IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In the Matter of the Seizure of

FOUR HUNDRED FORTY SIX THOUSAND SIX HUNDRED FIFTY ONE DOLLARS AND ELEVEN CENTS ($446,651.11) IN U.S. CURRENCY FROM NEW YORK COMMERCIAL BANK ACCOUNT # XXXXX9071, LOCATED IN RONKONKOMA, NEW YORK, HELD IN THE NAME OF BI-COUNTY DISTRIBUTORS, INC.

Case No. MISC. 14 1288

LINDSAY, M

RULE 41(g) MOTION FOR RETURN OF PROPERTY

This Rule 41 action seeks the return of $446,651.11 seized from Bi-County Distributors, Inc. ("Bi-County"), and its owners, Jeffrey, Richard, and Mitchell Hirsch ("Claimants") by agents of a New York taskforce of the U.S. Internal Revenue Service ("the Government"). Bi-County is a family-owned business that distributes candy, cigarettes, and other goods to convenience stores and that has been owned and operated by Claimants—who are three brothers—for 27 years on Long Island. The business is their entire livelihood. Neither Bi-County nor Claimants have ever been charged with a crime. Nevertheless, on May 21, 2012, the Government seized the contents of Bi-County's New York Commercial Bank Account No. XXXX9071, located in Ronkonkoma, New York, on the basis of an *ex parte* warrant issued by this Court. *See* Ex. A (seizure warrant). The funds seized by the Government are the lawful earnings of Bi-County's legitimate business, most of which was owed at the time of seizure to Bi-County's legitimate vendors. The loss of the funds put the company into a tailspin, from which Claimants are still trying to recover, and has imposed untold stress on the brothers and

their families. Bi-County remains in business only because a few of its long-time vendors have extended Claimants extraordinary credit on the basis of their exceptional reputation while Claimants have spent the past *two-and-a-half years* seeking the return of the money from the U.S. Attorney's Office.

Pursuant to Federal Rule of Criminal Procedure 41(g) and 18 U.S.C. § 983(a)(1)(F), Claimants hereby move this Court for the return of the seized $446,651.11. This Court "should construe a motion requesting return of property under Rule 41[g] as initiating a civil action in equity." *Lavin v. United States*, 299 F.3d 123, 127 (2d Cir. 2002) (*citing Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992)).

This Court's initial seizure warrant was supported by an affidavit—sworn by a Nassau County detective working in conjunction with the IRS, and based solely on that detective's review of Bi-County's bank statements—alleging that Claimants' bank deposits were "structured" to avoid federal currency transaction reporting requirements and therefore subject to forfeiture under 31 U.S.C. § 5317 and 18 U.S.C. § 984. More than two years have elapsed since the Government seized Claimants' funds. The Government, however, has not initiated further proceedings to complete the forfeiture. It has neither initiated administrative or civil forfeiture proceedings nor charged Claimants with criminal structuring. The Government also has not alleged that the funds are the proceeds of illegal activity; in fact, the funds are the Claimants' lawful earnings from Bi-County's operations. Indeed, in the more than two years that have elapsed since the funds were seized, the Government has not alleged *any* wrongdoing by Claimants or *any other basis* on which the funds might possibly be subject to forfeiture.

The Government is not entitled to hold Claimants' money indefinitely based solely on unproven (and unwarranted) allegations made in an *ex parte* warrant application. The

government has blown far past the mandatory deadline established by the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983(a)(1)(A), for initiating forfeiture proceedings. Congress has established a clear remedy for that failure: Pursuant to 18 U.S.C. § 983(a)(1)(F), the property must be returned. Even absent that statutory command to return the funds, the Government's delay is so extreme that to commence forfeiture proceedings at this stage would violate Claimants' constitutional right to due process of law. Claimants respectfully request an order from this Court directing the United States to immediately return the money it has seized.

BACKGROUND

A. Claimants' Business

Bi-County is a distributor of candy, cigarettes, and other goods to convenience stores. Jeffrey, Richard, and Mitchell Hirsch are brothers who have owned and operated the business on Long Island for 27 years. Ex. B ("Hirsch Decl.") ¶ 2. They are second-generation convenience-store distributors, having taken over customers from their father's similar distribution business when it closed approximately 23 years ago. *Id.* ¶ 4. The Hirsch brothers are all employed full-time by the business, and it is their livelihood. *Id.* ¶ 3. Neither any of the Hirsch brothers nor their business has ever been charged with any crime. *Id.* ¶ 5.

Every weekday, the brothers load their delivery vehicle and drive a delivery route to convenience stores throughout Nassau and Suffolk Counties. *Id.* ¶ 6. Because many of those convenience-store customers pay for goods with cash, Claimants make frequent cash deposits at their bank. *Id.* ¶ 7. Although the deposited funds consist entirely of Bi-County's lawfully earned cash receipts, Claimants' pattern of cash deposits evidently attracted the attention of a Nassau-County/IRS taskforce and led to the 2012 seizure of their bank account.

