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Professor Edward H. Cooper
Reporter, Advisory Committee on Civil Rules
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed New Admiralty Rule G.

Dear Professor Cooper:

On behalf of the over 10,000 members of our association (and the approximately 28,000 affiliate members from all fifty states), the National Association of Criminal Defense Lawyers ("NACDL" herein) is pleased to submit the following comments with respect to the proposed amendment to the Supplemental Rules for Certain Admiralty and Maritime Claims. We want to thank the Committee for giving us this opportunity to comment on the Supplemental Rule G draft at this early stage of the process. We also hope to continue participating in the Committee's future deliberations concerning this important proposed amendment.

We believe that our considerable familiarity with the drafting process of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA" herein) will shed important light on the validity of some of the proposals under discussion. (Because there were no committee reports on the final version of the bill, the legislative history of CAFRA is rather opaque.) NACDL member David B. Smith, in his capacity as a frequently cited expert on forfeiture law, played a critical role in drafting the legislation that became CAFRA.[1]

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[1] Mr. Smith is the author of the leading forfeiture treatise, PROSECUTION AND DEFENSE OF FORFEITURE CASES. Recognizing Mr. Smith's contributions to CAFRA, House Judiciary Chair Henry Hyde (R-IL) observed in his remarks to Congress following passage of the bill:

> "And I must thank David Smith, who has been there since the beginning. David helped me draft my first forfeiture reform bill, the Civil Asset Forfeiture Reform Act of 1993, and helped draft Senators LEAHY'S and HATCH'S reform bill and helped draft the Senate-passed bill we are considering today. This bill is truly his accomplishment."

146 CONG. REC. H2047 (daily ed. April 11, 2000).

Richard J. Troberman and E. E. Edwards III, as co-chairs of the National Association of Criminal Defense Lawyers Forfeiture Abuse Task Force, also worked directly with Chairman Hyde's staff and Senator's Leahy's staff in the drafting process, and testified before Congress.[2]

Proposed Rule G appears to be the latest round in a decade long struggle between the proponents and opponents of civil forfeiture reform--a struggle that we had hoped was ended by the enactment of CAFRA. While some parts of the proposed Rule G are useful and unobjectionable, the same cannot be said about many of the more significant provisions which are inconsistent with the language, the spirit, and the legislative intent of CAFRA, and represent substantive as well as procedural changes.

One of the main goals of CAFRA was to create a level playing field in civil forfeiture cases. Proposed Rule G, however, represents an attempt, outside of the legislative process, to amend the Supplemental Rules and CAFRA, and to overrule clear and well established case law, in ways that would stint many of CAFRA's due process protections and again tilt the playing field in favor of the government. Nowhere is this more obvious, or more egregious, than in the proposed Sections 4 and 5 of Rule G, which attempt to vastly expand the methods of service of process (Section 4) while at the same time severely limit who may contest a forfeiture (Section 5). See discussion, *infra*. Accordingly, we view the government's efforts here with deep suspicion and apprehension, as well as a misuse of the Rules Enabling Act process.

We believe that the Committee should question why the DOJ has submitted many of these proposals to the Committee instead of to Congress. Clearly, it would make more sense to include many of these provisions in 18 U.S.C. § 983, rather than in a new Supplemental Rule. We believe the answer is obvious: many of these proposals were previously rejected by Congress during the CAFRA debate, and many of the others would not be given serious consideration by the House or Senate Judiciary Committees.

Nevertheless, DOJ apparently now believes that it can persuade this Committee to do what Congress would not. But they can only accomplish that goal by distorting the meaning and intent of the relevant CAFRA provisions and existing caselaw. They are attempting to do precisely that, as we show below. We now turn to the specific

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[2] For their work on asset forfeiture reform and CAFRA, Mr. Troberman and Mr. Edwards were awarded NACDL's Marshall Stern Award for Legislative Achievement for 2000 and 1998, respectively.

provisions, which we address in the same order they appear in the draft. (Some of the provisions that are the most disturbing appear toward the end of the draft.)

Section (1). Application. Proposed Rule G(1) states that "This Rule G applies to a forfeiture action *in rem* for violation of a federal statute." The expressed intent of the proposed rule is "to place all of the procedures that are unique to civil judicial forfeiture proceedings in one place, *i.e.,* in Rule G." Explanation of Rule G ("Explanation") at 4. The problem with this approach is that the rules for civil forfeiture proceedings are not all the same. See, *e.g.,* 18 U.S.C. §983(i)(2), which excludes certain forfeiture proceedings from the definition of "civil forfeiture statute" in 18 U.S.C. §983, thus exempting them from the CAFRA reforms.[3]

Thus, while some of the provisions proposed in Rule G are intended to apply to *all* civil forfeiture actions, many others are not. Accordingly, we believe that this provision must identify with greater specificity those statutes to which Rule G will apply. Moreover, in light of 28 U.S.C. §2072(b), the amended Rule as written (being ostensibly procedural in nature) would apparently supplant, not supplement, much of the carefully crafted and recently enacted work of Congress in this area.

Section (2). Complaint.

Rule G(2)(b)(v). The Explanation states (p.5) that Rule G(2)(b)(v) is not intended to make a substantive change to the particularity requirement in current Rule E(2)(a). "Thus, the case law interpreting current Rule E(2)(a) would apply to Rule G(2)(b)(v)." Despite that assurance, we are concerned about the highly inaccurate presentation of the case law interpreting Rule E(2)(a) in footnote 18 of the Explanation. In particular, the statement that "a complaint that gives a detailed description of the property and the circumstances of seizure is sufficiently particular" is simply wrong. There is no support for that minimalist view of Rule E(2)(a) in the reported case law. The insertion of such misleading statements in the Committee's authoritative note is likely to be used by the government to persuade courts that the law is what the Committee's note says it is, not what the cases actually say. Thus, if case law is to be cited in the note, it is important to present that case law objectively.

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[3] The United States Customs Service, for example, has recently taken the novel position that forfeiture proceedings for violations of Title 21 United States Code, which would be subject to CAFRA if initiated pursuant to 21 U.S.C. §881, are exempt from CAFRA if Customs chooses to proceed instead under the Tariff Act of 1930, 19 U.S.C. §1595a. This attempted end-run around CAFRA demonstrates the difficulties inherent in trying to establish one set of rules for all judicial forfeiture proceedings.

Although the cases use various verbal formulations, the courts agree that the complaint must *at least* allege sufficient facts to support a reasonable belief that the government will be able to prove the property is subject to forfeiture. This is a fairly demanding requirement, as the cases show. *E.g., U.S. v. One Parcel of Real Property Known As 6 Patricia* Dr., 921 F.2d 370, 76 (1st Cir. 1990); *U.S. v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993); *U.S. v. One 1974 Learjet 24D*, 191 F.3d 668, 674 (6th Cir. 1999); *U.S. v. $38,000.00 In U.S. Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987); *U.S. v. 59,974.00 In U.S. Currency*, 959 F. Supp. 243, 248 (D.N.J. 1997). Thus, the particularity requirement provides an important protection for claimants by insuring that a forfeiture complaint will not be filed unless it is supported by substantial evidence.

