

Quentin M. Rhoades
 State Bar No. 3969
SULLIVAN, TABARACCI & RHOADES, P.C.
 1821 South Avenue West, Third Fl.
 Missoula, MT 59801
 Telephone: (406) 721-9700
 Facsimile: (406) 721-5838
qmr@montanalawyer.com

Pro Querente

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MONTANA
 BUTTE DIVISION

<p>RICHARD CELATA,</p> <p style="text-align: right;">Plaintiff,</p> <p>v.</p> <p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Defendant.</p>	<p>Cause No. CV-07-24-BU-SEH-RKS</p> <p style="text-align: center;">PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT</p>
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COMES NOW, Plaintiff, Richard Celata ("Celata"), and in further support of his motion for summary judgment pursuant to Rule 56(a), Fed.R.Civ.P., and in opposition to Defendant's cross-motion for summary judgment, submits the following:

COMBINED BRIEF

INTRODUCTION

Celata filed this action in an effort to obtain return of property seized by Defendant United States of America ("the Government") over a year ago. In his



complaint, and in his motion for summary judgment, Celata points out that since it failed to timely file a forfeiture action, the Government is holding the seized property in violation of 18 U.S.C. § 983(a)(3)¹ and 18 U.S.C. § 924(d)(1).² The Government responded by arguing it seized the property and is holding it as part of a criminal investigation of what it alleges are Celata's unlicensed manufacture of firearms, and possession of an unlicensed machine gun. It also argues the Court lacks jurisdiction to

¹ 18 U.S.C. § 983(a)(3), with emphasis added, reads:

(A) Not later than 90 days after a claim has been filed, the Government **shall** file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not—

(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

(ii) before the time for filing a complaint has expired—

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; **and**

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government **shall promptly release** the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

² 18 U.S.C. § 924(d)(1) states:

Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

declare the parties' respective rights. Finally it asserts Celata cannot meet the standards for return of property under Rule 41, Fed.R.Crim.P., and therefore it, rather than Celata, is entitled to summary judgment.

For the purposes of both parties' motions for summary judgment, Celata will accept the Government's rendition of the material facts as undisputed – with one exception. It has never provided to him any legal authority upon which it has refused to "promptly release" his property. Indeed, it does not cite to any such authority in its own brief. Moreover, in lieu of a Local Rule 56.1(b) statement of genuine issues in opposition to the Government's cross-motion, Celata rests on his own statement of undisputed facts filed in support of his own motion for summary judgment. Given these and the Government's contentions of fact, the seized property has been wrongfully retained, and it should be ordered promptly released.

DISCUSSION

1. Sovereign immunity does not apply because it has been expressly waived by statute.

The Government first seeks refuge in the doctrine of sovereign immunity, arguing the Court has no jurisdiction to declare the parties' rights in the seized property. However beguiling this argument may be, it cannot be reconciled with the U.S. Supreme Court's holding in U.S. v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in U.S. Currency.³ In that case, the Court instructed that if the Government

³ 461 U.S. 555, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983).

seizes property, the owner can vindicate his right to due process by, inter alia, the filing of his own civil action seeking return of the property:

A claimant is able to trigger rapid filing of a forfeiture action if he desires it. First, the claimant can file an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property.⁴

Moreover, in this case it is indisputable – as the Government itself admits – that the forfeiture issues raised are federal questions. In this context, it is “well-recognized” that 5 U.S.C. § 702⁵ serves as the necessary waiver of sovereign immunity.⁶ Thus, in harmony with U.S. v. Eight Thousand Eight Hundred and Fifty Dollars, sovereign immunity is waived over claims for relief from the Government’s illegal seizure of

⁴ Id., 461 U.S. at 569, 103 S.Ct. at 2014. See also, Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, 10, 4 L.Ed. 169 (1817).

⁵ 5 U.S.C. § 702 reads, in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

⁶ Taft v. U.S., 824 F.Supp. 455, 462-63 (D.Vt. 1993) (citing Sarit v. United States, 987 F.2d 10, 17 (1st Cir.1993); Marshall Leasing, Inc. v. United States, 893 F.2d 1096, 1102-03 (9th Cir.1990); Willis v. United States, 787 F.2d 1089, 1092-93 (7th Cir.1986); and Montgomery v. Scott, 802 F.Supp. 930, 934 (W.D.N.Y.1992)).

private property.⁷ As a result, the Court is invested with full and complete jurisdiction to adjudicate the claims Celata has plead.

2. Rule 41(g), Fed.R.Crim.P., does not apply because Celata has property filed a civil action.

As discussed above, the U.S. Supreme Court has ruled that if property is seized by the Government, a claimant is entitled to force timely action by the filing of a civil action seeking return of the property. Celata filed this case on grounds that the Government's failure to file a timely forfeiture complaint requires it to "promptly release" his property. Indeed, the Government does not dispute that its refusal to release the property is a violation of 18 U.S.C. § 983(a)(3). Rather it claims that Rule 41, Fed.R.Crim.P., is the only proper mode of seeking return, and since the criteria for release under Rule 41, Fed.R.Crim.P., is not satisfied, it need not comply with the law. The dispute, however, is not governed by the criteria for relief under Rule 41. The express and plainly expressed provisions of 18 U.S.C. §§ 983(a)(3) and 924(d)(1) apply, and under such authority, the Government must release Celata's property.

The statutes involved are relatively new. Yet, the relief sought under them here is not at all unprecedented. For example, regardless of the Government's resort to the jurisprudence of Rule 41(g), Fed.R.Crim.P., a U.S. District Court in Hawaii recently **rejected** a Rule 41 motion as an improper mechanism for enforcement of 18 U.S.C. §

⁷ Marshall Leasing, 893 F.2d at 1099; Taft, 824 F.Supp. at 462-63. See also, Bowen v. Massachusetts, 487 U.S. 879, 108 S.Ct. 2722, 101 L.Ed.2d 749 (1988).

983(a)(3).⁸ Rather, it ruled a civil complaint – such as Celata’s – is the only proper mechanism to seek return of property kept past the statutes’ forfeiture deadlines. As the court reasoned:

Because the Federal Rules of Criminal Procedure do not govern this action and this Court refrains from invoking its equitable jurisdiction, this Court lacks jurisdiction to hear this motion pursuant to Fed.R.Crim.P. 41(g). As the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") provide the rules applicable to this action, Movants should have filed an underlying complaint before filing the instant Motion, particularly for Movants’ due process arguments to enforce procedures under CAFRA. See Fed.R.Civ.P. 7(a) (providing that "[t]here shall be a complaint" for allowable pleadings); see also Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668, 680, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974) (involving the filing of a suit, presumably including a complaint, for due process violations and a taking of property for government use without just compensation pursuant to forfeiture statutes). The request to return property likewise should have been included in the complaint, rather than in a motion. Because no such complaint was filed here and Movants have failed to provide any reasons concerning why they should be able to circumvent the Federal Rules of Civil Procedure, this Court DISMISSES the instant Motion without prejudice.⁹

In this case, Celata has proceeded precisely as instructed by the Hawaii district court. He has filed a civil complaint – not an improper motion under Rule 41(g), Fed.R.Crim.P. Thus, not only are the Government’s Rule 41 arguments utterly irrelevant to this case, but to consider them in the circumstances – where a civil complaint has in fact already been filed – would circumvent the Federal Rules of Civil Procedure.

⁸ In re Application of Farrar, No. 07-00019, 2007 WL 601985, * 3 (D.Hawai’i, February 21, 2007) (footnotes omitted).

⁹ Id.

3. The Government's refusal to promptly release the seized property is unlawful because it has failed timely to either file a civil forfeiture action, or to obtain a criminal indictment.

