheme for which the defendant was convicted even if they had “greedy or dishonest motives.” The court held that the case was different from the case where the robber steals ill gotten gains from his confederates. The victims’ “intentions were not *in pari materia* with the defendant.” 545 F.3d at 222-23. The issue was taken up at sentencing after defendant’s trial, and there is no indication of any other proceeding in which evidence may have been taken to deny the defendant’s objections to restitution to the victims of his theft. Nor is the decision grounded in any specific provision of 18 U.S.C. § 3664. In *United States v. Koonce*, 991 F.2d 693 (11th Cir. 1993) the Eleventh Circuit upheld the restitution order where among other issues probation and the court simply agreed that defendant would not be ordered to make restitution to a prostitute with whom

he paid for services with a worthless money order). Defendant Scanlon has cited no other authority for his position that he has a legal right to pursue this line of objection or when.

Certain provisions of § 3664 significantly limit a defendant's ability to collaterally attack a court's restitution order. *See* discussion *infra* at 7. Therefore, Scanlon may be procedurally foreclosed from ever challenging his obligation to pay GT, if not allowed to do so at this stage of the sentencing.⁴ One possible outcome of precluding the right to challenge reimbursement claims would mean that the court-administered restitution process could require a defendant to compensate a person with criminal liability in the same scheme without any opportunity to challenge that aspect of the order. Such a circumstance could occur in connection with sentencings of criminal conspirators when the investigation is ongoing and all the co-conspirators have not yet been charged. In the instant matter, the government considers its investigation closed.

2. What Is the Appropriate Role of the Government In This Process?

Under 18 U.S.C. § 3664(e), the government is charged with representing victims' interests in determining who the victims are and the amounts of the claims. However, § 3664(e) also contains language authorizing it to place responsibility with other parties: "the burden of demonstrating such other matters as the court deems appropriate shall be upon a party designated

⁴ In the court opinions where criminally culpable claimants were denied recovery, *see* discussion *infra* at page 9-10, the issue appears to have been considered when the amount of restitution was determined, not at some later collection stage. Arguments could be made that if there are funds available to make restitution beyond the victims to include the parties who compensated victims, the most efficient and fair time to resolve this question is at the time of sentencing when the relevant evidence is most easily marshaled and available. However, when there is a slim prospect of full restitution of uncompensated victims ever being made, the process may invite unnecessary litigation.

by the court as justice requires.” Through sentencing, the Government has represented victims’ interests in determining the victims and the amounts of claims, and the Court has ordered full restitution to all of the victims. However, the question before this court is whether in this proceeding, the Government or GT is in the best position to represent GT’s right to reimbursement for compensating the losses suffered by Scanlon’s and Abramoff’s victims.

The Government does not believe that it should represent any of the parties to this dispute. The Government suggests that the Court designate that GT represent its own interests in the dispute under § 3664(e). The Government has already represented the interests of the victims in obtaining the restitution order. This collateral proceeding, however, may require the Government to go beyond its usual role and advocate about the involvement of GT in the underlying criminal conduct in a manner that is extremely atypical. Because the Government did not seek criminal charges against or designate GT as an unindicted co-conspirator, the Government submits that it should not now be required to take a position regarding GT’s involvement in the offenses and whether the facts would rise to the level of GT’s criminal culpability, and, thus, impact GT’s ability to collect funds from Scanlon. Consequently, pursuant to 18 U.S.C. § 3664(e), the Government submits that it is in the interest of justice to have GT represent its own interests in this matter.

3. Must Scanlon Pay the Full Amount of Restitution To Another Party or Fund if He Prevails ?

In theory, if Scanlon prevails in establishing that he is entitled as a legal matter to challenge his obligation to compensate GT as a party who compensated victims, and he establishes under an appropriately high standard that GT has criminal liability for the same offenses for which he is obligated to make mandatory restitution, does Scanlon get to keep the

money he would otherwise have had to pay victims which are fraud proceeds?⁵ This issue does not appear to have been litigated in this or other circuits. As GT's opposition reflects, the policy underlying mandatory restitution legislation appears to incorporate both interests in compensating victims and in punishing the defendant by disgorging illegally gained profits. GT Opposition Memo at 7, DE 3.

However, there is no clear authority for ordering the defendant subject to mandatory restitution to pay the full amount of the restitution ordered even after all victims and any compensators entitled to restitution are paid. The mandatory restitution statute requires that restitution be ordered without regard to the defendant's ability to pay,⁶ or the possibility that the victim will be compensated from some other source for the loss caused by the defendant.⁷ But § 3664(j)(2) appears to provide only that no double recoveries should be permitted:

Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in--(A) any Federal civil proceeding; and (B) any State civil proceeding, to the extent provided by the law of the State.

18 U.S.C. § 3664(j) (2). Accordingly, if GT is not entitled to compensation, Scanlon would not

⁵ This would mean Scanlon would pay approximately \$2.5 million to uncompensated victims and would not be required to pay an additional approximately \$17.7 million in net profits CCS received from the fraud scheme. (Here, Scanlon's net profit from the scheme was actually reduced by taxes paid on the profits as if they were legitimate.)

⁶ Section 3664(f)(1)(A) provides that "[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."

⁷ Section 3664(f)(1)(B) provides that, "[i]n no case shall the fact that the victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution."

be required to pay restitution beyond the \$2.5 million in uncompensated losses suffered by two victims of his and Abramoff's fraud schemes.

In implementing restitution orders, there are circumstances where defendants ordered to pay restitution are not required to pay the full amount of that restitution. For example, where co-defendants are jointly and severally liable and one pays the entire amount of the restitution ordered so that victims are fully compensated and any compensators are paid, the government does not require the non-paying co-defendant to nevertheless pay the amount of restitution ordered to any other person or entity. There is no statutory authority for ordering defendants to pay money except to victims or persons or entities who compensate victims as provided for in § 3664(j). It might reasonably be expected that co-defendants (or compensators) would bring civil actions against each other to try to collect some portion of the amounts paid, but the government does not get involved in this further collection effort.

WHEREFORE, the United States respectfully submits its legal position that there is little published authority or precedent for the specific situation of whether to allow a defendant ordered to pay mandatory restitution to challenge the right of any entity who compensated victims to be reimbursed for those payments under §§ 3663A or 3664. The general provisions of § 3664(e) for determining the amounts and types of claims in connection with imposing mandatory restitution under 18 U.S.C. §§ 3663A and 3664 appear to be the most relevant provisions, but they provide only general guidance. The Government further submits that in the

interests of justice, pursuant to 18 U.S.C. § 3664(e), that GT be designated to represent its own interests in this matter.

RESPECTFULLY SUBMITTED,

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Dated: March 31, 2011

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 31st day of March 2011, I caused a true and correct copy of the foregoing Memorandum to be filed by ECF which will electronically serve all counsel.

/s/ Mary K. Butler
Criminal Division
U.S. Department of Justice