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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FILED
NOV 13 2003
CLERK OF COURT
WESTERN DISTRICT OF N.C.

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,)	NO. 3:98mc96-McK
MORE OR LESS)	
<hr/>		
GEORGE AND DOLORES ROLLAR,)	
)	
Plaintiffs,)	
v.)	NO. 3:01CV205-McK
)	
UNITED STATES OF AMERICA, <u>et al.</u> ,)	
)	
Defendants.)	

**GOVERNMENT'S SUR-REPLY REGARDING 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, by leave of Court, and hereby respectfully submits this sur-reply 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, and in response to their reply filed on or about November 24, 2003.

INTRODUCTION

In their reply, the Rollars raise certain legal arguments for the first time (e.g., the government's standing to contest their motion). They also make factual arguments that may tend to mislead the Court and to obscure their lack of any true factual or legal support for their motion. The government is therefore submitting this sur-reply to address those arguments.

ARGUMENT

1. Standing.

The Rollars argue that the government lacks standing to object to their motion because of the following language in ¶8 of the Consent Order filed on October 11, 2001:

“[T]he government, as stakeholder, is hereby deemed to have duly invoked interpleader . . . with regard to the seized funds. After furnishing all discoverable information as provided above, the government shall have no further interest in or liability for the seized funds, and this case shall be stayed as to the government in all respects, except that the government may designate individual witnesses to testify by deposition or otherwise in this case. 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.”

Citing one bankruptcy case, they interpret this provision to mean that the government’s “lack of an actual interest in the disbursement of the Seized Funds results in a lack of standing for its opposition to the Rollars’ motion for attorneys fees”

In order to determine the true meaning of the Consent Order, it is necessary to make a distinction between two possible types or categories of the government’s “interest in . . . the seized funds” which could arise in this case and thus arguably be subject to the terms of the Consent Order. The first is a *financial or property interest*, such as a forfeiture interest (which was the government’s original legal basis for the seizure). The second is a *law enforcement interest* in making sure that seized proceeds of a crime *are not* returned to criminals and *are* returned to victims, which is an inherent and essentially unique responsibility of the government.¹ See, e.g., 18 U.S.C. §§981(e)(6) and 3664. As indicated by the factual context described in the language quoted above, i.e., the government’s invocation of interpleader as a “stakeholder,” the Consent Order was

¹The bankruptcy case cited by the Rollars, In the Matter of Zedda, 169 B.R. 605 (1994), involved only the question of a financial or property interest held by private individuals in a bankruptcy estate, rather than the law enforcement interest asserted here by the government.

clearly meant to terminate any financial or property interest, and, more specifically, any possessory interest, that was previously held by the government in the seized funds, upon the contemplated appointment of a receiver. This fact is not in dispute, but it does not, in and of itself, support the Rollars' position on standing.

As to the government's *law enforcement interest* in the proper disbursement of criminal proceeds to victims, the language of the Consent Order does not expressly address this subject, and the Consent Order is therefore ambiguous in this regard. In the negotiations leading to the final version of the proposed Consent Order, there was no specific discussion between or among the parties and the receiver about whether the government would or would not continue to communicate its position to the Court in this case on matters affecting the victims, or on anything else.²

Subsequently, the government has remained actively involved in this case³ without (until now) any objection or complaint from the Rollars. On December 20, 2001, for example, the government filed a response objecting to A.C.W.C. Mohr's motion for return of the seized funds, a motion that was eventually denied by the Court. The receiver has served the government with copies of all proposed interim disbursements and fee applications in this case, and the government

²From its first contact with the Rollars, the government indicated that it would take no position on whether the equitable pro rata theory (later adopted by the court) or the Rollars' tracing theory should be utilized in disbursing the seized funds. Otherwise, however, the government never agreed or implied that it would "stand silent" if victims sought to recover amounts in excess of a lawful share of their losses resulting from the crimes in question.

