

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 12-1905 (RWR)
)	
SUM OF \$70,990,605, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION AND ORDER

Plaintiff United States filed this civil *in rem* forfeiture action, alleging that the defendant funds -- approximately \$63 million in three different banks -- are the proceeds of a wire fraud conspiracy and subject to seizure under 18 U.S.C. §§ 981, 983 and 984. The United States moves under 18 U.S.C. § 981(g)(1) to stay the civil forfeiture proceeding, except for any forthcoming government motions to strike under Supplemental Rule G(8)(c), until the conclusion of the related criminal proceedings. Claimants Hikmatullah Shadman, Najibullah, and Rohullah ("Shadman claimants") and Afghanistan International Bank ("AIB") also move for leave to file surreplies. Because a protective order can protect the interests of the parties, a complete stay is unjustified and the government's motion to stay will be denied. Because the proposed surreplies are

unnecessary, the claimants' motions for leave to file surreplies will also be denied.

BACKGROUND

In short, the United States has alleged that the defendant property is subject to forfeiture as the proceeds of a wire fraud conspiracy and that Shadman, as a subcontractor and owner of Hikmat Shadman Logistics Services Company ("HSLSC"), "conspired to obtain payments from the United States for the transportation of military supplies in Afghanistan through the illegal and fraudulent use of the wires . . . [by making] bribe payments, fraudulently inflat[ing] prices, and caus[ing] the United States to be invoiced for and to make payments of \$77,920,605 to two bank accounts in Afghanistan[.]" 2d Am. Compl. ¶¶ 10, 34. The United States alleges that Shadman paid bribes to TOIFOR Global Life Support Services operations managers Henry Omonobi-Newton and Paul Hele, id. ¶¶ 24, 38, and that Shadman conspired with Hele to "inflate[] and manipulate[]" subcontractors' bids, id. ¶ 39, to allow Hele "to award TMRs [Transportation Movement Requests] to [HSLSC] at an inflated rate," id. ¶¶ 23, 39g. Allegedly because of the bribery and fraud, HSLSC was awarded 5,421 TMRs, which cost the United States \$77,920,605. See id. ¶¶ 35, 43.

On August 27, 2013, Shadman, Najibullah, and Rohullah filed a verified claim and statement of interest in the seized property, asserting that they are the owners of the seized funds. Verified Claim and Statement of Interest or Right in Property Subject to Forfeiture In Rem at 8. They made these claims both individually, and on behalf of their companies. Id. at 14-16. It appears that all the accounts are held in the name of the companies, rather than the individuals, except for one account at Emirate National Bank. Id. at 8-12. The Shadman claimants then filed a motion under 18 U.S.C. § 983(f) for immediate release of funds and a motion for preliminary injunctive relief, both of which have been denied. The Shadman claimants also filed a motion to dismiss for failure to state a claim and based on the affirmative defenses of international comity and the act of state doctrine, which was also denied.

On October 16, 2013, AIB filed a verified claim, asserting that it has legal title, ownership, and possessory interest to \$4,330,287.03 of the defendant funds. AIB's Verified Claim of Interest in Defendant Property at 2, 4.

The United States now moves under 18 U.S.C. § 981(g)(1) to stay the civil forfeiture proceedings because "the United States has a related criminal investigation and allowing discovery now may jeopardize that investigation." United States' Mot. for a

Stay Pursuant to 18 U.S.C. § 981(g) ("U.S. Mot.") at 1. The government requests that the proceeding be stayed until the conclusion of the criminal case, with the exception of any forthcoming government motions to strike a claim or answer under Rule G(8)(c). Id. The government proposes a status report in 180 days to allow assessment of the continuing need for a stay. Id. attach. 1 at 2. Claimants oppose. See Claimants' Opp'n to United States' Mot. for a Stay ("Shadman Claimants' Opp'n"); Claimant AIB's Opp'n to the United States' Mot. for a Stay Pursuant to 18 U.S.C. § 981(g) ("AIB's Opp'n"). Both the Shadman claimants and AIB also filed opposed motions for leave to file a surreply.

