

Civil and Criminal Forfeiture Procedure

U.S. Department of Justice
Asset Forfeiture & Money Laundering Section
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Part I - pages 51-100

- *United States v. Escandon*, No.1 :02-CV -1739-0DE (N.D. Ga. Feb. 27,2003) (unpublished) (if notices are sent separately to A and B, each with its own deadline, A's claim is not timely if it is filed after A's deadline but before B's deadline);

- The claimant does not have to wait for the Government to send notice to file a claim:

- *United States v. \$52,800 in U.S. Currency*, 33 F.3d 1337 (11th Cir. 1994) (claimant may file claim at any time after property is seized);

2. The claim is "filed" on the date it is received by the seizing agency, not when it is mailed:

- *Sandoval v. United States*, 2001 WL 300729 (S.D.N.Y. 2001) (claim is considered filed in a civil forfeiture action when it is received by the seizing agency, not when it is mailed by the claimant);

- *Florez-Perez v. United States*, Case No. 3:99-CV-1230-J-20A (M.D. Fla. Sept. 1,2000) (claim sent by Federal Express on the last day for filing a claim but not received by the DEA until the next day was not timely filed);

- *But see Longenette v. Krusing*, 322 F.3d 758 (3d Cir. 2003) (holding that in pre-CAFRA cases, the "mailbox rule" determined when a claim was filed with a seizing agency);

3. The claim must identify the property being claimed, state the claimant's interest, and be made under oath, *see* section 983(a)(2)(C):

- *Manjarrez v. United States*, 2002 WL 31870533 (N.D. In.. 2002) (claim filed by claimant's attorney, instead of by claimant personally, is not "under oath" as the statute requires, and therefore is not a valid claim);

- *Note*: Pub. L. No. 106-561, 114 Stat. 2787 (12/21/2000) amended 18 U.S.C. § 983(a)(2)(C)(ii) by deleting (1) the requirement that claimants provide customary documentary evidence that may be available to show their interest in the seized property being claimed and (2) the requirement that claimants state that their claims are not frivolous.

4. The cost bond is abolished, *see* section 983(a)(2)(E).

5. Fifth Amendment issues:

- *United States v. Salgado-Santana*, Crim. 00-0692CCC (D.P.R. Feb. 14) 2002) (unpublished) (defendant who refused to file claim in accordance with section 983(a)(2) citing Fifth Amendment concerns, is not a claimant and thus has no standing to request a stay of the forfeiture under section 981 (g); motion to vacate administrative forfeiture denied);

3. Time for filing a complaint: 18 U.S.C. § 983(a)(3):

1. The Government has 90 days from the filing of the claim to file a complaint, include the property in an indictment, or return the property, *see* section 983(a)(3):

- *United States v. \$39,480.00 in U.S. Currency*, 190 F. Supp. 2d 929 (W.D. Tex. 2002) (where the Government inadvertently filed its complaint on the 91 st day because of a clerical error on the date stamp, claimant suffered no prejudice, and strict enforcement of the 90-day rule would have had a "Draconian effect" on the Government's forfeiture case, the court equitably tolled the 90-day period and deemed the complaint timely filed);

2. The 90 days begins to run from the date the claim is received by the seizing agency, not the date on which it was mailed by the claimant

- *Manjarrez v. United States*, 2002 WL 31870533 (N.D. m. 2002) (90-day period in which the Government is required to file a civil, judicial forfeiture complaint does not begin to run until the claimant files a valid claim);

- *United States v. One GMC Yukon Denali*, CV 03-6890 LGB (C.D. Cal. Dec. 4, 2003) (90-day time period for filing a civil forfeiture complaint begins to run when the claim is received by the "propel" official in an asset forfeiture section of the seizing agency, not when it is received by a remote mail room);

- *See* Testimony of David Smith, National Association of Criminal Defense Lawyers, 1997 WL 11233673; CAFRA Legislative History at 212 ("if a person files a claim letter with the seizing agency, the U.S. Attorney would then have to file a civil forfeiture claim within ninety days of the receipt of the claim letter");

- *See* cases on deadline for filing a claim, *supra*.

3. If there is a bona fide dispute *as* to whether the claim filed in the administrative forfeiture proceeding was valid and timely, the 90-day period for filing the complaint should be tolled:

- *Longenette v. Krusing*, 322 F.3d 758 (3d Cir. 2003) (in pre-CAFRA case, court tolls statute of limitations under section 1621 to allow Government to file judicial forfeiture action because Government acted in good faith when it concluded that claim filed in the administrative forfeiture proceeding was not timely);

4. Under pre-CAFRA law, there was no filing deadline; the only consideration was whether a delay in filing the complaint violated due process:

- *United States v. \$8,850 in U.S. Currency*, 461 U.S. 555 (1983) (applying the 4-part test from *Barker v. Wingo*, Supreme Court finds that 18-month delay in commencing civil forfeiture action did not violate due process);

- *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (6th Cir. 2003) (in pre-CAFRA case, 5-year delay did not violate due process where first 3 years were due to Government waiting for parallel criminal case to conclude, and defendant did not seek return of his property during the remaining 2 years);

- *United States v. \$874,938.00 U.S. Currency*, 999 F.2d 1323 (9th Cir. 1992) (11-month delay from time of seizure not unreasonable);

- *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (30-month delay from time of seizure not unreasonable);

- *United States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (23-month delay not unreasonable where first 11 months were attributable to claimant's decision to file remission petition with Customs instead of immediately filing claim and cost bond);

- *United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997) (8-month delay not unreasonable where the Government waited until property no longer had evidentiary value in a criminal case);

- *United States v. Funds in Amount of \$37,760.00*, 1998 WL 42465 (N.D. In. 1998) (38-month delay justified because the Government was properly concerned with risk of civil discovery if it commenced forfeiture before conclusion of criminal case; also, claimant took no action to prompt earlier filing and suffered no prejudice);

- *In Re McCorkle*, 972 F. Supp. 1423 (M.D. Fla. 1997) (if most of claimant's property has been seized, then the Government must be reasonably prompt in filing civil or criminal forfeiture action; court sets 90-day deadline);

- *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (U.S.C. 1999) (delay in filing judicial forfeiture does not violate due process where property was administratively forfeited, claimant waited 2 years to challenge it, and the Government refiled 2 months after administrative forfeiture was vacated);

- *United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (filing civil forfeiture while criminal forfeiture was pending would have been redundant; therefore, nothing improper in waiting to file civil forfeiture until defendant's death made it necessary);

- *United States v. \$1,646,000 in Cashiers Checks and Currency*) 118 F. Supp. 2d 977 (N.D. Cal. 2000), *opinion withdrawn*, 118 F. Supp. 2d 1186 (N.D. Cal. 2000) (6-year delay between seizure and trial date was unreasonable where claimant suffered prejudice in being deprived of large sum of money for long time and Government had little justification for most of the delay; three-year period before case was referred to USAO, when Customs was reviewing and denying remission petition and time after AUSA filed complaint) but before trial date, all count against

Government);

- *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (8-month delay from time of referral of claim to USAO to time complaint filed not a constitutional violation);

- *United States v. Six Negotiable Checks*, 207 F. Supp. 2d 677 (E.D. Mich. 2002) (29-month delay - mostly attributable to Customs' practice of resolving remission petition first, then referring case to U.S. Attorney - did not violate due process);

- *Cf United States v. \$557,933.89, More or Less. in. U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (claimant makes no constitutional objection to the delay, but asserts that 15-month delay violated "promptness" requirement in pre-CAFRA version of section 981 (b); court holds that promptness requirement only applied to administrative forfeiture);

5. Under 21 U.S.C. § 888(c) (repealed), the Government had 60 days from the filing of a claim involving an automobile to file a complaint:

- *United States v. 1997 Mercedes Benz 5500*, No. 98-WM-2754 (D. Colo. Sept. 10, 1999) (unpublished) (section 888(c) operates only in favor of claimants who file claims in the administrative proceeding; person who did not file a claim and cost bond lacks standing under section 888 to object to the complaint); *id.* (sections 888 applies only to vehicles, not to property such as cash that is found inside the vehicle at the time it is seized);

- *United States v. Clinkscale*, 86 F. Supp. 2d 780 (N.D. Ohio 2000) (section 888 only applies to civil forfeiture; therefore, even if the Government missed the 60-day deadline for filing a civil forfeiture complaint, it was not barred from including the property in a criminal indictment);

6. The Government has the option of switching to criminal forfeiture within the 90 days or filing parallel civil and criminal cases, *see* sections 983(a)(3)(B) and (C):

- *In Re: 2000 White Mercedes ML320*, 220 F. Supp. 2d 1322 (M.D. Fla. 2001) (under section 983(a)(3)(B)(ii), if the Government switches to criminal forfeiture and does not file a civil complaint, it must get an order under section 853(e) to maintain custody of the property);

- Pre-CAFRA law:

- *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (there is nothing improper in the Government beginning a forfeiture case with a civil seizure and switching to criminal forfeiture once an indictment is returned; it is commonplace);

- *United States v. Lugo*, 63 F. Supp. 2d 896, 897 n.2 (N.D. In.. 1999) (the Government may start a forfeiture action as an administrative forfeiture and then proceed with a criminal forfeiture if defendant files a claim);

- *United States v. One 1990 Arctic Cat EXT Snowmobile*, 1996 WL 132107 (S.D.N.Y. 1996) (claimant in civil forfeiture case could not object to the Government's motion to dismiss the

forfeiture action once the property was forfeited in a criminal case even though the claimant saw some strategic advantage in proceeding with his civil claim);

C. Arrest warrants *in rem* - Rule (C)(2):

1. At the time a complaint is filed, the court issues a warrant for the arrest of the property *in rem*, pursuant to Supplemental Rule C(2):

- *United States v. Real Property 874 Garrel Drive*, 79 F.3d 86 (9th Cir. 1996) (arrest warrant *in rem* may be issued by clerk without probable cause hearing);

- *United States v. Twp. 17 R 4*, 970 F.2d 984 (1st Cir. 1992) (warrant *in rem* issued by clerk of the court - not judge or magistrate - does not violate Fourth Amendment);

- *United States v. Daccarrett*, 6 F.3d 37 (2d Cir. 1993) (the Government must have probable cause for arrest warrant *in rem*, but need not obtain judicial determination of probable cause prior to seizure); *but see* Fifth Amendment cases, *infra*;

- *United States v. One Parcel... Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (arrest warrant *in rem* authorizing seizure of all personal property in residence is not a general warrant if magistrate found probable cause to believe everything claimant owned was purchased with drug proceeds);

- *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722,731 (D. Me. 1991) (no violation of Fourth Amendment if property is arrested with arrest warrant issued by clerk after same property is seized with Rule 41 warrant issued by magistrate upon finding of probable cause);

- *Note*: The arrest warrant requirement in Rule C(3)(a) does not apply to real property cases, *see* 18 U.S.C. § 985(c)(3).

2. "Forthwith" requirement-Rule E(4):

- *United States v. Real Property... 9832 Richeon Ave.*, 234 F. Supp. 2d 1136 (C.D. Cal. 2002) (Rule E(4) is a rule governing service of process, akin to Rule 4; failure to comply does not deprive the court of jurisdiction or require dismissal of the complaint);

- *But see United States v. Funds Representing Proceeds of Drug Trafficking* (\$75,868.62), 52 F. Supp. 2d 1160 (C.D. Cal. 1999) (Rule E(4)(a) requires arrest of the property "forthwith" once the complaint is filed; 94-day delay while complaint remained under seal failed to comply with this requirement; complaint dismissed);

- *United States v. 2,164 Watches*, No. CVOO-11781-RMT(nVJx) (C.D. Cal. Sept. 25- 2002) (unpublished) (dismissing complaint because 75-day delay in serving arrest warrant violated Rule E(4) even though property was already in Government custody and claimant had notice and filed claim), *appeal pending*;

In general, if a statute contains a time limit for which there is no specified sanction, the courts ordinarily will not create one.

