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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
10

11 UNITED STATES OF AMERICA

CASE NO. 1: 11-cv-00304-BAM

12 Plaintiff,

13 vs.

**ORDER STAYING PROCEEDINGS;
GRANTING IN PART AND DENYING IN
PART CLAIMANTS' MOTION TO
COMPEL DISCOVERY; DENYING
CLAIMANTS' MOTION FOR A
PROTECTIVE ORDER AS MOOT**

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16 REAL PROPERTY LOCATED AT
17 6415 NORTH HARRISON AVE, FRESNO
COUNTY, et al,

18 Defendants.
19 _____/

20 **I. INTRODUCTION**

21 Currently pending before the Court is the motion of Plaintiff United States of America (The
22 "United States," or "Government") to stay further proceedings pending the conclusion of related criminal
23 proceedings (the "Motion to Stay"). (Doc. 70.) Also pending before the Court are the motions of
24 claimants Bok Hee Ee and Judy Ee ("Claimants") to compel discovery responses from the United States,
25 as well as Claimants' motion for a protective order concerning discovery requests propounded by the
26 United States (the two motions are collectively referred to as Claimants' "Discovery Motions"). (Doc.
27 71, 75.)
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1 On July 31, 2012, the Court vacated the hearings on these motions, and ordered the parties to
2 meet and confer to narrow the scope of disputed issues between the parties. (Doc. 78.) The Court
3 additionally ordered the parties to submit a joint discovery statement concerning any unresolved matters.
4 *Id.* On August 20, 2012, and August 21, 2012, the parties submitted three separate statements which,
5 taken together, address all unresolved issues requiring the Court’s attention.¹ (Doc. 81, 82, 83.) Having
6 considered the parties’ moving papers, oppositions and separate discovery statements, as well as the
7 Court’s file, the Court issues the following Order.

8 II. FACTUAL BACKGROUND

9 The United States Department of Homeland Security Immigration and Customs Enforcement
10 (“ICE”) conducted an investigation of Kwan Yong Choi, also known as Daniel Choi (hereinafter referred
11 to as “Choi”) and his wife, Bok Hee Ee, regarding involvement in multiple fraud schemes. (Pl.’s
12 Compl., ¶ 5, Doc. 1.) Specifically, the United States alleges Choi misrepresented himself under various
13 false pretenses to multiple Korean nationals as part of a fraudulent investment scheme. (Pl.’s Compl.,
14 ¶ 11, Doc. 1.) The United States alleges Choi defrauded multiple victims of approximately
15 \$2,638,542.00. (Pl.’s Compl., ¶ 12, Doc. 1.)

16 The alleged fraud schemes involved several bank accounts used by Choi and Bok Hee Ee for
17 laundering victim funds. (Pl.’s Compl., ¶¶ 6-9, 12-15, Doc. 1.) Two bank accounts controlled by Choi
18 were used to deposit victim funds (the “Deposit Accounts”). (Pl.’s Compl., ¶¶ 11-12, Doc. 1.) In an
19 effort to conceal the source of the funds, the funds were transferred from the Deposit Accounts to several
20 accounts controlled by both Choi and Bok Hee Ee (the “Transfer Accounts”). (Pl.’s Compl., ¶ 13, Doc.
21 1.)

22 The United States alleges Bok Hee Ee opened a home-equity line of credit for \$70,000.00 (the
23 “HELOC”) using a residential piece of property as the underlying collateral (the “Real Property”). (Pl.’s
24 Compl., ¶ 6, Doc. 1.) The Real Property is currently held in joint tenancy by Bok Hee Ee and Judy Ee.
25 (Pl.’s Compl., ¶ 6, Doc. 1.); (Claimant’s Ans., ¶ 6, Doc. 7.) The United States alleges that Choi and
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27 ¹ The Court admonishes the parties for their continued failure to obey the orders of this Court and the Court’s Local
28 Rules by failing to meet and confer and prepare a joint statement. In the interests of judicial economy, however, the Court
will resolve these disputes as they have been presented.

