Attachment D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA, v. LONNIE BRANTLEY, Defendant, and ANNA BRANTLEY and FIRST FINANCIAL BANK, Interested Third Parties.[1]	No. 4:15-CR-225-BJ

GOVERNMENT'S MOTION FOR FINDING OF DEFAULT AND/OR RESENTENCING, AVOIDANCE OF FRAUDULENT TRANSFERS, THE SALE OF REAL PROPERTY, AND INCREASED PAYMENT SCHEDULE

Respectfully submitted,

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[1] Joined and noticed pursuant to 28 U.S.C. §§ 3012, 3013, 3202(c), and 3304 as co-owner (Anna) and lienholder (First Financial Bank) of the real property located at 442 Marshall Road, Southlake, Texas.

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The United States of America (the government) moves this court for entry of orders of default in accordance with 18 U.S.C. § 3613A and/or resentencing under 18 U.S.C. § 3614, avoidance of fraudulent transfers of property under the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. § 3304(b)(1) and/or TEX. BUS. & COM. CODE ANN. § 24.005(a), the sale of real property pursuant to 18 U.S.C. § 3613A and 28 U.S.C. § 3306, and increased installment payments under 18 U.S.C. § 3664(k) and/or 28 U.S.C. § 3204. In support of this motion, the government states:

I. Factual Background

A. Lonnie has perpetually delayed and repeatedly refused to pay restitution beyond the minimum court-ordered monthly payments.

For over a year, Lonnie Brantley (Lonnie) has demonstrated a wonton disregard for his restitution obligations and obstructed justice by thwarting the government's numerous requests for financial information and attempts to collect his judgment debt.

1. Lonnie argued against applying the proceeds of a real property sale toward his restitution debt.

Lonnie first attempted to thwart the government's valid collection efforts by contesting the payoff required, extra-judicially, to obtain a release of judgment lien when he sold an investment property. *See* Petition for Release (Dkt. 26). After a hearing, this court denied Lonnie relief and allowed the government to keep the net proceeds from the sale of the real property at 2216 Snake River, Granbury, Texas 76048, just as lien payoffs routinely occur in the ordinary course of closing real property transactions. At the court's direction, immediately after the hearing, the parties met and conferred in person at the courthouse to discuss Lonnie's restitution requirements moving forward. During the

courthouse meeting, the government reiterated previous discussions in its meeting with Lonnie held approximately two months earlier at the United States Attorney's Office. In both meetings, the government explained its duty to collect restitution and presented various ways in which Lonnie may cooperate in payment of his debt to avoid enforced collection of the judgment through the panoply of remedies available to do so. In both meetings, the government emphasized that Brantley's voluntary cooperation in the liquidation of assets would be mutually beneficial to maximize recovery, reduce his debt, and minimize negative impact on his spouse, Anna Brantley (Anna), and his family. The government also reminded Lonnie that he must provide financial documents upon request as he had expressly agreed to do in his plea agreement. *See* Plea Agreement (Dkt. 11).

At the February 17, 2016 hearing, Lonnie alleged that he needed the money from the sale of the Snake River property to pay taxes owed by his company, Advantage Heating and Air Conditioning. In compromise, to accommodate Lonnie's continuing ability to operate his business, the government authorized Lonnie to sell his luxury vehicles to pay his company's tax bill.

Notwithstanding the 18 U.S.C. § 3613 lien against all of Lonnie's property and rights to property, the government further agreed to let him use some money from the sale of one of his luxury sport-utility vehicles (SUV) to buy a more reasonably priced non-luxury replacement vehicle. *See* Letter dated February 18, 2016 attached as Exhibit A.

