LAW OFFICE OF ERIC HONIG
Eric Honig - CA Bar No. 140765
P.O. Box 10327
Marina del Rey, CA 90295
erichonig@aol.com
Telephone: (310) 314-2603
Fax: (310) 314-2793

Attorney for Claimant/
Petitioner Carmen Badrian

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. $19,985 IN U.S. CURRENCY, et al, Defendants, CARMEN BADRIAN, ASHKEN DJEREDJIAN, et al, Claimants.	**Case No. CV 07-3622-GHK (FMOx)** <u>Consolidated with</u>: *U.S. v.. Avedis Djeredjian*, No. CR 07-475-GHK **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR PARTIAL SUMMARY JUDGMENT, BASED ON LACK OF PROBABLE CAUSE FOR FORFEITURE WHEN COMPLAINT WAS FILED; DECLARATIONS; EXHIBITS** DATE: May 16, 2011 TIME: 9:30 a.m. CTRM: 650 Roybal Fed. Cthse.

TO THE CLERK OF THE ABOVE-ENTITLED COURT, AND TO THE PLAINTIFF UNITED STATES OF AMERICA:

PLEASE TAKE NOTICE that on May 16, 2011, at 9:30 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable George H. King, U.S. District Judge, located at Courtroom 650, Roybal Federal Courthouse, 255 E. Temple Street, Los Angeles, CA 90012, Claimant Carmen Badrian will move for summary judgment or, in the alternative, partial summary judgment, based on the plaintiff government's lack of probable cause for forfeiture of the defendant Doverwood and Greenbriar real properties and the defendant BMW at the time it filed the complaint for forfeiture.

Claimant's motion is based on Federal Rule of Civil Procedure 56, the Local Rules, on all other relevant case law, statutes and rules of civil procedure, on the attached memorandum of points and authorities, and upon any other oral and/or documentary evidence which may be adduced at the hearing on this motion. The motion is made following an in-person conference of counsel on December 1, 2010, pursuant to Local Rule 7-3.

Dated: April 15, 2011 Respectfully submitted,

LAW OFFICE OF ERIC HONIG
A Professional Law Corporation

/s/ Eric Honig
ERIC HONIG
Attorney for Claimant/Petitioner
Carmen Badrian

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

TABLE OF AUTHORITIES (continued)

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The government cannot meet its burden of showing that, at the time it filed its civil forfeiture complaint, there was probable cause that the defendant properties were traceable to proceeds obtained from violations of 18 U.S.C. §2342(a). Neither the Fanelly Affidavit, on which the government has primarily relied, nor the government's other evidence in its possession when it filed the complaint, even allege any specific illegal transactions that may have violated §2342(a) and that may have generated specific illegal proceeds as a result of any such violations. Even had the government made those allegations in its complaint and Affidavit, it did not and cannot point to evidence tracing any such proceeds into the defendant real properties and BMW.

Moreover, the Affidavit falsely stated that illegal cigarette trafficking was the only source of income earned by Vicken Djeredjian and Avedis Djeredjian known to the government when, at the time it filed the complaint, the government had thousands of pages of documents in its possession showing they earned **substantial legitimate income**. Accordingly, there is no genuine issue of material fact that the evidence in the possession of the government when the complaint was filed did not establish there was probable cause for forfeiture of the properties, and summary judgment should be granted against the government.

II.

STATEMENT OF FACTS

On December 5, 2005, the government filed an Amended Complaint for Forfeiture against the defendant real properties located at 1356 Doverwood Drive and 1633 Greenbriar Drive, in Glendale, California, and the defendant 2004 BMW, *inter alia*. Exhibit 1, Amended Complaint. The original complaint was filed on November 14, 2005 and then amended as Document No. 33 with the Clerk's Office in the Eastern District of North Carolina, Case No. 5:05-CV-767-FL (3), before being transferred to this district on June 5, 2007. *See* Civil Docket filed in the present civil forfeiture action (CV 07-3622-GHK), Document No. 2.

Attached as Exhibit C to the complaint and incorporated by reference was the affidavit of an ATF agent, Michael Fanelly ("Fanelly Affidavit"). The complaint alleged that the facts in the Affidavit constituted probable cause for forfeiture of the properties pursuant to 18 U.S.C. §981(a)(1)(A) and (C) because they were involved in transactions in violation of 18 U.S.C. ¶¶1956 and 1957 and were traceable to those transactions and to violations of the Contraband Cigarette Act, 128 U.S.C. ¶2341. Exhibit 1, Amended Complaint, ¶¶6-8.

