Texas district court failed to state a claim for a class action based on a required hold harmless agreement and the timeliness of the return of her property. Plaintiff filed a lawsuit alleging that the U.S. Customs and Border Protection ("CBP") violated the Civil Asset Forfeiture Reform Act ("CAFRA") and the U.S. Constitution in connection with a seizure of currency. When Plaintiff returned from a trip to the United States, she was directed to a secondary border inspection where CBP officers "ransacked her luggage" and slit open the bottom of her leather purse. Another officer told Plaintiff that CBP would "follow her wherever she goes" and subject her to this invasive treatment every time she travels internationally because she has been placed on a "screening list." After CBP sent Plaintiff a notice of seizure, she filed a CAFRA claim verifying her ownership interest in the seized cash, however, the government failed to timely file a judicial forfeiture action. CBP sent a letter to Plaintiff informing her that she could either sign and return a Hold Harmless Agreement ("HHA") within 30 days to obtain the return of her currency or CBP would initiate administrative forfeiture proceedings. The letter stated that if Plaintiff signed the HHA, a refund check would be mailed to her within eight to ten weeks, but that she waived any claim to attorney's fees, interest, or any other relief related to the seizure of the property. Plaintiff chose to not sign the HHA, and initiated this class lawsuit. Without a signed HHA, the government initiated a refund of the $41,337 to Plaintiff. Plaintiff later traveled to Nigeria, and her outbound luggage was searched. In the complaint, Plaintiff sought return of the $41,377, brought claims directly under the Fifth Amendment for her alleged placement on a "screening list" and challenges CBP's practice to condition the return of seized property on the execution of an HHA. In a motion to dismiss, the government argued the return of the seized property mooted the CAFRA and constitutional claims and, because she never signed an HHA as a condition precedent to the return of the money, she suffered no harm from CBP's request to do so. Plaintiff counters that her claim is not moot because she has a legally viable claim for interest on the seized cash and therefore also may act as a class representative for others who were required to sign an HHA to obtain return of property. The court found that the interest provision of 28 U.S.C. §2465 is applicable only when a judicial forfeiture case is filed and thus sovereign immunity barred her claim for interest. Also, Plaintiff's complaint that she was subjected to additional scrutiny at the border failed to state a claim for relief because she did not allege any facts showing the search of her luggage was arbitrary, capricious or in violation of the law, particularly in light of her admitted prior failure to declare a significant amount of currency at the border. The law allows CBP considerable discretion in its decisions to implement border searches. Nevertheless, the court recognized that some claims are so "inherently transitory" that it would be impossible to rule on a class certification before an individual's claim became moot, so despite the refund of her money Plaintiff had standing at the time that the complaint was filed to seek class-based relief. As for CBP's HHA ultimatum, the government has not waived sovereign immunity for damages, attorney's fees, interest and costs incurred during an administrative forfeiture proceeding, and thus that portion of the HHA was not an unconstitutional deprivation of property without due process of law. Also, the court held that it is prudent for the United States to seek an HHA to protect itself when it is releasing the property without a full inquiry into actual ownership, and thus Plaintiff failed to state a claim for a due process violation based on conditioning the non-judicial release of seized property on the signing of an HHA containing an indemnification provision. If Plaintiff did not wish to sign the HHA, she could have proved her ownership of the property in the administrative forfeiture proceeding. Finally, the government began to take steps to promptly release the property as required by

CAFRA after the 90-day period elapsed, so Plaintiff failed to state a claim for a class action based on the timeliness of the return of her property. *Nwaorie v. U.S. Customs & Border Prot.*, No. CV H-18-1406, 2019 WL 3753734 (S.D. Tex. Aug. 8, 2019).