2. Lonnie failed to sell his SUV and instead bought a newer and more expensive luxury vehicle.

When the government authorized Lonnie to sell a luxury SUV, it had already explained to him that he—as a judgment-debtor owing over $3 million in restitution—could not continue to drive expensive vehicles. The government informed Lonnie how he could voluntarily sell the vehicles to maximize recovery in lieu of involuntary execution sales. But Lonnie repeatedly refused to sell his vehicles. So after months of delay, the government sought and obtained a writ of execution. *See* Application for Writ of Execution (Dkt. 54). The United States Marshals Service (USMS) seized one of Lonnie's two luxury SUVs, a late model Chevrolet Suburban, in September of 2016, more than six months after he claimed he needed money from that vehicle to pay his tax bill.

While this court issued writs of execution for the levy of two vehicles—a Cadillac Escalade in addition to the Chevrolet Suburban—the USMS was only able to seize the Suburban from the Brantley home because Lonnie refused to get Anna to return there to surrender the Escalade to the USMS. At the court's request, the parties had a phone conference on August 24, 2016. Even after requiring judicial intervention, the government again attempted to accommodate Lonnie by allowing him to sell the Escalade instead of having the USMS seize and sell it. The government agreed to allow Lonnie to keep $15,000 from the proceeds of the Escalade sale to buy a reasonably priced non-luxury replacement vehicle. Anna was to use that vehicle as the family car, and Lonnie could use a work truck from his business to commute to work.

Yet this did not happen. Lonnie sold the 2015 Escalade to a Cadillac dealership for $55,000, so he should have paid $40,000 to the Clerk of the Court. Instead, he paid only $29,874.22 toward his restitution and kept an additional $10,125.78 for his benefit. *See* Declaration of Emily Shutt attached as Exhibit D. He used that money as a down payment to lease a new 2016 Cadillac Escalade that cost $82,388.31, which requires $775.22 monthly payments on the vehicle—payments that should be going to his victim.

In attempt to disguise this transaction, Lonnie titled the new Escalade in his mother-in-law's name even though Anna maintains possession, custody, and control of it. Anna even put the same vanity plate ("Mamma Z") on the new Escalade that she had on her previous model. *See id.* Lonnie and Anna wanted the transaction to look like a "sale" and not a "trade in" despite selling the 2015 Escalade to the dealership and using some of the proceeds towards the new 2016 model. *Id.*

Beyond disguising the transaction details, by titling the new Escalade in his mother-in-law's name, Lonnie also attempted to avoid violating one of his conditions of release. Lonnie is not to incur any new debt while on release, and a car lease would violate this condition. *See* Judgment (Dkt. 16 at 3, Special Conditions of Probation).

3. Lonnie failed to produce business records.

The government first requested financial documents related to Lonnie's company during its initial meeting with him in December of 2015. The government reiterated its request after the February 2016 hearing regarding the net proceeds from the sale of the Snake River property. The government sent a follow up letter on February 18, 2016, memorializing the agreement to let Lonnie sell his Escalade to pay his company's taxes

and including a list of action items required of Lonnie, including disclosure of his company's first quarter financial information. *See* Exhibit A.

Lonnie has yet to produce the requested documents nearly two years since the government has been asking for them. Counsel for the government frequently communicated with attorneys for Lonnie and Anna over this period only to be repeatedly rebuffed with excuses and delays. For example, in the government's application for a writ of execution on the vehicles, the government noted that it had contacted Lonnie's attorney at least 15 times by email in addition to numerous phone calls. (Dkt. 54 at n.4). Since that filing, the government has continuously tried to obtain financial information from their attorneys to no avail.[2] To aid in its recovery efforts, the government deposed Lonnie on January 12, 2017. *See* Deposition Transcript attached as Exhibit B. The government also noticed Anna's deposition for the same date, but she failed to appear. *See* Notice of Deposition and related communication attached as Exhibit E. Despite specifically requesting that Lonnie bring certain documents to his deposition, he did not bring them. *See* Exhibit B at 37:5-17. While the government again requested that Lonnie provide the documents after he failed to bring them to his deposition, more than nine months later, Lonnie still has not done so.

[2] Counsel for the government emailed opposing counsel on August 29, September 9, September 28, and October 25, 2016. And the government has called opposing counsel on multiple occasions.

