APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0053n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 19-3199

[Filed January 27, 2020]

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
$46,340.00 IN U.S. CURRENCY,	)
	)
Defendant,	)
	)
GEORGE ABERNATHY,	)
	)
Claimant-Appellant.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: MERRITT, CLAY, and GRIFFIN, Circuit Judges.

GRIFFIN, Circuit Judge.

The Drug Enforcement Administration seized $46,340.00 in U.S. Currency from a residence in Toledo, Ohio pursuant to a search warrant, leading the government to commence this forfeiture proceeding. Claimant George Abernathy filed a verified claim attesting to his ownership of the money, but refused to answer the government's discovery requests "on the basis of his Fifth Amendment Rights." So the government moved to strike his claim for lack of standing and for summary judgment under Federal Rule of Civil Procedure 56 and Rule G(8)(c) of the Federal Rules of Civil Procedure's Supplemental Rules for Admiralty or Maritime Claims and Civil Forfeiture Actions. A magistrate judge recommended that the district court grant the government's motion for lack of standing. The district court overruled Abernathy's objections, adopted the report and recommendation, and ordered the money forfeited. Abernathy appeals.

"[W]e review a district court's decision to strike a claim in an *in rem* forfeiture action for an abuse of discretion. However, we review *de novo* the district court's determination of a claimant's standing to contest a federal forfeiture action." *United States v. $31,000.00 in U.S. Currency*, 872 F.3d 342, 347 (6th Cir. 2017) (brackets, internal quotation marks, and citations omitted). This appeal is meritless. Abernathy "bears the burden of demonstrating an interest in the seized [currency] sufficient to satisfy the court of his standing as a claimant." *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir. 1998). Mere physical possession of property does not suffice to

show standing; instead, we "require some explanation or contextual information regarding the claimant's relationship to the seized property." *Id.*

Abernathy's universal invocation of the Fifth Amendment during discovery foreclosed any way for him to sustain this burden: "[A] blanket assertion of the [Fifth Amendment] privilege is no defense to a forfeiture proceeding," *United States v. Certain Real Prop. 566 Hendrickson Blvd., Clawson, Oakland Cty., Mich.*, 986 F.2d 990, 996 (6th Cir. 1993), and likewise cannot be used as "a sword . . . to make one's assertions of ownership impervious to attack," *United States v. $31,000.00 in U.S. Currency*, 774 F. App'x 288, 292 (6th Cir. 2019). Otherwise, a "claim of privilege . . . could furnish [a claimant] with what may be false evidence and prejudice the government by depriving it of any means of detecting the falsity." *United States v. $99,500.00 U.S. Currency Seized on Mar. 20, 2016*, --- F. App'x ---, 2019 WL 5783471, at *4 (6th Cir. Nov. 6, 2019).

Having properly struck Abernathy's verified claim as a Fifth-Amendment sword, *$31,000.00 in U.S. Currency*, 774 F. App'x at 292, the district court was left with a "record devoid of any other evidence that would demonstrate standing to contest the forfeiture," *id.*; *see also $99,500.00 U.S. Currency Seized on Mar. 20, 2016*, 2019 WL 5783471, at *4 (similar). The government was therefore entitled to summary judgment on the basis of lack of standing. And because Abernathy lacked Article III standing, we will not consider his merits-based contention regarding "the propriety of the initial seizure." *$31,000.00 in U.S.*

Currency, 774 F. App'x at 292 n.2; *see also Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990) ("[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue.").

For these reasons, we affirm the district court's judgment.

APPENDIX B

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 19a0321n.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-4044

[Filed June 25, 2019]

GEORGE ABERNATHY,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
GEORGE KRAL, Chief of Toledo Police; JOHN THARP, Sheriff; MICHAEL NOEL, DEA Agent; CITY OF TOLEDO, OH,	)
	)
Defendants-Appellees.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: WHITE, BUSH, and LARSEN, Circuit Judges.

LARSEN, Circuit Judge. George Abernathy sued Drug Enforcement Administration (DEA) agent

Michael Noel, the City of Toledo, and local law-enforcement officers in Ohio state court, seeking a return of $46,340 seized from his residence. Noel removed the case to federal court, which ultimately dismissed Abernathy's complaint. Abernathy now challenges the removal to federal court. We AFFIRM.