We also note that although the Explanation states (p. 5) that "the intent is solely to place the current particularity requirement in the same section of the Rule where other pleading requirements pertaining to the complaint appear," proposed Rule G(2)(b)(v) has inexplicably deleted the language "without moving for a more definite statement" which currently appears in Rule E(2)(a). If the language of Rule G(2)(b)(v) differs from the language of Rule E(2)(a), it will inevitably invite the argument that a different meaning was intended. Accordingly, we see no basis for the removal of this clause, and request that it be reinserted into the proposed new provision.

Rule G(2)(c). Rule G(2)(c) allows interrogatories to be served with the complaint without leave of court. Although that language carries forward the provision currently found in Rule C(6)(c), it is an anomaly that can no longer be justified in a rule that is intended to "place all of the procedures that are *unique to civil judicial forfeitures* in one place."

The Advisory Committee's Note to the 2000 Amendment of Rule C(6) acknowledges that the procedure for serving interrogatories with the complaint departs from the general provisions of Fed.R.Civ.P. 26(d), but states that "the special needs of expedition that often arise *in admiralty* justify continuing the practice." However, in the same Note, the Committee rightly says that "[a]dmiralty and maritime in rem proceedings often present special needs for prompt action that do not commonly arise in forfeiture proceedings." Although the Committee established different procedures for forfeiture and admiralty proceedings where appropriate, it inexplicably failed to do so in this instance. This would be an appropriate opportunity to eliminate this oversight.

Allowing the government to serve a first set of interrogatories with the complaint also encourages abuse. Many prosecutors serve lengthy, intrusive and burdensome interrogatories with the complaint in the hope of discouraging the claimant from contesting the forfeiture. These interrogatories frequently ask the claimant to detail her

entire financial history. The Committee should be aware that a high percentage of claimants are either unrepresented by counsel or ineffectively represented. They do not understand that they have a right to object to interrogatories that are overly burdensome or seek irrelevant information. Faced with the prospect of having to quickly answerer a battery of intrusive, burdensome interrogatories, many claimants will decide that they do not have the time or the intestinal fortitude to fight the government.

Accordingly, we submit that proposed Rule G(2)(c), instead of authorizing the service of interrogatories with the complaint, should clearly provide that Rule C(6)(c) does *not* apply to forfeiture actions *in rem* for violation of a federal statute.

Section (3). Judicial Authorization and Process.

Rule G(3)(a). This proposed rule, which is derived from current Rule C(3)(a)(i), authorizes the clerk of the court, upon the filing of a complaint for forfeiture, to issue--without prior judicial approval--a warrant of arrest for the property that is subject to forfeiture. There is a serious question as to whether this provision passes constitutional scrutiny when it forms the basis for the *actual seizure* of the property. A clerk's ministerial action in issuing a warrant for the arrest of property cannot make lawful a seizure that is not based upon probable cause.

Addressing the issue of "whether a valid warrant of arrest may issue without a prior determination of probable cause by a neutral and detached magistrate," the Fourth Circuit has concluded

> We hold that *if the seizure of the property is otherwise proper under the fourth amendment*, no violation of the fourth amendment occurs when the district court clerk issues a warrant of arrest in rem pursuant to subsection 881(b).

United States v. Turner, (One 1963 Corvette), 933 F.2d 240, 245 (4th Cir. 1991) (emphasis supplied). In reaching this conclusion, the Court further observed:

> Other courts considering the constitutionality under the fourth amendment of the warrant procedure established by subsection 881(b) and Rule C(3) have found it unconstitutional. *United States v. Real Property Located at 25231 Mammoth Circle, El Toro, Cal.,* 659 F.Supp. 925 (C.D. Cal. 1987); *United States v. Life Ins. Co. of Va., Single*

> *Premium Whole Life Policy, Policy No. 002138373,* 647 F.Supp. 732, 742 (W.D.N.C. 1986); *rev'd on other grounds sub nom. United States v. B & M Used Cars,* 860 F.2d 121 (4th Cir. 1988); *United States v. One Hundred Twenty-Eight Thousand Thirty-Five ($128,035.00) in U.S. Currency,* 628 F.Supp. 668 (S.D. Ohio), *appeal dismissed,* 806 F.2d 262 (6th Cir. 1986); *In re Kingsley,* 614 F.Supp. 219 (D.Mass. 1985), *appeal dismissed,* 802 F.2d 571 (1st Cir. 1986).

Id., 933 F.2d at 245.

Thus, courts have upheld this procedure only when no actual seizure of the property has occurred based upon a warrant of arrest issued by a court clerk.

> In the present case, the Government did not "seize" the real property. Instead, the Marshal's posting of the arrest warrant served only as notice to the in rem defendants of the civil complaint filed against them. Appellant Cunan has not shown that he was denied access to the property in question, which would indicate an actual seizure of the property by the government. A seizure occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. We find no such "meaningful interference" here for the warrant executed in this case only gave notice to the defendant in rem--it did not effect a seizure. Posting an in rem defendant is an appropriate method of notifying such a defendant of the action against it in much the same way as an in personam defendant is served with a copy of a complaint. It is a fictional way of acquiring jurisdiction over the res in an in rem action.

United States v. TWP 17 R 4, Certain Real Property in Maine, 970 F.2d 984 (1st Cir. 1992) (citations omitted) (containing a discussion of the Commentary to the 1985 Amendment to Rule C(3)). See also, *United States v. Pappas,* 613 F.2d 324, 329-330 (1st Cir. 1980) (en banc); *Schrob v. Catterson,* 948 F.2d 1402, 1415 (3rd Cir. 1991).

Accordingly, we believe that it is appropriate to include language in this provision, or in the Advisory Committee's Notes, to make clear that a warrant of arrest in rem issued by a clerk of the court under this section does not authorize the *actual seizure* of property, and thus is not a substitute for a proper seizure under the fourth

amendment. Stated another way, a warrant of arrest in rem issued pursuant to this provision by a clerk of the court without a prior determination of probable cause by a neutral and detached judicial officer may serve only to notify the defendant in rem of the filing of a civil complaint for forfeiture, in much the same way as an in personam defendant is served with a summons.

Rule G(3)(b)(ii). The other problem we have with proposed Rule G(3) is the provision in Rule G(3)(b)(ii) that allows the government to delay execution of the warrant when the complaint is filed under seal or when the action is stayed prior to execution of the warrant. We are unaware of any authority that permits the government to file a civil forfeiture complaint under seal. Indeed, the Explanation acknowledges (p. 7) that the "forthwith" service requirement of Rule E(4)(a) "is inconsistent with the notion that a complaint may be filed under seal." Filing a complaint under seal and delaying execution of process, which provides notice to the owner, can easily be abused. It allows the government to meet statute of limitations requirements and the ninety day deadline for filing a complaint pursuant to 18 U.S.C. § 983(a)(3)(A) without notifying the owner or giving her an opportunity to contest the forfeiture. Thus, the purpose of the ninety day deadline and the statute of limitations is thwarted. Under the proposed rule, execution of process may be delayed indefinitely.

