

Ninth Circuit holds that because the forfeiture judgment amounted to joint and several liability, the court vacated and remanded it for a determination of the defendants' individual liability. The district court found that Defendants stole \$160,000 in the Idaho fraud, \$1,000,000 in the Montana fraud, and \$855,000 in the North Carolina fraud, for a total of \$2,015,000. The \$160,000 from the Idaho fraud went to one lawyer's trust account before being distributed into several accounts. At least one account owned by defendant Thompson was used to issue defendant Fincher checks totaling thousands of dollars. The court said Fincher and Thompson jointly obtained all the fraud proceeds because it was a joint decision to have the money initially go into the attorney's trust account. The \$1,000,000 from the Montana fraud went to another attorney's trust account, directed by Thompson. There was no evidence that Fincher directed those proceeds, however \$196,500 was disbursed to an account owned by Fincher in three separate transactions. Fincher later withdrew some of this money as a cashier's check to pay for a pickup truck. Fincher also wired \$9,000 to Thompson. The \$855,000 from the North Carolina fraud went to a third attorney's trust account "controlled and directed" by Thompson, but from which \$275,000 was wired to Fincher's bank account. The court held that Fincher obtained \$631,500 of the total proceeds, even though the court found that less than that came to rest with Fincher. The court ordered Fincher to forfeit the pickup truck plus \$631,500, representing the fraud proceeds he obtained directly and indirectly. The court also ordered Thompson to forfeit the pickup truck plus \$2,015,000, he obtained, directly and indirectly. There were not two pickup trucks. Defendants argued on appeal that the forfeitures amounted to a joint and several forfeiture impermissible under the Supreme Court's recent decision in *Honeycutt*, and that the district court should be required to apportion the total proceeds they obtained individually. The court first held that *Honeycutt* applies to forfeitures under 18 U.S.C. §981(a)(1)(C). Under Section 981, forfeiture cannot extend beyond the tainted property and proceeds traceable to it, such as the pickup truck Fincher bought with the stolen money. Yet the money judgments against Thompson and Fincher were not based on findings of how much of the proceeds came to rest with them, nor did the government show that it complied with Section 853(p) to obtain substitute property. To forfeit money from Thompson, the district court was required by Section 981 to find that the amount forfeited came to rest with him as a result of his crimes. The same for Fincher. The district court made no findings establishing how the loot was divided among the conspirators. Because the forfeiture judgment against Thompson and Fincher amounted to joint and several liability contrary to *Honeycutt*, the court vacated and remanded it. *United States v. Thompson* (9th Cir. 2021) 990 F.3d 680.

Tennessee district court grants partial summary judgment for government because claimant did not establish her standing. Officers stopped a van and camper trailer in which Michelle Avery was a passenger. A criminal history check revealed an outstanding warrant for her arrest on drug-related charges. During a search, a K-9 alerted to the presence of the odor of narcotics, and officers found a backpack filled with bundles of money wrapped in rubber-bands and placed in manila envelopes inside the van. Avery gave a false name and date of birth, and said some of the money was the result of deaths in the family, some was from selling drugs, and \$35,000 was her savings from buying and selling things. After the government filed a forfeiture complaint, Michelle's mother Mary filed a claim to a portion of the defendant property, asserting it belonged to her, and loaned it to Michelle. The government moved for summary judgment claiming Mary did not have statutory or Article III standing. In her first affidavit filed with her claim to the property, Mary stated that the defendant funds came from a portion of inheritance

from Michelle's father and grandfather, combined with a cash/gift loan to Michelle and Michelle's savings from retail sales and basement rental of her home. The court said that Mary, however, could not claim an ownership interest in Michelle's inheritance or retail income, which is Michelle's property. In response, Avery submitted a second affidavit stating that she loaned her daughter \$213,000 from her cash reserve fund and expected repayment and that the seized defendant funds include \$190,600 of the loaned cash. She also introduced several years of bank statements showing a series of cash withdrawals from accounts held by her late husband and transfers from his bank account to Michelle's bank account. Mary did not introduce any loan document, security agreement, or other evidence showing that she made a loan to Michelle or establishing the terms of such a loan, nor did she claim that the purported loan was secured by collateral. The court agreed that Mary did not have standing to pursue a claim to the defendant property, but was, at most, an unsecured creditor, and granted partial summary judgment as to her claim. *United States v. \$191,222.00* (M.D. Tenn., Mar. 25, 2021, No. 3:19-CV-00977) 2021 WL 1143888.

