Quentin M. Rhoades
State Bar No. 3969
SULLIVAN, TABARACCI & RHOADES, P.C.
2075 Charlotte St., Ste. 1
Bozeman, MT 59718
Telephone: (406) 556-1121
Facsimile: (406) 556-1129
qmr@montanalawyer.com

Attorneys for Richard Celata

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

UNITED STATES OF AMERICA, Plaintiff, v. **MODEL 1911, .45 CALIBER PISTOL, UNKNOWN MANUFACTURER, SERIAL NUMBER KTO 03041002; MODEL AR15, .223 CALIBER FIREARM, UNKNOWN MANUFACTURER, NO SERIAL NUMBER; MODEL 1911, .45 CALIBER PISTOL, UNKNOWN MANUFACTURER, SERIAL NUMBER 03041001; and RIFLE, NO CALIBER, UNKNOWN MANUFACTURER, NO SERIAL NUMBER,** Defendants.	**Cause No. CV 06-85-BU-SEH** **BRIEF IN SUPPORT OF MOTION FOR RELIEF FROM ORDER**

COMES NOW Claimant, Richard Celata ("Celata"), and in support of his motion for leave to file motion for relief from order filed February 15, 2007, submits the following:

PRINCIPAL BRIEF

INTRODUCTION

Plaintiff United States of America ("the Government") filed a motion to dismiss this action pursuant to Rule 41(a)(2), Fed.R.Civ.P. The motion did **not** expressly seek dismissal without prejudice. The Court then entered an Order dismissing the case by Order filed stamped February 8, 2007, on grounds of the Government's filing of a motion to voluntarily dismiss the instant civil forfeiture proceeding pursuant to Fed.R.Civ.P. 41(a)(2). The order of dismissal states that "Claimant does not oppose dismissal."

Celata, however, does oppose dismissal of this case with**out** prejudice. Celata seeks instead dismissal **with** prejudice. Undersigned counsel was contacted on the morning of Thursday, February 8, 2007, by Assistant U.S. Attorney Paulette Stewart. Stewart informed counsel of her intent to file a voluntary motion to dismiss, and sought Celata's consent. Although Celata's counsel did state he did not want to "continue further litigation" needlessly, he could and would **not** recommend to Celata any consent without: (a) first studying the issue of voluntary dismissal in more detail; (b) reaching a satisfactory resolution on the issues of Celata's fees and costs; and (c) obtaining the return to Celata of the Defendant firearms. Furthermore, in any event, counsel

informed Stewart that he could not consent without **first** consulting with his client, Celata. Stewart responded by saying she intended to file the motion to dismiss immediately and would not await counsel's consultation with Celata. She did not indicate the reason for her urgency.

Later that morning, counsel sent an email letter to Stewart at 9:28 o'clock a.m., stating expressly:

> Until I have a chance to study the issues, we cannot consent to dismissal without a promise of a return of the defendant firearms and payment of our fees.
>
> On an not unrelated point, we'd still like our client's other belongings returned ASAP. Thanks!

(See Exhibit A, attached.) Stewart then filed at 11:28 o'clock a.m., the voluntary motion to dismiss. (See Exhibit B, attached.) The motion stated Celata "does not want to continue further litigation." Stewart omitted counsel's remarks made in his email and his oral statements that he could **not** recommend consent to his client without further study of Rule 41(a)(2), and without resolution of the issues of Celata's fees and costs, and the return to Celata of the Defendant firearms. Furthermore, Stewart omitted counsel's caveat that he could not consent in any event without **first** consulting with his client, Celata. Regardless, Stewart implied to the Court that Celata had consented. When later challenged on the issue, Stewart stated she has used counsel's "own words" in the voluntary motion to dismiss, and excused herself by stating she had not filed the motion as "an unopposed motion." (See Exhibit C, attached.) When

undersigned pointed out in a subsequent email that counsel also stated that he could not consent without terms and conditions (Id.), Stewart never responded.

Thus, as expressly stated both orally and in the email to Stewart, Celata did **not** consent to the motion. Yet, Celata's consent appears to have been a primary basis for the Court's granting the motion to dismiss. Furthermore, dismissal without prejudice is not appropriate over Celata's objection because the statute of limitations has expired. The case should be ordered dismissed **with** prejudice, Celata should be designated a prevailing party entitled to statutory fees and costs, and the Defendant firearms should be ordered returned to Celata forthwith.