Permitting execution of the warrant to be delayed if the action is stayed prior to execution of the warrant raises the same concerns. The government would make an *ex parte* application for a stay when it filed the complaint. The owner would not know of the complaint or the stay order until the court saw fit to lift the stay. But the government could file a lis pendens notice, effectively freezing real property, or direct a bank or brokerage firm to freeze the owner's accounts based on the secret complaint.

The government should be required to explain to the Committee why it is necessary to have resort to such drastic measures. And if these measures are to be made available, there must be a showing by the government that the circumstances of the particular case justify them. The draft does not require the government to make any showing before sealing a complaint or when seeking a stay of the action. It would encourage prosecutors to routinely resort to these extraordinary procedures.

Section (4). Notice.

Although we have many objections to proposed Rule G(4), we are especially troubled by the "Direct Notice" provisions in Section G(4)(b). Proposed Rule G(4)(b) constitutes a drastic revision of current Rule C(3)(b), and improperly conflates the administrative notice requirements of 18 U.S.C. §983(a)(1)(A)(i) and 19 U.S.C.

§1607(a) with the current service of process requirements of Rule C(3)(b) and Fed.R.Civ.P. 4 and 4.1. As explained below, this Rule, if adopted, would provide expansive new methods for service of process which would be unique to civil forfeiture actions. There is no justification for such an expansive and unique set of rules.

Rule G(4)(a)(i)(C). This provision permits publication of notice in the district "where (1) the action is filed, (2) the property was seized, or (3) the property is located." Current Rule C(4) requires publication in the district where the action is filed. No explanation is given for this proposed change. The current requirement should not be altered to give the government a choice of where to publish notice.

The district where the action is filed is usually the district where publication is likely to be most effective in providing notice to interested persons. In the case of personal property, the district where the property is "located" may often be different than either the district of seizure or the district where the action is filed because the Customs Service and the Marshals Service have widely scattered facilities for storing airplanes, boats and vehicles, and persons with an interest in the property often do not know where the property has been taken. Thus, publication solely in the district to which the property has been moved *by the seizing agency* is not likely to reach persons with an interest in the property.

For these reasons, we suggest that in those cases where the property is seized (or in the case of real property, is located) in a district other than the district in which the action is filed, the government should be required to publish notice in *both* districts.

We also believe that it is desirable that publication be made in a newspaper of national circulation such as *USA Today*. Such a practice would be much more likely to reach all interested persons than publication in some obscure local newspaper or business journal. Some law enforcement agencies already follow this practice in administrative forfeiture cases. We would propose this as an alternative method of publication.

Rule G(4)(a)(iv)(A). This provision provides that if the property is located in a foreign country, or the person on whom notice must be served is believed to be located in a foreign country, publication may be made (1) in a newspaper in the district in the United States where the action is filed; (2) in a newspaper published outside the foreign country where the property is located but generally circulated in the foreign country; or (3) in a newspaper, legal gazette, or listing of legal notices published and circulated in the foreign country where the property is located. We believe that when the property is located in a foreign country, or the person to whom notice must be

served is believed to be located in a foreign country, notice published solely in the district in the United States where the action is filed is clearly insufficient both in practical and in constitutional terms. Thus, in those situations, the government should be required to also publish notice in a newspaper or legal gazette generally circulated in the foreign country where the person or property is located. Anyone truly desiring to provide notice to interested persons would certainly do so.

Rule G(4)(a)(v). This provision would permit publication of the Notice required by Rule G(4)(a)(i) to be made solely on the Internet. The government cites statistics purporting to show that 58% of U.S. households have access to the Internet. Even if true, that still leaves almost half the population without Internet access. Moreover, experience teaches that those are the households that are more likely to have their property seized. Even if one has Internet access, how would one know that the government posts forfeiture notices on a particular web site? More importantly, what if the property seized is the claimant's computer (a not at all uncommon occurrence)? While we agree that in keeping up with technological advances it would be a good idea for the government to post notice on the Internet, we believe that at least for the foreseeable future this posting should be *in addition* to publishing notice in a newspaper, not *in lieu* thereof, since it would cost the government virtually nothing to post a notice on the Internet. Indeed, it is much too soon to mandate the use of the Internet in this way, as the Judicial Conference has repeatedly determined in other contexts in recent years, such as in discussing electronic filing and service by e-mail.

(B) Direct Notice.

Rule G(4)(b)(ii). This proposed rule would so radically change current civil procedure that it would make it almost unrecognizable in the context of civil judicial forfeiture proceedings. The proposed rule would permit *service of process* in civil judicial forfeiture cases "in any manner reasonably calculated to ensure that the notice is received, including first class mail, private carrier, or electronic mail." The government provides no justification, or even explanation, for such a radical change.[4]

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[4] The government's entire "explanation" for this radical and unprecedented change in existing law is as follows:

> Subsection (b)(ii) addresses the manner in which direct notice may be served. The notice may be served on either the potential claimant or his counsel in any manner "reasonably calculated to ensure that such notice is received," including first class mail, private carrier or electronic mail. (p. 10)

We know of no other civil proceeding in which such expansive methods of service of process are authorized as a matter of right. Nor do we see any need for such expansive methods in the context of civil forfeiture proceedings.

There are several disturbing departures from the current rules of civil procedure buried within this provision. For example, we are unaware of any rule in any other context that would allow service of process to be made by electronic mail. If this method is not deemed sufficiently reliable in any other case, why should it be deemed an appropriate method of service in a civil forfeiture proceeding in which the government is seeking to permanently deprive the claimant of his or her property? It is common knowledge that e-mail can be accidentally or intentionally deleted by anyone with access to the same e-mail address, for example the claimant's child. E-mail can be also be sent to the wrong person, and e-mail addresses often change based on who the claimant's internet service provider is at any given time. Moreover, not everyone with e-mail can download an attached document, and in this era of internet viruses many people who are computer savvy simply refuse to do so. In sum, adoption of this provision would turn the spirit of CAFRA--which was to make forfeiture proceedings more fair--on its head.

Proposed Rule G(4)(b)(ii) would also allow service of process to be made on "the potential claimant's counsel." We are unaware of any provision authorizing service of original process on a person's counsel as a matter of right in any other context. *Bye v. United States,* 105 F.3d 856 (2nd Cir. 1997), the case cited in footnote 28 at page 10 of the Explanation, is clearly inapposite. That case dealt with an administrative notice of forfeiture, not service of process after a civil forfeiture complaint was filed.

Moreover, the proposed rule does not specify upon which of the "potential claimant's" counsel process may be served. Would this apply to a potential claimant's divorce counsel, or any other counsel representing the potential claimant in a non-related matter? Even if the provision was more narrowly drafted to limit it to counsel representing the potential claimant in a related criminal matter, it would continue to pose practical problems. This is so because a significant majority of criminal defense lawyers, especially public defenders, are not experienced in civil forfeiture law, and rarely handle these proceedings. Thus, it is not unheard of for such counsel to simply place the notice in the client's file and either take no further action at all, or not take *timely* action.

