

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2007 JUL 26 PM 2:10
CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

GECU,)
Plaintiff,)
)
v.)
)
UNITED STATES OF AMERICA and)
FRANK B. APODACA,)
Defendants.)

CIVIL CAUSE NO. EP-07-CA-181-FM

**DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS
UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6) FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

COMES NOW, the United States of America by and through the United States Attorney for the Western District of Texas and files this, its Motion to Dismiss under Fed. R. Civ. Proc. 12(b)(6) for failure to state a claim upon which relief can be granted, and in support thereof would state as follows:

INTRODUCTION

This is an action was filed by Government Employee's Credit Union (GECU) seeking the Court's intervention to retrieve funds from either the United States or from co-defendant Apodaca. GECU initially turned funds over to the United States pursuant to a seizure warrant issued by this Court on accounts registered to co-defendant Apodaca. After having been served the Court authorized seizure warrant, GECU then dispersed funds to Apodaca putatively from the same account. Having caused its own problems, GECU now asks the Court for an order to return to it the funds distributed to either the United States or Apodaca. The Court lacks subject matter jurisdiction to consider this action and GECU's petition should be dismissed.

FACTS¹

The facts relevant to the issues before the Court on GECU's Original Complaint for Interpleader and Declaratory Relief are as follows:

On May 21, 2007, Special Agent (SA) Kay Lee Kennedy of the Federal Bureau of Investigations Public Corruption unit in El Paso, Texas served a seizure warrant upon a Senior Vice President, Fermin Acosta, Jr., of the Plaintiff, Government Employees Credit Union. The warrant sought funds in four numbered accounts belonging to Frank Apodaca. After some discussion, Mr. Acosta informed Special Agent Kennedy that a "hold" had been placed on the accounts and that SA Kennedy could pick up a check or the contents of the accounts the next day, May 22, 2007.

Because of other duties, SA Kennedy was unable to pick up the checks from GECU on May 22, 2007. However, FBI Paralegal Specialist Sianez spoke to Mr. Fred Morton, legal counsel for GECU. In that conversation, Sianez informed Mr. Morton that the check should be made out to the United States Marshals Service. Sianez was informed by Mr. Morton that the balance of the Apodaca accounts was approximately \$91,000.00.

On May 23, 2007, SA Kennedy and some of her fellow agents went to GECU to pick up the check, Mr. Acosta provided them a check for \$14,000.00. When SA Kennedy informed Mr. Acosta that she was informed the accounts held \$91,000.00, Mr. Acosta stated that approximately \$77,000.00 had been given to Mr. Apodaca earlier that day. After some discussion, he determined to put a stop payment order on the check given to Mr. Apodaca. Mr.

¹The facts in the United States Motion are taken from the Affidavit of Special Agent Kay Lee Kennedy which is attached.

Acosta then provided SA Kennedy an additional check for Approximately \$77,000.00 which, with the \$14,000.00 check already provided equaled the \$91,000.00 Mr. Morton had told the FBI was in the specified accounts. This action ensued.

ARGUMENT

The Court lacks jurisdiction to consider Plaintiff's Original Complaint for Interpleader and Declaratory Relief because the United States has not waived sovereign immunity in suits such as the one before the Court. Even if Plaintiff could point to a waiver of sovereign immunity, Plaintiff's suit is not one for interpleader but rather a suit for common law replevin to recover funds already distributed. Lastly, should the Court find a waiver of sovereign immunity and that Plaintiff has adequately plead an interpleader action, under the specific terms of the interpleader statute, 28 U.S.C. 1335, the Court lacks subject matter to consider Plaintiff's Complaint.

1. The Court Is Deprived of Jurisdiction to Consider the Plaintiff's Complaint Because the United States Has Not Waived Sovereign Immunity.

