IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:08cv230

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**REPLY TO DEFENDANT'S**
	)	**RESPONSE TO MOTION TO**
	)	**LIFT STAY AND**
	)	**TO UNSEAL ORDERS,**
	)	**MOTIONS, PLEADINGS,**
3039.375 POUNDS OF COPPER COINS, *et al.,*	)	**EXHIBITS, AND TRANSCRIPTS**
	)	
	)	
Defendants.	)	
	)	

Claimants Shelter Systems, LLC, a/k/a Shelter Systems Warehouse (hereinafter, "Systems"), Bernard von NotHaus, Mary Nothhouse, Jeff Kotchounian, Matt Pitagora, Dave Gillie, Dan Morrow, Gerhart Reile, Karl Reile, Alan McConnell, Tom Olmsted, William H. Wesson, Dan Priest, and Vernon L. Robinson (hereinafter referred to as "CLAIMANTS"), for themselves alone and for no other Defendants or Claimants, hereby reply to Plaintiff's Response to Motion to Lift Stay and to Unseal Orders, Motions, Pleadings, Exhibits, and Transcripts, as follows:

1. In its Response, Plaintiff argues "six reasons" why this Court should deny CLAIMANTS' Motion. First, Defendant argues that it reserves the right to challenge the standing of CLAIMANTS before this Court. Thus, Defendant argues this Court should not entertain the Motion because Defendant

may challenge CLAIMANTS standing at a later time in this case. This argument of Defendant puts the proverbial "cart before the horse." This Court cannot address "standing" until and unless Defendant files a Motion challenging CLAIMANTS' standing before this Court. The CLAIMANTS have filed Claims, have filed an Answer, and are parties to this proceeding. Until such challenge to standing is filed by Defendant, this Court cannot address the hypothetical issue. Tower South Property Owners Ass'n v. Summey Bldg. Systems, Inc., 47 F.3d 1165 (4th Cir. 1995) (standing is an affirmative argument, which must be affirmatively raised by the party seeking to use such argument). Therefore, Plaintiff's first argument, relating to standing, is without merit.

2. Second, Plaintiff argues in its Response that the Motion to Lift the Stay and Unseal should be denied because Defendant properties are contraband, and, therefore, cannot be returned. Again, Plaintiff puts the "cart before the horse." The only legal issue, included in the Motion presently before the Court, is whether the Court should lift the stay and unseal records so that the parties can prepare and proceed to trial. CLAIMANTS' Motion, presently before this Court, is not a Motion for Summary Judgment. Via their Motion to Lift the Stay and Unseal, CLAIMANTS are merely seeking to end the delay and to have their day in court within a reasonable time-period. Thus, Plaintiff's second argument is misplaced because the issue of whether Defendant properties are "contraband" is the penultimate issue in this case, which will not be addressed by this Court until the Order of Stay is lifted and the records are unsealed.

3. Third, Plaintiff argues that *ex parte* evidence has been submitted to this Court under Seal, which supports the Order of Stay. Obviously, CLAIMANTS are not privy to the contents of Sealed filings with the Court. However, such evidence is presumably the same evidence that was already published—whether intentionally or inadvertently—in the 33-page Affidavit of the government in support of the search and seizure warrants. *See* Exhibit 1 to the Motion to Lift Stay and Unseal. Thus, Plaintiff's alleged evidence of a crime is not a reason to continue the Order of Stay and Seal if the same evidence is already published. U.S. v. Moussaoui, 65 Fed. Appx. 881 (Slip Op. 5) (4th Cir. 2003) (Justification for Seal no longer stands where court filings, available to the press and general public, reveal the nature of the sealed information). Therefore, Plaintiff's third argument fails because the nature of the sealed information is already in the public domain.