4. Lonnie failed to set aside a post-nuptial agreement with Anna.

In 2015, a few months before he was indicted and pled guilty in his criminal case—and three years after marrying Anna—Lonnie signed a post-nuptial partition agreement that gave the couple's community property to Anna. *See* Postnuptial Agreement dated February 15, 2015 attached as Exhibit C. In this agreement, Lonnie did not receive anything in return. When questioned during his deposition, Lonnie provided the following reasoning for entering this agreement: "Just due to the fact of winding down the R.H. Lending Facilities, and so that, you know, my wife and children would have something and I would have something. For the best interest of my wife and my children and myself." *See* Exhibit B at 19:23–20:4. Yet Lonnie admits that he did not receive anything in the agreement, nor does the agreement mention R.H. Lending. *Id.* 20:5–9; 22:18–20. Further, the agreement contains a merger clause that makes it the sole agreement between the two parties. *See* Exhibit C at Article II, Section D.

Lonnie and Anna now attempt to use this post-nuptial agreement as a shield from the government's efforts to gather financial information and collect this court's restitution judgment. For example, Anna filed a motion to quash the government's subpoena to US Bank because she claimed US Bank only has her separate property. *See* Motion to Quash (Dkt. 63). Yet Anna failed to produce any support for her contention. And upon the court's order denying Anna's motion (Dkt. 65), the government received credit card bills that demonstrate Lonnie and Anna have failed to reduce their family's unnecessary, unreasonable, and excessive spending.

5. Lonnie structured Advantage Heating and Air Conditioning to pay Anna four times more than himself.

Lonnie set up Advantage Heating and Air Conditioning in Anna's name and arranged for her to receive approximately four times more than he does in salary while she works one fourth as many hours as Lonnie. This gross salary disparity coupled with the partition agreement shows a blatant attempt by Lonnie and Anna to limit the government's collection ability to 25% of Lonnie's artificially deflated salary. In the absence of the agreement, the government would be entitled to 25% of the married couple's combined salary under Texas's community property laws.

Lonnie cannot justify his low salary or Anna's high salary as commensurate compensation for the work that each of them perform. Anna does not have a background in plumbing, HVAC, or home improvement, while Lonnie at least previously did some work in the field. *See* Exhibit B at 13:1–4; 9:24–10:3. At the time the couple structured the company and set salaries, Anna worked part time (20 hours a week) while Lonnie worked up to 80 hours a week. *Id.* at 10:4–10; 47:2–6. Lonnie admitted Anna gets the kids in the afternoon and is the primary caregiver for their four children. *Id.* at 42:16–43:10.

Lonnie makes less per hour than any of his employees, even those that he supervises. *Id.* at 10:11–24. Lonnie makes $36,000 a year despite working 70–80 hours a week. *Id.* at 11:4–6. If he works 70 hours a week for 50 weeks a year, that is 3500 hours per year. Lonnie's compensation equates to a little over $10 an hour without accounting for overtime, while the company's lowest paid hourly employees make $15 to $24 an

hour. *Id.* at 12:4–5. By comparison, Anna makes around $120,000.[3] *Id.* at 48:14–49:5. But Lonnie could not explain why Anna is worth so much more to the company than he is—instead, he just says that the company was set up for her security and for the children. *Id.* Moreover, it is unclear how much money the couple makes from the business—whether from salary, dividends, or other remuneration—because Lonnie and Anna have still not produced any documents from the company despite repeated requests by the government for over a year.

6. Lonnie has failed to curb excessive spending.

Before pleading guilty, Lonnie routinely spent thousands of dollars a month on expensive vacations, high-end retail stores, upscale restaurants, and other unnecessary or unreasonable expenses. In late 2015, the government explained to Lonnie that he needed to curb excessive spending to use that money to pay off his restitution. While Lonnie may no longer routinely take $5,000 weekend trips to Vegas, he has continued to spend money on pool service, a concierge doctor, and expensive hotels, among other non-exempt categories.

As previously discussed, rather than use $15,000 to buy a used vehicle as agreed, Lonnie leased an $82,388.21 Escalade and now incurs a monthly $775.22 lease payment. Further, every month, Lonnie pays for pool service. Exhibit B at 31:25–32:4. He spends about $550 a month to Revolution Wellness, which is a concierge medicine service that

[3] During his deposition, Lonnie pleaded ignorance on financial matters, claiming that Anna handles the family finances. *See* Exhibit B at 26:20-25. Lonnie could not recall Anna's salary, which the government gleaned from a copy of her 2016 tax return.

advertises that its goal is to "provide our clients with the most luxurious and result-oriented experience available." Exhibit D ¶ 6. Lonnie spends about $1,800 a month on utilities, likely for expansive cell phone, Internet, and cable TV plans, in addition to heating and cooling a 5,000 square foot house. Lonnie has also refused to lower his standard of lodging accommodations. In February of 2016, he spent two nights in San Antonio at the luxury Omni La Mansion del Rio, which costs almost $400 a night. *Id.* ¶ 8. Later that year, he spent over $5,000 at the Horseshoe Bay resort. *Id.* ¶ 9.

7. Lonnie failed to recover equity from his house.

For over a year, the government has sought Lonnie's cooperation to recover approximately half a million dollars in equity in his home, either by voluntarily securing a home-equity loan or by selling the house. Lonnie steadfastly refuses to consider moving, despite his monthly mortgage approaching the IRS limits for a family of his size and in his location to spend a month in total for necessary expenses. *See Id.* ¶ 10.

Lonnie's house is worth an estimated $939,825, based on an average from online real estate websites Zillow, Realtor.com, and Homes.com. *Id.* ¶ 11. Further, the appraisal district's assessed value is $920,489. *Id.* Based on his credit report, which showed an outstanding balance of $445,743 on January 12, 2017, Lonnie has an estimated $494,082 net equity in his house. *Id.* Despite the unavailability of a homestead exemption under state law, Lonnie erroneously believes that the equity in his home is protected from a judicial sale. Exhibit B at 32:23-33:15.

Lonnie's failure to refinance or sell his house to recover equity not only deprives his victim of the cash value of the property, but his hefty monthly mortgage payment also reduces his ability to make larger monthly restitution payments. In addition, because of the size of the house, Lonnie's utilities, insurance, taxes, and recurring monthly bills related to this property are more expensive than what he is reasonably allowed. For example, Lonnie's electric bill routinely exceeds $600 a month with a high of $842.95 in August of 2016. Homeowner's insurance, property taxes, and other tangential costs all increase with his large expensive home. Lonnie could sell his house, get approximately $500,000 for his victim, and reduce his monthly living expenses, making more money available for installment payments towards his restitution debt.

B. Anna has also failed to comply with discovery in this case.

The government first noticed the depositions of Lonnie and Anna in late 2016. Exhibit E. To accommodate their attorney, the government rescheduled their depositions from December 2016 to January 12, 2017, the date specifically requested by their attorney. *Id.* However, the afternoon before the deposition, their attorney informed the government that he could not make the deposition. *Id.* The government declined to reschedule, and Lonnie showed up without Anna. John Taylor, an attorney who works with Lonnie and Anna's attorney, represented Lonnie during the deposition. Lonnie could not explain why his wife did not show up. *Id.* He made an excuse about how she needed to be at home for the kids (which again questions how much Anna works for "her" company). *Id.* Further, all of the Brantley kids are in school, so it is unclear why she

could not attend her deposition. Nine months have passed since Anna's scheduled deposition, and despite assurances that she would reschedule, she has failed to do so.

II. Authorities and Arguments for Alternative Remedies

There are several alternative and cumulative remedies available to this court to address Lonnie's resistance to the collection of his judgment debt.

A. The court should find Lonnie in default and/or resentence him.

The court should schedule a hearing to consider a finding of default and fashion an appropriate remedy as provided in 18 U.S.C. §§ 3613A-3614. Title 18 U.S.C. § 3613A(a)(1) provides that upon a finding of default on a restitution obligation, the court may revoke the defendant's supervised release, resentence the defendant under 18 U.S.C. § 3614, hold the defendant in contempt of court, enter a restraining order or injunction, order the sale of the defendant's property, accept a performance bond, enter or adjust a payment schedule, or take any other action necessary to obtain compliance. *See United States v. Vitek Supply Corp.*, 151 F.3d 580, 584 (7th Cir. 1998); *United States v. Payan*, 992 F.2d 1387, 1397 (5th Cir. 1993); *United States v. Roush*, 452 F. Supp. 2d 676, 679–80 (N.D. Tex. 2006). A defendant ordered to pay restitution is in default when he has failed to pay what he could in good faith. *United States v. Trigg*, 119 F.3d 493, 500 (7th Cir. 1997) (citing *United States v. Jaroszenko*, 92 F.3d 486, 492 (7th Cir. 1996);*United States v. Ahmad*, 2 F.3d 245, 249 (7th Cir. 1993)).

In determining the appropriate action, the court must consider the defendant's employment status, earning ability, financial resources, the willfulness in failing to comply with the restitution order, and any other circumstances that may have a bearing

on the defendant's ability or failure to comply with the order. 18 U.S.C. § 3613A(a)(2). The court may resentence a defendant who knowingly fails to pay restitution to any sentence which might have originally been imposed, 18 U.S.C. § 3614(a), or a term of imprisonment for willful refusal to pay or failure to make sufficient bona fide efforts to pay, 18 U.S.C. § 3614(b). But a defendant may not be incarcerated solely on the basis of inability to pay. 18 U.S.C. § 3614(c); *Payan*, 992 F. Supp. 2d at 1397.

B. The court should declare the Postnuptial Agreement void as fraudulent.

1. Actual fraud under 28 U.S.C. §§ 3304(b)(1)(A) and 3306 and Tex. Bus. & Com. Code An. § 24.005(a)(1).

Under both federal and Texas law, to prevail on a fraudulent transfer theory, the United States must show *either* (l) that the transfer was made with actual intent to hinder, delay, or defraud a creditor;[4] *or* (2) that the transfer was made by an insolvent debtor without receiving adequate consideration.[5] The United States should prevail under either theory.

The Postnuptial Agreement should be set aside under the FDCPA, which provides:

> [A] transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States, whether such debt arises before or after the transfer is made or the obligation is incurred, if the debtor makes the

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[4] For actual fraud, specific intent is inferred from consideration of all relevant factors. *See, e.g.*, 28 U.S.C. § 3304(b)(l)(A) and analogous fraudulent transfer provisions in the Bankruptcy Code, 11 U.S.C. § 548, and the Texas Uniform Fraudulent Transfer Act (TUFT A), TEX. Bus & COM. CODE ANN.§ 24.005(a)(l); *Phillips & Hornsby Litig. v. Glass*, 204 F. App'x 398, 401 (5th Cir. 2006) (citing *BMG Music v. Martinez*, 74 F.3d 87, 90–91 (5th Cir. 1996)).

[5] For constructive fraud, intent is irrelevant when a debtor conveys assets for inadequate consideration, rendering himself insolvent, at time when he has existing or contemplated indebtedness. *See* 28 U.S.C. § 3304(b)(l)(B)(ii); *United States v. Loftis*, 607 F.3d 173, 176-77 (5th Cir. 2010); *United States v. Resnick*, 594 F.3d 562, 567 (7th Cir. 2010); and TEX. Bus & COM. CODE ANN. § 24.005(a)(2).

> transfer or incurs the obligation . . . with actual intent to hinder, delay, or defraud a creditor . . ..