The United States, as sovereign, is immune from suit save as it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767, 769 (1941). The absence of a waiver of sovereign immunity by the government is a jurisdictional defect. *Bodin v. Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006). Any such "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text . . . and will not be implied." *Lane v. Pena*, 518 US 187, 116 S.Ct. 2092 (1996), *internal citations removed*. "Moreover, a waiver of the government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Id.* A plaintiff bears the burden of identifying an explicit waiver of sovereign

immunity. *Suburban Mortg. Associates, Inc. v. United States Department of Housing and Urban Development*, 480 F.3d 1116, 1120 (Fed.Cir. 2007).

Plaintiff GECU has neither pled nor proved any waiver of sovereign immunity. Plaintiff alleges jurisdiction under 28 U.S.C. 1335 and 28 U.S.C. 2201, the declaratory judgment act. However, "it is well settled that the statute authorizing declaratory relief does not serve as a waiver of sovereign immunity." *Shaffer v. Commissioner of Internal Revenue Service*, 515 F.Supp 748, 752 (D.C. La 1981) citing *People of the State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). See also *In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, (5th Cir. 2001)(Declaratory Judgment Act does not provide a federal court with an independent basis for exercising subject matter jurisdiction. 28 U.S.C.A. 2201 et seq.).

Likewise, the federal interpleader act, 28 U.S.C. 1335, is also not a waiver of sovereign immunity. "Congress did not waive sovereign immunity by its enactment of the interpleader statute, 28 U.S.C. 1335." *United States v. Sanitary Dairy Products, Inc.*, 211 F.Supp 185, 187 (D.C.La 1962) citing *United States v. Dry Dock Savings Institution*, 149 F.2d 917 (2 Cir., 1945) and *Herter v. Hemsley-Spear, Inc., D.C.*, 149 F.Supp. 713 (1957). Neither of Plaintiff's alleged jurisdictional bases establishes an unequivocal statutory waiver of sovereign immunity by the United States. Consequently, this Court is deprived of subject matter jurisdiction to consider Plaintiff's Original Complaint for Interpleader and Declaratory Judgment and this action should be dismissed.

2. Plaintiff's Has Not Properly Plead an Interpleader Action.

While styled by GECU as an Interpleader, this action is in reality not an action in interpleader, but rather an attempt by GECU to retrieve funds it distributed to Apodaca after it

was served with a seizure warrant freezing the assets in the named accounts. As such, GECU's Original Complaint for Interpleader and Declaratory Relief is not an interpleader action, but rather one more akin to a common law action for replevin and Plaintiff's Complaint should be dismissed.

"The federal interpleader statute is an independent grant of jurisdiction in the federal district courts where there are adverse claimants or potential claimants." *ALFA Financial Corp., v. Key, et al*, 927 F.Supp 423, 428 (M.D. AL 1996). "The purpose of interpleader is to enable the plaintiff-stakeholder to avoid the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing." *Hussain v. Boston Old Colony Ins. Co.*, 311 F.3d 623, 631 (5th Cir. 2002). However, "[i]nterpleader is not designed to solve all problems associated with multiparty litigation." *Wausau Ins. Co. V. Gifford*, 954 F.2d 1098, 1101 (5th Cir. 1992) citing *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. at 535, 87 S.Ct. At 1206. The party seeking interpleader bears the burden of proving that interpleader is appropriate. *Fresh America Corp. v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 411, 414 (N.D. Tex 2005).

The Fifth Circuit has established a method by which the courts are to analyze an interpleader action:

"An interpleader action typically involves a two step process. In the first stage, the district court decides whether the requirements for rule or statutory interpleader action have been met by determining if there is *a single fund* at issue whether there are adverse claimants to that fund. If the district court finds that the interpleader action has been properly brought the district court will then make a determination of the respective rights of the claimants."