Second Circuit modifies order releasing rental income to claimants because government was required to provide a pre-deprivation hearing or establish exigent circumstances for seizure. The government sought forfeiture of 650 Fifth Avenue, a building in midtown Manhattan, as well as other assets owned by the claimants. The district court ordered the government to release to Claimants a portion of rental income generated from the building. On cross-appeal, the court modified the order releasing rental income first finding that Claimants were deprived of their management rights, transfer rights, rights to improve the property, rights to negotiate and contract with tenants and third parties, and the right to collect rental income, exactly the kinds of meaningful restrictions over real property and interests in the same that rise to the level of a seizure as opposed to a mere restraining order. Moreover, prior to the seizure, the government was required to provide a pre-deprivation hearing or establish exigent circumstances, neither of which it did. Accordingly, the seizure violated Claimants' constitutionally protected due process rights. The government argued the district court's finding of probable cause for the seizure meant that previously unlawfully seized rental income should not be released. The court disagreed. Although an illegal seizure standing alone does not immunize property from forfeiture, the government must account for the profits or rent which it denied the claimant during the period of illegal seizure. *In re 650 Fifth Avenue Company* (2d Cir., Mar. 9, 2021, No. 20-1212) 2021 WL 865286.

Illinois district court denies motion to dismiss complaint because totality of circumstances of currency seizure showed reasonable grounds for the belief of guilt supported by a substantial chance of criminal activity. DEA task-force officers observed Cook driving along Interstate-70 in Illinois in a white car that "was extremely dirty," with the driver's side rear window partially down, which the officers thought was suspicious due to the outside temperature being approximately 30 degrees. The officers followed him and noticed that he was tailgating the car in front of him and that he had a material obstruction in the front windshield, which appeared to be a bracket for holding a cell phone or a GPS system. Then they observed the vehicle travel over the white fog line. Based on these traffic violations (i.e., tailgating, obstructed view, and improper lane usage), the officers determined there was sufficient probable cause to conduct a traffic stop. When the officers approached, Cook rolled down all four windows of the vehicle. The officers thought that he was attempting to air out the vehicle from possible drug odor or a masking agent odor. Cook then handed over his driver's license, and the

officers learned that he was from California, but was actually “a student in Utah.” He said his grandmother recently moved to Indiana and left some of her belongings in California, so he went to Indiana to deliver those items and help her move. The officers found that story suspicious because there were not any current holidays that would explain why Cook might be on a school break. Cook also looked “visibly nervous,” evidenced by shaky hands and constricted pupils. They observed in plain view two large duffle bags laying flat in the rear area of the vehicle, which, in their experience, are commonly used to transport large quantities of illegal drugs. The officers discovered Cook did not own the car but it belonged to Lisa Cook. From the officers’ perspective, drug traffickers utilize third party vehicles in an attempt to not have the vehicle seized if caught by law enforcement transporting illegal drugs. One of the officers googled Cook's address and learned that his hometown in California was near the “Emerald Triangle,” known for growing the largest amount of cannabis in the United States. A K-9 gave a positive indication for the odor of narcotics. Cook advised he had “pot” in the center console area and approximately \$120,000 in cash. The duffel bags previously observed were practically empty but emanated “a strong odor of raw cannabis,” and one contained several large storage Ziploc bags. Officers found several rubber banded bundles of currency beneath some clothes in another duffel bag. Based on these suspicious findings, the officers seized the money. After the government filed a civil forfeiture case and Cook filed a claim, he moved for dismissal, arguing the complaint presented ambiguous facts that constituted, at best, mere suspicion and conjecture that the money was traceable to illegal drug proceeds or was intended for an illegal drug transaction. He said that the pipe, open windows, and jars of marijuana found in the vehicle merely suggested he was a user, not a distributor, and the K-9 simply alerted to the scent of marijuana generally in the vehicle, not the scent of marijuana on the cash itself. The court disagreed, finding reasonable grounds for the belief of guilt supported by a substantial chance of criminal activity, including the fact that Cook's hometown was near California's Emerald Triangle, he had shaky hands and constricted pupils, and refused to discuss the source of the cash by stating, “I can't, they will kill me.” These facts helped nudge the government's claim from possible to plausible. While Cook suggested he was merely a marijuana user, using and dealing are not mutually exclusive activities. Thus, the government pleaded enough factual content to establish a nexus between the seized cash and criminal activity. *United States v. \$128,915.00* (S.D. Ill., Mar. 26, 2021, No. 20-CV-00667-JPG) 2021 WL 1165127.