The Fanelly Affidavit alleged that in 2002-2005 Avedis Djeredjian, while operating Star Tobacco and working with Masis Geragosian's business Five Star Wholesale, transported cigarettes to California without paying California taxes on the cigarettes, together causing a loss to the State of approximately $4.3 million in unpaid taxes. Exhibit 2, Fanelly Affidavit, ¶¶1-127. The Affidavit stated Avedis Djeredjian and his wife, Claimant Carmen Badrian, did not file personal income tax returns for 2003 or 2004, and Star Tobacco filed corporate federal tax returns for 2002 and 2003 showing taxable income of $2,711 and a net operating loss of $4,769, respectively, and did not file a return for 2004. It also alleged that in January 2002-April 2005 Avedis Djeredjian purchased approximately 495,412 cartons of cigarettes at a cost of $8,760,492 and that illegal cigarette trafficking was his only source of income known to the government. Exhibit 2, Fanelly Affidavit, ¶¶130-134.

The Affidavit alleged that on August 5, 1999, Vicken Djeredjian paid a total of $170,819.61 for the purchase of the defendant 1356 Doverwood Drive property (the purchase price was $628,000 and the mortgage was $471,000), including $30,000 coming from an account in the name of Mike Capocci (a name used by Avedis Djeredjian). From March 2002-March 2003, an additional $29,277.72 was paid towards the mortgage from an account in the name of Allen Nazarian/Discount Outlet. Exhibit 2, Fanelly Affidavit, ¶¶157-158. The Affidavit also alleged that on May 18, 2000, Vicken Djeredjian purchased the defendant 1633 Greenbriar Drive property, and that illegal cigarette trafficking was his only source of income known to the government. The Affidavit did not identify how much was paid for the purchase. Exhibit 2, Fanelly Affidavit, ¶166.

The Affidavit further alleged that the defendant 2004 BMW was purchased on February 20, 2004 for approximately $48,500 and registered to Carmen Badrian, and that the only source of disposable income for Avedis Djeredjian and Ms. Badrian known to the government was generated through illegal cigarette trafficking. Exhibit 2, Fanelly Affidavit, ¶¶178-180. At the time it filed its complaint, however, the government had in its possession DMV records showing that the BMW was **financed** through BMW Bank North America, which held a lien on the car, and it was purchased with a **$5,000.00 downpayment**, the source of which was **credit** from Avedis Djeredjian's Discover card. *See* Exhibit 3, DMV records obtained by government on October 17, 2005; *see also* Exhibit 4, Avedis Djeredjian's March 20, 2004 Discover card statement obtained by government on May 11, 2005, Bates Number 21102 (provided in discovery in the criminal case).

On January 17, 2006, Claimant Carmen Badrian filed a verified statement of interest in that North Carolina action claiming interests in the defendant real properties located at 1356 Doverwood Drive and 1633 Greenbriar Drive, both in Glendale, California, and in the defendant 2004 BMW, along with answers to both complaints. These pleadings were filed in the present action on June 5, 2007. *See* Civil Docket filed in the present action (CV 07-3622-GHK), Document Nos. 4, 9 and 14.[1] On August 15, 2007, this civil forfeiture action was transferred to U.S.

---

[1] On October 13, 2010 the Court ordered this civil forfeiture action consolidated with the ancillary criminal forfeiture proceedings in *United States v.*

District Judge George H. King. See Document No. 28.

On or about October 18, 2010, the government provided its responses to Ms. Badrian's contention interrogatories regarding the allegations in the forfeiture complaint. Interrogatory No. 1 asked the government to separately describe in detail the facts supporting each of its contentions in specific paragraphs (¶¶128-135; 136(k), (l) and (n); 157-174; 178-180; and 191-193) of Fanelly's Affidavit **that was in its possession prior to the filing of the complaints**. The government's responses, however, merely referred to discovery and evidence from the related criminal case against Avedis Djeredjian, including records from Bank of America, Washington Mutual, and Antelope Valley Bank, and records relating to the purchase of the Doverwood and Greenbriar properties. Exhibit 5, government's responses to Badrian's first sets of interrogatories and document requests, pp. 3-4.

Interrogatory No. 3 asked the government to separately describe how the three properties were traceable to transactions in violation of 18 U.S.C. §1956, including describing each of the alleged money laundering transactions. Interrogatory No. 5 requested a description as to how the properties constituted or were derived from violations of 18 U.S.C. §2341, including all tracing of alleged illegal proceeds into the properties. Interrogatory No. 8 sought a detailed description of all investigations conducted by the government as to the allegations in the complaint. Ms. Badrian's 23 document requests essentially sought all documents allegedly supporting the government's claims. Each of these discovery requests also specifically sought the evidence in the government's possession

---

Avedis Djeredjian, Case No. CR 07-475-GHK, and that the litigation for both the civil forfeiture case and ancillary criminal forfeiture proceeding shall be conducted at the same time. Civil Docket Document No. 94, p. 1. Accordingly, on November 12, 2010 Ms. Badrian also filed a petition in this action requesting an ancillary hearings of her claimed interests in the properties. Civil Docket Document Nos. 101, 102.

before the complaint was filed. The government's responses, however, again merely referred to the discovery and evidence from the related criminal case. Exhibit 5, government's responses to Badrian's first sets of interrogatories and document requests, pp. 5-8, 10-28.

