

Eleventh Circuit affirms denial of claimants' request to amend dismissal to be without prejudice so they could seek attorney fee award. Officers searched Salgado's home and seized cashier's checks and \$15,070 in cash in the master bedroom closet and \$55,600 more in cash beneath a nightstand in the bedroom of her and ex-husband Colorado's daughter. The government filed a complaint alleging the funds were the proceeds of drug crimes or transportation of stolen garments. Colorado and his garment company Kurvas Secret claimed ownership of the cashier's checks and the \$55,600 and Salgado claimed ownership of the \$15,070. A Florida state court later entered a default judgment in favor of a complaint filed by the alleged victim of the garment theft, AnnChery, based on the failure of the defendants Colorado and Kurvas to comply with its discovery orders. Under Florida law, the default judgment conclusively established all factual allegations in that complaint. AnnChery had alleged that all of Colorado's claimed funds were derived from the sale of stolen garments. The government moved for summary judgment in favor of two of its forfeiture claims and, in the alternative, for leave to dismiss the complaint without prejudice, because the state judgment and permanent injunction "effectively" rendered the outcome of the forfeiture case moot. The government said that, regardless of the outcome of its in rem action, the funds would be transferred to AnnChery. The district court granted the government's motion. The claimants filed a notice of objection and moved to dismiss with prejudice and to amend the judgment so their attorney could pursue attorney's fees pursuant to 28 USC §2465. Before the district court ruled on the claimants' motions, Salgado, AnnChery, and the claimants' attorney settled, with \$10,387.92 of the defendant funds to Salgado, \$128,920.61 to AnnChery, and \$62,991.06 to the claimants' attorney to hold in escrow pending the resolution of the motion for attorney's fees. The district court rewrote the consent settlement order lodged by the claimants per the government's request, and denied the claimants' motions. On appeal, the court said the government did not unreasonably delay the litigation by failing to interplead the funds in the state action (which the government had proposed), since the two actions were of entirely different kinds: AnnChery sued Colorado and Kurvas Secret in personam for alleged civil torts under Florida law, and the government sued the funds in rem as subject to forfeiture for alleged violations of federal law. AnnChery's lawsuit asserted no property interest in any of the funds because AnnChery had none to assert (although it never filed a claim in the forfeiture case). Its property interest in the funds came into being only after the state court had transferred their in rem interests in the funds to AnnChery in satisfaction of that personal judgment. The court said the district court reached the commonsense conclusion that it no longer mattered whether the government or the claimants had superior title to the funds because, either way, the money would end up with AnnChery. Although claimants contended the dismissal without prejudice deprived them of their right to collect attorney's fees upon "substantially prevailing," the district court rejected this argument as untimely, since the claimants made no reference to attorney's fees in their opposition to the government's motion. Also, there is no clear legal prejudice unless it is clear that the claimants would have substantially prevailed on the merits, which claimants did not show here. Moreover, dismissal without prejudice is the general rule, not the other way around. Finally, although the state judgment and levy provided no basis to dismiss the federal action with respect to Salgado's claim since she was not a party to the state action and the state judgment affected none of her rights to the funds, the claimants did not raise this argument in their one timely response to the government's motion for voluntary dismissal. In any event, Salgado did not show she suffered clear legal prejudice by the government's voluntary dismissal. As for

attorney fees, the claimants did not substantially prevail because there was no “judicial imprimatur” on the legal relationship of the parties, since the government could refile the same forfeiture action in the future and the government’s claim of superior title to her share of the funds remained unadjudicated. *United States v. \$70,670.00 in U.S. Currency*, No. 18-10312, 2019 WL 2912210 (11th Cir. July 8, 2019).

