Money Laundering and Forfeiture Digest

Summaries and Analyses of Recent Money Laundering and Asset Forfeiture Cases
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Money Judgments / Joint and Several Liability

Fifth Circuit follows all others in holding that a criminal forfeiture order may take the form of a personal money judgment, even if the forfeiture is based on a civil forfeiture statute applied in a criminal case through Section 2461(c).

All co-conspirators are jointly and severally liable for the full amount of the proceeds of the conspiracy; the district court's failure to say so in the forfeiture order may be corrected as a clerical error.

United States v. Nagin, ___ F.3d ___, 2016 WL 98478 (5th Cir. Jan. 7, 2016)

Fifth Circuit * Defendant Ray Nagin, the former mayor of New Orleans, was convicted of honest-services wire fraud and ordered to pay a $501,200 forfeiture money judgment. He appealed both his conviction and the forfeiture order.

After rejecting Defendant's *Skilling* argument and affirming his conviction, the court addressed the forfeiture issues.

First, Defendant argued that 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), the applicable forfeiture statutes, authorize the forfeiture of specific assets only, and not the entry of a forfeiture order in the form of a personal money judgment. But the court disagreed. Section 981(a)(1)(C), the court said, authorizes the forfeiture of "personal property," a term that may be broadly defined to include personal money judgments. Moreover, as other circuits have noted, "the exclusion of personal money judgments would undermine the purpose of criminal forfeitures," which include "prevent[ing] a defendant from ridding himself of his ill-gotten gains to avoid the forfeiture sanction."

Accordingly, the court held that Sections 981(a)(1)(C) and 2461(c) authorize forfeiture in the form of a personal money judgment which is measured by the proceeds of the defendant's criminal activity and not by the amount assets that he retains at the time of sentencing.

Second, Defendant argued that the order of forfeiture failed to state the he would be jointly and severally liable for the forfeiture along with his co-defendant. The panel agreed that "co-conspirators subject to criminal forfeiture are held jointly and severally liable for the full amount of the proceeds of the conspiracy," but held that the district court's failure to say this expressly in the forfeiture judgment was a clerical error that the court was free to correct pursuant to Rule 36 of the Federal Rules of Criminal Procedure.

So Defendant's conviction and forfeiture order were affirmed in all respects. *SDC*

Contact: AUSA Andre Lagarde (E.D. La.)

Comment: It is now well-established that criminal forfeiture orders may take the form of a personal money judgment, even though most criminal forfeiture statutes contain no provision that says so expressly. See *Asset Forfeiture Law in the United States* (2d ed. 2013), § 19-4(c). The wrinkle that only a few courts have addressed is whether that rule applies to a forfeiture based on Section 981(a)(1)(C) – a civil forfeiture statute authorizing only *in rem* forfeitures of specific assets – when it is applied in a criminal case pursuant to Section 2461(c).

The defense argument goes like this: Maybe other criminal forfeiture statutes implicitly authorize money judgments because criminal forfeiture is, after all, an *in personam* sanction. But when the forfeiture is based on a *civil* forfeiture statute, a narrower rule must apply. That's because *all that Section 2461(c) does is to allow the court to impose a civil forfeiture in a criminal case*, and the civil forfeiture, by definition, is an *in rem* forfeiture against specific assets.

The flaw in this argument is the italicized phrase. Section 2461(c) *does not* simply allow the court to impose a civil forfeiture in a criminal case. To the contrary, it *converts* the authority to forfeit property civilly into authority to forfeit property criminally, pursuant to all the powers and limitations that apply to any other criminal forfeiture action. *See United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008) (when a civil forfeiture statute is incorporated into a criminal case via § 2461(c), it becomes an *in personam* criminal forfeiture statute under which the defendant is liable for a money judgment); *United States v. Capoccia*, 2009 WL 273301, *2 (D. Vt. Feb. 4, 2009) (once forfeiture is incorporated into a criminal case via § 2461(c) it is a criminal forfeiture for all purposes; the tracing requirements that apply in *in rem* civil actions do not apply, even though the authorizing forfeiture statute is § 981(a)(1)(C)), aff'd *United States v. Capoccia*, 402 Fed. Appx. 639, 640 (2d Cir. 2010) (the court may enter a forfeiture order in the form of a money judgment whether the forfeiture is based on a criminal forfeiture statute or on a civil forfeiture statute incorporated by § 2461(c)).

Thus, when the Government bases a criminal forfeiture proceeding on Sections 981(a)(1)(C) and 2461(c), the former statute serves only to define the categories of property subject to forfeiture – *viz.,* the "proceeds" of the criminal offense. The forfeiture is in all other respects a criminal forfeiture like any other criminal forfeiture.

The court's straightforward statement on joint and several liability is also worth noting. In 2015, the District of Columbia Circuit departed from the consensus on joint and several liability and held that criminal forfeitures are limited to the amount of proceeds personally obtained by each defendant. *See United States v. Cano-Flores,* 796 F.3d 83 (D.C. Cir. 2015). So it is important to recognize that the Fifth Circuit, like all other circuits, ignored *Cano-Flores* and continued to follow the majority rule holding that all co-conspirators are jointly and severally liable "for the full amount of the proceeds of the conspiracy." *SDC*

Conspiracy / Proceeds / "But-For" Test / Money Laundering Forfeiture

Defendants convicted of a mail fraud conspiracy must forfeit all proceeds of the conspiracy, regardless of whether every aspect of the conspiracy was charged as a substantive act.

Under the "but for" test, all revenue of a business that was established for the purpose of committing fraud is subject to forfei-

ture, even if some of the revenue was derived from legitimate services.

If a defendant commits a money laundering offense by purchasing property with commingled funds, the property so purchased is forfeitable in its entirety as the subject matter of the money laundering transaction.

United States v. Vico, 2016 WL 233407 (S.D. Fla. Jan. 20, 2016).

S.D. Fla. * Defendants established a rehabilitation clinic for the purpose defrauding insurance companies by submitting false claims for "staged" accidents. They were convicted of conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349, and two counts of money laundering in violation of Section 1957 in connection with their use of fraud proceeds to purchase two parcels of real property.

The court conducted a post-conviction forfeiture hearing pursuant to Rule 32.2(b)(2)(B) to determine the amount of the forfeiture judgment that should be imposed in connection with the mail fraud conspiracy, and whether the two parcels were forfeitable as property involved in the money laundering offenses.

First, the court held that "it is not necessary to charge as a substantive offense every aspect of a conspiracy in order to forfeit the proceeds of an entire conspiracy." Thus, the court held that all of the revenue of the clinic was subject to forfeiture without limitation to the amounts involved in the particular executions of the conspiracy that were charged as substantive counts in the indictment.

Defendants objected that this would include revenue they received from the admittedly small number of legitimate services that their clinic did perform. But the court held that because the clinic was established from the beginning to submit fraudulent billings, there would have been no revenue – legitimate or otherwise – but for the scheme to defraud. Thus, all of the revenue was subject to forfeiture as the proceeds of the conspiracy.

Finally, with respect to the two parcels of real property, Defendants objected that the purchases involved commingled funds derived from the fraud scheme and from at least a few legitimate billings. But the court held that when a money laundering offense involves the purchase of property with commingled funds, the property so purchased is subject to forfeiture in its entirety as the subject matter or "corpus" of the money laundering offense.

So the court ordered Defendants to pay a money judgment in the amount of $1.87 million, and to forfeit both parcels of real property. *SDC*

Contact: Toni Barnes (S.D. Fla.)

Comment: This case reads like a primer on criminal forfeiture, starting with the procedure for conducting the post-conviction forfeiture hearing and then collecting the cases supporting each of its substantive points.

Among other things, the court does a nice job of explaining why, under the "but for" test, the entire revenue stream of the defendant's rehab clinic is subject to forfeiture. This is not, the court says, a business that started off as a legitimate enterprise and engaged in some fraudulent activity along the way. Rather, it was a fraudulent enterprise from the get-go, which meant that there would have been no business, and hence no revenue of any kind, but for the fraud.

The cases the court cites in support are cited in Section XXXVII.A.1 of my Criminal Forfeiture Case Outline. *See also Asset Forfeiture Law in the United States* (2d ed.