DISCUSSION

1. Upon a timely filed motion for relief, a court can and should correct errors in the record.

A district court may grant relief from an erroneously entered order "under either Fed.R.Civ.P. 59(e) (motion to alter or amend a judgment) or Rule 60(b) (motion for relief from judgment)."[1] Relief from judgment under Rule 60(b) requires a showing only of "mistake, surprise, or excusable neglect."[2] A district court in Arizona once explained the applicable standard thus:

> The Court has discretion to reconsider its order granting final judgment. Reconsideration is warranted to consider newly discovered evidence or an intervening change in controlling law, as well as to correct clear error. Other highly unusual circumstances also may warrant reconsideration. In

---

[1] School Dist. No. 1J, Multnomah County v. ACandS. Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) cert. denied, 512 U.S. 1236, 114 S.Ct. 2742, 129 L.Ed.2d 861 (1994).

[2] Id.

> addition, a judgment may be vacated upon a showing of "(1) mistake, inadvertence, surprise, or excusable neglect" or "(6) any other reason justifying relief."[3]

It has also been held that such relief is appropriate if "the district court . . . committed clear error ***or*** the initial decision was manifestly unjust."[4] The Court therefore has full authority under the Federal Rules of Civil Procedure to remedy the consequences of the dismissal by vacating or amending its order dismissing the case to allow for the relief requested herein. In this case, Celata was not afforded, pursuant to Local Rule 7.1(d), an opportunity to oppose the Government's motion to dismiss. The Court should, as a result, vacate its order of dismissal, and take Celata's position into account in its disposition of the motion.

2. Dismissal should be with prejudice.

The voluntary motion to dismiss was filed pursuant Rule 41(a)(2), Fed.R.Civ.P., but it did not specify whether dismissal was sought "with" or "without" prejudice. The Court granted the motion, but likewise did not indicate whether dismissal was without prejudice. The Rule, however, states that if not otherwise specified, dismissal under Rule 41(a)(2) is "without prejudice."

Yet, before dismissing an action without prejudice on motion of a plaintiff under Rule 41(a)(2), Fed.R.Civ.P., it is must be determined whether such a dismissal would

---

[3] Arizona Civil Liberties Union v. Dunham, 112 F.Supp.2d 927 (D.Ariz. 2000) (citations omitted).

[4] Id.; Diamond Ben. Life Ins. Co. v. Dreyfuss, 119 F.3d 5, 6 (9th Cir. 1997) (emphasis on the disjunctive "or" added).

impose upon a non-moving party "plain legal prejudice."[5] Plain legal prejudice is "prejudice to some legal interest, some legal claim, some legal argument."[6] Legal prejudice arises from the loss of a statute of limitations defense.[7] "The types of cases in which defendants would suffer 'plain legal prejudice,' thereby justifying refusal of a dismissal without prejudice," include circumstances where the record "showed that plaintiff's claim was barred by the statute of limitations."[8]

Furthermore, a Rule 41(a)(2) dismissal without prejudice leaves the parties in their original positions, as though the action had never been brought.[9] Thus, "in the absence of a statute to the contrary, the [statute of] limitation period is not tolled during the pendency of the dismissed action."[10] It has therefore been held that "the practical effect of this rule" is that dismissal should be allowed with**out** prejudice **only** if

---

[5] Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir.1994); Hamilton v. Firestone Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir.1982); see also Westlands Water Dist. v. United States, 100 F.3d 94, 97 (9th Cir.1996) (factors to consider include whether dismissal would result in the loss of a federal forum, the right to a jury trial, or a statute of limitations defense).

[6] Wetlands Water Dist., 100 f.3rd at 97.

[7] See Manshack v. Southwestern Elec. Power Co., 915 F.2d 172, 174 (5th Cir.1990); Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1276 (5th Cir.1990); Davis v. USX Corp., 819 F.2d 1270, 1276 (4th Cir.1987); Schroeder v. Int'l Airport Inn Partnership (In re Int'l Airport Inn Partnership), 517 F.2d 510, 512 (9th Cir.1975) (per curiam).

[8] Blue Mountain Const. Co. v. Werner, 270 F.2d 305, 310 (9th 1959).

[9] See Concha v. London, 62 F.3d 1493, 1506-07 (9th Cir.1995); Humphreys v. United States, 272 F.2d 411, 412 (9th Cir.1959).

