

On June 8, 2010, an Amended Judgment was filed which modified and corrected the previous restitution order of this Court (See Exhibit "A"). Defendant was ordered to pay restitution in the amount of \$369,548.42 with the restitution going to various victims in specified amounts. The total restitution for the Health Care Fraud was ordered to be paid jointly and severally with defendant William Fry in the amount of \$62,237.42, with the payments directed to Blue Cross of California (\$12,901.42), Blue Cross Blue Shield of Kansas (\$48,468.00) and Regence Blue Shield of Idaho (\$1,868.00). The restitution for the Tax Fraud was ordered to be paid to the IRS in the amount of "\$306,311 plus any penalties and interest."¹ Payment of restitution was ordered to be made at a monthly rate of \$500 following the defendant's release from prison. In addition, a fine of \$7,500 was imposed, with monthly payments of \$200 upon release from custody.

B. Restitution Compliance

Defendant RUBIO was released from custody in March of 2011 and began his term of supervised release.² Dr. RUBIO began making monthly restitution payments upon release from custody. The defendant was advised by the U.S. District Court Clerk that all payments submitted to the Clerk would be received and applied to victim restitution until restitution is fully satisfied, pursuant to 18 U.S.C. § 3612(c), and prior to application to fine payment. Thus, the defendant's total monthly payment of \$700 has been applied solely to restitution since April of 2011. To date, Dr. RUBIO has made timely restitution payments each month and is in compliance with this Court's restitution order.³ At this time, Dr. RUBIO has made total victim restitution payments in the amount

¹ The restitution order included personal income tax owed for tax years 1998-2003, plus penalties and interest for those same years. Dr. RUBIO had received credit for a \$50,000 restitution payment to the IRS made prior to sentencing, pursuant to plea agreement.

² Dr. RUBIO has been supervised by United States Probation Officer (USPO) Craig Bilinski.

³ In addition, pursuant to request of the Financial Litigation Unit (FLU) of the U.S. Attorney's Office, Dr. RUBIO made an additional lump sum payment of \$10,000 toward restitution on June 30, 2011. This request came after review of Dr. RUBIO's finances by the FLU.

1 of \$21,250. (See Exhibit “B”; Letter from Mickey Ochoa, Financial Supervisor, Office of
2 the Clerk, dated July 13, 2012). These payments have all been applied pro rata toward the
3 private victim (health insurance) restitution as required by 18 U.S.C. § 3664(i).

4 **C. Collection Proceedings by the Government (IRS)**

5 Pursuant to plea agreement in this cause, defendant RUBIO entered into an
6 agreement with the government to pay restitution for taxes owing for 1998-2003 in the
7 amount of \$356,311, plus penalties and interest in an amount to be determined by the
8 IRS.⁴ On June 8, 2010, this Court entered a Judgment including Restitution to the IRS in
9 the amount of “\$306, 311 plus any penalties and interest” reflecting the liability amount
10 computed in the plea agreement and Closing Agreement minus the \$50,000 restitution
11 paid to the IRS prior to sentencing. The IRS restitution order was contained within the
12 Special Conditions of Supervision (supervised release) which stated: “Pay all federal
13 income taxes, penalties and interest lawfully determined to be due and owing for calendar
14 years 1998 through 2003.”

15 On February 21, 2012, a Notice of Federal Tax Lien for tax years 1998-2003 was
16 sent to defendant. The Tax Lien was filed with the San Diego County Recorder and
17 included the total taxes, penalties and interest calculated for the pertinent tax years. The
18 notice was transmitted by E. Kelly, IRS Revenue Officer. (See Exhibit “C”).

19 Three weeks later, on March 14, 2012, Ms. Kelly issued a Summary of Contact to
20 Dr. RUBIO requiring the production of a voluminous quantity of documents pertaining to
21 all aspects of his personal, family and business finances. The Summary of Contact
22 indicated the documents were required in order to “determine the appropriate resolution
23 of the taxpayer’s case” and to “ensure that the taxpayer remains in current compliance
24 with applicable filing and paying requirements.” (See Exhibit “D”; Summary of Contact).
25 The Revenue Officer required all documents to be provided on March 23, 2012, nine (9)

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28 ⁴ Defendant entered into a Closing Agreement with the IRS for tax periods 1998-2003 on
February 18, 2009, with said Agreement approved by the IRS on May 17, 2010.

1 days later.

