

New York district court holds that where property was criminally forfeited but, on appeal, government conceded there was no nexus to drugs, but then filed a civil forfeiture complaint, it failed to take the proper steps to maintain custody of the property, and must show evidentiary value for its continued custody. After a lengthy investigation into a large narcotics trafficking operation, officers seized \$296,172.00 and a 2008 Ford Expedition from claimant Joshua G. Stegemann's premises. A few days later, officers seized \$160,020.00 inside a safe at Stegemann's sister's residence. After Stegemann filed claims, he was indicted and then convicted on drug and firearm violations, and the court ordered criminal forfeiture of the property. On appeal, the government conceded it failed to demonstrate the requisite nexus between the defendant property and the criminal activity. On the same day as the government's concession, it filed a civil forfeiture proceeding against the property. Stegemann then sought dismissal, which the court denied, although the court noted that the government had thus far failed to take the proper steps to maintain custody of the property. The government filed an amended complaint, which was followed by Stegemann's motion to dismiss. The court said the only issue was whether the government took the steps necessary to preserve its right to maintain custody of the property; if not, CAFRA mandates the prompt release of the property and bars the government from taking any further action to effect civil forfeiture in connection with the underlying offense. Generally, the government can comply with 18 U.S.C. §983(a)(3)(B)(ii)(II) by obtaining a protective order under 21 U.S.C. §853(e) or – if the government demonstrates that a protective order is insufficient to assure the property's availability for forfeiture – a criminal seizure warrant under 21 U.S.C. §853(f). Courts have found that where the government already has custody of property, it can discharge its obligation and preserve the property's availability for forfeiture by seeking a "house keeping order" under §853(e). The government need not take any additional steps where it either seized the property with a multi-purpose warrant based on both 18 U.S.C. §981(b) and 21 U.S.C. §853(f), or holds the property as evidence. The property's evidentiary value may provide an independent basis for the government to maintain possession of it during the pendency of a criminal forfeiture proceeding. This corresponds with the generally-accepted rule that a district court cannot order the return of property on a Fed. R. Crim. P. 41(g) motion when the government has a continuing need for the property as evidence. When the government properly maintains possession of property based on a valid evidentiary basis, no additional steps are necessary to satisfy §983(a)(3)(B)(ii)(II). Nonetheless, if the government's continued possession of property is based only on its evidentiary value, the government must seek an alternative basis to maintain possession if and when that evidentiary value evaporates. The government still must comply with 18 U.S.C. §983(a)(3)(B)(ii)(II) when it initially seizes property pursuant to 18 U.S.C. §981 but instead pursues criminal forfeiture. If the government only pursued criminal forfeiture, the mandates of 18 U.S.C. § 983(a)(3) would be irrelevant. However, since the government eventually decided to commence these civil forfeiture proceedings, it had to satisfy both §983(a)(3)(B)(ii)(I) and (II), or it was barred from taking any further action to effect civil forfeiture. Were the court to adopt the position that all the government had to do to preserve its ability to file a subsequent civil forfeiture proceeding was name the defendant property in the criminal indictment within ninety days of Stegemann's claim, it would render §983(a)(3)(B)(ii)(II) wholly superfluous. Moreover, CAFRA's procedural safeguards could be easily circumvented, given that Supp. Rule G(3)(b) requires the court clerk to issue a warrant of arrest in rem for property in the government's possession without the need for any probable cause determination. Under such circumstances, there would be no initial check

on the government's continued possession of property, which is the very type of abuse that Congress sought to curb by enacting CAFRA. Also, the government did not identify the evidentiary value of the defendant property or specify how long it persisted; it appeared the evidentiary value of the currency was arguably lost when it was deposited into bank accounts. Although the Marshals Service has been in continuous custody of the currency and SUV, its policy manual indicates that the Marshal does not store property held as evidence, even when it is subject to forfeiture; instead, the property must be retained in the custody of the seizing agency until it is no longer needed for evidence. Also, the government only relied on photos of the property at trial. Therefore, the court ordered the government to identify any specific evidentiary value of the property and how long this value provided an independent basis for its continued possession of the property. *United States v. \$16,072.00 in U.S. Currency*, No. 117CV308GLSDJS, 2019 WL 1229827 (N.D.N.Y. Mar. 15, 2019).

