

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

UNITED STATES OF AMERICA,

Plaintiff.

v.

CIVIL ACTION NO. 5:23-cv-00393

\$168,849.42 SEIZED FROM FIRST COMMUNITY
BANK, ACCOUNT NUMBER XX2781;
\$299,604.40 SEIZED FROM FIRST COMMUNITY
BANK, ACCOUNT NUMBER XX2660;
\$2,333,832.28 FROZEN FROM ALLY INVESTMENT,
ACCOUNT NUMBER XX-X6295-11;
\$45,000 FROZEN FROM ALLY INVESTMENT,
ACCOUNT NUMBER XX-X6295-11,

Defendants.

**UNITED STATES' RESPONSE TO SHOW CAUSE ORDER
AND RECOMMENDATION THE COURT GRANT CLAIMANT ROSS BAILEY'S
MOTION TO STAY THIS PROCEEDING, OR, IN THE ALTERNATIVE,
SET A SCHEDULING CONFERENCE PURSUANT TO RULE 26(f)**

COMES NOW, the United States of America, by counsel William S. Thompson, United States Attorney for the Southern District of West Virginia, and Chris Arthur¹ and Justin Marlowe, Assistant United States Attorneys for the Southern District of West Virginia, and files this response to the show cause seeking the Court permit the case to proceed on its merits, or grant claimant Ross Bailey's ("Bailey") "Claimants²" Motion to Stay," and files this response to the show cause order entered on December 9, 2024, (ECF 43) as to whether the case should be dismissed or,

¹ Chris Arthur scheduled approximately 8 months ago a trip outside the country from December 15, 2024, through December 22, 2024, and will not be available during that period. Mr. Marlowe is willing and able to appear at any hearing or respond to any future orders during that time period.

² In the motion to stay, claimants include Ross Bailey and R&R Delivery Service, Inc. R&R Delivery Service, Inc. has not appeared in this matter.

alternatively, the parties to submit their views concerning the necessary case events and intervals to bring the case to judgment, and recommends the Court grant Claimant Ross Bailey's Motion to Stay this proceeding, or in the alternative, set a scheduling conference pursuant to Rule 26(f).

Relevant Facts

1. On May 17, 2023, the United States filed "Verified Complaint for Forfeiture in Rem" ("Complaint") seeking final order of forfeiture in the total amount of \$2,847,286.10. *See* ECF 1.
2. The Complaint alleges Bailey engaged in theft of government proceeds and engaged in transactions in violation of 18 U.S.C. 641 (theft of government funds), 18 U.S.C. 1343 (wire fraud), 18 U.S.C. 666 (theft or bribery concerning programs receiving Federal funds), 18 U.S.C. 1956 (laundering of monetary instruments), and 18 U.S.C. 1957 (laundering in monetary transactions in property derived from specified unlawful activity exceeding \$10,000). *Id.*
3. On May 18, 2023, the Clerk issued Warrant of Arrest and Notice in Rem commanding the financial institutions in custody of the defendant assets listed in the Complaint to maintain custody until further order of the Court. *See* ECF 3.
4. On June 20, 2023, John Carr ("Carr"), then counsel for Bailey, requested an extension to file an answer. The United States agreed to a thirty-day extension. *See* First Stipulation, ECF 4; *see also* emails dated June 20, 2023, attached hereto as Exhibit A.
5. On August 16, 2023, Carr, on behalf of Bailey, requested another extension to file answer. The United States did not object to extending the deadline for thirty days. *See* Second Stipulation, ECF 5; *see also* emails dated August 16, 2023, attached hereto as Exhibit B.

6. On or about September 18, 2023, the United States met with Carr, Bailey's counsel to discuss the evidentiary basis for the Complaint. At the meeting, the lead investigators outlined the investigation that resulted in the United States concluding that Bailey had committed a crime supporting the forfeiture.
7. On September 20, 2023, Carr requested another extension until October 20, 2023, to file a responsive pleading. The United States did not object to the extension, especially in light of the complexity and the volume of documents involved. *See* Stipulation, ECF 6; *see also* email dated September 19, 2023, attached hereto as Exhibit C. The September email also states, "I am working with [Erik] Goes [Assistant United States Attorney handling the criminal matter] to get this handled within the next few weeks." *Id.*
8. On October 19, 2023, Carr requested an additional extension until November 19, 2023, to file a responsive pleading. The United States did not object to the extension, but stated, "I am not agreeing to another extension. We already are pushing our luck with [Volk]. Trial date would not be set for a year after your answer anyways. Civil cases typically get trial date 10 to 14 months after answer." *See* Stipulation, ECF 7; *see also* emails dated October 19-20, 2023, attached hereto as Exhibit D.
9. On November 19, 2023, Carr requested an additional extension. Carr explained that he continued to have discussions with AUSA Goes relating to the criminal matter and had a meeting scheduled for early December to explore settlement. Due to the potential for resolution, the United States reluctantly agreed to additional extension until December 20, 2023. *See* Stipulation, ECF 8.
10. On December 14, 2023, the United States filed Declaration of Publication notifying the Court that Notice of Civil Forfeiture was posted on an official government internet site

