UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANTHONIA NWAORIE, on behalf of herself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	CIVIL NO. 4:18-cv-1406
UNITED STATES CUSTOMS AND BORDER PROTECTION, *et al.*,	§	
Defendants.	§	

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants United States of America, U.S. Customs and Border Protection ("CBP"), and Kevin McAleenan, in his official capacity as Commissioner of CBP, (collectively "Defendants"), by and through the undersigned Assistant United States Attorney, files this reply in support of their motion to dismiss the claims against them. *See Dkt.* #26.

I. Plaintiff's Individual Claims are Moot under Fed. R. Crim. P. 41(g)

In her response to Defendants' Motion to Dismiss[1], Plaintiff argues that her individual claims are not moot because she has an unresolved claim of interest on the currency that was seized due to her violation of the currency reporting requirements. In addition, she argues her claim that she has been selected for additional screening in violation of her due process rights is not moot.

[1] As an initial matter, Plaintiff violated the Court's Procedural Rules by not seeking leave to exceed the 25-page limit set by this Court. Under this Court's procedural rule 7, without leave of court, any memoranda shall be limited to 25 pages. Plaintiff's Response is 54 pages. As such, Defendants move that Plaintiff's response be limited to 25 pages of argument or struck in its entirety for failing to comply with the Court's procedures.

A. Plaintiff is not Entitled to Pre-judgment Interest on the Seized Currency

According to the Supreme Court, the United States is immune from an interest award in the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit. *See U.S. v. Craig*, 694 F.3d 509, 512 (3d Cir. 2012) (quoting *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), *superseded on other grounds* by Civil Rights Act of 1991)). Plaintiff brings her individual claim under Federal Rule of Criminal Procedure 41(g) and claims she is owed interest on the seized property. *See P's Complaint*, at p. 5, para. 11. Notably, Plaintiff does not bring her claim under the provisions of the Civil Asset Forfeiture Reform Act ("CAFRA"), 28 U.S.C. § 2465. Rule 41(g) states:

> **Motion to Return Property.** A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Rule 41(g), while treated as a civil equitable action, cannot serve as the basis for subjecting the United States to all forms of equitable relief. *See id*. (citing *United States v. Bein*, 214 F.3d 408, 412 (3d Cir. 2000)). Rule 41(g) makes no explicit mention of interest and does not waive the sovereign's immunity with respect to interest claims. *See id*.; *see also Pena v. United States*, 157 F.3d 984, 986 (5th Cir. 1998) (since a motion for return of property has no provision for monetary damages [or interest], the Court would not read into the statute a waiver of the federal government's immunity from such damages [or interest]; *Beckett v. United States*, A-09-CV-524 LY, 2010 WL 11610445 at n. 11 (W.D. Tex. July 27, 2010) (citing *Adeleke v. United States*, 355 F.3d 144, 150 (2d Cir. 2004) (Rule 41(g) only provides for return of seized property and does not waiver the sovereign immunity of the United States); *Bein*, 214 F.3d at 414-15 (additional citations

omitted)). Citing *Bein*, the Third Circuit Court cited the majority view and held that the Rule "'only provides for one express remedy – the return of property,'" and, a rule that does not expressly provide for an award of monetary damages does not waive sovereign immunity. *Id*. (quoting *Bein*, 214 F.3d at 413). "The same logic applies to an award of interest." *Id*. Despite Plaintiff's citations to the minority view from the Sixth, Ninth, and Eleventh Circuits, the majority view is the Third Circuit's holding that the Rule does not provide for an award of interest. *See id*. at 513 (citing *Larson v. United States*, 274 F.3d 643, 647 (1st Cir. 2001) (holding that sovereign immunity prevents recover of interest here); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610, 613, 614 (10th Cir. 2000); *United States v. $7,999.00 in U.S. Currency*, 170 F.3d 843, 845 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998)). The minority view espoused by the Sixth, Ninth, and Eleventh Circuits "is at odds with *Shaw's* exhortation that "'[c]ourts lack the power to award interest against the United States on the basis of what they think is or is not sound policy.'" *Id*. (citing *Shaw*, 478 U.S. at 321. Accordingly, Plaintiff's claim that she is owed interest under Rule 41(g) must fail and her claim is moot as she received her property as contemplated under Rule 41(g).

Even if the Court construed Plaintiff's individual claim for interest as falling under CAFRA, she is not entitled to any interest, as she "does not qualify as a 'substantially prevailing' party under CAFRA *See* 28 U.S.C. § 2465(b)(1). Under this provision, in any civil proceeding to forfeit property under any provision of Federal law, where a claimant substantially prevails, the United States is liable for . . . interest actually paid to the United States. . . and. . . an imputed amount of interest. *See id*. at 512. As Plaintiff obtained neither a judgment in her favor on the merits or any relief specific to the forfeiture action, she cannot qualify as a prevailing party under CAFRA to be owed interest. *See id*.

B. Plaintiff's Claim for Discriminatory Screenings Should be Dismissed.

In a similar case, *Bibicheff v. Holder*, 55 F. Supp. 3d 254, 262-63 (E.D. N.Y. 2014), the plaintiff alleged Fourth and Fifth Amendment due process constitutional violations because he was stopped three times for secondary inspection at the airport, interrogated, detained, and his luggage was searched. In denying the due process claim, the Court found that whatever weight might be given to Plaintiff's articulated private interest or risk of procedural error during [DHS] review process, such interest is significantly outweighed by the government's substantial interest in protecting the border and ensuring national security. *See id*. at 265. In addition, to the extent Plaintiff's contests CBP's authority to conduct secondary searches of his luggage; CBP has the authority to conduct such searches consistent with its interests in national security. *See id*. (citing 19 C.F.R. § 162.6[2] (stating that all persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer.)

The plaintiff also alleged that he was told by CBP that there was a "hit" against him in the system and he would be stopped every time he returned to the United States. In dismissing Plaintiff's due process claim, the Court found that the government's strong interest in protecting national security at its borders outweighs Plaintiff's assertion that he is entitled to knowledge about his existence in any governmental database. *See Bibicheff*, 55 F. Supp. 3d at 265. The Court dismissed Plaintiff's due process claim because, based on the possible harm to national security

[2] 19 CFR 148.21 - Opening of baggage, compartments, or vehicles - A Customs officer has the right to open and examine all baggage, compartments and vehicles brought into the United States under Sections 461, 462, 496 and 582, Tariff Act of 1930, as amended (19 U.S.C. 1461, 1462, 1496, and 1582) and 19 U.S.C. 482. To the extent practical, the owner or his agent shall be asked to open the baggage, compartment or vehicle first. If the owner or his agent is unavailable or refuses to open the baggage, compartment, or vehicle, it shall be opened by the Customs officer. If any article subject to duty, or any prohibited article is found upon opening by the Customs officer, the whole contents and the baggage or vehicle shall be subject to forfeiture, pursuant to 19 U.S.C. 1462.

and law enforcement interest, the Government need not reveal whether a particular person is on or not on a watch list. *See id*. Similarly, any due process claims Plaintiff asserts, in this case, for differential treatment in searches at the border are outweighed by the government's interest in protecting its national security and law enforcement interest. As such, her claim must be denied.

II. The Court Should Deny the Class Claims

With respect to Plaintiff's contentions that the class claims are valid, Defendants have fully briefed why Plaintiff's class claims should be dismissed. There is no need to repeat those arguments in this reply.

CONCLUSION

For these reasons and all the reasons set forth in Defendants' original motion, the Court should dismiss all claims against Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2018 a true and correct copy of the foregoing instrument was served via ECF on counsel of record:

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