IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10801

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

$4,480,466.16 in funds seized from Bank of America account ending in 2653

Defendant,

RETAIL READY CAREER CENTER INCORPORATED,

Claimant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR PANEL REHEARING

(Filed Nov. 5, 2019)

Before ELROD, WILLETT, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

The petition for panel rehearing is DENIED. We withdraw the previous opinion issued August 22, 2019, 936 F.3d 233, and substitute the following:

We address whether a claimant in a civil forfeiture proceeding may counterclaim for constitutional tort damages against the United States. The district court held a claimant may never file counterclaims of any kind. It adopted the First Circuit's reasoning that, because a forfeiture is an *in rem* proceeding against property, there is no "claim" against a claimant that he may "counter." Although this reasoning has been adopted by several district courts and recently by the Sixth Circuit, we find it unpersuasive and decline to adopt it. We nonetheless affirm the district court's judgment dismissing the counterclaims for a different reason. The counterclaims here seek damages based on alleged Fourth and Fifth Amendment violations arising from the property seizure. The United States has not waived sovereign immunity for either claim. We therefore affirm the district court's judgment on the alternative ground that the counterclaims are barred by sovereign immunity.

I.

Appellant Retail Ready Career Center ("RRCC") was a private school in Texas offering a six-week "boot camp style" course to train students as Heating, Ventilation, and Air Conditioning ("HVAC") technicians.[1] According to RRCC, "[m]ost" students were "veterans who pa[id] for the course using their earned GI Bill

[1] We draw these facts primarily from RRCC's verified claim, which we accept as true for purposes of reviewing the district court's grant of a motion to dismiss. *See Masel v. Villareal*, 924 F.3d 734, 743 (5th Cir. 2019).

benefit," but "courses were open to other participants" as well. In 2017, the United States Department of Veterans Affairs ("VA") began investigating whether RRCC had falsely claimed to be in compliance with the "85-15" rule. This rule prohibits the VA from approving a veteran's enrollment in a course "for any period during which more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees or other charges paid for them by the educational institution or by VA[.]" 38 C.F.R. § 21.4201. The rule's purpose is to "minimize the risk that veterans' benefits will be wasted on educational programs of little value . . . and to prevent charlatans from grabbing the veterans' education money." *Cleland v. Nat'l Coll. of Bus.*, 435 U.S. 213, 219 (1978) (cleaned up).

In September 2017, federal warrants were issued to seize the money in RRCC's bank accounts—amounting to over $4.6 million—as the alleged proceeds of federal law violations. *See* FED. R. CIV. P., SUPPLEMENTAL RULE ("SUPP. RULE") G(3)(b) ("the court—on finding probable cause—must issue a warrant" to seize movable property not in government control).[2] In October 2017, the government filed a complaint *in rem* seeking forfeiture of the funds under various fraud and conspiracy statutes.[3] After receiving notice of the

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[2] The government also seized other property not relevant to this appeal, including over $100,000 from five other bank accounts; real property located in Dallas, Texas; and seven luxury vehicles.

[3] *See*, *e.g.*, 18 U.S.C. § 981(a)(1)(C) (providing "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of [certain federal laws]" is "subject

forfeiture action, RRCC filed a verified claim to the seized property. *See* 18 U.S.C. § 983(a)(4)(A) (providing that "[a]ny person claiming an interest in the seized property may file a claim asserting such person's interest in the property"); SUPP. RULE G(5)(a) (setting out claim requirements). In its verified claim, RRCC alleged that the seizure occurred without prior notice or hearing; caused "an immediate and devastating effect on RRCC's business"; and forced RRCC to "close the school," dismiss employees without pay, and fly students home lest they be "stranded in Texas." RRCC also included two "constitutional counterclaims," which alleged the seizure violated the Fourth and Fifth Amendments and sought "damages to compensate [RRCC] for the destruction of its business."

The government moved to dismiss RRCC's counterclaims under Federal Rule of Civil Procedure 12(b)(6). Relying principally on the First Circuit's decision in *United States v. One Lot of U.S. Currency ($68,000)*, 927 F.2d 30 (1st Cir. 1991) ("*$68,000*"), the government argued that "claimants in civil-forfeiture cases may not file counterclaims against the United States, as they are merely claimants, not the party against which the

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to forfeiture to the United States"); *id.* § 981(a)(1)(D) (providing "[a]ny property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of [federal fraud statutes]" is "subject to forfeiture to the United States"); *id.* § 982(a)(3) (providing a court shall order that a person convicted of a federal fraud offense forfeit to the United States any property "which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation").

suit is directed." The district court noted the parties had not cited "any binding Fifth Circuit authority" on this question, but found "persuasive" the First Circuit's reasoning in *$68,000*, which had been followed by several district courts from other circuits.[4] The district court therefore granted the government's motion to dismiss RRCC's counterclaims, "hold[ing] that, as a claimant in an *in rem* civil forfeiture action, RRCC cannot bring a counterclaim."

Meanwhile, the government struggled to state an adequate claim against RRCC's funds under the forfeiture rules. The district court dismissed the government's first amended complaint, finding its allegations insufficiently specific. The second amended complaint met the same fate. *See*, *e.g.*, *United States v. $4,480,466.16 In Funds Seized*, 2018 WL 4096340, at *3 (N.D. Tex. Aug. 28, 2018) (ruling allegations in second amended complaint were "insufficient to comply with Supp[lemental] R[ule] G(2)'s requirement that the complaint must 'state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial'"); SUPP.

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[4] *See United States v. 8 Luxury Vehicles*, 88 F.Supp.3d 1332, 1337 (M.D. Fla. 2015); *United States v. Funds from Fifth Third Bank Account # 0065006695*, 2013 WL 5914101, at *12 (E.D. Mich. Nov. 4, 2013); *United States v. $22,832.00 in U.S. Currency*, 2013 WL 4012712, at *4 (N.D. Ohio Aug. 6, 2013); *United States v. $43,725.00 in U.S. Currency*, 2009 WL 347475 at *1 (D.S.C. Feb. 3, 2009); *United States v. 1866.75 Board Feet*, 2008 WL 839792, at *3 (E.D. Va. Mar. 25, 2008); *United States v. Assorted Comput. Equip.*, 2004 WL 784493, at *2 (W.D. Tenn. Jan. 9, 2004).

RULE G(2)(f). The parties continue to litigate that issue below.[5]

The issues before us on appeal concern only the fate of RRCC's counterclaims. On June 12, 2018, the district court entered a final judgment dismissing RRCC's counterclaims under Federal Rule of Civil Procedure 54(b), which RRCC timely appealed. We have jurisdiction to review that Rule 54(b) judgment. *See New Amsterdam Cas. Co. v. United States*, 272 F.2d 754, 756 (5th Cir. 1959) (dismissal of counterclaim, when plaintiff's claim is still pending, is non-appealable "absent a certificate under Rule 54(b)").

II.

We review the district court's judgment dismissing RRCC's counterclaims *de novo*, "'accepting all well-pleaded facts [in RRCC's counterclaims] as true and viewing those facts in the light most favorable to [RRCC].'" *SGK Props., LLC v. U.S. Bank Nat'l Ass'n*, 881 F.3d 933, 943 (5th Cir. 2018) (quoting *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007)). We may affirm the district court's judgment "on any basis supported

[5] Following RRCC's appeal in this case, the government filed its third amended complaint, in response to which RRCC moved for dismissal and summary judgment. The district court has not ruled on those motions. Instead, the district court granted the government's motion to stay the forfeiture action for 120 days during the pendency of a related, ongoing criminal investigation. The stay expired June 6, 2019, at which point the government moved to extend the stay for an additional 120 days. That motion is pending before the district court.

by the record." *Total Gas & Power North Am., Inc. v. FERC*, 859 F.3d 325, 332 (5th Cir. 2017) (citing *Taylor v. City of Shreveport*, 798 F.3d 276, 279 (5th Cir. 2015); *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014)); *see also Lee v. Kemna*, 534 U.S. 362, 391 (2002) ("[I]t is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record.").

III.

We decline to endorse the district court's ruling that claimants in *in rem* civil forfeiture proceedings are barred, always and everywhere, from filing counterclaims. As we explain below, that broad holding relies on dubious reasoning in a First Circuit opinion that overlooks the procedural rights of claimants in *in rem* forfeiture actions and that conflicts with longstanding practice in *in rem* admiralty cases. Nonetheless, we affirm the district court's judgment on the narrower ground that RRCC's constitutional damages claims are barred by sovereign immunity.

A.

The district court relied heavily on the First Circuit's decision in *$68,000*, which concerned an *in rem* forfeiture action against a cocaine-tainted Lincoln Town Car. 927 F.2d at 31–32. The claimant, Castiello, sought to retrieve a "portable telephone" from the car by "fil[ing] what he termed a 'counterclaim' for [its] return." *Id.* at 34. The First Circuit identified multiple

flaws in Castiello's position. For instance, the court pointed out that, because the forfeiture warrant did not even encompass the telephone, Castiello's "personal property claim had no place in th[e] action." *Id.* at 35.[6] But the court also laid down this broader reason for rejecting Castiello's "counterclaim":

> By definition, a counterclaim is a turn-the-tables response directed by one party ("A") at another party ("B") in circumstances where "B" has earlier lodged a claim in the same proceeding against "A." A forfeiture action is *in rem*, not *in personam*. The property is the defendant. Since no civil claim was filed by the government against Castiello—indeed, rather than being dragooned into the case as a *defendant*, he intervened as a *claimant*—there was no "claim" to "counter." Thus, Castiello's self-styled counterclaim was a nullity, and the court below appropriately ignored it.

$68,000, 927 F.2d at 34. This citationless half-paragraph furnished the sole rationale for the district court's holding below that "a claimant in an *in rem* civil forfeiture action . . . cannot bring a counterclaim."

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[6] Had the warrant included the telephone, the court stated it was "at least arguable" that Castiello could "replevy" it "within the contours of the government's forfeiture action." *Id.* at 34 n.7 (citing *United States v. Castro*, 883 F.2d 1018 (11th Cir. 1989); *Goodman v. Lane*, 48 F.2d 32 (8th Cir. 1931)). The court also pointed out that, regardless, Castiello remained free to retrieve the phone "administratively, by a motion in [his] underlying criminal case, or by bringing an independent civil action." *Id.* at 35 (cleaned up) (citing 19 U.S.C. § 1618; FED. R. CRIM. P. 41(e); *United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976)).

