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 9 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

10
 11 UNITED STATES OF AMERICA,
 12 Plaintiff,
 13 v.
 14 \$1,106,775.00 IN UNITED STATES
 CURRENCY,
 15 Defendant.

3:20-CV-158-MMD-WGC

**United States of America’s Reply to
 Claimants’ Opposition to Plaintiff’s
 Motion to Stay Substantive Discovery**

16
 17 **Reply and Memorandum of Points and Authorities**

18 **I. Introduction**

19 Plaintiff United States of America submits this Reply to Claimants Oak Porcelli’s and
 20 Gina Pennock’s Opposition to Plaintiff’s Motion to Stay Substantive Discovery. Plaintiff
 21 makes this reply pursuant to Local Rules LR 7-2(b) and LR 7-3(b).

22 In Plaintiff’s Motion to Stay Substantive Discovery, it argues that substantive
 23 discovery, including Claimants’ Federal Rule of Civil Procedure (Fed. R. Civ. P.) 33 and 34
 24 requests, should be stayed because of the pendency of litigation on standing. Claimants
 25 oppose Plaintiff’s Motion, primarily arguing that neither of the Motions cited by Plaintiff—
 26 its Supp. R. G(8)(c)(i)(A) Motion to Conditionally Strike nor its Motion to Stay
 27 Suppression—demonstrates good cause to stay discovery. For the reasons below, Claimants’
 28 arguments are unconvincing and this Court should order a stay of substantive discovery.

1 II. Argument

2 A. Legal Background

3 In the District of Nevada, courts typically consider three factors when evaluating the
4 “good cause” standard applicable to a motion to stay discovery under Fed. R. Civ. P.
5 26(c)(1). *See Kor Media Grp., LLC v. Green*, 294 F.R.D. 579, 581 (D. Nev. 2013). As part of
6 the analysis, a court will ask whether there is a pending dispositive motion and whether,
7 based on its preliminary evaluation, the court believes that the pending motion is
8 convincingly meritorious. *See Money v. Banner Health*, No. 3:11-cv-800-LRH-WGC, 2012 WL
9 1190858 (D. Nev. Apr. 9, 2012), at *5. In addition, federal courts, including in the District
10 of Nevada, at times evaluate Fed. R. Civ. P. 26(c)(1) motions under a broader “good cause”
11 standard, typically in specialized areas of civil litigation. *See, e.g., United States v.*
12 *Approximately 1,784,000 Contraband Cigarettes*, Case No. C12-5992 BHS, 2016 WL 6084938
13 (W.D. Wash. Oct. 18, 2016); *Grammer v. Colorado Hosp. Ass’n Shared Servs., Inc.*, No. 2:14-cv-
14 1701-RFB-VCF, 2015 WL 268780 (D. Nev. Jan. 21, 2015); *Incase Designs, Corp. v. Mophie,*
15 *Inc.*, Case No. 13-CV-00602 RS, 2013 WL 12174145 (N.D. Cal. Nov. 5, 2013).

16 In this case, Plaintiff has identified the pendency of two motions—its Motion to Stay
17 Suppression and Motion to Conditionally Strike—as foundations for its Motion to Stay
18 Discovery. Mot. Stay Disc., ECF No. 30, 10:21 to 12:8. Those Motions, coupled with
19 additional considerations—such as the unique, screening function of Supp. R. G(6) special
20 interrogatories and the procedural posture and facts of this case—demonstrate good cause to
21 stay substantive discovery. *See* ECF No. 30, 13:24 to 18:5.

22 B. Plaintiff’s Motion to Conditionally Strike

23 Plaintiff filed its Motion to Conditionally Strike in conjunction with its Motion to
24 Compel Responses to Special Interrogatories. Mot. Compel, ECF No. 28; Mot. Cond. Strike,
25 ECF No. 29, 1:20-24. In Plaintiff’s Motion to Stay Substantive Discovery, it explains that
26 good cause exists to stay substantive discovery because the Motion to Conditionally Strike
27 is a dispositive motion that is convincingly meritorious. ECF No. 30, 10:17 to 13:9. In
28 response, Claimants argue that the Motion to Conditionally Strike is meritless and

1 pretextual. *See* Opp. Mot. Stay Disc., ECF No. 36, 3:11 to 4:17. Those arguments are
2 unavailing.

