UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

MICHAEL P. S. SCANLON	)	
	)	
Petitioner	)	MISC. NO. 1:11-MC-00138-RCL
	)	
VS.	)	(FORMERLY: CRIM. NO. 05-CR-411)
	)	
GREENBERG TRAURIG, LLP	)	
	)	
Respondent	)	

GREENBERG TRAURIG, LLP'S RESPONSE IN OPPOSITION TO MICHAEL P.S. SCANLON'S "MOTION TO DETERMINE AVAILABILITY OF OBJECTION"

Michael P.S. Scanlon's "Motion to Determine Availability of Objection" and Supporting Memorandum of Law (the "Motion"), Dkt. # 78 in No. 05-cr-411, was filed on March 14, 2011, one day after the deadline set by the Court. Separate and apart from the utter lack of factual or legal basis for the relief requested in the Motion, Mr. Scanlon's failure to meet the filing deadline warrants the denial of his Motion and enforcement of the Court's Restitution Order.

As for the merits of Mr. Scanlon's Motion: there are none. The ostensible purpose for the hearing Mr. Scanlon has requested is to allow him to attack the conduct of a third-party, Greenberg Traurig, LLP ("Greenberg"), in the hopes of securing a ruling that Greenberg is ineligible to receive the restitution that the Court ordered Mr. Scanlon to pay. *See* Motion, at 3. Mr. Scanlon owes that restitution to Greenberg because during the seven years since his notorious fraud was exposed, he has chosen to keep ***all*** of the proceeds of that fraud, while leaving others to compensate his victims. *See* Restitution Order, No. 05-cr-411, Dkt. # 65. By challenging Greenberg's entitlement to receive the Court-ordered restitution—an entitlement that the ***victims*** of the fraud recognize and support—Mr. Scanlon's unspoken goal is to keep the

remaining proceeds of his fraud against Indian Tribes, including a $9 million luxury home on the Caribbean island of St. Bart's, as well as other properties purchased with fraudulent proceeds.

Mr. Scanlon does not identify a single statute, rule, or other authority that would sanction his right to conduct such a hearing, because no such authority exists. The cases on which Mr. Scanlon relies convened no such hearings, and they contain no language supporting his right to a hearing here. Instead, they are cases in which courts used ***previously-adjudicated facts*** to find that a convicted felon could not recover his own losses from a fraudulent scheme in which he participated, and that an unlicensed casino operating illegally could not recover funds that were stolen from its illegal operations. *See infra* at 8-10. Such cases in no way suggest or imply that a criminal defendant has the right to convene a separate hearing, after or as part of his sentencing, at which to attack the conduct of uncharged third-parties so that they, and not he, are left with the financial responsibility for compensating his victims. As Judge Huvelle put it during the course of recusing herself on this issue, that "is a very novel . . . proceeding, to say the least." *See* Ex. A (Tr. of Feb. 11, 2011 Hearing, at 6:19). But more than just a novel proceeding, it is a proceeding whose very purpose runs counter to federal sentencing policy that makes the payment of restitution an integral and mandatory part of criminal punishment. No such procedure exists today, and none should be created to serve Mr. Scanlon's improper purpose.

Even if that were not the case and Mr. Scanlon had some legal basis for convening this extraordinary hearing, he has completely failed in his obligation to proffer a set of facts that might justify it. While Mr. Scanlon asserts that a party which is "*in pari materia*" with the defendant should not be a beneficiary of a restitution order, Motion at 2-3, nowhere does he identify the conduct that would supposedly expose Greenberg to such a finding. The Motion is silent on that issue, leaving Mr. Scanlon in the position of asking the Court to convene an unprecedented hearing for the purpose of proving a set of facts that he refuses to reveal. There is

simply no reason to indulge Mr. Scanlon on these issues any longer. He has been sentenced, and should be ordered to comply forthwith with ***all*** aspects of that sentence, including restitution.

BACKGROUND

Mr. Scanlon pleaded guilty in November 2005 to a far-ranging fraud scheme in which he and Jack Abramoff defrauded their Indian Tribe clients of more than $20 million.[1] As a result of Mr. Scanlon's cooperation with a related investigation of public corruption (as to which Mr. Scanlon also pleaded guilty), his sentencing hearing was postponed multiple times, finally occurring on February 11, 2011. Judge Huvelle sentenced Mr. Scanlon to twenty months in prison, and ordered him to pay $20,191,537.31 in restitution, all but $2.5 million of which is payable to Greenberg. *See* Restitution Order, No. 05-cr-411-ESH, Dkt. # 65, at ¶ 1.