We readily grasp why the district court disposed of RRCC's counterclaims on this basis. As the court pointed out, the First Circuit's musing in *$68,000* has metastasized to several district courts, and also recently to the Sixth Circuit. *See Zappone v. United States*, 870 F.3d 551, 561 (6th Cir. 2017) (stating that owner in civil forfeiture action may "intervene" but "may not assert counterclaims against the United States") (citing *$68,000*). And the district court had no binding authority from our court, because we have never squarely addressed the issue. We do so now. Examining the issue as one of first impression, we respectfully reject the First Circuit's broad rationale for barring counterclaims in *in rem* civil forfeiture proceedings.

First, the fact that a forfeiture proceeding is "*in rem*, not *in personam*" does not determine a claimant's rights in the proceeding. The forfeiture rules allow a claimant to take numerous actions respecting the seized property, even though the proceeding is "*in rem*." To begin with, a claimant may "file a claim" to protect his interests in the property.[7] He may also file: (1) an answer to the government's complaint, SUPP. RULE G(5)(b); (2) a Rule 12 motion, *id.*; (3) objections to government interrogatories, SUPP. RULE G(6)(b); (4) a

[7] *See* 18 U.S.C. § 983(a)(4)(A) (providing "any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules"); SUPP. RULE G(5)(a)(i) (providing "[a] person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending").

motion to suppress use of the seized property as evidence, SUPP. RULE G(8)(a); and (5) a motion raising a defense under the Excessive Fines Clause of the Eighth Amendment, SUPP. RULE G(8)(e); *see also* 18 U.S.C. § 983(g) (claimant may file a "petition" to "determine whether the forfeiture was constitutionally excessive"). And the civil forfeiture statute lets claimants do other things, such as: (1) raise and prove an "innocent owner" defense, 18 U.S.C. § 983(d); (2) move to set aside the forfeiture for lack of notice, *id.* § 983(e); and (3) seek immediate release of seized property, *id.* § 983(f).[8] The point being: If a claimant can do all this in *in rem* forfeiture proceedings, it cannot be that he is barred from filing counterclaims simply because forfeitures are "*in rem* and not *in personam*."

Thus, contrary to the First Circuit's view in *$68,000*, the answer to this puzzle does not lie in the brute fact that, in a forfeiture proceeding, "[t]he property is the defendant." 927 F.2d at 34. That truism begs the question what *other* actors in the proceeding (besides the property itself) may assert rights arising out of the forfeiture. *See*, *e.g.*, *United States v. All Funds In Account Nos. 747.034/278, 747.009/278, & 747.714/278 Banco Espanol de Credito, Spain*, 295 F.3d 23, 25 (D.C. Cir. 2002) (observing that "[c]ivil forfeiture actions are

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[8] *See generally* Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis. 97, 97, 125–151 (2001) ("Casella") (summarizing "comprehensive revision" to forfeiture procedures enacted by Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), Pub. L. 106-185, 117 Stat. 202 (2000)).

brought against property, not people," but that "[t]he owner of the property may intervene to protect his interest"). The multiple procedural options given claimants by the civil forfeiture rules sit uneasily with the notion that a claimant can never bring counterclaims in those proceedings.

Second, the reasoning in *$68,000* overlooks the rules governing intervenors. Rule 24 allows intervention of right to "anyone" who, *inter alia*, "claims an interest relating to the property . . . that is the subject of the action." FED. R. CIV. P. 24(a)(2). That sounds quite like the position of a claimant in a forfeiture proceeding; indeed, the forfeiture rules treat a claimant in precisely those terms. *See* 18 U.S.C. § 983(a)(4)(A) (allowing "any person claiming an interest in the seized property" to file a claim); SUPP. RULE G(5)(a)(i) (allowing "[a] person who asserts an interest in the defendant property" to contest the forfeiture). Moreover, our cases have described "claimants" in forfeiture proceedings as "intervenors."[9] In *$68,000* itself, the First Circuit said Castiello "intervened as a claimant." 927 F.2d at 34. Likewise here, the government described RRCC as "an intervening party." The kinship between

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[9] *See*, *e.g.*, *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 981 (5th Cir. 1981) (observing, "[a]fter seizure pursuant to a warrant for arrest *in rem*, Pfizer intervened as claimant and filed an answer"); *United States v. 110 Bars of Silver*, 508 F.2d 799, 801 (5th Cir. 1975) (per curiam) ("This forfeiture proceeding stems from intervenor's conviction for melting down United States coins[.]"); *Westfall Oldsmobile, Inc. v. United States*, 243 F.2d 409, 411 (5th Cir. 1957) (describing owner contesting automobile forfeiture as "claimant-intervenor").

"claimants" and "intervenors" does not support a blanket rule barring claimants' counterclaims in forfeiture proceedings. Quite the opposite. As we have explained, "[u]nder federal law, an intervenor of right 'is treated as he were an original party and has equal standing with the original parties.'" *Brown v. Demco*, 792 F.2d 478, 480–81 (5th Cir. 1986) (quoting *Donovan v. Oil, Chem., and Atomic Workers Int'l Union*, 718 F.2d 1341, 1350 (5th Cir. 1983)); *see also* 7C WRIGHT & MILLER, FED. PRAC. & PROC. § 1920 (3d ed.) (explaining an intervenor "has equal standing with the original parties" and "is entitled to litigate fully on the merits once intervention has been granted") (citing *Gilbert v. Johnson*, 601 F.2d 761, 768 (5th Cir. 1979) (Rubin, J., specially concurring)).[10]

Third and finally, adopting the First Circuit's reasoning in *$68,000* would conflict with practice in

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[10] To be sure, the Supplemental Rules applicable to forfeiture actions do not expressly provide that a claimant may file counterclaims. But "[t]he Federal Rules of Civil Procedure also apply to [*in rem* forfeiture] proceedings except to the extent that they are inconsistent with these Supplemental Rules." SUPP. RULE A(2). We discern nothing in the Supplemental Rules inconsistent with the general proposition that claimants may file counterclaims in forfeiture proceedings. Relatedly, one district court has suggested that Rule 13(d) implicitly bars claimants in forfeiture proceedings from counterclaiming against the United States. *See United States v. 8 Luxury Vehicles*, 88 F.Supp.3d at 1334–1335, 1337 (M.D. Fla. 2015). We disagree. Rule 13 merely confirms that allowing counterclaims does not "expand" any waivers of sovereign immunity by the United States. *See* FED. R. CIV. P. 13(d) ("These rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States or a United States officer or agency."). We address sovereign immunity *infra*.

admiralty cases, which have long entertained counterclaims (or their equivalents) in *in rem* proceedings. *See*, *e.g.*, *Superior Derrick Services, LLC v. LONESTAR 203*, 547 F. App'x. 432, 437 (5th Cir. 2013) (unpublished) (discussing merits of counterclaim asserted in *in rem* proceeding); *Incas & Monterey Printing and Packaging, Ltd. v. M/V Sang Jin*, 747 F.2d 958, 963–964 & n.16 (5th Cir. 1984) (considering counterclaims by time-charterer of seized vessel in *in rem* action); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 335 (5th Cir. 1978) (considering United States' claims when it "intervened in plaintiffs' in rem action as a party defendant and filed a counterclaim asserting a property right in the res"); *Ellis Diesel Sales & Serv., Inc. v. M/V On Strike*, 488 F.2d 1095 (5th Cir. 1973) (per curiam) (considering *in rem* action in which "[d]efendant filed a counterclaim alleging damages negligently caused to the vessel")[11];

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[11] *See also*, *e.g.*, *Puerto Rico Ports Auth. v. Barge Katy-B, O.N. 606665*, 427 F.3d 93, 99, 100 (1st Cir. 2005) (noting intervenor's counterclaim for damages in *in rem* proceeding); *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, 330 F.3d 225, 230 (4th Cir. 2003) (considering counterclaim by claimants in *in rem* proceeding for wrongful arrest of vessel); *Bradford Marine, Inc. v. M/V Sea Falcon*, 64 F.3d 585, 586–587 (11th Cir. 1995) (reviewing attorney's fees awarded on a counterclaim in an *in rem* action); *Teyseer Cement Co. v. Halla Maritime Corp.*, 794 F.2d 472, 478 (9th Cir. 1986) (considering whether counterclaim by intervenor in *in rem* proceeding waived personal jurisdiction); *Ocean Ship Supply, Ltd. v. MV Leah*, 729 F.2d 971, 973 (4th Cir. 1984) (considering counterclaim for wrongful seizure and damages incurred therein); *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1039 (8th Cir. 1983) (reviewing district court's decision to sever counterclaims in an *in rem* action for trial by jury).

see also, *e.g.*, *Compania Naviera Vascongada v. United States*, 354 F.2d 935, 940 (5th Cir. 1966) (addressing merits of "libel" and "cross-libel" in *in rem* proceeding)[12]; *and see*, *e.g.*, THOMAS J. SCHOENBAUM, 2 ADMIRALTY & MAR. LAW § 21:6 (6th ed. 2018) ("SCHOENBAUM") (explaining that a claimant must prove "demonstrable bad faith or malice" to succeed on a wrongful seizure counterclaim).

Moreover, the modern procedural rules applicable to admiralty and maritime claims plainly foresee counterclaims in *in rem* and *quasi in rem* proceedings. For instance, Supplemental Rule E(7)—which applies to "actions *in rem* and *quasi in rem*"—sets forth the circumstances under which a plaintiff must furnish "security" for damages demanded in a "counterclaim." *See* SUPP. RULE E(7)(a), (b)[13]; *id.*, advisory committee

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[12] The older admiralty term "cross-libel" is equivalent to "counterclaim": "With the merger of law and admiralty in 1966, admiralty's classic and ancient phraseology of libels and cross-libels was replaced with the more mundane terminology of claims and *counterclaims*[.]" *Titan Nav., Inc. v. Timsco, Inc.*, 808 F.2d 400, 403 (5th Cir. 1987) (emphasis added); *see also* 3A BENEDICT ON ADMIRALTY § 306 (2019) ("Rule 13, Federal Rules of Civil Procedure which treats of counterclaims and cross-claims is the modern counterpart of the old admiralty cross-libels. While the nomenclature has changed the admiralty practice has basically remained the same.").