[10] Shumate v. Buna, 1998 WL 822771, *3 (N.D.Cal.,1998); Brown v. Hartshorne Pub. Sch. Dist. No. 1, 926 F.2d 959, 961 (10th Cir.1991); United States v. Mt. Vernon Memorial Estates, Inc., 734 F.2d 1230, 1236 (7th Cir.1984) ("[A] voluntary dismissal turns back the clock; it is as if plaintiff's lawsuit had never been brought."). See also, Humphreys v. U.S., 272 F.2d 411, 412, fn. 1 (9th Cir. 1959).

the statute of limitations has not expired during the pendency of the action.[11] The Sixth Circuit Court of Appeals has likewise noted: "Although the district court technically dismissed the refiled case with**out** prejudice, that dismissal was involuntary and, as the Duffys point out in their brief, operated as a dismissal **with** prejudice, **because the statute of limitations had run** on the Duffys' claims at that point."[12] Along those same lines, the Eighth Circuit Court of Appeals had held:

> We would consider it an abuse of discretion for a district court to find no legal prejudice, and thus to grant voluntary dismissal, where the nonmoving party has demonstrated a valid statute of limitations defense to the claims sought to be dismissed.[13]

Thus, if the statute of limitations has expired, dismissal under Rule 41(a)(2) should be **with** prejudice.[14]

In this case, the statute of limitations has expired. The complaint alleges in ¶ 5(tt) that the subject firearms were seized on June 7, 2006. The clerk's stamp indicates

---

[11] Shumate v. Buna, 1998 WL 822771 at *3. Celata is mindful of Cir. Rule 36-3, R.App.P., Ninth Circuit Court of Appeals. The rule, however, does not apply in U.S. district court, and therefore Shumate, while not binding, may be treated as persuasive authority. See Herring v. Teradyne, Inc., 256 F.Supp.2d 1118, 1128 (S.C.Cal.2002) (holding that Ninth Circuit Rule 36-3 does not bar district courts from considering other unpublished district court decisions and reviewing them for persuasive authority).

[12] Duffy v. Ford Motor Co., 218 F.3d 623, 629 (6th 2000) (emphasis added).

[13] Metropolitan Federal Bank of Iowa, F.S.B. v. W.R. Grace & Co., 999 F.2d 1257 (8th Cir. 1993). See also, Wojtas v. Capital Guardian Trust Co., --- F.3d ----, 2007 WL 475823 (7th Cir., Feb. 15, 2007) (holding dismissal without prejudice not allowed under Rule 41(a)(2) to prevent defendant from availing himself of statute of limitations defense); Phillips v. Ill. Cent. Gulf R.R., 874 F.2d 984, 987 (5th Cir.1989) (same); Metro. Fed. Bank v. W.R. Grace & Co., 999 F.2d 1257, 1263 (8th Cir.1993) (same). But see McCants v. Ford Motor Co., 781 F.2d 855, 859 (11th Cir.1986); Bolten v. General Motors Corp., 180 F.2d 379 (7th Cir.1950).

[14] Id., and Shumate, at *3.

it was filed on November 31, 2006 [sic], and the complaint was signed on December 1, 2006. Yet, any action or proceeding for the forfeiture of the firearms under 18 U.S.C. § 924(d)(1) must be commenced within 120 days of the seizure.[15] The relevant statutory part provides "Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure." Assuming the allegations of the complaint to be true, the motion to dismiss was filed 246 days after the Defendant firearms were seized. The statute of limitations is therefore expired. Thus, because the time-bar ensures it cannot be filed again, the complaint ought therefore to be dismissed **with** prejudice.[16]

This is especially true given that Celata filed a substantive motion to dismiss requesting a ruling on a meritorious statute of limitations defense **before** the Government sought dismissal. As has been stated in similar circumstances:

> Dismissing a possibly meritorious but time-barred case without prejudice so that a litigant may re-file the action in a jurisdiction with a longer limitations period is one thing. Dismissing a case in which no genuine issue of material fact exists without prejudice so that a litigant may re-file the action in another jurisdiction is quite another.[17]

Here, the Government should not be allowed to avoid Celata's pending motion on a meritorious defense by the expedient of a voluntary dismissal without prejudice. It chose to file the case as and when it did, and in fairness, it now should be held to the

---

[15] Accord, 27 C.F.R. § 72.21(b); 27 C.F.R. § 478.152(a).

[16] Shumate, 1998 WL 822771 at *3.

[17] Gulf States Steel, Inc., v. Lipton, 765 F.Supp. 696, 700 (N.D. Ala. 1990) (court did not allow voluntary motion to dismiss where valid statute of limitations defense had been raised and plaintiff refused to pay defendant's expenses).

consequences that flow from its decision. If it chooses to dismiss the action voluntarily after the time-bar, the dismissal should be with prejudice.