After a discovery "meet and confer" between the parties regarding the government's responses, the government confirmed that the Fanelly Affidavit "summarizes, refers to and sets forth all of the information in the government's possession at the time the complaint was filed." The government also reiterated that Affidavit and the documents produced in the criminal case were responsive to Ms. Badrian's discovery requests, *i.e.*, that those documents allegedly support forfeiture of the defendant two homes and 2004 BMW. The government claimed that the afore-mentioned bank records show that the bank accounts "contained proceeds of contraband cigarettes trafficking and were involved in money laundering transactions," and also show "that the proceeds of the contraband cigarette trafficking scheme were used to make the mortgage payments on the property." The government did not identify or produce any proceeds tracing analysis, but merely re-identified the Bates numbers from the discovery it produced in the related criminal case. *See* Exhibits 6, 8, and 9, November 15, 18 and 22, 2010 letters from AUSA Joshua B. Royster.

Claimant Ashken Djeredjian then served interrogatories seeking detailed descriptions of the specific alleged violations of §§2341, 1956 and 1957 the government contended generated the proceeds traceable to the real properties, including the dates and locations of the violations, the persons who committed the violations, and the specific contraband involved in the violation (*e.g.*, the type and amount of contraband cigarettes and what made those specific cigarettes contraband), the amount of proceeds generated from each of the violations and who obtained those proceeds, and how the government traced those specific proceeds into the properties (*i.e.*, how the real property constitutes or is derived from proceeds traceable to the violations). The government's interrogatory responses, however, repeated that the Fanelly Affidavit "summarizes, refers to and sets forth the information which is responsive to this interrogatory," and again generally referred to the discovery from the criminal case. Its response also identified facts "noted" in the Fanelly Affidavit, *i.e.*, 1) Avedis Djeredjian's 1993 application to the California Board of Equalization for a seller's permit and registration as a retailer; 2) the March 7, 2003 indictment of Vicken Djeredjian, which the government said was later superseded to allege he participated in a conspiracy since 1999 (although the Fanelly Affidavit mentions neither the superseded indictment nor the alleged conspiracy); 3) distributions of cigarettes in January 2002; and 4) use of bank accounts since 1997 to further the cigarette trafficking and money laundering (although the Affidavit did not allege any illegal transactions occurring prior to 2003). The responses also alleged "there has been no evidence of any legitimate business activity, specifically in the distribution of cigarettes, conducted by Avedis Djeredjian or Vicken Djeredjian" and "no evidence regarding a legitimate source of funds" to purchase the two homes. The interrogatory responses did not identify the requested specific transactions or the other detailed information requested, and the document responses again merely referred to the nearly 23,000 pages of criminal discovery and the other documents from the criminal case. Exhibit 7, Responses of United States to Claimant Ashken Djeredjian's First Set of Interrogatories and Request for Production of Documents to Plaintiff, pp. 3-5, 11-13, 16-22, 24-33.

Paralegal Ani Khachoian reviewed the documents in the government's possession at the time the complaint was filed produced in discovery in these consolidated cases, *U.S. v. Avedis Djeredjian*, CR 07-475-GHK and *U.S. v. $19,985.90*, CV 07-3622-GHK (FMOx), along with evidence in the government's possession from an earlier unrelated criminal case against Vicken Djeredjian. She has been working on these consolidated cases since mid-2008, and has become very familiar with the government's claims of violations of the Contraband

Cigarette Trafficking Act made in those cases and in the case against Vicken Djeredjian. Declaration of Ani Khachoian, ¶¶2-3.

Ms. Khachoian reviewed the documents in the government's possession before the complaint was filed relating to the purchase of the defendant Doverwood and Greenbriar real properties and the defendant 2004 BMW. None of those documents in the government's possession at the time the forfeiture complaint was filed, however, trace any of the funds used in the purchase of those defendant properties to any funds allegedly earned from those violations. In particular, as conceded in the Fanelly Affidavit, the two real properties were purchased in 1999 and 2000, before the initial criminal conduct in 2002 alleged in the Fanelly Affidavit. Also, at the time the complaint was filed, the government had in its possession DMV records showing that the BMW purchase was financed through BMW Bank North America, which held a lien on the car, and that it was purchased with a $5,000.00 downpayment, the source of which was credit from Avedis Djeredjian's Discover card (provided in government's discovery in the *Djeredjian* criminal case, Bates stamp No. 21102). Declaration of Ani Khachoian, ¶¶4-7.