[13] Supplemental Rule E(7) provides as follows:

> **(7) Security on Counterclaim.**
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> **(a)** When a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given

notes (2000) (explaining that "[s]ubdivision (7)(a) is amended to make it clear that a plaintiff need give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security to respond in damages in the original action").[14] Given those textual cues in the Supplemental Rules, it would seem anomalous to say that counterclaims are always out-of-bounds in *in rem* proceedings. And yet the First Circuit's rule would bar counterclaims in forfeiture actions precisely *because* they are "*in rem*, not *in personam*" proceedings. *$68,000*, 927 F.2d at 34. That

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must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise. Proceedings on the original claim must be stayed until this security is given unless the court directs otherwise.

(b) The plaintiff is required to give security under Rule E(7)(a) when the United States or its corporate instrumentality counterclaims and would have been required to give security to respond in damages if a private party but is relieved by law from giving security.

[14] *See also*, *e.g.*, *Transportes Caribe, S.A. v. M/V Trader*, 860 F.2d 637 (5th Cir. 1988) (affirming district court's order to post countersecurity under Rule E); *Titan Nav.*, 808 F.2d at 402–03 & n.2 (discussing development of Supplemental Rule E(7)); *Seaboard & Carribean Transp. Corp. v. Hafen-Dampfschiffahrt A.G. Hapag-Hadac Seebader-Dienst*, 329 F.2d 538, 539–541 (5th Cir. 1964) (applying Rule E precursor, Admiralty Rule 50, to a "cross-libelant" in a "libel *in rem*" proceeding); *and see also* SCHOENBAUM § 21:6 (explaining that "[s]ubsection 7 of [Supplemental Rule E] contemplates the filing of a counterclaim against the party initiating the seizure"); 4 BENEDICT ON ADMIRALTY § 2.23 (2019) (illustrating how a court may consider "whether or not a counterclaim has merit for the purposes of determining whether or not a counterclaimant is entitled to countersecurity" under Rule E(7)).

overbroad proposition clashes with venerable admiralty practice and modern maritime rules, and we decline to endorse it.

In sum, we respectfully decline to adopt the reasoning in *$68,000* that, because "the property is the defendant" in a forfeiture proceeding, a claimant with interests in that property may never file a counterclaim. If RRCC's counterclaims are to be dismissed, it must be for a different reason.[15]

B.

We affirm the district court's judgment on a narrower ground. *See*, *e.g.*, *AT&T, Inc. v. United States*, 629 F.3d 505, 510 (5th Cir. 2011) ("[i]t is well settled" that a court of appeals may affirm "on any ground supported by the record") (citation omitted). On appeal, the government argues in the alternative that the

[15] In addition to rejecting its reasoning, we note that *$68,000* addressed a scenario quite different from ours. As the First Circuit observed, the forfeiture warrant in that case did not encompass the property that was the subject of the claimant's "counterclaim." *See* 927 F.2d at 34 n.7 ("This is not a case where the claimant seeks the return of the same property which the government seeks to forfeit."). Had the warrant included the property, the First Circuit acknowledged, the claimant might have sought to "replevy" the property in the forfeiture action. *Id.* The Sixth Circuit's decision in *Zappone*—the only circuit case to have adopted the First Circuit's reasoning—is also procedurally distinguishable. That case affirmed the dismissal of untimely "counterclaims" asserting *Bivens* claims against IRS agents who seized property in a forfeiture action. 870 F.3d at 554. But the IRS agents were not even parties in the forfeiture proceeding, making a "counterclaim" against them particularly tenuous.

United States has not waived its sovereign immunity with respect to the particular claims asserted in RRCC's counterclaims—damages claims for violations of the Fourth and Fifth Amendments—and that those claims are therefore barred. We agree.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941); 14 WRIGHT, MILLER & COOPER, FED. PRAC. & PROC. § 3654); *see also*, *e.g.*, *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 251–52 (5th Cir. 2006) (en banc) ("The Constitution contemplates that, except as authorized by Congress, the federal government and its agencies are immune from suit.") (citing *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996)). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed," and any waiver "will be strictly construed, in terms of its scope, in favor of the sovereign." *Doe v. United States*, 853 F.3d 792, 796 (5th Cir. 2017) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Lane v. Peña*, 518 U.S. 187, 192 (1996)) (internal quotation marks omitted). The government argues that RRCC has identified no statute unequivocally waiving the United States' immunity for the damages claims in RRCC's counterclaims. Specifically, RRCC seeks damages arising from the "unreasonable seizure" of its bank accounts in violation of the Fourth Amendment and from the lack of "notice and hearing" in violation

of the Fifth Amendment's Due Process Clause. The government is correct.

In its reply brief, RRCC attempts to identify the required waiver in 28 U.S.C. § 2680(c). In that provision, Congress "re-waived" the United States' sovereign immunity under the Federal Tort Claims Act ("FTCA") for certain property damages claims arising out of forfeitures.[16] *See*, *e.g.*, *Smoke Shop, LLC v. United*

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[16] Section 2680(c) provides, in relevant part, that the FTCA immunity waiver applies "to any claim based on the injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

> **(1)** the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
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> **(2)** the interest of the claimant was not forfeited;
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> **(3)** the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
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> **(4)** the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law."

28 U.S.C. § 2680(c)(1)–(4). The subsection cross-references 28 U.S.C. § 1346(b), which in relevant part provides that federal district courts have exclusive jurisdiction over post-January 1, 1945 money damages claims against the United States for

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

States, 761 F.3d 779, 782 (7th Cir. 2014) (explaining that in the 2000 CAFRA reforms Congress " 'rewaived' the government's immunity" under the FTCA "for tort actions stemming from law-enforcement detentions of property" under specific circumstances); *Foster v. United States*, 522 F.3d 1071, 1075 (9th Cir. 2008) (explaining that "CAFRA . . . restored the waiver of sovereign immunity—or 're-waived' sovereign immunity—with respect to certain forfeiture-related seizures"). What RRCC overlooks, however, is that the FTCA's immunity waiver does not extend to "constitutional torts" like the Fourth and Fifth Amendment damages claims pled in RRCC's counterclaims. We have squarely recognized that "[c]onstitutional torts . . . do not provide a proper predicate for an FTCA claim." *Spotts v. United States*, 613 F.3d 559, 565 n.3 (5th Cir. 2010) (citing *FDIC v. Meyer*, 510 U.S. 471, 478 (1994)); *see also*, *e.g.*, *Coleman v. United States*, 912 F.3d 824, 835 (5th Cir. 2019) (the "source of substantive liability under the FTCA" must be the "law of the State" and not federal law) (citing *Meyer*, 510 U.S. at 478); *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (explaining "the FTCA does not provide a cause of action for constitutional torts" because "by definition constitutional torts are not based on state law") (cleaned up). Thus, the FTCA waiver does not encompass the constitutional damages

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would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b)(1).

claims in RRCC's counterclaims, and the district court therefore lacked jurisdiction over them.[17]

RRCC also argues that the United States waives sovereign immunity simply by "initiat[ing] an *in rem* proceeding." RRCC cites no authority supporting that grandiose proposition. It points only admiralty cases allowing a limited cross-libel against the United States when the United States sues another vessel for collision damages. *See United States v. The Thekla*, 266 U.S.

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[17] We do not decide whether RRCC could bring valid FTCA claims as counterclaims in a civil forfeiture proceeding. *See*, *e.g.*, *Life Partners Inc. v. United States*, 650 F.3d 1026, 1029-1030 (5th Cir. 2011) (discussing administrative exhaustion requirements which are "a prerequisite to suit under the FTCA") (citing 28 U.S.C. § 2675(a); *McAfee v. 5th Circuit Judges*, 884 F.2d 221, 222-23 (5th Cir. 1989)). We decide only that the specific claims asserted in RRCC's counterclaims fall outside the CAFRA re-waiver and are therefore barred by sovereign immunity. Additionally, we note that neither the Tucker Act nor its companion, the Little Tucker Act, waive sovereign immunity over RRCC's claims. The Tucker Act provides a judicial avenue for "any claim against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491(a)(1); *see also United States v. Bormes*, 568 U.S. 6, 11 (2012) (discussing Tucker Act). The waiver in the Tucker Act, however, "has been limited to apply only to the Takings Clause . . . because only that clause contemplates payment by the federal government." *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 194 F.3d 622, 625 (5th Cir. 1999). Here, RRCC does not invoke the Tucker Act, and its Fifth Amendment claims are premised on an alleged due process violation, not the Takings Clause. *See*, *e.g.*, *Bellamy v. United States*, 7 Cl. Ct. 720, 723 (1985) (explaining claims court "has no jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages" (quoting *Carruth v. United States*, 224 Ct. Cl. 422, 445 (1980) (cleaned up)).

328 (1924); *United States v. The Paquete Habana*, 189 U.S. 453 (1903); *The Siren*, 74 U.S. 152 (1868); *see also*, *e.g.*, *United States v. Shaw*, 309 U.S. 495, 502–03 (1940) (explaining that, in such cases, "it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision").[18] But RRCC directs us to no authority supporting the proposition that this distinct admiralty rule waives the United States' sovereign immunity whenever it institutes a civil forfeiture proceeding. Nor does RRCC direct us to any unambiguous statutory waiver of the United States' immunity under such circumstances.[19] As we have already explained, Congress did enact an unambiguous immunity waiver with respect to forfeiture proceedings, *see* 28 U.S.C. § 2680(c)(1)-(4), but it has no application here.

Finally, RRCC claims we cannot reach sovereign immunity for two reasons. First, RRCC points out the government did not raise the issue below. That is irrelevant: Whether the United States' sovereign immunity

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[18] *See also generally* 2 AM. JUR. 2d ADMIRALTY § 44 ("Whenever the United States sues for damage inflicted on its vessel or cargo, it impliedly waives its exemption from admiralty jurisdiction as to cross libels or counterclaims arising from the same transaction.") (citing *The Thekla*, 266 U.S. 328; *The Western Maid*, 257 U.S. 419 (1922)).

