

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN)
ACCOUNT NUMBER 000669829075 in)
THE BANK OF MM ACME BANQUE DE)
COMMERCE, INC., AT NATIONSBANK,)
N.A., CONSISTING OF \$18,756,420.97,)
MORE OR LESS.)

C.A. NO. 3:98mc96-McK

GEORGE AND DOLORES ROLLAR,)
)
Plaintiffs,)

v.)

C.A. NO. 3:01CV205-McK

UNITED STATES OF AMERICA, et al.,)
)
Defendants.)

RICHARD VASQUEZ,)
)
Intervener.)

**PLAINTIFF'S RESPONSE IN OPPOSITION TO A.C.W. MOHR'S
MOTION FOR RETURN OF PROPERTY SEIZED, MOTION FOR EXPEDITED
DISCOVERY AND REQUEST FOR EVIDENTIARY HEARING**

Plaintiffs George and Dolores Rollar file this Response in Opposition to A.C.W. Mohr's Motion for Return of Property Seized ("Motion") and respectfully say:

I. Summary of the Argument and the Relief Requested.

The Court should deny the Motion first and foremost because Mohr and his company, M.M. A.C.M.C. Banque de Commerce, Inc. ("ACMC"), obtained the funds that Mohr seeks to

have returned through a fraudulent Ponzi scheme that Mohr and other criminals¹ perpetrated on innocent investors. Because APMC obtained the funds as a result of fraud, neither Mohr nor APMC are entitled to possession of those funds as a matter of law or equity. Moreover, even if the funds were returned to APMC or Mohr, the funds would be held by them in a constructive trust for the benefit of the defrauded investors in the Mohr/Gilliland Ponzi scheme.

While the Court should summarily deny Mohr any relief because the Motion and its exhibits demonstrate as a matter of law that Mohr individually has no legally cognizable claim to the Seized Funds (defined below), the Rollars request that, in light of the competing claims to the Seized Funds, the Court enter an Order setting a date for an evidentiary hearing on the issue of APMC's alleged entitlement, to the exclusion of all others, to possession of the Seized Funds.² After the hearing, the Court should enter an order based on the evidence that will be presented finding that: a) APMC is not entitled to lawful possession of the Seized Funds; and b) the victims of Mohr's fraudulent scheme are entitled to possession of portions of the Seized Funds in amounts to be determined by the Court after receiving and considering i) any report and recommendation submitted by the receiver and ii) the arguments of the other parties to this proceeding respecting distribution. The Rollars further request that if a hearing is to be held, the date of the hearing be after the Rollars and the other interested parties (including the Court-

¹ Mohr is currently being prosecuted by Norwegian authorities for his role in the fraudulent international scheme to which the Rollars and others fell victim, a fact which Mohr fails to mention when he states in the Motion that "no criminal indictment" arose out of the investigation into this matter (Motion, ¶7). Indeed, at the request of the government and the Norwegian authorities, George Rollar testified by deposition in those criminal proceedings against Mohr. The government has advised the Rollars that Mohr's partner in crime, Frederick Gilliland, has been federally indicted for his role in the Ponzi scheme, but currently is a fugitive.

² The Rollars believe that most claims for return of property that may be filed in this case can be handled by the court appointed receiver with minimal involvement by the Court. The claims of Mohr and APMC, though, must be treated differently because of the unique position of APMC with respect to the Seized Funds. Indisputably, the Seized Funds were in an account in the name of APMC when they were seized. A finding that neither Mohr nor APMC are entitled to possession of the Seized Funds would pave the way for distribution of the Seized Funds to the many victims of the fraudulent scheme.

appointed receiver) have had an opportunity to take expedited discovery from Mohr and ACMC on the issues relevant to the Motion.

II. Facts.

As set forth in more detail in the Amended Complaint (already on file), prior to December 1998, George and Dolores Rollar ("Plaintiffs"), became the victims of a sophisticated fraud/Ponzi scheme perpetrated on them by Frederick Gilliland. Gilliland conspired with Mohr and Mohr's company ACMC in that scheme.