In addition, contrary to statements made in the Fanelly Affidavit, before it filed the forfeiture complaint the government had in its possession numerous documents reflecting substantial income earned by Avedis Djeredjian and Vicken Djeredjian prior to and since the purchase of the real properties, legitimately-earned income that was not traceable to the §2341 violations alleged in the Affidavit and in the criminal case documents. Declaration of Ani Khachoian, ¶8. This legitimate income included rebates from the tobacco companies pursuant to the "STARS" program, in which the tobacco companies pay the retailers substantial legitimate income by way of promotional rebates based on the volume of sales. Declaration of

Ani Khachoian, ¶9.[2]

This evidence of legitimate income (Bates-stamped document nos. 2226 through 2246 from the government's criminal discovery) included copies of buydown/rebate checks from tobacco manufacturers such as Philip Morris,

---

[2] On October 7, 2002 ATF Resident Agent Bart McEntire sent a letter to T.C. Richards at Philip Morris USA ("PM USA"), Brand Integrity, in which he requested PM USA to provide the government with copies of the volumes of sales, promotional rebates, merchandise rebates, contractual agreements, and industry sales records of PM USA products that were conducted since January 2001 by various stores owned by Vicken Djeredjian or Avedis Djeredjian (e.g., Modern Video, Modern Cigarettes, Bargain Cigarettes, etc.). See Exhibit 10, 10/7/02 Letter, Bates stamp document Nos. 2500-2501 from the government's criminal discovery. On January 10, 2003, Richards from PM USA sent a reply letter to Agent McEntire stating that per his request, PM USA was providing the requested documents. See Exhibit 11, 1/10/03 Letter, Bates Stamps 2502-2503 from government's criminal discovery. However, the documents attached to PM USA's letter from PM USA were not produced in the *Djeredjian* criminal case discovery.

Therefore, on December 22, 2010, Ms. Badrian's attorney Eric Honig sent a letter to government counsel demanding production of these documents, since the government's discovery responses in the civil forfeiture case relied on the criminal discovery. See Exhibit 12, 12/22/10 Honig Letter (stating "In addition, you did not yet respond to my December 10th e-mail regarding the following additional documents that appear to be missing and have not been produced: Bates-stamp Nos. 2500-2503 are letters exchanged with Phillip Morris, and the latter's response refers to attached documents that involve the subject companies' participation in something called the Stars program. We could not find Phillip Morris's attached documents in the discovery. If they are within the disks, could you please tell me the pages? If not, please send them to me.").

The government, however, has not produced these documents, which show legitimate income earned by Vicken and Avedis Djeredjian through the STARS program, which Agent Fanelly failed to acknowledge in his Affidavit. Thus, the government in fact had evidence of legitimate income earned by businesses owned by Avedis Djeredjian or Vicken Djeredjian at the time the complaint was filed. Avedis Djeredjian through the STARS program, which Agent Fanelly failed to acknowledge in his Affidavit. Thus, the government had this evidence of legitimate income earned by businesses owned by Avedis Djeredjian or Vicken Djeredjian when the complaint was filed. Declaration of Ani Khachoian, ¶¶10-11.

Commonwealth, JT International, Lorillard and Brown & Williamson Tobacco Corp for the period of June 8, 1999 through July 15, 1999. These rebate checks, which represent legitimate income, totaled nearly $100,000. Five checks from Brown & Williamson alone, all dated June 24, 1999 (check nos. 515885, 515886, 515887, 515888, and 515889) total $25,000. Declaration of Ani Khachoian, ¶12. Also, the government's analysis of deposits between the periods of 4/17/01 through 4/14/03 in the Discount Outlet/Allen Nazarian Bank of America Account No. 022231-14454 (Bates-stamped document nos. 2516 through 2518 from the government's criminal discovery) included **36 deposits in the amount of $283,690.13, which were rebate/buy down checks from tobacco manufacturers** such as Philip Morris, Lorillard, CMS and Brown & Williamson. This was all legitimate income, deposited into the same account from which the $29,277.72 was paid towards the Doverwood property in March 2002-March 2003, according to ¶158 of the Fanelly Affidavit. Declaration of Ani Khachoian, ¶13.