Due to Judge Huvelle's recusal from cases involving her former law firm, one issue was left unaddressed by that Order. In his pre-sentencing memorandum, Mr. Scanlon had asked the Court to convene an evidentiary hearing at which to contest Greenberg's right to receive restitution. *See* Def.'s Sentencing Mem., No. 05-cr-411-ESH, Dkt. # 62, at 12-14. As in the present motion, Mr. Scanlon argued that a party which is "*in pari materia*" with a criminal defendant can be denied restitution on that basis, but gave no reason why Greenberg would or could be regarded in those terms. *Id.* Greenberg responded by arguing that there was neither a legal basis for convening such a hearing, nor any suggestion by Mr. Scanlon of facts that could

[1] Although not directly at issue in the present Motion, Mr. Scanlon's plea agreement and stipulated loss amount reflect less than a third of the actual losses he and Mr. Abramoff inflicted upon their Indian Tribe clients. *See* "GIMME FIVE" – INVESTIGATION OF TRIBAL LOBBYING MATTERS, *Final Report of the Senate Committee on Indian Affairs* (6/22/2006), at 9-10 ("In total, six tribes paid Scanlon's companies, in particular a company called [CCS] . . . at least $66,000,000 over the three-year period. . . . Most of the money that the Tribes paid Scanlon appears to have been used by Scanlon and Abramoff for purely personal purposes—purposes unintended by the Tribes. . . . Scanlon seems to have used his share to purchase real estate and other investments.") Available at: http://indian.senate.gov/public/_files/Report.pdf

possibly make Greenberg "*in pari materia*" with his crimes. *See* Mem. of Greenberg Traurig Regarding Scanlon's Restitution Obligation, No. 05-cr-411-ESH, Dkt. # 64.

On February 10, 2011, the day before Mr. Scanlon's sentencing hearing, Judge Huvelle held a conference call in which she informed the parties that she could not decide the issue because Greenberg was represented by her former law firm, Williams & Connolly. For that reason, while Judge Huvelle sentenced Mr. Scanlon and ordered him to pay restitution to Greenberg, the Order entered by the Court provided Mr. Scanlon with the right to file a separate proceeding in which a different Judge would (a) determine whether Mr. Scanlon has a right to a hearing for purposes of challenging the payment of restitution to Greenberg, and, if so, (b) resolve the merits of that challenge. *See* Restitution Order, ¶ 2 (2/11/2011). The Court's Order then provided as follows:

> Scanlon must institute such action in the United States District Court for the District of Columbia ***on or before March 13, 2011***. Such action will be presided over by a judge other than the undersigned.

Id. Restitution Order, ¶ 2 (emphasis added). Mr. Scanlon and his counsel both indicated their knowledge and acceptance of that time frame on the record during the sentencing hearing. *See* Ex. A (Sentencing Hrg. Tr.) at 6. Mr. Scanlon did not file his "Motion to Determine Availability of Objection" until the afternoon of March 14, 2011.

ARGUMENT

I. MR. SCANLON'S MOTION IS UNTIMELY, AND SHOULD BE DENIED ON THAT BASIS ALONE.

As stated in plain terms in the Court's Restitution Order, Mr. Scanlon was required to file his Motion "on or before March 13, 2011." *See* Restitution Order, ¶ 2. He failed to do so, filing instead on the afternoon of March 14, 2011. For that reason alone, Mr. Scanlon's Motion can and should be denied. *See United States v. Locke*, 471 U.S. 84, 94-95 (1985).

