UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America, Plaintiff, vs. Contents of Wells Fargo Bank Account XXX5826 in the name of Automotive Consultants of Hollywood, Inc, d/b/a Universal Trust d/b/a Automotive Excellence of California, et al, Defendants.	:	Case No. 1:13-cv-716

ORDER

Before the Court is the motion filed by Automotive Consultants of Hollywood, Inc. ("ACH"), for an order releasing funds and vehicles seized by the United States. (Doc. 14) Also ripe for decision in ACH's motion to dismiss the amended forfeiture complaint. (Doc. 36) For the following reasons, the Court grants in part and denies in part the pending motions.

FACTUAL BACKGROUND

The seizure of the Wells Fargo Bank account identified in the caption was executed pursuant to a warrant issued on September 13, 2013. The warrant application was supported by the affidavit of Agent Morgan, Special Agent of the U.S. Secret Service. That affidavit remains sealed, and this Court previously denied ACH's motion to unseal that affidavit. Following the seizure, on September 26, 2013, ACH filed a civil replevin petition in this Court (Case No. 1:13-cv-692), seeking the immediate return of its funds. The United States then timely filed its verified complaint for forfeiture in rem of

the funds seized from the Wells Fargo account. (Doc. 1). That complaint alleges that the Secret Service is investigating "Trans National Money Laundering and Auto Exportation businesses," and that the seized funds are "property involved in financial transactions in violation of 18 U.S.C. §1956(a)(1), and §1957 using the proceeds of specified unlawful activity, that is one or more violations of 18 U.S.C. §1341 and §1343 and/or under 18 U.S.C. §981(a)(1)(C) because the property constitutes or is derived from proceeds traceable to violations of 18 U.S.C. §1341 (mail fraud) and §1343 (wire fraud)." (Doc. 1, ¶2) The original complaint is supported by the sealed Declaration of Agent Morgan.

ACH filed its claim to the funds (Doc. 5), followed by its emergency motion to dismiss the complaint, to suppress the seizure warrant and release its property, and to unseal Agent Morgan's affidavit. (Doc. 14) The United States filed its response (Doc. 16) and a motion for leave to file an amended complaint (Doc. 15). On December 17, 2013, the Court held a hearing on ACH's motions. ACH wanted to examine Agent Morgan, and the United States objected on several grounds. The Court proceeded to conduct in camera examination of Agents Morgan and Dye. After that examination, the Court denied ACH's motion to unseal the seizure warrant affidavit because the United States had satisfied its burden of demonstrating a compelling interest in keeping the affidavit sealed, and no appropriate alternative means existed by which to disclose the affidavit without harming an ongoing investigation. (See Doc. 22, TR Dec. 17, 2013 at 40.) However, prior to the hearing, the United States had filed a motion for leave to amend its complaint, supported by an unsealed version of Agent Morgan's declaration. (Doc. 16, Ex. 1) At the hearing, the United States asserted that it relied upon the four

corners of the unsealed Morgan declaration to establish probable cause to seize and restrain the funds. Agent Morgan's unsealed declaration includes all of the information that the United States was willing to disclose without jeopardizing its interests. Given the disclosures in the unsealed declaration, the Court orally denied ACH's request to cross-examine Agent Morgan during the December 17 hearing.

ACH then responded that it intended to attack the validity of the declaration, which it argued was replete with factual errors and unsupported conclusions. ACH asked the Court to permit it to submit a formal offer of proof as to its intended questioning of Agent Morgan, and a post-hearing brief regarding probable cause in view of the unsealed declaration and amended complaint. The Court granted those requests, adjourned the hearing, and set a briefing schedule. The Court also formally granted the United States leave to file its amended complaint, which was filed on December 17 with a slightly expanded unsealed declaration of Agent Morgan. (Doc. 19) The amended complaint seeks forfeiture of the Wells Fargo account seized pursuant to warrant, and the two vehicles that were seized without warrants by the United States from two local car dealerships. Those vehicles were in process of being purchased by agents for ACH.

In its February 4, 2014 Order (Doc. 32), the Court held that ACH had standing to challenge the seizure of the two vehicles, an issue that the Court has raised sua sponte during the December 17 hearing. The Court denied ACH's request for a Franks hearing[1] to challenge the seizure warrant affidavit, finding that ACH had not made a

[1] Franks v. Delaware, 438 U.S. 154, 155-156 (1978).

