UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	:	Case No. 3:10-cv-317
	:	
Plaintiff,	:	Judge Timothy S. Black
	:	
vs.	:	
	:	
$1,111,120.00 IN U.S. CURRENCY, *et al*.,	:	
	:	
Defendants.	:	

ORDER DENYING CLAIMANTS' MOTION TO DISMISS THE COMPLAINT, FOR JUDGMENT ON THE PLEADINGS, AND FOR RETURN OF THE DEFENDANT PROPERTY (Doc. 34)

This civil action is before the Court on the Claimants' motion to dismiss the complaint, for judgment on the pleadings, and for return of the Defendant property. (Doc. 34).[1] The Government filed a response in opposition (Doc. 35) and the Claimants filed a reply (Doc. 38). The matter is now ripe for decision.

I. BACKGROUND

This civil forfeiture case arose out of a criminal investigation involving alleged gambling activity in violation of Ohio state law. (Doc. 1-1 at ¶ 8). On or about January 28, 2010, the Ohio Department of Public Safety executed a state search warrant at Bill's Open Door, a bar located in Middletown, Ohio and owned by Claimant Michael Wieser ("Mr. Wieser"). (*Id*. at ¶ 9) The search resulted in the seizure of Defendants, $1,111,120.00 in U.S. Currency, $156,071.00 in U.S. Currency, and $62,743.65 in U.S. Currency (collectively the "Defendant currency"). (*Id*.)

[1] The Claimants include Michael B. Wieser and the Fraternal Order of Orioles 193.

On or about March 8, 2010, United States Magistrate Judge Michael Merz issued a federal seizure warrant upon finding that there was probable cause to believe that the Defendant currency was subject to civil and criminal forfeiture. (*United States v. $1,330,015 in U.S. Currency*, Case No. 3:10-mj-062 (S.D. Ohio Mar. 8, 2010)). Subsequently, Federal officials seized the Defendant currency pursuant to the seizure warrant. (Doc. 1-1 at ¶ 10). A notice of administrative forfeiture was mailed to all known potential claimants on April 15, 2010. (Doc. 1 at 2). On May 12, 2010, Mr. Wieser filed an administrative claim to Defendant currency. (*Id*.)

The Government filed a Verified Complaint for Forfeiture on August 11, 2010, initiating the instant case. (Doc. 1). On August 13, 2010, this Court, having reviewed the Verified Complaint, and upon finding that there was probable cause to believe that the Defendant currency was subject to forfeiture, issued a Warrant of Arrest *In Rem*. (Doc. 3). On September 23, 2010, both Mr. Wieser and the Fraternal Order of Orioles 193 ("Orioles"; collectively with Mr. Wieser, the "Claimants") filed claims to the Defendant currency. (Docs. 4, 5).

On February 4, 2011, Claimants filed a motion for change of venue and for judgment on the pleadings. (Doc. 11). This Court found that: (1) Claimants had not met their burden of demonstrating by a preponderance of the evidence that fairness and practicality favor a transfer (Doc. 21 at 7); and (2) a forfeiture complaint is not subject to dismissal due to lack of probable cause for the initial seizure (*Id*. at 9). Accordingly, the Court denied Claimants' motion.

On February 24, 2011, the Government filed a motion to stay the forfeiture proceedings pursuant to 18 U.S.C. § 981(g). (Doc. 15).[2] Claimants did not oppose the motion. On April 12, 2011, this Court granted the Government's motion to stay the proceedings, finding that the civil discovery process would adversely affect the related criminal investigation. (Doc. 22). The Government was ordered to file quarterly status reports while the stay was in effect. (*Id.*)

The Government began filing quarterly status reports on July 1, 2010. (Doc. 23). Contrary to the Claimants' allegations otherwise, the status reports were not filed under seal and were accessible to any interested party. On July 10, 2013, the Government filed its ninth consecutive and identical status report asserting that the related criminal investigation was not yet complete. (Docs. 23-31). Shortly thereafter, this Court *sua sponte* scheduled a status conference, which was held on July 23, 2013.[3] During the July 23rd status conference, this Court expressed its frustration with the status of the case. In an effort to resolve the matter informally, the Court held three additional status conferences with counsel on August 6, September 9, and September 30, 2013. Given the parties' inability to resolve the matter, the Court lifted the stay on September 30, 2013 (Doc. 22), and Claimants indicated that they would file a motion to dismiss.

[2] Concurrently, the Government filed a motion to submit "Exhibit #1" of the motion to stay proceedings *ex parte* and under seal, so as not to release information regarding the ongoing criminal investigation. (Doc. 14). The unopposed motion was granted. (Doc. 17).

[3] At no time between July 1, 2010 and July 23, 2013 did the Claimants file a motion contesting the length of the stay or contact the Court to request a status conference.

In due course, Claimants filed the instant motion arguing that the delay in investigation and prosecution of the related criminal offense deprived them of their property without due process. (Doc. 34). Claimants request a hearing in order to elicit facts from the Government regarding the reason for this delay. (*Id*.)

II. ANALYSIS

A. Motion to Dismiss

Claimants assert that dismissal of the complaint and return of the Defendant currency is appropriate given that "the United States has not diligently pursued the parallel criminal investigation," thereby depriving Claimants of their property without due process. (Doc. 34 at 2). Citing to Supreme Court and Sixth Circuit precedent, Claimants argue that the balancing test set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), is the appropriate standard to determine whether the alleged delay by the Government constitutes a due process violation.[4] However, Claimants' reliance on the *Barker* balancing test is misguided for two reasons.