- *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003) (holding that a 120-day time limit was intended to spur the agency to action, but not to render a late action invalid), quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction");

3. Service of process:

- *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (6th Cir. 2003) (Government must serve a copy of the complaint within the time prescribed by Rule 4, but the district court did not abuse its discretion when it expanded the time because of a mistake by the seizing agency);

- *United States v. 105,800 Shares of Common Stock*, 825 F. Supp. 191 (N.D. Ind. 1993) (federal law, not state law, governs service of process in civil forfeiture cases);

Jurisdiction:

- Subject matter jurisdiction, *in rem* jurisdiction over the property, and venue are three distinct concepts; all three requirements must be satisfied before the court can adjudicate a civil forfeiture case and dispose of the property:

- *United States v. Contents of Accounts Nos. 3034504504 and 144-07143*, 971 F.2d 974, 980-81 (3d Cir. 1992) (subject matter jurisdiction and venue are distinct concepts from *in rem* jurisdiction over the property);

- *United States v. \$633,995 in U.S. Currency*, No. 02-80181-CIV-HURLEY/LYNCH (S.D. Fla. Dec. 4, 2002) (unpublished);

1. Subject matter jurisdiction:

- *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (28 U.S.C. §§ 1345 and 1355(a) give the district courts subject matter jurisdiction over civil forfeiture actions);

- *United States v. \$633,995 in U.S. Currency*, No. 02-80781-CIV-HURLEY/LYNCH (S.D. Fla. Dec. 4, 2002) (unpublished) (section 1355(a) provides a district court with original subject matter jurisdiction over any forfeiture action that arises under an act of Congress; this is distinct from *in rem* jurisdiction over the defendant property);

- *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (section 1610, which permits administrative forfeitures in certain circumstances, does not abrogate right of U.S. Attorney to file the case judicially in the first instance, nor does it deprive the district court of subject matter jurisdiction under section 1355(a));

- *United States v. Approximately \$25,829,681.80 in Funds*, 1999 WL 1080370 (S.D.N.Y. 1999) (in addition to having *in rem* jurisdiction over the *res*, court must have subject matter jurisdiction over the cause of action; court has jurisdiction if it would have jurisdiction over the underlying criminal offense);

- *United States v. Real Property... 9832 Richeon Ave.*, 234 F. Supp. 2d 1136 (C.D. Cal. 2002) (Supplemental Rules are not jurisdictional; failure to comply with Rule E(4) does not deprive the court of subject matter jurisdiction);

2. *In rem* jurisdiction:

- *United States v. All Funds Distributed to Weiss*, 345 F.3d 49,56 n.8 (2d Cir. 2003) (seizure or constructive control of the property is necessary for the court to exercise *in rem* jurisdiction; distinguishing *James Daniel Good* as creating a special case for real property);

- *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (seizure of real property not necessary to obtain *in rem* jurisdiction);

- On October 28, 1992, Congress amended 28 U.S.C. § 1355, allowing the Government to file forfeiture actions in the district where the underlying crime giving "rise to forfeiture occurred, and giving that court nationwide service of process authority:

- *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (section 1355(b) is not merely a venue statute; it gives the court *in rem* jurisdiction over property located in another district; "it would make little sense for Congress to provide venue in a district court if there were no means for that court to exercise jurisdiction");

- *United States v. Funds in the Name or For the Benefit of Wetterer*, 210 F.3d 96 (2d Cir. 2000) (section 1355(b)(1)(B) gives *in rem* jurisdiction to court where venue would lie under section 981(h); but section 981(h) does not give court in E.D.N.Y. jurisdiction over funds in Miami bank where such funds are forfeitable only under a wire fraud theory and the indictment in E.D.N.Y. charged only mail fraud);

- *United States v. \$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (section 1355(b) is both a venue statute and an *in rem* jurisdictional statute; district has both jurisdiction and venue over property seized in other districts if some of the offenses giving rise to forfeiture occurred in district); *United States v. 18900 S.W. 50th Street*, 915 F. Supp. 1199 (N.D. Fla. 1994) (same);

- *United States v. Contents of Account Number 2033301*, 831 F. Supp. 337 (S.D.N.Y. 1993) (district court in New York has venue and *in rem* jurisdiction over action against structured funds found in Florida where structuring offense occurred in New York before effective date of section 1355(b));

- Nationwide service of process provision allows service of arrest warrant *in rem* outside

judicial district notwithstanding explicit provisions of Rule E(3)(a):

- *United States v. Parcel !, Beginning at a Stake*, 731 F. Supp. 1348, 1352 (S.D. 111. 1990) (ruling based on implied nationwide service authority in section 8810)); *United States v. Premises Known as Lots 50 & 51*, 681 F. Supp. 309, 313 (E.D.N.C. 1988) (same);

3. Intangible property:

- *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (court has jurisdiction to enter order forfeiting person's interest in intangible property; forfeiture of person's interest in future payouts on winning lottery ticket is analogous to forfeiture of shares of stock and right to future dividends);

- *United States v. 3 Parcels in La Plata County*, 919 F. Supp. 1449 (D. Nev. 1995) (to obtain jurisdiction over a debt, the Government must physically seize the debt instrument or rigorously comply with Supplemental Rule E(4)(c));

- *United States v. 105,800 Shares of Common Stock*, 825 F. Supp. 191 (N.D. In.. 1993) (relying on state law, court finds that intangible shares of stock exist in district where shareholder resides, not necessarily in district where certificates are later printed; service of process regarding intangible property may be made on shareholder or other person as Rule E(4)(c) provides);

4. Adoptive forfeitures and concurrent jurisdiction:

- *Madewell v. Downs*, 68 F.3d 1030, 1041 n.13 (8th Cir. 1995) (it is well established that only one court may have jurisdiction over the *res* at a time; the first court to obtain jurisdiction maintains it until it is relinquished);

- *United States v. \$174,206.00 in U.S. Currency* 320 F.3d 658 (6th Cir. 2003) (concurrent jurisdiction doctrine does not bar federal court from exercising *in rem* jurisdiction over property that state court has released to the claimants after state prosecutors failed to commence a forfeiture action within the deadlines specified by state law);

- *United States v. \$490,920 in U.S. Currency*, 911 F. Supp. 720 (S.D.N.Y. 1996) (district court cannot exercise *in rem* jurisdiction until state court relinquishes it), *motion for reconsideration granted*. 937 F. Supp. 249, 252-53 (S.D.N.Y. 1996) (court may grant anticipatory seizure warrant so Government can seize property as soon as state court relinquishes it);

- *United States v. \$633,995 in U.S. Currency*, No. 02-80781-CIV -HURLEY/LYNCH (S.D. Fla. Dec. 4, 2002) (unpublished) (under the concurrent jurisdiction doctrine, federal court cannot exercise *in rem* jurisdiction over property until state court relinquishes it; but Government can file its complaint and have court issue arrest warrant *in rem* in anticipation of state's relinquishment of property; federal court does not obtain *in rem* jurisdiction until the property is returned to the owner by the state and it is seized by the U.S. marshal pursuant to the arrest warrant);

- *United States v. \$639,470.00 in U.S. Currency*, 919 F. Supp. 1405, 1410 (C.D. Cal. 1996) (comity concerns that weigh heavily against federal court's exercise of *in rem* jurisdiction over property seized by state law enforcement are absent where the state presented the *res* to the Federal Government for adoption and there was no state court proceeding with which to interfere);

- *Hawkins v. Henderson County*, 22 F. Supp. 2d 573, 580 (E.D. Tex. 1998) (because DEA did not exercise forfeiture jurisdiction over property until after the state court turned the funds over by a court order, federal agency had jurisdiction; explaining and distinguishing *Scarabin*);

- *United States v. One Parcel Property...Lot 85*, 100 F.3d 740, 743 (10th Cir. 1996) (initiation of federal civil forfeiture action does not violate concurrent jurisdiction rule as long as property is not actually seized until after state action is dismissed);

- *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 478-479 (2d Cir. 1992) (federal court may exercise jurisdiction over property under federal forfeiture law once it is released by state court and resealed; state court's order releasing property has no effect on federal forfeiture);

- *United States v. One Black 1999 Ford Crown Victoria LX*, 118 F. Supp. 2d 115, 118-19 (D. Mass. 2000) (because only one court may exercise *in rem* jurisdiction over property at a time, federal court may not exercise jurisdiction while state forfeiture action is pending; but once state court rules that property must be released and the order is obeyed, state jurisdiction evaporates and property may be resealed and made subject to forfeiture under federal law; following *Jeep Wrangler*);

- *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660j 667 (D. S.C. 1999) (court has *in rem* jurisdiction over property adopted by feds for forfeiture where earlier state forfeiture proceeding was not pursued and thus there was no competing state proceeding);

- *But see United States v. \$29,126.04 in U.S. Currency*, No. IP-95-748-C-DIF (S.D. Ind. Feb. 26, 1996) (if state officials fail to comply with state law regarding procedure for turning over seized property to federal agency, district court has no *in rem* jurisdiction over the property);

- *In re: Seizure of Approximately 28 Grams of Marijuana*, 278 F. Supp. 2d 1097 (N.D. Cal. 2003) (federal court could not exercise jurisdiction over marijuana seized by local police as part of state criminal action once state court ordered its return on medical use grounds, unless there was a state turnover order);

- *United States v. \$25,000 in U.S. Currency*, 2003 WL 22159054 (N.D. Cal. 2003) (if state authorities seize property and give owner receipt telling him a state forfeiture proceeding will be commenced, and owner files claim, DEA may not adopt forfeiture without turnover order from state court; state prosecutor's acquiescence is insufficient);

- *Scarabin v. DEA*, 966 F.2d 989, 993-95 (5th Cir. 1992) (federal agency had no jurisdiction to administratively forfeit property turned over while property was still within exclusive jurisdiction of state court; Government must wait for turnover order or for state court to

relinquish control over the *res*);

- *Cf United States v. Thomas*, 319 F.3d 640 (3d Cir. 2003) (distinguishing *Scarabin*; the concurrent jurisdiction doctrine, which limits the ability of a federal seizing agency to assert jurisdiction over property held by a state court, does not bar administrative forfeiture of property seized by a federal court pursuant to a federal warrant);

- See cases on anticipatory seizure warrants at page 5.

5. *In rem* jurisdiction over property located abroad:

There is a split in the circuits as to whether a court in the United States has *in rem* jurisdiction over property abroad in all cases by virtue of 28 U.S.C. § 1355(b)(2)) or whether it has jurisdiction only if a foreign authority seizes the property on behalf of the court in the United States.

- *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (section 1355(b)(2) gives the district court *in rem* jurisdiction over property located abroad; the foreign country's compliance and cooperation "determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders");

- *Contents of Account Number 03001288 Held in the Name of Jalal*, 344 F.3d 399 (3d Cir. 2003) (same, following *Banco Espanol* and disagreeing with *Meza*);

- *United States v. All Funds in Any Accounts Maintained in the Names of Meza*, 63 F.3d 148 (2d Cir. 1995) (section 1355(b)(2) gives district court in New York venue and subject matter jurisdiction over property in United Kingdom; court also has *in rem* jurisdiction because seizure by UK authorities at request of United States gives court constructive possession or control);

- *United States v. All Funds in "The Anaya Trust" Account*, 1997 WL 578662 (N.D. Cal. 1997) (court has *in rem* jurisdiction over property abroad under section 1355(b)(2) if the property has been seized by a foreign official cooperating with the United States);

6. Retroactive application of amendments to section 1355:

- *United States v. Certain Funds (Hong Kong and Shanghai Banking Corporation)*, 96 F.3d 20 (2d Cir. 1996) (section 1355(b)(2) applies retroactively to create *in rem* jurisdiction over property in Hong Kong), *rev'g* 922 F. Supp. 761 (E.D.N.Y. 1996);

- *United States v. One 1978 Piper Cherokee Aircraft*, 91 F.3d 120 (9th Cir. 1996) (section 1355 as amended gives district court *in rem* jurisdiction over property located out of district if venue is proper by virtue of section 881(j); 1992 amendment applies to case pending at time of enactment); *United States v. One 1990 Lincoln Town Car*, 817 F. Supp. 1575 (N.D. Ga. 1993) (same for venue based On section 981(h)); *but see United States v. 51 Pieces of real Property*, 17 F.3d 1306 (10th Cir. 1994) (section 1355 amendments *do not* apply retroactively);

7. Court does not lose *in rem* jurisdiction when property is moved or changed in form:

- *Republic Nat 'l Bank v. United States*, 506 U.S. 80 (1992) (removal of currency from district for deposit into the Assets Forfeiture Fund following judgment does not deprive appellate court of jurisdiction over the appeal);

- *United States v. Real Property at 2659 Roundhill Drive*, 194 F.3d 1020 (9th Cir. 1999) (court does not lose properly acquired jurisdiction over *res* simply because there is change in control or possession; court retained jurisdiction over real property even after it was sold in foreclosure sale);

- *See* 28 U.S.C. § 1355(c) (amended October 28, 1992), providing that appellate jurisdiction is not defeated by removal of the *res* from the district pending appeal Justice Thomas, concurring in the judgment in *Republic Nat 'l Bank*, would have applied section 1355(c) retroactively on the ground that jurisdictional statutes may always be so applied.

S. Conversion of cash to another form:

- *Madewell v. Downs*, 68 F.3d 1030, 1042 n.14 (8th Cir. 1995) (currency, cashier's checks, and bank deposits are surrogates for each other and properly considered fungible for purposes of *in rem* jurisdiction);

- *United States v. \$46,588.00 in United States Currency*, 103 F.3d 902 (9th Cir. 1996) (district court has jurisdiction over the *res* when seized currency is replaced with a cashier's check and given to USMS for deposit into the Seized Asset Deposit Fund);

- *United States v. Thomas*, 319 F.3d 640 (3d Cir. 2003) (converting seized cash into cashier's check does not destroy *in rem* jurisdiction; rejecting *Scarabin*);

- *But see Scarabin v. DEA*, 966 F.2d 989,993 (5th Cir. 1992) (where DEA concedes there is a distinction between control of the seized cash and control of cashier's checks, agency did not have jurisdiction over the *res* for purposes of administrative forfeiture);

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T. Venue:

1. District where the crime occurred:

- *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (*Wally III*) (in an importation case, venue under section 1355(b) lies in the district where the importation occurred);

- *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (forfeiture action could have been filed in any of the districts where the conspiracy giving rise to the drug proceeds took place);

- *United States v. Premises Known as 6 Tenby Court*, 1997 WL 549989 (E.D. Pa. 1997) (forfeiture of real property in New Jersey filed in Pennsylvania, where criminal charges were brought);

2. Change of venue:

- *United States v. \$200,000*, 805 F. Supp. 585 (N.D.In. 1992) (motion for change of venue denied where case filed in district where property was located and claimant failed to show that case could have been filed in any other district);

- *United States v. \$633,021.67 in U.S. Currency*, 842 F. Supp. 528 (N.D. Ga. 1993) (section 1404 motion for change of venue denied even though property seized out of district pursuant to section 1355(d));

3. Property located abroad:

- *United States v. All Funds in "The Anaya Trust" Account*, 1997 WL 578662 (N.D. Cal. 1997) (civil forfeiture action against property abroad may be filed in Washington, D.C.; parties subsequently stipulated to change of venue);

- *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (civil forfeiture action against property in Spain could be filed in Washington, D.C.);

4. Contents of the complaint:

- Section 983(a)(3)(A) provides that a complaint must be filed in accordance with the Supplemental Rules, including Rule E(2)(a).

