APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed October 17, 2019]

No. 18-3201
(D.C. No. 6:15-CV-01230-JWB) (D. Kan.)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

$144,780.00 IN UNITED STATES CURRENCY, more or less,

Defendant.

NATHAN L. DUCKWORTH,

Claimant-Appellant.

ORDER AND JUDGMENT[*]

Before **TYMKOVICH**, Chief Judge, **BALDOCK** and **HOLMES**, Circuit Judges.

This is a civil forfeiture case brought under the Controlled Substances Act, 21 U.S.C. § 881(a)(6), seeking forfeiture of $144,780 in United States currency. After a bench trial, the district court concluded

[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the Government established by a preponderance of the evidence that Claimant–Appellant Nathan Duckworth intended to exchange the $144,780 seized from him during a traffic stop for controlled substances. Accordingly, the district court entered a judgment forfeiting the currency to the United States. Claimant appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

On May 12, 2015, Trooper James McCord of the Kansas Highway Patrol stopped a rented 2015 Chevrolet Tahoe traveling westbound on Interstate 70 in Ellis County, Kansas, after he observed the vehicle exceeding the speed limit. Claimant was driving the vehicle, and his companion, Walter Weathers, Jr., was in the front passenger seat. When Trooper McCord approached the Tahoe, he smelled the odor of burnt marijuana emanating from the vehicle. Trooper McCord asked Claimant and Weathers about their travel plans, and Claimant responded they were traveling to Denver for a week-long family vacation. Trooper McCord found this suspicious because the rental agreement indicated the Tahoe was due back in Kansas City at noon that same day and because there was no luggage in the vehicle—only two shirts and a pair of pants were hanging in the backseat. Both Claimant and Weathers denied smoking marijuana in the Tahoe, and they told Trooper McCord there were not any drugs in the vehicle.

Based on the smell of marijuana, Trooper McCord searched the Tahoe. The search revealed a backpack between the driver and passenger seat containing $144,780 rubber-banded together in two clear, vacuum-sealed plastic bags. When Trooper McCord asked Claimant why he was carrying such a large sum of

currency, Claimant said it was none of his business. During the search, Trooper McCord also found marijuana "gleanings"—small particles of marijuana—and tobacco gleanings in the Tahoe. The marijuana gleanings were photographed but never collected or tested. Trooper McCord did not find any burnt marijuana, cigars, rolling papers, or other drug paraphernalia in the Tahoe. A criminal background check revealed Claimant had two prior arrests for drug trafficking. Trooper McCord then moved the Tahoe to Kansas Patrol Troop D Headquarters. While at Troop D Headquarters, Kansas Highway Patrol Trooper William Gray conducted a canine sniff of the currency. Jaxx, a certified patrol dog, alerted to the presence of a narcotic odor on the currency.

The Government filed a complaint asserting the $144,780 seized from Claimant was subject to forfeiture under 21 U.S.C. § 881(a)(6) because the currency was intended to be furnished in exchange for controlled substances or was proceeds of an illegal drug transaction. Claimant filed a notice of claim and an answer to the complaint in which he asserted ownership of the currency, alleging the currency was legitimately derived and not connected to illegal drug activity. Claimant also moved to suppress the currency and other evidence discovered during the traffic stop, arguing the search violated the Fourth Amendment. Following a suppression hearing, the district court concluded Trooper McCord lawfully stopped Claimant's vehicle and probable cause existed to search the vehicle based on Trooper McCord's credible testimony that he smelled marijuana. Accordingly, the district court denied Claimant's motion to suppress.

At the bench trial, the Government introduced the testimony of Trooper Ryan Wolting of the Kansas

Highway Patrol over Claimant's objection. Trooper Wolting testified that on October 12, 2014, Claimant was a passenger in a rental vehicle heading eastbound on 1-70 in Ellsworth County, Kansas. Claimant and his wife, who was driving the vehicle, told Trooper Wolting they were unemployed and traveling back to Kansas City from Hays, Kansas, where they spent a one-night get away from home. Trooper Wolting searched the vehicle and discovered "approximately nine pounds of vacuum-sealed marijuana in one-pound individual packages, a loaded pistol in the center console, and approximately $5,320 in [Claimant's] pants pocket[,]" all of which Claimant claimed as his property. In the instant proceeding, Claimant admitted the 2014 stop occurred, but he denied ownership of the marijuana and testified he was neither charged nor convicted of marijuana possession or illegal possession of a firearm.

Claimant objected to Trooper Wolting's testimony on relevance grounds. While the district court allowed Trooper Wolting to testify over Claimant's objection, it also recognized Federal Rule of Evidence 404(b) places limitations on prior criminal acts. The court indicated it would examine the issue further and possibly disregard the evidence in making its ultimate rulings. In its order granting forfeiture, the district court stated it did not consider Trooper Wolting's testimony in reaching its decision.

The district court found Claimant's testimony regarding the purpose of his trip to Denver not credible. Claimant testified he was traveling to Denver to drop off $144,780 with Ruben Romero, a social media acquaintance he had never met in person, as an investment in a twelve-city music tour. Based on the evidence presented at trial, the district court found the

"tour idea was little more than a concept (or perhaps more accurately, a pretext), with no artists, venues, dates, locations (aside from Kansas City) or other details agreed to between Romero and Claimant." As to where the $144,780 came from, Claimant testified its sources included: (1) income from his event promotion business and (2) a $40,000 loan from Mustafa Ali, a business associate. While the district court questioned Claimant's alleged sources of the $144,780 due to discrepancies in his tax returns, it found his explanation "at least plausible."