1 Bok Hee Ee used the Transfer Accounts to pay down the balance on the HELOC. (Pl.’s Compl., ¶ 13,
2 Doc. 1.) The United States further alleges that Choi and Bok Hee Ee used the HELOC to transfer funds
3 back to the Transfer Accounts. *Id.* The United States alleges that at least \$184,823.05 in Transfer
4 Account funds were deposited in the HELOC. *Id.*

5 The United States alleges that \$11,000.00 was withdrawn against the HELOC as a down payment
6 on a 2005 Mercedes-Benz (the “Subject Vehicle”). (Pl.’s Compl., ¶ 8, Doc. 1.) The United States
7 further alleges that an additional \$9,000.00 down payment on the Subject Vehicle was made from a
8 Deposit Account. (Pl.’s Compl., ¶ 15, Doc. 1.) The remaining balance on the Subject Vehicle
9 (\$34,517.49) was subsequently paid off through the Deposit Accounts.

10 The United States of America filed this action *in rem* to enforce provisions of 18 U.S.C. §
11 981(a)(1)(A), providing for the forfeiture of any property involved in or traceable to a violation of the
12 anti-money laundering provisions of 18 U.S.C. §§ 1956 and 1957. The United States also seeks to
13 enforce the provisions of 18 U.S.C. § 981(a)(1)(D), which allows for the forfeiture of proceeds traceable
14 to mail fraud, in violation 18 U.S.C. § 1341; wire fraud, in violation of 18 U.S.C. § 1343; and 18 U.S.C.
15 981(A)(1)(c), which otherwise provides for forfeiture of any property traceable to a violation of any
16 offense constituting “specified unlawful activity,” or a conspiracy to commit such an offense. (Pl.’s
17 Compl., ¶ 1, Doc. 1.)

18 III. DISCUSSION

19 A. The United States’ Motion to Stay

20 The United States moves to stay these proceedings pursuant to 18 U.S.C. § 981(g), pending the
21 conclusion of related federal criminal proceedings, *United States v. Kwan Yong Choi*, 1: 10-CR-00206-
22 AWI. Choi was indicted by a federal grand jury on May 27, 2010. Choi is currently serving a prison
23 sentence in Korea, and is expected to be extradited to the United States in or around January of 2013.
24 The United States argues that a stay is necessary to prevent an adverse effect on the government’s ability
25 to prosecute the related criminal prosecution, because there is a high degree of similarity of parties,
26 witnesses, facts, and circumstances to the instant civil forfeiture action.

27 Claimants concede that a limited stay with respect to fraud allegations against Choi is warranted,
28 however, argue that discovery relating to the tracing of the tainted funds to the Subject Properties should

1 be permitted to go forward. Claimants argue that the tracing of fraud proceeds into the Subject
2 Properties is not an element of the Government's criminal charges against Choi, thus, permitting
3 discovery on this limited inquiry would not adversely affect the Government's ability to prosecute the
4 related criminal action.

5 **1. Legal Standard**

6 Pursuant to 18 U.S.C. § 981, "[u]pon the motion of the United States, the court shall stay [a] civil
7 forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the
8 Government to conduct a related criminal investigation or the prosecution of a related criminal case."
9 See 18 U.S.C. § 981(g)(1). Although the court "may determine that a stay is unnecessary if a protective
10 order limiting discovery would protect the interests of one party without unfairly limiting the ability of
11 the opposing party to pursue the civil case," 18 U.S.C. § 981(g)(3), under no circumstances may the
12 court "impose a protective order as an alternative to a stay if the effect of such protective order would
13 be to allow one party to pursue discovery while the other party is substantially unable to do so." *Id.*

14 The language in Section 981(g)(1) reflects an amendment by the Civil Asset Forfeiture Act of
15 2000 that "broadened the stay relief significantly" and removed the requirement that the Government
16 show good cause. *United States v. All Funds Deposited in Account No. 200008524845*, 162 F. Supp.
17 2d 1325, 1330 (D. Wyo. 2001). Indeed, Section 981(g)(1) does not require a particularized showing of
18 prejudice or specific harm; rather, all that the Court must determine is whether the civil discovery will
19 interfere with the criminal investigation. See *U.S. v. \$1,026,781.61 in Funds from Florida Capital Bank*,
20 No. CV 09-04381, 2009 WL 3458189, *2 (N.D. Cal. Oct. 21, 2009). In fact, more specific disclosure
21 of prejudice through detailed evidentiary support will only result in the very prejudice to the criminal
22 proceeding that the Government seeks to avoid. See *id.* Thus, courts have routinely issued Section
23 981(g)(1) stays on the basis of the Government's allegations of likely prejudice to the criminal
24 proceeding caused by the civil discovery. See *id.*; *United States v. Approximately \$69,577 in United*
25 *States Currency*, No. C 09-0674, 2009 WL 1404690 (N.D. Cal. May 19, 2009).