Michigan district court denies dismissal, finding that forfeiture complaint just barely stated sufficiently detailed facts to support a reasonable belief that the government could meet its burden of proof. DEA agents seized \$82,300 from Claimant at the Detroit Metropolitan Airport and filed a civil forfeiture complaint. Claimant answered and filed a motion to dismiss but did not file a traditional verified claim until six days after his deadline to do so. On that basis, the government moved to strike Claimant's verified claim and dismiss his interest in the money for lack of standing. However, an affidavit attached to Claimant's motion to dismiss, which was filed within the time permitted by Rule G(5)(a)(ii), met the criteria for a verified claim. It explained that the \$82,300 was part of \$158,500 he won at the Motor City Casino on January 28, 2018, the day before he was stopped at the Detroit airport. Critically, the affidavit was signed and sworn by Claimant and served on the government along with the motion to dismiss. The court thus construed it a timely verified claim and denied the government's motion to dismiss. Claimant moved to dismiss the complaint on the basis that the government had not satisfied the pleading requirements. Because it was filed after his answer, the court considered it a motion for judgment on the pleadings under FRCP Rule 12(c), which are functionally equivalent to a motion to dismiss. Rule G(2)(f) outlines the heightened pleading standard applicable in civil forfeiture actions, and provides that complaints in civil forfeiture actions must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." At the same time, Rule G(8)(b)(ii) provides that a civil forfeiture complaint "cannot be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." Under Rule 12(c), Rule G, and CAFRA's burden of proof provision, 18 U.S.C. §983(c)(1), the government must plead facts sufficient to establish by preponderance of the evidence that the \$82,300 was properly subject to forfeiture and had a "substantial connection" to unauthorized drug sale or purchase. Here, although Eddington had multiple prior felony drug convictions, such history is not in and of itself proof that the money he was carrying was used in illegal drug sales or purchases. The trained narcotics canine alert did suggest that the money was connected to the purchase or sale of illegal narcotics, but to establish a "substantial connection" between the \$82,300 and illegal drug trafficking was a closer call. Since a complaint cannot be dismissed because the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property, to dismiss at this stage solely because of a somewhat slack connection in the complaint between the seized money and drug trafficking seemed to violate this Rule. The court

said it may be that further investigation had discovered additional evidence showing a substantial connection between the money and drug trafficking. So, evaluating the sufficiency of the complaint under Rule G(2), the court found, though perhaps just barely, that the complaint stated sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial and denied the motion to dismiss. *United States v. Eighty-Two Thousand Three Hundred Dollars (\$82,300) in U.S. Currency*, No. 2:18-CV-11848, 2019 WL 1112390 (E.D. Mich. Mar. 11, 2019).

Eighth Circuit holds that Rule G(5) establishes only a bare-bones requirement to state the claimant's interest in the property, and not particularity. This case arose from a traffic stop conducted by an Arkansas State Police corporal who found two boxes containing \$579,475.00 in the cab of a tractor trailer. The government filed civil forfeiture complaint and LNG, a trucking company, filed a verified claim of ownership. The government moved to strike the claim for failing to comply with Supplemental Rule G(5)(a)(i)(B), which requires the claim to identify the claimant and state the claimant's interest in the property. The court struck the claim. The appeals court, however, concluded that the "specificity" requirement imposed by its prior decision was not supported by the rule, and that LNG's claim was sufficient to comply with Rule G(5). LNG, by asserting that it was "the owner" of the currency, and that it had "a claim to, interest in, and right to the property," satisfied the requirement to "state the claimant's interest in the property." To impose a mandate that the claimant must provide more detail or specificity, such as information about how it obtained the funds at issue, would go beyond the sparse terms of the rule. The government contended the court should look to Supplemental Rule C and Federal Rule of Civil Procedure 8 to determine the degree of specificity required. However, Rule G(5) addresses the issue of what is a sufficient claim; it establishes only a bare-bones requirement to "state the claimant's interest in the property." The absence of a particularity requirement in Rule G(5), despite its presence elsewhere in Rule G, e.g., Supp. R. G(2)(c), G(5)(a)(iii), showed that the rulemakers opted not to impose one for stating an interest in property. Courts are not licensed to impose heightened pleading requirements in certain classes of cases simply to avoid the risk that unsubstantiated claims will burden the courts and opposing parties. Rule G sets a low threshold for the filing of a claim, but provides another mechanism to address unsubstantiated claims. Rule G(6) allows the government to serve special interrogatories that may be used to test the claimant's relationship to the property at any time after the claim is filed, and a claimant's failure to comply with the interrogatory rule is grounds to strike the claim, pursuant to Supp. R. G(8)(c)(i)(A). The prior decision did not analyze the specificity question under Rule G(5) and seemed to believe that it was already settled by circuit precedent. The cited decisions, however, involved a predecessor rule with slightly different text and, more importantly, did not address whether an assertion of ownership is sufficient to state a claimant's interest in property, so it appeared in retrospect that the specificity requirement crept into circuit law without a panel decision that examined the precise issue. The decision in the prior decision created a conflict in the circuits, and another circuit later rejected the court's approach, so the court said leaving an erroneous precedent in place would perpetuate unwarranted disuniformity in the law. Addressing such a conflict in authority is one of the exceptional circumstances for which *en banc* review is designed, per Fed. R. App. P. 35(b)(1)(B). The court therefore overruled the portion of its prior decision that imposed a specificity requirement for the statement of a claimant's interest in property under Rule G(5)(a)(i)(B). *United States v. \$579,475.00 in U.S.*

Currency, 917 F.3d 1047, 1048–50 (8th Cir. 2019).

