UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-cv-80751-HURLEY/HOPKINS

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDGAR MITCHELL,

Defendant.

GOVERNMENT'S OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

For the following reasons, Defendant's Motion to Dismiss should be denied in its entirety.

First, it is a legal axiom that the United States is neither bound by state statutes of limitation nor subject to the defense of laches in enforcing its rights.

Second, Title 28, United States Code, Section 2415(c) provides that there is *no* statute of limitations on an action brought by the United States to "establish the title to, or right of possession of, real or personal property." Moreover, pursuant to Section 2416(c), a statute of limitations does not run against the Government if "facts material to the right of action are not known." Because the Government only recently learned of Defendant's possession of the NASA camera and his intention to sell it at a New York auction, all of the Government's claims in this matter are timely.

Third, pursuant to the Property Clause of the U.S. Constitution, the power to release or dispose of United States property is granted solely to the discretion of the U.S. Congress. Absent authority proscribed by federal statute or regulation, surplus Government property cannot be abandoned or transferred to third parties.

Fourth, all disputes regarding the ownership of Government property is controlled by federal law and not state law. The Government never asserted that Florida law governs this action. In fact, the Government does not even allege that any events underlying this action took place in Florida. The Government initiated this action in this Court because the Defendant is present in this judicial district and venue is appropriate.

Fifth, even if this Court was to dispense with controlling federal law and look to state law for guidance, the law of *Texas*, not Florida, would govern the Government's common law claims. The property belonged to NASA, based in Houston, Texas, and Defendant resided in Houston, Texas during all times relevant to his work with NASA. Moreover, even in instances where Congress has mandated that actions be governed by state law, the federal statute of limitations governs. Even then, similar to the federal statute of limitations, Texas' statute of limitations does not run until a plaintiff learns of the underlying wrongful acts supporting his or her entitlement to relief.

Sixth, nothing in Rule 8 of the Federal Rules of Civil Procedure or the U.S. Supreme Court's recent decisions in *Twombly* and *Iqbal* require a litigant to identify the date and time that a defendant wrongfully took possession of its property especially when the defendant does not dispute that the property belonged to plaintiff and alleges that he purportedly acquired title, either by abandonment or as a result of receiving it as a gift. Moreover, as confirmed by Defendant's premature Motion for Summary Judgment (*see* D.E. 11), the Government's Complaint has alleged sufficient facts to put Defendant on notice of its claims.

Finally, a motion to dismiss pursuant to Rule 12(b)(6) is a challenge to the allegations set forth in a complaint and is not the mechanism for deciding the merits of a case by the presentation of facts outside the four-corners of the complaint.[1] Having sufficiently stated a timely cause of action, Defendant's Motion to Dismiss should be denied in its entirety.

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[1] As set forth in Exhibit 1 to the Government's Motion to Strike (*see* D.E. 15-1), Defendant's extrinsic allegations as to why the NASA camera belongs to him have already been contradicted by the former director of NASA's Manned Spacecraft Center.

FACTUAL BACKGROUND

On March 17, 2011, NASA learned that Bonhams — a privately owned British auction house — was planning an upcoming Space History Sale that contained "one of two 16 mm motion picture Data Acquisition Cameras (DACs) carried on the Apollo 14 Lunar Module, Antares." Compl. at ¶¶ 7-8 (D.E. 1). Bonhams confirmed for NASA that the camera came "directly from the collection of Apollo 14 Lunar Module Pilot Edgar Mitchell." *Id.* at ¶ 8. Edgar Mitchell was the lunar module pilot on Apollo 14 and spent nine hours working on the lunar surface, making him the sixth person to walk on the Moon. *Id.* at ¶ 6.

On June 29, 2011, the Government initiated the present action to recover the Lunar Data Acquisition Camera that Defendant "attempted to sell for profit at a New York City auction." *Id*. at ¶ 1. In its Complaint, the Government: (i) seeks a declaratory judgment that Defendant "has no legal title or legal right of dominion over the NASA camera" and "that the NASA camera is the exclusive property of the United States" (*see* Count I); (ii) requests injunctive relief preventing Defendant from selling the camera (*see* Count IV); and (iii) has asserted claims for conversion and replevin (*see* Counts II and III).