26 **2. A Stay Is Warranted**

27 The criminal investigation and this civil forfeiture case arise out of the same facts and
28 circumstances, and are clearly related. See 18 U.S.C. § 981(g)(3). The facts and circumstances of this

1 forfeiture action mirror those of the related criminal prosecution. *Compare*, Complaint for Forfeiture
2 *In Rem*, No. 11-cv-00304-BAM (E.D. Cal., Feb. 22, 2011, Doc. 1,) *with* Indictment of Kwan Yong Choi,
3 No. 10-cr-00206-AWI (E.D. Cal., May 27, 2010, Doc. 1.). As such, nearly all of the facts, witnesses and
4 evidence offered by the Government in the forfeiture action will overlap with the criminal prosecution.

5 Civil discovery is likely to adversely affect the ability of the Government to conduct the related
6 criminal proceedings because it will subject the Government to broader and earlier discovery than would
7 occur in a criminal proceeding. *See United States v. Real Property and Improvements Located at 10*
8 *Table Bluff Road*, 2007 WL 911849 at *2 (N.D. Cal.2007). Moreover, considering the complexity and
9 frequency of financial transactions involved, complete evidence of the Government's tracing theories
10 would run the risk of revealing evidence Choi may use in his defense. *See, U.S. v. 2009 Dodge*
11 *Challenger*, 2011 WL 6000790 (D. Or. 2011) ("given the number of people involved, and the
12 complexity and amount of financial transactions involved, it is likely that discovery will need to take
13 place before this court can determine if there is a genuine issue of material fact as to whether any of the
14 seized funds or vehicles can be traced to the alleged fraud under 18 U.S.C. § 981"). As such, the Court
15 is obligated by the plain language of the statute to grant the Government's request for a stay. *See* 18
16 U.S.C. § 981(g)(1); *see also United States v. All Funds on Deposit in Suntrust Account Number*
17 *XXXXXXXXXX8359, In the Name of Gold and Silver Reserve, Inc.*, 456 F. Supp.2d 64, 65 (D.D.C. 2006)
18 ("Two things are obvious from this language: 1) the Government must satisfy the court that civil
19 discovery would adversely affect the criminal case; if so, then 2) the court must grant the stay.")

20 Claimants argue that a protective order limiting discovery to the tracing of victim funds to the
21 Subject Properties sufficiently protects the Government's ability to criminally prosecute Choi.
22 Specifically, Claimants suggest that tracing the alleged fraud proceeds into property belonging to
23 Claimants is not an element of Choi's offense, and will not be at issue at his trial. Claimants argue this
24 information should be produced because, even if it were presumed certain funds were obtained
25 fraudulently (which Claimants do not concede), summary judgment may still be appropriate if the
26 Government can not trace the allegedly tainted funds to the Subject Properties.

27 The tracing discovery sought by Claimants can be separated into three categories: (1) tracing of
28 victim funds to the Deposit Accounts; (2) tracing of funds from the Deposit Accounts to either the

1 Transfer Accounts or to the Subject Properties; and (3) tracing from the Transfer Accounts to the
2 HELOC or the Subject Properties. The Government has provided, or has expressed a willingness to
3 provide, the latter two categories of tracing, but not the first. Claimants argue they require all three
4 categories of tracing to move for summary judgment.