Ultimately, the district court concluded the Government failed to show by a preponderance of evidence the $144,780 constituted proceeds traceable to an illegal drug exchange. The court held, however, Claimant more likely than not intended to exchange the currency for controlled substances. Accordingly, the district court entered a judgment forfeiting the $144,780 to the United States.

II.

Claimant raises three issues on appeal. First, he argues the district court erred in denying his motion to suppress evidence discovered during the traffic stop resulting in the seizure of the $144,780. Second, Claimant contends the district court abused its discretion in allowing Trooper Wolting to testify concerning the 2014 traffic stop. Third, Claimant argues the Government presented insufficient evidence to support the district court's order of forfeiture. We address each issue in turn.[1]

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[1] Claimant also argues the district court erred in denying his motion for summary judgment and his motion for judgment as a matter of law. The denial of summary judgment, as is the case here, ordinarily is not appealable. *Castillo v. Day*, 790 F.3d 1013,

A.

First, Claimant contends the district court erred in denying his motion to suppress the $144,780 and other evidence discovered during the traffic stop. Claimant does not question the validity of the initial stop on appeal, so we need not review its legality here. Nor does Claimant dispute the well-established law that "the odor of marijuana by itself is sufficient to establish probable cause." *See United States v. Johnson*, 630 F.3d 970, 974 (10th Cir. 2010). Rather, he argues the district court erred in relying on evidence seized during the search—namely, the $144,780—to support its finding of probable cause.

Before we turn to the merits of Claimant's argument, we must address the appropriate standard of review. As Claimant acknowledges, he did not make this argument before the district court and has thus forfeited the argument. Accordingly, we review for plain error. *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011). To establish plain error, Claimant must show "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Although this is a civil case, "the government will be barred from introducing evidence illegally seized in violation of the [F]ourth [A]mendment to prove a claim of forfeiture." *United States v. $149,442.43*, 965 F.2d 868, 872 (10th Cir. 1992). "In reviewing a district

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1017 (10th Cir. 2015). Nonetheless, Claimant's basis for both these arguments is that the Government failed to present sufficient evidence to support forfeiture of the $144,780. As noted above, whether the Government presented sufficient evidence in this case is the third and final issue we address.

court's denial of a motion to suppress, we view the evidence in the light most favorable to the Government and accept the district court's factual findings unless clearly erroneous." *United States v. Gilmore*, 776 F.3d 765, 768 (10th Cir. 2015). "We review de novo the ultimate determination of the reasonableness of a search . . . under the Fourth Amendment." *Id.* But we can, of course, "affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court." *United States v. Fager*, 811 F.3d 381, 385 (10th Cir. 2016) (quoting *United States v. Mabry*, 728 F.3d 1163, 1166 (10th Cir. 2013)).

"[W]hen . . . officers have probable cause to believe that an automobile contains contraband, the Fourth Amendment does not require them to obtain a warrant prior to searching the car for and seizing the contraband." *Florida v. White*, 526 U.S. 559, 563-64 (1999). "Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence." *United States v. Chavez*, 534 F.3d 1338, 1344 (10th Cir. 2008) (quoting *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1212 (10th Cir. 2001)). Our cases provide the smell of marijuana alone establishes probable cause to search a vehicle. *United States v. Snyder*, 793 F.3d 1241, 1244 (10th Cir. 2015) (collecting cases).

The record clearly establishes Trooper McCord had probable cause to search the Tahoe based on the odor of marijuana he smelled coming from the vehicle. At the suppression hearing, Trooper McCord testified he is trained to detect marijuana and is familiar with the smell of marijuana. Trooper McCord also testified he detected an odor of marijuana coming from the Tahoe

and told Claimant someone had smoked marijuana in the vehicle. The district court found this testimony credible and concluded Trooper McCord had probable cause to conduct the search. Finding no clear error in the district court's factual findings, the smell of marijuana emanating from the Tahoe supplied Trooper McCord with probable cause to search the vehicle.

We further conclude the district court did not erroneously rely on evidence seized during the search as a basis for finding probable cause existed. In its probable cause ruling, the district court focused exclusively on Trooper McCord's testimony concerning the smell of marijuana coming from the Tahoe. As the court explained:

> I cannot conclude from what I've heard today that the trooper's testimony that he believed that he smelled the smoking of marijuana was deliberately untruthful, and because I can't conclude that I must conclude that he had probable cause to conduct the search.
>
> *Based on that probable cause finding*, I'm going to deny the Motion to Suppress.

Appellant's App. at 269-70 (emphasis added). Nowhere in its ruling does the district court mention the $144,780 or any other evidence discovered during the search. We are not persuaded by Claimant's attempt to paint the record as otherwise. The district court, therefore, did not err in its probable cause determination and in denying Claimant's motion to suppress. Because Claimant fails to show the district court erred in denying his motion to suppress, he cannot establish plain error.

B.

