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Subject Department of Justice comments

Attention: Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure. Enclosed are the Department of Justice's comments in response to the August, 2004 Preliminary Draft of Proposed Amendments to the Fedeal Rules of Civil Procedure -- addressing electronic discovery, proposed Supplemental Rule G, and Rule 50. Ted Hirt, for Assistant Attorney General Peter D. Keisler.

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U. S. Department of Justice

Civil Division

Assistant Attorney General *Washington, D.C. 20530*

February 15, 2005

Mr. Peter G. McCabe
Secretary of the Committee
on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on various proposed amendments to the Federal Rules of Civil Procedure. As the Nation's principal litigator in the Federal courts, the Department has a strong and long-standing interest in participating in the rules amendment process and in sharing with this Committee its experiences with the Rules and describing how its practice could be affected by the proposed amendments.

Our comments principally address two separate proposals: first, the Committee's comprehensive effort to address electronic discovery issues, and, second, proposed Supplemental Rule G, which will address civil forfeiture issues. Finally, we address a proposed change to Rule 50. Due to their length, our comments are enclosed as a separate document.

We thank the Committee for this opportunity to share our views. If you have any further questions or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,

Peter D. Keisler
Assistant Attorney General

Enclosure

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE

These comments address proposed changes to Rules 16, 26, 33, 34, 37, and 45, and Form 35 (which concern so-called "electronic discovery"), proposed new Supplemental Rule G, and associated changes to Supplemental Rules A, C, and E, and to Rule 26, and proposed changes to Rule 50.[1] The comments include suggestions as to the substance and wording of both the proposed Rules and accompanying proposed Advisory Committee's Notes ("Note(s)").

ELECTRONIC DISCOVERY

Rules 26(f) and 16(b)

The proposed amendments to Rule 26(f) would require the parties to discuss their plans for electronic discovery at the outset of the case, including the preservation of electronically stored information, the form of production of such information, and whether the court, upon agreement of the parties, should enter an order protecting the right to assert privilege after the production of privileged information. Rule 16(b) would be amended to provide that the court's initial scheduling order incorporate the parties' agreement on these issues. Form 35 would be amended to include the above-listed topics.

The Department supports the principle that the parties must discuss the possibility of electronic discovery issues, including the preservation of electronic discovery, in the context of their "meet and confer" conferences, as appropriate. There will be cases, including many involving the federal government, that are exempt from disclosure and discovery. See Fed. R. Civ. P. 26(a)(1)(E). The Note explicitly recognizes this situation. See Prelim. Draft at 59 ("[T]he discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases."). In cases in which disclosure and discovery proceed, however, it is important for the parties to discuss, and attempt to resolve, these issues at the outset of the case.

The Department supports the proposed Rule and Note, but provides a suggestion regarding the placement of one of the sentences in the Note. The sentence, "Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted[]" on page 61 appears to be out of place. It should be moved so that it precedes the Note's citation on page 60 to the Manual for Complex Litigation.

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[1] Citations are to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence (Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, August 2004) (referred to as the "Prelim. Draft"), using the page numbering at the bottom of each page.

Rule 26(b)(2)

Rule 26(b)(2) would be amended to provide that "[a] party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible." If the requesting party moves to compel the production of that information, the responding party must then demonstrate that the information is not "reasonably accessible." Once that showing is made, the court may order discovery of the information "for good cause," and "may specify terms and conditions for such discovery."

The Department views the proposed amendment, which it supports, as an effort to apply well-settled discovery standards to the unique context of electronic discovery. The Department also supports the allocations of the burden of persuasion described in the proposed Rule, i.e., that the responding party has the duty, after the filing of a motion by the requesting party, to show that the requested information is not reasonably accessible. Assuming that the responding party carries that burden, the requesting party must then demonstrate good cause for the production. As with paper discovery, the needs of a particular case, the likelihood of uncovering relevant information, and the degree of that relevance will be important factors in determining whether there is good cause to order the production of electronically stored information that is not reasonably accessible. Finally, the Department supports the principle that the court may impose "terms and conditions" for such discovery, which could include sampling the data, a limited production of data, or cost-shifting or cost-sharing given the potential volume and/or cost of the electronic discovery in specific cases.

The Department has several comments about the proposed Note, recognizing that it is very difficult for a note to set out comprehensive guidance for the resolution of these complex issues.

1. The Department supports the requirement in the Rule and Note that a party that chooses not to review or produce data under this provision must identify the information not produced as not reasonably accessible. Requiring such identification will be important for implementation of the Rule. The Note should clarify that a general description of the types of data or databases that are not being reviewed may be sufficient.

2. The Department points out that there may be some difficulties in defining the term "reasonably accessible" by reference to the producing party's practices on accessing the requested information. For example, the Note states that "if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information." Prelim. Draft at 55. This statement is overly broad in an important respect--it could unfairly penalize a party if it has ever accessed information, regardless of the purpose of that access or the burden or cost associated with that event. In addition, some requesters might be motivated to launch discovery to find particular circumstances in which data from disaster recovery systems has ever been accessed to try to defeat an assertion that data was kept "solely for disaster recovery." On the

other hand, if a party frequently accesses the data, the party probably cannot demonstrate that the data is not reasonably accessible. To address these various circumstances, the sentence quoted above should be revised to state that "the frequency and circumstances under which the producing party accesses the requested information are important factors in determining 'reasonable' accessibility."

3. The Department does not read the Note's description (Prelim. Draft at 53, 55) of various electronic media (e.g., legacy data, archival data, backup tapes) as creating "categories" of information that are deemed not to be reasonably accessible, nor should the Note be interpreted as creating such categories. Instead, the focus of the parties and the court (and thus the focus of the Note) should be on determining the ease or difficulty, and the associated costs and burdens, of the retrieval of requested information not already available by search of other accessible sources or media. For example, the Antitrust Division often is able to secure information from companies that has been stored on backup tapes and has successfully negotiated agreements with such companies on the scope of production from these tapes. That experience demonstrates that information on backup tapes, or in any other form, should not be considered categorically inaccessible.[2]

To ensure that courts and the parties apply this functional, and not categorical, approach, a new final sentence to the first paragraph of the Note on page 53 should be added: "These examples are merely descriptive and this Note is not intended to create categories of accessible vs. inaccessible data; each case should be examined on its specific facts."

4. Considerations of public policy and the importance of governmental enforcement efforts should be incorporated into the Note's analysis of good cause. Rule 26(b)(2)(iii) already permits courts to take into account "the importance of the issues at stake in the litigation." The 1983 advisory committee's note explains that "many cases in public policy spheres . . . may have importance far beyond the monetary amount involved." Thus, in balancing the reasonableness of discovery, a court should properly take into account the nature of the litigation, including whether the litigation is brought under a federal enforcement statute, and such a factor should be given significant weight. In a large antitrust case, for example, the recovery of data from backup tapes may be critical to the merits of the case. See, e.g., United States v. Dentslpy Int'l Inc., No. 99-5, 2000 WL 654286, at *4 (D. Del. May 10, 2000) ("Liberal discovery is particularly appropriate in a government antitrust suit because of the important public interest involved."). Accordingly, the following text should be added to the Note: "As provided in Rule 26(b)(2)(iii), a court's analysis of good cause will appropriately consider 'the importance of the issues at stake in the litigation.' For example, there is a strong public interest in securing documents needed for civil law enforcement proceedings, and a court should give that interest substantial weight."

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[2] The Antitrust Division obtains significant amounts of electronic documents and information in its investigations, including information that is required to be kept by the Sarbanes-Oxley Act, 18 U.S.C. § 1520(a); 17 C.F.R. § 210.2-06.