DISCUSSION

I. MOTION TO STAY

When the United States moves for a stay, "the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case." 18 U.S.C. § 981(g)(1).

To determine if the criminal case is related, "the court shall consider the degree of similarity between the parties, witnesses, facts, and circumstances involved in the two proceedings, without requiring an identity with respect to any

one or more factors." 18 U.S.C. § 981(g)(4). The United States "may, in appropriate cases, submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial." 18 U.S.C. § 981(g)(5).¹

Here, the government states that a United States Attorney's Office, the Fraud Section of the United States Department of Justice, and the Office of the Special Inspector General for Afghanistan Reconstruction are all "investigating whether Mr. Shadman and others violated U.S. criminal laws in connection with the award and receipt of lucrative contracts and payments for the transportation of U.S. military supplies in Afghanistan" U.S. Mot. at 5. Because the United States' criminal investigation stems, at least in part, from the same conduct that gives rise to this forfeiture action, the facts and circumstances involved in both the criminal and civil proceedings are similar. Id. at 5-6. The identity of facts and circumstances also means that the witnesses -- such as the

¹ The United States here chose not to submit any matters ex parte, though it did request leave to do so "[i]f this Court finds that the record set forth herein is insufficient to establish that civil discovery will adversely affect the ability of the Government to conduct the related criminal investigation." U.S. Mot. at 2, 8. However, because, as is explained below, the United States has shown that some specific civil discovery may adversely affect the criminal investigation, such ex parte evidence may not be necessary.

confidential informants and others that either witnessed or were involved in the alleged fraud and bribery -- will be similar since the operative events in both cases are the same. Id. at 5-7. Finally, while the parties are not identical, the parties are similar as Shadman is one of the claimants in the civil proceeding and Shadman is being investigated criminally. Id. at 5. Thus, where, as here, "a criminal investigation and a civil forfeiture action have common facts, similar alleged violations and some common parties, the actions are clearly related." United States v. All Funds on Deposit in Suntrust Account No. XXXXXXXXX8359 in the Name of Gold and Silver Reserve, Inc., 456 F. Supp. 2d 64, 65 (D.D.C. 2006).

In addition to being related, civil discovery must adversely affect the related criminal investigation to merit a stay. For example, civil discovery will adversely affect the related criminal investigation when "civil discovery would subject the Government's criminal investigation to 'early and broader civil discovery than would otherwise be possible in the context of the criminal proceeding.'" Suntrust, 456 F. Supp. 2d at 65 (quoting United States v. One Assortment of Seventy-Three Firearms, 352 F. Supp. 2d 2, 4 (D. Me. 2005)). This is because "civil discovery may not be used to subvert limitations on discovery in criminal cases, by either the government or by

private parties." McSurely v. McClellan, 426 F.2d 664, 671-72 (D.C. Cir. 1970) (footnotes omitted). However, if the government fails to show that civil discovery will in fact adversely affect its criminal investigation, a stay should be denied. See Suntrust, 456 F. Supp. 2d at 65; United States v. All Funds (\$357,311.68) Contained in Northern Trust Bank of Fla. Account No. 7240001868, No. Civ.A.3:04-CV-1476-G, 2004 WL 1834589, at *2 (N.D. Tex. 2004) ("There is no presumption that civil discovery, in itself, automatically creates an adverse affect on the government's related criminal proceeding.").

The government asserts that civil discovery "will subject the United States to broader and earlier discovery than would occur in the criminal proceeding[,]" U.S. Mot. at 6, because the claimants have requested access to "any evidence in [the government's] possession relating to the facts alleged in this case[,]" id. (quoting Shadman Claimants' Request for Status Conference and Motion for Protective and Preservation Orders at 9), which may "require the United States prematurely to disclose to the Claimants the identities of confidential informants," id. at 7. The United States contends that, if it were to disclose the identities of the confidential informants, then witnesses may be put "at risk and [the disclosure could] interfere with the Government's ability to obtain confidential information from

others in the criminal investigation." Id. Exposing confidential informants can justify a stay. See, e.g., Suntrust, 456 F. Supp. 2d at 66 ("Such discovery could compromise any existing confidential informants and/or interfere with the Government's ability to obtain confidential information from others."); United States v. Funds Held in Names or for Ben. of Wetterer, 138 F.R.D. 356, 360 (E.D.N.Y. 1991) (finding, under the good cause standard that predated the Civil Asset Forfeiture Reform Act, that a stay was justified because the interrogatories would reveal "cooperating witnesses and identity of informants").

