

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Newport News Division**

IN RE:

MICHAEL D. VICK,  
Debtor.

CASE NO. 08-50775-FJS  
Chapter 11

UNITED STATES OF AMERICA,  
Movant,

v.

MICHAEL D. VICK,  
Respondent.

Contested Matter

UNITED STATES' MOTION AND MEMORANDUM  
FOR RELIEF FROM AUTOMATIC STAY

COMES NOW THE UNITED STATES OF AMERICA on behalf of its United States Marshal's Service ("USMS") and Internal Revenue Service ("IRS") and by and through its undersigned counsel, and, pursuant to Federal Rule of Bankruptcy Procedure 4001(a)(1), hereby moves the Court to enter an order granting the United States relief from the automatic stay to permit USMS and IRS to setoff an overpayment of restitution paid by the debtor and held by USMS. Attached hereto in support of this Motion are the following documents: Plea Agreement in the case of *United States v. Michael Vick*, Criminal No. 3:07cr274, Exhibit 1 ("Plea Agreement"); Judgment in a Criminal Case and Restitution Judgment in the case of *United States v. Michael Vick*, Criminal No. 3:07cr274, Exhibit 2; Declaration of Caroline Catalano, Exhibit 3 ("Catalano Dec."); Consolidated Asset Tracking System Report, Exhibit 3-1 ("CATS Report"); Declaration of Bethanne Marik-Dinkins, Exhibit 4 ("Dinkins Dec."); Summary Spreadsheet, Exhibit 4-1; and IRS

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Proof of Claim, Exhibit 5. The grounds for this motion are as follows:

1. The debtor, Michael Vick, filed bankruptcy on July 7, 2008.
2. In *United States v. Approximately 53 Pit Bull Dogs*, Case No. 3:07cv397, the Court entered an Order forfeiting fifty-three pit bull dogs (the “Pit Bulls”). The Pit Bulls were at various animal shelters and facilities. (Dinkins Dec., at ¶¶ 1-5, Exhibit 4).
3. USDA was assigned the responsibility of paying for the care and maintenance of the Pit Bulls. (Catalano Dec., at ¶¶ 1-8, Exhibit 3; Dinkins Dec., at ¶ 5, Exhibit 4).
4. USDA did not have allocated, budgeted funds which could be used to pay such costs. A decision was made to have USDA use money from the Department of Justice’s (“DOJ”) Asset Forfeiture Fund (“AFF”) to pay costs to care and treat the Pit Bulls. (Dinkins Dec., at ¶¶ 5-8, 11-12).
5. USDA reprogrammed AFF money previously received by it and also received additional allotted AFF money to pay expenses for the Pit Bulls. All of this money was transferred from DOJ to USDA. (Dinkins Dec., at ¶ 7, Exhibit 4).
6. USMS also paid from AFF money expenses and costs associated with the Pit Bulls. USMS paid from AFF money \$883.50 in advertising expenses in connection with *United States v. Approximately 53 Pit Bull Dogs*, Case No. 3:07cv397 and \$6,253.45 to Sussex County, Virginia to reimburse it for repair bills for damage cause by some of the Pit Bulls. (Catalano Dec., at ¶¶ 6-7, Exhibit 3; Dinkins Dec., at ¶¶ 8, 11-12, Exhibit 4).
7. On August 24, 2007, a Plea Agreement was filed in the case of *United States v. Michael Vick*, Criminal No. 3:07cr274. The Plea Agreement was signed by the debtor. On August 24, 2007, a Plea Agreement was filed in the case of *United States v. Michael Vick*, Criminal No.

3:07cr274. (Plea Agreement, Exhibit 1).

8. In Paragraph 8 of the Plea Agreement, the debtor agreed to:

[M]ake restitution for the full amount of the costs associated with the disposition of all dogs which are currently the subject of the civil action known as *United States v. Approximately 53 Pit Bull Dogs*, Case No. 3:07cv397. Such costs may include, but are not limited to, all costs associated with the care of the dogs involved in that case, including if necessary, the long-term care and/or the humane euthanasia of some or all of those animals as may be directed by the court in that case.”

(Plea Agreement, at ¶8, p. 5, Exhibit 1).

9. On December 10, 2007, the debtor was convicted upon his entry of a guilty plea in the case of *United States v. Michael Vick*, Criminal No. 3:07cr274. As part of his sentence, debtor was ordered to pay restitution totaling \$928,073.04 to several persons, including the United States. (Judgment in a Criminal Case and Restitution Judgment, at ¶ 1, p. 7, Exhibit 2).

