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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

INNOVATIVE NUTRACEUTICALS, LLC, on behalf of itself and all others similarly situated, Plaintiff, v. UNITED STATES OF AMERICA, et al, Defendants.	No. CV 5:18-01400-JGB-SHK **OPPOSITION TO DEFENDANT USA'S MOTION TO DISMISS** Hearing date: November 18, 2019 Hearing time: 9:00 a.m. Honorable Judge Jesus G. Bernal United States District Judge

SUMMARY OF NOTICED MOTION AND PLAINTIFF'S OPPOSITION

The defendant government noticed a motion to dismiss portions of seven of the nine causes of action alleged in Plaintiff Innovative Nutraceuticals, LLC's Second Amended Class Action Complaint ("SAC"). The essence of the SAC is that the government seized and destroyed legal property for stated reasons that do not survive legal scrutiny, in all but one instance without any notice. Plaintiff seeks return of property, monetary relief for destroyed property, and injunctive relief to prevent a repeat performance. Now the government seeks to destroy Plaintiff's chance for relief, contending each cause of action is defective. None of these arguments has merit.

For example, the government argues Plaintiff must bring separate complaints in three different judicial districts where the seizures took place, even though the claims underlying each involves common issues of fact and law and would be much more efficient tried together. The government also argues Plaintiff's only remedy for financial relief was to make a motion to set aside the purported non-judicial forfeitures, ignoring the fact that the Plaintiff cannot file a motion for relief when the government fails to even initiate non-judicial proceedings in the first place. The below chart summarizes the motion's contentions as to each cause of action and Plaintiff's response:

Cause of Action	**Defendant's Argument**	**Plaintiff's Response**
First	No standing for Plaintiff for prospective relief under APA	seizures have continued, and are likely to be repeated, and pattern of officially sanctioned behavior by government
Second	Defendant did not move to dismiss claim	Defendant must file an answer
Third	Defendant did not move to dismiss portion of claim based on 2017 L.A. seizure	Defendant must file an answer to claim regarding that seizure
Third	as to out-of-state seizures, no venue in this District for motion for return of property	pendent venue exists here based on existing venue for L.A. seizures

Fourth	No jurisdiction under Little Tucker Act for solely constitutional claims	jurisdiction exists for constitutional claims – claim also based on violation of forfeiture statutes
Fourth	motion to set aside non-judicial forfeiture is Plaintiff's exclusive remedy	non-judicial proceedings never initiated (in violation of forfeiture statute), so not exclusive remedy
Fourth	Plaintiff cannot challenge merits of non-judicial forfeiture	Complaint not challenging merits, just procedural violations
Fifth	Plaintiff did not state claim for relief under FTCA	valid claim based on detention exception; also, Kentucky contract of adhesion is null
Sixth	Defendant did not move to dismiss portion of claim based on 2017 L.A. seizure	Defendant must file answer
Sixth	as to out-of-state seizures, no venue in this District for motion to set aside non-judicial forfeiture	pendent venue exists here based on venue for L.A. seizures
Seventh	Defendant did not move to dismiss	claim filed against individual defendants only
Eighth	Defendant did not move to dismiss	claim filed against individual defendants only
Ninth	No standing for Plaintiff for prospective relief under APA	seizures have continued, and are likely to be repeated, and pattern of officially sanctioned behavior by government
All Causes of Action (except 7 & 8)	2015 L.A. seizure cannot be used as basis for any claims because notice sent, petition denied, and property forfeited	seizure is basis for all claims, since Plaintiff filed Verified Claim, and Defendant failed to initiate judicial case, and thus must return property

Accordingly, Plaintiff requests that Defendant's motion be DENIED.

Dated: October 21, 2019

Respectfully submitted,

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I. STATEMENT OF FACTS[1]

This case involves the government's seizure, summary forfeiture and destruction of legally-imported hemp and cannabidiol ("CBD") without providing Plaintiff and the class members with constitutionally-mandated notice and the opportunity to be heard. The government has destroyed property summarily on an erroneous conclusion that legal materials are contraband, when it should have initiated federal statutory administrative forfeiture proceedings required for such seized lawful property. SAC, ¶¶1-10.

U.S. Customs officials have made it clear that if Plaintiff and the class members import these lawful products into the United States, they will continue to seize the property and impose fines and penalties. SAC, ¶17. Moreover, the continuing erroneous determination by Department of Homeland Security ("DHS") and Customs employees that hemp and CBD are contraband and subject to summary forfeiture and destruction, and the failure to institute mandatory administrative forfeiture proceedings, have been and continue to be conducted under the supervision and approval of DHS and Customs agency heads and supervisors. SAC, ¶¶26-32.

As for the December 6, 2015 Los Angeles seizure of Plaintiff's lawful hemp materials, in addition to filing a petition for administrative review of the seizure with Customs, Plaintiff explicitly filed a "Verified Claim" to the seized property. The government failed to then either institute judicial forfeiture proceedings within 90 days of denying Plaintiff's administrative petition. or return the property to Plaintiff, as required by federal civil forfeiture law. *See* Motion, Exhibit 2 to Declaration of Yasmin Yang, Clerk's Doc. No. 46-1, at page 17 (Exhibit B, "Verified Claim").

As for the March 24, 2018 seizure of Plaintiff's hemp shipment in Louisville, Kentucky on June 20, 2018, Customs agreed that the hemp should be returned, implicitly

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[1] The motion's statement of facts is for the most part accurate. There were, however, a few misstatements and omissions. Accordingly, Plaintiff supplements that statement with additional facts alleged in the SAC or in the motion's exhibits.

determining that the hemp was not contraband and therefore lawfully imported. Customs, however, told Plaintiff the shipment "may be" released to Plaintiff, but only on the condition that Plaintiff a) submit a notarized "Hold Harmless Agreement" not to sue Customs for its damages from this improper seizure, and b) either pay for the government's private storage contractor's delivery fees for the return of its shipment, or incur Plaintiff's own costs to pick up the shipment from the contractor in Dayton, New Jersey. Although Plaintiff eventually obtained return of its exempt hemp plant materials, it incurred substantial costs due to Defendants' unlawful seizure. SAC, ¶¶66-67.