Rule G(4)(b)(ii) includes another radical departure from current procedure by providing that "notice is served on the date that the notice is sent." In other words, Rule G(4)(b)(ii) provides that *service of process* is deemed complete on the date service of process is sent. Given the number of methods of service set forth in the

proposed rule, we have no idea what this means. Service has always been deemed complete on the date when it actually occurred. Thus, a return of service is filed with the court indicating when the person was served, not when the process server received the papers with instructions to serve them. Even in those rare instances when service is accomplished by some means other than personal service by agreement of the parties, the date of service is generally deemed to be when the notice is actually received. For example, where first class mail is used, certified mail with a return receipt typically indicates when the notice was actually received. We see no compelling need or justification for such a radical change in procedure.

Rule G(4)(b)(iii). This provision would require that "notice" (*i.e.,* service of process) to a potential claimant who is incarcerated be sent to the facility where the potential claimant is incarcerated. The purported rationale for this rule is the Supreme Court's decision this term in *Dusenbery v. United States,* 534 U.S. 161, 151 L.Ed.2d 597, 122 S.Ct. 694 (2002). But that is not what *Dusenbery* holds. *Dusenbery* involved an administrative notice of forfeiture, not service of process. Moreover, the FBI in that case also sent notices to the address of the residence where Dusenbery was arrested as well as to his mother's residence address.

The Supreme Court, in a 5-4 decision, held that the government had satisfied the *minimal* due process requirements of *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed.2d 865, 70 S.Ct. 652 (1950), because the notice was "reasonably calculated under all of the circumstances" to apprise Dusenbery of the pendency of the forfeiture. The Court observed as follows:

> The government here carried its burden of showing the following procedures had been used to give notice. The FBI sent certified mail addressed to petitioner at the correctional facility where he was incarcerated. At that facility, prison mailroom staff traveled to the city post office every day to obtain all the mail for the institution, including inmate mail. App. 36. The staff signed for all certified mail before leaving the post office. Once the mail was transported back to the facility, certified mail was entered in a logbook maintained in the mailroom. Id. at 37. A member of the inmate's Unit Team then signed for the certified mail to acknowledge its receipt before removing it from the mailroom, and either a Unite Team member or another staff member distributed the mail to the inmate during the institution's "mail call." Id. at 37, 51.

Id., 534 U.S. at 700. The government was only able to meet the minimal due process requirement by demonstrating the above facts. Nevertheless, four members of the Court found that the government's notice efforts in that case were insufficient.

Proposed Rule G(4)(b)(iii) does little to ensure that an inmate will actually receive process, because it only requires that notice be "sent" to the institution. Unlike the Court in *Dusenbery*, it says nothing about what steps the institution must take to deliver the notice to the inmate. While there may be established procedures for delivering mail to inmates in federal facilities, there is no guarantee that such procedures exist in state, county, or municipal facilities.[5]

Accordingly, while we agree that notice must be sent to the facility where a potential claimant is incarcerated, we believe that the rule should also provide that notice is deemed complete in such circumstances only when there is evidence that the potential claimant actually received the notice, *e.g.,* a signed receipt.

Rule G(4)(b)(iv). This provision deals with service of process on persons who were arrested in connection with the offense giving rise to the forfeiture, but who are not currently incarcerated. The rule provides that in such situations the "notice... may be sent to the address given by the potential claimant at the time of his arrest or release from custody, unless the potential claimant has provided a different address to the agency to which he provided the address at the time of his arrest or release from custody." The Explanation (p. 11) states that this procedure "is consistent with the rule some courts have adopted." Id. However, the government's sole support for this assertion is an unpublished order from a district court which upheld that procedure for an administrative notice, not for service of process, under the specific facts of that case.

We do not believe that the government should be relieved of making *reasonable* efforts to provide actual notice of forfeiture proceedings to potential claimants. That is what the caselaw requires. See, *Mullane, supra,* 339 U.S. 306. Reasonableness must be decided based upon the facts of each case. The proposed rule does not meet this test. For example, if the potential claimant is the subject of some pending criminal

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[5] As the government informed the Supreme Court on brief in *Dusenbery,* Bureau of Prison employees currently "must not only record the receipt of the certified mail and its distribution, but the prisoner himself must sign a log book acknowledging delivery. BOP Program Statement 5800.10.409, 5800.10.409A (Nov. 3, 1995). If a prisoner refuses to sign, a prison officer must document that refusal. BOP Operations Memorandum 035-99 (5800), July 9, 1999. 534 U.S. at 706 (GINSBURG, J., dissenting).

proceeding, or is currently on probation in another matter of which the government is aware, it is not unreasonable to require the government to check with the clerk of the court, the probation department, or the prosecutor or defense counsel, in an effort to determine a valid address for the potential claimant. Similarly, it is not unreasonable to require the government to check with the state Department of Licensing for the potential claimant's most current driver's license address. Any other plaintiff in a civil action is required to take such measures. Why should the government, with its superior resources, be relieved of such an obligation?

Rule G(4)(b)(v). This provision requires that the notice served with the Complaint must state that a claim must be filed no later than 30 days after the date of the notice. For the reasons stated in our objections to Rule G(4)(b)(ii), we find this provision unacceptable as a clear misstatement of well established law, and nothing in CAFRA was intended to change the current law in this regard. Contrary to the Explanation at page 11, this provision does not conform the rule with the statutory requirement in 18 U.S.C. §983(a)(4)(A). Section §983(a)(4)(A) provides that a claim must be filed "not later than 30 days after the date of service of the Government's complaint . . . " As stated above, service of a complaint has traditionally been on the date on which it was received, not the date on which it was sent.

The Explanation (p. 11) further complains that any other rule would be "unworkable" because the government would have no way of knowing when the notice is received. We suggest that this is more a problem created by the government's hoped-for expanded methods of service (*e.g.,* service by first class mail or by e-mail), for it has never been a problem with the traditional means of service currently in use. Indeed, even in those cases where service is accomplished by agreement of the parties utilizing first class mail, there is no difficulty in pinpointing the date when notice is received because the government sends a certified letter, return receipt requested.[6]

Even if there is doubt in some cases as to the precise date when the notice is received, this is not a practical problem. The government typically does not move for a default the day after the period for filing a claim expires, because Rule C(6) gives the court discretion to excuse the late filing of a claim. That discretion has been liberally exercised in the interest of deciding cases on their merits. Since the government normally waits at least a couple of weeks before moving for a default, determining the precise date when notice was received is generally not necessary.

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[6] See, *e.g.,* Fed.R.Civ.P. 4(d). Notably, the Civil Rules refer to this procedure as "waiver" of service, not "acceptance" of service.

The rule proposed by the DOJ, *if* service of process by mail is adopted by the Committee, would also unfairly penalize potential claimants who, through no fault of their own, receive notice after a long delay of the mail. Moreover, despite the fact that a notice might be dated on a certain date, there is no guarantee that it was actually mailed to the potential claimant on that date. Even when mail is timely delivered, the proposed rule would shave several days off the thirty day period for filing a claim under 18 U.S.C. §983(a)(4)(A). Treating the receipt of notice as the date service is hardly an "unworkable" rule, contrary to the protests of DOJ.

