

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

DAN HEINE,

Plaintiff,

v.

THE BANK OF OSWEGO,

Defendant.

Case No. 3:15-cv-1622-SI

OPINION AND ORDER

Caroline Harris Crowne, TONKON TORP LLP, 1600 Pioneer Tower, 888 SW Fifth Avenue, Portland, OR 97204; Jeffrey E. Alberts and Dustin N. Nofziger, PRYOR CASHMAN LLP, 7 Times Square, New York, NY 10036. Of Attorneys for Plaintiff.

G. Kevin Kiely, Casey M. Nokes, and Nicole M. Swift, CABLE HUSTON LLP, 1001 SW Fifth Avenue, Suite 2000, Portland, OR 97204. Of Attorneys for Defendant.

Michael H. Simon, District Judge.

In this civil lawsuit, Plaintiff Dan Heine (“Heine”) has filed two motions seeking “further necessary or proper relief” under 28 U.S.C. § 2202 against Defendant The Bank of Oswego (the “Bank”). ECF 86 and 111. Heine asserts that the Bank has failed to comply with the Court’s November 13, 2015 Opinion and Order (ECF 70) and the Court’s December 29, 2015 Judgment (ECF 81). The Court ordered, and the Judgment declared, that the Bank must advance Heine’s reasonable expenses incurred in defending the pending criminal case that has been brought

against him and co-defendant Diana Yates (“Yates”) in United States v. Heine and Yates, Case No. 3:15-cr-238-SI (D. Or.) (the “Criminal Action”). The undersigned district judge also presides over the Criminal Action. Trial is set to begin in the Criminal Action on October 10, 2017. For the reasons that follow, Heine’s motions for further relief are denied without prejudice and with leave to renew after the trial in the Criminal Action has concluded.

BACKGROUND

Heine and Yates co-founded the Bank in 2004. Until August 2016, the Bank had been a financial institution engaged in the business of personal and commercial banking and lending, headquartered in Lake Oswego, Oregon.¹ Heine previously served as the Bank’s President and Chief Executive Officer. Heine also was a member of the Bank’s Board of Directors (“Board”). Heine left the Bank in September 2014. Yates previously served as the Bank’s Executive Vice President and Chief Financial Officer. Yates also was the Secretary of the Board. Yates resigned from the Bank on March 22, 2012.

On June 24, 2015, a federal grand jury issued a 27-seven count indictment against both Heine and Yates for conduct related to their time with the Bank. On March 9, 2017, a federal grand jury returned a 19-count Superseding Indictment in this case. The Superseding Indictment (“Indictment”) charges Heine and Yates with one count of conspiring to commit bank fraud, in violation of 18 U.S.C. § 1349, and multiple counts of making false bank entries, reports, or transactions, in violation of 18 U.S.C. §§ 2 and 1005. The Indictment alleges that between September 2009 and September 2014, Heine and Yates conspired to defraud the Bank through materially false representations and promises. The Indictment further alleges that one of the

¹ On August 12, 2016, the Bank sold its loans and other assets to HomeStreet Bank (“HomeStreet”). The Bank of Oswego continues to exist as a corporate entity, but has relinquished its banking charter and now operates as Oswego Resolution.

purposes of the conspiracy was to conceal the true financial condition of the Bank from the Board, the Bank's shareholders, the public, and the Bank's regulators, including the Federal Deposit Insurance Corporation. According to the Indictment, Heine and Yates reported false and misleading information about loan performance, concealed information about the status of foreclosed properties, made unauthorized transfers of Bank proceeds, and failed to disclose material facts about loans to the Board, shareholders, and regulators, all in an effort to conceal the Bank's true financial condition.

