UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 16-2358

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAMIAN PHILLIPS,

Claimant - Appellant,

and

CURRENCY, $200,000.00 IN U.S.,

Defendant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Loretta C. Biggs, District Judge. (1:14-cv-00836-LCB-LPA)

Argued: January 24, 2018

Decided: February 21, 2018

Before WILKINSON, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

David Allen Bauernfeind, LAW OFFICE OF DAVID BAUERNFEIND, Raleigh, North Carolina, for Appellant. Steven N. Baker, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

DIANA GRIBBON MOTZ, Circuit Judge: In this civil forfeiture case, the United States claims that $200,000 in cash discovered in a storage unit leased by Byron Phillips is subject to forfeiture because the cash is connected to the "exchange [of] a controlled substance." *See* 21 U.S.C. § 881(a)(6). Damian Phillips, Byron's brother, seeks to intervene, contending that the money is his life savings and has nothing to do with drugs. The district court granted the Government summary judgment, holding that Damian lacked standing to intervene. We affirm. Although claimants in civil forfeiture cases need only show a colorable interest in the property to have standing, the undisputed record evidence here establishes that Damian lacks such an interest.

I.

On April 4, 2014, detectives with the Durham County Sheriff's Office received reports of a marijuana odor emanating from a section of storage units at Brassfield Self Storage, located in Durham, North Carolina. After narrowing down the source of the odor with the help of a drug-sniffing dog, officers obtained a search warrant for a storage unit leased to Byron Phillips. Inside the unit, officers discovered a duffle bag with $200,000 in twelve vacuum-sealed plastic bags, though they did not find any marijuana. A drug-sniffing dog later alerted to the cash, indicating an odor of narcotics. Byron had

previously been convicted of maintaining a vehicle or dwelling for controlled substances, and, in a separate incident, felony possession of marijuana.

Damian Phillips filed a verified claim stating that the currency found in the storage unit belonged to him, not his brother, Byron, and that the currency "was not [us]ed or intended to be used in exchange for controlled substances or to traffic in controlled substances." In support, Byron submitted a declaration stating that he had allowed his brother to store Damian's life savings of $200,000 in the storage unit.

During discovery, Damian asserted that he had accumulated the $200,000 between 2003 and 2013 by saving his earned income, a workers' compensation settlement, and unemployment benefits. He explained that he played professional football in the NFL and Arena Football League in 2003, worked as a counselor from 2004 to 2010, worked for a city parks and recreation program from 2004 to 2006, and received the settlement in 2008 and unemployment benefits from 2010 to 2011.

Damian's tax returns show that his adjusted gross income was $20,257 in 2003, $15,118 in 2004, $8,820 in 2006, $43,577 in 2007, $60,434 in 2008, $32,912 in 2009, and $10,168 in 2014. The IRS had no record of tax returns filed in 2005 or from 2010 to 2013. Phillips also produced a copy of a $40,095.45 settlement check. And he stated that he received $216 per week in unemployment benefits from November 2010 to November 2011, equivalent to $11,232 for a full year. The gross income reported in

tax returns, the settlement, and the unemployment benefits add up to $242,613.45.

Damian admitted that in 2006 and 2010, car dealerships repossessed his vehicles, and that in November 2012, he and his wife were four months ($8,400) behind in their rent payments. In addition, his wife filed for bankruptcy on August 27, 2012. Damian also provided estimates of his monthly expenses from 2003 through 2014, ranging from 3 $750 (in months when he allegedly lived with family members and paid no rent) to $4,552 (in the year 2013). The car payments and monthly expenses that Phillips reported he had incurred from 2003 through March 2014 totaled approximately $250,000.

The Government moved for summary judgment, contending that Damian had not submitted sufficient evidence to establish Article III standing. The district court granted the motion, holding that he lacked standing and that the Government was entitled to forfeiture of the $200,000 found in the storage unit. Damian timely appealed. We review de novo the district court's decision to dismiss for lack of standing. *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017).

II.

