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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
APPROXIMATELY \$415,000.00 IN U.S.)
CURRENCY SEIZED FROM SUN NATIONAL)
BANK ACCOUNT NUMBER 4750855637,)
HELD IN THE NAME OF INTRAMARK USA,)
INC. AND)
)
APPROXIMATELY \$184,246.76 IN U.S.)
CURRENCY SEIZED FROM SUN NATIONAL)
BANK ACCOUNT NUMBER 4750255624,)
HELD IN THE NAME OF INTRAMARK USA,)
INC.)
)
Defendants.)
)

2:08-cv-01899-GEB-GGH
ORDER

On February 18, 2009, SK Foods LP ("SK") filed a motion "for leave to file a late claim [under Rule G(5)(a)(ii) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules")] contesting the forfeiture of the defendant funds [("funds")] in this *in rem* [forfeiture] action." (SK Mot. at 1:24-25.) SK argues

1 that Plaintiff never provided it with "notice" of its forfeiture
2 action and thus "good cause" exists for it to file a late claim. At
3 the April 20, 2009 hearing on the motion, however, SK argued the claim
4 it desires to file "is not untimely" and "no claim filing time frame
5 has been triggered as to [SK]" under the Supplemental Rules.

6 When directly questioned why it filed a motion seeking a
7 judicial finding that good cause existed for it to file a late claim,
8 rather than directly filing its claim, SK's counsel, Mr. Mayo,
9 responded with a nonsensical argument. When asked at the hearing,
10 "Does late not mean [] untimely?" Mr. Mayo responded, "It can
11 certainly be construed as that, yes Your Honor." When the Court
12 rejoined, "That's not how you construe it?" Mr. Mayo did not
13 immediately respond to the call of the question, but the record
14 reveals the following:

15 THE COURT: [] I asked you, what do you mean in
16 your motion when you characterize it as a late
claim.

17 MR. MAYO: It would --it's-- it should be
18 construed only as -- only within the context
within which it is meant. We at the time --

19 THE COURT: Sir, just a moment. You say late claim
20 in this filing. Are you telling me that you
didn't mean to say late claim in this filing?

21 MR. MAYO: At the time we filed the motion, yes,
22 Your Honor, we perceived the claim as late under
the publication procedures of the [S]upplemental
23 [R]ules.

24 THE COURT: So subsequently you [came to] a
different belief? You no longer think your claim
is late?

25 MR. MAYO: That's correct. As I have explained to
26 you here today, Your Honor we do not believe the
claim is late for the litany of reasons I have
27 provided today.

1 The hearing was abruptly adjourned because SK's position was not
2 logical.

3 The referenced "litany of reasons" is SK's single contention
4 that it had no obligation to file a claim until the government
5 provided it direct notice under Supplemental Rule G(4) (b) (i).
6 However, in its written motion SK relies on Supplemental Rule
7 G(5) (a) (ii) which provides "[u]nless the court for good cause sets a
8 **different time, the claim must be filed [as prescribed in the**
9 **Supplemental Rules]**" (emphasis added). The Supplemental Rules
10 prescribe two time frames which govern when a claim is to be filed if
11 direct notice is not provided. Supplemental Rule G(5) (ii) (C)
12 prescribes "[i]f notice was not published and direct notice was not
13 sent to the claimant or the claimant's attorney[,] if the property was
14 in the government's possession, custody, or control when the complaint
15 was filed, **no later than 60 days after the filing . . .**" (emphasis
16 added). Plaintiff had already seized the funds when it filed its
17 initial complaint on August 14, 2008. Therefore, under this Rule, SK
18 should have filed its claim by October 17, 2008.

19 Supplemental Rule G(5) (ii) (B) prescribes: "if notice was
20 published but direct notice was not sent to the claimant's attorney,
21 [a claim] should be filed no **later than 30 days after final**
22 **publication**" (emphasis added). On October 15, 2008, Plaintiff filed
23 proof of publication showing notice was finally published in The Press
24 of Atlantic City on October 4, 2008. Therefore under this provision
25 of the Rule, SK should have filed a claim no later than November 3,
26 2008. However, as Plaintiff indicated at the hearing, this
27 publication was in New Jersey; and since SK is a California company it
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1 is doubtful that it should be expected to have become aware of that
2 publication.

