

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

BERNARD VON NOTHAUS,)
)
 Claimant,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)

CAUSE NO. 3:09-cv-00050-RLY-WGH
[3:07-mj-17-WGH-1]

MOTION TO DISMISS

Comes now the United States of America, by counsel, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and moves to dismiss the claimant Bernard Von Nothaus' ("Von Nothaus") motion for the return of property¹ because the claimant Von Nothaus fails to state a claim upon which relief may be granted.

In support of this motion, the United States advises the Court as follows:²

1. On November 8, 2007, the United States District Court for the Southern District of Indiana authorized a search warrant with respect to the property and premises located at 225 N. Stockwell Road, Evansville, Indiana. A copy of that search warrant is attached to Von Nothaus' Motion for Return of Property as Exhibit A.

¹Von Nothaus filed his Motion for Return of Property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. Such motions are treated as new civil cases pursuant to *United States v. Howell*, 353 F.3d 693 (7th Cir. 2004).

²The facts set forth herein are taken either from Von Nothaus' pleadings (including the exhibits to his pleadings) or are matters of which this Court may take judicial notice. *See Green v. Warden, United States Penitentiary*, 699 F.2d 364, 369 (7th Cir. 1983) (federal courts may take notice of proceedings in other courts, both within and outside the federal judicial system, if proceedings have a direct relation to matters at issue); *Kamsler v. M.F.I. Corp.*, 359 F.2d 752, 753 (7th Cir. 1966) (a court of appeals, in the interest of justice, may take notice of proceedings in related litigation).

2. A search of the property or premises located at 225 N. Stockwell Road, Evansville, Indiana, was conducted pursuant to the warrant on or about November 11, 2007, resulting in the seizure of the items listed on the receipt for seized property attached to Von Nothaus' Motion to Return Property as Exhibit B.

3. Some, but not all, of the items seized from the property or premises located at 225 N. Stockwell Road, Evansville, Indiana, in the search mentioned above are the subject of a forfeiture action pending in the United States District Court for the Western District of North Carolina in the case entitled *United States v. 3039.375 Pounds of Copper Coins, et al*, Cause Number 1:08-cv-230. The items subject to the civil forfeiture action in the North Carolina district court are not (according to Von Nothaus' pleadings) the subject of or included in the instant Motion for Return of Property. Nonetheless, Von Nothaus has not described or identified (except in the most general of terms) the items or materials whose return he seeks via this action with any precision or specificity.

4. On June 3, 2009, an indictment was unsealed in the case entitled *United States v. Bernard Von Nothaus, William Kevin Innes, Sarah Jane Bledsoe and Rachelle L. Moseley*, Cause Number 5:09-CR-27, United States District Court for the Western District of North Carolina. That indictment charged Von Nothaus and three additional defendants with violations of 18 U.S.C. § 371, 18 U.S.C. § 485, 18 U.S.C. § 486, 18 U.S.C. § 1341, and 18 U.S.C. § 2. Von Nothaus has been arrested (in Florida) on the charges alleged in the indictment.

5. The materials seized from the property or premises located at 225 N. Stockwell Road, Evansville, Indiana constitute evidence in the case against Von Nothaus and his co-defendants. That being the case, the United States is entitled to retain custody over the seized items which

Von Nothaus seeks to recover in this action until such time as the criminal proceedings against him and his co-defendants are resolved or terminated.

6. The claimant Von Nothaus has (in addition to failing to specify what precise materials he wants returned) failed to demonstrate his need for the materials; the likelihood of irreparable harm if the materials are not returned at this time; and that he has no available remedy at law (such as seeking access to the materials at issue by seeking an appropriate order from the district court before which his criminal case is docketed). *See Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991); *Mr. Lucky Messinger Serv. v. United States*, 587 F.2d 15, 17-18 (7th Cir. 1978). The United States has an interest in retaining the seized materials which are the subject of this litigation until the resolution or termination of the criminal proceedings against Von Nothaus and his co-defendants because such materials constitute evidence that may be used at the trial of Von Nothaus and his co-defendants.

Wherefore, the United States respectfully requests that the claimant Von Nothaus' motion for Return of Property be denied, that his motion (which is construed as a civil action) be dismissed, and for all other relief just and proper in the premises.

Respectfully submitted,

TIMOTHY M. MORRISON
United States Attorney

By: s/Gerald A. Coraz
Gerald A. Coraz
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2009, a copy of the foregoing was mailed, by first class

U.S. Mail, postage prepaid and properly addressed to the following:

Bernard Von Nat haus
1614 Emerson Street, # 18
Honolulu, HI 96813

Bernard Von Nat haus
527 N. Green River Road, # 158
Evansville, IN 47715

s/Gerald A. Coraz
Gerald A. Coraz
Assistant United States Attorney

Office of the United States Attorney
Southern District of Indiana
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048
(317) 226-6333