We initially address a matter of first impression in this circuit: the appropriate test for third-party standing in civil forfeiture cases. To establish Article III standing, a party "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct . . . and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To meet

these requirements, a claimant seeking to challenge a civil forfeiture must have an ownership or possessory interest in the property, "because an owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by return of the seized property." *United States v. $17,900*, 859 F.3d 1085, 1090 (D.C. Cir. 2017) (quoting *United States v. $515,060.42*, 152 F.3d 491, 497 (6th Cir. 1998)); *United States v. Contents of Accounts Nos. 3034504504 & 144-07143*, 971 F.2d 974, 985 (3d Cir. 1992). 4

As in all cases, the "manner and degree of evidence required" to establish standing depends on the "stage[] of the litigation." *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, a claimant in a civil forfeiture case need only *allege* a possessory or ownership interest in the property. *See $17,900*, 859 F.3d at 1090; *United States v. $133,420*, 672 F.3d 629, 638 (9th Cir. 2012). "In response to a summary judgment motion, however, the [claimant] can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

Our court has not previously addressed the "manner and degree of evidence required" for a claimant to establish standing at the summary judgment stage in a civil forfeiture proceeding. Every court of appeals that has addressed the issue in the last twenty years has used the "colorable interest" test, which requires a claimant to present "some evidence of ownership" beyond the mere assertion of an

ownership interest in the property. *See United States v. $81,000*, 189 F.3d 28, 35 (1st Cir. 1999); *Torres v. $36,256.80*, 25 F.3d 1154, 1158 (2d Cir. 1994); *Mantilla v. United States*, 302 F.3d 182, 185 (3d Cir. 2002); *Kadonsky v. United States*, 216 F.3d 499, 508 (5th Cir. 2000); *United States v. $515,060.42*, 152 F.3d 491, 497–98 (6th Cir. 1998); *United States v. $239,400*, 795 F.3d 639, 642–43 (7th Cir. 2015); *United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003); *$133,420*, 672 F.3d at 639 (9th Cir.); *United States v. $148,840*, 521 F.3d 1268, 1276 (10th Cir. 2008); *$17,900*, 859 F.3d at 1090 (D.C. Cir.).[1]

We agree that the colorable interest test applies to determine a claimant's standing to challenge a civil forfeiture. As other courts have recognized,

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[1] One older case held that ownership "by one who does not exercise dominion and control over the property is insufficient to establish standing." *United States v. 5000 Palmetto Drive*, 928 F.2d 373, 375 (11th Cir. 1991). In another even older case, the Eighth Circuit suggested that ownership might require "attendant characteristics of dominion and control." *United States v. One 1945 Douglas C–54 (DC–4) Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979). However, the court did not resolve the question of standing in that case, instead remanding for the district court to do so. *See id.* at 28–29. And the Eighth Circuit has since clarified that the burden of establishing standing in civil forfeiture cases "is not rigorous," because a "claimant need only show a *colorable interest* in the property." *One Lincoln Navigator 1998*, 328 F.3d at 1013 (emphasis added) (internal quotation marks and citation omitted).

demanding more than "some evidence" of ownership in such cases would be inappropriate in part because of "how challenging it can be to document ownership of property seized by law enforcement." *See $17,900*, 859 F.3d at 1090. This is especially true for cash, as "the very qualities that make paper money useful for illicit activity — in particular, its untraceability — often make it difficult to prove that any cash is legitimate, no matter its source." *Id.*

Moreover, applying the colorable interest test "preserves the important distinction between constitutional standing and the merits" of a civil forfeiture case. *Id.* at 1091. Although a claimant bears the burden of establishing standing, the government bears the burden of proving, on the merits, "that the property is subject to forfeiture." 18 U.S.C. § 983(c)(1). Here, for example, the Government contends that the currency is linked to the "exchange [of] a controlled substance." Damian contends to the contrary, namely, that the cash is his life savings, not drug money. Requiring him to prove that assertion by demonstrating something more than a colorable interest could impermissibly shift the merits burden to him — essentially requiring *him* to prove that the money is *unconnected* to drug activity.

Our *criminal* forfeiture cases — in which we have held that, to have statutory standing, a third party must demonstrate "dominion and control" over the forfeited property — in no way conflict with our holding today. *See In re Bryson*, 406 F.3d 284, 291 (4th Cir. 2005); *United States v. Morgan*, 224 F.3d 339, 343 (4th Cir. 2000). In those cases, we did not address Article III standing to challenge a forfeiture

at all, but rather described the *statutory* standing requirements unique to criminal forfeiture proceedings, contained in 21 U.S.C. § 853(n)(6).