We next turn to Claimant's argument that the district court abused its discretion in permitting Trooper Wolting to testify regarding the prior traffic stop and drug-related arrest of Claimant on October 12, 2014. Specifically, Claimant contends the evidence is inadmissible under Federal Rule of Evidence 404(b) because it constituted improper character evidence used to demonstrate action in conformity therewith.

We need not address whether Trooper's Wolting testimony constituted inadmissible character evidence under Rule 404(b) because even if the district court erred in allowing such testimony, the error was harmless. "An erroneous admission of evidence is harmless unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect." *United States v. Yeley-Davis*, 632 F.3d 673, 685 (10th Cir. 2011) (quoting *United States v. Bornfield*, 145 F.3d 1123, 1131 (10th Cir. 1998)). The district court is presumed to have disregarded improperly admitted evidence during a bench trial. *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 896 (10th Cir. 2000).

Claimant fails to show Trooper Wolting's testimony influenced the outcome in this case. Although the district court permitted Trooper Wolting to testify regarding the 2014 stop, the court explicitly stated in its order granting forfeiture it did not consider this evidence in reaching its decision. We have no reason to doubt the district court's exhortation. As we explain below, ample evidence existed—without considering evidence of the 2014 stop—for the district court to conclude the $144,780 was subject to forfeiture. Thus, Trooper Wolting's testimony did not substantially prejudice Claimant, and any error was harmless.

C.

Finally, we address Claimant's argument that the Government presented insufficient evidence to support forfeiture under 21 U.S.C. § 881(a)(6). "In an appeal from a bench trial, we review the district court's factual findings for clear error and its legal conclusions de novo." *United States v. $252,300.00 in United States Currency*, 484 F.3d 1271, 1273 (10th Cir. 2007) (quoting *Holdeman v. Devine*, 474 F.3d 770, 775 (10th Cir. 2007)). Sufficiency of the evidence is a legal question we review de novo. *Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009).

Section 881(a)(6) provides for the forfeiture of "[a]ll moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance . . . all proceeds traceable to such an exchange, and all moneys . . . used or intended to be used to facilitate any violation of this subchapter." 21 U.S.C. § 881(a)(6). The burden of proof lies with the Government to show, by a preponderance of the evidence, the defendant property is subject to forfeiture. 18 U.S.C. § 983(c)(1). In evaluating whether the Government has met its burden of proof, we employ a common-sense approach and look to the totality of the circumstances. *$252,300.00*, 484 F.3d at 1274.

As a preliminary matter, we are not convinced the Government must establish "a substantial connection between the property and the offense" where, as here, it employs a proceeds or intended-for-exchange theory. *See* 18 U.S.C. § 983(c)(3). Section 983(c)(3) provides: "[I]f the Government's theory of forfeiture is that the property was *used to commit or facilitate* the commission of a criminal offense, or was *involved in the commission* of a criminal offense, the Government shall establish that there was a substantial connection

between the property and the offense." 18 U.S.C. § 983(c)(3) (emphasis added). The plain text of the statute indicates the substantial connection requirement only applies when the Government is basing forfeiture on a facilitation theory. Moreover, in *$252,300.00*, we stated: "The government's theory of forfeiture is that the currency 'was furnished or intended to be furnished in exchange for a controlled substance, or constitutes proceeds traceable to such an exchange, *or was used or intended to be used to facilitate*' criminal acts." 484 F.3d at 1273 (emphasis added). Because, however, we find the evidence in this case sufficient to conclude a substantial connection exists between the $144,780 and illegal drug trafficking, and because the parties did not fully brief the issue, we decline to address whether such a showing is required here.

Considered in their totality, the facts of this case demonstrate the Government presented sufficient evidence to support the district court's order of forfeiture.[2] This evidence is as follows. Claimant rented a Tahoe on May 8, 2015, which was due back on May 12, 2015—the day of the stop. When Trooper McCord pulled the Tahoe over, Claimant stated he was traveling to Denver for a week-long family vacation, but the Tahoe contained no luggage; only two shirts and a pair of pants were hanging in the rear of the vehicle. At trial, Claimant admitted he lied to Trooper McCord about the purpose of his trip to Denver. Trooper McCord smelled the odor of burnt marijuana coming from the Tahoe, conducted a search of the Tahoe, and found $144,780 bundled with rubber bands inside

[2] In finding the Government presented sufficient evidence to support forfeiture, we do not consider the fact Jaxx, a certified narcotics detection dog, alerted to the presence of controlled substances on the $144,780.

two vacuum-sealed plastic bags. During the search, Trooper McCord also discovered marijuana gleanings in the third-row seating area of the Tahoe. After Trooper McCord discovered the currency, Claimant explained neither the source of the currency nor why he was traveling with such a large amount of cash.

Claimant later explained he planned to drop off the $144,780 with Romero, a Denver resident Claimant knew through Facebook but had never met in person, as an investment in a twelve-city music tour. No written agreement between Claimant and Romero or any documentation outlining the details of the tour existed at the time of the stop. Nor did Claimant produce any evidence to show he was investing the $144,780 in a music tour Romero was already putting together.

