

D.C. district court strikes special interrogatories because government plead in complaint that claimant owned and controlled bank accounts, and thus interrogatories were unnecessary to test standing. Claimants in this civil forfeiture action moved for a protective order to shield them from answering special interrogatories propounded by the government pursuant to Federal Rules of Civil Procedure Supplemental Rule G(6) to explore whether they had standing to challenge the forfeiture. The interrogatories had requested information about nine seized bank accounts, including facts supporting ownership, explanations of how and why the funds were obtained, and numerous other questions about the claimants' relationship with various business entities and associates. Claimants argued they met the low burden of establishing standing at the pleading stage because the government alleged in its verified complaint, and Claimants confirmed in their verified claim, that assets were seized from the defendant bank accounts opened, owned and controlled by Claimants. As a result, they argued that in general Rule G(6) interrogatories, which are solely intended to uncover standing issues, are unnecessary and answering them would be unduly burdensome. The court held that having standing to challenge a forfeiture case with a motion to dismiss does not preclude the government from issuing G(6) interrogatories early in the case to test whether a claimant has standing on the merits. Claimants also contended, however, that their standing was established under the somewhat more stringent "some evidence" standard that applies at the summary judgment stage of forfeiture actions. The court agreed. Through its verified complaint, the government averred that one of the claimants established, owned, and controlled each of the nine accounts. Claimants confirmed their dominion over the accounts in their verified claim. Since ownership and control of funds are hallmarks of standing in forfeiture cases, there was no factual dispute as to whether the claimants owned and controlled the funds at issue here. With their ownership and control acknowledged by the government, asking Claimants about the source of the funds and the circumstances of their ownership was unnecessary for the purpose of testing standing. Such questions are therefore properly stricken from the interrogatories. The government nevertheless identified two relevant areas of inquiry about the claimants' standing that justified at least some discovery through Rule G(6) interrogatories. The first involved the timing of the government's complaint, which only discussed Claimants' ownership interest in the property up until 2013, and the government argued it needed to verify that Claimants *currently* had an ownership interest in the property. Second, the government was interested in whether any agreements between the claimants stemming from their apparent divorce may have affected their respective ownership interests in the funds, which was implicated by an account they jointly owned, and could in theory also affect ownership of the other accounts. The court thus allowed the government to propound a new set of interrogatories tailored to exploring these specific standing issues. *United States v. \$215,587.22 in U.S. Currency*, No. 17-CV-00853 (CRC), 2017 WL 4564717 (D.D.C. Oct. 11, 2017).

Kentucky district court holds that although administrative seizure notices sent to defendant's place of incarceration were sufficient, notices sent only to residences were not, since the government knew he was incarcerated. Defendant Nguyen pleaded guilty to numerous drug charges and was sentenced to 10 years imprisonment. Following his incarceration, Nguyen filed motions challenging the administrative forfeiture of several cars, currency, a gun, documents and electronics on the basis that he did not receive notice of the forfeiture, and asking for the return of the property. In support of his motions, Nguyen tendered

his declaration asserting he had an ownership interest in the items, indicating he had standing to challenge the notices issued for their forfeiture. Because the motions implicated both criminal forfeiture and civil forfeiture, the court addressed those issues separately. First, the court had granted the government's Motion for Preliminary Order of Forfeiture relating to a seized gun and two cars, and the order was sent to Nguyen's counsel via CM/ECF. Thus, service of the criminal forfeiture order on counsel was sufficient to comply with due process requirements for the forfeited property covered by that order. When Nguyen was sentenced, the preliminary forfeiture order became a final and appealable judgment, and it was improper for him to rely on Fed. R. Crim. P. 41(g) or 18 U.S.C. § 985(e) – which address civil forfeitures – to circumvent his obligation to attack the criminal forfeiture on direct appeal. Because Nguyen did not take a direct appeal of his conviction (which he waived the right to do as part of his plea agreement), he was precluded from challenging criminal forfeiture of the property identified in the forfeiture order. Nguyen also argued the government failed to properly apprise him of the civil forfeiture proceedings, arguing that a forfeiture notice mailed to jail or prison is insufficient to comply with due process requirements. The U.S. Supreme Court, however, held that such notices may satisfy the government's due process obligations. While Nguyen denied receipt of any notice of civil forfeiture, the government presented evidence to the contrary for many of the items subject to forfeiture. As to the currency and some cars, notices were delivered via Fed Ex addressed to Nguyen at his parents' residence in Louisville and to him at the Marion County Jail. In addition, the ATF published a notice of seizure and intent to forfeit for 30 consecutive days, and no claim was timely made. Notices also delivered via Fed Ex addressed to his co-defendant girlfriend at her address in Louisville. Thus, the motion to vacate the administrative forfeiture was denied as to these items. Issues remained, however, regarding the sufficiency of notice Nguyen received for the forfeiture of three vehicles, since the government failed to send any notice to Nguyen at the Marion County Jail regarding these vehicles even though it clearly knew he was an inmate there. The fact that the notices also were sent to the girlfriend addressed to Nguyen reflected the government's belief that he had some ownership interest in those items. Because of Nguyen's incarceration, mailing of the notices to that address was unreasonable and insufficient. While Nguyen may have had a general understanding that property was subject to forfeiture, the record was not clear he knew or had reason to know these three items were being forfeited, so the court set aside their forfeiture, although without prejudice. *United States v. Nguyen*, No. 3:14-CR-00065-GNS-1, 2017 WL 4478012 (W.D. Ky. Oct. 6, 2017).