Here, the Shadman claimants have not only tried to identify the confidential informants, e.g., Claimants' Mot. for Expedited Review and Mot. to Dismiss Complaint at 11, 13 (asserting that "we believe we know the identity of these confidential sources" and identifying people the Shadman claimants suspect are the confidential informants), but the Shadman claimants have also requested statements of the confidential informants via interrogatories, Claimants' Notice of Supplemental Authority in Support of Mot. to Dismiss ("Supp. Authority"), Ex. 1 (Request 21) (requesting "[a]ny and all written statements of all confidential sources"), as well as statements from other witnesses, id. (requesting "all statements of witnesses who are

specifically referenced by name"), which it would not necessarily be entitled to in criminal discovery. Compare Federal Rule of Criminal Procedure 16 ("[T]his rule does not authorize the discovery . . . of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.") with Federal Rule of Civil Procedure 26 (allowing discovery of "any nonprivileged matter that is relevant to any party's claim or defense"); see also United States v. Morrow, Criminal No. 04-355 (CKK), 2005 WL 3163806, at *4 (D.D.C. April 13, 2005) ("[T]he Government enjoys a qualified although time-honored privilege to withhold the identity of its informants from criminal defendants." (internal quotation marks omitted)); United States v. Edelin, 128 F. Supp. 2d 23, 33 (D.D.C. 2001) ("Criminal defendants are only entitled to statements of non-testifying witnesses or co-conspirators if those statements qualify as Brady material."). The breadth of these discovery requests from the claimants could certainly adversely affect the United States by allowing the claimants access to discovery that they ordinarily would not have access to in a criminal case. See Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962) ("In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge

should be sensitive to the difference in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive.").²

The government also states that civil discovery for individuals currently under investigation would impair the criminal investigation because "it may prematurely expose facts and testimony of witnesses to potential subjects of the investigation[,]" U.S. Mot. at 7, and the requested discovery with respect to law enforcement officers would require discovery from those still actively involved in the investigation, id. at 8. Discovery of officers actively involved in a criminal investigation could adversely affect the investigation. E.g., United States v. All Funds Deposited in Account No. 20008524845,

² AIB argues that only the Shadman claimants "have sought discovery that would adversely affect [the government's] ongoing investigations." AIB's Opp'n at 5. While that may be true, AIB provides no legal authority supporting its implicit argument that individual claims should be parsed out and evaluated on a case by case basis. The provision permitting a stay is unequivocal: "the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation[.]" 18 U.S.C. § 981(g)(1). While, as is discussed below, Section 981(g)(3) permits a court to institute a protective order instead of a stay in certain situations, the provision does not appear to contemplate assessing who causes the adverse impact in determining if a stay is appropriate.

First Union Nat'l Bank, 162 F. Supp. 2d 1325, 1332 (D. Wyo.

2001). However, the United States does not point to any requests to depose law enforcement officials, or how particular requested discovery would adversely affect the investigation.

Additionally, the United States claims that civil discovery "would also expose prematurely the identities of those individuals presently under investigation, which could result in the destruction of evidence." U.S. Mot. at 7. The United States offers no evidence, however, that destruction of evidence is likely. While destruction of evidence would adversely affect a criminal investigation, the United States cannot rest on speculation about what may happen.

Ultimately, a stay may be "unnecessary if a protective order limiting discovery would protect the interest of one party without unfairly limiting the ability of the opposing party to pursue the civil case." 18 U.S.C. § 981(g)(3). "In no case, however, shall the court impose a protective order as an alternative to a stay if the effect of such protective order would be to allow one party to pursue discovery while the other party is substantially unable to do so." 18 U.S.C. § 981(g)(3). Here, a well-crafted protective order limiting discovery could "protect the interest" of the government while preserving the ability of the claimants to pursue the civil case. See id.