B. Federal Banking Regulations

Federal regulations require banks to file a currency transaction report with the U.S. Treasury whenever a customer engages in a cash transaction in excess of $10,000. *See* 31 U.S.C. § 5313. In addition, federal law makes it unlawful for the bank customer to break up cash deposits or withdrawals into amounts below that $10,000 threshold "for the purpose of evading" federal currency reporting requirements. *See* 31 U.S.C. § 5324. A person who has violated this latter prohibition is said to have impermissibly "structured" his cash transactions. Funds involved in structured transactions are subject to civil or criminal forfeiture, and individuals who engage in structuring can potentially be charged with a felony. *See* 31 U.S.C. § 5317.

Federal anti-structuring laws, however, do not criminalize every cash transaction below $10,000. Structuring is a crime only if a person engages in sub-$10,000 cash transactions with the *specific intent* to evade currency reporting requirements by doing so. *See United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005). A person who makes sub-$10,000 deposits for a legitimate business purpose is not guilty of any crime.

C. The Seizure and Further Proceedings

On May 21, 2012—nearly two-and-a-half years ago—agents of the IRS taskforce seized the entire contents of Bi-County's bank account. Michael Kearns, a detective with the Nassau County Police Department, Asset Forfeiture Unit, assigned to the New York Asset Forfeiture Task Force of the U.S. Internal Revenue Service, provided this Court with an affidavit alleging that Claimants' cash bank deposits were structured to avoid federal currency transaction reporting requirements. *See In the Matter of the Seizure of Any and All Funds on Deposit in New York Commercial Bank Account # XXXX9071*, No. M12-341 (E.D.N.Y. filed May 21, 2012) (Docket # 1). Detective Kearns based this allegation solely on his review of Bi-County's bank

statements and his "training and experience." This Court found probable cause to issue a seizure warrant, and the Government executed the warrant that same day. At the time the account was seized, it contained $446,651.11.

Claimants immediately took steps to secure the return of their funds. Within one day of learning that their bank account had been seized, Claimants retained an attorney, Joseph Potashnik, to contest the seizure. Hirsch Decl. ¶ 11. After a discussion with Claimant Jeffrey Hirsch, who was confident that neither he nor anyone else at Bi-County had done anything wrong, Mr. Potashnik took steps to initiate a meeting with the IRS and other authorities. *Id.* ¶ 12. On October 25, 2012, Mr. Potashnik met in person with Assistant U.S. Attorney Diane Beckmann and other unknown government officials. *Id.* ¶ 13. During that meeting, the participants called Claimant Jeffrey Hirsch and asked questions about Bi-County's business and banking practices. *Id.* ¶ 14. Mr. Hirsch answered all of the questions asked to the best of his ability. Following up on that meeting, Claimants provided the U.S. Attorney's office with a financial report prepared by Bi-County's long-time local CPA documenting the company's cash receipts and cash-handling procedures. *Id.* ¶ 15.

On October 5, 2012, Mr. Potashnik executed an "Agreement to Waive Rights Under the Civil Forfeiture Reform Act," by which Claimants agreed "to extend the time period for the government to file a civil forfeiture complaint pursuant to the provision of 18 U.S.C. § 983(a) for 60 days, until December 21, 2012." Ex. C ("Potashnik Decl.") ¶ 4. Claimants agreed to that extension in the hope that the matter would be resolved in a timely fashion without any need for protracted litigation, which Claimants could not afford. The Government, however, sat on the funds for nearly another year—well past the timeline established by the agreement. The

Government did not initiate any formal criminal or civil forfeiture proceedings, and also failed to return the funds.

Still hoping to avoid the burden and expense of litigation, in the summer of 2013, Claimants once again reached out to the Government and offered to provide any evidence they could to demonstrate their innocence and secure the return of their funds. On Mr. Potashnik's suggestion, Claimants hired a well-established Manhattan CPA firm, Baker Tilly, to perform an independent, forensic audit of their cash transactions for a period of 18 months prior to the seizure (encompassing the period relevant to the allegations in Detective Kearns' affidavit) at a cost of more than $25,000. Hirsch Decl. ¶ 16.

Baker Tilly conducted the audit in June 2013, and concluded that Bi-County properly reported all its bank deposits—including all cash transactions—on their federal tax returns, and that, in the professional opinion of firm, there was no basis to believe that Claimants attempted to circumvent government reporting of cash transactions. Mr. Potashnik presented the Baker-Tilly report to the government, and Claimant Jeffrey Hirsch and Mr. Potashnik met with the Government in June 2013 to once again discuss Bi-County's business, accounting, and banking practices. *Id.* ¶¶ 16, 17. Again, they were met with silence. In the nearly 16 months that have passed since that meeting, the Government has neither returned the funds nor filed any forfeiture action. The Government has contacted Claimants twice through their attorney, each time to verbally offer to settle the matter for an amount that Claimants considered excessive. *Id.* ¶ 18. Claimants refused those offers because they have done nothing wrong. *Id.* [1]

