

1 ELIZABETH A. STRANGE
2 First Assistant United States Attorney
3 District of Arizona

4 MATTHEW BINFORD
5 Arizona State Bar No. 029019

6 Matthew.Binford@usdoj.gov

7 CAROLINA ESCALANTE
8 Arizona State Bar No. 026233

9 Fernanda.Escalante.Konti@usdoj.gov

10 GARY M. RESTAINO
11 Arizona State Bar No. 017450

12 Gary.Restaino@usdoj.gov

13 Assistant U.S. Attorneys
14 40 N. Central Ave., Suite 1800
15 Phoenix, Arizona 85004
16 Telephone: 602-514-7500

17 *Attorneys for Plaintiff*

18
19 IN THE UNITED STATES DISTRICT COURT
20 FOR THE DISTRICT OF ARIZONA

21 United States of America,

22 Plaintiff,

23 v.

24 Thomas Mario Costanzo,

25 Defendant.

26 CR-17-00585-PHX-GMS

27 **UNITED STATES' RESPONSE TO
28 DEFENDANT'S MOTION FOR THE
RETURN OF PROPERTY PURSUANT TO
FED. R. CRIM. P. 41(g) (CR 95)**

29 Defendant Costanzo seeks the return of property seized from him at or shortly after
30 his arrest, and he focuses specifically on his interest in the 80.94512167 bitcoins¹ which he
31 exchanged with undercover agents for purported drug money. Because these bitcoins are
32 part of the forfeiture allegation in the criminal indictment, the equitable remedy of
33 Rule 41(g) is unavailable to defendant.

34 Defendant more specifically contends that because the government dismissed the
35 money transmittal counts, the government has no basis to forfeit all of the seized bitcoins
36 under the remaining money laundering counts. But that is simply incorrect. Defendant

37
38 ¹ Defendant claimed 49.99363132 bitcoins, while his business partner (Dr. Steinmetz, formerly a co-defendant) claimed the remaining interest.

1 transmitted the bitcoins to the undercover agent on April 20, 2017, in exchange for
2 \$107,000 of currency represented to be drug proceeds. *See* Superseding Indictment
3 (CR 18), at Count 7 and Forfeiture Allegation; *see also* Bill of Particulars (CR 46, at 9). It
4 is black letter law in this Circuit that the existence of civil or criminal forfeiture proceedings
5 precludes the return of property under Rule 41(g), or its predecessor, Rule 41(e). *E.g.*,
6 *United States v. Fitzen*, 80 F.3d 387, 389 (9th Cir. 1996) (as to forfeiture generally); *United*
7 *States v. \$83,310.78 in U.S. Currency*, 851 F.2d 1231, 1235 (9th Cir. 1988) (as to civil
8 forfeiture); *United States v. Cobb*, 2015 WL 518548 at * 5 (D. Nev. 2015) (as to forfeiture
9 alleged in an indictment); *United States v. Wetselaar*, 2013 WL 8206582 at * 18 (D. Nev.
10 2013) (same). *See also United States v. Tahir*, 2016 WL 641342 at *6 (E.D. Mich. Feb.
11 18, 2016) (because the government filed a Bill of Particulars specifically identifying a
12 Rolex watch as part of the criminal forfeiture, defendant cannot obtain relief under Rule
13 41(g)).

14 Defendant's argument is also premised on a faulty conclusion, that forfeiture of the
15 "clean" asset exchanged for the dirty money is somehow limited to the value at the time of
16 the transaction. The United States' interest in the bitcoins exchanged for dirty cash vested
17 immediately at the time of the offense. Put another way, any commodity, currency or other
18 type of property acquired in laundering the dirty money, including the subsequent
19 appreciation in value, belongs to the United States. Case law in other jurisdictions clearly
20 supports the government's position. *E.g.*, *United States v. Nektalov*, 461 F.3d 309, 319
21 (2nd Cir. 2006) (as to diamonds exchanged for dirty money); *United States v. Betancourt*,
22 422 F.3d 240, 251 (5th Cir. 2005) (as to a winning lottery ticket purchased with drug
23 proceeds). The government has not found any Ninth Circuit cases directly on point, but a
24 tracing case supports its position. In particular, the Ninth Circuit has held that where a
25 defendant engages in a subsequent transaction partially with laundered funds and partially
26 with untainted funds, the defendant's interest in the increased value is limited to the
27 percentage of "clean" funds in the overall purchase price. *See United States v. Real*
28

1 *Property Located at 22 Santa Barbara Dr.*, 264 F.3d 860, 872-73 (9th Cir. 2001) (assuming
2 that 28% of the purchase price was made with untainted funds, and therefore holding that
3 the government was entitled to at least 72% of the gain in value). This is of course not a
4 tracing case, and no authority supports apportionment here. Moreover, forfeiture of the
5 entirety of the thing of value being exchanged tracks the statutory language in 18 U.S.C.
6 § 982 (requiring the forfeiture to the United States of any property, real or personal,
7 “involved in” a money laundering offense) which is in turn tracked by the language of the
8 Superseding Indictment. The Court should deny relief under Fed. R. Crim. P. 41(g).

9 The government nonetheless recognizes that the value of the seized bitcoins has
10 fluctuated significantly and risen generally since the seizure. Although the government
11 would oppose any return of property to defendant at this stage of the case, the government
12 is willing to discuss with defendant (and the other third party claimant with a stake in the
13 bitcoins at issue) the possibility of moving the Court for an order authorizing an
14 interlocutory sale, pursuant to Fed. R. Crim. P. 32.2(b)(7) and consistent with the norms
15 and practices of the United States Marshals Service as the custodian of the asset,² in order
16 to preserve the status quo.

17 Respectfully submitted this 29th day of December, 2017.

18 ELIZABETH A. STRANGE
19 First Assistant United States Attorney
20 District of Arizona

21 *s/ Gary Restaino*
22 MATTHEW BINFORD
23 CAROLINA ESCALANTE
24 GARY M. RESTAINO
25 Assistant U.S. Attorneys

26
27 ² Generally speaking, the standard practice on disposition of bitcoins, whether post-
28 forfeiture or on an interlocutory basis, is through the use of an auction on a periodic basis.
The Marshals Service does not use commercial exchanges when selling seized bitcoins.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2017, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel of record.

s/ Lauren M. Routen
Legal Assistant
U.S. Attorney’s Office