

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
	§	
v.	§	OF HARRIS COUNTY, TEXAS
	§	
ONE 2004 CHEVROLET SILVERADO	§	269th JUDICIAL DISTRICT

**DEFENDANT-COUNTERCLAIMANT ZAHER EL-ALI'S  
FIRST AMENDED ANSWER AND COUNTERCLAIMS**

COMES NOW, Zaher El-Ali, a party who has an interest in the disposition of the above-referenced and identified vehicle, and files his Amended Answer and Counterclaims against Plaintiff. El-Ali would respectfully show the Court the following:

1. Zaher El-Ali has an interest in and is the rightful owner of the above-referenced and identified vehicle.

**GENERAL DENIAL**

2. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Zaher El-Ali denies each and every, all and singular, of the allegations contained in Plaintiff's Original Petition and demands strict proof thereof.

**AFFIRMATIVE DEFENSE**

3. Without waiving the foregoing, and by way of affirmative defense, Zaher El-Ali qualifies as an innocent owner under Tex. Code Crim. Proc. § 59.02(c)(1).

4. Texas law provides innocent owners and holders of a security interest in property with a statutory defense to civil forfeiture of their property or interest in the property. Tex. Code Crim. Proc. § 59.02(c).

5. Under Texas law, an owner or holder of a security interest may not have his interest in property forfeited, if he proves, by a preponderance of the evidence, that he (1) acquired and perfected his interest before or during the act or omission giving rise to forfeiture; and (2) “did not know or should not reasonably have known of the act or omission giving rise to the forfeiture or that it was likely to occur at or before the time of acquiring and perfecting the interest.” Tex. Code Crim. Proc. § 59.02(c).

6. Zaher El-Ali is the owner of the 2004 Chevy Silverado, Vehicle Identification Number IGCEC14X74Z114346, which is the subject of this forfeiture action.

7. El-Ali acquired his ownership interest in the 2004 Silverado before police seized the vehicle in July 2009.

8. At no point did El-Ali know, nor should he have known, of the act that would give rise to the forfeiture.

9. Because El-Ali qualifies as an innocent owner under Tex. Code Crim. Proc. § 59.02(c)(1), the 2004 Silverado may not be forfeited to the State of Texas and must be returned to El-Ali immediately.

### **COUNTERCLAIMS**

10. Zaher El-Ali, by way of counterclaim against Plaintiff, the State of Texas, would show the Court the following:

### **FACTUAL ALLEGATIONS**

11. Defendant-Counterclaimant Zaher El-Ali, incorporates by reference his answer to the Petition and Affirmative Defense as if they were fully set forth herein.

12. Defendant-Counterclaimant brings this action to redress deprivations of rights under the United States and Texas Constitutions. Both constitutions guarantee due process of law. Fundamental to these due process guarantees is that government must protect property owners from wrongful deprivations and act in an impartial manner in the administration of justice. As set forth in these counterclaims, Tex. Code Crim. Proc. §§ 59.02(c) and 59.06(c) violate these constitutional guarantees.

13. Defendant-Counterclaimant brings this action pursuant to the Texas Uniform Declaratory Judgments Act, *see* Tex. Civ. Prac. & Rem. Code § 37.001, *et seq.*; the Fourteenth Amendment to the United States Constitution; 42 U.S.C. §§ 1983 & 1988; and Article I, Section 19 of the Texas Constitution.

#### *Texas Civil Forfeiture Law*

14. Texas civil forfeiture proceedings, including the instant matter, are *in rem* actions against the supposed offending property itself. The current Texas civil forfeiture statute (the “Act”) was enacted in 1989 as Chapter 59 of the Texas Code of Criminal Procedure. H.B. 65, 71st Tex. Leg. 1st Special Session (1989).

15. Prior to 1989, forfeiture was tied only to controlled substances and driving while intoxicated. The Act greatly expanded the scope of forfeiture to include most felony offenses (and even some misdemeanors). *See* Tex. Code Crim. Proc. § 59.01(2). At the same time, it allowed for the forfeiture of real property, such as homes and land, which was previously excluded.

16. Under the Act, law enforcement officers can seize property for civil forfeiture if they have probable cause to believe that the property is “contraband.” “Contraband” subject to civil forfeiture is defined as any (1) property used in the

commission of or to facilitate a crime; (2) the proceeds of the crime; and (3) property derived from or purchased with proceeds of the crime. Tex. Code Crim. Proc. § 59.01(2).

17. Such contraband can include homes, cars, boats, land, and currency, among other types of real and personal property.

18. After the seizure, the State has 30 days to file a forfeiture action against the property and to give notice to all interest holders in the property. Tex. Code Crim. Proc. § 59.04. Interest holders then have 20 days to file an answer. If interest holders do not respond within the requisite period of time, the State can obtain a default judgment against the property.

19. Although the Act was codified as part of the criminal law, forfeiture actions function almost wholly as civil proceedings. Tex. Code Crim. Proc. § 59.05 provides that all parties “must comply with the rules of pleading as required in civil suits” and that all civil forfeiture cases, such as the instant matter, “shall proceed to trial in the same manner as in other civil cases.”

20. Unlike a criminal case, the burdens of proof are also civil in nature. One key feature of the Act is that it changed the burden of proof in forfeiture cases. Today, the government only needs to meet a “preponderance of the evidence” standard to take ownership of seized assets. Tex. Code Crim. Proc. § 59.05(b).

21. However, under Texas civil forfeiture law, the burden to prove that the property owner was innocent rests with the property owner. Tex. Code Crim. Proc. § 59.02(c).

22. The property owner must show that he “did not know or should not reasonably have known” of the allegedly illegal activity giving rise to the forfeiture. Tex. Code Crim. Proc. § 59.02(c).

23. If the State wins a forfeiture action either through judgment or by default, title to the property vests in the State. Tex. Code Crim. Proc. § 59.06(f). Unless a local agreement exists between the attorney representing the State and law enforcement agencies, all forfeited property and currency is to be deposited in the general revenue fund. However, if a local agreement exists, forfeited property is divided between the prosecutor and law enforcement agencies to be used for “law enforcement purposes only.” Tex. Code Crim. Proc. § 59.06(c)(2).

24. Such funds can be used, *inter alia*, for the official purposes of the prosecutor’s office, to pay the salaries and overtime pay of officers, and for equipment and supplies. Harris County, where the instant action arises, has a local agreement permitting forfeiture funds to go to law enforcement.

#### *Seizure of One 2004 Chevrolet Silverado*

25. Zaher El-Ali (“Ali”), Defendant-Counterclaimant in this case, moved to the United States from Jordan in 1978 and became a naturalized U.S. citizen in 1987. Apart from a brief stay in New York, he has lived and worked in Houston since his arrival in the U.S.

26. After graduating from the University of Houston in 1984, Ali worked in the insurance business, both at Mutual of Omaha and on his own. He lives in East Houston and, since 1999, has owned a small business there where he buys, rehabilitates,

and sells homes primarily to lower-income individuals. As a more minor part of his business, Ali also buys and sells automobiles.

27. In 2004, Ali acquired a 2004 Chevrolet Silverado, which is the subject of this proceeding. He purchased it with the intention to resell it, as part of his regular business.

28. In August 2004, Ali transferred possession and use of the Silverado to Roberto Lopez Faustino (“Faustino”). Faustino made a down payment of \$500 on the Silverado and agreed to pay Ali the remainder of the purchase price for the car on credit. As is his regular business practice, Ali retained the title to the truck and registered it in his own name. It was his intention, consistent with his regular business practice and the regular business practice of others in this line of business, to complete the sale of the Silverado to Faustino only when Faustino finished paying for the truck. From the time Ali transferred possession and use of the Silverado in August 2004, Faustino continued to make payments until mid-2009.

29. In July 2009, Faustino was driving the Silverado when he was apprehended on suspicion of driving while intoxicated (DWI). After his arrest, Faustino was placed in jail, where he has remained. At the time of his arrest, the Silverado was seized for forfeiture and it has remained in the possession of Harris County since that time.

30. In December 2009, Faustino plead guilty to felony DWI, his third conviction for DWI, and was sentenced to six years in jail.

31. Since his arrest and incarceration, Faustino has stopped making payments on the Silverado. Faustino owed Ali \$2,350 for the remainder of the payment on the Silverado when he stopped making payments.

32. After the Silverado's seizure, in July 2009, Ali wrote a letter to the police chief who had possession of the Silverado informing him of the fact that he is the owner of the truck. In August 2009, the State of Texas filed the instant action against the Silverado, asking this Court to find the Silverado to be contraband and that it be ordered forfeited to the State.

33. Ali was served notice of the forfeiture action, and in September 2009, Ali wrote a letter to the Harris County District Attorney's Office, which was filed with this Court, informing the district attorney that Faustino was no longer making payments on the vehicle and was unable to do so, and asking for possession of the Silverado. In the letter, Ali stated that the "truck is still mine," and he affixed copies of the registration and title bearing his name.

34. Ali did not hear from the Harris County District Attorney's Office until February 2010, when it served discovery on him: a Request for Disclosure, a Request for Admissions, a First Set of Interrogatories, and a Request for Production of Documents. (A copy of this discovery is affixed to this Answer and Counterclaims.) In it, the State of Texas, acting through the Harris County District Attorney's Office, asked, *inter alia*, whether Ali knew of Faustino's previous arrests for DWI while also demanding, *inter alia*, that Ali produce all checking account statements and savings account statements, both personal and business, from July 26, 2007 to July 26, 2009, as well as personal and business income tax returns from 2007, 2008, and 2009.

35. The instant matter is scheduled to go to trial on July 19, 2010.

### **COUNT I**

36. Defendant-Counterclaimant hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 35 of this Answer and Counterclaims as if set forth fully herein.

37. The Texas Constitution protects individuals' rights to hold, possess, and enjoy property.

38. To secure this right, the Texas Constitution expressly forbids the State from interfering with a person's property rights except by the due course of law. Tex. Const., Art. I, § 19.

39. Among other protections, Article I, Section 19 of the Texas Constitution stands for the proposition that the State may not forfeit the property of an innocent owner.

40. Forfeiture proceedings that satisfy the due course of law provision of the Texas Constitution may only require a claimant prove that he has an ownership, security, or lien interest in the property that is subject to forfeiture.

41. Once a claimant establishes a valid ownership, security, or lien interest in property that is subject to forfeiture, Article I, Section 19 of the Texas Constitution requires that the State must prove that the claimant either actually knew or was willfully blind of the act or omission giving rise to the forfeiture before it may forfeit the claimant's property.

42. Tex. Code Crim. Proc. § 59.02(c) imposes an unconstitutional burden on innocent owners. Under section 59.02(c), a property owner who asserts that he is an



innocent owner must prove a negative: “that he did not know or should not reasonably have known of the act or omission.”

43. The Texas Supreme Court has noted that “proving a negative is always difficult and frequently impossible.” *20801, Inc. v. Parker*, 249 S.W.3d 392, 397 (Tex. 2008) (quoting *State Farm Mut. Auto. Ins. Co. v. Matlock*, 462 S.W.2d 277, 278 (Tex. 1970)).

44. Defendant-Counterclaimant Ali is an innocent owner of property who has been deprived of the rightful ownership of his property since July 2009. Through the instant action, Defendant-Counterclaimant also faces permanent loss of his lawful property.

45. For exercising his rights under the innocent owner provision of Tex. Code Crim. Proc. § 59.02(c), Defendant-Counterclaimant has been served with overbroad, burdensome, and intrusive discovery.

46. Under color of state law, Plaintiff violates Defendant-Counterclaimant’s right not to be deprived of property without due course of law. As a direct and proximate cause of Plaintiff’s actions, Defendant-Counterclaimant faces irreparable harm to his constitutional rights. Unless Plaintiff is enjoined from committing the above-described constitutional violations, Defendant-Counterclaimant will continue to suffer great and irreparable injury.

## **COUNT II**

47. Defendant-Counterclaimant hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 46 of this Answer and Counterclaims as if set forth fully herein.

48. Defendant-Counterclaimant is guaranteed fair and impartial administration of justice under the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the Texas Constitution.

49. In Texas, the very agencies charged with enforcing and prosecuting the state's civil forfeiture laws have a direct financial stake in securing property and proceeds through local agreements between district attorneys and law enforcement officials.

50. When public officials and their agencies have a direct financial stake in the outcome of their actions, due process requires that such actions be subject to particularly close scrutiny. By permitting property subject to forfeiture and proceeds from the sale of such property to be channeled away from the general revenue fund of the State and directly to the officials and bodies charged with enforcing and prosecuting the law, Tex. Code Crim. Proc. § 59.06(c) creates the potential for bias, the appearance of bias, and/or actual bias in the administration of Texas's civil forfeiture law.

51. Tex. Code Crim. Proc. § 59.06(c) is thus unconstitutional as violative of the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution.

52. Defendant-Counterclaimant has had his property seized and now faces permanent loss of his lawfully obtained property through civil forfeiture. Under color of state law, Plaintiff violates Defendant-Counterclaimant's right to impartial adjudication as guaranteed by the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution.

53. As a direct and proximate result of Plaintiff's actions, Defendant-Counterclaimant faces irreparable harm to his constitutional rights. Unless Plaintiff is

enjoined from committing the above-described constitutional violations, Defendant-Counterclaimant will continue to suffer irreparable injury.

### **ATTORNEYS' FEES**

54. Defendant-Counterclaimant hereby incorporates and realleges each and every allegation contained in paragraphs 1 through 53 of this Answer and Counterclaims as if set forth fully herein.

55. Pursuant to Title 42, Section 1988(b) of the United States Code and Section 37.009 of the Texas Civil Practices and Remedies Code, Defendant-Counterclaimant hereby request all costs and reasonable attorneys' fees as are equitable and just.

### **PRAYER**

WHEREFORE, Zaher El-Ali, a party who has an interest in and is the rightful owner of the above-referenced and identified vehicle, requests that the Court render judgment as follows:

- (1) Declare all right, title, and ownership in the 2004 Chevrolet Silverado to Zaher El-Ali and order its immediate return;
- (2) Deny all relief requested by Plaintiff;
- (3) Dismiss Plaintiff's Petition in its entirety;
- (4) Declare that Tex. Code Crim. Proc. § 59.02(c) violates the due course of law clause of Article I, Section 19 of the Texas Constitution;
- (5) Declare that Tex. Code Crim. Proc. § 59.06(c) violates the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution;

- (6) Enjoin Plaintiff, its agents, and employees from enforcing or administering Tex. Code Crim. Proc. §§ 59.02(c) and 59.06(c);
- (7) Grant Defendant-Counterclaimant his reasonable attorneys' fees and costs; and,
- (8) Grant such further relief this Court deems just and proper in law or equity.

Respectfully submitted,

**INSTITUTE FOR JUSTICE**

BY: \_\_\_\_\_

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ATTORNEYS FOR DEFENDANT-  
COUNTERCLAIMANT ZAHER EL-ALI

*\*Motion for admission pro hac vice to be filed.*

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this Defendant-Counterclaimant Zaher El-Ali's First Amended Answer and Counterclaims has been served on Plaintiff's attorney

by:

- certified mail (return receipt requested)
- telephonic facsimile before 5:00 pm recipient's local time
- courier receipt by Federal Express
- hand delivery

on this 7th day of April, 2010, to wit:

KAREN L. MORRIS (TX Bar No. 14491100)  
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\_\_\_\_\_  
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