II. ARGUMENT

A. Applicable law.

1. Rule 12 motions and Rule 8 pleading requirements.

In ruling on a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ. P. 12(b)(6), a court must accept all factual allegations pleaded in the complaint as true, and construe and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mutual Insurance Co.,* 80 F.3d 336, 337-38 (9th Cir.1996); *Mier v. Owens,* 57 F.3d 747, 750 (9th Cir.1995).

A pleading that sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2). Under the liberal system of "notice pleading," this Rule does not require a plaintiff to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim, and it is axiomatic that a motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Even though it may appear on the face of the pleadings that a recovery is very remote and unlikely, that is not the test. In

reviewing the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

A motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1) may either attack the allegations of the complaint as insufficient to confer upon the court subject matter jurisdiction, or attack the existence of subject matter jurisdiction in fact. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.,* 594 F.2d 730, 733 (9th Cir.1979). As for the former, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors v. City of Oakland,* 96 F.3d 1204, 1207 (9th Cir.1996). For the latter, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the existence of subject matter jurisdiction in fact. *Thornhill* at 733.

A court considering motions relating to jurisdiction and the merits generally decides the jurisdictional issue first, and if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to do so. *Thornhill,* 594 F.2d at 733-34. When a statute provides the basis for both the subject matter jurisdiction of the court and the plaintiffs' substantive claim for relief, however, a motion to dismiss regarding subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous. *Id.* at 734. Importantly, where, as here, allegations establish "a likelihood of future injury," they are sufficient to give the plaintiffs standing to seek declaratory and injunctive relief. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

2. Pendent venue.

Under Rule 12(b)(3), if there appears to be no independent basis for venue over Plaintiff's claims, venue still may arise under the doctrine of "pendent venue." Under this doctrine, "[o]nce a court has determined that venue is proper as to one claim, it may

exercise pendent venue to adjudicate closely related claims." *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1191 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018). Whether to do so is a discretionary determination, and informing the exercise of discretion are "principles of judicial economy, convenience, avoidance of piecemeal litigation, and fairness to the litigants." *Id.*, citing *Am. Civil Liberties Union of N. Cal. v. Burwell*, No. 16-CV-03539-LB, 2017 WL 4551492, at *4 (N.D. Cal. Oct. 11, 2017), *inter alia.*

In *Saravia*, the court stated that it was quite clear that additional declaratory and injunctive relief Plaintiff sought was closely related to the factual and legal bases for his habeas petition, since the same witnesses and evidence were relevant to both sets of claims. Accordingly, where a case is built around a "single wrong, common issues of proof, and similar witnesses," pendent venue is more likely to be appropriate. Moreover, the federal government and its lawyers were already required to appear in the district to defend against the habeas petition, so any additional burden imposed on the government by requiring it to defend against the other claims was minimal. In contrast, requiring the plaintiff to split his claims would have resulted in duplicative proceedings concerning the same series of events, the same policies, and the same legal theories. *Id.* at 1192; *see also, Pacer Glob. Logistics, Inc. v. Nat'l Passenger R.R. Corp.*, 272 F.Supp.2d 784, 789–91 (E.D. Wis. 2003)(applying the doctrine of pendent venue to hear claims against a defendant over which the court otherwise would not have had venue and noting that, "[i]f two or more claims arise out of the same set of facts, it is wasteful of judicial resources and unfair to one or more of the parties to require that the claims be litigated in separate judicial districts").

3. Standing.

To have standing to contest a forfeiture, one must be a "claimant," i.e., one who claims to own the article or merchandise or to have an interest therein. *Baker v. United States*, 722 F.2d 517, 518 (9th Cir. 1983). One or more members of a class may sue as

representative parties. Fed.R.Civ.P. 23. In a class action under Rule 23(b)(2), the plaintiff must show the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

To meet minimum standing requirements under Article III, a plaintiff must allege an injury that is: 1) actual or imminent, both particularized and concrete; 2) caused by defendant's challenged action; and 3) likely to be redressed by a court's favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also, Torres v. Horne*, 2011 WL 587590 (D. Ariz. 2011)(plaintiffs had Article III standing to bring their claims because they alleged an actual injury, *i.e.*, that defendants seized and detained funds plaintiffs sent through Western Union). The harm must constitute actual injury; where a plaintiff seeks prospective injunctive relief, he must demonstrate that he is realistically threatened by a repetition of the violation. *Armstrong*, 275 F.3d at 860-61.

4. Administrative Procedures Act ("APA").

The APA provides for a waiver of sovereign immunity and a remedy to a person aggrieved by a final government agency action for which there is no other adequate remedy in a court. 5 U.S.C. §704. It vests the district court with authority to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §§702, 706(1); *Wiren v. Eide,* 542 F.2d 75, 760 (9th Cir. 1976)(APA invoked to review claim of inadequate forfeiture notice); *Marshall Leasing, Inc. v. U.S.*, 893 F.2d 1096 (9th Cir. 1990)(district court erred in dismissing challenge under the APA to a completed administrative forfeiture); *U.S. v. One 1985 Mercedes Benz*, 917 F.2d 415, 422 (9th Cir. 1990)(forfeitures, as a product of administrative agency action, are subject to the requirements of the APA).

5. 28 USC §1346.

The district courts have original jurisdiction of any civil action or claim against

the United States not exceeding $10,000 founded either upon the Constitution, any Act of Congress or any federal regulation. 28 U.S.C. §1346(a)(2). The district courts also have exclusive jurisdiction over civil actions on claims against the United States for money damages for injury or loss of property caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §1346(b)(1).

This statute unequivocally provides the federal government's consent to suit for certain money damages claims, *United States v. Mitchell*, 463 U.S. 206, 216, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983), and is a jurisdictional provision that operates to waive sovereign immunity for claims premised on other sources of law. *United States v. Navajo Nation*, 556 U.S. 287, 290, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009).

6. Federal seizure and notice statutes.

The government's motion acknowledged that the provisions of 18 U.S.C. §983 apply to the seizures described in the SAC, since the government used a civil forfeiture statute, 21 U.S.C. §881(f), as the grounds for the summary forfeiture and destruction of Plaintiff's property. Motion, 8:8-28. Under §983, in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, the government is required to send written notice to interested parties no more than 60 days after the date of the seizure. 18 U.S.C. §983(a)(1)(A)(i). If the government fails to send timely notice, it must return the property, without prejudice to commencing a forfeiture proceeding at a later time. The government is not required to return contraband or other property the person from whom the property was seized may not legally possess, 18 U.S.C. §983(a)(1)(F).

Any person claiming property seized in a nonjudicial civil forfeiture proceeding may file a claim with the appropriate official under oath, subject to penalty of perjury, identifying the specific property being claimed and stating the claimant's interest in such

property. A claim need not be made in any particular form, and any person may make a claim without posting bond with respect to the property. 18 U.S.C. §983(a)(2). If the government fails to file a civil forfeiture complaint (or an indictment with a forfeiture count) within 90 days of the filing of a verified claim, it must promptly release the property and may not take any further action to effect civil forfeiture in connection with the underlying offense. 18 U.S.C. §983(a)(3)(B).

B. The government did not move to dismiss the Second Cause of Action, or the Third and Sixth Causes of Action regarding the 2017 Los Angeles seizure.

The SAC alleged a total of seven causes of action against Defendant (the Seventh and Eighth Causes of Action are *Bivens* claims against individual defendants). Defendant moved to dismiss only six of those seven claims(the First, Third, Fourth, Fifth, Sixth and Ninth). Notice of Motion, p. vii. The motion did not seek to dismiss the Second Cause of Action. It also did not moved to dismiss the Third and Sixth Causes of Action regarding the 2017 seizure of Plaintiff's property in Los Angeles. Accordingly, Defendant must file an answer as to those claims. *See* Fed.R.Civ.P. 12(a)(4)(A), (g)(2) and 12(h).

C. The Court should deny the motion to dismiss.

1. Plaintiff has standing to bring its First and Ninth Causes of Action for prospective/injunctive relief under the APA.

The First Cause of Action requests, pursuant to the APA, that the Court order Defendant not summarily forfeit or destroy any seized hemp or CBD during the pendency of this action, and to provide notice and an opportunity for a hearing to contest seizures. SAC, ¶¶79-80. Similarly, the Ninth Cause of Action requests the Court to order that Defendant not summarily forfeit or destroy any seized hemp or CBD materials in the future, without first providing owners with notice and the opportunity for a hearing

to contest forfeiture, pursuant to 18 U.S.C. §983. SAC, ¶¶107-109.

The motion argues that Plaintiff does not have standing to bring this claim because it did not allege that it intends to import future shipments of hemp materials and that its property is in "imminent danger" of being seized and forfeited. This is an inaccurate statement of the applicable case law (particularly in the context of this class action lawsuit), which provides that where a plaintiff seeks prospective injunctive relief, he need only demonstrate that he is "realistically threatened by a repetition of the violation." *Armstrong, supra*, 275 F.3d at 860-61.[2] Thus, when a named plaintiff asserts injuries inflicted upon a class of plaintiffs, the Court may consider those injuries in the context of the harm asserted by the class as a whole, to determine whether a credible threat that the named plaintiff's injury will recur has been established. *Id.* at 861.

Also, the plaintiff may demonstrate that the harm is part of a "pattern of officially sanctioned ... behavior, violative of the plaintiffs' [federal] rights." *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir.1985). Therefore, where, as here, the defendants have repeatedly engaged in injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future to satisfy the "realistic repetition" requirement.

In the SAC, Plaintiff both explicitly and implicitly alleges the realistic threat of a repetition of the seizures of lawfully-imported hemp and CBD from Plaintiff and from class members. First, the SAC alleges that "This action also is properly maintainable as a class action because the Defendants have acted or refused to act on grounds generally

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[2] The actual standard described in *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947-48 (9th Cir. 2002), cited in support of Defendant's motion at p. 12, is that individual plaintiffs in a private action (not a class action) must have suffered an invasion of a legally protectable interest which is both "concrete and particularized," as well as "actual or imminent, **not conjectural or hypothetical**." *Id.* at 946-47 (emphasis added). In that case, after the parties conducted discovery and filed cross motions for summary judgment, the court concluded that the risk of harm to plaintiffs' crops created by the government's water management procedures was not so speculative or diffuse as to render the controversy a hypothetical one, and was sufficient to afford plaintiffs standing. *Id.* at 950.

applicable to the class, **and such conduct is likely to reoccur against Plaintiff and the class**, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." SAC, ¶42.

Second, Plaintiff and the class members are realistically threatened by a repetition of the violation, since the SAC alleged Customs officials made it clear that those who import CBD products into the United States will continue to be subject to seizures of their property and other fines and penalties. SAC, ¶¶17-18. Also, despite the enactment of the 2018 Farm Bill, which excluded hemp and its derivatives from the definition of marijuana, the government has continued to seize exempt hemp and CBD materials from class members in violation of the law. SAC, ¶¶70-76.[3] Plaintiff therefore has alleged that it and other class members will be subject to the same injury in the future beyond a "mere physical or theoretical possibility." *Murphy v. Hunt*, 455 U.S. 479, 482 (1982).

Third, the SAC alleges that Defendant's erroneous determinations that the hemp and CBD are contraband reflect the likelihood that it will continue to seize, forfeit and destroy the property of Plaintiff and the class members unlawfully, under the continued supervision and approval of agency heads and supervisors. SAC, ¶¶26-32 (e.g., "At times relevant to this Complaint, Defendant Kevin K. McAleenan has been the Acting Secretary of DHS and the Commissioner or Acting Commissioner of Customs. He is and was responsible for approving, managing, developing, directing, and supervising the activities and applying, overseeing, executing and implementing the laws and policies of DHS and Customs, including the unlawful and unconstitutional practices and policies described herein.").

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[3] Defendant in this case previously obtained dismissal of Plaintiff's request for prospective relief in its initial class action complaint, by convincing the Court that because of the change in the statutory definition of marijuana, shipments of hemp products would no longer be subject to summary forfeiture under 21 U.S.C. §881(f). *See* Order, Clerk's Doc. No. 28, p. 7. The SAC, however, alleges that the government's unlawful seizures and summary forfeitures have continued since then, not stopped.

These allegations in the SAC demonstrate that the seizures are part of a pattern of officially sanctioned behavior violative of the federal rights of Plaintiff and the class members. Since the defendants have repeatedly engaged in these injurious acts in the past, and have continued to do so, there is a sufficient possibility they again will engage in them. This satisfies the "realistic repetition" requirement for standing.[4]

Consequently, although true, Plaintiff was not further required, as the motion suggests, to specifically allege that it "intends to import future shipments of purportedly legal hemp plant materials and that it is in imminent danger of CBP seizing or forfeiting those future shipments." The SAC's allegations demonstrate Plaintiff's standing sufficient to request the injunctive relief sought in the First and Ninth Causes of Action, and thus the motion should be denied as to those causes of action.

Nevertheless, should the Court find that these specific words mentioned above must be recited in the SAC to establish standing, Plaintiff hereby requests **leave to amend** those two causes of action to add those allegations.[5]

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[4] Defendant's reliance on *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), is misplaced. In that case, the court did not consider the injuries to the unnamed class members primarily because the named class plaintiffs' injuries were too far removed to show likely repetition. *Id.* at 1044 ("Mr. Lopez drives between 400 and 500 miles a week and sees Border Patrol agents nearly every day. Ms. Hodgers–Durgin drives between Rio Rico and Nogales at least four or five times a week and sees Border Patrol agents 'all over the place' whenever she travels. Yet Mr. Lopez and Ms. Hodgers–Durgin were each stopped only once in 10 years. Based on plaintiffs' own factual record, we believe that it is not sufficiently likely that Mr. Lopez or Ms. Hodgers–Durgin will again be stopped by the Border Patrol. In the absence of a likelihood of injury to the named plaintiffs, there is no basis for granting injunctive relief that would restructure the operations of the Border Patrol ...."). In the present case, on the other hand, Plaintiff suffered at least four property seizures within a little over two years, with the most recent seizure occurring just eight months before this case was filed. Moreover, the unnamed class member's seizures described in SAC ¶¶70-76 occurred **after the law changed** to presumably prevent the repetition of these seizures.

[5] Because new facts arose since prospective relief was sought in the initial complaint, this is not a situation where Plaintiff previously has had the opportunity to amend this claim.

2. Pendent venue exists in this Court for the Third and Sixth Causes of Action for the seizures that occurred outside of California.

The Third Cause of Action seeks an order for the return of hemp and CBD shipments seized from Plaintiff and class members pursuant to Fed. Rule of Crim. Proc. 41(g). The Sixth Cause of Action, alternatively, seeks an order setting aside any declarations of forfeiture of the subject hemp and CBD pursuant to 18 U.S.C. §983(e), to the extent that Defendant contends formal administrative forfeiture proceedings were initiated by the government against those seized materials. SAC, ¶¶85-86, 97.

The motion argues that venue does not exist in this District under Rule 41(g) or §983(e) for any seizures that took place outside of this District (i.e., New Jersey, Kentucky and the Virgin Islands). This argument is erroneous.

First, the motion fails to contest, and thus implicitly admits, that venue does exist for the two seizures that took place in the Central District of California. SAC, ¶¶44-48, 55-61. Accordingly, the government has waived any objection to venue as to the claims regarding those seizures. Fed.R.Civ.P. 12(h)(1).

Second, since venue has been established for the Third and Sixth Causes of Action made pursuant to Rule 41(g) and §983(e) relating to the Los Angeles area seizures, then venue also exists under those statutes for the closely-related claims regarding the out-of-district seizures, under the doctrine of "pendent venue." *See* Section A.2. above. As in *Saravia*, it is quite clear that the relief Plaintiff seeks under the other causes of action in the SAC (return of the seized property under the APA and/or damages under 28 U.S.C. §1346 and *Bivens* for seized property that was forfeited and destroyed by the government) is closely related to the factual and legal bases for the relief sought under Rule 41(g) and §983(e)(return of the seized property and/or setting aside any forfeitures of the property), because the same witnesses and evidence are relevant to all sets of claims.

This class action case is built around a single wrong, common issues of proof, and similar witnesses, so pendent venue both is appropriate and promotes judicial economy. The federal government and its lawyers already are required to appear in this District to defend against all of the other claims, so any alleged additional burden on the government by requiring it to defend against the closely-related Third and Sixth Causes of Action based on out-of-District seizures either is minimal, or non-existent.

On the other hand, requiring Plaintiff to split its claims would result in duplicative proceedings concerning the same series of events, the same policies, and the same legal theories. It also would be wasteful of judicial resources and unfair to Plaintiff to require that these claims be litigated in separate judicial districts. Consequently, venue exists for the Third and Sixth Causes of Action, and Defendant's motion should be denied .[6]

3. The Fourth Cause of Action states a claim for damages under the Little Tucker Act.

The SAC's Fourth Cause of Action seeks compensatory damages for Plaintiff and the class members under the Little Tucker Act, 28 U.S.C. §1346(a)(2), for violations of the civil forfeiture statute, 18 U.S.C. §983(a), and for violations of the Takings and Due Process Clauses of the Fifth Amendment to the U.S. Constitution. The motion contends that the Court does not have jurisdiction under that section of the Act because Plaintiff failed to plead a basis for money damages. That argument also is incorrect.

a. <u>The Court has jurisdiction over Plaintiff's Due Process claim under the Little Tucker Act</u>.

Courts have held that §1346(a)(2) does not waive the government's sovereign immunity if the Fifth Amendment Due Process Clause is plead **alone** as the basis for

[6] Plaintiff does agree that the underlying facts regarding the hemp seized in Kentucky cannot be used as a basis only for the Third and Sixth Causes of Action (requesting return of the property or setting aside its forfeiture), since the government eventually returned that specific property to Plaintiff. Motion, at 22:19-27.

damages. *See, e.g., Hamlet v. United States*, 873 F.2d 1414, 1416–17 (Fed.Cir.1989). An alleged constitutional violation that a plaintiff has been illegally deprived of his property, however, can form part of its claim pursuant to a money-mandating statute. *Id*. (plaintiff claimed a due process violation and also relied on rights contained in a personnel policy manual that governed her employment); *see also*, *Wiren*, *supra*, 542 F.2d at 760 (where there was no statutory procedure for the plaintiff to halt the summary forfeiture mandated by 19 U.S.C. §1609, the court held that "Insofar as Wiren's claim is one for money damages not exceeding $10,000 in amount, the district court was empowered to reach the merits of that claim by the Tucker Act."); *Simons v. United States*, 497 F.2d 1046, 1049–50 (9th Cir.1974)(relief under the Tucker Act founded on the legal theory that the forfeiture was unlawful); *Serafin v. United States*, 1990 WL 51162, at *5 (N.D. Cal. Apr. 16, 1990)(acknowledging that the Ninth Circuit in *Wiren* held that the due process clause mandates the payment of money by the United States and therefore is a proper basis of District Court jurisdiction under the Tucker Act).

In a case nearly on point with the present case, the Court of Appeals for the Federal Circuit definitively held that a forfeiture statute provided a substantive right for money damages in situations in which a penalty is improperly exacted. *Litzenberger v. United States*, 89 F.3d 818, 820 (Fed. Cir. 1996). The Circuit analogized to the situation that arose in *Trayco, Inc. v. United States*, 994 F.2d 832, 834-35 (Fed.Cir.1993), where an importer brought suit in district court alleging U.S. Customs improperly assessed an import penalty under 19 U.S.C. §1592(a) and (c). The court rejected the government's argument that the district court lacked subject matter jurisdiction. and held the district court properly exercised jurisdiction under 28 U.S.C. §1346(a)(2): "The refund of a penalty improperly exacted pursuant to an Act of Congress is a substantive right for money damages. Thus, Trayco satisfied the requirements for jurisdiction in federal district court under the Tucker Act." *Id.* at 837–38 (citations omitted).

In *Litzenberger*, the plaintiff similarly alleged that by forfeiting his car, the FBI improperly assessed and exacted a penalty pursuant to an Act of Congress – the Controlled Substances Act, 21 U.S.C. §881. The court held that in the judicial condemnation proceedings contemplated by that Act, Litzenberger would be entitled to money damages if a district court concluded that forfeiture of his car would be improper, citing to the Customs forfeiture provisions of 19 U.S.C. §1608. The court concluded the district court properly exercised jurisdiction under the Little Tucker Act to address the merits of Litzenberger's claim.

As to the plaintiff's due process claim under the Little Tucker Act, the Court further explained:

> Congress has created a scheme which allows interested parties to assert their substantive arguments in a judicial forum. For this option to be meaningful, the interested parties must receive adequate notice informing them of the means by which they can assert their substantive arguments in court. [citation omitted]. Accordingly, there exists a longstanding practice, in district courts, to evaluate the adequacy of notice in forfeiture proceedings. [citation omitted]. As the United States Supreme Court has stated, the basic Constitutional requirement of due process of law is the right to be heard, and this "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.".

Id. at 821. The court added that Congress has recognized and expressly embedded the need for due process within the Controlled Substances Act by requiring that "the appropriate [ ] officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks.... Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article." *Id*., citing 19 U.S.C. §1607(a), and also 21 C.F.R. §1316.75, which enumerates information that must be included in the notice. The court therefore held it was **proper** for the district court to evaluate the merits of the due process claim. *Id.*

Here, the motion acknowledged Plaintiff's Fourth Cause of Action is based both

on the forfeiture provisions of the Controlled Substances Act, including 21 U.S.C. §881 and 18 U.S.C. §983, and the notice provisions of Title 19, *supra*. *See* Motion, e.g., pp. 1, 2, 5, 7, 8, 14-17.[7] Since *Litzenberger* and *Trayco* held that these Acts of Congress are money mandating, Plaintiff's due process claims joined with those statutes state a claim and basis for money damages under the Little Tucker Act in this District Court.[8]

b. The Court also has jurisdiction over Plaintiff's Takings claim under the Little Tucker Act.

Regarding the Fourth Cause of Action's alternative Takings Clause claim, the gravamen of Plaintiff's claim is that the effect of the government's otherwise valid exercise of sovereign authority (the power to seize property for the purpose of asset forfeiture) resulted in the unlawful taking of private property for public use without payment. *Crocker*, 37 Fed. Cl. at 196. Although the government is entitled to seize and administratively forfeit property it considers to be subject to forfeiture – a valid exercise of its authority – its failure to institute administrative forfeiture proceedings, its summary forfeiture and its ultimate destruction of the hemp and CBD seized from Plaintiff and

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[7] The Fourth Cause of Action alleges a due process violation for the government's failure to apply and enforce 18 U.S.C. §983(a) when Plaintiff's property has been seized. *See* section A.6, above (the government is required to send written notice to interested parties no more than 60 days after the date of the seizure). If the government fails to send timely notice, **it must return the property**. Although the government is not required to return contraband, this cause of action is based on the government's unilateral and erroneous determination that possession of hemp and CBD is unlawful, and the government's due process violation in failing to send notice of the seizures to property owners. Like in *Litzenberge*r, Section 983(a) is money-mandating in that the statute explicitly provides that if the government fails to provide notice, the seized asset – whether money or property – must be paid back or returned to its owner.

[8] The Court of Claims in *Crocker v. United States*, cited in Defendant's motion, admitted the Federal Circuit's opinion in *Litzenberger* "plainly stands for the proposition that **district courts** can exercise jurisdiction under 28 U.S.C. §1346(a)(2) over claims for money damages for violation of the forfeiture laws." 37 Fed. Cl. 191, 197,199, *aff'd*, 125 F.3d 1475 (Fed. Cir. 1997)(a wrongful forfeiture can constitute an "illegal exaction" sufficient to invoke Tucker Act jurisdiction)(emphasis added). The motion's additional reliance on *Crocker* to argue against jurisdiction in the present case is mistaken, since that court simply held such jurisdiction does not exist **in the Court of Claims**. Consequently, that limited holding does not apply here.

class members resulted in an improper taking without just compensation, in violation of that constitutional clause. *See also*, *Anoushiravani v. Fishel*, 2004 WL 1630240, at *9 (D. Or. July 19, 2004)("Takings Clause of the Fifth Amendment provides the substantive right enforceable against the United States for money damages" for unlawfully seized property).

Under the same reasoning of the *Litzenberger* holding, *et al*, this Court therefore also has jurisdiction to review the Takings Clause claims of Plaintiff and the class members, and the motion to dismiss should be denied.

c. Where formal administrative forfeiture proceedings against property are not initiated, a motion to set aside a forfeiture under 18 U.S.C. §983(e) is not the exclusive remedy.

The motion also asserts that the Fourth Cause of Action should be dismissed because 18 U.S.C. §983(e) is the exclusive remedy for alleged "wrongful seizures," such as the ones alleged in the SAC. Once again, the government is wrong.

Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture. The motion shall be granted if the government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice.. Such a motion may be filed not later than 5 years after "the date of final publication of notice of seizure" of the property. This motion is the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute. 18 U.S.C. §983(e)(1), (3) and (5).

On the face of these statutory subsections, the right to file a motion to set aside a declaration of forfeiture under §983(e)(1) necessarily presumes that formal administrative forfeiture proceedings were initiated against the seized property, including all of the attendant mandatory notice requirements of §983(a). *See* Section A.6, *supra*.

In urging that a motion to set aside a declaration of forfeiture is Plaintiff's exclusive remedy for alleged wrongful seizures of property (as opposed to the Little Tucker Act, *et al*), the motion implicitly concedes the government also must first have complied with the notice and return of property provisions of §983(a), *i.e.*, 1) in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, the government **is required to send written notice to interested parties no more than 60 days after the date of the seizure**, and 2) if the government fails to send timely notice, **it must return the property**. 18 U.S.C. §983(a)(1)(A)(i) and (a)(1)(F).

Although subsection (a)(1)(F) also provides that the government is not required to return contraband or other property, **the statute does not relieve the government from having to send the mandatory seizure notice required by §983(a)(1)(A)(i)**, even if the government alleges the seized property is contraband. Since this necessary condition precedent to §983(e) serving as the exclusive remedy for setting aside a declaration of forfeiture was never satisfied, that remedy therefore is not exclusive here. **Indeed, the failure to satisfy this condition is the very heart of the class action allegations in the SAC**.

Accordingly, a motion to set aside a declaration of forfeiture could be the exclusive remedy, but **only** if nonjudicial forfeiture proceedings had been initiated against the property. Plaintiff alleges in the SAC that in all but one instance **no such proceedings were initiated** (or else notice would have been sent), and that the government has admitted as such by telling Plaintiff the government was not required to send notice and would not send notice. *See, e.g.*, SAC, ¶52 ("Defendants failed to provide Plaintiff with notice and the opportunity for a hearing to contest the seizure of its property. Defendants instead informed Plaintiff that no notice had to be provided to Plaintiff because of the alleged positive test for marijuana."); ¶58 ("Plaintiff eventually learned the shipment was assigned Seizure #2018-2720-00009501, and was informed in

a February 26, 2018 email that Customs would not provide Plaintiff with a formal notice of the seizure, and instead, it already had summarily forfeited the materials because unspecified 'testing' allegedly revealed the presence of 'THC extracts' in the materials."); ¶74 ("The official later stated that the seized materials were classified as 'marijuana,' and thus Customs would not be sending any notice of the seizure.").

Although the motion alleges that no notice was required because it was allowed to summarily forfeit (and destroy) Plaintiff's property under 21 U.S.C. §881(f) without notice, Motion at p. 8, the SAC alleges that statute has been unconstitutionally applied since Plaintiff imported lawful hemp. SAC, ¶¶18, 107-109. Moreover, the motion's argument contradicts itself – if the government was constitutionally allowed to enforce the summary forfeiture procedures of §881(f) without notice, presumably the government could ignore the statutory notice requirements of §983(a) – but then the §983(e) exclusive remedy provision also would not apply. Either §983 applies to these seizures or it does not. Accordingly, the motion should be denied as to the Fourth Cause of Action,

d. The SAC challenges the government's forfeiture **procedures**, not the merits of its administrative determinations.

The motion states that once a federal agency completes an administrative forfeiture, courts may not reinvestigate the merits, in this case presumably Customs' determination that the seized hemp and CBD were contraband. This contention is specious.

As is clear from the face of the SAC, none of the nine causes of action requests the Court to decide in this case whether the contents of the individual shipments of seized hemp and CBD were in fact contraband. Instead, all challenge the government's seizure, notice and summary forfeiture **procedures**, and the failure to initiate such administrative proceedings as required by statute. *United States v. Cobb*, 646 F. App'x

70, 72 (2d Cir. 2016)("When property has been administratively forfeited, federal courts have jurisdiction to 'determin[e] whether the agency followed the proper procedural safeguards when it declared [claimant's] property summarily forfeited.'"). Accordingly, The motion to dismiss the Fourth Cause of Action should be denied.

4. The Fifth Cause of Action states a claim under the Federal Tort Claims Act .[9]

a. The Court has jurisdiction over Plaintiff's Due Process claim under the Federal Tort Claims Act.

The motion next argues that Plaintiff and the class members have no claim under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346(b)(1), based on a "detention of goods" exception to the waiver of sovereign immunity. Under that subsection, sovereign immunity is still waived if 1) the property was seized for the purpose of forfeiture, 2) Plaintiff's interest was not forfeited, 3) Plaintiff's interest – **although subject to forfeiture** – was not remitted or mitigated, and 4) Plaintiff was not convicted for a crime relating to the seized goods. 28 U.S.C. §2680(c).

As for the first factor, the motion quotes *Foster v. United States*, 522 F.3d 1071, 1075 (9th Cir. 2008), in arguing that it was not enough that the government may have had "the possibility of a forfeiture in mind" when it seized the property, when criminal investigation also was a legitimate purpose of the seizure. The motion adds that the SAC should have explicitly or constructively plead that the goods were seized "solely" for the purpose of forfeiture.

Foster is inapposite. The firearms in that case were seized during the execution of search warrants issued **for the purpose of a criminal investigation**. *Id.* at 1073.

[9] Plaintiff incorporates by reference its arguments from section 3.c, above, and reiterates that 18 U.S.C. §983(e) is not the sole remedy to contest the government's conduct in this case.

Here, however, the SAC alleges the hemp and CBD were seized **not as part of a criminal investigation, but as an unlawful practice and policy of the DHS** in seizing, summarily forfeiting and destroying lawful materials in an unconstitutional, unlawful, random, arbitrary, capricious and inconsistent enforcement of the law. SAC, ¶¶10, 26-31. Thus, this is not the situation where the government may have "had in mind, and later pursued, judicial forfeiture of property seized initially for a legitimate criminal investigative purpose." *Id.* at 1079. The SAC plainly shows that each of these seizures was made solely for the purpose of forfeiture.[10]

Nevertheless, the government's purpose for seizing the hemp and CBD is a question of fact, which also makes dismissal under Rule 12(b)(6) inappropriate. As shown in section A.1, above, a court must accept all factual allegations pleaded in the complaint as true, and construe them and draw all reasonable inferences from them in favor of the nonmoving party. Moreover, under the liberal system of "notice pleading," Plaintiff is not required to set out in detail the facts upon which he bases his claim, but need only provide "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. In reviewing the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. The SAC alleged sufficient facts to put Defendant on notice.

As for the second factor, the motion contends that the SAC alleged Plaintiff's hemp was forfeited (in three of four seizures). As the SAC makes clear throughout, however, Plaintiff and the class members have plead that the alleged summary forfeitures

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[10] Other allegations in the SAC both explicitly and implicitly show the government did not merely have "the possibility of a forfeiture in mind" when it seized the hemp and CBD, but seized the property – unlawfully – only for the purpose of summarily forfeiting it as contraband. *See, e.g.*, SAC ¶¶16, 18, 19 and ¶3 ("Defendants . . . continue to arbitrarily, capriciously and inconsistently decide that legal hemp and CBD are contraband, and seize, forfeit and destroy these materials summarily without notice to the owners of this property.").

were unlawful because of lack of notice. If Plaintiff prevails on that argument, the forfeitures would be nullities and set aside, and the Court then could order the government to compensate Plaintiff for destroying its property.

Also, the hemp seized in Kentucky was **not** remitted or mitigated. By returning the hemp, the government implicitly admitted it was not contraband and thus **not subject to forfeiture**, a mandatory requirement for the third factor. Plaintiff should be compensated under the for its expenses incurred as a result of that unlawful seizure.[11]

Accordingly, the motion to dismiss the Fifth Cause of Action should be denied. Nevertheless, should the Court determine that the SAC must more explicitly plead that the goods were seized "solely" for the purpose of forfeiture, Plaintiff hereby requests **leave to amend** this cause of action accordingly.[12]

b. A factual dispute exists as to the enforceability of the government's hold harmless agreement regarding the Kentucky seizure.

The motion next argues that the facts surrounding the Kentucky seizure "cannot form the factual basis for any of Plaintiff's claims," alleging that Plaintiff executed a hold harmless agreement in exchange for release of that hemp shipment.[13] The motion, however, misrepresents the facts alleged in the SAC.

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[11] This Kentucky seizure reinforces Plaintiff's claims of the government's arbitrary, capricious and inconsistent enforcement of the seizure laws, and that all of the seizures of Plaintiff's property were solely for the purpose of forfeiture, since the government agreed to return the hemp seized there after first claiming it was contraband **and did not seek to maintain possession of the hemp as part of any purported criminal investigation**.

[12] This cause of action was not plead in the initial complaint, and thus Plaintiff has not previously requested leave to amend it.

[13] The motion attaches a copy of the alleged agreement, however 1) Defendant did not request the Court to take judicial notice of the document, and thus it is inadmissible (and Plaintiff also hereby objects in advance to any such request by Defendant in a reply memorandum); 2) the SAC never stated that Plaintiff executed the alleged agreement, contrary to the motion's misrepresentation *(see infra)*; and 3) such hold harmless agreements are unenforceable and thus a nullity where, as here, the government already had agreed to return the seized property (because it was not contraband).

The motion misrepresents that Plaintiff alleged in ¶66 of the SAC that it executed said agreement. Motion, at 4:14-16). The SAC, however, never alleges the agreement was executed. *See* SAC, ¶66 ("On June 20, 2018, Customs responded that the shipment "may be" released to Plaintiff, but on the condition that Plaintiff a) submit a notarized "Hold Harmless Agreement" agreeing not to sue Customs for its damages relating to this improper seizure, and b) either pay for the government's private storage contractor's delivery fees for the return of its shipment, or incur its own costs to pick up the shipment from the contractor in Dayton, New Jersey.").

To the contrary, Plaintiff hereby contends that it did not voluntarily enter into a hold harmless agreement, and that such agreements in these circumstances (where the government states its intent to return non-contraband property) are unenforceable contracts of adhesion that are both procedurally and substantively unconscionable, and thus nullities. *Acorn v. Household Int'l, Inc*., 211 F. Supp. 2d 1160, 1168-69 (N.D. Cal. 2002)("A contract or clause is procedurally unconscionable if it is a contract of adhesion," and "[s]ubstantive unconscionability focuses on the harshness and one-sided nature of the substantive terms of the contract."). A contract of adhesion is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it. *Id.*

If the government seeks to enforce this alleged hold harmless agreement (Exhibit 4 to Motion, which is a standardized form drafted by the government), Plaintiff will contend in this case that the government maintained superior bargaining strength, relegating to Plaintiff the choice only to either adhere to such a contract or reject it. As ¶66 of the SAC alleges, the government held Plaintiff's property hostage unless and until Plaintiff agreed not to sue the government and pay the government's storage or delivery costs to obtain the property's release. This was, of course, an admission by the

government that the hemp was not contraband and there was no legal basis for the government to continue holding it. The apparent intent of such agreements is to effectively force property owners into a Hobson's Choice of either paying the expenses or losing their property (which the government implicitly admitted it had no grounds to forfeit).[14]

Taken together, the terms of such hold harmless agreements are unconscionable and, therefore, unenforceable. Accordingly, since there is a factual dispute as to the underlying facts of the Kentucky seizure, the motion to dismiss should be denied. *Acorn*, 211 F. Supp. 2d at 1174; *see also*, *Anoushiravani*, 2004 WL 1630240, at *14 (motion to dismiss denied where plaintiff alleged due process violation when Customs officials conditioned release of personal property exempt from import regulations on the owner signing a hold harmless agreement).

5. The facts from the 2015 Los Angeles seizure support the SAC because the government failed to file a judicial complaint or return the seized property as required by §983.

The motion also asserts that the 2015 seizure of hemp from Plaintiff in Los Angeles cannot be used as a basis for any of the SAC's causes of action because the government provided notice of the seizure and Plaintiff filed an administrative petition, which Customs denied (and then forfeited the hemp). This argument also is wrong.[15]

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[14] Moreover, the government has previously acknowledged that these agreements are essentially worthless and unenforceable in such circumstances. *See, e.g., Cook v. Drew*, 2008 WL 68669, at *2 (W.D. Pa. Jan. 4, 2008)(U.S. Attorney's Office advised agency counsel that government should return the seized property even if claimant would not sign the agreement).

[15] The motion opined that Plaintiff's inclusion of this seizure in the SAC was inconsistent with its due process arguments, since the government had initiated administrative forfeiture proceedings. To the contrary, this seizure illustrates the government's inconsistent, arbitrary, and capricious treatment of otherwise similar seizures of property, i.e., 1) providing notice but refusing to return and forfeiting one hemp seizure,2) providing no notice but returning another hemp seizure, and 3) providing no notice and summarily forfeiting the other seized hemp and CBD materials.

Defendant's notice allowed Plaintiff to request a decision on its administrative decision first, but also stated that Plaintiff would have an additional 60 days to file a claim for the property, to trigger the initiation of judicial forfeiture proceedings if it was dissatisfied with the petition decision. *See* Notice, Clerk's Doc. No. 46-1, page 4, third paragraph; *see also*, *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 566–67, 103 S. Ct. 2005, 2013, 76 L. Ed. 2d 143 (1983)("A claimant need not waive his right to a prompt judicial hearing simply because he seeks the additional remedy of an administrative petition for mitigation. Unreasonable delay in processing the administrative petition cannot justify prolonged seizure of his property without a judicial hearing."); *United States v. One 1964 MG, Serial No. 64GHN3L34408, Washington License No. Dfy 260*, 408 F. Supp. 1025, 1029 (W.D. Wash. 1976), *rev'd*, 584 F.2d 889 (9th Cir. 1978)("The Court believes the better procedure is that followed by the Government in this case—completion of the administrative claim followed by filing a civil action if there is no remission.").

Accordingly, in anticipation of a possible denial of its petition, Plaintiff at the same time also filed a "Verified Claim" to the property. Verified Claim, Clerk's Doc. No. 46-1, p. 17; *see also* section A.6, *supra* (Any person claiming property seized in a nonjudicial civil forfeiture proceeding may file a claim under oath, subject to penalty of perjury, and any person may make a claim without posting bond).[16] Plaintiff's administrative petition further 1) **explicitly stated** Plaintiff was filing both an administrative petition **and the Verified Claim**, 2) **explicitly noted in bold letters** that it was not waiving the ability to seek judicial action in federal court, and 3) requested to withdraw the petition and seek immediate judicial review if Customs construed the

[16] Although Customs' notice letter and subsequent e-mail referred to a cost bond, section 983(a)(2)(E) prohibited such a bond requirement since, as the government in its Motion admitted, the seizure was "under a civil forfeiture statute," i.e, pursuant to 21 U.S.C. §881. Motion, p. 8, fn. 8.

petition as a waiver of such review. *Id.* at p. 9.

Since Plaintiff filed a verified claim, and the government failed to file a civil forfeiture complaint within 90 days from the denial of the administrative petition, it was required to promptly release the property to Plaintiff and not take any further action to effect forfeiture. 18 U.S.C. §983(a)(3)(B). Accordingly, as the SAC alleges, the government's purported summary forfeiture and destruction of Plaintiff's property from this seizure in Los Angeles was unlawful and provides a factual basis for all of the SAC's causes of action.

III. CONCLUSION

Plaintiff hereby requests the Court to deny the government's motion to dismiss, and/or allow it to amend the complaint as requested above.

Dated: October 21, 2019

Respectfully submitted,

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