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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE OTIS D. WRIGHT, II, U.S. DISTRICT JUDGE

IN THE MATTER OF THE SEIZURE OF)
ALL FUNDS ON DEPOSIT IN DEUTSCHE)
BANK SECURITIES, INC., ACCOUNT)
NUMBERS 5XL-066365; 5XL-066605;) CASE NO.
5XL-069104; 5XL-069112;)
5XL-069120; 5XL-878025;) CV 15-0389-ODW (VBKx)
5XL-878033; 5XL-878264;)
5XL-878272; 5XL-878579;)
A3V-943232; AND A3V-943240,)
)
AND)
)
UP TO \$11,666,645.00 ON DEPOSIT)
IN BANK OF AMERICA ACCOUNT NUMBER)
11548-63190, AND UP TO)
\$5,630,385.00 ON DEPOSIT IN BANK)
OF AMERICA ACCOUNT NUMBER)
11548-63195.)
_____)

REPORTER'S TRANSCRIPT OF
MOTION TO DISMISS FOR RETURN OF PROPERTY
MONDAY, APRIL 13, 2015
2:17 P.M.
LOS ANGELES, CALIFORNIA

DEBI READ, CSR 3949 CRR RMR
FEDERAL OFFICIAL COURT REPORTER
312 NORTH SPRING STREET 432A
LOS ANGELES, CALIFORNIA 90012
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A P P E A R A N C E S

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ON BEHALF OF THE MOVANT:

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ALSO PRESENT

TINA KELESHYAN, SENIOR PARALEGAL TO STEVEN WELK

1 LOS ANGELES, CALIFORNIA; WEDNESDAY, APRIL 15, 2015

2 2:17 P.M.

3 -oOo-

4 (Call to Order of the Court.)

5 THE COURTROOM DEPUTY: Calling Item 4, CV 15-389, In
6 the matter of the Seizure Funds on Deposit in Deutsch Bank
7 Securities, Inc.

8 Counsel, come forward and state your appearances, please.

9 MR. UMHOFFER: Good morning, your Honor.

10 Matthew Umhofer and Luke Kuo on behalf of the movants.

11 THE COURT: Counsel, good afternoon.

12 MR. WELK: Good afternoon, your Honor.

13 Assistant U.S. Attorney Steven Welk for the government.

14 And with me is paralegal Tina Keleshyan.

15 THE COURT: Good afternoon.

16 All right. Well, all right. We begin here with a Notice
17 of Motion and a Motion for Return of Property pursuant to
18 Title 18 United States Code Section 983(a). And of course the
19 government has taken the position that the defendants are
20 seeking return of personal property pursuant to the wrong
21 statute and that this is tantamount to a new civil action for
22 the return of seized property under Rule 41(g) of the Federal
23 Rules of Criminal Procedure.

24 I'll just tell you preliminarily I'm inclined to adopt the
25 government's position. So --

1 MR. UMHOFFER: An uphill battle then, your Honor.

2 THE COURT: Indeed.

3 MR. UMHOFFER: Your Honor, first I'd note that our
4 original motion that the government is moving to dismiss now
5 and our opposition were filed -- both which were filed under
6 seal -- I know the government did not seal its papers in the
7 case -- but given the fact that we are proceeding on something
8 that was originally filed under seal, I would ask to clear the
9 courtroom so that we could conduct the proceedings under seal.

10 THE COURT: We are not going to be discussing
11 anything other than the applicability of one statute over the
12 other. We're not going to talk about the facts. The facts
13 don't matter.

14 MR. UMHOFFER: Understood, your Honor. Thanks, your
15 Honor.

16 THE COURT: I had a friend in law school. He never
17 read the facts, just get to the law. I'm not saying that, but
18 I'm saying in this particular case we don't have to talk about
19 the facts of the case at all.

20 MR. UMHOFFER: Let's get to the law then, your Honor.
21 Let's start from the prospective that within the Ninth Circuit
22 forfeiture statutes are strictly construed against the
23 government. So this statute must be strictly construed against
24 the government.