California district court holds that incarceration, standing alone, was not a basis for tolling statute of limitations for filing Rule 41(g) motion for return of property. Defendant moved for return of property pursuant to Federal Rule of Criminal Procedure 41(g) for property seized pursuant to a search warrant from Defendant's residence. Defendant was indicted for conspiracy to commit tax evasion and presenting false and fraudulent financial instruments in the form of “Bills of Exchange” that purported to be securities or financial instruments. He was convicted on all counts. The government moved to dismiss the motion for return of property on statute of limitations grounds. The court found that the applicable statute of limitations was six years. When a Rule 41(g) motion is made after the termination of criminal proceedings against the defendant, a court treats it as a civil complaint for equitable relief. Such a motion accrues when the party seeking return of his property discovered or had reason to discover that his property was improperly seized. Further, where there has been a related criminal proceeding but no civil forfeiture proceeding, the cause of action accrues at the end of the criminal proceeding during which the claimant could have sought the return of his property by motion. Defendant's motion for return is subject to a six-year statute of limitations that accrued on February 14, 2012, the day this Court entered its Amended Judgment and Commitment. The motion, filed January 7, 2019, almost seven years after the Amended Judgment and Commitment, thus was untimely. Defendant argued that his claim was not time barred because the government had not yet provided notice of its intent to proceed via a forfeiture action. However, there had been criminal proceedings in the case, so the time ran from the end of the criminal proceedings. Defendant also argued that he has been under legal disability since his incarceration on October 3, 2011, suggesting that this should toll the statute of limitations period. Although there is a California statute that defines a “disability of imprisonment” and tolls any cause of action brought under state law for up to two years for any person incarcerated at the time the cause of action accrued, the court could not identify any authority that suggested this was a form of “legal impairment” sufficient to toll the statute of limitations in this federal case. Thus, incarceration, standing alone, was not a basis for tolling under an alleged “legal disability.” Accordingly, the court held that Defendant's motion was time-barred. *United States v. Ioane*, No. 1:09-CR-00142-LJO-03, 2019 WL 1332188 (E.D. Cal. Mar. 25, 2019).

North Carolina district court dismisses ancillary petition because petitioner did not demonstrate a valid legal interest in vehicle and, therefore, had no statutory standing. Chandler pleaded guilty to drug and firearms violations. The court issued a Judgment of Forfeiture under which he agreed that a silver 2006 BMW was subject to criminal forfeiture. Although at the time of his arrest Defendant was seated in the driver's seat of the BMW with approximately 553.4 grams of suspected methamphetamine, several thousand dollars, digital scales, two syringes, a .40 caliber handgun that was later determined to be stolen, a loaded .40 caliber magazine, and several zip lock bags, the government learned the BMW was registered in Claimant's name. Accordingly, consistent with 21 U.S.C. § 853(n)(1), the government provided direct notice of the forfeiture to Claimant by mailing him a copy of the Consent Order and Judgment of Forfeiture, along with a summary of the requirements for filing a valid petition. In particular, the Notice made clear that the petition must be signed by the petitioner under penalty of perjury and set forth the nature and extent of the petitioner's right, title or interest in each of

the forfeited properties. Claimant filed a petition asserting that the BMW has not been fully paid for by Chandler and the car was still in Claimant's name. The government moved to dismiss the petition, arguing he failed to satisfy the requirements of 21 U.S.C. §853(n)(3) and otherwise failed to sufficiently demonstrate a valid interest in the vehicle. The court directed Claimant to file an Amended Petition under penalty of perjury within 14 days. Claimant filed an Amended Petition but signed it in the presence of a notary, and attached a document he contended was his current title status statement, and a DMV statement for the vehicle. The government moved to dismiss again, arguing Claimant still failed to satisfy the requirements §853(n)(3). The court advised Claimant that he had the right to file a written response and explain why his Amended Petition should not be dismissed, and allowed 14 days to respond to the Government's Motion to Dismiss. Claimant did not respond and the time to do so passed. The court said the mere fact that an individual signed a document before a notary did not establish that he signed under penalty of perjury; it only demonstrated that the person signing the document was who he purported to be. Even a pro se litigant must comply with the applicable legal requirements. Claimant had at least three opportunities to comply with §853(n)(3), but patently failed to follow the statute or the instructions in the court's two previous orders. Although the court could summarily dismiss the Amended Petition, in an abundance of caution, it addressed the merits of the Petition. While Claimant contended he sold the vehicle to Chandler and Chandler had not fully paid him, the government pointed out that Claimant did not explain when this sale took place, the terms of the sale, and how much remained owed. In support of his petition, Claimant provided only his current title status and a DMV statement for the vehicle. This evidence merely showed that he had "bare legal title" to the vehicle, but did not demonstrate dominion or control or other indicia of true ownership of the forfeited property. Claimant should have submitted, as the Court instructed in its previous Order, copies of any paperwork showing he owned the car or that Defendant failed to pay for the car, such as a financing agreement, Bill of Sale, title, copies of checks, and receipts for payment of registration and taxes. Without such documentation, there was no proof Claimant legally purchased the car for value, that he was responsible for its care and maintenance, or that he exercised any other form of dominion and control over the vehicle. Thus, the court found that Claimant was merely a nominal owner of the vehicle, did not demonstrate a valid legal interest and, therefore, had no statutory standing under Section 853(n)(3). *United States v. Chandler*, No. 118CR00079MOCWCM, 2019 WL 1427556 (W.D.N.C. Mar. 29, 2019).