Claimant challenges the district court's finding that his explanation for his trip to Denver was implausible. Specifically, Claimant contends he produced evidence showing he had a successful event promotion business and had arranged a meeting with Romero to invest in a music tour; thus, the district court should have found his story credible. The district court found Claimant's explanation for transporting the currency—to leave $144,780 with a social media acquaintance as an investment in a music tour—either unsubstantiated or wholly lacking in credibility. We are required to give district court determinations of fact and assessments of witness credibility special deference. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985). The district court gave several reasons supported by the record for finding Claimant's story implausible, and we need not restate them here. Our review of the record simply provides no basis upon which to conclude the district court's assessments of credibility or other findings of fact were clearly erroneous.

The discovery of large quantities of cash alone, of course, is not sufficient to establish Claimant intended to furnish the $144,780 in exchange for a controlled substance or to prove the currency constituted proceeds of illegal drug transactions. We have, nonetheless, recognized such discovery is "strong evidence" of a connection to illegal drug trafficking. *$252,3000.00*, 484 F.3d at 1274-75. Additionally, legitimate businesses do not transport large quantities of cash wrapped in cellophane-type material—this is a technique drug traffickers use in an effort to prevent detection by drug-sniffing dogs. *Id.* Such evidence has "significant probative value." *Id.* The presence of a substantial amount of vacuum-sealed currency combined with the district court's finding—which is not clearly erroneous—that Claimant failed to credibly explain the purpose for his trip to Denver weigh strongly in favor of concluding the currency is subject to forfeiture.

Inconsistent statements as to the purpose of traveling with seized currency are also of probative value. *See $252,3000.00*, 484 F.3d at 1274. Claimant informed Trooper McCord he was going to Colorado for a family vacation, and he conceded at trial this was a lie. As to the purported music tour, Claimant's testimony contradicted Romero's testimony. Claimant testified he planned to merely invest the $144,780 in a music tour Romero had already been putting together. Romero, on the other hand, testified he only planned to handle the artists, the twelve-city tour was Claimant's idea, and Claimant would have lined up the venue in each city. The inconsistencies in Claimant's story weigh in favor of finding Claimant intended to exchange the $144,780 for a controlled substance and the $144,780 was connected to illegal drug activity.

Claimant's criminal history involving drugs is not coincidental; rather, it suggests the subject currency was connected to illegal drug activity. *See United States v. $67,220.00 in U.S. Currency*, 957 F.2d 280, 286 (6th Cir. 1992) (explaining a "claimant's record of drug activity is a highly probative factor in the forfeiture calculus"); *United States v. U.S. Currency $83,310.78*, 851 F.2d 1231, 1236 (9th Cir. 1988) (noting a claimant's prior arrests and convictions on drug charges "are circumstances demonstrating more than mere suspicion of his connection with an illegal drug transaction"). Claimant's prior drug-related arrests and convictions provide a nexus to illegal drug activity.[3] Where this evidence is accompanied by other persuasive evidence such as the odor of marijuana coming from his vehicle, the presence of drugs in his vehicle, and lying to a law enforcement officer, we conclude it supports the reasonable inference Claimant intended to exchange the $144,780 for controlled substances and the currency is connected to drug trafficking.

As to the sources of the currency, Claimant contends he established the legitimacy of the $144,780 by presenting evidence of substantial income through his event promotion business and a loan from a business associate. Evidentiary support, or lack thereof, establishing a legitimate source of the currency is "entitled to considerable weight" in the forfeiture calculus. *See $252,3000.00*, 484 F.3d at 1275. To support his claim, Claimant proffered evidence of a $40,000 loan he received from Mustafa Ali in exchange for a promissory note under which Claimant agreed to repay the loan in two months at 50% interest. Claimant also

[3] Like the district court, we did not consider evidence of Claimant's October 2014 traffic stop and arrest in reaching our decision.

testified about his successful event promotion business and proffered invoices showing his company profited more than $150,000 in the first half of 2015 before the seizure of the $144,780. Eric Union, the manager of Encore Nightclub, testified these contracts were legitimate and the invoices were accurate based on a headcount of how many people entered the club during each event.

But Union also testified neither he nor his employees handled the cash because Claimant controlled the cash during these events. Notably, Encore Nightclub closed on May 17, 2015, supposedly after it lost its liquor license. John Masha, Claimant's business associate, also testified that his full-time event booking company's annual gross income is approximately $50,000. Although Claimant had a personal checking account, savings account, and business bank account for his company, none of the seized $144,780 came from a bank. Claimant declared bankruptcy in 2011, and he never reported making more than $19,000 per year prior to the traffic stop giving rise to this case. Claimant initially reported about $17,000 as income on his 2014 tax return but subsequently amended this tax return to show about $95,000 in income after the seizure of the $144,780. The district court found Claimant generally lacked credibility due to, *inter alia*, his evasive and non-responsive answers at trial concerning his taxes.

Based on this evidence, the district court concluded the Government failed to establish by a preponderance of the evidence the $144,780 constituted proceeds of an illegal drug exchange. We are less convinced Claimant's proffer of possible innocent sources of income vitiates the Government's showing of a strong probability the $144,780 was in fact proceeds of illegal drug transac-

tions. But it is not this appellate court's place to weigh conflicting testimony or evaluate the credibility of the witnesses. *See Anderson*, 470 U.S. at 573-74. Although we may have weighed the evidence differently had we sat as the trier of fact, we cannot conclude the district court's account of the evidence is implausible in light of the record.