1. Standard for filing a complaint

- *United States v. Mondragon*, 313 F.3d 862, (4th Cir. 2002) (a complaint must satisfy the particularity requirement in Rule E(2)(a); post-CAFRA, that means the complaint must allege facts to support a reasonable belief that the property is subject to forfeiture; probable cause for seizure and the standard for filing a complaint are separate matters);

- *United States v. \$49,000 in U.S. Currency*, 330 F.3d 371,376 n.8 (5th Cir. 2003) (*dicta*) (following *Mondragon*; the standard for filing a civil forfeiture complaint is set forth in Rule E(2)(a), which requires the Government to "allege facts supporting a reasonable belief that it will be able to bear its burden at trial");

- *United States v. All Funds on Deposit at Dime Savings Bank*, 255 F. Supp. 2d 56 (E.D.N.Y. 2003) (all the Government has to do at the pleading stage is to satisfy the particularity requirement in Rule E(2)(a) by allege "sufficient facts to support a reasonable belief that the property is subject to forfeiture");

- *United States v. 630 Ardmore Drive*, 178 F. Supp. 2d 572 (M.D.N.C. 2001) (section 983(a)(3)(D) relaxes the pleading requirements necessary to withstand a motion to dismiss for failure to comply with the particularity requirement in Rule E(2));

- Pre-CAFRA cases:

- *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993) (complaint need not meet ultimate trial burden of establishing probable cause; it need only establish "reasonable belief that the [G]overnment can show probable cause for forfeiture at trial"); *United States v. \$15,270,885.69 Formerly on Deposit in Account No. 89002637*, 2000 WL 1234593 (S.D.N.Y. 2000) (same, following *Daccarett*);

- *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996) (same);

- *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (the Government does not need to have probable cause at the time it files its complaint; it need only have reasonable belief that, at the forfeiture trial, it can meet its burden of proof);

- *United States v. One Parcel... 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.O. Tenn. 1998) (complaint is sufficient to withstand motion to dismiss if it satisfies Rule E(2); the Government need not establish probable cause in its complaint, but need only provide reasonable basis to believe it will be able to meet its burden of proof at trial) (collecting cases);

- *United States v. Funds in the Amount of \$29,266*, 96 F. Supp. 2d 806,809 (N.D. m. 2000) (at pleading stage, Government is not required to present proof of probable cause, but is required only to satisfy pleading requirements of Rule E(2) and establish a reasonable basis to believe it will be able to meet its burden of proof at trial);

- *United States v. \$51,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (complaint that satisfies particularity requirement of Rule E(1), allowing claimant to commence an investigation, should not be dismissed);

- *United States v. One 1996 Lexus LX-450*, 1998 WL 164881 (N.D. In.. 1998) (the Government need not establish probable cause at the pleading stage, but only reasonable basis for belief that property is subject to forfeiture);

2. Purpose of the particularity requirement:

- *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) ("Rule E(2) is an important safeguard against the Government's seizing and holding property on the basis of mere conclusory allegations that the property is forfeitable");

- *United States v. Funds in Amount of \$122,500*, 2000 WL 984411 (N.D. Ill. 2000) (Rule E(2) requires more specificity than simple notice pleading and is meant to ensure that claimant is apprized of the circumstances that support a forfeiture);

- *United States v. \$94,010 U.S. Currency*, 1998 WL 567837 (W.D.N.Y. 1998) (particularity requirement ensures that the Government does not "seize and hold," for a substantial period, property to which it has no legitimate claim; but particularity requirement does not require demonstration of probable cause pretrial); *United States v. One Parcel...2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.O. Tenn. 1998) (same); *United States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (same), quoting *Pole No. 3/72*, 852 F.2d 636, 628 (1st Cir. 1988);

- *United States v. One 1997 L35 Ford Van*, 50 F. Supp. 2d 789 (N.D. m. 1999) (the heightened pleading requirements in Rule E(2)(a) are intended "to avoid the due process problems associated with the [G]overnment holding property to which it has no legitimate claim"; complaint alleging that funds were intended to finance Middle East terrorism was sufficiently particular);

- *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722, 728 (D. Me. 1991) ;

3. Enforcement of the particularity requirement:

- *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) ("claimants can enforce Rule E(2) by filing motions to dismiss for lack of particularity prior to filing their responsive pleadings");

4. Examples of complaints found to satisfy the reasonable belief standard:

- *United States v. Mondragon*, 313 F.3d 862 (4th Cir. 2002) (if complaint had only identified time, place, and amount of seizure and seizing officer's name, it would not have been sufficient; but complaint that also recites the unusual quantity of cash, its manner of packaging, existence of concealed compartment, and dog alert supports reasonable belief that property is subject to forfeiture);

- *United States v. All Funds on Deposit at Dime Savings Bank*, 255 F. Supp. 2d 56 (E.D.N.Y. 2003) (complaint that alleged facts showing money moving in and out of bank account sufficient to plead forfeiture under the money laundering statute; it is not necessary for the complaint to set forth any tracing analysis);

- Pre-CAFRA cases;

- *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (complaint described property with reasonable particularity where it named intermediate bank through which wire transfer occurred and the intended beneficiary);

- *United States v. \$15,270.885.69 Formerly on Deposit in Account No. 8900261137,2000 WL 1234593* (S.D.N.Y. 2000) (money laundering complaint was sufficiently particular because it apprized claimant of means by which money laundering scheme was carried out, Accounts involved, some of the bank officials who furthered the scheme, and dates) places, and amounts of a number of transactions);

- *United States v. One 1993 Ford Thunderbird*, 1999 WL 436583 (N.D. In. 1999) (complaint that provided date and location of seizure, identity of vehicle, and its relationship to alleged offenses was sufficiently particular);

- *United States v. Funds in Amount 01\$122,500,2000* WL 984411 (N.D. In. 2000) (complaint that contains specific information about the date and location of the seizure, the amount of money

seized, and claimant's actions on date of seizure is sufficiently particular); *United States v. Funds in the Amount of \$29, 266*, 96 F. Supp. 2d 806, 809 (N.D. In. 2000) (same);

- *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. m. 1999) (Government showed it had reasonable basis to believe it could prove money in bank. Accounts was sent into the United States to fund the HA11AS terrorist organization in violation of section 1956(a)(2)(A) even though the financial transactions were complex and layered to conceal the country of origin);

- *United States v. \$81,990.47*, 1992 WL 391385 (D. Conn. 1992) (complaint sets forth evidence establishing probable cause to believe bank Accounts were involved in section 5324 structuring violation);

5. Before CAFRA. several circuits held that a complaint had to be dismissed if the Government did not have probable cause at the time the complaint was filed:

- *United States*). *\$791,910.00 in U.S. Currency* 16 F.3d 1051 (9th Cir. 1994)(construing 19 U.S.C. § 1615 to require that the Government have probable cause at the time it files its complaint or suffer dismissal); *United States v. \$405,089.23 in U.S. Currency*, 122 F.3d 1285 (9th Cir. 1997) (the Government could not rely on drug dealer's conviction or evidence adduced at criminal trial to establish probable cause where forfeiture complaint was filed at the time of indictment); *United States v. Real Property Located at 22 Santa Barbara Drive*, 121 F.3d 719, 1997 WL 420580 (9th Cir. 1997) (unpublished) (Table) (same); *United States v. Twelve Pieces of real Property*, 54 Fed. Appx. 461, 2003 WL 103052 (9th Cir. 2003) (same);

- *United States v. Real Property Known as 22249 Dolorosa Street* 167 F.3d 509 (9th Cir. 1999) (applying *\$405,089.23*; became evidence in the Government's possession at the time the complaint was filed was suppressed, and because evidence acquired independently after the complaint was filed was inadmissible to show probable cause, the Government was unable to forfeit residence drug dealer purchased with drug proceeds);

- *United States v. \$734,578.82 in U.S. Currency*, 286 F.3d 641 (3d Cir. 2002) ("probable cause must exist to support the forfeiture when the Government files the forfeiture complaint"); *United States v. \$10,700.00 in U.S. Currency*, 258 F.3d 215 (3d Cir. 2001) (*dicta*) (stating, without analysis, that Government must have probable cause at the time it files its complaint);

- *United States v. Parcels of Property*, 9 F.3d 1000, 1003-04 (1st Cir. 1993) (holding section 1615 places "a preliminary burden [on the Government] to show that it had probable cause to

institute the forfeiture proceeding); *United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (probable cause determination in the First Circuit is made as of the time of the filing of the complaint);

- *United States v. One Int of U.S. Currency Totaling \$14,665.33*, 33 F. Supp. 2d 47 (D. Mass. 1998) (suggesting that in the First Circuit, the Government must have probable cause at the time it files the complaint);

- *United States v. One Parcel of real Estate Located at 1948 Martin Luther King Drive*, 91 F. Supp. 2d 1228 (C.D. m. 2000) (after-acquired evidence may not be used in the probable cause determination), *aff'd on other grounds*, 270 F.3d 1102 (7th Cir. 2001);

- *See also United States v. \$87,118.00 in U.S. Currency*, 95 F.3d 511 (7th Cir. 1996) (noting split in circuits on this issue but finding it unnecessary to address because, for section 1615 purposes, a forfeiture action is commenced with the filing of the complaint, not with the seizure);

- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (also noting split in the circuits and finding it unnecessary to resolve because evidence showed that the Government had probable cause at the time the complaint was filed);

6. Section 983(a)(3)(D) legislatively overrules these cases:

- *See* 18 U.S.C. § 983(a)(3)(D) ("no complaint may 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"); *see also* section 983(c)(2) (allowing the Government to use after acquired evidence to prove its case at trial);

- *Note* that section 983(c)(1), which makes establishes preponderance of the evidence as the standard for civil forfeiture cases, implicitly abrogates 19 U.S.C. § 1615, making the probable cause standard set forth in that statute inapplicable for any purpose in a civil forfeiture case;

- *United States v. 5443 Suffield Terrace*, 209 F. Supp. 2d 919 (N.D. In. 2002) (under section 983(a)(3)(D), a motion to dismiss a civil forfeiture complaint for lack of evidence to support the Government's theory of forfeiture is premature);

7. It is not necessary to identify specific transactions in the complaint:

- *United States v. Two Parcels in Russell County*, 92 F.3d 1123 (11th Cir. 1996) (when probable cause is based on evidence that the participants are generally engaged in the drug business, have no other source of income, and bought the properties with drug proceeds, it is not necessary to identify specific drug transactions in the complaint);

- *United States v. Twp. 17 R 4*, 970 F.2d 984 (1st Cir. 1992) (section 981 complaint alleging that property was purchased with drug proceeds by a fugitive using an alias between 1985 and 1988 was sufficiently particular to put the claimant on notice of the forfeiture action, and to allow him to investigate and answer the complaint);

- *United States v. 5443 Suffield Terrace* 209 F. Supp. 2d 919 (N.D. In. 2002) (forfeiture complaint does not have to detail specific transactions supporting Government's theory of forfeiture);

- *United States v. Real Property* (16899 S. W Greenbrier), 774 F. Supp. 1267, 1270 (D. Or. 1991) (section 981 complaint incorporating agent's affidavit, indicating nature of the fraud scheme, and tracing funds into defendant properties was sufficiently particular);

- *United States v. Certain Accounts*, 795 F. Supp. 391,395 (S.D. Fla. 1992) (the Government must allege violation of one of the referenced money laundering statutes);

- *United States v. Approximately \$25,829.681.80 in Funds*, 1999 WL 1080370 (S.D.N.Y. 1999) (complaint that alleges underlying fraud scheme and money laundering transaction is sufficiently particular; actual fraudulent statements need not be alleged);

- *But see United States v. \$59,074.00 in U.S. Currency*, 959 F. Supp. 243 (D.N.J. 1997) (complaint need not identify particular drug transactions; but simply citing 'violations of section 801 *et seq.* " without identifying type of drug trafficking violations or identity of persons who committed them is insufficient);

8. Complaint need not negate an affirmative defense:

- *United States v. 630 Ardmore Drive*, 178 F. Supp. 2d 572 (M.D.N.C. 2001) (complaint does not have to disprove claimants innocent owner defense);

- *United States v. One 1997 E35 Ford Van*, 50 F. Supp. 2d 789 (N.D. In. 1999) (innocent owner defense raised by wife and minor children win be addressed post-discovery; the Government need not negate it in its complaint);

9. Particularity requirement does not bar Government from alleging multiple legal theories:

- *United States v. \$15,270,885.69 Formerly 011 Deposit in Account No. 8900261137,2000* WL 1234593 (S.D.N.Y. 2000) (complaint properly alleged alternative money laundering theories as grounds for recovery under section 981 (a)(1)(A));

10. The Government may satisfy particularity requirement by including facts in motion for summary judgment:

- *United States v. One Parcel...Lot 41, Berryhill Farm*, 128 F.3d 1381 (10th Cir. 1997) (claimant not prejudiced because case was stayed from time complaint was filed until time the Government moved for summary judgment);

11. The Government is not required to identify the portion of the property traceable to money laundering activity in its complaint:

- *United States v. 155 Bemis Road*, 760 F. Supp. 245 (D.N.H. 1991) (applying *United States v.*

One Parcel of real Property, Etc., 921 F.2d 370,375 (1st Cir. 1990), to forfeitures under section 981)I

12. Pleading particular legal theories:

- Money laundering:

- *United States v. Certain Accounts*, 795 F. Supp. 391, 397-98 (S.D. Fla. 1992) (deposit of structured funds into primary account creates reasonable belief that entire contents of account are forfeitable under facilitation theory, but transfer of some funds from primary account to secondary account does not, without more evidence, create reasonable belief that entire contents of secondary account are forfeitable as facilitating property);

- *United States v. One Partially Assembled Drag Racer*, 899 F. Supp. 1334 (D.N.J. 1995) (complaint that merely tracks the language of section 1956 is not sufficiently particular; complaint must show how property can be traced to SUA proceeds or describe manner in which property was involved in effort to conceal or disguise SUA proceeds);

- *United States v. Puello*, 814 F. Supp. 1155 (E.D.N.Y. 1993) (facilitation of food stamp fraud scheme by business, real property, and vehicles pled with sufficient particularity);

- *United States v. One 1990 Porsche Carrera*, 807 F. Supp. 371 (D. Md. 1992) (bold statement that property was "involved in a violation of section 1957" not sufficiently particular; Government given leave to file amended complaint);

- Structuring:

