IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 01-272-01
DARREL WEIMER	:	

Memorandum and Order

YOHN, J. March ___, 2006

Defendant Darrel Weimer, a prisoner in the Federal Correctional Institution in Taft, California, brings this Motion for Return of Property Pursuant to Federal Rule of Criminal Procedure 41 in an attempt to recover various items that the Drug Enforcement Agency ("DEA") seized while executing a search warrant for his California home on February 20, 2001. After reviewing the record, I will grant an evidentiary hearing to further develop the facts and resolve whether the DEA provided Weimer with adequate notice of the administrative forfeiture proceedings that it instituted against his computer equipment. However, because the Eastern District of Pennsylvania is not the proper venue for Weimer to seek the return of property that was seized in California and then transferred to a sheriff's office in Arizona and a lienholder in California, the court will dismiss those claims without prejudice to the right of the defendant to refile them in a proper venue.

I. Factual and Procedural Background

A. Weimer's Arrest

On February 14, 2001, Border Patrol Agents in Yuma, Arizona stopped a truck at a

checkpoint near the border. The driver, Harold Boylan, acted suspiciously, which prompted the agents to ask for consent to search the truck. Boylan consented to a search, and the agents found 726 pounds of marijuana in the truck. After agreeing to cooperate, Boylan told DEA agents that he was acting as a courier for Darrel Weimer and Glen Houshar. Boylan explained that he had been transporting marijuana cross-country for the two men for three years, and had made about seventeen trips. He also stated that he was supposed to drive the present load of marijuana to Philadelphia, and agreed to travel to Philadelphia and make a controlled delivery to Weimer and Houshar.

On February 20, 2001, Weimer called Boylan in Philadelphia and told him that he and Houshar were ready to pick up the marijuana. Weimer and Houshar, along with associates Guy Mosier and Carl Robinson, drove to Boylan's hotel. Weimer and Houshar entered the hotel and met Boylan in his room, while Robinson and Mosier remained in the parking lot. Weimer then took the keys to Boylan's truck and moved the truck to the side of the hotel, next to Robinson's vehicle. Mosier and Robinson then transferred the marijuana to Robinson's vehicle. After the marijuana had been transferred, the DEA arrested Weimer, Houshar, Mosier, and Robinson.

Also on February 20, 2001, following the arrest, the United States District Court for the Southern District of California issued a warrant that authorized the DEA to search Weimer's residence at 7579 Cuyamaca Avenue, Lemon Grove, California.

On May 17, 2001, a grand jury returned an indictment charging Weimer in two counts: 1) conspiracy to distribute and to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846, and 2) possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). On June 18, 2001, Weimer pleaded guilty to both counts. On September 25, 2001,

the court sentenced Weimer to a term of 78 months' imprisonment.

B. Property Seized from Weimer

While executing the search warrant on February 20, 2001, DEA agents seized the following items from Weimer's residence: 1) five pieces of assorted jewelry; 2) $500 in cash; 3) ten Hong Kong bills; 4) an air compressor and a vacuum sealer; 5) assorted computer equipment; and 6) a 1999 Dodge 1500 truck.

The government has presented a statement from John Hieronymus, Forfeiture Counsel of the DEA, along with copies of relevant documents, that describe the disposition of the items that the DEA seized from Weimer. First of all, Hieronymus explained that the jewelry, the $500 cash, the Hong Kong money, and the air compressor and vacuum sealer were all referred to the Yuma County, Arizona Sheriff's Office for the institution of state forfeiture proceedings. (Hieronymus 2-4.) Additionally, the Dodge truck was released to lienholder Wells Fargo Auto Finance, Inc. of Walnut Creek, California on March 6, 2001. (Hieronymus 21.) The DEA did not institute forfeiture proceedings on any of those items. (Hieronymus 2-4, 21.)

The DEA did institute forfeiture proceedings on fourteen pieces of computer equipment, pursuant to 21 U.S.C. § 881. (Hieronymus 18-21.) On April 12, 2001, the DEA sent a notice of seizure by certified mail to Weimer at both his home on Cuyamaca Avenue and the Federal Detention Center in Philadelphia, the prison in which he was incarcerated at that time. (Hieronymus 18; Gov't Exs. 78, 80.) The DEA also sent notice to Cynthia Louise McHenry at 7579 Cuyamaca Avenue. (Hieronymus 19; Gov't Ex. 82.) Finally, the DEA published a notice of seizure in the Wall Street journal on three successive Mondays: April 23, April 30, and May 7, 2001. (Hieronymus 19; Gov't Ex. 19.) On May 18, 2001, the DEA received a claim from

McHenry for two of the items. (Gov't Ex. 84.) The DEA denied the claim as untimely, but provided McHenry with additional time to submit a petition for remission or mitigation. (Gov't Ex. 85.) The DEA received such a petition from McHenry on June 25, 2001. (Gov't Ex. 87.) On August 16, 2001, after not receiving any claim from Weimer, the DEA forfeited the property to the United States. (Ex. 89.) Then, on October 31, 2001, the DEA granted McHenry's petition. (Gov't Ex. 90.)

On August 18, 2005, Weimer filed the instant motion, in which he argues that he is entitled to the return of all of the seized property.

II. Legal Standards

Weimer seeks the return of various items that the DEA seized from his residence on February 20, 2001. Of these items, his computer equipment has been administratively forfeited, while the other items were transferred in part to a sheriff's office and in part to a lienholder. Although Weimer presented all of his claims under Rule 41(g), challenges to administrative forfeitures must be presented under 18 U.S.C. § 983, a section of the Civil Asset Forfeiture Reform Act ("CAFRA"), and the court will construe Weimer's claim for his computer equipment as such. However, all of his other claims are properly brought under Rule 41(g).

A. Property that Was Administratively Forfeited

The government has presented evidence showing that only Weimer's computer equipment has been subject to administrative forfeiture.[1] Weimer has not argued that the DEA

[1] The Controlled Substances Act authorizes forfeiture to the government of certain property seized from drug offenders, including "all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter." 21 U.S.C. § 881(a)(6). Property having a value of under $500,000 can be administratively forfeited, and the declaration of forfeiture has the same force and effect

administratively forfeited any of the other property that it seized from him. If an individual seeks to "set aside a declaration of forfeiture under a civil forfeiture statute," 18 U.S.C. § 983 provides "the exclusive remedy." 18 U.S.C. § 983(e)(5); *see also Mesa Valderrama v. United States*, 417 F.3d 1189, 1195 (11th Cir. 2005) (stating that "a party seeking to challenge a nonjudicial forfeiture that falls within CAFRA's purview is limited to doing so under 18 U.S.C. § 983(e)"); *Guzman v. United States*, No. 05-4902, 2005 WL 2757544, at *1 (S.D.N.Y. Oct. 24, 2005) (explaining that with the enactment of CAFRA, "Congress has attempted to create a single avenue for challenging a forfeiture of property seized by the federal government"). CAFRA applies to "'any forfeiture proceeding commenced on or after' August 23, 2000, 120 days after CAFRA was signed into law." *United States v. Contents of Two Shipping Containers Seized at Elizabeth, N.J.*, 113 Fed. Appx. 460, 463 (3d Cir. 2004) (quoting 8 U.S.C. § 1324 (note)). Here, the DEA administratively forfeited Weimer's computer equipment pursuant to 21 U.S.C. § 881, which is a civil forfeiture statute. *See United States v. McGlory*, 202 F.3d 664, 669 (3d Cir. 2000). Additionally, the forfeiture proceedings were commenced on April 12, 2001, when the

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as an order of forfeiture entered by a court. 19 U.S.C. §§ 1607, 1609 (as made applicable to the Controlled Substances Act by 21 U.S.C. § 881(d)). The government must (generally) send notice of administrative forfeiture actions to interested persons within sixty days of the seizure of the property. 18 U.S.C. § 983(a)(1)(A)(1). Then, the property owner must file a claim either before the deadline set forth in the notice letter, or, if the letter is not received, within thirty days of the final publication of notice of seizure. 18 U.S.C. § 983(a)(2)(A). If a property owner does file a claim, the government has ninety days under § 983(a)(3) to file a civil judicial action. If the government receives no response to the notice within the designated period of time, the seized property is declared administratively forfeited to the government. *See* 19 U.S.C. § 1609(a). An individual who fails to contest an administrative forfeiture, "loses all recourse for judicial review of the administrative proceeding's merits." *Longenette v. Krusing*, 322 F.3d 758, 761 n.4 (3d Cir. 2003) (citing 21 C.F.R. § 1316.77(b)). Courts can, however, consider challenges from the property-holder to the adequacy of the notice that the government provided. *See* 18 U.S.C. § 983(e).

DEA first sent notice to Weimer, well after August 23, 2000. *See Contents of Two Shipping Containers Seized at Elizabeth, N.J.*, 113 Fed. Appx. at 463 (stating that "legislative history indicates that 'for purposes of the effective date provision, the date on which a forfeiture proceeding is commenced is the date on which the first administrative notice of forfeiture relating to the seized property is sent.'" (quoting 146 Cong. Rec. H2040, H2051 (daily ed. April 11, 2000) (statement of Rep. Hyde))). Accordingly, CAFRA, and particularly § 983, governs Weimer's challenge to the forfeiture of his computer equipment.

B. Property that Was Not Administratively Forfeited

In addition to the computer equipment, the DEA also seized 1) five pieces of assorted jewelry; 2) $500 in cash; 3) ten Hong Kong bills; 4) an air compressor and a vacuum sealer; and 5) a 1999 Dodge 1500 truck from Weimer's residence.[2] The first four items were subsequently transferred to the Yuma County Sheriff's Office, while the fifth was transferred to the lienholder Wells Fargo Auto Finance, Inc. Thus, because none of these items were administratively forfeited, Weimer can seek their return under Federal Rules of Criminal Procedure Rule 41(g).[3]

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[2] Weimer attached to his motion a copy of the DEA's Report of Investigation, which shows that the DEA also seized such items as, *inter alia*, "one box of miscellaneous records," and "five binders containing corporate business information." This property was not forfeited. Thus, to the extent that Weimer seeks to recover this property (or any other non-forfeited property not explicitly discussed in this opinion), the Rule 41(g) analysis applies.

[3] As *United States v. Albinson*, 356 F.3d 278, 279 n.1 (3d Cir. 2004), explained:

> Fed. R. Crim. P. 41 was amended in 2002 "as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." *See* Fed. R. Crim. P. 41 advisory committee notes. As a result of the 2002 amendments, the previous Fed. R. Crim. P. 41(e) now appears with minor stylistic changes as Rule 41(g).

Throughout this opinion the court will refer to the relevant rule as 41(g), despite the fact that Weimer's motion refers to 41(e).

Rule 41(g) states simply that a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." The purview of Rule 41(g) has been described as follows:

> The proper office of a Rule 41(g), motion is, before any forfeiture proceedings have been initiated, or before any criminal charges have been filed, to seek the return of property seized without probable cause, or property held an unreasonable length of time without the institution of proceedings that would justify the seizure and retention of the property. The rule can also be invoked after criminal proceedings have concluded to recover the defendant's property when the property is no longer needed as evidence-- unless, of course, it has been forfeited in the course of those proceedings.

United States v. Sims, 376 F.3d 705, 708 (7th Cir. 2004). Accordingly, to the extent that Weimer seeks the return of property that has not been forfeited, his remedies are governed by Rule 41(g).

III. Discussion

A. The Computer Equipment

Weimer argues that he is entitled to the return of his computer equipment because the notice given by the government regarding forfeiture of this property was inadequate.[4] As described below, the court will grant an evidentiary hearing on this issue.

Weimer's challenge to the forfeiture of his computer equipment is governed by CAFRA. Pursuant to 18 U.S.C. § 983(e)(1), "[a]ny person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property." This right is founded on the Due Process Clause of the Fifth Amendment, which

[4] Weimer further argues that "there is no documentation showing that a final forfeiture of the seized property was effected." (Motion for Return of Property Pursuant to Rule 41(e) at 5.) This argument is without merit. The government's exhibit 89 is a Declaration of Forfeiture, and shows that on August 16, 2001 the computer equipment was forfeited to the United States.

provides individuals whose property interests are at stake with a guarantee of notice and an opportunity to be heard. *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Thus, an individual may challenge an already-completed administrative forfeiture by arguing that he did not receive notice of the proceedings. *See United States v. McGlory*, 202 F.3d 664, 670 (3d Cir. 2000) (explaining that "'the federal courts have universally upheld jurisdiction to review whether an administrative forfeiture satisfied statutory and due process requirements'" (quoting *United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993))); *see also Longenette v. Krusing*, 322 F.3d 758, 761 n.4 (3d Cir. 2003) (explaining that "[i]f an individual fails to contest an administrative forfeiture, he loses all recourse for judicial review of the administrative proceeding's merits"); *Linarez v. U.S. Dep't of Justice*, 2 F.3d 208, 213 (7th Cir. 1993) ("[A] forfeiture cannot be challenged in district court under any legal theory if the claims *could have* been raised in an administrative proceeding, but *were not*."). In this case, Weimer did not present a claim for this property during the administrative forfeiture proceedings, and now argues that he did not receive notice of the proceedings.

The government has shown that it attempted to apprise Weimer of these proceedings by sending written notice by certified mail to Weimer's former residence and the prison in which he was then incarcerated, as well as by publishing notice in the Wall Street Journal. The question, therefore, is whether the steps that the government took are sufficient to satisfy the Due Process Clause and 18 U.S.C. § 983(e).

In *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000), the Third Circuit considered the quality of notice that the government must provide when it pursues forfeiture proceedings against the property of an incarcerated defendant in its custody. The Third

Circuit held that "if the government wishes to rely on direct mail, it bears the burden of demonstrating that procedures at the receiving facility were reasonably calculated to deliver the notice to the intended recipient." *Id.* at 150. In *Toshiba*, because the district court had not made any factual findings as to what procedures, if any, the facility had in place to relay mail to the prisoners, the Third Circuit vacated the district court's judgment and remanded for further factual findings on the sufficiency of the notice. *Id.*

Subsequently, the Supreme Court decided *Dusenbery v. United States*, 534 U.S. 161, 163 (2002), in which the Court evaluated whether the Federal Bureau of Investigation ("FBI") had provided adequate notice to a federal prisoner of his right to contest the administrative forfeiture of property seized from the prisoner during the execution of a search warrant for the prisoner's residence. The Court held that while prisoners are entitled to notice, actual notice is not necessary; rather notice must merely be "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 168 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). In *Dusenbery*, the court found that the notice provided by the government was sufficient where the FBI sent certified mail addressed to the prisoner at the correctional facility in which he was incarcerated and presented evidence that the prison regularly employed the following procedures: 1) "prison mailroom staff traveled to the city post office every day to obtain all the mail for the institution, including inmate mail"; 2) "the staff signed for all certified mail before leaving the post office"; 3) "[o]nce the mail was transported back to the facility, certified mail was entered in a logbook maintained in the mailroom"; 4) "[a] member of the inmate's Unit Team then signed for the certified mail to acknowledge its receipt before removing

it from the mailroom"; and 5) "either a Unit Team member or another staff member distributed the mail to the inmate during the institution's 'mail call.'" *Id.* at 169-70.

Here, the government has presented no evidence of the procedures employed by the Federal Detention Center to ensure that mail is conveyed from the prison to the prisoners. Without such information, the court is unable to determine whether the government's notice was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 168 (quoting *Mullane*, 339 U.S. at 314). Accordingly, the court will grant an evidentiary hearing to develop the record on this issue.

B. Other Seized Property

As described above, Weimer's motion to recover: 1) five pieces of assorted jewelry; 2) $500 in cash; 3) ten Hong Kong bills; and 4) an air compressor and a vacuum sealer; and 5) a 1999 Dodge 1500 truck is governed by Federal Rules of Criminal Procedure Rule 41(g). However, this is not the proper venue for Weimer to bring claims under Rule 41(g). The text of the rule is unambiguous that such a motion "must be filed in the district where the property was seized." Rule 41(g). Weimer's property was seized in the Southern District of California, not the Eastern District of Pennsylvania, and accordingly, the Southern District of California is the only appropriate venue for Weimer to file this motion.[5]

[5] The Third Circuit has explained that when a party presents a motion for the return of property after the completion of his criminal proceeding, the court is to treat the motion as a "civil proceeding for equitable relief." *United States v. Chambers*, 192 F.3d 374, 376 (3d Cir. 1999). Nonetheless, in *United States v. Parlavecchio*, 57 Fed. Appx. 917, 921 (3d Cir. 2003), the Third Circuit stated that the venue provision of Rule 41(g) applies to "post-conviction motions for the return of property."

While the Third Circuit has not had occasion to apply this venue provision, it anticipated the amendment to Rule 41 that added the venue rule now in effect (and quoted above). In describing the then-imminent amendment, the court explained that while there once was a circuit split as to the proper venue for an individual to bring a Rule 41(g) motion for the return of property, the "circuit split would be resolved by the proposed change in Federal Rule of Criminal Procedure 41(g) designating the district in which seizure occurred as the location where a motion must be filed." *Foehl v. United States*, 238 F.3d 474, 481 n.9 (2001); *see also United States v. Parlavecchio*, 57 Fed. Appx. 917, 921 (3d Cir. 2003) ("Upon taking effect, the most recent amendments will put to rest any debate relating to the proper venue for a post-conviction Rule 41(e) motion. The new rule expressly requires post-conviction motions for the return of property to be made in the district where the property at issue was seized."). These amendments have been adopted, and accordingly, Weimer must bring his claims based on Rule 41(g) in the Southern District of California. *See Elfand v. United States*, No. 05-0071, 2006 WL 13068, at *1 (2d Cir. Jan. 3, 2006) (transferring 41(g) claim for money seized from San Diego to the Southern District of California); *Islamic Am. Relief Agency v. Unidentified FBI Agents*, 394 F. Supp.2d 34, 48 n.14 (D.D.C. 2005) ("Under the current version of the Rule, a motion seeking return of property is only proper in the district where the property was seized.").

Because I have concluded that venue in this judicial district is improper as a matter of law, the transfer provision applicable to this case is 28 U.S.C. § 1406(a). Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, 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).

Transfer under § 1406(a) is proper only if it is "in the interest of justice." The Supreme Court has held that transfer in lieu of dismissal is appropriate when dismissal will penalize the plaintiff by subjecting him to "justice-defeating technicalities," such as the impending expiry of a statute of limitations. *Goldlawr, Inc. v.. Heiman*, 369 U.S. 463, 467 (1962); *see also Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983) (holding that transfer is in the interest of justice when "[r]efusal to transfer spells the end to the action"). Dismissal is appropriate, however, when there is no threat of a procedural bar to plaintiff's cause of action, when the parties are commercially sophisticated and familiar with the forms of litigation, and when there was nothing obscure about the location of the proper forum for the case. *See Cont'l Ins. Co. v. M/V Orsula*, 354 F.3d 603, 608 (7th Cir. 2003). Finally, "[a] district court has 'broad discretion in deciding whether to order a transfer.'" *Decker v. Dyson*, No. 04-4200, 2006 WL 139199, at *3 n.3 (3d Cir. Jan. 19, 2006) (quoting *Caldwell v. Palmetto State Sav. Bank of S.C.*, 811 F.2d 916, 919 (5th Cir. 1987).

Based on the above considerations, I will dismiss these claims without prejudice to the right of the defendant to refile them in the Southern District of California. This is the preferred remedy under § 1406(a) and no reason has been proffered as to why it would be in the interest of justice to transfer the claims.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
	:	
vs.	:	
	:	
DARREL WEIMER	:	NO. 01cr272-01

O R D E R

AND NOW, this 6th day of March, 2006, upon consideration of defendant's motion for return of property pursuant to Federal Rule of Criminal Procedure 41(e) (Document No. 86) and the government's response, **IT IS HEREBY ORDERED** that:

1. An evidentiary hearing is **SCHEDULED** for **April 25, 2006 at 2:00 p.m.** to resolve the issue of whether the Federal Detention Center had sufficient procedures in place to transfer mail from the prison to the prisoners to render the government's mailing of notice to the prison adequate to apprise Weimer of the administrative forfeiture proceedings regarding his computer equipment.

2. The Superintendent at CI Taft shall designate Julie Strongin to contact Edward Morrissy in the Clerk's Office (267-299-7044) to make arrangements for the conference call.

3. Government counsel shall attend the hearing at the United States Courthouse.

4. The Clerk of Court shall fax a copy of this order to Julie Strongin at 661-765-3002 and Julie Strongin shall make the defendant available at the designated location at CI Taft for the conference call at the designated time.

5. Insofar as the motion seeks recovery of (1) five pieces of assorted jewelry; (2) $500.00 in cash; (3) ten Hong Kong bills; (4) an air compressor and a vacuum sealer; and (5) a 1999

Dodge 1500 truck, the motion is **DISMISSED** without prejudice to the right of the defendant to refile the claims in the Southern District of California (or some other appropriate venue).

William H. Yohn, Jr., Judge