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 GERONIMO RUBIO

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA  
 (Honorable John A. Houston)

UNITED STATES OF AMERICA,	)	CASE NO. 04CR1276-002-JAH
	)	
Plaintiff,	)	<b>JOINT MOTION TO AMEND</b>
	)	<b>RESTITUTION ORDER OF</b>
vs.	)	<b>DEFENDANT GERONIMO RUBIO</b>
	)	
GERONIMO RUBIO (2),	)	
	)	
Defendant.	)	
	)	

COMES NOW the Plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Laura E. Duffy, United States Attorney, and Carol M. Lee, Assistant United States Attorney, and Defendant, GERONIMO RUBIO, by and through his counsel, Frank T. Vecchione, and HEREBY JOINTLY move this Court for an amended Restitution Order with regard to defendant GERONIMO RUBIO. The parties are requesting an Amended Order<sup>1</sup> for Defendant Rubio to reflect that: 1)

<sup>1</sup>The requested Amended Order does not change the original total amount of restitution owed by the defendants.

1 Defendant Rubio is not jointly and severally liable for the restitution owed to private victims; 2)  
 2 Should co-defendant Fry not fulfill his obligation to the private victims by the end of his supervised  
 3 release term, Defendant Rubio will assume that liability; 3) Defendant Rubio owes and has paid in  
 4 full \$44,050 in restitution to the private victims; 4) a new payment schedule as follows: payment of  
 5 \$56,311 in January 2013, and 10 consecutive monthly payments of \$25,000 per month beginning  
 6 on February 15, 2013, and on the 15<sup>th</sup> of each month thereafter; 5) the removal of the term “interest  
 7 and penalties” as it applies to the IRS restitution;<sup>2</sup> and 6) the fine of \$7,500 which remains owing  
 8 shall be paid in full immediately following the final restitution payment to the IRS, pursuant to 18  
 9 U.S.C. § 3612(c).

10 This Joint Motion is based upon the instant motion, the attached Declaration of Defense  
 11 Counsel Frank Vecchione, Title 18 U.S.C. § 3664, the files and records in this case, and all other  
 12 matters this Court may consider prior to the determination of this motion.

# I

## BACKGROUND

15 On June 28, 2007, Defendant Geronimo Rubio and co-defendant William Fry pled guilty to  
 16 health care and tax charges pursuant to a written plea agreement. Doc. No. 174. Defendant was  
 17 sentenced by this Court to twelve months’ custody and three years of supervised release. Doc. No.  
 18 277. A restitution order was imposed directing payment to health care fraud victims (private  
 19 victims) and the Internal Revenue Service (IRS). Doc. Nos. 277 and 284. On June 8, 2010, an  
 20 Amended Judgment was filed modifying and correcting the earlier restitution order of this Court.  
 21 Doc. 288. The Amended Order was revised to reflect Defendant’s payment of \$50,000 to the  
 22 Department of Treasury prior to sentencing. Id. The Judgment was also amended to include  
 23 language that the two defendants were jointly and severally liable for the health care fraud restitution  
 24 of \$63,237.42, for three private health care victims. Id. Each defendant is individually responsible  
 25 for their remaining unpaid restitution to the IRS. Id. For Defendant, this individual amount owed

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26  
 27 <sup>2</sup>The parties agree that the total restitution owed does not include penalties and interest  
 28 assessed pursuant to Title 26 of the United States Code, and such penalties and interest will not be  
 considered paid or compromised pursuant to the terms of this motion or the payment of restitution.

1 to the IRS is \$306,311.00. Id. In addition, a fine of \$7,500.00 was imposed for Defendant Rubio.  
 2 Id.

3 This Court ordered payment at a monthly rate of \$500 to restitution and \$200 to the fine for  
 4 a total of \$700 per month as to both Defendants. Id. Upon release from custody, Defendant began  
 5 his monthly payments in April 2011. However, the payments by both defendants were applied fully  
 6 to restitution pursuant to 18 U.S.C. § 3612 and not separately as contemplated by this Court. See  
 7 Attached Declaration of Frank Vecchione.

8 Last year, the U.S. Attorney's Office, Financial Litigation Unit, learned that Defendant's  
 9 finances and monthly income were significantly improved and had changed since the time of  
 10 Defendant's sentencing. Id. After an analysis of Defendant's financial condition, the parties agreed  
 11 to recommend a new accelerated payment schedule to this Court and seek an Amended Order for  
 12 Defendant Rubio.

## 13 II

### 14 ARGUMENT

15 According to Title 18, United States Code, Section 3664(o), a sentence imposing an order  
 16 of restitution is a final judgment but such a sentence can subsequently be adjusted under 18 U.S.C.  
 17 3664(k) when there is "a material change in the defendant's economic circumstances." The United  
 18 States may notify the court of this change. "Upon receipt of the notification, the court may, on its  
 19 own motion or the motion of any party, . . . adjust the payment schedule, . . . as the interest of justice  
 20 require." 18 U.S.C. § 3664(k).