2013), § 25-4.

Similarly, with respect to the forfeiture of the property involved in the money laundering transactions, the court relies on *United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005), and the other cases citied in my Money Laundering Forfeiture Case Outline holding that commingled funds may be forfeited as the subject matter or "corpus" of a money laundering offense. *Id.* Section II.B.2. *See also Asset Forfeiture Law in the United States* (2d ed. 2013), § 27-9. Both case outlines are available on the Digest and Case Outlines page of my website, www.assetforfeiturelaw.us. *SDC*

AML Compliance / Whistleblower Protection Act

Court explains the scope of the protections that the Whistleblower Protection Act affords bank employees who report deficiencies in a bank's AML compliance program to the bank's regulators.

Taft v. Agricultural Bank of China Ltd, 2016 WL 80209 (S.D.N.Y. Jan. 6, 2016)

S.D.N.Y. * Plaintiff, the compliance officer at a bank, brought certain deficiencies in the bank's anti-money laundering (AML) compliance program to her supervisors' attention, and ultimately persuaded them to allow her to report the deficiencies to the New York Federal Reserve Bank. The report took the form of a memo requesting "guidance" on what the bank should do to comply with the applicable regulations. *See* 31 U.S.C. § 5318(h) (requiring banks to implement AML programs and authorizing the promulgation of regulations).

When the New York Fed responded in a way that was critical of the bank's AML program, the bank retaliated against Plaintiff by transferring her to other duties and forbidding her to have any communication with the regulators. In return, Plaintiff filed a lawsuit against the bank under the Whistleblower Protection Act (WPA), 31 U.S.C. § 5328, alleging that she was penalized for providing adverse information regarding the AML program. The bank moved to dismiss the complaint on several grounds.

First, the bank argued that the term "whistleblower" does not apply to compliance officers who are merely reporting adverse information to a regulator as part of their duties. But the court held that it would make no sense to exempt persons whose duties included the reporting of possible violations from the protections afforded whistleblowers. Such an exemption, the court said, "would permit employers to retaliate against a class of employees uniquely likely to possess, and to be in a position to effectively report, information regarding possible violations of law that the covered entity does not wish to expose."

Second, the bank argued that the WPA only protects employees who make an independent report to a regulator, not an employee who persuades a bank to self-report a violation after bringing the violation to the attention of her supervisors. The court agreed with the bank on this point and further agreed that Plaintiff's complaint did not sufficiently allege that she acted independently and not with the bank's approval. But the court gave Plaintiff leave to amend her complaint on this point.

Third, the bank argued that the WPA only applies to employees who provide adverse information regarding a bank's AML program, not to those who merely seek "guidance" from the regulator regarding what the bank must do to comply with the AML regulations. Again, the court agreed with the bank, but again it allowed Plaintiff to amend her complaint to allege, as she

now contends, that the request for "guidance" regarding "best practices" was a euphemistic way of reporting the bank's on-going non-compliance with the AML regulations.

Finally, the bank argued that Plaintiff failed to allege that her report to the New York Fed was the cause of the adverse actions taken against her by her supervisors. To the contrary, the bank asserted that Plaintiff may also have been the victim of gender discrimination. But the court held that the WPA does not require a showing that being a whistleblower was the only reason why an employee suffered discrimination in the workplace. Or stated differently, a bank cannot defend against a whistleblower's lawsuit by asserting that it was also guilty of other wrongdoing, such as gender discrimination.

So, the court granted the bank's motion to dismiss the complaint but granted Plaintiff leave to amend and refile. *SDC*

Comment: There is very little case law interpreting 31 U.S.C. § 5328. Consequently, this well-reasoned opinion is likely to provide much needed guidance to financial institutions and their employees regarding the scope of the protection for whistleblowers that the statute provides, and the elements that any viable complaint for relief must contain. *SDC*

AML Compliance / FinCEN Sanctions / Access to Grand Jury Information

The compliance officer of a financial institution may be held individually liable for a civil monetary penalty under 31 U.S.C. § 5321 for failing to implement an effective AML program.

In determining whether to assess a civil penalty, FinCEN may obtain access to grand jury material via a court order issued pursuant to 18 U.S.C. § 3322(b).

Imposing a sanction under Section under 5321 is a two-step process in which FinCEN first assesses the penalty, and then files an action in the district court to obtain judicial approval of the assessment.

U.S. Dept. of Treasury v. Haider, 2016 WL 107940 (D. Minn. Jan. 8, 2016).

D. Minn. * Defendant was the chief compliance officer for MoneyGram International from 2003 to 2008. In that role, he was responsible for ensuring that MoneyGram implemented and maintained an effective AML program.

In 2012, MoneyGram admitted that it willfully violated 31 U.S.C. § 5318(h) by failing to implement an effective AML program during Defendant's tenure and entered into a Deferred Prosecution Agreement with the Department of Justice. Among other things the DPA required MoneyGram to forfeit $100 million.

Meanwhile, FinCEN, the Treasury's Financial Intelligence Unit, obtained the evidence gathered by the grand jury in the MoneyGram case and used it to assess a $1 million civil monetary penalty against Defendant as an individual. FinCEN then filed an action in the district court pursuant to 31 U.S.C. § 5321 to enforce the penalty. Defendant moved to dismiss the action on a variety of grounds.

First, Defendant argued that Section 5318(h) – the statute that requires financial institutions to implement AML programs – applies only to the institutions themselves, and not to individuals. But the court held that Defendant's liability was based on 31 U.S.C. § 5321, which authorizes the imposition of civil penalties against any employee of a financial institution who willfully violates

Section 5318(h).

Second, Defendant argued that that the Government's complaint failed to provide an accounting of the violations used to calculate the $1 million penalty. But the court held that it was premature at the pleading stage to question the Government's ability to support the amount of the penalty, and that Defendant would have a full opportunity in the course of discovery to "explore the basis for the penalty."

Next, Defendant objected to FinCEN's use of grand jury materials to bring a civil action, but the court found that FinCEN had properly obtained the grand jury materials pursuant to a court order issued in terms of 18 U.S.C. § 3322(b).

Finally, Defendant objected that FinCEN violated his right to due process by assessing the civil penalty without giving him a right to be heard. But the court held that under Section 5321(b), the assessment of the penalty is only the first step in the enforcement action. To collect the assessment, the Government must file an action in the district court and await the district court's judgment. It is in that proceeding, not during the internal deliberations that led to the assessment, that the defendant must be provided an opportunity to review the Government's evidence and to put forward a defense.

Here, FinCEN has commenced a judicial proceeding in which Defendant will be afforded a full opportunity to explore the Government's case and his defenses in discovery. Thus, there has been no due process violation that would require the dismissal of the complaint.

Accordingly, the court rejected all of Defendant's arguments and denied the motion to dismiss. *SDC*

Contact: AUSA Christopher Harwood (S.D.N.Y.)

Comment: This is one of the few cases to discuss the disclosure of grand jury information under 18 U.S.C. § 3322. That statute was enacted in the wake of the Supreme Court's decisions in *Baggot* and *Sells* to provide a vehicle for using grand jury information in a civil enforcement action. As applied in this case, it provides that an attorney for the Government may ask a court to approve the disclosure of grand jury information relating to a "banking law violation" for use in a regulatory matter. 18 U.S.C. § 3322(b).

For purposes of the statute, a "banking law violation" includes any violation of the Bank Secrecy Act, including the AML compliance provision in Section 5318(h). Thus, the court was entirely correct in holding that it was proper for FinCEN to obtain a court order giving it access to grand jury information relating to MoneyGram's failure to implement an AML program, and to use that information to assess a civil penalty against the company's compliance officer.

Asset forfeiture practitioners should take note that while Section 3322(b) applies only to banking law violations, requires a court order, and limits the use of the grand jury materials to bringing regulatory actions, Subsection (a) of the same statute authorizes the disclosure of grand jury information *in any case* and *without a court order* for the purpose of bringing a civil forfeiture action. *SDC*

Financial Institutions / Liability in States Where Marijuana is Legal

Court refuses to issue an injunction requiring the Federal Reserve to allow a credit union, which was established specifically to serve marijuana-related businesses in

states that where marijuana is legal, to open an account.