Rule G(4)(b)(vi). This rule would, *inter alia*, require that the notice served with the Complaint include a statement that "an answer to the complaint must be filed under Rule G(5)(b) not later than 20 days after filing the claim. We recognize that this conforms with the statutory requirement of 18 U.S.C. §983(a)(4)(B) and current Rule C(6)(a)(iii). However, we believe it important to clarify that a claimant in a judicial civil forfeiture proceeding may file a responsive pleading pursuant to Fed.R.Civ.P. 12(b) within 20 days, rather than an answer. We explain our concerns in more detail in our response to proposed Rule G(5)(b), *infra.*

Section (5). Responsive Pleadings; Interrogatories.

This section is the single most objectionable provision of proposed Rule G. It would, without any legislative deliberation, severely restrict the class of persons who could file a claim to contest a forfeiture, and clearly conflicts with well established caselaw and the letter, spirit, and intent of CAFRA. Frankly, we are shocked by the content of this provision, and by the Explanation which accompanies it at page 13. As demonstrated below, the DOJ knows full well that CAFRA does not in any way, shape, or form limit the right to file a claim to persons asserting an ownership interest.

Rule G(5)(a)(i) and (a)(v)(i)(B). Proposed Rule G(5)(a)(i) states that "[A] person who asserts an *ownership* interest in the property that is the subject of the action may contest the action by filing a claim in the court where the action is pending." This is directly contrary to well established caselaw and current Rule C(6)(a). Rule C(6)(a)(i) provides that "[I]n an in rem forfeiture action for violation of a federal statute:

> **(i)** a person who asserts *an interest in or right against the property* that is the subject of the action must file a verified statement identifying *the interest or right* . . . (emphasis supplied)

* * *

> **(ii)** an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another; . . .

The Advisory Committee's Note to the 2000 Amendment of Rule C(6) includes the following statement:

> In a forfeiture proceeding governed by paragraph (a), a statement must be filed by a person who asserts an interest in or right against the property involved. *This category includes every right against the property, such as a lien, whether or not it establishes ownership or a right to possession.* In determining who has an interest in or a right against property, courts may continue to rely on precedents that have developed the meaning of "claims" or "claimants" for the purpose of civil forfeiture proceedings. (emphasis supplied).

Well established caselaw holds that in order to establish Article III standing, "a claimant must have a colorable *ownership, possessory or security interest* in at least a portion of the defendant property." *United States v. $515,060.42 in United States Currency,* 152 F.3d 491, 497 (6th Cir. 1998) (emphasis supplied).

The Second Circuit states the rule as follows:

> To demonstrate standing under Article III, therefore, a litigant must allege a "distinct and palpable injury to himself that is a direct result of the "putatively illegal conduct of the [adverse party]," and "likely to be redressed by the requested relief." (citations omitted)

United States v. Cambio Exacto, 166 F.3d 522, 527 (2nd Cir. 1999) (money exchange businesses had standing to contest a forfeiture of funds seized from their bank accounts because they had a financial stake in the funds--they had a liability to their customers in an amount equal to the forfeited funds).

See also, *United States v. Contents of Accounts Nos. 303450504 and 144-07143,* 971 F.2d 974, 985 (3rd Cir. 1992) (any colorable ownership or possessory interest sufficient); *United States v. 5 S 351 Tuthill Road,* 233 F.3d 1017, 1021-1026 (7th Cir. 2001) (conferring standing on the beneficiary of a land trust); *United States v.*

$191,910.00 in U.S. Currency, 16 F.3d 1051, 1057 (9th Cir. 1994) (claimant need only have some type of property interest in the forfeited items); *United States v. $260,242.00 in United States Currency,* 919 F.2d 686, 687 (11th Cir. 1990) (constructive possession of money in trunk of car is constitutionally sufficient for standing in forfeiture actions); 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04, 9-69 through 9-70.6(1) (June 2002 ed).

During the CAFRA drafting process, the location and meaning of the term "owner" in the innocent owner provision [18 U.S.C. §983(d)(6)] was the subject of considerable debate, despite the fact that *all* parties, including the DOJ, understood that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property.

As part of the CAFRA drafting process, House and Senate staffers working on the bill sought input from a number of sources, including both DOJ and NACDL. Memoranda were circulated requesting comments on specific provisions that were undergoing revision, including the innocent owner provision. In particular, Senator Leahy's staff invited comments from the DOJ regarding the following proposal:

> **Page 22, lines 16-17.** Strike "an ownership interest" and insert "an ownership or possessory interest."
>
> It is well established that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property. This is the formulation used in the Sessions/Schumer bill, both in the provision on notice ("Upon commencing administrative forfeiture proceedings, the seizing agency shall send notice of the proceedings . . . to each party known to the seizing agency at the time of the seizure to have an ownership or possessory interest, including a lienholder's interest in the seized property.") and in Section 3 (motion to set aside a declaration of forfeiture shall be granted if the moving party "had an ownership or possessory interest in the forfeited property"...) S.1931 as currently drafted is particularly confusing, because it refers to "possessory interest" in one context (on page 16, re hardship release of property), and "ownership interest" in another (on page 22, re definition of "owner"). (emphasis in original)

On March 16, 2000, the DOJ responded to this proposal as follows:

[This] proposal would strike "an ownership interest" and insert "an ownership or possessory interest" on page 22, lines 16-17. This proposal involves the definition of the word "owner" in proposed new section 983. A global search of this provision reveals that the terms "owner" or "ownership" appear only in the provision governing the "innocent owner" defense to civil forfeiture. (Page 10, line 25, through page 14, line 21). (The terms also appear in proposed new Section 985 (page 13, line 10, through page 36, line 16), although we see no indication that the definition of the term "owner" on pages 22-23 is intended to apply to this section.

We believe that what is needed in addition to the provision defining "owner" on pages 22-23 is a provision stating that a claimant shall be deemed to have standing to contest a civil forfeiture if he/she (1) establishes a possessory or ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest, (2) but not if the claimant is:

> (i) a person with only a general unsecured interest in, or claim against, the property or estate of another;
>
> (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or
>
> (iii) a nominee who exercises no dominion or control over the property.

Such a provision would codify established law that a claimant may establish standing to contest a forfeiture by showing either an ownership or a possessory interest in some portion of the property and it would also codify the exceptions to the standing requirement under current law. This appears to be what the definition of "owner" on pages 22-23 was intended to do, but it makes no sense to attempt to accomplish this purpose by defining a term that appears only in connection with the innocent owner defense.

We submit that the most logical place to put such a provision would be at page 10 of the March 9 draft just before current subsection (c) dealing with the burden of proof. . .

> We believe that the definition of "owner" on page 18 should remain intact. As noted, this definition applies to the "innocent owner" defense. Some provision is needed that makes clear that no relief will be granted where a person with a superior interest in the property subject to forfeiture fails to satisfy the "innocent owner" defense with respect to the property, while a person holding only a mere possessory interest is able to satisfy the defense. (emphasis in original).

DOJ's "March 16 Response to 'Comments on the March 9th Bill'" at 6-7.

Given that DOJ acknowledged to the drafters of CAFRA that clearly established law provides that persons with an ownership *or* possessory interest have standing to contest a forfeiture, and that DOJ even urged the inclusion of a separate provision that would make that point even more clear, it is incomprehensible to us that DOJ would now urge this Committee to adopt a rule that provides that only a person with an ownership interest has standing to contest a forfeiture.