substantial showing that Agent Morgan knowingly and intentionally made a false statement in that affidavit. But based on the offer of proof and evidence submitted to date, the Court found that ACH was entitled to a pre-trial evidentiary hearing to challenge probable cause to continue to hold the funds and the vehicles. This Court cited United States v. One 1974 Learjet 24D, 191 F.3d 668, 673-674 (6th Cir. 1999), where the Sixth Circuit noted that probable cause to seize an asset, which is often determined ex parte, and probable cause to forfeit the asset, are two different determinations that "involve different queries" and may involve different evidence. This Court noted some conflicts between Agent Morgan's declaration and Mr. Ceresa's declaration. The Court noted Mr. Lieberman's declaration (Lieberman was the ACH broker who negotiated the sale of the seized Porsche). Lieberman brokered the purchase of 12 other vehicles from the same Porsche dealer in the year preceding the sale of the Porsche at issue in this case, and he provided details concerning those purchases and his communications with the sales agent at Kings Porsche with whom he dealt. The Court also cited United States v. Contents of Accounts, et al, 2010 U.S. Dist. LEXIS 60525, **32-33 (W.D. Ky, June 17, 2010), where the government obtained sealed seizure warrants for defendants' business and personal property, and subsequently filed a civil forfeiture complaint. This was before any criminal charges were filed against the defendants. The district court held that while defendants had no right to a pre-deprivation hearing, "... the Court finds that, in some cases, a claimant in a civil forfeiture case may nevertheless be due a post-deprivation, pretrial hearing to contest the taking of his or her property."

After considering ACH's arguments and the record, this Court concluded that

ACH had raised

> ... a significant question whether the Government has shown probable cause to continue to hold these assets at this juncture of the case. ACH's written, verified claim filed in this case (Doc. 5) suggests that luxury automobile manufacturers have a long-standing civil dispute with dealers such as ACH, because the manufacturers want to protect their ability to sell vehicles in foreign markets at substantially higher prices than the prices charged by franchised dealers in the United States. ACH contends that the manufacturers (most of whom are foreign companies such as Porsche AG, Mercedes, or Range Rover) attempt to maintain these artificial foreign market prices by adopting anti-export policies, which ACH contends are (or should be declared to be) unlawful for various reasons. But in any event, ACH contends that there is nothing illegal about exporting vehicles that are bought in this country, and the Government is not contending that ACH is engaged in an illegal export scheme. On the other hand, the Government contends that the seized assets constitute or are derived from proceeds traceable to wire and/or mail fraud, because ACH is engaged in an intentional scheme to defraud the franchised automobile dealers by "duping" them into selling cars to exporters, subjecting the dealers to penalties from the manufacturers.

(Doc. 32 at 9)

Based upon ACH's offer of proof and the entire record to date, this Court reopened the December 17 hearing and held that ACH would be permitted to cross-examine Agent Morgan regarding the issues identified in ACH's offer of proof. The Court invited both parties to present any additional evidence and testimony relevant to the issue of probable cause.

That evidentiary hearing was held on March 10 and 11, 2014. Agent Morgan was the only witness, and both parties submitted exhibits admitted for purposes of the hearing. After considering all of the evidence and the testimony of Agent Morgan, the Court concludes that the United States has not carried its burden of establishing

probable cause to continue to hold the seized assets.

DISCUSSION

1. Seizure of the Funds and Vehicles

The United States has the burden of establishing that it has probable cause to seize and to forfeit property. As noted above and as stated on the record during the March 10 hearing, the analysis of probable cause must be a flexible one, depending upon the circumstances presented at the time the analysis is undertaken. The Sixth Circuit has held that for purposes of a forfeiture complaint against a defendant arrested and later convicted for selling heroin, probable cause which the government must show to forfeit funds seized from defendant's person and home at the time of his arrest is "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." United States v. $22,287, 709 F.2d 442, 446-47 (6th Cir. 1983)(internal citation omitted). The Supreme Court held that the government may restrain the assets of an individual under indictment pursuant to 21 U.S.C. §853 (the criminal forfeiture statute), even if that individual needs the funds to pay his criminal lawyer. The assets may be restrained based on a finding of probable cause to believe the assets would be subject to forfeiture upon conviction. United States v. Monsanto, 491 U.S. 600, 615 (1989). However, the Supreme Court expressly stated that it was not addressing whether the Due Process Clause requires a hearing before the issuance of a pretrial restraining order, or what sort of hearing might be required. Id. at 615, n.10. It is clear that probable cause for pre-trial asset seizures must be based on particularized facts, and not mere suspicion of illegal activity.

The United States contends that it has established probable cause to believe that

the funds and the two vehicles are proceeds of ACH's mail and/or wire fraud offenses, pursuant to 18 U.S.C. §§1341 and 1343. To obtain a conviction under those statutes, the United States would have to prove beyond a reasonable doubt that: (1) ACH knowingly participated in a scheme or artifice to defraud; (2) ACH used an interstate mail or wire communication to further its scheme; and (3) ACH had the specific intent to deprive the victim of money or property. United States v. Daniel, 329 F.3d 480, 486 (6th Cir. 2003), quoting United States v. Prince, 214 F.3d 740, 747-48 (6th Cir. 2000). A "scheme" to defraud is a plan or a course of action by which the perpetrator intends to deprive his victim of money or property by making false or fraudulent representations, or by a knowing material omission. In response to ACH's written offer of proof, the United States argues that Agent Morgan had "every reason to believe" that the challenged statements and conclusions contained in his declaration were in fact true. Based on his declaration, as amplified and augmented by his testimony at the March 10-11 evidentiary hearing, the United States urges the Court to deny ACH's motion because there is ample evidence satisfying its probable cause burden at this juncture.

