IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

VOCATURA'S BAKERY, INC.,

*Plaintiff*,

v.

INTERNAL REVENUE SERVICE,

JOHN KOSKINEN, COMMISSIONER OF INTERNAL REVENUE,

LORETTA LYNCH, ATTORNEY GENERAL OF THE UNITED STATES,

UNITED STATES OF AMERICA,

*Defendants*.

Case No. _____

May 24, 2016

**MEMORANDUM IN SUPPORT OF MOTION FOR RETURN OF PROPERTY UNDER RULE 41(g)**

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*Applications for Admission *Pro Hac Vice* to be filed forthwith.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Constitutional Provisions**



**Codes and Statutes**

**Rules**

Pursuant to Federal Rule of Criminal Procedure 41(g) and 18 U.S.C. § 983(a)(3)(B), Plaintiff Vocatura's Bakery, Inc. ("Vocatura's Bakery" or "the bakery") submits the following memorandum in support of its motion for the return of $68,382.22 seized on May 1, 2013. 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)).

Vocatura's Bakery is a small family business located in Norwich, Connecticut. The bakery was founded in 1919, and several generations of the Vocatura family have grown up at the bakery. The current generation of Vocaturas works around the clock to keep the business going: Family members bake bread in the middle of the night, drive delivery trucks in the morning, and oversee the retail store throughout the day.

On May 1, 2013, the Internal Revenue Service seized the entire contents of the bakery's bank account. The funds seized by the IRS are the lawful earnings of the bakery's legitimate business. The IRS initially sought to justify its seizure under so-called "structuring" laws, which make it a crime to deposit cash in the bank in amounts of $10,000 or less with a specific intent to evade federal bank reporting requirements. In the more than three years since the seizure, however, neither Vocatura's Bakery nor anyone associated with the bakery has been charged with structuring or any other crime. At this point, for reasons explained below, any attempt to prosecute the Vocaturas under the structuring laws would violate IRS and DOJ policies limiting enforcement of the structuring laws to cases where the pattern of bank deposits was intended to conceal some *other* illegal activity. No such allegation has been made in this case. In the three years that the government has held the Vocaturas' money, the government has not made any effort to prove its allegation of structuring in a court of law.

Instead of initiating a legal case, federal prosecutors have spent three years aggressively pressuring the Vocaturas to agree to the "voluntary" forfeiture of their funds. Most recently, in February 2016, the government presented two of the Vocatura brothers with proposed plea agreements under which they would have pleaded guilty to criminal charges of structuring and consented to forfeiture of the bakery's approximately $68,000 as well as approximately $160,000 in personal assets—and also faced three to four years in prison. The Vocaturas rejected that plea, as they believe they have done nothing wrong. Shortly thereafter, rather than seeking an indictment on criminal structuring charges, the government retaliated by serving Vocatura's Bakery with an incredibly broad and far-reaching grand jury subpoena seeking *eight years* of financial records—a burdensome and expensive fishing expedition into every aspect of the bakery's finances.

The law is clear that, three years after the seizure of the bakery's funds, the money must be returned. The government is not entitled to hold the bakery's money indefinitely while it searches for some basis that could possibly justify the seizure. The government has blown far past the mandatory 90-day deadline established by the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 18 U.S.C. § 983(a)(3)(A), for initiating forfeiture proceedings. Congress has established a clear remedy for that failure: the property must be returned. *See* 18 U.S.C. § 983(a)(3)(B). 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 the bakery's constitutional right to due process of law. Vocatura's Bakery respectfully requests an order from this Court directing the United States to immediately return the money it has seized.

## BACKGROUND

### A. Plaintiff's Business

Vocatura's Bakery is a family business founded in 1919 and located in Norwich, Connecticut. *See* Declaration of David Vocatura in Support of Motion for Return of Property Under Rule 41(g) ("Vocatura Decl.") ¶¶ 2-3. The current generation of Vocaturas—David, Larry, Richard, and Frankie—grew up in the bakery. *Id.* ¶ 3. As children, they would crawl into the industrial sized oven (when not in use) and ride on the baking trays as they circulated like the cars of a carousel. *Id.* Today, David and Richard run the front of the store, Larry does the baking, and Frankie bakes bread and drives a delivery truck. *Id.* ¶ 2. The bakery is a fixture in the community and wins awards for its grinder sandwiches and outstanding white pizza. *Id.* ¶ 5. The bakery provides bread to local schools, as well as other pizza houses and restaurants. *Id.*

For almost its entire history, the bakery's retail store operated primarily as a cash business. *Id.* ¶ 6. The Vocaturas place cash receipts in a safe located on the premises of the bakery and make a weekly trip to the bank to deposit the week's earnings. *Id.* ¶ 7. The deposited funds consist entirely of the bakery's lawfully earned cash receipts. *Id.* There has been no allegation that the funds seized by the government are the proceeds of any illegal activity. Indeed, there can be no such allegation. Throughout almost a century in business, Vocatura's Bakery has made its money lawfully, selling freshly made bread, sandwiches, grinders, and pizza that the Vocatura family makes by hand. *Id.* ¶¶ 3-7.

### B. Federal Banking Regulations

Federal law requires 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 of $10,000 or less "for the purpose of evading" federal currency reporting requirements. *See id.* § 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 id.* § 5317.

These laws were intended to target drug dealers, money launderers, and hardened criminals, but overly aggressive federal prosecutors have sought to apply them to small business owners accused of nothing more than doing business in cash. In October 2014, *The New York Times* reported on two such cases involving Carole Hinders, an elderly restaurant owner in small-town Iowa, and Jeff, Richard, and Mitchell Hirsch, three brothers in the convenience-store distribution business on Long Island. *See* Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times, Oct. 25, 2014, at A1. In both of those cases, the government seized the business's entire bank account, only to back down months or years later and return all the money it had seized.[1]

Notably, federal anti-structuring laws do not criminalize every cash transaction of $10,000 or less. Structuring is a crime only if a person engages in cash transactions of $10,000 or less with the *specific intent* to evade currency reporting requirements. *See United States v.*

[1] Other small business owners targeted under the structuring laws include Terry Dekho, a grocery store owner in Michigan; Mark Zaniewski, the proprietor of a gas station also located in Michigan; and Lyndon McLellan, the owner of a North Carolina convenience store. *See* Institute for Justice, Taken: Federal Lawsuit In Michigan Challenges Forfeiture Abuse, http://www.ij.org/michigan-civil-forfeiture-background (last visited May 16, 2016); Institute for Justice, Government Unreformed: IRS Seizes $107,000 From Innocent Small Business, Despite Recent Policy Changes Meant To Prevent Exactly This Kind Of Case, http://ij.org/case/north-carolina-forfeiture/ (last visited May 16, 2016). The Institute for Justice, which represents Vocatura's Bakery here, has also represented all these property owners.

*MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005). A person who makes deposits of $10,000 or less for a legitimate business purpose is not guilty of any crime.[2]

**C. The Seizure and Further Proceedings**

On May 1, 2013—over three years ago—the IRS seized the entire contents of the bakery's bank account. *See* Vocatura Decl. Exs. A, B. Following the seizure, a group of armed IRS agents visited the bakery and began asking a number of outlandish questions about implausible criminal conduct. Vocatura Decl. ¶¶ 8-9. At the conclusion of the interview, the IRS notified the Vocaturas that all of the funds in the bakery's bank account had been seized. *Id.* ¶ 11. The IRS sent Vocatura's Bakery notice of administrative forfeiture proceedings on June 12, 2013, Vocatura Decl. Ex. B, and Vocatura's Bakery filed a claim with the agency on July 8, 2013 to avoid the automatic forfeiture of their funds. Vocatura Decl. Ex. C. Through their attorneys, the Vocaturas provided significant financial information to the federal prosecutor in an attempt to resolve the case. Vocatura Decl. ¶ 17.

Subsequent to those events, as seizures under the structuring laws generated significant public attention and outrage, the government announced a change of policy intended to rein in enforcement of the structuring laws. In October 2014, the IRS announced that, absent "exceptional circumstances," it would henceforth limit application of the structuring laws to "illegal-source" cases, meaning cases where the money involved in the structured transaction was derived from illegal activity. *See* Exhibit A to Declaration of Ross H. Garber in Support of

[2] *See, e.g.*, *United States v. $255,427.15 in United States Currency*, 841 F. Supp. 2d 1350, 1356-60 (S.D. Ga. 2012) (denying government's motion for summary judgment despite 286 cash transactions of $9,000 by owner of convenience store because the court could not conclude from mere pattern of transactions that store owner knew about and was trying to avoid Treasury reporting); *United States v. $79,650.00 Seized From Bank of Am. Account*, No. 1:08-cv-01233, 2010 WL 1286037, at *4-5 (E.D. Va. Mar. 29, 2010) (denying summary judgment to government because, although claimant admitted knowing that the bank had to fill out a form if he deposited more than $10,000, he did not know it was a government form).

Motion for Return of Property Under Rule 41(g) ("Garber Decl."). DOJ announced a similar policy change in March 2015. *See* Garber Decl. Ex. B.

Around the time of these policy changes, it appeared that government prosecutors had lost interest in pursuing a structuring case against the Vocaturas. The Vocaturas heard nothing from the government for about a year. Vocatura Decl. ¶ 18. But, then, in February 2016, federal prosecutors contacted the Vocaturas and proposed criminal plea agreements. *Id.* ¶¶ 19-20. Under the proposed plea agreements, David and Larry Vocatura would have pleaded guilty to charges of structuring the bakery's bank deposits; waived their right to a grand jury indictment; stipulated to a Guidelines sentencing range of 37 to 46 months and a fine range of $15,000 to $150,000; consented to the forfeiture of the approximately $68,000 seized from the bakery's bank account; consented to the forfeiture of an additional approximately $160,000 in personal assets; and waived any right to make a constitutional challenge to the forfeiture. *See* Vocatura Decl. Exs. D & E. David and Larry rejected these plea agreements, as they believe they have done nothing wrong.[3] Vocatura Decl. ¶ 21.

In retaliation for David and Larry's refusal to agree to forfeiture of the bakery's funds, on May 10, 2016, the government did *not* seek to proceed with criminal structuring charges and instead served the Vocaturas with an extraordinarily overbroad grand jury subpoena. *See* Vocatura Decl. ¶¶ 22-24, Ex. F. The subpoena heralds an unbounded fishing expedition into the bakery's business, seeking some retroactive justification for the seizure of the bakery's funds. It

[3] Notably, the proceeds of 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); *United States v. Funds Held in the Name or for the Benefit of Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) ("[T]he agency that conceives the jurisdiction and ground for seizures, and executes them, also absorbs their proceeds.").

demands *eight years* of practically every record generated by the bakery, including "[a]ll books, general ledgers, records, bank statements, canceled checks, deposit tickets, work-papers, financial statements, correspondence, Forms W-2's and Forms 1099's issued, payroll records for any and all employees, list of employees with addresses and contact information, records of suppliers and distributers, cash receipts journals, cash disbursement journals, and other pertinent documents," "[a]ll records, books of account, and other documents or papers relative to financial transactions," and "[a]ll invoices, receipts, sales slips, and billing records for [the bakery's] clients/customers, including . . . all correspondence with this client/customer." *Id.*

**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 Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992) ("[W]here no criminal proceedings against the movant are pending or have transpired, a motion for return of property is treated as a civil equitable proceeding.") (quotation marks and alterations omitted); *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."). The availability of this procedural mechanism ensures that the government may not hold seized property indefinitely without commencing judicial proceedings. *See, e.g.*, *United States v. Kramer*, No. 1:06-cr-200, 2006 WL 3545026, at *3-4 (E.D.N.Y. Dec. 8, 2006) (granting Rule 41(g) motion on the ground that the government did not comply with deadlines set by Section 983(a)(3)(B)); *Application of*

*Mayo*, 810 F. Supp. 121, 125 (D. Vt. 1992) ("In the absence of a properly commenced forfeiture proceeding, this Court now orders the return of the seized property.").

Given the amount of time that has elapsed since the government seized the bakery's funds, the government's continued possession of the funds violates not only the timelines established by 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). Congress also was quite clear about the appropriate remedy if the government failed to comply with the statutory deadlines: "[T]he Government *shall* promptly release the property." 18 U.S.C. § 983(a)(3)(B)(ii) (emphasis added). Under CAFRA, there can be no question about the proper resolution of this case. The government has not complied with the deadlines established by Congress, and thus must be ordered to return the bakery's money.

CAFRA carefully sets forth a series of deadlines that apply to both civil and criminal forfeiture proceedings. Following a seizure, the government has 60 days to either send "written notice to interested parties" of a "nonjudicial civil forfeiture proceeding," commence "a civil judicial forfeiture action," or "obtain a criminal indictment containing an allegation that the property is subject to forfeiture." 18 U.S.C. § 983(a)(1). The government complied with this first deadline on June 12, 2013 by sending notice of administrative forfeiture proceedings, thereby triggering a 30-day deadline for Vocatura's Bakery to file an administrative claim. *See* Vocatura Decl. Ex. B. Vocatura's Bakery filed a timely claim for the money, thus avoiding automatic

forfeiture of the property. *See* Vocatura Decl. ¶ 16, Ex. C. This, in turn, triggered a 90-day deadline for the government to either "file a complaint for forfeiture" *or* "obtain a criminal indictment containing an allegation that the property is subject to forfeiture" and "take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute." 18 U.S.C. § 983(a)(3)(B). If the government allows the 90-day period to lapse without either commencing civil or criminal forfeiture proceedings, CAFRA provides that "the Government *shall* promptly release the property." *Id.* (emphasis added).[4]

In this case, the government has long since passed that 90-day deadline without taking any action to commence civil or criminal forfeiture proceedings. The 90-day deadline for the government to commence forfeiture proceedings expired on October 6, 2013—over two-and-a-half years ago. Yet the government has continued to hold the bakery's property and, rather than initiate legal proceedings, has sought to persuade the Vocaturas to agree to the "voluntary" forfeiture of their funds.[5]

The remedy for the government's extraordinary course of conduct is plainly spelled out by Congress in CAFRA and should be ordered without delay: "[T]he Government shall promptly release the property." 18 U.S.C. § 983(a)(3)(B). So, for instance, the court in *United States v. Funds from Fifth Third Bank Account* ordered the return of seized property where the

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[4] *See, e.g.*, *In the Matter of 2000 White Mercedes ML 320 Five-Door SUV*, 174 F. Supp. 2d 1268, 1269 (M.D. Fla. 2001) ("In order to avoid releasing the property, within ninety days from the filing of the claim, the government must either file a civil forfeiture complaint or obtain a criminal indictment naming the property as subject to forfeiture.").

[5] The government's delay violates Department of Justice policies, in addition to Congress's statutory command. The policy memorandum issued in March 2015 provides that, "[w]ithin 150 days of seizure based on structuring," "a prosecutor must either file a criminal indictment or a civil complaint against the asset." Garber Decl. Ex. B at 3. This 150-day deadline may be extended only by the United States Attorney. *Id.* Barring special approval from the United States Attorney, "the prosecutor *must* direct the seizing agency to return the full amount of the seized money to the person from whom it was seized." *Id.* (emphasis added).

government commenced a civil forfeiture proceeding just one day after the expiration of the 90-day deadline. No. 13-11728, 2013 WL 5914101, at *7 (E.D. Mich. Nov. 4, 2013); *see also United States v. $80,891.25 in U.S. Currency*, No. 4:11-cv-183, 2011 WL 6400420, at *1 (S.D. Ga. Dec. 19, 2011) (same, but filing was two days late). Indeed, in *Kramer*, the court invoked section 983(a)(3)(B) even where the government *had* obtained a criminal indictment against the property owner, on the ground that the government had failed to take *other* steps required to satisfy the 90-day deadline—including obtaining a criminal (as opposed to civil) seizure warrant. 2006 WL 3545026, at *3; *see also United States v. Numisgroup Int'l Corp.*, 128 F. Supp. 2d 136, 146 (E.D.N.Y. 2000) (ordering return of property lacking evidentiary value, following criminal indictment, because government failed to allege in indictment that the property was subject to criminal forfeiture).

Here, where the government has threatened criminal forfeiture but has not even taken the initial step of obtaining an indictment—and, indeed, has not taken *any* formal legal action against the Vocaturas or Vocatura's Bakery apart from the issuance (over three years after the seizure) of a grand jury subpoena—the government's obligation to return the property is all the more clear. On this basis alone, the Motion for Return of Property should be granted.

**B. Return of The Bakery's Funds Is Also Required by Due Process.**

The government's delay in this case does not merely run afoul of CAFRA, but also violates the bakery's 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). *See also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (due process entitles a property owner to a hearing "at

a meaningful time").[6] 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 process requirement of fairness has been satisfied." *Id.* at 565. Of all the factors, "the overarching factor is the length of the delay." *Id.* 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) (13-month delay); *United States v. $19,440.00 in U.S. Currency*, 829 F. Supp. 303, 305, 308 (D. Alaska 1993) (33-month delay); *United States*

[6] Vocatura's Bakery also reserves the argument that, should the funds not be immediately returned, due process separately guarantees the right to a prompt hearing to contest the government's continued retention of the money during the pendency of any forfeiture action. *See, e.g., Krimstock v. Kelly*, 306 F.3d 40, 69 (2d Cir. 2002) (Sotomayor, J.) (holding that property owners "must be given an opportunity to test the probable validity of the [government's] deprivation of their [property] *pendente lite*"). At this time, however, discussion of that question would be premature.

*v. Sharp*, 655 F. Supp. 1348, 1352 (W.D. Mo. 1987) (23-month delay).[7] 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 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). Over thirty-six months have elapsed since the government seized the money belonging to Vocatura's Bakery. Courts have found violations of due process based on substantially shorter periods of delay. *See, e.g., United States v. One Motor Yacht Named Mercury*, 527 F.2d 1112, 1113-14 (1st Cir. 1975) (12 months); *United States v. One (1)1984 Nissan 300 ZX*, 711 F. Supp. 1570, 1572-74 (N.D. Ga. 1989) (18 months). Indeed, in this case, the Vocaturas went approximately sixteen months without hearing *anything* from the government—only to have that lengthy period of silence broken by a sudden demand to enter a guilty plea. Vocatura Decl. ¶¶ 18-19. The government is not entitled to hold property for years while searching for some retroactive justification to uphold a property seizure.

The second factor—the lack of any apparent explanation for the delay—also weighs heavily in favor of Vocatura's Bakery. 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).[8] Thus, where courts have approved lengthy delays

[7] Notably, all these cases predate Congress's enactment of a statutory deadline for forfeiture actions. When Congress set a statutory deadline in CAFRA, 18 U.S.C. § 983, it provided that a forfeiture action would have to be filed at most 180 days following the seizure. Congress's judgment that 180 days provides a sufficient amount of time for prosecutors to commence forfeiture proceedings following a seizure surely is relevant to the due process analysis in this case, where the government has held the property for over 1,110 days.

[8] *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

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. Here, there can be no explanation for the government's delay. Any investigation by the government has been half-hearted at best, consisting only of the initial raid on the business and some subsequent requests for financial information. Three years ago, when the bakery's funds were originally seized, all of the members of the family voluntarily cooperated with the government's investigation, expecting the government to act expeditiously and in good faith. They produced voluminous financial documentation to the government and they submitted to extensive, lengthy interviews with law enforcement agents. But it was only after the government failed in its efforts to convince the Vocaturas to plead guilty and relinquish any claims to their funds that the government issued a grand jury subpoena in this case, more than *three years* after the seizure, seeking all of the bakery's financial records for an eight-year period. If such an unfocused fishing expedition is the best the government can do three years after the seizure, the government can hardly be heard to suggest that it has been diligently pursuing the case. To be sure, the government has used this time to pressure the Vocaturas to agree to "voluntary" forfeiture of the funds, but an effort to pressure property owners to plead guilty to criminal charges in the absence of a grand jury indictment cannot possibly be accepted as a valid justification for delay in initiating forfeiture proceedings.

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the delay."); *One (1) 1984 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).

The third factor in the test—the steps Plaintiff has taken to secure return of the property—likewise weighs in favor of Vocatura's Bakery.[9] The Vocaturas have worked diligently to secure the return of their property, including by filing a claim for the property, retaining counsel to negotiate with the government, and promptly contacting the government in an effort to resolve the case. Vocatura Decl. ¶¶ 14, 16-17. When the government requested financial information from the Vocaturas—including information about their personal net worth, assets and liabilities, and monthly cash flow—the Vocaturas voluntarily complied with that request. *Id.* ¶ 17. The only thing the Vocaturas have not done is agree to the plea deal proposed by the government, which would not only involve pleading guilty to felony structuring charges and paying substantial fines, but would also require them to forfeit the seized property.

Finally, the prejudice to Vocatura's Bakery from the deprivation of the 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. Vocatura's Bakery has been deprived of over $68,000 in operating funds for over three years; if the Vocaturas had not had other funds in savings, the bakery might well have been forced out of business by the seizure. Vocatura Decl. ¶ 13. And the bakery also has 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

[9] This factor is entitled to less weight in the analysis than the length of the government's delay and purported justifications for such delay. *See, e.g., Sharp*, 655 F. Supp. at 1352 (ordering property returned notwithstanding that claimant's "first assertion of right" came in motion for return of property).

recollections to fade; for instance, the longtime accountant for Vocatura's Bakery passed away during the three years following the seizure, compromising their ability to explain the business's finances to the government. *See* Vocatura Decl. ¶ 25. Also, the bank where the bakery made the allegedly offending deposits has seen its personnel change repeatedly over the years, and it is increasingly likely that the employees whom the Vocaturas interacted with no longer work at the bank. *Id.* There is also an increasing risk that important documents will be lost or misplaced over the years. 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 (1992). The government must offer some justification—apart from a desire to exert pressure to obtain a voluntary forfeiture—for imposing that burden on the bakery. Because it cannot do so, any forfeiture proceeding would be barred by due process and the property must be returned.

## CONCLUSION

Both the provisions of CAFRA and the Due Process Clause of the Fifth Amendment to the U.S. Constitution require the immediate return of the $68,382.22 seized from Vocatura's Bakery. The accompanying motion for return of property should, therefore, be granted.

Dated: May 24, 2016

Respectfully submitted,

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*Applications for Admission *Pro Hac Vice* to be filed forthwith.

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