UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. 3:01CV205-McK

IN RE: ALL FUNDS ON DEPOSIT IN ACCOUNT NUMBER 000669829075 IN THE NAME OF MMAC BANQUE DE COMMERCE, INC., AT NATIONSBANK, N.A., CONSISTING OF $18,756,420.97, MORE OR LESS	)	NO. 3:98mc96-McK
GEORGE AND DOLORES ROLLAR, Plaintiffs,	)	
v.	)	NO. 3:01CV205-McK
UNITED STATES OF AMERICA, et al., Defendants.	)	

CORRECTED **GOVERNMENT'S RESPONSE TO MOTION OF PLAINTIFFS GEORGE AND DELORES ROLLAR FOR ATTORNEYS' FEES AND COSTS**

NOW COMES the United States of America, by and through Robert J. Conrad, Jr., United States Attorney for the Western District of North Carolina, and hereby respectfully submits this response in opposition to the motion for attorneys' fees and costs filed by plaintiffs George and Delores Rollar (hereinafter "the Rollars") on or about October 14, 2003. The government objects to the Rollars' motion on three grounds. First, because most of their expenditure of attorneys fees and costs has not conferred any benefit whatsoever on the other victims in this case, there is simply no factual basis for the Rollars' reliance on the equitable "common fund doctrine." Second, many if not most of these expenses were originally incurred by the Rollars in an effort to obtain a larger share of the seized funds than (as it now appears) they will have received upon completion of the receiver's work, at the expense of the other victims in this case. It would be highly inequitable ***in***

principle to reward this effort on their part by taking money from the other victims to pay the Rollars' attorneys fees, no matter how small a percentage of the seized funds such an award would represent. Third, when the Rollars signed the consent order that was subsequently filed on October 11, 2001 (which led to the appointment of the receiver in this case), they expressly agreed to the following term in paragraph 8: "Once the seized funds (and any interest) have been finally disbursed by order of the Court, plaintiffs' complaint shall be dismissed as to the government, with prejudice. As to those claims, each party shall bear it [sic] own costs, including attorneys fees."

BACKGROUND

On December 11, 1998, FBI agents executed a seizure warrant on funds totaling more than $18.7 million in a Charlotte NationsBank account. In connection with issuing the warrant, this Court found probable cause to believe that the seized funds were subject to forfeiture as proceeds of mail and wire fraud and money laundering from a large-scale "Ponzi" investment scheme. However, the government has never sought to forfeit this money. The government's position from the beginning has been that the seized funds should be returned to victims of the scheme through a receivership process under court supervision. While related criminal investigations and prosecutions were proceeding in a number of jurisdictions, including Norway, the seized funds were initially placed in the custody of the Marshals Service and held in an interest-bearing account.

The NationsBank account in question was in the name of MM ACMC Banque de Commerce, Inc., a North Carolina corporation. August Christian Wilhelm Mohr, who controlled MM ACMC Banque de Commerce, was later tried and convicted on related criminal charges in Norway. However, it is now anticipated that he will receive a second trial in Norway beginning around March or April of 2004.

In August of 2000, Attorney Frank Blanchfield, of the firm then known as Mayer, Brown, & Platt, contacted the undersigned on behalf of the Rollars and requested a meeting to discuss the situation regarding the seized funds. While the government had no obligation to agree to such a meeting, especially in light of the pending criminal investigations, the undersigned met with Mr. Blanchfield and explained that the Rollars might be entitled to recover some portion of the seized funds. Among other things, there was discussion of alternative theories that a court might ultimately follow in dividing the seized funds among the Rollars and other victims, such as a tracing theory and an equitable pro-rata distribution theory. See SEC v. Credit Bancorp, Ltd., 2000 WL 1752979, at 11-12 (S.D.N.Y.), aff'd 290 F.3d 80 (2d Cir. 2002) (discussing differences between these two theories). It was explained to Mr. Blanchfield that the government intended to seek the appointment of a receiver because of the work that would be required to send out notices and to review claims from hundreds of victims.