25 So then we move from there to what does the statute say

1 and what have courts said about what the statute says.

2 THE COURT: I guess which statute? We're talking
3 about 983?

4 MR. UMHOFFER: 983. Yes, your Honor, 983.

5 THE COURT: Which they say is not applicable.

6 MR. UMHOFFER: That's right, your Honor. And what I
7 found interesting was that the government, even though exceeded
8 the required page limit and had plenty of space to do it, never
9 took issue with the central case that we cited, which we cited
10 in our original motion and in our opposition. We put it front
11 and center, your Honor.

12 THE COURT: I always find it interesting that
13 counsel would bring up that the -- that fact that the other
14 side has violated a page limit. Does that annoy you if you
15 have to read a few too many pages? Or should that be my
16 concern?

17 MR. UMHOFFER: Your Honor, I'm sure that if I'd
18 exceeded the page limit, Mr. Welk would have filed something on
19 the other side as well, so --

20 THE COURT: I would have ignored that, too.

21 MR. UMHOFFER: I understand, your Honor. Look, your
22 Honor, let's get to it.

23 THE COURT: Okay.

24 MR. UMHOFFER: The core case here which is the case
25 from this district is *In re Return of Seized Property* 625

1 F.Supp.2d 949. That case is directly on point and the
2 government never says a thing about it anywhere, never
3 addresses it once.

4 What that case said was that the government made the same
5 argument it's making here. The direct quote from that case is,
6 "The government contends that this provision would only apply
7 if it had initiated a 'nonjudicial civil forfeiture
8 proceeding,' which it chose not to do in this case."

9 That's exactly what happened here, your Honor. So the
10 government made in 625 F.Supp.2d, the Return of Seized Property
11 case, this argument that 983 doesn't apply here because it's a
12 nonjudicial forfeiture case.

13 THE COURT: Okay.

14 MR. UMHOFFER: And the court in that case rejected
15 it.

16 THE COURT: This is much to do about notice, right?

17 MR. UMHOFFER: It is.

18 THE COURT: Why isn't that a frivolous argument?

19 MR. UMHOFFER: It's absolutely not a frivolous
20 argument. But I --

21 THE COURT: We're having e-mail exchanges either on
22 the day of the seizure or shortly thereafter. I mean, clearly
23 notice was given.

24 MR. UMHOFFER: Well, your Honor, couple different
25 things. First of all, the critical factual issue in this case

1 is whether whatever notice was received -- and we contend there
2 was no formal notice here which is required under the
3 statute -- it wasn't sufficient. That's a factual issue we got
4 to get into in discovery and that's why summary judgment is
5 inappropriate here and why -- why, in particular, actual notice
6 isn't enough. And I point the Court to a case 386 F.Supp.2d 9.
7 So it's 386 F.Supp.2d 9. It's from the District of Puerto
8 Rico. It's all these strange case names, your Honor. This one
9 is entitled *In re Assorted Jewelry*.

10 THE COURT: Trial court decision from Puerto Rico.

11 MR. UMHOFFER: In that case, your Honor, considering
12 this very thing, the government argued actual notice, your
13 Honor, so no formal notice was required.

14 THE COURT: Okay.

15 MR. UMHOFFER: And the court rejected that argument
16 and held because there was no formal notice --

17 THE COURT: What's formal notice mean?

18 MR. UMHOFFER: Well, your Honor, that's a very good
19 question, your Honor, and Mr. Welk knows this. Every single
20 time the government does a forfeiture and does notice, it sends
21 out a particular form that has lots of information on it. And
22 this is one of the key issues in the case, that the government
23 never sent out that form.

24 THE COURT: Wait a minute. Wait. Hang on. You
25 talk very fast.

1 MR. UMHOFFER: Sorry, your Honor.

2 THE COURT: All right. But the statute doesn't
3 require that -- under 983, the statute doesn't require that
4 this form be sent out, right?

5 MR. UMHOFFER: It requires notice. And so what we
6 have is a dispute --

7 THE COURT: You're not answering my questions, are
8 you?

9 MR. UMHOFFER: It says notice; that's all it says.

10 THE COURT: Right. It doesn't require that a form
11 go out, right? Or that the form contain certain identifying
12 information -- or information?

13 MR. UMHOFFER: The statute does not. 28 CFR 9.4
14 does. So 28 -- it's -- that's a Code of Federal Regulations
15 that pivots on what sort of notice is required. And in that
16 section, which we filed as a supplemental authority with the
17 Court, 28 CFR 9.4(a), it says the government when it does send
18 notice is required to notify the receiver that it has 30 days,
19 and the government never did that. And these e-mails make no
20 reference to 30 days being required.

21 And that gets to the larger issue of why notice was
22 insufficient here, your Honor, is because notice triggers very
23 specific deadlines under the statute. That's why formal notice
24 is required and actual notice isn't enough.

25 And the reason why is because when the government sends

1 that formal notice, it's got to let you know what the deadlines
2 are that are running, and because if you don't within 30 days
3 of receiving that notice file a claim, you're out of luck, your
4 Honor. And so that's why this idea of actual notice doesn't
5 really work.

6 And if you take a step back and think about forfeiture,
7 the government comes and takes something from you, takes the
8 car out of your driveway, takes the funds out of your account,
9 of course you have notice of that. But the government's
10 required to provide formal notice. Everybody's going to have
11 actual notice of the seizure, your Honor.

12 So the reason why Congress required formal notice and why
13 the government always sends out a very formal form that has
14 very specific information about what the next steps are is
15 because if you snooze, you lose under the deadlines, and so
16 actual notice creates this really questionable circumstance
17 under which somebody may or may not know that their car's been
18 taken. The government insists they must know because it was
19 taken or we sent an e-mail, but -- and then the 30-day clock is
20 running and the government gets to keep that if somebody didn't
21 really realize that the money was taken or the car was taken.

22 So that's why the government has to send out notice and
23 why the government usually not only sends out the specific
24 form, which wasn't sent in this case, but also does
25 publication. It actually publishes and puts it out as far as

1 it can in order to make sure that all interested parties get
2 the information that they can. The government didn't do
3 anything of that. They sent a couple e-mails, your Honor.

4 THE COURT: So you're maintaining that this is a
5 forfeiture action.

6 MR. UMHOFFER: Your Honor, this is a seizure action,
7 right?

8 THE COURT: Right.

9 MR. UMHOFFER: This is -- there's been a seizure.

10 THE COURT: Yes.

11 MR. UMHOFFER: And the government has a decision to
12 make within 60 days, right? It has to figure out what it's
13 going to do within 60 days. That's what the statute says.

14 So if you look at 983 and you start from the beginning, it
15 starts with in a nonjudicial forfeiture case it's got to send
16 out notice within 60 days. That's what the statute says, not
17 disputing that.

18 The next thing it says is no notice is required if before
19 the 60-day period expires the government files a civil judicial
20 forfeiture action. So built into the statute is this notion
21 that the government has got to move within 60 days: either
22 give notice with a nonjudicial forfeiture action or file a
23 civil forfeiture complaint within 60 days.

24 And then the third piece is, again, if before the 60-day
25 period expires the government doesn't go civil but goes

1 criminal, then no notice is required.

2 So this really points to one of the biggest problems with
3 the position the government's taking is that Congress could not
4 have made this mistake; they must have intended this notice
5 provision to apply only to the 60-day time period. That's
6 absolutely not true because if you look at the government's
7 Asset Forfeiture Policy Manual, which I presume Mr. Welk had
8 some involvement in drafting, it specifically talks about
9 Congress having made a mistake. At page 59 of the Asset
10 Forfeiture Manual, this is what -- this is what it says and
11 this is the DOJ speaking, "Congress did not consider, however,
12 that not all forfeiture cases begin as administrative
13 forfeitures." Congress didn't consider that the government
14 doesn't always start with administrative forfeiture. It left
15 that out.