5. A sentence should be added to the Note's discussion of good cause on either page 54 or page 56 that states: "In some cases the court may wish to defer resolution of whether certain inaccessible information must be produced until factual issues from the rest of the case have been developed." Doing so may simplify such determinations. It may also necessitate some changes to case management. For instance, if production is deferred until after certain key depositions, the requesting party may need to supplement those depositions in light of information produced.

6. As parties confer on these issues in litigation, it is reasonable to expect that they will cooperate, without judicial intervention, to establish reasonable discovery boundaries, i.e., what information will be made available and when it will be made available. That negotiation is likely to lead to more targeted requests that result in early access to highly relevant information, with agreement on the preservation of other information for later access should that become necessary. Thus, the Note should emphasize that the Rule is not intended to disrupt the parties' informal efforts to address and resolve electronic discovery issues.

Rule 26(b)(5)(B)

Proposed Rule 26(b)(5)(B) would provide that when a party produces information "without intending to waive a claim of privilege, it may, within a reasonable time, notify any party that received the information of its claim of privilege." After such notice, the party "must promptly return, sequester, or destroy the specified information and any copies." The producing party must then create a "privilege log" and preserve the information pending a court ruling.

This procedure may be of considerable benefit in litigation, including litigation involving the federal government. Parties may have legitimate concerns that they will produce masses of electronically stored information without a fully adequate opportunity to review the information in advance of production in order to withhold privileged information. The proposed procedure, of course, would not eliminate the risk that an inadvertent disclosure will be deemed to constitute a waiver of a privilege. It will, however, establish an orderly mechanism for protecting potentially privileged material while the parties submit the issue, if necessary, for judicial resolution.

The proposed Rule requires that notification by a producing party of the production of privileged information be "within a reasonable time." The Rule, however, does not set either a fixed or presumptive deadline by which the producing party must make its privilege assertion. It may be unrealistic for the proposed Rule to prescribe a fixed deadline for the assertion of privilege but in situations in which the parties have negotiated a Rule 26(f) agreement regarding the right to assert privilege after the production of such information, a deadline should be part of that negotiation. Thus, the words "at a time or date prescribed by agreement of the parties, if there is such an agreement, or" should be inserted into the proposed Rule before the phrase "within a reasonable time." If this revision is made, the Note that accompanies Rule 26(f)

correspondingly should state that the parties' agreement should establish a specified time for the assertion of privilege.

The proposed Rule would also require that "[a]fter being notified, a party must promptly return, sequester, or destroy the specified information and any copies." This is a reasonable requirement, but merits some additional guidance for implementation. With respect to this provision, the Department makes the following suggestions.

1. The Rule should not be interpreted to prohibit a receiving party from submitting the information to the court in camera and under seal to support a privilege challenge motion. The Note now only states that if the receiving party contends that the information is not privileged, "it may present the issue to the court by moving to compel production of the information." Prelim. Draft at 58. It may be necessary for the Rule itself to clarify this point.

2. The Note should state that the "copies" to be returned, sequestered, or destroyed are limited to "copies derived from the version produced," as a party may have obtained the same information from an independent source.

Finally, current Rule 26(b)(5) (to be renumbered as Rule 26(b)(5)(A)) authorizes producing parties to withhold documents on two grounds, either for claims of privilege or for claims of protection of trial preparation materials (i.e., work product). Proposed Rule 26(b)(5)(B) refers only to taking back documents that are claimed to be privileged and is silent as to documents that are claimed to be protected trial preparation materials. The Note is also silent on this point. To avoid unnecessary confusion, the proposed Rule should refer expressly to both privilege and protection. Language such as ". . . without intending to waive a claim of privilege or protection" at page 47, line 47, and such as ". . . of its claim of privilege or protection" at line 49, would address this ambiguity. The subheadings in (A) and (B) also should include these words.

Rule 33

Rule 33(d) would be amended to provide that if the answer to an interrogatory may be determined by examining a party's business records, and if the burden of determining the answer will be substantially the same for either party, "electronically stored information" will be among the categories of information the responding party may produce as its answer to the interrogatory.

The Department supports this amendment. It points out, however, one ambiguity in the Note. The Note explains that, in some situations, the responding party may be required to provide "some combination of technical support, information on application software, access to the pertinent computer system, or other assistance. The key question is whether such support enables the interrogating party to use the electronically stored information as readily as the responding party." Prelim. Draft at 66. The latter assertion overstates what the proposed Rule is

to accomplish, which is to enable the requesting party to locate within the electronically stored information the answer to its interrogatory and not necessarily to use the information in the same manner as it is used by the responding party. The Note should be modified to address this issue.

Rule 34

Proposed Rule 34(a) would specify that "electronically stored information" is among the items that can be requested in discovery. Rule 34(b) would be amended to permit a requesting party to specify the form in which electronically stored information is to be produced, and would require the responding party to state any objection to such requested form of production. Unless the parties otherwise agree, or the court otherwise orders, if the requesting party has not specified a form of production for such information, the producing party is to produce the information in a form in which it is ordinarily maintained or in an electronically searchable form. The party producing electronically stored information need only produce it in one form.

The Department agrees that it is important to clarify the form for the production of electronically stored information, and notes that the Rule properly leaves that decision, in large part, to the producing party if the requesting party does not prescribe a form. The Department questions, however, whether the Rule may be unduly restrictive in prescribing that the producing party may only produce the information in a form "in which it is ordinarily maintained" or in an electronically searchable form. There could be situations in which it would be more practical to produce the information in a form not specifically prescribed. For added flexibility, the proposed Rule (page 69, line 51) could be modified by adding the phrase "or in such other form that is reasonable under the circumstances." The corresponding portion of the Note should also be modified.

The Department also has several suggestions for improving the Note:

1. There should be a specific reference to cost and burden as valid grounds for objecting to a form chosen by the requesting party, as well as to the interest in avoiding production of irrelevant and potentially proprietary or confidential information that is stored along with relevant data.

2. The Note should include some reference to the informational content of a particular form of production as a consideration in resolving objections. Some electronic forms may have more utility or informational content than others.

3. The Note should state that a producing party cannot produce data in a form accessible only via proprietary software unless it provides a means for accessing and using that data.

4. The language of the Rule could be interpreted as concluding that records are either searchable or not. The state of electronic production, however, is more sophisticated. For

example, documents can be produced in a form in which they are searchable in only limited ways. The objective should be that the requesting party can use the information, and search it effectively. The Note should be revised to address this problem.

Rule 37

Proposed Rule 37(f) would state that, "[u]nless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions" under the Rules for the party's failure to provide such information as long as "the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action[,]" and "the failure resulted from loss of the information because of the routine operation of the party's electronic information system."

The Department supports the principle of a "safe harbor," which would preclude the award of sanctions under the Rules against entities that, in good faith, reasonably rely upon automated retention and destruction of electronically stored information operating pursuant to legitimate business needs. The Department recommends, however, that the Committee consider incorporating a concept more akin to "gross negligence" along the following lines.

> (f) Electronically Stored Information. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:
>
> (1) the party acted with gross negligence in failing to preserve the information; or
>
> (2) the party violated an order issued in the action requiring the preservation of the information.

