

Pmw

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	No. 06 CR 964
vs.)	Judge Ronald A. Guzman
)	
MICHAEL E. KELLY)	

ORDER

This matter comes on to be heard on the report of the Special Master appointed in this case concerning certain litigation now pending in the United States District Court for the Northern District of Texas captioned *IP FUND 1, Inc. v. MICHAEL E. KELLY et al.*, case number 3:07-CV-1556-P. On October 22, 2012, this Court was informed by the Special Master that on October 16, 2012, an order was entered in that case granting the plaintiffs' motion to reconsider the dismissal of certain defendants. [Dkt. # 154]. It appears from this order that in granting relief, United States District Judge Jorge A. Solis relied on various representations made by plaintiffs. This Court is concerned that certain of these representations are not accurate concerning the Special Master's purported authority and agreement to accept service of process on behalf of others, this Court's alleged establishment of a claims procedure outside this criminal case, and the nature of the IP FUND 1 INC.'s ("IP FUND")'s "participation" in this criminal case. Specifically, Judge Solis's October 16 order states:

Now before the Court is Plaintiffs' Motion to Reconsider the Court's decision to

dismiss all unserved foreign Defendants for want of prosecution. (Docket #152.) Plaintiffs insist they have been pursuing service options on the foreign Defendants. They also contend they have been monitoring and participating in criminal proceedings against Defendant Michael Kelly in the Northern District of Illinois. In that action, a Special Master has been appointed to pursue recovery of monies owed to investors including Plaintiffs. The Illinois court also established a claims procedure in July 2010 whereby investors could pursue claims outside the criminal restitution procedure. Plaintiffs maintain they were told the Special Master would accept service on behalf of the foreign Defendants and therefore, they requested that the Special Master accept such service. At the time this motion was filed, the Special Master had not responded to Plaintiffs' request.

In response, this Court states:

1. In appointing the Special Master in 2009, this Court did not authorize, nor has it since authorized, the Special Master to accept service of process on behalf of the defendant in this criminal case or on behalf of any other person or entity.¹

2. The Court accepts the representations of the Special Master that he has not advised the IP Fund or any other person that he would accept service of process on behalf of any person or entity related to the litigation in the Northern District of Texas.

3. On June 14, 2009 this Court entered an order governing the procedures for victims to claim restitution [Dkt. #419].² The order stated in part: “[N]o part of this order shall preclude victims from seeking to enforce any claims they may have against Michael E. Kelly in his personal capacity, or against any agent, servant, co- conspirator of Michael E. Kelly or any assets owned by or affiliated with Michael E. Kelly that have not been

¹ The Order Appointing the Special Master in this case and defining his duties and authority was entered on February 10, 2009. [Dkt. #100].

² This order was superseded in part by the order of July 28, 2009 [Dkt. #460].

transferred to the control of the court through the Special Master” [Dkt. #419, p. 8]. This language did not establish a claims procedure “whereby investors could pursue claims outside the criminal restitution procedure” as the IP FUND plaintiffs have apparently represented to Judge Solis. This language was simply an acknowledgment that the Mandatory Victims Restitution Act (18 U.S.C. § 3663A) does not prohibit a victim from seeking an additional civil remedy to which he is entitled.

4. It also appears that a clarification of the IP FUND plaintiffs’ “participation” in this criminal case is necessary. The record reflects that the IP FUND, associated persons, and its spokesperson, Ernest Bustos, have filed a number of objections, “Advisories,” and a motion for injunction concerning various matters before the Court concerning restitution, all of which relief this Court has denied. The record also reflects that on December 23, 2008, this Court denied the motion of the IP FUND to appoint its own entity to serve as Special Master.

5. In April 2010, Bustos (and 58 others associated with him) filed motions to intervene in this criminal case. These motions were denied on May 25, 2010 and again on July 2010. Thereafter, on July 23, 2010, Bustos filed a Petition for Mandamus with the United States Court of Appeals for the Seventh Circuit (No. 10-2752) seeking the writ to compel this Court to permit Bustos to intervene in the criminal case. The petition asserted that this Court had not honored Bustos’s rights as a crime victim as prescribed by the Crime Victims’ Rights Act, 18 U.S.C. § 3771. In denying the petition on July 26, 2010, the Court

2010, the Court of Appeals, without briefing, ruled:

The function of §3771(a) is to ensure that victims are heard out. Giving victims a voice in the criminal process differs from giving them a *veto power*, which often is both the goal and the effect of intervention. For a settlement depends on the consent of all parties. The district court, the United States Attorney, the SEC, and the receiver appear to believe that it may be possible to provide for restitution in a way that will maximize the pool of assets, and thus the amount each victim can receive. But if as a result of intervention every victim acquires a power to reject the proposed disposition, the process may either collapse or yield a less satisfactory result.

6. In summary, this Court has authorized the Special Master solely in this criminal case to obtain, maintain, and liquidate the defendant's assets and to make authorized distributions of restitution for the benefit of victims of the charged scheme to defraud. The Special Master has no authority to accept service of process for other persons or entities in other litigation.

ENTER


RONALD A. GUZMAN
UNITED STATES DISTRICT JUDGE

October 31, 2012