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IN THE DISTRICT COURT OF GUAM

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TRACT 16309, LOT 213 OF PROJECT 935-45)
 LOCATED ON AP 551-111-10 TOGETHER)
 WITH AN UND 1/11 INT IN LOT 213,)
 ORANGE, CA CENSUS TRACT/BLOCK)
 524.17/3, A.K.A. 20 BOMBAY, IRVINE, CA,)
)
 Defendant.)

CIVIL CASE NO. 11-00004

ORDER
re Motion for Sanctions

Pending before the court is a motion for sanctions against the Government, filed by claimants Roland Ho, Ronson Ho, and Ryan Ho (hereinafter the “Ho Children Claimants”). The Ho Children Claimants requested the court order the Government to pay them \$5,000 to cover the cost of attempting to procure the discovery sought and prepare and file the Motion to Compel. ECF No. 30 at 6. The court held several evidentiary hearings on the matter,¹ during which time evidence and testimony was presented through Todd Peterson, a special agent with the Internal Revenue Service, Criminal Investigation. Upon review of the testimony adduced and evidence admitted at the hearing, and giving due consideration to the parties’ argument and applicable case law, the court hereby grants in part the motion for sanctions.

BACKGROUND

The dispute centered around the Government’s failure to timely and adequately respond to the Ho Children Claimants’ discovery requests. A brief time line of the facts associated with

¹ Hearings were held on December 21, 2011, January 12, 2012, and February 8, 2012.

1 this dispute is as follows:

- 2 July 14, 2011 Claimant Roland Ho served his First Set of Interrogatories on the
3 Government.
- 4 July 19, 2011 Claimants Ronson Ho and Ryan Ho served their first Set of
5 Interrogatories on the Government, and Claimant Ronson Ho served
6 his First Request for Production of Documents. Razzano Decl. (ECF
7 No. 33) and Exhibit C thereto.
- 8 August 18, 2011 **Mr. Razzano wrote to Ms. Johnson inquiring when she would
9 respond to the First set of Interrogatories.** Razzano Decl. (ECF
10 No. 33) and Exhibit D thereto.
- 11 August 26, 2011 **Mr. Razzano again wrote to Ms. Johnson inquiring about the
12 Government's responses to all outstanding discovery requests
13 propounded.** Razzano Decl. (ECF No. 33) and Exhibit E thereto.
- 14 Sept. 12, 2011 **Mr. Razzano wrote to Ms. Johnson for the third time and asked to
15 "meet and confer" concerning the discovery dispute and the
16 signing of a stipulation concerning said dispute, both of which
17 were prerequisites to the filing of a discovery motion.** Razzano
18 Decl. (ECF No. 33) and Exhibits F and G thereto.
- 19 Sept. 15, 2011 Mr. Razzano and Ms. Johnson met to discuss ongoing discovery
20 dispute, and **Ms. Johnson agreed to produce the requested
21 documents on September 16, 2011, at 3:00 p.m.**
- 22 Sept. 16, 2011 Benjamin Huber (an associate at Mr. Razzano's law firm) went to the
23 U.S. Attorney's Office and was told that Ms. Johnson had left two
24 binders of documents for his review. Mr. Huber was instructed to note
25 which pages he would like to have copied. **Upon review of the
26 documents, Mr. Huber did not find any documents which were
27 responsive to the Request for Production of Documents. Mr.
28 Huber brought this to the office staff's attention, but he was told
that Ms. Johnson would not be available until the following
Monday, Sept. 19.** Huber Decl. (ECF No. 32) at ¶¶4, 6-9.
- Sept. 19, 2011 **Mr. Huber's office contacted the U.S. Attorney's Office and was
told that Ms. Johnson was unavailable. A message was left for Ms.
Johnson to call back Mr. Huber, but no return call was made.**
Huber Decl. (ECF No. 32) at ¶¶10-11.
- Sept. 20, 2011 Mr. Huber wrote to Ms. Johnson about his review of the binders and
his belief that said binders contained documents which were non-
responsive to the discovery requests. Said letter also contained a two-
and-a-half page list of documents that the claimant believed he was
entitled to and had requested in his First Request for Production of
Documents. Huber Decl. (ECF No. 32) and Exhibit A thereto.
- Sept. 30, 2011 **Ms. Johnson wrote to Mr. Huber and agreed to provide him with
all the information requested with the exception of two items: the
videotapes made by undercover agents of the illegal MGM poker
games (which Ms. Johnson believed were irrelevant to the case)
and the handwritten notes agents made during interviews**

1 Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). However, a court need not impose sanctions if
2 the moving party filed the motion before a good faith attempt to obtain the discovery, the
3 opposing party's conduct was substantially justified, or other circumstances make an award of
4 sanctions unjust. Fed. R. Civ. P. 37(a)(5)(A(i)-(iii)). Because the court has already granted the
5 Ho Children Claimants' Rule 37(a) Motion to Compel, the court must next decide whether it will
6 impose the mandatory sanctions against the Government.

7 Here, counsel for the Ho Children Claimants attempted in good faith to obtain the
8 discovery prior to filing the motion. Fed. R. Civ. P. 37(a)(5)(A(i)). The interrogatories and
9 request for production of documents were served on the Government in July 2011. After
10 repeated and failed attempts to get a timely response as detailed *supra*, counsel for the Ho
11 Children Claimants finally filed the motion to compel in October 2011. Counsel waited patiently
12 for over two months after the Government's responses to the discovery requests were due to
13 bring this motion. The requested documents were in the Government's possession, and the
14 Government did not produce them until after the Motion to Compel was filed and after this court
15 ordered their production. Under the circumstances, counsel for the Ho Children Claimants
16 engaged in sufficient good faith efforts to resolve this dispute without court intervention.