Missouri district court compels claimant’s answers to special interrogatories, including tax and financial information. The government filed a complaint to forfeit \$63,575.00 in cash. Hernandez filed a claim contending it was earned income from lawful employment and an inheritance from her husband. The government served Special Interrogatories pursuant to Rule G(6) of the Supplemental Rules, and then filed a Motion to Compel regarding certain answers, in which she objected that the interrogatories were vague, overbroad and beyond the scope of Supplemental Rule G(6). Special Interrogatories 2, 5,6, and 12 all request information regarding Plaintiff’s ability to show an interest in the currency. Claimant provided checks and information about her self-employment and her late husband’s employment. The government argued the information provided lacked specificity and documentation. Claimant objected to the interrogatories regarding her tax information and her net and gross income on the basis that they are not appropriately limited to the scope of Rule G(6), and are not necessary to demonstrate standing in this case, since not all property owned must be reported on taxes. The court said that although the Eighth Circuit had not specifically addressed the discoverability of tax returns in civil forfeiture cases, other courts determined that tax and financial records were relevant to the issues of forfeitability and standing and do not exceed the scope of Rule G(6). In addition, Claimant in her response stated that a portion of the currency originated from lawful gambling activity, but did not identify any documentation supporting that assertion, which she said officers seized. The court said the government may challenge Claimant’s asserted reason for lacking documentation through other means of discovery. The court thus granted the motion to compel. *United States v. Sixty-Three Thousand, Five Hundred & Seventy-Five Dollars in U.S. Currency*, No. 4:18CV02131 JCH, 2019 WL 2996001 (E.D. Mo. July 9, 2019).

Sixth Circuit holds that since claimants misused their Fifth Amendment privileges by refusing to answer even non-incriminating questions, district court did not abuse its discretion when it struck their verified claims. Drug Enforcement Administration agents searched luggage and found \$31,000 hidden in the lining of Wiggins’s suitcase and \$10,000 tucked away in a sock in Allison’s carry-on bag. According to the government, Wiggins claimed the money belonged to his company, “Wiggins Cleaning,” but he could only name a single client, “Mike & Mike.” Yet the government could not locate any business filings for either “Wiggins Cleaning” or “Mike & Mike.” R. 1, Pg. ID 5, ¶ 36. Similarly, Allison claimed he won his money gambling but could not name the casino or provide the date he won the money. Unpersuaded by their stories, the government suspected that the money came from drug trafficking. Because the government suspected that the seized cash was connected to drug trafficking, it initiated a forfeiture action. Wiggins and Allison filed verified claims that asserted an ownership interest in the property “as the person who is the sole and absolute owner, and who was in exclusive possession of these monies.” Initially, the district court found this insufficient for standing to contest the forfeiture, but the circuit court, holding that “a verified claim of ownership” was enough to show standing at the motion-to-dismiss stage. When the government then served

interrogatories, Claimants responded with a blanket opposition arguing that the court's previous ruling obviated any need for a response, and also asserting the Fifth Amendment privilege to all questions. When the government tried to depose them, they again they "pled the Fifth" to almost every question, including questions about how they got the money and whether they owned it, and also about whether they were even at the airport in the first place. On a motion for summary judgment. The district court found that Wiggins and Allison had abused the discovery process by using the Fifth Amendment as a sword rather than a shield, and struck their ownership statements from their verified claims, leaving only the bare fact that they possessed the cash when the government seized it. The district court then found that mere possession (as opposed to ownership) did not give them standing and granted summary judgment to the government. On appeal again, the court agreed that they abused their Fifth Amendment privileges. The Fifth Amendment operates as a shield against compulsory self-incrimination, not a sword used to make one's assertions of ownership impervious to attack. Wiggins and Allison wielded the Fifth Amendment offensively, refusing to answer even basic inquiries. Although parties can invoke the Fifth Amendment against questions that would incriminate them – even questions about the contested property's origins – they run the risk of having their claim struck if they blanketly assert the privilege as a stonewalling tactic. Because Wiggins and Allison misused their Fifth Amendment privileges by refusing to answer even non-incriminating questions, the district court did not abuse its discretion when it struck their verified claims, and the only evidence left was a single, bare assertion that they were in possession of these monies, which alone cannot establish a sufficient interest in property to contest its forfeiture. And although the court decided they had standing at the motion-to-dismiss stage, it never held that they also had standing at summary judgment. Parties must demonstrate standing for each stage of litigation, so the law-of-the-case doctrine did not apply. *United States v. \$31,000.00 IN U.S. Currency*, No. 18-3701, 2019 WL 3425191 (6th Cir. July 30, 2019).