Rule G(5)(a)(ii)(A). We object to this provision based upon our objection to the notice provision in Rule G(4)(b)(ii) ("notice is served on the date notice is sent.").

Rule G(5)(b). We agree that current Rule C(6)(a)(iii) and 18 U.S.C. §983(a)(4)(B) provide for the filing of an "answer" to the complaint within 20 days after the date of the filing of the claim. However, we are troubled by DOJ's interpretation of this rule as set forth in the Explanation, at 15, fn. 36. Relying on a single published decision of a district court judge in New Jersey--a decision which is currently under appeal to the Third Circuit--and one unpublished district court decision, the Explanation implies that, pursuant to Rule C(6)(a)(iii), a claimant may not file a motion to dismiss pursuant to Fed.R.Civ.P. 12(b), *or any other motion,* before filing an answer (as well as answers to interrogatories if served with the complaint). (See proposed Rule G(7)(d)(i)). We strongly disagree. In effect, DOJ's interpretation of Supplemental Rule C(6)(a)(iii) and proposed Rule G(5)(b) would not merely supplement Rule 12 of the Federal Rules of Civil Procedure, but would entirely supersede it.

The purpose of Rule C(6) and proposed Rule G(5) is clear: in situations in which the government brings an *in rem* proceeding against potentially forfeitable property, some mechanism is necessary in order to determine who has standing to enter the controversy. Obviously, the property, which is the actual defendant in the action, cannot itself contest the action. Rule C(6)(a) and proposed Rule G(5)(a) establish a procedure for entering the controversy, *i.e.,* by filing a claim. Admittedly, this procedure differs from Fed.R.Civ.P. 12, because in the ordinary civil case, there is no

need to file a claim. The Rules, however, also provide the time limit within which an answer must be filed *after* the filing of a claim. See Supplemental Rule C(6)(a)(iii) and proposed Rule G(5)(b). Thus, while Rule C(6) and proposed Rule G(5) interpose what is clearly a *supplemental* requirement--the filing of a verified claim--the remainder of the rule merely clarifies the requirement that an answer to the verified complaint must be served and filed following the filing of the claim, and the deadline for doing so.

Rule A provides, in relevant part, that "the general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules." We do not believe that current Rule C(6)(a)(iii) or proposed Rule G(5)(b) is inconsistent with Fed.R.Civ.P.12. Instead, Rule C(6) and proposed Rule G(5) merely *supplement* Rule 12's explicit language that "the service of a motion permitted under this rule alters these periods of time [to answer] as follows: if the court denies the motion . . . the responsive pleading shall be served within 10 days after notice of the court's action." Fed.R.Civ.P. 12(a)(4)(A). The purpose of this rule is obvious: a defendant in a civil action should not bear the burden of responding to the allegations of a complaint that is so deficient that further proceedings will be unnecessary.

Indeed, Supplemental Rule E(2) requires that the government's complaint "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts." See Objections to proposed Section G(2)(b)(v), above. The requirements of Supplemental Rule E(2) and proposed Rule G(2)(b)(v) would be meaningless, and their purpose frustrated entirely, if a claimant were required to answer insufficiently pled allegations *before* moving for relief. See also, David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶9.04[4] (June, 2001) ("[c]laimant will be excused from filing an answer on the merits pending disposition of defenses made by motion under Fed.R.Civ.P. 12.").

Thus, we submit that Rule C(6)(a) and proposed Rule G(5)(b) are not inconsistent with Fed.R.Civ.P. 12. We further submit that there is no justification for prohibiting the filing of a motion to dismiss prior to the filing of an answer pursuant to Rule 12(b) in judicial civil forfeiture proceedings. Indeed, the government has yet to explain why a different rule should apply to civil forfeiture proceedings. We submit that, in order to clarify once and for all that Fed.R.Civ.P. 12 applies in forfeiture proceedings, the first sentence of proposed Rule G(5)(b) should be redrafted as follows:

> (b) Answer. A person filing a claim must serve and file an answer to the complaint, or a responsive pleading pursuant to Fed.R.Civ.P. 12, within 20 days after filing the claim.

For the same reasons, we object to the proposed new requirement that objections to the exercise of the Court's *in rem* jurisdiction over the property, or to venue, must be raised in the answer or will be deemed waived. The basis for objections to jurisdiction or venue may not become apparent until discovery has commenced. Fed.R.Civ.P 12(b) expressly provides that these matters may be raised by motion. The Explanation offers no justification for requiring that these matters be raised in the answer or are deemed waived.

Rule G(5)(c). We object to this provision based upon our objections to Rule G(2)(c), above.

Section (6). Preservation and Disposition of Property; Sales.

As discussed in detail below, proposed Section (6) creates broad new authority for the government to force the interlocutory sale of property named as a defendant in an *in rem* civil forfeiture proceeding. While at first glance this section appears benign and seemingly reasonable, the authority it grants--specifically the authority in subsections (6)(b) and (6)(c)--leaves substantial room for abuse by the government. Unfortunately, history strongly suggests that abuses will occur under these provisions. *See, e.g., United States v. Michelle's Lounge,* 39 F.3d 684, 699 (7th Cir. 1994)(using civil forfeiture laws to seize all of a person's substantial assets and hold such assets over two years without adversary hearing before indictment reflects a statutory scheme which "does present a great opportunity for abuse by the prosecutorial of the government"); *United States v. Farmer,* 274 F.3d 800 (4th Cir. 2001)(same; almost two years between seizure of all of defendant's assets and his indictment).

Rule G(6)(a). Preservation of Property. This subsection deals with property which is a defendant *in rem* in a forfeiture case and the owner or another person remains in possession of the property. In such cases the court may "enter any order necessary to preserve the property and to prevent its removal, destruction or encumbrance." While we have no objection to courts having this power, we are concerned with the expansive interpretation DOJ has placed on this power. As the government notes, the authority for proposed Rule G(6)(a) is derived from current Rule E(10). However, there is no provision in Rule E(10) that would allow for a *sale* of property under proposed Rule G(6)(a). Indeed, a sale of the defendant property would be inconsistent with the title and purpose of the proposed subsection, *i.e., the preservation* of the property.

Rule G(6)(b). Interlocutory Sales; Delivery. This subsection authorizes the sale of any defendant item of property, at any time after a forfeiture complaint is filed, on motion of any party, including the government or even the marshal, if any of four circumstances are shown:

(A) the property is perishable, or liable to deterioration, decay, diminution in value, or injury by being detained in custody pending the action;

(B) the expense of storage is "excessive or disproportionate to its fair market value";

(C) the property is subject to a mortgage or taxes on which the owner is in default; or

(D) other good cause is found by the court.

Although this provision is apparently derived from current Rule E(9), it is an enormous expansion of the circumstances where the government can obtain a forced interlocutory sale. The phrase "diminution in value" does not appear in Rule E(9). Any car, truck, boat, or plane which is priced in the marketplace by the model year of the property (and thus depreciates with time) would fall within the scope of this provision. Forfeiture actions very often involve property of this type. This provision would substantially and unfairly increase the government's power to coerce settlements where the owner seeks the return of the actual seized property.