3. Because any future action is time-barred, Celata is entitled to return of his property and to his fees and expenses.

A. The Defendant firearms should be ordered returned immediately.

Under 28 U.S.C. § 2465(b)(1)(A),[18] property subject to a civil forfeiture action is to be returned to the claimant upon entry of a judgment in his favor. In this case, per Celata's motion and brief in support of his motion to dismiss, he has put at issue several substantive defenses which should result in a judgment in his favor, including a statute of limitations defense. Thus, given the time-bar to refiling, dismissal should be with prejudice. Dismissal with prejudice amounts to a judgment in Celata's favor.[19] The Court should therefore order return of the property.[20]

---

[18] 28 U.S.C. § 2465(a) reads:
(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law--

(1) such property shall be returned forthwith to the claimant or his agent; and

(2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

[19] Stewart v. U.S. Bancorp, 297 F.3d 953, 956 (9th Cir.2002).

[20] Averill v. Smith, 84 U.S. 82, 95, 17 Wall. 82, __, 21 L.Ed. 613, (1872) ("Viewed in any light the better opinion is that it is the duty of the claimant to move the court for the necessary orders to cause the property or its proceeds to be returned to the rightful owner.").

Meanwhile, with the voluntary dismissal having been granted, the Government is also required to "promptly" return the Defendant firearms under 18 U.S.C. § 983(a)(3). The relevant statutory language, 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.

In this case, Celata filed a claim to ownership of the Defendant firearms with the Government on September 1, 2006. (See Exhibit D, attached.) Meanwhile, the dismissal under Rule 41(a)(2) functions as though the complaint had never been filed.[21] It has been 174 days since September 1, 2006. The Government therefore has not

---

[21] Concha, 62 F.3d at 1506-07; Humphreys, 272 F.2d at 412.

"file[d] a complaint for forfeiture" within 90 days.[22] As a result, "the Government shall promptly release the property."[23]

B. Celata should be awarded his fees and costs.

(1) Celata is entitled to fees and cost.

Dismissal with prejudice, as this case should be, makes Celata the "substantially" prevailing party. Under 28 U.S.C. § 2465(b)(1)(A),[24] he is therefore entitled to his

---

[22] 18 U.S.C. § 983(a)(3)(A).

[23] 18 U.S.C. § 983(a)(3)(B).

[24] 28 U.S.C. § 2465(b) reads:

(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for--

(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

(B) post-judgment interest, as set forth in section 1961 of this title; and

(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale--

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency. ....

reasonable fees and litigation costs.[25] Morever, 18 U.S.C. § 924(d)(2)(A), which also provides for fee shifting in civil forfeiture actions,[26] with emphasis added, reads:

> In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court **shall** allow the **prevailing party**, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

Here, the Government based its complaint on Chapter 9 of Title 18, specifically 18 U.S.C. § 924 (d)(1).[27] Thus, § 924(d)(2)(A) applies. With the case having been dismissed **after** the statue of limitations has run, the only question remaining is whether Celata is a "prevailing party." If he is, he is entitled to his attorney's fee and litigation expenses.

The Ninth Circuit Court of Appeals has held that for a litigant to be a "prevailing party" for the purpose of awarding attorney's fees, he must meet only two criteria: (1) "he must achieve a 'material alteration of the legal relationship of the parties;'" and (2) "that alteration must be 'judicially sanctioned.'"[28] The Court rejected any overly narrow interpretation of "judicial action sufficient to convey prevailing party status,"[29] and concluded:

> In recognizing that a litigant can "prevail" for the purpose of awarding attorney's fees as a result of judicial action **other** than a judgment on the

---

25 U.S. v. $60,201.00 U.S. Currency, 291 F.Supp.2d 1126, 1127-28 (C.D.Cal. 2003).

26 U.S. v. Fourteen Various Firearms, 899 F.Supp. 249, 252 (E.D.Va. 1995).

27 Complaint, ¶ 1.

28 Carbonell v. I.N.S., 429 F.3d 894, 898 (9th Cir. 2005) (quoting Buckhannon.

29 Id.

> merits or a consent decree (provided that such action has sufficient "judicial imprimatur "), this court is in agreement with the vast majority of other circuits that have considered this issue since Buckhannon.[30]

In this case, there has been a material alteration of the parties' positions for two reasons: First, the case cannot be re-filed because the statute of limitations has expired. Before it moved to dismiss the action, the Government could have pursued the Defendant firearms on the merits if it chose to do so. Now, it cannot. Second, as is detailed above, the dismissal gives rise to the Government's obligation to return the Defendant firearms "promptly."[31] Thus, Celata meets the first requirement for a "prevailing party" because the dismissal alters the relationship between the parties' and their respective rights to possession of the Defendant property.