Fifth Circuit affirms dismissal of unsecured creditor's petition, but holds that petition of creditor with written loan agreement alleged sufficient facts to establish a facially valid claim and was entitled to ancillary proceeding regarding his interests. Huma and Salahuddin asserted interests in a convicted criminal defendant's property subject to criminal forfeiture and restitution, including cash and electronic devices, seeking ancillary hearings and the return of property. Huma, the defendant's sister, claimed that she had a "priority ownership" in and was a "bonafide purchaser" of the cash and devices because she had paid off a debt that he owed to a third party for lending him money to purchase electronic devices. The district court denied her motion because she was not a party to the criminal proceeding. Salahuddin contended he was a secured creditor of the defendant's and that he possessed a lien superior to that of the United States because he had executed a Collateralized Inventory Loan that placed that property "under lien." The court also denied Salahuddin's motion because he was an unsecured creditor of the cash and devices. On appeal, the court said Huma's petition for an ancillary hearing did not state a claim under 21 U.S.C. §853(n). The cash and devices were located in Texas, so whether Huma held a valid security interest in that property was governed by Texas law, which provides that where collateral is not in the possession or control of a purported secured party, a security interest cannot arise unless the parties execute a written security agreement, signed by the debtor, that contains a description of the collateral. Huma, however, did not produce a written security agreement to establish her as a secured creditor with a lien on the cash or devices. Her petition

asserted only an unsecured interest in the cash and devices, so she was merely an unsecured creditor, and thus generally lacked standing to contest forfeiture of their debtor's property. She also was a "bona fide purchaser for value" of that property, since she alleged no facts to support that claim. Accordingly, the district court properly rejected Huma's petition for an ancillary hearing. In his petition, Salahuddin claimed he and the defendant executed a Collateralized Inventory Loan, which he attached as supporting evidence. The loan agreement provides that Salahuddin would lend the defendant up to \$400,000 for the purchase electronic devices. It also granted a first priority lien in the property. Therefore, he alleged sufficient facts to establish a facially valid third-party claim to the devices and was entitled to an ancillary proceeding regarding his interests. *United States v. Butt*, No. 18-20131, 2019 WL 3071295 (5th Cir. July 15, 2019).

New York district court refuses to strike claim because claimant's belated answer due to law office's tracking error constituted excusable neglect. This case arose from a DEA investigation of an organization that laundered drug proceeds for narcotics traffickers in California and New York. The DEA seized \$96,900.00, but neither the Claimant Chen nor the person from whom the funds were seized was charged with a crime related to the currency. The government filed a verified complaint and Chen filed a timely Verified Claim. Chen filed a letter requesting a time extension to file an answer, which the Court granted and extended the deadline. Chen failed to file a timely answer, for which he blamed on an administrative office failure at his attorney's office, which did not track the status of the answer because the calendar clerk failed to record the extended deadline. Also, the person responsible for keeping track of deadlines resigned from the law firm without informing their former colleagues about the deadlines. The government moved to strike the Claim, and in a cross-motion Chen asked the court for favorable use of discretion and for an extension of time to file an answer. Chen asserted his ownership of the funds and contended he was an innocent owner likely to succeed in his claim, and attached a proposed answer as an exhibit to his moving papers. The government did not contest Chen's Article III standing and conceded he filed a timely Claim, but argued Chen lacked statutory standing since he failed to file a timely answer. After considering the relevant factors, the court found that the reason for delay, the length of delay, and the prejudice to the claimant weighed in favor of granting his motion to extend the deadline to answer. Considering the "reason for delay" factor predominated when balancing these factors, and the courts' preference for deciding cases on the merits, the court found that Chen's failure to file a timely answer amounted to "excusable neglect." *United States v. 96,000.00 in United States Currency*, No. 1:18-CV-5993 (ALC), 2019 WL 3334493 (S.D.N.Y. July 25, 2019).

Missouri district court denies motion to strike claim since claimant sufficiently stated a "colorable ownership interest" in responses to special interrogatories. Claimant was traveling on Interstate 70 when he was stopped by police officers for following another vehicle too closely. Claimant's pickup truck was subjected to a K9 sniff, and the dog alerted to the presence of a controlled substance. Although none were found, the officers seized \$195,005 from a black duffle bag. Claimant was not issued a traffic citation. He told the officers he did not have an ownership interest in the money, and signed a disclaimer of property form. After Claimant filed a claim to the defendant property and the government served special interrogatories, he served his answers, which counsel for the government contended were not sufficient, particularly

