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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 UNITED STATES OF AMERICA,
9 Plaintiff,

1:11-cv-00304-OWW-SKO
MEMORANDUM DECISION AND ORDER
RE: MOTION TO DISMISS (Doc.
12)

10
11 v.

12 REAL PROPERTY LOCATED AT 6415
13 N. HARRISON AVE., FRESNO,
CALIFORNIA APN:407-751-08,

14 Defendant.

15 I. INTRODUCTION.

16 On February 22, 2011, the United States filed a complaint for
17 forfeiture in rem against Real Property Located at 6415 N. Harrison
18 Avenue, Fresno, Fresno County, California. (Doc. 1).

19 On May 2, 2011, claimants Bok Hee Ee and Judy Ee ("Claimants")
20 filed a motion to dismiss. (Doc. 12). The United States filed
21 opposition on May 27, 2011. (Doc. 15). Claimants filed a reply on
22 June 3, 2011. (Doc. 16).

23 II. FACTUAL BACKGROUND.

24 The defendant in this action is real property located at 6415
25 North Harrison Avenue, Fresno, Fresno County, California, APN:
26 407-751-08 ("the Property"), described as follows:

27 Lot 2 of Tract No. 3600, Craycroft Village, according to
28 the map thereof recorded in Volume 42, Page 1 of Plats,

1 Fresno County Records. APN: 407-751-08

2 The recorded owners of the Property are Bok Hee Ee ("Ee"), a widow,
3 and her daughter Judy C. Ee, a single woman, as joint tenants. Bok
4 Hee Ee purchased the Property in 1993. On or about January 23,
5 2001, Bok Hee Ee opened a Home-Equity Line of Credit ("HELOC") with
6 Bank of the West secured by the equity value of the Property.

7 Ee married Kwan Yong Choi ("Choi") in October 2004. The
8 complaint alleges that an investigation conducted by Immigration
9 and Customs Enforcement ("ICE") from February 2009 to February 2010
10 revealed that Ee and Choi used the HELOC to launder funds from
11 fraudulent investment schemes perpetrated by Choi. Choi was
12 indicted on May 27, 2010 for money laundering in violation of 18
13 U.S.C. §§ 1956 and 1957; Choi's criminal case is pending.

14 According to the complaint, Choi placed fraudulently obtained
15 funds into a Bank of America business account number ***9021 ("9021
16 Account") and a personal Bank of America account number ***838
17 ("838 Account"). Choi used funds from the 9021 Account and 838
18 Account to fund checks deposited into the following accounts:

- 19 a. Hanmi Bank account number ***753 dba Trinity
20 California Theological Seminary controlled by Choi;
- 21 b. Bank of America account number *** 575 in the name of
22 Kwan Choi (hereafter "BoA575");
- 23 c. Bank of the West account number ***286 in the name of
24 Bok Ee (hereafter "BoW286");
- 25 d. Bank of the West account number ***166 in the name of
26 Bok Ee (hereafter "BoW166"); and,
- 27 e. Bank of America account number ***159 in the name of
28 Bok Choi, the married name of Bok Ee (hereafter
"BoA159").

Funds from these five accounts were used to service the HELOC.

1 Funds from the HELOC were then placed back into Ee's Bank of
2 America ***159 and Bank of the West ***166 accounts.

3 **III. LEGAL STANDARD.**

4 Motions to dismiss in rem forfeiture actions are governed by
5 Federal Rule of Civil Procedure 12(b) and Rule G of the
6 Supplemental Rules for Admiralty or Maritime Claims and Asset
7 Forfeiture Actions.