3 *i. Plaintiff's Motion to Conditionally Strike is convincingly meritorious and*
4 *substantively and procedurally justified.*

5 As Plaintiff argued in its Motion to Compel and Reply, Porcelli is noncompliant with
6 Supp. R. G(6); Plaintiff incorporates by reference the arguments made in its Motion to
7 Compel and Reply for purposes of addressing Claimants' attack on the substantive merits of
8 Plaintiff's Motion to Conditionally Strike. *See* ECF No. 28; Reply Mot. Compel, ECF No.
9 33. As for the procedural merits of Plaintiff's Motion to Conditionally Strike, that Motion
10 was in full compliance with Supp. R. G and Ninth Circuit precedent and practice.

11 First, the Motion was made pursuant to Supp. R. G(8)(c)(i)(A). Supp. R. G(8)(c)(i)(A)
12 allows the government to file a motion to strike for a claimant "failing to comply with Rule
13 G . . . (6)." For the reasons stated in Plaintiff's Motion to Compel and Reply, Porcelli was
14 noncompliant with Supp. R. G(6). *See* ECF No. 28; ECF No. 33.

15 Second, the Motion comported with *United States v. Real Property Located at 17 Coon*
16 *Creek Rd., Hawkins Bar California, Trinity Cty.*, 787 F.3d 968 (9th Cir. 2015). The *17 Coon Creek*
17 *Rd.* court determined that a Supp. R. G(8)(c)(i)(A) motion is akin to a motion for a discovery
18 sanction and, therefore, a district court should not grant the motion without affording a
19 claimant an opportunity to cure (unless it would be futile to do so or the record reflects
20 persistent discovery abuses by the claimant). *See* 787 F.3d at 973. In Plaintiff's Motion, it
21 requested that this Court permit Porcelli an opportunity to cure before making a final
22 determination on the Motion. *See* ECF No. 29, 2:12-16; 3:1-3; 4:6-9.

23 Third, the Motion was fashioned after a motion made, and approved by, a Ninth
24 Circuit federal district court in the wake of *17 Coon Creek Rd.*, namely in *United States v.*
25 *\$295,726.42 in Account Funds Seized*, 279 F. Supp. 3d 1050 (C.D. Cal. 2018). The *\$295,726.42*
26 court acknowledged the holding of *17 Coon Creek Rd.* and, in compliance with that decision,
27 determined that it would be "fair and reasonable" to conditionally strike the claimant's claim
28

1 for noncompliance with Supp. R. G(6) subject to a thirty-day opportunity to cure. *See* 279 F.
2 Supp. 3d at 1055-56.

3 To expand on this third point, Plaintiff notes that in *17 Coon Creek Rd.* the court—in
4 interpreting Supp. R. G(8)(c)(i)(A)—approvingly cited *United States v. Approximately*
5 *\$658,830.00 in U.S. Currency*, No. 2:11-cv-00967 MCE KJN PS, 2011 WL 5241311 (E.D. Cal.
6 Oct. 31, 2011). *See* at 787 F.3d at 973. That case is instructive, as it addressed the very issues
7 pending before this Court in Plaintiff’s Motions to Stay Substantive Discovery and to
8 Conditionally Strike.

9 In *\$658,830.00*, the government served the claimant with special interrogatories and,
10 following the claimant’s failure to timely reply, filed a motion to compel responses and a
11 motion to strike under Supp. R. G(8)(c)(i)(A). *See* 2011 WL 5241311 at *1, *3. The court
12 determined that the claimant was in violation of Supp. R. G(6) but should be afforded an
13 opportunity to cure. *Id.* at *3. The court granted the government’s motion to strike in part,
14 affording the claimant twenty-one days to come into compliance with Supp. R. G(6), at
15 which time any continued noncompliance by the claimant would result in the United States
16 Magistrate Judge recommending that a renewed motion to strike be granted. *See id.* at *3-4.
17 In addition, the court ordered that “the government’s obligation to respond to [the
18 claimant’s] pending discovery requests [wa]s stayed until 21 days after [the claimant] serve[d]
19 the government with responses to the government’s special interrogatories.” *Id.* at *4.

