IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK DIVISION

UNITED STATES OF AMERICA, Plaintiff, v.	§	
ONE 2014 BLACK PORSCHE CAYMAN COUPE BEARING VEHICLE IDENTIFICATION NUMBER (VIN) WP0AB2A85EK191487;	§	Civil Action No. 2:15-cv-2036
THE REAL PROPERTY KNOWN AS 10212 DENTON DRIVE, DALLAS, TEXAS;	§	
AND A TOTAL OF APPROXIMATELY $5,453,011.81 COMPRISED OF: $2,845,428.41 PREVIOUSLY DUE AND PAYABLE BY THE UNITED STATES MINT TO AMERICA NAHA, INC.;	§	
$2,388,091.18 PREVIOUSLY DUE AND PAYABLE BY THE UNITED STATES MINT TO WEALTHY MAX LIMITED; AND	§	
$219,492.22 PREVIOUSLY DUE AND PAYABLE BY THE UNITED STATES MINT TO XRACER SPORTS CO. LTD.,	§	
Defendants *in Rem*.	§	

MEMORANDUM OF LAW IN SUPPORT OF CLAIMANT WEALTHY MAX'S MOTION TO DISMISS AMENDED VERIFIED COMPLAINT FOR FORFEITURE *IN REM* OR, ALTERNATIVELY, TO SEVER

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Table of Contents

PRELIMINARY STATEMENT 1

ARGUMENT 3

POINT I - THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE VENUE DOES NOT LIE IN THE DISTRICT OF NEW JERSEY 4

POINT II - THE "DEFENDANT FUNDS" SEIZED BY THE GOVERNMENT MUST BE RETURNED TO WEALTHY MAX BECAUSE OF THE EGREGIOUS VIOLATIONS OF CAFRA 7

POINT III - THE COINS TENDERED TO THE MINT BY WEALTHY MAX WERE NOT IMPORTED FOR MONETARY PURPOSES AND THEREFORE, UNDER TREASURY REGULATIONS, DO NOT QUALIFY AS COUNTERFEIT COINS 13

POINT IV - THE DECISION BY THE MINT TO REDEEM THE COINS SUBMITTED BY WEALTHY MAX CONSTITUTED AN ACTION OF THE SECRETARY OF THE TREASURY TO ACQUIRE ARTICLES, MATERIALS OR SUPPLIES NECESSARY TO PRODUCE COINS AND IS NOT REVIEWABLE BY A UNITED STATES COURT 16

POINT V - THE AMENDED COMPLAINT MUST BE DISMISSED FOR FAILURE TO ALLEGE FACTS SUPPORTING FORFEITURE OF CLAIMANTS' PROPERTY 18

A. The Government Must Plead Specific Facts with Particularity to Support a Reasonable Belief It Can Meet Its Burden at Trial. 18

B. The Amended Complaint Makes Mere Conclusory Allegations that Claimant's Property is Forfeitable. 20

C. The June 2014 Shipment Was Either Deemed Non-Counterfeit by the Mint or the Mint Concluded That, Inasmuch as the Coins Had Lost Their Character as Money, They Met Its Requirements for Redemption. 24

D. The Government Cannot Establish the Requisite Nexus between Claimant's Property and the Alleged Counterfeit Activity 26

POINT VI - THE FORFEITURE CLAIMS AGAINST CLAIMANT'S PROPERTY SHOULD BE SEVERED 29

A. The Government's forfeiture claim fails to assert a right to relief against the claimants or their property "jointly or severally," or based on the "same transaction [or] occurrence" 29

B. Wealthy Max's claim should not be adjudicated in the same proceeding with a claimant whom the Government claims made statements against interest that may be used against Wealthy Max.. 32

CONCLUSION.. 34

TABLE OF AUTHORITIES

Page(s)

Cases

Alliance for Multilingual Multicultural Educ. v. Garcia,
2011 WL 2532478 (N.D.Cal. 2011)……….5

Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.,
—— U.S. ——, 134 S.Ct. 568, 577, 187 L.Ed.2d 487 (2013)……….4

Bruton v. United States,
391 U.S. 12 (1968)……….33

Daniel v. Am. Bd. of Emergency Med.,
428 F.3d 408 (2d Cir. 2005)……….5

Fedele v. Harris,
18 F.Supp.3d 309 (E.D.N.Y. 2014)……….4

French Transit v. Modern Coupon Sys.,
858 F. Supp. 22 (S.D.N.Y. 1994)……….4

Johnson v. Creighton Univ.,
No. 14 C 4622, 2015 WL 4247781 (N.D. Ill. July 14, 2015)……….4

Langbord v. U.S. Dep't of the Treasury,
783 F.3d 441 (3d Cir. 2015)……….10

Manta v. Mukasey,
263 Fed. Appx. 262 (2008)……….33

Nasious v. City and County of Denver–Denver Sheriff's Dept.,
2011 WL 595789, (10th Cir. 2011)……….30

Next Phase Distribution, Inc. v. John Does 1-27,
284 F.R.D. 165 (S.D.N.Y. 2012)……….32

Richmond Techs., Inc. v. Aumtech Bus. Solutions,
2011 WL 2607158 (N.D.Cal. 2011)……….5

Russel v. Chesapeake Appalachia, L.L.C.,
305 F.R.D. 78 (E.D. Pa. 2015)……….30

Sisneroz v. California,
2009 WL 302280 (E.D. CA Feb. 6. 2006)……………………………………………………..33

Third Degree Films, Inc. v. John Does 1-72,
No. 12-CV-14106, 2013 WL 1164024 (E.D. Mich. Mar. 18, 2013)……………………..…32

United States v. $119,030.00 in United States Currency,
955 F. Supp. 2d 569 (W.D. Va. 2013)…………………………………………………...….27

United States v. $134,972.34 Seized From FNB Bank Account Number –5351,
___ F. Supp. 3d ___, 2015 WL 1411879 (N.D. Ala. Mar. 30, 2015..19

United States v. $1,399,313.74,
591 F. Supp. 2d 365 (S.D.N.Y. 2008)..19, 24

United States. v. $263,327.95,
936 F. Supp. 2d 468 (D.N.J. 2013) 3

United States v. $59,074.00 in U.S. Currency,
959 F. Supp. 243 (D.N.J. 1997) 27

United States v. $8,221,877.16 in U.S. Currency,
330 F.3d 141 (3d Cir. 2003)... 23

United States v. 34 Luxury Vehicles,
No. 13-cv-793-FtM-38CM, 2014 WL 4954825 (M.D. Fla. Oct. 1, 2014) 31

United States v. Any and All Funds Contained in BancorpSouth Account No, XXXX-581-3,
2013 WL 840042 (N.D.Ala. 2013)……………………………………………………………18

United States v. Bezmalinovic,
962 F. Supp. 435 (S.D.N.Y. 1997) 5, 6

United States v. Daccarett,
6 F.3d 37 (2d Cir. 1993)………………………………………………………………..…19

United States v. Nineteen Thousand Eight Hundred Fifty Five ($19,855.00) Dollars in U.S. Currency,
No. 2:12–CV–146–WKW, 2012 WL 5869090 (M.D.Ala. Nov. 19, 2012)……………..……18

United States v. Khan,
497 F.3d 204, 208 (2d Cir. 2007)………………………………………………...………7

United States v. One Gulfstream G-V Jet Aircraft,
941 F. Supp. 2d 1 (D.D.C. 2013)....................19, 20

United States v. One Partially Assembled Drag Racer,
899 F. Supp. 1334 (D.N.J. 1995), *aff'd*, 107 F.3d 684 (3d Cir. 1997)....................19, 23, 27

United States v. Real Property Located in Layton, Utah,
No. 07-CV-6 TS, 2011 WL 887641 (D. Utah Mar. 14, 2011) 30

Statutes

18 U.S.C. § 485....................27

18 U.S.C. § 486....................27

18 U.S.C. § 487....................27

18 U.S.C. § 545....................27

18 U.S.C. § 641....................27

18 U.S.C. § 981....................12

18 U.S.C. § 983....................10, 14

18 U.S.C. § 1343....................22

18 U.S.C. § 2320....................22

18 U.S.C. § 2323....................22

19 USC § 1484....................9, 13

19 USC § 1607....................8

28 U.S.C. § 1355....................5

28 U.S.C. § 1391....................4, 5

28 U.S.C. § 1406....................4

19 C.F.R. § 141.4....................13

19 C.F.R. § 162.45....................8

31 C.F.R. §100.11……………………………………………………………….....…14, 15

31 U.S.C. § 5111………………………………………….…………………………….16, 17

Other Authorities

7 CHARLES ALAN WRIGHT, *et al.*,
FED. PRACTICE & PROCEDURE § 1652 (3d ed.2001)..32

Asset Forfeiture Policy Manual (2013), Chap. I, Sec. 3(C)..13

"American Scrap," *The New Yorker* (2008),
http://www.newyorker.com/magazine/2008/01/14/american-scrap
....22

Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"),
Pub.L. No. 106–185, 114 Stat. 202..10, 11

http://www.bahrsdie.com/about-us/ (visited Sept. 9,
2015)………..….22

http://www.federalreserve.gov/paymentsystems/fedach_about.htm (visited
Sept. 18, 2015)……...1

http://www.mydiemaker.com/stamping-dies.php (visited Sept. 9,
2015)………..22

http://www.treasury.gov/resource-center/faqs/Coins/Pages/edu_faq_coins_sales.aspx
(visited Sept. 9, 2015)...………15

http://www.usmint.gov/about_the_mint/index.cfm?action=coin_specifications
(visited Sept. 9, 2015)...………15

http://doubleddie.com/58201.html
(visited Sept. 9, 2015)...………22

Department of the Treasury Office of Inspector General ("OIG") Management Implication Report 2008-0096, review of the Mutilated Coin Program, 2010, http://www.governmentattic.org/12docs/TreasuryOIG-MIP2008-0096_2010.pdf 21, 27, 28

Department of the Treasury, Customs Service, Internal Advice Request ("Internal Advice Request"), HQ H139056, 2012 WL 2954323 (June 27, 2012) (Exhibit A)……………........…13, 16

Harmonized Tariff Schedule HTSUS Exploratory Note (EN 71.18)……………………………13

H.R. REP. 105-358(I), 105TH Cong., 1ST Sess. 1997, 1997 WL 677201 (Leg.Hist.) CIVIL ASSET FORFEITURE REFORM ACT, October 30, 1997..11

Federal Register / Vol. 79, No. 136 / Wednesday, July 16, 2014 / Proposed Rules……………10

Fed. R. Civ. P. 12(b)(3)..3, 4

Fed. R. Civ. P. 12(b)(6)...3

Fed. R. Civ. P. 20(a)(2)..29

Fed. R. Civ. P. 21..4

Fed. R. Civ. P. Supp. G(8)(b)(i)..3

Fed. R. Civ. P. Supp. G (2)(f) 3,13,18

Fed. R. Civ. P. Supp. G (3)(b)(ii) 12

PRELIMINARY STATEMENT

Wealthy Max Limited ("Wealthy Max"), a Hong Kong company, is in the business of collecting mutilated coins for sale in the United States and a number of other countries, both through its own operations and through purchases from other vendors. Wealthy Max was incorporated in 2008 and delivered its first shipment of mutilated coins to a foundry (PMX in Cedar Rapids, Iowa) to the U.S. Mint on or about June 26, 2014. The shipment weighed 54,000 kilograms and was given an approximate value by Wealthy Max of $2,380,992.

According to the Amended Verified Complaint ("AC"), prior to the June 2014 melt, "samples" were drawn from the shipment. AC ¶ 42. Subsequently, testing by the Customs and Border Protection ("CBP") laboratory determined that "the coins" did not meet certain "specifications provided by the United States Mint," specifically, "they contained elements, such as aluminum and silicon, which are not found in genuine United States coins … as well as insufficient amounts of certain metals typically found in genuine United States coins, such as nickel and copper." *Id.* Despite this, the Mint concluded that, "due to regulations concerning the United States Mint's Mutilated Coin Program," it was required to pay Wealthy Max for the scrap coins it had accepted. *Id.* ¶ 43. The Mint therefore prepared to send the payment to Wealthy Max via the Federal Reserve System Automated Clearing House ("ACH") system.[1] *Id.* ¶¶ 43, 44.

[1] "The automated clearinghouse (ACH) system is a nationwide network through which depository institutions send each other batches of electronic credit and debit transfers. The direct deposit of payroll, social security benefits, and tax refunds are typical examples of ACH credit transfers. The direct debiting of mortgages and utility bills are typical examples of ACH debit transfers. While the ACH network was originally used to process mostly recurring payments, the network is today being used extensively to process one-time debit transfers, such as converted check payments and payments made over the telephone and Internet." *See* http://www.federalreserve.gov/paymentsystems/fedach_about.htm (visited Sept. 18, 2015).

On or about September 4, 2014, Government agents obtained a seizure warrant for $5,453,011.81 of "Defendant Funds," an amount that included the $2,388,091.18 due and owing to Wealthy Max for the June shipment. *See Id.* ¶ 4(c)(i). The seizure warrant was executed on or about September 17, 2014. *Id.* ¶ 44. According to the AC, these funds were to have been

> processed through a Federal Reserve facility in East Rutherford, New Jersey . . . . However, [they] were intercepted *before they were processed through the Federal Reserve Facility in New Jersey*, and they were seized by the U.S. Attorney's Office for the District of New Jersey, following the receipt of the results from the CBP Laboratory . . . concluding that the sampled mutilated coins were counterfeit.

Id. (emphasis added). Elsewhere, Claimant is alleged to have "fraudulently caused the United States Mint to issue electronic payments" that "were processed through a Federal Reserve Facility in East Rutherford, New Jersey" (*Id*. ¶ 7). The AC does not allege precisely where or how "the funds," in actuality, a bookkeeping entry sent from one bank to another, were "intercepted," except to say, inconsistently, that the interception occurred before the wire arrived in East Rutherford. *Id.* ¶ 41.

On September 30, 2014, Wealthy Max was notified via email from Thomas Browne, Cash Division Head, Traffic Manager, United States Mint that the coins had been delivered and processed by PMX and the proceeds seized by Anthony Lanzilotti, Special Agent, United States Department of Homeland Security, Homeland Security Investigations ("HSI") in Newark, New Jersey. The Government's original complaint alleged that venue in New Jersey was proper "because the acts and omissions giving rise to the forfeiture occurred in the District of New Jersey," although it did not state what those acts and omissions were. Complaint ¶ 6 (Dkt. 1, filed Mar. 20, 2015). The AC (filed Aug. 11, 2015) discloses that these "acts and omissions" apparently amounted to just the Mint's *intention* to deliver the funds owed to

Wealthy Max via the Federal Reserve Fed wire, which, had this occurred, would have meant the wire transmission traveled through a Federal Reserve facility in New Jersey. AC ¶¶ 7, 29, 44, 63.

Seven months after the seizure, on March 20, 2015, the United States filed its Verified Complaint for Forfeiture *In Rem* regarding Claimant's Property – the money due and owing to it, as determined by the Mint. The Government obtained a seizure warrant from a Magistrate Judge and, apparently, having seized the proceeds previously on September 4, 2014, seized them again, from itself. Wealthy Max received a copy of the original complaint via Federal Express in Hong Kong on May 5, 2015, some five weeks after it had been filed. Wealthy Max's customs and trade counsel who had been in direct communication with Agent Anthony Lanzilotti regarding the seizure was not served with the complaint. The Government filed its AC on August 11, 2015.

ARGUMENT

The AC is defective for two reasons: (1) under Federal Rule of Civil Procedure 12(b)(3), venue in this district is improper and (2) under Federal Rule of Civil Procedure 12(b)(6), the allegations do not state a claim upon which relief can be granted. *See* Fed.R.Civ.P. Supp. G(8)(b)(i) ("A claimant who establishes standing to contest forfeiture may move to dismiss the action under [Civil] Rule 12(b)); *United States v. $263,327.95*, 936 F.Supp.2d 468, 471 (D.N.J. 2013). Here, the Government's allegations are conclusory and the Government has failed to meet its burden of "stat[ing] sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Fed.R.Civ.P. Supp. G(2)(f). The Government's seizure of the coins violated CAFRA. The coins tendered to the Mint by Wealthy Max were not imported for Monetary Purposes and

therefore, under Treasury Regulations cannot qualify as counterfeit coins. The decision by the Mint to redeem the coins submitted by Wealthy Max constituted an action of the Secretary of the Treasury to acquire materials or supplies necessary to produce coins and is not reviewable by a United States Court. Insofar as the AC is not dismissed in its entirety, Claimant seeks to sever the Government's claims against Claimant's Property from the other claims the Government is making, pursuant to Fed.R.Civ.P. 21.

POINT I

THE AMENDED COMPLAINT MUST BE DISMISSED BECAUSE VENUE DOES NOT LIE IN THE DISTRICT OF NEW JERSEY

The Government has failed to allege facts sufficient to show that venue properly lies in the District of New Jersey. Accordingly, the AC must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3).