From the outset of these proceedings, ACH has argued that its conduct in brokering the sale of luxury automobiles by undisclosed agents (or what the United States calls "straw buyers") is not illegal. The United States does not allege that ACH is engaged in an "illegal export scheme" in violation of any export or customs statutes, and is not alleging that ACH is "smuggling" automobiles out of this country. Rather, Agent Morgan's unsealed declaration (Doc. 19, Ex. 1) states that the luxury vehicle manufacturers do not want their dealerships to sell new vehicles to a purchaser who intends to export the car. The manufacturers impose these prohibitions because

"unauthorized exports cause financial problems ... by creating problems in the manufacturers' distribution markets, causing market infringement problems, harming franchise dealerships, and causing problems relating to vehicle recall and service." (Id. at 8) To attempt to enforce this policy, manufacturers impose contractual obligations on their dealers (via the franchise agreements) that prohibit sales to exporters. Pursuant to these contracts, the manufacturers "may" assess certain penalties against their dealers if they knowingly sell vehicles to exporters. (Id. at 9) Agent Morgan further asserts that the United States believes that ACH conspired to defraud both the dealerships and the manufacturers by receiving funds from international wire transfers to finance the purchases and hiring "straw buyers" to purchase the cars, thereby attempting to conceal ACH's intent to export the vehicles.

At the March 10-11 hearing, Agent Morgan testified that in 2013, the Secret Service began investigating vehicle brokers (including ACH) for alleged schemes to export luxury vehicles. Agents developed a plan to contact local dealers and ask to meet with them to discuss this issue. It is evident from this testimony that this investigation did not spring from any complaints by local dealerships, or reports from them about losses based on any illegal exporting. In preparation for these planned meetings, Agent Morgan developed a straw buyer checklist, which he described as "red flags" dealers could use to try to identify "illegal" purchasers. This checklist, Government Hearing Ex. 6, lists these factors, including a buyer who uses a cashier's check and is willing to pay full purchase price without bargaining; or a buyer who has the vehicle trucked off the dealer's lot rather than driving the vehicle away. The checklist includes a highlighted statement telling the dealer that "it is important to have

each buyer sign the clause identifying they are purchasing the vehicle for personal use and do not have the intention of transferring ownership immediately or shipping the car overseas for resale. Please call [telephone numbers provided] at the onset of the sales process to allow law enforcement time to respond." The Secret Service "badge" logo is imprinted at the top of this form. Agent Morgan said that local dealers were somewhat aware of these "red flags" before the agents visited.

He specifically testified about visiting the two local dealers involved in the sales of the two seized vehicles at issue in this case. On August 20, 2013, Morgan met with Bill Winslet, the sales manager at Kings Porsche. Morgan showed him the checklist and described the Service's investigation. Winslet told Morgan that a pending purchase order for a sale to a Mr. Kolody might be of concern; Morgan then talked to the sales agent (Jeff Paul) handling that sale. Paul revealed that the Kolody order had actually been arranged by Phil Lieberman, someone to whom Paul had sold several vehicles in the past. Lieberman lived in Florida, and bought cars that were titled in the names of his friends and/or family. Each time, the cars were bought with a third-party cashier's check, and were shipped from Cincinnati by truck. According to Lieberman's affidavit, he brokered the purchase of 12 cars from Kings Porsche between July 2012 and September 2013. Paul tried to sell other vehicles to Lieberman, vehicles that Kings Porsche had trouble selling locally. In at least one instance described in Lieberman's affidavit, Paul and Winslet agreed to sell him two 2014 Porsche Cayenne cars but instructed Lieberman that they needed two different names for the titles and would need separate cashier's checks for each car. (See Doc. 28, Ex. 3, Lieberman Aff. at ¶12) According to Morgan, Paul told Morgan that Lieberman was a good contact for him to

sell cars to, but Paul claimed he did not suspect Lieberman to be a broker or an exporter. Morgan admitted on cross-examination that Paul did not disclose the full extent of his relationship with Lieberman at the time of Morgan's August 20, 2013 visit. He further testified that during the investigation, he learned that at some point, Lieberman had been placed on Porsche AG's list of "known exporters" that Porsche AG provides its dealers. Paul admitted that he did not check that list before selling the cars to buyers arranged by Lieberman, but only checked the buyers' names. On August 20, Kings Porsche received the cashier's check for the Kolody purchase; there is no dispute that the check was drawn on the seized Wells Fargo account. On August 21, with Kings Porsche's permission, the United States seized the Porsche that Lieberman had purchased.