5 Full and complete tracing discovery would, in fact, require the Government to disclose evidence
6 and information necessary to Choi's criminal prosecution. Tracing of victim funds to the Deposit
7 Accounts implicates evidence or legal theories the Government may employ at Choi's criminal
8 proceeding. Choi was indicated for multiple counts of money laundering. To prevail on these claims,
9 the Government has the burden of proving that the financial transactions executed between the various
10 accounts were done so with "the proceeds of some form of unlawful activity." 18 U.S.C § 1956(a)(1).
11 According to the allegations of the indictment, the "unlawful activity" alleged is the defrauding of
12 various Korean nationals. To prove these fraud allegations, the Government must prove that Choi
13 *obtained money* by means of materially false and fraudulent pretenses, representations or promises.
14 Foregoing discovery of Choi's misrepresentations does not cure the prejudice to the Government
15 because the Government must still prove Choi *obtained money* as a result of the misrepresentations.
16 Choi's acquisition of victim funds - an essential element of the Government's criminal prosecution -
17 represents the first category of tracing the Claimants now seek. Thus, complete tracing discovery would
18 entail the disclosure of information that may adversely affect the ability of the Government to conduct
19 the related criminal prosecution.

20 Further, to prove the Government's money laundering charges, the Government must reveal how
21 the fraudulently obtained monies were concealed. Both the language of the indictment, as well as the
22 allegations in the forfeiture proceedings, indicate the Government's belief that the fraudulently obtained
23 monies were concealed by passing the victim funds from the Deposit Accounts, to the Transfer
24 Accounts, and lastly, to the HELOC and the Subject Properties. Thus, providing evidence of any one
25 of the three categories of tracing could arguably run the risk of unnecessarily or prematurely revealing
26 evidence Choi could use in his defense.

27 Claimants also object to the imposition of a stay because it could take years before Choi's
28 criminal case is concluded. Choi is currently serving time in a Korean prison, and is not expected to be

1 released until January of 2013. Claimants argue that the time it would take to extradite Choi, coupled
2 with his criminal proceedings, could delay this forfeiture action for up to three years. In support of this
3 argument, Claimants cite *United States v. \$8,850*, 461 U.S. 555 (1983) for the proposition that civil
4 forfeiture claimants have a constitutional right to trial without undue delay, measured by the criminal
5 speedy trial factors of *Barker v. Wingo*, 407 U.S. 514 (1972).

6 Claimants are correct that “[a]n unreasonable delay between seizure of property and a forfeiture
7 action violates a claimant's right to due process.” *U.S. v. Approximately \$1.67 Million*, 513 F.3d 991
8 (9th Cir. 2008), citing *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S.*
9 *Currency*, 461 U.S. 555, 564, 103 S.Ct. 2005 (1983). To determine whether a delay is unreasonable,
10 courts balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the timing of
11 claimant's assertion of his rights; and (4) prejudice to the claimant. *Barker*, 407 U.S. at 530, 92 S.Ct.
12 2182; *Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. at 564-69,
13 103 S.Ct. 2005. One factor by itself does not create a “sufficient condition for finding unreasonable
14 delay. Rather, these elements are guides in balancing the interests of the claimant and the government
15 to assess whether the basic due process requirement of fairness has been satisfied in a particular case.”
16 *Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. at 565, 103 S.Ct.
17 2005.

18 In balancing these factors, a stay is warranted. Considering the first factor, i.e., the length of
19 delay resulting from the imposition of a stay, that issue is not yet ripe for determination. While Choi's
20 extradition will not take place until January of 2013 at the earliest, the Court will not speculate on the
21 anticipated duration of Choi's criminal proceedings. The Court notes, however, that in considering the
22 reason for the delay (the second factor), the presence of related criminal proceedings has long been
23 considered a justification for a lengthy delay in forfeiture proceedings. *See \$8,850*, 461 U.S. at 567; *U.S.*
24 *v. Forty-Seven Thousand Nine Hundred Eighty Dollars*, 804 F.2d 1085 (9th Cir. 1986). In addition, the
25 delay is not be the result of any dilatory conduct by the United States. Choi is serving a prison sentence
26 in Korea; a circumstance outside the United States' control.

27 The third factor favors neither party. Claimants have timely raised their right to proceed with
28 the case in response to the Government's Motion to Stay. The Court notes, however, that Claimants

1 have repeatedly asserted they sought a stay of these forfeiture proceedings when the case was first filed.
2 Thus, both parties have, at various points in these proceedings, requested a stay pending the conclusion
3 of the Choi criminal prosecution.