In its Complaint, the Government never alleged that its action was governed by Florida law, as exemplified by the fact that the only allegation in its Complaint relating to Florida was the fact that Defendant is now a resident of Florida. *See id.* at ¶ 3 ("Venue is proper in this District under 28 U.S.C. § 1391(b)(1) as the Defendant resides in Lake Worth, Florida in Palm Beach County.").[2] As discussed further below, the Government's action is governed by federal law and not state law and even if state law was relevant, it would be the law of Texas. The property belonged to NASA, based in Houston, Texas and Defendant

[2] Under 28 U.S.C. § 1391(b)(2), the Government's action could have easily been filed in the U.S. District Court for the Southern District of Texas, as a "substantial part of the events" giving rise to this action occurred in Houston, Texas.

resided in Houston, Texas during all times relevant to his affiliation with NASA.[3]

On July 19, 2011, Defendant moved to dismiss the Government's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that the Government's "claims [were] inherently implausible" and barred under Florida's statute of limitations. *See* D.E. 9 at 2-3. In anticipation of filing his Motion for Summary Judgment six days later, Defendant injected allegations into his Motion to Dismiss that were outside the four-corners of the Government's Complaint, such as: (i) NASA purportedly having abandoned its camera by attaching it to the lunar module (*see* Def.'s Mot. at ¶ 2 (D.E. 8)); (ii) NASA purportedly having presented the camera to Defendant as a "gift" (*see* Def.'s Mem. at 1 (D.E. 9)); (iii) the circumstances surrounding Defendant's quarantine upon return to earth (*see* Def.'s Mot. at ¶ 2); and (iv) the procedure by which the camera was removed from the lunar module. *See id*; D.E. 10, 12 (providing statements suggesting that NASA had a policy of allowing astronauts to have mementos from their space journeys). In response to Defendant's assertions, Christopher C. Kraft. Jr. — the former director of NASA's Manned Spacecraft Center — declared, under oath, that the personal items an astronaut could retain during space flight as mementos consisted of "patches, medallions, emblems, watches, and rings" and such items could only be retained if management gave approval *prior to* the launch. *See* D.E. 15-1.

ARGUMENT

I. FEDERAL LAW CONTROLS THE GOVERNMENT'S CLAIMS OVER THE NASA CAMERA

A. Constitutional Authority

"Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution." *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941) (citing U.S. Const. art. IV, § 3, cl. 2); *State of Alabama v. State of*

[3] As an exhibit to its Motion to Strike, the Government has attached Defendant's employment records, which identify his residence in Houston, Texas during all times relevant to his affiliation with NASA. *See* D.E. 15-2.

Texas, 347 U.S. 272, 273 (1954) ("The power of Congress to dispose of *any kind of property* belonging to the United States is vested in Congress without limitation.") (citation and punctuation omitted) (emphasis added); *Kern Copters, Inc. v. Allied Helicopter Serv., Inc.*, 277 F.2d 308, 313 (9th Cir. 1960) ("Congress has the power to provide for the disposition of property of the United States, and the power must be exercised by the authorized authority, and in the authorized manner") (citations omitted).

This principle has its roots in the Property Clause of the U.S. Constitution, which provides that Congress has the sole authority to provide for the disposal of Government property, and that any such disposal requires specific statutory authority:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .

U.S. Const. art. IV, § 3, cl. 2.

B. Federal Statutory Authority

The U.S. Congress has implemented the Property Clause primarily through the Federal Property and Administrative Services Act of 1949 (FPASA), Pub. L. No. 81-152, 63 Stat. 377 (1949). *See* 40 U.S.C § 101, *et seq*. (also codified in scattered sections of 40 U.S.C. and 41 U.S.C.).[4] Congress enacted the FPASA to provide the Government "with an economical and efficient system for . . . disposing of surplus property." 40 U.S.C. § 101(3). The General Services Administration (GSA) has primary responsibility for monitoring the Act, and does so through the Federal Property Management Regulations (FPMR), 41 C.F.R § 101-1.101. *See United States v. 434.00 Acres of Land More or Less, in Camden County, State of Ga.*, 792 F.2d 1006, 1009 n.4 (11th Cir. 1986) (citing provisions of the FPASA and stating that "Congress has provided by statute the only way by which the United States may be divested of a property interest . . . it must be declared to be surplus property available for

[4] As the FPASA has been amended over time, its sections in the United States Code have been renumbered.

disposal through sale, lease, transfer or other express act and attended by the usual transfer of title documents"); *id.* ("[T]he federal government is not to be deprived of its property interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property") (citation and punctuation omitted).