The provision in proposed Rule G(6)(b)(C) relating to property subject to a mortgage or taxes in default is also not found in Rule E(9). This too is a substantial broadening of the government's power to force interlocutory sales. We oppose this expansion of the government's power because it is all too easily subject to abuse, and because of its potential to exacerbate erroneous deprivations. For example, where the government has seized all of a person's assets, or frozen the person's bank accounts, it is unlikely that the person will be able to keep mortgage or tax payments current. If the seizure or freeze order was in error, the error will be compounded by a sale of the property. *See Michelle's Lounge, supra,* at 698-700, citing *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 528 (1976).

Consider also, *e.g.,* a forfeiture action against a family residence where the husband and wife owners are claimants. Since *United States. v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), the government has been required to use a non-possessory method such as filing a *lis pendens* when

commencing a forfeiture action against real property. In order to take actual possession, prior notice and an adversary hearing is required. Significantly, the family that resides in the home is permitted to remain in possession while the case is pending. Under proposed (6)(b), if the family got behind on mortgage payments, the government could force an interlocutory sale, and the claimants would be helpless to stop it. Even if the owners ultimately prevailed after several years of litigation, they would still have lost their home. Moreover, the cost of buying comparable housing years later would almost certainly exceed the cash realized by the forced sale. In such cases, simply the *threat* by the government to force a sale could be used to coerce the claimants into accepting a settlement on the government's terms without any opportunity to have their claims adjudicated.

Similarly with motor vehicles, boats, and planes, the owner may have an interest in recovering the specific property that was seized. For example, the owner may know that the property functions well and has been well maintained. Its value to the owner may exceed what it would bring in the marketplace, and the owner may believe that it will be realistically impossible to buy an item of comparable quality on the open market. Such an owner would be highly susceptible to coercion to accept the government's settlement offer where the government is threatening to force a sale of the property.

In some cases the owner may agree to liquidate a defendant property. Obviously, in such instances no coercion would be involved, and a sale by agreement could proceed. However, in order to avoid the risk of erroneous deprivation, the authority to prevent a forced sale should remain with the owner.

In sum, we believe that the phrase "diminution in value" should be deleted from (6)(b)(i)(A) and that (6)(b)(i)(C) should be deleted altogether. The provision in (6)(b)(ii) allowing an alternative to a forced sale, *i.e.,* delivering the defendant property to a party while the case is pending upon the party's giving security, should be kept in the rule.

Rule G(6)(c). Sales; Proceeds. If the changes proposed in (6)(b) above, are made, we would have no opposition to this subsection.

Rule G(6)(d). Entry of Order of Forfeiture. This subsection provides that, upon the entry of an order of forfeiture, the property "must be disposed of as provided by law." No mention is made of a stay pending appeal. In order to avoid confusion, language should be added qualifying the mandatory disposal by the phrase "unless a stay is granted."

Section (7). Pre-trial Motions.

Section (7) addresses a number of issues that are not covered by the existing rules. We see no need to address any of these issues in Rule G. However, if the Committee is inclined to adopt any of these proposals, we want to be sure that the rule makes clear that the motions described in this section are not intended to be all-inclusive. We also have specific objections to the treatment of these issues.

Rule G(7)(a). Subsection (a) is a misguided attempt to codify existing case law holding that the Fourth Amendment exclusionary applies to civil forfeiture cases. As drafted, this proposal improperly narrows the holding of the caselaw because it limits suppression to use of the property as evidence "at the forfeiture trial." The caselaw provides for suppression of the use of the property for *all purposes.* Moreover, we are not aware of any "confusion among practitioners" concerning the application of the exclusionary rule. Explanation at 17.

Rule G(7)(b). Subsection (b) provides that the government may "move at any time to strike a claim and answer for failure to comply with the filing requirements, or for failure to establish an ownership interest in the property subject to forfeiture." We have already explained in response to proposed Section 5 why it is not necessary to establish an ownership interest in the property in order to have standing. This subsection would allow the government to move at any time to disqualify a claimant for failure to comply with the technical filing requirements governing claims and answers. We see no reason to permit the government to argue at trial, or even after trial on the merits, that a claim was filed late. Just as a claimant may waive certain issues by not raising them at the appropriate time, so can the government.

Rule G(7)(c). Subsection (c) provides that a claimant "with an ownership interest in the property" may move "at any time after filing a claim and answer, for release of the property under 18 U.S.C. 983(f)." DOJ claims that this subsection is needed to provide "a procedural counterpart to 18 U.S.C. § 983(f)." Explanation at 17. In fact, 18 U.S.C. §983(f) provides its own procedural rules, and they are incompatible with DOJ's proposal.

First, §983(f)(1)(A) merely requires the claimant to have "a possessory interest in the property," not an ownership interest. Second, whereas subsection (c) only permits the filing of a motion for release of property after a claim and answer have been filed, §983(f)(3)(A) permits a "claimant" to file a petition for release of the property on hardship grounds even "if no complaint has been filed." CAFRA's hardship release provision was thus intended to be available immediately following the seizure of the

property. A claimant is not required to wait many months until the government files a complaint, nor is there any requirement that the claimant first file a claim and an answer.

The Explanation states that subsection (c) is "necessary to address confusion caused by the pre-CAFRA case law" governing motions under Rule 41(e) of the Federal Rules of Criminal Procedure.[7] Explanation at 17. However, we do not see any language in subsection (c) that addresses this alleged "confusion."

The Explanation at 19 further states that subsection (b) provides that the criteria set forth in Section 983(f) are the only grounds for the pre-trial release of the property, but there is no such language in the draft of Rule G(7)(b) that was provided to us. If the reference was intended to be to subsection (c), we object to that characterization because this subsection is at odds with the language of 18 U.S.C. §983(f), which does not preclude other motions for release of seized property based on the illegality of the seizure. DOJ sought to insert language in section 983(f) making it the exclusive means of obtaining release of property prior to trial. Congress rejected that effort to abolish Rule 41(e) motions. Moreover, we do not agree with the government's view of Rule 41(e). It still has an important role to play after the enactment of Section 983(f). Indeed, the government appears to concede that a Rule 41(e) motion will lie before an administrative forfeiture proceeding is commenced.

But even after a notice of seizure is sent to the owner, there are situations where the claimant cannot wait an additional ninety days or more (the time for filing a complaint may be extended for good cause) for a remedy, and thus the forfeiture suit itself does not provide an adequate remedy at law. A company's property may have been seized illegally and the property may severely diminish in value over time, *e.g.*, perishable goods. Contrary to the view expressed by many courts, there should be no hard and fast rule that a motion under Rule 41(e) will not lie once a notice of seizure

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[7] The Explanation (p. 18) erroneously complains that "in adopting the standards set forth in Rule 41(e), courts confused the legality of the seizure, which is the issue in Rule 41(e) motions, with the hardship suffered by the claimant as result of the pre-trial seizure of his property." In fact, Fed.R.Crim.P. 41(e) provides, in relevant part, that "A person aggrieved by an unlawful search and seizure *or by the deprivation of property*" may move the district court for return of the property. (emphasis supplied). The Advisory Committee's Note to the 1989 amendments to Rule 41(e) explains that "[a]s amended, Rule 41(e) provides that an aggrieved person may seek return of property that has been unlawfully seized, and a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it."

is served. *See* 1 David B. Smith, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶10.05A, 10-93 (June 2002 ed.)("The court should carefully weigh the competing interests of the claimant and the government in determining whether to rule on a motion for return of seized property. The equities may vary enormously depending on the circumstances and courts should be flexible."); *Muhammed v. DEA*, 92 F.3d 648, 652 (8th Cir. 1996)(Rule 41(e) motion may still lie after initiation of administrative forfeiture proceedings, depending on the equities of the situation).