4 Claimants argue the delay from a stay would prejudice Claimants for two reasons. Claimants
5 argue that the Subject Vehicle continues to depreciate in value, and that Claimants endure substantial
6 hardship from being deprived of the Vehicle. Claimants also argue that the delay resulting from a stay
7 would result in loss of evidence because “[m]emories fade, witnesses become unavailable and
8 documents are lost.” Claimants suggest this case will involve substantial banking records that will have
9 been destroyed by the time the case recommences.

10 The delay resulting from a stay would not significantly prejudice Claimants. The Court has
11 already ruled on Claimants arguments that the Government’s retention of the Subject Vehicle prejudices
12 Claimants.² *See United States of America v. 2005 Mercedes-Benz*, No. 11-cv-01150 (E.D. Cal. 2011,
13 Doc. 36). Claimants argue that the Court denied the hardship petition because Claimants lacked
14 sufficient ties to the community, but that was only part of the Court’s rationale. The Court also found
15 that the prejudice to Claimants was not significant. *See, Id.* (“Claimant has not shown a substantial
16 hardship if the Subject Vehicle were not released The need for the Subject Vehicle is as a
17 convenience to the Claimant rather than a necessity.”)

18 Regarding the unavailability and “fad[ing] memories” of witnesses, because Claimants concede
19 a stay of depositions and witness interviews is warranted, the Court does not find any prejudice in
20 delaying this kind of discovery.

21 Any potential prejudice with respect to banking records has not been shown. Claimants have not
22 offered any evidence, anecdotal or otherwise, that banks will have destroyed the relevant banking
23 records. Additionally, Claimants are not seeking documents from the banks; rather, Claimants seek
24 these documents from the Government. As Claimants acknowledge, “[t]he banks would not honor the
25 subpoena [to Choi’s accounts] without Choi’s consent.” Thus, whatever documents Claimants now seek

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27 ² Claimants have renewed their Motion for release of the Subject Vehicle. Claimants have not presented any new
28 arguments in support of this request. *See* Local Rule 230(j). The Court denies this motion for the same reasons the Court previously denied the motion. *See, United States of America v. 2005 Mercedes-Benz*, No. 11-cv-01150 (E.D. Cal. 2011, Doc. 36).

1 will still be in the possession, custody and control of the Government - regardless of a given bank's
2 document retention policies. Moreover, as it relates to accounts Claimants have access to at the bank,
3 they can request the relevant records, regardless of whether a stay is in place. Lastly, Claimants already
4 have, or will be provided some tracing discovery. As for victim funds-related tracing, the Government
5 will be required to produce this information when the stay is lifted.

6 **B. Claimant's Discovery Motions**

7 Based on the information provided to the Court, it appears as though the Government has
8 provided complete discovery responses concerning the tracing of funds from the Transfer Accounts and
9 Deposit Accounts to the HELOC. Additionally, it appears the Government has provided a sampling of
10 tracing discovery concerning funds transferred from Deposit Accounts to Transfer Accounts. As the
11 Court has determined that all tracing discovery arguably could prejudice the Government's criminal
12 prosecution against Choi, the Court will not compel any undisclosed tracing information until the stay
13 is lifted. However, it is unclear if the Government has been fully responsive in its document production
14 concerning the tracing information provided in the Government's interrogatory responses. To the extent
15 the Government has not provided supporting documentation for tracing disclosed in its interrogatory
16 responses, the Court hereby orders the Government to do so.

17 As the Court is imposing a stay in this matter, the remainder of Claimants' Motion to Compel
18 is denied as moot. Claimants' Motion for a Protective Order is also denied as moot.

19 **IV. CONCLUSION**

20 Based on the foregoing, the Court ORDERS as follows:

- 21 1. To the extent the United States has not already done so, within 30 days of the date of this Order,
22 the United States of America will provide supporting documentation for tracing information listed in
23 the United States' response to Claimants' interrogatories;
- 24 2. The remainder of Claimants' Motion to Compel is DENIED;
- 25 3. Claimants' Motion for a Protective Order is DENIED;

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1 4. This Action is STAYED pending the conclusion of the related criminal matter, *United States v.*
2 *Kwan Yong Choi*, 1: 10-CR-00206-AWI (E.D. Cal.)

3 IT IS SO ORDERED.

4 **Dated: September 21, 2012**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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