As a result of the fraudulent representations Gilliland made to the Rollars about investment opportunities in so-called medium term notes ("MTNs"), in July and August 1998, the Rollars caused \$12.5 million of their money to be wire transferred to accounts in the Isle of Man controlled by Gilliland for investment in MTNs. Before the Rollars transferred any money, Gilliland told the Rollars that the Rollars' funds would remain in an account jointly owned by Gilliland and the Rollars.

George Rollar later learned that, without the Rollars' knowledge or consent, Gilliland caused the Rollars' \$12.5 million (along with \$7.5 million of unknown origin) to be transferred on September 16, 1998 from the Isle of Man account to ACMC account number 0006 6982 9075 at NationsBank, N.A. (now Bank of America) in Charlotte, North Carolina. ACMC was controlled at that time by Mohr.

In December 1998, the government obtained a seizure warrant in No. 3:98mc96-MU, pending in the United States District Court for the Western District of North Carolina (the "Seizure Action"),³ and on or about December 11, 1998 seized over \$18.7 million from the ACMC account identified above (hereinafter the account will be referred to as the "Seized

³ On December 20, 2001, the Court signed an Order consolidating the Seizure Action and the Rollars' lawsuit, No. 3:01CV205-McK. This Rollars file this response in the consolidated proceedings.

Account” and the funds as the “Seized Funds”). In its papers filed in support of its application for the seizure warrant, the government alleges that there is probable cause to believe that the Seized Funds are the proceeds of wire fraud and money laundering.

The Rollars never received any return on their \$12.5 million “investment” and were never repaid any of their principal. Because the Rollars believe that at least \$12.5 million of the over \$18.7 million seized rightfully belongs to them, the Rollars filed a Complaint seeking the return of their money that had been a) obtained from them by means of fraudulent representations, b) transferred by Gilliland into the Seized Account without the Rollars’ knowledge or consent, and c) held by the government for over two years after the seizure.

On July 2, 2001, Richard Vasquez filed a motion to intervene and later filed a Complaint in which Vasquez claims entitlement to nearly \$900,000 of the Seized Funds. Vasquez, like the Rollars, claims to be the victim of a fraudulent scheme perpetrated by Gilliland and others.

On October 11, 2001, the Court entered a Consent Order that, among other things, authorized the appointment of a receiver and recognized the government’s interpleader of the Seized Funds pursuant to 28 U.S.C. §1335 and Federal Rule of Civil Procedure 22. On October 29, 2001 the Court entered an order appointing Michael J. Quilling as receiver with the authority to accept and review claims and to make recommendations to the Court as to the order and priority of payment.

On December 11, 2001, Mohr filed in No. 3:98mc96-MU his Motion for Return of Property Seized.⁴ On or about December 20, 2001, the government filed its Response to Motion

⁴ Mohr’s motion does not make clear whether Mohr seeks relief on his own behalf, or on behalf of A.C.M.C. For example, the introductory paragraph states that A.C.W. Mohr, President of M.M. A.C.M.C. Banque De Commerce, moves the Court for return of the Seized Funds. Moreover, the Motion apparently seeks to have the funds re-deposited into the Seized Account. Motion, ¶9. Those facts tend to indicate that Mohr is acting on behalf of A.C.M.C. On the other hand, in paragraph 13 of the Motion, Mohr seems to seek relief in his individual capacity

for Return of Property (Government's Response"). In the Government's Response, it asserts, among other things that: a) Mohr has no legitimate claim to the Seized Funds because the true equitable owners of those funds are Mohr's victims; b) Mohr's papers fail to make a prima facie showing of a valid interest in the Seized Funds by either Mohr or ACMC; and c) Mohr's Motion should be treated as a claim to be evaluated by the receiver.⁵ Government's Motion, ¶4. The Rollars adopt by reference the arguments in paragraph 4 of the Government's Response.

On December 21, 2001, the Court-appointed receiver served his Response to Motion for Return of Property Seized. The Rollars adopt by reference the arguments advanced by the receiver. In addition, the Rollars oppose Mohr's Motion for the reasons set forth below.

III. Argument and Authorities.

A. The Court should summarily deny Mohr's individual claim under Rule 41(e) because Mohr personally has no legally cognizable interest in the Seized Funds.⁶

Fed. R. Civ. P. 41(e) provides that "[a] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property."⁷ It is undisputed that the Seized Funds were seized from an

("A.C.W. Mohr as claimant of property seized from bank account 000669829075 in the amount of approximately \$18.7 million claims title to such property . . .").

⁵ The government also addresses Mohr's claim that the government failed to provide him with notice as required in 18 U.S.C. §983(a). The Rollars have no information on that issue and therefore take no position with respect to Mohr's arguments.

⁶ While Mohr's Motion does not state that it is made under Federal Rule of Criminal Procedure 41(e), its caption, "Motion for Return of Property Seized," suggests that Mohr seeks relief under Rule 41(e). Moreover, even though Mohr apparently also claims entitlement to the Seized Funds under 18 U.S.C. §983, that statute does not provide a mechanism for Mohr or ACMC to bring suit directly against the government to enforce its provisions. Moreover, even if the Court were to imply a statutory remedy under section 983, neither Mohr nor ACMC would be entitled to relief under section 983 because, among other reasons, they may not legally possess the Seized Funds, which are the proceeds of an interstate and international fraudulent scheme. *See* 18 U.S.C. §2315.

⁷ The Court has jurisdiction to hear and determine Mohr's 41(e) motion. The Seized Funds were seized pursuant to a seizure warrant. The Court found that there was probable cause to seize the funds based on the government's representation that there was probable cause to believe the funds were subject to forfeiture pursuant to 18 U.S.C. §831. While the government seized the funds, it never actually instituted any civil forfeiture proceedings.

account owned by M.M. A.C.M.C. Banque de Commerce, Inc. Motion, ¶¶1 and 2. To the extent Mohr's Motion seeks relief for Mohr individually, it must fail. Motion, ¶13.

Inasmuch as Mohr admits in the Motion that the Seized Account was owned by A.C.M.C., Mohr is not the person "aggrieved by" the deprivation of property in this case, and thus not a person entitled to relief under Rule 41(e). Moreover, the fraudulent "Escrow Agreement" on which Mohr relies in his Motion as the basis for his claim to title, rather than supporting Mohr's claim under Rule 41(e) (assuming the legitimacy of the document only for present purposes), further distances Mohr from any claim that he, individually, is a "person aggrieved". The purported "Escrow Agreement" is between "M.M. A.C.M.C. Fiduciary & Nominees BA" and "Sterling Asset Services, Ltd." As set forth above, the Seized Funds were seized from M.M. A.C.M.C. Banque de Commerce, Inc., not M.M. A.C.M.C. Fiduciary & Nominees BA. Mohr has failed to produce a single piece of documentary or other evidence that would arguably entitle him personally to relief under Rule 41(e), even assuming Mohr was not a criminal intimately and actively involved in swindling innocent victims of the millions of dollars he now has the audacity to claim as his own.⁸

and never provided any interested person notice of forfeiture. *See United States v. One 1974 Learjet*, 191 F.3d 668 (1999)(noting distinction between seizure when the government has probable cause to believe an item is subject to civil forfeiture and the institution of actual civil forfeiture proceedings, and holding that "[a]fter the government initiates forfeiture proceedings and notifies a claimant of the proceedings, a claimant may no longer use Rule 41(e), but instead must submit to the statutory procedures governing civil forfeiture proceedings.") (emphasis added). Since no civil forfeiture proceedings were ever initiated, Rule 54(b), which states that the Federal Rules of Criminal Procedure do not apply to civil forfeiture proceedings, does not bar application of Rule 41(e) in this case even if it otherwise would (the Fourth Circuit apparently has not yet decided Rule 54(b)'s effect, if any, on a motion brought under Rule 41(e)). Even if the Court were to determine that the civil forfeiture process was instituted by the government's seizing the Seized Funds and never taking any steps to forfeit them and that Rule 54(b) therefore precluded jurisdiction over Mohr's Motion on the basis of Rule 41(e), the Court would nevertheless have jurisdiction over Mohr's Motion pursuant to its equitable or "anomalous" jurisdiction. *See In re \$67,470.00*, 901 F.2d 1540, 1545 (11th Cir. 1990).

⁸ As set forth in the replies of both the Government and the Receiver, Mohr was recently tried by the Norwegian government for his role in the Ponzi scheme by which the Rollars were swindled out of \$12.5 million dollars. Apparently, all that remains of that trial is a verdict from the Norwegian authority.