A federal court may not exercise its equitable powers to issue an order that would facilitate activity that remains criminal under federal law.

Fourth Corner Credit Union v. Federal Reserve Bank, 2016 WL 54129 (D. Col. Jan. 5, 2016).

D. Col. * The State of Colorado has legalized the personal use of marijuana, but the manufacture and distribution of marijuana remains an offense under federal law. Accordingly, businesses engaged in the marijuana trade in Colorado have had difficulty opening bank accounts at financial institutions that fear prosecution under federal law for aiding and abetting an illegal business.

To fill the need for financial services, and willing to risk federal prosecution, Plaintiffs opened a credit union specifically for the purpose of serving marijuana-related businesses. To operate, however, the credit union needed to open an account at the Federal Reserve ("the Fed"), but when Plaintiffs submitted their application for such an account, the Fed turned them down on the ground that it would not facilitate activity that remained criminal under federal law.

Plaintiffs then filed a lawsuit against the Federal Reserve seeking an injunction forcing the Fed to open the account. The Fed opposed the motion, arguing *inter alia* that the court should not use its equitable powers to facilitate criminal activity. The court agreed, and declined to enter the injunction.

Claimants argued that the credit union would not be facilitating a federal crime because a memo from Deputy Attorney General James Cole ("the Cole Memo"), issued in an effort to clarify the Government's position regarding the enforcement of the federal drug laws in states that have legalized marijuana, appeared to say that the Government would not prosecute banks that served marijuana-related businesses. But the court disagreed.

The Cole Memo, the court said, "emphatically reiterates that the manufacture and distribution of marijuana violates the Controlled Substances Act," and says that the Justice Department remains committed to enforcing the law. In the court's view, all the memo does is to provide policy guidance suggesting that prosecutors have higher priorities than enforcing the law in states that have legalized marijuana, and thus might "look the other way if financial institutions don't mind violating the law."

But the court concluded that "a federal court cannot look the other way," and because a court "cannot use equitable powers to issue an order that would facilitate criminal activity," Plaintiffs' request for an injunction requiring the Fed to let the credit union open an account was denied. *SDC*

Structuring / Aiding and Abetting / *Pinkerton* Liability

Defendants who did not conduct any structured transactions themselves, but who used a third party to convert checks to cash, are legally liable – either as aiders and abettors or under a Pinkerton *theory – for the substantive structuring offenses that the third party committed.*

United States v. Adams, ___ Fed. Appx. ___, 2016 WL 67277 (4th Cir. Jan. 5, 2016).

Fourth Circuit * Defendants, owners of mining companies, conspired with vendors of mining supplies to perpetrate a tax evasion scheme. To commit the offense, the

vendors would give Defendants false invoices for mining supplies, Defendants would pay the invoices with checks, the vendors would convert the checks to cash in structured withdrawals of less than $10,000, and the vendors would return the cash to Defendants, less a 10 percent fee. The benefit to Defendants was that they could use the false invoices to take false business expense deductions on their tax returns, and could use the cash to pay wages "off the books" to their employees.

Defendants were convicted by a jury of conspiracy to defraud the United States and to commit structuring offenses as well as multiple substantive counts of structuring. They objected that the evidence was insufficient to support the structuring convictions and moved for a judgment of acquittal, but the district court denied the motion. *United States v. Adams,* 2014 WL 4312073 (W.D. Va. Sept. 2, 2014). Defendants appealed.

Among other things, Defendants argued that they could not be guilty of the substantive structuring violations because 1) they did not make the structured withdrawals themselves; 2) they did not know the vendors would be making structured withdrawals, and 3) there was no evidence that they (as opposed to the vendors) knew of the reporting requirements or intended to evade them. But the panel denied the appeal for several reasons.

First, the court held that it made no difference that Defendants did not personally make the structured withdrawals. If they arranged for the vendors to make the withdrawals for them, they were guilty of aiding and abetting the structuring offense and could be found guilty as principals.

Second, there was circumstantial evidence that Defendants were aware that the structured withdrawals were being made, that there was a $10,000 reporting requirement, and that the reason for the structured transactions was to evade it. For example, the dollar amounts on Defendants' checks to the vendors matched the amounts of the structured withdrawals; other members of the conspiracy admitted to knowing about the reporting requirements; and Defendants' efforts to disguise the transactions suggested that they knew that what they were doing was illegal. That evidence, the court said, was sufficient to find Defendants guilty of structuring.

Alternatively, the court held that Defendants could also be guilty of structuring because it was foreseeable to them that their co-conspirators would structure currency transactions in the course of the conspiracy. Under the *Pinkerton* doctrine, a conspirator is liable for the substantive acts of his co-conspirators that are committed in furtherance of the conspiracy and are foreseeable to him. Here, it was reasonably foreseeable, as a necessary or natural consequence of the conspiracy to defraud the United States and to commit tax evasion, that the vendors who received Defendants' checks would engage in structuring in the course of converting those checks to cash. Thus, under *Pinkerton*, Defendants were legally responsible for the structured withdrawals that did occur.

Accordingly, the court held that the evidence was sufficient to support Defendants' convictions and affirmed the denial of their motion for a judgment of acquittal. *SDC*

Contact: AUSA Randy Ramseyer (W.D. Va.)

Comment: It is no surprise that a person can be convicted of structuring, even if he does not conduct the structured transactions himself, if he procures another person to conduct the transactions for him. But

what about the *mens rea* elements? Does the aider and abettor not have to know about the reporting requirement and intend to evade it?

The court in this case answers that question in two ways. First, the circumstantial evidence was sufficient to show that the defendants not only knew that structuring was taking place, but also that they *did* know about the reporting requirements and *did* intend to evade them. Among other things, the court noted that the defendants' co-conspirators admitted to the *mens rea* elements, and that their own conduct allowed the jury to infer that the defendants shared the co-conspirators' knowledge and intent.

But alternatively, and perhaps more controversially, the court holds that whether the defendants actually knew the structured transactions were taking place, and whether they actually knew of the reporting requirements and shared the vendors' intent to evade them, they were legally liable for the structuring offenses under *Pinkerton.* The court's theory seems to be this: the defendants conspired to commit tax evasion by converting checks to cash; it was foreseeable to them that the vendors who were cashing the checks (and providing false invoices, all for a 10 percent fee) would be using structured transactions to obtain the cash needed to perpetrate the offense, *ergo* because the structuring offenses occurred in furtherance of the conspiracy, the defendants are legally liable whether they were aware of the currency reporting requirements or not. *SDC*

Plea Agreements / Substitute Assets / Joint and Several Liability / Application of *Santos* / Section 2255

The Government did not breach the defendant's plea agreement when it promised not to forfeit his residence as directly-forfeitable property but reserved the right to forfeit it as a substitute asset and did so.

The procedure for moving to amend a forfeiture order to include substitute assets is to file a motion under Rule 32.2(e); the defendant may appeal from an order granting a motion under that rule.

Defendant waived his right to challenge both the order holding him jointly and severally liable for a money judgment, and the order forfeiting substitute assets, by not taking a direct appeal.

District court declines to follow the recent decision of the D.C. Circuit holding that joint and several liability does not apply in criminal forfeiture cases, noting that all other appellate cases are to the contrary.

The Supreme Court's decision in Santos *defining "proceeds" as "net profits" does not apply to criminal forfeiture cases.*

United States v. Nunley, 2016 WL 99203 (E.D. Ky. Jan. 8, 2016).

E.D. Ky. * Defendant pled guilty to a drug conspiracy and agreed to the entry of a $1.2 million forfeiture money judgment. When the Government later forfeited his residence as a substitute asset, however, Defendant filed a Section 2255 motion collaterally challenging his conviction on various grounds, including breach of the plea agreement and ineffective assistance of counsel.

First, Defendant argued that the AUSA's representation that Defendant's supervised release would not be revoked on the ground that Defendant could not satisfy the forfeiture judgment constituted a promise that the Government would not seek to satisfy the judgment with substitute assets. But the court held that these were two separate issues, and that the Government's rep-

resentation regarding Defendant's supervised release did not foreclose its seeking to enforce the money judgment in other ways.