The Department concludes that the gross negligence concept is more appropriate for several reasons. As currently drafted, whether the responding party "knew or should have known" the information was discoverable in the action may focus a court on the wrong inquiry, e.g., whether anything could have been done to prevent the deletion of a particular document or type of information (as is suggested by the reference to "steps" in the existing text). In contrast, a gross negligence inquiry will focus the court on the entity's general practices and procedures regarding information retention. Pursuant to a finding of gross negligence, sanctions might be appropriate when the entity "knew" that its systems contained discoverable information, but nonetheless failed to have reasonable procedures in place to ensure that such information was retained after it learned of litigation.

Under an approach that focuses on the producing party's processes for retaining discoverable information, the Note could identify situations in which the safe harbor would not apply, e.g., when the producing party had a substantially unreasonable process for retaining information (or had no process at all, where such a process would have been appropriate), the

process operated in manner that was grossly negligent, or the party engaged in the intentional or reckless destruction of discoverable information. Differentiating among these situations may help clarify the different analyzes and burdens that might apply in those different contexts. In addition, the Note should point out that the court should take into account the degree of culpability in determining the appropriate sanction. Finally, the Note should recognize the existence of a reasonable range of variation in document management practices, as well as the possibility that there may be occasional oversights in the execution of those policies.

The Department offers these proposals in light of the fact that many federal agencies have large quantities of electronic data and are involved frequently in litigation. Government data systems are complex and highly diverse, and it can be very difficult to disseminate discovery-related retention requirements to all relevant persons within an agency, particularly if multiple offices in various geographic locations are involved. Other large institutions face similar challenges.

The Department has one minor textual change to clarify an ambiguity in the Note. On page 77, the sentence: "Preservation steps should include consideration of system design features that may lead to automatic loss of discoverable information," is ambiguous. The Department suggests the following revision. "Preservation steps should include consideration of the impact of system design features that otherwise may lead to automatic loss of discoverable information[.]"

Rule 45

Rule 45 would be amended to incorporate the changes made in the other discovery rules to apply to the production of electronically stored information by nonparties.

The Department supports this amendment, but emphasizes that imposing electronic discovery on nonparties may be particularly burdensome, and often in unexpected ways. The Note on page 92 appropriately recognizes that Rule 45(c) is intended to guard against "undue imposition" being placed upon those nonparties.

There is one textual omission in proposed Rule 45(d), which likely is inadvertent. Proposed Rule 26(b)(2) addresses the production of information that is not reasonably accessible, stating, inter alia, that the court "may specify terms and conditions for such discovery." Prelim. Draft at 48, line 31. Nonparties should be entitled to the same protections as parties in these situations. Identical language should be inserted at the end of proposed Rule 45(d)(1)(C).

In addition, a nonparty should have the same options as a party with respect to the form of production of electronically stored information. For the reasons explained above, the phrase "or in such other form that is reasonable under the circumstances" should be added to proposed Rule 45(d)(1)(B). Finally, the Department's recommendations regarding the inadvertent production of privileged information in Rule 26(b)(5) also apply to the counterpart provisions of

proposed Rule 45(d)(2)(B).

PROPOSED SUPPLEMENTAL RULE G AND ASSOCIATED CHANGES

Proposed Supplemental Rule G, for the first time, will combine most provisions of the Supplemental Rules bearing on civil forfeiture into one rule. As the Committee is aware, the United States (hereafter referred to as "the Government") initiates civil forfeiture actions by filing a complaint in federal district court.[3] That complaint and subsequent litigation are governed by statutes and, reflecting forfeiture's traditional roots in admiralty practice, by the Supplemental Rules for Certain Admiralty and Maritime Claims (the "Supplemental Rules").[4] A well-developed body of case law fills gaps in forfeiture procedure and applies constitutional requirements, including the Fourth Amendment's warrant requirement, the Fifth Amendment's Due Process Clause, the Seventh Amendment's right to trial by jury, and the Eighth Amendment's Excessive Fines Clause.

The proposed Rule will amend the Supplemental Rules to resolve conflicts between the applicable statutes and the Rules. It includes new provisions to fill gaps discovered in forfeiture litigation, and to address issues that have arisen in the wake of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"). It codifies constitutional requirements recognized in case law, such as the requirement that the United States send direct notice of forfeiture actions to persons known to have an interest in the defendant property. The proposed Rule also addresses situations not contemplated by traditional admiralty, such as forfeiture actions against foreign assets, and updates forfeiture procedure to take advantage of advances in technology, as by permitting notice of forfeiture actions to be posted on a government Internet website in lieu of traditional newspaper publication.

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[3] Most civil forfeitures begin with a seizure of property by law enforcement agents. The Government may forfeit most seized property administratively. If the Government commences an administrative forfeiture, and no one contests it, the property is forfeited to the United States by the seizing agency's declaration of forfeiture with no court action. If someone contests the administrative forfeiture, or statutes require judicial forfeiture (as they do for real property and for non-cash property worth over $500,000), or the Government elects to bypass administrative forfeiture, the Government commences a civil forfeiture action.

[4] 28 U.S.C. § 2461(b) (property seized on land forfeited federally by proceedings conforming "as near as may be to proceedings in admiralty"); 18 U.S.C. § 981(b)(2)(A) (seizure of property for civil judicial forfeiture by arrest warrant in rem under Supplemental Rules); 18 U.S.C. § 983(a)(3) (if claimant contests administrative forfeiture, Government files forfeiture complaint under Supplemental Rules); 18 U.S.C. § 983(a)(4) (claimant in civil judicial forfeiture must file claim and answer under Supplemental Rules, subject to statutory time limits).

Consolidating civil forfeiture provisions in one rule will aid the administration of justice. The current situation is confusing, with rules applicable to civil forfeiture spread over the Supplemental Rules, mixed in with rules applicable only to admiralty. The single rule will provide clear guidance to courts and practitioners. Separating the civil forfeiture rules from those governing traditional admiralty will also avoid the confusion, inefficiency, and unintended consequences that arise when language intended to apply to one type of case is applied in the other type of case. Such separation will avoid the disruptions to traditional admiralty practice that have occurred when long-established procedures or well-defined terms were modified by courts applying them in the non-admiralty civil forfeiture context. Adoption of this Rule will not affect the rules applicable to such traditional admiralty practice.

The Department commends the Advisory Committee for the work it already has done on the current proposal. By addressing most of the issues that arise in the typical civil forfeiture case, and by placing all of the procedures relating to civil forfeiture in one place, the new Rule will simplify the practice of forfeiture law and make it more accessible to both practitioners and the courts. The proposed Rule is comprehensive and well-drafted, and reflects the input of experts in the practice of both forfeiture law and admiralty law. The Committee's including such experts in the drafting process has resulted in a proposed Rule that is more complete in its coverage of issues, and has reduced the likelihood that seemingly straightforward provisions will be found to have unintended consequences. The Department thanks the Committee for including its representatives in this process.

There remain, inevitably, several areas where ambiguities in the case law have not been completely addressed. The Department recognizes that it may not be possible to resolve all of the outstanding issues in the emerging area of forfeiture law at this stage of the proposed Rule's development. Nevertheless, there are a number of areas in which the Rule could be improved by resolving unnecessary ambiguities.

General Comment

The title to the Supplemental Rules should be changed to the following: "Supplemental Rules for Admiralty and Asset Forfeiture Claims."

Rule G(3)

Rule G(3)(b) deals with the manner in which the court obtains in rem jurisdiction over the defendant property. If the property is already in the Government's "possession," the Clerk must issue a warrant of arrest in rem under G(3)(b)(i); if the property is not in the Government's "possession," the court must issue the warrant under G(3)(b)(ii) after making a probable cause determination that the property is subject to forfeiture. The term "government's possession" as used in Rule G(3)(b)(i) and (b)(ii) may be too narrow. Currency that is seized and deposited into an interest-bearing account at a financial institution is certainly within the Government's custody and control, but arguably is not in the Government's possession. Accordingly, Rule G(3)(b)(i)

and (b)(ii) should be amended by inserting ", custody or control" after "possession." The Note should be revised to reflect this change.