Puerto Rico district court denies attorney fees based on dismissed administrative claim. U.S. Customs and Border Protection filed an administrative forfeiture action and Román filed a verified claim. Subsequently, the government voluntarily dismissed the administrative forfeiture action. Román requested attorney's fees pursuant to CAFRA. Attorney's fees are warranted "in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails." 28 U.S.C. §2465(b)(1). The court said the term "substantially prevails" does not encompass voluntary dismissal of an administrative forfeiture action because a dismissal without prejudice lacks the required judicial imprimatur to quality as a material alteration of the parties' legal relationship. Therefore, because Román did not substantially prevail, his motion for attorney's fees was denied. *In re Approximately 245 bills of US currency*, No. MC 19-101 (FAB), 2019 WL 3763954 (D.P.R. Aug. 9, 2019).

Ninth Circuit holds that personal forfeiture money judgment is authorized by statute. A jury found Nejad guilty of fraudulently obtaining Social Security, Medicaid, and food-stamp benefits. The indictment sought forfeiture of any property derived from proceeds traceable to the violations. At sentencing, the district court ordered Nejad to forfeit $154,694.50. At the time of his conviction, Nejad no longer had the money in his possession, so rather than request forfeiture of specific property, the government asked the district court to enter a "personal money judgment" pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure. On appeal, Nejad argued that none of the criminal forfeiture statutes here authorized entry of a personal money judgment against him, but authorized only the forfeiture of a defendant's "property," without saying anything about permitting entry of an in personam money judgment as an alternative. He further contended that when Congress authorized entry of a personal money judgment in the criminal forfeiture context, it has done so explicitly, as in 31 U.S.C. §5332(b)(4), which authorizes forfeiture in connection with certain cash-smuggling offenses, and provides for entry of a money judgment when the property subject to forfeiture is unavailable and the defendant lacks sufficient substitute property that may be forfeited. The court said such judgments are necessary to avoid undermining Congress' objectives in enacting mandatory forfeiture sanctions, pointing in particular to the substitute-property provision found in 21 U.S.C. §853(p). A contrary rule would allow an insolvent defendant to escape the mandatory forfeiture penalty Congress has imposed simply by spending or otherwise disposing of his criminal proceeds before sentencing. Only when these procedures are followed, however, may the government satisfy a personal money judgment from the defendant's untainted assets. *United States v. Nejad*, No. 18-30082, 2019 WL 3788254 (9th Cir. Aug. 13, 2019).

Fifth Circuit holds that government's sovereign immunity is not waived for claimant's counterclaims to forfeiture complaint. The government seized millions of dollars from a Texas vocational school, alleging the funds were the fruits of a scheme to fleece veterans. The school intervened as a claimant, denied the government's allegations, and counterclaimed for constitutional tort damages against the government for ruining its business. The district court dismissed the school's counterclaims as a matter of law. On appeal, the school protested the

categorical rule barring all counterclaims in civil forfeiture proceedings was incorrect. The court declined to address that question, however, because the school's specific counterclaims were barred for a more fundamental reason – sovereign immunity – and so the district court lacked subject matter jurisdiction. As the government pointed out, the United States has not waived its sovereign immunity with respect to the particular claims asserted in the counterclaims – damages claims for violations of the Fourth and Fifth Amendments. Specifically, the school sought damages arising from the "unreasonable seizure" of its bank accounts and from the lack of "notice and hearing" in violation of the Due Process Clause. It attempted to identify the required waiver in 28 U.S.C. §2680(c), where Congress "re-waived" the United States' sovereign immunity under the Federal Tort Claims Act ("FTCA") for certain property damages claims arising out of forfeitures. However, that FTCA waiver does not extend to "constitutional torts" like the Fourth and Fifth Amendment damages claims pled in the counterclaims. The school also argued the United States waives sovereign immunity simply by initiating an in rem proceeding, but cited no authority supporting that grandiose proposition. It pointed only to admiralty cases allowing a limited cross-libel against the United States when the United States sues another vessel for collision damages. Congress did enact an unambiguous immunity waiver with respect to forfeiture proceedings, but it had no application here. Congress provided various remedies for claimants who assert that the United States has wrongfully seized their property in forfeiture proceedings. Under certain circumstances, claimants who "substantially prevail" in a forfeiture action may recover attorneys' fees, costs, and interest, and in some cases, they may sue the United States for property damages under the FTCA. What claimants may not do, however, is sue the United States for constitutional torts arising out of the property seizure. Congress has not waived the United States' sovereign immunity for damages claims of that nature. Because the counterclaims sought precisely those kinds of damages, they were barred by sovereign immunity. *United States v. $4,480,466.16 in funds seized from Bank of Am. account ending in 2653*, No. 18-10801, 2019 WL 3955842 (5th Cir. Aug. 22, 2019).

