UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN ACCOUNT NUMBER 000669829075 in THE BANK OF MM ACME BANQUE DE COMMERCE, INC., AT NATIONSBANK, N.A., CONSISTING OF $18,756,420.97, MORE OR LESS.	C.A. NO. 3:98mc96-McK
GEORGE AND DOLORES ROLLAR, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	C.A. NO. 3:01CV205-McK
RICHARD VASQUEZ, Intervener.	

MOTION AND MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56 FOR SUMMARY JUDGMENT DENYING MOTION OF M.M. A.C.M.C. BANQUE DE COMMERCE, INC. FOR RETURN OF PROPERTY SEIZED

The Court-appointed receiver, plaintiffs George and Dolores Rollar and Intervener Richard Vasquez join in this Motion and Memorandum of Authorities in Support of Motion Pursuant to Federal Rule of Civil Procedure 56 for Summary Judgment Denying the Motion of M.M. A.C.M.C. Banque De Commerce, Inc. for Return of Property Seized and respectfully say:[1]

[1] The government concurs with the Motion and the relief requested. This Motion and Memorandum of Authorities in Support of Motion Pursuant to Federal Rule of Civil Procedure 56 for Summary Judgment Denying the Motion of M.M. A.C.M.C. Banque De Commerce, Inc. for Return of Property Seized ("Motion") is supported by

I. Summary of the Undisputed Facts and the Argument.

On or about December 11, 1998, the Federal Bureau of Investigation ("FBI") seized $18,756,420.97 from account number 0006 6982 9075 in the name of M.M. A.C.M.C. Banque de Commerce, Inc. ("BDC") at NationsBank, N.A. (now Bank of America, N.A.). On or shortly after May, 8, 1999, the FBI seized an additional $32,134.96 from the same account (the funds seized are hereafter referred to as collectively the "Seized Funds" and the account from which they were seized as the "Seized Account"). BDC has filed a Motion for Return of Property Seized ("Motion for Return") in which it asks the Court to order the return to it of the Seized Funds.[2] In sum, the undisputed facts are that:

- August Wilhelm Christian Mohr ("Mohr"), BDC's president and chairman of its Board of Directors (Mohr Dep., 99, l.'s 17-23), and the person filing the Motion for Return on BDC's behalf, has been convicted in Norway and sentenced to six years' imprisonment for, among other things, obtaining the Seized Funds by means of "investor fraud" and "complicity in gross fraud" (Angell Aff., ¶¶ 3-4, Ex.'s 1 & 2);[3]

- BDC had no ownership interest in the great majority of the funds deposited into the Seized Account (*Id.*, 162, l.'s 22-25; 163, l.'s 1-5);[4] instead, BDC held those funds only for investment purposes on behalf of others (Motion for Return, ¶4) and was under the obligation to return the funds to the investors (*Id.*, 170, l.'s 16-25; 171, l.'s 1-25; 172, l.'s 1-4);

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the evidence contained the in the Appendix to Motion for Summary Judgment ("Appendix"), filed contemporaneously herewith, including: 1) excerpts from the February 27, 2002, Deposition of August Christian Wilhelm Mohr and selected exhibits thereto (hereafter cited as "Mohr Dep., p. __, l. __, Ex. __)(Appendix, Exhibit 1); 2) the Affidavit of Arnt Angell and its Exhibits (hereafter cited as Angell Aff., ¶__, Ex. __)(Appendix, Exhibit 2); 3) the Affidavit of Michael J. Quilling and its Exhibits (hereafter cited as Quilling Aff., ¶__, Ex. __)(Appendix, Exhibit 3); 4) Application and Affidavit for Seizure Warrant (hereafter cited as "Seizure Affidavit") (Appendix, Exhibit 4); 5) Affidavit of Richard P. Vasquez without its Exhibits (hereafter cited as Vasquez Aff., ¶__ (Appendix, Exhibit 5); and 6) Affidavit of George J. Rollar and its Exhibits (hereafter cited as Rollar Aff., ¶__, Ex. __)(Appendix, Exhibit 6).

[2] Mohr stipulated during his deposition that he was not making a claim to the Seized Funds in his personal capacity; therefore, Movants address only the claims with respect to BDC. Mohr Dep., 142, l.'s 7-15.

[3] Mohr claimed in his deposition that the judgment of conviction against him was "set aside" the same day it was entered. Mohr Dep., 104, l. 25; 105 l.'s 1-3. Factually, it is undisputed that Mohr a) was convicted; and b) gave notice of appeal in open court. *Id.*, 107, l.'s 4-20; Angell Aff., ¶7, Exs.' 3 & 4. As discussed below, the pendency of Mohr's appeal does not vitiate the collateral estoppel effect in this civil action of Mohr's criminal conviction.

[4] The funds deposited into the Seized Account were of four categories: 1) the initial $1,000 deposit to open the account (the "Initial Deposit"); 2) investor deposits ("Escrow Funds"); 3) payments to BDC for the "lease" of treasury notes ("Lease Payments"); and 4) interest ("Interest"). *See* Section II.D.1, *infra*. The Initial Deposit, Interest and Lease Payments are collectively the "Non-Escrow Funds."

- BDC claims entitlement to the Seized Funds, not because it ever owned them or held them in its own right, but as "damages and compensation" (*Id.*, 161, l.'s 1-5) owed to BDC by virtue of a Norwegian default judgment BDC took against Fred Gilliland and Sterling Asset Services (hereafter "Norwegian Default Judgment") (*Id.*, 150, l.'s 10-20)(a theory not set forth in BDC's Motion for Return).

Based on the foregoing undisputed facts, the Court should enter a final judgment denying BDC the relief it requests because:

- BDC lacks Article III standing to pursue "return" of the Escrow Funds under either Rule 41(e) or 18 U.S.C. §§981 or 983;
- BDC has no legally cognizable interest in the Escrow Funds either for purposes of Federal Rule of Criminal Procedure 41(e) or 18 U.S.C. §§ 981 or 983;
- BDC may not lawfully possess the Escrow Funds inasmuch as they constitute the proceeds of a fraudulent scheme perpetrated by Mohr and BDC;
- BDC held the Escrow Funds which were the proceeds of fraud, in a constructive trust for the benefit of the defrauded investors;
- BDC has unclean hands and therefore is not entitled to equitable relief in a proceeding under Federal Rule of Criminal Procedure 41(e); and
- the Seized Funds (including the Escrow Funds, Interest and Lease Payments) should be returned to persons legally and equitably entitled to possess them—the innocent victims of the fraudulent scheme Mohr was convicted of perpetrating.

II. The Undisputed Facts.

A. In December 1998, the government seized $18.8 million as the probable proceeds of mail and wire fraud.

As set forth above, in and after December 1998, the FBI seized approximately $18.8 million from account 0006 6982 9075 at NationsBank, N.A. (now Bank of America, N.A.). In the Application and Affidavit for Seizure Warrant dated December 3, 1998, the government alleged that there was reason to believe that the Seized Funds were related to a Ponzi scheme and represented the proceeds of mail and wire fraud perpetrated by, among others, Mohr and Frederick Gilliland ("Gilliland"). *See generally*, Seizure Affidavit.

B. Background Facts.

Plaintiffs George and Dolores Rollar and Intervener Richard Vasquez each have significant assets traceable to the Seized Funds. Although Rollar and Vasquez did not know each other prior to the present litigation, they both were the victims of a similar fraudulent scheme involving Gilliland and Mohr. While the court-appointed receiver has not yet completed the process of receiving claims forms and notifying potential victims of the Ponzi scheme the government identified in the Seizure Affidavit, the stories of Rollar and Vasquez (briefly summarized below) are probably typical (with the exception of the amounts they invested) of the as yet untold stories of the many other victims.

1. The Rollar Investment.

George Rollar and his wife Dolores met Fred Gilliland in March 1998. Gilliland pitched to the Rollars the concept of high-yield investments in medium term notes ("MTNs") and provided Rollar with a brochure titled, All You Wanted to Know about Bank Debentures Trading Programs But Did Not Dare to Ask. Rollar Aff., ¶¶2-3, Ex. 2. In connection with their March meeting with Gilliland, Rollar and his wife signed a "Nondisclosure/Non-Circumvent Agreement." *Id.*, Ex. 1. Thereafter, from April through approximately June 1998, Rollar "invested" approximately $300,000 in MTNs with Gilliland in a transaction unrelated to the Seized Funds or Mohr. *Id.*, ¶6. Rollar was paid approximately $150,000 in what he was told were earnings on his $300,000 investment. *Id.*, ¶6.

In approximately May 1998, Gilliland approached Rollar with the concept of making a large investment in an MTN type transaction directly with a trader. Gilliland proposed an investment in the amount of approximately $20 million, with he and Rollar each contributing $10 million toward the investment. *Id.*, ¶7. The investment was to be made through the cooperation of Gilliland's company, Sterling Asset Services, Ltd. ("SAS") and one of Rollar's

companies, Halsbury Group, Ltd. In anticipation of making a $20 million investment in MTNs with Gilliland, in July 1998, Rollar began transferring funds to SAS in accordance with wiring instructions Gilliland provided. *Id.*, ¶¶12-13. As it turned out, Gilliland told Rollar he could only come up with $7.5 million, so Rollar put up a total of $12.5 million of the $20 million investment. *Id.*, ¶7.

Gilliland took responsibility for arranging the details of the alleged investment. Among other things, Gilliland told Rollar that: MTN programs were primarily done in Europe; Gilliland would find a trader in Europe with whom to execute trades directly; the investment funds would remain in an SAS account at Allied Dunbar Bank for the duration of the investment program; and the investment would earn a 130% return during the first ten days in the account. *Id.*, ¶¶8-12. In December 1998, Gilliland told Rollar for the first time that the investment funds had been transferred out of the SAS account at Allied Dunbar Bank and were part of assets seized by the FBI in an account at Bank of America. Gilliland never returned to Rollar any of the $12.5 million that Rollar "invested" with Gilliland. *Id.*, ¶17. The only return Rollar has received on his $12.5 million investment is an interim distribution in the amount of $1.25 million from the receiver.

2. The Vasquez Investment.

In approximately January 1998, Richard Vasquez met Anthony J. Marino ("Marino"). Marino told Vasquez that he and his company, AJM International, worked in an exclusive and semi-secret financial marketplace sponsored by the "Fed." Marino told Vasquez that he would receive a 60 percent return on any investment he made in the Fed program. Vasquez Aff., ¶2. From January 1998 through May 1998, Vasquez made a couple of investments with Marino in so-called "private placements." *Id.*, ¶¶3-24. In or about July 1998, Marino informed Vasquez that Marino had another investment opportunity available. *Id.*, ¶29. On or about July 29, 1998,

Vasquez, on behalf of Special K's (a company that Vasquez controls and of which he is the Director) executed a Joint Venture Investment Agreement for an investment with Mousa Enterprises, Inc., a company that Vasquez believed was controlled by Marino. Marino told Vasquez to wire transfer the investment funds to Anglo Irish Bank's correspondent account at the Chase Manhattan Bank for credit to Mousa Enterprises, Inc.'s Anglo Irish Bank account. In accordance with Marino's instructions, Vasquez attempted the wire transfer; however, Vasquez was notified that the wire transfer had been unsuccessful. Thereafter, Marino advised Vasquez to wire transfer the $900,000 to a "friend's account" at Allied Dunbar Bank International. The account was in the name of Sterling Asset Services, Ltd.—the company controlled by Gilliland. *Id.*, ¶¶ 30-34.

In approximately December 1998, Vasquez received a letter from Marino advising that Mousa Enterprises, Inc. was ceasing all operations. *Id.*, ¶37. Vasquez traveled to meet with Marino to discuss the investment. Marino told Vasquez that Marino's residence had been searched and that Marino was moving to Costa Rica. *Id.*, ¶38. Marino suggested that Vasquez contact Gilliland. In approximately January 1999, Vasquez submitted a written request to SAS for return of Special K's principal. *Id.*, ¶41. In approximately January 1999, Gilliland contacted Vasquez and informed him that the SAS account had been seized. *Id.*, ¶ 42. The only "returns" Vasquez has received on his investment are the interim distributions from the receiver totaling $139,987.57.

3. The SAS-Gilliland/BDC-Mohr Connection.

Mohr is indirectly the fifty percent owner of a company called Stillbuild International, Inc. ("Stillbuild"). Mohr Dep., 18, l.'s 4-17. On September 17, 1998, Gilliland executed on behalf of SAS a Contract/Agreement with Stillbuild ("Stillbuild Contract") whereby Stillbuild was to invest USD $20 million on behalf of SAS. Mohr Dep., 18-19, Ex. 2. In relevant part, the

Stillbuild Contract designated SAS as "Investor" and Stillbuild as "Program Manager" and required Stillbuild to open a "parallel account for Investor in his own name with Program Managers [sic] transacting fiduciary bank (Nation Bank) [sic]." The Stillbuild Contract required that the account was to be a "non depletion [sic] account," and further stated that:

> THE PROGRAM.
>
> PROGRAM MANAGER WILL BE THE PRINCIPAL AND SIGNATORY TO THE MASTER CONTRACT.
>
> THE CONTRACT IS ISSUED BY A **UNITED STATES OF AMERICA GOVERNMENT AGENCY**. THE FUNDS WILL BE BLOCKED FOR A YEAR AND ONE DAY.
>
> **WITHIN SEVENTY-TWO HOURS OF THE FUNDS BEING BLOCKED ONE HUNDRED AND FIFTY PERCENT (150%) WILL BE PAID TO INVESTORS** [sic] **DESIGNATED BANK ACCOUNT. THERE AFTER** [sic] **ON BEST** [sic] **EFFORT BASIS INVESTOR WILL RECEIVE TEN PERCENT (10 %) PER WEEK FOR THIRTY NINE** [sic] **WEEKS AT WHICH TIME THE CONTRACT WILL BE CONCLUDED.**

Mohr Dep., Ex. 2, p. 2 (emphasis in original).

Also on September 16, 1998, Mohr faxed to Gilliland a letter explaining that trading in "High Yield Private Placement Programs" is handled by BDC in North Carolina. Mohr Dep., 23, l.'s 5-14, Ex. 4. Eventually Mohr, on behalf of M.M. A.C.M.C. Fiduciary & Nominees BA ("F&N"), and Gilliland, on behalf of SAS, executed a Fiduciary Capital Management Escrow Agreement effective as of September 16, 1998 ("Escrow Agreement") concerning the deposit of USD $20 million into a segregated escrow account. Mohr Dep., 41, Ex. 6. In sum, the Escrow Agreement recognized that: SAS had entered into other agreements (one of which was the Stillbuild Contract referenced above and attached as exhibit 2 to Mohr's deposition) for the investment of USD $20 million; and SAS was to place a sum of USD $20 million (the "Escrow Funds") in a segregated escrow account with a Prime Banking Institution to be held by F&N as "Escrow Agent" for the purpose of the transactions outlined in the other agreements. The

Escrow Period began on September 16, 1998 and expired on September 16, 1999. Mohr Dep., Ex. 6.

In connection with the execution of the above agreements and other dealings between Mohr and Gilliland, Gilliland caused the transfer on September 16, 1998, of $20,002,000 from the SAS Allied Dunbar International bank account to the BDC bank account at NationsBank (the Seized Account). Mohr Dep., 122, l.'s 4-18; Motion for Return, ¶¶3-4. As set forth above, in the first part of December 1998, the funds in the NationsBank account were seized as part of an investigation into mail and wire fraud undertaken by the FBI.

C. Mohr is convicted in Norway of fraud in connection with Gilliland, BDC and the Seized Funds.

As it turns out, the government's suspicions concerning BDC, Mohr and the Seized Account were correct.[5] Mohr was tried in the Oslo District Court and sentenced on January 10, 2002, to a six-year term of imprisonment for numerous counts of financial fraud in connection with, among other things, several fraudulent "MTN" and "fed programs" and the Seized Funds. Mohr Dep., 104, l.'s 19-25; 105, l.'s 1-3; Angell Aff., ¶¶2-5, Ex.'s 1 & 2 (Exhibit 1 to the Angell Affidavit is a certified copy of the Sentence of the Oslo court and Exhibit 2 is the English translation ("Sentence"). As set forth in the Sentence, Mohr acted in conspiracy with Fred Gilliland and others to defraud George and Dolores Rollar and others out of millions of dollars. Angell Aff., Ex. 2, pp. 52-59. In fact, Count VI of the Sentence is entitled "The Gilliland Case – Investor Fraud – Complicity in Gross Fraud."

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[5] Mohr is a citizen of Norway who, within the last ten years, was incarcerated for two years for a criminal conviction based on "[b]ringing documents into Luxembourg by [his] hand into the bank that were either unauthorized, withdrawn, ineffective, or without value. . ." Mohr Dep., 103-104. As stated in the Sentence, Mohr was convicted in "1995 for having used false/forged documents with fraudulent intent to the detriment of a bank in August 1993." Angell Aff., Ex. 2, Sentence, p.14.

In sum, the Oslo court found that: a) Gilliland was the operator of Sterling Asset Services, Ltd. and Sterling Management Services, Inc.; b) Gilliland solicited Rollar to invest in certain "high yield programmes" involving Medium Term Notes or Standby Letters of Credit; c) Gilliland assured Rollar that there was no risk of losing his principal investment; d) Rollar transferred more than $12 million to accounts controlled by Gilliland; e) additional funds were deposited into the SAS account that appear to have come from investors other than Rollar; f) Gilliland entered into various agreements with Mohr respecting the investment of USD $20 million in "fed programs;" g) Mohr represented to Gilliland that returns of "5 per cent per week may be expected for one type of trade, and for another type of trade 130 per cent + 10 per cent multiplied by the number of reinvestments allowed by Fed–calculated in proportion to the amount deposited;" and h) the "Federal Reserve has never operated with or been contributory to trading programmes" such as those Mohr described.

Based on the evidence before it, the Oslo court concluded:

> The court considers that the initial contract between Rollar and Gilliland, the escrow agreement with the Mohr company and the contract with Stillbuild were all parts of a fraud scheme. In addition, Mohr aided and abetted actively and intentionally through his telefaxes. Gilliland, Firetto and Mohr jointly and unlawfully deluded Rollar into making arrangements for a transfer of USD 20 million to an account controlled by Mohr. An essential part of the amount that was transferred from Allied Dunbar Bank, undoubtedly came from Rollar. The account was virtually emptied in connection with the transfer, and more than USD 13 million plus interest came from payments made by Rollar. Even if Rollar during the taking of evidence not himself stated [sic] that he had been defrauded, the court considers this to be an indubitable fact. Emphasis is in this connection placed [sic] on the facts described above, and the court's subsequent general remarks. The court does not attach significance to the circumstance that Rollar during the taking of evidence did not clearly state that he had been defrauded. Primarily, the court has a considerably better survey of facts than what Rollar, according to his deposition, had. Secondarily, as long as the amount is blocked and Gilliland is on the loose, he might have a hope of having the funds returned on a basis of voluntariness. Rollar was unlawfully deluded in that Gilliland, Firetto and Mohr brought rise to and exploited his misapprehension, to wit that a Fed programme as described above did exist. The purpose of the fraud scheme

> was to obtain an unlawful gain, and an unlawful gain was also obtained by means of the transfers that were made. The same plan would also have succeeded concerning the funds remaining in the account unless US authorities/FBI/Økokrim had taken action at the proper time. Thus, an economic loss was caused, in addition to the fact that there was a risk of loss. As an accomplice, Mohr acted with intent for the purpose of obtaining an unlawful gain – also for himself. The offence is considered gross due to the size of the amounts and other circumstances.
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> The defendant will accordingly be convicted of violation of section 270, paragraph 1, no. 1 cf. paragraph 2 cf. section 271 of the Norwegian Penal Code.[6]

Angell Aff., Ex. 2, Sentence, p. 59; Mohr Dep., 173, l.'s 11-25; 174, l.'s 1-25; 175, l.'s 1-10. The facts set forth in the Sentence concerning the fraud perpetrated on Rollar are corroborated and, in large part, independently established by the Rollar Affidavit and the Seizure Affidavit.

As the Oslo court noted in the Sentence, Rollar was not the only victim of the Mohr/Gilliland fraud scheme. As set forth above and in the Vasquez Affidavit, Vasquez had caused nearly $900,000 to be transferred to the SAS account identified by the Oslo court in the Sentence.

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[6] Mohr and BDC are collaterally estopped from disputing the factual findings essential to Mohr's conviction in the Norwegian trial. *See Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568, 71 S.Ct. 408, 95 L.Ed. 534 (1951) (a prior criminal conviction can operate as estoppel in favor of the government in subsequent civil proceedings); *United States v. DiBona*, 614 F.Supp. 40, (E.D. Pa., 1984)(fraud of officer of corporation may be imputed to corporation when officer's conduct was in course of his employment and for benefit of corporation); and *Black Clawson Co., Inc. v. Kroenert Corp.*, 245 F.3d 759, 763 (8th Cir. 2001) (a United States court will recognize, enforce, and give preclusive effect to a foreign judgment if it finds that the foreign court: (a) provided a full and fair trial of the issues in a court of competent jurisdiction; (b) ensured the impartial administration of justice; (c) that the trial was conducted without prejudice or fraud; (d) the foreign court had jurisdiction over the parties; and (e) the foreign judgment does not violate public policy). As the Sentence makes clear, Mohr was a party to the Norwegian proceedings, was represented by two attorneys and had the opportunity to cross-examine witnesses. Moreover, Rollar and Vasquez each testified in the Norwegian proceedings that led up to the Sentence. Mohr Dep., 134, l.'s 20-25; 135, l.'s 1-13; 172, l.'s 5-25; 173, l.'s 1-10. Finally, Mohr's conviction was based upon proof beyond a reasonable doubt. Angell Aff., ¶6. The fact that Mohr has appealed his Norwegian conviction does not alter the collateral estoppel effect of the Sentence. Under well-settled federal law, the pendency of an appeal normally does not suspend the operation of a final judgment for purposes of collateral estoppel. *Nixon v. Richey*, 513 F.2d 430, 438, n.75 (D.C.App. 1975); 18 Charles Alan Wright, Arthur Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 4433.

D. BDC admits it has no ownership interest in or current right to possess the vast majority of the Seized Funds.

1. The sources of the funds in the Seized Account.

When the Government seized the Seized Account, it was comprised of deposits originating from the Initial Deposit to open the account, Escrow Funds, Interest and Lease Payments. Based on Mohr's deposition, the BDC bank records and the tracing performed by the receiver (and as set forth in Quilling Affidavit at ¶18), there were deposits into the Seized Account: a) in the amount of $1,000.00 to open the account (the Initial Deposit); b) in the amount of $21,851,985 by third parties for investment purposes (the Escrow Funds); c) in the amount of $105,749.93 for interest (net of federal withholding taxes)(the Interest);[7] and d) in the amount of $380,000 for the "lease" to Boyden & Laufer of $3,000,000 in treasury notes (the Lease Payments). Quilling Aff. ¶18. In addition, there were disbursements from the account totaling $3,583,252.40.[8]

2. The Escrow Funds originated from persons and entities other than BDC.

As the Sentence makes plain, the Escrow Funds were not the property of BDC or Mohr. Rather, the Escrow Funds represent the "investment" dollars of many people. Moreover, the court-appointed receiver has undertaken an extensive tracing in an effort to identify the sources of all of the funds in the Seized Account. Although the receiver's tracing is not yet completed, there is no evidence that any portion of the Seized Funds (with the possible exception of the

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[7] The Interest includes the $32,134.96 seized in May 1999.

[8] According to Mohr, $2,500,000 was disbursed to Gilliland at his request (Mohr Dep., 69, l.'s 5-25; 70, l.'s 1-3) $1,000,000 was used to acquire a treasury bill and $50,000 was used to open an investment account at Southwest Securities. *Id.*, 117, l.'s 14-18. The other disbursements were for mostly for wire fees and miscellaneous banking charges. Quilling Aff., Ex. 5.

approximately $899,984 of the September 16 Transfer originated from accounts in the name of Richard Vasquez.[11] The remainder of the Escrow Funds transferred into the Seized Account originated from accounts in numerous different names—some in the names of individuals and some in the names of other legal entities—but none of those originating accounts has any discernable connection with Mohr or BDC.

3. Mohr admitted during his deposition that BDC had no ownership interest in the Escrow Funds.

The receiver's tracing effort to date is entirely consistent with Mohr's own testimony. Mohr claimed in his deposition to have been under the impression in 1998 that the $20,002,000 transferred into the Seized Account belonged to Fred Gilliland. *See* Mohr Dep., 40, l.'s 24-25; 41, l.'s 1-10; 49-53; 61, l.'s 7-12. Indeed, Mohr testified that shortly after the September 16 Transfer Gilliland requested the return to him of $2.5 million. *See Id.*, 69, l.'s 7-25; 70. According to Mohr, he advised Gilliland that:

> that will infringe on the possibilities for us to work for Sterling Asset Services in respect of the agreements being made [the alleged investment contracts]. That would have a consequence for Sterling Asset Services, and **Mr. Fred Gilliland since he is the owner of the funds it's entirely up to him as to what he wants and doesn't want. If he wants to delay it or do something else, cancel it, he has the right to do it.**

Id., 70, l.'s 22-25; 71, l.'s 1-5 (emphasis added). Mohr further testified that he was under the impression that the other deposits into the account, with the exception of the Lease Payments and

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On behalf of Sterling Asset Services Ltd., Gilliland on 14 September 1998 opened an account with M. M. ACMC Administration BA and announced a transfer of USD 20 million.

Angell Aff., Ex. 2, Sentence pp. 53-54.

[11] With respect to Vasquez, in general terms, the tracing demonstrates that on or about August 12, 1998, $75,000 was transferred from an account in the name of Richard Vasquez at Barnett Bank into the Sterling Asset 200997 Account. Additionally, on or about August 14, 1998, $824,994 was transferred from an account in the name of Special K's at Barnett Bank into the Sterling Asset 200997 Account. Vasquez has submitted documentation establishing that Special K's was a company he controlled. As set forth in the preceding footnote, on or about September 2, 1998, $18.9 million was transferred from the Sterling Asset 200997 Account to the Sterling Asset 200999 Account. Quilling Aff. ¶15, Ex.'s 3-4.

the Interest, were made at the direction of Gilliland and were part of the Escrow Funds. Mohr Dep. 169 l.'s 17-25; 170, l.'s 1-15. Thus, Mohr admitted that neither BDC nor any of the other Mohr related entities involved owned the Escrow Funds in the Seized Account or had the right to exert control over them to the exclusion of SAS and Gilliland.

Mohr claimed in his deposition to have learned after his companies entered into the agreements with SAS that SAS/Gilliland was not the sole "owner" of the $20,002,000 subject of the September 16 Transfer or the other "investment" deposits into the Seized Account. Rather, as it turns out, the funds in the Seized Account were "pooled"—in other words, Gilliland had apparently been aggregating funds from various individuals for purposes of "investing" with F&N and Mohr's other companies. *Id.*, 151, l.'s 22-25; 152-155, l.'s 1-6; s*ee also, id.*, 39, l.'s 19-25; 40, l.'s 1-25; 41, l.'s 1-10; 142, l.'s 20-25; 143, l.'s 1-23.

4. BDC possessed the Escrow Funds only temporarily pursuant to the Escrow Agreement between SAS and F&N, which has expired and been terminated.

As set forth above, F&N came into possession of the Escrow Funds pursuant to a scheme to defraud investors. Therefore, the agreements between SAS and F&N and Mohr's other companies are void on the basis of fraudulent inducement.[12] However, even if the agreements were not void, F&N and BDC would be obligated to return the Escrow Funds to SAS and the other investors. Specifically, the Escrow Agreement provides that the Escrow Period commences on September 16, 1998, and expires on September 16, 1999. Mohr Dep., Ex. 6, p. 3, ¶1. Mohr admitted that the Escrow Period had never been extended and that the Escrow Period has now ceased. Mohr Dep., 49, l.'s 3-14. Moreover, the court-appointed receiver delivered to Mohr personally on February 27, 2002, a letter terminating the Escrow Agreement. Mohr Dep.,

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[12] *See* section III.C.3. *infra*.

133, l.'s 18-25; 134, l.'s 1-6. Inasmuch as the Escrow Period is over, even assuming the Escrow Agreement was not the product of a "gross fraud" as the Norwegian court determined, the Escrow Funds must be returned to the investors. Even Mohr recognized the obligation to return the money to the investors.

> Q. Let me ask you a hypothetical question. If the [default] judgment[13] had never been entered against Sterling Asset Services and David Gilliland – I'm sorry, Fred Gilliland, at some point in time you'd have to give all this money back to the investors, is that correct, because it was their money?
>
> A. First of all, if we hadn't had the discovery we had, we wouldn't even know that there was people behind Sterling Asset Services. We would then have returned less commissions we've earned on all the trading and less all the profits we would have made, we would have turned the amounts back to Sterling Asset Services account at Isle of Man providing that account, of course, existed at that time or any such account that Sterling Asset Services could legally hold, and, henceforth, we would have returned the funds there less our earnings, which would be more than $20 million.
>
> Q. And that's because that money never belonged to Banque de Commerce or Fiduciary & Nominees, it was just holding it for investment purposes, and after the investment program had run its course, it would be obligated to give it back plus earnings less fees?
>
> A. That is correct. We would have paid back the principal. We would have paid back the earnings due to the investor being -- Banque de Commerce would be Fiduciary & Nominees, Fiduciary & Nominees would settle with Sterling Asset Services in the manner appropriate according to the escrow agreement and the whole matter would be settled nicely and nobody would have claims or problems. Of course, for the record, I cannot verify what the investors, participants, lenders or whatever to Sterling Asset Services, what they would have had. We would have returned the funds to Sterling Asset Services as such and they would have to argue among themselves as to how they will distribute. Again I had no knowledge of there being any other party. This is something we learned in the aftermath.

Mohr Dep., 170, l.'s 16-25; 171; 172, l.'s 1-4.

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[13] The Norwegian Default Judgment, which is the basis for BDC's claims, is discussed below.

E. The competing claims to the Seized Funds.

1. The claims of the defrauded investors.

George and Dolores Rollar and Richard Vasquez have filed suit against the government seeking return to them of a portion of the Seized Funds. The basis for the Rollars' claims is set forth in their Amended Complaint and in the Rollar Affidavit, and the basis for Vasquez's claims is set forth in his Complaint and in the Vasquez Affidavit. In sum, among other things, the Rollars and Vasquez each allege that they are the victims of a fraudulent scheme; that the government seized the proceeds of that fraudulent scheme (the Seized Funds); that the Seized Funds were held in a constructive trust on their behalf by the perpetrators of the fraud, including BDC, Mohr and Gilliland; and that they are entitled to have the government return to them their investment funds fraudulently taken from them.

After the Rollars filed their Amended Complaint and after Vasquez intervened, the Court appointed a receiver. As set forth above, the receiver has performed a tracing, and there is no evidence that any portion of the Seized Funds (except possibly the Initial Deposit) originated from Mohr or BDC. It is the receiver's position that the Escrow Funds should not be returned to BDC or F&N because, among other reasons, Mohr, BDC and F&N obtained the Escrow Funds by fraud. The receiver, on behalf of all of the claimants to the Seized Funds, believes that BDC and F&N held the Escrow Funds in a constructive trust for the benefit of all of the defrauded investors and that the Escrow Funds should be returned to the investors based on a distribution method to be determined in the near future. Quilling Aff., ¶20. Finally, the government makes no claim to the Seized Funds. Rather, it seeks to have them returned in an equitable manner to the victims of the fraud scheme.

2. BDC's claim.

In the Motion for Return, BDC alleges that SAS deposited $20 million into the Seized Account pursuant to the Escrow Agreement, which BDC alleges to have been a "valid contract." Motion for Return, ¶3. BDC alleges that the deposit was made for the "purpose of investing the deposited funds in certain investments as described in the Escrow Agreement." *Id.*, ¶4. BDC claims that the government's seizure of the Seized Funds coupled with its failure to return the Seized Funds to the Seized Account constitutes a taking of property without due process of law "in direct violation of the Fourteenth Amendment of the United States Constitution, and other applicable law." BDC also contends that the government failed to provide it with written notice as required in 18 USC § 983. *Id.*, ¶11. Other than stating that it held the funds it seeks for investment purposes, BDC does not provide any explanation in its Motion for Return in support of its claimed entitlement to return of the Seized Funds. Instead, BDC merely refers to the exhibits attached to its Motion for Return—the Escrow Agreement (to which BDC is not even a party) and a "Statement as to Non Solicitation" which purports to bear the signature of Frederick Gilliland (not BDC or any of its agents). Finally, without explanation, BDC refers to a "Default Judgment issued in Norway on May 9, 2000, against Mr. Frederick Gilliland as Manager/Director of Sterling Asset Service, Ltd. and Sterling Asset Service Ltd." as a basis for its motion (the Norwegian Default Judgment referenced above). Motion for Return, ¶13.