³Although not mentioned by the Rollars in their reply, ¶4 of the Consent Order (to which, of course, they consented) provides that the "government agrees to remain in this lawsuit under the terms and conditions of this order" Conceptually, it is difficult to imagine how any party can "remain" in a lawsuit under any "terms and conditions" without having standing to object to a motion filed by another party. Given ¶4, it would seem that the Rollars cannot prevail on their standing argument and would have to show an express waiver by the government of the right to object to a claim for attorneys fees, which they have not attempted to do.

has reviewed these papers to make sure that no unwarranted payments are approved. In its unique role as the federal sovereign, the government has worked closely with Norwegian authorities on Mohr's criminal case and has assisted the receiver in efforts to recover an additional sum of approximately \$300,000 in criminal proceeds held in Norway, so that these funds can be included in the amount disbursed to the victims in this case. Perhaps most significantly (with regard to the Rollars' standing argument), the government appeared and addressed the Court at a hearing on October 10, 2002, on the receiver's Unopposed Amended Motion to Establish Distribution Procedures, essentially supporting the receiver's motion without any objection from the Rollars, whose counsel was present. In one way or another, all of these actions have presupposed the government's continued standing in this case. However, apparently because these government actions tended to benefit them (along with the rest of the victims), the Rollars saw no reason to object.⁴ For purposes of construing the Consent Order, this subsequent course of conduct suggests that the intent of the parties was never to deny the government standing, and that the Rollars' argument to the contrary is merely opportunistic. In addition, even if the Rollars once had a legitimate objection to the government's standing based on the Consent Order, they have long since waived it by their course of conduct.

2. Waiver.

The Rollars' argument on the waiver issue is especially confused and misleading, which is ironic in view of their accusation that the government's response was either "sloppy" or "intended to mislead the Court." They argue that the "clear and unambiguous effect" of ¶8 and ¶12 in the

⁴Surely the law cannot be that the Rollars are entitled to the "benefits" of the government's involvement in this case but are exempt from the "burdens," as where the government happens to disagree with their position.

Consent Order is that they “only agreed not to seek attorneys’ fees from the government for the claims in the Complaint” and “reserved all of their rights to make ‘any and all claims for distribution from the seized funds.’” Reply at 4. This interpretation is manifestly *not* “clear and unambiguous.” In fact, it is not even a reasonable inference from the language of the Consent Order.

The Rollars are attempting to distinguish between what they characterize as “claims against the government” in ¶8 and “claims for payment from the seized funds” in ¶12, arguing that they waived their right to recover attorneys fees for the former but not as to the latter. In light of their complaint, however, this is a distinction without a difference. The complaint seeks payment of \$12.5 million *only from the seized funds* and does not assert any other claim or theory of liability *against the government*. In ¶8, the Rollars waived any right to recover attorneys fees for “those claims,” *which consisted of precisely the same demand for payment from the seized funds both before and after entry of the Consent Order*, regardless of whether the funds were being held by the government or by the receiver.⁵ By their argument, the Rollars are trying to rewrite ¶8 to *allow* recovery of attorneys fees that were clearly incurred “as to those claims” once the funds were transferred to the receiver, a result contrary to the express language of the waiver. If the parties had simply intended to allow the recovery of attorneys fees for “those claims” *from the seized funds rather than from the government*, it would have been easy to say so; however, ¶8 and ¶12 would not have been the way to do it. If, on the other hand, the parties intended to preclude any

⁵For this reason, the Rollars’ timing argument (Reply at 5, n.3) is also unpersuasive. They waived any right to recover attorneys fees with regard to “those claims,” and the nature of the claims did not change according to *when* the government or the receiver had possession of the seized funds. There is an obvious difference between a waiver that failed to anticipate legislation not yet enacted, as in the Underwood case cited by the Rollars, and the waiver in the Consent Order here, which expressly anticipated the appointment of a receiver.

recovery of attorneys fees incurred by the Rollars in pursuing their claim for \$12.5 million, but also to leave them free to assert any claim or legal theory to the seized funds *other than attorneys fees incurred "as to those claims,"* then ¶8 and ¶12 would be a natural and straightforward way to say this.

In other words, a reasonable interpretation of the Consent Order would give effect to both ¶8 and ¶12. Only the former expressly mentions attorneys fees. The rights reserved in ¶12 are reserved "[s]ubject to the terms and conditions of this order," which include the waiver of attorneys fees in ¶8. Under normal principles for the judicial interpretation of contracts, the Rollars should not be heard to use ¶12 to nullify the waiver in ¶8.

3. Absence of Evidence.

At one point in their reply, the Rollars suggest that the government is making a conclusory argument "without offering any evidence to support the conclusions," thus ignoring the fact that the motion before the Court is their motion, not the government's. It should go without saying that the Rollars, as the moving party, must offer *some* evidence to support their basic theory, i.e., (1) that the government was failing to do something it had a duty to do; (2) that their lawsuit was necessary and proper to remedy this failure; and (3) that, as a result, a benefit was conferred on the rest of the victim class. In support of this theory the Rollars offer only a bare chronology which, in and of itself, tells the Court nothing, despite their hyperbolic claim that it "speaks volumes . . ." Reply at 6.