See 28 U.S.C. § 3304(b)(l)(A). Pursuant to 28 U.S.C. § 3306, this court may void any such transfer to the extent necessary to satisfy the debt to the United States.

Because debtors rarely admit fraudulent intent, however, intent may also be inferred from several relevant factors, which include but are not limited to, whether:

(1) the transfer was to an insider;

(2) the transfer was concealed;

(3) prior to the transfer, the debtor had been sued or threatened with suit;

(4) the transfer was of substantially all of the debtor's assets;

(5) consideration for the transfer was of a reasonably equivalent value;

(6) the debtor was insolvent or became insolvent shortly after the transfer; and

(7) the transfer occurred shortly after a substantial debt was incurred.

See 28 U.S.C. §§ 3304(b)(2); and TEX Bus. & COM. CODE ANN.§ 24.005(a)(2). The United States need not prove that all of the badges of fraud exist to prevail. *See, e.g., Phillips & Hornsby Litig.,* 204 F. App'x at 401; *Hinsley v. Boudloche* (*In re Hinsley*), 201 F.3d 638, 643–44 (5th Cir. 2000); *Lichtenstein v. Aspect Comput. Corp.* (*In re Comput. Personalities Sys.*), 362 B.R. 669, 674 (Bankr. E.D. Pa. 2006) (citing cases finding that the presence of just one factor may suffice to establish fraudulent intent and confluence of several in one transaction provides conclusive evidence of an actual intent to defraud); and *Andrews v. United States*, 69 F. Supp. 2d 972, 979–80 (N.D. Ohio 1999) (a combination of badges of fraud gives rise to an inference or presumption in favor of the

creditor, which shifts the burden to the debtor to establish that a conveyance was not fraudulent but made for fair consideration).

In addition to the exceptional direct evidence of fraudulent intent present in this case, multiple badges of fraud also provide sufficient circumstantial evidence to demonstrate the actual intent to hinder, delay, or defraud the United States here:

First, Lonnie transferred his community property interest to his spouse, Anna, who is an insider as defined in 28 U.S.C. § 3301(5).

Second, Lonnie and Anna executed their Postnuptial Agreement three years after their marriage (when they did not enter a prenuptial agreement) and only several months before Lonnie's guilty plea and sentencing.

Third, at the time the transfers occurred, Lonnie had defrauded his victim of more than $3 million, an offense of conviction for which restitution would be mandatorily imposed pursuant to the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. §§ 3612-13 and 3663A-3664. *See* Plea Agreement dated September 29, 2015 (Dkt. No. 11).

Fourth, Lonnie transferred substantially all of his assets to Anna, leaving little to no assets to pay his huge restitution obligation. *See* Postnuptial Agreement, Exhibit C.

Fifth, Lonnie did not receive reasonably equivalent value in exchange for the transfers. Reasonably equivalent value is determined from the standpoint of creditors on the date of transfer. *Hinsley*, 201 F.3d at 643. The proper focus is on the net effect of the transfers on the debtor's estate and the funds available to creditors. *Id.* Intangible benefits such as preservation of marriage or executory promises to provide support do not qualify as value. *Id.* and *In re Schaefer,* 331. B.R. 401, 419-20 (Bankr. N.D. Iowa 2005).

Sixth, Lonnie was insolvent or became insolvent as a result of the transfers. Under § 3302(a) of the FDCPA, a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation, and a debtor is presumed insolvent if he is generally not paying debts as they come due. *See* 28 U.S.C. §§ 3302(a) and (b). Here, Lonnie's assets paled in comparison to his debts at the time of and after he executed the Postnuptial Agreement.

Because these badges of fraud establish that Lonnie made these transfers to Anna with the actual intent to hinder, delay, and/or defraud the United States, the Postnuptial Agreement should be declared void under § 3304(b)(l)(A) and set aside pursuant to § 3306 of the FDCPA.