Nonetheless, the Government plainly carried its burden in this case to prove the $144,780 is subject to forfeiture under 18 U.S.C. § 881(a)(6). Given the implausibility of Claimant's explanation for his trip, Claimant's false statement to Trooper McCord about the purpose of his trip, the large amount of cash involved, the method in which the currency was bundled and vacuum sealed, Claimant's borrowing $40,000 from a business associate with a promise to repay the loan with 50% interest in two months, the marijuana gleanings found in his rental vehicle, his drug-related criminal history, and the discrepancies between his alleged income and his tax returns, the Government presented sufficient evidence showing Claimant intended to exchange the $144,780 for a controlled substance and the $144,780 is substantially connected to illegal drug trafficking. Thus, the district court properly forfeited the currency to the Government.

* * *

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

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed August 27, 2018]

Case No. 15-1230-JWB

UNITED STATES OF AMERICA,

Plaintiff,

v.

$144,780.00 IN UNITED STATES CURRENCY, more or less,

Defendant,

and

NATHAN DUCKWORTH,

Claimant.

MEMORANDUM AND ORDER

This action for forfeiture pursuant to 21 U.S.C. § 881(a)(6) came before the court for a bench trial on July 13, 2018. (Doc. 73.) At the close of the evidence, the court took the matter under advisement to permit the parties to submit proposed findings of fact and conclusions of law. Those items have now been filed (Docs. 77, 78) and the court is prepared to rule. For the reasons stated herein, Plaintiff is GRANTED a judgment of forfeiture of the defendant property, and Claimant's claim to the property is DENIED.

I. Background

On July 28, 2015, the United States filed a complaint for forfeiture of $144,780 in United States currency. (Doc. 1.) The complaint alleged the money

was seized by the Kansas Highway Patrol during a traffic stop of a car driven by Claimant Nathan Duckworth on 1-70 in Ellis County, Kansas. Plaintiff contends the money is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6) because it was intended to be used in an illegal exchange for controlled substances or is proceeds traceable to a violation of the Controlled Substances Act. (Doc. 49 at 3.)

A warrant was issued for arrest of the defendant property. (Doc. 3.) Claimant filed a notice of claim (Doc. 5) and answer to the complaint (Doc. 6), in which he asserted the money was his, that it was legitimately derived from his business and personal savings, and that it was not the proceeds of, or intended to be used in connection with, controlled substances. On November 14, 2016, the Honorable Eric F. Melgren held a hearing on Claimant's motion to suppress evidence (Doc. 24), and orally denied the motion. (Docs. 36, 52 at 80.) On May 3, 2018, the undersigned judge denied Claimant's motion for summary judgment. (Doc. 66.) The court has jurisdiction to hear this forfeiture proceeding pursuant to 28 U.S.C. § 1355(b).

II. Findings and Analysis

The following property is subject to forfeiture to the United States, and no property right shall exist in them: all moneys intended to be furnished by any person in exchange for a controlled substance in violation of Subchapter I of the Controlled Substances Act. 21 U.S.C. § 881(a)(6). Under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983(c), it is Plaintiff's burden to show by a preponderance of the evidence that forfeiture applies. *United States v. $252,300 in US. Currency*, 484 F.3d 1271, 1273 (10th Cir. 2007).

The evidence at trial showed that on May 12, 2015, on 1-70 in Ellis County, Kansas, Kansas Highway Patrol Trooper James McCord was on duty when he received a call from dispatch. The dispatcher said a caller reported a westbound black Chevrolet Tahoe with Kansas plates weaving in and out of traffic at a high rate of speed near McCord's location. Shortly thereafter, McCord saw a black Chevy Tahoe with Kansas plates traveling westbound and clocked it on radar going 85 miles per hour in a 75 mile per hour zone. McCord stopped the car, which was driven by Claimant. There was one other person in the car – a friend of Claimant's named Walter Weathers. Claimant told McCord he was on his way to Denver for a week-long family vacation. McCord determined from a rental agreement that the car had been rented by Claimant on May 8, 2015, from Advantage Rental Car in Kansas City, and that it was due back in Kansas City on May 12, the day of the stop. During the stop, McCord detected an odor of marijuana coming from the Tahoe, and remarked to Claimant that someone had been smoking marijuana in the car. Claimant denied anyone had been smoking marijuana or that there were any drugs in the car.

Based on the smell of marijuana from the vehicle, McCord decided to search the car. During the search, he located a backpack between the driver and passenger seats. The backpack contained two clear, heat-sealed vacuum bags with a large amount of United States currency inside. (Govt. Exh. 1.) When McCord asked how much money was in the bags, Claimant told him it was none of his business. McCord also located what he characterized as marijuana and tobacco "gleanings" on the carpet floor in front of the vehicle's third row of seats. Photographs of the gleanings (Govt. Exhs. 2, 3) support McCord's testimony. McCord is an experi-

enced trooper with training in the visual recognition of marijuana and testified that he recognized marijuana in the vehicle and as shown in the photos. The court finds that testimony, as well as McCord's testimony that he detected an odor of marijuana from the vehicle, to be credible.

Aside from the backpack containing the money, there was no luggage in the vehicle. McCord saw only two shirts and a pair of pants hanging in the rear passenger window. Officers found a total of five cell phones in the car. (Govt. Exh. 5-3.) In his deposition, Claimant stated that three of the cell phones belonged to him. (Govt. Exh. 5 at 43-45.)

