

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ARLENE HARJO,

Plaintiff,

vs.

CIVIL NO. 1:16-cv-01113-JB-WPL

CITY OF ALBUQUERQUE,

Defendant.

JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN

Pursuant to FED. R. CIV. P. 26(f), a telephonic conference meeting was held by the parties on October 27, 2016, at 9:00 a.m. and was attended by:

- Robert Frommer and Arash Kashanian for Plaintiff.
- Kyle Hibner and Philomena Hausler and Eric Locher for Defendant City of Albuquerque (the “City”). Note: Eric Locher joined the conference at approximately 9:10 a.m. while it was in progress and left at 9:45 a.m. before it concluded.

NATURE OF THE CASE

Plaintiff Arlene Harjo filed this action in the Second Judicial District Court for the State of New Mexico on August 31, 2016, in order to challenge the legality of the City of Albuquerque’s civil forfeiture program. Arlene is the target of a civil forfeiture case that is currently pending in state court, in which the City is seeking to forfeit Arlene’s 2014 Nissan Versa because her son borrowed the car and then allegedly drove drunk. *See City of Albuquerque v. One (1) 2014 Nissan 4DR Silver*, No. D-202-CV-2016-03614 (N.M. 2d Dist.). Arlene is contesting that forfeiture action. At the same time, Arlene filed the instant case to seek relief

beyond the mere return of her car. Arlene raised her claims both by filing the instant case and by filing identical counterclaims in the civil forfeiture action, as courts disagree about whether a property owner can raise a counterclaim in a civil forfeiture case. *See, e.g., United States v. Eight Luxury Vehicles*, 88 F. Supp. 3d 1332 (M.D. Fla. 2015) (summarizing case law and holding counterclaims are not permitted). Arlene filed this case in the same court where the civil forfeiture action is pending, but the City removed to federal court on October 7, 2016.

Arlene's Complaint raises two federal-law claims under 42 U.S.C. § 1983 and one state-law claim. **First**, Arlene contends that the City's civil forfeiture program violates the Fourteenth Amendment because forfeiture proceeds go to fund the budget of the forfeiture program and even pay the salaries of forfeiture personnel, thereby creating an unlawful financial incentive to seize and forfeit property. Compl. ¶¶ 78-84 (Count II). **Second**, Arlene contends that the procedures employed by the City's civil forfeiture program fail to comport with due process. *Id.* ¶¶ 85-90 (Count III). **Third**, and finally, Arlene contends that the City's civil forfeiture program is contrary to state forfeiture law. *Id.* ¶¶ 72-77 (Count I). As a remedy for these alleged violations, Arlene seeks declaratory and injunctive relief barring the continued operation of the City's forfeiture program, compensation for any damage to her vehicle while in the City's possession, refund of the \$50 hearing fee charged by the City in the course of her forfeiture proceedings, and \$1 in nominal damages. *Id.* ¶¶ A-H.

AMENDMENTS TO PLEADINGS AND JOINDER OF PARTIES

Plaintiff does not intend to file any amendment to her pleadings at this time.

- Plaintiff asks that she be allowed until July 31, 2017 to move to amend the pleadings and join additional parties in compliance with the requirements of FRCP 15(a).
- The City asks that the deadline for Plaintiff to move to amend her pleading and join additional parties be set at January 21, 2017. *See* Exceptions.

Defendant does not intend to file any amendment to its pleadings at this time.

- Plaintiff proposes that the City should be allowed until July 31, 2017 to move to amend the pleadings and join additional parties in compliance with the requirements of FRCP 15(a).
- The City asks that the deadline for the City to move to amend its pleading and join additional parties be set at February 21, 2017.

STIPULATIONS

Jurisdiction and Venue:

The parties hereto stipulate and agree that venue is properly laid in this District and that the United States District Court for the District of New Mexico has jurisdiction of the parties. The parties also stipulate that the Court has subject matter jurisdiction. However the City's stipulation on this last point is subject to the caveats on exhaustion of administrative remedies and justiciability noted below in the City's Contentions. More specifically, the City asserts that Plaintiff has not exhausted her administrative remedies to the claim for a taking¹ in Count II or the claim for deprivation of procedural due process in Count III and/or that Counts II and III are

¹ Plaintiff disputes the City's characterization of Count II as a "taking" claim.

not justiciable because they are not ripe. To the extent these deficiencies affect subject matter jurisdiction, the City does *not* stipulate that the Court has jurisdiction over the claims asserted in Counts II or III.

Facts:

The Plaintiff asserts that the City has stipulated to the following facts by admitting them in its Answers. Although the City admitted the following facts in its Amended Answer [Doc. No. 17], the City is not willing to stipulate that all of these facts are necessarily material to the parties' claim or defenses:

1. Plaintiff Arlene Harjo is a resident of Albuquerque, New Mexico.
2. Defendant City of Albuquerque is a municipal corporation organized under the laws of the State of New Mexico.
3. The City of Albuquerque operates a vehicle forfeiture program pursuant to City of Albuquerque Code §§7-6-1 *et seq.*
4. Albuquerque's forfeiture program generates revenue both through auctions of forfeited vehicles and through settlement agreements whereby property owners agree to make monetary payments to avoid the forfeiture of their vehicles.
5. Albuquerque's vehicle forfeiture program collected approximately \$8.7 million in revenue between 2010 and 2014.
6. Albuquerque's vehicle forfeiture program seized 1,232 vehicles and received proceeds of \$1,124,079 between July 1, 2014 and June 30, 2015.
7. The City of Albuquerque dedicates proceeds of its vehicle forfeiture program to offset program costs.

8. Revenue generated by Albuquerque's forfeiture program is returned to the program's budget, including to pay the salaries of city attorneys who prosecute forfeitures under the program.
9. The City of Albuquerque plans for vehicle forfeitures in its annual budget.
10. The City specifically plans for salaries to be paid out of the proceeds of vehicle forfeitures.
11. The City's 2016 budget anticipates that \$512,000 will be transferred from the fund that receives vehicle forfeiture revenues to pay the salaries of "two paralegals, two attorneys, two DWI seizure assistants and one DWI seizure coordinator."
12. In 2015, the City of Albuquerque approved \$2.5 million in new bonds to purchase a larger parking lot to hold all the cars the City expects to seize.
13. The cover analysis for the City Council bill approving \$2.5 million in new bonds to purchase a larger parking lot states that the "revenue source to pay the bonds will be revenues generated by the DWI Seizure program."
14. The City of Albuquerque seized a 2014 Nissan Versa registered to Plaintiff Arlene Harjo.
15. The City of Albuquerque is currently attempting to have the 2014 Nissan Versa registered to Arlene Harjo declared forfeited to the City.
16. The City of Albuquerque makes offers of settlement prior to an administrative hearing in the form of a temporary immobilization or release agreement. Immobilization agreements range from a period of weeks or months and range from hundreds to thousands of dollars.

17. An Assistant City Attorney offered Plaintiff Harjo a settlement agreement regarding the 2014 Nissan Versa registered in her name.
18. Arlene Harjo requested an administrative hearing pursuant to Albuquerque Code § 7-6-5(D).
19. Plaintiff Arlene Harjo received a hearing before Chief Hearing Officer Stanley Harada.
20. Stanley Harada was a former Assistant City Attorney during the early stages of Albuquerque's vehicle forfeiture program.
21. Hearing officers are selected by the mayor, can be either employees or individuals hired on a contract basis, and are paid by the City of Albuquerque.
22. At the administrative hearing, the City of Albuquerque called the officer who arrested Tino Harjo for drunk driving as a witness, but called no other witnesses.
23. At the administrative hearing, Plaintiff Arlene Harjo told Chief Hearing Officer Harada that the car was in her name and that she had no reason to think that Tino would drink and drive.
24. Chief Hearing Officer Harada told Plaintiff Harjo that the "point" of the forfeiture proceedings was to tell her, "don't trust [Tino] until he starts showing you he can be trusted."
25. Plaintiff Harjo told Harada that she believed she could trust Tino when she lent him the car, as so many years had gone by without incident, and Harada cut her off to say: "well, your trust was misplaced."
26. Chief Hearing Officer Harada faulted Plaintiff Harjo for not "communicating" with Tino because she did not know he was planning to go to Clovis. Plaintiff Harjo informed

Harada that she had in fact asked Tino where he was going but Tino had lied. At that point, Harada abandoned the theme of communication and told Plaintiff Harjo: “well, that means you shouldn’t trust him.”

Governing Law:

The parties further stipulate and agree that the law governing this case is:

- United States Constitution, Fourteenth Amendment
- 2015 NM H.B. 560 (codified at NMSA § 31-27-2 *et seq.*)
- 42 U.S.C. § 1983
- City of Albuquerque Code §§ 7-6-1 *et seq.*
- City of Albuquerque Code §§ 7-9-1 *et seq.*
- City of Albuquerque Code §§ 7-14-1 *et seq.*

PLAINTIFF’S CONTENTIONS

Plaintiff Arlene Harjo contends that the City of Albuquerque’s vehicle forfeiture program is both illegal and unconstitutional. For the last seven months, the City actively sought to take Arlene’s 2014 Nissan Versa using civil forfeiture. Arlene was not accused of any crime. Instead, the City sought to take Arlene’s car using civil forfeiture because *her son* borrowed the car and allegedly drove drunk. If the City succeeded in taking Arlene’s car, proceeds from the sale of the car would have gone to fund the City’s forfeiture program—and even to pay the salaries of the officials who were responsible for pursuing the forfeiture of the car. Arlene has raised two federal-law challenges and one state-law challenge to this municipal scheme.

In a late-breaking development, the City notified Arlene at close of business on the last business day before the deadline to file this Report that the City has determined that Arlene’s car

was located outside the city limits at the time that it was seized. Because the City admits it lacked jurisdiction to forfeit the car, it has agreed to return the car and terminate its forfeiture proceeding.² This stunning development underscores Arlene's due process challenge to the City's scheme: Arlene claims that the City's forfeiture ordinance is unconstitutional because it gives police and prosecutors a financial incentive to seek forfeitures where they would not otherwise, *see infra*, and that concern is vividly illustrated by the fact that city officials now concede they reached outside their jurisdiction to take Arlene's car.

The City claims (*infra*) that this development renders Arlene's case moot. But, at a minimum, Arlene remains entitled to nominal damages for the violation of her constitutional rights. *See, e.g. Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257–58 (10th Cir. 2004); *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1526–27 (10th Cir. 1992). In addition, Arlene is seeking limited compensatory damages as a remedy for both her state and federal claims. If necessary, Arlene may seek leave to amend her complaint to add additional limited items of compensatory damages. Arlene is not trying to get rich—and does not plan to seek the full measure of damages potentially available under the law—but she is entitled to be made whole. These claims for damages mean the case is not moot.³

The following discussion begins with a brief synopsis of the procedural posture of the case. The discussion then summarizes each of Arlene's claims on the merits.

² Arlene has not been provided with a copy of this video and therefore has not had an opportunity to verify the truth of the City's assertions.

³ The City also suggests that Arlene's federal claims are not yet ripe because its forfeiture case is still ongoing. The City's late-breaking decision to dismiss its forfeiture complaint seems to obviate that concern. But, regardless, this argument mistakes the nature of Arlene's injury. Arlene's constitutional rights were violated—and her claim became ripe—the instant she was subjected to the City's unconstitutional procedures. *See Schanzenbach v. Town of La Barge*, 706 F.3d 1277, 1283 (10th Cir. 2013).

The City has drafted 13 pages of “contentions,” which read in parts like a motion to dismiss. *See infra*. At this stage of the case, however, a motion to dismiss is no longer timely. *See* F.R.C.P. 12(b) (“A motion asserting any of these defenses must be made before pleading.”). Plaintiff has endeavored to respond briefly to the City’s contentions and stands ready to respond in greater detail if these arguments are raised in a timely motion.

Procedural Posture

Arlene filed this case, when she was also litigating a civil forfeiture action in state court, because this case seeks relief that may not be available in the civil forfeiture action. Specifically, Arlene seeks declaratory and injunctive relief that would extend beyond her case to the City’s *entire* program, and Arlene also seeks nominal damages and some minor items of compensatory damages. Courts disagree about whether claimants in civil forfeiture cases can seek this kind of relief by filing counterclaims. *Compare United States v. Eight Luxury Vehicles*, 88 F. Supp. 3d 1332 (M.D. Fla. 2015) (no), *with State ex rel. Cty. of Cumberland v. One 1990 Ford Thunderbird*, 371 N.J. Super. 228, 236–37, 852 A.2d 1114, 1119 (App. Div. 2004) (yes). In view of that uncertainty, Arlene raised her claims both by filing counterclaims in the civil forfeiture action and by filing this action.

Notably, Arlene filed her Complaint in the same state court where the forfeiture action is pending. This was emphatically *not*, therefore, an attempt by a civil forfeiture claimant to mount a federal collateral attack on an ongoing state proceeding. It was the City—not Arlene—that invoked this Court’s jurisdiction.⁴ While this case might have raised questions of federalism and

⁴ The City filed a motion to excuse the first state court judge assigned to the case on October 4, 2016, and a second state court judge was assigned to the case on October 5, 2016. The City filed its notice of removal on October 7, 2016.

comity if Arlene had filed it in this Court in the first instance, those questions melt away where (as here) the government itself invoked the Court's jurisdiction. *See ACORN v. Municipality of Golden*, 744 F.2d 739, 742 n.2 (10th Cir. 1984) (city "voluntarily submitted to a federal forum" and thus "waiv[ed] the protection that 'Our Federalism' would otherwise confer" (citing Wright & Miller, *Federal Practice and Procedure* § 4252 (1978))). As the City prefers to have Arlene's federal claims decided in a federal forum, and Arlene does not object, Arlene's federal claims should move forward to discovery and an eventual decision on the merits.

While neither party disputes that the Court has jurisdiction over Arlene's pendent state-law claim, the City suggests that the state-law claim should be remanded to state court in the interest of "comity." Arlene is ready and willing to litigate her state-law claims in either forum, but Arlene does not object to a partial remand of her state-law claim.

Lastly, the City argues that Kirtland Federal Union is a necessary party because it has a security interest in Arlene's car. That disregards the difference between this case and the civil forfeiture case. This case does not directly concern ownership of Arlene's 2014 Nissan Versa. Instead, Arlene is seeking relief *beyond* the return of her car and is challenging the legality of the City's *entire* civil forfeiture program. Kirtland is no more a necessary party than any other property owner affected by the City's program.

Plaintiff's Merits Contentions

1. Federal Claim: Unlawful Profit Incentive

Arlene's first federal cause of action asserts that the City has violated the Fourteenth Amendment to the U.S. Constitution by operating a civil forfeiture program under which the

proceeds of forfeitures go to fund the budget of the forfeiture program—and even to pay the salaries of the city attorneys who pursue the forfeitures. *See* Compl. ¶¶ 78-84.

The Supreme Court set out the legal framework for such a claim in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The Court there rejected the suggestion that “the Due Process Clause imposes no limits on the partisanship of administrative prosecutors” and held that “[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.” *Id.* at 249-50.

The City of Albuquerque’s forfeiture program has all of the features that the decision in *Marshall* holds will give rise to an unconstitutional profit incentive. 446 U.S. at 251. The City has admitted that forfeiture revenues are used to fund the forfeiture program’s budget and even to pay the salaries of the very city attorneys who pursue forfeitures. *See* Amended Answer ¶¶ 14-15. This is emphatically not a minor incentive: Plaintiff alleged, and the City did not deny, that forfeiture revenues will make up “close to or even more than 100% of the forfeiture program’s budget.” Compl. ¶ 15, Amended Answer ¶ 15. That extraordinary incentive violates *Marshall* by giving rise to a “possibility that [officials’] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement.” 446 U.S. at 250.

2. Federal Claim: Violation of Procedural Due Process

Arlene’s second federal claim challenges the adequacy of the procedures provided to property owners by the City’s civil forfeiture program. *See* Compl. ¶¶ 85-90.

This claim broadly challenges the adequacy of the procedures provided by the City’s civil forfeiture program. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). The City’s procedures

violate due process by creating a significant financial incentive for litigants to abandon their property rights, as even property owners who succeed in recovering their property can face thousands of dollars in storage fees. Compl. ¶¶ 37-39, 42, 87. And the City's procedures are inadequate in other ways, as well, including failure to provide access to a neutral decisionmaker, *id.* ¶¶ 29-33, 88, use of voluminous discovery to pressure property owners to cede their property rights, *id.* ¶¶ 41, 89, and failure to afford property owners a presumption of innocence, *id.* ¶ 32. These and other procedural issues—combined with the profit incentive—give rise to a system that fails to comport with the requirements of due process.

3. State Claim: Preemption

Finally, Arlene claims that the City's civil forfeiture program is contrary to state law. In 2015, New Mexico's Legislature enacted legislation to abolish civil forfeiture across the state. *See* House Bill 560 (codified at N.M.S.A. § 31-27-1 *et seq.*) (hereinafter, "the Forfeiture Reform Law"). The Forfeiture Reform Law says at its outset that it is intended to "ensure that *only criminal forfeiture* is allowed in this state." N.M.S.A. § 31-27-2(A)(6) (emphasis added). In other words, a person's property is only "subject to forfeiture if . . . the person is convicted by a criminal court." *Id.* § 31-27-4(A). And, just as significant, forfeiture proceeds are to be deposited in the general fund, not retained by law enforcement. *Id.* § 31-27-7(B). The City's program violates this law, as it allows forfeiture without a criminal conviction and allows law enforcement to keep the property that they seize to fund their budgets and pay their salaries.

THE CITY'S CONTENTIONS

The City prefaces this discussion by noting a very late development that may render Plaintiff's claims moot. On December 15, 2016, as the City was preparing a supplement to its

initial disclosures, it reviewed the videotape of the traffic stop that led to the arrest of Tino Harjo for the offense of Driving While Intoxicated (“DWI”). The City came into possession of this videotape approximately one week before, when it requested files from the New Mexico State Police that might be used as possible exhibits. This arrest resulted in the seizure of the Nissan Versa that Plaintiff Arlene Harjo owns. After reviewing the video, a question arose as to whether the New Mexico State Police Officer who effected the seizure turned the vehicle over to the correct jurisdiction. More specifically, it appeared to undersigned counsel that the New Mexico State Police stopped the vehicle while it was heading west on Interstate 40 (“I-40”) in the vicinity of Carnuel, New Mexico. This would mean that the stop occurred outside the City limits in what is unincorporated Bernalillo County. *See* Bernalillo County Ordinance § 82-4 (providing that vehicles may be forfeited if the vehicle is driven in unincorporated areas of the county and the driver commits DWI 2nd or later).

The New Mexico State Police officer who performed the traffic stop testified at the Plaintiff’s administrative hearing that he seized the vehicle within the City limits. However, after investigating the videotape against GIS mapping data, the City has determined that this was not the case. Accordingly, the City cannot obtain forfeiture of Plaintiff’s vehicle through its Nuisance Vehicle Ordinance at § 7-6-1 *et seq.* Because of this late development, the City will voluntarily withdraw its complaint for forfeiture and file a stipulation of dismissal with prejudice in the Second Judicial District Court for the State of New Mexico pursuant to Rule 1-041(A)(1)(b) NMRA. The City will also release the vehicle to Plaintiff and reimburse her for the \$50 fee that she paid to request an administrative hearing, and reimburse her in the event that her

vehicle was damaged while it was in the custody of the City. Plaintiff's counsel has been advised of these developments on December 16, 2016.

In view of these developments, the City contends that Plaintiff's preemption claim will be moot. *See Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (holding that a suit against the government was moot after the property disputes had all been resolved). At every stage of a case, there has to be an "actual controversy." *Brown v. Buhman*, 822 F.3d 1151, 1165 (10th Cir. 2016). After release of the vehicle, Plaintiff does not face a credible threat enforcement under the City's Nuisance Vehicle Ordinance at § 7-6-1 *et seq.* *See id.* at 1169.

Notwithstanding the previous paragraph, the City contentions as to the claims asserted against it are as follows. The City contends that its Nuisance Vehicle Ordinance at § 7-6-1 *et seq.*, which authorizes the seizure and forfeiture of motor vehicles used for DWI or while driving on a revoked license, is not preempted by the Forfeiture Act, NMSA 1988, §§ 31-27-1 *et seq.* As a home rule municipality, the City has broad constitutional authority "to exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X § 6(D); *see also* N.M. Const. art. X § 6(E) ("The purpose of this section is to provide for maximum self-government. A liberal construction shall be given to the powers of municipalities."). Additionally, the Legislature has vested municipalities with broad powers to regulate nuisances. *See* NMSA 1978, § 3-18-17(A) (providing that municipalities, including home rule municipalities shall have the power "to define a nuisance, abate a nuisance and impose statutory penalties on a person who creates or allows a nuisance to exist.").

The City maintains that nothing in the Forfeiture Act limits the City's authority to enact a Nuisance Vehicle Ordinance such as the one that appears at § 7-6-1 *et seq.* of the City Code. By

its plain language, the Forfeiture Act applies only to those seizures, forfeitures and dispositions of property that are made pursuant to “laws that specifically apply the Forfeiture Act.” NMSA 1978, § 31-27-2(B)(1) (2015) (emphasis added). Likewise, the Forfeiture Act defines “property subject to forfeiture” as “property or an instrumentality described and declared to be subject to forfeiture by the Forfeiture Act or a state law outside of the Forfeiture Act.” NMSA 1978, § 31-27-3(L) (emphasis added). Because the City’s Nuisance Vehicle Forfeiture Ordinance does not “specifically apply the Forfeiture Act” and deals with property that is not subject to forfeiture by the Forfeiture Act or any other state law, it is not preempted. *See Albin v. Bakas*, 2007-NMCA-076, ¶ 28, 141 N.M. 742 (“The Forfeiture Act only has application to ‘property subject to forfeiture,’ which is by definition property that a *state law describes and declares* to be subject to forfeiture.” (discussing pre 2015 amendments to the Forfeiture Act, which retain the same definition for “property subject to forfeiture”)) (emphasis added).

Five separate judges within the Second Judicial District Court for the District of New Mexico have reviewed the City’s Nuisance Vehicle Forfeiture Ordinance and found that it is not preempted by the Forfeiture Act. *See Order on Motion for Default* by Judge Victor Lopez, at ¶¶ 4-5 in D-202-CV-2015-06661 (NM 2d Jud. Dist. 3/20/2016) (finding that: The Forfeiture Act, NMSA 1978, § 31-27-1 et seq. (2015) does not apply to Albuquerque City Ordinance § 7-6-1 et seq. due to the limited scope of applicability in NMSA 1978, § 31-27-2(B)(1)” and “The Forfeiture Act, NMSA 1978, § 31-27-1 et seq. (2015) does not preempt Albuquerque City Ordinance at §§ 7-6-1 et seq.); *Judgment* by Judge Alan Malott, at ¶ 8 in D-202-CV-2015-07488 (NM 2d Jud. Dist. 4/21/2016) (finding that: “Albuquerque Revised Ordinance 7-6-1 is not precluded, preempted, qualified or limited by the Forfeiture Act.”); *Final Judgment and Order*

by Judge Valerie Huling, at page 2 in D-202-CV-2016-04156 (N.M. 2d Jud. Dist. 10/6/2016) (finding that: “The New Mexico Forfeiture Act, NMSA 1978[,] § 37-27-1 *et seq.* (2015), does not preempt or limit in any way the City of Albuquerque’s ordinance, Albuquerque, N.M. Rev. Ordinances ch. 7, art. VI, § 7-6-1 *et seq.* (1992, amended 2014); *Order Denying Defendant Derek Delgado’s Motion to Dismiss Plaintiff’s Complaint under Rule 1-102(B)(6) NMRA* by Judge Nancy Franchini at ¶¶ 1, 3-4 in D-202-CV-2016-02199 (N.M. 2d Jud. Dist. 10/21/2016) (finding that: “The Forfeiture Act, NMSA 1978, § 31-27-1 *et seq.* does not preempt the enforcement of Albuquerque City Ordinance § 7-6-1 *et seq.*” and certifying the question for interlocutory appeal); *Order on Claimant’s Motion to Dismiss* by Judge Carl Butkus at ¶¶ 4-5 in D-202-CV-2012-07538 (N.M. 2d Jud. Dist. 6/15/2016) (finding that “Albuquerque City Ordinance § 7-6-1 *et seq.* is a valid exercise of home rule authority granted to municipalities” and “the amendments to the Forfeiture Act do not preempt Albuquerque City Ordinance § 7-6-1 *et seq.*”).⁵

There have been no contrary rulings on this issue. Accordingly, the City asserts that the aforementioned rulings constitute persuasive authority for dismissal of Count I of Plaintiff’s Complaint. *See Radian Asset Assur. Inc. v. Coll. of the Christian Bros. of New Mexico*, No. CIV 09-0885 JB/DJS, 2011 WL 10977180, at *15 (D.N.M. Jan. 24, 2011) (discussing state law matters before federal courts “Where no controlling state decision exists, the federal court must attempt to predict what the state’s highest court would do.... In doing so, it may seek guidance from [inter alia] decisions rendered by lower courts in the relevant state. . .”).

⁵ Each of these rulings may be accessed at <http://opa.nmcourts.gov> by searching under the case number and date of the order or judgment.

Nevertheless, the issue of whether the City's Nuisance Vehicle Forfeiture Ordinance is preempted by the Forfeiture Act is currently on appeal before the New Mexico Court of Appeals, *See* Docketing Statement at 3, ¶¶ 1-2, in *Espinoza v. City of Albuquerque* (NM Ct. App. Oct. 13, 2016),⁶ on appeal from Order of Judge Valerie Huling (asserting that the Mr. Espinoza brought a declaratory and injunctive action to permanently enjoin the City of Albuquerque from enforcing its civil forfeiture ordinance at § 7-6-1 et seq. "But the trial court denied Mr. Espinoza's request for relief, concluding that the 'New Mexico Forfeiture Act, NMSA 1978[,] § 31-27-1 et seq. does not preempt or limit in any way the City of Albuquerque's civil forfeiture ordinance' [and] Mr. Espinoza is appealing this decision."). In view of this fact, and in the interest of avoiding duplicate rulings on an evolving issue of state law, the City contends that the Court should decline to exercise supplemental jurisdiction over Count I and remand it. Comity demands that the Court let New Mexico's intermediate appellate court resolve the issue presented in Count I. *See City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 22, 124 N.M. 640, 954 P.2d 72 (noting that the New Mexico Supreme Court has authority to review questions on issues of state law that are certified by federal courts in matters for which " 'there are no controlling precedents' in decisions of the New Mexico Supreme Court *or the New Mexico Court of Appeals.*" (citing NMSA 1978, § 34-2-8 (1993, repealed 1997); accord NMSA 1978, § 39-7-4 (effective July 1, 1997)))" (emphasis added).

⁶ The appeal by Espinoza was filed on October 10, 2016. *See* nmcourts.gov for case lookup in case number D-202-CV-2016-04156 (Register of Actions Activity). Thus, the appeal was docketed several days after the City removed the instant case to federal court, [Doc. No. 1], and before the instant case was assigned [Doc. No. 6]. On December 14, 2016, the New Mexico Court of Appeals assigned the appeal to the General Calendar. Thus, this issue is proceeding on appeal through the New Mexico Courts.

Additionally, the supplemental jurisdiction statute provides that court may decline to exercise its jurisdiction over claims that “raise[] a novel or complex issue of State law.” 28 U.S.C. § 1367(c)(1); *see also Gold v. Local 7 United Food & Commer. Workers Union*, 159 F.3d 1307, 1310 (10th Cir. 1998) (“Section 1367 reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and *at every stage of the litigation*, the values of judicial economy, convenience, fairness, and *comity*.”) (citations and internal quotations omitted and emphasis added); and *DeVolk v. Board of Regents of the Univ. of N.M.*, CIV 01-0774 PK/JHG, Memorandum Opinion and Order at 3-4 (D.N.M. May 17, 2002) (noting that the New Mexico courts ought to resolve questions about the applicability of the New Mexico Tort Claims Act, even when federal claims remained in suit).

As to Count II, which alleges that the City has effected a taking of Plaintiff’s property without just compensation, Complaint at ¶ 84, the City contends that this claim suffers from numerous legal deficiencies. For example, Plaintiff fails to explain how the takings clause of the Fifth Amendment, which is extended to the states under the Fourteenth Amendment, applies to the civil forfeiture of her vehicle. The U.S. Supreme Court ruled long ago in a case involving vehicle forfeiture that: “The government may not be required to compensate an owner for property that it has lawfully acquired under the exercise of governmental authority other than the power of eminent domain.” *Bennis v Michigan*, 516 U.S. 442, 452 (1996), accord *Tate v. Dist. of Columbia*, 627 F.3d 904, 909-10 (D.C. Cir. 2010); *AmeriSource Corp. v. U.S.*, 525 F.3d 1149, 1153-54 (Fed. Cir. 2008); *Ross v. Duggan*, 402 F.3d 575, 583 (6th Cir. 2004).

There is reason to question whether Plaintiff or her counsel *really* believe she is due just compensation for forfeiture of her two-year old silver Nissan Versa. The City notes that Plaintiff is only requesting nominal damages of one dollar for violation of her constitutional rights, and compensation in the event that the vehicle has been damaged while it has been in the City's custody. *Complaint* at ¶ 2, and at § Prayer for Relief at ¶¶ D, F. Indeed, the City contends that Plaintiff's counsel have brought this action purely to recover attorney's fees and did not conduct a reasonable inquiry into the applicable law or the facts supporting the claims in Counts II and III prior to filing these claims. *See* Fed.R.Civ.P.11(b)(1)-(3) (providing, *inter alia*, that by presenting a pleading to the court, an attorney certifies to the court that to the best of his knowledge, information and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose such as to needlessly increase the cost of litigation; (2) the claims are warranted by existing law or a nonfrivolous argument for extending, reversing or modifying existing law or establishing new law, or (3) the factual contentions have evidentiary support).

It is not merely that Count II seems to overlook U.S. Supreme Court precedent in *Bennis*. Count II also overlooks the fact that the administrative hearing of which Plaintiff complains is *not* a final agency action and her vehicle has not been transferred to the City through a judgment of forfeiture. *See Romero v. City of Albuquerque*, No. 33917, mem. op. at 2 (N.M. Ct. App. April 13, 2015) (a hearing officer's decision in a City forfeiture proceeding was not a final agency action subject to judicial review where an order "expressly contemplated further proceedings on the merits," and it did not dispose of "all issues of law and fact to the fullest extent possible under traditional finality rules.") (citing and quoting *State v. Vaughan*, 2005-NMCA-076, ¶ 18,

137 N.M. 674, 114 P.3d 354); *Complaint* at ¶ 40 (if the hearing officer finds against officer finds against the owner, the City will initiate civil forfeiture proceedings in the Second Judicial District Court) (citing City Code at §§ 7-6-5(D), 7-9-3(C), 7-14-5(E)); *see also* Register of Actions Activity in D-202-CV-2016-03614, *City of Albuquerque, Ex rel., Albuquerque Police Dep't vs. One (1) Nissan 4DR Sliver [sic], V.I.N. 3NICN7AP4EL842551, N.M. License No. 11SMW*, available at nmcourts.gov (case lookup database under case number) (showing that the district court for the Second Judicial District of New Mexico, which has in rem jurisdiction over the silver Nissan vehicle at issue in Harjo's taking claim, has yet to issue a judgment or order of forfeiture).

Thus, Count II is not ripe for judicial review by this Court because there is no final agency action with respect to the forfeiture of Plaintiff's vehicle and therefore, Count II should be dismissed for lack of jurisdiction. *See Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1203 (D.N.M. 2010) ("The causes of action are not ripe for review until there has been a final agency action.") (citing *McKart v. U.S.*, 395 U.S. 185, 193 (1969)); *Alto Eldorado Partners v. City of Santa Fe*, 644 F. Supp. 2d 1313, 1340 (D.N.M. 2009), *aff'd sub nom. Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011) ("[T]he issue of ripeness is jurisdictional.").

Furthermore, even if Count II represented a ripe claim, and takings claims applied to property forfeitures effected under local government police powers, there is no case law in support of the central premise of Count II. Plaintiff complains that the City uses proceeds generated through its Nuisance Vehicle Forfeiture Program to pay personnel costs associated with the Program and this constitutes an "[u]nlawful [p]rofit [i]ncentive" in violation of the

Fourteenth Amendment. *See Complaint* at Count II, § Caption, and at ¶¶ 80-83 (alleging that “bias, risk of bias, and/or the appearance of bias infects every aspect of the City’s forfeiture process” because city attorneys who prosecute forfeiture cases in court, police officers who investigate cases and act as witnesses, and administrative hearing officers who make probable cause determinations on seized vehicles all have portions of their salaries or use equipment purchased through forfeiture revenues). The City’s Nuisance Vehicle Forfeiture Ordinance provides that when property is forfeited under the Ordinance the proceeds shall be used to carry out the purpose and intent of the Ordinance. City Code at § 7-6-5(E).

The City submits that no court has held the retention of proceeds from vehicles subject to civil forfeiture violates the Fourteenth Amendment because retention creates a risk of bias or the appearance of bias. And the City submits that Plaintiff has not alleged any facts that would allow the Court to infer *she* was subject to actual bias as a “direct and proximate result of the City’s policy and practice of retaining forfeited property and its proceeds.” *See Complaint* at ¶ 84; *see also Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006) (To establish municipal liability under 42 U.S.C. § 1983 for a constitutional violation, a plaintiff must show: “1) the existence of a municipal policy or custom *and* 2) *a direct causal link between the policy or custom and the injury alleged.*”) (emphasis added).

To the extent that Count II asserts a substantive due process claim, the City asserts that Count II also fails to state a legally viable claim. Plaintiff has not alleged that the retention of forfeiture proceeds bears no rational relationship to a legitimate state interest.⁷ *See Rackley v.*

⁷ As noted above, the City’s Nuisance Vehicle Forfeiture Ordinance provides that when property is forfeited under the Ordinance the proceeds shall be used to carry out the purpose and intent of the Ordinance. City Code at § 7-6-5(E). The New Mexico Supreme Court has already noted that

City of N.Y., 186 F. Supp. 2d 466, 480 (S.D.N.Y. 2002) (dismissing a substantive due process claim involving seizure of a vehicle under a municipal parking enforcement ordinance because plaintiff failed to produce evidence showing that the challenged scheme served no legitimate government interest); *see also Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009) (“In addition to guaranteeing fair procedures, the Due Process Clause of the Fourteenth Amendment ‘cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them.’ This substantive component guards against arbitrary legislation by requiring a relationship between a statute and the government interest it seeks to advance. If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest. But *if an enactment burdens some lesser right, the infringement is merely required to bear a rational relation to a legitimate government interest.*”) (internal citations omitted).

Nor has Plaintiff alleged that that the retention of forfeiture proceeds constitutes such an outrageous or arbitrary governmental act that it “shocks the conscience.” *See Graves v. Thomas*, 450 F.3d 1215, 1220–21 (10th Cir. 2006) (“The ‘ultimate’ standard for determining whether

the City’s Nuisance Vehicle Forfeiture Ordinance serves an important public purpose. *See City of Albuquerque v. One (1) 1984 White Chevy Ut., VIN 1G8CS18BXE8176575, New Mexico License No. 335-KRH*, 2002-NMSC-014, ¶ 18, 132 N.M. 187, 46 P.3d 94. (“In New Mexico, the elimination of driving while intoxicated and its related offenses is a matter of grave concern to society in general, and to our courts and Legislature in particular. . .New Mexico has a serious problem with drunk drivers, with one of the highest rates in the nation of DWI-related fatalities. Reviewing the City’s Nuisance Vehicle Forfeiture Ordinance to determine if it is remedial in nature: “We conclude that the clear intent and purpose of the City Ordinance [at is to establish a remedial measure to protect the public from those drivers who persist in driving after license revocation and multiple DWI offenses. We hold that the City Ordinance serves the remedial purpose of protecting the public.”). Thus, it is difficult to see how Plaintiff could argue in good faith that retention of forfeiture proceeds to fund the administrative costs of the City’s forfeiture program serves no legitimate state interest.

there has been a substantive due process violation is whether the challenged government action shocks the conscience of federal judges.”) (internal citations omitted). “To shock the court’s conscience, ‘a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power’ ” *Brooks v. Saucedo*, 85 F. Supp. 2d 1115, 1126 (D. Kan.), *aff’d*, 242 F.3d 387 (10th Cir. 2000) (quoting *Uhrig v. Harder*, 64 F.3d 567, 573 (10th Cir. 1995)). Moreover, when courts evaluate substantive due process concerns under this standard, they have been advised of “ ‘the need for deference to local policymaking bodies in making decisions impacting upon public safety.’ ” *Id.* (noting that the U.S. Supreme Court has highlighted three basic principles for evaluating substantive due process claims, which include the “ ‘need for deference to local policymaking bodies in making decisions impacting upon public safety.’ ”) (internal citations omitted).

Lastly, Count II is subject to dismissal under Federal Rule of Civil Procedure 12(b)(7) for failure to join a required party. Plaintiff is well aware that there is a lien on her 2014 silver Nissan, and the lienholder is a party to the forfeiture proceeding that is currently pending in state court. *See Answer to Complaint for Forfeiture by Kirtland Federal Credit Union at ¶ 7 in D-202-CV-2016-03614, City of Albuquerque, Ex rel., Albuquerque Police Dep’t vs. One (1) Nissan 4DR Sliver [sic], V.I.N. 3N1CN7AP4EL842551, N.M. License No. 11SMW* (N.M. 2d Jud. Dist. July 1, 2016, which is available *available at* <http://opa.nmcourts.gov> (admitting that the Credit Union holds a valid, subsisting and perfected lien in the vehicle securing the amounts due the Credit Union including interests, costs and attorney fees, and that the Credit Union is a bona fide lien holder in the silver Nissan under seizure).

Under the City's Nuisance Vehicle Forfeiture Ordinance, if a secured party owns an interest in a forfeited vehicle that is greater than the value of the vehicle, title is transferred to the secured party upon motion to the district court. City Code at § 7-6-7(B). If the Second Judicial District Court were to issue an order of forfeiture on Plaintiff's silver Nissan, the Kirtland Federal Credit Union would undoubtedly move for transfer of title to it. However, if this Court were to find that the seizure of Plaintiff's silver Nissan constituted a taking of Plaintiff's property without just compensation and enjoin the City from enforcing its Ordinance, the vehicle would be returned to Plaintiff.

In short, because forfeiture of the silver Nissan vehicle is a subject of litigation in two different courts, there is a risk that the City could be subject to inconsistent obligations, absent joinder of Kirtland Federal Credit Union in the present action. *See Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1183-84 (D.N.M. 2010) (discussing joinder of required parties under Fed.R.Civ.P. 19(a)(1)(B) and 19(a)(1)(B)(ii), and noting that the Tenth Circuit has provided a hypothetical scenario to illustrate when this rule applies, e.g., a federal district court orders a defendant to transfer stock to the plaintiff while a state court orders the same defendant to transfer the same stock to a different party who is not involved in the federal litigation) (citing *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1098 (10th Cir. 2003)).

To the extent that Plaintiff seeks "just compensation" for a taking of her 2014 silver Nissan and compensation for damage to her vehicle while it has been in City custody, and to enjoin enforcement of the City's Nuisance Vehicle Forfeiture Ordinance, *see Complaint* at ¶ 84, and Prayer for Relief at ¶¶ C, F, Kirtland Federal Credit Union is an required party and should be joined in the instant action. *See Ford Motor Credit Co. v. NYC Police Dep't*, 503 F.3d 186, 190-

91 (2d Cir. 2007) (lienholder on vehicle seized for forfeiture has a cognizable property interest in the vehicle's sale proceeds *and a property interest in the present value of the seized vehicle*).

As to Count III, which alleges that the City has violated Plaintiff's procedural due process rights, the City contends that this claim is equally meritless and subject to dismissal. The City does not dispute that Plaintiff has a protected property interest in the silver Nissan vehicle seized when Plaintiff's son was arrested for DWI and that procedural due process protections apply before she can be deprived of that interest. *See Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1998) (noting that courts engage in a two-step inquiry to determine if a plaintiff was denied procedural due process and the first inquiry is: "Did the individual possess a protected interest to which due process protection was applicable?").

The second inquiry in determining whether a plaintiff was denied procedural due process "requires the court to determine precisely what process is due the petitioners, and whether or not any process afforded by the City would be sufficient." *Pub. Serv. Co. of New Mexico v. City of Albuquerque*, 755 F. Supp. 1494, 1499 (D.N.M. 1991). In this case, the record shows that Plaintiff received the process to which she was entitled under the City's Nuisance Vehicle Forfeiture Ordinance, which was a hearing before a City hearing officer. City Code at § 7-6-5(D)(8); *see also Complaint* at ¶¶ 63, 65 (asserting that Plaintiff received a hearing before City hearing officer Stan Harada and asserted therein that the car was in her name and she had no reason to believe her son would drink and drive).

Plaintiff alleges that the City's procedures deny property owners access to a *neutral* decisionmaker, but the fact that the City hearing officer was not persuaded by Plaintiff's innocent owner defense does not mean he was biased. After all, the record shows that Plaintiff

agreed to waive any future innocent owner defense in 2009 when her son was first arrested and convicted for DWI while driving a vehicle she owned. *See* [Doc. No. 17, § Affirm. Defenses No. 7] (citing 240-Day Vehicle Immobilization and Release Agreement, May 9, 2009, ¶ 5).

Additionally, Plaintiff is currently before a second decisionmaker, Judge Carl Butkus of the Second Judicial District Court for the District of New Mexico, who is conducting a *de novo* review of the question of whether there was probable cause to seize Plaintiff's vehicle and whether Plaintiff is an innocent owner. *See Romero*, No. 33917, mem. op. at 4 (noting that appellant is entitled to review of City hearing officer's probable cause determination on the seizure of his vehicle, "[b]ut that review must take place in the course of the forfeiture proceedings rather than in separate collateral proceedings such as the separate action filed below [*i.e.*, petition for judicial review of agency action under Rule 1-075 NMRA]."). The fact that the City is currently trying to obtain a judgment of forfeiture against Plaintiff in the Second Judicial District Court suggests that the City has not deprived Plaintiff of her property yet. Thus, her claim for deprivation of due process is not ripe as it is contingent on a final action in state court.

Granted, it is generally the case that "individuals must receive notice and an opportunity to be heard *before* the Government deprives them of property" in order to satisfy procedural due process. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (emphasis added). This requirement ensures that a plaintiff has the opportunity to prevent " 'substantively unfair or mistaken deprivations of property' " *Id.* at 53 (internal citations omitted).⁸ However, when the

⁸ Even if the continued retention of Plaintiff's silver Nissan is wrongful because e.g., the City's forfeiture procedures are tainted by unlawful profit incentives, no procedural due process violation has occurred "if a meaningful postdeprivation remedy for the loss is available." *See Storey v. Taylor*, 936 F.2d 554, 560 (10th Cir. 1996) (citing *Hudson v. Palmer*, 468 U.S. 517,

property is the “sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given,” notice and a hearing may be postponed until the property has been secured. *See id.* at 52 (quoting *Calero–Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974); *see also U.S. v. Von Neumann*, 474 U.S. 242, 251 (1986) (no preseizure hearing is required when customs officials seize an automobile at the border).

Notably, “[t]he deprivation of procedural due process is not *complete* unless and until the state fails to provide adequate constitutionally essential procedures.” *Winters v. Board of County Comm’rs*, 4 F.3d 848, 856 (10th Cir. 1993). Plaintiff has not alleged that the forfeiture proceedings underway in the Second Judicial District Court are inadequate or do not give her the opportunity to challenge the seizure of her vehicle or to assert an innocent owner defense to forfeiture. *See Brooks*, 85 F. Supp. 2d at 1125 (“To state a procedural due process claim, plaintiff must show that the government process which [s]he must follow is insufficient to properly protect her ownership rights.”). In view of these facts, Count III is subject to dismissal because it is not ripe and/or because Plaintiff has failed to exhaust the procedures available to her under state law. *See Romero*, No. 33917, mem. op. at 4 (“We perceive no sound judicial policy for allowing a party aggrieved by an administrative decision to forego an available avenue of judicial review only to allow that same party to initiate judicial review in another form. . . . [i]ndeed, the efficient administration of justice requires just the opposite.”) (quoting *Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786).

PROVISIONAL DISCOVERY PLAN:

533 (1984), as extending the holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), to cover intentional deprivations of property by state employees acting under color of state law).

The parties jointly propose to the Court the following discovery plan:

Plaintiff's Witnesses:

1. Arlene Harjo



Information regarding Defendant's seizure and attempted forfeiture of Plaintiff's car.

2. Tino Harjo



Information regarding Defendant's seizure and attempted forfeiture of Plaintiff's car.

3. Chief Hearing Officer Stanley Harada

Office of Administrative Hearings

P.O. Box 1293

Albuquerque NM 87103

Information regarding the seizure and attempted forfeiture of Plaintiff's car, as well as Defendant's vehicle forfeiture program generally.

4. Lieutenant Donovan Rivera

Albuquerque Police Department

Information regarding Defendant's vehicle forfeiture program generally.

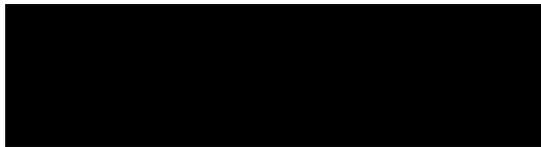
5. Additional City of Albuquerque personnel (to be identified)

City of Albuquerque

Information regarding Defendant's vehicle forfeiture program generally, including the retention of forfeiture proceeds to fund the program's budget.

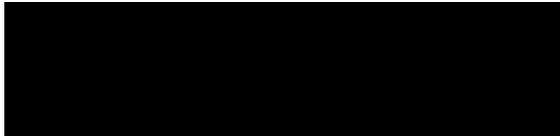
The City's Witnesses:

1. Arlene Harjo



Information regarding Defendant's seizure and attempted forfeiture of Plaintiff's car.

2. Tino Harjo



Information regarding Defendant's seizure and attempted forfeiture of Plaintiff's car.

3. Chief Hearing Officer Stanley Harada

Office of Administrative Hearings

P.O. Box 1293

Albuquerque NM 87103

Information regarding the seizure and attempted forfeiture of Plaintiff's car, as well as Defendant's vehicle forfeiture program generally.

4. Lieutenant Donovan Rivera
Albuquerque Police Department
400 Roma NW
Albuquerque, NM 87102

Information regarding Defendant's vehicle forfeiture program generally.

5. Lacsia Rivera
Albuquerque Police Department
400 Roma NW
Albuquerque, NM 87102

Information regarding Defendant's vehicle forfeiture program generally.

6. Aubrey Thompson
Albuquerque Police Department
400 Roma NW
Albuquerque, NM 87102

Information regarding the financial aspect of Defendant's vehicle forfeiture program.

7. Toby Lafave

New Mexico State Police

2501 Carlisle Blvd., NE

Albuquerque, NM 87110

Information regarding the seizure of Plaintiff's car.

8. Representative of Kirtland Federal Credit Union

P.O. Box 80570

Albuquerque, NM 87198

Information regarding the loan on Plaintiff's car.

9. Lieutenant Zak Cottrell

Albuquerque Police Department

400 Roma NW

Albuquerque, NM 87102

Information regarding Defendant's vehicle forfeiture program generally.

Plaintiff's Exhibits:

1. Text of Defendant's Vehicle Forfeiture Ordinance.
2. Text of An Act Relating to Forfeiture, 2015 NM H.B. 560.
3. Documents establishing plaintiff's ownership of the 2014 Nissan Versa seized by Defendant.

4. Documents pertaining to the City of Albuquerque's attempt to forfeit Plaintiff's Seized Vehicle.
5. The City of Albuquerque's annual budgets.
6. Any documents obtained through discovery pertaining to the use of forfeiture proceeds to fund the forfeiture program's budget and pay salaries of forfeiture personnel.
7. Any documents obtained through discovery pertaining to the procedures employed by the City's forfeiture program.
8. Any Exhibits listed by Defendant.
9. Any Exhibits needed for rebuttal.

The City's Exhibits:

1. Transcript of Administrative Hearing on May 25, 2016.
2. New Mexico State Police Report, CAD # 16-105165.
3. Title to the 2014 Nissan Versa.
4. New Mexico Motor Vehicle Division records for a 2014 Nissan Versa.
5. Any Exhibits listed by Plaintiff.
6. Any Exhibits needed for rebuttal.

Plaintiff's Experts:

None at this time.

The City's Experts:

None at this time.

Plaintiff's List of Discovery Subjects:

- Procedures employed by Defendant's vehicle forfeiture program.
- Defendant's policy and practice of retaining and using forfeiture proceeds to pay for vehicle forfeiture program expenses.

The City's List of Discovery Subjects:

- Plaintiff's practices involving consensual use of her 2014 Nissan Versa vehicle.
- Updated payment history on her 2014 Nissan Versa vehicle.
- Plaintiff's knowledge surrounding Tino Harjo's propensity to operate a vehicle illegally.
- Plaintiff's knowledge surrounding past illegal uses of her vehicle(s).

Written Discovery and Depositions

- Maximum of 25 interrogatories by each party to any other party. (Responses due 30 days after service).

- Maximum of 25 requests for admissions by each party to any other party.
(Responses due 30 days after service).
- Maximum of 10 depositions by each party.
- Each deposition shall be limited to 7 hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:

- **June 1, 2017:** Initial report from Plaintiff's expert witnesses, if any.
- **June 30, 2017:** Rebuttal report from Defendant's expert witnesses, if any.
- **July 31, 2017:** Reply report from Plaintiff's expert witnesses, if any.

Supplementation under Rule 26(e) due every 30 days.

All discovery commenced in time to be complete by August 31, 2017.

Other Items:

- The parties agree to service of discovery via electronic mail.
- The parties believe that this proceeding is amenable to being decided upon dispositive motions. The parties would ask that the Court set a deadline for filing dispositive motions 45 days following the close of discovery.

- Plaintiff asks that responses to dispositive motions be due 28 days after receipt of such motions, and deadlines for replies in support of dispositive motions be due 21 days following receipt of response briefs.
- The City asks that the deadlines for filing responses and replies to dispositive motions correspond to the deadlines set in D.N.M.LR-Civ 7.4(a), which may be extended by joint agreement of the parties.
- The parties request that the Court not set a schedule for submission of pretrial disclosures, etc., until after it has ruled on the parties' dispositive motions.

PRETRIAL MOTIONS

Plaintiff intends to file:

- Motion for Summary Judgment on Counts I, II and III.

The City intends to file:

- Motion to Dismiss for mootness;
- Motion to stay Count I for reasons of comity;
- Motion to Dismiss Count II for failure to join required party under FCRP 12(b)(7);
- Motion to Dismiss Counts II and III for Lack of Ripeness and Failure to Exhaust Administrative Remedies; and/or in the alternative,
- Motion to Dismiss Count II for Failure to State a Claim and/or in the Alternative Motion for Summary Judgment on Count II; and
- Motion to Dismiss Count III for Failure to State a Claim and/or in the Alternative Motion for Summary Judgment on Count III.

- Motion for excess costs and attorney's fees under 42 U.S.C. § 1988.

ESTIMATED TRIAL TIME

- The parties estimate trial will require **3 days**.
- This is a **non-jury** case.
- The parties request that a pretrial conference be set **no earlier than 30 days** after the Court rules on the parties' dispositive motions, if such rulings do not dispose of the case.

SETTLEMENT

The possibility of settlement in this case is considered unlikely as this litigation concerns the legality and constitutionality of the City's vehicle forfeiture program. Should the Court wish for the parties to enter into settlement discussions, the parties would request that any settlement conference occur no earlier than the close of discovery.

EXCEPTIONS

Plaintiff's Exceptions:

Plaintiff objects to artificially cutting off the time to amend the pleadings at an early stage of the litigation, as it is sometimes necessary in litigation to adjust the pleadings to conform with information obtained through discovery. That being said, Plaintiff would not object to setting an early deadline for amendments to the pleadings so long as it was made clear that amendments to the pleadings would remain "freely" available following that deadline with leave of court under F.R.C.P. 15(a)(2).

Defendant's Exceptions:

The City does not agree to the deadlines Plaintiff has proposed for amendments to the pleadings and joinder of parties. The City asks that such deadlines be set between 30 days of the Scheduling Conference so that the City knows who the parties will be and what claims are being asserted against it before great time and effort is invested in discovery.

The City does not agree to the extended deadlines that Plaintiff proposes for filing responses and replies to dispositive motions and asks that such deadlines remain as they are under in D.N.M.LR-Civ 7.4(a).

APPROVED WITH EXCEPTIONS

Arash "Asher" Kashanian
525 Figueroa St.
Albuquerque, NM 87123
Tel: (631) 805-0027
Fax: (505) 212-0279

/s/ Robert Everett Johnson
Robert Everett Johnson
Robert Frommer
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
For Plaintiff

CITY OF ALBUQUERQUE
Jessica M. Hernandez
City Attorney

/s/ Kyle J. Hibner

Eric J. Locher
Kyle J. Hibner
Philomena M. Hausler
Assistant City Attorney
P.O. Box 2248
Albuquerque, NM 87103
505-768-4500
For Defendant