- *United States v. Funds in the Amount of \$170,926.00*, 985 F. Supp. 810 (N.D. m. 1997) (civil forfeiture complaint in a structuring case satisfies the particularity requirement if it alleges that the perpetrator intended to evade the CTR reporting requirement; it need not allege that he knew about the requirement);

- Fungible property:

- *United States v. \$15,270,885.69 Formerly 011 Deposit in Account No. 8900261137*, 2000 WL 1234593 (S.D.N.Y. 2000) (complaint alleging that a bank's correspondent account is subject to forfeiture, notwithstanding the exception in section 984(c), must allege that the bank was itself involved in the underlying criminal activity);

13. Application of Rule 9(b):

- *United States v. \$15,270,885.69 Formerly on Deposit in Account No. 8900261137*, 2000 WL 1234593 (S.D.N.Y. 2000) (Rule 9(b) has no application to civil forfeiture; adequacy of civil forfeiture complaint is determined exclusively by Rule E(2));

- Motion to dismiss the complaint:

1. Standard for surviving motion to dismiss:

- *United States v. Funds in Amount of \$122,500*, 2000 WL 984411 (N.D. In. 2000) (complaint should not be dismissed unless it appears plaintiff cannot prove any facts in support of his claim that would entitle him to relief; to withstand a motion to dismiss, complaint need only set forth facts sufficient to set forth the essential elements of the cause of action); *United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (*Wally III*) (same);

- *United States v. One Parcel... 2556 Yale Avenue*, 20 F. Supp. 2d 1212 (W.D. Tenn. 1998) (when motion to dismiss was filed, court presumed all facts alleged to be true and would have denied motion unless it appeared beyond doubt that the Government could prove no set of facts in support of its claim that would entitle it to relief); *United States v. Approximately \$25,829.681.80 in Funds*, 1999 WL 1080370 (S.D.N.Y. 1999) (same);

- *United States v. One 1993 Ford Thunderbird*, 1999 WL 436583 (N.D. In. 1999) (motion to dismiss is intended to test sufficiency of complaint, not its merits; complaint need only set out essential elements of the cause of action);

- *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722, 725 & n.5 (D. Me. 1991) (probable cause to believe property was purchased by long-time drug trafficker using alias sufficient to withstand motion to dismiss);

2. Forfeitability is determined at the time of trial; motion to dismiss for failure to establish sufficient nexus between property and criminal act in the complaint should be denied:

- *United States v. \$557,933.89. More or Less. in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (the Government may rely on evidence it has lawfully obtained up to the time of the forfeiture trial);

- *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (Government does not have to establish forfeitability of the property until time of trial; court may not dismiss complaint on ground that the Government lacked probable cause for the seizure);

- *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (unless claimant challenges seizure, as in a motion to suppress, the Government is not required to establish probable cause until the time of trial);

- *United States v. \$15,270,885.69 Formerly on Deposit in Account No. 8900261137*, 2000 WL 1234593 (S.D.N.Y. 2000) (motion to dismiss may not be used to test the sufficiency or admissibility of the evidence); *United States v. One 1997 F35 Ford Van*, 50 F. Supp. 2d 789 (N.D. In. 1999) (same);

- *United States v. All of the Inventories of the Businesses Known as Khalife Brothers Jewelry*, 806 F. Supp. 648, 651 (E.D. Mich. 1992) (where property is seized 7 months after money laundering offense occurred, the Government must have opportunity at trial to demonstrate probable cause to believe that the seized property is traceable to the property that facilitated the

offense; motion to dismiss complaint denied);

3. Complaint may not be dismissed *sua sponte*:

- *United States v. One 1974 Learjet*, 191 F.3d 668 (6th Cir. 1999) (district court erred in converting Rule 41(e) motion into motion to dismiss and granting such motion sua sponte without giving the Government opportunity to respond);

4. Motion to dismiss should be denied where complaint - on its face - satisfies probable cause requirement:

- *United States v. Funds in Amount of \$122,500*, 2000 WL 98441 1 (N.D. In. 2000) (complaint set forth facts establishing, if true, probable cause that money was seized from drug courier);

- *United States v. All Funds on Deposit in the Name of Perusa, Inc.*, 935 F. Supp. 208 (E.D.N.Y. 1996) (assuming all facts alleged in the complaint to be true, the Government set forth facts sufficient to establish probable cause to believe bank Accounts were involved in money laundering);

- *United States v. A Certain Parcel of Land*, 781 F. Supp. 830, 833 (D.N.H. 1992) (pattern of structured deposits sufficient to show that seizure of bank accounts was based on probable cause);

- *United States v. \$81,990.47*, 1992 WL 391385 (D. Conn. 1992) (pattern of structured deposits into account A, and transfers of money from A to B, establish probable cause for section 981 forfeiture of both Accounts);

5. Evidence outside the pleadings:

- *United States v. Real Property... 9832 Richeon Ave.*, 234 F. Supp. 2d 1136 (C.D. Cal. 2002) (court may consider exhibits submitted with the complaint and matters that may be judicially noticed);

- *United States v. Funds in the Amount of \$29,266*, 96 F. Supp. 2d 806,809 (N.D. Ill. 2000) (on motion to dismiss, plaintiffs allegations assumed to be true; evidence outside the pleadings rebutting allegation in the complaint win not be considered unless motion is converted into a motion for summary judgment);

6. Cases where motion to dismiss granted:

- *United States v. All Funds on Deposit (Great Eastern Bank)*, 804 F. Supp. 444,445-46 (E.D.N.Y. 1992) (claimant generally not entitled to hearing on probable cause until trial, but where no set of facts could support probable cause with respect to portion of funds in account, arrest warrant *in rem* must be vacated in part and funds returned);

- *United States v. Certain Accounts*, 795 F. Supp. 391, 397-99 (S.D. Fla. 1992) (where complaint

fails to state any basis for forfeiture of untainted portion of funds in account (motion to dismiss for failure to comply with particularity requirement must be granted);

- *United States v. \$13,570.00 in U.S. Currency*, 1997 WL 722947 (E.D. La. 1997) (motion to dismiss granted where there was no probable cause for airport stop and the Government did not seek to offer any subsequently acquired evidence); *United States v. \$14,876.00 in U.S. Currency*, 1997 WL 722942 (E.D. La. 1997)(same);

- *United States v. \$40,000 in U.S. Currency*, 999 F. Supp. 234 (C.D.P.R. 1998) (court assumed all facts alleged by the Government in its complaint to be true and would have granted a motion to dismiss only if there were no set of facts on which the Government could have prevailed; but court not required to accept conclusory allegation that currency seized in airport stop was drug money and would have dismissed complaint if facts alleged in the complaint did not establish probable cause);

- *United States v. \$57,443.00 in U.S. Currency*, 42 F. Supp. 2d 1293 (S.D. Fla. 1999) (complaint for forfeiture under section 5317 dismissed where none of the facts alleged by the Government suggested money purchased in the Black Market Peso Exchange had ever been transported across border from outside United States; thus, no facts specified in complaint could support the alleged cause of action);

- *United States v. One 1997 £35 Ford Van*, 50 F. Supp. 2d 789 (N.D. m. 1999) (motion to dismiss granted to the extent complaint was based on a section 1957 offense because that statute requires proof that the money is SUA proceeds; money sent into the United States to fund terrorist acts abroad is not "proceeds" of any SUA offense);

7. Motion to dismiss on Eighth Amendment grounds:

- *United States v. Funds in the Amount of \$170,926.00*, 985 F. Supp. 810 (N.D. Ill. 1997) (Government not required to allege evidence rebutting excessive fines claim in its complaint; motion to dismiss on Eighth Amendment ground dismissed as premature; issue must be raised post-trial);

8. Government's motion to dismiss its own complaint:

- *United States v. One 1990 Arctic Cat EXT Snowmobile*, 1996 WL 132107 (S.D.N.Y. 1996) (the Government has right to dismiss civil forfeiture case even if claim is pending; claim is not a counterclaim that claimant has right to maintain; claimant cannot choose civil forfeiture over criminal forfeiture because he perceives procedural advantages);

H. Amending the complaint:

- The Government is not limited to the theory of forfeiture asserted at the time of seizure or in its original complaint; it may amend a complaint to include a new theory or to cure a defect that caused the complaint to be dismissed.

- *United States v. Portrait of Wally*, 2000 WL 1890403 (S.D.N.Y. 2000) (*Wally II*) (district court has discretion to permit the Government to file a new forfeiture complaint when the case involves important public policy issues and the omission of legal theories from the original complaint, which caused the complaint to be dismissed, was inadvertent);

- *United States v. U.S. Currency in the Amount of \$146,800*, 1997 WL 269583 (E.D.N.Y. 1997) (the Government is permitted to amend complaint to include section 981 theory even though original theory was that property was forfeitable as proceeds under section 881 (a)(6));

LC claim and answer:

The claimant must file a claim and answer to the complaint pursuant to Supplemental Rule C(6), *see* section 983(a)(4):

1. Time for filing claim:

- Section 983(a)(4) provides that a claim must be filed within 30 days of service of the complaint or final publication of notice of the filing of the complaint; Rule C(6) (as amended December 1, 2002) has the same time limit but uses the term "statement of interest":

- *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 72 n.2 (2d Cir. 2002) (there is no substantive difference between a "claim" and a "statement of interest");

- *United States v. One Parcel of real Property Known as 16614 Cayuga Road*, 69 Fed. Appx. 915, 2003 WL 21437207 (10th Cir. 2003) (the purpose of Supplemental Rule C(6) is "to force claimants to come forward as soon as possible after forfeiture proceedings have been initiated so

that all interested parties can be heard and the dispute resolved without delay"; claim filed by third party after the forfeiture trial was concluded was untimely);

- Pre-CAFRA law:

- *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (claim filed years after forfeiture case was concluded was untimely; later intervening event was no excuse for not having contested the forfeiture when it was timely to do so);

- *United States v. Real Property Located at 22 Santa Barbara Dr.*, 264 F.3d 860 (9th Cir. 2001) (claim dismissed as untimely; fact that claim lacked merit at the time the complaint was filed, and gained merit only upon the occurrence of a later intervening event, does not excuse claimant from filing in accordance with Rule C(6));

- *United States v. Approximately 2,538.85 Shares of Stock Certificates*, 988 F.2d 1281 (1st Cir. 1993) (with respect to part of Rule C(6) requiring notice to owner, 10 days runs from date of personal service, not from date of publication where publication occurs later);

- *United States v. Approximately 2,538.85 Shares of Stock Certificates*, 988 F.2d 1281 (1st Cir. 1993) (10-day requirement in Rule C(6) is triggered when "process" is executed; process includes *both* service of notice on OViller *and* arrest of property itself; where the Government cannot prove stock certificates were arrested, 10-day period for filing claim may never have begun to run);

- *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp, 838 (D.D.C. 1996) (time for filing claim runs from service of the arrest warrant *in rem*); *United States v. One 1990 Mercedes Benz 300CE*, 926 F. Supp. 1 (D.D.C. 1996) (same);

- *See* morion to strike claim and answer at page 78.

2. Claim must be verified:

- *Mercado v. U.S. Customs Service*, 873 F.2d 641 (2d Cir. 1989) (claim verified "to the best of [the claimant's attorney's] knowledge, information and belief" did not satisfy the verification requirement of Rule C(6));

- *United States v. Commodity Account No. 54954930 at Saul Stone & Co.*, 219 F.3d 595 (7th Cir. 2000) (verification forces the claimant to place himself at risk of perjury for false claims; failure to verify the claim results in dismissal for lack of statutory standing);

- *United States v. \$50,672.00 in U.S. Currency*, 35 F. Supp. 2d 373 (D. Del. 1999) (where claimant's whereabouts are unknown, unverified claim filed by counsel does not satisfy Rule C(6));

- *United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (dismissing unverified claim: "because there is a substantial danger of false claims in forfeiture proceedings, verification on oath or affirmation is an essential element of a claim Wlder Rule C(6)");

3. Claim must identify the claimant:

- *United States v. \$138.381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (claim that referred repeatedly to "claimant and his wife" had only one claimant; the wife was not a claimant because she was not identified as such);

4. Claim must state nature of claimant's interest:

- *United States v. U.S. Currency (\$97.253.00)*, 1999 WL 458155 (E.D.N.Y. 1999) (claimant violated Rule C(6) by asserting he was owner of seized cash in his claim-and later asserting he was a bailee-but remedy is not dismissal of claim, but amendment);

5. Claim filed by bailee must identify bailor:

- *United States v. \$205,991.00 in United State.> Currency*, 1997 WL 669839 (S.D.N.Y. 1997) (bailees failure to identify bailor is grounds for dismissal of claim for failure to comply with

Rule C(6));

- *United States v. \$557,933.89 in U.S. Funds*, 1998 WL 817651 (E.D.N.Y. 1998) (no statutory standing under Rule C(6) where bailee failed to identify the bailor);

- *But see United States v. Portrait of Wally*, 2002 WL 553532 (S.D.N.Y. 2002) (bailee who identifies the bailor need not separately state that he is authorized to file the claim on behalf of the bailor);

6. Claim filed in administrative forfeiture is no substitute for claim required by Rule c:

- *United States v. \$1,437.00 in U.S. Currency*, 242 F. Supp. 2d 193 (W.D.N.Y. 2002) (that he filed a claim in the administrative forfeiture proceeding is no excuse for claimant's filing only an answer, but no verified claim, in the judicial proceeding);

- *United States v. \$22,700 in U.S. Currency*, 2002 WL 31758027 (D. Del. 2002) (claim filed in administrative forfeiture is not a substitute for claim required by Rule C(6));

- *United States OJ, One 1990 Mercedes Benz 300CE*, 926 F. Supp. 1 (D.D.C. 1996) ("a claim submitted during the course of the administrative forfeiture proceedings does not satisfy the verified claim obligation of Rule C(6)"); *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (samej "the fact that claimant considers the verified claim requirement redundant, does not excuse her noncompliance with the applicable rules");