Because criminal forfeiture is an action brought against a defendant as part of the prosecution of that defendant, there is only a very limited possibility for a third party to intervene: "Following the entry of an order of [criminal] forfeiture," a third party may, within thirty days, "petition the court for a hearing to adjudicate the validity of his alleged interest in the property." *Id.* §§ 853(n)(1), (2). At this hearing, the petitioner must establish that he or she had a "legal right, title, or interest in the property" at the time of the criminal acts that gave rise to the forfeiture. *Id.* § 853(n)(6)(A). These statutory requirements apply only in criminal forfeiture cases, not in civil forfeiture cases.

Furthermore, the requirement in § 853(n)(6) that a claimant provide more evidence of ownership in criminal forfeiture cases does not present the same risk of shifting the merits burden away from the Government. This is so because § 853(n) allows a claimant to intervene in a criminal forfeiture proceeding only *after* the court has already resolved the merits and ordered forfeiture. By contrast, in civil forfeiture cases, a claimant with standing may intervene earlier to contest the forfeiture on the merits.

For these reasons, we hold that a claimant challenging a civil forfeiture must have a colorable interest in that property, which he or she must support with some evidence beyond a mere assertion of ownership to survive summary judgment.

III.

Having articulated what claimants must show to establish standing in a civil forfeiture case, we turn to whether Damian Phillips has met that requirement here. In doing so, we view the evidence in the light most favorable to him and draw all reasonable inferences in his favor. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (per curiam).

Damian does not contend that he had a possessory interest in the money; instead, he claims an ownership interest. Under the colorable interest test, a claimant alleging an ownership interest in seized property must, at a minimum, present some evidence "regarding how the claimant came to possess the property." *$515,060.42*, 152 F.3d at 498. Although courts must refrain from weighing the evidence on summary judgment, courts "may lawfully put aside testimony" that is "undermined either by other credible evidence" or by "physical impossibility." *See $17,900*, 859 F.3d at 1093 (internal quotation marks and citations omitted).

Here, Damian alleged facts purporting to show that beginning in 2003, he accumulated $200,000, which he then secured in his brother's storage unit, where it was uncovered in 2014. But Damian presented no objective evidence corroborating those facts. Indeed, the undisputed record evidence demonstrates exactly the opposite: that he simply could not have saved $200,000.

As summarized above, Damian's total income from 2003 to 2014 was $242,613.45, adding up all income that he reported from any source, including his unemployment benefits. If Damian saved $200,000,

he would have had $42,613.45 on which to live during that twelve-year period — but according to Damian himself, his expenses in 2013 *alone* totaled $54,624. Viewed in total, the expenses Damian acknowledges from 2003 through March 2014 — $250,000 — were *greater* than his income, meaning he could not have saved *any* money, let alone $200,000.

The record contains further evidence of Damian's significant financial troubles during this period, including two car repossessions, his wife's bankruptcy, failure to file tax returns in 2005 and 2010–2013, and delinquency in making rent payments. Though we need not rely on this additional evidence, it confirms that Phillips cannot be the owner of the $200,000 found in the storage unit.

To resist this conclusion, Damian relies heavily on his "consistent, unwavering assertion of ownership" in the $200,000. Appellant Reply Br. at 11. That assertion, no matter how unwavering, does not suffice to show the colorable interest needed to establish standing, for the colorable interest test requires some evidence *beyond* a mere assertion.

Damian also suggests that the years in which the IRS had no tax returns from him constitute "blanks" in the evidence that must be construed in his favor. *See* Oral Arg. at 10:10–10:25. In Damian's view, this court must presume that he had legitimate income in years for which no evidence of income exists. Damian is mistaken. We construe *evidence* in the light most favorable to the non-movant; we do not similarly construe an absence of evidence. Were it

otherwise, parties opposing summary judgment would be best advised to submit no evidence at all, assured that the court would fill the void with imaginary evidence that favors them.

In sum, Damian did not merely fail to provide some evidence to show a colorable interest in the property; the undisputed evidence affirmatively proves the contrary. We therefore affirm the judgment of the district court that Damian lacked standing.[2]

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[2] Damian also argues that the district court should have held an evidentiary hearing on the question of standing. But he cites no authority suggesting that a district court ever *must* hold such a hearing; the cases he points to merely indicate that a district court *may* do so. Moreover, because Damian did not request such a hearing below, he cannot raise that argument for the first time on appeal. *See In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

Plaintiff,

v. 1:14-cv-836

$200,000 IN U.S. CURRENCY

Defendant.