In the only line of case authority that is arguably relevant, the Fourth Circuit held that a delay of 16 months prior to the government's commencement of forfeiture proceedings was not unreasonable. United States v. Turner, 933 F.2d 240, 246 (4th Cir. 1991), citing United States v. \$8,850, 461 U.S. 555, 564-65 (1983) (delay of 18 months following simple airport currency

seizure held not unreasonable). Following §8,850, the Fourth Circuit identified four factors to be considered by the courts: the length of delay, the reason for the delay, the claimant's assertion of his right, and prejudice to the claimant. 933 F.2d at 246. While the length of delay and the Rollars' assertion of their rights are not in dispute, they have offered no evidence whatsoever as to the other two factors.⁶ Unless and until they offer such evidence, the Rollars have not made out a prima facie case of unreasonable delay and thus have failed to establish a factual predicate for their theory.

4. Legal Authority.

At this point in the history of this litigation, and especially in light of their glib assertion that the government's response to their motion is "lean on authority" (Reply at 1-2, n.1),⁷ it is remarkable that the Rollars have yet to cite any substantive case authority to support the basic theory of their lawsuit, as summarized in the first paragraph of Section 3 above. They should not be entitled to recover attorneys fees if they had no legal justification for their lawsuit in the first

⁶While most of the evidence from the criminal investigation, including information as to other victims, is obviously in the government's possession, the Rollars have not sought any of this information for purposes of their motion for attorneys fees. Since the government is still a party, however, they could have at least attempted to conduct civil discovery, and the government could have objected and/or asserted any applicable privileges in response. Instead, the Rollars have simply elected not to present *any* evidence that would allow the Court to analyze two of the relevant factors under §8,850 and Turner.

⁷The Rollars dismissively but misleadingly state that the government cited only one case in its response to the motion. They fail to note the fact that the response referenced the government's motion to dismiss and supporting brief previously filed on August 30, 2001. If the number of cases cited is important (as the Rollars seem to think), the government cited approximately 46 cases in that brief, most of which fully support the government's position that the Rollars' entire lawsuit was and is frivolous. In addition, the government had no reason to cite any cases on the common fund doctrine because the general principles of that doctrine are not in dispute. The Rollars simply do not have the facts to trigger its application in this case.

place. In addition, they have studiously avoided any discussion of the line of case authority represented by \$8,850 and Turner, which clearly demonstrates the fundamental legal problem with their lawsuit.

5. The Receiver's Position.

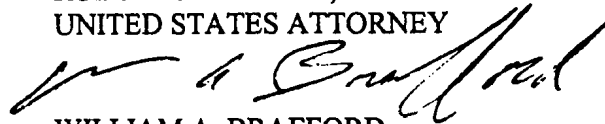
In their reply, the Rollars attempt to get some mileage out of the fact that the receiver has not filed an objection to their motion. Reply at 3, n.2. On December 3, the undersigned spoke with the receiver by telephone and was informed that he had decided not to take a position on the Rollars' motion because he saw no reason to incur legal expenses on behalf of the receivership in order to analyze and argue a position that was being fully advocated by the government. If, however, the Court were to accept the Rollars' argument on standing and strike the government's response (see Reply at 3), the Receiver stated that it would be his responsibility to consider this issue and possibly to file a response. He specifically requested notice if the Court elected not to consider the government's position and arguments. On this point, as on so many others, the facts simply do not support the conclusion suggested by the Rollars.

CONCLUSION

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

This the 4th day of December, 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 GOVERNMENT'S MOTION FOR LEAVE TO FILE SUR-REPLY, a proposed order, and GOVERNMENT'S SUR-REPLY REGARDING 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:

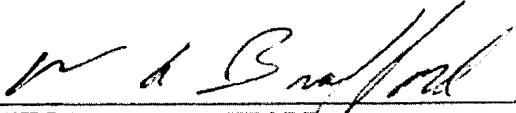
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In the event these documents are not served in the manner and on the date described herein, the United States will immediately notify the Court and the above party of the factually correct method of service.

This the 4th day of December, 2003.



WILLIAM A. BRAFFORD
Assistant United States Attorney