Venue in civil actions is generally governed by 28 U.S.C. § 1391; *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex*., —— U.S. ——, 134 S.Ct. 568, 577, 187 L.Ed.2d 487 (2013). A civil action may be filed in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated. Once a defendant has challenged venue, the plaintiff has the burden of demonstrating that venue is proper in the chosen district. *Johnson v. Creighton Univ.*, No. 14 C 4622, 2015 WL 4247781, at *6 (N.D. Ill. July 14, 2015); *Fedele v. Harris*, 18 F.Supp.3d 309, 216 (E.D.N.Y. 2014), *citing French Transit v. Modern Coupon Sys.,* 858 F.Supp. 22, 25 (S.D.N.Y. 1994*).* If venue is improper, the court "shall dismiss [the case], or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a); *Atl. Marine Const*., 134 S.Ct. at 577.

Under § 1391(b)(2), "[t]o determine whether a substantial part of the events giving rise

to the claim occurred in the forum, the court first considers what acts or omissions by the defendants give rise to the plaintiffs' claims." *Alliance for Multilingual Multicultural Educ. v. Garcia*, 2011 WL 2532478, at *6 (N.D. Cal. 2011) (citing *Daniel v. Am. Bd. of Emergency Med.,* 428 F.3d 408, 432 (2d Cir. 2005). "[F]or venue to be proper, significant events or omissions material to the plaintiff's claim must have occurred in the district in question, even if other material events occurred elsewhere." *Richmond Techs., Inc. v. Aumtech Bus. Solutions*, 2011 WL 2607158, at *10 (N.D. Cal. 2011) (citation omitted).

The Government attempts to meet its burden by citing 28 U.S.C. § 1355(b)(1) and claiming that "acts and omissions giving rise to the forfeiture occurred in the District of New Jersey." AC ¶ 7. The only act alleged is that Claimant "fraudulently caused the United States Mint to issue electronic payments" that either "were processed through a Federal Reserve Facility in East Rutherford, New Jersey" (*Id*.) or, alternately, "*were to be processed* through a Federal Reserve facility in East Rutherford, New Jersey" (*Id.* ¶ 41). (Emphasis added.) But the AC does not allege that Claimant imported mutilated coins from China that were then sold in New Jersey, or that the foundry to which the coins were sent was in New Jersey (*see Id.* ¶ 23) or that the end product of that process, coin roll, was shipped to New Jersey to manufacture new coins (*see Id.* ¶ 26). The only connection of Wealthy Max to New Jersey claimed in the AC is that the "funds" owed to it by the Mint for the shipment of coins processed on or about June 26, 2014 were deftly "intercepted" and then "seized by" the U.S. Attorney for New Jersey (*Id.* ¶ 44). In no event, of course, could the fact that the prosecutor's office or the agent who made the seizure were based in New Jersey even arguably be a basis upon which jurisdiction might properly be asserted.

On facts similar to those alleged here, the U.S. District Court for the Southern District

of New York dismissed a criminal case because venue was lacking. *United States v. Bezmalinovic*, 962 F.Supp. 435 (S.D.N.Y. 1997). There the Government based its venue claim on the fact that the defendant's bank in the Eastern District of New York sent the checks deposited by the defendant to the bank's processing center in Manhattan to be credited to the defendant's account, and from there they were sent to the lending bank's processing center in Manhattan to be debited from the lending bank's closing account. *See Id.* The court held that those allegations were insufficient to establish venue in the Southern District of New York, stating:

> [The] defendant did not intend those acts to take place in the Southern District, nor could he have foreseen that the acts would occur there. The crediting and debiting that occurred in Manhattan were purely ministerial acts that did not involve any decision-making; the decision to grant defendant a mortgage had already been made by [the lending-bank] in the Eastern District.

Id. at 438. The court concluded by noting that adopting the Government's theory would vastly expand venue for bank fraud, such that "[i]t would have no relation to the acts committed by a defendant, to the foreseeable results of those acts, or to the actual effect of those acts, but only to the inner workings of large financial institutions." *Id.* Here, the Government's claim regarding venue is practically identical. Wealthy Max has no ties to New Jersey.

Further, it appears from the Government's response to another claimant's Motion to Dismiss that it now concedes the seized payments were not processed through New Jersey: "the Defendant Funds were intercepted before they were processed through the Federal Reserve Facility in New Jersey." Dkt. 44, page 16. So, grasping at straws, the Government has changed its theory and asserts that *previous payments* by the Mint to co-claimants *were* processed through New Jersey. *Id.*, pages 14-15. Those payments were not seized, took place at a different time and were made for entirely different coins the Mint had redeemed. There is no claim that any of those coins were counterfeit. (What the relevance of such a contention

might be to this action in any event is hard to discern since this is an action *in rem.)* Those shipments cannot provide a basis for venue of this action in New Jersey. Thus, accepting the facts as alleged in the AC as true, no event material to the plaintiff's claim occurred in New Jersey and venue does not lie in New Jersey.

For the reasons noted below, this action should be dismissed, not merely transferred to a district where it could have been brought, as transferring the case would not be in the interest of justice.

POINT II

THE "DEFENDANT FUNDS" SEIZED BY THE GOVERNMENT MUST BE RETURNED TO WEALTHY MAX BECAUSE OF THE EGREGIOUS VIOLATIONS OF CAFRA

Under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), Pub.L. No. 106–185, 114 Stat. 202, which Congress passed in "react[ion] to public outcry over the government's too-zealous pursuit of civil and criminal forfeiture," and "to deter government overreaching." *United States v. Khan,* 497 F.3d 204, 208 (2d Cir. 2007), with exceptions not relevant here, "in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve *proper notice* as soon as practicable, and in no case more than 60 days after the date of the seizure." 18 U.S.C. § 983(1)(A)(i) (emphasis added).

Here, the only notice of any kind provided to Wealthy Max was an email *from a Mint employee* on September 30, 2014 in which it was advised that the payment for the shipment of coins delivered on June 26 "[had] been seized by Homeland Security." Other than that, the email note simply gave the name of the "Agent in charge [of something]" and provided his address and telephone number. There is nothing about that cryptic email message, coming from an employee

of the Mint, that suggested a law enforcement proceeding had been initiated and the proceeds of the shipment had not only been "seized," whatever the consequences of that might be, but that they would be subject to forfeiture. Nothing in the note advised as to how Wealthy Max might submit a claim for the proceeds or what rights it had to recover its property and what procedure it needed to follow to initiate a claim.

CAFRA provides that "[a]ny person claiming property seized in a nonjudicial civil forfeiture proceeding under a civil forfeiture statute may file a claim with the appropriate official after the seizure." *Id.* § 983(2)(A). But Wealthy Max had no notice that its property was subject to forfeiture, nor that it needed to file a claim to obtain its return, or that such a claim needed to be filed "not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed) … ." *Id.* § 983(2)(B).

CAFRA requires generally that the agency that makes a seizure to provide written notice of the seizure to parties that may have an interest in the property. Such notice must be sent in a manner that will provide "proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure." 18 U.S.C. § 983(a)(1). An email note from a person in an agency with whom the person being notified had dealt for many years advising simply that the funds that had been sent via wire by the agency to Wealthy Max had been seized and stating the name of the agent-in-charge is not an adequate notice. *Cf.* 19 C.F.R. § 162.45 (seizure notice required by § 607, Tariff Act of 1930, as amended, 19 U.S.C. § 1607). The notice must --

> (1) Describe the property seized and in the case of motor vehicles, specify the motor and serial numbers;
>
> (2) State the time, cause, and place of seizure;
>
> (3) State that any person desiring to claim property must appear at a designated place and file with the Fines, Penalties, and Forfeitures Officer within 20 days from the date of first publication of the notice a claim to such property

> and a bond in the sum of $5,000 or 10% of the value of the claimed property, whichever is lower, but not less than $250, in default of which the property will be disposed of in accordance with the law; and
>
> (4) State the name and place of residence of the person to whom any vessel or merchandise seized for forfeiture under the navigation laws belongs or is consigned, if that information is known to the Fines, Penalties, and Forfeitures Officer.

Here, after accepting the shipment of scrap coins from Wealthy Max, melting them, conducting an assay, determining what was owed based on the metal content, turning the metal into coin roll, and making at least a faux attempt to send payment to Wealthy Max (although no doubt cooperating with the United States Attorney for New Jersey to ensure its seizure), all Wealthy Max is told, and this only after many inquiries, more than 90 days after the Mint had accepted the June 26 shipment and converted it, is that the $2,388,000 payment due and owing to Wealthy Max had been "seized" by an agent of the Department of Homeland Security. Basically, the email went on to say "if you want to know more, call him." Wealthy Max was never notified that the seizure of the funds meant likely that they would be subject to a judicial or nonjudicial forfeiture proceeding.