While BDC did not explain the basis for its Motion for Return in its papers, Mohr made clear in his deposition that BDC's position is that it is entitled to possession of the Seized Funds as "damages and compensation" (Mohr Dep., 161, l.'s 1-5) to which BDC became entitled by virtue of the Norwegian Default Judgment. Specifically, Mohr testified:

> Q So based on the representation by Fred Gilliland and his agents that his $20 million and some change was transferred into the Banque de Commerce account

on September 16, 1998, was all Fred Gilliland's money to invest, you went to these banks in Europe and set up a trading deal, is that correct?

A. That is correct.

Q. And the trading deal that you set up for the money that you thought was Fred Gilliland's is the trading deal you're not going to tell us the specifics about, is that correct? [14]

A. I'm not allowed to do that. I signed those forms.

Q. In any event, you set up this trading deal as you testified, I believe, on the basis of first 20, then 18, then 15 million dollars; is that correct?

A. That is correct.

Q. And that deal went bad because that bank in Europe that you won't tell us about, you won't disclose the identity of, learned that you didn't have access to the money; in other words, the money had been frozen, so they wouldn't complete your trade; is that correct?

A. That is correct.

Q. And the bank that you won't tell us about that wouldn't complete your trades cancelled its deal?

A. They cancelled deal, they wanted to sue me or sue the Banque de Commerce.

Q. So the damages that are caused to you and your company by the bank you won't tell us about cancelling [sic] the deal you won't tell us about are the damages that are subject of the lawsuit you filed against Sterling Asset Services in Norway; is that correct?

A. That was a little bit doubled up.

Q. You had a deal with the bank to invest first 20, then 18, then 15 million dollars. That deal wouldn't go through --

A. That didn't go through.

Q. The money got seized, correct?

A. That is correct.

Q. You had damages from that bank you won't give us the identity of because they cancelled the deal, is that correct?

A. They cancelled the deal, they cancelled any other deal, and could cancel us from the market.

Q. But you're not going to tell us about any of that stuff?

A. No. We had to make a private settlement with them to avoid them from blacklisting us.

Q. I'm going to ask you for that information. What were the terms of your settlement?

A. I'm sorry, I can't discuss it.

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[14] Mohr refused during his deposition to identify either the bank, the banker, the terms of the investment deal or the terms of the ultimate settlement Mohr reached with the bank concerning the secret bank's claims against BDC. Mohr testified that his relationship with the bank was subject to some super-secret confidentiality agreement and that he could not disclose that information. Mohr Dep., 76, l.'s 2-25; 77, l.'s 1-11; 78, l.'s 14-25; 79; 80, l.'s 1-2.

Q. You're not going to tell me that? I'm asking you here under oath in a deposition in the United States District Court for the Western District of North Carolina to tell me that answer. You're not going to tell me?

A. I'm sorry, I cannot. That's privileged information. It comes in the trade secret part of the agreement for the trading bank which is limited information or restricted information under C64 agreement that I made.

Q. In any event, those damages from the bank yield [deal] you won't tell us about are the damages that you sought in the lawsuit against Sterling Asset Services, is that correct?

A. That's correct.

* * * *

Q And that's the lawsuit that is embodied in Exhibit Number 22, is that correct?

A Yes, I trust that's 22.

Q Take a look at it. I want to make sure we're right.

A It's 22.

Q So you've got a judgment which is comprised in Exhibit 22, a default judgment against Sterling Asset Services, correct?

A And Fiduciary & Nominees and Gilliland, whoever.

Q And this is the judgment -- Exhibit Number 22 is your basis for claiming that you have a right to the money that was seized from the Bank of America?

A. That is correct, sir.

Mohr Dep. 155, l. 7 – 159, l. 16.

Exhibit 22 to the Mohr Deposition is a copy of a) the Complaint and Demand for Restitution that Mohr filed on behalf of BDC in Norway against SAS and Gilliland; and b) the "Judgment by Default" BDC obtained against SAS and Gilliland. Exhibit 22 also includes English translations that Mohr testified are accurate. Mohr Dep., 125, l.'s 12-25; 126 - 127. Mohr testified, and Exhibit 22 confirms, that the default judgment was obtained by delivering a copy of the complaint and summons to Mohr's residence for forwarding to SAS and Gilliland. *Id.*, 128-129. In short, Mohr filed a lawsuit against Gilliland and SAS on behalf of BDC, caused it to be delivered to himself at his home, waited for the answer period to expire and then obtained a default judgment. Mohr offered no proof that he has made any effort to enforce the Default

Judgment in the United States. [15] Mohr offered no basis during his deposition for BDC's entitlement to possession of the Seized Funds other than the Default Judgment.

III. Argument and Authorities.

A. BDC's Motion is only properly considered under Federal Rule of Criminal Procedure 41(e).

In its Motion, BDC seeks relief for "the taking of property without due process of law" in connection with the Seized Funds (BDC Motion, ¶9) and for the government's alleged failure to provide notice to it as required in 18 U.S.C. §983. BDC, however, does not make clear the basis for the Court's jurisdiction over its Motion.[16]

Federal Rule of Civil Procedure 41(e) provides that "[a] person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property." Because BDC complains of the deprivation of property without due process, and because the government never gave notice of any forfeiture proceeding or instituted any forfeiture proceedings in which BDC could assert its claim of entitlement to the Seized Funds,[17] Rule 41(e) provides BDC the mechanism to contest the seizure. *See United States v. Garcia*, 65 F.3d 17, 20 (4th Cir. 1995).

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[15] Mohr did not have any documents at his deposition that proved that he served SAS or Gilliland with the Complaint and Demand for Restitution, and Mohr has failed to provide them as of yet, even though he agreed at his deposition to do so. Mohr Dep., 128-129.

[16] BDC's reliance on §983(e) (BDC Motion, ¶12) is misplaced because that section applies to a "motion to set aside forfeiture." In the present case, the Seized Funds were never forfeited, so there is no forfeiture to move to set aside. Alternatively, BDC relies on 18 U.S.C. §981, but does not provide a specific cite.

[17] In the present case, the government seized the Seized Funds pursuant to a seizure warrant issued by this Court. However, the government thereafter never initiated forfeiture proceedings (never provided notice directly to interested parties, never provided notice by publication and never instituted a civil judicial forfeiture action against the Seized Funds). Inasmuch as the government never provided notice of forfeiture, neither BDC, Mohr nor the Rollars (collectively, the "Claimants") ever had the opportunity to pursue administrative remedies. The government did not initiate forfeiture proceedings because it was engaged in the time consuming process of attempting to trace the "investments" into the Seized Account. It always has been the government's goal to return the Seized Funds to the defrauded investors in some equitable manner. In any event, if the government had initiated forfeiture

B. Summary Judgment denying BDC's Motion is appropriate because there are no issues of material fact respecting BDC's Motion.

A motion for return of property, at least where no criminal proceedings are pending, is a civil action against the United States and is equitable in nature. *United States v. Garcia*, 65 F.3d 17, 18 & n. 2. (4th Cir. 1995); *United States v. Jones*, 42 F.Supp.2d 618, 621 (W.D.N.C. 1999). Inasmuch as a proceeding under Rule 41(e) is a civil proceeding, the Federal Rules of Civil Procedure apply. *Jones*, 42 F.Supp.2d at 620. Fed. R. Civ. P. 56 provides for the entry of summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In the present case, the undisputed facts establish that BDC possessed the Seized Funds at the time they were seized by virtue of its ownership of the Seized Account.[18] Typically, during the pendancy of a criminal investigation before an indictment is filed the movant bears the burden of proving both that the seizure was illegal and that it is entitled to lawful possession of the property. However, in a case such as this one, where the property in question is no longer needed for evidentiary purposes because the government has completed its criminal investigation (as BDC notes at 8, n.1 of its Motion, no criminal charges likely will be brought against Mohr or BDC in the United States), the burden of proof changes, and the entity from which the property is seized is presumed to have a right to its return. Under such circumstances, the government (or a party with a competing interest in the seized property) has the burden of demonstrating that it has a legitimate reason to retain the property. *United States v. Chambers*, 192 F.3d 374, 377 (3rd

proceedings (by giving notice of such proceedings or initiating a civil judicial forfeiture with notice to the Claimants) and the Claimants had had the opportunity to participate in administrative proceedings, then Rule 41(e) likely would be inapplicable. *Ibarra v. United States*, 120 F.3d 472, 475 (4th Cir. 1997).

[18] Technically, since the Seized Funds were on deposit at Bank of America (then NationsBank), BDC did not possess the Seized Funds; rather, it possessed a claim against Bank of America in the amount of the Seized Funds. *See United States v. $3,000 in Cash*, 906 F. Supp. 1061, 1066 (E.D. Va. 1995). For simplicity, Movants simply refer to the BDC's claim as one to the Seized Funds.

Cir. 1999) *citing United States v. Martinson*, 809 F.2d 1364, 1369 (9th Cir. 1987); *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1061 (9th Cir. 1991)(recognizing that under some circumstances a third party who establishes a claim to seized property might defeat a defendant's Rule 41(e) motion for the property's return). However, before the Court considers the merits of BDC's claims, it must determine whether BDC has a sufficient interest in the Seized Funds to assert any claims to them—in other words, does BDC have standing to seek their return.

C. The undisputed evidence establishes that BDC lacks Article III standing with respect to all of the Escrow Funds.[19]

Article III standing is a claimant's key to the courthouse door. The concept of Article III standing involves both constitutional and prudential considerations. As the Fourth Circuit has recently noted in *Burke v. City Of Charleston*, 139 F.3d 401 (4th Cir. 1998), the standing requirement ensures a litigant has a sufficient personal stake in an otherwise justiciable controversy such that the judicial process appropriately should resolve the controversy for that individual. *Burke v. City Of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998). As the *Burke* court wrote:

> While the Supreme Court has not defined standing 'with complete consistency,' the irreducible constitutional minimum of standing requires: (1) that the plaintiff personally has suffered actual or threatened injury that is concrete and particularized, not conjectural or hypothetical; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision from the court.

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[19] Based on Mohr's testimony that BDC "owned" the Lease Payments, the Interest and the $1000 transferred into the account to open the account (collectively the "Non-Escrow Funds"), those funds are distinguishable from the Escrow Funds. For purposes of this standing analysis and this motion for summary judgment, BDC probably has alleged a sufficient "possessory or ownership" in the Non-Escrow Funds to pursue a claim under Rule 41(e). Although Mohr offered no documents to prove BDC's claims that the $380,000 really constituted "lease payments," movants accept Mohr's testimony as true for purposes of this Motion. However, even if BDC has standing to pursue a "due process" claim under Rule 41(e) for the Non-Escrow Funds, as set forth below, BDC's due process claim is moot because before BDC filed its Motion for Return alleging due process violations after the Court had already implemented a process that BDC should have followed to make its claim.

Burke, 139 F.3d at 405; *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1056 (9th Cir.1991) (considering standing in the context of Rule 41(e) and noting that "[t]o establish standing, a party must show he has suffered a direct and palpable injury and there is a substantial likelihood that the relief requested of the court will redress that injury" and that party generally "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") The prudential considerations "add to the constitutional minima a healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed, the claim not be an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate." *Burke*, 139 F.3d at 405 (citations omitted).

In *United States vs. Rodriguez-Aguirre*, 264 F.3rd 1195 (10th Cir. 2001), the Tenth Circuit specifically considered the concept of standing in the context of a motion under Rule 41(e). After addressing in general terms the constitutional and prudential aspects of the standing analysis, the Tenth Circuit turned to a more specific analysis of standing in the context of Rule 41 (e):

> In a Rule 41 (e) proceeding, a claimant must allege 'a colorable ownership, possessory or security interest in at least a portion of the defendant property.' When the claimant alleges such an interest in the seized property, the standing requirements are satisfied 'because an owner or possessor of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property.'"

Rodriguez-Aguirre, 264 F.3rd at 1204.[20] As the *Rodriguez-Aguirre* court noted, "ownership" per se is not required for standing under Rule 41(e)—a possessory interest can be

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[20] *But see Matthews v. United States*, 917 F.Supp. 1090, 1104 (E.D. Va. 1996), in which the district court recognized on the one hand that Rule 41(e) speaks in terms of "possession," but held on the other hand that to establish standing under 41(e) one must establish "ownership" ("an allegation of ownership and some evidence of ownership are together sufficient. . ."). The district court, like many others, borrowed its 41(e) standing analysis from cases addressing the standing issue in the context of civil forfeiture. BDC clearly would not have standing if "ownership" of the Escrow Funds is required. Moreover, as set forth above, BDC does not have standing in any event because it does not even have a present right to possess the Escrow Funds.

sufficient under some circumstances. Some courts have recognized in the civil forfeiture context that even bailees only in constructive possession of property can have standing to contest a forfeiture. *United States v. $38,000.00*, 816 F.2d 1538, 1544 (11th Cir. 1987).

In the present case, though, BDC has no standing to seek possession of the Escrow Funds because the uncontroverted evidence establishes that any right to possession by BDC of the Escrow Funds either expired years ago pursuant to the terms of the applicable documents or never existed because BDC obtained possession of them by fraud.

1. The documents that BDC offers in its Motion for Return establish BDC's lack of standing as a matter of law.

As set forth above, BDC attached to its Motion a copy of the Escrow Agreement and a copy of a "Statement as to Non-Solicitation." The former is between SAS and F&N and the latter is binding only on SAS and does not even mention BDC. BDC offers not a single document that explains its right to possession of the Seized Funds. In the absence of any documents that demonstrate any right in BDC to possession of the Seized Funds, Mohr testified that BDC was the intended "Recipient" (identified on page 2 of the Escrow Agreement) of the Escrow Funds (now the Seized Funds). Accepting as true (though doubting it) Mohr's testimony, BDC nevertheless has no present right to possession of the Escrow Funds on the basis of the documents it identified.

BDC has admitted that: a) the Escrow Funds were deposited in the Seized Account by people other than BDC for "investment" purposes (Motion for Return, ¶4, Mohr Dep., 170, l.'s 16-25; 171; 172, l.'s 1-4)); b) the Escrow Funds were never owned by BDC (*Id.*); c) the Escrow Funds were owned by the investors (people or entities other than BDC) (*id.*); d) BDC possessed the Escrow Funds only pursuant to the Escrow Agreement between F&N and SAS (BDC Motion, ¶3, Mohr Dep., 47, l.'s 13-25; 48, l.'s 1-4); e) the Escrow Period began on September

16, 1998 and expired on September 16, 1999 (Mohr Dep., 49, l.'s 6-10 and Ex. 6, p. 3, ¶1); and f) F&N was obligated at the end of the Escrow Period to return the Seized Funds to the owners (the investors) (Mohr Dep., 170, l.'s 16-25; 171; 172, l.'s 1-4).[21]

Thus, placing to one side for the time being BDC's claim that it is entitled to possess the Seized Funds, including the Escrow Funds, by virtue of the Norwegian Default Judgment (a claim not explained in BDC's Motion), and ignoring for the moment the fact that the Escrow Agreement and Stillbuild Contact are void as the product of a fraudulent scheme, the documents on which BDC relies for in its Motion demonstrate as a matter of law that F&N's and, in turn, BDC's right to possess the Escrow Funds expired no later than September 16, 1999. Because BDC's derivative right (through the F&N and SAS Escrow Agreement) to possess the Escrow Funds expired more than two years before BDC filed its Motion, BDC has no current possessory or other interest in the Escrow Funds sufficient to confer standing on BDC under 41(e) (or under 18 U.S.C. §§ 981 or 983).

2. The Default Judgment provides no basis for BDC to seek return of the Escrow Funds.

Faced with the indisputable fact that BDC has no direct claim to possession of the Escrow Funds through the Escrow Agreement or the Stillbuild Contract, Mohr testified that BDC's claim to possession of the Seized Funds was based on the Default Judgment. Mohr Dep. 159, l.'s 1-16. Assuming without conceding that the Default Judgment is legitimate and potentially enforceable (an assumption that is almost certainly unfounded), it leaves BDC as nothing more than a general creditor with unsecured claims against Gilliland and SAS for the money damages identified in the Default Judgment. Unlike secured creditors, general creditors

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[21] To the extent there was any question concerning the termination of the Escrow Period, the receiver, pursuant to the authority granted to him by this Court, notified BDC through Mohr on February 27, 2002, of the termination of the Escrow Agreement. Mohr Dep., 133, l.'s 18-25; 134, l.'s 1-6.

cannot claim an interest in any particular asset that makes up the debtor's estate. For this reason, the federal courts have consistently held that unsecured creditors do not have standing to challenge the civil forfeiture of their debtors' property because they do not have an interest in any specific assets of their creditor, and thus no specific interest in the property being forfeited. *United States v. BCCI Holdings (Luxembourg)*, 46 F.3d 1185, 1191-1192 (D.C. Cir. 1995), *but see United States v. Reckmeyer*, 836 F.2d 200, (4th Cir. 1987) (holding that where the entire estate has been forfeited to the government, a claimant's interests necessarily lies within that estate, thus allowing claimant to meet the threshold qualification for relief by asserting a legal interest in the property subject to forfeiture).[22] Under the facts of the present case the Norwegian Default Judgment does not provide BDC with the necessary "security interest" in the Escrow Funds to give it standing to seek their return. *Rodriguez-Aguirre*, 264 F.3d at 1204.

In any event, there is no evidence that BDC has ever taken any steps to enforce the Default Judgment against Gilliland or SAS, and even if it had, BDC would not be able to satisfy the Default Judgment out of the Escrow Funds because, as Mohr admitted in his deposition and as the receiver's tracing confirms, the evidence reveals that the Escrow Funds were not the property of Gilliland or SAS in the first place. *See, e.g., Universal C.I.T. Credit Corp. v. Walters*, 230 N.C. 443, 447, 53 S.E.2d 520, 523 (1949)(holding that judgment creditor acquires no greater lien or interest in property of judgment debtor than debtor had at the time judgment lien became effective). *See also Flatow v. Islamic Republic of Iran*, 67 F. Supp.2d 535, 538 (D. Md. 1999)(citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611,

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[22] *Reckmeyer* is not controlling in this case because the evidence establishes that SAS's entire estate was not seized. Specifically, Exhibit 5 to the Quilling Affidavit establishes transfers to Gilliland of $2.5 million. That money was not seized. Moreover, no other circuit court has followed the holding of *Reckmeyer*, and even district courts in the Fourth Circuit question *Reckmeyer's* continued precedential value. *See United States v. $3,000 in Cash*, 906 F.Supp. 1061, 1069 and n.13 (E.D.Va. 1995).

103 S.Ct. 2591, 77 L.Ed.2d 46 (1993))(holding that in order to levy against property of third party in the hands of a judgment debtor the judgment creditor must show that either (1) the third-party is agent, alter ego, or instrumentality of judgment debtor; (2) the third-party is a garnishee of judgment debtor; or (3) there was conveyance of property between judgment debtor and third-party with intent to defraud creditors).[23]

3. As the product of fraud, the Escrow Agreement and the Stillbuild Agreement are void and conferred no rights in the Escrow Funds to F&N or BDC.

Moreover, it is undisputed that Mohr, BDC's president and CEO, was convicted in Norway of obtaining the Seized Funds by fraud in conspiracy with Gilliland. Under North Carolina law, contracts that are induced by fraud are void and "'no title passes under such an instrument-it is void–and no right may be acquired thereunder even by innocent third parties.'" *United States v. Real Property Located at 5201 Woodlake Drive*, 895 F.Supp. 791, 797 (M.D.N.C. 1995), citing *Furst & Thomas v. Merritt*, 190 N.C. 397, 130 S.E. 40, 43 (1925).[24] Because the agreements on which BDC bases its claim to possession of the Escrow Funds were procured by fraud (as conclusively established in the Sentence), neither BDC nor F&N ever obtained any rights–ownership, possession, or otherwise–to the Escrow Funds. Because neither BDC nor F&N had any ownership, possessory or other legitimate rights to the Escrow Funds, as a matter of law BDC has no standing to seek possession of the Escrow Funds under any theory.

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[23] By the same rationale BDC does not have standing to seek "return" of the Non-Escrow Funds under Rule 41(e) by virtue of the unperfected Norwegian Default Judgment because it does not give BDC an interest in the Non-Escrow Funds.

[24] The cases that have considered the issue in the context of forfeiture proceedings under 18 U.S.C. §981 have noted that a claimant's "ownership" interest in the seized property is governed by state law. *See e.g., United States v. Smith*, 966 F.2d 1045, 1054 n.1 10 (6th Cir.1992); *accord, United States v. Real Property Located at 5201 Woodlake Drive*, 895 F.Supp. 791, 797 (M.D.N.C. 1995) (applying North Carolina law to determine whether claimants had standing under 18 U.S.C. § 981). Movants have been unable to locate any cases addressing whether state law of "ownership" would apply in the context of a Rule 41(e) motion; however, inasmuch as 41(e) requires a claimant to file in the court for the district where the property was seized, and because the courts that have considered the issue have analogized 41(e) standing to 18 U.S.C. §981 standing, it is reasonable to apply state law ownership principals in the 41(e) context.

4. BDC, as the instrumentality of Mohr's fraudulent scheme, held the Escrow Funds in a constructive trust for the benefit of the defrauded investors.

BDC has no standing to claim possession of the Escrow Funds because the incontrovertible evidence demonstrates that BDC obtained the Escrow Funds through Mohr's fraudulent conspiracy with Gilliland. BDC, therefore, held the Escrow Funds in a constructive trust for the benefit of the defrauded investors. As the *5201 Woodlake Drive* court noted (applying North Carolina law--the state where the Seized Funds were located at the time of seizure and the state where BDC has its offices and is incorporated (Mohr Dep., 10, l.'s 18-25; 11, l.'s 2-12)):

> 'A constructive trust is imposed when the holder of title acquired the property through fraud, a breach of duty', or 'some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.'
>
> It is a 'fraud-rectifying' trust, created by a court of equity to prevent the unjust enrichment of the holder of title. The court constructs a trust, makes the defendant a trustee without his consent, for the purpose of working out the ends of justice. It is not a permanent trust, in which the trustee is to have any duties of administration, but passive, temporary trust, **in which the trustee's sole duty is to transfer the title to the beneficiary.**

5201 Woodlake Drive, 895 F.Supp. at 795-796 (emphasis added).[25] Inasmuch as it is BDC's sole duty to transfer title to the beneficiaries of the constructive trust (Rollar, Vasquez and the other defrauded investors), BDC does not have standing to seek return of the Escrow Funds because it

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[25] *5201 Woodlake Drive* concerned, among other things, the efforts of the estates of two decedents to contest the forfeiture of real property improved with proceeds from insurance fraud. The government was forfeiting the real property owned by the beneficiaries of an insurance policy who were convicted of killing the insured (one of the decedents) and taking the insurance proceeds, which then were invested in the real property. The estates of the insured and his mother claimed a constructive trust on the real property on the theory that the property was improved with proceeds from insurance fraud. The court declined to impose a constructive trust, noting the disconnect between the fraud on the insurance company and the estates (not the victims of fraud, but of murder). The court noted, "if the facts in the present case indicated that either [of the decedents] owned or possessed real or personal property which was fraudulently taken from them by [the killers], then a fraud-rectifying device or constructive trust would be an appropriate remedy." *Id.*, at 796. In other words, the estates were not the victims of the fraud, the insurance company was. In the present case, a constructive trust is appropriate because there is a direct nexus between the fraudulent scheme perpetrated by Gilliland and Mohr and the innocent victims before the Court who are the beneficiaries of the resulting constructive trust.

has no right to possess them, only the immediate obligation to return the Escrow Funds to the victims of the fraudulent scheme.

5. Summary of Standing Argument.

In sum, as a matter of law based on the undisputed facts BDC does not have standing to assert any claims to the Escrow Funds in the Seized Account because it has suffered no injury with respect to that portion of the Seized Account that fairly can be traced to the seizure of the Seized Account. As Mohr testified in his deposition, the injury BDC suffered was caused by Gilliland's misrepresentation of the source of the Escrow Funds. The only arguable injury BDC has suffered from the seizure of the Escrow Funds is the lost value to it of the possession of the funds in the NationsBank account during the remainder of the Escrow Period (from December 1998 to September 16, 1999). That claim would be a claim for damages resulting from the seizure, and the government is immune from claims for money damages under such circumstances. *Cf. United States v. Jones*, 225 F.3d 468 (4th Cir. 2000) (holding sovereign immunity deprives courts of jurisdiction to award monetary damages in lieu of destroyed property in a Rule 41(e)). Likewise, with respect to the Escrow Funds, BDC has suffered no injury that is likely to be redressed by a favorable decision from this Court. Even if the Court were to award BDC possession of the Escrow Funds, BDC's immediate obligation under the Escrow Agreement and as a result of the constructive trust is to return the Escrow Funds to the investors. Finally, even if the Norwegian Default Judgment is enforceable, BDC is not entitled to satisfy that unsecured claim out of any part of the Seized Funds.

D. Even if BDC has Article III standing to make a claim for return of the Seized Funds, BDC's claim fails on the merits as a matter of law.

As a matter of law, BDC has no standing to seek return of the Escrow Funds. Likewise, the undisputed evidence mandates that BDC's claims to possession of any portion of the Seized

Funds be summarily rejected. It is now almost universally recognized that a court may refuse to return seized property to a claimant if: 1) the defendant is not entitled to lawful possession of the seized property; (2) the property is contraband or subject to forfeiture; or (3) the government has a continuing evidentiary need for the property.[26] *United States v. Van Cauwenberghe*, 934 F.2d 1048, 1061 (9th Cir.1991). Movants may meet their burden of demonstrating that BDC is not entitled to possession of the Seized Funds by, among other things, establishing: a) a cognizable claim of ownership or right to possession of the Seized Funds adverse to that of the defendants (*United States v. Jones*, 42 F.Supp.2d 618, 621 (W.D.N.C. 1999)(citing *United States v. Palmer*, 565 F.2d 1063, 1065 (9th Cir. 1977)); or b) that BDC may not lawfully possess the Seized Funds (*see United States v. Felici*, 208 F.3d 667, 669 (8th Cir. 2000)(convicted felon not entitled to return of firearms because he may not legally possess them).

1. Each of the legal arguments that defeats BDC's standing to claim the Escrow Funds alternatively defeats as a matter of law BDC's claim on the merits to the Escrow Funds.

Even if BDC has standing to present its claim for return of the Escrow Funds, each of the legal arguments set forth above defeats BDC's claim as a matter of law on the merits. Specifically, with respect to the Escrow Funds: a) the documents that BDC offers in its Motion for Return establish that BDC has no present legally cognizable interest in the Escrow Funds; b) the unperfected Norwegian Default Judgment does not give BDC an enforceable interest in the Escrow Funds; c) as the product of fraud, the Escrow Agreement and the Stillbuild Agreement are void and conferred no rights in the Escrow Funds to F&N or BDC; and d) BDC, as the instrumentality of Mohr's fraudulent scheme, held the Escrow Funds in a constructive trust for

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[26] In the present case, the third basis is not applicable because, by stating that it is not likely to pursue criminal charges in this district, the government has indicated it has no continuing evidentiary need for the Seized Funds.

the benefit of the defrauded investors. Moreover, as a matter of law, BDC is precluded from recovering any portion of the Seized Funds.

2. The evidence establishes as a matter of law the existence of claimants with rights to possession of the Escrow Funds superior to BDC's.

In the context of a proceeding under Rule 41(e), "the government has a legitimate interest in returning lawfully seized property to its true owner." *United States v. Nauracy*, 1996 WL 316989 (N.D. Ill. 1996); *United States v. Jones, supra.* In this case, as in *Nauracy* and *Jones*, there is a legitimate interest in returning the Escrow Funds to their rightful owners—the victims of the Gilliland/Mohr fraudulent investment scheme. Mohr's testimony and the tracing performed by the receiver demonstrate conclusively that, with the possible exception of the Initial Deposit, none of the Seized Funds originated from BDC or Mohr. Instead, the vast majority of the Seized Funds were delivered to BDC by the investors in the fraudulent MTN and fed programs. It is those investors who have the superior right to possession of the Escrow Funds, and the evidence establishes as a matter of law their superior right to possess them. Moreover, the Interest, as a fruit of the BDC/Mohr fraud scheme, rightfully should be returned to the investors.

3. The Escrow Funds should not be returned to BDC because it may not legally posses them.

Rule 41(e) entitles a person to obtain return of property "on the ground that such person is entitled to lawful possession of the property." 18 U.S.C. § 983(a)(1)(F) provides, that "[t]he Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess." 18 U.S.C. §2315 makes it a federal

crime to knowingly possess money or property worth $5,000 or more that has crossed a state or United States boundary after having been unlawfully converted.[27]

The Rollars, Vasquez and the other investors were separated from their money that ended up in the Seized Account by means of fraudulent representations about excellent returns on investments in a non-existent MTN or fed investment program. In short, the investors were the victims of fraud perpetrated by Mohr and his compatriots. The Escrow Funds are the proceeds of that fraud. Inasmuch as Mohr, BDC's president and CEO, was convicted of fraud in connection with the Seized Funds, and because the undisputed facts establish interstate and international wire transfers of the Seized Funds, BDC's possession of the Escrow Funds would constitute a federal crime.

4. BDC is not entitled to any relief because it has unclean hands.

Inasmuch as proceedings under Rule 41(e) are equitable in nature, the Court should deny BDC any relief based on the doctrine of unclean hands. *United States v. Parlavecchio*, ___ F.Supp.2d ___, 2002 WL 440555 (M.D. Penn. 2002) (noting that a basic principle applicable to 41(e) cases is "that one requesting the court to exercise its equitable powers must come into court with 'clean hands'" and denying the movant any relief because to allow her to recover the illegally obtained material "would constitute judicial approval of her criminal activities and reward her for her crime."). In the present case, Mohr, who controls BDC, has been convicted of fraud in connection with BDC's possession of the Seized Funds, therefore, BDC comes into court with unclean hands and is not entitled to equitable relief. Moreover, giving BDC equitable

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[27] As the receiver's tracing and Rollar's affidavit demonstrate, the Rollars' $12.5 million was transferred via wire transfer from accounts in the U.S. to at least one foreign bank (Allied Dunbar Bank) and then back to the U.S. (Bank of America in Charlotte, North Carolina).

relief would constitute judicial approval of Mohr's and BDC's criminal activities and reward them for their crimes.

5. BDC's Motion for Return should be denied as moot.

Application of the law governing BDC's Motion for Return to the undisputed evidence before the Court compels the rejection as a matter of law of BDC's claim to any of the Seized Funds. Even if the Court assumes the truth of Mohr's claim that BDC "owns" the Non-Escrow Funds (the Interest, Lease Payments and Initial Deposit (amounts totaling $486,749.93)), and if the Court does not reject the entirety of BDC's claim on the grounds set forth above, BDC's claim should be limited to one not exceeding the total of the Non-Escrow Funds—the only funds to which BDC claimed any ownership or possessory interest. Even then, the Court should deny BDC any relief on its Motion for Return because the Motion for Return is moot. Specifically, well before BDC filed its Motion for Return, the Court entered an Order appointing a receiver to receive and evaluate claims to the Seized Funds and to make a recommendation to the Court concerning the disposition of those claims. *See* Orders dated October 11 and 29, 2001. Although BDC relies in its Motion for Return on the Fourteenth Amendment, to the extent it alleges deprivation of property without due process, its motion is more properly based on the Fifth Amendment inasmuch as the seizure was accomplished by the United States government rather than by a state agent or agency. Because this Court had appointed a receiver to consider claims to the Seized Funds before BDC filed its claim, its Fifth Amendment due process rights were and are protected. The Court should require BDC to submit its claim with respect to the Non-Escrow Funds to the receiver in accordance with the mandated process for the consideration of claims that was in place before BDC filed its Motion for Return.

IV. CONCLUSION.

For the foregoing reasons, the Court should enter summary judgment denying BDC's Motion for Return in its entirety. Alternatively, the Court should enter summary judgment denying BDC's Motion for Return with respect to the Escrow Funds and allow BDC thirty days to file a claim with the receiver with respect to the Non-Escrow Funds, failing which, BDC's claim to the Non-Escrow Funds should be denied.

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RECEIVER

Dated: May 8, 2002

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion and Memorandum of Authorities In Support of Motion Pursuant to Federal Rule of Civil Procedure 56 For Summary Judgment Denying Motion of M.M. A.C.M.C. Banque De Commerce, Inc. for Return of Property Seized** was served by hand delivering a true copy of same to the following:

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This the 6th day of May, 2002.

Rodney E. Alexander