21 Title 18, United States Code, Section 3612, dictates that money received from a defendant  
 22 shall be disbursed in the following sequence until each obligation is paid in full:

23 (1) A penalty assessment under section 3013 of Title 18, United States Code,

24 (2) Restitution of all victims.

25 (3) All other fines, penalties, costs, and other payments required . . . .

26 18 U.S.C. § 3612 (c). Further, in a case where the United States is a victim, the court must ensure  
 27 that all other victims receive full restitution before the United States receives any amount of  
 28 restitution. 18 U.S.C. § 3664(i).

Here, the parties discovered that Defendant Rubio has the financial ability to accelerate his restitution payments but because he is under Court-ordered payments of \$700 per month, the parties must seek an amended order from the Court. See attached declaration of Frank Vecchione. Additionally, the fine remains outstanding as the Clerk's Office continued to apply the full monthly payment to restitution and not the fine, despite the Court's order that they be divided. Id. However, there are two components to Defendant Rubio's restitution; payment of \$63,237.42 restitution to private victims which is joint and several, and payment of \$306,311 to the IRS, which is not joint and several. Doc. 288. Defendant has already paid \$44,050 toward the total private restitution. Id. There is a remaining balance of \$5,882.42.<sup>3</sup> The parties would like to have Defendant Rubio begin paying restitution to the IRS. To that end, Defendant Rubio has agreed to pay \$56,311 to his outstanding IRS restitution in January 2013.<sup>4</sup> Id. Thereafter, Defendant Rubio will make ten consecutive monthly payments of \$25,000 per month beginning February 15, 2013. Id. The remaining balance to be paid to the private victims will continue to be paid by co-defendant Fry.<sup>2</sup> However, 18 U.S.C. § 3664(i) mandates that the United States comes last in the sequence of disbursement for restitution and since there is a remaining restitution balance for the private victims, Defendant Rubio cannot begin IRS payments until the original Order is amended. In order to have Defendant Rubio begin paying the IRS, his payment of \$44,050 to the private restitution must be ordered as satisfied and not joint and several with co-defendant Fry. These proposed changes take into account Defendant Rubio's ability to pay restitution, and the need to make the victims whole, as the interests of justice require. 18 U.S.C. § 3664 (k).

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<sup>3</sup>Co-defendant Fry has paid \$13,305 of private restitution, therefore, the total paid to private restitution is \$57,355. The remaining balance is \$5,882.42, to be paid by co-defendant Fry.

<sup>4</sup>This does not affect co-defendant Fry's payment of \$700 per month which will continue till the remaining balance of \$5,882.42 to the private victims is paid. Nor does this affect co-defendant Fry's separate individual liability owed to the IRS. Changing the joint and several liability status of defendants as to the private victim restitution will enable Defendant Rubio to begin paying the IRS restitution at an accelerated rate.

<sup>2</sup>Defendant Rubio has agreed to assume co-defendant Fry's liability for private restitution if Fry fails to pay the remaining balance at the end of Fry's supervised release.

1 //

2 III

3 CONCLUSION

4 The parties respectfully request that the Court enter an Amended Order for Defendant Rubio  
5 to reflect that: 1) Defendant Rubio is not jointly and severally liable for the restitution owed to  
6 private victims; 2) Should co-defendant Fry not fulfill his obligation to the private victims by the  
7 end of his supervised release term, Defendant Rubio will assume that liability; 3) Defendant Rubio  
8 owes and has paid in full \$44,050 in restitution to the private victims; 4) a new payment schedule  
9 as follows: payment of \$56,311 in January 2013, and 10 consecutive monthly payments of \$25,000  
10 per month beginning on February 15, 2013, and on the 15<sup>th</sup> of each month thereafter; 5) the removal  
11 of the term "interest and penalties" as it applies to the IRS restitution; and 6) the fine of \$7,500  
12 which remains owing shall be paid in full immediately following the final restitution payment to the  
13 IRS, pursuant to 18 U.S.C. § 3612(c).

14 Respectfully submitted,

15 Dated: January 17, 2013

LAURA E. DUFFY  
United States Attorney

17 s/Carol M. Lee  
18 CAROL M. LEE  
Assistant United States Attorney  
19 Attorney for Plaintiff  
UNITED STATES OF AMERICA  
20 Email: carol.lee@usdoj.gov

21 Dated: January 17, 2013

s/Frank T. Vecchione  
22 FRANK T. VECCHIONE  
Attorney for Defendant  
23 GERONIMO RUBIO  
24 Email: ftvlaw@aol.com

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26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ) Case No. 04CR1276-JAH  
 )  
Plaintiff, )  
 )  
v. ) CERTIFICATE OF SERVICE  
 )  
GERONIMO RUBIO, )  
 )  
Defendant. )

IT IS HEREBY CERTIFIED THAT:

I, Carol M. Lee, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Joint Motion to Amend Restitution Order of Defendant Geronimo Rubio on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

N/A

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

Frank T. Vecchione  
Law Office of Frank T. Vecchione  
105 West F. Street, Suite 215  
San Diego, CA 92101

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 17, 2013.

S/CAROL M. LEE  
Carol M. Lee