In addition, government discovery in the (unrelated) case of *U.S. v. Vicken Djeredjian*, WD/VA Case No. 7:3-CR-49-SGW, included a letter dated 3/2/04 from a Phillip Morris attorney to the ATF (Bates-stamped as nos. VID-16912 through VID-16985, Control 1252.1-Philip Morris), providing information on contract and promotion payments made by Philip Morris to Bargain Cigs, Smokehouse, Discount Cigs, Cigarette Depot, Modern Cigarettes, Star Tobacco, Cigarette Stop, and Modern Cigarettes 2, from 1996 through May of 2003, totaling approximately $1,169,420.20. This was all legitimate income earned by Vicken Djeredjian, et al. Declaration of Ani Khachoian, ¶14.

Also in that case, Bates-stamped nos. VID-010575 through VID010580, Control 1190A Lorillard Tobacco, show IRS 1099 form tax information provided by one company, Lorillard Tobacco, for payments in the following amounts: for Vicken Djeredjian in 2000 – $42,382.35; in 2001 –$5,790.30; in 2002 –$2,040; for Avedis (Mike) Djeredjian in 2000 – $39,944.00; in 2001 – $7,019.90; and in 2002

–$7,238.55. This also is all evidence of legitimate income in the government's possession at the time the complaint was filed. Declaration of Ani Khachoian, ¶15.

Moreover, government discovery in that other case (Bates-stamped nos. VID-18337 through VID-18800, Control 1209.1 Allstate, and nos. VID-18801 through VID-19542, Control 1209.2 Allstate) shows insurance claim payments for theft and burglary losses made to Modern Cigarettes and Discount Outlet. Modern Cigarettes received eight payments from 1/6/01 through 7/21/01 totaling $108,385.11. Discount Outlet received 17 payments from 4/14/01 through 7/17/01 totaling $328,370.47. Presumably, Allstate investigated each of these insurance claims (as evidenced by the numerous backup documents submitted in support of the claims) thoroughly before paying any monies. All checks were made payable to Avedis Djeredjian as the owner of the umbrella policy for the stores. Bates-stamped nos. VID-16396 through VID-16526, Control 1245 Farmers Insurance further show monies paid on two claims on the Doverwood property for a total payout of $88,312.81 between 5/11/00 and 1/3/01. These check payments also were all legitimate income in the government's possession at the time it filed the civil forfeiture complaint. Declaration of Ani Khachoian, ¶¶16-17.

Discovery in that case (Bates-stamped nos. VID-005603 through VID-005868, Control 1093 American Express) also showed cigarettes purchased from Costco Wholesale (a direct distributor) using Vicken Djeredjian's ex-wife's various American Express credit cards, in excess of $784,349.28 during the period of 7/8/00 through 12/19/01. Since the purchase was from a direct distributor, the taxes were prepaid and Djeredjians did not have to pay California taxes on those cigarettes, and thus the cigarettes were acquired legally and could be re-sold legally at a profit. Similarly, Bates-stamped nos. VID-18144 through VID-18158, Control 1253 FW Strickler, showed a large amount of purchases of cigarettes by both Vicken Djeredjian and Avedis Djeredjian made from direct distributor FW Strickler, which also were acquired legally and could be re-sold legally at a profit.

Declaration of Ani Khachoian, ¶¶18-19.

Finally, Bates-stamped document nos. 9589-16840 from the criminal discovery included over 7,000 checks averaging more than $10 per check paid to Modern Video in 2002-2005 for video rentals, accounting for at least another $70,000 in legitimate income. This income did not even include the video rentals that were paid for with cash or by credit card. Declaration of Ani Khachoian, ¶20.

III.

ARGUMENT

A. Summary judgment should be granted when there is no genuine issue of material fact for trial and the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corporation. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 89 L.Ed.2d, 538 (1986); *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *Harper v. Wallingford*, 877 F.2d 728 (9th Cir. 1989).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson*, 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative, admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence submitted by the non-moving party. The moving party need not disprove the other party's case. *Celotex*, 477 U.S. at 325.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970)). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252.

To be admissible for purposes of summary judgment, declarations or affidavits must be based upon personal knowledge, must set forth "such facts as would be admissible in evidence," and must show that the declarant or affiant is competent to testify concerning the facts at issue. F. R. Civ. P. 56(e). Declarations on information and belief are insufficient to establish a factual dispute for purposes of summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Summary judgment is not "a disfavored procedural shortcut" but is "an integral part of the Federal Rules a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting F.R.Civ.P. 1).

B. Forfeiture statutes are strictly construed against the government.

Forfeiture statutes are strictly construed against the government, and courts are "reluctant to find that a statute allows forfeiture where a plausible interpretation of the statute would not allow it." *United States v. $191,910.00 in U.S. Currency*, 16 F. 3d 1051, 1068 (9th Cir. 1994)(citing *United States v. One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. 219, 226, 59 S. Ct. 861, 864 (1939). Moreover, courts are "particularly wary of civil forfeiture statutes, for they impose 'quasi-criminal' penalties without affording property owners all of the procedural protections afforded criminal defendants." *Id.*; *see also United States v. Marolf*, 173 F. 3d 1213 (9th Cir. 1999)("forfeitures should be enforced only when within both the letter and spirit of the law").