Rule G(4)

Adhering to the due process standard established in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), Rule G(4)(a)(iv) provides that the "government should select from the following options a means of publication [of notice of forfeiture] reasonably calculated to notify potential claimants of the action. . . ." But the Note on this provision, in conflict with Mullane and with the text of the Rule, states that "A reasonable choice of the means most likely to reach potential claimants at a cost reasonable in the circumstances suffices." Prelim. Draft at 122) (emphasis added). In order to avoid instigating litigation over which of two or more reasonable, and therefore constitutionally sufficient, means of publication would be "most" likely to succeed in each particular case, and to harmonize the Note with the Rule, the underlined language in the Note should be revised to "a means likely."

Rule G(4)(a)(iv) also discusses various particular means of publication of a notice of forfeiture. Subparagraphs (A) and (B) describe alterative means of publication in a newspaper, depending on whether the property is located inside or outside of the United States. Subparagraph (C) allows the publication to take place on the Internet. This is intended to be an alternative to either (A) or (B), depending on which is applicable. Accordingly, the introductory phrase in subparagraph (C) should be "instead of (A) or (B)."

Rule G(4)(b)(i) provides that the Government must send notice to any person "who reasonably appears to be a potential claimant. . . ." While this seems straightforward, one court has already cited the proposed Rule in a case involving crime victims who, in the Government's view, were unsecured creditors without standing to contest the forfeiture. See United States v. $4,224,958.57, 392 F.3d 1002, 1005 (9th Cir. 2004). The Department has no objection to the current language in Rule G(4)(b)(i) and agrees that it should always send notice to persons who reasonably appear to be potential claimants, but forfeiture cases would become unmanageable if the Rule were construed to require direct notice to thousands of victims in fraud cases who would not, in any event, have standing to contest the forfeiture. Accordingly, the Rule should be clarified by adding the following sentence: "Notice need not be sent to persons without standing to contest the forfeiture."

Rule G(4)(b)(iii)(A) again recognizes the Mullane standard as controlling, this time with respect to the Government's method of sending direct notice to known potential claimants. Rule G(4)(b)(iii)(B) provides that the Government may satisfy the direct notice requirement by sending notice either to the potential claimant or to his attorney.[5] Nothing in the text of the Rule

[5] The term "he" or "his" in describing a claimant is meant to comprise masculine, feminine, and neuter claimants.

expresses any preference for one method of satisfying the requirement over the other. The Note, however, contains the following sentence relating to the alternative of sending notice to counsel: "This provision should be used only when notice to counsel reasonably appears to be the most reliable means of notice." Prelim. Draft at 124 (emphasis added). The Department strongly objects to this sentence because it is inconsistent with Mullane and with the text of the rule and is likely to lead to litigation in every case where G(4)(b)(iii)(B) would apply over whether sending notice to counsel representing the potential claimant in a closely related proceeding was or was not "the most reliable means of notice." Typically, the Government will send notice to both the potential claimant and his attorney if the Government knows that the potential claimant is represented in some related proceeding, but the purpose of Rule G(4)(b)(iii)(B) is to make clear that in those cases where the effort to send the notice to the claimant turned out, for any reason, to be inadequate, the sending of notice to counsel would preclude any attempt by the claimant to challenge the forfeiture on grounds unrelated to the merits of the case. The quoted sentence in the Note undermines this purpose by creating an opening for the claimant to challenge the forfeiture based on the inapplicability of the notice-to-counsel option in every case, simply by arguing that some other means of notice--e.g., personal in-hand service upon the claimant--would have been more likely to succeed.

Rules G(4)(b)(iii)(D) and (E) provide that in sending notice to the potential claimant, the Government is entitled to rely on the address that the claimant "last gave to the agency that arrested or released" the person, or the address that the claimant "gave to the agency that seized the property." This proposal makes clear that once the claimant provides the Government with an address, he cannot contest the forfeiture on the ground that Government should have taken steps to find a better one. The ambiguity in the current language concerns the term "the agency." The intent of the Rule is to allow the Government to rely on the address that the potential claimant gave to an agent or other person working on the particular case involving the defendant property. As drafted, however, the Rule could be read to require the Government to send the notice to an address that the potential claimant gave to an agent or employee of his acquaintance who had no connection whatsoever with the instant case. For example, if the potential claimant gives Address A to the agent who seized his property, but later gives Address B to another employee of the same agency who has no connection either to the case or to the property but rather is involved in the investigation of an unrelated matter, the Government should be able to send the notice to Address A without having to fear that the notice will be found not to comply with Rule G(4)(b)(iii). The Note to Rule G(4)(b)(iii) should be revised to make this clear by amending the paragraph discussing items (D) and (E) as follows:

> Items (D) and (E) of subparagraph (iii) authorize the Government to rely on an address that the potential claimant has provided to the Government in connection with the seizure of the defendant property, or in connection with the potential claimant's arrest or release in a related criminal case. The Government is not obliged to undertake an independent investigation to verify the address or to take steps to find a better one, nor is the Government required to verify that it did not obtain a different address for the potential claimant in an unrelated matter or

investigation.

Rule G(4)(b)(iv) is awkward. It could be simplified without any change in meaning or loss of clarity by striking "by the following means".

Rule G(5)

Rule G(5)(a)(iii) provides that a claim filed by a person asserting an interest as a bailee must identify the bailor. (Emphasis supplied.) The Note to the Rule, however, says that "if the claimant states its interest in the property to be as bailee, the bailor should be identified." Prelim. Draft at 126 (emphasis supplied). The Note should be amended by replacing "should" with "must" to reflect the actual text of the Rule.

As drafted, Rule G(5)(a)(iii) provides that "A claim filed by a person asserting an interest as a bailee must identify the bailor." This is intended to carry forward the existing pleading requirement in Rule C(6). A recent district court decision points out, however, that Rule (C)(6) contains the additional requirement that the bailee state that it is authorized to make a claim in the bailor's behalf. See Via Mat International South America Ltd. v. United States, No. 04-20518-CIV-HOEVELER (S.D. Fla. Dec. 17, 2004). A copy of this decision is attached. In that case, the additional requirement was found to be essential in resolving a case in which both the bailee and the bailor filed competing claims. Because the competing claim of the bailor made it clear that the bailee was not authorized to file a claim on the bailor's behalf, the court held that the bailee had not complied with Rule C(6) and therefore lacked statutory standing to contest the forfeiture. Id.

The decision in Via Mat International points out the importance of retaining the second requirement in Rule C(6). Accordingly Rule G(5)(a)(iii) should be amended to state: "(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor and state that the person is authorized to file a claim in the bailor's behalf."

Rule G(5)(b) gives the claimant the alternative of filing a Rule 12 motion instead of an Answer. In the second sentence, the Rule states that certain defenses are waived unless raised in the motion or stated in the Answer. It is implicit that the "motion" referred to in the second sentence is the Rule 12 motion referred to in the first sentence. To make this absolutely clear, the phrase "Rule 12" should be repeated in the second sentence.

Rule G(6)

Rule G(6)(a) provides that the Government may serve special interrogatories "under Rule 33" that are limited to the claimant's identity and relationship to the defendant property. The Note explains that the purpose of the Rule is to allow the Government to discover facts that may be relevant to a motion to dismiss the claim for lack of standing. It then states that the reference to Rule 33 means that the number of special interrogatories will be counted against the total

number of interrogatories that the Government may serve regarding the merits of the case in chief. For the reasons explained below, the number of interrogatories that may be served under Rules G(6)(a) and 33 should be totally independent of each other.