[1] Notably, the proceeds of civil forfeiture settlements or judgments are used to augment the budgets of the agencies involved in the seizure. *See* 31 U.S.C. § 9703 (authorizing payment of seizure and forfeiture proceeds to agencies under control of the U.S. Treasury); 21 U.S.C. § 881(e)(2)(A)-(B) & 28 U.S.C. § 524(c) (authorizing payment of seizure and forfeiture proceeds to agencies under control of the U.S. Department of Justice). *See also United States v. Funds*

The seizure has been a disaster for Claimants and their business. In decades of business they had never bounced a check, but suddenly they found themselves scrambling to maintain inventory and make payroll. *Id.* ¶¶ 21, 25. To pay immediate bills, they were forced to cash in two certificates of deposit that Bi-County held in the amount of approximately $56,000. *Id.* ¶ 22. Bi-County has subsequently been able to stay in business thanks only to the Hirsch brothers' excellent reputation and longstanding roots in the community, which have led long-time vendors to extend extraordinary credit. *Id.* ¶ 23. Claimants speak with these and other creditors nearly weekly, explaining the actions they have been taking, while the vendors wait patiently for the matter to be resolved. *Id.* ¶ 24. Moreover, the Hirsch brothers and their families have suffered tremendous stress over the past years: the stress of not knowing whether they will lose the money they have worked so hard to earn; of not knowing when their money might be returned; of worrying that, should any of their vendors lose patience while the Government decides whether to return their money, it would spell the end of the business; and of having to explain to vendors, customers, friends and relatives that they were targeted for seizure by the Government. *Id.* ¶ 26.

ARGUMENT

When the Government seizes property but fails to commence a forfeiture proceeding in a timely way, a Rule 41(g) motion is the appropriate means to seek the return of the property. *See United States v. Sims*, 376 F.3d 705, 708 (7th Cir. 2004) ("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 . . . held an unreasonable length of time without the institution of proceedings that would justify the seizure and retention of the property."); *see*

Held in the Name or for the Benefit of Wetterer, 210 F.3d 96, 110 (2d Cir. 2000) ("the agency that conceives the jurisdiction and ground for seizures, and executes them, also absorbs their proceeds").

also United States v. Kramer, 2006 WL 3546026 (E.D.N.Y. 2006) (granting Rule 41(g) motion on the ground that the Government did not comply with Section 983(a)(3)(B)); *United States v. Numisgroup Int'l Corp.*, 128 F. Supp. 2d 136, 146 (E.D.N.Y. 2000) (property without evidentiary value must be returned unless Government alleges that the property is subject to criminal forfeiture within a reasonable period of time).

Given the amount of time that has elapsed since the government seized Claimants' funds, the government's continued possession of the funds violates not only the timelines established by Congress in the Civil Asset Reform Act of 2000 ("CAFRA"), but also the Due Process Clause of the Fifth Amendment. CAFRA and due process demand the property be returned immediately.

A. The Government Has Violated The Deadlines Set By CAFRA, And Is Therefore Obligated To Return The Funds.

While CAFRA included numerous reforms intended to prevent abuse of the forfeiture laws, the most sweeping change enacted by the law was the creation of strict deadlines that the Government must follow when initiating forfeiture proceedings. *See* 18 U.S.C. § 983(a). The United States Department of Justice, in its manual for Assistant United States Attorneys, acknowledges that in setting these deadlines, Congress "made clear its intent that the Government be expeditious in providing notice and in initiating forfeiture actions." *See* Department of Justice, Criminal Division, Asset Forfeiture Policy Manual at 54 (2013).[2] Congress also was quite clear about the appropriate remedy if the Government failed to comply with the statutory deadlines: "[T]he Government *shall* return the property" to the person from whom the property was seized. 18 U.S.C. § 983(a)(1)(F) (emphasis added). Under CAFRA, there can be no question about the proper resolution of this case. The Government has not

[2] *Available at* http://www.justice.gov/criminal/afmls/pubs/pdf/policy-manual-2013rev.pdf.

complied with the deadlines established by Congress, and thus must be ordered to return Claimants' property.

Under CAFRA, the Government has only 60 days after the seizure of property to commence civil or criminal forfeiture proceedings. *See* 18 U.S.C. § 983(a)(1). CAFRA permits the government to commence administrative forfeiture proceedings by providing "written notice to interested parties" of a "non-judicial civil forfeiture proceeding," but provides that such notice must be sent "in no case more than 60 days after the date of the seizure." *Id.* § 983(a)(1)(A)(i). In lieu of administrative forfeiture, the government also may choose within that same 60-day window to pursue a civil forfeiture action in the courts: The government is excused from the requirement to send written notice "if, before the 60-day period expires, the Government files a civil judicial forfeiture action." *Id.* § 983(a)(1)(A)(ii). Or the government may choose to pursue criminal charges: Within that same "60-day period" the government may forego the required notice if it "obtain[s] a criminal indictment containing an allegation that the property is subject to forfeiture" and "take[s] the steps necessary to maintain custody of the property as provided in the applicable criminal forfeiture statute." *Id.* § 983(a)(1)(A)(iii). If the government fails to take any of these steps, the government may unilaterally extend the 60-day deadline once by 30 days, and then obtain further 60-day extensions from the court. *Id.* § 983(a)(1)(B)-(C).[3] What the government may *not* do is sit on the property beyond 60 days without doing anything at all. If the government allows the 60-day period to lapse without taking one of these various steps, "the

[3] The statute carefully delimits the circumstances under which an extension may be granted. The government must show that an extension is necessary to avoid (1) "endangering the life or physical safety of an individual," (2) "flight from prosecution," (3) "destruction of or tampering with evidence," (4) "intimidation of potential witnesses," or (5) "otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. § 983(a)(1)(D).

Government *shall* return the property" to the person from whom the property was seized. *Id.* § 983(a)(1)(F) (emphasis added).

In this case, although the Government seized more than $446,000 from Claimants on the basis of an *ex parte* warrant, the Government subsequently took no apparent action to investigate the matter further or to respond to Claimants' inquiries about how to secure return of the property. Although the 60-day deadline established by CAFRA and came and went, the Government failed to provide Claimants with the written notice of forfeiture and opportunity to contest that forfeiture that CAFRA commands and failed to commence either administrative or judicial forfeiture proceedings. After more than six months had elapsed, the Government acknowledged that it was bound by CAFRA by seeking (and receiving from Claimants) a limited waiver of the deadlines after they had already run. It is questionable whether such a waiver is even authorized by the terms of CAFRA, under which extensions beyond 30 days may not be granted except by a court, *see* 18 U.S.C. § 983(a)(1)(B), but even if valid, that waiver would have extended the Government's 60-day deadline only to February 19, 2013.

Yet the Government blew past even that extension and went back to ignoring the matter for another six months. Desperate to save their now ailing business, Claimants sought to demonstrate their innocence of structuring or any other illicit financial activity by retaining a highly-respected New York City CPA firm to conduct a costly independent audit of Bi-County's accounts. Claimants presented that report to the Government, and met with the Government again in August 2013 to again discuss Bi-County's business and banking practices. Inexplicably, the Government has continued to sit on Claimants' money for more than another year, flatly in violation of CAFRA and with total disregard of Claimants' due process rights.

The remedy for the government's extraordinary inaction is plainly spelled out by Congress in CAFRA, and should be ordered without delay: "[T]he Government shall return the property." 18 U.S.C. § 983(a)(1)(F). On this basis alone, the Motion for Return of Property should be granted.

B. Return Of Claimants' Funds Is Also Required By Due Process.

The government's delay in this case does not merely run afoul of CAFRA, but also violates Claimants' right to due process of law under the Fifth Amendment. After so much time has elapsed, any judicial forfeiture action would be so untimely that it would violate the due process standard established by the Supreme Court's decision in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555 (1983).[4] Because due process acts as a total bar to any eventual forfeiture of the funds, there is no conceivable point to the government's continued possession of the funds and they must be immediately returned.

The Supreme Court explained, in *Eight Thousand Eight Hundred and Fifty Dollars*, that the test for whether delay in initiating forfeiture proceedings violates due process is the same as the test for whether a delayed trial violates a defendant's right to a speedy trial. *See* 461 U.S. at 564 (citing *Barker v. Wingo*, 407 U.S. 514 (1972)). In other words, the court "looks to four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* The Court explained that "none of these factors is a necessary or sufficient condition for finding unreasonable delay," and that "these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due

[4] Claimants further contend that, should their funds not be immediately returned, due process also guarantees the right to a prompt hearing to contest the Government's continued retention of the money during the pendency of any forfeiture action. It is premature to address that question at this time, however, and Claimants reserve it in the event that further proceedings become necessary.

process requirement of fairness has been satisfied." *Id.* Of all the factors, "the overarching factor is the length of the delay." *Id.* at 565. Where a court finds that delay in initiating forfeiture proceedings amounts to a violation of due process, the proper remedy is to bar any forfeiture of the property and order its immediate return. *See, e.g., United States v. $23,407.69 in U.S. Currency*, 715 F.2d 162, 166 (5th Cir. 1983); *United States v. $19,440.00 in U.S. Currency*, 829 F. Supp. 303, 305 (D. Alaska 1993); *United States v. Sharp*, 655 F. Supp. 1348, 1352 (W.D. Mo. 1987). In other words, just as the remedy for a speedy trial violation is to bar the defendant's trial, the remedy for unreasonable delay in the forfeiture context is to bar any further forfeiture proceedings.

In this case, the most significant factor is the length of the delay. *See Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. at 565 (delay is the "overarching factor" in light of which all other factors must be assessed). Nearly twenty-nine months have elapsed since the government seized Claimants' property. Even assuming the clock only began to run after the extension of time agreed to by Bi-County's counsel expired, the delay still would amount to nearly twenty months. Courts have found violations of due process based on comparable or shorter periods of delay. *See, e.g., United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1113 (1st Cir. 1975) (twelve months); *United States v. One (1) Nissan 300 ZX*, 711 F. Supp. 1570, 1572-73 (N.D. Ga. 1989) (eighteen months); *Sharp*, 655 F. Supp. at 1350 (twenty-three months). Indeed, the Fifth Circuit found a shorter—thirteen month—delay unreasonable where the evidence showed that for a "six month period nothing was done by the government." 715 F.2d at 165. In the instant case, there is no indication that the government has done anything at all to investigate or otherwise advance towards a resolution of the case for almost twenty-nine

months. *See* Hirsch Decl. ¶ 19. That extraordinary period of inaction requires some meaningful justification from the government.

The second factor—the lack of any apparent explanation for the delay—also weighs heavily in Claimants' favor. As the Fifth Circuit has explained, "the government must explain and justify substantial delays in seeking forfeiture of seized property." *$23,407.69 in U.S. Currency*, 715 F.2d at 166 (citing cases).[5] Thus, where courts have approved lengthy delays in the initiation of forfeiture proceedings, they generally have done so because the government has offered a valid explanation for the delay; in *Eight Thousand Eight Hundred and Fifty Dollars*, for instance, the Supreme Court found that a delay of 18 months was "substantial" and was only "justified by the Government's diligent efforts in processing [a] petition for mitigation or remission and in pursuing related criminal proceedings." 461 U.S. at 569.[6] Here, there is no indication that the government has been actively investigating the case or that the government can point to any other ground to justify its failure to act in a timely fashion either to initiate forfeiture proceedings or to return Claimants' funds. The government, of course, cannot hold Claimants' property for over two years without a valid reason.

The third factor in the test—the steps Claimants have taken to secure return of the property—likewise weighs in Claimants' favor.[7] Claimants took numerous steps to prompt the

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[5] *See also, e.g., $19,440.00 in U.S. Currency*, 829 F. Supp. at 305 ("In situations such as this where the government substantially delays in instituting forfeiture proceedings, it must justify the delay."); *One (1) Nissan 300 ZX*, 711 F. Supp. at 1573 (explaining that, "where the delay is significant . . . the government must establish additional justification" beyond mere need for deliberation).

[6] *See also, e.g., United States v. U.S. Currency in the Amount of $228,536.00*, 895 F.2d 908, 917 (2d Cir. 1990) (finding delay "reasonable because the government has offered a valid explanation," specifically the existence of an ongoing criminal prosecution).

[7] This factor is entitled to less weight in the analysis than the length of the Government's delay and their purported justifications for such delay. *See, e.g., Sharp*, 655 F. Supp. at 1352

government to resolve the case: they attempted to contact the officer who had signed the affidavit in support of the seizure warrant, *see* Hirsch Decl. ¶ 10; they met promptly with the Government and, in an effort to demonstrate their innocence, answered questions asked during that meeting by the Government, *id.* ¶¶ 12-14; they prepared a costly accounting report to explain their banking practices, and then hired a second, independent CPA firm to prepare a forensic audit at a cost of more than $25,000, *id.* ¶¶ 15-16; they presented those accounting reports to the Government along with a request for return of their money, *id.* ¶ 16; and they met with the government in June 2013 to once more answer the Government's questions, *id.* ¶17. The only thing they have not done is agree to two verbal settlement offers the Government has made in the course of these two-and-a-half years (in 2013 and again in early 2014) to drop the matter on terms that Claimants deemed unjust and too costly to bear. *Id.* ¶ 18.

Finally, the prejudice to Claimants from the deprivation of their property is manifest and significant. As the Supreme Court recognized in *Eight Thousand Eight Hundred and Fifty Dollars*, "[b]eing deprived of [a] substantial sum of money for a year and a half is undoubtedly a significant burden." 461 U.S. at 565; *see also $23,407.69 in U.S. Currency*, 715 F.2d at 166 (same). Indeed, "prejudice to the [property owner] can be presumed where he is deprived of the use of his property by the government without justifiable cause." *Sharp*, 655 F. Supp. at 1352. And Claimants also have been "hampered . . . in presenting a defense on the merits." *Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. at 569. The delay in this case has allowed evidence to go stale and recollections to fade; for instance, the bank where Bi-County's officers made the allegedly offending deposits has seen its personnel change repeatedly over the years, and Claimants are unaware of whether anyone who is personally familiar with their banking

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(ordering property returned notwithstanding that claimant's "first assertion of right" came in motion for return of property).

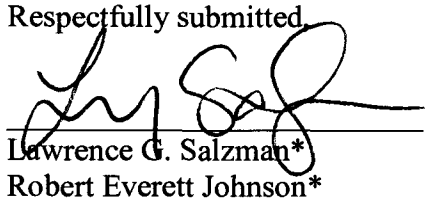
practices currently remains at the bank. *See* Hirsch Decl. ¶ 27. Indeed, even beyond such specific examples of prejudice, the Supreme Court has recognized that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett v. United States*, 505 U.S. 647, 655-56 (1992). The government must offer some justification for imposing that burden on Claimants. Because it cannot do so, any forfeiture proceeding would be barred by due process, and the property must accordingly be returned.

CONCLUSION

CAFRA and due process require the immediate return of Claimants' property. The motion for return of property should, therefore, be granted.

Dated: October 16, 2014

Respectfully submitted,



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Attorneys for Claimants

CERTIFICATE OF SERVICE

I, Lawrence G. Salzman, do hereby certify that on October 16, 2014, a true and correct copy of Claimants' Motion for Return of Property was served via process server upon the following:

Diane C. Beckmann
Assistant U.S. Attorney
610 Federal Plaza
Central Islip, New York 11722

Internal Revenue Service
Criminal Investigations
1180 Veterans Memorial Highway
Hauppauge, NY 11788

BY: _____
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EXHIBIT A

CLAIMANTS' MOTION FOR RETURN OF PROPERTY

United States District Court
EASTERN DISTRICT OF NEW YORK

RECEIVED
MAY 21 2012
Hand delivered by BE BCI

In the Matter of the Seizure of

ANY AND ALL FUNDS ON DEPOSIT IN NEW YORK COMMERCIAL BANK ACCOUNT NUMBER #130019071, LOCATED IN RONKONKOMA, NEW YORK, HELD IN THE NAME OF BI-COUNTY DISTRIBUTORS, INC., UP TO AND INCLUDING ONE MILLION FOUR HUNDRED SEVENTY-SIX THOUSAND NINE HUNDRED NINETY-TWO DOLLARS AND NO CENTS ($1,476,992.00), AND ALL PROCEEDS TRACEABLE THERETO.

SEIZURE WARRANT
Case No.

M 12-341

TO: The INTERNAL REVENUE SERVICE and any Duly Authorized Officer or Contractor of the United States:

An affidavit having been made before me by Detective Michael J. Kearns, of the Nassau County Police Department, Asset Forfeiture Unit, who has reason to believe that in the Eastern District of New York there is now certain property which is subject to forfeiture to the United States, namely:

All funds and other things of value on deposit in, or transferred to or through, the above-referenced accounts, and all proceeds traceable thereto.

I am satisfied that the affidavit establishes probable cause to believe that the property so described is subject to seizure and that grounds exist for the issuance of this seizure warrant pursuant to 31 U.S.C. § 5317 and 21 U.S.C. § 853(f).

YOU ARE HEREBY COMMANDED to seize within 10 days the property specified, by serving this warrant and making the seizure (in the daytime - 5:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established), by faxing and sending by overnight delivery a copy of the warrant to the above-captioned financial institutions and making a receipt for the property so seized and prepare a written inventory of the property seized and promptly return this warrant as required by law.

THE ABOVE-REFERENCED FINANCIAL INSTITUTIONS ARE HEREBY COMMANDED to effect the seizure of the contents of the above-referenced accounts by immediately providing to any duly authorized agent or law enforcement officer a bank or certified check made payable to the United States Department of the Treasury in the full amount of the balances in the respective above-captioned accounts and to refuse the withdrawal of any amount from said account by anyone other than duly authorized law enforcement agents, promptly provide officers or contractors of the Internal Revenue Service with the current account balances, and accrue any

deposits, interest, dividends, and any other amount credited to said accounts until the aforementioned law enforcement agents direct that the contents of said accounts be finally liquidated and withdrawn.

Date and Time Issued 5/21/14 @ 2:45pm
Central Islip, New York

Arlene R. Lindsay
United States Magistrate Judge

EXHIBIT B

CLAIMANTS' MOTION FOR RETURN OF PROPERTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In the Matter of the Seizure of FOUR HUNDRED FORTY SIX THOUSAND SIX HUNDRED FIFTY ONE DOLLARS AND ELEVEN CENTS ($446,651.11) IN U.S. CURRENCY FROM NEW YORK COMMERCIAL BANK ACCOUNT # XXXXX9071, LOCATED IN RONKONKOMA, NEW YORK, HELD IN THE NAME OF BI-COUNTY DISTRIBUTORS, INC.	Case No. _____

DECLARATION OF JEFFREY HIRSCH IN SUPPORT OF CLAIMANTS' RULE 41(g) MOTION FOR RETURN OF PROPERTY

State of New York)
Suffolk County)

I, Jeffrey Hirsch, hereby declare and state as follows:

1. I am the President of Bi-County Distributors, Inc. ("Bi-County"), a family-owned business that distributes candy, cigarettes, and other items to convenience stores on Long Island.

2. I have owned and operated Bi-County for 27 years, along with my brother Mitchell. My brother Richard joined the business approximately 23 years ago.

3. Mitchell, Richard, and I are all employed full-time by Bi-County, and it is our only significant source of income.

4. My father owned a candy and cigarette distribution business before me on Long Island in which my brothers and I sometimes worked. About 23 years ago, after my brothers and I began operating Bi-County, my father closed up his distribution business and many of his customers

moved over to Bi-County.

5. I have never been charged with any crime, and neither have my brothers or Bi-County been charged with any crime.

6. Every weekday, my brothers and I drive a delivery route to convenience stores in Nassau and Suffolk Counties of Long Island.

7. Many of our customers pay for their deliveries with cash. As a result, my brothers and I make frequent cash deposits at the bank.

8. On May 21, 2012, I learned that the government had seized the entire contents of Bi-County's bank account. The account was located at the Ronkonkoma branch of New York Commercial Bank and contained $446,651.11 at the time of seizure.

9. The money seized on May, 21, 2012, was earned in the course of Bi-County's distribution business and would have been used for payments to vendors, payroll, or other expenses connected to the business.

10. A copy of the seizure warrant and an affidavit in support of the seizure warrant were delivered by U.S. Postal Service to Bi-County's office on May 21, 2012. On that same day, I contacted the Nassau County Detective that was named in the affidavit and was told that I should get a lawyer.

11. One day after learning that the funds had been seized, I retained an attorney, Joseph Potashnik, to contest the seizure.

12. Mr. Potashnik suggested that we meet with the authorities who took the money. I agreed in the hope that, by explaining our banking practices and how we conduct business, the matter would be quickly resolved.

13. Within a few weeks of the seizure, Mr. Potashnik spoke with government officials at the

Office of the United States Attorney. Mr. Potashnik met in person with government officials to discuss the seizure on October 25, 2012. My understanding is that Assistant U.S. Attorney Diane Beckmann was present at that meeting, along with several other government officials unknown to me.

14. During the initial meeting between Mr. Potashnik and government officials, I was called by telephone to answer questions about Bi-County's business, particularly its banking practices, and to explain third-party checks that we often receive from our customers. I answered the questions asked of me to the best of my ability.

15. Soon after the initial meeting between Mr. Potashnik and government officials, I asked Bi-County's long-time CPA to prepare a written accounting report, documenting Bi-County's financial position and cash transactions. I provided this report to Mr. Potashnik, who discussed it with the U.S. Attorney's office.

16. In mid-2013, when the government had taken no action to return the money it had seized, Mr. Potashnik suggested that Bi-County hire forensic accountants to perform a forensic audit of Bi-County's cash transactions. At a cost of more than $25,000, we retained Baker Tilly to conduct an audit encompassing a period of approximately 18 months prior to the seizure. Baker Tilly concluded its audit in June 2013. Mr. Potashnik then presented the Baker Tilly report to the government.

17. Mr. Potashnik and I together met with government officials at the U.S. Attorney's office in June 2013. At that meeting, we discussed Bi-County's accounting for cash, its procedures, its customers, and its banking practices.

18. On two occasions, once in 2013, and once in 2014, Mr. Potashnik informed me that the government made verbal offers to drop this matter if we agreed to pay what I believed to be an

excessive amount. I rejected both settlement offers, as I believed, and still believe, that I have done absolutely nothing wrong.

19. Outside the meetings and settlement offers described above, I have not been contacted by the government in connection with the seizure of Bi-County's funds. The government has not given me any other indication that it is actively investigating this matter.

20. The government's seizure of $446,651.11 from Bi-County's bank account has caused serious harm to the company's operations and serious challenges for me as its president.

21. The funds taken by the government represented operating funds used to pay vendors, payroll, utility bills, rent, and other expenses.

22. In order to keep the business afloat after the money was seized, I cashed in two certificates of deposit held in the name of Bi-County in the amount of approximately $56,000.

23. Two vendors with longstanding business relationships with Bi-County also have lent significant credit to the business. If it were not for these sources of credit, the business would not have survived the loss of its operating account.

24. I speak with Bi-County's creditors nearly weekly to explain the actions that we have been taking to resolve this situation.

25. Although I had never bounced a check prior to the loss of Bi-County's bank account, I have subsequently been forced on numerous occasions to call vendors to ask them to wait to cash Bi-County's checks to avoid overdrawing our account. This has been a source of considerable embarrassment for me as a business owner.

26. The seizure of Bi-County's bank account has been a source of considerable stress for me, for my brothers, and for our families. We struggle on a regular basis with the uncertainty of not knowing whether or when the money will be returned. We worry that our vendors may lose

patience if this situation is not resolved. And we have found it to be extraordinarily stressful to have to explain to vendors, customers, friends, and relatives that we have been targeted by the federal government.

27. For approximately 10 years, Bi-County has banked at the location of what was the Ronkonkoma branch of New York Commercial Bank at the time of the seizure. That branch has changed ownership at least twice during that period, resulting in various personnel changes. Bi-County has not banked at that branch at all in the approximately two-and-a-half years since the seizure. I am unaware of whether anyone who is personally familiar with Bi-County's banking practices remains at the branch.

28. All I want out of this litigation is the recovery of my and my business's lawfully earned money and to restore Bi-County to its normal operations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14 day of October, 2014.

Jeffrey Hirsch
President, Bi-County Distributors, Inc.

EXHIBIT C

CLAIMANTS' MOTION FOR RETURN OF PROPERTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In the Matter of the Seizure of FOUR HUNDRED FORTY SIX THOUSAND SIX HUNDRED FIFTY ONE DOLLARS AND ELEVEN CENTS ($446,651.11) IN U.S. CURRENCY FROM NEW YORK COMMERCIAL BANK ACCOUNT # XXXXX9071, LOCATED IN RONKONKOMA, NEW YORK, HELD IN THE NAME OF BI-COUNTY DISTRIBUTORS, INC.	Case No. _____

DECLARATION OF JOSEPH POTASHNIK IN SUPPORT OF CLAIMANTS' RULE 41(g) MOTION FOR RETURN OF PROPERTY

State of New York)
New York County)

I, Joseph Potashnik, hereby declare and state as follows:

1. I am an attorney at the law firm of Joseph Potashnik & Associates, which is located in New York City.

2. On May 22, 2012, I was retained by Jeffrey Hirsch to represent Bi-County Distributors, Inc., and its owners in connection with the seizure of $446,651.11 by the United States Government.

3. Soon after being retained by Mr. Hirsch, I placed a phone call to the office of the United States Attorney. I arranged a meeting between me, Assistant U.S. Attorney Diane Beckmann, and other government officials at the U.S. Attorney's Office in Central Islip. During that

meeting, I requested the return of Bi-County's property and also arranged for Mr. Hirsch to speak by telephone to answer questions about Bi-County's business and banking practices.

4. In October 2012, I received a document from the U.S. Attorney's Office titled an "Agreement to Waive Rights Under the Civil Forfeiture Reform Act." A true and correct copy of that document is attached to this declaration as Attachment 1. The document constitutes an agreement to extend all applicable deadlines under the Civil Asset Forfeiture Reform Act, including the time period for the government to file a civil forfeiture complaint, until December 21, 2012. I signed and returned that document on behalf my clients.

5. Since signing the agreement noted in ¶ 4 above, I have executed no further agreements to extend any deadlines provided by the Civil Asset Forfeiture Reform Act in this case.

6. In June 2013, I presented to the government the results of a forensic audit of Bi-County's business conducted by the accounting firm Baker Tilly. On or about June 17, 2013, I met again with Assistant U.S. Attorney Beckmann and other government officials at the U.S. Attorney's office to discuss the case and request the return of my client's seized funds.

7. On two occasions, the government has made oral offers to settle the matter for amounts that my clients deemed unreasonable and unjust. These settlement offers were made orally over the telephone in 2013 and 2014. My clients rejected both offers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of October, 2014.

Joseph Potashnik

EXHIBIT C –

ATTACHMENT 1

CLAIMANTS' MOTION FOR RETURN OF PROPERTY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

In re the Seizure of:

ANY AND ALL FUNDS ON DEPOSIT IN NEW YORK COMMERCIAL BANK ACCOUNT NUMBER #130019071, LOCATED IN RONKONKOMA, NEW YORK, HELD IN THE NAME OF BI-COUNTY DISTRIBUTORS, INC., UP TO AND INCLUDING ONE MILLION FOUR HUNDRED SEVENTY-SIX THOUSAND NINE HUNDRED NINETY-TWO DOLLARS AND NO CENTS ($1,476,992.00), AND ALL PROCEEDS TRACEABLE THERETO,

Agreement to Waive Rights Under the Civil Asset Forfeiture Reform Act (ACAFRA@), 18 U.S.C. § 983

----------X

I, Joseph Potashnik, attorney for Bi-County Distributors, Inc. (the AClaimant@), claimant to the above-referenced property, which was seized from the Claimant on or about May 21, 2012 hereby agree to extend the time period for the government to file a civil forfeiture complaint pursuant to the provisions of 18 U.S.C. ' 983(a) for 60 days, until December 21, 2012. I am duly authorized to represent the Claimant and to execute this waiver as its counsel. I agree that all applicable deadlines, including but not limited to the time period for the government to file a civil forfeiture complaint pursuant to the provisions of 18 U.S.C. ' 983(a) and all other CAFRA deadlines, will begin to run again at the conclusion of the time period specified above.

Dated: New York, New York
October 5, 2012

By: _____

Joseph Potashnik, Esq.
Joseph Potashnik and Associates, PLLC
111 Broadway, Suite 1305
New York, New York 10006