10. On December 10, 2007, the Court entered a Restitution Judgment against the debtor in the case of *United States v. Michael Vick*, Criminal No. 3:07cr274 . Paragraph 2 of the Restitution Judgment stated:

The amount of restitution and recipients are set forth in Exhibit A. The Amount of restitution shall not exceed any recipient’s total expenses associated with the care and maintenance of the dogs. In the event a recipient determines that it has received an overpayment, such excess funds shall be immediately returned to the court registry for refund to the defendant.

(Judgment in a Criminal Case and Restitution Judgment, at ¶ 2, p. 7, Exhibit 2).

11. Exhibit A to the Restitution Judgment listed the amounts of restitution to be paid to various parties. The sum of \$566,875 was to be paid to various private animal rescue organizations. (Exhibit A to Judgment in a Criminal Case and Restitution Judgment, at pp. 9-10, Exhibit 2). Page 3 of Exhibit A to the Restitution Judgment listed the reimbursable expenses to be paid to USMS for purposes of reimbursing the Asset Forfeiture Fund. Specifically, debtor was ordered to pay as

restitution “\$361,198.04 payable to ‘USDA c/o USMS’ with notation ‘Vick Reimbursement’ for purpose of reimbursing the Assets Forfeiture Fund for costs incurred by USDA.” (Exhibit A to Judgment in a Criminal Case and Restitution Judgement, at p. 11, Exhibit 2).

12. The Restitution Judgment did not include a specific line item for the advertising expenses paid by USMS.” (Exhibit A to Judgment in a Criminal Case and Restitution Judgement, at p. 11, Exhibit 2; Catalano Dec., at p. 11, Exhibit 3).

13. At the time the Restitution Judgment was entered, the exact amount of expenses related to the Pit Bulls was not known and accordingly was estimated on the Restitution Judgment. (Dinkins Dec., at ¶ 11, Exhibit 4).

14. On or about January 16, 2008, Debtor fully paid his restitution obligation to the United States. (Catalano Dec., at ¶ 12, Exhibit 3; Dinkins Dec., at ¶¶ 13, Exhibit 4).

15. The actual expenses for the care and treatment of the dogs paid from the Asset Forfeiture Fund were \$338,182.20. (Catalano Dec., at ¶¶ 12-15, Exhibit 3; CATS Report, at p. 16, Exhibit 3-1; Dinkins Dec., at ¶¶ 13, Exhibit 4; Summary Spreadsheet, Exhibit 4-1).

16. The actual expenses paid for the care and treatment of the dogs paid from the Asset Forfeiture Fund (\$338,182.20) were less than the restitution funds paid to or recovered by the United States (\$361,268.04). (Catalano Dec., at ¶¶ 16-17, Exhibit 3; Dinkins Dec., at ¶¶ 12-15, Exhibit 4; Summary Spreadsheet, Exhibit 4-1).

17. Debtor overpaid his restitution obligation by \$23,086.84 (the “Excess Funds”). (Catalano Dec., at ¶¶ 16-17, Exhibit 3; Dinkins Dec., at ¶¶ 13, Exhibit 4).

18. USMS wrote a check dated July 16, 2008 in the amount of \$23,016.84 to refund the overpayment. (Catalano Dec., at ¶ 18, Exhibit 3).

19. The check was voided and the account frozen in order to preserve the United States' setoff rights. (Catalano Dec., at ¶ 18, Exhibit 3).

20. USMS is holding the Excess Funds. (Catalano Dec., at ¶¶ 16-17, Exhibit 3).

21. USMS has the right to setoff its advertising expenses against the Excess Funds. *See* 11 U.S.C. §553(a).

22. If USMS is permitted to setoff the Excess Funds, \$22,203.34 in Excess Funds will remain.

23. Debtor owes to IRS \$409,182.21 in secured taxes, penalties and interest for 2006 (the "secured tax claim"), calculated to the petition date. (IRS Proof of Claim, Exhibit 5).

24. On May 16, 2008, the IRS filed a Notice of Federal Tax Lien against the debtor with the Clerk of the Circuit Court for the City of Hampton, Virginia. (IRS Proof of Claim, Exhibit 5).

25. IRS's secured tax claim is partially secured by the right to setoff the remaining Excess Funds in the amount of \$22,203.34.

26. Currently, it is recognized that the United States is a single government creditor for purposes of Section 553 and may exercise setoff rights across agency lines. *See United States v. Maxwell*, 157 F.3d 1099, 1102 (7<sup>th</sup> Cir. 1998); *In re Hal, Inc.*, 122 F.3d 851, 852-53 (9<sup>th</sup> Cir. 1997); *Turner v. Small Business Administration*, 84 F.3d 1294, 1296 (10<sup>th</sup> Cir. 1996); *In re Chateaugay Corp.*, 94 F.3d 772,779 (2<sup>nd</sup> cir. 1996); *and Doe v. United States*, 58 F.3d 494, 498 (9<sup>th</sup> Cir. 1995)(all allowing inter-agency setoff). *See also Cherry Cotton Mills v. United States*, 327 U.S. 536 (1946)(holding in a nonbankruptcy case that United States is a unitary creditor).<sup>1</sup>

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<sup>1</sup> In the past, a minority of case held that there was no mutuality between different governmental agencies for purposed of Section 553. The main cases were *In re Hancock*, 137 B.R. 835, 840 (Bankr. N.D. Okla. 1992), *In re Ionosphere Clubs, Inc.*, 164 B.R. 839 (Bankr.