C. The government has the burden of proving that it had probable cause for forfeiture at the time it filed the complaint.

Before 2000, 19 U.S.C. §1615 required the government to show that probable cause existed to institute a forfeiture action, and then the burden shifted to the claimant to prove by a preponderance of the evidence that the property was not subject to forfeiture. The Civil Asset Forfeiture Reform Act of 2000, however, removed the burden of proof at trial from the claimant and placed it on the government to prove by a preponderance of evidence that the defendant property is subject to forfeiture. *See* 18 U.S.C. §983(c)(1); *see also U.S. v. $493,850 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008).

The Ninth Circuit, nevertheless, has since held that because forfeiture statutes are strictly construed against the government, and Congress intended to institute stronger procedural safeguards before the government could forfeit property, *inter alia*, section 1615 continues to require that the government show that it had **probable cause to institute a forfeiture action**. *U.S. v. $493,850* at 1169. Thus, this motion for summary judgment challenges only the government's evidence gathered before the complaint was filed. *U.S. v. $191,910, supra* at 1071, *superseded on other grounds as stated in United States v. $80,010 in U.S. Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002). As such, any evidence obtained by the government after the complaint was filed is irrelevant and inadmissible in deciding this motion.[3]

---

[3] Thus, if the government's summary judgment opposition asks for time to conduct additional discovery pursuant to Fed.R.Civ.P. 56(f), such a request would be inappropriate and prohibited for the purposes of the instant motion, since this motion tests only whether the government already had probable cause for

D. The government has the burden of showing probable cause that the defendant properties were purchased with the proceeds of violations of 18 U.S.C. §2342.

In determining whether the government had probable cause for forfeiture at the time it filed the forfeiture complaint in this action, it must have had reasonable grounds to believe that the property was connected to illegal activity, supported by less than prima facie proof but more than mere suspicion. *U.S. v. $191,910 in U.S. Currency*, 16 F.3d at 1071. Based on the allegations in the complaint, to forfeit the Doverwood and Greenbriar properties and the 2004 BMW, the government must prove those items were purchased with proceeds traceable to violations of the Contraband Cigarette Trafficking Act ("CCTA"), 18 U.S.C. §2341, *et seq*. See Exhibit 1, Complaint, ¶8.

The CCTA provides that it is unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes or contraband smokeless tobacco. 18 U.S.C. §2342(a). The relevant forfeiture statute provides that any real or personal property which constitutes or is derived from proceeds traceable to a violation of any "specified unlawful activity" as defined in 18 U.S.C. §1956(c)(7) is subject to forfeiture to the United States. *See* 18 U.S.C. 981(a)(1)(C). Section 1956(c)(7) includes as specified unlawful activities any act or activity constituting an offense listed 18 U.S.C. §1961(1), which in turn includes any violation of 18 U.S.C. §§2341-2346. Therefore, if the Doverwood or Greenbriar properties or the 2004 BMW are traceable to proceeds obtained through violations of 18 U.S.C. §2342(a), then they may be subject to forfeiture.[4]

---

forfeiture **at the time it filed the complaint**.

[4] The complaint also alleged that the properties are subject to forfeiture pursuant to 18 U.S.C. §981(a)(1)(A) as property involved in or traceable to transactions conducted in violation of the money laundering statutes, 18 U.S.C. §§1956 and 1957. *See* Exhibit 1, Complaint, ¶8. The government's proof under those sections, however, would be redundant and cumulative to its burden under

Even if the government could show probable cause that **some** illegal proceeds were used to purchase a particular defendant property, **the remaining portion of the property that is not traceable to a violation is not subject to forfeiture**. *United States v. Real Property Located at 20832 Big Rock Dr.*, 51 F.3d 1402, 1411 (9th Cir.1995)(any interest in property purchased with illegitimate assets is forfeitable, but any interest purchased with legitimate assets is not forfeitable, because it is not "proceeds traceable to" a violation). Accordingly, a if the government did not have probable cause that a portion of the defendant property is traceable to a violation of §2342(a) when it filed the complaint, then that portion is not subject to forfeiture.

Under the probable cause standard, the government is required to establish by some **credible** evidence the probability that the subject property was in fact connected to the alleged violation. *U.S. v. U.S. Currency, $30,060.00*, 39 F.3d 1039, 1041 (9th Cir. 1994). To demonstrate this probability, the government must establish a **sufficient connection** between the detailed illegal activity and the particular assets targeted by the government's forfeiture proceeding. *U.S. v. Real Property Known as 22249 Dolorosa Street, et al.,* 167 F.3d 509, 514 (9th Cir. 1999).