3 SK's only argument as to why good cause exists for it to
4 file a late claim is that Plaintiff's failure to send it direct notice
5 constitutes a violation of SK's "procedural due process" right to this
6 notice. However, Supplemental Rule G(4)(b)(v) prescribes, "[a]
7 potential claimant who had actual notice of a forfeiture action may
8 not oppose or seek relief from forfeiture because of [Plaintiff's]
9 failure to send the required notice." Moreover, "[i]f . . . an
10 interested party has actual knowledge of ongoing forfeiture
11 proceedings from other sources, inadequacies in the notice afforded by
12 the government will not work a deprivation of due process."
13 Gonzalez-Gonzalez v. United States, 257 F.3d 31, 36 (1st Cir.
14 2001) (internal citation omitted). See Upshaw v. United States Customs
15 Serv., 153 F. Supp. 2d 46, 51 (D. Mass. 2001) (stating "In any event,
16 even if there was a statutory or regulatory violation [with respect to
17 providing direct notice], this hardly arises to a constitutional
18 dimension because [the party] had actual notice.") See also United
19 States v. One Piece of Real Prop. Located at 15010 S.W. 168th St.,
20 2008 U.S. Dist. LEXIS 84542 *6-7 (S.D. Fla. 2008) (holding that even
21 where the government concedes notice was inadequate, if the potential
22 claimant has actual notice, "he cannot look to the Supplemental Rules
23 to advance his cause.")

24 Plaintiff shows SK had actual notice "at least by August 17,
25 2008" when the Sacramento Bee published an article which includes the
26 following prepared statement from SK: "[SK] is not in a position to
27 comment on allegations pertaining to [Plaintiff's] attempt to obtain a
28 forfeiture of [the defendant] funds." (Pl. Opp'n at 12:1-8.) This

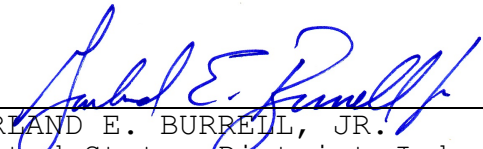
1 article includes discussion of Plaintiff's filing of its initial
2 forfeiture complaint. SK argued at the hearing that this article only
3 shows it had actual notice of Plaintiff's initial forfeiture
4 complaint, not actual notice of Plaintiff's amended forfeiture
5 complaint, which was filed on September 8, 2008. Plaintiff rejoins
6 that Supplemental Rule G(4)(b)(v) only requires that a potential
7 claimant have actual notice of the "forfeiture action;" and that the
8 initial complaint was sufficient to provide notice of this forfeiture
9 action because the amended complaint is "exactly the same," except one
10 number in one of the account numbers was altered. Plaintiff is
11 correct that the initial complaint was sufficient to put SK on actual
12 notice of Plaintiff's forfeiture action against the defendant funds.

13 SK proffers no reason justifying its six month delay filing
14 its motion for leave to file a late claim other than Plaintiff's
15 failure to provide it with direct notice. See United States v.
16 100,348.00 in United States Currency, 354 F.3d 1110, 1117-8 (9th Cir.
17 2004) (outlining some factors a district court may consider in ruling
18 on an untimely claim.) Further, SK virtually conceded at the hearing
19 it had actual notice of the forfeiture action when its then counsel
20 spoke to the Sacramento Bee, but counsel for SK then indicated in a
21 conclusory manner (unsupported by facts or law) that the time to file
22 a claim prescribed the Supplemental Rules should be ignored. SK makes
23 this argument in the face of Plaintiff's argument that, "[b]ut for
24 SK['s] belated effort to challenge the forfeiture, this civil action
25 would now be closed." (Pl. Opp'n at 3:8-9.) Plaintiff states in its
26 April, 9, 2009 Status Report, that if "SK['s] motion is denied,
27 [P]laintiff will immediately file a Final Judgment of Forfeiture for
28 the Court's signature" in accordance with the "Stipulation for Final

1 Judgment of Forfeiture" filed by Plaintiff on February 20, 2009. (Pl.
2 Status Report at 3:1-2.)

3 Since SK has not shown good cause to justify granting its
4 motion, its motion is denied.

5 Dated: April 21, 2009

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9 GARLAND E. BURRELL, JR.
10 United States District Judge
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