Rule 33 fixes the number of interrogatories that both parties may serve with respect to the facts supporting the forfeitability of the property and any affirmative defense that the claimant may raise. The number of interrogatories that may be necessary to flesh out those issues depends on the factual complexity of the case, and is wholly independent of the number of interrogatories needed to resolve the threshold question of standing. Thus, the Government should be able to serve the same number of Rule 33 interrogatories focused upon the merits in two cases with similar facts irrespective of the number of interrogatories needed to resolve the standing issues. Otherwise, a claimant who created complex standing issues by styling its claim in a particular way would enjoy a windfall vis a vis similarly situated claimants: the more complex the standing issues, the fewer interrogatories the Government could serve under Rule 33 on the merits of the case.

The cross reference to Rule 33 is perfectly appropriate insofar as it relates to the procedure for serving interrogatories, but the statement in the Note that the number of interrogatories that the Government may serve under Rule 33 is limited by the number of special interrogatories served under Rule G(6)(a) should be eliminated. Indeed, the Note would be greatly improved by including the following explicit statement: "The reference to Rule 33 is intended to make the procedures in Rule 33 applicable to the service of special interrogatories under Rule G(6)(a), but the number of special interrogatories served under G(6)(a) does not count against the number that may later be served under Rule 33."

Rule G(7)

Rule G(7)(a) gives the court the authority to "enter any order necessary to preserve the property and to prevent its removal or encumbrance." In some forfeiture cases, however, the Government seeks to restrain the use of property not to preserve its value for forfeiture or to prevent the wrongdoer from removing it from the jurisdiction of the court, but to prevent the property from being used to commit an on-going criminal offense while the forfeiture action is pending. A good example is an Internet domain name or Website that is being used to collect money for terrorists, to promote child pornography offenses, or to facilitate the distribution of illegal drugs. Accordingly, the language in Rule G(7)(a) should be modified to authorize the court to enter any order necessary "to preserve the property, to prevent its removal or encumbrance, or to prevent its use in the commission of a criminal offense."

Rule G(7)(b)(i) lists circumstances in which the court may order the interlocutory sale of property over the objection of the claimant. During the drafting process, the Department sought to have the "diminution in the value of the property" included as one of the grounds for an interlocutory sale. The Committee rejected the suggestion, noting that cases in which the equities favored the sale of property that was diminishing in value would be covered by the

catch-all provision in item (D), which allows the sale if "the court finds other good cause."

That compromise resolution of the issue, however, is undermined by the proposed Note which states that "this ground should be invoked with restraint in circumstances that do not involve physical deterioration." Prelim. Draft at 129. In fact, the situations most likely to require an interlocutory sale involve not physical deterioration (such as rotting fish or perishable fruit), but diminution in value due to market conditions. The Note, however, essentially rejects fluctuating market conditions as a basis for ordering an interlocutory sale. If that view were to be adopted in judicial interpretations of the Rule, a claimant who had little or no hope of defeating a forfeiture action against his property in a falling market could frustrate the Government's efforts to obtain fair market value for the property, and to use it to reimburse the victims of the offense, by his stubborn refusal to acquiesce in its sale.

The court must balance, in such cases, the Government's desire to obtain the full value for the property against the claimant's desire to recover a specific asset, but in foreclosing the Government's reliance on market conditions in seeking the interlocutory sale, the Note goes beyond such a neutral statement regarding the balancing of interests. It should be revised simply to state that the balancing of interests of all parties, including victims, should be taken into account in determining whether or not to order an interlocutory sale.

Rule G(7)(b)(i)(C) authorizes a court to conduct an interlocutory sale of the defendant property, over the claimant's objection, if the property is subject to a mortgage or to taxes on which the owner is in default. The Note goes on to explain that this provision "does not address the question whether a mortgagee or other lien holder can force sale of property held for forfeiture or whether the court can enjoin the sale." Prelim. Draft at 128. This statement is intended to be neutral, but the attempt at neutrality may have the unintended effect of suggesting that there is some uncertainty regarding a matter of law that is in fact well-settled. Cf. United States v. Croce, 334 F. Supp. 2d 781, 785 n.12 (E.D. Pa.) (disagreeing with case decisions and holding that a court is not authorized by Criminal Rule 32.2 to enter a money judgment in a criminal forfeiture case because the seemingly neutral statement regarding money judgments in the Note to Rule 32.2 suggests that at least one member of the Criminal Rules Advisory Committee thought that money judgments were not authorized), amended, 345 F. Supp. 2d 492 (2004), vacated in part, ___ F. Supp. 2d ___, 2005 WL 273234 (Feb. 2, 2005). Accordingly, the Note would be improved by changing the quoted sentence to say simply that the Rule does not change the existing law with respect to the authority of the court to enjoin third parties from collecting outstanding mortgage payments or taxes through foreclosure.

Rule G(8)

Rule G(8)(b) refers variously, in the title and the text, to a motion to dismiss the "action" and a motion to dismiss the "complaint." For consistency, the same term should be used throughout. Accordingly, Rule G(8)(b) should be titled "Motion to Dismiss the Complaint" and "action" should be changed to "complaint" in Rule G(8)(b)(i). The same change should be made

to Rule G(8)(c)(ii), but see the discussion regarding more extensive changes to that Rule, infra.

During the drafting process, the Committee devoted considerable time and attention to issues involving the claimant's standing to contest the forfeiture. Ultimately the Committee decided not to attempt to define the basis for standing in the Rule, and the Department does not seek to revisit that debate here.[6] The Committee did attempt, however, to set forth the procedure for determining if a claimant had standing (however it may be defined) in Rule G(8)(c). As currently drafted, the Rule goes a long way toward clarifying the existing case law on this issue. In light of the abundance of recent case law dealing with challenges to a claimant's standing, however, it may be appropriate to clarify further how Rule G(8)(c) is intended to work.

Under current law, there are three ways in which the Government may challenge a claimant's standing to contest a forfeiture action: by filing a motion for judgment on the pleadings, by filing a motion to dismiss (or strike) the claim and answer and request an evidentiary hearing; or by filing a motion for summary judgment. Citations to the most recent case law on each point are provided in the margin for the benefit of the Committee.

Motion for judgment on the pleadings

Under Rule G(5)(a)(i), the claimant must allege in his verified claim that he has a sufficient interest in the defendant property to establish standing. Accordingly, if the claimant files a claim that is insufficient on its face to satisfy the standing requirements--such as a claim that alleges only that the claimant is an unsecured creditor with no legal interest in the defendant

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[6] Some lawyers routinely argue that any time Congress or an Advisory Committee on the Federal Rules rejects a suggestion from the Department of Justice to resolve an outstanding legal issue in a particular way, it is appropriate to draw a negative inference that the suggestion was rejected on its merits. In this instance, it should be made clear in the Note that the Committee rejected the Government's suggestion to limit claim standing to those who are "owners," as defined in 18 U.S.C. § 983(d)(6), not because the Committee disagreed with the merits of that suggestion but because the Committee thought it more appropriate to leave the definition of standing to the legislative process. Accordingly, the Note on page 130 should be amended to include a statement to this effect: "Nor does this Rule include a definition of claim standing. That omission indicates nothing other than the Rule's neutrality on this still developing substantive legal issue."

property itself[7]--the Government may move for judgment on the pleadings.[8] Similarly, the Government may move for judgment on the pleadings if the claimant fails to comply with any other technical pleading requirement in Rule G(5), such as failure to file a timely claim, failure to sign the claim under penalty of perjury, or failure to file an answer. Some cases are resolved this way, but a challenge to the claimant's standing can be resolved at the pleading stage only if there are no material issues of fact that preclude the entry of judgment as a matter of law.[9] Therefore, a claim that satisfies the pleading requirements in Rule G(5) and alleges sufficient facts to establish Article III and statutory standing (however those terms may be defined) will usually survive a challenge to the claimant's standing at this stage of the case.[10]

Motion to dismiss the claim for lack of standing

If the claimant survives a motion for judgment on the pleadings, or if no such motion is made, the Government may file a motion to dismiss the claim for lack of standing prior to trial.