Morgan testified about the circumstances leading to the seizure of the second vehicle, a Range Rover, described in his declaration. On August 26, 2013, Agent Morgan (along with Special Agent Dye) visited Jaguar Land Rover Cincinnati, and met with its general manager, Rich Allen. Allen told the agents that his dealership routinely receives and denies one to three suspected exporter inquiries per week. The demand for the cars is so high that Allen believes he could sell his entire inventory in a matter of days if he did not screen for exporters. Allen maintained and frequently updated an exporter list. On the day of this visit, Allen told the agents that a suspected straw buyer was on a test drive in a 2014 Range Rover. The buyer was Jame Cain, of Covington, Kentucky, and the agents decided to wait at the dealership in order to observe the transaction. Cain completed the paperwork and drove the Range Rover to his home, with a friend (Pennington) driving Cain's car back to Cain's house. The agents followed,

and both Cain and Pennington agreed to talk to them. Cain told Morgan that he was recruited by an acquaintance, Andija Deskaj, who paid him $500 to $1,000 for every vehicle Cain purchased. According to Cain, Deskaj told him how to go about purchasing these cars and convincing salespeople that Cain was buying the car for his personal use. Deskaj provided Cain with the money to purchase the Range Rover, a bank check drawn on the seized Wells Fargo account. Cain agreed to surrender the Range Rover to the Secret Service that day. Unaware that the vehicle had been seized, Deskaj contacted Cain a few days later, telling him to take the vehicle to a storage facility where it would be picked up. Agents went to the location on the day the car was supposed to be picked up and interviewed a truck driver who arrived at that location. The driver had a dispatch order to take the car to California, and he told the agents that he assumed the car was destined for export. In December 2013, Agents Morgan and Dye interviewed Eric West, the salesman for the Cain transaction. West told the agents at that time that Cain provided false information about his job, marital status, and his finances, which persuaded West to continue with the sale.

Agent Morgan's unsealed declaration also includes information about certain wire transfers to the Wells Fargo account from August 2 to September 13, 2013, totaling $1,354,785.00. (Doc. 19, Ex. 1 at ¶58) No facts tie these specific transfers to any vehicle purchases. At the evidentiary hearing, Agent Morgan presented additional information obtained from records subsequently received from Wells Fargo. Government Hearing Ex. 5 is a chart listing Vehicle Identification Numbers ("VINs") that were included on some of the wire transfer documents. The chart also includes information that Secret Service agents have obtained from export records. According to

Ex. 5, there were 14 VINs listed on wire transfer documents; 9 of those vehicles have apparently been exported (to China, Korea, and Hong Kong). The chart does not show that ACH exported these vehicles, and there is no evidence about the facts surrounding the purchase of any of those vehicles. Regarding ACH's alleged exporting activity, Agent Morgan's declaration states that on September 25, 2013, he learned that ACH exported approximately 25 vehicles since 2008. (Doc. 19, Ex. 1 at ¶64.) He testified at the hearing that further research revealed that ACH is listed as the exporter on 34 separate Shipper Export Declarations ("SEDs") covering 36 vehicles. Of the 36 vehicles, Agent Morgan described 19 of them as high-end, luxury vehicles. Other entities that Agent Morgan alleges are connected with ACH in some way (USA Recruitment, Quantum Leasing, Luxury Collection) were listed as the exporter on 33 SEDs covering 43 vehicles; 15 of those were high-end luxury vehicles. It is unclear what period of time these SEDs span, but Agent Morgan believes that some of them were for exports during 2013.

Government Hearing Ex. 1 is another chart created by the agents based upon records from Wells Fargo. This chart purports to depict the flow of funds from foreign and domestic wire transfers into three accounts at Wells Fargo held in ACH's name. Agent Morgan testified that the situation depicted on the chart raises a suspicion that ACH is "layering transactions" in an attempt to disguise the source of funds it receives to purchase vehicles. Agent Morgan could not think of any other reason for the transfers depicted on the chart.

In its offer of proof (Doc. 28, Ex. A), ACH identifies a number of what it contends are unsupported conclusions, misstatements in or omissions from Agent Morgan's

unsealed declaration. ACH denies that it is in the business of exporting vehicles. Mr. Ceresi's declaration states that it "has been brought to [ACH's] attention that on a handful of occasions [it] was listed as such on an SED/AES. These vehicles that Automotive Consultants was listed as the exporter were not high-end luxury vehicles. Instead, they were older vehicles with high mileage. To the extent [ACH] has been listed as the U.S. principal party in interest on an SED for a high-end luxury vehicle, this was done by mistake, without [ACH's] knowledge, and/or was an isolated incident." (Doc. 28, Ceresi Dec. at ¶27) ACH and Agent Morgan apparently agree that about half of the vehicles that the government asserts ACH exported were not "high-end luxury" cars, which would support Ceresi's assertion. And with respect to the SEDs listing ACH as an exporter for such vehicles, none of them are before the Court and there are no facts about the specific purchases involved.