MEMORANDUM OPINION AND ORDER

LORETTA C. BIGGS,
District Judge.

The United States of America ("Plaintiff" or the "Government") initiated this *in rem* civil forfeiture proceeding on September 30, 2014, pursuant to 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981(a)(1)(C) for the forfeiture of $200,000 in U.S. Currency ("Defendant Currency"). (Compl. at 1, ECF No. 1.) On January 6, 2015, Damian Phillips filed a Verified Claim to Defendant Currency, (Claim, ECF No. 7), and an Answer to the Complaint (Answer, ECF No. 8). Before the Court is Plaintiff's Motion for Summary Judgment, filed on March 4, 2016, which includes a motion to strike Mr. Damian Phillips' claim and answer based on lack of standing. (ECF No. 15; ECF No. 16 at 6.) For the reasons that follow, Plaintiff's Motion for Summary Judgment is granted.

I. STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it might affect the outcome of the litigation, and a dispute is

"genuine" if the evidence would permit a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When the nonmoving party bears the burden of proof on an issue, the moving party is entitled to judgment as a matter of law if the nonmoving party "fail[s] to make a sufficient showing on an essential element of [his] case." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (noting that a "complete failure of proof" on an essential element of the case renders all other facts immaterial).

The party seeking summary judgment bears the initial burden of "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." Id. at 325. To defeat summary judgment, the nonmoving party must designate "specific facts showing that there is a genuine issue for trial." Id. at 324. The nonmoving party must support its assertions by citing to particular parts of the record, such as affidavits, depositions, answers to interrogatories, and admissions on file. Fed. R. Civ. P. 56(c)(1); Celotex Corp., 477 U.S. at 324.

When reviewing a motion for summary judgment, the court must "'resolve all factual disputes and competing, rational inferences in the light most favorable'" to the nonmoving party. Rossignol v. Voorhaar, 316 F.3d 516, 523 (4th Cir. 2003) (quoting Wightman v. Springfield Terminal Ry. Co., 100 F.3d 228, 230 (1st Cir. 1996)). This standard applies in forfeiture cases. See United States v. Bailey, 926 F. Supp. 2d 739, 753 (W.D.N.C. 2013).

II. FACTS

On April 14, 2014, the Durham Police Department advised the Durham County Sheriff's Office that they had received information that a "strong odor of marijuana" was emitting from a section of storage units located at the Brassfield Self Storage facility located at 2136 Page Road, Durham, North Carolina. (ECF No. 1-1 ¶ 5.) A Durham police officer met with members of the Sheriff's Department at the storage facility and directed them to building 200, units 11-21, the area he was told smelled like marijuana. (Id. ¶ 5.)

The Sheriff's Department requested a K-9 unit to conduct a free air sniff of the area in question. Deputy Carson responded with his K-9 "Frisco" and was directed to building 200, units 11-21. (Id. ¶ 6.) "Frisco" stopped and gave a positive indication of the scent of narcotics at unit 18. After giving this positive indication, Deputy Carson took "Frisco" to a set of interior units. "Frisco" did not alert on any of the interior units. Deputy Carson then had "Frisco" return to the line of units 11-21, building 200 and "Frisco" again alerted at unit 18. (Id.) Deputy Carson has been a canine handler and paired with

"Frisco" for over six years. Together they have over 1,000 hours of training and have been certified with the National Police Canine Association and the Durham Police Department's K-9 Certification Course in Narcotics. (Id. ¶ 7.)

Based on the information received from the Durham Police Department and the positive canine alerts, the Sheriff's Department applied for and received a state search warrant for building 200, unit 18. (Id. ¶ 8.) With the assistance of management, the officers gained entrance to the unit. Inside were the following items: "a small desk, four tires, a suitcase, a black/grey duffle bag, burgundy duffle bag, a boxing bag, and a few other miscellaneous items." (Id. ¶ 9.) The suitcase found in the unit was "strong with the odor of raw marijuana, though none was found inside." (Id.) The black/grey duffle bag was located in the desk and contained a large sum of U.S. currency, in 12 vacuum-sealed plastic baggies. "The burgundy duffle bag contained two digital scales." (Id.) The vacuum-sealed baggies of currency, scales, suitcase, and duffle bags were seized and transported back to the Sheriff's Department. (Id.) At the Sheriff's Department, "Frisco" once again alerted on the seized currency which had been placed in a brown paper bag next to other, empty, paper bags. (Id. ¶ 10.) The currency was counted and totaled $200,000.00 in U.S. currency.