[19] RRCC incorrectly points to the immunity waiver in 46 U.S.C. § 30903(a), but that statute also pertains only to certain admiralty claims involving the United States. *See*, *e.g.*, *MS Tabea Schiffahrtsgesellschaft MBH & Co. KG v. United States*, 636 F.3d 161, 165 n.1 (5th Cir. 2011) (explaining that "[t]he Suits in Admiralty Act (SAA) . . . provides the appropriate waiver for maritime tort claims against the United States") (citing 46 U.S.C. § 30903).

has been waived is a question of subject matter jurisdiction we can address for the first time on appeal. *See*, *e.g.*, *Lewis v. Hunt*, 492 F.3d 565, 568 (5th Cir. 2007) (appellate court may consider United States' sovereign immunity *sua sponte*, "[a]lthough the parties and the district court did not raise [it]"); *Bodin v. Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006) (lack of waiver of United States' sovereign immunity under FTCA "deprives federal courts of subject matter jurisdiction"). Second, RRCC claims that addressing sovereign immunity would convert a without-prejudice dismissal below into a with-prejudice dismissal on appeal, which would be inappropriate without a cross-appeal. *See*, *e.g.*, *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (explaining "an appellee who does not cross-appeal may not 'attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary' ") (quoting *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924)). RRCC is again mistaken. Claims barred by sovereign immunity are dismissed without prejudice, not with prejudice. *See*, *e.g.*, *Warnock v. Pecos Cty., Tex.*, 88 F.3d 341, 343 (5th Cir. 1996) (explaining that "[b]ecause sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice"); *see also*, *e.g.*, *United States v. Texas Tech Univ.*, 171 F.3d 279, 285 n.9 (5th Cir. 1999) (same, citing *Warnock*); 9 WRIGHT & MILLER, FED. PRAC. & PROC. § 2373 (because dismissal for lack of jurisdiction does not reach merits, claim "must be considered to have been dismissed without prejudice."). Thus, we may, and

do, rule that RRCC's counterclaims are barred by sovereign immunity.[20]

IV.

Congress has provided various remedies for claimants like RRCC who assert that the United States has wrongfully seized their property in forfeiture proceedings. *See*, *e.g.*, *United States v. Khan*, 497 F.3d 204, 208 (2nd Cir. 2007) (by reforming the forfeiture laws in CAFRA, "Congress was reacting to public outcry over the government's too-zealous pursuit of civil and criminal forfeitures"). Under certain circumstances, claimants who "substantially prevail[ ]" in a forfeiture action may recover attorneys' fees, costs, and interest. *See* 28 U.S.C. § 2465(b)(1)(A)–(C). In some cases, they may sue the United States for property damages under the FTCA. *See* 28 U.S.C. § 2680(c)(1)–(4). What claimants may not do, however, is sue the United States for constitutional torts arising out of the property seizure. Congress has not waived the United States' sovereign immunity for damages claims of that nature. Because RRCC's counterclaims sought precisely those kinds of

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[20] Because we resolve the appeal on sovereign immunity grounds, we do not address the government's argument that RRCC's damages counterclaims are barred by 28 U.S.C. § 2465(b)(2)(A). Part of a provision addressing government liability for costs, fees, and interest when a claimant prevails in a forfeiture proceeding, § 2465(b)(2)(A) provides that "[t]he United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection." 28 U.S.C. § 2465(b)(2)(A).

damages, we hold its counterclaims are barred by sovereign immunity.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10801

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

$4,480,466.16 in funds seized from Bank of America account ending in 2653

Defendant,

RETAIL READY CAREER CENTER INCORPORATED,

Claimant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

(Filed Aug. 22, 2019)

Before ELROD, WILLETT, and DUNCAN, Circuit Judges.

STUART KYLE DUNCAN, Circuit Judge:

In this civil forfeiture proceeding, the United States seized millions of dollars from a Texas vocational school, alleging the funds were the fruits of a scheme to fleece veterans. The school intervened as a claimant, denied the government's allegations, and counterclaimed for constitutional tort damages

against the government for ruining its business. The district court dismissed the school's counterclaims as a matter of law. Finding no authority from our court on the issue, the district court adopted the First Circuit's view that claimants in an *in rem* forfeiture proceeding may *never* bring counterclaims. *See United States v. One Lot of U.S. Currency ($68,000)*, 927 F.2d 30, 34 (1st Cir. 1991) ("*$68,000*"). On appeal, the school protests that this categorical rule barring all counterclaims in civil forfeiture proceedings is incorrect. We decline to address that question, however, because the school's specific counterclaims are barred for a more fundamental reason—sovereign immunity—and so the district court lacked subject matter jurisdiction over them. We therefore vacate the district court's judgment and remand with instructions to dismiss the school's counterclaims for lack of subject matter jurisdiction.

I.

Appellant Retail Ready Career Center ("RRCC") was a private school in Texas offering a six-week "boot camp style" course to train students as Heating, Ventilation, and Air Conditioning ("HVAC") technicians.[1] According to RRCC, "[m]ost" students were "veterans who pa[id] for the course using their earned GI Bill benefit," but "courses were open to other participants" as well. In 2017, the United States Department of

[1] We draw these facts primarily from RRCC's verified claim, which we accept as true for purposes of reviewing the district court's grant of a motion to dismiss. *See Masel v. Villarreal*, 924 F.3d 734, 743 (5th Cir. 2019).

Veterans Affairs ("VA") began investigating whether RRCC had falsely claimed to be in compliance with the "85-15" rule. This rule prohibits the VA from approving a veteran's enrollment in a course "for any period during which more than 85 percent of the students enrolled in the course are having all or part of their tuition, fees or other charges paid for them by the educational institution or by VA[.]" 38 C.F.R. § 21.4201. The rule's purpose is to "minimize the risk that veterans' benefits will be wasted on educational programs of little value . . . and to prevent charlatans from grabbing the veterans' education money." *Cleland v. Nat'l Coll. of Bus.*, 435 U.S. 213, 219 (1978) (cleaned up).

In September 2017, federal warrants were issued to seize the money in RRCC's bank accounts—over $4.6 million—as the alleged proceeds of federal law violations. *See* FED. R. CIV. P., SUPPLEMENTAL RULE ("SUPP. RULE") G(3)(b) (explaining "the court—on finding probable cause—must issue a warrant" to seize movable property not in government control).[2] In October 2017, the government filed a complaint *in rem* seeking forfeiture of the funds under various fraud and conspiracy statutes.[3] After receiving notice of that

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[2] The government also seized other property not relevant to this appeal, including over $100,000 from five other bank accounts; real property located in Dallas, Texas; and seven luxury vehicles.

[3] *See*, *e.g.*, 18 U.S.C. § 981(a)(1)(C) (providing "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of [certain federal laws]" is "subject to forfeiture to the United States"); *id.* § 981(a)(1)(D) (providing

action, RRCC filed a verified claim to the seized property. *See* 18 U.S.C. § 983(a)(4)(A) (providing "[a]ny person claiming an interest in the seized property may file a claim asserting such person's interest in the property"); SUPP. RULE G(5)(a) (setting out claim requirements). In its verified claim, RRCC alleged that the seizure occurred without prior notice or hearing; caused "an immediate and devastating effect on RRCC's business"; and forced RRCC to "close the school," dismiss employees without pay, and fly students home lest they be "stranded in Texas." RRCC also included two "constitutional counterclaims," which alleged the seizure violated the Fourth and Fifth Amendments and sought "damages to compensate [RRCC] for the destruction of its business."

The government moved to dismiss RRCC's counterclaims under Federal Rule of Civil Procedure 12(b)(6). Relying principally on the First Circuit's decision in *$68,000*, 927 F.2d 30, the government argued that "claimants in civil-forfeiture cases may not file counterclaims against the United States, as they are merely claimants, not the party against which the suit is directed." The district court noted the parties had not cited "any binding Fifth Circuit authority" on this

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"[a]ny property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, from a violation of [federal fraud statutes]" is "subject to forfeiture to the United States"); *id.* § 982(a)(3) (providing a court shall order that a person convicted of a federal fraud offense forfeit to the United States any property "which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation").

question, but found "persuasive" the First Circuit's reasoning in *$68,000*,[4] which had been followed by several district courts from other circuits.[5] The court therefore granted the government's motion to dismiss RRCC's counterclaims, "hold[ing] that, as a claimant in an *in rem* civil forfeiture action, RRCC cannot bring a counterclaim."

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[4] The entirety of the First Circuit's reasoning on this point consists of this citation-free half-paragraph:

> By definition, a counterclaim is a turn-the-tables response directed by one party ("A") at another party ("B") in circumstances where "B" has earlier lodged a claim in the same proceeding against "A." A forfeiture action is *in rem*, not *in personam.* The property is the defendant. Since no civil claim was filed by the government against [the claimant]—indeed, rather than being dragooned into the case as a *defendant*, he intervened as a *claimant*—there was no "claim" to "counter." Thus, [the claimant's] self-styled counterclaim was a nullity, and the court below appropriately ignored it.

$68,000, 927 F.2d at 34.

[5] *See United States v. 8 Luxury Vehicles*, 88 F. Supp. 3d 1332, 1337 (M.D. Fla. 2015); *United States v. Funds from Fifth Third Bank Account # 0065006695*, No. 13-11728, 2013 WL 5914101, at *12 (E.D. Mich. Nov. 4, 2013); *United States v. $22,832.00 in U.S. Currency*, No. 1:12 CV 01987, 2013 WL 4012712, at *4 (N.D. Ohio Aug. 6, 2013); *United States v. $43,725.00 in U.S. Currency*, No. 4:08–1373–TLW, 2009 WL 347475 at *1 (D.S.C. Feb. 3, 2009); *United States v. 1866.75 Bd. Feet*, No. 1:07cv1100 (GBL), 2008 WL 839792, at *3 (E.D. Va. Mar. 25, 2008); *United States v. Assorted Comput. Equip.*, No. 03–2356V, 2004 WL 784493, at *2 (W.D. Tenn. Jan. 9, 2004). The Sixth Circuit has recently adopted the First Circuit's rationale in *$68,000. See Zappone v. United States*, 870 F.3d 551, 561 (6th Cir. 2017).

