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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. APPROXIMATELY $20,725.00 IN U.S. CURRENCY, APPROXIMATELY $24,855.00 IN U.S. CURRENCY SEIZED FROM SAFE DEPOSIT BOX #235, APPROXIMATELY $129,676.77 SEIZED FROM BANK OF AMERICA ACCOUNT NUMBER 02816-06729, APPROXIMATELY $11,196.18 SEIZED FROM BANK OF AMERICA ACCOUNT NUMBER 02810-16004, APPROXIMATELY $117,302.47 SEIZED FROM BANK OF AMERICA CD ACCOUNT NUMBER 02819-08191, APPROXIMATELY $185,247.84 SEIZED FROM BANK OF AMERICA CD ACCOUNT NUMBER 02810-08280, APPROXIMATELY $5,242.55 SEIZED FROM CHASE BANK ACCOUNT NUMBER 18212938435,	2:11-MC-00003-JAM-EFB POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RETURN OF PROPERTY PURSUANT TO CRIMINAL RULE 41(g) (OR CIVIL COMPLAINT IN THE NATURE OF MOTION FOR RETURN OF PROPERTY)

APPROXIMATELY $479,170.28 SEIZED FROM WEST AMERICA BANK ACCOUNT NUMBER 1505054492,

APPROXIMATELY $12,305.80 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 25630085,

APPROXIMATELY $6,403.46 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 25630413,

APPROXIMATELY $12,186.97 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 802820151,

APPROXIMATELY $39,715.64 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 2800578,

APPROXIMATELY $37,895.74 SEIZED FROM WEST AMERICA BANK ACCOUNT NUMBER 505107300,

APPROXIMATELY $17,928.84 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 802820585,

APPROXIMATELY $12,413.49 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 2249995,

APPROXIMATELY $19,675.65 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 2249669,

APPROXIMATELY $98,515.79 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 25630652,

APPROXIMATELY $7,119.45 SEIZED FROM CITY NATIONAL BANK ACCOUNT NUMBER 25630099,

APPROXIMATELY $292,573.97 SEIZED FROM WELLS FARGO BANK ACCOUNT NUMBER 3598404063,

APPROXIMATELY $103,117.83 SEIZED FROM WELLS FARGO BANK ACCOUNT NUMBER 910442044750301, and

APPROXIMATELY $63,160.41 SEIZED FROM WELLS FARGO BANK ACCOUNT NUMBER 7936680284,)

Defendants.)

Criminal Rule 41(g) provides a remedy for persons aggrieved by the illegal seizure of property by law enforcement agents, or the illegal detention of the property. Where there is no related criminal case pending, as here, the motion for return of property is treated as a civil equitable action.

> Although Rule 41(g) is ordinarily used to seek return of property after an indictment is issued, "district courts have the power to entertain motions to return property seized by the government when there are no criminal proceedings pending against the movant." *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993) (construing former Rule 41(e)). "These motions are treated as civil equitable proceedings, and, therefore, a district court must exercise 'caution and restraint' before assuming jurisdiction." Id.

United States v. Kama, 394 F.3d 1236, 1238 (9th Cir. 2005). *See also United States v. Martinson*, 809 F.2d 1364, 1366 (9th Cir. 1987). Because it is an equitable action, the claimant must show the absence of adequate remedies at law. In cases where the property was seized for forfeiture, as here, the pendency of civil forfeiture proceedings would deprive the court of jurisdiction to hear a Rule 41(g) motion. Here, however, administrative forfeiture proceedings were commenced by the DEA in September 2010, and Claimants filed timely claims in October 2010. No other persons came forward and filed claims. See Stipulation filed in this case, at Doc. 7 p. 3 paragraph 1.

As the government stipulated in Doc. 7:

> Under 18 U.S.C. § 983(a)(3)(A), the United States is required to file a complaint for forfeiture against the defendant funds and/or to obtain an indictment alleging that the defendant funds are subject to forfeiture within 90 days after a claim has been filed in the administrative forfeiture proceedings, unless the court extends the deadline for good cause shown or by agreement of the parties.

To allow the government to conclude its investigation, after receiving ample documentation from Claimants as to the legitimate sources of the seized bank accounts, Claimants agreed to two extensions of that deadline. This case was filed by the government for the purpose of extending its deadlines for filing the complaint. When Claimants refused to agree to any further extensions, the government let its April 15, 2010 deadline run and then filed a Notice of Election, stating its intention not to file a forfeiture complaint. Doc. 10, filed May 17, 2011. It has now been more than nine weeks after its deadline ran for filing a forfeiture complaint, yet the United States has not returned the money to the Claimants. Yesterday DEA official Lawrence D'Orazio emailed counsel stating the United States intends to turn the property over to Tehama County *again* to allow it to pursue forfeiture under state law.

This money, representing virtually all of the bank accounts and most of the liquid assets of both Claimants, has now been detained an entire year without probable cause. There was never any showing of probable cause to seize the bank accounts. They were seized from the banks under the apparent authority of a state search warrant. The affidavit supporting the search warrant does not even attempt to show probable cause to believe the bank accounts contain proceeds of any crime, or any other grounds for forfeiture.

Prior to the federal adoption of the state seizure, Tehama County initiated the state forfeiture process against these seized funds on or about July 20, 2010 by serving notice of non-judicial forfeiture under Health & Safety Code § 11488.4(j). See Doc. 11-4. Claimant Frankovich responded by filing in Superior Court of Tehama County, a Claim Opposing Forfeiture on August 6, 2010, and paying the filing fee. The Tehama County District Attorney having invoked the jurisdiction of Tehama County Superior Court by serving the § 11488.4(j) notice of non-judicial forfeiture, and Frankovich having filed a timely claim, § 11488.4(j) required Tehama County to file a state forfeiture petition within 30 days. "If a claim is timely filed, then the Attorney General or district attorney *shall file a petition of forfeiture pursuant to this section within 30 days of receipt of the claim*." *Id*. No such state forfeiture petition was ever filed. See Exhibit 1 hereto, a computer printout of the docket in Frankovich's Claim Opposing Forfeiture, Tehama County Superior Court Case #CI63918.

On September 27, 2010, Frankovich filed a motion for return of property under state law, which entitled him to an evidentiary hearing, at which the government would be required to put on evidence establishing probable cause for the detention. Doc. 11-6.

Despite having invoked the jurisdiction of the Tehama County Superior Court by commencing the non-judicial forfeiture process, and without a court order from Tehama County Superior Court releasing the property from its jurisdiction, the District Attorney of County turned the property over the DEA under the federal adoption program. When Frankovich went to court in Tehama County Superior Court demanding his evidentiary hearing, the District Attorney avoided the evidentiary hearing by saying it was not seeking forfeiture under state law. The District Attorney wanted Claimant to stipulate that the property would be turned over to the federal government for forfeiture under federal law, after which time it would return to Tehama County jurisdiction if the federal government declined forfeiture. Claimant refused, and insisted that the state court release all of the seized property unconditionally, which the court did. See order Doc. 11-7. When the court asked whether the action should be dismissed with or without prejudice, Claimant requested that it be dismissed without prejudice, because the only matters filed in the case were the Claim Opposing Forfeiture, and Claimant's Motion for Return of Property. The county never having filed a forfeiture petition, there was no forfeiture to dismiss with prejudice. Rather, the county government had defaulted by failing to file a forfeiture petition within 30 days after service of the claim. Given this procedural history in Tehama County before and after the adoptive federal administrative process was even commenced, forfeiture under state law would be barred by H&S § 114884(j), judicial estoppel (Tehama County having conceded it was not pursuing state forfeiture to avoid having to show probable cause at the November 17, 2010 evidentiary hearing on the motion for return of property), and due process of law.