- *United States v. \$50,200 in U.S. Currency*, 76 F. Supp. 2d 1247 (D. Wyo. 1999) (claim filed in administrative forfeiture proceeding is no substitute for claim required by Rule C(6) in judicial forfeiture proceeding);

- *United States v. U.S. Currency in the Sum Of \$261,480*, 2002 WL 827420 (E.D.N.Y. 2002) (filing administrative claim does not relieve claimant of Rule C(6) requirementj administrative claim does not notify court of the claim and does not establish standing);

7. Court has discretion to waive requirements of Rule C(6):

- *United States v. Real Property at 2659 Roundhin Drive*, 194 F.3d 1020 (9th Cir. 1999) (district court exercised discretion to pennit late fiting by ignoring the Government's Rule C(6) argument in its motion for summary judgment)j

- *United States v. \$10,000 in U.S. Currency*, 2002 WL 1009734 (M.D.N.C. 2002) (court vacates default judgment; failure to file claim required by Rule C(6) due to attorney's mistaken belief that claim filed in administrative forfeiture proceeding would transfer to judicial case should not deprive claimant who was not otherwise dilatory of opportunity to litigate on the merits);

- *United States v. One 1991 Mercedes-Benz 300E*, 1999 WL 1069242 (N.D. m. 1999) (court has discretion to permit claimant to file late claim under Rule C(6) if the Government has suffered no , prejudice);

- *United States v. \$230,963.88 in U.S. Currency*, 2000 WL 1745130 (D.N.H. 2000) (court may excuse late filing of claim and answer if, pursuant to Rule 6(b), it finds "excusable neglect");

- *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp. 838 CD.D.C. 1996) (listing factors court should consider in deciding whether to waive Rule C requirements, and finding none present); *United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (same);

- *United States v. \$347,542.00 in U.S. Currency*, 2001 WL 335828 (S.D. Fla. 2001) (court permits claimant to amend claim so that it is filed under oath);

8. *Pro se* claims:

- *United States v. \$9,020.00 in U.S. Currency*, 30 Fed. Appx. 855, 2002 WL 220578 (10th Cir. 2002) (district court erred in failing to accept *pro se* claim filed within the requisite time period and otherwise satisfying the requirements of Rule C(6), but labeled as a petition for remission);

9. Excusable neglect:

- *United States v. 1979 30-Foot Sea Ray*, 2000 WL 1889676 (N.D.N.I. 2000) (attorney's negligence in failing to file timely claim is imputed to client and is not excusable neglect; court 'Kin not exercise discretion to enlarge time for filing where property is worth no more than \$20,000 and there are storage costs);

- *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (counsel's misunderstanding of requirements of Rule C provides no basis for relief);

- *United States v. \$1,437.00 in U.S. Currency*, 242 F. Supp. 2d 193 (W.D.N.Y. 2002) ("press of other business" is no excuse for attorney's failure to observe section 983(a)(4) deadlines);

10. Fifth Amendment issues:

- *United States v. Gretaeci*, 62 F.3d 301, 311 (9th Cir. 1995) (*dicta*) (requiring a criminal defendant to claim ownership of property in a parallel civil forfeiture violates none of his rights because the Government would be barred from using the claim of ownership against defendant in the criminal case);

- *United States v. Scrivner*, 167 F.3d 536 (9th Cir. 1999) (under *Cretacci*, forcing defendant to choose between waiving Fifth Amendment right against self-incrimination and loss of his property is unconstitutional; if defendant must file a claim asserting ownership to challenge civil forfeiture, such claim may not be used against defendant in his criminal trial; section 2255 petition granted), *petition for relz 'g granted and opinion vae'd*, 189 F.3d 825 (9th Cir. 1999) (because *Cretacci* was *dicta*, it was not a change in the law; therefore, law of the case doctrine applies and *pre-Cretacci* order rejecting Fifth Amendment argument on direct appeal stands);

- *United States v. Twelve Pieces of real Property*, 54 Fed. Appx. 461, 2003 WL 103052 (9th Cir.

2003) (Table) (giving a defendant a Hobson's choice by filing parallel civil forfeiture and criminal proceedings does not violate defendant's Fifth Amendment rights; defendant is not required to testify in the civil case and can defend his property through other witnesses and documents);

11. Answer:

- Section 983(a)(4) and Rule C(6) provide that the answer must be filed within 20 days of filing a claim and responses to the Government's interrogatories must be served with the answer:

- *United States v. U.S. Currency in the Sum of \$261,480*, 2002 VIL 827420 *1 n.3 (E.D.N.Y. 2002) (claim and answer serve different purposes: claim forces person contesting forfeiture to swear that he has an interest in the property; answer requires claimant to state his defenses and to admit or deny plaintiffs "advertisements");

Rule 12(a)(4) applies in forfeiture cases; claimant may delay filing answer until court rules on motion to dismiss complaint

- *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) (filing of a motion to dismiss the forfeiture complaint tolls the period for filing an answer and for responding to interrogatories under Rule C(6));

- *But see United States v. \$38,870.00 in U.S. Currency*, No. 7:99-CV-47-(HL) (Nt.D. Ga. Sept. 24, 1999) (failure to file answer results in entry of default judgment; Rule 12(a)(4) does not apply in forfeiture cases);

12. Failure to comply with Rule C means claimant lacks statutory standing:

- *United States v. One-Sixth Share*, 326 F.3d 36 (1st Cir. 2003) (compliance with Rule C is required to establish statutory standing to contest a civil forfeiture);

- *United States v. \$138,387 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (failure to file answer results in dismissal of claim; claimant cannot rely on answer filed by another claimant that she did not sign);

- *United States v. \$437.00 in U.S. Currency*, 242 F. Supp. 2d 193 (W.D.N.Y. 2002) (court grants motion for default judgment where claimant filed no claim and filed answer out of time);

- *United States v. U.S. Currency in the Sum of \$261,480*, 2002 WL 827420 (E.D.N.Y. 2002) (claimant who files no claim and files answer out of time lacks standing; motion to strike answer granted);

- *United States v. Commodity Account No. 54954930 at Saul Sloane & Co.*, 219 F.3d 595 (7th Cir. 2000) (claimant who filed claim but waited 2 years to file his answer lacked statutory standing under Rule C(6));

- *United States v. \$345,510.00 in U.S. Currency*, 2002 WL 22040 (D. Minn. 2002) (failure to file answer results in entry of default judgment even though claimant filed "statement of interest");

- *United States v. \$230,963.88 in U.S. Currency*, 2000 WL 1745130 (D.N.H. 2000) (the time limits in Rule C(6) exist to force claimant to come forward as soon as possible after forfeiture

proceedings have begun and to prevent false claims; therefore they are strictly enforced; ignorance of the time limits is not "excusable neglect")j

- *United States v. Contellts of Account Number 901121707,36 F. Supp. 2d 614* (S.D.N.Y. 1999) (claimant who agreed not to contest civil forfeiture in his criminal guilty plea and waited several months to file claim challenging civil forfeiture lacks standing under Rule C(6))j

- *United States v. Real Property... Lido Motel*, 135 F.3d 1312 (9th cir. 1998) (claimant who received proper notice but failed to file claim in accordance with Rule C lacked standing to challenge magistrate's authority to enter default judgment);

- *United States v. \$50,100 In U.S. Currency*, 76 F. Supp. 2d 1247 (D. Wyo. 1999) (claimant who filed answer but no claim lacked statutory standing; claim filed in administrative forfeiture proceeding is no substitute for claim required by Rule C(6) in judicial forfeiture proceeding);
United States v. 522,700 in U.S. Currency, 2002 WL 31758027 (D. Del. 2002) (same);

- *United States v. One 1990 Mercedes Benz 300CE*, 926 F. Supp. I (D.D. C. 1996) (granting motion to strike answer because verified claim was filed more than 3 months late);

- *United States v. \$88,260.00 in U.S. Currency*, 925 F. Supp. 838 (D.D.C. 1996) (granting motion to strike answer because claimant chose to file motion to dismiss complaint instead of filing a verified claim);

- *United States v. \$68,000 in U.S. Currency*, 1995 WL 8712 18 (E.D. Mich. 1995) (claimant filed answer but never filed verified claim);

- *United States v. Real Property Located at Incline Vinage*, 976 F. Supp. 1321 (D. Nev. 1997) (claimant's 7-year delay in filing claim in still-pending case was excusable neglect; claimant did not realize she had any legal interest);

- *United States v. One Parcel of Real Property at Route 2*, 46 F. Supp. 2d 572 (S.D. Miss. 1998) (claimant who filed claim but no answer and second claimant who filed answer but unverified claim both lack statutory standing; courts enforce pleading requirements strictly) (citing cases);

- *See generally (United States v. 58,121,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) (explaining the difference between statutory standing and Article III standing);

- *Cf United States v. Wade*, 230 F. Supp. 2d 1298 (M.D. Fla. 2002) (if requiring strict compliance with Rule C(6) is not an abuse of discretion in a civil forfeiture case, requiring such compliance with the time for filing a claim in an administrative forfeiture case is not an abuse of

discretion either even though DEA freely grants extensions of time);

IX. Dispositive Pretrial Motions

- Fugitive disentitlement doctrine:

1. Before CAFRA, a fugitive in a related criminal case was not barred from opposing the civil forfeiture of his or her property:

- *Degen v. United States*, 517 U.S. 820 (1996) (fugitive disentitlement doctrine cannot be created by case law);

- *United States v. Funds Held in the Name of Wellerer*, 17 F. Supp. 2d 161 (E.D.N.Y. 1998) (because of *Degen*, claimant that is *alter ego* of fugitive may file claim challenging forfeiture of bank account held by perpetrator of mail fraud/child sex abuse scheme who is resisting extradition in Guatemala);

2. CAFRA reinstates the fugitive disentitlement doctrine at 28 U.S.C. § 2466:

- *United States v. Contents of Account Number 68108021 (Collazos)*, 228 F. Supp. 2d 436 (S.D.N.Y. 2002) (section 2466 is Congress's response to the Supreme Court's decision in *Degen*; it does not violate the claimant's constitutional right to due process);

3. Required elements of section 2466:

- *United States v. Contents of Account Number 68108021 (Collazos)*, 228 F. Supp. 2d 436 (S.D.N.Y. 2002) (the court first must determine if the civil action is related to a pending criminal prosecution and whether the claimant had notice of that prosecution; if so, it must then determine if claimant purposefully left, declined to enter or reenter, or otherwise evaded the jurisdiction of the United States and/or the court where the criminal case is pending);

- *United States v. \$1,231,349.68 in Funds*, 221 F. Supp. 2d 130 (D.D.C. 2002) (under section 2466, a district court may strike a claim filed in a civil forfeiture proceeding if it finds that the claimant (1) knew that a warrant had been issued for his apprehension and (2) fled the jurisdiction "in order to avoid criminal prosecution");

4. Retroactive application of section 2466:

- Section 2466 applies to pending cases, *see* CAFRA, section 21;

- *United States v. Contents of Account Number 68108021 (Collazos)*, 228 F. Supp. 2d 436 (S.D.N.Y. 2002) (applying section 2466 to civil forfeiture case filed in 1999);

5. Civil case must be related to a pending criminal prosecution:

United States v. Contents of Account Number 68108021 (Collazos), 228 F. Supp. 2d 436 .

(S.D.N.Y. 2002) (the term "related" is not defined in section 2466, but the definition in 18 U.S. C. § 981 (g)(4) maybe used; cases based on the facts, circumstances, and illegal activity are "related"; so are cases where the forfeiture allegation in the criminal case seeks forfeiture of the same funds);

- *United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (criminal prosecution for CMIR offense, and civil forfeiture of undeclared funds, are "related" for purposes of section 2466);

6. Notice of the criminal proceedings:

- *United States v. Contents of Account Number 68108021 (Collazos)*, 228 F. Supp. 2d 436 (S.D.N.Y. 2002) (defendant, whose counsel in the criminal case advised the AUSA that defendant would not return to the United States unless granted pretrial release, was obviously aware of the criminal indictment);

7. The related criminal case can be either state or federal:

- *United States v. Contents of Account Number 68108021/ (Collazos)*, 228 F. Supp. 2d 436, 443 n.5 (S.D.N.Y. 2002) (section 2466 "was intended to reach conduct involving not only the evasion of federal court jurisdiction but also that of state and local courts");

8. Fleeing or evading the jurisdiction of the court:

- *United States v. Contents of Account Number 68108021 (Collazos)*, 228 F. Supp. 2d 436 (S.D.N.Y. 2002) (foreign defendant who declines to enter the United States to face a criminal indictment is covered by section 2466(a)(1)(B); it is not necessary for the defendant to have been in the United States at the time the illegal activities took place);

9. Fugitive disentitlement doctrine applies to corporations:

- Section 2466(b) provides that the fugitive disentitlement doctrine applies to a claim filed by a corporation if a majority shareholder or the person filing on behalf of the corporation is a fugitive;

B. Default judgment:

- *United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (court enters default against all potential claimants who could have filed claims but did not);

- *United States v. Cadillac One 2002 Escalade*, 2003 WL 22220264 (N.D. In. 2003) (default is appropriate where claimant, who filed claim in administrative forfeiture proceeding, failed to file claim or answer in judicial proceeding);

- *United States v. Commodity Account at Saul Stone & Co.*, 1999 WL 91910 (N.D. In. 1999) (once notice has been published and time for filing claims has expired, court may enter default

judgment against all potential claimants who did not file claims), *aff'd*, 219 F.3d 595 (7th Cir. 2000)I

- *United States v. \$230,963.88 in U.S. Currency*, 2000 WL 1745130 (D.N.H. 2000) (when party fails to respond to the complaint within the time specified by Rule C(6), the Government may move for default pursuant to Fed. R. Civ. P. 55(a); entry of default is prerequisite to a default judgment);

- *But see United States v. \$345,510.00 in U.S. Currency*, 2002 WL 22040 (D. Minn. 2002) (even if no one files a claim, court is required to find evidence sufficient to establish forfeitability of property by preponderance of the evidence);