Kansas Highway Patrol Trooper Ian Gray and his patrol service dog, Jaxx, are trained and certified as a Narcotic Detection Dog Team. (Govt. Exh. 4.) Jaxx is trained to detect marijuana, heroin, methamphetamine, and cocaine. A few hours after the stop, Gray and Jaxx were called in to Troop D Headquarters to do a "currency screening" on the cash from Claimant's vehicle. The screening was a "blind" test where the cash was removed from its plastic container and hidden from view by a third party. Gray and Jaxx were then brought in to screen the area. Jaxx passively alerted to the money by sifting next to a cardboard box containing the money. Gray testified he had training or experience concerning vacuum-sealed money and that some people use that technique to try to prevent an odor of drugs on money from being detected.[1] The

[1] The Government additionally presented the testimony of Kansas Highway Patrol Trooper Ryan Wolting, who said that on October 12, 2014, Claimant was a passenger in a rental vehicle being driven by Claimant's wife eastbound on 1-70 in Ellsworth County, Kansas. Wolting stopped the vehicle for going 78 in a 75 mile-per-hour zone. Wolting did not believe the explanation

cash was counted and found to be $144,780.00 in United States currency.[2]

At the trial, Claimant conceded he lied to Trooper McCord about going to Denver for a family vacation. He testified he felt the purpose of the trip was none of the Trooper's business, and that if he had disclosed the real purpose or the fact that he had a large amount of cash, the Trooper would have targeted him. After McCord said he smelled marijuana, Claimant testified he thought it was better to "shut[] down and let the law take place." Claimant testified he was on his way to Denver to meet with Ruben Romero and give the money to Romero to invest it in a musical tour that he and Romero had discussed. Claimant said Romero told him he had put together a 12-city tour and needed a total of $600,000 to put it on. Claimant indicated he

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of Claimant and his wife, who were both unemployed, that they wanted to get away from home so they had traveled from Kansas City to spend a night in Hays, Kansas, before returning home. Wolting said he searched the vehicle and found nine pounds of marijuana in individual one-pound vacuum-sealed bags, a loaded pistol in the center console, and just over $5,000 in cash in Claimant's pants pocket. Wolting said Claimant claimed responsibility for the items. Wolting arrested Claimant but did not know of the disposition of the charges against him.

The defense objected to this evidence on relevance grounds and additionally intimated that the search of the vehicle may have been unlawful. The evidence presented at trial here was inconclusive with respect to the lawfulness of the search. Under the circumstances, the court declines to consider evidence of the October 14, 2014, stop in reaching its decision.

[2] Claimant also asserted that the actual amount seized was $147,200. (Doc. 5 at 2.) The evidence at trial did not support this assertion, as the credible evidence showed only the seizure of $144,780. Claimant's counsel asked one witness whether $3,500 was also found in Claimant's pocket, but no evidence indicating the seizure or disposition of such a sum was presented.

was one of the investors in the tour. Claimant said it was common in the music business to vacuum-seal money. He said he did not tell his friend, Walter Weathers, about the money in the backpack. Claimant indicated he planned to go to Denver to drop off the money, find out more about what was going on, and drive right back to Kansas City. For reasons discussed later in this opinion, the court finds Claimant's testimony concerning the purpose of his trip is not credible.

Claimant lives in Kansas City, Missouri, with his wife and daughter. Claimant used to work at a chemical company but later got into the promotion business. In 2011, Claimant came out of Chapter 7 bankruptcy with no non-exempt assets. By the end of 2014, Claimant had an entertainment promotion business called "Building Bridges Entertainment, LLC," which was registered in Missouri. Claimant testified that most of the cash in his car came from his entertainment promotion business, in addition to $40,000 loaned to him by an associate in Kansas City named Mustafa Ali.

Mustafa Ali lives in Kansas City and operates a rental car business and a business that sells energy drinks. Claimant was involved with Ali in the energy drink business. Ali testified by deposition that he loaned Claimant $40,000 in cash on May 8, 2015, under an agreement whereby Claimant was to repay him within two months, together with 50% interest ($20,000). (Def. Exh. 603 at 4-5.[3]) Claimant gave him a signed promissory note. (Def. Exh. 605.) Ali testified he had $43,000 in cash at his house at the time, which

[3] Page numbers here refer to the numbers in the upper right-hand corners of the exhibit, not to individually numbered deposition pages.

constituted several years' worth of savings, and he gave Claimant $40,000 of it. Ali understood the money was for some sort of concert tour but said he did not ask Claimant specifics. Ali was not aware that Claimant had any criminal history and knew nothing about vacuum sealing of the money.

Claimant presented evidence of promotion contracts he entered with Encore Nightclub in Kansas City in late 2014 and early 2015 relating to various events at the nightclub. Claimant testified he promoted these events and obtained performers, provided services such as doormen and security, and in exchange he collected cash entry fees from event patrons. He then paid his expenses out of the collected cash. Claimant cites invoices purportedly showing his company collected fees exceeding $10,000 for many of these events, with net profits in the first half of 2015 totaling nearly $150,000. (Def. Exhs. 605-615.)