Presumably, Mr. Scanlon believed his Motion was timely filed on March 14 because the deadline set by the Court was a Sunday, and his filing was accomplished on the next following date that the Court was open. There is no reason why Mr. Scanlon should have believed that to be the case. Under the Federal Rules, a "date certain" filing deadline—that is, a deadline that must be met "on or before" a specific date, rather than within a period of days—requires compliance *no later than* the appointed date, even if that date is a Saturday, Sunday or legal holiday. *See Violette v. P.A. Days, Inc*., 427 F.3d 1015, 1017-19 (6th Cir. 2005). Such deadlines are unaffected by the provision in Fed. R. Civ. P. 6(a) (or its analog in Fed. R. Crim. P. 45(a)) that a deadline expressed in a period of days should be calculated so as not to end on a weekend or holiday. "Computation under Rule 6(a), by its very nature, is only necessary when a court orders something to be done in a particular number of days." *Violette*, 427 F.3d at 1018 (quoting *Fleischhauer v. Feltner*, 3 F.3d 148 (6th Cir. 1993)). In contrast, a deadline that requires a filing to occur "on or before" a specified date means exactly what it says, and a filing a day later should be stricken as untimely. *Id*. (reversing district court decision to accept as timely class action "opt out" notices postmarked on the first business day after a Saturday mailing deadline); *see also Fleischhauer*, 3 F.3d at 151 (holding that date certain deadline falling on a Saturday was a "final deadline" and that a filing made the following Monday was untimely); *Sizemore v. State of New Mexico Dept. of Labor*, 182 Fed. App'x. 848, 852 n.5 (10th Cir. 2006) (following *Fleischhauer*). Because Mr. Scanlon's Motion was not filed until after the deadline, it too should be stricken.

One court previously reached a contrary conclusion in a bankruptcy case. *See In re Am. Healthcare Mgmt., Inc*., 900 F.2d 827, 832 (5th Cir. 1990) (applying the Bankruptcy Rule equivalent of Rule 6(a) to extend a date certain deadline from a weekend to the next business day). But in the 2009 Amendments to the Federal Rules, the drafters sought deliberately to

overrule that decision and to establish the rule from *Violette* as the norm in all cases brought under both the Federal Rules of Criminal and Civil Procedure:

> The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order).

Fed. R. Crim. P. 45, Advisory Notes, 2009 Amendments, Subdivision (a); *see also* Fed. R. Civ. P 6, Advisory Notes, 2009 Amendments, Subdivision (a) (same). Under the Rules there is accordingly no ambiguity that a deadline of "on or before March 13, 2011" means exactly what it says, and that a filing on March 14, 2011 is one day too late.

The conclusion that Mr. Scanlon's Motion should be dismissed as untimely is not harsh. It is enough that Mr. Scanlon is asking the Court to invent a new procedure unsanctioned by any statute, case or rule of procedure, and to do so for the illicit purpose of attacking a third party's conduct in an effort to keep the substantial proceeds of his fraud. He should not also be forgiven his own failure to request that unprecedented relief within the deadline allotted by the Court. Mr. Scanlon easily could have met his obligation by filing his Motion via ECF as late as 11:59 pm on Friday, March 11, 2011. Failing that, he could have asked the Court to clarify or modify its deadline. Having chosen neither of those options and instead filed after a deadline he plainly knew about, Mr. Scanlon's Motion should be denied as untimely.

II. THERE IS NO BASIS FOR MR. SCANLON'S REQUESTED HEARING

Separate and apart from the fact that it is untimely, there is no basis whatsoever for Mr. Scanlon's suggestion that Greenberg was "*in pari materia*" with his fraudulent scheme, nor any basis on which to conduct a hearing regarding that or any other issue that would alleviate Mr. Scanlon from his responsibility to pay restitution. The Motion should be denied.

A. There is No Legal Basis for the Requested Hearing.

The Mandatory Victims Restitution Act ("MVRA") makes restitution mandatory for certain offenses because it serves "to mete out appropriate criminal punishment for [the defendant's] conduct." *Pasquantino v. United States*, 544 U.S. 349, 364 (2005). There are accordingly few grounds on which a felon, like Mr. Scanlon, is permitted to contest the entry or amount of a mandatory restitution order, and fewer grounds still on which such felons are afforded the right to an evidentiary hearing. In fact, the MVRA provides only *one* circumstance in which a court may (but need not) convene a post-sentencing evidentiary hearing regarding restitution, and that is when "the victim's losses are not ascertainable" prior to sentencing and a hearing is needed after-the-fact to resolve that issue. *See* 18 U.S.C. § 3664(d)(5). Aside from that issue—which is inapplicable here because Mr. Scanlon's plea agreement identified his victims and the amounts of their respective losses—the statute affords no discretion to deny the imposition of a restitution order, or to limit its amount to something less than the total amount of the victims' injuries. *See, e.g., United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000) ("Critically, with passage of the MVRA, Congress completely deleted the language of the VWPA affording the district court discretion in cases such as this to consider any factor it deemed appropriate in determining the amount of restitution to be ordered, and replaced it with language requiring the district court to order restitution in the full amount of loss to each victim as determined by the district court."); *United States v. Leon-Delfis*, 203 F.3d 103, 116 (1st Cir.