Oklahoma district court finds no legal basis for disturbing an order of forfeiture that has been final for nearly two years despite recent U.S. Supreme Court decision, and also that since proceeds obtained by the defendant were unavailable due to his own actions or omissions, then currency seized from him was subject to forfeiture as a substitute asset.

Defendant pled guilty to a drug conspiracy charge and agreed to the entry of a criminal forfeiture money judgment in the amount of \$10 million. Under the plea agreement and order of forfeiture, Defendant was “jointly and severally liable” for this amount as proceeds of the drug conspiracy. The government moved to forfeit \$2,688 as a substitute asset to partially satisfy the criminal forfeiture judgment because it was seized from his pockets upon his arrest. The court denied the motion, finding that the government's supporting affidavit merely recited the standard found in 21 U.S.C. § 853(p) for forfeiture of substitute property without demonstrating that it had, in fact, exercised due diligence in trying to locate directly forfeitable property. The court later granted an

amended motion to forfeit the money. In response to Defendant's argument that the government failed to establish Defendant's own actions or omissions justified the forfeiture of substitute assets, the court held Defendant was jointly and severally liable for the acts and omissions of his co-conspirators that resulted in the dissipation of the conspiracy proceeds. Defendant appealed and won, because while the appeal was pending, the Supreme Court in *Honeycutt v. United States* held that joint and several liability does not apply under 21 U.S.C. §853, and that the government is authorized to confiscate assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation. The district court thus directed the government to file a brief regarding the application of *Honeycutt* to its motion for forfeiture. The government subsequently filed a Second Amended Motion for forfeiture of \$2,688 as a substitute asset, and also asked to change the money judgment amount in the order of forfeiture from \$10,000,000 to \$40,000. This amount, according to the government, represented a conservative estimate of the drug conspiracy proceeds that Defendant personally obtained. The court held that although it is improper under *Honeycutt* to apply joint and several liability in the §853 forfeiture context, there was no legal basis for disturbing an order of forfeiture that has been final for nearly two years. Of course, under Fed. R. Crim. P. 32.2(e), the court may at any time – upon a motion by the government – enter an order of forfeiture or amend an existing order of forfeiture to include substitute property that qualifies for forfeiture. Whether or not to allow forfeiture of the substitute property is a separate issue from altering the money judgment amount included as part of Defendant's sentence. Defendant only appealed the order related to the forfeiture of \$2,688 as a substitute asset. As such, this Court found it inappropriate to alter the forfeiture order. The next question was whether the government provided sufficient evidence to support a factual finding that Defendant's own acts or omissions caused directly forfeitable property to become unavailable. The court concluded it did. Regardless of exactly how the proceeds were dissipated, the court found that the proceeds obtained by Defendant were unavailable due to the actions or omissions of Defendant himself. Thus, the \$2,688 seized from him was subject to forfeiture as a substitute asset. Therefore, the government's second amended motion was granted in part, and denied in part. The Motion was denied to the extent the government requested an amendment of the \$10,000,000 money judgment in the Court's final forfeiture order, but was granted as to the forfeiture of \$2,688 as a substitute asset. *United States v. Purify*, No. 13-CR-00028-JED-29, 2017 WL 4875296, (N.D. Okla. Oct. 25, 2017).

Massachusetts district court holds that forfeiture of assets valued up to approximately 10 times the maximum guidelines fine was within the limit of constitutional proportionality.

The government sought forfeiture of several fishing vessels and permits after the defendant Rafael pled guilty to 23 counts of false labeling and identification, in violation of the Lacey Act. Rafael owned one vessel outright and had a ½ interest in the remainder of the fleet. Based on the current market, the estimated gross value of the Vessels and Permits was approximately \$30,000,000 and there were approximately \$2-3,000,000 in liens and attachments, reducing their value to approximately \$27-28,000,000. The court first found that forfeiture was statutorily mandated since Rafael admitted that the property was subject to forfeiture. Nevertheless, he contended the forfeiture the government sought ran afoul of the Eighth Amendment Excessive Fines clause. The court held that Rafael's violations of the Lacey Act impaired regulators' ability to determine the appropriate quota to set, since his offense conduct – misreporting his catch – was exactly the type of conduct the Lacey Act was designed to prevent. Also, the government