Ruben Romero lives in Denver. He testified by way of deposition. He and Claimant became mutual Facebook friends. Romero said Claimant proposed putting together a 12-city tour, with Romero booking artists and Claimant lining up the nightclubs and venues. Romero was a musician who had a business called EnV Entertainment that he formed to sell his own music CDs. Romero's CDs "flopped," however, and he lost money. The company was dormant as of May 12, 2015. Romero said he talked to "a couple of managers" about a possible tour. EnV Entertainment had no bank account as of May 2015 and had filed no tax returns because it had no income. Romero had never organized a concert tour before. Romero testified that Claimant said he only deals in cash.

Claimant testified that he was investing in a 12-city tour that he believed Romero had already put

together. By contrast, Romero testified he had "no idea" of what 12 cities would be chosen, as he said it was Claimant's role to line up venues. According to Romero, the figure of approximately $140,000 for the tour that he and Claimant talked about was just Romero's "rough ballpark estimate" and "spit-balling a number" of what the tour would cost to put on. Claimant and Romero had no written agreement of any kind. In 2016, about nine months after the money was seized, Claimant emailed Romero and asked him to provide a copy of what their contract "was supposed to have been." Romero drafted and sent back a "basic outline of what it [the contract] was going to be." (Def. Exh. 601, Att. B.) Romero has a prior felony conviction in Colorado relating to marijuana, for which he spent 18 months in prison, and admits to occasionally using marijuana, although he denies selling it.

Claimant's federal tax return for 2011 shows he reported just over $19,000 in adjusted gross income. (Govt. Exh. 5-4.) For 2012, he reported adjusted gross income of just over $12,000. (Govt. Exh. 5-5.) In 2013, he reported just under $18,000. (Govt. Exh. 5-6.) In 2014, he initially reported adjusted gross income of about $17,000. Sometime after the May 2015 seizure of $144,780 from his car, Claimant was referred by Mustafa Ali to accountant Connie Neighbors. Neighbors helped Claimant file an amended federal tax return that reported over $95,000 in adjusted gross income for the year 2014, including over $45,000 in business net income. (Govt. Exh. 6-3.) Neighbors also helped Claimant file his federal tax return for 2015, in which he reported adjusted gross income of over $114,000, and business net income of over $89,000. (Govt. Exh. 6-4.)

Claimant was convicted of a federal cocaine offense in approximately 1996 and spent time in prison. His supervised release for that offense was later revoked. In his deposition, Claimant explained that the revocation occurred after marijuana was found in his car and a passenger blamed it on Claimant, although Claimant denied knowing about the marijuana and was not prosecuted for it. (Govt. Exh. 5 at 70-72.) When Claimant was asked at trial about initially reporting only $17,000 on his federal tax return for 2014, Claimant said that figure was "correct but it wasn't accurate." When asked to explain, he indicated that he decided to "get . . . on the right track" and report the cash income from his business.

The court finds Claimant's explanation that he intended to use the $144,780 to invest in a musical tour is not credible. There are a number of reasons for this, including but not limited to the following. First, it is doubtful that a large sum of cash like this would be used to fund a legitimate musical tour. Legitimate businesses would typically use checks, bank transfers, and bank accounts to move such sums, and the transactions would ordinarily be documented. *See United States v. Hernandez-Lizardi*, 530 F. App'x 676, 684 (10th Cir. 2013) ("large quantities of cash are strongly probative of participation in drug distribution"); *United States v. $242,484.00*, 389 F.3d 1149, 1161 (11th Cir. 2004) ("A common sense reality of everyday life is that legitimate businesses do not transport large quantities of cash rubber-banded into bundles. . . ."). In his deposition, when asked whether promoters deal in cash or in checks and bank drafts, Claimant indicated that every deal was different but this one "was the first time it was a cash deal," and that it was done that way because Romero asked for cash. (Govt. Exh. 4 at 38.) Claimant's and Romero's explanations for the cash

were contradictory, with Romero indicating it was Claimant's idea because Claimant said "he deals with cash," (Govt. Exh. 7 at 7), while Claimant said it was Romero's idea. Claimant's additional explanation that the world of rap music typically operates with cash was unsupported by credible evidence and was equally unpersuasive under the specifics of this supposed deal. Romero's testimony shows the tour idea was little more than a concept (or perhaps more accurately, a pretext), with no artists, venues, dates, locations (aside from Kansas City) or other details agreed to between Romero and Claimant. There was certainly no evidence that anything had been lined up. Yet Claimant asserted in his deposition that Romero had "supposedly . . . got everything situated" on March 11, 2015, and so the trip on the 12th "was a hurry up deal but it was already being put together" by Romero. (Govt. Exh. 5 at 48.) Claimant's and Romero's testimony thus conflicted on major points like whether Romero had already put a tour together or whether Claimant was supposed to come up with the venues and cities for the tour. Common sense suggests a legitimate small business operator would not likely drive from Kansas City to Denver with $144,780 in cash to drop it off with a social media acquaintance, for a tour that neither one of the principals knew much of anything about. That explanation is particularly questionable given that Romero had no experience funding or promoting a tour of this sort. The two principals clearly had very little communication about a tour before Claimant headed to Colorado. They had no documentation or contract at the time and no concrete plans of any sort.