Pursuant to Section 541, the Administrator of General Services supervises and directs the disposition of surplus property. *See* 40 U.S.C. § 541. Federal agencies, such as NASA, are delegated this authority pursuant to 40 U.S.C. § 542.[5] A federal agency may "dispose of surplus property [] by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, on terms and conditions that the Administrator [of General Services] considers proper." 40 U.S.C. § 543.[6] A private party can obtain conclusive title to Government property by receiving cognizable transfer instruments issued by the Government to the private party or that party's predecessor:

> A deed, bill of sale, lease, or other instrument executed by or on behalf of an executive agency purporting to transfer title or other interest in surplus property under this chapter is conclusive evidence of compliance with the provisions of this chapter concerning title or other interest of a bona fide grantee or transferee for value and without notice of lack of compliance.

40 U.S.C. § 544; *see Pacific Harbor Capital, Inc. v. U.S. Dep't of Agric.*, 845 F. Supp. 1, 5 (D.D.C. 1993) (holding that 40 U.S.C. § 544, formerly 40 U.S.C. § 484 (d) "protects bona fide grantees and transferees for value who receive government property and can point to an instrument documenting the transfer").[7]

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[5] Under the provisions of Section 203 of the National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426 (1958), NASA was authorized to "sell and otherwise dispose of real and personal property [] in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended[.]"). *See* http://history.nasa.gov/spaceact-legishistory.pdf, last visited August 5, 2011.

[6] Pursuant to 40 U.S.C. § 543, an "agency may execute documents to transfer title or other interest in the property and may take other action it considers necessary or proper to dispose of the property."

[7] Personal property can be abandoned by an agency upon a "written determination that the property has no commercial value or the estimate cost of its continued care and handling would exceed the estimated proceeds from its sales." 41 C.F.R. § 102-36.305. An agency can also donate personal property subject to abandonment/destruction, but only to a public body or approved non-profit. *See* 41 C.F.R § 102-36.320. Under the provisions of Section 203 of the National Aeronautics and Space

C. Federal Law Controls Disputes Regarding Government Property

Consistent with the property clause of the U.S. Constitution and congressional statutes and regulations implementing that clause, an action to determine the Government's rights in relation to its property is governed by federal law and not state law. *See, e.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) (applying federal common law, rather than state law, to determine the Government's rights and duties regarding its commercial paper); *434.00 Acres*, 792 F.2d at 1009 ("Congress has provided by statute [— *i.e.* the FPASA —] the only way by which the United States may be divested of a property interest[.]"); *Langbord v. United States Dep't of the Treasury*, No. 06-5315, --- F. Supp. 2d ----, 2011 WL 3047804, at *2, 3 n.1 (E.D. Pa. Jul. 5, 2011) (concluding "that federal common law would apply to the Government's hypothetical quiet title action" over "Double Eagle" U.S. Mint coins, "meaning that whether Pennsylvania law limits quiet title actions to real property is of no import") (citation omitted); *United States v. Ferguson*, 727 F.2d 555, 559 (6th Cir. 1984) (citing *Clearfield* and applying federal common law to a negligence action involving damage to federal property); *United States v. Warner*, 461 F. Supp. 729, 731 (W.D. Mich. 1978) (applying federal common law to negligence action involving damage to Government vehicle and stating that the "[r]ights and responsibilities in the ownership of Government property are essentially of a federal character. They vitally affect the interests, powers, and relations of the Federal government so as to require uniform national disposition rather than diversified state rulings.") (citations omitted); *United States v. Kearns*, 595 F.2d 729, 732 (D.C. Cir. 1978) ("[I]t is by now accepted that federal common law provides remedies in many situations" where the Government brings a claim "as a legal entity, for example in cases involving trespass on government property, handling of the Government's commercial paper, Government contracts, and tort claims.") (citations and punctuation

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Act of 1958, as amended, "any . . . department or agency is authorized, notwithstanding any other provision of law, to transfer to or to receive from [NASA], without reimbursement, aeronautical and space vehicles, and supplies and equipment other than administrative supplies or equipment."