The Rollars filed their original complaint on May 1, 2001, and an amended complaint on August 20, 2001, asking the Court to order the government to pay them $12.5 million plus interest from the seized funds. In their complaint, the Rollars asserted Fed. R. Crim. P. 41(e) and the Due Process Clause of the Fifth Amendment as grounds for relief. In essence, the Rollars acknowledged that the government was working on returning the money to the victims, but they filed their lawsuit in part because the government was moving too slowly to suit them. Although the Rollars never identified a rule or statute that imposes a deadline for returning seized property, they alleged that the "defendants have not returned the Rollars' property to them or initiated judicial forfeiture proceedings or any other judicial or administrative proceeding in which the Rollars could seek the return of their property." (Amended Complaint, ¶39.)

On June 15, 2001, in its initial response to this lawsuit, the government filed a motion to stay the proceedings and to appoint an interim receiver.

One other claimant to the seized funds, Richard Vasquez, filed a motion to intervene on July 2, 2001, and a complaint on July 18, 2001. None of the other victims has filed a complaint (apparently because all of their claims have been or will be fully resolved through the work of the receiver subsequently appointed in this case).

The Rollars vigorously contested the government's motion for an interim receiver and aggressively asserted their claim to $12.5 million based on a tracing theory, thereby totally ignoring or rejecting the competing interests and due process rights of all other victims. On or about June 21, 2001, for example, they filed a response opposing the government's motion for an enlargement of time to answer or otherwise respond to their lawsuit (despite the fact that the government's motion was clearly justified for the reasons stated therein, and was later granted by the Court). In a copy of a letter dated June 13, 2001, which was attached to this response (following Tab 2, at footnote 1), their counsel stated, "it is the Rollars' position that they are entitled in this case to an immediate return to them of the entire $12.5 million (plus the interest that has been accruing on that money since seized by the government) that is traceable to them." On or about July 12, 2001, in another response opposing the appointment of an interim receiver (at 10-12), the Rollars expressly argued against the equitable pro rata distribution theory that was ultimately adopted by this Court, again seeking to prevail against the adverse interests and potential competing claims of all the other victims.[1]

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[1]It may not have been improper (given the existence of some legal authority to support a tracing theory) for the Rollars to seek to recover the full amount of their loss at that time, and even for them to disregard the competing interests of all the other victims who were not yet

On August 30, 2001, the defendants in this case filed their Motion to Dismiss or (In the Alternative) Motion for Compulsory Joinder. On August 31, counsel met with the Court in chambers for a status conference. With the benefit of this discussion, the parties were able to agree to a consent order that provided for appointment of "either a receiver under Fed. R. Civ. P. 66 or a special master under Fed. R. Civ. P. 53 . . . ." That order was filed on October 11, 2001, and the Court's order appointing Michael J. Quilling as a receiver was filed on October 29, 2001 (about four months after the government had filed its initial motion for a receiver).

On or about December 11, 2001, A. C. W. Mohr, through counsel, filed a motion for return of the seized funds in the Court's seizure warrant case file, No. 3:98mc96-McK. In his motion, Mohr relied entirely on the notice provisions of 18 U.S.C. §983(a)(1)(A)(i), which had been recently enacted as part of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000) ("CAFRA") (effective August 23, 2000). The government filed a response in opposition to this motion on December 20, 2001, and the receiver filed a similar response the next day. Also on December 21, 2001, an order was filed consolidating No. 3:01CV205 and No. 3:98mc96. On or about January 7, 2002, the Rollars filed their response in opposition to Mohr's motion. After several months of further litigation, including Mohr's deposition and an extensively-briefed motion for summary judgment filed jointly by the Rollars, Vasquez, and the receiver on or about May 8, 2002, this Court denied Mohr's motion for the return of the seized funds in an order filed on July 30,

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parties. However, it takes more than a little chutzpa to come back now (after losing on and/or abandoning both their tracing theory and their opposition to a receiver) and argue that those other victims should, in effect, have to reimburse their attorneys fees for this effort.

2002,[2] directing him to submit any remaining claims he might have to the receiver.

On March 27, 2002, while Mohr's motion for return of property in this case was being litigated, the SEC filed its civil enforcement action in this district against Frederick J. Gilliland and MMAC Banque de Commerce, Inc., Docket No. 3:02CV1280. On May 22, 2003, Michael J. Quilling was also appointed as receiver in that case, primarily to deal with any assets recovered from Gilliland and his associated companies. If Mr. Quilling had not already been appointed (on October 29, 2001) as receiver of the seized funds by consent of the parties in the present case, he could have been appointed in the SEC's case shortly after the SEC filed its complaint (on March 27, 2002), which would have represented a time difference of approximately five or six months.

In any event, on or about September 26, 2002, the receiver filed a Receiver's Unopposed Motion to Establish Distribution Procedures and Request for Evidentiary Hearing in this case. After the hearing, and with the express consent of the Rollars and the government, the Court entered an order filed on October 11, 2002, approving a "pro rata or equitable distribution" process, which has been followed since that date as a number of interim distributions have been made to victims, including the Rollars. By their consent to the Court's order, the Rollars finally abandoned the tracing theory that was the premise of their legal position during the first seventeen months of this lawsuit.

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[2]In connection with the work on this summary judgment motion, as noted by the Rollars (Memorandum at 5, n. 4), on August 21, 2002, the Court entered an order by consent of the parties (including the government) that counsel for the Rollars be reimbursed for attorneys' fees in the amount of $53,943 and costs of $896.25. This work was done at the request of the receiver, rather than as part of the normal litigation of the claims asserted by the Rollars in their complaint. Accordingly, these are the ***only*** fees generated by counsel for the Rollars that arguably conferred any benefit on the rest of the victims. The fees sought by the Rollars in the present motion obviously fall into a different category.

ARGUMENT

The factual premise of the Rollars' motion is simply that, by filing their lawsuit, they conferred a benefit on the rest of the victims "by causing (or, at the very least, considerably accelerating) government action to return the seized funds . . . ." (Rollars' Memorandum at 1.) This premise is false, and the Rollars have repeatedly distorted the facts in an effort to support it.[3] Once these distortions are factored out of the picture, there is no remaining evidence left to show any arguable benefit conferred by the Rollars' lawsuit on the rest of the victims.

In broad outline, the true facts are as follows: The government was proceeding expeditiously on a massive and complex international fraud investigation involving hundreds of victims and at least a dozen civil and criminal cases in a number of other jurisdictions. The Rollars simply have no meaningful information relevant to any alleged "delay" on the part of the government in connection with this matter. The undersigned Assistant U.S. Attorney never gave counsel for the Rollars any "assurances" (Memorandum at 3) about a timetable, whether "by the end of the calendar

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[3]The Rollars' main attempt to support their premise of unreasonable government delay is made in their Response in Opposition to Defendants' Motion for Appointment of an Interim Receiver and to Stay Proceedings, filed on or about July 12, 2001. The government's detailed refutation of their numerous misleading assertions is found in the reply to that response filed on July 17, 2001, which is incorporated herein by reference. If the Court is inclined to give any credit to the Rollars' self-serving account of the history of this matter, the government refers the Court to that reply.

In addition, the Rollars have put a misleading spin on the government's legal position (regarding the pre-CAFRA case law on due process) by stating that, "[e]ssentially, the government argued that once it seized the money, it could hold it indefinitely without instituting forfeiture proceedings . . . ." (Memorandum at 5.) However, the government's summary of the pre-CAFRA cases makes it clear that a "reasonableness" balancing test is applicable (Brief in Support of Motion to Dismiss at 19), and the Rollars have never offered any legal authority or argument to the contrary. Remarkably, in their continuing effort somehow to put the government in a bad light, the Rollars are complaining about the government making a correct statement of the law to the Court.

year 2000" (Memorandum at 3, n.2) or as to any other such deadline.[4] The referral of this matter to the SEC was entirely proper, since civil enforcement actions with receiverships are a major part of the SEC's specialized expertise. The Rollars have no evidence that there was any unreasonable delay by the SEC, again because they have no idea what information had to be collected and reviewed as part of the SEC's work. Moreover, the receiver in this case could have been appointed within a few weeks after the Rollars filed their complaint, if they had been willing to consent, but months of subsequent delay was caused by ***their*** refusal to do so. In fact, simply by filing their frivolous lawsuit,[5] the Rollars may have actually delayed the resolution of this matter by distracting government officials from their duties. See Defendant's Brief in Support of Motion to Dismiss at 10-16.

Even viewing the entire history of this matter in a way that is favorable to the Rollars, they arguably "accelerated" the appointment of a receiver only from approximately April of 2002 (when a receiver almost certainly would have been appointed in the SEC's case, No. 3:02CV1280) to October of 2001 (when the receiver was in fact appointed in this case), ***a period of about six months***. During this time, the seized funds were earning interest while held on deposit by the Marshals, and

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[4]If the Court wishes, the undersigned AUSA will submit a detailed affidavit, created from contemporaneous notes and memoranda, as to what was and was not stated to counsel for the Rollars before they filed their lawsuit. However, such an affidavit would mostly duplicate what has already been covered in the government's reply filed on July 17, 2001, and would not appear to be necessary in order for the Court to rule on the present motion.

[5]If the government had not elected to consent to the appointment of a receiver ***in this case***, the Rollars complaint would have been subject to dismissal for the reasons set forth in the government's motion and brief filed on August 30, 2001, to which the Rollars have never responded. However, it was only when they were confronted by this motion that the Rollars finally consented to a receiver. The government continues to believe that their lawsuit was substantively without any merit whatsoever. Frivolous litigants should not be rewarded or encouraged by the recovery of their attorneys' fees from innocent crime victims.

it is therefore difficult to see how this six month period will ultimately have made any difference in terms of the benefits actually received by the other victims.

Perhaps more important, in terms of equity, is the fact that, by filing their lawsuit based on a tracing theory, the Rollars were deliberately and aggressively trying to prevail over the interests and due process rights of the other victims, who would have recovered far less under a tracing theory than under the equitable pro rata theory subsequently adopted by this Court. The true nature of their efforts is clearly seen from their court filings, as quoted above. While their legal strategy may not have been improper,[6] it certainly undermines their equitable claim that they incurred their legal fees in the course of conferring a benefit on those victims.

Finally, in signing the consent order filed on October 11, 2001, which essentially settled this case as to everyone except Mohr, the Rollars expressly agreed to "bear [their] own costs, including attorneys fees." This language should be understood, among other things, as a waiver of their right to come back later and recover their attorneys' fees out of the seized funds. If they wanted to preserve this alleged right, they should have told the government and the Court at that time so that this issue could have been negotiated and either settled or litigated along with the rest of their claims.

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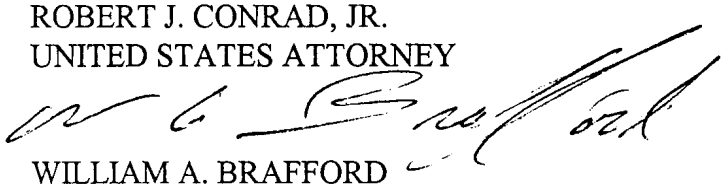
[6]See note 1, supra.

CONCLUSION

For all the reasons stated above, the Rollars' motion for attorneys' fees and costs should be denied.

This the 3d day of November, 2003.

ROBERT J. CONRAD, JR.
UNITED STATES ATTORNEY



WILLIAM A. BRAFFORD
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that on this date I am serving the opposing parties in this action with a copy of the foregoing *CORRECTED* GOVERNMENT'S RESPONSE TO MOTION OF PLAINTIFFS GEORGE AND DELORES ROLLAR FOR ATTORNEYS' FEES AND COSTS by depositing in the United States mail copies of the same, each in an envelope addressed as follows:

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In the event these documents are not served in the manner and on the date described herein, the United States will immediately notify the Court and the above party of the factually correct method of service.

This the 3d day of November, 2003.

WILLIAM A. BRAFFORD
Assistant United States Attorney