The Sheriff's Department further determined, through its investigation, that Byron T. Phillips rented storage unit 18 on November 16, 2012. A record of unit access using Phillips' gate access number, 1929, revealed that the code had been used numerous times between November 16, 2012 and

April 4, 2014 at all times of day and night. (Id. ¶ 11.) A check of Byron Phillips' criminal record revealed that he has served jail sentences for drug offenses involving marijuana in 2007 and 2009. Claimant, in this case, is Damian Phillips ("Mr. Phillips" or "Claimant"), Byron Phillips' brother. He claims that he is the owner of Defendant Currency and that he had placed the seized property in the storage unit for safekeeping.

III. STANDING

As a threshold matter, the Government seeks to have Mr. Phillips' claim stricken on the basis that he lacks standing to contest the forfeiture. A claimant seeking the return of forfeited property must have standing to challenge the forfeiture. United States v. Real Prop. Located at 5201 Woodlake Drive, 895 F. Supp. 791, 793 (M.D.N.C. 1995). The burden of proof is on the claimant to establish standing by a preponderance of the evidence. United States v. $119,030.00 in U.S. Currency, 955 F. Supp. 2d 569, 576 (W.D. Va. 2013). Standing is derived from statute and Article III of the U.S. Constitution. Real Prop. Located at 5201 Woodlake Drive, 895 F. Supp. at 793. A claimant must establish both statutory and Article III standing to proceed with his claim. United States v. $7,000.00 in U.S. Currency, 583 F. Supp. 2d 725, 729 (M.D.N.C. 2008) (citing United States v. $487,825.00 in U.S. Currency, 484 F.3d 662, 664 (3d Cir. 2007)). Statutory standing is not at issue in this action, (ECF No. 16 at 7), thus the Court need only examine whether Mr. Phillips has met his burden with respect to Article III standing.

Article III standing exists if a claimant "has a legally cognizable interest in the property that will be injured if the property is forfeited to the government." $7,000 in U.S. Currency, 583 F. Supp. 2d at 729 (quoting United States v. $38,000 in U.S. Currency, 816 F.2d 1538, 1543 n.12 (11th Cir. 1987)). Claimant's injury must be "'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). "Courts generally do not deny standing to a claimant who is either the colorable owner of the [property] or who has any colorable possessory interest in it." $7,000 in U.S. Currency, 583 F. Supp. 2d. at 729 (alteration in original) (quoting United States v. Contents of Accounts Nos. 3034504 and 144-07143, 971 F.2d 974, 985 (3d Cir. 1992)).[3] One asserting an ownership interest must support the claim with evidence beyond a bare assertion of ownership. Id. at 729–30. There must be "other indicia of true ownership." Id. at 730 (citing United States v. One Lot or Parcel of Ground Known as 1077 Kittrell St., Norfolk, Va., 947 F.2d 942, 1991 WL 227792, at *2 (4th Cir. Nov. 7, 1991) (unpublished table decision)); see also United States v. Morgan, 224 F.3d 339, 343 (4th Cir. 2000) (same in criminal forfeiture context). "Ownership may be established by proof of actual possession, control, title, and financial stake." $119,030 in U.S. Currency, 955 F. Supp. 2d at 576 (quoting United States v. One (1) 1983 Homemade

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1 A colorable interest has been defined as an interest that is "plausible". See Engle v. Isaac, 456 U.S. 107, 122 (1982) (using "colorable" and "plausible" interchangeably in the habeas context).

Vessel Named Barracuda, 625 F. Supp. 893, 897 (S.D. Fla. 1986)).

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Mr. Phillips does not, nor can he, claim a possessory interest in Defendant Currency. He was not present at the time Defendant Currency was seized and neither was he the owner nor the renter of the storage unit in which Defendant Currency was found. In addition, no personal items of Claimant were found with or near Defendant Currency to connect it with Mr. Phillips. Rather, Mr. Phillips argues that he is the owner of the seized property.[4]