2000) ("[T]he language of the . . . statutes regarding restitution is plain and allows the district court no discretion.").

Mr. Scanlon's request for a hearing, the ultimate purpose for which is to eliminate some $17.7 million of his $20.2 million restitution obligation, is therefore unsupported by any part of the MVRA, and runs directly counter to both the purpose of the statute and the limitations Congress imposed on the Court's discretion to deny restitution for equitable reasons. Nevertheless, Mr. Scanlon claims to find support for his requested hearing in three court decisions that he cites (but barely explains) in his papers. *See* Motion, at 2. Mr. Scanlon is misreading the authority upon which he relies.

None of the cases cited by Mr. Scanlon involved an adjudication of a non-party's conduct as an extension of the defendant's sentencing. In *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), the Court of Appeals held that a District Court erred in calculating a loss amount that reflected injuries suffered by the defendant's co-conspirators, who were not "victims" within the meaning of the MVRA. *Id.* at 122-35. But the court's basis for reaching that conclusion was that the co-conspirators in question *had been indicted, tried, and convicted alongside the defendant for the same offense*. *Id.* at 70-71 (identifying defendant Laken as among the convicted); *id.* at 127-28 (reversing restitution order because it improperly reflected losses suffered by Laken and other convicted co-conspirators). The relevant facts were established by prior judicial process involving all of the affected parties, not an extraordinary hearing as part of sentencing like Mr. Scanlon is seeking.

Similarly, in *United States v. Martinez*, 978 F. Supp. 1442 (D.N.M. 1997), the Court determined that the victim of a robbery, an Indian casino, was not a "victim" for purposes of the MVRA because it was operating illegally and therefore had no right of possession to the stolen funds. *Id.* at 1453. But, as in *Reifler*, this was not a conclusion the court reached during an *ad*

hoc hearing convened as part of the defendant's sentencing. Rather, the illegality of the casino's operations was established during a series of trials that had resulted in judgments of illegality that were affirmed by the U.S. Court of Appeals for the Tenth Circuit and the New Mexico Supreme Court. *Id.* at 1448-49. Once again, the Court's finding was based on facts established through prior judicial process, not as part of an *ad hoc* hearing convened as part of the defendant's sentencing.

The third case cited by Mr. Scanlon is no different. In *United States v. Ojeikere*, 545 F.3d 220 (2d Cir. 2008), the court of appeals simply cited its earlier decision in *Reifler* as supporting the proposition that an adjudicated co-conspirator could not be a "victim" under the MVRA, before finding that holding to be inapposite: "[U]nlike the coconspirators in Reifler, the victims here were not involved in the offense of conviction, which was a fraudulent scheme to obtain money from *them*." *Id.* at 222-23. "Whatever illegal scheme the victims thought they were involved in, it was not a scheme to lose their own money, which they earned fairly (as far as we know), lost, and now want returned." *Id.* While the Court's opinion does not say how it reached that conclusion, its recitation of the procedural history of the case gives no suggestion that the district court convened any kind of hearing resembling the one Mr. Scanlon has asked for, and instead implies that the relevant facts about the victim's conduct had been established at trial. *Id.* at 221.

In short, the process Mr. Scanlon is asking for is not provided for in any applicable statute, and is not sanctioned by any of the cases on which he relies. Mr. Scanlon is simply asking the Court to invent a new procedure that would allow him potentially to avoid restitution that is mandated by the MVRA as a necessary part of his sentence. There is no basis on which the Court could, or should, grant that request.

B. There is No Factual Basis for Mr. Scanlon's Requested Hearing.

There is likewise no factual basis for Mr. Scanlon's suggestion that a hearing will show Greenberg is "*in pari materia*" with his fraud. Notwithstanding the extraordinary relief he has requested from the Court, Mr. Scanlon has not deigned to tell the Court or Greenberg the basis for his contention that Greenberg shares culpability for his fraud. He simply raises the issue as a hypothetical ground on which to deny an award of restitution, but leaves to the imagination any basis for believing that a hearing would establish facts sufficient to deny restitution on that basis.