In addition, the alteration of the parties' respective rights is clothed with the Court's imprimatur. Dismissal in this case was sought under Rule 41(a)(2), Fed.R.Civ.P., which requires an order of the Court. The Court granted the motion, allowing the relief sought, and dismissing the case by its Order signed on February 8, 2007. Thus, the dismissal was "judicially sanctioned." As a result, Celata also meets the Ninth Circuit's second criteria to qualify as a prevailing party.[32] He is therefore entitled to an award of fees under both 28 U.S.C. § 2465(b)(1)(A) and 18 U.S.C. § 924(d)(2)(A).

---

30 Id. at 899 (emphasis added).

31 18 U.S.C., § 983(a)(3)(B).

32 Carbonell, 429 F.3d at 898.

(2) Reasonable fees and litigation expenses amount to the sum of $20,475.12.

As set forth in the concurrently filed Affidavit of Attorney Fees and Expenses, Celata seeks fees in the sum of $19,052.85, and litigation expenses in the amount of $1,422.27, for a total request of $20,475.12. In assessing the amount of fees and expenses, a District Court should determine a reasonable attorney's fee by first calculating the "lodestar."[33] "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate."[34] The lodestar should be presumed reasonable unless some exceptional circumstance justifies deviation.[35] In assessing the need for any deviation, the District Court should consider the additional following dozen factors:

(1) the time and labor required;

(2) the novelty and difficulty of the questions involved;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

---

[33] $60,201.00 U.S. Currency, at 1127-28 (citing Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

[34] Id.

[35] Id.

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.[36]

In this case, as set forth in the accompanying Affidavit of Attorney Fees and Expenses, there is no reason to deviate in either direction from the lodestar. The novelty and difficulty of forfeiture has led at least one court to conclude "that expertise in civil forfeiture actions qualifies as a practice specialty requiring distinctive knowledge and skills."[37] The skills required to practice in federal court in Montana further justifies the fee sought. The amount of time and effort involved in this case is an opportunity cost to counsel's case load that makes the fee sought reasonable. The fee application establishes that the rates charged by Celata's counsel are within the customary fees charged in Western Montana. The result obtained supports the fee application, as does the experience, reputation and ability of counsel. The fee is fixed, but with a rate in the reasonable market range. Neither time limitations, the "undesirability" of the case, nor the nature of and length of relationship with the client are significant factors for departure from the lodestar. Finally, awards in similar cases justify the fee application. For example, in Mgndichian, the petitioner was granted a total award of $56,344.51

---

[36] Id. (citing Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir.1975), cert. denied, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976)).

[37] In re Application of Mgndichian, 312 F.Supp.2d 1250, 1264 (C.D.Cal. 2003).

after succeeding in having property returned on motion practice.[38] Likewise, in $60,201.00 U.S. Currency, the Government was ordered to pay $58,969.38 in fees in costs after losing a motion for summary judgment.[39] Thus the request for fees and expenses is reasonable in the circumstances.

CONCLUSION

The Court should grant relief from its order of dismissal without prejudice. Because the statute of limitations expired on the Government's claim prior to its motion to dismiss, dismissal under Rule 41(a)(2), unless it is **with** prejudice, constitutes plain legal prejudice to Celata, depriving him of the statute of limitations defense. Equally important, dismissal ought to be **with** prejudice where, as here, the statute of limitations has expired prior to the motion for voluntary dismissal. Upon such result, Celata is the prevailing party. As prevailing party, he is entitled by statute to a reasonable attorney fee as well as litigation expenses. Finally, Celata is entitled to the prompt return of the Defendant firearms for the Government's failure to timely file a complaint for forfeiture.

WHEREFORE, PREMISES CONSIDERED, the Court is respectfully requested to:

1. Reinstate the case for disposition on the merits; or, IN THE ALTERNATIVE,
2. Designate the dismissal to be **with** prejudice;

---

[38] Id. at 1266.

[39] $60,201.00 U.S. Currency, at 1132

3. Enter an Order awarding to Celata attorney fees and costs in the sum of $20,475.12; and

4. Enter an Order directing the Government to return the Defendant firearms to Celata immediately.

DATED this 22nd day of February, 2007.

Respectfully submitted,

SULLIVAN, TABARACCI & RHOADES, P.C.

By: /s/ Quentin M. Rhoades
Quentin M. Rhoades,
Attorneys for Richard Celata

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 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. Paulette L. Stewart
Assistant U.S. Attorney
U.S. Attorney's Office
901 Front Street, Suite 1100
Helena, MT 59626

/s/ Quentin M. Rhoades