- Statute of limitations:

1. The limitations period for civil forfeiture actions is specified in 19 U.S. C. § 1621:

- *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (an action filed 'within the 5-year limitations period in section 1621 is timely);

2. The limitations period runs from the date of the discovery of the offense, not the date the offense was committed:

- *United States v. Real Property 874 Ganel Drive*, 79 F.3d 918 (9th Cir. 1996) (limitations period runs from time of discovery of the offense) not from date offense committed);

- *United States v. Four Tracts...on the Waters of Leiper's Creek*, 181 F.3d 104, 1999 WL 357773 (6th Cir. 1999) (unpublished) (Table) (limitations period runs from date of discovery of the offense, not date of commission, and it is tolled during the time the property is concealed);

3. The key date is *when federal agents became aware of the offense*:

- *United States v. Real Property Titled in the Names of Kang and Lee*, 120 F.3d 947 (9th Cir. 1997) (limitations period runs from time *federal agents became aware of the offense*; when state authorities became involved is irrelevant);

- *United States v. \$57,960.00 in U.S. Currency*, 58 F. Supp. 2d 660 (U.S. C. 1999) (assuming without deciding that statute of limitations under section 1621 runs from date feds adopt the forfeiture);

4. Prior to CAFRA, the courts were divided as to whether the 5 years began to run from the date of the discovery of the criminal offense or the date of discovery of the involvement of the property in the offense:

- *United States v. Carrell*, 252 F.3d 1193 (11th Cir. 2001) (date of discovery of the offense" is date when Government discovers the nexus between the property and the offense);

- *But see United States v. Twenty-seven Parcels of real Property*, 236 F.3d 438 (8th Cir. 2001) (in cases covered by the amended version of section 1621, Government win have 2 years from the discovery of the nexus between property and the offense to file a complaint; but amendment was necessary because under pre-CAFRA law applicable to this case, Government had to file within 5 years of discovery of the offense itself; remanded to determine if statute might have been tolled due to claimant's concealment);

- *See a/so Contents of Account Number 0300/288 Held in the Name of Jalal*, 344 F.3d 399, 407 n.4 (3d Cir. 2003) (finding unnecessary to decide whether the statute begins to run from date of discovery of the offense, or date of discovery of the nexus of the property to the offense, because when property is abroad, the statute never starts to run at all);

5. CAFRA resolved this issue-section 1621 now contains two limitations periods: 5 years from the discovery of the offense or 2 years from the discovery of the involvement of the property, whichever is later:

- *United States v. 5443 Suffield Terrace*, 209 F. Supp. 2d 919 (N.D. Ill. 2002) (CAFRA creates two limitations periods: a civil forfeiture complaint must be filed either within 5 years of the discovery of the offense giving rise to the forfeiture or within 2 years of the discovery of the connection between the property and the offense);

- *United States v. \$122,000 in U.S. Currency*, 198 F. Supp. 2d 106, 109 n.2 (D.P.R. 2002) (*dicta*) (CAFRA does not apply to case filed before August 23, 2000; but if it did, the 2-year extension of the statute of limitations would allow the Government to forfeit drug money derived from a 1988 offense but not discovered until 2000);

- *United States v. \$72,100 in U.S. Currency*, No. 2:03CV0140 DS (D. Utah July 3, 2003) (assuming without discussing that the 2-year extension applies to a post-CAFRA case, even though the 5-year limitations period under pre-CAFRA law arguably expired before CAFRA amended section 1621 in 2000);

6. When there is a continuing course, of conduct, the limitations period starts anew with each new offense:

- *United States v. 5443 Suffield Terrace*, 209 F. Supp. 2d 919 (N.D. Ill. 2002) (action filed in 2002 could be based on an offense occurring in 1997 even though it was part of a scheme first uncovered in 1996);

- *But see United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998) (if the Government is aware of an ongoing scheme, the statute of limitations runs from the time the Government first became aware of the scheme, not from the date of the particular violation that generated the seized property);

7. Interplay of section 1621 and 1-year limit under section 984:

- *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003) (if the

Government is relying on section 984, *it* must file its forfeiture complaint within 1 year of the offense; seizing the property within the 1-year period is not sufficient);

- *United States v. One Parcel of real Property...J70 Westfield Dr.*, 34 F. Supp. 2d 107 (D.R.I. 1999) (if the Government can trace the property to the underlying offense, using "drugs in-last out" or "drugs in-first out" principles, the 5-year limit applies; the 1-year limit in section 984(c) only applies when the Government cannot trace);

- *Note*: Effective August 23, 2000, section 984 was amended to make clear that nothing in section 984 was intended to limit the ability of the Government to forfeit property under another forfeiture statute if the Government was able to trace the property to the offense, *see* section 984(d);

- *See* additional cases cited in the fungible property section of the Money Laundering Forfeiture Case Outline on this point.

8. Statute of limitations is an affirmative defense:

- *United States v. Real Property... 9917 Amazona Drive*, 1999 WL 1940056 (W.D.N.C. 1999) (statute of limitations is waived unless raised in the answer or in a timely motion to dismiss);

- *United States v. Grover*, 119 F.3d 850 (10th Cir. 1997) (defendant who agrees not to contest a civil forfeiture action may not assert statute of limitations as a defense);

- *United States v. One Parcel of real Property...J70 Westfield Dr.*, 34 F. Supp. 2d 107 (D.R.I. 1999) (claimant has burden of proving by a preponderance of the evidence when the Government discovered the underlying offense and that it occurred outside the limitations period);

9. Statute of limitations is tolled during period when the claimant is a fugitive:

- *United States v. 657 Acres of Land in Park County*, 978 F. Supp. 999 (D. Wyo. 1997) (applying 18 U.S. C. § 3290 to civil forfeitures);

10. Statute of limitations is tolled while forfeiture is barred by the anti-alienation provision in ERISA.:

- *United States v. All Funds Distributed to Weiss*, 345 F.3d 49 (2d Cir. 2003) (it would be inequitable to allow the statute of limitations to expire while the forfeitable property was held in an ERISA-protected pension plan; Government may wait until the funds are distributed to bring its forfeiture action);

11. Statute of limitations is tolled while property is concealed or absent:

- *United States v. Four Tracts...on the Waters of Leiper's Creek*, 181 F.3d 104, 1999 WL 357773 (6th Cir. 1999) (unpublished) (Table) (limitations period is tolled during the time the property is

concealed; concealment continued after defendant dug up buried cash and used it to buy property because the Government was unaware of the purchase);

- *United States v. Carrell*, 252 F.3d 1193 (11th Cir. 2001) (even though Government knew defendant was a drug dealer, because the limitations period is tolled during concealment, the statute did not begin to run until Government discovered that property titled in wife's and son's names actually belonged to defendant);

- *United States v. \$122,000 in U.S. Currency*, 198 F. Supp. 2d 106 (D.P.R. 2002) (statute of limitations was tolled from time defendant committed drug offense in 1988 until Government discovered the drug money in 2000);

- *United States v. 657 Acres of Land in Park County*, 978 F. Supp. 999 (D. Wyo. 1997) (statute was tolled during time claimant concealed property's involvement in the offense; thus the Government could file action in 1996 against property purchased with drug proceeds even though defendant was indicted on drug offense in 1989);

- *Santana v. United States Customs Service*, 972 F. Supp. 304 (M.D. Pa. 1997) (refusing to interpret section 1621 as running from date of discovery of nexus between property and offense; even if statute could be tolled during period of concealment, it would not apply because the Government informant was aware of the nexus more than 5 years before complaint was filed);

Effective August 23, 2000, section 1621 was amended to make the limitations period 5 years from the discovery of the offense, or 2 years from the discovery of the involvement of the property in the offense, whichever is longer.

12. Property located abroad is "absent" from the United States:

- *United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23 (D.C. Cir. 2002) (funds located abroad are "absent" from United States for purposes of section 1621; the statute of limitations is tolled "indefinitely" for actions against property located in foreign countries);

- *Contents of Account Number 03001288 Held in the Name of Jalal*, 344 F.-3d 399 (3d Cir. 2003) (same, following *Banco Espanol*);

X. Pretrial Procedural Issues

A. Discovery:

1. Protective orders:

- *United States v. \$506,641.00 in U.S. Currency*, 1996 WL 78364 (N.D. Ill. 1996) (claimant not entitled to order precluding distribution of discovery materials to law enforcement agencies where no parallel criminal proceeding, was pending);

- *United States v. \$160,066.98 From Bank of America*, 202 F.R.D. 624 (S.D. Cal. 2001) (foreign claimant not entitled to order moving deposition from San Diego to Pakistan where case arises out of business transactions that occurred in the United States; the defendant property is in the United States; the claimants selected the United States for their business; and conducting the deposition in claimants' home country would be logistically difficult);

2. Informants:

- *United States v. Property Identified as Lot Numbered 718*, 1997 WL 420331 (D.D.C. 1997) (if the Government relies on hearsay from confidential informant to establish probable cause, it must reveal identity of informant to claimant who is required to rely on admissible evidence to rebut probable cause showing);

3. Request for admissions:

- *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414 (6th Cir. 2003) (incarcerated prisoner's failure to reply to request for admissions in civil forfeiture case served as a "constructive admission");

4. Claimant not entitled to take deposition of AUSA regarding seizure of funds:

- *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 894 (E.D.N.Y. 1992);

5. Sanctions for failure to comply with discovery:

- *Empire Blue Cross and Blue Shield v. Finkelstein*, 111 F.3d 278 (2d Cir. 1997) (person who fails to appear for properly noticed deposition and ignores order to appear before the court is a fugitive in the civil case; appellate court may invoke dispositive doctrine to dismiss appeal from adverse judgment; *Degen* distinguished);

- *United States v. \$1,322,242.58, 938 F.2d 433, 439-41* (3d Cir. 1991) (dismissing claim for failure to comply with civil discovery);

- *United States v. \$49,000 in U.S. Currency*, 330 F.3d 37 (5th Cir. 2003) (striking claim and answer was appropriate sanction under Rule 37 for claimants' failure to comply with discovery order within the court's deadline);

- *United States v. U.S. Currency in the Amount of \$24,170.00*, 147 F.R.D. 18 (E.D.N.Y. 1993) (dismissing claim for failure to answer interrogatories on two grounds: loss of statutory standing under Rule C and as an appropriate sanction under Rule 37);

- *United States v. One Parcel of real Property Known as 16614 Cayuga Road*, 69 Fed. Appx. 915, 2003 WL 21437207 (10th Cir. 2003) (any violation of the civil discovery procedures in Rule 26 was harmless where the evidence used by the Government in the civil forfeiture case was the same as the evidence previously admitted in claimant's criminal case);

- See *Degen v. United States*, 517 U.S. 820 (1996) (listing sanctions other than complete disentitlement that the court may impose to prevent a fugitive from gaining an advantage in forfeiture case);

- But see *United States v. Funds Held in the Name of Wetterer*, 17 F. Supp. 2d 161 (E.D.N.Y. 1998) (the: Government's request for adverse missing witness instruction denied where fugitive claimant who is resisting extradition has "reasonable excuse" for why he did not appear in the civil forfeiture case);

- See also cases in Criminal Forfeiture Outline on sanction for failure to comply with discovery in the ancillary proceeding;

6. Perjury during discovery:

- *United States v. \$138,381 in U.S. Currency*, 240 F. Supp. 2d 220 (E.D.N.Y. 2003) (defendant's perjury at his deposition in a civil forfeiture case leads to the revocation of his probation in a parallel criminal case);

L Stay of civil forfeiture pending criminal case:

1. Section 981 (g) (amended August 23, 2000) provides for the stay of a civil forfeiture case pending the conclusion of a criminal investigation or trial:

- *United States v. All Funds Deposited in Account No. 200008524845*, 162 F. Supp. 2d 1325 (D. Wyo. 2001) (new version of section 981(g) is broader than the old; it permits entry of stay, based on the Government's *ex parte* application, in order to prevent interference with a criminal investigation; stay granted where civil discovery "has a substantial potential of interfering" with the ongoing criminal investigation);

- *United States v. 29.17 Acres East of Soda Springs Road*, 2001 WL 30450119 (D. Or. 2001) (granting criminal defendant's motion to stay civil case pursuant to section 981(g)(2));

2. Only a claimant may seek a stay:

- *United States v. \$1,231,349.68 in Funds*, 227 F. Supp. 2d 130 (D.D.C. 2002) (because only a claimant may seek a stay under section 981 (g)(2), person whose claim is stricken under the fugitive disentitlement doctrine is not eligible to seek a stay);

- *United States v. Salgado-Santana*, Crim. OO-Q692CCC (D.P.R. Feb. 14,2002) (unpublished) (defendant in criminal case cannot use section 981 (g) to stay administrative forfeiture; he must first file a claim under section 983(a)(2) and then move to stay the civil judicial forfeiture);

- *In the Matter of the Seizure of the Contents Of Community Trust Bank Account 4000393242*, No. 01-2050 (S.D. Ohio Nov. 5, 2001) (claimant cannot seek stay of civil forfeiture proceeding before the complaint is filed and before claimant has filed claim and answer to that complaint);

No requirement that claimant file answer before requesting stay:

- *United States v. 14280 N.W. Tradewinds St., Portland*, 2001 WL 34050118 (D. Or. 2001) (criminal defendant, upon filing a claim, had standing to file a motion to stay civil forfeiture proceedings even though he did not file an answer in the civil case);

3. Pre-CAFRA., courts were divided over whether it was permissible to grant a preindictment stay:

- *United States v. Funds on Deposit...Sterling Bank*, Civ. No. H-97-1537 (S.D. Tex. Aug. 14, 1997) (stay granted; court has inherent power to prevent use of civil discovery to undermine ongoing criminal investigation);

- *United States v. Account #87303569 in the Name of Down East Outfitters, Inc.*, 1996 U.S. Dist. LEXIS 14555 (E.D.N.C. 1996) (stay denied; unindicted defendant has right to early judicial determination of claim to recover property; but *dicta* suggests that the Government may be entitled to a protective order);

