

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

UNITED STATES OF AMERICA

v.

NICHOLAS HOUSHAR

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CRIMINAL ACTION

NO. 01-272-02

Memorandum and Order

YOHN, J.

March __, 2006

Defendant Nicholas Houshar,¹ a prisoner in the Federal Correctional Institution in Lompoc, 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 Houshar with adequate notice of the administrative forfeiture proceedings that it instituted against his BMW and assorted electrical equipment. However, because the Eastern District of Pennsylvania is not the proper venue for Houshar to seek the return of two camcorders and one digital camera,² a Ford Explorer, and a Toyota truck, which

¹ There is some discrepancy in the various documents regarding defendant’s name. Defendant refers to himself as “Nicholas Glen Houshar,” the DEA has referred to him as “Glen Nicholas Houshar,” and defendant’s lawyer has referred to him as “Glenn Nicholas Houshar.” For simplicity, the court will refer to defendant as just “Houshar” for the rest of this opinion.

² The DEA assigned Houshar’s two camcorders and one digital camera a single asset identification number, so the three items will be treated as a single item throughout this opinion.

were all seized in California and then transferred to a sheriff's office in Arizona, a lienholder in Ohio, and judicially forfeited in Arizona, respectively, 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. Houshar'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 Houshar and Darrel Weimer. 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 Houshar and Weimer.

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 Houshar's residence at 2445 Colinas Paseo, El Cajon, California.

On May 17, 2001, a grand jury returned an indictment charging Houshar in two counts: 1) conspiracy to distribute and to possess with intent to distribute marijuana, and 2) possession with intent to distribute marijuana. On June 18, 2001, Houshar pleaded guilty to both counts. On October 19, 2001, the court sentenced Houshar to a term of 120 months' imprisonment.

B. Property Seized from Houshar

While executing the search warrant on February 20, 2001, DEA agents seized the following items from Houshar's residence: 1) two camcorders and one digital camera; 2) a 1991 Toyota truck; 3) a 1995 BMW 740iL; 4) electronic equipment (two computers); and 5) a 2000 Ford Explorer.

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 Houshar. First of all, Hieronymus explained that the two camcorders and one digital camera were transferred to the Yuma County Sheriff's Office for the institution of state forfeiture proceedings. (Hieronymus 3). Additionally, on March 8, 2001, the DEA released the Ford Explorer to lienholder Bank One in Akron, Ohio. (*Id.* at 21.) The DEA did not institute forfeiture proceedings on these items. (*Id.* at 3, 21.)

The DEA did, however, institute forfeiture proceedings on the 1991 Toyota truck. (Hieronymus 4-8.) On April 12, 2001, the DEA sent written notice of the seizure by certified mail to Houshar at 2445 Colinas Paseo, El Cajon, California; 170 Chambers Street, El Cajon, California; 2295 Needham Road, #57, El Cajon, California; and 5240 Prosperity Lane, San

Diego, California (c/o Donald Zaitzow). (Hieronymus 4-5; Gov't Exs. 1, 3, 5, 7.) The letters sent to the first three addresses were accepted by signature, while the fourth was returned to the DEA as undeliverable. (Hieronymus 4-5; Gov't Exs. 2, 4, 6, 8.) The DEA also sent notice to Houshar at the Federal Detention Center in Philadelphia, the prison in which he was incarcerated at that time. (Hieronymus 5; Gov't Ex. 9.) In addition to the letters addressed to Houshar, the DEA also sent notice to Elizabeth Sofia Gochicoa-Jaureui at 2445 Colinas Paseo and Timothy Houshar at 2445 Colinas Paseo, 170 Chambers Street, and 5240 Prosperity Lane (again c/o Zaitzow). (Hieronymus 6-7; Gov't Exs. 11, 13, 15, 17.) All of these letters were accepted by individuals who signed in the signature block except for the letter addressed to Timothy Houshar at 5240 Prosperity Lane, which was returned as undeliverable. (Hieronymus 6-7; Gov't Exs. 12, 14, 16, 18.) Finally, the DEA published notice of seizure in the Wall Street Journal on three successive Mondays, April 23, April 30, and May 7, 2001. (Gov't Ex. 19.) On May 10, 2001, the DEA received a petition for release due to hardship and a petition for remission or mitigation from attorney Donald J. Zaitzow on behalf of Timothy Houshar. (Ex. 20.) On May 17, 2001, the DEA referred the claim to the U.S. Attorney for the District of Arizona for judicial forfeiture proceedings. (Ex. 24.) A docket entry supplied by the government shows that: on June 28, 2001, a complaint was filed in the United States District Court for the District of Arizona; on October 7, 2001, the government filed a motion for default judgment; and on October 17, 2001, the court entered a default judgment and ordered that the Toyota truck be forfeited to the United States.

The DEA also instituted administrative forfeiture proceedings on the BMW. (Hieronymus 8-14.) The DEA took similar action to provide notice of the seizure as described above: on April 12, 2001 it sent letters to Houshar at four residential addresses (three of which

were accepted) and the Federal Detention Center (Hieronymus 9-10; Gov't Exs. 26-34); it sent a letter to Gochicoa-Jaureui (Hieronymus 11; Gov't Ex. 42); it sent three letters to Timothy Houshar (Hieronymus 10-11; Gov't Exs. 36, 38, 40); and it published notice of seizure in the Wall Street Journal on three successive Mondays, on April 23, April 30, and May 7, 2001 (Gov't Ex. 19). The DEA also sent notice to WFS Financial in San Diego on April 12, 2001. (Hieronymus 11, Gov't Ex. 44.) On April 20, 2001, the DEA received a letter from Frank M. Spina, II, Esquire, who was Houshar's lawyer in the criminal proceedings, acknowledging receipt of the notice of seizure letter and informing the DEA that the property had been included in the indictment in Houshar's criminal case and that Houshar intended to contest the seizure in the criminal proceedings. (Gov't Ex. 46.) The DEA also received a lienholder petition from WFS Financial. (Gov't Ex. 47.) On October 2, 2001, after not receiving a claim from Houshar, the DEA forfeited the vehicle to the United States (Gov't Ex. 56) and granted the lienholder petition (Gov't Ex. 54).

The DEA also instituted administrative forfeiture proceedings on Houshar's electrical equipment. (Hieronymus 14-17.) The DEA took the same action to provide notice of the seizure as described above: it sent the same five letters to Houshar (Hieronymus 14-15; Gov't Exs. 58, 60, 62, 64, 66), sent one letter to Gochicoa-Jaureui (Hieronymus 16-17; Gov't Ex. 74), sent three letters to Timothy Houshar (Hieronymus 16; Gov't Exs. 68, 70, 72), and published notice in the Wall Street Journal (Gov't Ex. 19). The DEA again received a letter from attorney Spina, acknowledging receipt of the notice of seizure. (Gov't Ex. 76.) On June 28, 2001, because the DEA had received no claims for the items, it forfeited the items to the United States. (Gov't Ex. 77.)

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

II. Legal Standards

Houshar seeks the return of various items that the DEA seized from his residence on February 20, 2001. Of these items, his BMW and electrical equipment have been administratively forfeited, his two camcorders and one digital camera have been transferred to a sheriff's office, his Ford Explorer has been transferred to a lienholder, and his 1991 Toyota Truck has been judicially forfeited through a default judgment. Although Houshar presented all of his claims under Rule 41(g), the different dispositions of these items necessitate different analyses. Challenges to the notice provided in 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 Houshar's claim for his BMW and electrical equipment as such. However, Houshar's claims for his other items are properly brought under Rule 41(g), although his claim for his Toyota truck, which was judicially forfeited, could also be brought pursuant to Federal Rules of Civil Procedure Rule 60(b).

A. Property that Was Administratively Forfeited

The government has presented evidence showing that only Houshar's BMW and electrical equipment have been subject to administrative forfeiture.³ Houshar has not argued that

³ 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 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

the DEA 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 Houshar’s BMW and electrical 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 DEA first sent notice to Houshar, well after

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).

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 Houshar’s challenge to the forfeiture of his BMW and electrical equipment.

B. Property that Was Transferred and not Forfeited

In addition to the property that it later forfeited, the DEA also seized 1) two camcorders and one digital camera, and 2) a Ford Explorer from Houshar’s residence.⁴ The camcorders and camera were subsequently transferred to the Yuma County Sheriff’s Office, while the Ford Explorer was transferred to the lienholder Bank One. Thus, because none of these items were forfeited, Houshar can seek their return under Federal Rules of Criminal Procedure Rule 41(g).⁵

Rule 41(g) states simply that a “person aggrieved by an unlawful search and seizure of

⁴ Houshar attached to his motion a copy of the DEA’s Report of Investigation, which shows that the DEA also seized such items as, “one box of miscellaneous records,” and “one piece of paper.” This property was not forfeited. Thus, to the extent that Houshar seeks to recover this property (or any other non-forfeited property not explicitly discussed in this opinion), the Rule 41(g) analysis applies.

⁵ 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 Houshar’s motion refers to 41(e).

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 Houshar seeks the return of property that has not been forfeited, his remedies are governed by Rule 41(g).

C. Property that Was Judicially Forfeited

The government has presented evidence that Houshar's 1991 Toyota truck was forfeited to the United States through a default judgment entered by the United States District Court for the District of Arizona on October 17, 2001. Houshar has presented no evidence to the contrary. Thus, if Houshar desires to recover his truck, he must either move a court to vacate the default judgment or attack the judgment in a collateral proceeding.

Federal Rules of Civil Procedure Rule 60(b) is the primary vehicle by which a party may challenge a judicial forfeiture.⁶ See *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000) (party's "motion was to vacate the forfeiture judgments against him and is treated, as discussed above, as arising under Fed. R. Civ. P. 60(b)"); see also *United States v.*

⁶ This procedure is consistent with that set out in Rule 55(c) of the Federal Rules of Civil Procedure, which provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Since Houshar seeks to challenge a default judgment, Rule 55 directs him to Federal Rules of Civil Procedure Rule 60(b).

Rodriguez-Aguirre, 414 F.3d 1177 (10th Cir. 2005) (“A Rule 41(e) motion is an inappropriate vehicle for challenging a judicial forfeiture; the proper vehicle is a motion for relief of judgment under Rule 60(b) of the Federal Rules of Civil Procedure.” (citing *United States v. Madden*, 95 F.3d 38, 40 (10th Cir. 1996))); *United States v. Mosquera*, 845 F.2d 1122, 1126 (1st Cir. 1988) (“If the car had been *judicially* forfeited (that is, in a court proceeding), then petitioner could seek to set aside the judgment of forfeiture by filing a motion for relief from judgment under Fed. R. Civ. P. 60(b).”).

Pursuant to Rule 60(b)(4), “[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment” if “the judgment is void.”⁷ The Third Circuit has explained that when the government provides constitutionally inadequate notice of a forfeiture proceeding, the resulting forfeiture is void.⁸ *United States v. One Toshiba Color Television*, 213 F.3d 147, 156 (3d Cir. 2000). Thus, if Houshar can show that the government provided such inadequate notice, the judgment will be rendered void and can be set aside under Rule 60(b)(4).

Additionally, “[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.” *Insurance Corp of Ireland, Ltd v Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). In other words, “a void judgment may be collaterally attacked (i.e., the judgment may be shown to be void and the issues supposedly determined in the judgment

⁷ A void judgment “is one which, from its inception, was a complete nullity and without legal effect.” *Raymark Industries, Inc. v. Lai*, 973 F.2d 1125, 1132 (3d Cir.1992).

⁸ “A judgment can be voided on two grounds: (1) if the rendering court lacked subject matter jurisdiction or (2) if it acted in a manner inconsistent with due process of law.” *Construction Drilling, Inc. v. Chusid*, 131 Fed. Appx. 366, 373 (3d Cir. 2005) (citing 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2862).

relitigated) in any subsequent state or federal action in which the judgment becomes relevant.”

12 James Wm. Moore et al., *Moore’s Federal Practice*, § 60.44[1][b] (3d ed. 2005); *see also* 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2695 (“Attacks of this type also are made collaterally at the time an attempt is made to enforce the judgment.”).

III. Discussion

A. The BMW and Electrical Equipment

Houshar argues that he is entitled to the return of his BMW and electrical equipment because the notice given by the government regarding the forfeiture of this property was inadequate.⁹ As described below, the court will grant an evidentiary hearing on this issue.

Houshar’s challenge to the notice provided by the government regarding the forfeiture of his BMW and electrical 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 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

⁹ Houshar 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 exhibits 56 and 77 are Declarations of Forfeiture, and show that on June 28, 2002 and October 2, 2001, Houshar’s electronic equipment and BMW, respectively, were forfeited to the United States.

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, Houshar did not present a claim for this property during the administrative forfeiture proceedings,¹⁰ and now argues that he did not receive notice of the proceedings.

¹⁰ While Houshar’s criminal attorney, Spina, did submit letters to the government regarding both of these items, the court concludes that the letters did not constitute “claims” under 18 U.S.C. § 983(a)(2). Spina’s letters stated “[a]s Counsel for Glenn Nicholas Houshar, owner of the above-referenced property, I am in receipt of a Copy of the Notice of Seizure letters forwarded to him,” and expressed a desire to contest the forfeitures as part of the criminal proceedings. (Gov’t Exs. 46, 76.) A claim, according to 18 U.S.C. § 983(a)(2)(C), must: 1) “identify the specific property being claimed”; 2) “state the claimant’s interest in such property”; and 3) “be made under oath, subject to penalty of perjury.” Here, the letters did not state Houshar’s interest in the property and were not made under oath. See *Manjarrez v. United States*, Nos. 01-7530, 01-9495, 2002 WL 31870533, at *2 (N.D. Ill. Dec. 19, 2002) (explaining that a document signed by an attorney for the defendant that the attorney did not attempt to verify was not a claim made under oath). Accordingly, the court finds that Spina’s letters were not claims that would require the DEA to initiate judicial forfeiture proceedings.

The court also notes that while Spina appeared to have presented his letters with the intent of staying the administrative forfeiture proceedings and litigating the matter entirely during the criminal trial, the government was not required to agree to do so. As a commentator has explained, “[p]arallel civil and criminal forfeiture actions are routine.” Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. Legis 97, 147 (2001); see also *United States v. Libretti*, 208 F.3d 228 (10th Cir. 2000) (table) (case in which government included a count of forfeiture in the indictment but nevertheless progressed with administrative forfeiture proceedings); *United States v. Cupples*, 112 F.3d 318 (8th Cir. 1997) (same); *United States v. All Funds, Monies, Sec., Mut. Fund Shares & Stocks*, 81 F.3d 147 (1st Cir. 1996) (table) (same). Indeed, as the “leading treatise on forfeiture,” *United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141, 155 n.11 (3d Cir. 2003), has explained, “[e]ven after CAFRA’s reforms, civil

The government has shown that it attempted to apprise Houshar of these proceedings by sending written notice by certified mail to Houshar at several residential addresses 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

forfeiture procedure still affords the government many advantages in comparison with a criminal prosecution,” David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 1.03. Among the advantages of a civil forfeiture is that the government must satisfy a lower burden of proof, *see United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-62 (1984), and that a criminal forfeiture proceeding only determines the government’s rights to the property against the criminal defendant, whereas a civil forfeiture proceeding determines the government’s rights to the property against all parties, Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 2.03. Thus, it was the government’s prerogative to initiate parallel proceedings, and even if Houshar would have preferred to assert his claims as part of his criminal proceedings, in order to protect his rights he was required to follow the government’s lead.

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.¹¹

B. The Camcorders, Digital Camera, and Ford Explorer

As described above, Houshar's motion to recover: 1) two camcorders and one digital camera, and 2) a Ford Explorer is governed by Federal Rules of Criminal Procedure Rule 41(g). However, this is not the proper venue for Houshar 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). Houshar'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 Houshar to file this motion.¹²

¹¹ Additionally, the fact that Houshar's criminal attorney, Spina, wrote a letter acknowledging receipt of the administrative forfeiture does not change the analysis. While the Third Circuit has explained that "if there is a signed receipt from the served party, the government does not then have to prove anything about the procedures that were in place," *United States v. One Toshiba Color Television*, 213 F.3d 147, 155 (3d Cir. 2000), here, of course, the signed receipt was from Spina, not Houshar. In concluding that this notice to Spina did not constitute actual notice to Houshar, the court is guided by *United States v. \$184,505.01 in U.S. Currency*, 72 F.3d 1160, 1164 (3d Cir. 1995). In *\$184,505.01*, the Third Circuit emphasized the difference between criminal proceedings and civil forfeiture proceedings, explaining "for purposes of the civil forfeiture proceedings against the \$14K and the statues, [the defendant] did not have an attorney at the time process was received by [the criminal attorney]; hence, service on [the criminal attorney] was not service on [the defendant's] attorney, and thus could not constitute actual notice to [the defendant]." *Id.* Similar reasoning applies here. Spina was Houshar's lawyer in his criminal proceeding, and although in his letter Spina referred to himself as "counsel for Glenn Nicholas Houshar," this does not necessarily mean that Spina was Houshar's attorney in the forfeiture matter. Indeed, since Spina did not pursue the forfeiture matter beyond writing this simple letter (sent twice), it does not seem appropriate to conclude that he was Houshar's attorney in the forfeiture proceedings.

¹² 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, Houshar must bring his claims based on Rule 41(g) in the Southern District of California. *See Elford 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.

C. The Toyota truck

The Toyota truck that was seized from Houshar’s residence has been forfeited through a default judgment entered by the district court in Arizona. Thus, if Houshar seeks to recover the truck, he must show that the judgment is void. However, as described above, such an attack is usually brought pursuant to Rule 60(b), and 60(b) motions must generally be presented in the

court that rendered the adverse judgment.

As a leading commentator explains, regarding the proper court in which to bring a Rule 60(b) motion:

Rule 60(b) does not explicitly limit the court in which a motion for relief from judgment may be filed. However, it is clear that the drafters of the rule contemplated that the motion (as opposed to an independent action in equity that could be brought anywhere that was appropriate) would always be brought “in the court and in the action in which the judgment was rendered.”

12 James Wm. Moore et al., *Moore's Federal Practice*, § 60.60 (3d ed. 2005) (quoting Fed. R. Civ. P. 60(b) advisory committee note of 1946); *see also Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1034 (7th Cir. 2000) (“This circuit is among the majority that require Rule 60(b) motions to be presented to the rendering court.”); *Bankers Mortgage Co. v. United States*, 423 F.2d 73, 78 (5th Cir. 1970) (stating that “[o]bviously a 60(b) motion addressed to a United States District Court is not the proper vehicle for securing relief from a decision of the Tax Court”); *SEC v. Gellas*, 1 F. Supp.2d 333, 335 (S.D.N.Y. 1998) (stating “a Rule 60(b) motion must be brought in the court that rendered the disputed order”); *Goodwin v. Home Buying Inv. Co., Inc.*, 352 F. Supp. 413, 416 (D.D.C. 1973) (stating “[i]nsofar as plaintiff relies on Rule 60(b)(6) of the Federal Rules of Civil Procedure, the Court can only observe that such reliance is misplaced where the judgment from which a party seeks relief was not a judgment of the court in which relief is sought”); 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2865 (2d ed. 1995) (stating that “[r]elief under Rule 60(b) ordinarily is obtained by motion in the court that rendered the judgment”). Courts recognize an exception to this general rule when the judgment has been registered in a different court, *see, e.g., Harper Macleod Solicitors v. Keaty & Keaty*, 260 F.3d 389, 395 (5th Cir. 2001) (holding that

“registering courts may use Rule 60(b)(4) to sustain jurisdictional challenges to default judgments issued by another district court”), or a different court is being used to enforce the judgment, *see, e.g., Construction Drilling, Inc. v. Chusid*, 131 Fed. Appx. 366 (3d Cir. 2005) (considering due process challenges to a Texas court’s judgment when one party sought an order from a New Jersey court that would effectuate the Texas judgment). Neither of those exceptions is applicable to this case. The default judgment was rendered by the United States District Court for the District of Arizona, and Houshar has presented no evidence that it has been registered or enforced in the Eastern District of Pennsylvania.¹³ Accordingly, the court will dismiss this claim without prejudice to the right of the defendant to refile it in the proper venue.

An appropriate order follows.

¹³ While the court has found some caselaw noting that a party may be able to attack a default judgment in a second forum even when the second forum has not been used to enforce or register the judgment, *see Covington Industries, Inc. v. Resintex A.G.*, 629 F.2d 730, 733 (2d Cir. 1980); *Wayside Transp. Co. v. Marcell's Motor Exp., Inc.*, 284 F.2d 868, 871 (1st Cir. 1960), the court is convinced by the weight of authority described above that the better practice, particularly in this case where the defendant has not presented any argument as to why he should be entitled to attack the Arizona court’s judgment in this court, is to avoid disturbing the original court’s judgment.

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

UNITED STATES OF AMERICA : CRIMINAL
:
vs. :
:
GLEN HOUSHAR : NO. 01cr272-02

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. 84) 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 Houshar of the administrative forfeiture proceedings regarding the BMW and electrical equipment.

2. The Superintendent at FCI Lompoc shall designate Darla Nodle to contact Edward Morrissy in the Clerk's Office (267-299-7044) to make arrangements for the video-conference.

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 Darla Nodle at 805-737-3157 and Darla Nodle shall make the defendant available at the designated location at FCI Lompoc for the video-conference at the designated time.

5. Insofar as the motion seeks the recovery of (1) two camcorders and one digital camera; and (2) a Ford Explorer, the motion is **DISMISSED** without prejudice to the right of the

defendant to refile the claims in the Southern District of California.

6. Insofar as the motion seeks recovery of the 1991 Toyota truck, the motion is **DISMISSED** without prejudice to the right of the defendant to pursue the claim in the District of Arizona.

William H. Yohn, Jr., Judge