16 Now, I'm going to -- I'm going to point the Court to
17 another case that's directly on point, goes the wrong way for
18 us, but it involves reasoning that I think is very persuasive
19 here. It's *In re Funds on Deposit* 919 F.Supp.2d 169. It's
20 from the District of Massachusetts. There's only two cases in
21 the country that I found that are on point on here. One is the
22 case from this district that rejects the argument that the
23 government's making today. The other one is this case from the
24 District of Massachusetts. And it specifically talks about how
25 there is a hole in the statute and it cites directly to that

1 Asset Forfeiture Policy Manual where the government's conceding
2 that Congress did make a mistake here. Congress requires
3 notice for a thousand dollar seizure but not a hundred million
4 dollar seizure and that frustrates the statutory scheme.
5 That's what the court held in the District of Massachusetts
6 case.

7 Now, if that's the case, then the plain language of the
8 statute must be ignored under the Ninth Circuit's law. The
9 Ninth Circuit says specifically that you can't -- you must
10 ignore the plain meaning, the plain language of the law if the
11 statutory structure and scheme is frustrated by the
12 interpretation in the plain language, or if leads to an absurd
13 result. And I've got both here, your Honor, because the scheme
14 is there to make sure that everybody gets notice, and to go
15 down the list, the statute is clearly designed to make sure
16 something happens within 60 days, either a notice or a filing
17 of the civil forfeiture case -- hasn't happened -- or the
18 filing of a criminal forfeiture case. That hasn't happened.

19 So all those things haven't happened here in the 60 days
20 and the government's own policy memorandum concedes the
21 government made -- that the Congress made a mistake here.
22 Congress thought that every single forfeiture that comes
23 through the door is going to start as an administrative
24 forfeiture case. That's why it says only nonjudicial
25 forfeiture cases require the 60-day time period. So now

1 Congress has made this mistake. DOJ has conceded, contrary to
2 what the government has argued here, that Congress made a
3 mistake.

4 THE COURT: Okay. You're starting to repeat
5 yourself now. Let's forget --

6 MR. UMHOFFER: That's fine, your Honor. I'll move on
7 from that point.

8 THE COURT: Well, before you go too far, I got a
9 couple of questions.

10 MR. UMHOFFER: Sure.

11 THE COURT: Number 1, you'll have to excuse me if
12 it -- if Congress concedes that it makes a mistake, that's one
13 thing. Every now and then I concede that Congress has made a
14 mistake. That doesn't mean a thing, nor does it when DOJ says
15 Congress made a mistake. This arbitrary cutoff of \$500,000, do
16 you know why? I don't. But it's there, right?

17 MR. UMHOFFER: It is there, your Honor.

18 THE COURT: Okay.

19 MR. UMHOFFER: It is.

20 THE COURT: All right. Maybe it's a mistake, maybe
21 it was an oversight. I don't know. But it's there and we're
22 dealing with hundreds of millions of dollars.

23 MR. UMHOFFER: Understood, your Honor.

24 THE COURT: Okay. Now tell me. I think I've missed
25 something in the proceedings. I understand Judge Kenton has

1 been working with you all for some time now. I assume some
2 things have happened because now all of a sudden we're at
3 forfeiture. What has gone on before that we are now at
4 forfeiture of a significant sum of money?

5 MR. UMHOFER: Your Honor, nothing has happened and
6 that's the problem.

7 THE COURT: Well, then, why is it forfeiture?

8 MR. UMHOFER: Because there is a notice requirement
9 in 983 --

10 THE COURT: Well, forget that.

11 MR. UMHOFER: -- which dims off the seizure.

12 THE COURT: No, forget that. Forget that. I'm
13 trying to figure out the basis upon which the government can
14 contend that these moneys are now forfeit? What happened?
15 What went on before? What gave them that authority?

16 MR. UMHOFER: So let me -- let me make something
17 clear, your Honor.

18 THE COURT: Okay.

19 MR. UMHOFER: Are you asking -- just to clarify the
20 question -- are you asking how did the government seize these
21 moneys?

22 THE COURT: No. I know how they seized it. They
23 had a warrant.

24 MR. UMHOFER: They had a warrant.

25 THE COURT: They went and got the money and I don't

1 know how this happened.