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[2] A number of district courts, both in this circuit and others, "generally look to dominion and control, such as [actual] possession, title, [and] financial stake, as evidence of an ownership interest" to establish Article III standing. $7,000 in U.S. Currency, 583 F. Supp. 2d at 729 (quoting United States v. Funds from Prudential Sec., 300 F. Supp. 2d 99, 107 (D.D.C. 2004)). Though the Fourth Circuit has not published an opinion addressing whether evidence of dominion or control is required in order to show standing in civil forfeiture cases, see United States v. Batato, --- F.3d ---, 2016 WL 4254916, at *22 n.6 (4th Cir. Aug. 12, 2016), the Court in $7,000 in U.S. Currency, concluded that "the Fourth Circuit would almost assuredly apply the 'dominion and control' test, which it has applied in an unpublished civil forfeiture opinion and in the criminal forfeiture context." 583 F. Supp. 2d at 729. Mr. Phillips' claim would easily fail under the heightened standard articulated in these cases. The Court need not, however, forecast how the Fourth Circuit might rule on this issue as Mr. Phillips, in addition to having no possessory interest in Defendant

Mr. Phillips' evidence in support of his claim of ownership includes his own verified claim, a declaration from his brother (the renter of the unit in which the seized property was found), and assertions concerning what he claims is the legitimate source of the currency. (Resp. at 3–4, ECF No. 19.)

The verified claim of Mr. Phillips and the declaration of his brother, without more, are insufficient to support that he has standing. Mr. Phillips' verified claim merely states that he is the owner of Defendant Currency and that the property was not used or intended to be used in exchange for controlled substances. See United States v. $104,250 in U.S. Currency, 947 F. Supp. 2d 560, 564–65 (D. Md. 2013) (finding no standing when only evidence was self-serving testimony that property was claimant's); see also United States v. $447,815 in U.S. Currency, No. 1:09cv204, 2011 WL 4083640, at *3 (M.D.N.C. July 26, 2011) (claims of ownership, standing alone, are insufficient to establish standing (citing Kadonsky v. United States, 216 F.3d 499, 508 (5th Cir. 2000))). Further, the declaration of his brother offers little to corroborate Mr. Phillips' ownership claim. The declaration provides, in pertinent part, that Byron Phillips rented the storage unit in which the seized property was found, that he allowed Mr. Phillips access to the unit, and that, to the "best of his knowledge," no one else had

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Currency, has likewise failed to demonstrate any colorable ownership interest.

such access. (ECF No. 19-2.) There is no assertion that he ever saw Mr. Phillips in possession of Defendant Currency, that he witnessed Mr. Phillips place Defendant Currency in the storage unit, or that he had any specific knowledge of the source of Defendant Currency except for a blanket reference to Defendant Currency as Claimant's life savings. (Id.)

The Court must therefore look to the other "indicia of ownership" offered by Mr. Phillips to determine whether it is sufficient to show that he has a colorable interest and therefore a financial stake in Defendant Currency to establish standing.[5] Mr. Phillips asserts that he earned Defendant Currency from employment over the 11 years prior to its seizure and that he was frugal with these earnings during those years. Specifically, he states that he accrued most of the Defendant Currency from playing professional football in 2003 in addition to receiving a "sizable disability settlement" in 2009. (ECF No. 19 at 4, 8.) Mr. Phillips played football for three different teams in two separate leagues, both the NFL and the AFL, in 2003. (ECF No. 19-4 at 2.) However, he reports only each team's "potential base

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[3] In evaluating an assertion of financial stake in seized property for purposes of standing, courts in this circuit consider whether a claimant has the financial means to accumulate the amount of money that was seized. See, e.g., United States v. $122,640 in U.S Currency, 81 F. Supp. 3d 482, 493–94 (D. Md. 2015); see also 1077 Kittrell St., 1991 WL 227792, at *2.

salary," not what he actually earned with any teams, and submits no tax returns or bank statements to corroborate his assertions. (Id.) Further, while Mr. Phillips did receive a settlement check in 2009 from the Indiana Firebirds, it was for $ 40,090.95, not the $50,000 he alleges. (ECF No. 16-13.)

The Government argues that Mr. Phillip's explanation of the source of the funds is not plausible given the lack of evidence confirming Defendant Currency's source. See United States v. $10,000 in U.S. Currency, 348 F. Supp. 2d 612, 617 (M.D.N.C. 2004) (explaining that "[t]he mere allegation of a highly unlikely legitimate source of income without some support to give the allegation credibility" does not rise to the level of an ownership interest (citation omitted)). The Government also argues that Mr. Phillips' behavior during the years in question "contradicts his assertions that he was in possession of a cash hoard." (ECF No. 21 at 3.)