Rule G(7)(d)(i). Subsection (d)(i) provides that a claimant (again misdefined as a party "with an ownership interest in the property") "may, at any time after filing a claim *and answer*, move to dismiss the complaint under Rule 12(b)." We see the necessity for first filing a claim but not for first filing an answer. Fed.R.Civ.P. 12(b) gives the pleader the option to make seven specified defenses by motion before answering the complaint. Surely DOJ does not believe that a different rule should apply in civil forfeiture cases. If they do, they have provided no rational justification to support such a rule.

Rule G(7)(d)(ii). Subsection (d)(ii) provides that a complaint may not be dismissed on the ground that the United States did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." DOJ states that this provision is necessary to provide a procedural counterpart to a new statute, 18 U.S.C. § 983(a)(3)(D), which it claims was enacted "to overturn legislatively a number of cases permitting a civil forfeiture complaint to be dismissed pre-trial based on lack of evidence." Explanation at 20. DOJ states that lack of evidence is not a basis for a motion to dismiss under Rule 12.

Subsection (d)(ii) is not necessary to implement 18 U.S.C. §983(a)(3)(D), which is self-enforcing. DOJ wants to insert this provision, with a completely misleading explanation of section 983(a)(3)(D), in order to give section 983(a)(3)(D) a meaning it clearly does not have, and which Congress specifically sought to avoid.

Many cases, both before and after the enactment of the CAFRA, hold that the government must have probable cause at the time it files the complaint.[8] Indeed, the

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[8] In addition to the cases cited in the Explanation at 20 n.43, see *U.S. v. $734,578.82 In U.S. Currency*, 286 F.3d 641, 655 (3d Cir. 2002). As the Third Circuit observed, this rule "avoids the obvious questions of fundamental fairness that would arise from the government attempting to have a court order forfeiture without first having an adequate factual basis to support the request."

legislative history of CAFRA expressly states the requirement:

> And, while the government may use evidence obtained after the forfeiture complaint is filed to establish the forfeitability of the property by a preponderance of the evidence, the government must still have had enough evidence to establish probable cause at the time of filing (or seizure, if earlier). The bill is not intended to limit the right of either party to bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

146 CONG. REC. H2050 (daily ed. April 11, 2000).

The government may not acquire its probable cause later, by conducting civil discovery. This probable cause requirement follows naturally from the fact that the Fourth Amendment prevents the government from seizing property without probable cause. It is also embodied in a statute, 19 U.S. C. § 1615, that was originally enacted in 1790, to govern the burden of proof in customs forfeiture cases.

DOJ asked Congress to abolish this requirement when it enacted CAFRA, but Congress refused to do so. However, Congress did agree that because CAFRA raised the government's burden of proof from probable cause to preponderance of the evidence, the government should not be required to prove its case by a preponderance of the evidence at the time it files the complaint. That is the rule found in section 983(a)(3)(D). The same rule is found twice in CAFRA. The other place is section 983(c), which provides that the "government may use evidence gathered after the filing of a complaint for forfeiture to establish, *by a preponderance of the evidence*, that property is subject to forfeiture." Congress thought it was enough that the government have probable cause at the time it commenced the forfeiture action. Had Congress wished to enact the DOJ's proposal, it would have substituted the words "probable cause" for "adequate evidence. . . to establish the forfeitability of the property" in section 983(a)(3)(D).[9]

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[9] H.R. 1965, a pro-government version of the "Hyde bill" introduced in 1997, would have relieved the government of the need to demonstrate that it had probable cause at the time it filed its complaint. That was one of the more objectionable features of the bill that ultimately resulted in its failure to pass. See H. Rep. No. 105-358, 105th Cong., 1st Sess. 47, 89 (1997).

There is a further problem with the government's proposal. CAFRA exempts certain statutes, mainly the Customs forfeiture laws under Title 19, from its main provisions. Those "carve-out" statutes remain unreformed. 18 U.S.C. §983(i). The government's burden of proof in those proceedings remains probable cause, as provided in 19 U.S.C. §1615. For those statutes, the government must have adequate evidence at the time it files the complaint to establish the forfeitability of the property.

Accordingly, the fact that a Rule 12 motion to dismiss will not normally lie for lack of evidence does not matter. In the unique context of civil forfeiture law, most courts agree that the government must have probable cause at the time it files the complaint. If it does not, then it may suffer dismissal or summary judgment or judgment after a trial.

If the Committee is inclined to adopt proposed Rule G(7)(d)(i) and/or (ii), we urge the Committee to add a new subsection (e) as follows:

> (e) Summary Judgment. Any party may bring a motion for summary judgment after the filing of the complaint pursuant to Fed.R.Civ.P. 56(a) or 56(b).

This proposed new subsection (e) is consistent with existing caselaw, and the intent of CAFRA, as set forth in the legislative history quoted above. If the Rule addresses motions to dismiss pursuant to Fed.R.Civ.P. 12(b), we think it also appropriate, in order to avoid confusion, to address motions for summary judgment in the same rule.

Rule G(7)(e). Subsection (e) supposedly "fills in the gaps" in 18 U.S.C. §983(g), the proportionality provision of the CAFRA. DOJ notes that section 983(g) is silent as to the point in a civil forfeiture proceeding when an Eighth Amendment challenge may be made. The reason section 983(g) is silent on that point is easily explained. The DOJ asked Congress to include a provision exactly like subsection (e) but Congress rejected it. Congress saw no reason to force claimants to wait until the government had conducted discovery on the issue. It decided to leave that to the discretion of the court. There will be some cases where the forfeiture sought is so clearly excessive that civil discovery is not necessary to resolve the issue.

We also see no reason for a hard and fast rule that an excessiveness issue may not be raised unless the claimant has pleaded it as a defense under Rule 8. Case law under Fed.R.Civ.P. 8 should govern this "waiver" issue. There is no need for a special rule pertaining to this one defense. This is a transparent attempt to create another trap for the unwary--something CAFRA specifically sought to avoid.

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Section (8). Trial.

There is no need to provide that trial is to the court unless a party requests a trial by jury under Rule 38. Rule 38 already covers this subject. Rule 38(d) provides that the failure of a party to serve and file a demand as required by Rule 38(b) constitutes a waiver by the party of trial by jury.

This concludes our comments to proposed Rule G. As always, NACDL appreciates the opportunity to offer the Advisory Committee our comments on proposed rule changes that may affect the interests of our clients. We thank you again for the opportunity, and look forward to our continued participation in the rule-making process.

Very truly yours,

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