Moreover, under the civil complaint, the relief sought is warranted because the Government's action (or, really, lack of action) has been unlawful. Celata filed a timely ownership claim against certain articles of the seized real property. According to the 11th Circuit Court of Appeals: "Once any person files a claim, the Government is **required** to either initiate a judicial action or **return** the property.... The statute is clear on this point; [the claimant] has a right to judicial process."¹⁰ The 7th Circuit Court of Appeals agrees, and expressly recognizes the 90 day deadline: "Pursuant to 18 U.S.C. § 983(a)(3)(A), an action for forfeiture must be commenced not later than 90 days after an administrative claim has been filed."¹¹ The 1st Circuit Court of Appeals has reached the same conclusion: "Once a party has filed an administrative claim, the government has 90 days either to file a complaint for forfeiture in the district court or to release the property."¹²

¹⁰ Via Mat Intern. South America Ltd. v. U.S., 446 F.3d 1258, 1264 (11th Cir. 2006) (emphasis added).

¹¹ U.S. v. \$84,940 U.S. Currency, 86 Fed.Appx. 978, 980 (7th Cir. 2004).

¹² U.S. v. \$23,000 in U.S. Currency, 356 F.3d 157, 161 (1st Cir. 2004)(citing 18 U.S.C. § 983(a)(3)(A)-(B) (2003)).

The U.S. District Court from the North District of New York applied the same analysis in U.S. v. \$1,073,200 in U.S. Currency.¹³ In dismissing a forfeiture complaint for the Government's failure to timely file, the Court stated:

As part of the Civil Asset Forfeiture Reform Act of 2000, "[a]ny person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure[]" and this claim "may be filed not later than the deadline set forth in a personal notice letter[.]" 18 U.S.C. § 983(a)(2)(A)-(B). "Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture ... or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties." *Id.* at § 983(a)(3)(A). **If the Government fails to file its complaint within 90 days, it must return the seized property and is prohibited from taking "any further action to effect the civil forfeiture of such property in connection with the underlying offense."** *Id.* at § 983(a)(3)(B).¹⁴

Of particular note in \$1,073,200 is the similarity of the procedural posture with this case. As here, the Government did, initially, file a timely forfeiture action. But, as here, it then "voluntarily dismissed that complaint without prejudice pursuant to Rule 41(a)(1)(i)."¹⁵ The court held that since the dismissal was voluntary and it was without prejudice there could be no extension of the plainly stated statute of limitations:

Relying on materials outside the complaint, the government argues that it timely filed a complaint in the Southern District of Georgia on January 20, 2006, 88 days after Rockwell filed his claim. The government, however, through the United States Attorney for the Southern District of Georgia,

¹³ U.S. v. \$1,073,200.00 in U.S. Currency, No. 5:06-CV-578, 2007 WL 1017317 (N.D.N.Y., March 30, 2007) (emphasis added).

¹⁴ *Id.*, * 3.

¹⁵ *Id.*, fn. 1.

voluntarily dismissed that complaint without prejudice pursuant to Rule 41(a)(1)(i) on March 15, 2006. Even if the Court were to consider this argument and assume the filing of that complaint in the Southern District of Georgia tolled the filing period, and the calculation of the 90 days resumed upon dismissal, the filing of the instant complaint on May 10, 2006, 56 days after the government voluntarily dismissed the complaint in the Southern District of Georgia, would still be untimely. The government cites no case law indicating that the 90 day time period starts anew upon the voluntary dismissal of a complaint.¹⁶

Despite this litany of authority, the Government argues here that because it maintains an aging criminal investigation, it can keep Celata's property. At this late date, however, such an investigation is insufficient to retain the property. Before the 90 days expires, the mere investigation of suspected criminal activity must result in the filing of a civil or criminal action for forfeiture – or the Government cannot retain claimed property. The statute, 18 U.S.C. § 983(a)(3)(B) provides that if the Government fails to file a civil complaint for forfeiture in 90 days, it must obtain a criminal indictment, **and** take steps to preserve the property under the criminal rules:

(ii) before the time for filing a complaint has expired–

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; **and**

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.¹⁷

¹⁶ Id.