4. Pre-CAFRA cases granting stay to avoid Fifth Amendment problems for claimant:

- *United States v. All Assets of Statewide Autoparts, Inc.*, 971 F.2d 896 (2d Cir. 1992); *United States v. A Certain Parcel of Land*, 781 F. Supp. 830, 833 (D.N.H. 1992); *United States v. Puella*, 814 F. Supp. 1155 (E.D.N.Y. 1993);

- *United States v. All Monies ...Account Number ALE 238254 F.2.*, 1996 WL 807890 (E.D. Tex. 1996) (civil case is stayed and the Government can continue to hold the property until the Government gives claimant immunity or statute of limitations runs on offenses with which claimant could be charged);

- *United States v. One Parcel, Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (stay of civil forfeiture at claimant's request to avoid Fifth Amendment problems does not violate claimant's due process rights);

- *United States v. \$557,933.89 in U.S. Funds*, 1998 WL 817651 (E.D.N.Y. 1998) (claimant's motion for stay of civil discovery until expiration of statute of limitations on criminal charges granted; court has discretion to grant stay even though defendant has not been indicted);

- *Cf United States v. Scrivner*, 167 F.3d 536 (9th Cir. 1999) (suggesting in *dicta* that the Government can avoid forcing defendant to invoke the Fifth Amendment in a civil forfeiture case by delaying the civil forfeiture until the criminal case is over or by granting defendant immunity for statements made in the civil case);

5. Pre-CAFRA cases denying stay despite Fifth Amendment problems:

- *In Re Philips, Becbivith & Hall*, 896 F. Supp. 553 (B.D. Va. 1995) (stay not warranted where property is not in the Government's possession and stay would frustrate the Government's ability

to recover the property);

- *Note:* The claimant's assertion of fear of self-incrimination must be based on the existence of an actual investigation or prosecution, and not mere speculation:

- See *United States v. Lot 5, Fox Grove*, 23 F.3d 359 (11th Cir. 1994) (claimant's mere blanket assertion of Fifth Amendment protection against self-incrimination in connection with related criminal case insufficient grounds for stay); *United States v. Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d 990, 997 (6th Cir. 1993) (same);

6. A "related criminal case" includes a case in which persons other than the claimants are defendants:

- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (stay granted based on *in camera* review of *ex parte* evidence, to avoid impact on criminal trial of notorious drug trafficker; claimant and criminal defendant were different people);

- *United States v. All Right, Title and Interest in Real Property (228 Blair Ave.)*, 821 F. Supp. 893 (S.D.N.Y. 1993) (case may be sufficiently related to criminal case even if claimants in civil case are not defendants);

7. Conclusory allegations of impact on criminal case do not constitute "good cause" for a stay:

- *United States v. All Right, Title and Interest in Real Property (228 Blair Ave.)*, 821 F. Supp. 893 (S.D.N.Y. 1993) (conclusory allegations of adverse effect of discovery on related criminal case insufficient where stay would be for an indefinite period and claimant's business is suffering under Government management);

8. Stay denied where it would result in indefinite delay in claimant's having any remedy for deprivation of property:

- *United States v. Four (4) Contiguous Parcels*, 864 F. Supp. 652 (W.D. Ky. 1994);

9. Government's appeal from denial of stay:

- *United States v. Oman*, 156 F.3d 110, 118 n.10 (1st Cir. 1998)(dicta)(if district court unreasonably denies the Government's request for stay of civil case pending imminent criminal trial, the Government has strong basis for appeal);

C. Interlocutory sale:

1. Property may be sold to avoid deterioration and waste while civil case is stayed:

- *United States v. One Parcel Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (interlocutory sale of residence while civil case was stayed pending criminal trial avoided waste and expense and allowed the Government to satisfy mortgage that defendant had stopped

paying);

- *Aguilar v. United States*, 1999 WL 1067841 (D. Conn. 1999) (interlocutory sale of real property to prevent vandalism and avoid mortgage payments justified by exigent circumstances despite claimant's lack of consent);

- *United States v. Real Property Known as 2916 Forest Glen Court*, 162 F. Supp. 2d 909 (S.D. Ohio 2001) (denying claimant's motion to force Government to sell seized pharmaceuticals before they expire and become worthless because, *inter alia*, the FTCA gives claimant an adequate remedy if he prevails in the forfeiture case after the property becomes worthless);

- *United States v. 4620 Macland Road*, No. 1:97-CV-1978-JEC (N.D. Ga. Dec. 8, 1998) (unpublished) (interlocutory sale of real property subject to civil forfeiture is governed by Rule E(9)(b); interlocutory sale authorized to avoid deterioration and to allow the Government to pay off lienholder; claimant not prejudiced because if not for the forfeiture action, lienholder could have foreclosed; following *Berryhill Farm*);

2. Mortgage foreclosure:

- *United States v. Real Property at 2659 Roundhill Drive*, 194 F.3d 1020 (9th Cir. 1999) (if court permits lienholder to sell forfeitable real property at foreclosure sale, it should issue order making the proceeds of the sale the *res* subject to forfeiture; otherwise the real property remains subject to forfeiture under Rule E(5) even though it has been sold);

- *United States v. Real Property at 2659 Roundhill Drive*, 194 F.3d 1020 (9th Cir. 1999) (the Government's acquiescence in foreclosure sale does not constitute abandonment of its intent to forfeit the property);

D. Immunity:

- Application of *Kastigar*:

- *In re Grand Jury Subpoena of Elbarasse*, 1998 WL 879700 (S.D.N.Y. 1998) (civil forfeiture is a "criminal case" within the meaning of the use immunity statute, section 6002);

E. Civil restraining orders:

CAFRA authorizes the court to issue a pretrial restraining order in a civil forfeiture case, *see* section 983(j):

- *Importex International, Inc. v. United States*, No. 96-2134-CN-MORENO (S.D. Fla. July 18, 1997) (unpublished) (temporary restraining order issued to restrain 1,100 bank. Accounts long enough to preserve status quo while the Government reviewed records);

- *See Outline on Civil Restraining Orders* by Gordon Kromberg, available on AFML Online.

F. Appointment of counsel:

- Section 983(b) provides for appointment of counsel in a civil forfeiture case in two instances, *see Outline on Appointment of Counsel and Attorneys' Fees* by Harry Harbin, available on AFML Online.
- *United States v. One 2000 Wells Cargo Trailer*, 2002 WL 31466501 (D. Or. 2002) (under section 983(b), claimant is not entitled to have anyone other than the attorney who represented him in the criminal case appointed to handle the civil forfeiture; also, no counsel will be appointed if the civil forfeiture claim appears to be without merit);
- *United States v. \$500,000 in U.S. Currency*, 271 F. Supp. 2d 1255 (S.D. Cal. 2003) (section 983(b)(1)(A) allows the court to expand the scope of the appointment of Criminal Justice Act counsel to include civil forfeiture proceedings, but it does not authorize the appointment of separate counsel to handle the forfeiture);
- *United States v. \$500,000 in U.S. Currency*, 271 F. Supp. 2d 1255 (S.D. Cal. 2003) (criminal and civil cases are related for purposes of section 983(b)(1)(A) if the transactions underlying the criminal case may be used as Rule 404(b) evidence in the civil case);
- Pre-CAFRA law:
 - *United States v. 87 Blackheath Road*, 201 F.3d 98 (2d Cir. 2000) (wife of indicted defendant is not entitled to appointment of Criminal Justice Act counsel to represent her in a parallel civil forfeiture case);
 - *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995) (even if civil forfeiture is punitive, there is no Sixth Amendment right to counsel in a case that cannot result in incarceration);
 - *United States v. Deninno*, 103 F.3d 82 (10th Cir. 1996) (same);

XI. Forfeitability: Nexus Between the Property and the Offense

- Before CAFRA, the Government was required only to establish probable cause to believe that the property was subject to forfeiture; *see* 19 U.S.C. § 1615. For all cases commenced on or after August 23, 2000, however, the Government must prove the forfeitability of the property by a preponderance of the evidence, *see* 18 U.S.C. § 983(c).

A. Pre-CAFRA law-the probable cause standard:

1. Probable cause for forfeiture is tested by the same criteria as used to determine probable cause for the issuance of a search warrant:

- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) ("the probable cause threshold in

this context is the same as that which applies elsewhere");

- *United States v. Lot 9, Block 2 of Drybrook Place*, 919 F.2d 994, 998 (5th Cir. 1990); *United States v. \$149,442.43 in U.S. Currency*, 965 F.2d 868,876 (10th Cir. 1992); *United States v. One 1986 Ford Pickup*, 56 F.3d 1181 (9th Cir. 1995); *United States v. Real Property, 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996);

- *But see United States v. \$242,484.00*, *But see United States v. \$242.484.00*, - F.3d-1 2003 WL 22723431 (11th Cir. Nov. 20, 2003) (amount of evidence needed to establish probable cause standard is higher in civil forfeiture cases than it is for search or seizure, even though the standard is the same);

2. Probable cause requirement means the Government must have "reasonable grounds" to believe that the property is subject to forfeiture:

- *United States v. 1948 Martin Luther King Drive*, 270 F.3d 1102 (7th Cir. 2001) (there is probable cause if "the totality of the circumstances demonstrates a nexus between the property and illegal drug activity");

- *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119 (2d Cir. 1993); *United States v. \$200,000,805 F. Supp. 585, 589* (N.D. 111.1992); *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984,990 (E.D.N.Y. 1992); *United States v. A Certain Parcel of Land*, 781 F. Supp. 830, 833 (D.N.H. 1992);

- *United States v. One Parcel... 7079 Chilton County Road*, 123 F. Supp. 2d 602 (M.D. Ala. 2000) (probable cause is based on a totality of the circumstances and "a common sense view to the realities of normal life"), *rev 'd on other grounds*, 270 F.3d 1331 (11th Cir. 2001);

- *United States v. Tencer*, 1993 WL 310527 (E.D. La. 1993) (probable cause for section 981-82 seizure warrant requires evidence to support "reasonable belief that there was a substantial connection between the property to be forfeited and the alleged crime");

- *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248,251 (E.D. Va. 1993) ("the probable cause standard requires courts to make a practical, common sense decision whether, given all the circumstances, there is a fair probability that the property to be forfeited was involved in or the subject of a transaction that fits within [section] 1956 or [section] 1957");

- *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74 (D.R.I 1999) (probable cause is based on totality of circumstances and may include circumstantial evidence and evidence not admissible at trial);

3. Hearsay admissible to show probable cause:

- *United States v. 3814 Thurman Street*, 164 F.3d 1191 (9th Cir. 1999) ("probable cause may be supported by otherwise inadmissible hearsay"); *United States v. Property. Parcel of Aguilar*, 337 F.3d 225 (2d Cir. 2003) (same);

- *United States v. 1948 Martin Luther King Drive*, 270 F.3d 1102 (7th Cir. 2001) (hearsay is admissible to show probable cause if there is strong indicia of reliability);
- *United States v. \$129,727.00 U.S. Currency*, 129 F.3d 486 (9th Cir. 1997) (the Government may use hearsay to establish probable cause, but must use admissible evidence to rebut evidence presented by the claimant);
- *United States v. \$9,041,598.68*, 163 F.3d 238 (5th Cir. 1998) (the Government may establish probable cause with hearsay and circumstantial evidence);
- *United States v. 1978 Cessna Turbo 210*, 182 F.3d 919, 1999 WL 407469 (6th Cir. 1999) (unpublished) (Table) (hearsay, including statements of informants, may be used to establish probable cause; test is the same as it is for search and seizure);
- *United States v. \$200,000*, 805 F. Supp. 585 (N.D. Ill. 1992) (allowing hearsay to show probable cause in section 981 case); *United States v. One 1987 Mercedes Benz 300E*, 820 F. Supp. 248 (E.D. Va. 1993) (same);
- *United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (hearsay admissible if reliable);
- *United States v. \$271,070.00 in U.S. Currency*, 1997 WL 106307 (N.D. Ind. 1997) (denying claimant's motion to strike agent's affidavit containing hearsay submitted by the Government as part of opposition to claimant's motion for summary judgment on probable cause issue);
- *United States v. One 1997 Ford Expedition*, 135 F. Supp. 2d 1142 (D.N.M. 2001) (hearsay may be considered at the summary judgment stage in forfeiture proceedings in considering if the Government has met the probable cause standard);

3. Proceeds cases:

- In proceeds cases under CAFRA, the Government must prove by a preponderance of the evidence that the property was derived from a criminal offense, or that the offense is traceable to such property:

1. The preponderance standard: In general, circumstantial evidence establishes that money is proceeds of crime:

- *United States v. \$174,206.00 in U.S. Currency*, 320 F.3d 658 (6th Cir. 2003) (drug dealer's lack of legitimate income, as demonstrated by his federal tax returns, is sufficient to establish the forfeitability of his property by a preponderance of the evidence);
- *United States v. Veggacado*, 2002 U.S. App. LEXIS 11960 (6th Cir. 2002) (Table) (applying the preponderance standard, circumstantial evidence-drug dealer's lavish lifestyle without legitimate source of income-sufficient to establish forfeitability of jewelry as drug proceeds without having to link each piece of jewelry to drug trafficking by direct evidence);

- *United States v. \$181,087.14 in U.S. Currency*, 2002 WL 31951270 (S.D. Ohio 2002) (parents' meager income and son's drug dealing established that money held in parents' names was actually proceeds of son's drug trafficking);

Pre-CAFRA probable cause cases:

- *United States v. 1948 Martin Luther King Drive*, 270 F.3d 1102 (7th Cir. 2001) (it was sufficient to show that the property was acquired by a drug dealer during the time he was making large sums from drug deals, that he had no legitimate income, that the transactions were usually in cash, and that the property was titled in third party names);

- *United States v. One Lot of U.S. Currency* (\$36,674), 103 F.3d 1048 (1st Cir. 1997) (circumstantial evidence that money was involved in drug trafficking sufficient); *United States v. One Parcel Known as 352 Northup St.*, 40 F. Supp. 2d 74 (D.R.I. 1999) (same);