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[7] See United States v. $20,193.39 U.S. Currency, 16 F.3d 344, 347-48 (9th Cir. 1994) (court views Government's motion for summary judgment as a motion to strike the claim for failure to allege a sufficient interest in the property to challenge the forfeiture action, and grants motion because claimant alleged only that he was an unsecured creditor).

[8] See United States v. $244,320.00 in U.S. Currency, 295 F. Supp. 2d 1050, 1061-63 (S.D. Iowa 2003) (granting Government's Rule 12(c) motion for judgment on the pleadings because the claim failed to offer explanation for claimant's constructive possession of seized currency) (collecting cases). In other cases, the Government's motion has been styled as a motion to strike the claim for failure to comply with the pleading requirements (i.e., lack of statutory standing), or for failure to state a claim on which relief can be granted.

[9] See United States v. $244,320.00 in U.S. Currency, 295 F. Supp. 2d 1050, 1055 (S.D. Iowa 2003) (motion for judgment on the pleadings may be granted only if the moving party has clearly established no material issue of fact remains and that it is entitled to judgment as a matter of law; the court must accept as true all of the facts pleaded by the non-moving party, and generally must consider only those materials in the pleadings); United States v. $57,790.00 in U.S. Currency, 263 F. Supp. 2d 1239, 1242 (S.D. Cal. 2003) (mere allegation of ownership may be sufficient to support standing at motion to dismiss stage and in cases where standing is not disputed; however, where government challenges standing, claimant must prove it at trial by preponderance of the evidence).

[10] See United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1057 (9th Cir. 1994) (motion to dismiss on the pleadings denied; a claimant "need not explain [his] interest in detail, . . . so long as he does something more than conclusorily state that he has some undefined 'interest'"); United States v. 1982 Sanger 24' Spectra Boat, 738 F.2d 1043, 1046 (9th Cir. 1984) (motion to strike claim on the pleadings denied; "it is not necessary . . . that a claimant under the forfeiture statute allege ownership").

If the Government files such a motion, the claimant has the burden of establishing his standing to contest the forfeiture in a pre-trial hearing or as a threshold matter at trial. In responding to the Government's motion, the claimant cannot rely on the pleadings but must establish his standing based on a preponderance of the evidence.[11] Because standing is a threshold legal matter, it is for the court alone to decide, not the jury.[12]

So, for example, if the Government moves to dismiss the claim based on the claimant's lack of standing, but the evidence regarding the nature of the claimant's interest in the property is in dispute, the court must conduct an evidentiary hearing at which the claimant must establish, by a preponderance of the admissible evidence, that he has the requisite interest in the defendant property.[13] At this stage in the proceedings the claimant may not rely on the allegations he made in the pleadings. As the Fifth Circuit said in United States v. $321,470.00, U.S. Currency,[14] a

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[11] See United States v. $20,193.39 U.S. Currency, 16 F.3d 344, 346 (9th Cir. 1994) (standing is a threshold issue on which the claimant in a forfeiture action bears the burden of showing he has an interest in the forfeited property); United States v. $38,570 in U.S. Currency, 950 F.2d 1108, 1111 (5th Cir. 1992) (the claimant "bears the burden of demonstrating an interest in the seized item sufficient to satisfy the court of his standing") (internal quotations omitted); Mercado v. United States Customs Serv., 873 F.2d 641, 644 (2d Cir. 1989) ("Before a claimant can contest a forfeiture, he must demonstrate standing"); United States v. $746,198 in U.S. Currency, 299 F. Supp. 2d 923, 927-28 (S.D. Iowa 2004) (the burden is on the claimant to establish standing); United States v. $244,320.00 in U.S. Currency, 295 F. Supp. 2d 1050, 1058 (S.D. Iowa 2003) (same); United States v. $57,790.00 in U.S. Currency, 263 F. Supp. 2d 1239, 1242 (S.D. Cal. 2003) (while a mere assertion of a colorable interest may be sufficient to survive a motion to dismiss on the pleadings, at trial the claimant must establish standing by a preponderance of the evidence).

[12] See United States v. One Lincoln Navigator, 328 F.3d 1011, 1014 (8th Cir. 2003) (court may resolve standing issues without a jury, but may not resolve issues going to the merits of the innocent owner defense, as that is the province of the jury); United States v. $557,933.89, More or Less, in U.S. Funds, 287 F.3d 66, 78 (2d Cir. 2002) ("Standing is, moreover, a legal question to be determined by the court, not a jury"); United States v. $244,320.00 in U.S. Currency, 295 F. Supp. 2d 1050, 1057 (S.D. Iowa 2003) (standing is an issue of law that should be decided by the court).

[13] See United States v. 1998 BMW "I" Convertible, 235 F.3d 397, 399-400 (8th Cir. 2000) (district court erred in striking claim on the pleadings; where there is contradictory evidence regarding claimant's standing, court must conduct evidentiary hearing where claimant must demonstrate his interest in the property); see also United States v. One Lincoln Navigator, 328 F.3d 1011, 1013-14 (8th Cir. 2003) (if the standing issue raises material fact disputes, the district court may conduct an evidentiary hearing and resolve them).

[14] United States v. $321,470.00 in U.S. Currency, 874 F.2d 298 (5th Cir. 1989).

claimant who is unable or unwilling to provide evidence supporting his assertion of an interest in the property will see his property forfeited without the Government having to put on a forfeiture case at trial.[15] Moreover, the Government is free to rebut the claimant's attempt to establish his interest in the property with any admissible evidence of its own, including the claimant's own prior statements denying any interest in the property.[16]

Motion for summary judgment

Prior to conducting the evidentiary hearing, the court may allow the parties to conduct discovery on the standing issue. Indeed, Rule G(6) gives the Government the right to serve special interrogatories on the claimant expressly for this purpose. If, at the conclusion of such

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[15] $321,470.00 in U.S. Currency, 874 F.2d at 303. See United States v. $100,348 in U.S. Currency, 354 F.3d 1110, 1118-19 (9th Cir. 2004) (because "the danger of false claims in these proceedings is substantial," courts require more than "conclusory or hearsay allegations of some interest in the forfeited property"); Mercado v. United States Customs Serv., 873 F.2d 641, 645 (2d Cir. 1989) (because there is a "substantial danger of false claims in forfeiture proceedings," more is required than conclusory, hearsay statements to establish standing); United States v. $57,790 in U.S. Currency, 263 F. Supp. 2d 1239, 1244 (S.D. Cal. 2003) (claimant who did not appear for deposition or to testify at trial could not rely on the self-serving claims of ownership of the seized currency set forth in their claims; such assertions are "classic hearsay"); United States v. $271,070.00 in U.S. Currency, 1997 WL 94722, at *3 (N.D. Ill. March 3, 1997) (possessory interest is sufficient for standing, but bald assertions of possessory or ownership interest without evidentiary support will not be sufficient); see generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (the standing requirements are "indispensable" parts of the case that "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."); see also David Smith, Prosecution and Defense of Forfeiture Cases (1997), 9.04, 9-67 ("In order to establish Article III standing, a would-be claimant must be able to demonstrate that he has an ownership, possessory or security interest in at least a portion of the property."); id. at 9-68.7 ("Although a claimant asserts an interest in the res sufficient to confer standing, the Government is free to challenge his factual allegations and demand strict proof."); id. at 9-68.8 ("Unless the claimant can first establish his standing he has no right to put the Government to its proof. Thus, property may be forfeited without any showing by the Government that it is subject to forfeiture if the only claimant is unable or unwilling to provide evidence supporting his assertion of an interest in the property.") (citing *$321,470.00*); id. at 9-68.9 ("Where decision of a standing question requires the taking of evidence, it is within the court's discretion to leave the matter unresolved until the trial.")).