There are several areas in which the claimants can seek discovery that would not implicate the sensitive information that the government seeks to protect, such as additional information about the applicability of international comity, the act of state doctrine, or the innocent owner defense.

The government, however, argues that civil discovery "may have the effect of inappropriately allowing one party to conduct discovery while the other party -- the United States -- would be unable to take discovery from the persons with pertinent knowledge of the facts" because the witnesses may claim the Fifth Amendment privilege against self-incrimination. U.S. Mot. at 7. Yet, the government offers no evidence that any witness has claimed the Fifth Amendment, and no indictment has yet been returned. Cf. SEC v. Dresser Indus., 628 F.2d 1368, 1376 (D.C. Cir. 1980) (affirming the district court's refusal to stay a proceeding at the request of a person under investigation because there had been no indictment or threat to the person's Fifth Amendment privilege, and because Federal Rule of Criminal Procedure 16(b) "ha[d] not come into effect" nor had the subpoena required the person to reveal the basis of his defense). The United States offers no evidence that it cannot

take discovery because of the pending criminal investigation.³

E.g., Northern Trust Bank, 2004 WL 1834589, at *2 ("[T]he Government's arguments do nothing more than speculate about how civil discovery will adversely affect its criminal investigation. . . . Such speculative and conclusory theories undercut the requirement of section 981(g) that the Government actually show that civil discovery will adversely affect its ability to conduct the criminal investigation." (emphasis omitted)). Accordingly, because there is no evidence that only one side will be able to take discovery with a properly crafted protective order in place, a protective order is permissible.

II. MOTIONS FOR LEAVE TO FILE SURREPLY

"The standard for granting . . . leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." Lewis v. Rumsfeld, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). A surreply is not justified to correct "an alleged mischaracterization." Id.

The Shadman claimants and AIB request leave to file a surreply. AIB contends that the government "improperly raised [a standing argument] for the first time in its reply."

³ There is, of course, nothing that prevents the government from renewing its motion for a stay if its ability to conduct discovery is impaired by parties and witnesses who do, in fact, assert their Fifth Amendment privilege.

Claimant AIB's Mot. for Leave to File a Surreply in Further Opp'n to the U.S.'s Mot. for a Stay Pursuant to 18 U.S.C. § 981(g) at 2. Because the government's standing argument was not considered, AIB is not "unable to contest" the matter, and thus a surreply is unnecessary.

The Shadman claimants argue that the government made "new assertions and material misrepresentations" in its reply. Claimants' Mot. for Leave to File Surreply in Opp'n to the U.S.'s Mot. for a Stay Pursuant to 18 U.S.C. § 981(g) at 1. A surreply, however, is not justified to correct alleged mischaracterizations. Lewis, 154 F. Supp. 2d at 61. Additionally, the Shadman claimants did not identify any arguments that the government raised for the first time in its reply. While the Shadman claimants point to the government's argument that a protective order is inappropriate, the United States brought up this argument in its original motion for a stay. Accordingly, a surreply is unjustified and will be denied. See id.

CONCLUSION

The government has failed to demonstrate that a stay is necessary because a well-crafted protective order limiting discovery will suffice to protect the United States' asserted interest and the protective order will not allow only one side

to pursue discovery. Additionally, the claimants do not prove that a surreply is necessary. Accordingly, it is hereby

ORDERED that the government's motion to stay [56] be, and hereby is, DENIED without prejudice. It is further

ORDERED that the United States consult the claimants and submit within 30 days a proposed protective order suggesting limitations to discovery that will protect its interests while also allowing claimants to move forward with the case. It is further

ORDERED that AIB's motion for leave to file a surreply [64] be, and hereby is, DENIED. It is further

ORDERED that the Shadman claimants' motion for leave to file a surreply [65] be, and hereby is, DENIED.

SIGNED this 17th day of April, 2014.

/s/
RICHARD W. ROBERTS
Chief Judge