because the claimant has previously disclaimed his interest in the defendant property. Claimant answered number 4(a) – which asked about the date, time, and place in which he acquired any portion of the property – by referring to previous employers between 1998 and 2017, a \$12,000 workers compensation payout in 1993, the sale of various unspecified vehicles over the years, tax refunds totaling over \$90,000, gifts of Hewlett Packard stock from his parents totaling approximately \$118,000, and four or five other gifts from his parents ranging from \$22,000 to \$26,000. The income from those alleged sources totaled \$246,000 – well over the amount seized from claimant. None of the alleged sources of income were disclosed with the details specified in the Special Interrogatories. Special Interrogatory No. 5 asked the claimant to identify all documents relating to his answer to Interrogatory No. 4. Claimant’s answer attached copies of cash withdrawal receipts totaling \$97,300 and his statement from the Social Security Administration indicating his taxed Social Security and Medicare earnings. In response to the motion to strike, he also belatedly attached five previously-undisclosed pages of redacted bank statements. Claimant did not, however, make any effort to show his expenses for that same period, nor explain how the \$100,000 ended up in a duffel bag in his vehicle. Furthermore, he made no effort to rectify his current position with his statements to law enforcement that the seized currency did not belong to him. The court denied the motion to strike the claim, holding that the claimant sufficiently stated a “colorable ownership interest” and thus satisfied Rule G(6). This ruling did not foreclose the government from pursuing the details through regular discovery. *United States v. One Hundred Ninety-Five Thousand, Five Dollars in U.S. Currency (\$195,005.00)*, No. 4:18CV1501 SNLJ, 2019 WL 3082651 (E.D. Mo. July 15, 2019).

Second Circuit affirms securities fraud criminal forfeiture judgment because forfeited funds were traceable to fraud, and defendant misappropriated large sums of the money others invested in his hedge funds for his own use. Martin Shkreli appealed from an amended judgment ordering forfeiture in the amount of \$7,360,450.00, following a jury verdict for securities fraud. Shkreli argued that forfeiture in the amount of \$6,400,450, representing the total amount invested by investors in his hedge funds, was inappropriate because 1) not all investors testified, and thus the government did not prove that the funds associated with the non-testifying investors were acquired by fraud; 2) the amount should have been reduced to account for losses he incurred by making trades for the funds; and 3) the large returns seen by investors in the funds should reduce the forfeiture to zero. The court agreed with the government that the continuing misrepresentations sent to all investors in the funds (in the form of false performance reports sent out on a regular basis, for example) clearly linked Shkreli’s ability to retain the invested money to his fraud. As such, there was no clear error in the district court’s factual finding that the money associated with all the investors was traceable to Shkreli’s fraud irrespective whether or not the investors testified. The court also said it was Shkreli’s burden to prove his direct costs, and he failed to do so. For example, he argued that for one hedge fund “[his] net gain, after the investment of the received funds was factored, was a significantly lesser amount” than the full amount originally invested in the fund, but he did not explain what that net gain might have been or how the court should have calculated it. Lastly, “forfeiture is gain based,” not based on the losses (or gains) to victims. Shkreli made no suggestion that he did not profit from the frauds. To the contrary, the district court found he misappropriated large sums of the money invested in his funds for his own use. The court therefore affirmed the judgment of the district court. *United States v. Shkreli*, No. 18-819-CR, 2019 WL 3228933 (2d Cir. July 18, 2019).

Ninth Circuit reverses stay order because district court made no factual findings and relied on conclusory allegations. The government obtained ex parte civil seizure warrants in the Central District of California authorizing the pre-trial seizure of approximately 89 bank accounts belonging to Backpage.com’s corporate parent’s owners containing proceeds of alleged crimes. After the seizures, the owners filed a motion to vacate or modify the seizure warrants alleging that the seizures violated their constitutional rights. Without responding to the motion, the district court stayed proceedings pursuant to 18 U.S.C. §981(g)(1), pending the related criminal matter in the District of Arizona. The owners appealed the Stay Order arguing that the district court erred in imposing the stay by failing to first address the constitutional challenges to the pretrial seizures. The court said that while 18 U.S.C. §981(g) permits a court to stay a civil forfeiture proceeding when “civil discovery will adversely affect ... the prosecution of a related criminal case,” it still requires some minimal showing by the government of such effect. Here, the government alleged concerns regarding the impact of the disclosure of privileged materials on its strategy in the criminal case, but the court made no actual findings about the materials, nor did the record reflect any type of in-camera review to verify that those allegations had any merit. Thus, the court found no basis outside of conclusory allegations in the record for such a stay. *In re Any & All Funds Held in Republic Bank of Arizona Accounts XXXX1889*, No. 18-56455, 2019 WL 3430476 (9th Cir. July 30, 2019).

