BRENDA GRANTLAND, ESQ.
pro hac vice (California Bar #165899)
20 Sunnyside Suite A-PMB 204
Mill Valley CA 94941
415/380-9108
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
ALBUQUERQUE DIVISION

UNITED STATES OF AMERICA Plaintiff, v. GABRIEL RODRIGUEZ AGUIRRE & ELENO AGUIRRE Defendants.	Crim. No. 92-0486-JC DEFENDANTS' REPLY TO MOTION TO DISMISS 41(e) MOTION FOR THE RETURN OF PROPERTY

Defendants, Gabriel Rodriguez Aguirre, Eleno Aguirre, Doloras Contreras and Tony Bancomo, through undersigned counsel, respond to the government's Motion to Dismiss With Prejudice Defendants' Rule 41(e) Motion for Return of Property as follows:

I. Statute of limitations

In its motion to dismiss with prejudice, the government argues that defendants' statute of limitations for bringing a motion for return of property has run. They claim that defendants are bound by the six year statute of limitations of 28 U.S.C. §2401(a), and that defendants' claim for return of property accrued when the property is seized. The government does not point to any

Tenth Circuit or Supreme Court authority to support those propositions, but rely only on dicta in two Second Circuit cases. The two Second Circuit cases cited by the government[1] do not discuss when such a cause of action accrues. In a subsequent case, citing *Boero*, the Second Circuit held:

> Polanco's cause of action accrued when he discovered or had reason to discover that his property had been forfeited without sufficient notice. *See Leon v. Murphy,* 988 F.2d 303, 308 (2d Cir.1993). The district court assumed that the cause of action accrued when the currency was seized on April 4, 1990. But the specific constitutional violation alleged--the permanent deprivation of Polanco's property without notice--did not occur until sometime later, when the property was forfeited. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.,* 522 U.S. 192, ----, 118 S.Ct. 542, 549, 139 L.Ed.2d 553 (1997) (cause of action accrues when plaintiff has a "complete and present" cause of action and "can file suit and obtain relief") (citation and quotation marks omitted). Accordingly, this action accrued at the earliest of the following dates:
>
> > (1) at the close of the forfeiture proceedings, however soon after the seizure; or
> >
> > (2) if no forfeiture proceedings were conducted, at the end of the five-year limitations period during which the government is permitted to bring a forfeiture action, *see Boero,* 111 F.3d at 305, at which time the claimant--without other notice--had reason to know that the forfeiture proceedings had begun (or that the property was being held) without due process.

Polanco v. DEA, 158 F.3d 647 (2nd Cir. 1998).

The defendants have found no evidence that any forfeiture proceedings have ever been conducted against this property. If there were no forfeiture proceedings against this property, under the Second Circuit's test, the defendants' six year statute of limitations under 28 U.S.C. §2401(a) accrued when the government's statute of limitations ran.

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[1] *Boero v. Drug Enforcement Administration*, 111 F.3d 301, 305 fn. 5 (2nd Cir. 1997) and *Ikelionwu v. United States*, 150 F.3d 233, 238 (2nd Cir. 1998).

As we explain below, we believe that the Second Circuit's test for when the statute of limitations begins to accrue on a Rule 41(e) motion is incorrect – it's not the earlier of the two events, but the later.

A. Computing the government's statute of limitations

There are two statutes of limitations which are arguably applicable to the government in drug forfeiture cases. One is 28 U.S.C. §2462, which provides a general statute of limitations of five years for any "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise."

It is also possible that the Customs statute of limitations -- 19 U.S.C. §1621 -- applies. Although by its terms §1621 only applies to Customs statutes, 21 U.S.C. §881(d) incorporates by reference

> [t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims...

into §881 forfeiture cases. Under §1621 the statute of limitations runs "five years after the time when the alleged offense was discovered." The language quoted above seems to incorporate only the procedures of the customs laws, and not the statutes of limitation.

Computing that date is problematic under §1621 because it requires the accrual of claimants/defendants' statute of limitations to depend in part on when the government learned of the accrual of its cause of action - a fact distinctly within the knowledge of the opposing party, but unknown to the defendant/claimant. This "discovery" by the opposing party test is made even more complex by the fact that the government must establish a nexus - or a "substantial connection" between one or more offenses and each item of property. The defendants have no knowledge of when (if ever) the government discovered the offenses triggering potential forfeiture of the property named in this motion.

On the other hand, it was clear that the government's forfeiture claim must have accrued by October 21, 1992, when seizure warrants were executed simultaneously on 51 properties belonging to defendants and their family members, and virtually all of the worldly possessions of defendants and their families was seized.