20 Here, Plaintiff filed a Supp. R. G(8)(c)(i)(A) motion to strike Porcelli’s claim for his
21 failure to comply with Supp. R. G(6) and, in it, asked this Court to either conditionally strike
22 Porcelli’s claim or withhold final resolution of the Motion pending a finite, brief opportunity
23 for Porcelli to cure his noncompliance. *See* ECF No. 29, 1:25 to 2:28. Plaintiff’s Motion to
24 Conditionally Strike conformed to the procedures utilized by the courts in *\$295,726.42* (a
25 post-*17 Coon Creek Rd.* decision that crafted relief to be in compliance with the Ninth Circuit’s
26 determination) and *\$658,830.00* (a pre-*17 Coon Creek Rd.* decision that the *17 Coon Creek Rd.*
27 court relied on). For the above reasons, Claimants’ contention—that Plaintiff’s Motion to
28 Conditionally Strike is meritless—is unconvincing.

1 *ii. Plaintiff's Motion to Conditionally Strike is not pretextual.*

2 Turning to Claimants' argument that Plaintiff's Motion to Conditionally Strike is
3 pretextual—namely, filed solely for the purpose of supporting the Motion to Stay Substantive
4 Discovery, *see* ECF No. 36, 4:15-17—that assertion is belied by the procedural posture of this
5 case and the contents of Plaintiff's Motions to Conditionally Strike and to Stay Substantive
6 Discovery.

7 First, as just discussed, Plaintiff's Motion to Conditionally Strike was filed because
8 Porcelli failed to comply with Supp. R. G(6); pursuant to Supp. R. G(8)(c)(i)(A) and
9 precedent from Ninth Circuit courts, it was appropriate for Plaintiff to file its Motion at the
10 very time, and in the very form, that it was filed. Second, although the pendency of Plaintiff's
11 Motion to Conditional Strike supports its Motion to Stay Substantive Discovery, *see* ECF
12 No. 30, 10:21 to 11:13; 12:14-21, Plaintiff's request for a discovery stay is also supported by
13 three alternate, self-sufficient theories (the pendency of the Motion to Stay Suppression, *see*
14 ECF No. 30, 11:14 to 12:8; 12:22 to 13:2, good cause based on federal precedent in
15 specialized civil litigation, *see* ECF No. 30, 6:22 to 8:14; 13:13 to 15:25, and good cause based
16 on the facts and procedural posture of this case and the unique nature of civil actions for
17 forfeiture in rem, *see* ECF No. 30, 16:3 to 18:5). Third, as explained in Plaintiff's Motion to
18 Conditionally Strike and expanded on below, Plaintiff filed its Motion to promote the
19 efficient, sequential resolution of litigation on standing and avoid the prospect of protracted
20 delay of the resolution of that issue. *See* ECF No. 29, 3:1 to 4:9.

21 In Plaintiff's Motion to Conditionally Strike, it justified the filing of the Motion, in
22 part, by noting the likelihood of litigation on standing continuing to stymie this case absent
23 clear parameters on Porcelli's obligation to fully and completely comply with Supp. R. G(6).
24 *See* ECF No. 29, 3:1 to 4:9. Plaintiff cited, and is aware of, two instances in which federal
25 judges reprimanded—at length and in written opinions—claimants who were represented by
26 Claimants' non-local counsel here for delaying litigation by repeatedly failing to comply with
27 Supp. R. G(6). *See United States v. Funds in the Amount of \$574,840*, 109 F. Supp. 3d 1043,
28 1045, 1049 (N.D. Ill. 2015) (“What [the district court judge] clearly did not want—for the