On August 26, 2015, two months after the grand jury returned the original indictment, Heine, a citizen of Florida, brought this civil action against the Bank, a citizen of Oregon, invoking diversity jurisdiction.² In this lawsuit, Heine sought both declaratory relief and advancement of his reasonable legal fees and expenses in connection with his defense of the federal criminal action, pursuant to the Bank's indemnification obligations contained in its Articles of Incorporation. The Court held that Heine was entitled to advancement of his reasonable legal fees and expenses of defense and entered Judgment accordingly. The Bank began to pay the defense costs of both Heine and Yates.

By August 2016, Heine and Yates's combined advancement expenses exceeded the limits of the Bank's Director & Officer insurance policy, and the Bank began to pay Defendants' requested advancement expenses with its own funds. In November 2016, the Bank began to pay less than all of Heine's (and Yates's) submitted bills. On January 26, 2017, the Bank filed a non-party motion in the Criminal Action, asking the Court to review for reasonableness the detailed billing statements that the Bank had received from counsel for Heine and Yates.

² Yates was unable to join Heine's civil lawsuit or file her own federal court action against the Bank because she is a citizen of Oregon.

In its motion, the Bank stated that it remains committed to satisfying any obligations it may have to advance Defendants' reasonable criminal defense fees and expenses. The Bank also disclosed, in a sealed filing, the substantial amounts that it had already paid as of November 4, 2016. The Bank added that it had recently received bills from counsel for Heine and Yates for work performed in October and November and that, in the Bank's judgment, the resulting legal bills were excessive and unreasonable. The Bank also stated in its January 26, 2017 motion that Heine objected as "premature" to the Court reviewing for reasonableness in the Criminal Action the invoices that his counsel had sent to the Bank. On February 16, 2017, the Court declined to exercise ancillary jurisdiction in the Criminal Action over Bank's fee dispute with Heine or Yates. Eight days later, on February 24, 2017, Heine filed in this civil case his first of two motions for further relief.

DISCUSSION

In declining to exercise ancillary jurisdiction in the Criminal Action over the fee dispute between Heine and Yates, on the one hand, and the Bank, on the other, before the criminal trial had concluded, the undersigned explained:

If the Court were to resolve the pending fee dispute involving Defendants Heine or Yates, the Court would need to consider and opine upon the reasonableness of the performances and decisions of Defendants' counsel thus far in this case, including the legal strategies that counsel have pursued. For example, because the Bank asserts that "most" of the invoices submitted by Defendants "appear[] attributable to the hearing on Defendants' motions to suppress," the Court likely would need to consider and comment upon the potential strategic motives of Defendants' counsel in litigating their recent motions to suppress. Ruling upon such issues at this time risks jeopardizing the Court's role in neutrally presiding over this criminal case, at least until the trial has concluded.

Although the Court declines at this time to find that it has and should exercise ancillary jurisdiction over the Bank's pending fee dispute, the Court recognizes that the circumstances may be

different after the trial concludes. Thus, although the Court denies the Bank's motion at this time, the Bank as well as both Defendants or either of them have leave to renew this issue with the Court after the trial has concluded and the Court has ruled on all other post-trial motions, if any.

United States v. Heine and Yates, Case No. 3:15-cr-238-SI (D. Or. Feb. 16, 2017) (ECF 581 at 4-5) (brackets in original).

The Court continues to believe that it would be inappropriate for the undersigned to rule on any dispute concerning the reasonableness of the fees or expenses submitted by either Heine or Yates before the Criminal Action has been tried. Accordingly, Heine's two motions for further relief are denied without prejudice and with leave to renew after the trial in the Criminal Action has concluded. In the alternative, if both Heine and the Bank stipulate that this Court should transfer this civil action to another district judge before the Criminal Action has been tried, they may inform the Court by filing a stipulated request for reassignment.

CONCLUSION

Plaintiff's Motion for Further Relief Based on the Court's Declaratory Judgment (ECF 86) and Plaintiff's Second Motion for Further Relief Based on the Court's Declaratory Judgment (ECF 111) are DENIED without prejudice and with leave to renew consistent with this Opinion and Order.

IT IS SO ORDERED.

DATED this 27th day of July, 2017.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge