

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
	)	Case No. 1:11CR00035
	)	
v.	)	<b>OPINION AND ORDER</b>
	)	
<b>ROBERTO RICIERI RIBEIRO, ET AL.,</b>	)	By: James P. Jones
	)	United States District Judge
Defendants.	)	

*Joseph W.H. Mott, Assistant United States Attorney, Roanoke, Virginia, for United States; H.M. Whitesides, Jr., Law Offices of H.M. Whitesides, Jr., P.A., Charlotte, North Carolina, for Petitioner KneX Worldwide, LLC.*

A defendant in this criminal prosecution, Belcorp of America, Inc. (“Belcorp”), a cigarette manufacturer, pleaded guilty to charges involving a scheme to avoid payment of the federal cigarette excise tax. As a result, certain of its property was forfeited. The petitioner, KneX Worldwide, LLC (“KneX”), a supplier of cigarette manufacturing material and machinery, has filed a claim to the property in these ancillary proceedings. The magistrate judge has recommended that the claim be denied. KneX has objected to this recommendation and its objections have been fully briefed and are ripe for decision.<sup>1</sup>

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<sup>1</sup> I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

## I.

According to KneX, it supplied materials to Belcorp, for which it has not been paid. It claims it is owed \$74,296.67 on unpaid invoices. A Notice of Forfeiture was served by the government on KneX, including a copy of the Preliminary Order of Forfeiture, advising KneX that if it claimed an interest in any of the forfeited property, it must file a petition with this court, signed under penalty of perjury, within 30 days. The notice was received by KneX on December 22, 2012, and on January 3, 2013, R. Dennis Makepeace, the president of KneX, filed with the court a letter describing and submitting a claim for the unpaid invoices. It was not signed under penalty of perjury.

The government filed a Motion to Dismiss Knex's claim on the ground that KneX was simply an unsecured creditor of Belcorp, and thus had no standing to contest the forfeiture. The government also objected to the claim because most of the invoices were directed not to Belcorp but to other named entities. In his letter, Makepeace had explained that this was because those entities had handled the purchases on behalf of Belcorp.

The government did not object to the claim because it had not been not sworn to, but the magistrate judge, to whom the matter had been referred, sua sponte recommended that the claim be dismissed because it was not signed under penalty of perjury, as required by 21 U.S.C. § 853(n)(3). In her report, filed May

7, 2014, the magistrate judge notified KneX that objection must be made to this recommendation within 14 days, or appellate review could thus be waived.

On May 27, 2014, not having seen any objection, I accepted the magistrate judge's recommendation and granted the government's Motion to Dismiss. On that same day, Makepeace filed another letter with the court, dated May 21, 2014, addressed to the magistrate judge. In it, he indicated that he had previously sent a signed claim to Assistant United States Attorney Sharon Burnham, then handling the matter for the government, but that "[i]f there is another form we were to sign under penalty of perjury," to send it to him. He ended by requesting that she consider "my above objection." (Makepeace letter, ECF No. 364.)

In response to this letter, the magistrate judge directed the government to advise her if there had been any signed claim form sent to it on behalf of KneX. Makepeace responded, including copies of his correspondence with the government. The government also responded, stating that it had no documents from KneX other than those provided by Makepeace. Accordingly, by Order entered August 14, 2014, the magistrate judge held that since none of these documents contained a sworn claim or any statement made under penalty of perjury, she found no reason to amend or vacate her prior report and recommendation.

Thereafter, KneX finally obtained legal counsel, who timely filed a pleading requesting review of the magistrate judge's Order of August 14, including therein a request that KneX be allowed to now file a verified claim. Attached was a sworn statement by Makepeace, setting forth in detail KneX's claim.

## II.

The government opposes the request to now allow the filing of a claim compliant with the requirement that it be made under penalty of perjury. It does not contend that the original claim in the form of Makepeace's letter of December 27, 2012, was untimely or otherwise procedurally defective except that it was not sworn to. The government agrees that the court has the power to extend the time to file a late claim, *see United States v. Borromeo*, 945 F.2d 750, 753-54 (4th Cir. 1991), and commendably concedes that it can show no identifiable prejudice to it from permitting a sworn claim at this stage of the case, the most important factor for the court to consider, *id.* at 754. The government does argue, however, that KneX fails to show excusable neglect since it had adequate time to take whatever steps it needed to protect its interests, including consulting with legal counsel.

Makepeace, on behalf of KneX, contends that he was misled by his conversations with AUSA Burnham into his relaxed responses to the Notice of Forfeiture and the magistrate judge's ruling. AUSA Burnham assured him in telephone calls, he claims, that "citizens would be compensated for their claims

before the government agencies would be compensated,” and accordingly he believed that “she was looking out for the interests of KneX.” (Makepeace Aff. ¶¶ 18, 23, ECF No. 403-2.)

I find that Makepeace acted negligently in not submitting his original claim to the court under oath. The Notice of Forfeiture clearly commanded as much, in accord with the law. An oath is an important requirement in order to inhibit the making of false claims, which is always a substantial danger. *See United States v. \$103,387.27*, 863 F.2d 555,559 (7th Cir. 1988). Nevertheless, I find it to be excusable neglect. While I do not believe that Makepeace was misled by the AUSA, his positive dealings with her may have convinced him to attempt to save expenses by proceeding in court without a lawyer, a bad mistake.

In light of the absence of prejudice to the government, and under all of the circumstances presented, I will allow KneX to now file a petition signed under penalty of perjury. Of course, I make no ruling on the merits of KneX’s claim, and will leave to the magistrate judge a recommendation in that regard.

### III.

For the reasons set forth above, it is **ORDERED** as follows:

1. The court’s Order of May 27, 2014, granting the government’s Motion to Dismiss the claim of KneX on the ground that it was not signed under penalty of perjury, is VACATED;

2. KneX is granted leave to file a proper petition in accord with 21 U.S.C. § 853(n)(3), provided it is filed within 14 days of the date of entry of this Order; and

3. Provided that such a petition is timely filed by KneX, it is referred to United States Magistrate Judge Pamela Meade Sargent for report and recommendation to the undersigned.

ENTER: October 27, 2014

/s/ James P. Jones  
United States District Judge