1 *third* time—was the claimants to say where the bundles of cash were found or to expostulate
2 pointlessly and endlessly on why the Order was unnecessary, or misguided or wrong”
3 (emphasis in original)); *United States v. \$209,815 in U.S. Currency*, Case No. C 14-0780 SC,
4 2015 WL 1927431 (N.D. Cal. Apr. 28, 2015), at *5 (“[I]t should not have taken over a year,
5 three court orders, and five supplementations . . . to fully respond to a series of
6 straightforward interrogatories ‘well within the scope of the’ Supplemental Rules.”); *see*
7 *also United States v. Funds in the Amount of \$574,840*, No. 11-CV-07803, 2015 WL 1537577
8 (N.D. Ill. Mar. 31, 2015) (stating, in an opinion authored by the United States District Court
9 Judge who referred the previously cited *\$209,815* matter to the United States Magistrate
10 Judge, that the claimants would have “45 days to respond to the Government’s Special
11 Interrogatories” and that “[t]he Court w[ould] entertain no further delays related to th[at]
12 discovery dispute”); Opp. Mot. Stay Supp., ECF No. 21, 2:9-21 (“[T]he Government cites
13 the undersigned’s own *United States v. \$209,815 in U.S. Currency*”). In light of (1) those
14 opinions; (2) the similarities between the legal arguments made, and procedural conduct
15 exhibited, by the claimants in those cases and Claimants here; and (3) the nature of the relief
16 sought in Plaintiff’s Motion to Conditionally Strike, which is specifically addressed to
17 avoiding the litigation tracks described in *\$209,815* and *\$547,840*, Claimant’s argument—that
18 Plaintiff’s filing of its Motion to Conditionally Strike was a mere pretext to support its Motion
19 to Stay Discovery—rings hollow.

20 C. Plaintiff’s Motion to Stay Suppression

21 In Plaintiff’s Motion to Stay Substantive Discovery, it also identifies its pending
22 Motion to Stay Suppression as a basis for staying substantive discovery. *See* ECF No. 30,
23 11:14 to 12:8; 12:22 to 13:2. Plaintiff explains that if this Court resolves Plaintiff’s Motion to
24 Stay Suppression in Plaintiff’s favor, the result will be a determination that Claimants are
25 not presently entitled to litigate evidentiary and constitutional issues related to the day of the
26 traffic stop. *See* ECF No. 30, 11:22-26. Further, Plaintiff notes that a favorable ruling on that
27 Motion will entitle Plaintiff to an opportunity to obtain standing-related discovery and file a
28 Supp. R. G(8)(c)(i)(B) motion to strike for lack of standing. *See* ECF No. 11:26 to 12:1.

1 Claimants respond by arguing that (1) their Motion to Suppress is not dispositive, *see* ECF
2 No. 36, 4:21 to 5:2; and (2) Supp. R. G does not temporally prioritize the resolution of a
3 claimant's Article III standing over the claimant's ability to bring a Supp. R. G(8)(a) motion,
4 *see* ECF No. 36, 5:11-27. Those arguments do not meaningfully address the good cause
5 standard that informs this Court's evaluation of Plaintiff's Motion to Stay Discovery.

6 Regarding Claimants' first argument, their focus is misplaced. Claimants' reasoning
7 seems to be that because their Motion to Suppress is not a dispositive motion Plaintiff's
8 Motion to Stay Suppression cannot be dispositive. Plaintiff's argument is not that the Motion
9 to Suppress or Motion to Stay Suppression requires this Court to resolve the merits of this
10 case. Instead, Plaintiff's argument is that in the context of a civil action for forfeiture in rem
11 and under the facts and procedural posture of this case the pendency of Plaintiff's Motion to
12 Stay Suppression should be viewed as constituting good cause to stay discovery. This,
13 because the Motion directly addresses (a) if and when Claimants can litigate the events
14 surrounding the traffic stop; and (b) when and how the government can obtain the very
15 discovery, and engage in the very investigation, necessary to evaluate standing and make a
16 Supp. R. G(8)(c)(i)(B) motion to strike for lack of standing. *See* Mot. Stay Supp., ECF No.
17 17, 7:23 to 9:16; 16:14 to 17:2; 18:13-18.