B. In light of the competing claims to the Seized Funds, the Court should, at the appropriate time, hold an evidentiary hearing on the issue of whether ACMC is entitled to lawful possession of the Seized Funds to the exclusion of the many victims of the fraudulent Ponzi scheme.

Fed. R. Civ. P. 41(e) provides that “[t]he court shall receive evidence on any issue of fact necessary to the decision” of a motion made under the Rule. In the present case, an issue of fact exists with respect to who is entitled to lawful possession of the Seized Funds—ACMC, on the one hand, or the defrauded victims of the Gilliland/Mohr fraudulent MTN investment scheme on the other hand. *See Waymon v. United States*, 1999 WL 412675 *2 (N.D.Ill. 1999) (“When multiple entities claim a legal right to the same item, an evidentiary hearing is necessary to determine the factual dispute of whom the rightful owner is”). In the context of a proceeding under Rule 41(e), “the government has a legitimate interest in returning lawfully seized property to its true owner.” *United States v. Nauracy*, 1996 WL 316989 (N.D. Ill. 1996)

Now that Mohr has submitted to the jurisdiction of the Court by filing his Motion, the Court and the parties have the opportunity to bring Mohr and ACMC before the Court so that the Court may hear evidence as to who has the superior right to possession of the Seized Funds. The importance of the governmental interest in returning seized property to its *rightful* owners was recognized by the District Court for the Northern District of Illinois in *United States v. Nauracy*, 1996 WL 316989 (N.D. Ill. 1996). In *Nauracy*, the defendant was arrested and pled guilty to a scheme to defraud insurance companies. Before his conviction, the FBI executed search warrants at the homes of the defendant and his father, and seized weapons and other property at both locations. The defendant then filed a motion for return of property, including a coin collection that was alleged to have been stolen from a third party. The government opposed defendant’s motion. *Nauracy*, at *1.

In deciding the defendant's motion, the court discussed the equitable nature of proceedings under Rule 41(e) when the movant complains of continued "deprivation of property" rather than an "unlawful search and seizure." When a claimant relies on deprivation of property as the basis for a Rule 41(e) motion, as Mohr does here, "the court has freer reign to balance whatever interests the defendant asserts in the property against the interests of the government in retaining the property. *In these cases, the defendant must begin with a prima facie case of lawful entitlement.*" *Id.*, *3-4 (emphasis added, citations omitted).

The *Nauracy* court noted that the government may respond to a Rule 41(e) motion by, among other things, rebutting the movant's claimed right of lawful entitlement. It may rebut the claim by, among other things, proving an ownership interest in the requested property adverse to the defendant or by showing that defendant's possession of requested property was unlawful. *Id.*, *5. The court went on to state:

The government has already demonstrated that ownership of the coins [which were alleged to have been stolen] is unclear. The government is actively seeking to return the coins to their true owner by means of the requested ownership hearing. These circumstances justify the government's continued retention of the coins. *The government has a legitimate interest in returning lawfully seized property to its true owner.*

Id., *6 (emphasis added).

In this case, as in *Nauracy*, there is a legitimate interest in returning the Seized Funds to their rightful owners—the victims of Gilliland and Mohr's fraudulent investment scheme. The government has instituted that process by interpleading the Seized Funds and seeking the appointment of the receiver to evaluate the claims of rightful ownership. At the appropriate time, the Court should hold an evidentiary hearing to determine the merits of APMC's claimed entitlement to possession of the Seized Funds. The evidence at the hearing will establish that

neither Mohr nor ACMC is entitled to possession of the Seized Funds for at least the following reasons in addition to those advanced by the receiver and the government.

1. Neither Mohr nor ACMC is entitled to relief under Rule 41(e) because they have unclean hands.

A motion pursuant to Rule 41(e) is treated as a civil, equitable proceeding. *See United States v. Jones*, 42 F.Supp.2d 618, 621 (W.D.N.C. 1999). The law is well settled that “he who comes into equity for relief must come into court with clean hands.” Neither Mohr nor ACMC are entitled to any relief in this equitable proceeding because they come into court with unclean hands, being responsible for, or at the very least connected with, the very fraudulent scheme by which the Seized Funds were swindled from many innocent victims. *United States v. Grover*, 119 F.3d 850 852 (10th Cir. 1997)(recognizing equitable nature of Rule 41(e) motion and denying relief under Rule 41(e) on basis of claimant’s unclean hands).