I.

Noel has been a DEA agent since 2008. He also is an appointed Special Deputy Sheriff of Lucas County, Ohio. In 2017, Noel obtained a state-court warrant to search Abernathy's residence. With the assistance of other DEA agents and local law-enforcement officers, Noel executed the warrant and seized narcotics, currency, and other narcotics-related items from Abernathy's residence. The DEA took custody of the items and later turned the currency over to the United States Marshal Service.

Seeking a return of the seized currency, Abernathy promptly sued Noel, the City of Toledo, and local law-enforcement officers in Ohio state court. Noel removed the case to federal court pursuant to 28 U.S.C. § 1442(a)(1), which allows an officer of the United States to remove a case directed against him "for or relating to any act under color of such office." Abernathy initially objected to removal, contending that Noel was not a federal officer acting under the color of his office when he obtained and executed the search warrant. The district court denied the objections but granted Abernathy leave to file a motion to remand to state court for want of federal jurisdiction. Rather than file such a motion, Abernathy filed a document that he styled a "Motion for Clarification," but which

was really no motion at all. Telling the court that he "regard[ed] the return of this matter to the State Court as not being in [his] best interest" and that "it really makes no difference[] to [him] where the issues here are resolved," Abernathy disavowed any further challenges to removal and expressed his preference to have the matter speedily resolved in federal court.

Thereafter, the district court dismissed Abernathy's complaint. The court stated: "Plaintiff originally objected to removal. He now no longer does, per his 'Motion for Clarification.' Those motions are moot and overruled accordingly." The court then determined that dismissal was appropriate because the government's pending civil forfeiture action provided Abernathy with an opportunity to pursue an adequate legal remedy and because Abernathy's various other challenges to the seizure of the currency were meritless. The district court subsequently denied Abernathy's motion for reconsideration.

II.

Despite having previously disavowed any further objection to removal, Abernathy's appeal challenges only the removal. Because Abernathy's removal challenges touch on our jurisdiction, we will not treat the claim as having been either forfeited or waived. *See City of Cookeville v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 388 n.4 (6th Cir. 2007). But his failure to build his case against removal when given the opportunity by the district court nonetheless colors our analysis of Abernathy's appeal.

To qualify for federal-officer removal under § 1442(a)(1), a federal officer "must both raise a colorable federal defense and establish that the suit is *for* a[n] act under color of office." *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (alteration in original) (citation and internal quotation marks omitted). Although we struggle to decipher his briefing, Abernathy's overarching argument appears to be that removal was improper because Noel had not met his burden of showing that (1) he was a federal officer and (2) he was acting under the color of his office as a DEA agent when obtaining and executing the search warrant. Abernathy argues that a factual dispute remains as to those issues and that the district court therefore erred by siding with Noel.

But on the record before us, we cannot say the district court erred by concluding that federal-officer removal was appropriate. There is no doubt that Noel is a federal officer. He has been a DEA agent since 2008. But was he acting under color of that office? To show that he was, Noel had to establish "a causal connection between the charged conduct and asserted official authority." *Jefferson County*, 527 U.S. at 431 (citation and internal quotation marks omitted). According to Noel's affidavit, both DEA agents and local law-enforcement officers assisted Noel in executing the search warrant. But once the items were seized from Abernathy's home, Noel "listed everything seized on a DEA inventory form." Then, "[t]he DEA," not the State of Ohio or any other state or local government entity, "took custody of every item on the DEA inventory form immediately upon seizure." And, according to Noel, "[t]he DEA continues to maintain

custody of all items on the DEA inventory form with the exception of the Seized Currency. The DEA turned over custody of the Seized Currency to the United States Marshals Service . . . ." Noel's affidavit, therefore, shows that he was working under the color of his federal office when he seized the currency.

Abernathy seems to believe that the affidavit alone could not satisfy Noel's burden of showing that he was acting under color of his federal office. But that is not so. *See Willingham v. Morgan*, 395 U.S. 402, 407–10 (1969) (finding that removal was proper based on the removing parties' unrebutted affidavits). Similarly, Abernathy seems to suggest that the district court erred by treating Noel's affidavit as true. Abernathy, however, offered no evidence to contradict Noel's sworn assertions, despite being given the chance to further pursue a remand to state court.[1]

Abernathy does not contest the second requirement for federal-officer removal, that the officer "raise a colorable federal defense." *Jefferson County*, 527 U.S. at 431. Noel nevertheless addresses the issue, saying that he was not required to raise a federal defense because the United States is the real party in interest. *See Upper Cumberland Elec. Membership Corp.*, 484 F.3d at 391. We need not decide whether Noel is exempt from the federal-defense requirement because,

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[1] Abernathy attempts to "disavow that in [his] lawsuit any allegations were directed at the Government." That is, Abernathy seems to ask that, in the event we determine Noel was acting as a federal officer when executing the search warrant, we should overlook that fact so Abernathy can return to state court. This we decline to do.

regardless, he raised a colorable federal defense. We note that assessing whether a colorable federal defense has been presented is a case-specific inquiry, and our task is complicated somewhat by the unclear nature of Abernathy's pleadings. Nevertheless, Abernathy seemed to argue in part that the seizure of his property was improper because Noel was not acting as a federal lawenforcement officer and Noel improperly seized the funds in the name of the United States. Noel disputed these arguments, and resolution of these issues depends at least in part on federal law. *See Mesa v. California*, 489 U.S. 121, 127–30 (1989). The district court, therefore, properly proceeded with the case.[2]

Having concluded that removal was appropriate, we would, ordinarily, turn to the merits of the district court's decision dismissing the case. But Abernathy makes no developed argument regarding the district court's decision to dismiss. Therefore, we need not comment on the merits of that decision.

* * *

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[2] Abernathy argues that removal was improper without Noel first obtaining certification by the Attorney General as required by the Westfall Act, 28 U.S.C. § 2679. *See Osborn v. Haley*, 549 U.S. 225, 229–30 (2007) ("When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" (quoting 28 U.S.C. § 2679(d)(1), (2))). Abernathy's claim is meritless. He did not sue Noel in tort. *Id.* at 229 (recognizing that the Westfall Act "accords federal employees absolute immunity from commonlaw tort claims arising out of acts they undertake in the course of their official duties"). Nor did Noel seek protection under the Westfall Act.

We AFFIRM the judgment of the district court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:18CV86

[Filed February 7, 2019]

United States of America,	)
	)
Plaintiff	)
	)
v.	)
	)
$46,340.00 in U.S. Currency,	)
	)
Defendant	)
	)

ORDER

This is a forfeiture action seeking to recover funds that the DEA obtained during execution of a drug investigation-related search warrant. The claimant challenges the forfeiture. On referral to U.S. Magistrate Judge James R. Knepp, II, the Magistrate Judge has filed a Report & Recommendation (R&R) recommending that the claimant's claim be dismissed for want of standing. (Doc. 21).

The claimant has filed an objection to the R&R. (Doc. 23). For the reasons that follow, I agree with the

Magistrate Judge that the claimant has failed to establish his standing.

In support of standing, the claimant has submitted a sworn, barebones affidavit that he was in lawful possession of the contested funds. He declines to provide any further information on the basis of his Fifth Amendment right not to incriminate himself.

Well and good: but that it not enough. There is no apparent, much less submitted, reason why a person cannot provide proof of his lawful possession of funds with no jeopardy to his Fifth Amendment rights. There is nothing inconsistent with asserting, "I earned that money by working at XYZ company: here are my pay stubs," or "I own rental property at 1234 Nowhere St., and here are my rent stubs," or "Here is a copy of my most recent 1040 income tax form, showing my lawful income and the taxes I paid."

No statement of that sort is incriminating; or, if, somehow it might be, the claimant has not shown how, hypothetically and in law, that might be so. Thus, simply saying, in effect, that "I don't have to show you how I lawfully possessed that money because the Constitution give me the right not to incriminate myself," is not enough to meet the claimant's burden to establish standing.

Alternatively, the claimant argues that the issue of the legitimacy of the seizure is as of yet unresolved. He argues, as well, that only small amounts of drugs – amounting to less than is indicative of personal use – was found.

True enough. But those contentions ignore the government's averments in the affidavit on which it based its warrant and ensuing right to search for and seize not just drugs, but related items as well. Which it did, finding and seizing, along with the cash at issue, a digital scale (a common implement in the drug distribution business) with trace residue and gallon baggies and plastic containers useful for packaging and distributing sizable quantities of drugs.

But it's not just what was found that supports, by a preponderance of the evidence now before the Court, the illegal nexus between those items and the large quantity of cash at issue here. There were as well meetings between the claimants and a confidential source (CS) that make manifestly clear that the subject was illegal drugs and their distribution.

The claimant acknowledges none of this evidence. Instead, he contends that he needs to take discovery (from, apparently, the CS) in order to make out his standing. Aside from the "informant's privilege" of *Rovario v. United States*, 353 U.S. 53 (1957), there is no reason to apprehend that the CS could give us information as to any possible lawful source of the funds at issue.

In light of the foregoing, and based on my *de novo* review, I find no flaw in the Magistrate Judge's thorough, well-reasoned, and entirely well-founded Report & Recommendation. Accordingly, it is hereby

ORDERED THAT:

1. The claimant's objection (Doc. 23) to the Magistrate Judge's Report & Recommendation (Doc.

21) be, and the same hereby is overruled;
2. The Report & Recommendation be, and the same hereby is adopted as the Order of this Court; and
3. The funds at issue be, and the same hereby are, forfeited to the United States of America.

So ordered

/s/ James G. Carr Sr.
U.S. District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:18CV86

[Filed February 7, 2019]

United States of America,	)
	)
Plaintiff	)
	)
v.	)
	)
$46,340.00 in U.S. Currency,	)
	)
Defendant	)
	)

JUDGMENT ENTRY

In accordance with the order filed contemporaneously with this judgment entry, it is hereby ORDERED THAT:

1. The claimant's objection (Doc. 23) to the Magistrate Judge's Report and Recommendation (Doc. 21) be, and the same hereby is, overruled;

2. The Magistrate Judge's Report and Recommendation be, and the same hereby is, adopted as the Order of this Court; and

3. The funds at issue be, and the same hereby are, forfeited to the United States of America.

So ordered

/s/ James G. Carr Sr.
U.S. District Judge.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:18CV86

[Filed November 14, 2018]

United States of America,	)
	)
Plaintiff	)
	)
v.	)
	)
$46,340.00 in U.S. Currency,	)
	)
Defendant	)
	)

REPORT AND RECOMMENDATION

INTRODUCTION

On January 11, 2018, pursuant to 21 U.S.C. § 881(a)(6), the United States of America ("Plaintiff") filed a Verified Complaint in Forfeiture (Doc. 1), and took custody of $46,340.00 in seized funds ("Defendant funds") on January 12, 2018 (Doc. 3). Claimant George Abernathy ("Claimant") filed a Verified Claim to the funds on February 9, 2018 citing an "absolute and unqualified ownership interest". (Doc. 4, at 1). The Court has jurisdiction pursuant to 28 U.S.C. §§ 1345

and 1355. Currently pending before the Court is Plaintiff's Motion to Strike Claimant's Verified Claim and Grant Summary Judgment. (Doc. 17). Claimant has not filed a response.

For the reasons discussed below, the undersigned recommends Plaintiff's Motion (Doc. 17) be GRANTED.

BACKGROUND

Viewing the facts in the light most favorable to Claimant, the background of this case is as follows:

Search Warrant and Currency Seizure

On two separate occasions in June 2017, the Drug Enforcement Administration ("DEA") used a confidential source ("CS") to meet with Claimant inside a residence at 610 Waverly Avenue in Toledo, Ohio. (Doc. 17-1, at 2). The DEA used audio and video recording equipment to document both encounters. *Id*. During the first meeting, Claimant and the CS were recorded discussing the quantity, quality, and price of cocaine/crack that Claimant possessed. *Id*. at 2-3. Two weeks later, during the second meeting, an unidentified third party led Claimant into the back door of 610 Waverly Avenue. *Id*. at 3. Once inside, the CS observed Claimant holding a glass jar containing a white substance. *Id*. Claimant and the CS discussed what the contents of the jar were "going for". *Id*. When the CS asked for a sample, Claimant declined, stating it was from a different batch than what he would be selling the CS in the future. *Id*.

On June 30, 2017, Special Agent Mike Noel obtained a search warrant for 610 Waverly Avenue. *Id*.

He executed the warrant on July 5, 2017. *Id*. During the search, agents recovered a quantity of an unknown white powdery substance, and a "small" quantity of marijuana. *Id*. at 4. Agents also recovered several items commonly used for packaging narcotics including: a digital scale (which had cocaine residue on it), suitcases containing gallon-size Ziploc bags, and plastic storage containers (some containing marijuana residue, and others with a white powdery residue inside). *Id*. Agents also recovered the Defendant funds (totaling $46,340.00) during the search from the following places:

(a) $2,000.00 on top of a dresser in the master bedroom;

(b) $4,100.00 in an office desk;

(c) $40,090.00 in an office safe; and

(d) $150.00 in a kitchen drawer.

Id. Agent Noel found an additional $2,000.00 inside of a ledger book as he took inventory of the evidence seized from the home. *Id*. Following the seizure, a drug detection K-9, handled by the Ohio Bureau of Criminal Investigations, was used to sniff the currency. *Id*. The K-9 gave a positive alert for the presence of narcotics. *Id*.

Discovery

On May 30, 2018, Plaintiff and Claimant attended a Case Management Conference. (Doc. 11, at 1). There, the Court ordered the parties to make initial disclosures in accordance with Federal Civil Rule 26(a)

by June 29, 2018. *Id*. Prior to the deadline, Plaintiff provided Claimant with its initial disclosures, including redacted investigation reports, photographs, and audio and video recordings of the meetings. (Doc. 17, at 3-4). The same day, Plaintiff served Claimant with interrogatories, requests for production, and requests for admission pursuant to Civil Rules 33, 34, and 36; these were completed by Claimant and returned to Plaintiff on August 1, 2018. *See* Doc. 17-2. Claimant's written response to each question or request was: "The Claimant refuses to answer on the basis of his Fifth Amendment Rights". *See id.* Claimant also did not provide Plaintiff with any initial disclosures. (Doc. 17, at 4).

STANDARD OF REVIEW

Pursuant to Federal Civil Rule 56(c), summary judgment is appropriate where there is "no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." When considering a motion for summary judgment, the Court must draw all inferences from the record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court is not permitted to weigh the evidence or determine the truth of any matter in dispute; rather, the Court determines only whether the case contains sufficient evidence from which a jury could reasonably find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The moving party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). This burden "may be discharged by 'showing'—that is,

pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id*. Further, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *See* Fed R. Civ. P. 56(c)(3) (noting that the court "need consider only the cited materials"). The fact that the motion for summary judgment is unopposed does not relieve the Court of the task of determining whether a material factual dispute exists. *United States v. Crooksville Coal Co., Inc*., 560 F. Supp. 141, 142 (S.D. Ohio 1982) (citing *Smith v. Hudson*, 600 F.2d 60 (6th Cir. 1979)).

DISCUSSION

In its motion, Plaintiff argues Claimant has not met his burden to establish the Article III standing necessary to pursue the Defendant funds. (Doc. 17, at 1, 10). For the reasons discussed below, the undersigned agrees, and finds Claimant's ownership claim, together with his answers to Plaintiff's interrogatories, are insufficient to establish standing.

Standing is a threshold matter. As in any federal lawsuit, a forfeiture claimant must have Article III standing to move forward with litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a claimant must show (1) he suffered an "injury in fact"; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) a likelihood "the injury will be redressed by a favorable decision". *Id*. (internal quotation marks omitted). Importantly, a claimant's injury must be "concrete and particularized", and

"actual or imminent, not 'conjectural or hypothetical'". *Id*. (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "Each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id*. at 561.

In civil *in rem* forfeiture cases, "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 U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998). If established, a colorable ownership or possessory interest satisfies Article III's standing requirement because the claimant "suffer[ed] an injury which could be redressed, at least in part, by the return of the seized property." *Id*.

Further, special rules governing pleadings, discovery, and motion practice in *in rem* forfeiture actions are found in Rule G of the Federal Rules of Civil Procedure's Supplemental Rules for Admiralty or Maritime Claims and Civil Forfeiture Actions (the "Supplemental Rules"). At issue here, are Rules G(6) (*Special Interrogatories*), and G(8)(c) (*Motions*). Specifically, Supplemental Rule G(8)(c) provides:

> (i) At any time before trial, the government may move to strike a claim or answer:
> (A) for failing to comply with Rule G(5) or (6), or
> (B) because the claimant lacks standing.

(ii) The motion:

(A) must be decided before any motion by the claimant to dismiss the action; and

(B) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of evidence.

Supplemental Rule G(8)(c)(i)-(ii). Rule G(6)(a) permits the government to "serve special interrogatories limited to the claimant's identity and relationship to the defendant property". The purpose of the rule is "to permit the government to file limited interrogatories at any time after the claim is filed to gather information that bears on the claimant's standing." Rule G, 2006 Advisory Committee Notes (subdivision 6).

Here, Claimant has only attempted to establish an interest in the Defendant funds though a general claim of ownership in his Verified Claim. (Doc. 4, at 1). He asserts, under oath, that he "was in sole, and exclusive possession of each of these monies when it was unlawfully removed from my exclusive possession and control." *Id*. As the Sixth Circuit recently held, "*at the pleading stage*, a verified claim of ownership is sufficient to satisfy Article III and the procedural requirements of Rule G." *United States v. $31,000.00 in U.S. Currency*, 872 F.3d 342, 351 (6th Cir. 2018) (emphasis added).

As the saying goes, possession is nine-tenths of the law. However, "[w]hen confronted with mere physical

possession of property as a basis for standing, [courts] require some explanation or contextual information regarding the claimant's relationship to the seized property." *$515,060.42 in U.S. Currency*, 152 F.3d at 498 (citing *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1058 (9th Cir. 1994)). With *in rem* actions, "the assertion of simple physical possession of property as a basis for standing must be accompanied by factual allegations regarding how the claimant came to possess the property, the nature of the claimant's relationship to the property, and/or the story behind the claimant's control of the property." *Id*. In other words, broadly declaring a relationship to the funds is not enough. *Id*. Here, Plaintiff attempted to obtain such information from Claimant through interrogatories. (Doc. 17-2, at 2-3) ("[s]tate the interest you claim in the defendant currency and state each and every fact on which you base your claim . . . the date or time period you received the defendant currency. . . the identity of the person or entity from which you obtained the defendant currency."). However, Claimant's blanket invocation of his Fifth Amendment right in response to each question fails to produce the critical link between two points – possession, and how he gained it. He has avoided providing any information regarding his relationship to, and acquisition of, the funds. Without interrogatory responses, Claimant is left standing only on his Verified Claim, which is (at best) a naked claim of possession – not enough to establish standing and survive summary judgment. *$515,060.42 in U.S. Currency*, 152 F.3d at 498.

Undoubtedly, a person found holding a bag of money in close proximity to a controlled substance is in an

unfortunate predicament, and the Fifth Amendment plays an important role in the ensuing litigation. The Court recognizes there are not many things are more sacred in the law than an individual's right to avoid self-incrimination, even when answering interrogatories relating to a bag of money. Unfortunately, the shield cannot also act as the sword in these situations. *United States v. Certain Real Property 566 Hendrickson Boulevard,* 986 F.2d 990, 996 (6th Cir. 1993) ("Claimant cannot avoid completely his Rule 56 burden by merely asserting a Fifth Amendment privilege."). There, the Court finds the crux of Claimant's conundrum – a blanket invocation of his Fifth Amendment rights at the discovery phase is not enough to establish standing and survive summary judgment; the two concepts are interrelated – "without evidence of a claim of ownership, claimant cannot establish standing." *United States v. $99,500.00 in U.S. Currency*, 2018 WL 4510095, at *6 (N.D. Ohio).

As the Supplemental Rules dictate, a motion to strike may be presented by the government "at any time before trial", and "may be presented . . . by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of evidence." Supplemental Rule, G(8)(c)(i)-(ii). Claimant's refusal to answer interrogatories in this case has left him with an unexplained claim of possession which is insufficient to establish standing at the summary judgment stage. *$99,500.00 in U.S. Currency*, 2018 WL 4510095, at *8. For these reasons, the undersigned recommends the Court strike Claimant's conclusory assertion of ownership in his Verified Claim.

CONCLUSION

Claimant did not respond to Plaintiff's Motion to Strike and Grant Summary Judgment. Without evidence to support Claimant's position, and upon review of the record, the undersigned finds there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law. As such, the undersigned recommends Plaintiff's Motion to Strike and Grant Summary Judgment (Doc. 17) be GRANTED.

s/James R. Knepp II
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).