Eighth Circuit affirms decision to strike claim for failure to fully respond to special interrogatories. Transportation Security Administration agents at the Little Rock, Arkansas airport discovered nearly $285,000 in cash in a false bottom of Thompson's suitcase, and a drug-sniffing dog indicated the odor of narcotics on the suitcase. The government filed a civil forfeiture complaint and Thompson filed a verified claim and answer asserting that part of the money belonged to a business and part was personal savings jointly held with his girlfriend. He claimed "a right to possess the property as an owner and/or agent of the owner." The government served Thompson with special interrogatories pursuant to Supplemental Rule G(6), and then identified several deficiencies in Thompson's answers. After he did not supplement his answers, it moved to strike the claim and asked that Thompson at least be compelled to provide adequate responses to the special interrogatories. The district court concluded that Thompson's claim had satisfied Supplementary Rule G(5)'s initial threshold for standing, denied the motion to strike, and ordered Thompson to supplement his responses within 21 days. Despite multiple extensions of time, Thompson continued to provide incomplete responses to the interrogatories, and the government again moved to strike. Thompson countered that the interrogatories were overly burdensome and sought a protective order. The district court struck his claim as a Rule 37 discovery sanction for failing to comply with the order, and entered a default judgment and decree of forfeiture The appellate court found that Thompson's responses showed a willful

violation of this discovery order. He had already asserted in his claim that he and his girlfriend owned part of the money jointly as savings, but his responses failed to clarify which portions belonged to which parties. The government also made several requests for documents or records that supported his claim that he obtained the currency through gifts, investments, and employment, however Thompson replied that he could not provide responsive documents because the government had seized relevant documents. In reality, the government had offered Thompson access to all of his information in its possession, but Thompson never accepted this offer. These opaque, confusing, and evasive responses prejudiced the government by hindering its ability to "gather information that bears on the claimant's standing" as provided for in the Supplemental Rules. Although where the government concedes that a claimant has established standing, and no special interrogatories are necessary to test that issue, it would be an abuse of discretion to strike a claim for failure to respond to them. But here, the government did not concede Thompson's standing and actively contested it. *United States v. $284,950.00 in U.S. Currency, No. 18-2701*, 2019 WL 3773479 (8th Cir. Aug. 12, 2019).