2. Constructive fraud under 28 U.S.C. §§ 3304(b)(1)(B) and 3306 and Tex. Bus. & Com. Code Ann. § 24.005(a)(2).

Even absent any intent, the Postnuptial Agreement should also be set aside under the constructive fraud provision of the FDCPA, which provides:

> [A] transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States, whether such debt arises before or after the transfer is made or obligation is incurred, if the debtor makes the transfer or incurs the obligation . . . without receiving a reasonably equivalent value in exchange for the transfer or obligation if the debtor . . . intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

See 28 U.S.C. § 3304(b)(l)(B). Again, the court may void such transfers to the extent necessary to satisfy the debt owed the United States. 28 U.S.C. § 3306(a).

As discussed, Lonnie did not receive reasonably equivalent value in exchange for the assets he gave to Anna in the Postnuptial Agreement. Moreover, on the date of each

transfer, Lonnie knew or should have known he would incur debts beyond his ability to pay as they became due. At the moment of the illegal conduct, defendants have implied knowledge that they will be held liable for restitution. *See Loftis*, 607 F.3d at 177–78 (citing cases).

3. Fraud under TEX. FAM. CODE ANN. § 4.106.

In addition to the provisions of the FDCPA, the Postnuptial Agreement should also be declared void under TEX. FAM. CODE ANN. § 4.106. The United States may enforce restitution orders in accordance with federal and state law. *See* 18 U.S.C. §§ 3613(a) and (t); 18 U.S.C. §§ 3664(m)(l)(A)(i)(ii); 28 U.S.C. §§ 3001-3008; and *United States v. Phillips*, 303 F.3d 548, 550–51 (5th Cir. 2002).

Section 4.102 of the Texas Family Code, the provision under which the Postnuptial Agreement in this case was executed, permits spouses in the state of Texas to partition their community property and convert the community property into the separate property of one or both of the spouses. *See* TEX. FAM. CODE ANN. § 4.102 (2005). Partition agreements executed pursuant to § 4.102, however, are limited by § 4.106(a), which provides that an "agreement made under this subchapter is void with respect to the rights of a preexisting creditor whose rights are intended to be defrauded by it." *See* TEX. FAM. CODE ANN. § 4.106(a) (2002). The Fifth Circuit has used the badges of fraud identified in TUFTA to determine whether a partition agreement was intended to defraud a creditor under § 4.106(a). *See In re Hinsley,* 201 F.3d at 643 n.8. The TUFTA badges of fraud are nearly identical to those set forth in § 3304(b)(2) of the FDCPA. As previously

discussed, these badges of fraud clearly indicate Lonnie's fraudulent intent in executing the Postnuptial Agreement.

Once the badges of fraud under § 4.106 of the Texas Family Code are established, the last determination is whether the United States was a preexisting creditor at the time the Postnuptial Agreement was executed. *See, e.g., Loftis,* 607 F.3d at 177–78. In *Loftis*, the Fifth Circuit affirmed the district court's holding that voided the transfer from husband to wife. *Id.* The husband transferred the assets without receiving reasonably equivalent value. *Id.* At the time of the transfer, the husband faced lengthy prison term and sizable criminal restitution, so he should have reasonably believed he was incurring debts beyond his ability to pay. *Id.* The Court noted that the defendant owed his restitution debt at the time he committed the acts leading to the restitution order. *Id.* According to Lonnie's plea agreement and factual resume, the criminal act leading to his restitution debt took place more than two years before he executed the Postnuptial Agreement (Dkt. No. 13).