8 Dismissal under Rule 12(b)(6) is appropriate where the
9 complaint lacks sufficient facts to support a cognizable legal
10 theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
11 Cir.1990). To sufficiently state a claim to relief and survive a
12 12(b)(6) motion, the pleading "does not need detailed factual
13 allegations" but the "[f]actual allegations must be enough to raise
14 a right to relief above the speculative level." *Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).
16 Mere "labels and conclusions" or a "formulaic recitation of the
17 elements of a cause of action will not do." *Id.* Rather, there must
18 be "enough facts to state a claim to relief that is plausible on
19 its face." *Id.* at 570. In other words, the "complaint must contain
20 sufficient factual matter, accepted as true, to state a claim to
21 relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S.
22 ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal
23 quotation marks omitted).

24 The Ninth Circuit has summarized the governing standard, in
25 light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to
26 survive a motion to dismiss, the nonconclusory factual content, and
27 reasonable inferences from that content, must be plausibly
28 suggestive of a claim entitling the plaintiff to relief." *Moss v.*

1 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal
2 quotation marks omitted). Apart from factual insufficiency, a
3 complaint is also subject to dismissal under Rule 12(b)(6) where it
4 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or
5 where the allegations on their face "show that relief is barred"
6 for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.
7 910, 166 L.Ed.2d 798 (2007).

8 In deciding whether to grant a motion to dismiss, the court
9 must accept as true all "well-pleaded factual allegations" in the
10 pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not,
11 however, "required to accept as true allegations that are merely
12 conclusory, unwarranted deductions of fact, or unreasonable
13 inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988
14 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss,
15 if a district court considers evidence outside the pleadings, it
16 must normally convert the 12(b)(6) motion into a Rule 56 motion for
17 summary judgment, and it must give the nonmoving party an
18 opportunity to respond." *United States v. Ritchie*, 342 F.3d 903,
19 907 (9th Cir.2003). "A court may, however, consider certain
20 materials-documents attached to the complaint, documents
21 incorporated by reference in the complaint, or matters of judicial
22 notice-without converting the motion to dismiss into a motion for
23 summary judgment." *Id.* at 908.

24 Pursuant to Rule G of the Supplemental Rules for Admiralty or
25 Maritime Claims, a forfeiture complaint must "state sufficiently
26 detailed facts to support a reasonable belief that the government
27 will be able to meet its burden of proof at trial." Supp. R. G for
28 Admiralty or Maritime Cl. and Asset Forfeiture Actions Rule E

1 requires the complaint to "state the circumstances from which the
2 claim arises with such particularity that the defendant or claimant
3 will be able, without moving for a more definite statement, to
4 commence an investigation of the facts and to frame a responsive
5 pleading." Supp. R. E(2) (a) for Admiralty or Maritime Cl. and Asset
6 Forfeiture Actions.

7 **IV. DISCUSSION.**

8 **A. Statute of Limitations**

9 Claimants assert that the United States' action is time
10 barred. Pursuant to 19 U.S.C. § 1621, a forfeiture action must be
11 "commenced within five years after the time when the alleged
12 offense was *discovered.*" *United States v. 874 Gartel Drive*, 79 F.3d
13 918, 922 (9th Cir. 1996) (citing 19 U.S.C. § 1621). "The
14 statutory period begins to accrue only upon discovery of the
15 offense, not with the commission thereof." *Id.*

16 According to the complaint, the money laundering scheme
17 underlying the United States' forfeiture action was not discovered
18 until, at the earliest, February 2009, when the United States began
19 its investigation into Choi and Bok Ee. (Compl. at 3). The
20 complaint in this action was filed in 2011, within the five-year
21 period proscribed by section 1621.

22 Claimants invoke the one-year statute of limitations set forth
23 in 18 U.S.C. § 984(b). Section 984 applies:

24 [i]n any forfeiture action in rem in which the subject
25 property is cash, monetary instruments in bearer form,
26 funds deposited in an account in a financial
institution...or precious metals.

27 18 U.S.C. § 984(a) (1). The United State's complaint does not seek
28 forfeiture of the types of property identified in section

1 984(a)(1); the United States seeks only forfeiture of real
2 property. By its own terms, section 984 does not apply to the
3 instant action. *Id.* Section 1621 provides the applicable statute
4 of limitations for the United States' forfeiture claim.