[16] See United States v. Derenak, 27 F. Supp. 2d 1300, 1302 (M.D. Fla. 1998) (defendant's prior statement--that seized cash belonged to co-defendant--sufficient to negate standing to contest forfeiture).

discovery, the court finds that there are no material facts in dispute, it may treat the Government's motion to dismiss for lack of standing as a motion for summary judgment. The procedures that apply under Rule 56 when the non-moving party has the burden of proof apply to such motions; thus, the court may grant summary judgment for the Government if the claimant fails to set forth sufficient evidence to establish his interest in the property under whatever definition of standing applies in the particular jurisdiction.[17]

Rule G(8)(c) codifies most, but not all, of this procedure. Rule G(8)(c)(i) allows the Government to move to strike the claim or answer for failure to comply with Rules G(5) or (6) or for lack of standing. And Rule G(8)(c)(iii) provides as follows: "If, because material facts are in dispute, a motion [to strike a claim for lack of standing] cannot be resolved on the pleadings, the court must conduct a hearing. The claimant has the burden of establishing standing based on a preponderance of the evidence." The attempt at brevity in the drafting of the Rule may have left some points uncertain, such as when the motion is treated as a motion for judgment on the pleadings, when it is considered a matter that requires discovery or an evidentiary hearing, and when it should be treated as a motion for summary judgment. Accordingly, Rule G(8)(c) should be revised to set out the procedure in greater detail as follows:

> **(c) Motions for Judgment on the Pleadings; Challenges to Standing**
>
> **(i) Motion for Judgment on the Pleadings.** At any time before trial, the Government may move for judgment on the pleadings for failing to comply with the pleading requirements in (5) or (6), or for failing to state a sufficient interest in the property to satisfy the standing requirements under the applicable law.
>
> **(ii) Motion to Dismiss for Lack of Standing.**
>
> (A) If a motion under (i) is denied, or if no such motion is made, the Government may file a motion to dismiss the claim for lack of standing and request an evidentiary hearing.

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[17] See United States v. Real Property Located at 5208 Los Franciscos Way, 385 F.3d 1187, 1192 (9th Cir. 2004) (if the Government files a motion for summary judgment alleging lack of Article III standing, the burden is on the claimant to show that there is a triable issue of fact on that question; because claimants were, at most, beneficiaries of a fraudulent conveyance, summary judgment was entered for the Government); United States v. $321,470.00, U.S. Currency, 874 F.2d 298, 300, 304 (5th Cir. 1989) (affirming grant of summary judgment for Government when claimant was unwilling to explain his possession of seized cash); United States v. $746,198, U.S. Currency, 299 F. Supp. 2d 923, 932 (S.D. Iowa 2004) (granting Government's motion for summary judgment where claimant failed to explain naked possession); United States v. $57,790.00, U.S. Currency, 263 F. Supp. 2d 1239, 1242 (S.D. Cal. 2003) (the Government may move for summary judgment based on claimant's inability to meet that burden).

At such hearing, the claimant has the burden of establishing standing based on a preponderance of the evidence.

(B) A motion filed under this paragraph is a threshold legal matter to be determined by the court prior to trial.

(iii) Motion for Summary Judgment. If, at the conclusion of discovery under (6), the court determines that there are no material facts in dispute, the court may consider a motion filed under (ii) as a motion for summary judgment.

(iv) Priority. Any motion filed under (8)(c) must be decided before any motion by the claimant to dismiss the complaint.

The Note to Rule G(8)(c) should make clear that the Rule is intended only to set forth the grounds and procedures for moving to dismiss a claim for lack of statutory or Article III standing and does not preclude motions to dismiss a claim on other grounds under other provisions of law. For example, the Government would still have the right to move to dismiss a claim as a sanction for failing to comply with pre-trial discovery under Rule 37(b)(2)(C).

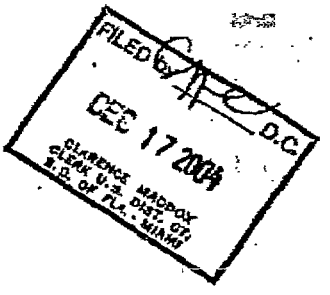
PROPOSED AMENDMENTS TO RULE 50

Rule 50 would be amended to delete the requirement that a party, having made a motion for judgment as a matter of law after the opposing party has been heard on an issue, renew a motion for judgment as a matter of law at the close of the evidence in order to preserve it. The Rule also would be amended to set an explicit time for making of certain post-trial motions.

The Department supports the proposed amendment. This is a fair and practical solution to an issue that can confuse practitioners.

ATTACHMENT TO THE DEPARTMENT OF JUSTICE COMMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 04-20518-CIV-HOEVELER



VIA MAT INTERNATIONAL SOUTH AMERICA LTD,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss, filed May 25, 2004. The Plaintiff filed a Response on June 10, 2004. Defendant filed a Reply on June 25, 2004. Finally, a hearing was held on the matter on December 3, 2004. The Court having considered the Motions and arguments of counsel, and being otherwise fully advised in the premises, grants the Defendant's Motion to Dismiss for the reasons outlined below.

Background

On July 29, 2003, agents from Immigration and Customs Enforcement, Department of Homeland Security, seized $2,757,975.09 in foreign bank notes from a Lan Chile warehouse at the Miami International Airport. The notes were seized pursuant to 31 U.S.C. §5317 for failure to file Customs Form 4790, as required by §5316, which applies when a person transports, arranges for transport, or attempts to transport currency in an amount greater than $10,000 to or from a foreign country, from or to the United States. It is uncontested that the bank notes were owned by Gales Casa Cambiaria d/b/a Lespan, S.A. ("Lespan"). Via Mat International South America LTD. ("Via Mat"), the Plaintiff in this litigation, has a less apparent connection to the money that was seized. It is apparent,

however, that the Plaintiff contracted Lan Chile to physically transport this money from Montevideo,Uruguay to London, England, via Miami. That being the case Via Mat's relation to both the res in question and the rightful owner would be that of a bailee or at a minimum, an agent.

On August 6, 2003, the United States Customs and Border Patrol (CBP), Office of Fines, Penalties, and Forfeitures (FP&F) notified the Plaintiff of the seizure and invited it to complete and submit an Election of Proceedings CAFRA Form. Approximately ten days later Plaintiff submitted the CAFRA Form which requested that CBP consider its petition administratively. Lespan, as the rightful owner had also been informed of the seizure and had submitted a CAFRA Form in which it elected to proceed administratively as well. Subsequently, on August 12, 2003, Lespan filed a Petition for Early Release of the res. Three days later Plaintiff also filed a Petition for Early Release which indicated that Lespan was the owner of the funds. On September 26, 2003, FP&F informed Via Mat that it would release the funds contingent upon 1)CBP retaining $500,000 in lieu of forfeiture 2)the execution of a hold harmless agreement 3)the execution of an early release agreement, which contained a waiver of any further administrative or judicial proceeding as to the res. Inadvertently, Lespan was not independently informed of the decision.