17 The court must next decide whether the Government's failure to timely provide the
18 requested discovery was substantially justified. Fed. R. Civ. P. 37(a)(5)(A(ii)). A party meets the
19 "substantially justified" standard when there is a "genuine dispute" or if "reasonable people
20 could differ" as to the appropriateness of the motion. *Pierce v. Underwood*, 487 U.S. 552, 565
21 (1988); *see also* 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS,
22 FEDERAL PRACTICE AND PROCEDURE § 2288 (3d ed. 2010) ("Making a motion, or opposing a
23 motion, is 'substantially justified' if the motion raised an issue about which reasonable people
24 could genuinely differ on whether a party was bound to comply with a discovery rule.").

25 In the present case, the Government has not shown that its conduct was substantially
26 justified. Its response to the First Request for Production of Documents was due on August 19,
27 2011. The Government did not meet this deadline. It is important to note that the Government
28 did not take any proactive measure which would substantially justify their untimely response to

1 the discovery requests. The Government never sought a protective order nor an extension of time
2 to respond to the discovery requests. On September 30, 2011, Ms. Johnson wrote to Mr. Huber
3 and agreed to provide him with all the information requested with the exception of two items: the
4 videotapes made by undercover agents of the illegal MGM poker games and the handwritten
5 notes agents made during interviews. The Government believed the videotapes were irrelevant
6 to the case, and she also believed that the agents' handwritten notes were not discoverable if their
7 contents were accurately reproduced in the agents' reports. Unfortunately, the Government is
8 incorrect with regard to its understanding of the civil discovery rules. The parties to a civil
9 forfeiture proceeding are entitled to conduct civil discovery in accordance with the Federal Rules
10 of Civil Procedure as they would in any other civil case filed in a federal court. As the United
11 States Supreme Court stated:

12 A criminal defendant is entitled to rather limited discovery, with no general right
13 to obtain the statements of the Government's witnesses before they have testified.
14 In a civil case, by contrast, a party is entitled as a general matter to discovery of
15 any information sought if it appears reasonably calculated to lead to the discovery
16 of admissible evidence. The Government contends [defendant] might use the rules
17 of civil discovery in the forfeiture suit to gain an improper advantage in the
18 criminal matter, prying into the prosecution's case in a manner not otherwise
19 permitted. These problems are not uncommon when criminal and civil forfeiture
20 suits are pending at the same time . . . the risk of compromising the criminal case
21 could be avoided by staying the civil suit until the prosecution is over.

18 *Degen v. United States*, 517 U.S. 820, 825–26 (1996), citations omitted, *superceded on other*
19 *grounds* at 28 U.S.C. § 2466(a). Thus, in this civil forfeiture action, the scope of discovery is not
20 limited if the information sought is “nonprivileged” and “relevant to any party’s claim or
21 defense.” Fed. R. Civ. P. 16(b)(1). The Government never asserted any claim of privilege over
22 the videotapes or the handwritten notes. There is no “genuine dispute” over whether the
23 videotapes are relevant to the Government’s claims that Betsy Ho and others were engaged in a
24 scheme to conduct illegal gambling. As for the handwritten notes, the court also determined that
25 they were relevant to the Government’s claims as well as the possible defenses. The notes could
26 help establish the truth or veracity of a witness’s testimony. While the Government believes that
27 said notes need not be produced since its contents are accurately reproduced in the agents’ formal
28 reports, there is no such limitation found in the liberal civil rules of procedure. Accordingly, the

1 court concludes that the Government's objections and conduct were not substantially justified.

2 Finally, the court must decide whether there are other circumstance that would make a
3 sanctions award unjust. Fed. R. Civ. P. 37(a)(5)(A)(iii). Agent Peterson testified that part of the
4 delay in producing the documents was his desire to produce the documents in some organized
5 fashion. Agent Peterson also stated that in reviewing the boxes of documents, he wanted to
6 exclude many financial documents³ he deemed to be "irrelevant" to the gambling operations in
7 general and the property in this case more specifically. He further explained that there was some
8 delay by the forensic experts in gaining access to one of the more current QuickBooks files found
9 in a computer seized during the search warrant execution and so he could not verify the validity
10 of certain entries. The court appreciates the complexity of the Government's investigation into
11 the alleged illegal gambling rings and acknowledges that the documentary evidence involved in
12 this case is quite voluminous.⁴ Because there was no evidence of bad faith on the part of the
13 Government, and based on the sizeable quantity of documents involved in this case, the court
14 finds that there are circumstances present that would make a full award of the sanctions requested
15 unjust, and thus the court will only require the Government to pay half the amount requested.

16 **CONCLUSION**

17 In light of the above analysis and pursuant to Rule 37(a)(5)(A), the court orders the
18 Government to pay a sanction of \$2,500.00. Said sanction shall be paid to counsel for the Ho
19 Children Claimants no later than 30 days from the date of this Order.

20 **IT SO ORDERED.**



/s/ **Joaquin V.E. Manibusan, Jr.**
U.S. Magistrate Judge
Dated: Mar 07, 2012

25 _____
26 ³ These documents included personal bank statements of people who were related to
27 those involved in the alleged gambling operations but were not themselves part of the alleged
28 scheme, and credit card receipts, since their accuracy were never at issue.

⁴ According to Agent Peterson, he has about 16 boxes of documents associated with this investigation.