omitted); *United States v. Swiss Am. Bank, Ltd.*, 23 F. Supp. 2d 130, 135 n.4 (D. Mass. 1998), *aff'd in part*, *rev'd in part*, 191 F.3d 30 (1st Cir. 1999) (noting "the existence of substantial authority for the general proposition that federal common law controls many instances in which the United States asserts its own property rights in federal court") (citations omitted); *United States v. Mailet*, 294 F. Supp. 761, 765 (D. Mass. 1968) (concluding that the Government's action for conversion of a surplus jaw rock crusher depended upon "federal rather than state law"); *United States v. Sommerville*, 324 F.2d 712, 715 (3d Cir. 1963) (concluding that the Government's conversion action to recover the value of livestock, covered by a security agreement, was governed by federal law); *Marker v. United States*, 646 F. Supp. 433, 435 (D. Del. 1986) (instructing that questions concerning the disposal of Government property are controlled by general federal common law and not the law of any specific state).[8]

D. Alleged Gifts And Abandonment Are Not Legitimate Defenses

In *United States v. California*, the U.S. Supreme Court confirmed the special power the Government has over its property as a sovereign:

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

332 U.S. 19, 40 (1947).

[8] *See also United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) (holding that the existence of a cause of action for the Government's loss of a soldier's services due to tortious injury was a matter of federal, not state law); *United States v. Lahey Hosp. Clinic, Inc.*, 399 F.3d 1, 15 (1st Cir. 2005) (applying federal common law doctrines of payment by mistake and unjust enrichment to recover wrongly paid out funds); *United States v. Crown Equip. Corp.*, 86 F.3d 700, 706 (7th Cir. 1996) (applying federal common law to tort action commenced to recover damages for destroyed commodities in warehouse fire); *United States v. Cambridge Trust Co.*, 300 F.2d 76, 77 (1st Cir. 1962) (applying federal common law to Government's action to recover amounts paid on fraudulent postal money orders).

Accordingly, Government property not formally divested by authorized Government officials pursuant to the specific procedures set forth in pertinent laws and regulations remains Government property. *See, e.g.*, *Royal*, 313 U.S. at 294 ("Subordinate officers of the United States are without [] power" to transfer government property unless authority "has been conferred upon them by Act of Congress or is to be implied from other powers so granted."); *Kern Copters*, 277 F.2d at 313 ("Inactivity, or neglect, upon the part of Government officers is insufficient to cause the Government to lose its property."); *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 740 (8th Cir. 2001) (rejecting abandonment theory because "Congress never abandoned the government's 1971 claim to Devils Lake [. . . and] Associate Solicitor Chambers was a 'subordinate officer,' who lacked Congressional authorization to abandon a government land claim"); *United States v. Ins. Co. of N. Am.*, 65 F. Supp. 401, 407 (W.D.S.C. 1946) (holding that Government employee's approval of insurance form was insufficient to establish that Government, "in some way, waived its right to claim the endorsement was not effective" because subordinate officers of the United States are without the power to release or dispose of Government property) (citation omitted); 77 Am. Jur. 2d *United States* § 32 (2011) ("Subordinate officers of the United States may release or otherwise dispose of federal property only if Congress has conferred that power on them or if the power to do so may be implied from other granted powers") (citation omitted).

Likewise, "the Government cannot abandon property without congressional authorization." *Warren v. United States*, 234 F.3d 1331, 1338 (D.C. Cir. 2000); *Spirit Lake*, 262 F.3d at 740 (same) (quoting *Warren*, 234 F.3d at 1338); *see Kingman Reef Atoll Invs., L.L.C. v. United States*, 545 F. Supp. 2d 1103, 1113 (D. Haw. 2007) ("The government cannot be held to have abandoned property based on the conduct of officials not authorized to affect government property interests."); *United States v. Steinmetz*, 763 F. Supp. 1293, 1298 (D.N.J. 1991), *aff'd* 973 F.2d 212 (3d Cir. 1992) (rejecting theory of abandonment

when "only Congress and those persons authorized by Congress may dispose of United States property pursuant to appropriate regulations").

The Court of Appeals decision in *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992) illustrates the well-established principle that a sovereign cannot be dispossessed of its property without its consent. In *Steinmetz*, a ship's bell was recovered in 1936 from a Confederate raiding vessel sunk by the Union Navy in 1864 off the coast of France. *Id.* at 214-15. The bell was sold to a bar owner in Guernsey, where it was displayed until the bar was destroyed by British bombers after Guernsey was overtaken by Germans in World War II. *Id.* at 215. The bell came into the possession of an antique dealer in England, before it was purchased by a collector who brought it to New Jersey, where it sat on a shelf for 11 years, before being displayed in a New York gallery in 1990. *Id.*

The Court of Appeals affirmed summary judgment in favor of the United States based on Article IV, Section 3, Clause 2 of the United States Constitution and the principle that the United States holds its interests in property "in trust for all the people" and cannot be "deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property." *Id.* at 222 (citing *California*, 332 U.S. at 40). Similarly, in this case, Defendant cannot argue abandonment as a reason for his entitlement to the NASA camera, especially when the detailed procedure for abandoning surplus property is addressed by federal regulation. *See* 41 C.F.R. § 102-36.305.

II. THE GOVERNMENT'S CLAIMS ARE TIMELY

"It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States v. Moore*, 968 F.2d 1099, 1100 (11th Cir. 1992) (quoting *United States v. Summerlin*, 310 U.S. 414, 416 (1940)); *Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003) (same) (quoting *Summerlin*, 310 U.S. at 416); *accord Indus. Indem. Ins. Co. v. United States,* 757 F.2d 982, 985 (9th Cir. 1985) ("[T]he United States is not bound by state statutes of limitation. When the

government acquires a cause of action, the state statute of limitation ceases to run.") (citations omitted); *United States v. Weiss*, --- F. Supp. 2d ----, No. 6:98-cr-99-Orl-19KRS, 2011 WL 2119395, at *17 (M.D. Fla. May 27, 2011) ("[A]bsent any statutory waiver, state statutes of limitations do not apply to actions filed by the federal government") (citing *Moore*, 968 F.2d at 1100 and *Summerlin*, 310 U.S. at 416); *United States v. Guyton*, No. 3:07-cv-273-J16-MCR, 2009 WL 1308431, at *4 (M.D. Fla. May 8, 2009) ("[C]ase law makes clear that the Government's claim is not subject to state statutes of limitation, including Florida Statute § 733.705(8), absent its own consent.") (citations omitted).[9]

Courts have also "long held that the United States is not bound by any limitations period unless Congress explicitly directs otherwise [because . . .] [t]he doctrine that the mere passage of time cannot foreclose the rights of the United States derives from the common law principle that immunity from the limitations periods is an essential prerogative of sovereignty." *United States v. Alvarado*, 5 F.3d 1425, 1427-28 (11th Cir. 1993) (quoting *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981)). Moreover, to the extent any statute of limitations is proscribed against the Government, such statute "must receive a strict construction in favor of the Government." *Alvarado*, 5 F.3d at 1428 (citing *Moore*, 968 F.2d at 1100 and *Summerlin*, 310 U.S. at 416). Under federal law, the statute of limitations on a Government action is governed by 28 U.S.C. §§ 2415, 2416.

A. Government's Declaratory Judgment Claim

Count I of the Government's Complaint asks for a declaratory judgment that Defendant has no legal title or legal right of dominion over the NASA camera and that that NASA camera is the sole property of the United States. *See* Compl. at ¶¶ 1, 14-15. In an exercise of its discretion, this Court may grant declaratory relief in accordance with the

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[9] Even in instances when Government actions "are generally governed by state law," the federal statute of limitations would apply because any other interpretation "would leav[e] the federal government subject to a statute of limitations for which Congress did not provide." *Moore*, 968 F.2d at 1101; *see United States v. Neidorf*, 522 F.2d 916, 920 n.6 (9th Cir.1975).

following statutory provision:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a); *see Langbord*, 2011 WL 3047804, at *1-3 n.1 (permitting the Government to bring a declaratory judgment claim as to issues relating to the rightful ownership of Double Eagle U.S. Mint coins). Moreover, further necessary relief "based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

Title 28, United States Code, Section 2415(c) provides that there is *no* statute of limitations on an action brought by the United States to "establish the title to, or right of possession of, real or personal property." 28 U.S.C. § 2415(c); *see United States v. Hess*, 194 F.3d 1164, 1174 n.8 (10th Cir. 1999) ("[N]o statute of limitation bars the government from bringing an action to establish title to the gravel" located on a ranch).[10] Accordingly, the Government will *never* be timed barred from bringing an action to establish its rightful ownership of the NASA camera.

B. Federal Common Law Claims

Under governing federal law, a statute of limitations does not run against the Government for any period during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the

[10] Quiet title actions can relate to personal property as well as realty. *See, e.g., Langbord*, 2011 WL 3047804, at *2, 3 n.1 (applying federal common law to Government's quiet title action" over "Double Eagle" U.S. mint coins, "meaning that whether Pennsylvania law limits quiet title actions to real property is of no import") (citation omitted); *First Trust Co. of St. Paul v. Minnesota Historical Soc.*, 146 F. Supp. 652, 669 (D. Minn. 1956) (considering Government's intervening quiet title claim regarding notes from the Lewis and Clark expedition). Moreover, when Congress provided a right to sue the United States seeking to quiet title, Congress provided that such a right extended to either "real or personal property." 28 U.S.C. § 2410(a) (authorizing an individual to seek quiet title against United States for "real or personal property on which the United States has or claims a mortgage or other lien").

responsibility to act in the circumstances." 28 U.S.C. § 2416(c). In other words, "under federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 861 (10th Cir. 1993) (quoting *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830, 834 (Fed. Cir. 1991)); *see FDIC v. Wheat*, 970 F.2d 124, 128 (5th Cir. 1992) ("The plain language of section 2416 leads us to conclude the limitations period could not begin until the FDIC had *constructive knowledge* of the cause of action") (emphasis added). As alleged in its Complaint, the Government only recently learned of Defendant's possession of the NASA camera after his attempted sale of the camera at a New York auction. *See* Compl. at ¶¶ 7-13. The Government also had "no record of its camera as having ever been transferred to Defendant." *Id.* at ¶ 12. Moreover, Defendant's recent allegations of "abandonment" and "gift" — as allegedly establishing his legal right to the NASA camera — represent affirmative evidence of Defendant's non-compliance with the FPASA.

Because NASA had no knowledge of Defendant's acquisition and claim of title over the NASA camera until recently, no statute of limitations has run in this case. *See, e.g.*, *Moore*, 968 F.2d at 1101 (rejecting statute of limitations challenge when the Government was not even aware of the relevant conduct until it was notified by defendant's counsel); *Phillips Petroleum*, 4 F.3d at 861-64 (reversing judgment on statute of limitations grounds and remanding for evaluation of whether the Government lacked knowledge of relevant facts); *Hess*, 194 F.3d at 1175 (tolling statute of limitations because "government officials could not have reasonably known about the [defendant's] gravel extraction until [defendant's officer] erected his highly visible business sign advertising gravel sales"); *United States v. Foster*, No. 04-CV-4256-JPG, 2005 WL 1458266, at *1-3 (S.D. Ill. Jun. 15, 2005) (tolling statute of limitations on Government's claims of trespass and conversion to date when Government discovered defendant was cutting the trees on its property); *United States v. United Techs. Corp.*, 255 F. Supp. 2d 779, 784 (S.D. Ohio 2003) (rejecting statute of

limitations challenge to common law unjust enrichment claim and finding that statute did not run until knowledge of fraud existed); *United States v. Gov't Dev. Bank*, 725 F. Supp. 96, 100 (D.P.R. 1989) (finding statute of limitations on Government contract action to run from the date when employees of administrator were arrested for food stamp fraud, and not earlier date when food stamp operation was under investigation); *United States v. Reinhardt Coll*, 597 F. Supp. 522, 526 (N.D. Ga. 1983) (rejecting statute of limitations challenge when action did not accrue until Government learned of facts through its compliance audit).

While Florida may have abandoned the "discovery rule" for certain claims (*see* D.E. 9 at 2), the United States Congress clearly has not. Consistent with federal law, the Government should be entitled to proceed forward with its claims of conversion and replevin. *See, e.g.*, *United States v. Barnard*, 72 F. Supp. 531, 531, 533 (W.D. Tenn. 1947) (affirming judgment for Government on replevin action to recover gold coins issued by the U.S. Mint); *Mailet*, 294 F. Supp. at 765 (considering Government's conversion claim under federal common law and relying upon the Second Restatement of Torts for the elements of conversion).

C. State Law Guidance

The United States Supreme Court has instructed that when considering the confines of federal common law, "state law may furnish convenient solutions in no way inconsistent with adequate protection of the federal interest." *Standard Oil*, 332 U.S. at 309. In this case, the applicable state law that has any relevance to this matter is the law of Texas. The NASA camera belonged to NASA, based in Houston, Texas and Defendant resided in Houston, Texas during all times relevant to his affiliation with NASA. *See* D.E. 15-2 (identifying Defendant as a resident of Houston, Texas during all times relevant to his affiliation with NASA).[11] Even if Texas law applied, the federal statute of limitations would still govern.

[11] To the extent state law applies in this case, under either choice of law doctrines, *i.e.*, the location where the conversion occurred, or the location with the most substantial relationship to the facts of the case, the relevant jurisdiction would be Texas. *See* Sections 145(2), 147 of the Restatement

See Moore, 968 F.2d at 1101; *Neidorf*, 522 F.2d at 920 n.6.

Consistent with the federal statute of limitations, Texas has adopted the "discovery rule." Under Texas law, "an action does not accrue until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury." *USPPS, Ltd. v. Avery Dennison Corp.*, 326 F. App'x 842, 847 (5th Cir. 2009) (punctuation and citation omitted). The discovery "rule postpones the running of the statutory limitation period until such time as the claimant discovers, or in exercising reasonable diligence should have discovered, facts that indicate he has been injured." *Id.* (quoting *Colonial Penn Ins. v. Mkt. Planners Ins. Agency Inc.*, 157 F.3d 1032, 1034 (5th Cir. 1998) (punctuation omitted).

Moreover, under "Texas law, a cause of action for conversion accrues 'upon the discovery of facts supporting the cause of action, or upon demand and refusal, whichever occurs first.'" *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 739 (2nd Cir. 2010) (quoting *Nelson v. Am. Nat'l Bank*, 921 S.W.2d 411, 415 (Tex. App. 1996)); *accord Millan v. Dean Witter Reynolds, Inc.*, 90 S.W.3d 760, 764 (Tex. App. 2002) ("A cause of action for conversion accrues at the time facts come into existence that authorize a claimant to seek a judicial remedy. . . . The discovery rule doctrine provides that an action does not accrue until a plaintiff knew or in the exercise of reasonable diligence should have known of a wrongful act and resulting injury.").

Even if this Court was to look to state law for guidance, the Government's action would still be timely under Texas law.[12]

(Second) of the Conflict of Laws (1971); *Toltest, Inc. v. Nelson-Delk*, No. 3:03 CV 7315, 2008 WL 1843991, at *8 (N.D. Ohio Apr. 22, 2008) (applying § 147 to determine that Michigan law applied because injury to property occurred in Michigan, as well as alleged events that brought about injury); *Emke v. Compana, L.L.C.*, No. 3:06-CV-1416-L, 2007 WL 2781661, at *4-6 (N.D. Tex. Sept. 25, 2007) (applying both §§ 145(2) and 147 to find jurisdiction in California to be appropriate because that was the location of the injury to the property).

[12] Even if this Court disregarded federal law and applied Florida law, the federal statute of limitations would still apply (*see supra* note 9). Moreover, even under Florida law, the Government's action will still be timely. As Defendant concedes in his Motion to Dismiss (*see* Def.'s Mot. at ¶ 1 (D.E.

III. THE GOVERNMENT'S COMPLAINT STATES A VALID CAUSE OF ACTION

All Rule 8 of the Federal Rules of Civil Procedure requires is "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss for failure to state a claim, the complaint at issue, "must contain factual allegations that 'raise a reasonable expectation that discovery will reveal evidence' in support of the claim and that plausibly suggest relief is appropriate." *Perlman v. Five Corners Investors I*, No. 09–cv-81225, 2010 WL 962953, at *2 (S.D. Fla. Mar. 15, 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); *see Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949-50 (2009). This "threshold is exceedingly low."

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8)), a demand for return of the property, *even* under Florida law, is an element for a claim for replevin. Thus, "the cause of action for replevin first arises with the refusal to return the property upon demand for its return." 12 Fla. Jur. 2d § 44 (quoting *Senfeld v. Bank of Nova Scotia Trust Co. (Cayman) Ltd.*, 450 So. 2d 1157, 1161 n.5 (3d DCA 1984)). Because the Government only recently learned of Defendant's purported possession of the NASA camera and only recently requested its return (*see* Compl. at ¶¶ 7-13), the Government's action for replevin is timely. Moreover, under Florida law, as Defendant concedes, the statute of limitations does not run until the "last element constituting the cause of action occurs." Def.'s Mem. at 2 (D.E. 9) (citation omitted). In *Star Fruit Co. v. Eagle Lake Growers*, the Florida Supreme Court explained that the "gist of a conversion [claim is] not the acquisition of the property of the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled." 33 So. 2d 858, 860 (Fla. 1948) (*en banc*) (citations and punctuation omitted); *see Ernie Passeos, Inc. v. O'Halloran*, 855 So. 2d 106, 108-09 (2nd DCA 2003) (instructing that the "essence of conversion" is the possession of property "in conjunction with a present *intent* on the part of the wrongdoer to deprive the person entitled to possession of the property, which may be, but is not always, shown by demand and refusal.") (quoting *Senfeld*, 450 So. 2d at 1161) (emphasis added).

While the Florida Supreme Court in *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002) held that the discovery rule did not act to toll the statute of limitations on claims of conversion, it did not state that all claims of conversion accrued immediately upon possession. In *Davis*, the alleged conversion was monies and negotiable instruments. *Id.* at 709. Courts have uniformly found a conversion to occur immediately upon the transfer of a negotiable instrument and have rejected the discovery rule in those instances. *See, e.g., Dhingra v. PNC Fin. Servs. Group, Inc.*, No. 10 C 7553, 2011 WL 2470650, at *2, 4 (N.D. Ill. Jun. 20, 2011); *West v. Nationwide Tr. Servs., Inc.*, No. 1:09cv295-LG-RHW, 2009 WL 5103159, at *3 (S.D. Miss. Dec. 16, 2009); *Loyd v. Huntington Nat. Bank*, No. 1:08 CV 2301, 2009 WL 1767585, at *5 (N.D. Ohio Jun. 18, 2009). In this case, given that Defendant — subjectively believed — that he had good title to the NASA camera based on purportedly receiving it as a gift (*see* Def.'s Mem. at 1 (D.E. 9)), the Government's action, under Florida law, did not accrue against Defendant until very recently when Defendant refused to return the camera.

Perlman, 2010 WL 962953, at *2 (citation and punctuation omitted); *see Kalpak v. EMC Mortg. Corp.*, No. 3:11-cv-49 (CAR), 2011 WL 2711182, at *2 (M.D. Ga. Jul. 13, 2011) ("On a motion to dismiss, the Court's function is not to assess the veracity or weight of the evidence; instead, the Court must merely determine whether the complaint is legally sufficient. . . . Because this standard imposes such a heavy burden on the defendant, Rule 12(b)(6) motions are rarely granted.") (citations omitted).

In reaching this determination, "a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well-pleaded facts as true." *Larach v. Standard Chartered Bank Intern. (Americas) Ltd.*, 724 F. Supp. 2d 1228, 1232 (S.D. Fla. 2010) (citation omitted). In doing so, the Court's task is not to "decide whether the plaintiff will ultimately prevail on the merits, but instead whether such plaintiff has properly stated a claim and should therefore be permitted to offer evidence in support thereof." *Napier ex rel. Napier v. Florida Dep't of Corr.*, No. 09-CV-61158, 2010 WL 2427442, at *2 (S.D. Fla., Jun. 16, 2010).

In this case, the Government has alleged sufficient facts to identify the NASA camera and explain how it learned of Defendant's intention to sell it at a New York auction. *See* Compl. at ¶¶ 1-13. These facts are sufficient to put Defendant on notice of its action, as exemplified by Defendant's premature Motion for Summary Judgment (*see* D.E. 11), where he concedes that he acquired the NASA camera and asserts defenses of "abandonment" and "gift" in response to the Government's Complaint. *Compare* Def.'s Mem. at 1 (D.E. 9) (alleging that the NASA camera was "given to him by NASA as a gift") *with* Def.'s Mot. at 1 (D.E. 8) (alleging that "NASA abandoned the camera by attaching it to the lunar module").

Accordingly, the Government's Complaint adequately alleges sufficient facts to state a plausible entitlement to relief. *See, e.g.*, *Core 4 Kebawk, LLC v. Ralph's Concrete Pumping, Inc.*, No. 10-2792, 2011 WL 743455, at *2 (E.D. La. Feb. 22, 2011) (admonishing defendant for attempting to "stretch[] the Supreme Court's *Iqbal* and *Twombly* decisions

much too far" and finding conversion claim based on allegation of ownership of property and defendant's access to property sufficient to state a claim); *Crowl v. Allcare Dental and Dentures*, No. 4:11CV00105, 2011 WL 2421061, at *3 (N.D. Ohio Jun. 13, 2011) (considering allegations that defendant received plaintiff's money and maintained a claim of dominion over it as sufficient to state a claim for conversion).

CONCLUSION

For all these reasons, Defendant's Motion to Dismiss should be denied in its entirety.

Dated: August 5, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by CM/ECF on August 5, 2011 on all counsel or parties of record on the Service List below.

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