C. The court should order the sale of real property.

The court should order the sale of the real property located at 442 Marshall Road, Southlake, Texas, which has a legal description of Block 3, Lot 8, Kirkwood Hollow Addition. As of today's date, the 5300 square feet house has an estimated value exceeding $900,000, with approximately 50% equity in the home. Pursuant to 18 U.S.C. § 3613, the government recorded a notice of lien in the official records of Tarrant County, Texas on March 19, 2012 to perfect its judgment lien against Lonnie's property and rights to property, including the real property at 442 Marshall Road, Southlake,

Texas. The court has authority to order the sale of real property in which Lonnie has a substantial nonexempt interest by either 18 U.S.C. § 3613A, 28 U.S.C. § 3306, or judicial lien foreclosure pursuant to 18 U.S.C. §§ 3613 and 3664(m)(1)(A), 26 U.S.C. §§ 7402(a) and 7403(d) and 28 U.S.C. § 3203(e).[6]

Despite repeated demands made by the government, Lonnie has steadfastly refused to seek a home equity loan or sell his house to recover the equity as payment toward his restitution. Meanwhile, Lonnie's monthly mortgage payment is $5,000, which is an unreasonable expense that shows his refusal to modify his extravagant lifestyle. There is no reason to allow Lonnie to simultaneously refuse to extract the equity from his house while also claiming his high monthly mortgage payment to be a necessary expense to limit the amount he pays toward his restitution. The IRS guidelines for a family of his size in his county allocates less than half of Lonnie's current mortgage payment for living expenses. *See* Exhibit D ¶ 10.

D. The court should order installment payments of at least $2,775 per month.

While the court made Lonnie's entire restitution judgment due immediately (Dkt. 16), and he expressly agreed to that in his plea agreement, the judgment also required Lonnie to make minimum installment payments of at least $1,500 per month. This court is authorized to order installment payments as provided for in either the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3664(f)(2), or the Federal Debt Collection

[6] Regardless of which statute is t used to order the sale of real property, the government acknowledges that any ad valorem taxes owed on the property and secured interests of the mortgage lender are to be paid from the proceeds of the sale before payment to the Clerk of the Court toward Lonnie's restitution. *See IRS v. McDermott*, 507 U.S. 447, 449 (1993) (property interests governed by priority of liens and common law principle that first in time is first in right).

Procedure Act (FDCPA), 28 U.S.C. § 3204. *See, e.g., United States v. Hosking,* 567 F.3d 329, 335 (7th Cir. 2009) (payment schedule under 18 U.S.C. § 3664(f)(2)); *United States v. Miles*, 310 F. App'x 943 (8th Cir. 2009) (installment payment order under 28 U.S.C. § 3204)). Moreover, installment payment orders may be adjusted based on a defendant's financial circumstances under 28 U.S.C. § 3204(b) and 18 U.S.C. § 3664(k).

As set forth above, Lonnie can and should be required to pay much more than $1,500 per month if he accepts responsibility for his restitution and adjusts his spending habits from excessive, extravagant spending to reasonable, necessary expenses. Lonnie has chosen to pay unnecessary and unreasonable expenses instead of restitution to his victims. As discussed, he spends $775 on a 2016 Escalade lease and $500 on concierge doctor services, in addition to his expensive mortgage, vacations, and other unallowable expenses. Based on this financial information, Lonnie appears to be able to make at least an additional $1,275 per month towards his restitution debt, bringing his minimum monthly payment from $1,500 to $2,775 per month.

Therefore, the government requests that this court enter an installment payment order that requires Lonnie to pay at least $2,775 per month to the Clerk of the Court until further court order, to notify the United States Attorney's Office and this court of any material change in his economic circumstances that might affect his ability to pay restitution, and to submit a completed financial statement to the United States Attorney's Office upon request until further notice.

III. Conclusion

For all of the foregoing reasons, the government asks the court to enter a finding of default and/or resentence the defendant pursuant to 18 U.S.C. §§ 3613A-3614, and orders voiding the fraudulent transfers of property under 28 U.S.C. § 3304(b)(1) and/or TEX. BUS. & COM. CODE ANN. § 24.005(a), requiring the sale of real property under 18 U.S.C. § 3613A and 28 U.S.C. § 3306, and for increased minimum monthly installment payments pursuant to 18 U.S.C. § 3664(k) and/or 28 U.S.C. § 3204 until the judgment debt is satisfied.

Respectfully submitted,

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