¹⁷ 18 U.S.C. § 983(a)(3)(B) (emphasis added).

If it fails to do so, as it has failed here, it "shall" promptly return the seized property. Just a few weeks ago, a U.S. District Court from Georgia put it this way: "Within ninety days of the filing of such a claim, the Government **must** either file a complaint, **return** the property, **or** include a forfeiture allegation in a criminal indictment."¹⁸

In this case, the 90 day deadline passed long ago. Yet, the Government neither filed a civil forfeiture complaint nor obtained an indictment (regardless of whether the latter included a forfeiture allegation). The Government therefore "shall promptly return" the property. Its refusal to do so is illegal.

Finally, as an aside, the Government's brief argues Celata seeks "all property" seized in this case, including those items deemed to be contraband.¹⁹ Celata, however, has not claimed all the property the Government seized (e.g., the machine gun the Government claims to have taken from the premises), and exactly none of what he has actually claimed is alleged by the Government to be contraband. Celata does not seek return of any article for which he has not made a claim. Rather, the only property he seeks is that he timely claimed.²⁰ With regard to the claimed articles, the Government

¹⁸ U.S. v. U.S. Currency Totaling \$180,000.00, No. CV406-250, 2007 WL 1706357 * 1 (S.D.Ga., June 11, 2007) (citing 18 U.S.C. § 983(a)(3)(A)) (emphasis added). See also, U.S. v. Forty-Four Miscellaneous Firearms, No. CV507-7, 2007 WL 1101240 * 1 (S.D.Ga., April 12, 2007) (same holding).

¹⁹ Def. Memo. in Opp. to Pl. Rule 56(a) Mot. for Summ. J., p. 3.

²⁰ Plaintiff's Separate Statement of Undisputed Facts in Support of Rule 56(a) Motion for Summary Judgment, ¶ 6. (Dkt. No. 6.)

failed to timely follow the required procedures, and it is therefore, as a matter of law, obligated to promptly release Celata's property.

CONCLUSION

The Court has jurisdiction to adjudicate claims for the Government's wrongful seizure of private property under 5 U.S.C. § 702 and U.S. v. Eight Thousand Eight Hundred and Fifty Dollars. Moreover, despite the Government's arguments, Rule 41(g) of the Federal Rules of **Criminal** Procedure and its interpretative case law do not apply. Rather, Celata has properly pursued his claims by the filing of this **civil** action. Finally, he is entitled to the relief sought because the Government has failed to either timely pursue a civil forfeiture action, or to obtain a criminal indictment seeking forfeiture. Thus, Celata's motion for summary judgment should be granted, and the Government's cross-motion ought to be denied.

WHEREFORE, PREMISES CONSIDERED, Celata prays for summary judgment and relief as follows:

- A. An order declaring that the GOVERNMENT shall forthwith return all of the CELATA PROPERTY;
- B. An order directing the GOVERNMENT to return the CELATA PROPERTY to CELATA forthwith, and enjoining the GOVERNMENT from continuing to hold any of the CELATA PROPERTY;
- C. An order denying the Government's motion for summary judgment;

D. A judgment awarding CELATA a reasonable attorney fee and costs of Court; and

E. Such further relief as the Court may deem just, proper and equitable.

DATED this 22nd day of June, 2007.

Respectfully submitted,
SULLIVAN, TABARACCI & RHOADES, P.C.

By: /s/ Quentin M. Rhoades
Quentin M. Rhoades,
Pro Querente

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2007 a copy of the foregoing document was served on the following persons by the following means:

- 1 CM/ECF
- Hand Delivery
- Mail
- Overnight Delivery Service
- Fax
- E-Mail

1 George F. Darragh
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 3447
Great Falls, MT 59403

/s/ Quentin M. Rhoades