The Government's evidence includes, among other things, the following: (1) Claimant's wife filed for bankruptcy on August 27, 2012, and by November 2012 the couple was $8,400 in arrears on the lease for their home (ECF No. 16-7 ¶¶ 2, 8; ECF No. 16 at 6); (2) Claimant's credit report reveals a number of accounts in Claimant's name that are currently listed as "derogatory" (ECF No. 16-12 at 1); (3) Two cars owned by Claimant were repossessed during the period in question (ECF No. 19-4 at 4–5); and (4) Claimant applied for and received unemployment benefits for one full year (id. at 11). According to the Government, such evidence, in combination with Claimant's modest verifiable income, "is inconsistent with someone possessing [$200,000] in

cash." $122,640 in U.S. Currency, 81 F. Supp. 3d at 494; see also 1077 Kittrell St., 1991 WL 227792, at *2. (concluding that plaintiff lacked standing because the overwhelming evidence showed that he could not "identify a credible source for these funds" and "what evidence he did present was inconsistent"). This Court agrees.

Further, Mr. Phillips' explanation for allegedly keeping Defendant Currency in closets in his home over an eleven-year period, and then in vacuum-sealed baggies in his brother's storage unit, is not plausible. He offers no explanation as to why Defendant Currency was contained in vacuum-sealed baggies. Some courts have noted that such a storage system can be meant to "hamper canine detection." United States v. $14,800 in U.S. Currency, No. ELH-11-cv-3165, 2012 WL 4521371, at *7 (D. Md. Sept. 28, 2012) (citing United States v. $84,615 in U.S. Currency, 379 F.3d 496, 502 (8th Cir. 2004)); see also $122,640 in U.S. Currency, 81 F. Supp. 3d at 493 ("Frequently, drug traffickers and couriers will place the currency in vacuum-sealed plastic bags to disguise the odor of controlled substances emanating from the currency.") He further states that he kept Defendant Currency first in his closet and then in the storage unit due to his discomfort with the banking industry, noting the Great Recession as an example.

Reviewing the evidence in the record as a whole, the Court concludes Mr. Phillips' uncorroborated evidence or lack thereof is not plausible and is insufficient as a matter of law to support that he has standing to challenge forfeiture of Defendant Currency. Claimant has failed to carry his burden of

establishing standing and his Claim and Answer must be stricken.

IV. GOVERNMENT IS ENTITLED TO FORFEITURE

Although Claimant lacks standing, to prevail on its motion for summary judgment, "[t]he Government must still show an entitlement to a forfeiture judgment as a matter of law." United States v. 998 Cotton St., Forsyth Cty, N.C., No. 1:11-CV-356, 2013 WL 1192821, at *9 (M.D.N.C. Mar. 22, 2013). The Civil Asset Forfeiture Reform Act of 2000 places the burden on the government to establish that the currency is subject to forfeiture. 18 U.S.C. § 983(c)(1); see, e.g., United States v. Mondragon, 313 F.3d 862, 865 (4th Cir. 2002). The Government must show, by a preponderance of the evidence, that it was entitled to seize Defendant Currency based on "the totality of the circumstances." United States v. $864,400 in U.S. Currency, 1:05CV919, 2009 WL 2171249, at *2 (M.D.N.C. July 20, 2009), aff'd, 405 F. App'x 717 (4th Cir. 2010).

The Government contends that it is entitled to civil forfeiture on two grounds. The first is based on 21 U.S.C. § 881(a)(6), which permits forfeiture of "[a]ll moneys . . . furnished, or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys . . . used or intended to be used to facilitate any violation of this subchapter."

The second is based on 18 U.S.C. § 981(a)(1)(C), which provides for forfeiture of any property that

"constitutes or is derived from proceeds traceable to . . . any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such an offense." "Specified unlawful activity" includes "dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year[.]" 18 U.S.C. §§ 1961(1)(A), 1956(c)(7)(A).