Second, Defendant argued that the Government's promise not to seek the forfeiture of his residence as directly forfeitable property barred it from seeking the forfeiture of the same property as a substitute asset. But the court noted that the Plea Agreement expressly reserved the Government's right to seek the forfeiture of any property including the residence as a substitute asset.

Next, Defendant argued that in forfeiting the residence, the Government failed to comply with the procedures and requirements of 21 U.S.C. § 853(p) and Rule 32.2(e). In addition, he argued that the court erred in finding him jointly and severally liable for the full amount of the money judgment. But the court rejected both arguments on two grounds.

As a procedural matter, Defendant could have objected to the scope of his liability for the money judgment by taking a direct appeal from his conviction and sentence. Similarly, when the Government successfully moved to amend the forfeiture order to include the substitute asset pursuant to Rule 32.2(e), Defendant could have taken a direct appeal as soon as the amendment became final. Because he did neither, he could not seek relief under Section 2255.

Moreover, the court held that neither objection had any substantive merit.

With respect to the requirements for forfeiting a substitute asset, the court held that Defendant's admission that he did not have assets sufficient to satisfy the $1.2 million forfeiture judgment was all that the Government needed to satisfy the requirement in Section 853(p) that, due to some act or omission of the defendant, the directly forfeitable property was unavailable.

Regarding joint and several liability, Defendant argued that the court should follow the recent decision of the District of Columbia Circuit in *United States v. Cano-Flores,* which declined to apply joint and several liability to criminal forfeiture judgments. But the court noted that all other appellate courts, including the Sixth Circuit, have applied joint and several liability in criminal forfeiture cases, and declined to accept the reasoning of the *Cano-Flores* panel.

Finally, Defendant argued that his counsel erred in failing to argue that the forfeiture money judgment should be limited to the net profits of his drug conspiracy under the Supreme Court's decision in *Santos*. But the court followed all others in holding that *Santos* has no application to criminal forfeiture.

So Defendant's Section 2255 motion was denied on all grounds. *SDC*

Contact: AUSA David Olinger

Comment: There is a lot going on in this opinion, but several points deserve a brief comment, including the court's discussion of the procedure for forfeiting substitute assets and the defendant's right to take a direct appeal when such assets are forfeited.

Section 853(p) provides that the Government is entitled to an order forfeiting substitute assets only if it shows that the directly forfeitable property (e.g., the proceeds of the offense) are unavailable due to an act or omission of the defendant. There are many cases discussing what the Government must show to satisfy this requirement, *see* Section XIII.C of my Criminal Forfeiture Case Outline. But this may be the first to say that the defendant's admission that he

cannot satisfy the forfeiture money judgment automatically satisfies the statutory requirement.

In addition, the court properly notes that Rule 32.2(e) sets out the procedure for amending the forfeiture order to include a substitute asset, and that the defendant's remedy if he objects to the amendment is to take a direct appeal as soon as the amendment becomes final. I was recently looking for cases discussing the latter point and only found a couple. This decision helps to fill that void.

Finally, it was entirely predictable that defense attorneys would ask trial judges to follow the D.C. Circuit's decision in *United States v. Cano-Flores*, 796 F.3d 83 (D.C. Cir. 2015), declining to apply joint and several liability in criminal forfeiture cases, even though the courts in every other circuit have held to the contrary. *See* the Comment following the summary of *United States v. Nagin, supra,* on the same point. What's important, therefore, is that this court expressly rejects and declines to adopt the reasoning in *Cano-Flores* and collects the cases setting forth the majority rule. *SDC*

Plea Agreement

Because defendant's plea agreement did not mention the administrative forfeiture of his property, his agreement to forfeit $50,000 in criminal proceeds is assumed to be a separate matter, with no credit for the property already forfeited.

Adams v. U.S. Customs and Border Protection, 2016 WL 206463 (N.D. Cal. Jan. 14, 2016).

N.D. Cal. * Defendant, a federal prisoner, filed a *pro se* motion for the return of administratively forfeited property. He alleged that when he pled guilty and paid a $50,000 money judgment of forfeiture in his criminal case, he understood that the cash and vehicles previously seized and forfeited would be returned to him.

The Government opposed the motion, arguing that the administrative forfeiture of Defendant's property -- $10,000 in cash, a truck and a motorcycle – was a separate matter, and that the plea agreement never contemplated the return of that property.

Construing Defendant's motion as one based on a breach of the plea agreement, the court held that there was no evidence that the parties to the plea agreement considered the administrative forfeiture and the criminal forfeiture to be related matters. To the contrary, the court noted that Defendant was aware of the administrative forfeiture at the time he signed the plea agreement, that he did not file a claim in the administrative proceeding, and that there was no mention of the administrative forfeiture in the plea agreement.

Accordingly, the court agreed with the Government that the criminal forfeiture judgment and the administrative forfeiture proceeding were separate matters, and held that Defendant's request for the return of his property based on an alleged breach of the plea agreement should be denied. *SDC*

Contact: AUSA James Scharf

Comment: To avoid unnecessary post-conviction litigation in matters such as these, it is often useful for the Government, when drafting a plea agreement, to note that the defendant did not contest the administrative forfeiture of certain property and that nothing in the plea agreement is intended to affect the finality of that administrative forfeiture. *SDC*

Motion for Return of Forfeited Property / Motion for Return of Property Never Forfeited

Section 983(e) is the exclusive remedy for seeking to vacate an administrative forfeiture; defendant who claimed that a forfeited firearm belonged to his wife lacked standing to file the Section 983(e) motion, even though the weapon was seized from his residence at the time of his arrest.

Defendant who waited three years to move for the return of computers, cameras and cell phones that were seized but never forfeited and were later destroyed was not entitled to equitable relief.

United States v. Foster, ___ Fed. Appx. ___, 2015 WL 9583470 (11th Cir. Dec. 31, 2015).

Eleventh Circuit * Defendant, a convicted cocaine dealer, filed a Rule 41(g) motion for the return of cash, a firearm, and various personal items (computers, cameras and cell phones) that was seized at the time of his arrest. The district court denied the motion and Defendant appealed.

As a threshold matter, the panel held that Rule 41(g) is not the appropriate vehicle for seeking the return of property once a criminal case has been concluded. With respect to the cash and firearm, which were administratively forfeited by the DEA long before Defendant's trial, his proper remedy was a motion to vacate the administrative forfeiture under 18 U.S.C. § 983(e). That motion would have failed on the merits, however, for two reasons: 1) to the extent Defendant argued that the firearm belonged to his wife, he lacked standing to file the Section 983(e) motion; and 2) the only ground for relief under Section 983(e) is lack of notice, and Defendant made no claim that he did not have notice of the administrative forfeiture proceeding.

The panel also held that Rule 41(g) was not the proper vehicle for seeking the return of the personal items that were never forfeited. The availability of relief under the rule, the court said, terminates when the related criminal case is over. In appropriate cases, a court may nevertheless exercise equitable jurisdiction to grant relief to a property owner, but this was not such a case.

First, Defendant only asked for monetary damages; "but sovereign immunity protects the Government from money damages sought under Rule 41(g)."

Second, although DEA retained possession of the personal items for more than two years from the time of Defendant's arrest to the conclusion of his unsuccessful appeal, Defendant waited until after DEA had destroyed the personal items to file his motion. His unexplained delay in sitting on his rights, the court said, justified the district court's decision to deny him equitable relief.

So the denial of Defendant's motion was affirmed. *SDC*

Contact: AUSA Mary Roemer (N.D. Ga.)

Comment: The panel's ruling with respect to the improper use of Rule 41(g) to seek the return of administratively forfeited property is straightforward: Section 983(e) is the exclusive remedy, and it is available only if the property owner claims that the seizing agency did not provide adequate notice of the forfeiture proceeding.

What is noteworthy about the panel's discussion of that issue, however, is the clear statement that the person filing a Section 983(e) motion must have standing to do so.

