

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

08-CR-6019CJS

KEITH GORDON-SMITH,

Defendant

**GOVERNMENT'S MOTION PURSUANT TO
TITLE 18, UNITED STATES CODE, SECTION 3771**

THE UNITED STATES OF AMERICA, by and through its attorneys, Kathleen M. Mehltreter, United States Attorney for the Western District of New York, and Craig R. Gestring, Assistant United States Attorney, respectfully submits this motion, pursuant to Title 18, United States Code, Section 3771, seeking entry of the attached proposed order which describes the procedures to be followed in notifying potential victims of public proceedings to be held in this case.

Applicable Law

The Justice for All Action of 2004 (the "Act") expanded the rights of victim in federal criminal proceedings and established certain requirements concerning the Government's notification of victims. See 18 U.S.C. § 3771(a). The Act provides certain rights to victims in federal criminal proceedings. Among these rights is the right to "reasonable, accurate, and timely notice" of public court proceedings. 18 U.S.C. § 3771(a). The Act

defines a crime victim as "a person directly and proximately harmed as a result of the commission of a Federal offense . . ." 18 U.S.C. § 3771(e).

Section 3771 requires the Court to ensure that crime victims are afforded the rights enumerated in the statute, see 18 U.S.C. § 3771(b), and obligates the Government to use "best efforts to see that crime victims are notified of, and accorded, the rights" provided, see 18 U.S.C. § 3771(c). The Act does not set forth any specific notification procedures. Importantly, the Act recognizes that for crimes involving multiple victims, the Court has discretion to adopt procedures that will not unduly interfere with the criminal proceedings. Thus, 18 U.S.C. § 3771(d)(2) provides:

[i]n a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

Discussion

The United States submits that this case readily falls within the "multiple crime victims" provision. The "direct and proximate" victims of the charged Clean Air Act violations are individuals who were, at some time, present in one of more of the following buildings, and who were exposed to the asbestos therein during the applicable times:

<u>BUILDING</u>	<u>TIME PERIOD</u>
Bloomfield Elementary School 5475 W. Maple Road East Bloomfield, New York	June 21, 2006-Present
Hastings Center for Academics (a/k/a the old library) Roberts Wesleyan College 2301 Westside Drive Rochester, New York	October 15, 2007-Present
West Wing, Genesee Hospital 224 Alexander Street Rochester, New York	January 1, 2007-Present

The United States estimates that there are thousands of individuals who spent time in any of these buildings during the relevant time periods. These numerous individuals simply cannot be fully identified and located. We do not know, and cannot with reasonable diligence determine, which of these individuals may have been exposed, and if so, for how long and at what concentrations.

Given that there are thousands of potential victims in this case, and that as far the Government is aware, there is no available compilation of all such individuals and entities, the Government respectfully submits that it is impracticable to give individualized notice to each potential victim.

Rather than seek a complete waiver of the notice provision of the Act, the United States proposes that the Court authorize it to provide initial notice by publication and post subsequent scheduled public court proceedings on its Internet website. In this case, the number of potential crime victims is large, and as

noted above, it is impracticable to provide reasonable, accurate, timely, and individualized notice to all of them. Initial notice by publication and subsequent posting of scheduled public court proceedings on the United States Attorney's Office Internet website are reasonable procedures that will give effect to the Act and will not unduly complicate or prolong the proceedings.

The United States intends to submit a notice in the legal notices section of the Democrat and Chronicle to read:

ATTENTION PERSONS WHO HAVE BEEN IN THE BLOOMFIELD ELEMENTARY SCHOOL DURING THE TIME PERIOD JUNE 21, 2006-PRESENT, THE HASTINGS CENTER FOR ACADEMICS AT ROBERTS WESLEYAN COLLEGE DURING THE TIME PERIOD OCTOBER 15, 2007-PRESENT, OR THE WEST WING OF THE GENESEE HOSPITAL DURING THE TIME PERIOD JANUARY 1, 2007-PRESENT: Keith Gordon-Smith has been indicted on charges involving the violation of the Clean Air Act related to improper asbestos activities at these sites during the above time periods. Any person who was, at some time, present in one of more of the above-referenced buildings during the applicable time periods may have been exposed to the asbestos therein. Affected persons have the right to attend any public court proceedings. For more information, please refer to the website of the U.S. Attorney's Office at <http://www.usdoj.gov/usao/nyw> or call 1-800-799-6033.

We intend to place this notice for one day, preferably within ten days of the filing of the superseding indictment. The Democrat and Chronicle business office needs two days' notice for publication. We will contact them upon receiving the Court's order authorizing this procedure.

Thereafter, the United States Attorney's Office will post notification of any scheduled public proceedings on its Internet website at <http://www.usdoj.gov/usao/nyw> on a separate Web page

for this case. Said Web page will also provide the following information:

a. The caption, case number and assigned judge for the case for which notification is made;

b. A substantially verbatim listing of the rights provided for in Title 18, United States Code, Section 3771(a);

c. A listing of public proceedings scheduled in the case;
and

d. The name and contact information for a United States Attorney's Office representative with responsibility for addressing victims rights.

Counsel for the defendant has been informed of the Government's proposed notification procedure.

Conclusion

For the foregoing reasons, the Government respectfully requests that the Court enter the proposed order.

DATED: Rochester, New York, June 18, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2009, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant(s) on this case:

Paul Vacca, Esq.

s/ KIM M. PETTIT