located assets that were directly forfeitable, and did not seek to impose a forfeiture money judgment upon assets Rafael did not have and would have to pay into the future. Moreover, Rafael had at least 20 other vessels that were part of his fleet that had lucrative permits attached to them, so the forfeiture would not substantially impair his ability to make a living. Moreover, the harm he caused was substantial, since he continuously ignored and circumvented the regulatory restrictions on commercial fishing applicable to all fishermen, and this systemic fraud allowed him to avoid buying fishing quota on the secondary market. Rafael's conduct was calculated, repeated, and done for his own benefit. Furthermore, the court sentenced him within the sentencing guidelines. Thus, it held that forfeiture of assets valued up to approximately 10 times the maximum guidelines fine, and probably a bit more, was within the limit of constitutional proportionality in the circumstances of this case. Nevertheless, the court did not allow forfeiture of two of the vessels because they had scalloping permits and scalloping was not involved in this wrong doing, but ordered forfeiture of four fish boats with a total appraised value for Rafael's interest of \$2,258,850 and 34 permits. *United States v. Rafael*, No. CR 16-10124-WGY, 2017 WL 4542051 (D. Mass. Oct. 11, 2017), *reconsideration denied*, No. 16-10124-WGY, 2017 WL 4927663 (D. Mass. Oct. 31, 2017).

Sixth Circuit reverses striking of claim because at the pleading stage a verified claim of ownership is sufficient to satisfy Article III standing and the procedural requirements of Rule G. Primm, the claimant in this in rem civil forfeiture action, appealed from the district court's orders striking his verified claim for lack of standing and forfeiting U.S. currency. Primm had filed a verified claim swearing that he was the “sole and absolute owner of the monies” and “was in exclusive possession of these monies when they were seized.” His separate answer also asserted sole ownership and exclusive possession of the currency. The government moved to strike Primm's claim on the grounds that his “naked assertion of ownership or possession” did not satisfy the pleading requirements of Supplemental Rule G(5)(a)(i)(B). Primm argued his pleadings were sufficient to establish standing to challenge the seizures on the merits. The district court granted the government's motion, finding that Primm's pleadings failed to establish either Article III standing or statutory standing under Supplemental Rule G. On appeal the court held that Primm's claim asserting sole ownership of the cash sufficiently alleged Article III standing. In addition, although the government argued his naked assertion of ownership failed to adequately “state the claimant's interest in the property” as required by Rule G(5)(a)(i), at the pleading stage a verified claim of ownership is sufficient to satisfy Article III and the procedural requirements of Rule G. Thus, Primm's claim should not have been stricken for failure to comply with Rule G(5)(a)(i)(B), and the district court order was reversed and the case remanded. *United States v. \$99,500.00 U.S. Currency Seized on Mar. 20, 2016*, No. 17-3436, 2017 WL 4812582 (6th Cir. Oct. 25, 2017).

Michigan district court dismisses wife’s ancillary petition for bank account in her name because she failed to plead any facts giving rise to her interest in the bank funds and, at most, she would be a general creditor rather than a bonafide purchaser for value.

Habib filed a petition for a hearing to adjudicate her interests in a bank account in her name ordered forfeited in her husband’s criminal case. She claimed she made loans to her husband in the amounts of \$75,000 and \$35,000, the funds for the loans were earned through her

employment, and her husband subsequently repaid the loans. She claimed an interest in an amount of \$110,000.00. In addition, she said the balance of the funds in the account were also lawfully obtained through her individual employment and for services provided for her husband's company in good faith and without knowledge of any illegal conduct the government alleged as a basis for forfeiture. The government moved to dismiss her claim. Petitioner argued she had superior title to her husband (and the government) because the two accounts were in her name, however the court found that the petition did not set forth the time and circumstances of her acquisition of her interest in the money, as required by 21 U.S.C. §853(n)(3). She failed to plead any facts regarding her alleged individual employment, such as where she was employed, her dates of employment, and her responsibilities as an employee. Furthermore, she did not offer the dates on which the loans were repaid. The fact that the two accounts were in Petitioner's name, alone, was inadequate to support a claim for relief. Moreover, her first loan to her husband did not predate the start of his health care fraud scheme in June 2010, when title vested in the government, i.e., when the criminal enterprise began. Petitioner also argued that because she was the owner of the money in the account, having received some through repayment of loans and some through her employment with husband's company, she demonstrated that she is a bona fide purchaser for value. This conclusory statement, however, was insufficient to support her claim. By failing to plead any facts surrounding the circumstances that gave rise to the loans she made to her husband, she did not establish standing, and with respect to her argument that the accounts were in her name, the most she would be under this theory was a general creditor. The court thus dismissed her petition. *United States v. Akhtar*, No. 15-20600, 2017 WL 4778732 (E.D. Mich. Oct. 23, 2017).