Under the normal procedures followed by Government agencies when they have seized property, a form notice describing what has occurred and what the rights a person claiming an interest in the property has to contest the seizure. In this case, of course, there is no question that Wealthy Max had an interest in the property (the funds were being wired to its bank account) or how to notify the company of the seizure: the Mint had several points of contact.

But the fact and the meaning of the "seizure" was confusing. Payment had already been delayed beyond the time it normally took for payment to be made. There was no written notice a seizure of the proceeds of the melt from the Department of Homeland Security or the Department of Justice. The only notice that something was afoot was an email from someone at

the Mint suggesting that a call to an agent of the Department of Homeland Security might be in order. What now was this complication, and what to make of the fact that the proceeds had been seized by Homeland Security agents? Was there a national security concern? Or perhaps just a routine form that needed to be completed before payment could be finally made? It was very unclear.

In any event, despite the efforts of Matthew Wong, one of the owners of Wealthy Max, to discern what the problem was in direct communications with the agent in charge shortly after receipt of the September 30 email, he never received any formal notice of seizure and was never told that the United States Government intended to seek forfeiture of the property on the grounds that it contained contraband, nor was he told that the seizure had occurred pursuant to warrant issued by a U.S. Magistrate Judge.

And months later, when Mr. Wong ultimately told trade counsel for Wealthy Max that there was a problem with the payment for the June shipment and asked that he look into the situation, counsel's own direct dealings with the agent in charge did not immediately clarify why the payment had been seized. Nevertheless, Mr. Wong and his counsel worked cooperatively with the investigator and responded multiple requests for information over the course of approximately 5 months (December, 2014 through April 2015) throughout which repeated requests were made to release the subject goods. In cooperating completely with the investigator, they acted in the belief – mistaken, as it turned out – that the United States Government would turn square corners with them. It did not.

Under CAFRA, if the Government has seized property, it must file a complaint for judicial forfeiture within 90 days of receipt of a claim or else return the property. 18 U.S.C. § 983(a)(3)(A), *see Langbord v. U.S. Dep't of the Treasury*, 783 F.3d 441, 444 (3d Cir. 2015),

reh'g en banc granted, opinion vacated (July 28, 2015). Here, the Government failed to initiate forfeiture proceedings until March 20, 2015, seven months after the "Defendant Funds" were seized on or about September 17, 2014. Equally significant, as indicated above, the Government never provided Wealthy Max with adequate notice of the seizure. Notice of the forfeiture was not provided to Wealthy Max on March 20, 2015 when the Government initiated forfeiture proceedings against Wealthy Max's property, but it was only provided finally on May 5, 2015 via Federal Express to Wealthy Max's Hong Kong address. Trade counsel was not provided notice even though trade counsel was well known to the investigator after having exchanged information with him for approximately five months.

By failing to give a proper and adequate notice to Wealthy Max that the proceeds of the melt had been seized as part of proceeding by which they could be forfeited, the Government avoided alerting Wealthy Max to its forfeiture plans, effectively preventing the company from filing a claim for return of the property and achieving a prompt adjudication of the lawfulness of the action taken to seize funds that the United States Bureau of the Mint, *after learning that the CBP lab had determined that "the coins" sent to the furnace at PMX in June 2014 were counterfeit,* determined nevertheless that payment for the shipment was due and owing. The Government will no doubt respond that since it did not initiate a forfeiture action until March 2015, it was not required to give notice of the seizure to Claimant. But this defeats CAFRA's goal of making "federal civil forfeiture procedures fair for property owners" and giving "innocent property owners the means to recover their property and make themselves whole." H.R. REP. 105-358(I), 105TH Cong., 1ST Sess. 1997, 1997 WL 677201 (Leg.Hist.) CIVIL ASSET FORFEITURE REFORM ACT, October 30, 1997.

Here, the fact is that a long-time provider of goods to the Government, one that had tendered mutilated coins to the Mint on numerous occasions in routine business transactions, more than 90 days after tendering those goods, had still not received a truthful acknowledgement of what was afoot. Wealthy Max did not know until September 30, 2014 that the June shipment had been seized. No official notice of the seizure was ever sent, only the oblique email coming from a Mint employee. And that "notice" only advised Wealthy Max that payment for the goods had been "seized," without any explanation of what that meant or what rights it had to contest the seizure. That kind of informal email coming from someone who was not fully informed about the seizure and who provided no information about the nature of the action having been taken is not a valid notification. Telling Matthew Wong that he should "call Tony" is not notice.

By failing to provide Wealthy Max with proper notice of the seizure, the Government avoided the need for more than a year to concern itself with a forfeiture proceeding in which its actions would be judged by an impartial judicial officer under a set of defined legal standards – at the same time penalizing Wealthy Max by depriving it of money that it was entitled to have for more than a year now.

According to the Government's forfeiture manual: while the seizure of property pursuant to a civil seizure warrant issued under § 981(b) or warrant of arrest *in rem* under Supplemental Rule G(3)(b)(ii) provides a valid basis for the Government's physical possession of property pending the outcome of a criminal forfeiture proceeding, "*this is so only as long as the civil forfeiture matter is pending, including if the civil proceeding is stayed during the pendency of the case. If someone files a claim in an administrative forfeiture proceeding, the Government has 90 days in which to (1) commence a civil forfeiture action, (2) commence a criminal forfeiture*

action, or (3) return the property. Asset Forfeiture Policy Manual (2013), Chap. I, Sec. 3(C) (emphasis added); 18 U.S.C. § 983(a)(3)(B).

Wealthy Max was "slow rolled" by the Government. The Government's deliberate action, or, perhaps, better put, deliberate "inaction" in failing to provide a proper notice of the seizure to Wealthy Max, denied Wealthy Max its Due Process rights to have the legality of the seizure adjudicated expeditiously. Given this egregious breach, the pending action must be dismissed, the Government ordered to release the $2,388,000 of proceeds belonging to Wealthy Max and Wealthy Max be awarded costs and attorney's fees. *See* 18 U.S.C. § 983(a)(3)(A) & (B).

POINT III

THE COINS TENDERED TO THE MINT BY WEALTHY MAX WERE NOT IMPORTED FOR MONETARY PURPOSES AND THEREFORE, UNDER TREASURY REGULATIONS, DO NOT QUALIFY AS COUNTERFEIT COINS

Under Treasury Department regulations, merchandise imported into the United States is subject to statutory entry requirements. *See* Department of Homeland Security, U.S. Customs and Border Protection, Internal Advice Request ("Internal Advice Request"), HQ H139056, 2012 WL 2954323 (June 27, 2012) (also attached as Exhibit A); 19 U.S.C. § 1484; 19 CFR § 141.4. The Harmonized Tariff Schedule of the United States ("HTSUS") specifically exempts coins falling within the definition of heading 71.18 from meeting the normal entry requirements; however, to be exempt from entry procedures, the coins must be "currently in circulation" and "imported for monetary purposes." *See* Internal Advice Request, citing HTSUS Exploratory Note (EN 71.18). Coins meeting those criteria enter the country free of the normal entry requirements. On the other hand, "Broken, cut or battered coins of a kind usable

only as scrap or waste metal" – essentially a qualification for the Mutilated Coin Redemption Program – are not imported to the U.S. for use as money, are not in circulation and are therefore treated as a commodity – scrap metal in this case subject to the normal (more burdensome) entry requirements.

CBP decided the question in 2012 as the result of a seizure of a shipment of coins from China at the Port of Los Angeles. The shipment was seized for failure to file FINCEN Form 105, a Treasury Department form which relates to "Currency and Other Monetary Instruments." The question raised by the seizure was whether the company needed to file that form and whether, given the nature of the goods entering the country, they were required to meet the normal entry requirements.

To be exempt from the entry requirements applicable to most goods, as mentioned, one criterion under HTSUS is that the coins be imported for "monetary purposes." CBP determined that the coins were, in fact, destined for the U.S. Mint in Philadelphia, which would redeem them "at a per pound rate" and use them as feedstock to make new coins. Thus, CBP determined they were not being imported into the United States to be used in transactions as legal tender. Further, as a practical matter, the mutilated coins were not usable as coins because, as CBP held, they could not be counted by a normal counting machine. *See* 31 C.F.R. § 100.11(a) (defining bent coins as "bent or deformed so as to preclude normal machine counting"). In other words, the coins were usable only as scrap for redemption under the Mutilated Coin Redemption Program. Thus, CBP concluded that the coins were "being imported for the sole purpose" of being used as feedstock in the manufacturing process. Without a monetary purpose, they were a mere commodity and were therefore *subject to the normal entry requirements*.