D.C. district court dismisses some claims for relief but allows others to proceed in lawsuit alleging Customs delays in processing petitions for remission and claims in administrative forfeiture proceedings. The plaintiffs import and sell replacement parts for automobiles, including automotive “repair grilles.” Customs and Border Protection (CBP) began seizing grilles imported by the plaintiffs at ports in Georgia, California, and Minnesota. CBP said the grilles were unlawful counterfeits of trademarked grille designs registered by the original auto manufacturers. By law, when an importer receives notice of a seizure by CBP, the importer can file a “petition for remission or mitigation” with CBP, and then work together to resolve the dispute informally, without court intervention. At any time, the importer can opt out of this process and elect to challenge the seizure in a judicial forfeiture proceeding instead. The importer alternatively can submit a claim to the seized property, along with a bond, to CBP, and the U.S. Attorney must either seek civil judicial forfeiture of the goods in federal court or decline to do so (in which case the goods are returned to the claimant). The plaintiffs filed this action challenging CBP’s delay in referring the plaintiffs’ claims to DOJ and DOJ’s delay in initiating forfeiture proceedings for the claims that had been referred. The plaintiffs also sought an injunction compelling the government to return the plaintiffs’ property or initiate forfeiture proceedings within a specified time. When months went by without a ruling from CBP, the plaintiffs withdrew some of their petitions and elected to pursue the judicial forfeiture option instead. Roughly five months after the first seizures occurred, CBP began denying some of the plaintiffs’ administrative petitions. The complaint sought relief under the Due Process Clause of the Fifth Amendment, the APA, and the Court’s equitable jurisdiction. The plaintiffs also sought a declaration that DHS violated the plaintiffs’ Fifth Amendment rights, an injunction compelling the return of the plaintiffs’ property in every case in which their Due Process rights were violated, and injunctions compelling CBP to refer the plaintiffs’ claims to DOJ and to immediately inquire into the plaintiffs’ claims and direct the local U.S. Attorneys to either return the plaintiffs’ property or file forfeiture proceedings. The plaintiffs further sought compensatory damages from

individual defendants sued in their personal capacities under *Bivens v. Six Unknown Named Agents* under the Fifth Amendment. The government moved to dismiss, first arguing that the plaintiffs' requests for injunctive and declaratory relief were moot because CBP had since referred most of the plaintiffs' claims to DOJ, and DOJ initiated forfeiture actions for many (but not all) of those claims. The court, however, said these actions plainly did not moot all the relief sought by the plaintiffs, since CBP had still not referred one of the plaintiffs' claims, which had now been pending with CBP for well over eight months, and still had not filed forfeiture actions for 21 of the claims the plaintiffs filed before bringing the suit. The court noted that LKQ could trigger rapid filing of an unreasonably delayed judicial forfeiture proceeding by filing an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property. Nonetheless, the government urged the court to decline to exercise equitable jurisdiction because another "adequate remedy" exists, i.e., LKQ could challenge the seizures in future forfeiture proceedings. However, the government failed to recognize the alleged injury and remedy sought here – LKQ contended the government deprived it of the opportunity to challenge the seizures in a timely manner. The Supreme Court has repeatedly acknowledged the existence of the equitable remedy LKQ sought, and has never suggested that the availability of a future forfeiture proceeding raises a jurisdictional bar to the remedy. The plaintiffs' APA claims concern CBP's alleged failure to "promptly" refer their claims to DOJ, as required by 19 U.S.C. §1603, and DOJ's failure to initiate forfeiture actions "without delay," as required by 19 U.S.C. §1604. The court said the plaintiffs have one remedy now that enables them to trigger forfeiture proceedings (or have their property returned), and they will have a second remedy later that will enable them to address any prejudice that may have resulted from the government's delay in commencing those proceedings. These two remedies, together, deprived the court of jurisdiction over the plaintiffs' APA claims. Also, the plaintiffs did not allege facts with sufficient specificity to establish personal jurisdiction over the unnamed defendants, at least at this stage. Finally, the facts and legal theory differed meaningfully from that of the original three *Bivens* cases, since the remaining individual defendants were high-ranking, government officials within the executive branch, rather than the line-level FBI agents sued in *Bivens*. The plaintiffs challenged what amounted to discretionary, resource-based judgments made by those high-level officials. Most crucially, the presence of a comprehensive statutory scheme governing customs regulations counseled strongly against expanding the implied *Bivens* cause of action to the plaintiffs' claims. Thus, the court declined to extend *Bivens* to the present context. *LKQ Corp. v. United States*, No. 18-CV-1562 (DLF), 2019 WL 3304708 (D.D.C. July 23, 2019).