2. The Seized Funds should not be returned to Mohr or to ACMC in any event because they may not legally possess them.

The Rollars’ were separated from their \$12.5 million that ended up in the Seized Account by means of fraudulent representations about excellent returns on investments in a non-existent MTN investment program. In short, the Rollars were the victims of fraud perpetrated on them by Gilliland in apparent conspiracy with Mohr, and the Seized Funds are the proceeds of that fraud.

18 U.S.C. § 2315 makes it a federal crime to knowingly possess money or property worth \$5,000 or more that has crossed a state or United States boundary after having been unlawfully converted. Inasmuch as it is likely that Mohr was a participant in the fraudulent MTN investment program, his or his company’s (ACMC’s) possession of the Seized Funds would

constitute a federal crime.⁹ Rule 41(e) entitles a person to obtain return of property “on the ground that such person is entitled to lawful possession of the property.” Because neither Mohr nor ACMC may lawfully possess the Seized Funds, they are not entitled to relief under Rule 41(e).

Likewise, 18 U.S.C. § 983(a)(1)(F) provides, in pertinent part:

If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. *The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.*

(Emphasis added.)

Though not expressly stated by the government in its reply, the facts set forth in the Government’s Reply support its refusal to return the Seized Funds to ACMC because, as set forth above, neither Mohr nor ACMC may possess the Seized Funds without being in violation of 18 U.S.C. § 2315.

C. The parties should be entitled to take expedited discovery from Mohr and ACMC before the evidentiary hearing.

As the Fourth Circuit has made clear, a proceeding under Rule 41(e) is civil in nature and, at least where no criminal proceedings are pending, constitutes a civil action against the United States. *United States v. Garcia*, 65 F.3d 17, 18 n.2 (4th Cir. 1995). Civil actions are governed by the Federal Rules of Civil Procedure (Fed. R. Civ. P. 1), which specifically allow for discovery between parties (*see* Fed. R. Civ. P. 26). *United States v. Jones*, 42 F.Supp.2d 618, 621 (W.D.N.C. 1999)(“a motion to return property under Rule 41(e) of the Federal Rules of


⁹ The Rollars’ \$12.5 million was taken from them by means of fraud and wire transferred from the United States to a foreign bank and then apparently to ACMC’s Bank of America account in Charlotte, North Carolina.

Criminal Procedure is treated as a civil equitable proceeding; consequently, the Federal Rules of Civil Procedure apply”). Because of the parties’ interest in expeditious resolution of all of the claims in this case, the Rollars request that the Court enter an Order allowing expedited discovery from Mohr and APMC on the issues relevant to their Motion. The Rollars believe expedited discovery from Mohr would aid in early resolution and disposal of Mohr’s/APMC’s claims (either through summary judgment or through default by Mohr and APMC in responding to discovery).

IV. Conclusion.

For the foregoing reasons, the Court should deny Mohr any relief in his individual capacity, allow expedited discovery from Mohr and APMC and then hold an evidentiary hearing at the appropriate time on the issue of APMC’s alleged entitlement to possession of the Seized Funds. In no event should the Court grant possession of the Seized Funds to Mohr or APMC because they may not legally possess them. A proposed form of Order granting the relief requested is attached for the Court’s consideration.

Respectfully submitted,



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Dated: January 7, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Plaintiff's Response in Opposition to A.C.W. Mohr's Motion for Return of Property Seizer, Motion for Expedited Discovery and Request for Evidentiary Hearing** and proposed **Order** were served by depositing a copy of same in the U.S. Mail, postage prepaid and addressed as follows:

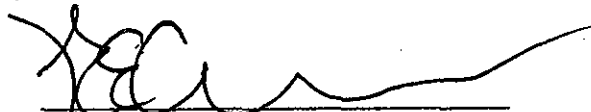
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This the ____ day of January, 2002.



Rodney E. Alexander