2 Counsel for defendant contacted Revenue Officer Kelly upon receipt of the
3 Summary of Contact and advised Ms. Kelly of the court ordered restitution payment
4 schedule. Revenue Officer Kelly indicated the court order had “no impact on the IRS
5 collection action” and would not “forestall the collection action.” Counsel requested and
6 received additional time to allow Dr. RUBIO to compile the documents requested.⁵

7 Pursuant to advice from counsel, Dr. RUBIO retained the CPA firm of Levitzacks,
8 San Diego, to act as consultant regarding “collection issues” with the IRS. Dr. RUBIO
9 compiled and produced hundreds of pages of financial documents in response to the IRS
10 request for documents. The Levitzacks representatives, Theresa Drouillard, CPA, and
11 attorney Mark Morris, and Revenue Officer Kelly agreed on a meeting date of May 17,
12 2012, to produce additional documents and discuss collection issues including a possible
13 payment schedule with the IRS.

14 Prior to the May 17 meeting, this counsel contacted the Office of the Clerk,
15 Financial Supervisor, in order to determine whether participating in collection
16 proceedings and negotiations with the IRS, outside of the parameters of a court restitution
17 order, was appropriate or permissible by law. The Financial Supervisor, after contacting
18 the chambers of this Court, advised counsel that restitution collection by the IRS at this
19 time would be violative of 18 U.S.C. § 3664(i) and improper. On May 10, 2012, this
20 counsel corresponded with the Levitzacks representatives and advised them that any
21 continued restitution collection proceedings by the IRS was improper and violative of 18
22 U.S.C. § 3664(i). Counsel requested that Revenue Officer Kelly be so advised and copied
23 the letter to USPO Bilinski. (See Exhibit “E”; letter of counsel to Levitzacks
24 representatives).

25 Theresa Drouillard contacted Revenue Officer Kelly and voiced the concerns of
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27 ⁵ Revenue Officer Kelly advised counsel that she was already in possession of numerous
28 documents pertaining to Dr. RUBIO’s financial status which she had received from USPO Bilinski.

1 counsel for defendant RUBIO. Revenue Officer Kelly opined that her collection efforts
2 were “outside” the restitution order of the Court and therefore permissible. Ms.
3 Drouillard pointed out that the Restitution Order included all taxes, penalties and interest
4 for 1998-2003, therefore there could be no assessments outside the Restitution Order.
5 Revenue Officer Kelly insisted that the May 17 meeting go forward and that it would take
6 place at the office of USPO Bilinski.

7 On May 17, 2012, representatives Drouillard and Morris, along with defendant
8 RUBIO, met with Revenue Officer Kelly in the office of USPO Bilinski.⁶ Defendant
9 produced voluminous documents in response to the March IRS request and answered
10 questions posed regarding his finances for several hours. Representative Drouillard
11 objected to the proceeding as impermissible and violative of the Restitution Order and
12 federal law. Revenue Office Kelly indicated she had made inquiry of IRS Chief Counsel
13 but had received no response. The meeting concluded with an indication from Revenue
14 Officer Kelly that there would be additional follow-up inquiries.

15 On June 12, 2012, Revenue Officer Kelly submitted a letter to Theresa Drouillard
16 as a “follow-up” to the May 17 meeting. Additional “information and documents” were
17 requested as well as a “list of questions that Mr. Rubio is required to complete.” The
18 documents requested include twenty three (23) areas of inquiry and the “list of questions”
19 are comprised of fifty five (55) multi-faceted questions, all of which are required to be
20 answered under oath. With regard to the concern expressed that the restitution collection
21 proceeding by the IRS is improper, Revenue Officer Kelly stated, “As we discussed on
22 May 17, 2012, I am still working with the IRS Chief Counsel’s Office on the Service’s
23 position regarding pursuit of the Civil Tax Assessments outside of the Court Ordered
24 Restitution.⁷ In the interim, I will continue to conduct the Collection Investigation.”

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26 ⁶ This counsel was out of town and unavailable to attend the meeting.

27 ⁷ Once again, Revenue Officer Kelly appears to misunderstand the fact that there are no
28 applicable civil assessments outside the Court’s Restitution Order.

1 Revenue Officer Kelly demanded response by July 9, 2012. (See Exhibit “F”).

2 Counsel for defendant then contacted this Court and requested a hearing for July
3 30, 2012, in order to determine whether the IRS may legally continue their restitution
4 collection efforts. Revenue Officer Kelly has agreed to extend compliance with her latest
5 demands until July 31, 2012.

6 II.

7 THE COLLECTION OF RESTITUTION BY THE 8 INTERNAL REVENUE SERVICE IS VIOLATIVE 9 OF 18 U.S.C. § 3664(i)

10 Title 18 U.S.C. Section 3664 governs and controls the procedure for issuance and
11 enforcement of orders of restitution by a United States District Court. Title 18 U.S.C. §
12 3664(i) reads:

13 “If the court finds that more than 1 victim has sustained a loss
14 requiring restitution by a defendant, the court may provide for
15 a different payment schedule for each victim based on the type
16 and amount of each victims’s loss and accounting for the
17 economic circumstances of each victim. In any case in which
the United States is a victim, the court shall ensure that all other
victims receive full restitution before the United States receives
any restitution.”