Regarding the issue of chargebacks imposed upon dealers, Agent Morgan described these as monetary penalties imposed by the manufacturer on a dealer who sells to an exporter. ACH notes that Agent Morgan did not mention Ohio Rev. Code 4517.55, which sets forth specific circumstances that constitute "good cause" for a manufacturer to terminate a dealer's franchise. Subsection (B)(8) states "good cause" does not include "the export of new motor vehicles to a foreign country, absent evidence that the new motor vehicle dealer knew or should have known that the vehicle was purchased for export. There shall be a rebuttable presumption that a new motor vehicle dealer did not know, or should not have known, that a vehicle was purchased for export if the vehicle is titled in the United States." The Court notes that a companion statute, O.R.C. 4517.59, sets forth actions that a motor vehicle manufacturer-franchisor shall not

take against a dealer, notwithstanding the terms of a written franchise agreement. Subsection (20) of this statute prohibits a manufacturer from reducing "... the amount to be paid to the new motor vehicle dealer or charge a new motor vehicle dealer back subsequent to the payment of the claim unless either of the following applies: ... (b) the new motor vehicle dealer knew or should have known a new motor vehicle was sold for export to a foreign country. There shall exist a rebuttable presumption that a new motor vehicle dealer did not know, or should not have known, that a vehicle was sold for export to a foreign country if the motor vehicle is titled in the United States." These statutes provide an obvious degree of protection to dealers, as they are entitled to a rebuttable presumption if the purchaser takes title. The Court notes that in both of the sales before the Court, the purchaser signed an application for a certificate of title for the vehicle. Agent Morgan also testified, based on information obtained from Porsche corporate, that the Kings dealership has been charged $600 in chargebacks due to exported vehicles. Even if that is true, given the volume of cash sales the dealer engaged in just with Lieberman (and there is no evidence about the volume of sales to other out-of-state purchasers or brokers), a $600 debit could well be seen as simply the cost of doing business with brokers like Lieberman.

Agent Morgan also suggested that dealers could face possible losses of allocations of desirable vehicles if the dealers sell to exporters. But there is no evidence that any such allocation loss has been sustained by any dealer; and it is unclear if a dealer would be entitled to claim the same statutory presumption to protect against this sort of sanction if the dealer did not know the car was going to be exported. There was also a suggestion that dealers do not want to lose income from the post-sale servicing

of the new cars they sell; that concern did not interfere with Kings Porsche's willing sale of at least 12 cars to Lieberman, all destined for out-of-state purchasers.

With regard to ACH's alleged intent to defraud the luxury vehicle **manufacturers**, ACH notes Agent's Morgan's declaration cites non-specific problems in "distribution markets" and "market infringement," and problems concerning vehicle recalls and servicing. At the hearing, Agent Morgan testified that the North American corporate subsidiaries of these foreign manufacturers are being sanctioned by their foreign parents by way of chargebacks. He further testified that at least one manufacturer (BMW) is attempting to conduct an economic analysis of losses due to exporting. (This testimony was based on an email Agent Morgan had received just before his redirect examination on March 11.) Regarding recalls and servicing, Agent Morgan suggested that the manufacturers may have problems getting recall notices to the owners of the exported cars, and that servicing the vehicles may cost more because North American parts would have to be shipped to the foreign country. But there is no evidence of any of these problems with respect to any vehicle purchased by ACH or one of its buyer/brokers. Any additional servicing costs that might result from a foreign purchaser choosing to buy a vehicle through a broker, rather than through an authorized dealer (say in China or Korea) would appear to the Court to be an issue for the vehicle owner and the parts seller to sort out. These nebulous issues aside, it appears to the Court that the primary concern of the manufacturers is guarding their foreign market profits from competition from domestic automobile brokers.

There are also issues raised regarding a vehicle's MSO, and certain non-export agreements that some dealers obtain from their buyers. Agent Morgan's declaration

states that the U.S. Customs and Border Protection ("CBP") permits a vehicle to be exported only if it has a valid certificate of title or a Manufacturers Statement of Origin ("MSO"). An MSO is assigned by a manufacturer to every vehicle, and is provided to the licensed dealer. (Apparently in most routine car sales, when a dealer sells a car, the purchaser applies for a title, and the MSO is destroyed.) Agent Morgan categorically states that an MSO "is not provided to the purchaser" of the vehicle. (Doc. 19, Ex. 1 at 14) But Mr. Ceresa states in his declaration that on at least two occasions, luxury dealers gave an MSO to ACH's undisclosed agents who purchased cars. Those MSOs are attached as Exhibit 1 to his declaration; one is from an Indiana Range Rover dealer, and the second is from a Colorado Mercedes-Benz dealer. (Doc. 28, Ceresa Dec.) ACH also cites certain regulations (19 C.F.R. 192.2(b)(3)(ii)) describing other documents that are sufficient to prove ownership of a vehicle for export purposes in the absence of an MSO or a title certificate. At the hearing, Agent Morgan clarified that his initial statement came from the manufacturers, as a matter of common practice. He conceded that on occasion, a dealer had given an MSO to an ACH purchaser.