The United States Supreme Court has held that Rule 41(g) is a proper remedy for asserting ones' rights to prompt return of property that has been seized illegally and held an unreasonable time without the institution of forfeiture proceedings. *See United States v. $8,850*, 461 U.S. 555, 569

(1983). The Court applied the four factor speedy trial balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972) for determining when delay in instituting a forfeiture case violates due process. *Id.* 461 U.S. at 564. Those factors are: length of delay, reason for the delay, claimant's assertion of the right, and prejudice.

With regard to the first factor, length of delay, the Supreme Court said:

> Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case. Our inquiry is the constitutional one of due process; we are not establishing a statute of limitations. Obviously, short delays -- of perhaps a month or so -- need less justification than longer delays. We regard the delay here -- some 18 months -- as quite significant. Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden.

Id. at 565. In *$8,850* the challenged delay of 18 months was the "length of time between the seizure and the initiation of the forfeiture trial." Here, no forfeiture case has even been commenced by any entity, the federal government has declined to initiate a forfeiture action, and the state has already had the chance and waived it.

With regard to the reasons for delay, the Supreme Court relied on the pendency of a petition for remission. *Id.* at 566. Here, both the state and federal government both initiated administrative proceedings and then abandoned them when the Claimants filed claims. In *$8,850* the government also relied upon the pendency of criminal proceedings against the claimants. *Id.* at 567. No criminal charges have been filed against Claimants in any court. The Supreme Court noted that some delay is tolerated for investigating a case to determine whether the government should decline forfeiture.

> Both the Government and the claimant have an interest in a rule that allows the Government some time to investigate the situation in order to determine whether the facts entitle the Government to forfeiture so that, if not, the Government may return the money without formal proceedings.

Id. at 565. Here, the Claimant stipulated to two requested extensions of time filed in this proceeding, and approved by this court, to allow an investigation which would certainly reveal what the Claimants have been saying all along – there are no evidence that proceeds of any crime were deposited into any of these accounts. Indeed, the U.S. Attorney's Office filed a notice declining forfeiture after concluding its investigation. However, Claimants did not consent to this delay merely to allow the federal government to toss the case back to Tehama County for another bite at the apple. During the November 17, 2010 hearing in Tehama County, when Frankovich insisted on the state government showing probable cause or releasing the assets unconditionally, Claimant pointed out that the federal government had already declined forfeiture for the first bank account (totaling $500,000), after finding no evidence the account contained forfeitable proceeds. Claimant told the court that the same result would likely happen to the remaining bank accounts once the federal prosecutor conducted an investigation, and that the county prosecutor was taking the chance of that result when deciding to forego state forfeiture in order to avoid having to show probable cause.

The third factor is assertion of the right to a prompt determination of grounds for forfeiture. Frankovich promptly asserted that right in state court by filing the motion for return of property, and by insisting that the evidentiary hearing go forward on the first scheduled date. Claimants have not caused any delay in this case. The only delays chargeable to both parties are the two brief extensions stipulated to in this case. But Claimants only stipulated to the extensions to allow *the federal government* to conduct its investigation and determine whether grounds existed to pursue forfeiture under federal law. Claimants did not consent to this extension to give Tehama County another chance to pursue forfeiture under state law.

The final factor is prejudice. Claimants describe the prejudice from the seizure and detention of virtually all of their liquid assets in the Declaration of Thomas Frankovich, Exhibit 2 to this memorandum. If 18 months' delay is "quite significant" or "undoubtedly significant" for the deprivation of a mere $8,850, depriving Claimants of $1.5 million – virtually all of the liquid assets of both Claimants and Frankovich's law practice for one entire year without any process, is far beyond the limits tolerated by the Due Process clause.

For the above reasons, the reasons set out in the revised Memorandum of Law In Support of Motion for a Temporary Restraining Order, filed today, the declarations and exhibits and procedural history in this case, and any further reasons as may appear from a hearing on this motion, this Court should grant the Temporary Restraining Order, and then after a hearing on this motion, should order the United States to return the seized funds to Claimants forthwith, with interest.

Dated: 6/24/2011

Respectfully submitted,

/s/ Brenda Grantland

BRENDA GRANTLAND
Attorney for Claimants