- *United States v. Parcels of Land*, 903 F.2d 36, 42 (1st Cir. 1990) (accepting circumstantial evidence and rejecting requirement that the Government must link seized properties with particular drug transactions); *United States v. Parcels of real Property*, 913 F.2d 1, 3 (1st Cir. 1990) (same); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (same); *United States v. All Funds on Deposit in Any Accounts*, 801 F. Supp. 984, 990 (E.D.N.Y. 1992) (same);

- *United States v. Certain Real Property Located on Hanson Brook*, 770 F. Supp. 722, 725 (D. Me.1991) (history of drug trafficking and use of large quantities of cash to purchase real property sufficient under section 981 to support reasonable belief that money laundering violations had occurred);

- *United States v. A Parcel of Land (92 Buena Vista)*, 937 F.2d 98, 104 (3d Cir. 1991), *aff'd on other grounds*, 507 U.S. 111 (1993) (where drug dealer drops off sack of cash containing \$220,000, and wires a portion to third party to buy a house, house is forfeitable as proceeds since there was reasonable basis to believe cash probably was derived from drug transactions); *United States v. Eleven Vehicles*, 836 F. Supp. 1147 (E.D. Pa. 1993) (section 981 case);

- *United States v. One 1996 Lexus LX450*, 1999 WL 617686, at *8 (N.D. m. 1999) (when convicted drug dealer begins spending large sums of cash without a legitimate source of income 2 years after his release from prison, there is probable cause to believe the cash is drug proceeds);

- *But see United States v. Real Property Known as 22249 D%rosa Street*, 167 F.3d 509 (9th Cir. 1999) (once all evidence showing how defendant paid for real property was suppressed, there was insufficient evidence that property was traceable to drug proceeds; that defendant was a drug dealer with no legitimate source of income was insufficient);

- *Pimentel v. DEA*, 99 F. Supp. 2d 420 (S.D.N.Y. 2000) (DEA had no probable cause to believe gold chain defendant was wearing at time of arrest had any connection to drug trafficking);

2. Cash seizures: highway/airport/passenger train stops:

- Preponderance of the evidence cases:

- *United States v. \$30,670 in U.S. Funds*, 2002 WL 31093587 (N.D. In. 2002) (dog sniff, purchase of one-way ticket with cash, quantity of currency concealed in woman's girdle on courier's person, and implausible story-all supported by follow-up investigation-satisfied preponderance of the evidence standard);

- *United States v. \$22,991.00, More or Less, in U.S. Currency*, 227 F. Supp. 2d 1220 (S.D. Ala. 2002) (dog sniff, quantity of currency, history as drug user/dealer, and presence of drugs in car sufficient to establish forfeitability by preponderance of the evidence);

- *United States v. \$345,510.00 in U.S. Currency*, 2002 WL 22040 (D. Minn. 2002) (following \$141,770.00; positive dog alert to suitcase in baggage compartment of Amtrak train, odor of marijuana, quantity of currency and packaging in plastic and paper bags, and inconsistent story sufficient to establish forfeitability by preponderance of the evidence);

- *United States v. \$18,170.00 in U.S. Currency*, 69 Fed. Appx. 714, 2003 WL 21659445 (6th Cir. 2003) (presence of small amount of marijuana, dog alert, quantity of currency, evidence of involvement in prior drug deal, and tax returns showing lack of legitimate income was sufficient to establish forfeitability of currency by preponderance of the evidence);

- *United States v. \$99,990 in U.S. Currency*, 69 Fed. Appx. 757, 2003 WL 21698849 (6th Cir. 2003) (large amount of currency, manner of packaging, false statements, dog sniff, evasive driving, and 10-year-old marijuana conviction established forfeitability of seized currency by preponderance of the evidence);

- *United States v. Currency U.S. \$42,500,283* F.3d 977,984 n.1 (9th Cir. 2002) (*dicta*) (the usual evidence in a currency seizure case--dog sniff, quantity of currency and manner of packaging, and claimant's implausible story--would be sufficient to meet the Government's burden under the heightened preponderance standard);

- *United States v. \$39,400 in U.S. Currency*, No. 01cv16255-IEG(LSP) (S.D. Cal. Aug. 12, 2002) (summary judgment for Government based on amount of currency, manner of packaging, attempt at concealment, claimant's unbelievable story and prior drug conviction, and drug activity at residence from which claimant departed);

- *Cf United States v. Hurtado*, 38 Fed. Appx. 661, 2002 WL 1275025 (2d Cir. 2002) (Table) (lack of legitimate income or explanation for source of money and positive alert by drug dog sufficient to establish beyond a reasonable doubt in a criminal case that \$500,000 in cash was drug proceeds; expert opinion regarding validity of dog sniff satisfied Rule 702 of the Federal Rules of Evidence and the Supreme Court's decision in *Daubert*);

- Cases decided under the pre-CAFRA probable cause standard:

- *United States v. \$22,474 in U.S. Currency*, 246 F.3d 1212 (9th Cir. 2001) (dog sniff by dog that alerts to methyl benzoate, plus claimant's criminal record, inconsistent and false statements. the quantity of the currency, and courier "profile" information-traveling on one-way ticket, purchased with cash, to drug source city--established probable cause);

- *United States v. Currency, U.S. \$42,500,283* F.3d 977, 984 n.1 (9th Cir. 2002) (following \$22,474; dog sniff is highly probative if trainer testifies that dog was trained to alert to methyl benzoate, not to background contamination of cocaine on the currency);

- *United States v. \$141,770.00 in U.S. Currency*, 157 F.3d 600 (8th Cir. 1998) (quantity of currency, packaging in three layers of ziplock bags wrapped in fabric softener sheets, placement of money in hidden compartment, positive dog sniff, and false statements supplied probable cause even though no connection to drug traffickers was found);

- *United States v. \$129,727.00 U.S. Currency*, 129 F.3d 486 (9th Cir. 1997)(drug courier profile provided adequate basis for investigative stop, and once bags were opened, large quantity of cash and manner of packaging-bundles wrapped in fabric softener sheets and plastic wrap-provided probable cause);

- *United States v. One Lot of U.S. Currency* (\$36,674)) 103 F.3d 1048 (1st Cir. 1997) (dog sniff, defendant's connection to known criminals, quantity of cash, itinerary of air travel, and evasive answers to questions all add up to probable cause);

- *United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994) (dog sniff supports finding that laundered cash is drug proceeds); *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995);

- *United States v. \$39,873.00*, 80 F.3d 317 (8th Cir. 1996) (dog sniff, packaging of currency, and proximity to drug paraphernalia provided sufficient probable cause for seizure of currency during highway stop);

- *United States v. All Right, Title and Interest... 785 St. Nichols Ave.*, 983 F.2d 396,405 (2d Cir. 1993) (lack of legitimate income and failure to account for large amounts of cash are factors establishing cash was drug proceeds) (collecting cases);

- *United States v. Twelve Pieces of real Property*, 54 Fed. Appx. 461, 2003 WL 103052 (9th Cir. 2003) (Table) (manner of packaging-i.e., placement of cash in heat-sealed plastic bags, which is typically done to frustrate drug dogs-is evidence that the money is drug proceeds);

- *United States v. U.S. Currency in the Amount of \$898,719.00*, 2003 WL 21544283 (W.D. Mo. 2003) (quantity of currency, dog sniff, prior drug seizure, inconsistent statements, and manner of packaging and concealment supplied probable cause for forfeiture);

- *United States v. \$13,477.00 in U.S. Currency*, 2002 WL 31190140 (S.D.N.Y. 2002) (following *Sf. Nicholas Ave.*; drug dealer's inability to offer credible explanation for large quantity of cash is sufficient to establish probable cause);

- *United States v. \$189,825.00 in U.S. Currency*, 8 F. Supp. 2d 1300 (N.D. Okla. 1998), *aff'd*, No. 98-5227 (10th Cir. May 23, 2000) (courier profile and travel on highway known as a "drug pipeline," unique packaging and placement of money in gas tank, implausible story, and dog sniff established probable cause);
- *Albajon v. Gugliotta*, 72 F. Supp. 2d 1362 (S.D. Fla. 1999) (dog sniff, quantity of cash [\$57,000] in socks and pants, conflicting explanations, and multiple identifications established probable cause for cash seizure);
- *United States v. \$86,020.00 in U.S. Currency*, 1 F. Supp. 2d 1034 (D. Ariz. 1997) (discounting dog sniff, the Government nevertheless established probable cause based on large quantity of cash, use of assumed name, and other courier profile factors);
- *United States v. \$9,135.00 in U.S. Currency*, 1998 WL 329270 (E.D. La. 1998) (courier profile-nervous behavior, absence of luggage, bundling of currency in pockets and shoes, implausible story, dog sniff, and lack of sufficient legitimate income together established probable cause);
- *United States v. \$8,880,945* F. Supp. 521 (W.D.N.Y. 1996) (claimant with history of drug trafficking buys airline tickets with cash using false name, carries no luggage, and refuses to show photo identification to ticket agent);
- *United States v. \$206,323.56 in U.S. Currency*, 998 F. Supp. 693 (S.D. W. Va. 1998) (claimant's flight during highway stop, dog sniff, presence of marijuana and weapons, quantity of currency, and manner of bundling established probable cause);
- *United States v. \$94,010 U.S. Currency*, 1998 WL 567837 (W.D.N.Y. 1998) (false story about destination, concealment of cash in false compartment, and alert by drug dog showed that the Government had sufficient evidence to satisfy particularity requirement in Rule E(2)(a); dog sniff is probative evidence in the Second Circuit);
- *United States v. Akins*, 995 F. Supp. 797 (M.D. Tenn. 1998) (drug courier profile can be used to justify *Terry* stop if supported by other evidence);
- *United States v. \$339,884 in U.S. Currency*, No. 99-2238-CIV-HIGHSMITH (S.D. Fla. Mar. 2, 2000) (probable cause based on quantity of currency [\$339,884]; manner of packaging-i.e.) currency wrapped in rubber bands; circumstances of transfer-I. e., claimant received canvas bag in supermarket parking lot; claimant's denial of any knowledge of the money; positive dog sniff; and claimant's invocation of the Fifth Amendment);
- *United States v. \$263,448.00 in U.S. Currency*) Civ. No. I;96-CV -284-HTW (N.D. Ga. Sept. 24, 1998) (unpublished) (totality of the circumstances establishes that a 21-year-old dropout who has no source of income, travels with \$263,000 in street money in a carry-on bag, and has associations with known drug dealers is a courier who carries drug money);
- *United States v. Real Property at 40 Clark Road*, 52 F. Supp. 2d 254 (D. Mass. 1999) (\$1

million in cash and gold hidden in home of drug dealer is probably drug proceeds);

- *United States v. Funds in the Amount of \$29,266*, 96 F. Supp. 2d 806, 809 (N.D. In. 2000) (amount of cash and dog sniff, by themselves, not sufficient to establish probable cause; but other evidence-lack of legitimate income, flight, false statements-show money is criminal proceeds of some kind, and drug trafficking is the most likely source);

- *United States v. Funds in Amount of \$122,500*, 2000 WL 984411 (N.D. 111. 2000) (Government established probable cause to believe over \$100,000 in cash seized from person who filed false CMIR, had insufficient legitimate income, and worked as courier for foreign drug trafficker before and after seizure was drug proceeds);

- *United States v. \$349,425 in U.S. Currency*, No. 99-195-SLR (D. Del. Nov. 30, 2000) (unpublished) (positive dog sniff, results of an Ion Scan test, packaging of large amount of currency in rubber bands in bag hidden in trunk of car, and the driver's admission that a person in Queens, NY, gave him instructions to deliver money to someone in Miami established probable cause to believe the money seized in southbound lanes of I-95 in Delaware was drug proceeds);

- *See also United States v. \$557,933.89, More or Less. in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (dog sniff is valid as to seized money orders because, unlike currency, there is no chance the money orders were subject to environmental contamination from cocaine in the money supply);

3. Adverse decisions on cash seizures:

- *Note:* The following cases were decided under the pre-CAFRA probable cause standard:

- *United States v. \$242,484.00*, - F.3d -,2003 WL 22723431 (11th Cir. Nov. 20, 2003) (quantity and packaging of cash, travel to and from source city, dog sniff, and claimant's inability to identify persons from who she received cash or to provide receipts all insufficient to establish probable cause);

- *United States v. \$30,060*,39 F.3d 1039 (9th Cir. 1994) (dog sniff not probative where 75 percent of currency in the community is contaminated), *distinguished*, *United States v. \$22,474 in U.S. Currency*, 246 F.3d 1212 (9th Cir. 2001) (in *\$30,060*, court did not have benefit of scientific evidence that drug dogs alert to volatile chemical by-product that is absent from currency in general circulation; also claimant in *\$30,060* had no prior criminal conviction);

- *United States v. \$10,700.00 in U.S. Currency*, 258 F.3d 215 (3d Cir. 2001) (dog sniff, Ion Scan analysis, criminal records for drug trafficking, bundling of currency with rubber bands in plastic bags, nervous behavior, and inconsistent statements, taken together) are insufficient circumstantial evidence);

- *United States v. \$49,576.00 in U.S. Currency*, 116 F.3d 425 (9th Cir. 1997) (seizure of cash at airport lacked probable cause despite dog sniff, evasive answers, fake identification, courier profile, and prior drug arrest); *United States v. \$13,570.00 in U.S. Currency*, 1997 WL 722947

(E.D. La. 1997) (same); *United States v. \$14,876.00 in U.S. Currency*, 1997 WL 722942 (E.D. La. 1997) (same);

- *United States v. \$40,000 in U.S. Currency*, 999 F. Supp. 234 (D.P.R. 1998) (dog sniff) drug courier profile, quantity of currency, and evasive answers are not sufficient to establish probable cause where the Government fails to establish any connection between claimant and any drug trafficker);