First, the *Barker* test requires balancing the interests of the claimant against those of the government to determine whether the delay in ***initiating*** the forfeiture process (*i.e.*, the time period between seizure of the property and bringing a judicial forfeiture action)

[4] The *Barker* balancing test was developed to determine the point at which government delay infringes upon the right to a speedy trial. *Id*. In *United States v. $8,850 in U.S. Currency*, the Supreme Court adopted the *Barker* test to determine whether the government's delay in initiating a forfeiture action deprived the claimant of property without due process. 461 U.S. 555, 564 (1983).

has resulted in a deprivation of property without due process.[5] *See, e.g.*, *$8,850*, 461 U.S. 555; *United States v. 93 Firearms*, 330 F.3d 414 (6th Cir. 2003). Thus, the *Barker* test is inapplicable to the instant case, where the Government timely initiated the forfeiture action and this Court appropriately stayed the proceedings. Second, although the greatest contributing factor to the alleged delay in this civil case was the stay of proceedings, Claimants neither opposed the Government's motion when it was filed, nor did they express any concern about the delay until this Court's independent inquiry brought the matter to light.

[5] Claimants cite four cases in support of their argument that the *Barker* balancing test applies to delays subsequent to the commencement of the forfeiture action: *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d. Cir. 1986); *United States v. Premises Located at Route 13*, 946 F.2d 749 (11th Cir. 1991); *United States v. $12,248 U.S. Currency*, 957 F.2d 1513 (9th Cir. 1992); and *United States v. $59,074 in U.S. Currency*, 959 F.Supp. 243 (D.N.J. 1997). However, each of these cases was decided prior to the passage of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). Pub. L. No. 106-185, 114 Stat. 202. The purpose of CAFRA was to "create general rules relating to federal civil forfeiture proceedings designed to increase the due process safeguards for property owners whose property has been seized." H.R. Rep. No. 106-192, at 2 (1999). As the Sixth Circuit noted, CAFRA "is primarily remedial in nature" and "is specifically designed to rectify an unfairness to the individual vis-à-vis the government." *United States v. Real Prop. in Section 9, Town 29 N., Range 1 W. Twp. of Charlton, Ostego Cnty., Mich.*, 241 F.3d 796, 799 (6th Cir. 2001). Among the safeguards imposed by CAFRA are strict deadlines regarding notice requirements and the *commencement* of judicial forfeiture actions. H.R. Rep. No. 106-192, at 21-22. Noticeably absent from the reforms is a deadline to accelerate the investigation or prosecution of the related criminal offense.

In addition to being decided pre-CAFRA, these cases are distinguishable in other respects. For example, in *$12,248*, the government effectively admitted having no justification for their failure to investigate the related criminal offense during the fifteen months *before filing* the forfeiture complaint *and* the additional three years they waited to prosecute. 957 F.2d at 1518. Similarly, in *$59,074*, the court found that the government's thirty month delay was significant due to the "substantial" twelve month delay *before filing* the forfeiture complaint *in addition* to the eighteen month delay after filing the complaint. 959 F.Supp. at 250. Furthermore, the greater underlying concern was that "30 months after seizure of the defendant money, the Government [had] yet to file a complaint which [came] close to meeting the pleading requirement." *Id*.

Assuming *arguendo* that the *Barker* test is applicable to the pending action, this Court would be required to consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the claimant's assertion of his right; and (4) the prejudice to the claimant. *$8,850*, 461 U.S. at 564. Although length of the delay is "to some extent a triggering mechanism," no one factor is dispositive. *Id*. (citing *Barker*, 407 U.S. at 530).

In applying the facts of this particular case, the third and fourth factors would weigh heavily against Claimants' assertions. As previously noted, the Government filed nine identical status reports while these proceedings were stayed. (Docs. 23-31). At no point did Claimants object to the Government's ongoing criminal investigation (or to its pace),[6] which they now assert was "not diligently pursued." (Doc. 34 at 2). Furthermore, Claimants argue that the delay is prejudicial to their ability to defend their claims, as one witness has died, another has become seriously ill, and certain evidence may no longer be available. (*Id*. at 12). However, this argument is undermined by the fact that Claimants failed to raise the issue until this Court raised it *sua sponte*.

While the Court finds that there was in a fact a serious delay, which is why the Court raised the issue, dismissal of the complaint is not the appropriate remedy. The stay

[6] Claimants state that they attempted to "resolve the investigation and forfeiture" and "made efforts to push the government to complete the criminal investigation that was delaying this civil forfeiture action." (Doc. 34 at 10). While commendable, such informal efforts are insufficient to constitute a formal assertion of the Claimants' rights. *$8,850*, 461 U.S. at 569 (finding that defendant had not adequately asserted his rights by "occasionally inquir[ing]" and asking that officials "reach a decision promptly," rather than utilizing available judicial remedies). This is particularly true in light of the substantial value of Defendant currency. *Barker*, 407 U.S. at 533 ("The more serious the deprivation, the more likely a defendant is to complain.")

has been lifted and a calendar order established. As it stands now, no due process violation has occurred and Claimants will soon have their day in court.

B. Request for Hearing

Claimants also request "a hearing to elicit from the government the facts resulting in the delay which the Court needs to apply[… to] the law regarding due process." However, as this Court has already determined, "the law [Claimants cite] regarding due process" is inapplicable to the instant case. Moreover, no due process violation has occurred. Accordingly, a hearing is not required.

III. CONCLUSION

Based upon the foregoing, Claimants' motion to dismiss, for judgment on the pleadings, and for return of the defendant property (Doc. 34) is hereby **DENIED**.[7]

IT IS SO ORDERED.

Date: 2/18/14

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

[7] Plaintiff's motion for leave to file a sur-reply (Doc. 42) is denied as moot.