2 MR. UMHOFFER: Right.

3 THE COURT: Was there some confession to judgment?
4 Apparently it's nonjudicial so there are no courts involved.

5 MR. UMHOFFER: Correct.

6 THE COURT: I don't understand about -- I understand
7 about seizures, right, and the government wrongfully seizes
8 someone's property, then someone can say, "Whoa. Give me my
9 property back."

10 MR. UMHOFFER: Right. And that's what I'm trying to
11 do, your Honor, and they won't let me because I don't have a
12 proceeding in which to do that yet.

13 THE COURT: It's like a -- well, you don't. You
14 can -- I took this as a new pleading. Okay?

15 MR. UMHOFFER: No --

16 THE COURT: As far as I know, I look at the docket,
17 there's nothing going on here, we have no case, right? But
18 apparently you've lost -- your clients have lost some money and
19 you've demanded to have that money back, and I look at this as
20 a brand new civil action to get your money back or your
21 client's money back. Okay?

22 MR. UMHOFFER: That's right, your Honor.

23 THE COURT: And I'm thinking that I'm -- you know
24 how sometimes we take one motion that's got a whole lot of
25 extraneous material in it and then we -- we simply construe

1 that motion under Rule 56 as one for summary judgment? Well,
2 I'm construing this -- your motion your new action for return
3 of personal property under Rule 41(g). I know you don't like
4 that.

5 MR. UMHOFER: I understand, your Honor.

6 THE COURT: Go on with your arguments then.

7 MR. UMHOFER: I'll speak to that if you want to, but
8 the truth of the matter is -- and I just point the Court here
9 to the Ninth Circuit's decision in *Purcell* --

10 THE COURT: Okay.

11 MR. UMHOFER: -- on Rule -- just on the Rule 41
12 issue. Ninth Circuit in *Purcell* said that styling such
13 proceedings, a motion for return of property, as Rule 41(e)
14 motions when no criminal proceedings are pending can lead, as
15 in this case, to needless waste of limited judicial resources.

16 THE COURT: Uh-huh.

17 MR. UMHOFER: What it really is is a civil action,
18 civil equitable action. It's not even -- it's not a Rule 41
19 motion and it's really not even a 983 motion. It's a civil
20 equitable action. That's what we've brought here. We cited
21 983 as our basis to do that, but at the end of the day Ninth
22 Circuit says it all goes into the civil equitable pot, not
23 Rule 41, not 983, and that's where we are.

24 THE COURT: All right.

25 MR. UMHOFER: So that's my only point on that, your

1 Honor. So -- but I want to pick up on that point you raised,
2 your Honor, because what we do have here is the government
3 seized the money, we had a proceeding, and they submitted to
4 Judge Kenton in an affidavit. They sealed that.

5 We went to Judge Kenton, said we've got a Fourth Amendment
6 right to see that, and Judge Kenton denied that. We're going
7 to appeal it. But that's what happened with Judge Kenton.

8 So just to clarify, we're trying to -- I want to be able
9 to challenge this seizure, right? I don't have a proceeding to
10 do that in and now I can't even right now see the affidavit
11 that established the probable cause for that seizure.

12 This action here -- so I want to eventually bring, once I
13 get that affidavit, a motion for return of property that seeks
14 the return of property based on the lack of probable cause in
15 that affidavit. That's what I want to do.

16 THE COURT: Okay.

17 MR. UMHOFFER: This one is a different one and it's
18 very narrow because I can't bring the larger one yet; I don't
19 have my affidavit. And this one is just because the government
20 blew the 60-day deadline, we get the money back under 983. And
21 that's the narrow point we're raising.

22 I understand I haven't convinced the Court, but I think
23 that if you look at *In re Return Seized Property* here within
24 this district, it's right on point. It rejects the argument
25 the government's made here.

1 If you look at *In re Funds*, the case from the District of
2 Massachusetts, all the reasoning there that happened favors a
3 finding that -- that reading the case -- reading the statute as
4 the government would would not only frustrate the structure of
5 CAFRA, but lead to the absurd result of a thousand dollar
6 seizure's requiring notice, but a million dollar seizure's not.