South Carolina district court denies motion to dismiss because totality of complaint’s allegations supported a reasonable belief that the government could meet its burden of proof at trial. Claimants argued the complaint did not allege sufficient facts to satisfy the “reasonable belief” standard in Rule G(2)(f). Here, the government alleged that officers stopped and searched Claimants after reports they and their luggage smelled strongly of marijuana. Claimants admitted to smoking marijuana that day and a K-9 trained in narcotics detection alerted to claimants' luggage. These allegations suggested they had a drug connection or source. That belief was further supported by claimants' criminal records relating to drug possession. Additionally, claimants were carrying a large amount of cash bundled with rubber bands and hidden in various items of clothing, tending to suggest an illegitimate purpose or source of that money. Claimants' possession of the defendant currency was further suspect in light of claimants' reported wages, inconsistent claims of ownership of the cash, and inconsistent stories about the intended use of the cash. For example, one claimant first claimed that the defendant currency belonged only to them, but soon after claimed some of the money belonged to his mother, yet his mother did not file a verified claim of interest in the defendant currency.

Moreover, one claimant claimed the money was to purchase “beats” and shoot a music video with the other, an aspiring rap artist, however the ostensible rapper stated that he planned to use the money to purchase new clothes. The government also alleged that claimants were traveling to a “source state” via a one-way ticket. The totality of these allegations supported a reasonable belief that the government could meet its burden of proof at trial. Additionally, 18 U.S.C. §983(c)(2) expressly provides that the United States may use evidence gathered after the filing of a forfeiture complaint to meet its burden of proof. As such, dismissal at this stage in the litigation was premature since the allegations pleaded in the complaint were sufficient to survive the motion to dismiss. *United States v. \$32,920.00 in United States Currency* (D.S.C., Mar. 4, 2021, No. 2:20-CV-00137-DCN) 2021 WL 825654.

Third Circuit revives currency owner’s motion for return of property because district court relied on jail officer’s affidavit without converting government’s motion to dismiss into a motion for summary judgment. In August 2015, Love was arrested by police during a traffic stop in Allegheny County, Pennsylvania. During the stop, the police seized \$35,835 from Love. The DEA took control of the currency and commenced administrative forfeiture proceedings. At that time, Love was incarcerated at the Allegheny County Jail. In December 2015, the DEA, having received no claim to the currency from Love (or anyone else), declared the currency forfeited. About a year later, Love filed a *pro se* motion in the district court, seeking the return of the currency and arguing the DEA had “unlawfully taken” it from him. The government moved to dismiss. The government said the DEA had sent, via certified mail, notice of the forfeiture proceedings to Love at the jail. Love responded to the government's motion by alleging the DEA had violated his due process rights by failing to take adequate steps to notify him of the forfeiture proceedings. He alleged he had not received the forfeiture notice, and the DEA's attempt to send that notice to him was inadequate. The government responded by arguing that due process does not require actual notice of the forfeiture proceedings, and that the manner in which the forfeiture notice was mailed to him at the jail satisfied due process, attaching an affidavit from a jail officer. The district court granted the government's motion, with prejudice, for lack of jurisdiction. On appeal, the court held that in rejecting Love's due process claim, the district court relied on the affidavit, which cannot be considered under Rule 12(b)(6), and the court had not converted the government's motion to dismiss to one for summary judgment (nor did the district court comply with the requirements for effecting such a conversion. The government argued, however, that this failure to convert the motion to dismiss was harmless. In view of Love’s allegations of lack of notice, the court could not conclude there was no set of facts that could be proven to establish the DEA's liability. Because the court’s erroneous dismissal of Love's due process claim was not harmless, the court vacated that dismissal order and remanded for further proceedings. *Love v. DEA* (3d Cir., Mar. 30, 2021, No. 17-3830) 2021 WL 1191653.