

EDWARD H. KUBO, JR. #2499
United States Attorney
District of Hawaii

RONALD G. JOHNSON #4532
Chief, Major Crimes

LAWRENCE L. TONG #3040
RACHEL S. MORIYAMA #3802
Assistant U.S. Attorneys
Room 6-100, PJKK Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850
Telephone: (808) 541-2850
Facsimile: (808) 541-2958
E-mails: Larry.Tong@usdoj.gov
Rachel.Moriyama@usdoj.gov

Attorneys for UNITED STATES
OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

IN THE MATTER OF THE SEARCH) MISC. NO. 09-00099 HG-KSC
OF:) (MAG. NO. 09-00253 LEK)
)

A Single Family Residence)
Located at Lot 77 of the)
Waiolani Mauka Subdivision,)
Waikapu, Maui, Hawaii)
_____)

IN THE MATTER OF THE SEIZURE) MISC. NO. 09-00099 HG-KSC
OF:) (MAG. NO. 09-00248 LEK)
)

A silver 2006 Toyota Tacoma)
pickup truck bearing Hawaii)
license plate number 646-MDC)
and vehicle identification)
number 5TENX62N76Z246033, and)
registered to John D. Oliver)
and Ihilani K. A. Catugal)
_____)

IN THE MATTER OF THE SEIZURE) MISC. NO. 09-00099 HG-KSC
OF:) (MAG. NO. 09-00247 LEK)
)

A cream 2005 Toyota Tacoma)
pickup truck bearing Hawaii)
license plate number MNA-551)
and vehicle identification)
number 5TETX22N15Z071504, and)
registered to John D. Oliver)
_____)
)

IN THE MATTER OF THE SEIZURE) MISC. NO. 09-00100 HG-KSC
OF:) (MAG. No. 09-00246 LEK)
)

All funds contained in First)
Hawaiian Bank Account Number)
41345438 held in the name of)
Petro T. Hoy Trust c/o Petro)
T. Hoy, up to the amount of)
\$22,063.29)
_____)
)

IN THE MATTER OF THE SEIZURE) MISC. NO.09-00101 JMS-BMK
OF:) (MAG. No. 09-00249 LEK)
)

A light green 2009 Toyota)
Prius 4-door sedan bearing)
Hawaii license plate number)
MSR-136 and vehicle)
identification number)
JTDKB20U193487304, and)
registered to Leatrice Lehua)
Hoy)
_____)
)

IN THE MATTER OF THE SEIZURE) MISC. NO. 09-00102 DAE-LEK
OF:) (MAG. No. 09-00245 LEK)
)

(a) All funds contained in)
Hawaii National Bank Account)
Number 15119424 held in the)
name of Pilialoha K. Teves)
Trust c/o Pilialoha K. Teves)
and Kaikaikaokalani K. Teves,)
\$34,087.00; and)
)

(b) All funds contained in)
Hawaii National Bank Account)
Number 1501007653 held in the)
name of Pilialoha K. Teves)
Trust c/o Pilialoha K. Teves)
and Kaikaikaokalani K. Teves,)
up to the amount of)
\$45,000.00)
_____)

IN THE MATTER OF:)
)
FOR JUDICIAL NOTICE IN)
RE: CASE MAG. NO. 09-00253,)
OTHERS)
_____)

MISC. NO. 09-00114 HG-LEK

IN RE MAHEALANI V. OLIVER)

MISC. NO. 09-00120 HG-LEK

IN RE ERIC AARON LIGHTER)

GOVERNMENT'S RESPONSE TO)
OBJECTIONS AND MOTIONS FOR)
RETURN OF PROPERTY FILED BY)
JOHN OLIVER, PETRO HOY,)
LEHUA HOY, PILIALOHA TEVES,)
AND MAHEALANI VENTURA-OLIVER;)
EXHIBITS A - F; CERTIFICATE)
OF SERVICE)

GOVERNMENT'S RESPONSE TO OBJECTIONS AND MOTIONS)
FOR RETURN OF PROPERTY FILED BY JOHN OLIVER, PETRO HOY,)
LEHUA HOY, PILIALOHA TEVES, AND MAHEALANI VENTURA-OLIVER)

I. INTRODUCTION

The United States is conducting a criminal investigation into the activities of various individuals involved in the marketing of a program which allegedly provides mortgage loan assistance to individuals experiencing financial difficulties. The government has not yet brought charges against

any of the individuals, and the nature and scope of the ongoing investigation is confidential.

On April 6, 2009, as part of the investigation, the Federal Bureau of Investigation ("FBI") obtained two search warrants and eight seizure warrants from this Court.¹ All of the search and seizure warrants were supported by affidavits which were ordered sealed by this Court, on the grounds that the affidavits set forth confidential information, the disclosure of which might jeopardize the ongoing criminal investigation.

On April 7, 2009, the FBI executed the search warrants and some of the seizure warrants, and obtained evidence, funds and vehicles. On the same day, the FBI also obtained and

¹ The search warrants authorized searches of (1) offices located at 310 Hookahi Street, Suite 201, Wailuku, Maui, (Mag No. 09-00243 LEK), and (2) a residence located at Lot 77 of the Waiolani Mauka Subdivision in Waikapu, Maui (Mag. No. 09-00253 LEK). The seizure warrants authorized the seizure of (1) funds contained in six Maui County Federal Credit Union accounts held in the names of Hawaiiiloa Foundation, Mahealani Ventura-Oliver and/or the John D. Oliver Trust (Mag. No. 09-00244 LEK), (2) funds contained in two Hawaii National Bank accounts held in the names of Piliialoha K. Teves and Kaikaikaokalani K. Teves (Mag. No. 09-00245 LEK), (3) funds in a First Hawaiian Bank account held in the name of the Petro T. Hoy Trust (Mag. No. 09-00246 LEK), (4) a 2005 Toyota Tacoma pickup truck registered to John D. Oliver (Mag. No. 09-00247 LEK), (5) a 2006 Toyota Tacoma pickup truck registered to John D. Oliver and Ihilani K.A. Catugal (Mag. No. 09-00248 LEK), (6) a 2009 Toyota Prius registered to Leatrice Lehua Hoy (Mag. No. 09-00249 LEK), (7) assorted gold and silver coins (Mag. No. 09-00250 LEK), and (8) a gold bracelet (Mag. No. 09-00251 LEK).

executed an additional search warrant for office space in Wailuku, Maui.²

Following the searches and seizures, John Oliver, Petro Hoy, Lehua Hoy, Mahealani Ventura-Oliver, Piliialoha Teves and Eric Lighter (collectively "movants") filed various documents with this Court. While it is not completely clear what relief they seek, the movants appear to object to the validity of the searches and seizures, seek copies of the Court's "recorded certified affidavit of probable cause and the enjoined appropriate process," and alternatively seek the "instant return of the wrongfully seized property."

The government submits that the movants' various requests should be denied. The movants have already been given copies of the warrants authorizing the search or seizure of property which they controlled. These warrants represent the Court's determination that the searches and seizures were supported by probable cause. If movants seek disclosure of the underlying affidavits, their request should be denied because the criminal investigation is ongoing. Finally, if construed as a motion to return property under Fed. R. Crim. P. 41(g), movants'

² The search warrant authorized a search of offices located at 310 Hookahi Street, Suites 202 and 206, Wailuku, Maui (Mag. No. 09-00255 LEK). The affidavit supporting this search warrant was also ordered sealed by the court.

request should be denied, as they cannot show that the Court should exercise its equitable jurisdiction over the matter.

II. DISCUSSION

A. The Movants Have Been Provided With Copies Of The Search And Seizure Warrants.

The movants seem to seek evidence that agents had lawful authority to search their premises and seize their property. In pleadings filed in MC No. 09-00099 HG/KSC, John Oliver demanded "a copy of the Kobayashi Court's certified copy of the filed affidavit of probable cause including the enjoined appropriate process[.]" In accordance with Fed. R. Crim. P. 41(f)(1)(C), FBI agents provided Oliver with a copy of the search warrant for the residence at lot 77 at the Waiolani Mauka subdivision, and the seizure warrants for the 2005 and 2006 Toyota Tacoma pickup trucks. Copies of those documents, together with the returns of those warrants, are attached hereto as Exhibits "A," "B" and "C," respectively.

In a pleading filed in MC Nos. 09-00100 HG/KSC and 09-00101 JMS/BMK, Petro Hoy and Lehua Hoy demanded a "certified copy of the FBI's appropriate process authorization" to seize funds from First Hawaiian Bank Account No. XXXX5438 and a 2009 Toyota Prius. Copies of the relevant seizure warrants, and their returns, are attached hereto as Exhibits "D" and "E."³

³ The seizure warrant for the funds was served upon First Hawaiian Bank, and the government understands the bank gave a

In a pleading filed in MC No. 09-00102 DAE/LEK, Piliialoha Teves similarly seeks a "certified copy of the FBI's appropriate process authorization" to seize funds from two Hawaii National Bank accounts. A copy of the pertinent seizure warrant, and its return, is attached as Exhibit "F."⁴

Each search or seizure warrant was issued only after this Court independently determined it was supported by probable cause. The movants thus have been provided with warrants showing that agents acted pursuant to lawful process issued by this Court. The movants are not entitled to anything more at this early stage of the proceedings.⁵

copy to Lehua Hoy. The seizure warrant for the Prius was previously given to Hoy. Following the seizure of the Prius, the FBI determined that Hoy had insufficient equity in the vehicle to support a forfeiture action. The Prius thus was returned to Hoy, which renders her motion for return of the car moot.

⁴ HNB was also directed to provide a copy of the seizure warrant to Teves. In discussions with the FBI, Teves acknowledged receipt of the warrant.

⁵ In addition to the foregoing pleadings, Lehua Hoy, Piliiahola Teves and Mahealani Ventura-Oliver have filed voluminous documents which appear to defend certain actions that may fall within the scope of the criminal investigation. In documents filed in MC No. 09-00114 HG-LEK, Hoy and Teves filed a "certification by the registrar" and various "affidavits of truth" and "affidavits of probable cause." These documents purport to attest to the legitimacy of Hawaiiiloa Foundation, and to allege the theft of private property by the State of Hawaii and United States agents. In a declaration filed in MC No. 09-00120 HG-LEK, Ventura-Oliver attested to facts concerning a foreclosure suit on Maui entitled Betsill v. Oliver, et al., Civ. No. 09-0077 in the Second Circuit Court, State of Hawaii. Ventura-Oliver appears to allege that Betsill and its attorney gave false information to Internal Revenue Service agents in

B. The Affidavits Supporting the Search and Seizure Warrants Should Remain Sealed During The Investigative Stages of the Case.

Movants also seek copies of the sealed affidavits supporting the search and seizure warrants. There is no constitutional, statutory or common law right of access to such affidavits during the pre-indictment stages of an investigation. Times Mirror Co. v. United States, 873 F.2d 1210, 1214 (9th Cir. 1989). Indeed, "the experience of history implies a judgment that warrant proceedings and materials should not be accessible to the public, at least while a pre-indictment investigation is still ongoing[.]" Id. The affidavits in this case reflect the nature and direction of the ongoing investigation, and their premature disclosure would reveal the identities of witnesses, and jeopardize the government's ability to gather evidence and evaluate potential charges.⁶ The Court was well within its discretion in ordering that the affidavits be sealed. Id. (sealing orders may be "granted freely upon a showing that a given criminal investigation requires secrecy"). The affidavits should remain sealed until the investigation has been concluded.

connection with the foreclosure action. Eric Lighter, a co-defendant in the foreclosure suit, also filed a declaration. If these documents seek any relief, it is the same relief sought by the other movants, all of which should be denied for the reasons stated in this memorandum.

⁶ In considering movants' requests, this Court may review the sealed affidavits in camera. See Mr. Lucky Messenger Service, Inc. v. United States, 587 F.2d 15, 17 (7th Cir. 1978).

C. The Court Should Decline To Exercise Equitable Jurisdiction Over Movants' Pre-Indictment Requests For Return Of Property.

In their pleadings, movants ask for evidence of the lawfulness of the seizures or, alternatively, for an immediate return of their property. As the movants have been given copies of the search and seizure warrants issued by this Court, their request for return of property is moot.

Movants' request for return of property also fails even if considered on the merits. Fed. R. Crim. P. 41(g) permits a person from whom property is seized to move for its return.

"Although Rule 41(g) is ordinarily used to seek return of property after an indictment is issued, district courts have the power to entertain motions to return property seized by the government when there are no criminal proceedings pending against the movant." United States v. Kama, 394 F.3d 1236, 1238 (9th Cir. 2005) (citing Ramsden v. United States, 2 F.3d 322, 324 (9th Cir. 1993), cert. denied, 511 U.S. 1058 (1994) (internal quotations omitted)). Such pre-indictment motions are treated as civil equitable proceedings, and thus the court must exercise "caution and restraint" before assuming jurisdiction. *Id.*

Before exercising its equitable jurisdiction, this Court must consider (1) whether the government's action involved a callous disregard for the movants' constitutional rights, (2) the nature of movants' interest in, and need for, the seized

property, (3) whether the movants would be irreparably injured by a denial of their request for return of property, and (4) whether the movants have an adequate remedy at law to redress their grievances. Kama, 394 F.3d at 1238 (citing Ramsden, 2 F.3d at 324-25). This Court should exercise its equitable jurisdiction only if the "balance of equities tilts in favor of reaching the merits" of the Rule 41(g) motion. Id.

Here, movants have not shown, and cannot show, that the balance of equities favors reaching the merits of their request for return of property at this time. The search and seizure warrants were based on lengthy and detailed affidavits submitted to this Court. The warrants were issued only after a neutral and detached judicial officer made a determination that they were supported by probable cause. The agents embraced the judicial process, and thereby respected, rather than disregarded, the movants' constitutional rights.

Movants also have made no showing of their interest in, or need for, the seized property, or that they would be irreparably harmed by a denial of its return. "When a motion for return of property is made before an indictment is filed (but a criminal investigation is pending), the movant bears the burden of proving both that the seizure was illegal and that he or she is entitled to lawful possession of the property." United States v. Martinson, 809 F.2d 1364, 1369 (9th Cir. 1987) (citations

omitted). This burden stays with a movant until "the property in question is no longer needed for evidentiary purposes, either because trial is complete, the defendant has pleaded guilty, or ... the government has abandoned its investigation[.]" Id. In this case, the government seized documents, currency, vehicles and other items in accordance with the warrants issued by this Court. The items are being held either as evidence in the ongoing criminal investigation, or as proceeds of the crimes being investigated. The movants have made no showing whatsoever that they are entitled to the property, that any of the property was wrongfully seized, or how they would be harmed if the property is not immediately returned. The balance of equities thus favors the government, as the evidence and items are necessary to an ongoing investigation, which is presently secret, and movants have not shown that the temporary deprivation of property will irreparably harm them.⁷ See Shea v. Gabriel, 520 F.2d 879, 882 (1st Cir. 1975) (dismissal of pre-indictment motion for return of property affirmed because prejudice to movant outweighed by government's interest in protecting on-going investigation).⁸

⁷ The FBI has lessened the collateral impact of the seizures by offering to provide movants with copies of documents which are necessary to their ongoing business activities.