Meanwhile, the government struggled to state an adequate claim against RRCC's funds under the forfeiture rules. The district court dismissed the government's first amended complaint, finding its allegations insufficiently specific. The second amended complaint met the same fate. *See United States v. $4,480,466.16 In Funds Seized*, No. 3:17–CV–2989–D, 2018 WL 4096340, at *3 (N.D. Tex. Aug. 28, 2018) (ruling allegations in second amended complaint were "insufficient to comply with Supp[lemental] R[ule] G(2)'s requirement that the complaint must 'state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial'"); SUPP. RULE G(2)(f). The parties continue to litigate that issue below.[6]

The issues before us on appeal concern only the fate of RRCC's counterclaims. On June 12, 2018, the district court entered a final judgment dismissing RRCC's counterclaims under Federal Rule of Civil Procedure 54(b), which RRCC timely appealed. We have jurisdiction to review that Rule 54(b) judgment. *See New Amsterdam Cas. Co. v. United States*, 272 F.2d 754, 756 (5th Cir. 1959) (dismissal of counterclaim,

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[6] Following RRCC's appeal in this case, the government filed its third amended complaint, in response to which RRCC moved for dismissal and summary judgment. The district court has not ruled on those motions. Instead, the district court granted the government's motion to stay the forfeiture action for 120 days during the pendency of a related, ongoing criminal investigation. The stay expired June 6, 2019, at which point the government moved to extend the stay for an additional 120 days. That motion is pending before the district court.

when plaintiff's claim is still pending, is non-appealable "absent a certificate under Rule 54(b)").

II.

We review the district court's judgment dismissing RRCC's counterclaims *de novo*, "accepting all well-pleaded facts [in RRCC's counterclaims] as true and viewing those facts in the light most favorable to [RRCC]." *SGK Props., LLC v. U.S. Bank Nat'l Ass'n*, 881 F.3d 933, 943 (5th Cir. 2018) (quoting *Stokes v. Gann*, 498 F.3d 483, 484 (5th Cir. 2007)). We may affirm the district court's judgment "on any basis supported by the record." *Total Gas & Power N. Am., Inc. v. FERC*, 859 F.3d 325, 332 (5th Cir. 2017) (citing *Taylor v. City of Shreveport*, 798 F.3d 276, 279 (5th Cir. 2015); *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 481 (5th Cir. 2014)); *see also Lee v. Kemna*, 534 U.S. 362, 391 (2002) ("[I]t is well settled that an appellate tribunal may affirm a trial court's judgment on any ground supported by the record.").

III.

On appeal, RRCC asks us to disclaim the district court's broad ruling that claimants in *in rem* civil forfeiture proceedings are barred, always and everywhere, from filing counterclaims. We decline to address that question, however, because RRCC's counterclaims are barred for a more fundamental reason: sovereign

immunity.[7] As the government points out, the United States has not waived its sovereign immunity with respect to the particular claims asserted in RRCC's counterclaims—damages claims for violations of the Fourth and Fifth Amendments—and the district court therefore lacked subject matter jurisdiction over them. We agree.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941); 14 WRIGHT, MILLER & COOPER, FED. PRAC. & PROC. § 3654); *see also*, *e.g.*, *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 251–52 (5th Cir. 2006) (en banc) ("The Constitution contemplates that, except as authorized by Congress, the federal government and its agencies are immune from suit." (citing *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996))). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed," and any waiver "will be strictly construed, in terms of its scope, in favor of the sovereign." *Doe v. United States*, 853 F.3d 792, 796 (5th Cir. 2017) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Lane v. Pena*, 518 U.S. 187, 192 (1996)) (internal quotation marks omitted). The government

[7] Because we rule on the basis of sovereign immunity, nothing in our opinion should be read as approving the First Circuit's rationale in *$68,000* that counterclaims in *in rem* forfeiture proceedings are categorically barred. As the district court pointed out, no decision of ours has adopted that broad view and we have no occasion to address whether it is correct.

argues that RRCC has identified no statute unequivocally waiving the United States' immunity for the damages claims in RRCC's counterclaims. Specifically, RRCC seeks damages arising from the "unreasonable seizure" of its bank accounts in violation of the Fourth Amendment and from the lack of "notice and hearing" in violation of the Fifth Amendment's Due Process Clause. The government is correct.

In its reply brief, RRCC attempts to identify the required waiver in 28 U.S.C. § 2680(c). In that provision, Congress "rewaived" the United States' sovereign immunity under the Federal Tort Claims Act ("FTCA") for certain property damages claims arising out of forfeitures.[8] *See*, *e.g.*, *Smoke Shop, LLC v. United States*,

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[8] Section 2680(c) provides, in relevant part, that the FTCA immunity waiver applies "to any claim based on the injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

> **(1)** the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;
>
> **(2)** the interest of the claimant was not forfeited;
>
> **(3)** the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and
>
> **(4)** the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law."

28 U.S.C. § 2680(c)(1)–(4). The subsection cross-references 28 U.S.C. § 1346(b), which in relevant part provides that federal

761 F.3d 779, 782 (7th Cir. 2014) (explaining that in the 2000 Civil Asset Forfeiture Reform Act or "CAFRA" Congress " 'rewaived' the government's immunity" under the FTCA "for tort actions stemming from law-enforcement detentions of property" under specific circumstances); *Foster v. United States*, 522 F.3d 1071, 1075 (9th Cir. 2008) (explaining "CAFRA . . . restored the waiver of sovereign immunity—or 're-waived' sovereign immunity—with respect to certain forfeiture-related seizures"). RRCC overlooks, however, that the FTCA waiver does not extend to "constitutional torts" like the Fourth and Fifth Amendment damages claims pled in RRCC's counterclaims. We have squarely recognized that "[c]onstitutional torts . . . do not provide a proper predicate for an FTCA claim." *Spotts v. United States*, 613 F.3d 559, 565 n.3 (5th Cir. 2010) (citing *FDIC v. Meyer*, 510 U.S. 471, 478 (1994)); *see also*, *e.g.*, *Coleman v. United States*, 912 F.3d 824, 835 (5th Cir. 2019) (the "source of substantive liability under the FTCA" must be the "law of the State" and not federal law (citing *Meyer*, 510 U.S. at 478)); *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989) (explaining "the FTCA does not provide a cause of action for constitutional

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district courts have exclusive jurisdiction over post-January 1, 1945 money damages claims against the United States for

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. § 1346(b)(1).

torts" because "by definition constitutional torts are not based on state law" (cleaned up)). Thus, the FTCA waiver does not encompass the constitutional damages claims in RRCC's counterclaims, and the district court thus lacked jurisdiction over them.[9]

RRCC also argues that the United States waives sovereign immunity simply by "initiat[ing] an *in rem* proceeding." RRCC cites no authority supporting that grandiose proposition. It points only to admiralty cases

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[9] We do not decide whether RRCC could bring valid FTCA claims as counterclaims in a civil forfeiture proceeding. *See*, *e.g.*, *Life Partners Inc. v. United States*, 650 F.3d 1026, 1029-30 (5th Cir. 2011) (discussing administrative exhaustion requirements which are "a prerequisite to suit under the FTCA") (citing 28 U.S.C. § 2675(a); *McAfee v. 5th Circuit Judges*, 884 F.2d 221, 222–23 (5th Cir. 1989)). We decide only that the specific claims asserted in RRCC's counterclaims fall outside the CAFRA re-waiver and are therefore barred by sovereign immunity. Additionally, we note that neither the Tucker Act nor its companion, the Little Tucker Act, waive sovereign immunity over RRCC's claims. The Tucker Act provides a judicial avenue for "any claim against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491(a)(1); *see also United States v. Bormes*, 568 U.S. 6, 11 (2012) (discussing Tucker Act). The waiver in the Tucker Act, however, "has been limited to apply only to the Takings Clause . . . because only that clause contemplates payment by the federal government." *Rothe Dev. Corp. v. U.S. Dep't of Defense*, 194 F.3d 622, 625 (5th Cir. 1999). Here, RRCC does not invoke the Tucker Act, and its Fifth Amendment claims are premised on an alleged due process violation, not the Takings Clause. *See*, *e.g.*, *Bellamy v. United States*, 7 Cl. Ct. 720, 723 (1985) (explaining claims court "has no jurisdiction over claims based upon the Due Process and Equal Protection guarantees of the Fifth Amendment, because these constitutional provisions do not obligate the Federal Government to pay money damages" (quoting *Carruth v. United States*, 224 Ct. Cl. 422, 445 (1980) (cleaned up)).

allowing a limited cross-libel against the United States when the United States sues another vessel for collision damages. *See United States v. The Thekla*, 266 U.S. 328 (1924); *United States v. The Paquete Habana*, 189 U.S. 453 (1903); *The Siren*, 74 U.S. 152 (1868); *see also*, *e.g.*, *United States v. Shaw*, 309 U.S. 495, 502–03 (1940) (explaining that, in such cases, "it is necessary to determine the cross-libel as well as the original libel to reach a conclusion as to liability for the collision").[10] But RRCC directs us to no authority for the proposition that this distinct admiralty rule waives the United States' sovereign immunity whenever it institutes a civil forfeiture proceeding. Nor does RRCC direct us to any unambiguous statutory waiver of the United States' immunity under such circumstances.[11] As we have already explained, Congress did enact an unambiguous immunity waiver with respect to forfeiture proceedings, *see* 28 U.S.C. § 2680(c)(1)-(4), but it has no application here.

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[10] *See generally* 2 AM. JUR. 2d ADMIRALTY § 44 ("Whenever the United States sues for damage inflicted on its vessel or cargo, it impliedly waives its exemption from admiralty jurisdiction as to cross libels or counterclaims arising from the same transaction." (citing *The Thekla*, 266 U.S. 328; *The Western Maid*, 257 U.S. 419 (1922))).

[11] RRCC incorrectly points to the immunity waiver in 46 U.S.C. § 30903(a), but that statute also pertains only to certain admiralty claims involving the United States. *See*, *e.g.*, *MS Tabea Schiffahrtsgesellschaft MBH & Co. KG v. United States*, 636 F.3d 161, 165 n.1 (5th Cir. 2011) (explaining that "[t]he Suits in Admiralty Act (SAA) . . . provides the appropriate waiver for maritime tort claims against the United States" (citing 46 U.S.C. § 30903)).

Finally, RRCC claims we cannot reach sovereign immunity for two reasons. First, RRCC points out the government did not raise the issue below. That is irrelevant: Whether the United States' sovereign immunity has been waived is a question of subject matter jurisdiction we can address for the first time on appeal. *See*, *e.g.*, *Lewis v. Hunt*, 492 F.3d 565, 568 (5th Cir. 2007) (holding that an appellate court may consider United States' sovereign immunity *sua sponte*, "[a]lthough the parties and the district court did not raise [it]"); *Bodin v. Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006) (explaining that lack of waiver of United States' sovereign immunity under FTCA "deprives federal courts of subject matter jurisdiction"). Second, RRCC claims that addressing sovereign immunity would convert a without-prejudice dismissal below into a with-prejudice dismissal on appeal, which would be inappropriate without a cross-appeal. *See*, *e.g.*, *Jennings v. Stephens*, 574 U.S. 271, 135 S. Ct. 793, 798 (2015) (explaining "an appellee who does not cross-appeal may not 'attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary' " (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924))). RRCC is again mistaken. Claims barred by sovereign immunity are dismissed without prejudice, not with prejudice. *See*, *e.g.*, *Warnock v. Pecos Cty., Tex.*, 88 F.3d 341, 343 (5th Cir. 1996) (explaining that "[b]ecause sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice"); *see also*, *e.g.*, *United States v. Tex. Tech Univ.*, 171 F.3d 279, 285

n.9 (5th Cir. 1999) (same, citing *Warnock*); 9 WRIGHT & MILLER, FED. PRAC. & PROC. § 2373 (because dismissal for lack of jurisdiction does not reach merits, claim "must be considered to have been dismissed without prejudice"). Thus, we may, and do, rule that RRCC's counterclaims are barred by sovereign immunity.[12]

IV.

Congress has provided various remedies for claimants like RRCC who assert that the United States has wrongfully seized their property in forfeiture proceedings. *See*, *e.g.*, *United States v. Khan*, 497 F.3d 204, 208 (2nd Cir. 2007) (by reforming the forfeiture laws in CAFRA, "Congress was reacting to public outcry over the government's too-zealous pursuit of civil and criminal forfeitures"). Under certain circumstances, claimants who "substantially prevail[]" in a forfeiture action may recover attorneys' fees, costs, and interest. *See* 28 U.S.C. § 2465(b)(1)(A)–(C). In some cases, they may sue the United States for property damages under the FTCA. *See* 28 U.S.C. § 2680(c)(1)–(4). What claimants may not do, however, is sue the United States for constitutional torts arising out of the property seizure.

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[12] Because we resolve the appeal on sovereign immunity grounds, we do not address the government's argument that RRCC's damages counterclaims are barred by 28 U.S.C. § 2465(b)(2)(A). Part of a provision addressing government liability for costs, fees, and interest when a claimant prevails in a forfeiture proceeding, § 2465(b)(2)(A) provides that "[t]he United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection." 28 U.S.C. § 2465(b)(2)(A).

Congress has not waived the United States' sovereign immunity for damages claims of that nature. Because RRCC's counterclaims sought precisely those kinds of damages, we hold its counterclaims are barred by sovereign immunity.

We VACATE the district court's judgment and REMAND with instructions to dismiss RRCC's counterclaims for lack of subject matter jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. $4,480,466.16 IN FUNDS SEIZED FROM BANK OF AMERICA ACCOUNT ENDING IN 2653, et al., Defendants *in rem*.	§ § § § § § § § § § §	Civil Action No. 3:17-CV-2989-D

MEMORANDUM OPINION AND ORDER

(Filed Apr. 26, 2018)

In this civil forfeiture action, claimants Retail Ready Career Center, Inc. ("RRCC"), Jonathan Davis ("Davis"), Melissa Richey ("Richey"), Lake Forrest Drive Properties, Inc. ("Lake Forrest"), Clear Conscience, LLC ("Clear Conscience"), and Trades United Inc. ("Trades United") (collectively, "claimants") move to dismiss the first amended complaint ("amended complaint") and for a more definite statement.[1] Claimants have also filed two motions to unseal court records. The government moves under 18 U.S.C. § 981(g)(1) to stay this proceeding during the pendency of a related, ongoing criminal investigation, and it moves under Fed. R. Civ. P. 12(b)(6) to dismiss RRCC's

[1] Claimants also move to dismiss the complaint, but, as discussed below, *see infra* § III (A), these motions are moot.

counterclaims. For the following reasons, the court denies the government's motion to stay; grants the government's motion to dismiss RRCC's counterclaims; denies as moot claimants' motions to dismiss plaintiff's complaint; grants claimants' motions to dismiss plaintiff's amended complaint; denies claimants' motions to unseal court records; and grants the government leave to file a second amended complaint in order to comply with Supp. R. G(2)(f).

I

In September and October 2017, the government seized certain property (collectively, the "defendant property") as derived from proceeds traceable to a violation, violations, or conspiracy to violate federal law.[2] On October 30, 2017 the government filed the instant *in rem* action, alleging, *inter alia*, that the defendant property

> is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(c), 18 U.S.C. § 981(a)(1)(D), and 18

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[2] The government seized $4,480,466.16 in funds from a Bank of America account ending in 2653; $146,370.00 in funds from a Bank of America account ending in 0252; $77,437.59 in funds from a Charles Schwab account ending in 8588; $263.47 in funds from a Wells Fargo account ending in 2092; $9,668.28 in funds from a Bank of Utah account ending in 2251; $2,814.51 in funds from a Bank of Utah account ending in 0784; a 2014 Lamborghini Aventador; a 2016 Ferrari 488; a 2017 Bentley Continental GT V8; a 2017 Mercedes-Benz AMG S63; a 2016 Mercedes-Benz G63; a 2016 Dodge Ram 2500; a 2016 BMW Alpina; real property located at 14888 Lake Forest Drive in Dallas, Texas; and $11,005.00 in funds from a Capital One account ending in 2713.

> U.S.C. § 982(a)(3) because it is derived from proceeds traceable to a violation, violations, or conspiracy to violate 18 U.S.C. § 1031, 18 U.S.C. §§ 286 and 371, 18 U.S.C. § 641, 18 U.S.C. § 1001, 18 U.S.C. § 1341, and 18 U.S.C. § 1343 [as] is shown by the Verification Affidavit in Support of the United States' Complaint for Forfeiture of Special Agent Miguel Coias, filed under seal, and incorporated as Plaintiff's Exhibit 1, in the Appendix filed in support of this Complaint.

Compl. ¶ 6.[3]

After receiving notice of the action, claimants filed verified claims to the defendant property. They then moved, in three separate motions, to dismiss the complaint and for a more definite statement. They also moved to unseal court records. On December 14, 2017 the government filed the amended complaint and moved to dismiss the constitutional counterclaims of claimant RRCC. Claimants, again in three separate motions filed on December 29, 2017, moved to dismiss the amended complaint and for a more definite statement. They also filed a second motion to unseal court records. On January 18, 2018 the government filed a motion to stay, pursuant to 18 U.S.C. § 981(g)(1), on the ground that a stay is necessary to protect the ongoing

[3] The amended complaint contains a similar allegation, except that it also cites 28 U.S.C. § 2461(c). *See* Am. Compl. ¶ 6.

criminal investigation from expansive civil discovery. The court now addresses these motions.[4]

II

The court turns first to the government's motion to stay.

A

The government seeks a stay of this civil forfeiture action against the defendant properties pursuant to 18 U.S.C. § 981(g)(1), which provides, in pertinent part: "[u]pon the motion of the United States, the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case." 18 U.S.C. § 981(g)(1). In deciding whether to grant such a stay, "the court must determine, first, whether a related criminal investigation or prosecution exists and, second, whether civil discovery will 'adversely affect' the ability of the government to conduct that criminal investigation or prosecution were the civil forfeiture case allowed to proceed." *United States v. All Funds ($357,311.68) Contained in N. Tr. Bank of*

[4] Two other motions remain pending: claimant Davis' April 5, 2018 motion and petition to release property pursuant to 18 U.S.C. § 983(F), and claimant Richey's April 10, 2018 motion and petition to release property pursuant to 18 U.S.C. § 983(F). These motions will be decided in due course.

Fla. Account No. 7240001868, 2004 WL 1834589, at *2 (N.D. Tex. 2004) (Fish, C.J.) ("*All Funds*").

B

The government contends that a stay is necessary to protect an ongoing criminal investigation from the expansive scope of civil discovery; that the criminal investigation and the civil forfeiture case arise from the same facts and circumstances, as set forth in a sealed affidavit filed with the amended complaint; that discovery in this civil forfeiture case could compromise the investigation by permitting depositions of individuals who may be called to testify at a criminal trial, including the defendants (who have a Fifth Amendment right to remain silent), law enforcement agents, and individuals involved in the scheme under investigation; and that civil discovery could compromise confidential law enforcement information, as well as provide improper opportunities for the defendants to ascertain prematurely the details of the ongoing criminal investigation by earlier and broader civil discovery than is permissible in criminal proceedings.[5]

[5] The government contends that requiring it to disclose the identity of all witnesses with discoverable information and all documents gathered in the course of the investigation, as claimants have already sought to do in the Rule 26 initial disclosure process, would prejudice the criminal prosecution by subjecting the government's criminal investigation to broader discovery than would otherwise be available at this stage to the subject of a criminal investigation.

Claimants respond that the government has failed to meet its burden to show that discovery will adversely affect a related criminal investigation. They contend that the government has shown only a hypothetical possibility that discovery "could" have a harmful effect on a related criminal investigation, which is insufficient to establish that a criminal investigation "will" be adversely affected; that the government has failed to identify any discovery request or discovery abuse, or identify any particular types of information for which discovery should not be permitted (such as, for example, confidential informants or witnesses whose identities must be protected); that civil discovery will not harm the criminal investigation because this case can be resolved without discovery—the only reason claimants have not filed a motion for summary judgment "packed with evidence proving [their] innocence" is because the government refuses to disclose the allegations that claimants need to disprove, Claimants' Br. 6; and that the government's inability or unwillingness to submit evidence in support of its motion to stay is indicative of the fact that the motion lacks merit. Claimants also posit that, even if the government could meet its burden to show that civil discovery will adversely affect a related criminal investigation, a stay would nonetheless be inappropriate because a protective order, rather than a stay, would protect the government's interest without unfairly limiting claimants' ability to pursue the civil case.

The government replies that, if it is required to disclose all of the people who have relevant knowledge

about the case, this will have a negative impact on the government's related, ongoing criminal investigation, and that a protective order would be inadequate because "if the case were to continue, information would necessarily be disclosed to people who are both claimants [in] this case and subjects of the related criminal investigation, obviating a protective order's efficacy." Gov't Reply 7.

C

Claimants do not challenge the existence of a related, ongoing criminal investigation. Instead, they contend that the government has failed to meet its burden to show how discovery will adversely affect that investigation. This court has previously explained that § 981(g)(1) requires "that the Government actually show that civil discovery will adversely affect its ability to conduct the criminal investigation." *All Funds*, 2004 WL 1834589, at *2 (emphasis omitted). "There is no presumption that civil discovery, in itself, automatically creates an adverse affect on the government's related criminal proceeding. On the contrary, the Government must make an actual showing regarding the anticipated adverse affect." *Id.* (citing cases); *see also United States v. $3,592.00 United States Currency*, 2016 WL 5402703, at *2 (W.D.N.Y. Sept. 28, 2016) ("But to grant a stay on this record, without any specific showing and when no lesser alternatives (such as a protective order, or preliminarily limiting discovery to certain areas or types) have even been attempted, in this Court's view would be inconsistent with the

standard articulated by the statute."); *cf. United States v. 1,730,010.00 in U.S. Currency More or Less*, 2007 WL 1164104, at *3 (W.D. Tex. Apr. 16, 2007) (granting stay where government "specifically establishe[d]," through a sealed affidavit, that "civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation."). The government has failed to do so in its present motion.

The government contends that "[d]iscovery in this case could compromise the investigation by permitting depositions of individuals who may be called at a criminal trial, including the defendants (who have a Fifth Amendment right to remain silent), law enforcement agents, and individuals involved in the scheme under investigation," Gov't Br. 5, and that civil discovery "also could compromise confidential law enforcement information, as well as provide improper opportunities for the defendant to ascertain prematurely the details of the ongoing criminal investigation by earlier and broader civil discovery than is permissible in criminal proceedings," *id.* at 6. The government cites as an example claimants' Rule 26 initial disclosure requests, which the government contends will

> forc[e] the government to disclose the identity of all witnesses with discoverable information and all documents gathered in the course of the investigation [which] would prejudice the criminal prosecution by subjecting the government's criminal investigation to broader discovery than would otherwise be available to the subject of an investigation at this stage.

Id. The government's arguments, however, "do nothing more than speculate about how civil discovery will adversely affect its criminal investigation." *All Funds*, 2004 WL 1834589, at *2.

As Chief Judge Fish explained in *All Funds*, under the government's theories, "*every* civil forfeiture case with a related criminal investigation is entitled to a stay. Such speculative and conclusory theories undercut the requirement of section 981(g) *that the Government actually show that civil discovery will adversely affect its ability to conduct the criminal investigation.*" *Id.* As in *All Funds*, the government has failed here to point to any specific discovery request or abuse that has taken place, and it makes no legitimate argument about the prospective ability of any of the claimants to engage in discovery that could compromise its related criminal investigation.[6] *Id.* (citations omitted). The government has not shown that civil discovery will compromise the identity of confidential informants or

[6] In its reply brief, the government states that it described the negative impact that discovery would have "and the specific harm that would arise from the claimants' Rule 26 disclosures demand, demonstrated in the attached exhibits." Gov't Reply 5-6. The attached exhibits consist of the government's Rule 26(a)(1) initial disclosures, in which the government states that it is "withholding the names of . . . all other individuals aside from the lead case agents listed below, subject to the Court's ruling on the government's impending motion to stay and the Claimants' motion to unseal the affidavit filed under seal in support of the Plaintiff's first amended complaint," Gov't Reply App. 6, and a transmittal email. Neither of these documents, however, sheds any light on *how* civil discovery in this case will have a negative impact on the government's related, ongoing criminal investigation.

cooperating witnesses. *Id.* (citing cases). Nor has the government shown how the claimants might abuse the discovery process with overbroad discovery requests. *Id.* (citing cases).

In sum, the government has not carried its burden of showing that discovery in this civil forfeiture action will adversely affect its criminal investigation of any claimant. *See* 18 U.S.C. § 981(g)(1). Accordingly, the government's motion to stay this civil forfeiture proceeding is denied.

D

The court below is granting the government leave to file a second amended complaint and is permitting claimants to move anew to dismiss if, in light of the amended pleading, they are still unable to draft a responsive pleading or conduct meaningful discovery. If the government is able to make the required showing to obtain a stay under 18 U.S.C. § 981(g)(1), or to obtain other relief short of a complete stay (e.g., a protective order or order limiting discovery to certain areas or types), it may seek such relief by timely motion.

III

The court turns next to claimants' motions to dismiss and for more definite statement.

A

In view of the filing of the amended complaint, RRCC's December 4, 2017 motion to dismiss and for more definite statement, Davis' December 4, 2017 motion to dismiss and for more definite statement, and the December 4, 2017 motion to dismiss and for a more definite statement of claimants Richey, Lake Forrest, Clear Conscience, and Trades United, all of which were directed at the government's now-superseded complaint, are denied without prejudice as moot.

B

In their December 29, 2017 motions to dismiss—which are addressed to the amended complaint—claimants first move to dismiss on the ground that the government has failed to plead a statutory basis for the court to exercise *in rem* jurisdiction over the defendant property.

Supp. R. G(2)(b) provides, in pertinent part, that the complaint must "state the grounds for subject-matter jurisdiction [and] in rem jurisdiction over the defendant property." Supp. R. G(2)(e) requires that the complaint "identify the statute under which the forfeiture action is brought." The amended complaint alleges that the defendant property is subject to forfeiture under 18 U.S.C. § 981(a)(1)(C) and (D) and 18 U.S.C. § 982(a)(3), and that the defendant property (other than the real property) was seized in Dallas and has been turned over to the United States Marshals

Service in Dallas, who maintains custody of it.[7] Am. Compl. ¶¶ 4, 6. These allegations are sufficient to state the grounds for subject-matter jurisdiction and to identify the statute under which the forfeiture action is brought.

C

Claimants next move to dismiss the amended complaint on the ground that it fails to plead sufficient facts to state a claim under 18 U.S.C. § 981(a)(1)(C), 18 U.S.C. § 981(a)(1)(D), 18 U.S.C. § 982(a)(3), or 24 U.S.C. § 2461(c).[8]

1

Pleading requirements for forfeiture actions *in rem* are governed by Rule G of the Supplemental Rules of the Federal Rules of Civil Procedure. *See generally* Supp. R. G. Under Supp. R. G(8)(b), a claimant who establishes standing to contest forfeiture[9] may move to dismiss the action under Rule 12(b). The sufficiency of the complaint is governed by Supp. R. G(2), which

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[7] 18 U.S.C. § 981(b)(2)(C) provides that a seizure of property subject to forfeiture may be made without a warrant if the property was lawfully seized by a state or local law enforcement agency and transferred to a Federal agency. The government contends, and claimants do not dispute, that the defendant property was seized pursuant to a valid seizure warrant.

[8] The government acknowledges "that it has no claims under 24 U.S.C. § 2461(c)." Gov't Br. at 9-10.

[9] The government does not contend that any claimant lacks standing.

requires, *inter alia*, that the verified complaint "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial."[10] Supp. R. G(2)(f). In other words, the government must "state[] the circumstances giving rise to the forfeiture claim with sufficient particularity" to allow a claimant to conduct a "meaningful investigation of the facts and draft[] a responsive pleading." *United States v. Mondragon*, 313 F.3d 862, 867 (4th Cir. 2002).[11]

2

In their motions to dismiss, claimants contend, *inter alia*, that the government has not alleged sufficiently detailed facts to support a reasonable belief that it will be able to establish that a violation of any

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[10] 18 U.S.C. § 983(c) provides that, in a civil forfeiture suit, "the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture," and that "if 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)(1), (3).

[11] Although *Mondragon* pre-dates the adoption of Supp. R. G(2), the advisory committee's notes explain that the new Rule expressly incorporates the Fourth Circuit's holding in promulgating the new pleading standard for *in rem* forfeiture actions. *See* Supp. R. G advisory committee's note to 2006 Amendments ("The complaint must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. *See* [*Mondragon*, 313 F.3d at 866]. Subdivision (2)(f) carries this forfeiture case law forward without change.").

of the enumerated statutes occurred or that any of the defendant property is traceable to any of the unpleaded facts regarding the purported violations. The court agrees.

In support of its claim for civil forfeiture, the government pleads the following "facts and basis for forfeiture":

> [t]he defendant property is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(c), 18 U.S.C. § 981(a)(1)(D), 18 U.S.C. § 982(a)(3), and 28 U.S.C. § 2461(c) because it is derived from proceeds traceable to a violation, violations, or conspiracy to violate 18 U.S.C. § 1031, 18 U.S.C. §§ 286 and 371, 18 U.S.C. § 641, 18 U.S.C. § 1001, 18 U.S.C. § 1341, and 18 U.S.C. § 1343. This is shown by the Verification Affidavit in Support of the United States' Complaint for Forfeiture of Special Agent Miguel Coias, filed under seal, and incorporated as Plaintiff's Exhibit 1, in the Appendix filed in support of this amended complaint.

Am. Compl. ¶ 6. These allegations are insufficient to meet Supp. R. G(2)'s requirement that *the complaint* must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. G(2)(f). *See*, *e.g.*, *United States v. All Funds on Deposit in Lee Munder Wealth Planning Resource Account Number ***-**1080*, 137 F.Supp.3d 125, 130 (D. Mass. Jan. 22, 2016) (holding as a matter of law that, where complaint "[left] too much to the imagination," and "[f]actual

allegations regarding many of the required elements of [11 U.S.C. § 547(b), on which first claim for forfeitability is based] [were] missing," complaint failed to meet pleading standard of Supp. R. G(2)(f)); *cf. United States v. Funds in the Amount of $33,534.93 Account Number Ending **8429 From Bank of Am.*, 2013 WL 12333983, at *6 (D. N.M. Mar. 25, 2013) (denying motion to dismiss in civil forfeiture action where "the totality of facts alleged [were] sufficiently detailed to apprise Claimant of the basis for the forfeiture action, allowing her to respond by contesting the source of these funds. She is sufficiently informed to be able to conduct a meaningful investigation [and therefore Supp. R.] G's particularity requirements have been met[.]").

3

The government maintains that claimants' arguments essentially focus on the fact that, pursuant to court order, the verifying affidavit of Special Agent Miguel Coias has been filed under seal. The government contends that the sealed affidavit includes facts about an ongoing criminal investigation that forms the basis of this lawsuit; that there are many decisions in which courts have allowed civil forfeiture complaints to be filed, and remain, under seal when the disclosure of the underlying information could compromise an ongoing criminal investigation; that the sealed affidavit filed in support of the amended complaint contains more than sufficient facts to demonstrate the government's entitlement to file and maintain the facts under seal, and to the relief sought at this stage of the civil

lawsuit and ongoing criminal investigation; that disclosure of the affidavit would reveal matters related to an ongoing criminal investigation about claimants' business dealings, and would have a deleterious effect on the investigation; that, on balance, the need to complete the pending investigation outweighs claimants' need for information to establish their rights to the defendant property; and that the government has filed a motion to stay this civil litigation while the parallel criminal investigation proceeds, and the government should not be required to disclose any sealed materials until the conclusion of the related criminal investigation. The court is not persuaded by the government's arguments.

First, although the court granted the government's motion to seal the affidavit submitted in support of its amended complaint, the court is today denying the government's motion to stay. For the reasons explained above, the court holds that the government has not met its burden to show under 18 U.S.C. § 981(g)(1) that discovery in this civil forfeiture case will adversely affect the related, ongoing criminal investigation of any claimant.

Second, the government has failed to point to any case, and the court has found none, that supports the court's consideration of a *sealed* affidavit that a claimant is unable to challenge—as opposed to a publicly-filed affidavit—when determining whether the complaint meets the pleading standards of Rule 8 and Supp. R. G(2). *Cf. United States v. One Parcel of Real Property*, 921 F.2d 370, 376 (1st Cir. 1990) (reversing

dismissal of *in rem* action where, although forfeiture complaint was insufficient, government's second affidavit, "expressly made part of the second forfeiture complaint, alleges facts sufficient to support a reasonable belief that the government, at trial, can make a probable cause showing that most, if not all, of the defendant property is connected to illegal drug proceeds." (footnote omitted)); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1266 (2d Cir. 1989) (holding that affidavit stating "the dates, circumstances, location and parties to the alleged drug transactions as well as the drugs and drug paraphernalia seized from the premises, cured any defect in the complaint" (citation omitted)). Allowing the government to keep from claimants the "detailed facts" supporting its forfeiture claim (especially in a case such as this where discovery has *not* been stayed in light of a pending criminal investigation) would frustrate claimants' ability to conduct a "meaningful investigation of the facts and draft[] a responsive pleading." *Mondragon*, 313 F.3d at 867.

D

Although the court concludes that the amended complaint does not satisfy the pleading requirements of Supp. R. G(2) and that claimants' motion to dismiss should be granted, it declines at this juncture to dismiss this action. Instead, the court grants the government leave to file, within 28 days of the date of this memorandum opinion and order is filed, a second amended complaint that "state[s] sufficiently detailed

facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. G(2)(f). If, after the government files its second amended complaint, claimants are still unable to draft a responsive pleading or conduct meaningful discovery, they may move anew to dismiss the second amended complaint.

IV

Claimants have filed two motions to unseal court records.[12] In light of the court's granting of leave to the government to file a second amended complaint that complies with Supp. R. G(2)(f), the court concludes that the court records (i.e., the affidavits) should not be unsealed at this time.

First, because the court is not relying on the contents of the sealed affidavits to deny claimants' motions to dismiss, it is unnecessary to unseal the court records. Second, the sealed affidavits filed in support of the complaint and amended complaint may contain information protected by the attorney-client privilege or as work product. The court should not require the government to disclose potentially protected material without permitting it to invoke the privilege and/or protection.

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[12] On December 4, 2017 claimants moved to unseal court records, and, on December 29, 2017, after the government amended its complaint, claimants filed a second motion to unseal court records.

Accordingly, the court denies claimants' motions to unseal.

V

Finally, the court considers the government's motion to dismiss the counterclaims filed by claimant RRCC.

A

In connection with its verified claim in this case, RRCC has filed two constitutional counterclaims, alleging that the government violated the Fourth Amendment by committing an unreasonable seizure of its property, i.e., by seizing the claimed property without an indictment, notice and hearing, or admissible evidence supporting a claim of forfeiture, and that the government violated the Fifth Amendment by depriving RRCC of its property without due process of law.

The government moves under Rule 12(b)(6) to dismiss RRCC's counterclaims, contending, *inter alia*, that because RRCC is a claimant in this civil forfeiture action—not a party against whom a claim is made—RRCC may not file a counterclaim. In response, RRCC argues that no *in rem* jurisdiction exists in this case; that, as a matter of historical practice, an owner of arrested property can bring suit against the government in actions *in rem*; that Supp. R. E(7) permits counterclaims *in rem*; that the Fifth Circuit has never

suggested that counterclaims in *in rem* proceedings were impermissible; and that the government's authorities are incorrect because they all trace back to a First Circuit case that cites no authority for the proposition that counterclaims cannot be asserted *in rem*.

B

Neither the government nor RRCC cites any binding Fifth Circuit authority addressing the question whether a claimant can bring a counterclaim against the United States in a civil forfeiture proceeding. Persuasive authority from other circuits, however, supports the conclusion that because RRCC is not a defendant against whom a claim has been asserted, it cannot bring a counterclaim in this civil forfeiture proceeding.

In *United States v. One Lot of U.S. Currency ($68,000)*, 927 F.2d 30 (1st Cir. 1991), the First Circuit held that a claimant in a civil forfeiture action could not assert a counterclaim against the government. The court explained:

> By definition, a counterclaim is a turn-the-tables response directed by one party ("A") at another party ("B") in circumstances where "B" has earlier lodged a claim in the same proceeding against "A." A forfeiture action is *in rem*, not *in personam*. The property is the defendant. Since no civil claim was filed by the government against [the claimant]—indeed, rather than being dragooned into the

> case as a *defendant*, he intervened as a *claimant*—there was no "claim" to "counter." Thus, [the claimant's] self-styled counterclaim was a nullity, and the court below appropriately ignored it.

Id. at 34. Other courts have followed this approach. *See*, *e.g.*, *United States v. 8 Luxury Vehicles*, 88 F.Supp.3d 1332, 1337 (M.D. Fla. 2015) (citing persuasive authority and concluding that "there is a general rule prohibiting the filing of counterclaims in civil proceedings based on case law, Rule 13(d), and Supplementary Rule G."); *United States v. Funds from Fifth Third Bank Account # 0065006695*, 2013 WL 5914101, at *12 (E.D. Mich. Nov. 4, 2013) (holding that claimant could not file counterclaim in civil forfeiture proceeding because United States had not filed any claims against claimant and any permissible claims against United States had to be filed as separate action); *United States v. $22,832.00 in U.S. Currency*, 2013 WL 4012712, at *4 (N.D. Ohio Aug. 6, 2013) ("Claimants in an *in rem* civil forfeiture action generally may not file counterclaims against the government."); *United States v. $43,725.00 in U.S. Currency*, 2009 WL 347475 at *1 (D.S.C. Feb. 3, 2009) ("[T]he true defendant in a civil forfeiture action is the property that has been seized, rather than the claimant of that property, and the claimant of the seized property is not entitled to pursue a counterclaim against the Government or individuals within the limited scope of the *in rem* civil forfeiture action."); *United States v. 1866.75 Board Feet*, 2008 WL 839792, at *3 (E.D. Va. Mar. 25, 2008) ("claimants in an *in rem* civil forfeiture action . . . are not entitled to include

counterclaims."); *United States v. Assorted Computer Equip.*, 2004 WL 784493, at *2 (W.D. Tenn. Jan. 9, 2004) (stating that civil forfeiture is *in rem*, not *in personam*, and that defendant is the property subject to forfeiture, not the claimant, and "[b]ecause the government has not asserted a claim against [claimant], there can be no counterclaim.").

Based on these persuasive authorities, and absent binding Fifth Circuit authority to the contrary, the court grants the government's motion to dismiss RRCC's counterclaim. The court holds that, as a claimant in an *in rem* civil forfeiture action, RRCC cannot bring a counterclaim. Accordingly, the court grants the government's motion to dismiss RRCC's counterclaims.

* * *

For the reasons explained, the court denies the government's January 18, 2018 motion to stay; grants the government's December 20, 2017 motion to dismiss RRCC's counterclaims; denies without prejudice as moot claimants' December 4, 2017 motions to dismiss and for more definite statement; grants claimants' December 29, 2017 motions to dismiss first amended complaint and for more definite statement; denies claimants' December 4, 2017 motion to unseal court records and December 29, 2017 second motion to unseal court records; and grants the government leave to file a second amended complaint within 28 days of the date this memorandum opinion and order is filed.

SO ORDERED.

April 26, 2018.

/s/ Sidney A. Fitzwater
SIDNEY A. FITZWATER
UNITED STATES
DISTRICT JUDGE