5 **B. Claimants' Arguments Regarding Traceability**

6 Claimants contend that "to forfeit property as direct
7 'traceable proceeds' the government literally has to trace the
8 exact same identifiable assets from the tainting act into the res."
9 (Motion to Dismiss at 9). Claimants cite no authority in support
10 of their argument, which is contrary to Ninth Circuit law. Tracing
11 of money for the purposes of section 981 does not require that the
12 identical money be traced. *E.g., United States v. Check No. 25128*
13 *in the Amount of \$ 58,654.11*, 122 F.3d 1263, 1264 (9th Cir. 1997).

14 As the Second Circuit has explained:

15 Where the credit in a depositor's account represents the
16 net results of transactions that include a deposit of
17 drug money, there is a plausible argument to be made
18 either that the account contains the "traceable proceeds"
19 of the tainted deposit (so long as the balance has not
20 fallen below the amount of the tainted deposit) or that
21 any withdrawal (in excess of the tainted deposit)
22 contains the "traceable proceeds" of such a deposit.
23 Which approach reflects reality in any particular case
24 will depend on the precise circumstances. For example, if
25 a depositor placed a \$ 175 check from his automobile
26 insurer in payment of a damage claim into an account that
27 contained \$ 100 from a drug sale and the next day paid a
28 \$ 175 bill for car repairs, a fact-finder would be
entitled to conclude that the \$ 175 withdrawal did not
contain "traceable proceeds" of the drug transaction but
solely the "traceable proceeds" of the insurance payment,
with the tainted deposit remaining in the account.
Obviously few cases will present facts that neatly match
untainted deposits with withdrawals, and the real
question therefore becomes which side bears the risk of
the inevitable uncertainty that will arise in most cases.
Congress has answered that question in the Government's
favor by assigning it a lenient burden of proof in
obtaining forfeiture of "traceable proceeds" of drug
transactions.

1 *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159-1160
2 (2nd Cir. 1986) *superceded on other grounds by statute as stated in*
3 *United States v. Contents in Account No. 059-644190-69*, 253 F.
4 Supp. 2d 789, 795 (D. Vermont 2003).

5 The only case cited in Claimants' motion concerning their
6 traceability argument is *United States v. All Funds Presently on*
7 *Deposit at Am. Express Bank*, 832 F. Supp. 542, 560 (E.D.N.Y 1993).
8 The selective quotation from *All Funds* provided by Claimants,
9 however, is from a passage in which the court was quoting a portion
10 of the legislative history of section 984. Not only is *All Funds*
11 inapposite, it does not even stand for the proposition Claimants
12 cite it for: that "when proceeds are commingled in a bank account
13 with clean money, the trail of 'directly traceable proceeds' ends."
14 (Motion to Dismiss at 8).

15 The complaint alleges facts sufficient to support a reasonable
16 belief that the government will be able to meet its burden of proof
17 at trial of establishing that the Property is derived, at least in
18 part, from proceeds traceable to offenses identified in section
19 981. *See, e.g., United States v. 3814 NW Thurman St.*, 164 F.3d
20 1191, 1196 (9th Cir. 1999) (increased equity value of real property
21 traceable to tainted funds subject to forfeiture); *see also United*
22 *States v. 216 Kenmore Ave.*, 657 F. Supp. 2d 1060, 1069 (D. Minn.
23 2009) (holding that real property was "traceable to" money
24 laundering activity where monies were used to pay property taxes
25 and conduct renovations).¹ Claimants' motion to dismiss the

26
27 ¹ There are potential problems with the government's tracing based claims, but
28 Claimants have not identified them. It does not appear that the entire property
is subject to forfeiture under the government's tracing-based claims; rather,

1 Government's tracing-based claims is DENIED, without prejudice.

2 **C. Claimants' Arguments Concerning 981(a) (1) (A)**

3 Claimants contend that the Property was not "involved in" the
4 alleged money laundering transactions within the meaning of section
5 981(a) (1) (A).² Claimants aver that

6 the fact that the line of credit was secured was merely
7 incidental or fortuitous - it did not make the underlying
8 criminal offense "less difficult or more or less free
9 from obstruction or hindrance." *United States v.*
10 *Schifferli*, 895 F.2d 987 (4th Cir. 1990).

11 (Motion to Dismiss at 10). In *Schifferli*, the Fourth Circuit
12 adopted the facilitation approach to determining whether property
13 was "involved in" criminal conduct. See *Schifferli*, 895 F.2d at
14 990. Although section 981(a) (1) (A) does not contain the words
15 "facilitate" or "facilitating," numerous courts have concluded that

16 only the equity value of the property traceable to tainted funds appears to be
17 subject to forfeiture. See, e.g., *NW Thurman St.*, 164 F.3d at 1196 (holding that
18 increased equity value of real property traceable to tainted funds subject to
19 forfeiture). Several district courts have noted a distinction between forfeiture
20 claims against real property based on "traceability" and claims based on the
21 property's actual involvement in money laundering. E.g., *In re 650 Fifth Ave.*
22 *& Related Props.*, 2011 U.S. Dist. LEXIS 34295 *100-101 n. 11 (S.D.N.Y. 2011)
23 (noting distinction between 981(a) (1) (C) claims and 981(a) (1) (A) claims); *United*
24 *States v. Real Prop. at 7401-7403 S. Racine*, 2010 U.S. Dist. LEXIS 31465 *24
25 (N.D. Ill. 2010) (same). Unlike the government's claim under section
26 981(a) (1) (A), the government's tracing-based claim may not apply to the entire
27 value of the property, but rather only to the portion of the equity value
28 traceable to laundered funds. This issue has not been briefed. Ultimately, it
appears seems the government's tracing claims are redundant an unnecessary in
light of the government's section 981(a) (1) (A) claim. Tracing is unnecessary to
the extent that the property was "involved in" laundering.

² Claimants also invoke the "substantial connection" requirement set forth in 18
U.S.C. § 983(c) (3). Section 983(c) (3) sets forth the applicable burden of proof
in cases where the government's theory is that property was involved in the
commission of an offense. The government need not satisfy its burden of proof
at the pleading phase, however. See, e.g., *United States v. \$ 11,500.00 in*
United States Currency, 2010 U.S. Dist. LEXIS 76868 (D. Oregon 2010)
(distinguishing pleading burden from burden at trial under section 983). As
discussed above, the United State's has satisfied its pleading burden by alleging
facts sufficient to support a reasonable belief that the Property was involved
in money laundering.

1 the phrase "property involved in" includes property used to
2 facilitate an offense. *E.g., United States v. All Monies In*
3 *Account No. 90-3617-3*, 754 F. Supp. 1467, 1473 (D. Hawaii 1991);
4 *see also In re 650 Fifth Ave. & Related Props.*, 2011 U.S. Dist.
5 LEXIS 34295 *92-94 (S.D.N.Y. 2011) (collecting cases).³

6 Property need not be indispensable to the commission of an
7 offense in order to be "involved in" the offense. *See, e.g.,*
8 *United States v. 3639-2nd St., N.E.*, 869 F.2d 1093, 1096 (8th Cir.
9 1989). As the district court explained in *All Monies In Account*
10 *No. 90-3617-3*:

11 Facilitating property is forfeitable if it makes the
12 underlying criminal activity less difficult or "more or
13 less free from obstruction or hindrance." There must be
14 more than an incidental or fortuitous connection between
15 the property and the illegal activity, but the property
16 need not be indispensable to the commission of the
17 offense. Nor does the property need to be used
18 exclusively for illegal activity.

19 754 F. Supp. at 1473 (citations omitted).

20 Several courts have held that real property is "involved in"
21 a money laundering offense if laundered funds are used to make
22 payments toward purchase of the property and to pay for
23 improvements. *See In re 650 Fifth Ave.*, 2011 U.S. Dist. LEXIS 34295
24 at * 99 (citing *United States v. Myers*, 21 F.3d 826, 831 (8th Cir.