To the extent that the defendant was arguing that the firearm belonged to his wife, he lacked standing to file the motion to vacate the administrative forfeiture, even though the firearm was seized from his residence at the time of his arrest. Other courts agree. *See Munoz-Valencia v. United States*, 169 Fed. Appx. 150, 152 (3d Cir. 2006) (person seeking return of administratively forfeited property under section 983(e) must have Article III standing to contest he forfeiture); *O'Neal v. United States*, 2015 WL 6783156, *3 (D. Md. Nov. 6, 2015) (person moving for the return of administratively forfeited property under Section 983(e) must establish standing to do so; that he was in possession of the property at the time it was seized is not sufficient). *See also* Section IV.H of my Civil Forfeiture Case Outline, and *Asset Forfeiture Law in the United States* (2d ed. 2013), § 5-4(a).

The court's ruling with respect to the unavailability of a Rule 41(g) to seek the return of property never forfeited is more surprising. Other circuits do permit a property owner to use Rule 41(g) in those circumstances. *See United States v. Sims,* 376 F.3d 705, 708-09 (7th Cir. 2004) (if the property was never forfeited, the claimant may file a motion under Rule 41(g)); *Bertin v. United States,* 478 F.3d 489 (2d Cir. 2007) (following *Sims;* Rule 41(g) is the proper vehicle for seeking the return of property seized but neither forfeited nor returned at the conclusion of a criminal case). All courts agree, however, that whatever the basis for seeking relief might be, the Government is immune from paying monetary damages, and equitable relief is available only where practical. There are numerous cases on this issue cited in Section XXVI.D of my Criminal Forfeiture Case Outline. *See, e.g., United States v. Bacon,* 546 Fed. Appx. 496, 499 (5th Cir. 2013) (Rule 41(g) cannot be used to seek the return of property never forfeited if the criminal case is over and the property has been destroyed).

SDC

Motion for the Return of Forfeited Property

A defendant's pro se *motion for the return of administratively forfeited property should be construed as a motion made pursuant to Section 983(e), and not as part of his related criminal case.*

Advising a defendant at sentencing that his property has been forfeited administratively does not cure the seizing agency's failure to provide him adequate notice of the administrative forfeiture proceeding.

United States v. Moore, ___ Fed. Appx. ___, 2016 WL 97592 (11th Cir. Jan. 8, 2016).

Eleventh Circuit * Defendant filed a *pro se* motion to set aside the administrative forfeiture of his property based on lack of sufficient notice. Instead of treating the motion as one filed under 18 U.S.C. § 983(e), however, the district court considered it part of Defendant's criminal case and denied it on the ground that Defendant was apprised of the forfeiture at his sentencing. Defendant appealed.

The panel agreed with Defendant (and the Government) that the district court misconstrued his motion and granted the appeal. When a property owner seeks relief from the administrative forfeiture of his property on the ground that the notice was inadequate, his only remedy is to move to vacate the forfeiture under Section 983(e). It makes no difference that he is also the defendant in a related criminal case. Thus, the district court erred in docketing the motion as part of the criminal case instead of construing it as a motion under Section 983(e).

Moreover, the court's procedural error was prejudicial to Defendant. By the time he was sentenced in his criminal case, his property had already been forfeited administratively. Advising him at sentencing that the administrative forfeiture had occurred did nothing to cure the problem that Defendant raised: that he did not have adequate notice of the administrative forfeiture *before* the property was forfeited.

Accordingly, the panel vacated the judgment of the district court and remanded the case for consideration pursuant to Section 983(e). *SDC*

Contact: AUSAs Linda McNamara and Arthur Bentley (M.D. Fla.)

Comment: When I read the district court's opinion in this case last year, it was obvious to me that the court had missed the point of Defendant's motion and committed reversible error. That's why I didn't include the case in the Digest.

The district court's mistake was failing to appreciate what the defendant was complaining about. To be sure, he was aware by the time he was being sentenced that his property had been forfeited. His point, however, was that he was not given notice of the forfeiture proceeding *before* his property was forfeited. Therefore, disposing of the case on the ground that the defendant was apprised of the forfeiture at sentencing failed to address the relevant issue, and it was appropriate for the Court of Appeals to remand the case so that can be addressed the second time around. *SDC*

Ancillary Proceeding / Standing

A third party who cannot show that its property was included among the assets listed in the order of forfeiture lacks standing to contest the forfeiture under Section 853(n)(2).

United States v. Natalie Jewelry, 2015 WL 9700962 (S.D. Fla. Dec. 23, 2015).

S.D. Fla. * Defendant, a jewelry dealer, pled guilty to a money laundering conspiracy and agreed to the forfeiture of its assets. Claimant filed a claim asserting that 41 oz. of scrap gold that it had placed in Defendant's custody was inadvertently included among the forfeited assets. The Government opposed the claim on the ground that Claimant's property was not included among the forfeited assets and moved for summary judgment.

To prevail in the ancillary proceeding, a third party must first establish that it has standing by showing that it has a legal interest in the forfeited property. 21 U.S.C. § 853(n)(2). Here, Claimant was unable to refute the evidence set forth in an agent's affidavit that Defendant transferred Claimant's scrap gold to another party the day before Defendant's assets were seized, and that accordingly Claimant's property was not included among the forfeited assets.

Because Claimant could not show that any of its property was forfeited, inadvertently or otherwise, it lacked standing to contest the forfeiture. At best, Claimant was an unsecured creditor with a cause of action against Defendant for the value of the 41 oz. of gold.

Accordingly, the court granted the Government's motion for summary judgment. *SDC*

Contact: AUSA Arimentha Watkins

Comment: Aside from stating the obvious – that a third party cannot contest a forfeiture order if nothing that belongs to it has been forfeited – the court makes a useful procedural point. The issue in this case, the court says, is not the claimant's ability to prevail on the merits under Sections

853(n)(6)(A) or (B), but rather its ability to establish standing under Section 853(n)(2). Many courts, as this court observes, have conflated those two issues. Properly viewed, however, Section 853(n)(2) imposes a threshold requirement that the claimant must satisfy before the court needs to address the merits of its claim.

Here, because the claimant could not show that any of its property was included in the assets seized from and forfeited by the defendant, it could not satisfy the threshold "legal interest" requirement in Section 853(n)(2), and thus did not have standing. The cases discussing the standing requirement in Section 853(n)(2) are collected in Section XVIII.A.2 of my Criminal Forfeiture Case Outline. *SDC*

Other courts have dealt with similar factual situations in a slightly different way, holding that the court lacks subject matter jurisdiction over a claim to property that is not included in the order of forfeiture. *See, e.g., United States v. Fabian*, 2013 WL 150361, *5 (W.D. Mich. Jan. 14, 2013) (court lacks subject matter jurisdiction over claim to assets not listed in the forfeiture order); *United States v. Smith*, 2011 WL 2786491, *2 (E.D. Ky. July 14, 2011) (court lacks subject matter jurisdiction over a claim to the extent that it asserts an interest over property that was forfeited administratively and not included in the preliminary order of forfeiture). Other cases on the same point are collected in Section XVI.F of the Criminal Forfeiture Case Outline.

But these are simply two sides of the same coin: if a third party does not have standing to contest a criminal forfeiture order, the court lacks jurisdiction under the "case or controversy" requirement in Article III of the Constitution to adjudicate his claim. *SDC*

Due Process / **Delay** / **Discovery Sanctions** / **Stay**

Post-complaint delay in bringing a civil forfeiture case to trial can violate due process just as pre-complaint delay can; but if the delay is due to the claimant's own litigation tactics, he may not benefit from it.

United States v. $307,970.00 in U.S. Currency, 2016 WL 197217 (E.D.N.C. Jan. 14, 2016).

E.D.N.C. * The Government seized Claimant's property in February, 2012 and filed a civil forfeiture complaint five months later. For the next three and a half years, the parties engaged in motions practice, discovery disputes, and other matters that prevented the case from being brought to trial. Ultimately, Claimant moved to dismiss the case on the ground that the four-year delay violated his right to due process, and also as a sanction for the Government's failure to disclose certain information in discovery. The Government opposed the motion and moved to stay the case pursuant to 18 U.S.C. § 981(g).