E. There is no genuine issue of material fact that the government cannot meet its probable cause burden that the defendant properties are traceable to a violation of 18 U.S.C. §2342(a).

The government cannot meet its burden of showing that, at the time it filed its complaint, there was probable cause showing that the defendant properties were

---

18 U.S.C. §981(a)(1)(C), and would actually require it prove an additional element to prevail under its claims, i.e., first that illegal proceeds were generated from a violation of 18 U.S.C. §2342(a), and next that financial transactions were conducted with those proceeds. Consequently, if the government can prevail under 18 U.S.C. §981(a)(1)(C), then its §981(a)(1)(A) claims are unnecessary; similarly, if the government cannot prevail under §981(a)(1)(C), then it also cannot prevail under §981(a)(1)(A).

traceable to proceeds obtained from violations of 18 U.S.C. §2342(a). The Fanelly Affidavit, on which the government has primarily relied, merely made a conclusory statement that Masis Geragosian and Avedis Djeredjian "have acted in concert to transport thousands of cases on contraband cigarettes from North Carolina to California without paying California cigarette taxes in violation of the CCTA, 18 United States Code, 2342(a) and 371." Exhibit 2, Fanelly Affidavit, ¶128. It also alleged (excise) tax losses to the State of California that resulted from the alleged violations. *Id.* at ¶¶126-127. The time period of the alleged illegal activity referenced in the Affidavit, although it is incredibly vague, appears to be in 2003-2005.

The Fanelly Affidavit discussed transactions conducted in an Allen Nazarian/Discount Outlet account at Bank of America in 2002-2003, but it did not trace any alleged illegal proceeds into the account, but merely made conclusory statements that some of the funds deposited into the account were used to purchase "contraband" cigarettes and were "used to purchase cigarettes in furtherance of the cigarette trafficking conspiracy." *Id.* at ¶¶138a-f. The Affidavit also mentioned transactions in Modern Cigarettes and Modern Video merchant accounts at Antelope Valley Bank, however it mentioned transactions in these retail accounts in 1997-1999. *Id.* at ¶¶142-144, 146-148. The Affidavit further discussed cash transactions conducted in a Star Tobacco bank account at Wells Fargo Bank in 2004 and 2005, and concluded that deposits of $865,467.56 were made into this account, however it did not identify the dates of these deposits. *Id.* at ¶¶150-154.

This Affidavit and the government, however, did not and cannot show any specific illegal transactions that violated §2342(a) and generated specific illegal proceeds as a result of any such violations. Even had the government made that allegation and showing, it did not and cannot point to evidence tracing any such proceeds into the defendant real properties and BMW. Moreover, the Fanelly Affidavit falsely stated that illegal cigarette trafficking was the only source of income earned by Vicken Djeredjian and Avedis Djeredjian known to the government, when the government had thousands of pages of documents in its possession (many of which it failed to produce in discovery in both the criminal and civil forfeiture cases) showing they earned **substantial legitimate income**.

1. The Doverwood property was purchased before any alleged §2342(a) violations were committed.

The government's forfeiture complaint against the defendant 1356 Doverwood property relied on facts alleged in the Fanelly Affidavit, which asserted that on **August 5, 1999**, Vicken Djeredjian paid a total of $170,819.61 for the purchase downpayment (the purchase price was $628,000), and that in March 2002-March 2003, an additional $29,277.72 was paid towards the mortgage from an account in the name of Allen Nazarian/Discount Outlet. The Fanelly Affidavit, however, **did not identify any violations of 18 U.S.C. §2342(a) that allegedly were committed prior to the purchase of the Doverwood property**. Even assuming, *arguendo*, that the government could point to specific violations and illegal proceeds generated from those violations that occurred in 2002-2003, after the purchase – the time period during which the $29,277.72 additional payment was alleged to have been made – **more than 85% of the total equity payments** for the purchase of the Doverwood property were made **in 1999, three to four years before that payment**. Nevertheless, neither the Affidavit nor any of the government's evidence produced in discovery trace any additional equity payments towards the mortgage to any specific proceeds obtained from a §2342(a) violation.

In addition, the Khachoian Declaration shows that at the time it filed the complaint, and contrary to the self-serving conclusory allegations in the Fanelly Affidavit, the government was in possession of evidence that Vicken and Avedis Djeredjian operated legitimate retail video and tobacco stores and generated substantial legitimate income both prior to and after the purchase of the Doverwood property, income completely unrelated to any §2342(a) violations alleged in the Fanelly Affidavit.[5]

At the time it filed its complaint, the government did not have credible evidence of a sufficient connection between the alleged illegal activity and the Doverwood property.[6] Accordingly, there is no genuine issue of material fact that, at the time the government filed its complaint, probable cause for forfeiture of the Doverwood property did not exist.