Regarding non-export agreements: Government Hearing Exs. 7 and 8 are sales documents from the Kolody Porsche sale. Exhibit 7 is a buyer's order sheet; handwritten in the "options" section of the sheet is the following: "By signing this agreement, you intend to operate the above Porsche in the United States of America for a period of at least six months from the above Buyer's order date. You further agree not to transfer, export or sell the above Porsche to any used car dealer, broker or exporter for a period of six months from the above buyer's order date." Agent Morgan testified that Kings Porsche told him that it hand-writes this text on each sales order for every car

it sells. Exhibit 8 is a preprinted document entitled "Purchaser's Certification of Non-Export Sale," with the Porsche logo at the top, and Kings Porsche's address listed. The text states that by signing the document, Kolody represents that it is not his intent to export the vehicle. The document also contains a hold harmless clause by which Kolody agrees to indemnify Kings Porsche and "its parent and affiliated companies" from any damages, losses or costs incurred as a result of any removal or exportation of the car. There is no evidence that the Range Rover dealer asked Cain to sign such a document or that he ever did so. The United States contends that this is additional evidence of ACH's intent to defraud dealers and/or manufacturers.

ACH responds that these are private agreements and any breach is a civil matter, not evidence of any crime. Neither the buyer's order nor the certification form state anywhere that a breach could lead to criminal liability, nor does either form identify any damages that might flow from any breach. Agent Morgan's declaration asserts that dealers "do not sell" new vehicles to exporters. Yet the circumstances surrounding the Porsche sale to Kolodny/Lieberman strongly suggest that Kings Porsche, at best, was ignoring the consistent features of its sales to Lieberman that Agent Morgan believes are "red flags" for exporters: cars paid for in cash via third party checks, never test driven, sold to out-of-state buyers, and trucked (not driven) from Kings Porsche's lot. Did this dealer (and perhaps others) willingly sell cars to out-of-state cash buyers because the sale documents allow the dealer under Ohio law to claim no knowledge about exporting? In the Court's view, this is as reasonable an inference to draw as the inference the United States draws, that the dealer was "duped" or defrauded by ACH or Lieberman by using straw buyers. The Court recognizes that the facts in the record to

date concerning the Range Rover sale to Cain are different from the situation at Kings Porsche; nevertheless, that is one sale by one dealer. The facts surrounding that one sale do not support probable cause to believe that all of the seized funds were part of a criminal fraudulent scheme.

Finally, Agent Morgan testified about wire transfers into the seized Wells Fargo account, and his suspicion that ACH is engaging in "layering" transactions to conceal the source of the funds. Government's Hearing Ex. 1 depicts deposit and transfer activity for ACH's Wells Fargo accounts from January to August 2013. Based on an analysis of certain bank records, Agent Morgan testified that agents selected the six largest sources of domestic wire transfers into ACH's accounts for that time period. Those six entities are Modern Motors, Geveen, Store Systems/Pacific Motor Cars, Edward Chukwu DBA Auto, Goldsall Global Group, and Swift International. Agent Morgan testified that these entities are exporters. These entities then wired approximately $14 million to ACH's Wells Fargo account. The chart also notes that there were other domestic wire transfers from other sources in the amount of $11,429,023. Government Ex. 2 is a flow chart showing foreign wire transfers from August 13 to September 10 into two of the six other entities' accounts, those for Store Systems and Pacific Motor Cars. These two entities each maintained a business savings account and a business checking account; wire deposits were made to the savings account, then transferred to the checking account, from which Agent Morgan believes that transfers were made to various brokers, including ACH.

ACH counters with evidence that its customer who bought the Porsche wired funds to ACH from Bank of America (see Ceresi Declaration Ex. 4, highlighting an

August 7, 2013 wire transfer from Bank of America/ Dynasty Auto Design, Inc.). This buyer represented itself as a domestic company. The customer who bought the Range Rover wired its funds from JP Morgan Chase Bank to ACH (see Ceresi Declaration Ex. 6, an August 20 wire transfer to Wells Fargo checking account #5378 from JP Morgan Chase/USA Corporation), and represented itself as a domestic company. There is no evidence about any "high-end luxury" vehicle purchases that may have been made using the funds from any of the other wire transfers described on Exhibits 1 or 2. As ACH contends, there is nothing inherently illegal about using wire transfers to move money, nor about wires from foreign sources. Exhibit 1 also shows that ACH receives a substantial amount in domestic wire transfers, and there is no evidence suggesting these funds are part of the alleged criminal scheme. ACH contends that all of this evidence is insufficient to support the existence of some logical nexus between the $1.1 million in seized funds and mail or wire fraud.