Regarding the alleged due process violation, the court agreed with Claimant that the Supreme Court's decision in *United States v. $8,850,* which applied the criteria in *Barker v. Wingo* to the delay in bringing a civil forfeiture action, provided the proper analytical framework. A delay can violate due process, the court said, whether it occurs pre-complaint as in *$8,850,* or post-complaint as here. But the court declined to find that the four-year delay justified the dismissal of the complaint.

Some of the delay, the court said, was the result of a "necessary and permissible attempt" to accommodate a related criminal investigation, and thus would not count heavily against the Government. At the same time, much of the delay was due to

Claimant's own litigation tactics. "Although claimants should not be penalized for mounting a vigorous defense," the court said, "nor should they gain a windfall by prolonging the case only to have it dismissed as a result of that delay."

With respect to the alleged discovery violation, the court agreed with Claimant that the Government violated its discovery obligations when it failed to disclose a recorded conversation between Claimant and third party discussing a drug deal. The court held, however, that the Government's discovery violation occurred "at an early stage" in the discovery process and that Claimant suffered no prejudice because the Government corrected its error in time for Claimant to incorporate the new material into his defense. So Claimant's request to dismiss the case as Rule 37 sanction was denied.

Finally, the Government granted the motion under Section 981(g)(1) to stay the civil case to avoid interfering with its related criminal investigation of Claimant's drug dealing. But in light of the already lengthy delay in the case, the court limited the stay to six months, at which time the parties will be required to submit a status report. *SDC*

Contact: AUSA Steve West

Special Interrogatories / Claim and Answer

Rule G(5) requires more than a blanket assertion of ownership; claimant must provide details regarding the nature of his interest in the property and how it was acquired, even though it was seized from his possession.

The Government may use special interrogatories to force the claimant to flesh out the nature of his interest in the defendant property and how he acquired it even though his claim of ownership in property seized from his possession would be sufficient to survive a motion to dismiss on the pleadings.

United States v. $70,670 in U.S. Currency, 2016 WL 233405 (S.D. Fla. Jan. 20, 2016).

S.D. Fla. * Claimants filed a claim contesting the forfeiture of currency and cashier's checks seized from their bedroom, asserting only that they were the owners of the property. The Government served them with special interrogatories requesting detail as to how, when, and from whom Claimants acquired the currency, but Claimants objected that the request was "frivolous" because their standing to contest the forfeiture was clear.

Ruling on the Government's motion to compel, the court held that Claimants' blanket assertion of ownership did not comply with the pleading requirements in Rule G(5), and that in any event, the Government was entitled to test Claimants' standing by inquiring into their relationship to the seized money even though it was seized from their bedroom.

So the Government's motion to compel was granted. *SDC*

Contact: AUSA Nalina Sombuntham

Comment: This case addresses two controversial issues. First, the court agreed with the Government that Rule G(5) requires a claimant to do more than make a blanket assertion of ownership of the defendant property, and that the Government may use special interrogatories under Rule G(6) to force a person who makes such a vague claim to flesh out the basis for it.

Not all courts agree that Rule G(5) requires the claimant to set forth in detail the nature of his legal interest in the defendant property and the manner in which that interest

was obtained. The cases on that issue are collected in Section VIII.M.4 of my Civil Forfeiture Case Outline and Section 7-13(d) of *Asset Forfeiture Law in the United States* (2d ed. 2013). The next case summary and Comment expand on this point.

Moreover, the courts that agree with the Government that a claim must contain more detail to comply with Rule G(5) do not necessarily agree on the remedy. One alternative is for the Government to move the strike the claim unless the claimant provides more detail regarding his relationship to the property and the manner in which he acquired it. But as this court perceives, another alternative is for the Government to use Rule G(6) to serve the claimant with special interrogatories designed to fill in the details of a vague claim.

To be sure, special interrogatories are intended to be used to test the claimant's standing, not to enforce the pleading requirements in Rule G(5). But as this court suggests, the two issues are interrelated: the Government cannot test the claimant's standing if it does not know the basis on which he is asserting a legal interest in the defendant property.

Second, the opinion rejects the argument that special interrogatories are unnecessary if the claimant's standing is obvious from the circumstances of the seizure. It is true, as the court notes, that a person who claims ownership in property seized from his possession will be able to survive a motion to dismiss his claim on the pleadings. But as other courts have held, the claimant has the burden of establishing his standing by a preponderance of the evidence, and the Government has the right to use special interrogatories to test his ability to do so notwithstanding the fact that the defendant property was seized from his possession. *See United States v. $307,970.00 in U.S. Currency,* 2013 WL 4095373 (E.D.N.C. Aug. 13, 2013) (rejecting the suggestion that because the claimant satisfied the standing requirement at the pleading stage by alleging ownership, the Government no longer has a reason to serve him with special interrogatories; the special interrogatories allow the Government to challenge the claimant's ability to establish his standing by a preponderance of the evidence if the Government files a motion under Rule G(8)(c)). *But see United States v. Funds in the Amount of $239,400,* 795 F.3d 639, 645 n.3 (7th Cir. 2015) (special interrogatories are limited to what is relevant to claimant's standing; because it is sufficient for standing purposes for claimant to say that he is the owner of the property and that it was seized from his possession, a claimant who answers the special interrogatories in that fashion has said all that he needs to say). Other cases on the same point are collected in Section X.A.2 of the Civil Forfeiture Case Outline. *SDC*

Claim and Answer

United States v. One Parcel of Property . . . 21279 Vantage Point Dr., 2016 WL 323612 (D.S.D. Jan. 26, 2016).

Where the Government's own complaint sets forth the connection between the claimant and the property subject to forfeiture, it is not necessary to require the claimant to set forth his connection to the property in great detail in his claim.

D.S.D. * The Government filed a civil forfeiture action against real and personal property allegedly traceable to a structuring offense. Claimant filed a claim stating only that he was "the bona fide owner" of the property.

Asserting that the claim lacked the specificity required by Rule G(5), the Government moved to dismiss the claim. In

support, the Government cited a string of cases holding that a "bald assertion of ownership" is insufficient to comply with the pleading requirement. But the court denied the Government's motion.

The court agreed that courts may require strict compliance with the pleading requirements and did not disagree that a "bald assertion of ownership" may be insufficient in many instances. But the court held that the cases requiring greater specificity generally deal with situations where the claimant's relationship to the property is unclear. As an example, the court cited cases involving the seizure of currency from a traveler who may or may not be the true owner of the money. In those cases, the court said, "sound reasoning supports heightened requirements when asserting ownership" of the seized property.

In contrast, in the instant case, the Government's own complaint detailed the source of the funds used to purchase the defendant property and Claimant's relationship to them. In such a case, the court concluded, "rigid application of Rule G(5) is not necessary." *SDC*

Contact: AUSA Stephanie Bengford

Comment: This case follows a recent trend requiring varying degrees of specificity in the pleadings under Rule G(5) depending on the facts alleged in the Government's complaint. The emerging rule seems to this: where there is a genuine concern that the claimant may have no legal interest in the seized property, a bald assertion of ownership will not satisfy the pleading requirements in Rule G(5); instead, the claimant must set forth his connection to the property – including the time, place and manner of his acquisition of his legal interest in it – in a way that allows the Government to test his standing to assert a claim. On the other hand, where there is no genuine dispute as to the claimant's legal interest in the property – *e.g.,* where the Government's own complaint alleges that he purchased the property in his own name with money that he took from his own bank account – the necessity of requiring greater specificity in the claim, which is to weed out false claims, is not present.

The point is that interpreting Rule G(5) to require greater specificity is necessary to guard against the filing of false claims. But when that danger is not present, neither is the need for requiring more detail in the claim.