7 And with that, your Honor, unless you have any more
8 questions, you got the core of my argument. I understand I may
9 not have convinced you, but I did my best.

10 Any other questions, your Honor?

11 THE COURT: Thank you counsel. Thank you very much.

12 Mr. Welk?

13 MR. WELK: Just briefly, your Honor, just to respond
14 to a couple of the things that Mr. Umhofer said. You know,
15 they filed these copies of the Remission Regulations the other
16 day in a surreply. The section that Mr. Umhofer was just
17 discussing, 28 CFR Section 9.3, is entitled Petitions in
18 Administrative Forfeiture Cases. The following section,
19 Section 9.4, is titled Petitions in Judicial Forfeiture Cases.

20 I think, as I understand the Court's point that you were
21 just making, is there are no forfeiture -- there are no formal
22 forfeiture proceedings pending against these assets at this
23 point. They've been seized. The government hasn't given --
24 well, the government's just not required to give them notice
25 under 983(a) because the statute specifically provides that it

1 doesn't.

2 But the point is that the government did give notice of
3 the seizures, detailed notice. In fact, with our original
4 papers, the movants filed a copy of the seizure warrant that
5 they admit in the declaration of Luke Kuo was provided to them
6 by me, by AUSA Steven R. Welk. And I didn't just give them the
7 seizure warrant, I gave them the seizure warrant with the
8 return. So they knew what had been seized, precisely what had
9 been seized, when it had been seized, and the legal basis under
10 which it had been seized because that's laid out in the face of
11 the seizure warrant.

12 THE COURT: His complaint, of course, is that you
13 didn't also advise them that something must be done in order to
14 protect their interests.

15 MR. WELK: Well, there's nothing for them to do at
16 this point because the government has not yet initiated formal
17 forfeiture proceedings, and that's because the criminal
18 investigation is still ongoing and we're at a point where going
19 forward -- there is -- there is a gap in the statute and that's
20 what's recognized in the forfeiture manual.

21 The gap is that the -- there's no deadline for
22 forfeitures -- for seizures that are not subject to
23 administrative forfeiture proceedings. But even if there were,
24 there are many -- and I discussed them in the papers; I won't
25 go through them again because they're described in here --

1 there are numerous provisions in the statute that provide that
2 the government is entitled to additional time and those
3 deadlines can be set aside by the Court for good cause shown.
4 And the primary purpose of that good cause is always an ongoing
5 criminal investigation. So there's a very strong policy in the
6 statute to protect ongoing criminal investigations.

7 This one, as the numbers will suggest, is a big one. It's
8 a big criminal investigation and there were a lot of seizures
9 of data and evidence in addition to the money here, and that
10 investigation is ongoing.

11 THE COURT: And I know that what you say is true,
12 but no such request for extensions were made, so I'm not even
13 sure why we're talking about it. I'm fairly certain that had
14 the request been made it probably would have been routinely
15 granted, as they generally are. I know I can't substitute my
16 judgment for that of those who are actively involved in
17 investigating these things, so -- all right.

18 Listen, this is -- this is all very entertaining -- no,
19 it's not. This is just a strange consumption of time and I
20 know you're going to be back -- right? As soon as you get a
21 chance to take a look at the affidavit, then you will be back,
22 and I so like hearing matters over and over again.

23 But I'm going to deny your request for the return of
24 property and grant your -- the government's motion to dismiss.
25 It's not over. We will be back.

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MR. UMHOFFER: Thank you, your Honor.

MR. KUO: Thank you, your Honor.

(Proceeding concluded at 2:40 P.M.)

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CERTIFICATE OF OFFICIAL REPORTER

I, DEBRA READ, FEDERAL OFFICIAL REALTIME COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE, THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 15TH DAY OF APRIL, 2015.

/S/ DEBRA READ

DEBRA READ, CSR NO. 3949 CRR RMR
FEDERAL OFFICIAL COURT REPORTER