The general rule for accrual of federal claims is that "the statute of limitations begins to run when a plaintiff knows or should know of the injury." *Bowling v. Founders Title Co.,* 773 F.2d 1175, 1178 (11th Cir. 1985), *cert. denied*. 475 U.S. 1109 (1986); *Alexander v. Perkin Elmer Corp.*, 729 F.2d 576 (8th Cir. 1984). Here, claimants/defendants knew, or had reason to believe, that the government had a forfeiture claim against the property when the government seized it - on October 21, 1992. (However, if the property was seized for evidence and not for forfeiture, then seizure alone might not indicate the government's potential forfeiture claim had accrued.)

One thing is now relatively certain in this morass of overlapping and hazy statute-of-limitations rules – the claimants' cause of action under Rule 41 would not start to accrue until after the running of the government's statute of limitations for forfeiture.

In *Bay Area Laundry, supra*, the Supreme Court made it clear that a cause of action doesn't accrue for statute of limitations purposes until the plaintiff has the unrestricted right to sue on the claim. "A limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.' Rawlings v. Ray, 312 U.S. 96, 98 (1941). " *Bay Area Laundry,* 522 U.S. at 197. The High Court construed the typical language found in statute of limitations "the date on which the cause of action arose" as incorporating

> the standard rule that the limitations period commences when the plaintiff has "a complete and present cause of action." *Rawlings v. Ray*, 312 U.S. at 98; see also *Clark v. Iowa City*, 20 Wall. 583, 589 (1875) ("All statutes of limitation begin to run when the right of action is complete . . . ."). Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become "complete and present" for limitations purposes until the plaintiff can file suit and obtain relief. See *Reiter v. Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.")

Bay Area Laundry, 522 U.S. at 201.

When property has been seized and there is a potential forfeiture proceeding against the seized property, the property owner does not enjoy a "complete and present cause of action" for recovery of that property -- except through the forfeiture process -- until the government's statute of limitations for forfeiture has run. That is because federal forfeiture statutes include provisions that bar replevin actions against seized property. See e.g. 28 U.S.C. §2462. In addition, numerous courts, including the Tenth Circuit, have held that Rule 41(e) equitable jurisdiction is unavailable where the property owner has an adequate remedy at law - i.e. a separate forfeiture case.

> Rule 41(e) is an equitable remedy, see *Floyd v. United States*, 860 F.2d 999, 1003 (10th Cir.1988), available to Mr. Clymore only if he can show irreparable harm and an inadequate remedy at law, see id.; see also *Blinder, Robinson & Co. v. United States (In re 6455 S. Yosemite)*, 897 F.2d 1549, 1556 (10th Cir.1990) (same with pre-indictment 41(e) motion).

Clymore v. United States, 164 F.3d 569, 571 (10th Cir. 1999).

The most that any Rule 41(e) motion would accomplish prior to the exhaustion of the government's statute of limitations is that the claimant can force the government to file a forfeiture action or give the property back. If the government files a forfeiture action, the claimant's Rule 41(e) motion is dismissed without further proceedings. That remedy certainly falls short of being a "complete and present cause of action" as defined by the Supreme Court.

Thus, a property owner's statute of limitations for a motion for return of property could not begin to accrue until after the government's statute of limitations had run for forfeiting the property. To the extent that the Second Circuit's test would, under some circumstances, allow a claimant's statute of limitations for a Rule 41(e) motion to begin accruing before the government's statute of limitations ran on the forfeiture, it has to be wrong under the Supreme Court's reasoning in *Bay Area Laundry*.

III. Laches

> Laches is based on the maxim, "*vigilantibus non dormientibus aequitas subvenit,*" meaning "equity aids the vigilant, not those who sleep on their rights." *Ivani,* 103 F.3d at 259. It is an equitable defense that "bars a plaintiff's equitable claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." *Id.* (internal quotation marks and citations omitted). A party asserting the defense of laches must establish that: (1) the plaintiff knew of the defendant's misconduct; (2) the plaintiff inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay. *See, e.g., Tri-Star Pictures, Inc. v. Leisure Time Prod., B.V.,* 17 F.3d 38, 44(2d Cir.1994).

> We conclude that dismissal based on laches is inappropriate here because the government failed to show that Ikelionwu knew of his right to challenge the forfeiture proceedings. There was, therefore, no "inexcusable delay" on the part of Ikelionwu. The government: (1) began its investigation of Ikelionwu and his connection to the March 25 currency immediately after the money was seized; (2) indicted Ikelionwu for crimes related to the March 7 and March 25 currency ***238** two months later; and (3) was informed by Onochie, within seven months of the seizures, that Ikelionwu owned the March 7 and March 25 currency. However, at no time during the four-year pendency of the forfeiture proceedings did the government ever provide Ikelionwu with the requisite notice of those proceedings. *See* 19 U.S.C. s 1607(a).