Likewise, the shipment of coins from Wealthy Max that the Government accepted in June 2014 consisted of mutilated coins that could not be used as money, but were redeemable by the Mint "based on their scrap metal value."[2] The Mint redeems mutilated coins at the rate of $44.09 per kilogram or $20 per pound, for copper-nickel clad coins (dimes, quarter dollars and half dollars). 31 C.F.R. § 100.11; *see also* Federal Register / Vol. 79, No. 136 / Wednesday, July 16, 2014 / Proposed Rules.

Surely, in any shipment of coins as large as those the Mint accepted from Wealthy Max, and despite the rigorous procedures that Wealthy Max uses to sort through the scrap to attempt to ensure the authenticity of the coins delivered to the Mint, there is the potential that some of the coins may be of foreign origin, or the shipment may contain pieces of scrap metal that are not coins and may have contaminated a shipment. In the event that any unexpected metals turn up in the melt, the Mint would, presumably, not compensate the party that tendered the shipment for such metals. Or, if the Mint determined through a scientific sampling process that 1% of a shipment was comprised of counterfeit coins, it could deny the party tendering the shipment credit for 1% of such shipment. It is another thing entirely to seek forfeiture of the entire shipment.

Thus, the AC should be dismissed for failure to state a claim upon which relief can be granted.

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[2] *See* http://www.treasury.gov/resource-center/faqs/Coins/Pages/edu_faq_coins_sales.aspx); *see also* http://www.usmint.gov/about_the_mint/index.cfm?action=coin_specifications (visited Sept. 9, 2015).

POINT IV

THE DECISION BY THE MINT TO REDEEM THE COINS SUBMITTED BY WEALTHY MAX CONSTITUTED AN ACTION OF THE SECRETARYOF THE TREASURY TO ACQUIRE ARTICLES, MATERIALS OR SUPPLIES NECESSARY TO PRODUCE COINS AND IS NOT REVIEWABLE BY A UNITED STATES COURT

The coins whose authenticity has been challenged by the United States Attorney for New Jersey were brought in to the country to be tendered to the Mint and, if accepted, used as feedstock for new coins. The coins were examined and tested and accepted by the Mint. Despite the fact that the coins were not usable as legal tender, the United States Attorney takes the position that large shipments of coins that are "being imported for the sole purpose" (Exhibit A - CBP report) of being used as feedstock for new coins, inconsistent with the CBP's 2012 decision on imported mutilated coins (*Id.*), should be treated as having a monetary purpose and deemed to be counterfeit. That argument, as we have shown (Point III, above) is meritless, as well as unrealistic and contrary to statute.

Further, in the case of domestic coinage, the Secretary of the Treasury's decisions to acquire "articles, materials, supplies and services" are not "reviewable in any administrative proceeding or court of the United States." Specifically, 31 U.S.C. § 5111, provides as follows:

> **(c) Procurements relating to coin production.—**
>
> **(1) In general.**--The Secretary may make contracts, on conditions the Secretary decides are appropriate and are in the public interest, to acquire articles, materials, supplies, and services (including equipment, manufacturing facilities, patents, patent rights, technical knowledge, and assistance) necessary to produce the coins referred to in this title.
>
> **(2) Domestic control of coinage.--**(A) Subject to subparagraph (B), in order to protect the national security through domestic control of the coinage process, the Secretary shall acquire only such articles, materials, supplies, and services (including equipment, manufacturing facilities, patents, patent rights, technical knowledge, and assistance) for the production of coins as have been produced or manufactured in the United States unless the Secretary determines it to be inconsistent with the public interest, or the cost to be unreasonable, and

publishes in the Federal Register a written finding stating the basis for the determination.

(B) Subparagraph (A) shall apply only in the case of a bid or offer from a supplier the principal place of business of which is in a foreign country which does not accord to United States companies the same competitive opportunities for procurements in connection with the production of coins as it accords to domestic companies.

(3) Determination.—

(A) In general.--Any determination of the Secretary referred to in paragraph (2) *shall not be reviewable in any administrative proceeding or court of the United States*. (Emphasis added.)

Based upon acceptance of the shipment from Wealthy Max, as the Treasury itself acknowledged in attempting to pay for the shipment, it owed Wealthy Max a sum of money calculated on the basis of the metal recovered. This decision mooted any question about forfeiture of the funds due Wealthy Max for the June 26, 2014 shipment. Inasmuch as the decision of the Mint, acting under the authority of the Secretary of the Treasury, was to accept the shipment of "Broken, cut or battered coins of a kind usable only as scrap or waste metal" by Wealthy Max and, having done so, to meet its obligation to pay for it, the forfeiture action must be dismissed, as the scrap coins were "articles" or "materials" procured "for the production of coins," and the Secretary's decisions in this field are not subject to review by any court of the United States. 31 U.S.C. § 5111(c)(2) & (c)(3)(A). Therefore, the AC should be dismissed for failure to state a claim upon which relief can be granted.

POINT V

THE AMENDED COMPLAINT MUST BE DISMISSED FOR FAILURE TO ALLEGE FACTS SUPPORTING FORFEITURE OF CLAIMANT'S PROPERTY

A. The Government Must Plead Facts with Particularity to Support a Reasonable Belief It Can Meet Its Burden at Trial

Under the special pleading rules applicable in forfeiture cases, the Government's 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." Fed.R.Civ.P. Supp. G (2)(f) The Government cites to no authority that Wealthy Max had any responsibility to test the coins it tendered to the Mint to establish their authenticity, beyond, perhaps, making a visual inspection, and the Government has not alleged that any coins included in the shipment that it alleges were counterfeit were obvious fakes that should have been apparent to Wealthy Max.[3]

As the Court noted in *United States v. Nineteen Thousand Eight Hundred Fifty Five ($19,855.00) Dollars in U.S. Currency*, No. 2:12–CV–146–WKW, 2012 WL 5869090, *1 (M.D.Ala. Nov. 19, 2012) (footnote omitted), "the standards [set forth in Rule G(2)] are more stringent than the general pleading requirements set forth in the Federal Rules of Civil Procedure, ... an implicit accommodation to the drastic nature of the civil forfeiture remedy. *See Any and All Funds Contained in Bancorpsouth Account No, XXXX-581-3,*

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[3] While the Government alleges that the shipment contained counterfeit coins, Wealthy Max has not been provided with the results of the testing done to establish that coins included in the June 2014 shipment were counterfeit, although, given the references to it in their motion to dismiss, it is apparent that this report was provided to counsel for Claimants America Naha, Inc., Kei Yi Loung, also known as Kenneth E. ("Kenny") Loung, Chien Chieng Loung, Harry Kenneth Loung, Lisa Marie Loung, and Mary Robin Loung sometime before August 29, 2015, the date these claimants filed their motion to dismiss. We requested a copy of the report on August 21 (see email letter from Bradford L. Geyer to Lakshmi Herman and Shana Chen, attached as Exhibit B), a request to which we have had no response.

2013 WL 840042 (N.D.Ala. 2013)*; United States v. Daccarett*, 6 F.3d 37, 47 (2dCir. 1993).

Civil forfeiture is a powerful tool in the Government's battle against crime, and its use is circumscribed by important Fourth and Fifth Amendment rights. It must be carried out scrupulously within constitutional bounds. Accordingly, the requirements of Rule G(2) are more than a mere technicality; they are a means of upholding this drastic remedy against a possible due process challenge and of preventing the seizure of the defendant property for long periods of time when, in fact, the government has no claim to the property. *Cf. United States v. One Partially Assembled Drag Racer,* 899 F.Supp. 1334, 1340 (D.N.J. 1995). Pleadings that fail to meet the particularity requirement must be dismissed. *See, e.g., United States v. One Gulfstream G-V Jet Aircraft*, 941 F.Supp. 2d 1 (D.D.C. 2013); *United States v. $1,399,313.74*, 591 F.Supp. 2d 365 (S.D.N.Y. 2008).

When a claimant moves to dismiss a civil asset forfeiture complaint under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted," the court should determine the sufficiency of the complaint by first separating the factual and conclusory allegations, and then applying the standard of Supplemental Rule G(2)(f) asking, Does the complaint "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial"? *See United States v. $134,972.34 Seized From FNB Bank Account Number – 5351*, ___ F.Supp.3d ___, 2015 WL 1411879 (N.D.Ala. Mar. 30, 2015).

B. The Amended Complaint Makes Mere Conclusory Allegations That Claimant's Property is Forfeitable and Should Be Forfeited

Although the AC alleges that some coins entering the United States from China under the Mutilated Coin Redemption Program may be counterfeit, it is not until paragraph 58 that the Government attempts to make any direct connection between Wealthy Max and any purportedly counterfeit shipments of mutilated coins. *United States v. One Gulfstream G-V Jet Aircraft,* 941 F. Supp. 2d at 14 (noting that the heightened particularity requirement for a civil forfeiture pleading is designed to "protect property owners against the threat of seizure upon conclusory allegations"). Instead, before then, the AC recites a litany of federal crimes (*see* AC ¶¶ 9-17), but does not allege that Claimant committed any of those crimes. Likewise, while the AC alleges that "certain individuals and entities, including the Subjects and their respective entities, are defrauding the Mutilated Coin Program by importing counterfeit mutilated coins from China . . ." (*Id*. ¶ 28), none of the allegations that follow (*see Id.* ¶¶ 28-39) identify any act allegedly committed by Wealthy Max that is tied to counterfeiting. Apparently, Wealthy Max's status as "Subject" of the investigation is supposed to suffice for evidence of criminality and the pending case is against the property. So, for example, the Government claims that United States Mint personnel "believe" that "more half dollars have been redeemed by the China-sourced redeemers in the last ten years than the United States Mint has ever manufactured in its history." *Id.* ¶ 36. Inasmuch as sampling was not routinely done and that it would appear that no particular employee of the Mint was tasked with observed the melts (*see Id*. ¶ 26, referring just to "Mint personnel" being present for the melts), much less inventoried the denominations of the coins being

redeemed, how such a belief might have been formed is difficult to imagine, as is the significance of a mere "belief."

Then, there is the claim that "[a]ll of the waste coin imports[4] appeared to be corroded (having a greenish-brown patina) and mechanically deformed and/or chipped." *Id.* ¶ 37. But if this was the first time Mint personnel had noticed the greenish-brown patina or the (unstated) ways in which the coins were "mechanically deformed or chipped," it does raise the question of whether these supposed indicia of counterfeiting had just appeared in June 2014, even though the AC alleges that the individuals and entities named in the AC have been engaged in an undefined "scheme to defraud" the United States Mint (*Id.* ¶ 3) for an undefined period of time, but attempting to leave the implication that the scheme began in or before 2009, as this is when the Government alleges shipments of waste coins from China increased markedly (*Id.* ¶¶ 29-30). Interestingly, the Department of the Treasury Office of Inspector General ("OIG") had concluded in a Management Implication Report (No. 2008-0096) that all of the coins received under the Mutilated Coin Program that were examined without any notice to the submitters were genuine. *See* *http://www.governmentattic.org/12docs/TreasuryOIG-MIP2008-0096_2010.pdf* at page 3:

> Agents observed that the coin shipments were delivered via three tractor-trailer trucks, which carried 37 crates of mutilated coins that had been shipped from three foreign companies. Eleven crates were randomly selected for examination and were sampled by dumping the contents of the crate onto a vibratory conveyor belt that facilitated the visual and manual inspection by the Treasury OIG, the Secret Service, Immigration and Customs Enforcement and U.S. Mint team. Visual examination of the coins inspected indicated them to be properly consistent in appearance and denomination with genuine coins. . . . Approximately 50 samples were selected from each shipment for examination by a Mint metallurgist. The metallurgist subsequently confirmed that the coins were, in fact, genuine U.S. coins.

[4] The timeframe is not specified, but the allegation is presumably limited to the several shipments of coins accepted by the Mint and melted on about June 26, 2014, one of which was from Wealthy Max.

Similarly, the AC alleges that the coins seem to have been mutilated in a "uniform manner" (AC ¶ 39), but neglects to mention that legitimate coins run through the same kinds of scrap metal processing equipment would presumably also be mutilated in a similar manner. Thus, this is no more of an indication that a coin is counterfeit than is a showing that die stamping machinery may be found in China.[5] Finally, painting with the same broad brush it uses throughout the AC, the Government alleges that the Mint sold die striking machinery to "a Chinese company." *Id.* ¶ 38. While the AC is silent on the point, if there was anything unique about the die striking machinery sold, it is difficult to imagine that the Mint would have allowed such equipment to be sold without disabling any unique features that made it particularly suitable for the manufacture of genuine U.S. coins. From this, however, the Government concludes that such equipment is available in China – and, indeed, there is, of course, little doubt that die striking machinery is "available" in China, just as it is "available" most everywhere in the world.[6] Thus, this allegation is meaningless.

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[5] In all the Government's suggestions of massive counterfeiting of U.S. coins in China, the Government never once mentions the term "Zorba." Zorba is the name given to "the heterogeneous mixture of aluminum and copper that remains after the shredded car has passed through the entire downstream operation—about four per cent of the total car. It is made of small twisted pieces of aluminum from transmission casings, mixed in with chopped-up copper wires." "American Scrap," *The New Yorker* (2008), http://www.newyorker.com/magazine/2008/01/14/american-scrap. It is far too expensive to try to sort these materials from the detritus of shredded auto parts in this country; hence, it is shipped to China in massive quantities. The author described what he saw at just one facility:

> We toured the facilities in a stylish golf cart. The grass and leaves around the huge sorting shed, where the Zorba had been taken, were covered with *a thin layer of aluminum dust*. Inside the open-walled shed, *four hundred women, working in groups of twenty*, surrounded fifteen-foot piles of metal. The women wore gloves and masks and white uniforms. They picked through the pieces by hand, sorting the aluminum into different grades (these also have colorful industry names—"tense," "twitch," "taint/tabor"), and each grade had its own bucket. They also separated out small pieces of copper wire and whatever else they might find in the Zorba—*American coins, left in gummy car ashtrays, were not uncommon*.

Id.

[6] *See, e.g.,* http://www.mydiemaker.com/stamping-dies.php, http://www.bahrsdie.com/about-us/ (visited Sept. 9, 2015); *see also* http://doubleddie.com/58201.html (describing the die striking process) (visited Sept. 9, 2015).

Thus, even if all of these allegations happened to be true, they do not lead to an inference that *Wealthy Max* tendered counterfeit coins to the U.S. Mint. Nevertheless, the Government would have the Court infer from its allegations that Wealthy Max primarily imports half dollars, that all of its shipments contained coins that were corroded and deformed in the same way, and that the Chinese company that bought the surplus die striking machines from the Mint is a wholly owned subsidiary of Wealthy Max. The Government's allegations about half dollars, corroded and deformed shipments of coins and die striking machines being sold in China are not connected to Wealthy Max by any specific allegation; thus, these assertions do in any way support a reasonable belief that the Government will be able to meet its burden of proof at trial. They do not tend to establish that Wealthy Max is a counterfeiter, nor, for that matter, that counterfeiters in China have been producing massive quantities of counterfeit U.S. coins that have been sold to the U.S. Mint. The AC merely contains disjointed innuendo and veiled allegations that make no specific connection to Wealthy Max's property.

As the Court knows, the prosecution must allege – and eventually prove – its case with actual evidence that the *rem* was derived from unlawful activities. It is not enough to suggest that criminality has occurred. *See United States v. $8,221,877.16*, 330 F.3d 141, 154 (The Rules are an important safeguard against the government's seizing and holding property on the basis of mere conclusory allegations that the property is forfeitable.); *One Partially Assembled Drag Racer*, 899 F.Supp. at 1341 (allegations of complaint failing to indicate that Government would be able to trace proceeds of claimant's alleged criminal activity to his purchase of the forfeitable property and thus were "too vague to pass muster").

United States v. $1,399,313.74 illustrates the point. There the Government attempted to use random allegations of "bad" acts not specifically tied to the claimants or to the property sought to be forfeited as a substitute for particularized allegations. The case involved Columbian nationals who used a peso broker to purchase U.S. dollars for deposit into their savings account at a U.S. bank. 591 F.Supp.2d at 367. Claiming that a pattern of wire transfers and deposits into the account prior to the date of seizure indicated that the account was being used for money laundering, the Government sought forfeiture of the funds in the account (*Id.* at 367-68), relying on "general facts" regarding the black market peso exchange process, including that "some peso brokers are . . . involved in the laundering of drug money." *Id.* at 374. In dismissing the complaint, the court held that the Government's attempt to link the claimants and their funds to the black market peso exchange failed because the "[c]omplaint [was] comprised of conclusory allegations that [were] insufficient to raise a right to relief above the speculative level" – the same deficiency from which the AC in this case suffers. *Id.*

C. The June 2014 Shipment Was Either Deemed Non-Counterfeit by the Mint or the Mint Concluded That, Inasmuch as the Coins Had Lost Their Character as Money, They Met Its Requirements for Redemption

The Government attempts to salvage its AC by alleging that samples of the coins were removed, and when tested, were "not within the specifications provided by the United States Mint"; therefore, they were deemed "counterfeit." AC ¶¶ 41-42. Despite the assessment that the coins in the Wealthy Max shipment were counterfeit, the Mint chose to accept them, melt them and to attempt, at least, to pay for the metal recovered in the smelting process. In the language of the AC, the mutilated coins were "redeemed." *Id.* ¶ 43. At the same time, the Mint destroyed the primary source of evidence that "the coins" were or were not counterfeit.

As the guardian of the integrity of the Nation's currency, the Mint surely would not knowingly redeem shipments of counterfeit coins under its Mutilated Coin Redemption Program. Yet, the AC acknowledges that the coins were redeemed and, because they were melted, their identity as U.S. coins, or not, placed beyond the reach of any mortal. *See* AC ¶ 39 ("On or about June 26, 2014, PMX melted the mutilated coins submitted to the United States Mint by XRacer Sports, America Naha, and Wealthy Max, but retained some of the coins as samples.") No description of the sampling technique is provided, nor is it even clear whether the persons who did the sampling selected coins from each of the shipments.

After the mutilated coins arrive at a given foundry, United States Mint personnel witness the melting of the coins. *Id*. ¶ 23. Once the metal reaches its molten state, it is formed into large coils that are sold and shipped to the United States Mint to make new coins. In deciding to accept the Wealthy Max shipment, either the Mint did not accept the CBP laboratory analysis that the coins were counterfeit, or consistent with CBP's classification of the coins as scrap metal, decided that the coins, whether genuine or counterfeit, or a mixture, were now just feedstock for new coins; thus, the question was merely whether they should be accepted or rejected. They were accepted. With regard to the first explanation, the record here already contains a substantial basis on which to believe that the CBP lab's testing protocols or conclusions, or both, were flawed.

Dr. Richard P. Baron, specialist with numerous publications and recognitions to his credit in the fields of materials science and engineering, and who specializes in forensic engineering and chemical compositional testing, has identified a number of flaws in the Government testing and analysis. *See* Declaration of Richard P. Baron, Ph.D., P.E. ("Baron Decl.") (Dkt. 20). Just to name just a couple: while the allegation of counterfeiting is based, in

part, on the presence of aluminum and silicon in the sample coins tested because neither is found in authentic U.S. coins (AC ¶ 42), but detecting aluminum and silicon during chemical analysis is "not uncommon" since both elements are "very abundant in nature" (Baron Decl. ¶ 5), the detection of such elements in metallic objects that have been mutilated would be expected (*Id.*), particularly, perhaps, when aluminum is one of the metals recovered from Zorba (*see* n.3 *infra*) and, second, the AC's emphasis on the "greenish-brown patina" of mutilated coins imported from China is misguided, as that sort of discoloration "is typical for corroded copper-rich materials and is not necessarily an indication that the subject coins were intentionally exposed to chemicals in order to mask their true appearance" (*Id.* ¶ 10).

In short, paragraphs 40 through 43 of the AC – the Government's best evidence that Claimant was engaged in importing counterfeit coins – demonstrate that the Government's testing was flawed, its conclusions wrong and the June 2014 shipment, which was melted by PMX and redeemed by the Mint, authentic. With regard to the second explanation, the record here already shows that because these shipments of mutilated coins entered the country not to be a medium of exchange (no one would accept them and they were not machine countable) but merely to become feedstock for new coins, *consistent with CBP's classification of the coins as scrap metal* (*see* Part III, above). Obviously, the Mint determined that the shipment conformed to its requirements, or it would not have redeemed the coins and ordered that payment be sent to Wealthy Max, even after the CBP lab reported that "the coins" – again there is no specificity as to whether some or all, but, presumably, all – were fake.

D. The Government Cannot Establish the Requisite Nexus Between Claimant's Property and the Alleged Counterfeit Activity

To succeed in this forfeiture action, the Government must prove that a substantial connection exists between the property forfeited and the criminal activity that is defined by the

statute, a showing requiring "more than incidental or fortuitous connection to criminal activity." *United States v. $119,030.00 in United States Currency*, 955 F.Supp.2d 569, 584 (W.D.Va. 2013). In addition, it must establish the predicate criminal acts and that the property it seeks to forfeit derived from those acts. *One Partially Assembled Drag Racer*, 899 F.Supp. at 1341; *United States v. $59,074.00 in U.S. Currency*, 959 F.Supp. 243, 248 (D.N.J. 2013).

The AC alleges that the $2,388,091.18 "previously due and payable by the United States Mint to Wealthy Max" (AC ¶ 4(c)(ii)) should be forfeited as proceeds traceable to offenses in violations of (a) 18 U.S.C. §§ 485, 486, 487, 545, 641 and 1343; and (b) 18 U.S.C. § 2323 as property "constituting or derived from any proceeds obtained directly or indirectly as a result of the commission of an offense in violation of 18 U.S.C. § 2320 (trafficking in counterfeit goods)." *Id.* ¶ 8. Giving the AC its most generous reading, the Government claims that Wealthy Max imported counterfeit mutilated coins in June 2014 and invites the Court to presume that "fact" based on the several paragraphs that raise the aura of large-scale counterfeiting and mutilating of U.S. coins in China. *See Id.* ¶¶ 28-39. The Government's argument is simple and blunt and wrong. The Government asserts that large volumes of genuine United States coins do not exist in China, although previous investigation showed that large shipments from China were comprised of authentic coins (*see* Point V(B), *supra*). Further, of course, to the extent not examined, even to suggest that previous shipments containing coins that were never tested for authenticity must have been comprised of counterfeit coins is a bridge too far and basically ignores that fact that the Mint, having had the opportunity to test them, accepted all of Wealthy Max's (and its predecessor company (Glory Smart's)) earlier shipments. It also ignores the result of the 2008 Treasury OIG, Secret Service and Immigration and Customs Enforcement investigation which determined that,

having isolated 37 crates of suspected mutilated coins and randomly selected 11 for inspection, *every last one tested genuine. See* http://www.governmentattic.org/12docs/TreasuryOIG-MIP2008-0096_2010.pdf at page 7.

The Government's case resembles nothing so much as a theory in search of facts. Even the most essential and elemental claim – that there were at least some counterfeit coins in the shipment of June 2014 – is undercut by the declaration of Dr. Baron. *See* Baron Decl. (*passim*) (Dkt. 20). Beginning with the absence of information concerning the test methods employed or "the actual elemental concentration values measured," Dr. Baron eviscerates the AC's allegations that the coins examined were counterfeit. Baron Decl. ¶ 4. Dr. Baron points out the AC's failure to "address the sampling method used to characterize the waste coins." *Id.* ¶ 6. Subsequently, he undermines the Government's claim that it was able to determine that some of the selected sample coins were counterfeit. *See supra* at xxx. Thus, any suggestion that the interpretations given by the Government to its "findings" established that the coins were counterfeit is a stretch. The Government does not even claim that the results of the test melt of the samples removed from the shipments or of the commercial melt of the contents of the large container in any way suggested that the coins were counterfeit. Those results must have been consistent with expectations for a run of genuine coins. Perhaps this is one reason the Mint, following certain unspecified "regulations" that the Government chose not to reference (*see* AC ¶ 43), decided it had to pay Wealthy Max for the June 2014 shipment, even after the CBP lab concluded that the shipment contained or was comprised of counterfeit coins.

In addition, it is noteworthy that the Government makes no claim that the CBP lab's opinion that "the waste coins submitted to the United States Mint" – apparently all of the

samples – were counterfeit. But the AC, at least does not suggest the sampling was done scientifically, or how many of the samples were drawn from each shipment and kept separate from the others. What does it mean that the sample coins "were not within the specifications provided by the United States Mint"? *Id.* ¶ 39. What tolerances did the lab use in making that judgment? Were the samples from each shipment tested separately? In sum, the AC does not state sufficiently detailed facts to support a reasonable belief that the Government will be able to meet its burden of proof at trial.

POINT VI

THE FORFEITURE CLAIMS AGAINST CLAIMANT'S PROPERTY SHOULD BE SEVERED

A. The Government's forfeiture claim fails to assert a right to relief against Wealthy Max and its property "jointly or severally" with other claimants or based on the "same transaction [or] occurrence"

If the AC is not dismissed in its entirety, the Government's claims against the funds owed to Wealthy Max should be severed from the rest of the case as involving the property of unrelated persons and entities. Joinder is proper only if, with respect to the cargo or other property subject to admiralty process *in rem,* --

> **(A)** any right to relief is asserted against [persons or property] jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> **(B)** any question of law or fact common to all defendants will arise in the action.

Fed.R.Civ.P. 20(a)(2). The Government's claims here fail to meet the first requirement, that the United States has a right to relief against the several separate claimants or their property "jointly or severally"; they also fail to meet the requirement that the right to relief arises out of the "same transaction [or] occurrence." The problem for the Government is that the

transactions involving multiple parties are not the same transaction, nor are they shown to be part of a series of connected transactions. Indeed, other than the bald allegation that Homeland Security Investigation ("HSI") agents have identified the individuals and entities named in the complaint "as having engaged in a scheme to defraud" the U.S. Mint, there is no description of this supposed "scheme," nor is there alleged to have been any interaction or, indeed, a connection of any kind among all or any of the persons or unrelated entities whose property is subject to this action. AC ¶ 3.

The Government seems to believe that because the funds it hopes to have forfeited to it were derived from the sale of mutilated coins to the Mint, it may allege "a scheme" with no description of its dimensions or the existence of any *fact supporting this claim* – beyond it being the belief of two or more HIS agents that such a scheme existed. But no *fact* alleged in the AC connects the actions of any of entity with those of any other. There is no allegation that any of the entities have actual connections to each other or that they coordinated any of their actions "in furtherance" of the alleged scheme. Nor does the AC contend that any representatives of the companies whose property is sought to be forfeited had ever dealt with each other (or even knew each other), had ever even met each other or had engaged in discussions in furtherance of a common plan or scheme.

Thus, Wealthy Max's motion to sever should be granted because "the events that give rise to … [the Government's] claims against defendants do not stem from the same transaction." *United States v. Real Prop. Located at Layton, Utah*, No. 1:07-CV-6 TS, 2011 WL 887641, *1 (D.Utah Mar. 14, 2011), *quoting Nasious v. City & Cnty. of Denver-Denver Sheriff's Dep't,* 415 Fed.Appx. 877, 880-81 (10th Cir. 2011); *see also Russel v. Chesapeake Appalachia, L.L.C.*, 305 F.R.D. 78, 80-81 (E.D. Pa. 2015).

Under the Government's "theory," if someone, say, Mr. Smith, were robbed on Bleeker Street by Robber A on Day One and on the same street by Robber B on Day Two, whether Day One and Day Two are a year apart or a day apart, it would be appropriate to charge the two robbers with having engaged in a "scheme" to rob Mr. Smith merely because Mr. Smith was robbed twice on the same street, even though there were no proof of any joint activity or plan by the robbers. Of course, such a claim would be preposterous. Nevertheless, in this case, the claim by the United States similarly lumps the alleged acts of separate entities together for purposes of a trial when the only commonality that exists among them is that the shipments of coins they provided to the Mint are subject to forfeiture proceedings. For example, in *34 Luxury Vehicles*, the forfeiture claims regarding vehicles owned by the claimant were severed from the forfeiture proceeding because they were unrelated to the other vehicles for which forfeiture was sought and the United States conceded that "the participants, evidence, and some witnesses relating to … [movant's] vehicles [were] different from the other defendant vehicles." *United States v. 34 Luxury Vehicles*, No. 13-cv-793-FtM-38CM, 2014 WL 4954825, at *1-2 (M.D. Fla. Oct. 1, 2014) ("A district court may sever the jointly indicted defendants' trials if joinder appears to prejudice a defendant or the government.").

The issues at trial in this case – if there is a trial – will necessarily focus on the contents of each separate shipment, how the sampling was done, how the samples were handled, the results of the assays of the metal content obtained from the coins in each separate shipment smelted on or about June 26, 2014, what metals or residue were found in the melt from each separate shipment (and the relevance or significance of such substances, in the quantities found), whether the Government's "expert" on counterfeit coins can be qualified to testify on the basis of any special knowledge as to the detection of counterfeit coins or has only the

credentials to perform a test of metal content and, with respect to each separate shipment, what the assays of the metals and other content of the smelting process actually say about the contents of that shipment.

The Government is not entitled to sweep with such a broad brush in forcing the joinder of unrelated claimants in proceeding against property that it contends is forfeitable. Moreover, in a single trial, given the lack of commonality, the Court would be required to address differing factual and legal claims by the various claimants, leading potentially to prejudice, expense or delay, exactly what Rule 20(a) is designed to prevent. *See* 7 CHARLES ALAN WRIGHT, *et al.*, FED. PRACTICE & PROCEDURE § 1652 (3d ed.2001); *see also Third Degree Films, Inc. v. John Does 1-72*, No. 12-CV-14106, 2013 WL 1164024 (E.D. Mich. Mar. 18, 2013); *Next Phase Distribution, Inc. v. John Does 1-27*, 284 F.R.D. 165 (S.D.N.Y. 2012).

B. Wealthy Max's claim should not be adjudicated in the same proceeding with a claimant whom the Government claims made statements against interest that may be used against Wealthy Max

The Court should sever Wealthy Max from this proceeding for another reason as well, namely the likelihood of prejudice to Wealthy Max stemming from certain evidence – in this case, alleged statements by one claimant, Kei Yi Loung, a/k/a Kenneth E. Loung, the owner of America Naha Inc. – as described in the AC. The AC first notes that Loung was present at the melt on June 26, 2014. AC ¶ 38. It then charges that while there Loung "was questioned by an HIS Agent about the source of his waste coins and he stated that his coins came from shreddedcars and metal that were incinerated in China by various companies that employ thousands of people who sort through the scrap metal looking for coins." *Id.* ¶ 55.

The Government contends that that explanation as to "the source of the waste

coins that he was importing is not only improbable, but is also factually impossible." *Id.* Further, the Government contends that the statement is inconsistent with an earlier statement Loung made to CBP officers on or about August 22, 2014. *Id.* ¶ 56. At that time, according to the Government, Loung first told CBP officers that he ran a scrap metal company in Dallas "and stated that his company exported scrap metal to China and imported mutilated coins into the United States to sell to the United States Mint." *Id.* Loung said "that he discovered a lot of coins in cars sent from the United States to China for scrap metal . . . ." *Id.*

Moreover, the Government claims that during the "secondary inspection" of Loung by CBP officers as he arrived at Dallas-Ft. Worth International Airport, he "changed his story and stated for the first time that he is a broker for a Hong Kong-based company called Pacific Worldwide Supply, which exported mutilated coins to the United States for sale to the United States Mint." *Id.* ¶ 57. The admissions by Loung are likely to have a spillover effect on Wealthy Max in light of the common scheme allegation. In addition, unless Loung chooses to appear and testify at trial, Wealthy Max will have no ability to cross-examine him, denying the company of its Due Process rights to confront the witnesses against it under the Fourteenth Amendment. *See, e.g., Manta v. Mukasey*, 263 Fed. Appx. 626 (2008); *Sisneroz v. California*, 2009 WL 302280 (E.D.CA Feb. 6, 2009); *cf. Bruton v. United States*, 391 U.S. 123 (1968).

Ordering severance here will merely serve to allow claimants to have the issues that are necessarily unique to their shipments decided on the basis of the evidence regarding *those shipments* and no others. In addition, it will prevent the possibility of Due Process violations stemming from the inability of Wealthy Max to confront witnesses. Further, neither the

Government nor the other claimants will be prejudiced by severance. In fact, American Naha has filed a motion for severance in this matter on similar grounds.

For all these reasons, Wealthy Max should not be required to contest the forfeiture of its property in a proceeding in which the trier of fact will be presented with evidence that has no bearing on whether any of its property is forfeitable.

CONCLUSION

Based on the foregoing, Claimant respectfully requests that the Court dismiss the AC, with prejudice, and order the Government to deliver to Wealthy Max the proceeds from the redemption of the shipment accepted by the Mint on or about June 26, 2014 – and acknowledged by the Mint to be "due and owing" to Wealthy Max – based upon violations of CAFRA by the Government. The AC should also be dismissed with prejudice because the coins tendered to the Mint by Wealthy Max were not imported for monetary purposes and therefore, under Treasury regulations, do not qualify as counterfeit coins, because the decision by the Mint to redeem the coins submitted by Wealthy Max constituted an action of the secretary of the Treasury to acquire articles, materials or supplies necessary to produce coins and is not reviewable by a United States court. The AC should also be dismissed with prejudice for the Government's failure to state sufficiently detailed facts to support a reasonable belief it will be able to meet its burden of proof at trial.

Should the Court allow this action to proceed, in the interest of justice, we ask that the Court sever the Government's claims against Claimant's property from the separate property claims of other individuals and entities inasmuch as no connection among them has been shown to exist and, therefore, the issues presented do not indicate that "any right to relief is asserted against [persons or property] jointly, severally, or in the alternative with respect to or

arising out of the same transaction, occurrence, or series of transactions or occurrences.

Dated: October 20, 2015.

Respectfully submitted,

GEYERGOREY, LLP

By: _/s/ Bradford L. Geyer
A Member of the Firm