Claimant's explanation that he was carrying the money to invest in a tour was also undermined by his lack of credibility generally. His answers to numerous

questions at trial were evasive or non-responsive. Claimant showed little inclination to accept responsibility for any of his actions. After being stopped for speeding, Claimant promptly lied to McCord about the purpose of his trip, falsely telling McCord he was going to Colorado for a vacation with family. Claimant's tax returns also support an inference that he misled the IRS about his income, as he initially reported only about $17,000 in income for 2014, but amended his 2014 return to show about $95,000 in income after being found in possession of the $144,780. Claimant suggested the amendment was due to a simple desire to operate his business cleanly, but a more likely explanation is that he was concerned about discovery of illegitimate activities and felt compelled to declare more income after being found in possession of a large amount of cash. Also undermining the credibility of Claimant's testimony was the fact that he vacuum-sealed the alleged investment money. One obvious reason for doing that, as indicated by Trooper Gray's testimony, would be to avoid detection of the money by a drug-sniffing dog. Claimant asserted that it was "very common to vacuum seal your money" in the music business, but the totality of circumstances suggests the former explanation – avoiding detection – was the more likely one for Claimant's behavior. For these reasons and others, the court finds Claimant was not a credible witness with respect to the asserted purpose of the money and the trip.

Courts have recognized that the following circumstances can give rise to or contribute, to some degree, to a reasonable inference of criminal activity and/or drug trafficking: large sums of cash (*United States v. Thompson*, 881 F.3d 629, 633 (8th Cir. 2018)); an implausible cover story (*United States v. Castillo*, 713 F.3d 407, 411 (8th Cir. 2013)); implausible travel plans

including traveling a long distance only to stay one night at a destination (*United States v. Latorre*, 893 F.3d 744, 751 (10th Cir. 2018)); criminal history (*Id.* at 752); bundling and transporting money in vacuum-sealed bags (*United States v. Burkley*, 513 F.3d 1183, 1189 (10th Cir. 2008; *United States v. $252,300 in U.S. Currency*, 484 F.3d 1271, 1275 (10th Cir. 2007)); and lying to officers (*Teague v. Overton*, 15 F. App'x 597, 601 (10th Cir. 2001)). Most of the foregoing decisions address whether the totality of circumstances in a particular case give rise to a reasonable suspicion of criminal activity. In the instant case, the court has considered the evidence relating to the above factors, as well as the remaining evidence, and finds it shows by a preponderance that the $144,780 in Claimant's car was intended to be furnished by Claimant in exchange for a large quantity of marijuana or other controlled substances, which he then planned to distribute, in violation of the Controlled Substances Act.

A primary factor supporting this conclusion is the implausibility of Claimant's explanation that he was driving to Denver to leave a backpack full of cash with a social media acquaintance for a non-existent tour. Other evidence supporting an inference that Claimant intended to use the money for such an illicit purpose includes Claimant's lie to the Trooper at the time of the stop about his reason for going to Colorado, the large amount of cash involved, the fact that Claimant vacuum-sealed the cash, and Claimant borrowing $40,000 cash from a business acquaintance under an extraordinary promise to repay the principal with 50% interest in two months. When considered with other evidence, including the fact that Claimant had residue of marijuana in his car at the time of the stop, and that both Claimant and Romero had prior felony convictions for drug trafficking offenses, the court finds that

Claimant likely possessed the $144,780 with the intent to furnish it to Romero and/or others in exchange for a substantial quantity of controlled substances, so that Claimant or others could distribute the substances.

On the other hand, Plaintiff has failed to show by a preponderance that the $144,780 itself constituted proceeds traceable to an exchange for controlled substances. Claimant's tax returns raise some concern about whether the cash actually came from his entertainment business and from a loan, as he claimed, but Claimant's explanation of the source of the cash was at least plausible under the evidence presented. For that reason, the court attaches no real significance to the alert of Jaxx indicating an odor of controlled substances on the money. Indeed, Trooper Gray, the dog handler, testified that Jaxx might have alerted to the cash if even one bill in the stack was tainted with the smell of controlled substances. Although such an alert might be probative in other circumstances, evidence indicating that the cash could have been collected from thousands of individuals at a night club weakens any inference that the alert shows the money constituted proceeds traceable to a drug trafficking exchange. *Cf. United States v. Kitchell*, 653 F.3d 1206, 1222 (10th Cir. 2011) (noting question of whether large percentage of circulated currency is tainted by contact with controlled substance, but finding alert was sufficient for probable cause). Nevertheless, for the reasons indicated previously, Claimant's packaging of the money, the circumstances of his trip, and the other evidence previously discussed shows that Claimant likely intended to use the money to exchange it for controlled substances.

III. Conclusion

The court determines the United States is entitled to forfeiture of Defendant $144,780.00 in United States currency, pursuant to 21 U.S.C. § 881(a)(6). The court further finds that Claimant Nathan Duckworth has no property right in the currency; his claim to the same is denied.

The foregoing Memorandum and Order constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). Plaintiff may submit a form of judgment to the court consistent with the foregoing findings.

IT IS SO ORDERED this 27th day of August, 2018.

s/John W. Broomes
JOHN W. BROOMES
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed November 13, 2019]

No. 18-3201

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

$144,780.00 IN UNITED STATES CURRENCY, more or less,

Defendant.

NATHAN DUCKWORTH,

Claimant-Appellant.

ORDER

Before **TYMKOVICH**, Chief Judge, **BALDOCK**, and **HOLMES**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk