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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

RICHARD CELATA, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	2:07-CV-00024-SEH-RKS <u>DEFENDANT'S MEMORANDUM IN</u> <u>OPPOSITION TO PLAINTIFF'S RULE</u> <u>56(a) MOTION FOR SUMMARY</u> <u>JUDGMENT AND IN SUPPORT OF</u> <u>DEFENDANT'S CROSS MOTION FOR</u> <u>SUMMARY JUDGMENT</u>
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Plaintiff has filed a motion for summary judgment. Defendant offers the following in opposition to said motion. Defendant also offers the following in support of defendant's motion for summary judgment.

Jurisdiction

The United States, as a sovereign, is immune from suit unless it has waived its immunity. *Balser v. Dep't of Justice, Office of U.S. Trustee*, 327 F.3d 903, 907 (9th Cir. 2003). Sovereign immunity is a jurisdictional bar if the United States has not consented to be sued on a particular claim. *Id.* The United States must express unequivocally its waiver of sovereign immunity, and the terms of the waiver define the Court's jurisdiction. *Id.* Absent such a waiver, sovereign immunity bars both equitable and legal claims. *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Board of Oil and Gas Conservation of State of Montana*, 792 F.2d 782, 792 (9th Cir. 1986). The party bringing an action against the United State bears the burden of demonstrating an unequivocal waiver of immunity. *Graham v. Federal Emergency Mgmt. Agency*, 149 F.3d 997, 1005 (9th Cir. 1998).

The plaintiff identifies the jurisdictional bases for this Court to hear this action as 28 U.S.C. § 2201 and 2202 (Declaratory Judgment Act) generally on Article III, Section 2 of the United States Constitution and 18 U.S.C. § 924(d)(1)(2), and 983(a)(3)(b). Defendant contends these provisions may establish the Court's jurisdiction, but they do not constitute specific waivers of the United States' sovereign immunity.

The Declaratory Judgment Act, 28 U.S.C. § 2201-2202, does not constitute the United States' consent to be sued, it "merely grants an additional remedy in cases where jurisdiction already exist in the court. *Brownell v. Ketcham Wire and Mfg. Co.*, 211 F.2d 121,128 (9th Cir. 1954); *E.J. Friedman Co., Inc. v. United States*, 6 F.3d 1355, 1359 (9th Cir. 1993). Although not specifically cited in the complaint, plaintiff's

reference to Article III, Section 2 of the United States Constitution apparently relates to 28 U.S.C. § 1331 (federal question) as a jurisdictional bases. Section 1331 creates jurisdiction, but does no waive the United States' sovereign immunity. *Pit River Home and Agr. Co-op, Ass'n v. United States*, 30 F.3d 1088, 1098 n. 5 (9th Cir. 1994) (citing *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983)). Nowhere in 18 U.S.C. § 924(d)(1)(2) and 983(a)(3)(B) contain express waiver of sovereign immunity.

Remedy for Return of Property Seized in June, 2006

By way of this action plaintiff seeks the return of all property seized as the result of the search of his property pursuant to a federal search warrant on June 7, 2006. The sole bases for the plaintiff's contention for return of the property is that the United States has not pursued a civil forfeiture action within the time allowed by the statute. The United States concedes the fact that the civil forfeiture action, CV 06-85-BU-SEH was voluntarily dismissed. The United States contends that the property may be retained as the items seized are either contraband or potential evidence related to ongoing criminal investigations in the District of New Hampshire.

Defendant believes the proper remedy for an individual seeking the return of property seized pursuant to a federal search warrant is a motion for return of property under Rule 41(g) (formerly 41(e)) Fed. R. Crim. P. The Ninth Circuit Court of Appeals has repeatedly held that a Fed. R. Crim. P. 41(g) motion is properly denied if "the government's need for the property as evidence continues." *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 937 (9th Cir. 2006) citing *United States v. Fitzen*, 80 F.3d 387, 388 (9th Cir. 1996) and *United States v. Mills*, 991 F.2d 609, 612 (9th Cir. 1993). Furthermore, if the United States has a need for the property

in an investigation or prosecution, its retention of the property is generally reasonable. 473 F.3d at 937.

District Courts have the power to entertain motions to return property seized by the government when there are no criminal proceedings pending against the movant. *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993). (Internal citations omitted). These motions are treated as simple equitable proceedings and, therefore, the district court must exercise “caution and restraint” before assuming jurisdiction. *Id.* (Internal citations omitted). In *Ramsden* the court adopted the Fifth Circuit’s approach in adopting four factors that a district court should consider in deciding whether to entertain a Rule 41(e) (now 41(g)) motion made prior to the initiation of criminal proceedings. These factors include (1) whether the government displayed a callous disregard for the constitutional rights of the movant; (2) whether the movant has an individual interest in and need for the property he wants returned; (3) whether the movant would be irreparably injured by the denying return of the property; and (4) whether the movant has an adequate remedy at law for the redress of his grievance. 3 F.3d at 325. Plaintiff’s motion totally fails to address any of the factors listed that the Court must consider in determining whether the property should be returned. In response to the administrative notice of forfeiture plaintiff only has asserted a claim to four particular firearms. Having failed to claim an interest in two of the firearms they are deemed forfeited to the United States. (Statement of Genuine Issues, ¶ 4).

In the present action plaintiff now asks for the return of all property which was seized at the time of the execution of the search warrant. Plaintiff at no time has established or even argued that he would be irreparably injured by being denied the

return of the property. This is one of the items the Court must consider in determining whether to reach the merits of a pre-indictment Rule 41(g) motion. Plaintiff is the target of an on-going investigation in the district of New Hampshire for various criminal violations. (Statement of Genuine Issues, ¶ 8). The mere threat of prosecution is not sufficient to constitute irreparable harm. *Ramsden*, 2 F.3d at 326. In addition to not claiming an interest in the machine gun seized, the gun constitutes contraband and clearly should not be returned to the plaintiff. (Statement of Genuine Issues, ¶¶ 5,6 and 9).

A total of 63 items were seized during the search. These items are identified as #000001-000063. These items were seized administratively (i.e., seized for forfeiture) or seized for evidence. All of the items are either contraband or potential evidence. (Statement of Genuine Issues, ¶ 9). Upon completion of the matter in New Hampshire items not contraband will be returned to plaintiff.

Defendant takes exception to the plaintiff's contention that the government has never informed him of what legal basis it may have for keeping the property. A civil forfeiture action was initiated by the government in cause No. CV 06-85-BU-SEH concerning the four items the plaintiff filed a claimed interest. After a hearing held in that matter on February 2, 2007, AUSA Paulette Stewart and plaintiff's counsel had a discussion concerning Mr. Celata's desire for the return of the items seized. Plaintiff's counsel was advised that the property was being retained as part of the District of New Hampshire's on-going criminal investigation. Mr. Celata was also advised of the ongoing criminal investigation in New Hampshire on at least one other occasion with a phone call with Ms. Stewart. (Statement of Genuine Issues, ¶ 7). In addition, in the

United States' response in opposition to claimant Celata's motion for relief from order, CV 06-85-BU-SEH (docket No. 20, p. 2), plaintiff was again advised that the subject firearms are evidence in a pending criminal investigation in the District of New Hampshire and the criminal investigation is on-going.¹ In CV 06-85-BU-SEH plaintiff also sought the return of his property and fees and expenses. (Docket No. 17). The United States opposed plaintiff's request and this Court entered its order denying plaintiff's motion for relief from order. (Docket No. 21). Plaintiff's second attempt to get the items seized must also fail.

Plaintiff's brief requests summary judgment be entered including judgment awarding reasonable attorney fees and costs. Plaintiff does not provide the Court with information concerning the requested fees and costs. Defendant reserves the right to address this issue if and when the information is provided to the Court.

Conclusion

For the reasons set forth above the United States respectfully submits that the plaintiff's motion for summary judgment be denied. Defendant also submits that defendant is entitled to judgment in its favor.

DATED this 31st day of May, 2007.

WILLIAM W. MERCER
United States Attorney

/s/ George F. Darragh, Jr.
GEORGE F. DARRAGH JR.
Assistant U.S. Attorney
Attorney for Defendant

¹Courts may take judicial notice of their own records. See e.g. *Rand v. Roland*, 154 F.3d 952, 961-62 (9th Cir. 1998) (*en banc*); Fed. R. Of Evidence 201.