18 The Restitution Order in this cause names four (4) victims; three (3) private health
19 insurance companies and the IRS. As of this date, the private victims have been paid
20 restitution on a pro rata basis, pursuant to the Restitution Order. However, the private
21 victims have not been paid in full. This Court must ensure that the insurance companies
22 are paid in full before the IRS may collect restitution from the defendant. The IRS
23 “collection proceedings” are violative of 18 U.S.C. § 3664(i) and should cease.

24 III.

25 THE COLLECTION OF RESTITUTION BY THE INTERNAL 26 REVENUE SERVICE IN THIS CAUSE IS VIOLATIVE 27 OF 18 U.S.C. § 3612(c)

28 Title 18 U.S.C. Section 3612 governs the collection of unpaid fines or restitution

1 in United States District Courts. Title 18 U.S.C. § 3612(c) reads:

2 “(c) Responsibility for collection -

3 The Attorney General shall be responsible for collection of an
4 unpaid fine or restitution concerning which a certification has
been issued as provided in subsection (b).”⁸

5 The restitution order in this cause is contained in the Judgment and, as it pertains
6 to the IRS, is a Special Condition of Supervised Release. The Special Condition orders
7 the defendant to:

8 “Pay all federal income taxes, penalties, and interest lawfully
9 determined to be due and owing for calendar years 1998-2003.”

10 This order covers any and all monies owing to the IRS for tax years 1998-2003. Thus,
11 although the IRS may assist in **determining** the amount of penalties and interest owing, it
12 has no role in the **collection** of the penalties and interest owing. That is the sole function
13 of the Attorney General - not the Internal Revenue Service. In this cause, there are no
14 “Civil Tax Assessments outside of the Court Ordered Restitution” which can be sought by
15 Revenue Officer Kelly. All tax assessments for 1998-2003 are within the Court ordered
16 restitution, and are subject to collection by the Attorney General (FLU of the U.S.
17 Attorney’s Office). Collection of the IRS restitution, once it becomes timely, is within the
18 **sole** province of the U.S. Attorney’s Office.

19 This same issue was considered by the Eleventh Circuit in *Creel v. Commissioner*,
20 419 F.3d 1135 (11th Cir. 2005). In *Creel*, defendant pleaded guilty to a two count
21 information charging wilful failure to file federal income tax returns and, as part of the
22 plea agreement, agreed to make full restitution to the IRS of the amount of loss resulting
23 from his failure to file returns for the years 1986-1991. At sentencing, Creel was placed
24 on probation and was ordered to make restitution to the IRS in the amount of \$83,830
25 **plus any applicable penalties and interest.**” (emphasis original). Creel made his
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28 ⁸ Subsection (b) refers to a restitution order contained in a District Court Judgment.

1 restitution payments during the period of probation and paid the \$83,830 tax liability in
2 full. At the conclusion of probation, the USAO issued a Satisfaction Judgment indicating
3 that defendant's restitution to the IRS had been paid in full.

4 The IRS began collection proceedings to collect the unpaid penalties and interest
5 for the pertinent years. Creel petitioned the United States Tax Court for relief. The Tax
6 Court found that Creel's payment of \$83,830, and the U.S. Attorney's issuance of a
7 Satisfaction of Judgment, settled all civil tax liabilities to the IRS. The Commissioner
8 appealed.

9 The Eleventh Circuit agreed that Creel's tax liabilities had been satisfied. Under
10 the facts of the case, when the District Court included **all applicable penalties and**
11 **interest** within the restitution order, Creel's civil tax liabilities were "inextricably
12 intertwined" with his criminal tax liabilities, which together formed a condition of his
13 probation. *Id.*, at 1142. Because the United States Attorney has the authority to settle the
14 criminal side of the case, and the civil penalties were consolidated within the criminal
15 case, the Court found that the authority to collect and/or settle the entire tax liability rests
16 with the United States Attorney. Had the restitution condition of probation **not** included
17 penalties and interest, the IRS could have attempted to collect those liabilities.

18 The instant case is identical to *Creel*. The restitution condition of supervised
19 release includes all penalties and interest applicable to years 1998-2003. The collection
20 and/or settlement of this tax liability is wholly within the jurisdiction of this United States
21 Attorney. There are no "civil tax assessments outside of the court ordered restitution"
22 which could be the subject of an IRS collection proceeding in this cause. The collection
23 efforts of the IRS are improper and must cease.

24 IV.

25 CONCLUSION

26 For the aforementioned reasons, defendant GERONIMO RUBIO respectfully
27 requests this Court to enter an Order that the Internal Revenue Service comply with the
28 Restitution Order of this Court, Title 18 U.S.C. §§ 3664(i) and 3612(c) and terminate

1 restitution collection proceedings directed at defendant.

2 Respectfully submitted,

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4 Dated: July 16, 2012

s/Frank T. Vecchione
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