25 ³ Claimants attempt to distinguish *In re 650* on the basis that, in that case,
26 "the real property being forfeited there was itself the alleged vehicle
27 generating the income from specified unlawful activity." (Reply at 6). However,
28 the distinction Claimants raise is actually harmful to their position. *In re 650*
held "here...[t]he Building was *merely* the source of the money laundered; it was
not involved in the laundering itself. The Building as a whole therefore cannot
be forfeited as having been 'involved in' money laundering." *Id.* (emphasis
added). The basis for the holding in *In re 650* was not that the building was the
source of the tainted money; rather, the court held that the building was subject
to forfeiture because tainted money was used to maintain the building. *Id.* at
*100. Here, the complaint alleges that tainted money was used to increase the
equity value of the Property and that the Property itself was used to facilitate
money laundering.

1 1994); *United States v. 10.10 Acres Located on Squires Road*, 386 F.
2 Supp. 2d 613, 616 (D.N.C. 2005); *United States v. Schlesinger*, 261
3 Fed. Appx. 355, 36 (2nd Cir. 2008); and *United States v. 216*
4 *Kenmore Ave.*, 657 F. Supp. 2d 1060, 1069 (D. Minn. 2009) (tracing
5 theory)). In *Schlesinger*, a defendant deposited the proceeds of a
6 fraudulent scheme into the business operating accounts of companies
7 he ran at the premises and then used funds from the operating
8 accounts to pay the companies' monthly lease and tax expenses.
9 261 Fed. Appx. At 361. The Second Circuit affirmed the district
10 court's finding that the premises "served as a conduit for the
11 proceeds of illegal transactions," making the premises subject to
12 forfeiture. *Id.* Similarly, in *Myers*, the Eight Circuit held that
13 a farm was forfeitable because it was "involved in criminal
14 activity" where a defendant made substantial payments on a real
15 estate contract for the farm and paid for improvements on the farm
16 with laundered funds.

17 Here, the complaint alleges sufficient facts to support a
18 forfeiture claim under the theory that Property was the conduit
19 through which a money laundering scheme was carried out. Absent
20 the Property, Choi and Ee would not have had access to the ELOC,
21 which facilitated numerous transfers of substantial amounts of
22 money to and from accounts involved in the money laundering scheme
23 alleged in the complaint. It cannot be disputed that the Property,
24 through the ELOC, made the alleged money laundering scheme less
25 difficult because it provided access to an apparently legitimate
26 source of funds. Claimants' attempt to separate the ELOC from the
27 Property is of no avail; absent the Property, the \$70,000.00
28 equity line of credit would not have been available, and there

1 would have been no source of apparently legitimate funds to deposit
2 into the various accounts held by Ee and Choi.

3 Contrary to Claimants' repeated contention, the United State's
4 forfeiture claim under section 981(a)(1)(A) does not rely on the
5 "expanding drop of ink theory;" accordingly, Claimants citation to
6 *United States v. \$3,148,884.40 (Bital)*, 76 F.Supp.2d 1063, 1067
7 (C.D. Cal. 1999) for the proposition that "the 'expanding drop of
8 ink' or 'facilitating bank account'" is no longer viable is of no
9 avail. (Motion to Dismiss at 11). The United States claim under
10 section 981(a)(1)(A) is based on the contention that the Property
11 was used to facilitate money laundering, not that the Property is
12 subject to forfeiture because its equity value was paid for in part
13 by tainted funds (this theory is the basis of the United States
14 claims under section 981(a)(1)(C) and 981(a)(1)(D)). Claimants'
15 motion to dismiss is DENIED, without prejudice.

16 **ORDER**

17 For the reasons stated, Claimants' motion to dismiss is
18 DENIED, without prejudice.

19
20 IT IS SO ORDERED.

21 **Dated: June 27, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE