

APPENDIX

APPENDIX

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APPENDIX A

**NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION**

File Name: 19a0561n.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Case No. 18-4042

[Filed November 6, 2019]

| | |
|----------------------------------|---|
| UNITED STATES OF AMERICA, |) |
| |) |
| Plaintiff-Appellee, |) |
| |) |
| v. |) |
| |) |
| \$99,500.00 U.S. CURRENCY SEIZED |) |
| ON MARCH 20, 2016; \$107,900.00 |) |
| U.S. CURRENCY SEIZED ON JUNE |) |
| 17, 2016; and \$57,999.00 U.S. |) |
| CURRENCY SEIZED ON AUGUST |) |
| 18, 2016, |) |
| |) |
| Defendants, |) |
| |) |
| SAMSON PRIMM, |) |
| |) |
| Claimant-Appellant. |) |

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

BEFORE: BOGGS, BATCHELDER, and DONALD,
Circuit Judges.

BERNICE BOUIE DONALD, Circuit Judge.

Samson Primm wants to proceed on a claim to the defendant monies that are now the subject of this governmental forfeiture action. But because Primm no longer has a colorable ownership, possessory, or security interest in at least a portion of the defendant properties, the district court dismissed his claim on summary judgment for lack of Article III standing. We affirm.

I.

This civil-forfeiture action involves three defendant properties seized by law-enforcement officers and Primm’s asserted interests in said properties. The United States filed this forfeiture action on October 3, 2016, pursuant to 21 U.S.C. §881(a)(6), against the defendant properties—namely, \$99,500; \$107,900; and \$57,999 in U.S. currency seized by law enforcement on March 20, 2016; June 17, 2016; and August 18, 2016, respectively. The government alleged that the defendant properties constitute proceeds from illegal drug trafficking, were furnished or intended to be furnished in exchange for illegal drugs, and/or were used or intended to be used to facilitate illegal drug-trafficking activities.

In response to the action, Primm filed a verified claim “assert[ing] his absolute[] and unqualified[]

ownership interest[] and his unqualified right (and entitlement) to, and in,” the defendant properties and stating that he was “in sole[] and exclusive possession” of these monies when they were seized. He also filed a separate answer that claimed sole ownership and exclusive possession of the properties when they were seized from him but, notably, denied all of the government’s pertinent allegations regarding the seizures thereof, including that the monies were taken from his possession and that he won some of it while gambling.

The United States moved to strike both claims, arguing that Primm made only bald assertions of ownership insufficient to meet the statutory requirements of Rule G of the Federal Rules of Civil Procedure’s Supplemental Rules for Admiralty or Maritime Claims and Civil Forfeiture Actions. *United States v. \$99,500.00 U.S. Currency*, 699 F. App’x 542, 542 (6th Cir. 2017). The district court granted the motion to strike, and Primm appealed. *Id.* Relying on our decision in *United States v. \$31,000.00 in U.S. Currency*, 872 F.3d 342 (6th Cir. 2017) [hereinafter *\$31,000.00 I*], we reversed the district court’s holding, reasoning that Primm’s verified claim of ownership was sufficient to satisfy Article III standing requirements and the procedural requirements of Rule G at the pleading stage. *United States v. \$99,500.00 U.S. Currency*, 699 F. App’x at 543-44. We then remanded the matter back to the district court. *Id.* at 544.

On remand, the district court held a case-management conference, where it set deadlines for discovery and dispositive motions. On January 25,

2018, the United States timely served special interrogatories and requests for production of documents to Primm's counsel. The discovery sought information about the nature of Primm's interest in the defendant monies, the source of the defendant monies, and Primm's legitimate sources of income, if any. Primm did not respond to the discovery requests and, instead, filed an "Opposition to Government's First Set of Interrogatories and Request for Production of Documents." In his opposition, Primm argued that he was not required to respond to the requests until the United States survived his motion to suppress and proved that the defendant monies are subject to forfeiture. Primm also attached an affidavit asserting his Fifth Amendment right in response to the requests but also implying (in conjunction with his opposition) that he reserved the right to supplement his responses after the district court ruled on his motion to suppress and determined forfeitability of the seized properties.

On March 9, 2018, the district court entered an order explaining that Primm's assertions were not supported by law and that discovery would proceed as scheduled. The district court also ordered Primm to clarify whether he was making a blanket refusal to answer to the United States' discovery requests based upon his Fifth Amendment privilege against self-incrimination or if he intended to respond to the outstanding requests. In response, Primm stated that he was not making a "blanket refusal" and that he would respond to any question that would not tend to incriminate him. Primm ended his response, however, by once again suggesting that he did not need to respond to any discovery requests until after the

government proves that the monies at issue were lawfully seized and forfeitable.

With Primm still not responding to the discovery requests, the government filed a motion to compel Primm's responses to the outstanding discovery, which the district court granted on April 20, 2018, and ordered Primm to respond to the requests by April 27, 2018. Again, Primm did not respond. Accordingly, the United States, pursuant to Fed. R. Civ. P. 37(b)(2)(A), moved to strike Primm's claim and his answer for failing to respond to its discovery requests. At that point, Primm responded in opposition by stating that he had all along asserted his Fifth Amendment privilege in response "to all questions put to him, and, [that] he will continue to do so"; he also asserted his Fifth Amendment privilege in reference to his being compelled to produce any documents. With it then clear that Primm was asserting his Fifth Amendment response to all discovery, the district court denied the government's motion to strike.

Thereafter, the United States filed a motion for summary judgment on the issue of standing, arguing that the district court should strike Primm's verified claim and answer, along with the naked assertions of ownership therein, based upon Primm's failure to respond to discovery requests aimed at determining the legitimacy of his claimed ownership interests. Primm opposed the relief sought and filed a cross-motion for summary judgment. The United States then filed, as one document, a reply to its own motion and a response to Primm's motion. Upon consideration, the district court struck Primm's conclusory assertions of

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ownership in his verified claim and answer, granted the United States' motion for summary judgment on the issue of standing based on Primm's failure to satisfy Article III, and denied Primm's motion for summary judgment.¹

II.

"Generally, we review 'a district court's decision to strike a claim in an *in rem* forfeiture action for an abuse of discretion.'" *\$31,000.00*, 872 F.3d at 347 (quoting *United States v. One 2011 Porsche Panamera*, 684 F. App'x 501, 506 (6th Cir. 2017)). We review *de novo*, however, "[a] district court's determination of a claimant's standing to contest a federal forfeiture action." *Id.* (quoting *United States v. Real Prop. Located at 4527-4535 Mich. Ave., Detroit, Mich.*, 489 F. App'x 855, 857 (6th Cir. 2012)). Moreover, this Court reviews a district court's grant of summary judgment *de novo*. *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 503 (6th Cir. 2017) (en banc).

III.

We hold that the district court did not err in finding that Primm failed to meet his burden of establishing Article III standing at the summary-judgment stage of the proceeding below. In challenging the district court's summary-judgment ruling in favor of the United

¹ Although the United States filed a motion for summary judgment on June 5, 2018, the district court, thereafter, granted it leave to file a motion for summary judgment on the issue of standing. The latter motion is what the district court relied on in dismissing Primm's claims and is the subject of this appeal.

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States, Primm makes three primary arguments: (A) the lower court's ruling goes against the law of the case; (B) the lower court improperly drew an adverse inference against him based on his invocation of the Fifth Amendment right against self-incrimination; and (C) the lower court improperly sanctioned him for his invocation of the right against self-incrimination, because Fed. R. Civ. P. 26(b)(1) and (b)(5) limit the scope of discovery to matters "not privileged."

A.

Addressing Primm's first argument, we hold that the district court, in finding that Primm lacked standing at summary judgment, did not go against the law of the case. The law-of-the-case doctrine "provides that courts' earlier decisions 'should continue to govern the same issues in subsequent stages in the same case.'" *In re Blasingame*, 920 F.3d 384, 392 (6th Cir. 2019) (quoting *Musacchio v. United States*, 136 S. Ct. 709, 716 (2016)). The rule applies after a case is remanded to a trial court by an appellate court. *United States v. Twp. of Brighton*, 282 F.3d 915, 919 (6th Cir. 2002).

In regard to Primm's standing in this matter, this court previously ruled that Primm's verified claim of ownership was sufficient to satisfy Article III standing requirements and the procedural requirements of Rule G at the pleading stage. *\$99,500.00 U.S. Currency*, 699 F. App'x at 544. The district court's most recent Article III determination, however, was not made at the pleading stage. On remand, the district court held a case-management conference and set deadlines for discovery and dispositive motions before ruling at the

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summary-judgment stage of the proceedings that Primm did not have Article III standing. *United States v. \$99,500 in U.S. Currency*, 339 F. Supp. 3d 690, 693, 700 (N.D. Ohio 2018).

This Court's determination of whether Primm met his burden of establishing Article III standing and the requirements of Rule G at the pleading stage, did not preclude the United States from arguing, or the district court from ruling, that he failed to show Article III standing on summary judgment. *United States v. \$31,000.00 in U.S. Currency*, 774 F. App'x 288, 292-93 (6th Cir. 2019) [hereinafter *\$31,000.00 III*]. Indeed, at no point has this court held that Primm has standing for summary-judgment purposes. Thus, Primm's first argument is without merit.

B.

Primm's argument that the lower court improperly drew an adverse inference against him because of his invocation of his Fifth Amendment privilege against self-incrimination also lacks merit. In ruling on the United States' summary-judgment motion below, the district court stated as follows:

Claimant does not address the government's argument that the Court should strike his naked assertion of ownership because he failed to answer any discovery directed at determining the legitimacy of that assertion. Instead, he argues that the Court cannot draw an adverse inference from the assertion of the privilege. Because the government has not asked for an

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adverse inference, the Court need not address this argument.

\$99,500 in U.S. Currency, 339 F. Supp. 3d at 697 n.4. As evidenced by the above excerpt, and through the remainder of the district court's opinion, the court below did not consider, let alone make, any adverse inferences as a result of Primm invoking his right against self-incrimination.

To be certain, the district court struck Primm's conclusory assertions of ownership in his verified claim and answer, leaving him with an unexplained claim of possession. *Id.* at 697-700. As found by the district court, such an unexplained claim of possession is insufficient to meet the burden of establishing Article III standing at the summary-judgment stage.² See *United States v. \$677,660.00 in U.S. Currency*, 513 F. App'x 531, 532 (6th Cir. 2013) (per curiam); see also *United States v. \$ 515,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir. 1998). Thus, although the district court struck Primm's conclusory assertions of ownership, the district court did not draw any adverse inferences as a result of Primm's invocation of his right against self-incrimination.

² Although Primm makes a cursory argument that the facts relied upon by the United States in support of its motion for summary judgment on the issue of standing were insufficient to carry its burden of proof, we do not reach this issue, as Primm never met his threshold burden of establishing Article III standing.

C.

Moreover, we find no merit in Primm’s argument that the district court abused its discretion by striking his assertions of ownership from his verified claim and answer, which he frames as an improper imposition of a sanction based on a rightful assertion of a privilege, in violation of Fed. R. Civ. P. 26. “As in any federal suit, a claimant must have Article III standing” in an *in rem* civil forfeiture proceeding. *\$31,000.00 I*, 872 F.3d at 348. The burden to show standing in such matters is on the claimant. *Id.* Courts assess “Article III standing in civil forfeiture cases by requiring that ‘a claimant must have a colorable ownership, possessory[,] or security interest in at least a portion of the defendant property.’” *Id.* (quoting *\$515,060.42 in U.S. Currency*, 152 F.3d at 497). At the summary-judgment stage, a claimant must “present ‘some evidence of ownership’ beyond the mere assertion of an ownership interest in the property.” *United States v. \$31,000 in U.S. Currency*, No. 1:16 CV 1581, 2018 U.S. Dist. LEXIS 86656, at *11–12 (N.D. Ohio May 23, 2018) [hereinafter *\$31, 000.00 II*] (citing *United States v. Phillips*, 883 F.3d 399, 403 (4th Cir. 2018)).

Below, the United States filed a motion for summary judgment on the issue of standing, requesting that the district court strike Primm’s verified claim and answer, along with the naked assertions of ownership therein, based upon Primm’s failure to respond to discovery requests aimed at determining the legitimacy of his claimed ownership interests. In other words, the United States argued that the district court should strike Primm’s conclusory

assertions of ownership that came as a result of Primm freely responding to questions that were advantageous to his cause, given that he, thereafter, made a blanket invocation of his Fifth Amendment right to avoid answering questions relevant to his ownership assertions.

The district court, finding merit in the argument, struck Primm's assertions of ownership. As held by the district court below, as well as this court and our sister circuits, where a claimant seeks to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts may, to prevent prejudice to opposing parties, adopt remedial procedures or impose sanctions, which includes striking claims of ownership in a verified claim or answer. *\$31,000.00 III*, 774 F. App'x 288, 291-92; *see \$99,500 in U.S. Currency*, 339 F. Supp. 3d at 697-99 (discussing cases). The reason why courts do so, in such circumstances, is that the claimants' claim of privilege "raises the core concern" that their testimony could furnish them with what may be false evidence and prejudice the government by depriving it of any means of detecting the falsity. *\$99,500 in U.S. Currency*, 339 F. Supp. 3d at 698-99 (quotation omitted) (quoting *\$31,000.00 II*, 2018 U.S. Dist. LEXIS 86656, at *19); *see also United States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 642 (9th Cir. Feb. 21, 2012).

As seen here, striking Primm's assertions of ownership left the record devoid of any claim of ownership to the seized currency. With only an unexplained claim of possession, Primm could not meet his burden of establishing standing at the summary

judgment stage. *See \$677,660.00 in U.S. Currency*, 513 F. App'x at 532 (per curiam); *see also \$ 515,060.42 in U.S. Currency*, 152 F.3d at 498. Thus, the district court did not abuse its discretion in striking Primm's claim of ownership in the defendant properties.

Regarding the remainder of Primm's assertions challenging the validity of the underlying seizures and forfeiture, the court finds no error in the district court not considering the arguments, as Primm did not meet his threshold burden of showing Article III standing.

IV.

Because Primm no longer has a colorable ownership, possessory, or security interest in at least a portion of the defendant properties, he has not met his burden of establishing standing under Article III, precluding him from proceeding on a claim to the defendant monies.

We affirm.

APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CASE NO. 1:16 CV 2422

JUDGE PATRICIA A. GAUGHAN

[Filed September 20, 2018]

| | |
|------------------------------------|---|
| United States of America, |) |
| |) |
| Plaintiff, |) |
| |) |
| Vs. |) |
| |) |
| \$99,500 in U.S. Currency, et al., |) |
| |) |
| Defendants. |) |

Memorandum of Opinion and Order

INTRODUCTION

This is a civil forfeiture action. Pending before the Court is the United States' Motion for Summary Judgment on the Issue of Standing (Doc. 50) and the Cross-Motion for Summary Judgment (Doc. 52) filed by claimant Samson Primm. For the reasons that follow, the government's motion is GRANTED, and claimant's cross-motion is DENIED.

FACTS¹

A. The defendant currencies

Claimant has a long criminal history relating to drugs. In March of 2016, the Drug Enforcement Administration (“DEA”) began investigating him for drug trafficking and money laundering offenses. The DEA received information that claimant was scheduled for one-way air travel from Las Vegas, Nevada, to Cleveland, Ohio, on March 20, 2016. A DEA special agent observed him leaving the airport on this date. The DEA then requested assistance from the Lorain Police Department (“LPD”). An LPD officer conducted a traffic stop of claimant’s vehicle for a window tint violation. After speaking with claimant, the officer requested that a K-9 officer respond to the scene. The K-9 officer and his K-9 partner, Garp, arrived while the warning citation for the window tint violation was being written. Upon being deployed, Garp provided a positive alert for a narcotic odor. Following the alert, four bags were removed from the vehicle. Garp alerted to a suitcase and backpack where stacks of money were found. In total, \$99,500 in U.S. currency was recovered. Claimant claimed to have won the money at the Cosmopolitan casino in Las Vegas.

On June 17, 2016, an Ohio State Highway Patrol (“OSHP”) sergeant paced claimant’s vehicle traveling at 85 miles per hour on the highway. A K-9 trooper initiated a traffic stop. When he spoke with claimant,

¹ The facts are taken from claimant’s verified claim and answer, the government’s verified complaint, and the affidavit of DEA Special Agent Joseph Harper.

he smelled marijuana from inside the vehicle. He then retrieved his K-9 partner, who provided a positive alert for controlled substances. Two OSHP officers then conducted a search of the vehicle, locating a jar that contained marijuana in the center console. They also found several bundles of U.S. currency inside the vehicle and two suitcases in the back hatch that also contained currency. In total, \$107,900 was located in the vehicle.

Pursuant to a state search warrant, law enforcement authorities, including members of the DEA and local law enforcement, executed a search of claimant's residence on August 18, 2016. The officers observed jars containing marijuana in the residence. After testing and confirming the presence of marijuana, the investigators stopped the search and obtained a state narcotics search warrant. The narcotics search warrant named a number of items to be searched and seized, including marijuana, narcotic drugs, money, and weapons. Among other things, officers seized \$57,999 in U.S. currency.²

B. The forfeiture action

The government filed this forfeiture action on October 3, 2016, pursuant to 21 U.S.C. § 881(a)(6), alleging that the defendant currency (the \$99,500, \$107,900, and \$57,999 in U.S. currency seized by law enforcement) constitutes proceeds from illegal drug trafficking, was furnished or intended to be furnished

² The government's verified complaint does not allege that claimant asserted ownership over the money that was seized on June 17, 2016 and August 18, 2016.

in exchange for illegal drugs, and/or was used or intended to be used to facilitate illegal drug trafficking activities. Notice of the forfeiture action was served on claimant's counsel, and warrants taking custody of the seized funds were executed by the U.S. Marshal Service.

In its verified complaint, the government alleges that, between January of 2014 and August of 2016, claimant lost approximately \$59,500 while gambling at the Cosmopolitan of Las Vegas. It also alleges that claimant did not file Ohio personal income tax returns for the years 2012, 2013, and 2015, and that his 2014 Ohio personal income tax return claimed a federal adjusted gross income of \$37,410. Finally, it alleges that from January of 2014 to April of 2016, claimant made a number of large expenditures on airline tickets, hotels, cars, rental cars, sporting events, high-end retail stores across the country, nightclubs, and restaurants.

Claimant filed a verified claim swearing that he was the "sole and absolute owner of the monies" and "was in exclusive possession of these monies when they were seized." His separate answer claims sole ownership and exclusive possession of the currency but then denies all of the government's pertinent allegations regarding the seizure of the money, including that the currency was taken from his possession and that he won the money while gambling.

The government moved to strike both claims because they raised only bald assertions of ownership. It argued that such assertions were insufficient to meet the statutory requirements of Rule G of the Federal

Rules of Civil Procedure’s Supplemental Rules for Admiralty or Maritime Claims and Civil Forfeiture Actions (the “Supplemental Rules”). This Court granted the motion to strike, and the claimants appealed. Relying on its decision in *United States v. \$31,000 in U.S. Currency*, 872 F.3d 342(6th Cir. 2017), the Sixth Circuit reversed. In *\$31,000 in U.S. Currency*, the court decided, as an issue of first impression in this circuit, that “[a]t the pleading stage, a verified claim of ownership is sufficient to satisfy Article III [standing requirements] and the procedural requirements of Rule G.” *Id.* at 351.

C. Discovery on remand

On remand, this Court held a case management conference on January 11, 2018, and set a discovery deadline of May 15, 2018, and a dispositive motion deadline of June 15, 2018. The government served special interrogatories and requests for production of documents to claimant’s counsel on January 25, 2018. The discovery sought information about the nature of claimant’s interest in the defendant currencies, the source of the defendant currencies, and claimant’s legitimate sources of income, if any.

Claimant did not respond to the discovery requests. Instead, he filed an “Opposition to Government’s First Set of Interrogatories and Request for Production of Documents.”³ In the opposition, he implied that he was not required to respond to the requests until the

³ Claimant never filed a motion to stay this civil forfeiture proceeding pursuant to 18 U.S.C. § 981(g)(2) or argue that it applies to this case.

government survives his motion to suppress and proves that the defendant currencies are subject to forfeiture. He also attached an affidavit stating that he was asserting his Fifth Amendment right in response to the requests but that also implied he was reserving the right to supplement his responses after the Court ruled on his motion to suppress and determined forfeitability of the seized property. This Court entered an order on March 9, 2018, explaining that the law did not support claimant's assertion that he can wait to respond to discovery in this way and that discovery would proceed as scheduled. Because it was not clear if claimant was asserting a blanket Fifth Amendment privilege to the discovery requests, the Court ordered the claimant to clarify whether he was doing so or if he intended to respond to the outstanding requests.

In his response to the Court's order, claimant stated that he would respond to any question that would not tend to incriminate him. He ended his brief, however, by once again suggesting that he did not need to respond to any discovery until after the government proves that the currency at issue was lawfully seized and is forfeitable. He did not file any responses to the government's discovery requests.

The government then filed a motion to compel claimant's responses to the outstanding discovery. The Court granted the motion on April 20, 2018, holding that the Federal Rules of Civil Procedure applied to the government's discovery requests and that no authority existed for claimant's position that he did not have to respond to the requests until after the government proved that the property was lawfully seized and

forfeitable. The Court ordered claimant to respond to the requests by April 27, 2018, and noted that he could assert the Fifth Amendment privilege against self-incrimination in response to the requests if he wished to do so. Once again, claimant did not file any responses.

The government next moved to strike claimant's claim and answer for failing to respond to its discovery requests, relying on the discovery sanctions available under Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure. Claimant filed an opposition in which he stated that he had all along asserted his Fifth Amendment privilege in response "to all questions put to him, and, [that] he will continue to do so. To be sure, he has also asserted his Fifth Amendment privilege with reference to his being compelled to produce any documents." (Doc. 42, at 1). Because claimant had finally made clear that he was asserting the Fifth Amendment in response to all discovery, the Court denied the government's motion to strike.

The government thereafter filed a motion for summary judgment on the merits. Later, it filed an unopposed motion for leave to file a second motion for summary judgment on the issue of standing. This Court granted the motion for leave. The government's motion on standing, which claimant opposes, is now before the Court. Claimant has also filed a cross-motion for summary judgment, which the government opposes.

SUMMARY JUDGMENT STANDARD

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving

party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)); *see also LaPointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits,” if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)). A fact is “material only if its resolution will affect the outcome of the lawsuit.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Accordingly, the nonmoving party must present “significant probative evidence” to demonstrate that “there is [more than] some metaphysical doubt as to the material facts.” *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir.1993). The nonmoving party may not simply rely on its pleading, but must “produce evidence that results in a conflict of material fact to be solved by a jury.” *Cox v. Kentucky Dep’t. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

The evidence, all facts, and any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Eastman Kodak Co. v. Image*

Technical Servs., Inc., 504 U.S. 451, 456 (1992). However, “[t]he mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Moreover, if the evidence is “merely colorable” and not “significantly probative,” the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citation omitted).

LAW AND ANALYSIS

A. The government’s motion for summary judgment

In its motion for summary judgment, the government argues that claimant has failed to meet his burden of establishing standing at the summary judgment stage. The Court agrees.

1. Standing in civil forfeiture cases

In a civil forfeiture action, a person who wishes to intervene and assert an interest in the property must file two responsive pleadings: a verified claim and an answer. 18 U.S.C. § 983(a)(4)(A), (B); Supp. R. G(5). The verified claim must “identify the specific property claimed,” “identify the claimant and state the claimant’s interest in the property,” and “be signed by

the claimant under penalty of perjury.” Supp. R. G(5)(a)(i). Supplemental Rule G(6)(a) allows the government to serve special interrogatories seeking information related to the claimant’s identity and relationship to the defendant currency. The purpose of the rule is “to permit the government to file limited interrogatories at any time after the claim is filed to gather information that bears on the claimant’s standing.” Supp. R. G advisory committee’s note (subdivision (6)).

At any time before trial, the government may move to strike the claimant’s claim or answer “(A) for failing to comply with Rule G(5) or (6), or (B) because the claimant lacks standing.” Supp. R. G(8)(c). The motion “may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of the evidence.” Supp. R. G(8)(c)(ii)(B).

As in any case, standing is a threshold matter in an in rem civil forfeiture proceeding. *See, e.g., United States v. \$8,440,190.00 in U.S. Currency*, 719 F.3d 49, 57 (1st Cir. 2013). Thus, before the Court can address any other issue that claimant raises, he must meet his burden of establishing Article III standing at this stage of the proceedings.

As an initial matter, the Court rejects claimant’s argument that the government cannot challenge standing because the Sixth Circuit’s decision on the issue is “law of the case.” (Doc. 52, at 6). This argument is incorrect because the court held only that the claimant had Article III standing at the pleadings

stage. See *McKenzie v. BellSouth Telecommunications, Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) (“Accordingly, our holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment, when the complaint has been supplemented by discovery.”).

The Sixth Circuit’s conclusion rested entirely on its earlier decision in *\$31,000 in U.S. Currency*, which, like this case, was at the pleading stage when it was dismissed. As the Sixth Circuit explained in *\$31,000 in U.S. Currency*, its decision related to the claimant’s ability to establish standing at that early stage, *not* at a later stage of the proceedings where the preponderance of the evidence burden applies:

For the sake of completeness, we note that we have construed the government’s motion to strike as one made “on the pleadings” pursuant to Rule G(8)(c)(ii)(B)...We do not address the “preponderance of the evidence” burden of proof here, because that standard is inapplicable in a review of the pleadings in which the claimant need only allege, rather than prove, the facts establishing his standing to pursue the claim. *Cf. Lujan*, 504 U.S. at 561-62, 112 S.Ct. 2130; *\$196,969 U.S. Currency*, 719 F.3d at 646.

United States v. \$31,000.00 in U.S. Currency, 872 F.3d 342, 352 n.3 (6th Cir. 2017). See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130 (1992) (holding that the elements of standing “must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the

successive stages of the litigation”). Because the Sixth Circuit’s decision was limited to a determination of whether claimant met his burden of establishing Article III standing and the requirements of Rule G at the pleadings stage, it does not preclude the government from arguing that he fails to meet his burden on summary judgment.

To meet Article III’s case-or-controversy requirement, a claimant must establish the three elements of standing: an injury in fact, a causal connection between the injury and the conduct complained of, and a likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S.at 560–61. The evidentiary requirements for establishing standing vary depending on the stage of the litigation. *Id.* at 561. To withstand a motion for summary judgment on lack of standing, a plaintiff cannot rely on mere allegations but rather must “‘set forth’ by affidavit or other evidence ‘specific facts,’ which for purposes of the summary judgment motion will be taken to be true.” *Id.* (citation omitted).

Applying these principles to civil forfeiture actions, courts have used the “‘colorable interest’ test, which requires a claimant to present ‘some evidence of ownership’ beyond the mere assertion of an ownership interest in the property.” *United States v. Phillips*, 883 F.3d 399, 403 (4th Cir. 2018) (noting that “[e]very court of appeals that has addressed the issue in the last twenty years has used the ‘colorable interest’ test”) (citing cases from the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits). Under the colorable interest test, “Article III’s standing

requirement is ... satisfied because an owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property.” *United States v. \$515,060.42*, 152 F.3d 491, 497 (6th Cir.1998).

In cases such as this one where a claimant asserts an ownership interest—as opposed to a possessory interest—“[t]he required ownership interest can be demonstrated in a variety of ways, ‘including showings of actual possession, control, title and financial stake.’” *U.S. v. \$148,840.00 in U.S. Currency*, 521 F.3d 1268, 1275 (10th Cir. 2008). Courts consistently hold that claimants who assert an ownership interest in property that was seized from their possession have Article III standing at the summary judgment stage to challenge the forfeiture. *See, e.g., id.* (holding that claimant had standing at summary judgment stage “because [his] assertion of ownership is assumed to be true on this record, and because the currency was indisputably seized from a vehicle that Austin was driving”); *United States v. \$38,570 in U.S. Currency*, 950 F.2d 1108, 1112-3 (5th Cir. 1992) (holding that claimant who asserted an ownership interest had constitutional standing to challenge the forfeiture of currency seized from a car that he was driving); *see also U.S. v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 640 (9th Cir. 2012) (“[An] assertion of ownership, combined with [the claimant’s] possession of the currency at the time it was seized, would be enough to establish [his] standing for purposes of a motion for summary judgment.”).

2. Effect of claimant invoking Fifth Amendment in response to all discovery requests

Here, assuming the Court were to consider all of the evidence in the record, it would include the claimant's unequivocal claim of ownership in his verified claim and answer and the government's own verified complaint stating that the currency was found in his possession. The government, however, argues that the Court should not consider the claimant's assertion of ownership in his verified claim and answer because he chose to exercise his Fifth Amendment privilege rather than respond to the government's discovery requests, which were directed at determining the legitimacy of the claimant's naked assertions of ownership. Without evidence of a claim of ownership, claimant cannot establish standing.⁴

Circuit courts agree that “a district court may strike conclusory testimony if the witness asserts the Fifth Amendment privilege to avoid answering relevant questions, yet freely responds to questions that are advantageous to his cause.” *\$148,840.00 in U.S. Currency*, 521 F.3d at 1277 (citing *United States v. 4003–4005 5th Ave.*, 55 F.3d 78, 84–85 (2d Cir.1995)) (“If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process,

⁴ Claimant does not address the government's argument that the Court should strike his naked assertion of ownership because he failed to answer any discovery directed at determining the legitimacy of that assertion. Instead, he argues that the Court cannot draw an adverse inference from the assertion of the privilege. Because the government has not asked for an adverse inference, the Court need not address this argument.

trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions.”); *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir.1990) (holding in a civil forfeiture action that “a witness’ direct testimony can be stricken if she invokes the fifth amendment on cross-examination to shield that testimony from scrutiny”)); *see also U.S. v. \$110,873.00 in U.S. Currency*, 159 Fed. Appx. 649, 653 (6th Cir. 2005) (“[Claimant] had an opportunity to present his side of the case, and he simply chose to remain silent—a perfectly constitutional option but one that he may not leverage into a basis for avoiding the requirements of Rule 56 of the Federal Rules of Civil Procedure.”); *United States v. Certain Real Property 566 Hendrickson Boulevard*, 986 F.2d 990, 996 (6th Cir.1993) (“Claimant cannot avoid completely his Rule 56 burden by merely asserting a Fifth Amendment privilege.”).

In *\$133,420.00 in U.S. Currency*, for example, the claimant invoked his Fifth Amendment privilege to avoid answering an interrogatory question as to the “date(s), time, place and manner in which the defendant currency [] was obtained” and the “circumstances of each transaction by which [he] acquired or obtained any interest in the defendant currency.” 672 F.3d at 636. He did, however, provide a limited response stating that he was the “owner and possessor of said property, with a right to exercise dominion and control over said property.” *Id.* at 637. Because he had frustrated the government’s attempts to test the veracity of his claim of ownership, the district court struck this response, which left him with no evidence that he had made a claim of ownership to

the property. *Id.* Without a claim of ownership, he could not establish standing, so the district court granted summary judgment in favor of the government.⁵ The Ninth Circuit affirmed, agreeing that the claimant had “impaired the truth-seeking function of the judicial process” by invoking the Fifth Amendment in response to the government’s interrogatories. *Id.* at 642. As such, the district court did not abuse its discretion in striking the claimant’s response.

The Tenth Circuit has also noted that a district court has the discretion to strike a claim of ownership where a claimant chooses to invoke the Fifth Amendment privilege rather than respond to the government’s discovery regarding how he came into such ownership. In *\$148,840.00 in U.S. Currency*, the claimant testified in his deposition that the currency, which had been seized from a vehicle that he was driving, was his. He invoked the Fifth Amendment, however, when the government attempted to discover the nature of his ownership. The government moved for summary judgment, arguing that the claimant failed to establish standing. It did not move to strike the claimant’s deposition testimony regarding his claim of ownership, so the district court considered the testimony in ruling on the motion. Because the claimant had made a claim of ownership and the money was seized from a vehicle that he was driving,

⁵ His verified claim asserted that he had an “ownership and/or possessory” interest in the seized currency, which was insufficient to establish standing because it did not make clear whether he was asserting a possessory interest or an ownership interest. *Id.* at 640.

the court held that he had standing. The Tenth Circuit affirmed because the evidence remained in the record, but explained that “[t]his would, of course, be a different case if the district court had exercised its discretion to strike Austin’s claim of ownership to the currency in light of his repeated invocation of the Fifth Amendment privilege.” 521 F.3d at 1277.

On remand in *\$31,000 in U.S. Currency*, this Court struck the claimants’ claim of ownership because they repeatedly invoked the Fifth Amendment in response to the government’s discovery requests:

Here, the Court agrees with the government that claimants should not be permitted to use the Fifth Amendment as a way of frustrating the government’s attempt to determine the nature of their asserted ownership interest. Indeed, in rejecting the government’s argument that a claimant should be required to spell out his interest in the seized property at the outset of a case, the Sixth Circuit specifically noted that the government has at its disposal special interrogatories that are for the very purpose of discovering the veracity of a claim of ownership: “We have no doubt that the lawyers of the United States Attorney’s Offices within the Sixth Circuit have the capacity to draft useful interrogatories that will either confirm a claimant’s interest in the *res* or expose the futility of the claim.” *\$31,000 in U.S. Currency*, 872 F.3d at 354. By repeatedly invoking the Fifth Amendment, however, the claimants have obstructed the discovery process and made it

impossible for the government to use special interrogatories or any other type of discovery to test the truthfulness of their naked assertions of ownership. *See also United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (“[T]he power to strike is grounded in the principle that once a witness testifies, she may not invoke the fifth amendment privilege so as to shield that testimony from scrutiny. To allow her to do so would constitute a positive invitation to mutilate the truth.”) (internal quotations and citations omitted).

Because claimants’ claim of privilege “raises the core concern” that their testimony could furnish them with what may be false evidence and prejudice the government by depriving it of any means of detecting the falsity, the Court will strike their assertions of ownership in their verified claims. *\$133,420.00 in U.S. Currency*, 672 F.3d at 642. That leaves the record devoid of any claim of ownership to the seized currency. Without a claim of ownership, the claimants are unable to meet their burden of establishing standing at the summary judgment stage.

United States v. \$31,000 in U.S. Currency, No. 1:16 CV 1581, at 13-14 (N.D. Ohio May 23, 2018); *see also United States v. \$23,000 in U.S. Currency*, No. 16 CV 2140 (N.D. Ohio June 19, 2018) (Nugent, J.) (granting summary judgment to government where claimant invoked Fifth Amendment in response to government’s special interrogatories and provided no other form of evidence to support his claim of ownership).

Claimant in this case makes a naked claim of ownership as to two of the amounts at issue (the \$107,900 seized on June 17, 2016 and the \$57,999 seized on August 18, 2016)—he has never stated how or where he earned this money. Although he claimed to have won the \$99,500 seized on March 20, 2016 while gambling at the Cosmopolitan, the government’s verified complaint alleges that he actually *lost* \$59,500 at the casino. In addition, it alleges that he filed no Ohio personal income tax returns for 2012, 2013, and 2015, and that his 2014 Ohio personal income tax return claimed a federal adjusted gross income of only \$37,410. Thus, its discovery requests were properly aimed at determining whether claimant’s assertion of ownership was legitimate or fraudulent. Indeed, the Sixth Circuit recognized in *\$31,000 in U.S. Currency* that the government has every right to propound interrogatories to “either confirm a claimant’s interest in the res or expose the futility of the claim.” 872 F.3d at 354. *See also \$133,420.00 in U.S. Currency*, 672 F.3d at 642 (“The issue of standing is subject to adversarial testing under Supplemental Rule G(6)(a), which gives the government the right to question the claimant regarding the claimant’s identity and relationship to the defendant property, and to gather information that bears on the claimant’s standing[.]”). If the claimant were found to have standing even after he refused to answer any of the government’s discovery requests that bear on standing, that would deprive the government of the adversarial testing to which it is entitled and simply take claimant at his conclusory word.

As this Court found in *\$31,000 in U.S. Currency*, claimant’s assertion of privilege “raises the core

concern” that his testimony could furnish him with what may be false evidence and prejudice the government by depriving it of any means of detecting the falsity. *\$133,420.00 in U.S. Currency*, 672 F.3d at 642. The Court therefore strikes his conclusory assertions of ownership in his verified claim and answer. That leaves him with an unexplained claim of possession, which is insufficient to meet his burden of establishing standing at the summary judgment stage.

As noted, claimant’s primary argument with respect to standing is that the Sixth Circuit’s decision was law of the case. The rest of his response raises issues that the Court need not consider because he lacks standing (e.g., the forfeiture violates the Takings Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment; his Fourth Amendment rights were violated during the seizures; and the complaint fails to connect the defendant currencies with any criminal offense).

B. Claimant’s motion for summary judgment⁶

In his motion for summary judgment, claimant contends that this Court does not have *in rem* jurisdiction over the defendant currencies because the State of Ohio has *in rem* jurisdiction over them. This is incorrect. It is well established that “the court first assuming jurisdiction over the property may maintain

⁶ Claimant again argues in his motion for summary judgment that the currencies were not lawfully seized and that the government cannot show that the currency was related to any criminal offense. Because claimant lacks standing, the Court need not address these issues.

and exercise that jurisdiction to the exclusion of the other.’ ... Hence, ‘a court cannot exercise jurisdiction over a *res* that is already subject to the *in rem* jurisdiction of another court.’” *United States v. Cunningham*, 520 F. App’x 413, 415 (6th Cir. 2013) (quoting *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195, 55 S.Ct. 386, 79 L.Ed. 850 (1935); *United States v. Certain Real Property 566 Hendrickson Blvd.*, 986 F.2d 990, 993 (6th Cir.1993)). Thus, where a federal district court is the first to assume jurisdiction over the currency, it has *in rem* jurisdiction. *Id.* This is true even if the property was originally seized by state officers and held by the state prior to the United States ultimately taking possession. *U.S. v. \$22,832.00 in U.S. Currency*, 2013 WL 4012712 (N.D. Ohio Aug. 6, 2013) (citing *United States v. \$174,206.00 in U.S. Currency*, 320 F.3d 658, 660 (6th Cir. 2003) (“[t]he mere fact that the *res* was at one point in the state’s possession does not imply that it was the basis of the state court’s jurisdiction”).

In this case, the state never instituted an *in rem* forfeiture action against any of the defendant currencies. Accordingly, the state never had *in rem* jurisdiction over the properties. Because this Court was the first to assume jurisdiction over the currencies, it has *in rem* jurisdiction.

CONCLUSION

For the foregoing reasons, the claimant lacks standing to contest the forfeiture of the defendant currencies. The United States’ Motion for Summary Judgment on the Issue of Standing (Doc. 50) is,

App. 34

therefore, GRANTED. Claimant's Motion for Summary Judgment (Doc. 52) is DENIED.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Court
Chief Judge

Dated: 9/20/18

APPENDIX C

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CASE NO. 1:16 CV 2422

JUDGE PATRICIA A. GAUGHAN

[Filed May 23, 2018]

| | |
|----------------------------------|---|
| United States of America, |) |
| |) |
| Plaintiff, |) |
| |) |
| Vs. |) |
| |) |
| \$99,500 in U.S. Currency Seized |) |
| on March 20, 2016, et al., |) |
| |) |
| Defendants. |) |

Memorandum of Opinion and Order

INTRODUCTION

This matter is before the Court upon Plaintiff United States of America's Motion to Strike Claim and Answer for Failure to Respond to Discovery Requests (Doc. 40). This is a civil forfeiture action. For the following reasons, the Government's motion is DENIED.

On January 11, 2018, this Court held a case management conference and set a non-expert discovery deadline of May 15, 2018. Thereafter, on January 25, 2018, the Government served interrogatories and requests for production of documents on Claimant Samson Primm. Claimant's responses were due on February 28, 2018. Claimant did not respond to the discovery requests and instead filed an "Opposition to Government's First Set of Interrogatories and Request for Production of Documents." In his opposition, Claimant implied that he was not required to respond to the Government's discovery requests until the Government survives his motion to suppress and proves that the property at issue is subject to forfeiture. He also filed an affidavit stating that he was asserting his Fifth Amendment right in response to discovery but that also implied that he was reserving the right to supplement his discovery responses after the Court ruled on the motion to suppress and determined forfeitability of the seized property. The Court issued an order on March 9, 2018, explaining that the law did not support Claimant's assertion that he can wait to respond to discovery in this way and that discovery would proceed as scheduled. Because it was not clear if Claimant was asserting a blanket Fifth Amendment privilege to the Government's discovery requests, the Court ordered Claimant to clarify, within seven days, whether he was doing so or if he instead intended to respond to the outstanding requests.

On March 16, 2018, Claimant filed his response to the Court's order in which he stated that he would respond to any question that would not tend to incriminate him: "So let's be clear, the Claimant will

answer any and all questions put to him provided the answer to the questions will not tend to incriminate him.” (Doc. 34, at 1). He ended his brief, however, by once again suggesting that he did not need to respond to any discovery until after the government proves that the items at issue were lawfully seized and are forfeitable to the government. (*Id.* at 4). Claimant did not file any responses to the Government’s discovery requests.

On March 21, 2018, the Government filed a motion to compel discovery. This Court granted the motion, explaining that the Federal Rules of Civil Procedure applied to the discovery dispute and that there is no authority for Claimant’s position that he need not respond to any discovery requests until the Government shows that the property was lawfully seized and is subject to forfeiture. It ordered Claimant to respond to the Government’s discovery requests on or before April 27, 2018. The Court noted that, “[i]f Claimant wishes to assert the Fifth Amendment privilege against self incrimination in response to the discovery requests, he is free to do so.” (Doc. 39, at 3). Claimant did not file any responses by the date ordered.

The Government filed its motion to strike now pending before the Court on May 7, 2018. It asks the Court to strike Claimant’s verified claim and answer as a discovery sanction for failing to respond to discovery. (Doc. 40, at 5) (quoting Federal Rule of Civil Procedure 37(b)(2)(A) (iii) (“If a party...fails to obey an order to provide or permit discovery..., the court where the action is pending may issue further just orders. They

may include the following...striking pleadings in whole or in part[.]”). Claimant filed an opposition to the motion to strike in which he states:

If one thing here seems clear enough, it has to be that counsel for the Claimant is ill-equipped to make a simple point. This must be so, otherwise counsel would have by now made it clear that his client has been convinced, that his Fifth Amendment Right of self-incrimination applies and works even in the Northern District of Ohio, and that he has the right to assert it in this Forfeiture case. Indeed, he has done so with reference to all questions put to him, and, he will continue to do so. To be sure, he has also asserted his Fifth Amendment privilege with reference to his being compelled to produce any documents.

(Doc. 42, at 1).

Claimant is absolutely correct that his filings have not made clear that he intended to assert a blanket Fifth Amendment privilege in response to discovery. Both this Court and the Government acknowledged that he had a right to do so but explained on several occasions that Claimant’s filings did not make clear that this was his intent. Indeed, this Court ordered him to clarify whether he intended to invoke the Fifth Amendment in response to all discovery. Rather than clarifying his intent, Claimant’s filings continued to confuse the issue by suggesting that he would respond to all non-incriminating questions but also stating that he would assert the Fifth Amendment until the Government proved that the items were lawfully seized

and subject to forfeiture. Complicating matters even more, he failed to comply with the Court's direct order to respond to the Government's discovery requests by April 27, 2018.

Out of an abundance of caution, however, the Court will construe Claimant's response to the Government's motion to strike as a response to the Government's discovery requests. In it, he has finally made sufficiently clear that he has asserted the Fifth Amendment in response to all of the Government's discovery requests. As the Court has said several times, that is his right. Of course, discovery is now closed, and as this case proceeds, he must bear the consequences of having invoked the Fifth Amendment rather than respond to any of the Government's discovery requests. *See, e.g., U.S. v. \$110,873.00 in U.S. Currency*, 159 Fed. Appx. 649, 652-53 (6th Cir. 2005) ("A litigant may not invoke the Fifth Amendment to avoid answering questions in discovery, then cry foul when the absence of evidence in favor of the litigant requires summary judgment to be entered against him."); *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 84-85 (2d Cir.1995) ("If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions."); *U.S. v. \$148,840.00 in U.S. Currency*, 521 F.3d 1268, 1277 (10th Cir. 2008) ("[A] district court may strike conclusory testimony if the witness asserts the Fifth Amendment privilege to avoid answering relevant questions, yet freely responds to questions that are advantageous to his cause.").

The Court is disturbed by the amount of time that both the Court and the Government have had to expend on this issue when Claimant could have filed a response months ago that made clear that he was invoking the Fifth Amendment in response to all discovery. Nevertheless, Court finds that striking his claim and answer would be too harsh of a sanction in these circumstances. Thus, the United States' Motion to Strike Claim and Answer for Failure to Respond to Discovery Requests is DENIED.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
Chief Judge
United States District Court

Dated: 5/23/18

APPENDIX D

NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION

File Name: 17a0586n.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 17-3436

[Filed October 25, 2017]

| | |
|----------------------------|---|
| UNITED STATES OF AMERICA, |) |
| |) |
| Plaintiff – Appellee, |) |
| |) |
| v. |) |
| |) |
| \$99,500.00 U.S. CURRENCY |) |
| SEIZED ON MARCH 20, 2016; |) |
| \$107,900.00 U.S. CURRENCY |) |
| SEIZED ON JUNE 17, 2016; |) |
| \$57,999.00 U.S. CURRENCY |) |
| SEIZED ON AUGUST 18, 2016, |) |
| |) |
| Defendants, |) |
| |) |
| SAMSON PRIMM, |) |
| |) |
| Claimant – Appellant. |) |

On Appeal from the United States District Court for
the Northern District of Ohio

**Before: GUY, MOORE, and ROGERS, Circuit
Judges.**

PER CURIAM. Samson Primm, the claimant in this in rem civil forfeiture action, appeals from the district court's orders striking his verified claim for lack of standing and forfeiting certain U.S. currency pursuant to 21 U.S.C. § 881(a)(6). Because the district court's rationale for striking Primm's claim was expressly rejected by this court in *United States v. \$31,000 in U.S. Currency*, 872 F.3d 342 (6th Cir. 2017), we **REVERSE** the order granting the government's motion to strike Primm's claim and **REMAND** for further proceedings consistent with this opinion.

I.

The government sought forfeiture pursuant to 21 U.S.C. § 881(a)(6), alleging that the defendant property constituted proceeds from illegal drug trafficking, was furnished or intended to be furnished in exchange for illegal drugs, and/or was used or intended to be used to facilitate illegal drug trafficking activities. The complaint alleged that an investigation of Samson Primm for drug trafficking and money laundering offenses led to the seizure of: (1) \$99,500 in cash from Primm's SUV when he was stopped by the Lorain Police Department on March 20, 2016; (2) \$107,900 in cash from Primm's SUV after he was stopped by the Ohio State Highway Patrol on June 17, 2016; and (3) \$57,999 in cash when state search warrants were executed at Primm's residence on August 18, 2016.

Notice of the forfeiture action was served on Primm's counsel, and warrants taking custody of the seized funds were executed by the U.S. Marshal Service.

Primm filed a verified claim swearing that he was the "sole and absolute owner of the monies" and "was in exclusive possession of these monies when they were seized." Primm's separate answer also asserted sole ownership and exclusive possession of the currency. Days later, the government moved to strike Primm's claim on the grounds that his "naked assertion of ownership or possession" did not satisfy the pleading requirements of Rule G(5)(a)(i)(B) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions ("Supplemental Rules"). Opposing the motion, Primm argued, in part, that his pleadings were sufficient to establish standing to challenge the seizures on the merits. The district court granted the government's motion, finding that Primm's pleadings failed to establish either Article III standing or statutory standing under Supplemental Rule G. Having stricken the only claim, the district court granted the government's motion for entry of a final order of forfeiture with respect to the defendant currency. This appeal followed.¹

II.

A decision striking a claim in an in rem forfeiture action is generally reviewed for abuse of discretion, but

¹ Primm's earlier appeal of the order striking his claim was dismissed by this court for lack of jurisdiction because the order did not finally resolve the litigation and was not otherwise immediately appealable.

the district court's determination of a claimant's standing to contest the forfeiture is reviewed de novo. *See \$31,000 in U.S. Currency*, 872 F.3d at 347 (citing cases). At the pleading stage, the material allegations made in the verified claim are taken as true and are liberally construed in favor of the claimant. *Id.* (quoting *United States v. Real Prop. Located at 4527-4535 Michigan Ave., Detroit, Mich.*, 489 F. App'x 855, 857 (6th Cir. 2012)).

For Article III standing in civil forfeiture cases, “a claimant must have a colorable ownership, possessory or security interest in at least a portion of the defendant property.” *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998). However, as a matter of first impression, this court held in *\$31,000 in U.S. Currency* that a verified claim of ownership is sufficient to satisfy Article III at the pleading stage. *\$31,000 in U.S. Currency*, 872 F.3d at 351 (agreeing with *United States v. \$196,969 in U.S. Currency*, 719 F.3d 644, 647 (7th Cir. 2013)). Thus, Primm's claim asserting sole ownership of the cash that is the subject of this forfeiture action sufficiently alleged Article III standing.

In addition, a claimant who wishes to contest an in rem forfeiture also must satisfy the requirements of Supplemental Rule G in order to have statutory standing. *Id.* at 349 (citing cases). Any deviation from the requirements deprives the claimant of statutory standing. *Id.* (citing *One 2011 Porsche Panamera*, 684 F. App'x 501, 506-08 (6th Cir. 2017)). This case centers on the requirements of Rule G(5)(a)(i), which provides that a claim must: “(A) identify the specific property

claimed; (B) identify the claimant and state the claimant's interest in the property; (C) be signed by the claimant under penalty of perjury; and (D) be served on the government attorney designated under Rule G(4)(a)(ii)(C) or (b)(ii)(D)." Rule G provides, in part, that the government may move to strike a claim or answer "for failing to comply with Rule G(5) or (6)." Supplemental Rule G(8)(c)(i)(A).

The government argued that Primm's claim did not satisfy the minimum pleading standards of Rule G(5)(a)(i)(B) because his naked assertion of ownership failed to adequately "state the claimant's interest in the property." The district court agreed. Since then, however, this court expressly rejected the same arguments and held that: "At the pleading stage, a verified claim of ownership is sufficient to satisfy Article III *and the procedural requirements of Rule G.*" *\$31,000 in U.S. Currency*, 872 F.3d at 351 (emphasis added). Bound by that decision, which has equal application here, we find Primm's claim should not have been stricken for failure to comply with Rule G(5)(a)(i)(B).

Accordingly, the district court's order granting the government's motion to strike is **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion.

APPENDIX E

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CASE NO. 1:16 CV 2422

JUDGE PATRICIA A. GAUGHAN

[Filed January 5, 2017]

| | |
|----------------------------------|---|
| United States of America, |) |
| |) |
| Plaintiff, |) |
| |) |
| Vs. |) |
| |) |
| \$99,500 in U.S. Currency Seized |) |
| on March 20, 2016, et al., |) |
| |) |
| Defendants. |) |

Memorandum of Opinion and Order

INTRODUCTION

This matter is before the Court upon Plaintiff United States of America's Motion to Strike Claim of Samson Primm (Doc. 6). This is a civil forfeiture action against U.S. currency that was seized by law enforcement officials on March 20, 2016; June 17, 2016;

and August 18, 2016. For the following reasons, the government's motion is GRANTED.

BACKGROUND

The government alleges the following facts in its complaint in forfeiture (Doc. 1):

FORFEITURE

17. In March, 2016, and based upon information obtained since June, 2015, the DEA began investigating Samson Primm for drug trafficking and money laundering offenses.

18. The DEA received information that Primm was scheduled for one-way air travel from Las Vegas, Nevada (LAS), to Cleveland, Ohio (CLE), on March 20, 2016.

19. At approximately 4:50 p.m. on March 20, 2016, at the CLE, a DEA Special Agent observed Primm deplane carrying a black backpack. At approximately 5:09 p.m., Primm retrieved two (2) large black suitcases and proceeded to the valet. Upon delivery of his 2015 Infinity QX80 SUV, an attendant placed both suitcases in the rear cargo area of the vehicle. At approximately 5:45 p.m., Primm departed the CLE.

20. At approximately 6:25 p.m., an officer with the Lorain Police Department (LPD) conducted a traffic stop of Primm's vehicle. The stop - for window tint violation - occurred in the area of East 21st Street and East Avenue, Lorain, Ohio.

21. The officer made contact with the owner/operator of the vehicle, who identified himself as Samson Primm. The officer advised Primm of the reason for the stop.

22. When asked "where he was headed to this evening", Primm stated "a friend's house". However, Primm could not provide an address or street where the "friend" lived.

23. While the officer was checking Primm's window with his tint meter, a second LPD officer - who had arrived on scene as backup - requested that a K-9 officer respond to the scene.

25. While a warning citation was being written - and within minutes of the request for assistance - the K-9 officer and his partner "Garp" arrived on scene. Primm was advised that the K-9 officer and "Garp" were going to conduct a drug scent examination of the exterior of his vehicle. Upon being deployed, "Garp" provided a positive alert for the odor of controlled substances.

26. After "Garp" alerted on the vehicle, the two (2) black suitcases, the black backpack, and another backpack were removed from the vehicle. All four (4) bags were placed on the concrete, where "Garp" immediately alerted to a suitcase. A search of the suitcase was conducted and 18 separate stacks of money were located. The stacks of money were held together with rubber bands.

27 . A large amount of currency, in bundles wrapped with rubber bands, is consistent with illegal drug trafficking activity.

28. “Garp” also alerted to the black backpack. A search of the backpack was conducted and a sum of money was located.

30. The total amount of currency recovered was later determined to be \$99,500.00. This \$99,500.00 is a defendant property in the instant case.

32. Following the positive K-9 alerts, Primm had been advised of his Miranda rights. He said he understood those rights.

33. Primm claimed to have won the money while in Las Vegas. An officer asked him “what casino he stayed at while in Las Vegas” and Primm said the Cosmopolitan. The officer then asked Primm if the Cosmopolitan was where he won the money and Primm said yes.

35. The defendant \$99,500.00 was transported to the Lorain Police Department where it was turned back over to DEA personnel.

38. Between January, 2014, and August, 2016, Primm lost approximately \$59,555.00 while gambling at the Cosmopolitan of Las Vegas.

Paragraphs 39-48 of the Complaint allege that law enforcement authorities conducted ten trash pulls at Primm's residence. On each occasion, authorities recovered residual quantities of unburnt marijuana. Field tests for the presence of marijuana were conducted with positive results.

49. On June 17, 2016, at approximately 5:00 a.m., law enforcement authorities, including a DEA Special Agent, conducted surveillance of Samson Primm at a location in Parma, Ohio. At approximately 5:35 a.m., Primm exited the location. He placed two (2) suitcases in the rear of his 2015 Infinity QX80 SUV and departed the location. Primm entered onto I-480 at Ridge Road, Parma.

50. Members of the Ohio State Highway Patrol (OSHP) participated in this surveillance/investigation.

51. At approximately 5:49 a.m., an OSHP sergeant observed Primm's vehicle traveling westbound on I-480. The vehicle was traveling at approximately 85 mph.

52. As Primm's vehicle exited onto SR 237, it traveled over the yellow fog line on the left side of the road. A traffic stop was initiated.

53. An OSHP trooper made a passenger side approach on the vehicle. While speaking with

the driver and only occupant (later identified as Samson Primm), the trooper detected a faint odor of raw marijuana from inside of the vehicle.

54. The OSHP trooper explained to Primm the reason for the traffic stop. Primm denied speeding.

55. When asked where he was headed, Primm advised he was going to the airport to fly to California to watch the [Cleveland Cavaliers vs. Golden State Warriors NBA Finals Game 7] basketball game.

56. The OSHP trooper explained to Primm that he was a canine handler and that he was going to walk his dog ("Drago") around the vehicle. Upon being deployed, "Drago" provided a positive alert for the odor of controlled substances.

58. The OSHP sergeant and trooper conducted a search of the vehicle. A glass jar containing suspected marijuana was located in the center console. The trooper took the jar back to Primm and asked him about it. Primm stated that it had to have been left in the vehicle from one of his friends.

59. Later, a field test of the suspected marijuana was conducted with positive results.

60. The OSHP trooper went back and continued the search. A bundle of U.S. currency, with

rubber bands around it, was located in a black bag on the back seat wrapped in a cloth. The trooper asked Primm how much money was in the bag. He stated probably about \$9,000.00 but he was not really sure.

61. The back hatch of the vehicle was opened, and the two (2) suitcases were observed. In one of the suitcases, the OSHP sergeant located bundles of U.S. currency inside of shoes. In the second suitcase, the OSHP trooper initially located "a couple" bundles of U.S. currency inside of pants.

64. The vehicle was towed to the Cleveland Highway Patrol Post and the search of the vehicle was continued.... In total, 17 bundles of U.S. currency were recovered.

65. The amount of currency recovered was later determined to be \$107,900.00.... This \$107,900.00 is a defendant property in the instant case.

66. A DEA task force officer arrived on scene and took control of the money.

67. Primm was given a receipt for the recovered currency. Also, Primm was issued a minor misdemeanor summons for the possession of marijuana (later dismissed) and a warning for the speeding violation. Primm was released and drove away from the post.

Paragraphs 68-70 of the Complaint allege that law enforcement authorities conducted ten trash pulls at Primm's residence. On each occasion, authorities recovered residual quantities of unburnt marijuana. Field tests for the presence of marijuana were conducted with positive results.

71. On August 18, 2016, law enforcement authorities, including members of the DEA Cleveland Resident Office and members of the Cleveland Heights and Beachwood Police Departments, executed state search warrants at the Huntington Lane, Cleveland Heights, Ohio, residence of Samson Primm.

72. Samson Primm's wallet - containing his Ohio driver's license and other identification cards - was located on the dresser in his bedroom and his 2015 Infinity QX80 SUV was parked in the attached garage. Among other things, officers seized the following items pursuant to the execution of the search warrants: [over ten pounds of marijuana, \$57,999 in currency, jewelry, items commonly used in the preparation of drugs for sale, cellular telephones, and methylene.]

FINANCIAL INFORMATION

74. Samson Primm has not filed Ohio personal income tax returns for the years 2012, 2013, and 2015. On his 2014 Ohio personal income tax return, Primm claimed federal adjusted gross income of \$37,410.00.

Paragraphs 75-81 of the Complaint detail purchases that Primm made between January of 2014 and April of 2016 that total well over his reported income.

The government filed its complaint in forfeiture on October 3, 2016, naming the \$99,500, \$107,900, and \$57,999 seized by law enforcement as defendant currencies. The government alleges that the seized currencies are subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6) because they “constitute proceeds from illegal drug trafficking activities, and/or were used or were intended to be used in exchange for illegal controlled substances, and/or were used or were intended to be used to facilitate illegal drug trafficking activities.” (Compl. at ¶ 10). Primm, represented by counsel, filed a verified claim to the defendant currencies on November 14, 2016. Primm states that he has an “absolute, and unqualified, interest” in the seized money and that he was in “in exclusive possession of these monies when they were seized.” (Doc. 4 at 1-2).

The government now moves to strike Primm’s claim for lack of statutory standing under Supplemental Admiralty and Maritime Claim Rule G(5)(a)(i)(B). Primm opposes the government’s motion.

LAW AND ANALYSIS

The Supplemental Admiralty and Maritime Claims Rules govern judicial forfeiture proceedings. *United States v. Currency \$267,961.07*, 916 F.2d 1104, 1107 (6th Cir. 1990). Pursuant to Rule G(5) of the Supplemental Rules, persons claiming an interest in property that is subject to a forfeiture action *in rem*

may file a claim contesting the forfeiture. The claim must identify the specific property claimed, identify the claimant and state the claimant's interest in the property, be signed by the claimant under penalty of perjury, and be served on the government. Supp. Admiralty and Maritime Claim R. G(5)(a)(i)(A)-(D).

To contest a governmental forfeiture action, a claimant must have both statutory standing and Article III standing. *U.S. v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998). Statutory standing is established by satisfying the requirements of Rule G(5) for filing a claim. *See id.*; *see also U.S. v. \$25,982.28 in U.S. Currency*, 2015 WL 410590, at *2 (N.D. Ohio Jan. 29, 2015). To establish Article III standing, the claimant must have a colorable ownership, possessory, or security interest in at least a portion of the property. *\$515,060.42 in U.S. Currency*, 152 F.3d at 497.

Because of the danger of false claims, a claimant cannot satisfy Rule 5(G)(a)(i) with a conclusory statement of ownership. *\$25,982.28 in U.S. Currency*, 2015 WL 410590, at *1 (citing *United States v. Thirty-one Thousand Dollars in U.S. Currency*, 2012 WL 5343350, at *4 (E.D. Mich. Oct. 29, 2012) (bald assertion of ownership does not meet the requirements of Rule G(5); *United States v. Nine Thousand Five Hundred Dollars in U.S. Currency*, 2014 WL 7005129, at *2 (N.D. Ohio Dec. 10, 2014) (general statement that claimant is the rightful owner of currency is insufficient to satisfy Rule G(5)) (other citations omitted). Similarly, because of concerns about “straw man” transfers, a claimant cannot demonstrate Article

III standing with a claim of “naked possession.” *\$515,060.42 in U.S. Currency*, 152 F.3d at 498. “When confronted with mere physical possession of property as a basis for standing, [the Sixth Circuit] require[s] some explanation or contextual information regarding the claimant’s relationship to the seized property.” *Id.* When a claimant uses simple physical possession as a basis for standing, he or she must also allege facts “regarding how the claimant came to possess the property, the nature of the claimant’s relationship to the property, and/or the story behind the claimant’s control of the property.” *Id.*

At any time before trial, the government may move to strike a claim for failure to comply with Rule G(5) or because the claimant lacks standing. Supp. Admiralty and Maritime Claim RG(8)(c)(i)(A), (B). Here, the government moves to strike Primm’s claim to the defendant currencies, arguing that his bald assertions of ownership—that he is the “sole, and absolute owner of the monies, and...was in exclusive possession of these monies when they were seized”—is insufficient to establish statutory standing. In opposition, Primm argues that the seizure of the currency was in violation of the Fourth Amendment and the Takings Clause of the Fifth Amendment. He also argues that he has standing because “a simple claim of ownership, especially if made under oath is absolutely sufficient to satisfy all standing issues.” (Doc. 12 at 5).

Primm lacks both statutory standing under Rule G(5) and Article III standing. His claim is nothing more than a naked assertion of ownership. Indeed, he admits as much in his response to the government’s motion to

strike when he states that “a simple claim of ownership... is absolutely sufficient” to establish standing. His response does not provide any explanation or contextual information regarding his relationship to the seized currencies. Specifically, it does not identify any facts showing how he came to possess the currencies, the nature of his relationship to the currencies, or the story behind his control of the currencies.¹ Similarly, his answer does not shed any light on his claim to ownership. Like his claim and his response to the government’s motion, the answer merely states that Primm “swear[s], declare[s], indeed assert[s] and affirm[s] these various sums of money are owned, indeed 100% by him. Also, he was in exclusive and sole possession and control of each, and indeed all, of the indicated monies, when it was (or they were) illegally seized from him.” (Doc. 7 at 1).

Accordingly, the government’s Motion to Strike Claim of Samson Primm (Doc. 6) is hereby GRANTED.²

¹ Though the government’s motion put Primm on notice that his claim is deficient, he does not seek to supplement it.

² The government may test a claimant’s basis for standing by issuing special interrogatories directed at “the claimant’s identity and relationship to the defendant property” pursuant to Supplemental Rule G(6)(a). Primm does not argue that the government should have issued such interrogatories before moving to strike. Moreover, the government should not be put to the burden of propounding special interrogatories in this situation because the claimants’ assertions of ownership are too vague to facilitate the drafting of focused interrogatories. *See U.S. v. \$104,250.00 in U.S. Currency*, 947 F. Supp. 2d 560, 565-66 (D. Md. 2013) (granting motion to strike before government filed special interrogatories because “[t]here [was] no way, given such vague

Because Primm lacks standing, the Court need not reach his argument that the defendant currencies were unlawfully seized in violation of the Fourth Amendment or the Takings Clause. *See, e.g., United States v. \$57,888.00 in Currency*, 2011 WL 2972106, at **2-3 (N.D. Ohio July 11, 2011) (holding that because claimant lacked standing, court need not reach claimant's argument that government did not have probable cause to seize currency).

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

Dated: 1/5/17

notions of [the claimant's] connection to the seized currency, that the government could propound focused interrogatories that test the truthfulness of her claim").