To show that property is subject to forfeiture, the Government must allege that sufficient facts "are more likely true than not." $864,400 in U.S. Currency, 2009 WL 2171249, at *2 (citing United States v. Kiulin, 360 F.3d 456, 461 (4th Cir. 2004)). Circumstantial evidence is sufficient to establish that Defendant Currency is either proceeds of, or traceable to, criminal activity. See United States v. $433,908 in U.S. Currency, 473 F. Supp. 2d 685, 690 (E.D.N.C. 2007) (citing United States v. Thomas, 913 F.2d 1111, 1117 (4th Cir. 1990)). Proceeds need not be tied to any particular drug transaction. 998 Cotton St., Forsyth Cty., N.C., 2013 WL 1192821, at *13 (citing United States v. 1982 Yukon Delta Houseboat, 774 F.2d 1432, 1435 n.4 (9th Cir. 1985)). Here, the Government contends that there is overwhelming circumstantial evidence of narcotics trafficking in the storage unit rented to an individual with a history of drug trafficking. This evidence includes the "strong odor of marijuana" coming from the storage unit in question, the $200,000 in cash located in vacuum-sealed baggies, the dog alerts to the storage unit and the currency, and the presence of two sets of digital scales.

The Supreme Court has held that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert." Florida v. Harris, 133 S. Ct. 1050, 1057 (2013). As such, an alert from a properly trained canine is entitled to a presumption of reliability. Id. Courts in this district have independently found the same. See, e.g., $864,000 in U.S. Currency, 2009 WL 2171249, at *3. In this case, there is evidence in the record that canine "Frisco" has been trained and certified to detect marijuana, cocaine, and heroin. (ECF No. 16-4 ¶ 1.) "Frisco" alerted to the Defendant Currency three times: twice in the field, and a third time in a controlled environment. (ECF No. 1-1 ¶¶ 6, 10.)

Additionally, courts have held that possession "large sums of cash" can be "strong evidence" that the cash is related to drug activity. United States v. Currency, U.S., $147,900, 450 F. App'x 261, 264 (4th Cir. 2011) (quoting United States v. $84,615 in U.S. Currency, 379 F.3d 496, 501–02 (8th Cir. 2004)); see also United States v. $252,300 in U.S. Currency, 484 F.3d 1271, 1275 (10th Cir. 2007) ("A large amount of currency, while not alone sufficient to establish a connection to a drug transaction, is strong evidence of such a connection.") The fact that the cash was stored in vacuum-sealed bags is also significant as such a storage system can be meant to "hamper canine detection." $14,800 in U.S. Currency, 2012 WL 4521371, at *7.

Lastly, it cannot be ignored that Mr. Phillips' brother, the renter of the storage unit in question, was twice convicted of marijuana-related offenses. Overlooking such a fact could potentially "[a]llow[]

drug traffickers to shelter their profits by placing legal title to their property and possessions in the names of uninvolved third parties." United States v. 630 Ardmore Drive, City of Durham, Parkwood Twp., Durham Cty., N.C., 178 F. Supp. 2d 572, 583 (M.D.N.C. 2001); see also In re Bryson, 406 F.3d 284, 291 (4th Cir. 2005) (explaining that, to prevent manipulation of ownership by criminals, courts must look beyond bare legal title).

The Court concludes that the evidence offered by the Government, taken as a whole, is sufficient to demonstrate that Defendant Currency constitutes or is traceable to proceeds for illegal activity involving controlled substances and is therefore subject to forfeiture.

Mr. Phillips raises in his Response that, even if the Government shows entitlement to forfeiture by a preponderance of the evidence, that he is an "innocent owner" of Defendant Currency. See 18 U.S.C. § 983(d)(1) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute."). However, "[i]f the claimant cannot establish that [he] has the required ownership interest, then [his] innocence is irrelevant." United States v. Munson, 477 F. App'x 57, 67 (4th Cir. 2012) (first alteration in original) (citation omitted). As this Court has concluded that Mr. Phillips has failed to show even a colorable ownership interest in Defendant Currency, see § III, *supra*, the innocent owner defense does not apply here. See 998 Cotton St., 2013 WL 1192821, at *9 (concluding that because claimant was "not an 'owner' for purposes of the civil forfeiture statute, she [could not] be an 'innocent owner'").

IT IS THEREFORE ORDERED that Mr. Phillips' claim to Defendant Currency (ECF No. 7) and Answer to the Complaint (ECF No. 8) are STRICKEN due to lack of standing.

IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment (ECF No. 15) is GRANTED and Defendant Currency shall be and is hereby, forfeited to the United States of America pursuant to 21 U.S.C. § 881(a)(6).

This, the 28th day of September, 2016.

/s/ Loretta C. Biggs United State District Judge