⁸ Courts have recognized the government's need for adequate time to properly conduct criminal and/or forfeiture investigations, and consequently, have held significant pre-

Finally, the government notes that movants will have an adequate remedy at law as the investigation progresses. If criminal charges are brought, they will be able to seek the suppression of any evidence they believe was illegally seized.⁹ The movants will also have an opportunity to challenge the seizure of money and vehicles when administrative or judicial forfeiture proceedings are initiated.¹⁰ Once such forfeiture proceedings are initiated, movants will not be able to challenge

filing delays to be reasonable. See e.g., United States v. \$8,850, 461 U.S. 555, 567-70 (1983) (18-month delay in filing forfeiture action was justified by government's diligent efforts to pursue criminal proceedings and to address petition for remission/mitigation); United States Treasury Bills Totaling \$160,916.25, etc., 750 F.2d 900, 901-2 (11th Cir. 1985) (in finding 14-month delay in filing forfeiture action reasonable, court held that government's diligent pursuit of pending criminal proceedings constituted strong justification for delay).

⁹ Rule G(8)(a) of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions creates a statutory right to move to suppress illegally-seized evidence in a civil forfeiture case.

¹⁰ In this case, most of the seizure warrants were executed on April 7, 2009. Under the Civil Asset Forfeiture Reform Act (CAFRA), 18 U.S.C. § 983(a)(1)(A)(i), the United States has 60 days after the date of the seizure to initiate nonjudicial administrative civil forfeiture and send written notice to all interested parties. Accordingly, the government's deadline to initiate such administrative forfeiture proceedings in connection with the subject searches and seizures will not expire until June 6, 2009. Moreover, that June 6, 2009 deadline may be extended for an additional 30-day period by a supervisory official in the headquarters office of the seizing agency, see § 983(a)(1)(B), and then upon motion by the government, for additional 60-day periods, if a court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions set out in § 983(a)(1)(D) are present. See § 983(a)(1)(C).

the legality of the seizures by way of a Rule 41(g) motion, as the forfeiture actions will provide an adequate remedy at law.¹¹ United States v. Elias, 921 F.2d 870, 872 (9th Cir. 1990).

In view of the foregoing, this Court should decline to exercise its equitable jurisdiction over movants' claims. The government obtained court approval of the search and seizure warrants, which were duly executed. The items were seized less than 45 days ago, and are needed during the conduct of a complex, on-going investigation. Once criminal charges are initiated, movants will have an opportunity to challenge the lawfulness of the searches. Movants will also have an adequate remedy at law to address any deficiencies in the seizure warrants once forfeiture proceedings are initiated. Under the circumstances, movants have not shown that the balance of equities tilt in their favor.

III. CONCLUSION

The movants have been given copies of search and seizure warrants issued by this Court, which demonstrate that their property was seized under lawful process. Movants have

¹¹ The federal forfeiture statutes set out procedures for contesting forfeitures and for obtaining the immediate release of property. See e.g., 18 U.S.C. §§ 983(a)(2)(A) (procedure for filing claims to contest civil administrative forfeiture), 983(a)(4) (procedure for filing claims to contest civil judicial forfeiture) and 983(j) (provision allowing forfeiture claimant to file petition for immediate release of property) and 21 U.S.C. § 853(n), as incorporated by 18 U.S.C. § 982(b) (procedure to contest criminal judicial forfeiture).

established no basis to justify the unsealing of affidavits which reveal details about the nature and scope of the ongoing criminal investigation. Nor have they shown that the Court should order that their property be returned. All of their motions thus should be denied.

DATED: May 19, 2009, at Honolulu, Hawaii.

EDWARD H. KUBO, JR.
United States Attorney
District of Hawaii

/s/ Lawrence L. Tong
LAWRENCE L. TONG
RACHEL S. MORIYAMA
Assistant U.S. Attorneys

Attorneys for UNITED STATES
OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

Served by First Class Mail: May 19, 2009

Mahealani Ventura-Oliver
PMB BOX 129
1704 Wilipa Loop
Wailuku, Hawaii 96793

John Oliver
PMB Box 129
1704 Wilipa Loop
Wailuku, Hawaii 96793

Lehua Hoy
P.O. Box 882
Kula, Hawaii 96790

Petro Hoy
P.O. Box 882
Kula, Hawaii 96790

Pilialoha Teves
P.O. Box 1363
Wailuku, Hawaii 96793

DATED: May 19, 2009, at Honolulu, Hawaii.

/s/ Iris Naqao