The Court has carefully considered the arguments of both parties, the evidence proffered, and Agent Morgan's testimony (including the in camera examination conducted in December 2013). Considering all of this, the Court must conclude that the United States has not established probable cause to believe that the funds seized are the "proceeds" of wire or mail fraud. This conclusion is only strengthened by the fact that this is a civil case, and there are no criminal charges that have been brought against ACH or any of its principals or brokers. The Court believes that the record, at best, supports only a suspicion that ACH has engaged in **criminal** conduct, rather than what its counsel characterized as an arbitrage opportunity, taking advantage of vehicle price differentials in foreign countries, an opportunity that the foreign luxury car

manufacturers are clearly attempting to eliminate. Whether the United States will be able to meet its burden of proving by a preponderance of the evidence at trial that ACH is engaged in criminal mail/wire fraud and laundering proceeds resulting therefrom are issues for another day.

The Court is well aware that a judicial determination of probable cause (in this case by the Magistrate Judge) is entitled to deference. As the Supreme Court recently noted, probable cause "is not a high bar: It requires only the kind of fair probability on which reasonable and prudent [people], not legal technicians, act." Kaley v. United States, 134 S.Ct. 1090, 1103 (2014)(internal quotation omitted). In that case, the Supreme Court held that a defendant under indictment is not entitled to a pre-trial hearing to challenge the seizure of assets necessary to pay defendant's retained criminal lawyer. The Court noted that the question in such a case is whether there is probable cause to believe the defendant committed the crime alleged. That question had been answered by the grand jury, which gets "the final word" prior to trial. Id. at 1105. Here, of course, there is no grand jury indictment nor any criminal complaint, and the initial probable cause determination was based on a sealed affidavit. Since that time, the facts before the Court have been expanded, which has significantly altered the probable cause landscape. This Court notes the observation made by the dissent in Kaley: "It takes little imagination to see that seizures based entirely on ex parte proceedings create a heightened risk of error." Id. at 1113 (Roberts, C.J., dissenting). ACH has persuasively argued that situation occurred here. The Court must conclude that reasonable people could conclude, as does this Court, that probable cause to believe that ACH has engaged in criminal mail or wire fraud is lacking.

Given the Court's conclusion that the funds seized from the Wells Fargo account must be released, the Court finds that ACH's petition for release pursuant to 18 U.S.C. §983(f) is moot.

With regard to the two vehicles: the Court previously found that ACH had standing to challenge those warrantless seizures. The docket in this case includes the United States' certificate of service of direct notices sent to potential claimants of these vehicles, including the two local dealers, Mr. Cain, Mr. Kolody, Mr. Lieberman, and Mr. Deskaj. (Doc. 34, Exs. 1-3) The time for filing claims has expired and no other claimants have appeared. ACH has established its financial interest in the vehicles, because the funds used to purchase them came from its account, and Mr. Ceresi has identified the domestic wire transfers from his customers that pertain to each one. A certificate of title for the Range Rover was issued to Jame Cain, who admitted he was acting as ACH's agent. No certificate of title has apparently been issued for the Porsche; but under Ohio law concerning civil forfeiture, the lack of title does not foreclose a claimant from establish ownership of the vehicle. See, e.g., State of Ohio v. Shimits, 10 Ohio St.3d 83 (Ohio 1984), cited in the Court's February 4, 2014 Order concerning ACH's standing. In that case, the Ohio Supreme Court held that the Ohio legislature did not intend for the state's vehicle title statute "... to be construed to effectively deprive equitable owners of their interest in a vehicle where that vehicle may be forfeited to the state." Id. at 85. The Court has concluded that the United States has not established probable cause at this juncture of the case, and therefore orders that the two vehicles be released to ACH.

2. Motion to Dismiss Amended Forfeiture Complaint

The Court's conclusion that probable cause to seize and hold the property before trial is lacking does not control the disposition of ACH's motion to dismiss the amended forfeiture complaint. The two determinations involve "different queries, [and] also may involve different evidence." United States v. One 1974 Learjet 24D, 191 F.3d 668, 673 (6th Cir. 1999).

ACH's motion (Doc. 36) argues that the amended complaint fails to meet the standards required by the Supplemental Rules for Asset Forfeiture Actions. Rule G(f) of the Supplemental Rules states that a forfeiture complaint must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." That trial burden will be to establish by a preponderance of the evidence that the seized property is subject to forfeiture under the statutes cited in the amended complaint. If Rule G does not expressly address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply to forfeiture complaints. ACH argues that the amended complaint fails to satisfy the standards governing motions under Fed. R. Civ. Proc. 12(b)(6), as articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), as well as the requirements of Rule 9(b) with respect to pleading fraud.

ACH argues that the amended complaint does not allege facts that plausibly suggest it committed mail or wire fraud, because it does not allege that ACH made a material misrepresentation to further any "scheme or artifice" to defraud any dealer or any manufacturer. Nor does the complaint sufficiently allege that anyone suffered an actual loss. As ACH argued with respect to the seizures, it paid full price for both of the vehicles, and the amended complaint fails to plausibly allege that any manufacturer has

suffered a loss, much less that ACH **intended** to cause any such loss.

ACH further contends that the complaint, at best, alleges "constructive fraud" as opposed to "actual fraud." ACH cites Epstein v. United States, 174 F.2d 754 (6th Cir. 1949), and United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007), where the Second Circuit observed: "Our cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid - which do not violate the mail or wire fraud statutes - and schemes that depend for their completion on a misrepresentation of an essential element of the bargain - which do violate the mail and wire fraud statutes." And ACH argues that the allegations regarding the "victims" of ACH's alleged scheme lack "convergence," that the party deceived by a material misrepresentation is the same party injured as a result of the scheme. While the United States' original theory was apparently that the dealers were the victims, the amended complaint and Agent Morgan's declaration allege that both the dealers and the manufacturers are the intended victims. But there is no allegation of any misrepresentation allegedly made by ACH to any manufacturer. Moreover, without adequately pleading mail/wire fraud violations, the money laundering allegations fail as well.

The United States responds that the amended complaint is more than sufficient to satisfy the requirements of Supplemental Rule G(2). That Rule requires the complaint to describe the property, the basis for jurisdiction, the statute on which the claim of forfeiture is based, and "state sufficiently detailed facts to support a reasonable belief that the Government will be able to meet its burden of proof at trial." Because Rule G expressly states that the sufficiency of the complaint is governed by that Rule,

ACH's reliance on Rule 9(b) is misplaced. The United States also cites cases noting that the "plausibility" requirement discussed in Twombly and Iqbal does not necessarily conflict with Rule G's standards, and in any event that Rule G takes precedence. See, e.g., United States v. Real Prop. and Premises Located at 216 Kenmore Ave., 657 F.Supp.2d 1060, 1065-66 (D. Minn. 2009)("... because the Supplemental Rules provide the standards against which a forfeiture complaint must be measured, it is questionable whether *Twombly* has any application here.") ACH's motion essentially contends that the United States cannot prove its mail/wire fraud allegations, which is beyond the scope of a motion to dismiss. Rule G(8(b)(ii) and 18 U.S.C. §983(a)(3)(D) both plainly state that a civil forfeiture complaint may not be dismissed on the ground that the United States lacked adequate evidence when the complaint was filed to establish forfeitability of the property.

The significant due process concerns underlying the issue of probable cause for pre-trial seizure of assets are not present when considering the adequacy of the amended complaint. The Court concludes that the amended complaint is sufficient under the standards set forth in Rule G(2) to withstand dismissal. Most of the cases ACH relies on were appeals from convictions and judgments. For example, in United States v. Shellef, the court of appeals vacated a defendant's convictions on multiple counts of wire fraud based primarily on its conclusion that certain tax offenses had been improperly joined in the indictment. In discussing other issues that would likely arise on a retrial, the court found that one of two theories of fraud alleged in the indictment was insufficient to support the wire fraud convictions, and that discussion is what ACH cites. Here, while the United States presented some additional evidence at the March 10-11

probable cause hearing, formal discovery in this case has not yet begun.

With regard to the "convergence" issue, both parties cites cases reflecting a federal circuit split on whether this is a required element of the offense of mail/wire fraud. The most recent Sixth Circuit decision both parties cite is United States v. Frost, 125 F.3d 346 (6th Cir. 1997). In that case, involving many defendants and mail fraud charges stemming from alleged fraudulent schemes aimed both at government agencies and a private university, the Sixth Circuit noted a circuit split on the issue whether a defendant may be convicted of mail fraud for deceiving only persons other than the intended victims of the scheme. Id. at 360-361. But the court did not need to decide that question in order to resolve the issue on appeal. The United States also cites United States v. Seidling, 737 F.3d 1155, 1161 (7th Cir. 2013), noting the circuit split but concluding that "this Court does not interpret the mail fraud statute as requiring convergence between the misrepresentations and the defrauded victims."

This Court need not resolve the question at this early juncture of the case, as the amended complaint plainly alleges that both dealers and manufacturers were the intended victims of ACH's alleged scheme. ACH's arguments may prevail at trial, but the Court concludes that they are not a basis for dismissing the amended complaint.

CONCLUSION

For all of the foregoing reasons, the Court grants in part and denies in part ACH's emergency motion to dismiss, to suppress, and for release of property. (Doc. 14) The Court GRANTS ACH's motion to the extent that the Court orders the immediate release to ACH of the Wells Fargo account and the two seized vehicles. The motion to dismiss the original complaint, and the petition for release under 18 U.S.C. §983(f) are both

moot. ACH's motion to dismiss the amended complaint (Doc. 36) is DENIED.

SO ORDERED.

DATED: April 1, 2014

s/Sandra S. Beckwith
Sandra S. Beckwith, Senior Judge
United States District Court