27. Cause exists to grant the United States relief from stay. If it refunds the Excess Funds, it will lose its setoff rights.

28. The United States is not adequately protected.

29. Cause exists to grant the United States relief from stay to effectuate setoff under Section 362(d)(1).

30. Cause exists to waive the ten day stay established by Federal Rule of Bankruptcy Procedure 4001(a)(3).

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S.D.N.Y. 1994) and *In re Lakeside Community Hosp., Inc.*, 139 B.R. 886 (Bankr. N.D.Ill. 1992), aff'd, 151 B.R. 887 (N.D.Ill. 1993). It appears that this minority line of cases has been soundly rejected. Indeed, the holdings of *Hancock*, *Ionosphere* and *Lakeside* have been abrogated by decisions in other, later cases within their respective Circuits.

WHEREFORE, the United States respectfully requests that the Court enter an order granting the present motion, lifting the automatic stay to allow the setoff of the Excess Funds, permitting USMS to setoff \$883.50 of the Excess Funds against USMS's claim for advertising expenses, permitting the IRS to setoff \$22,203.34 of the Excess Funds against IRS's secured tax claim, waiving the ten day stay established by Federal Rule of Bankruptcy Procedure 4001(a)(3), and granting the United States such other relief as the Court may deem appropriate.

Date: September 18, 2008.

Respectfully submitted,

Chuck Rosenberg  
United States Attorney

By: /s/ Greg D. Stefan  
Greg D. Stefan  
Assistant United States Attorney

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NEWPORT NEWS DIVISION

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CASE NO. 08-50775-FJS  
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Contested Matter

NOTICE OF UNITED STATES' MOTION FOR RELIEF FROM AUTOMATIC STAY

The United States of America has filed papers with the Court seeking relief from the automatic stay. In that motion, the United States asks the Court to lift the automatic stay to permit the United States to setoff funds being held by the United States Marshal's Service ("USMS") against a fee owing to USMS and taxes owing to IRS.

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one. (If you do not have an attorney, you may wish to consult one).

If you do not want the Court to grant the motion, then on or before 15 days from the date of service of this Notice, you or your attorney must:

File with the Court, a written response to the motion, explaining your position, at:

Clerk's Office  
U. S. Bankruptcy Court  
600 Granby Street, Room 400  
Norfolk, VA 23510

If you mail your response to the Court for filing, you must mail it early enough so the Court will receive it on or before the date stated above.

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E-Mail: greg.stefan@usdoj.gov  
Counsel for the United States.

You must also mail a copy to:

Greg D. Stefan  
Assistant U. S. Attorney  
8000 World Trade Center  
101 West Main Street  
Norfolk, VA 23510

Kenneth N. Whitehurst, III  
200 Granby Street, Room 625  
Norfolk, VA 23510

You or your attorney also must attend the preliminary hearing to be scheduled regarding the United States' motion for relief from stay. You will receive from the Court separate notice setting forth the date, time and location of the preliminary hearing.

If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the motion and may enter an order granting that relief without further notice or hearing.

Date: September 18, 2008.

Respectfully submitted,

Chuck Rosenberg  
United States Attorney

Signature: /s/ Greg D. Stefan  
Greg D. Stefan  
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion, Notice and Exhibits 1, 2, 3, 3-1, 4, 4-1 and 5 have this 18<sup>th</sup> day of September 2008, been placed in the United States mail, first class, postage prepaid, and properly addressed to all members of the Official Committee of Unsecured Creditors, the debtor, debtor's counsel and the persons listed on the Service List attached hereto as Attachment A, including:

Michael D. Vick  
USP Leavenworth  
P.O. Box 100  
Leavenworth, KS 66048

Steve Friedberg, Esquire  
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Main Street Centre  
600 East Main Street  
Suite 1601  
Richmond, VA 23219

I further certify that copies of the foregoing Motion, Notice and Exhibits 1, 2, 3, 3-1, 4, 4-1 and 5 will be served this 18<sup>th</sup> day of September 2008, via the ECF e-mail notification system to all persons registered to receive electronic notice of filings in this case at their e-mail addresses of record, including the following:

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/s/Greg D. Stefan  
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