4. Fourth, Plaintiff argues that a sufficient showing of hardship has not been made by CLAIMANTS. However, as a procedural matter, a showing of "hardship" is not the standard for determining whether an Order of Stay and Seal should be lifted. Instead, Plaintiff has the burden of showing a compelling reason why the civil forfeiture action should continue to be stayed. U.S. v. All Funds on Deposit in Any Account, 767 F.Supp. 36, 42 (E.D.N.Y. 1991). Nevertheless, CLAIMANTS are harmed because they have been stripped of their property for almost one year and are being denied the ability to timely challenge the seizure in Court. The value of the Defendant property is not insignificant; instead, the Defendant property has a fair market valued in excess of US$3,000,000. Thus,

when weighing the competing interests of Plaintiff and CLAIMANTS, this Court must conclude that the right to timely challenge the seizure of significant assets outweighs Plaintiff's interests in sealed information that is already in the public domain. Therefore, the fourth argument of Plaintiff is without merit.

5. Fifth, Plaintiff argues that there is no legal authority that would serve as a basis for the Motion to Lift the Stay and Unseal. Plaintiff is incorrect. In United States v. All Funds on Deposit in Any Account, 767 F.Supp. at 42, the government seized bank accounts and initiated a civil forfeiture action & a related criminal proceeding. The government asked for a stay pursuant to 18 U.S.C. § 981(g). The Court denied the motion for stay as follows:

> As stated in Leasehold Interests in 118 Avenue D, however, 'mere conclusory allegations of *potential* abuse or simply the *opportunity* by the claimant to improperly exploit civil discovery…will not avail on a motion for a stay.' Here the Government fails to point to any specific discovery request or abuse that has taken place or any other compelling reason why the forfeiture action should be stayed at this time. [Emphasis in original].

Plaintiff's objection to the Motion to Lift Stay and Unseal is analogous to the failed contentions of the government in Leasehold Interests in 118 Avenue D. Plaintiff has not espoused a compelling reason why the Stay should remain in place. Therefore, Plaintiff's fifth argument is without merit.

6. Sixth, Plaintiff argues that the Stay is mandatory after the government unilaterally alleges that its criminal investigation would be adversely affected. Plaintiff contends that United States v. All Funds in Business Marketing Account, 319 F.Supp.2d 290, 294 (E.D.N.Y. 2004) supports its argument. However, such case does not support the broad conclusion alleged by the

Plaintiff. In All Funds in Business Marketing Account, the district court concluded that the identities of confidential informants would be revealed by lifting the stay, and the district court denied the Motion to Lift the Stay for this reason. The case at hand is distinguishable from All Funds in Business Marketing Account. Unlike the cited case, Plaintiff has not specifically alleged in either its Motion to Stay Civil Proceedings Pursuant to 18 U.S.C. § 981(g)(1) or the Response to the Motion to Lift Stay and Unseal that the identity of confidential informants would be revealed. In addition, such allegation, even if made, would have no merit here because the identity of the confidential informants has already been revealed when the 33-page Affidavit of the government in support of the search and seizure warrants was published. *See* Exhibit 1 to the Motion to Lift Stay and Unseal.

7. In addition, a stay is never mandatory based upon the unilateral allegations of one party. Instead, in Virginia Department of State Police v. Washington Post, 386 F.3d 567, 576 (4th Cir. 2004), the Court of Appeals stated:

> A district court must…weigh the appropriate competing interests under the following procedure: it must give the public notice of the request to seal and a reasonable opportunity to challenge the request; it must consider less drastic alternatives to sealing; and if it decides to seal it must state the reasons (and specific supporting findings) for its decision and the reasons for rejecting alternatives to sealing.

Therefore, this Court is not required to accept the unilateral allegations of Plaintiff that their criminal investigation would be adversely affected. Instead, this Court has the ability and the duty to determine whether the competing interests of the parties weigh in favor of lifting the Order of Stay and Seal. Thus, the sixth argument of Plaintiff is without merit.

8. Plaintiff has held the Defendant properties for almost one year from the date of the filing of this Reply. CLAIMANTS are seeking, and, so far, have been denied an opportunity to contest the seizure of the Defendant properties. CLAIMANTS are harmed by such denial, while Plaintiff has not espoused a credible reason why the Stay should continue in place.

WHEREFORE, CLAIMANTS respectfully request that this Court enter an Order lifting the Stay and Unsealing any Orders, Motions, Pleadings, Exhibits and Transcripts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded to all counsel of record by means of electronic filing on this 16th day of October, 2008.

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Date: October 16, 2008

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