For good reason, courts will not generally decide issues that a party fails to support with a minimally sufficient degree of factual and legal argument. *See, e.g.*, *SEC v. Banner Fund Int'l*, 211 F.3d 602, 613-14 (D.C. Cir. 2000) (refusing to address an "'asserted but unanalyzed' argument"); *United States v. Wade*, 992 F. Supp. 6, 21 (D.D.C. 1997) (declining to address an argument, briefly raised, but for which "absolutely no legal, factual, or rhetorical support" was offered). Here, Mr. Scanlon asks the Court to decide that he is entitled to the extraordinary relief of an evidentiary hearing to prove that Greenberg is "*in pari materia*," but does so without ever explaining how or with what proof he intends to achieve that purpose. The perfunctory three page motion Mr. Scanlon submitted in support of his request contains precisely the sort of "asserted but unanalyzed argument" courts routinely decline to consider, and that this Court should decline to consider here.

Mr. Scanlon was only slightly more forthcoming in his presentencing memorandum, asserting two grounds that presumably are still at the heart of his request for a hearing. Neither could remotely justify that request.

First, Mr. Scanlon argued in his presentencing memorandum that Greenberg was ineligible to receive restitution because the payments it made to victims were made as part of agreements to settle threatened or pending civil litigation. *See* Def.'s Sentencing Mem., Dkt. #

62, at 12. But as both Greenberg and the Government explained in their own papers, the law is settled that a third-party's potential *civil* liability and resulting settlement payments has no effect on that party's eligibility to receive restitution under 18 U.S.C. § 3664(j)(1). Every court to consider the issue has so held. *See United States v. Romine*, 37 Fed. App'x. 583, 584 (3d Cir. June 18, 2002) (holding that settling tort feasors are "permissible 'other source[s]' within the meaning of" the MVRA); *United States v. Rhodes*, 201 F. Supp. 2d 906, 909 (C.D. Ill.) (holding that a party that paid victims pursuant to civil settlements was "clearly" eligible to receive restitution), *aff'd* 330 F.3d 949 (7th Cir. 2002); *United States v. Stuckey*, No. 1:07-cr-54, 2009 WL 1748018, *4 (N.D. Ind. June 19, 2009) (apportioning restitution to party that settled civil claims); *United States v. Mintz*, No. 5:09-CR-194, 2010 WL 3075477, *1 - *3 (E.D. N.C. Aug. 5, 2010) (same). Thus, to the extent Mr. Scanlon wishes to convene a hearing to establish that Greenberg made these payments as part of settling civil claims based on its employment of Mr. Abramoff, there is no need for a hearing—Greenberg will stipulate that it did so, but that fact is irrelevant to Mr. Scanlon's obligation to pay, and Greenberg's right to receive, restitution.

Second, in his presentencing memorandum, Mr. Scanlon suggested (without actually arguing) that his "*in pari materia*" argument would be based upon an assertion that he confessed to wrongdoing in the presence of Greenberg lawyers in January 2004. Mr. Scanlon does not renew that suggestion in his Motion, and it is unclear what role, if any, that meeting plays in his current request for a hearing. Assuming that assertion remains a basis for his request, it is again completely irrelevant whether Mr. Scanlon made such a confession—which he did not—because it is undisputed that the last proceeds of the fraud were paid long before January 2004. There is simply no basis for suggesting that any version of a disputed event occurring in that month could result in a finding that Greenberg was "*in pari materia*" with a fraud scheme that Mr. Scanlon had perpetrated over the preceding three years.

But in any event, the Court need not ultimately decide whether either of these arguments, or both taken together, justifies an evidentiary hearing. It was Mr. Scanlon's obligation to support his request with sufficient factual and legal argument, and he failed to do so. Having presented no argument in favor of an evidentiary hearing, Mr. Scanlon should not be granted one.

CONCLUSION

For the foregoing reasons, Mr. Scanlon's request for an evidentiary hearing should be denied.

Respectfully submitted,

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March 24, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2011, the foregoing GREENBERG TRAURIG, LLP'S RESPONSE IN OPPOSITION TO MICHAEL P.S. SCANLON'S "MOTION TO DETERMINE AVAILABILITY OF OBJECTION" was filed electronically. Copies of the foregoing papers will be served on all counsel of record via the Court's CM/ECF system.

/s/ Carl R. Metz
Carl R. Metz