In a letter dated October 8, 2003 Plaintiff rejected CBP's proposal as to the early release of the res and requested that the matter be referred for judicial forfeiture.

On November 14, 2003, after learning of the offer that CBP had made, Lespan agreed to the terms of the Early Release. Consequently, the money was released less the $500,000.00 as agreed to by Lespan and CBP. The matter concerning the final disposition of the res proceeded administratively.

Following Via Mat's request for judicial forfeiture the government did not institute judicial forfeiture within 90 days. Therefore, Via Mat filed the complaint at issue here contending that it is entitled to return of all monetary instruments due to the government's failure to comply with 18 U.S.C. §983(3)(A).

On May, 20, 2004, The U.S. Customs and Border Protection, Office of Fines, Penalties and Forfeitures, issued its decision as to Lespan's administrative case.

Thereafter, the funds in question were returned to Lespan less $80,000.00, which was retained by CBP as payment in lieu of forfeiture of the monies initially seized.

The United States has moved to dismiss Plaintiff, Via Mat International South America LTD's complaint on the grounds that Plaintiff lacks standing and this court lacks subject matter jurisdiction pursuant to Fed. R. Civ. P. 12 (b)(1). Subsequently, the United States also urged that this matter be dismissed because the controversy concerning the forfeiture of the res had been disposed of administratively by Gales Casa Cambiaria d/b/a Lespan, S.A., the uncontested owner of the res, and the U.S. Customs and Border Protection, Office of Fines, Penalties and Forfeitures, thereby rendering the matter before this court moot.

Analysis

A. Standing

Defendant attacks Plaintiff's standing to make a claim on two separate grounds. Defendant alleges that the Plaintiff lacks the requisite interest required to establish a claimant's Article III standing. Defendant also avers that even if the Plaintiff had the requisite interest required to make a claim, that claim would fail having been usurped by Lespan, the rightful owner's, claim. After reviewing the matter, this Court finds that Plaintiff lacks statutory, rather than Article III standing.

Standing is a threshold issue. United States v. $38,000.00 in U.S. Currency, 816 F.2d 1538, 1543 (11th Cir. 1987). Claimants must have both statutory standing, through compliance with Supp. Admiralty and Maritime Claims R. C(6), and the Article III standing required for any action to be brought in federal court. United States v. $515,060.42 in United States Currency, 152 F.3d 491, 497 (6th Cir. 1998). The claimant bears the burden of establishing his standing. Five Hundred Thousand Dollars, 730 F.2d 1437, 1439 (11th Cir. 1984).

A claimant can demonstrate Article III standing, on the basis of an "ownership or possessory interest in the property seized." Five Hundred Thousand Dollars, 730 F.2d at 1439. Plaintiff contends that it had constructive possession of the res at the time of the

forfeiture based on its being the shipper and the consignee. Although, there is some question as to whether the possessory interest alleged by the Plaintiff is sufficient, it is not necessary for this Court to reach the merits of that argument as Plaintiff fails to satisfy its burden of establishing statutory standing.

> In addition to establishing Article III standing, claimants also must satisfy applicable statutory standing requirements." United States v. $38,000.00 in United States Currency, 816 F.2d 1538, at 1544 (11th Cir. 1987). The statutory provisions governing standing include Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims (West 1992). United States v. $ 260,242 United States Currency, 919 F.2d 686 (11th Cir. 1990) (per curiam); $ 38,000 in United States Currency, 816 F.2d at 1544-45. Rule C(6) provides, in relevant part, that "If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim." The "plain language of this rule, therefore, "does not permit [a claimant] simply to state that he is a bailee; he must state that he is 'duly authorized to make the claim.'" $260,242 United States Currency, 919 F.2d at 688.

United States v. $511, 780 in United States Currency, 847 F. Supp. 908, 913 (M.D. Ala. 1994). (Individuals transporting seized property had no ownership interest, but were found to be bailees).

In the instant case, Plaintiff's original claim failed to satisfy the statutory standing requirement. Plaintiff is undeniably not the rightful owner of the res in question and therefore must be seen as at most a bailee if not an agent. Further, the claim contains no language to indicate that Plaintiff had been duly authorized to make the claim. In some instances the Eleventh Circuit has considered a claimant's identifying the owner sufficient to satisfy the requirement of being duly authorized. $511,780 in United States Currency, 847 F.Supp at 913. In $511,780 the court concluded that the standing requirement would be satisfied by merely identifying the owner because the bailee was the sole and uncontested claimant. This case is readily distinguishable from the Five Hundred Eleven Thousand Seven Hundred and Eighty Dollars because here there are two claimants to the money and they have chosen different forums in

which to contest the forfeiture. Therefore, in this case, merely identifying the owner is not sufficient.

It is not unthinkable that a bailee would have standing to contest a forfeiture when the owner was also active in litigation. It should be noted that the Plaintiff was recently allowed to proceed judicially to contest a forfeiture in which the facts were remarkably similar to this instance. See, United States v. A Portion of $4,000,000, in United States Currency, Specifically $400,000 in United States Currency, Case No. 04-20006-CV-King (S.D. Fla. 2004). However, that case differs significantly from this one in that Via Mat was a recognized co-claimant along with the owner of the res, Bank of America.

In this instance once Lespan, the owner, had elected to proceed administratively to determine the final disposition of the res, any support Via Mat might have had as to its claim being duly authorized was rendered invalid. Consequently, FP&F was not obligated to reply to its request for judicial forfeiture .

Once Plaintiff was stripped of its status as a viable claimant, it also lost any right that it might have had to contest the disposition of the res in this Court. By choosing another method of dispute resolution and signing the Acknowledgment of Early Release of Seized Merchandise, Lespan explicitly waived its right to any judicial forfeiture proceedings. For such a waiver to be valid, binding, and effective, it must also preclude any party from proceeding judicially on behalf of the owner. Therefore, Via Mat could not be deemed duly authorized to proceed on Lespan's behalf. For this Court to determine otherwise would be to render Lespan's waiver powerless. For that reason this Court finds the Plaintiff lacked statutory standing and consequently will grant the Defendant's Motion to Dismiss.

B. Mootness

As to Plaintiff's claim that this matter is separate and distinct from the injury suffered by Lespan, this Court is unconvinced. Such an argument is belied

by the agreement made between Plaintiff and Lespan which acknowledged Plaintiff's liability to Lespan. That liability having directly stemmed from the forfeiture in question illustrates that the injury is not separate and distinct but the very same which was suffered by Lespan. Therefore, even if the Plaintiff met its burden of establishing standing, this Court would still have been compelled to dismiss the complaint as the matter has been recently disposed of administratively at the request of the rightful owner, Lespan.

C. Equitable Relief

Although duly noted, this Court does not find it necessary to explore the merits of Count II of the Plaintiff's complaint for Declaratory Judgment, as Count I is seen as dispositive of the matter.

For the foregoing reasons the Motion to Dismiss Complaint filed by Defendant, United States of America, is GRANTED.

DONE AND ORDER in Chambers in Miami this 17th day of December 2004.

WILLIAM M. HOEVELER
UNITED STATES DISTRICT COURT JUDGE

Copies Furnished:
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