Illinois district court allows claim to be filed by claimant's attorney. The government filed a complaint seeking civil forfeiture of $510,910.00 in United States currency and personal property. Two individuals filed verified claims: Barber asserted a bona fide possessory interest as the owner and/or possessor when they were seized, and stated he irrevocably assigned all right, title, and interest to a 50 percent interest of the gross amount seized, $521,550, to his attorney Stephen Komie. Komie then filed his own verified claim asserting a 50% ownership interest in the gross amount seized based on an assignment from Barber, for a total of $260,775, together with any interest or awards of attorney's fees. The United States moved to strike the claims and answer of Komie. Because the conduct giving rise to the seizure occurred before May 31, 2018 and Barber's interest in the property was assigned to Komie on June 6, 2018 – after the conduct giving rise to the forfeiture took place – the government argued Komie could not show that he did not know or was reasonably without cause to believe that the property was subject to forfeiture, as required by 18 U.S.C. §983(d)(3)(A). Moreover, because Komie knew the property was subject to forfeiture, he could not prove that he was an "innocent owner" of a portion of the seized funds. In response, Komie argued he met all requirements for a valid claim under Supplemental Rule G(5)(a)(I). The court agreed the government acted prematurely. Rule G(5) did not require Komie to plead – much less prove – that he had a "valid, legal interest" in the property. Rather, the plain language required only that he "state" his interest in the property. Since Komie met the procedural requirements of Rule G(5), the court declined to strike his claim and answer on that basis. The government also argued Barber lacked authority to grant Komie an interest in the property under the relation back doctrine. Komie argued the relation back doctrine did not apply until the court entered a final judgment of forfeiture. The court agreed, holding that Komie should be given an opportunity to prove the innocent owner defense. *United States v. $510,910.00 in United States Currency,* No. 3:18-CV-1683-NJR-MAB, 2019 WL 3997089 (S.D. Ill. Aug. 23, 2019).

Ninth Circuit holds that appeal of third-party ancillary petition is "civil" in nature for purposes of timeliness of appeal. The issue was whether an appeal of a third-party proceeding ancillary to a criminal forfeiture action should be treated as a "civil" or "criminal" case for purposes of determining the deadline to file a petition for panel rehearing or rehearing en banc

under Federal Rule of Appellate Procedure 40(a). In a similar context, the court held that for purposes of determining the timeliness of an appeal related to a third-party petition to amend a criminal forfeiture order, the third-party proceeding is considered "civil in nature." Therefore, an appeal from a third-party proceeding ancillary to a criminal forfeiture action should be treated as a civil appeal for purposes of applying Rule 40(a). *United States v. Close*, 931 F.3d 1218, 1219 (9th Cir. 2019).

Sixth Circuit holds district court lacked authority to enter forfeiture order months after Defendant filed her notice of appeal. Subject to very few exceptions, the filing of a notice of appeal shifts from the district court to the court of appeals adjudicatory authority over any aspect of the case. Yet here – more than four months after the district court entered its criminal judgment, and nearly as long after Defendant appealed – the district court purported to amend her sentence by entering a $17.5 million forfeiture order. By then the district court had lost authority to enter that order . After Defendant was convicted, the district court held a forfeiture hearing the next day in which the government stated that the only specific items of property it sought were two Cadillac Escalades, which she agreed to forfeit. That left the question of a money judgment, which the parties agreed to submit on briefs. The government later moved for a preliminary order of forfeiture requesting a money judgment of about $35 million. There matters stood until the district court sentenced Defendant and each of her co-defendants. The district court sentenced her to imprisonment without ruling upon the motion for a money judgment or otherwise mentioning a forfeiture order. Nor did the government ask for such an order during the hearing. The very next day the district court entered its criminal judgment. Defendant filed a notice of appeal as to that judgment and Defendant filed her opening brief. Two weeks later – and more than four months after Defendant appealed her conviction and sentence – the district court entered a forfeiture order in the amount of approximately $17.5 million, which Defendant appealed, arguing the district court lacked jurisdiction to enter that order because it was entered in violation of Federal Criminal Rule 32.2. The court must, whenever possible, enter a preliminary order of forfeiture sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the defendant's sentencing hearing, yet no preliminary order was entered here. The district court's violations of Rule 32.2, however, themselves deprive the court of jurisdiction to enter the forfeiture order. Carman's notice of appeal stated that she was appealing the district court's judgment in her criminal case. That judgment included both her conviction and sentence. Upon the filing of her notice of appeal, therefore, adjudicatory authority over "those aspects" of Defendant's case – i.e., her conviction and sentence – passed to the appellate court. The district court therefore lacked authority to enter its forfeiture order months after Defendant filed her notice of appeal. Accordingly, the court vacated the district court's forfeiture order. *United States v. Carman*, 933 F.3d 614, 615–18 (6th Cir. 2019).