2. <u>The Greenbriar property also was purchased before any alleged §2342(a) violations were committed</u>.

The government's forfeiture complaint against the defendant 1633 Greenbriar Drive property relied on facts alleged in the Fanelly Affidavit, which conceded that Vicken Djeredjian purchased the property on **May 18, 2000,** in full without a deed of trust. The Fanelly Affidavit also **did not identify any violations of 18 U.S.C. §2342(a) that allegedly were committed prior to the purchase**. Thus, the Greenbriar property was purchased **free and clear** before any alleged §2342(a) violations, and is not traceable to illegal proceeds.

In addition, at the time it filed in the complaint, and contrary to the self-serving conclusory allegations in the Fanelly Affidavit, the government was in possession of evidence that Vicken and Avedis Djeredjian operated legitimate retail video and tobacco stores and generated substantial legitimate income prior to the purchase of the Greenbriar property, income completely unrelated to any §2342(a) violations alleged in the Fanelly Affidavit.

At the time it filed its complaint, the government did not have credible evidence of a sufficient connection between the alleged illegal activity and the

---

[5] Ms. Khachoian's review and summary of the government's discovery documents is admissible pursuant to Federal Rule of Evidence 1006.

[6] At best, even assuming the government had evidence in its possession tracing proceeds obtained from §2342(a) violations into the property, at least 85% of the equity was paid into the property at the time of the purchase in 1999.

Greenbriar property. Accordingly, there is no genuine issue of material fact that, at the time the government filed its complaint, probable cause for forfeiture of the Greenbriar property did not exist.

3. <u>The government did not trace the purchase of the 2004 BMW to any alleged illegal proceeds</u>.

The government's forfeiture complaint against the defendant 2004 BMW relied on facts alleged in the Fanelly Affidavit, which asserted **only** that the vehicle was purchased on February 20, 2004 for approximately $48,500. However, neither the Affidavit nor any of the government's evidence produced in discovery trace any payments for the BMW to any specific proceeds obtained from a §2342(a) violation. In fact, at the time it filed its complaint, the government had in its possession DMV records showing that the BMW was **financed** through BMW Bank North America, which held a lien on the car, and it was purchased with a **$5,000.00 downpayment**, **the source of which was credit from Avedis Djeredjian's Discover card**.

Nevertheless, as shown above, at the time it filed in the complaint, and contrary to the self-serving conclusory allegations in the Fanelly Affidavit, the government was in possession of evidence that Vicken and Avedis Djeredjian operated legitimate retail video and tobacco stores and generated substantial legitimate income both prior to and after the purchase of the BMW, income completely unrelated to any §2342(a) violations alleged in the Fanelly Affidavit.

At the time it filed its complaint, the government did not have credible evidence of a sufficient connection between the alleged illegal activity and the BMW. Accordingly, there is no genuine issue of material fact that, at the time the government filed its complaint, probable cause for forfeiture of the BMW did not exist.

IV.

CONCLUSION

Based on the above, Claimant Carmen Badrian respectfully requests the Court to grant summary judgment against the government finding that probable cause for forfeiture of the two real properties and the BMW did not exist at the time the forfeiture complaint was filed. In the alternative, if the Court finds that the government lacked probable cause for forfeiture as to a portion of funds traceable to the purchase of any of the three properties, then she requests that the Court enter partial summary judgment against the government as to the specific amount of funds that the government did not establish were traceable to illegal proceeds.

Dated: April 15, 2011 Respectfully submitted,

LAW OFFICE OF ERIC HONIG
A Professional Law Corporation

/s/ Eric Honig
ERIC HONIG
Attorney for Claimant/Petitioner
Carmen Badrian

DECLARATION OF ERIC HONIG

I, Eric Honig, state and declare as follows:

1. I have personal knowledge of the facts hereinafter stated, and if called upon to testify, I could and would competently testify thereto.

2. I am currently counsel of record for the claimants Carmen Badrian and Ashken Djeredjian ("Ashken") in these consolidated cases, *U.S. v. $19,985 in U.S. Currency*, Case No. CV 07-3622-GHK (FMOx) and *U.S. v. Avedis Djeredjian*, No. CR 07-475-GHK.

3. Exhibits 1 through 11 are true and correct copies of pleadings filed in this civil action, discovery produced by the government in these consolidated actions and in *U.S. v. Vicken Djeredjian*, WD/VA Case No. 7:3-CR-49-SGW, and discovery-related correspondence between counsel in this case.

I certify under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed on April 15, 2011 at Marina del Rey, California.

/s/ Eric Honig

____

ERIC HONIG