The cases illustrating this dichotomy are collected in Section VII.M.4 of my Civil Forfeiture Case Outline. The following cases are good examples of the emerging view. *United States v. 263,327.95,* 936 F. Supp.2d 468, 473-74 (D.N.J. 2013) (where the defendant funds were seized from claimant's bank account, and the complaint acknowledges his interest in those accounts, common sense suggests the Government is well aware of the claimant's interest in the property and there is little danger claimant is making a false claim; in that situation, a bald assertion of ownership is sufficient); *United States v. $41,352.00 U.S. Currency,* 2015 WL 5638211 (W.D.N.Y. Sept. 24, 2015) (bald assertion of ownership insufficient to comply with Rule G(5)(a) where there is a danger of false claims – *e.g*. where claimant simply states that currency seized from bedroom she shares with drug dealer belongs to her; but if complaint alleges facts sufficient to establish claimant's standing – *e.g.*, where it alleges claimant purchased vehicle and titled it in his own name – claimant need say no more to comply with Rule G(5)(a));
United States v. $11,071,188.64 in U.S. Currency, 2014 WL 301014 (E.D. Mo. Jan. 28, 2014) (acknowledging that Rule G(5) re-

quires more than a bald assertion of possession as a guard against false claims, but holding that facts set forth in the claim explaining the source of the defendant money, coupled with the allegations in the complaint, were sufficient to satisfy Rule G(5)); *United States v. $5,253.00 in U.S. Currency,* 2014 WL 122254, *4 (W.D.N.Y. Jan. 13, 2014) (where the complaint alleged facts establishing claimant's interest in the property, a bald assertion of ownership was sufficient to comply with Rule G(5)(a)).

As suggested by the Comment following the previous case summary, however, the Government may still ask the claimant to provide additional details in response to special interrogatories. *SDC*

Claim and Answer

Court exercises its discretion to allow claimant to file a claim five days after the pleading deadline where Government was clearly on notice of claimants' intent to contest the forfeiture and thus suffered no prejudice.

United States v. Fifty-Five Boxes of Tide Downy Powder, 2015 WL 9581876 (E.D.N.Y. Dec. 30, 2015).

E.D.N.Y. * The Government seized tens of thousands of units of allegedly counterfeit health and beauty products and commenced administrative forfeiture proceedings. Instead of filing a claim with the seizing agency contesting the forfeiture, Claimants filed various motions in the district court seeking the return of the property.

The Government persuaded the court that it lacked jurisdiction over the motions once forfeiture proceedings were commenced, terminated the administrative forfeiture proceeding, and filed a civil forfeiture complaint against the property. Claimants then filed a claim contesting the forfeiture, but did so five days after the expiration of the filing deadline under Rule G(5).

The Government then moved to dismiss the claim for lack of statutory standing, but the court exercised its discretion and allowed the late claim to be deemed timely filed.

While courts generally require strict compliance with the pleading requirements, the court said, in this case all of the pre-complaint skirmishing over Claimants' motions for the return of the seized property put the Government on notice that Claimants meant to contest the forfeiture. Accordingly, the Government could not plausibly maintain that the five-day delay in filing a timely claim caused it any prejudice.

So the motion to dismiss the claim was denied. *SDC*

Contact: AUSA Tanya Hill

Money Laundering / Attorney Fee Exception to Section 1957

Whether a transaction alleged as a Section 1957 violation was an attorney's fee exempted under Section 1957(f)(1) was not the proper subject of a pre-trial motion to dismiss.

United States v. Osborn, 2016 WL 192282 (D. Col. Jan. 15, 2016).

D. Col. * Defendant moved to dismiss a Section 1957 charge from his indictment on the ground that the alleged transaction involved the payment of an attorney's fee.

Section 1957(f)(1) provides that the term "monetary transaction" does not include a transaction necessary to preserve a defendant's Sixth Amendment right to counsel. But the Government argued that the

transaction in question was not an attorney's fee but was the repayment of a loan.

The court held that this was a factual dispute that would have to be resolved at trial and accordingly denied the motion to dismiss. *SDC*

Contact: AUSA Linda Kaufman

Money Laundering / Structuring

Sixth Circuit affirms money laundering and structuring convictions of defendant who ran a Ponzi scheme and used investor funds to purchase personal items either directly or through a "front man."

United States v. McQueen, ___ Fed. Appx. ___, 2016 WL 232132 (6th Cir. Jan. 19, 2016).

Sixth Circuit * Defendant ran a Ponzi scheme and used funds obtained from investors to purchase personal items. He was convicted *inter alia* of concealment money laundering (18 U.S.C. § 1956(a)(1)(B)(i)), spending money laundering (18 U.S.C. § 1957), and structuring (31 U.S.C. § 5324(a)(3)). He appealed, arguing insufficiency of the evidence.

Affirming the conviction on all counts, the panel held the following:

- The case agent's testimony that defendant's sole source of income at the time he conducted the alleged money laundering transactions was funds obtained from investors was sufficient to satisfy the "proceeds element" of §§ 1956 and 1957;
- Evidence that Defendant used investor funds to purchase a motorcycle which he, in turn, used as a trade-in to obtain a second motorcycle, was sufficient to establish that the acquisition of the second motorcycle was an offense under § 1957;
- Defendant's transfer of investor funds to a "front man" who, in turn, used the funds to purchase a boat for Defendant, showed that the purpose of the transaction was to disguise the source of the funds in violation of § 1956(a)(1)(B)(i);
- Defendant's deposit of a check into his bank account, followed by the withdrawal of $9,000, $9,000 and $3,000 in cash, along with his comment to the bank teller that he did not want her to file a CTR, was sufficient to support his conviction for structuring. *SDC*

Contact:

Motion for Summary Judgment / Substantial Connection

A lab report showing that the substance concealed in claimant's vehicle was 1.68 grams of cocaine and one oxycodone tablet is sufficient to support the forfeiture of the vehicle under Section 881(a)(4).

United States v. 2007 Mercedes Benz R350, 2016 WL 123416 (E.D.N.C. Jan. 11, 2016).

E.D.N.C. * Claimant was stopped by police officers while transporting a quantity of cocaine and was charged with possession with intent to distribute. The Government filed a civil forfeiture action under 21 U.S.C. § 881(a)(4) against the car Claimant was driving and moved for summary judgment. The court, however, denied the motion, holding that the Government did not support its motion with a lab report or any other proof that the substance Claimant was

transporting was in fact cocaine. *United States v. 2007 Mercedes Benz R350,* ___ F. Supp. 3d ___, 2015 WL 4487365 (E.D.N.C. July 21, 2015).

When the Government subsequently obtained a lab report showing that the substance concealed in Claimant's vehicle was 1.68 grams of cocaine and an oxycodone tablet, it renewed its motion and this time the court granted it. *SDC*

Contact: AUSA Steve West

Comment: The court expressed its "concern" that the forfeiture of the vehicle in connection with the possession of less than 2 grams of cocaine raised Eighth Amendment issues, but for whatever reason did not address that issue. *SDC*

Interlocutory Sale

The district court did not abuse its discretion in approving the interlocutory sale of an airplane that was depreciating and incurring excessive storage costs, even though the sale realized less than what the parties assumed was its fair market value.

United States v. Any and All Funds in UBS AG, ___ Fed. Appx. ___, 2016 WL 75305 (5th Cir. Jan. 6, 2016).

Fifth Circuit * The Government moved under Rule G(7) for the interlocutory sale of an airplane named as the defendant in a civil forfeiture action. Joined by a third party who held a mechanic's lien on the plane for storage costs, the Government alleged that the plane was depreciating in value and costing $1700 per month in storage fees.

Claimant opposed the motion but the district court granted it, and Claimant appealed.

Claimant argued that the district court abused its discretion in allowing the Government to sell the plane for substantially less than its fair market value, but the panel did not agree.

Two of the grounds for approving an interlocutory sale under Rule G(7) are that the defendant property is depreciating in value and incurring excessive costs for storage and maintenance. Both of those factors were present here. Moreover, the Government publicized the sale and took reasonable steps to sell the plane for fair market value. That the amount realized from the sale was less than what the parties anticipated did not mean that the district court abused its discretion in approving the sale in the first place. *SDC*

Contact: AUSAs Daniel Castillo and Diana Cruz-Zapata (W.D. Tex.)

Comment: The cases approving interlocutory sales in civil forfeiture cases are collected in Section X.E of my Civil Forfeiture Case Outline. *SDC*

Currency Seizure / Default Judgment / Dog Sniff

District court reverses its earlier denial of a default judgment, finding that including evidence of the drug dog's training and reliability, and a NADDIS hit showing Claimant's involvement in drug investigations, tipped the balance in the Government's favor.