We cannot agree that Ikelionwu "slept on his rights" when he was neither aware nor informed of his right to challenge the forfeitures. Notice to Echendu and Onochie, from whom the currency was seized, does not excuse the government's failure to send written notice to Ikelionwu. Section 1607 requires the government to send "[w]ritten notice of seizure together with information on the applicable procedures to *each party* who appears to have an interest in the seized [property]." *Id.* That would clearly include Ikelionwu.

We accept the government's claim that Ikelionwu certainly knew about the *seizures* by the time the currency was introduced at his criminal trial--four years before he petitioned for the return of that property. This knowledge, however, does not imply that he was aware of the *forfeiture proceedings* or his right to challenge those proceedings.

The government maintains that Ikelionwu knew about the applicable forfeiture procedures and his rights thereunder from his experience in filing a prior return-of-property petition in 1992. We are unpersuaded. Ikelionwu's 1992 petition was distinct from his petition seeking return of the March 7 and March 25 currency. The 1992 petition related to jewelry, a car and an airplane ticket seized from him personally. In contrast, his petition at issue here related to currency seized from others. That Ikelionwu filed an earlier petition regarding a seizure from him personally does not discredit his claim that he was unaware of his right to seek the return of the March 7 and March 25 currency seized from Echendu and Onochie.

It is also not without significance that Ikelionwu's claim is timely under the applicable statute of limitations. Suits involving the taking of property without proper notice are subject to 28 U.S.C. s 2401(a), the general six-year statute of limitations for suits against the United States. *Boero,* 111 F.3d at 305, n. 5 (citing *Concepcion v. United States,* 938 F.Supp. 134, 139 (E.D.N.Y.1996)); *see* 28 U.S.C. s 2401(a) (1994) (omnibus six-year statute of limitations for suits against United States). Section 2401(a) provides: "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. s 2401(a).

IV. Standing

V. Substantial Danger of Fraud on the Court

Of all the arguments raised by the government this is the most obnoxious. The government is claiming that these defendants' simple request -- that the court determine whether certain items of property, seized in the underlying criminal case, and not included in any civil forfeiture judgment approximately eight years after seizure, should be returned to them – is somehow attempting to perpetrate a fraud upon the court.

The government has a lot of gall to make this claim. Defendants would ask this court to take judicial notice of the record in the pending §2255 proceedings brought by Gabriel Rodriguez Aguirre and Eleno Aguirre. Among other things, defendants have shown that the prosecutors and/or federal law enforcement agents in this criminal prosecution have:

(1) searched numerous parcels of real estate without a search warrant, but only under color of a seizure warrant, then claimed for years that they had search warrants for all the properties, including claims made to the court in the §2255 proceeding as recently as the last telephonic hearing - on April 24, 2000;

(2) paid hundreds of thousands of dollars to prosecution witnesses for their testimony at trial, including $40,000 paid to Alicia Armendariz in cash by the two lead agents in this case, in increments of $1000 or so at a time, over several years, stopping after the first trial, and resuming before the second trial and continuing until she had testified;[2]

(3) pocketed and failed to report approximately $3.5 million of the cash they dug up during the excavation of the Country Club Road property;

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[2] These payments were not made through the Federal Witness Protection Program, as AUSA Charles Barth acknowledged during the §2255 evidentiary hearing.

(4) planted a kilo of cocaine on a property forfeited from the defendants by default, just in time to dig it up for the retrial.

(5) threatened defendant Gabriel Aguirre's counsel of choice, Attorney Joe Johnson of Arkansas, with indictment as a co-conspirator in order to dissuade him from representing Gabriel Aguirre at trial. The threat worked.

(6) tried to get undersigned counsel removed from this case by (successfully) attacking her original local counsel, Ralph Binford. This was resolved by the hiring of new local counsel, after a difficult search in which all the other New Mexico attorneys contacted refused to get involved.

(7) threatened undersigned counsel that she would be held in contempt if she filed this motion for return of property.

Given the government's track record in this case, we would ask the Court to determine exactly *who* is attempting to perpetrate a fraud upon the court.

WHEREFORE, for the foregoing reasons this Court should order the return of this property.

Respectfully submitted,

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BRENDA GRANTLAND
Pro Hac Vice
20 Sunnyside, Suite A-204
Mill Valley, CA 94941
(415) 380-9108

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DAVID PROPER
Local Counsel
1980 E. Lohman
Suite E
Las Cruces, NM 88001
505-526-5741

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion for Return of Property was served upon AUSA Charles Barth, P.O. Box 607, Albuquerque, NM 87193, by first class mail, this ____________________ day of __________________, 2000.

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BRENDA GRANTLAND