18 In a typical (non-forfeiture) civil suit, neither party would be entitled to use Supp. R.
19 G(6) special interrogatories. Further, if a party wished to challenge another party's standing,
20 it would do so with a Fed. R. Civ. P. 12(b)(1) motion. *See HRPT Props. Trust v. Lingle*, 676 F.
21 Supp. 2d 1036, 1041 (D. Haw. 2009). Thus, were Plaintiff seeking a stay of discovery in a
22 typical civil case on the basis that an opposing party lacked standing, the deciding court
23 would look to the record for a pending Fed. R. Civ. P. 12(b)(1) motion. *See Morrison v. Quest*
24 *Diagnostics Inc.*, No. 2:14-cv-01207-RFB-PAL, 2015 WL 1640460 (D. Nev. Apr. 9, 2015), at
25 *1, *3.

26 In a civil action for forfeiture in rem, the government—in contrast to a typical civil
27 suit—is given the unique screening tool of Supp. R. G(6) special interrogatories, which are
28 fundamentally in place to test claimant standing, address issues of ownership, and screen for

1 meritless and fraudulent claims. *See, e.g., United States v. \$284,950.00 in U.S. Currency*, 933 F.3d
2 971, 973 (8th Cir. 2019); *United States v. \$209,815 in U.S. Currency*, No. C 14-0780 SC, 2015
3 WL 1927431 (N.D. Cal. Apr. 28, 2015), at *1. In addition, and also unlike in a typical civil
4 suit, the government’s principal avenue for challenging standing is through a Supp. R.
5 G(8)(c)(i)(B) motion to strike, which encompasses three separate standards, depending on
6 the state of evidence in the record. *See* Supp. R. G, Advisory Committee Note, Subdivision
7 (8)(c). The very structure of Supp. R. G conveys an overriding, heightened concern about
8 litigants participating in forfeiture litigation who lack the standing to do so. *See generally*
9 Stefan D. Cassella, Asset Forfeiture Law in the United States § 8-2 (2d ed. 2013) (explaining
10 that Supp. R. G(6)(c) recognizes that “the Government must be allowed to contest the
11 claimant’s standing as a threshold matter before having to respond to any motion or request
12 that the claimant may file,” and that this process entails the government’s use of “special
13 interrogatories” for the purpose of “contest[ing] standing”).

14 In a case such as this, where Claimants’ standing is at issue and where Plaintiff has
15 been unable to effectively use Supp. R. G(6), the Motion to Stay Suppression has become
16 necessary to effectuate the proper functioning of Supp. R. G(8)(c)(i)(B), which is Supp. R.
17 G’s version of Fed. R. Civ. P. 12(b)(1) (for challenges to standing). In this way, the Motion
18 to Stay Suppression is both directly related to a preliminary, jurisdictional issue (it seeks to
19 vouchsafe the government’s ability to properly, sequentially utilize Supp. R. G’s standing-
20 focused dispositional rule) and dispositive of an issue on which discovery is sought (the
21 present entitlement of Claimants to litigate the events of the day of the traffic stop, given the
22 substantial questions about their standing). *See Estate of Evans v. Kinecta Fed. Credit Union*,
23 Case No. 2:13-cv-01160-GMN-CWH, 2014 WL 12790972 (D. Nev. June 27, 2014), at *2
24 (“[P]reliminary issues such as jurisdiction, venue, or immunity are common situations that
25 may justify a stay.”); *Puckett v. Schnog*, No. 2:12-cv-01958-GMN-NJK, 2013 WL 1874754
26 (D. Nev. May 3, 2013), at *1 (“[T]he pending motion must be . . . at least dispositive of the
27 issue on which discovery is sought.” (internal quotation marks omitted)).