United States v. $24,700 in U.S. Currency, 2016 WL 184421 (D.N.J. Jan. 15, 2016).

D.N.J. * Agents seized $24,700 wrapped in rubber bands from a passenger's carry-on luggage at an airport. A drug dog alerted to the currency, and the passenger, who had prior drug arrests and no legitimate

source of income, gave false and inconsistent explanations for the currency and did not file a claim. When the Government moved for a default judgment, however, the court denied the motion, holding that the evidence was insufficient to establish the forfeitability of the property by a preponderance of the evidence. *United States v. $24,700 in U.S. Currency,* 2015 WL 4647978 (D.N.J. Aug. 5, 2015) (September 2015 *Digest*).

The Government then amended its complaint, repeating the same allegations but adding the following: three paragraphs detailing the training, certification and experience of the drug dog; notice that Claimant was indicted on drug charges eight months prior to the seizure; and evidence that a query of the NADDIS database revealed that Claimant's phone number was associated with four current DEA investigations.

The court repeated its earlier dismissal of the significance of Claimant's prior arrests and attached no significance to the more recent indictment referenced in the amended complaint. But it held that the evidence from the original complaint regarding Claimant's false and inconsistent statements and the lack of a legitimate source for the seized currency, combined with the new evidence of the drug dog's training and reliability, plus the NADDIS "hit" indicating that Claimant has a current "link to the drug trade," were sufficient, taken together, to support a reasonable belief that the Government could have established the forfeitability of the seized currency if Claimant had filed a claim.

Accordingly, this time the court granted the Government's motion for a default judgment. *SDC*

Contact: AUSA Peter Gaeta

Comment: I still believe that the court's earlier denial of the motion for a default judgment was wrong. *See* the Comment in the September 2015 *Digest.* I do not think that it is necessary for the Government to allege the details of the drug dog's training, certification and reliability in its civil forfeiture complaint to satisfy the pleading requirements in Rule G(2)(f), nor do I think that a NADDIS hit is a more reliable indicator of a person's link to the drug trade than his numerous prior arrests and indictments on drug charges. Thus, I think the original complaint was perfectly adequate and that the amended complaint did not add anything essential.

Apparently the court disagrees and find that the evidence of the dog's training and the NADDIS hit tipped the balance in the Government's favor. Another possibility, however, is that the court, on reconsideration, realized that it applied the wrong legal standard the first time around. Whereas, the court seemingly denied the Government's first motion for the default judgment because the evidence, in its view, was insufficient to establish the forfeitability of the property by a preponderance of the evidence, it now holds that the evidence alleged in the amended complaint is sufficient "to warrant a reasonable belief that the currency was connected to illicit drug trafficking."

The "reasonable belief" standard is, of course, the proper standard for evaluating the sufficiency of a civil forfeiture complaint under Rule G(2)(f). *SDC*

Analog Drug Act

Eighth Circuit affirms the application of the "Turcotte inference," which allows a jury to infer, from the defendant's knowledge of the effect of a synthetic drug on the human body, that the drug is chemically similar to a

controlled substance.

United States v. Carlson, ___ F.3d ___, 2016 WL 158036 (8th Cir. Jan. 14, 2016).

Eighth Circuit * Defendants were charged with selling several varieties of synthetic drugs from a head shop. They were convicted of violating the Analog Drug Act and related money laundering offenses and appealed.

The Analog Drug Act requires proof that the defendant knew that the synthetic drug was chemically similar to a controlled substance, and had similar effects on the human body. Following the Seventh Circuit's decision in *United States v. Turcotte,* the court instructed the jury that if it found Defendants knew about the effect on the human body, they could infer that they also knew that the drugs were chemically similar.

Defendants objected to the application of the *Turcotte* inference, but the panel found that the jury instruction was appropriate and affirmed the conviction.

"Knowledge of similar pharmacological effect may be considered as circumstantial evidence" that, in combination of with other evidence, may be sufficient to establish a defendant's knowledge of the chemical structure of the synthetic drug, the court said. Here, the additional evidence included one defendant's comment to a reporter that the Government could not keep up with policing synthetic drugs because his conduct was legal as long as "one little molecule" was different from the structure of a controlled substance. *SDC*

Contact: AUSA Surya Saxena (D. Minn.)

Notes

Ancillary Proceeding / Stay Pending Appeal

United States v. Risser, ___ Fed. Appx. ___, 2016 WL 232018 (6th Cir. Jan. 12, 2016).

Sixth Circuit * Claimant appealed the denial of her third-party claim to forfeited real property and asked the court to stay the forfeiture pending her appeal. The district court denied the stay and Claimant submitted her request to the Court of Appeals, but the panel found that Claimant had established neither likelihood of success on the merits nor irreparable injury and denied the stay. On the latter point, the court emphasized that the forfeited property was not Claimant's residence and there was therefore no "risk of homelessness."

Contact: AUSAs Kenneth Parker, Vipal Patel, and Pamela Stanek (S.D. Ohio)

Ancillary Proceeding / Timeliness of Claim

United States v. Fisher, 2016 WL 225679 (N.D. W.Va. Jan. 19, 2016).

N.D.W.Va. * The Government published notice of the criminal forfeiture of 19 firearms on www.forfeiture.gov but Claimant did not file a claim until nearly four months after the last date of publication. The court held that the claim was therefore untimely under 21 U.S.C. § 853(n)(2) and granted the Government's motion to dismiss.

Contact: AUSA Danae DeMasi

Attorney's Fees / Motion for Return of Forfeited Property

Glenn v. United States, No 13-CV-955 (E.D. Wis. Jan. 4, 2016).

E.D. Wis. * Claimant filed a motion to vacate the administrative forfeiture of $2860. Rather than contest the motion, the DEA returned the money. Claimant then requested reimbursement of his costs, including the filing fee, under the Equal Access to Justice Act, 28 U.S.C. § 2412(a)(1), but the court held that Claimant was not a "prevailing party" within the meaning of the Act because he did not prevail on any issue that was litigated.

Contact: AUSA Scott Campbell

Motion for Summary Judgment / Standing

United States v. $41,475.00 in U.S. Currency, ___ F. Supp.3d ___, 2016 WL 337380 (C.D. Cal. Jan. 6, 2016).

C.D. Cal. * Claimant's response to the Government's special interrogatories asking how he acquired $41,475 in seized currency was that he had sold a car for $20,000 in 2009, and had saved the balance over 19 years. He attached no supporting documents. Finding that a "fair-minded jury" could not find that such conclusory statements were sufficient to establish standing by a preponderance of the evidence, the court granted the Government's motion for summary judgment.

Contact: AUSA Frank Kortum

Motion for Summary Judgment / Currency Seizure

United States v. $15,400.00 in U.S. Currency, 2016 WL 81230 (D. Kan. Jan. 7, 2016).

D. Kan. * The Government moved for summary judgment in a civil forfeiture action filed against $15,400 discovered in Claimant's car during a traffic stop. The court found the following uncontroverted facts sufficient to justify granting the motion: the quantity of currency (comprising mostly $100 bills), a dog alert, the presence of unused vacuum-seal bags and a sealing machine in the car, Claimant's inconsistent explanations for this possession of the currency, his lack of legitimate income as revealed by his failure to file tax returns, and Claimant's arrest – the day after the traffic stop – in another state in possession of 21 bundles of marijuana in vacuum-sealed bags.

Contact: AUSA Colin Wood and SAUSA Robin Sommer.

Motion to Dismiss Complaint

United States v. All Funds on Deposit in Lee Munder Wealth Planning Resource Account, 2016 WL 287058 (D. Mass. Jan. 22, 2016).

D. Mass. * The Government filed a civil forfeiture action against $17.9 million in assets allegedly transferred to Claimant as part of a bankruptcy fraud scheme. Claimant moved to dismiss the complaint for failure to allege sufficient facts to support each of the elements of the bankruptcy violation on which the forfeiture action was based. The district court agreed with Claimant, and because this was the Government's third attempt to file the complaint in accordance with the requirements of Rule G(2)(f), it granted the motion to dismiss with prejudice.

Contact: AUSA Christine Wichers