(www.forfeiture.gov) for at least 30 consecutive days, beginning on November 10, 2023, and ending on December 9, 2023, as required by Rule G(4)(a)(iv)(C) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

11. On December 22, 2023, Bailey filed an answer. *See* Answer, ECF 9.
12. During the period of January 2024 and June 2024, the United States and Carr communicated and met several times to discuss potential resolution of this matter and the criminal matter. The United States further disclosed that it likely would pursue civil penalties against Bailey under the False Claims Act (“FCA”), 31 U.S.C. 3729-33, civil penalties under the Financial Institutions Reform, Recovery and Enforcement Act.
13. On June 25, 2024, a federal grand jury in the Southern District of West Virginia returned a thirty-one count Indictment against Ross Bailey for theft of government funds, theft of stolen funds across state lines, wire fraud, and money laundering in violation of 18 U.S.C. §§ 287, 641, 1343, and 1956. *See* Indictment, 5:24-cr-00105, ECF 1.
14. On July 8, 2024, Bailey was scheduled to be arraigned before Magistrate Judge Aboulhosn. Prior to the arraignment, Carr, Bailey’s counsel required medical assistance.
15. Due to Carr’s medical issues, the Court continued the arraignment and Bailey had to seek new counsel for this matter and the criminal matter.
16. On August 27, 2024, Bailey retained R. Brandon Johnson, and John D. Wooton, of Wooton, Davis, Hussell & Johnson, PLLC. *See* 5:24cr00105, ECF 26, 27.
17. On December 10, 2024, R. Brandon Johnson, and John D. Wooton, of Wooton, Davis, Hussell & Johnson, PLLC, entered a Notice of Appearance in this matter.
18. Further on December 10, 2024, Bailey’s new counsel moved this Court to stay this proceeding, arguing that Bailey has concurrent criminal charges for the same conduct. ECF

10. The United States did not oppose the motion to stay the civil penalty matter and also does not oppose staying this matter pending resolution of the criminal matter.

19. The complexity of this matter which caused delays is reflected in the seven matters stemming from the allegations asserted in this action:

5:23-cr-00131 (Mark Bailey);

5:24-cr-00105 (Ross Bailey);

5:24-cr-00106 (Ryan Bailey);

5:23-cv-00393 (Ross Bailey);

5:23-cv-00406 (Ryan Bailey);

5:24-cv-00455 (Ross Bailey); and

5:24-cv-00456 (Ryan Bailey).

Legal Argument

A. Standard of Review

Dismissal of a complaint with prejudice is an extreme sanction, reserved for flagrant cases of bad faith and callous disregard for the court's authority. *See Hillig v. Comm'r*, 916 F.2d 171, 174-75 (4th Cir. 1990) (vacating dismissal of petition); *see also Mutual Fed. Sav. & Loan Ass'n v. Richards & Assoc., Inc.*, 872 F.2d 88, 92 (4th Cir. 1989). Orders dismissing cases pursuant to Rule 41(b) are reviewed for abuse of discretion. *See Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

B. Facts Do Not Support Dismissal of this Action

The United States acknowledges this Court has the authority to dismiss an action for failure to prosecute. *See United States ex rel. Curnin v. Bald Head Island Ltd.*, 381 Fed. Appx. 286, 287 (4th Cir. 2010) (“A district court has inherent authority to dismiss a case for failure to prosecute. .

.”) (quoting *Doyle v. Murray*, 938 F.2d 33, 34 (4th Cir. 1991)). Despite that inherent power, the United States asserts dismissal is not an appropriate remedy in this matter.

Rule 41.1 of the Local Rules provides:

Dismissal of Actions. When it appears in any pending civil action that the principal issues have been adjudicated or have become moot, or that the parties have shown no interest in further prosecution, the judicial officer may give notice to all counsel and unrepresented parties that the action will be dismissed 30 days after the date of the notice unless good cause for its retention on the docket is shown.

In determining whether to dismiss a case involuntarily for want of prosecution, this Court should consider the following four factors:

- (i) the degree of personal responsibility of the plaintiff;
- (ii) the amount of prejudice caused the defendant,
- (iii) the existence of a history of deliberately proceeding in a dilatory fashion, and
- (iv) the existence of a sanction less drastic than dismissal.

Ballard v. Carlson, 882 F.2d 93, 95 (4th Cir. 1989).

The Fourth Circuit explained the foregoing factors are not meant to be applied as a rigid, formulaic test, but rather serve to assist the Court, along with the particular circumstances of each case, in determining whether dismissal is appropriate. *Id.*

Concerning the first factor, the United States asserts good cause exists resulting in delays seeking a scheduling order from this Court. As outlined above, Bailey filed an Answer on December 2023. Subsequent to the Answer, the United States and Bailey engaged in various discussions to resolve this action. The United States and Bailey’s counsel also discussed potential resolutions of the civil penalty matter and the criminal indictment. Unfortunately, Carr’s serious medical issues caused various delays, resulting in substitution of counsel on December 10, 2024. Carr’s medical issues even resulted in the cancellation of an arraignment proceeding. After that medical event occurred, Bailey retained new counsel in the criminal matter. Thereafter, claimant

Bailey retained new counsel in the civil penalty matter. Finally, claimant Bailey retained new counsel in this matter. The United States asserts that it has no or a de minimis responsibility for the delays in moving this matter forward. Accordingly, the first factor supports the United States' request to allow this matter to proceed on its merits.