1 Regarding Claimants' second point, they appear to argue that the pendency of
2 Plaintiff's Motion to Stay Suppression does not constitute good cause to stay discovery
3 because Supp. R. G does not explicitly require a Supp. R. G(8)(c)(i)(B) motion to be resolved
4 before a Supp. R. G(8)(a) motion. As discussed by Plaintiff in a previous filing, *see* ECF No.
5 17, 12:20 to 13:10, Claimants' view that a claimant raising a Supp. R. G(8)(a) motion does
6 not need to demonstrate Article III standing, *see* ECF No. 36, 5:11-13; 5:24-25, is without
7 merit. Federal courts routinely require the resolution of questions of standing before a
8 claimant may litigate suppression, notwithstanding that Supp. R. G lacks an express directive
9 to do so. *See United States v. \$17,980.00 in U.S. Currency*, No. 3:12-cv-01463-MA, 2014 WL
10 4924866 (D. Or. Sept. 30, 2014), at *2, *7; *United States v. \$119,030.00 in U.S. Currency*, 955
11 F. Supp. 2d 569, 576 n.3 (W.D. Va. 2013); *United States v. \$133,420.00 in U.S. Currency*, No.
12 CV-09-8096-PCT-NVW, 2010 WL 1433427 (D. Ariz. Apr. 9, 2010), at *5-6; *United States v.*
13 *Five Hundred Forty-Three Thousand One Hundred Ninety Dollars (\$543,190.00) in U.S. Currency*,
14 535 F. Supp. 2d 1238, 1248 (M.D. Ala. 2008).

15 D. Claimants' Ancillary Arguments

16 In their Opposition, Claimants raise three ancillary arguments: (1) that they have
17 unquestionably demonstrated their standing, *see* ECF No. 36, 3:18-20; (2) that Plaintiff's act
18 of not yet filing a Supp. R. G(8)(c)(i)(B) motion is a tacit acknowledgment that Claimants
19 have standing, *see* ECF No. 36, 3:9-10; and (3) that this Court cannot, or should not, consider
20 a summary-judgment motion without substantive discovery taking place, *see* ECF No. 36,
21 6:6-11. Plaintiff disagrees with all of those contentions. As to (1) and (2), Plaintiff has
22 addressed those items at length in its other filings, so it will not further discuss them here,
23 except to incorporate by reference its previous responses to them. *See, e.g.*, Reply Mot. Stay
24 Supp., ECF No. 24, 5:16 to 7:2; 10:1-8 (discussing the availability of three types of Supp. R.
25 G(8)(c)(i)(B) motions—with increasing burdens of proof for a claimant—and the efficiencies
26 of challenging standing via a single, fully informed motion rather than piecemeal through
27 numerous separate motions); ECF No. 28, 9:20-27 (explaining that Pennock's asserted
28 possessory interest is wholly derived from Porcelli asserted ownership interest); ECF No. 28,

1 12:1 to 13:8 (addressing Porcelli's standing with respect to the intermediate and highest
2 standards on standing); ECF No. 30, 10:25-27 (noting that the striking of Porcelli's Judicial
3 Claim will subject Pennock's Judicial claim to being struck under Supp. R. G(8)(c)(i)(B));
4 ECF No. 33, 5:24 to 8:2 (analyzing Porcelli's standing under the summary-judgment
5 standard).

6 Regarding (3), Claimants' suggestion—that allowing this case to proceed toward a
7 Supp. R. G(8)(c)(i)(B) motion would be impossible or unfair without substantive discovery—
8 conflates a government Supp. R. G(8)(c)(i)(B) motion on a claimant's standing with a
9 government Fed. R. Civ. P. 56(a) motion on the merits of a forfeiture action. A Supp. R.
10 G(8)(c)(i)(B) motion, when presented as a motion for summary judgment, solely addresses
11 the issue of a claimant's standing. As Plaintiff has explained, it is unclear why substantive
12 discovery would be necessary for the resolution of such a motion, since Claimants are in
13 possession of the historical, pre-traffic stop information bearing on their standing. *See* ECF
14 No. 33, 8:3-12 (citing *Stanford v. Home Depot USA, Inc.*, 358 Fed. App'x. 816, 819 (9th Cir.
15 2009) for support).

16 **III. Conclusion**

17 For the reasons stated, Plaintiff moves this Court to stay substantive discovery
18 pending the resolution of litigation on standing.

19 Dated this 29th day of July 2020.

20 Respectfully submitted,

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