Concerning the second factor, Bailey has not suffered prejudice, nor has he asserted so. The United States repeatedly agreed to extend the deadline to file an Answer; to informally provide documents supporting its claims; to participate in various meetings where the United States investigators outlined the factual basis for the claims; and consented to continuances in the criminal matter and civil penalty case. Accordingly, the second factor supports the United States' request to allow this matter to proceed on its merits.

Concerning the third factor, this Court has determined that "only a history of dilatory action" by a plaintiff weighs in favor of dismissal under the third factor. *See Hanshaw v. Wells Fargo Bank, N.A.*, 2014 WL 4063828, *4 (S.D.W. Va. Aug. 14, 2014) (J. Johnston). No such history exists here, as the undersigned has handled more than hundred civil cases and more than fifty criminal matters, including thirty-two indictments in the Southern District of West Virginia, dating back to 2002. During that period, the undersigned has tried civil cases where Judges Faber, Berger, and Pearson have presided, and one criminal case before Judge Goodwin. During that long history, there have been no assertions that the undersigned failed to act in an appropriate manner. The undersigned further asserts that delays were not deliberate and outlines good cause for any delays.

Concerning the fourth factor, the United States asserts sanctions are not appropriate. However, if the Court deems that sanctions may be appropriate, the United States respectfully requests a hearing and an opportunity to address any concerns the Court may have.

C. Public Policy Demands Deciding this Case on Its Merits

Because dismissal is such a harsh sanction, it “should be resorted to only in extreme cases.” *Dyotherm Corp. v. Turbo Machine Co.*, 392 F.2d 146, 149 (3d Cir. 1968). In deciding whether a case should be dismissed, a district court must consider conflicting policies: “(a)gainst the power to prevent delays must be weighed the sound public policy of deciding cases on their merits.” *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974). Here, the United States alleges claimant Bailey defrauded the United States in excess of \$2,000,000. Dismissal of this action would harm the taxpayers of the United States.

The United States further asserts that it recognized potential conflicts of interest involving Carr’s simultaneous representation of Ross Bailey, Ryan Bailey, and their companies dating back to January 2024, and further represents claimant Bailey’s counsel Carr also recognized the potential conflict and benefits of staying this matter. Initially, Carr had to address whether his representations of claimant Bailey and Ryan Bailey created a conflict. Carr also had to determine whether his representation in both the criminal and civil matter created a conflict. Those potential conflicts resulted in delays going forward on this case. Additionally, for various unforeseen circumstances, including Carr’s medical issues, the motion to stay was not filed earlier.

D. Not Practicable to Submit Rule 26(f) Report and No Order Requiring Rule 26(f) Report Has Been Entered.

The Local Rules of the Southern District of West Virginia address the obligations for the parties to comply with Rule 16 of the Federal Rules of Civil Procedure. For example, Local Rule 16.1(a), Order and Notice, states “[b]y entry of an Order and Notice, a judicial officer shall establish the date, time, and place of the scheduling conference, and inform the parties of their right to consent to proceed before a magistrate judge under FR Civ P 73(b).” Subsection (b), Obligation of the Parties to Meet, provides “[t]he parties shall, as soon as practicable and in any

event at least 21 days before the date set for the scheduling conference, meet in person or by telephone to discuss and report on all FR Civ P 16 and 26(f) matters,. . .” As explained above, Bailey’s counsel requested various extensions to address potential conflicts; tried to resolve any criminal matters prior to the indictment; and had serious medical issues requiring Bailey to retain new counsel.

The United States asserts that it was not practicable to submit a Rule 26(f) Report due to the complexity of this action and the additional complexities caused by the potential criminal and civil matters which have now been filed. Nevertheless, the United States asserts that going forward that it will proactively communicate with new counsel and work to finalize a Rule 26(f) report if the Court does not stay this action until resolution of the criminal matter.

Conclusion

Wherefore, the United States of America respectfully requests this Court grant Bailey’s motion to stay the proceeding until resolution of the criminal matter; or in the alternative allow the matter to proceed on its merits and enter an Order setting a deadline for the parties to meet and confer and to submit a Rule 26(f) report.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2024, I electronically filed the foregoing **United States' Response To Show Cause Order And Recommendation The Court Grant Claimant Ross Bailey's Motion To Stay This Proceeding, Or, In The Alternative, Set A Scheduling Conference Pursuant To Rule 26(F)** with the Clerk of the Court using the CM/ECF system and that I have served a true copy by U.S. mail to the following:

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/s/ Christopher R. Arthur
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