Rhoades v. Casey, 196 F.3d 592, 600 (5th Cir. 1999) emphasis added. "The courts and authorities

have uniformly held that a single, identifiable fund is a prerequisite to an interpleader action.” *Wausau Ins. Companies v. Gifford*, 954 F.2d 1098, 1100 (5th Cir. 1992). In this case there is not a single fund at issue, but rather *two* funds which Plaintiff has already dispersed to the defendants. “[A]n interpleader action . . . will not lie where there are independent funds each with its own claimants—even if the two arose out of a common origin.” *Gifford* at 1101, *citing Fidelity Fire Ins. Co. v. Contruccion Werl, Inc.*, 407 F.Supp 164, 174 (D.V.I. 1975). Because there are two funds in dispute, each being claimed by a separate party, this action does not qualify as an interpleader action and it should be dismissed.

Additionally, to establish an interpleader action, the “essential aspect is that the *res* be under the control of the person bringing the lawsuit, so as to be deliverable to the registry of the court.” *General Atomic Co. et al., v. Duke Power Co., et al.*, 553 F.2d 53, 5623 Fed. R. Serv.2d 703,709 (10th Cir. 1977). Here, Plaintiff is not in control of **any** disputed funds. GECU has distributed separate and distinct funds to each of the defendants. One distribution was the result of a lawful warrant issued by the Court, and one distribution was made in violation of that Order, after the Order had been received by GECU, and at the peril of those distributing said funds. *Tex. Crim. Proc. Code Ann. Art.59.12*. Plaintiff has none of the alleged disputed funds under its control to deliver into the registry of the Court. The possession of the disputed funds by the Plaintiff is a requirement of establishing an interpleader action. The fact that the Plaintiff has already distributed what it alleges to be the disputed funds makes this case, not an interpleader action, but rather an action by Plaintiff to recover funds it negligently, or otherwise, distributed to a party who had no legal right to the funds, i.e. Defendant Apodaca. That is an action sounding in replevy and not an interpleader. Because Plaintiff has not made out a case for interpleader,

Plaintiff's Original Complaint for Interpleader and Declaratory Relief should be dismissed.

3. This Court Lacks Jurisdiction to Consider GECU's Interpleader Action

Even if the Court determines that GECU's action is properly considered an interpleader, this Court lacks jurisdiction to consider it. To maintain jurisdiction under 28 U.S.C. §1335, GECU must prove that there are two or more adverse claimants who are diverse as defined in §1332, that there is at least \$500 in controversy, *Aetna Cas. & Sur Co. v. Aherns*, 414 F.Supp 1235, 1241(S.D.Tex 1975) citing *State Farm and Casualty Co. v. Tashire*, 386 U.S. 523, 530, 87 S.Ct. 1199,1203 (1967), and that the plaintiff has deposited such money or property into the registry of the Court. *Murphy v. Travelers Insurance Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976). Because there is no diversity between the putative claimants and GECU has failed to deposit any disputed funds in the Court's registry, the Court lacks jurisdiction to consider this matter and GECU's Original Complaint for Interpleader and Declaratory Relief must be dismissed.

a. There Is No Diversity Between the Defendants as Required for an Interpleader Action under 28 U.S.C. §1135.

"The interpleader statute, 28 U.S.C. s 1335 , applies where there are two or more adverse claimants, of diverse citizenship." *State Farm and Casualty Co. v. Tashire*, 386 U.S. 523, 530, 87 S.Ct. 1199,1203 (1967). "The United States, for the purposes of interpleader statute, is not a citizen of any state." *Kent v. Northern California Regional Office of Am. Friends Serv. Comm.*, 497 F.2d 1325, 1327 (9th Cir. 1974) citing *United States v. Dry Dock Savings Inst.*, 149 F.2d 917 (2d Cir. 1945) See also, *Lummis v. United States*, 686 F.2d 225 (5th Cir. 1982) affirming lower court opinion at 491 F.Supp. 5 (W.D.Tex 1979); *General Ry. Signal Co. v. Corcoran*, 921 F.2d 700 (7th Cir. 1991)(US is not a citizen for diversity reasons and, therefore, agencies of the United

States cannot be sued in diversity); *First Ntn'l Bank of Brownsville, Texas v. United States*, 172 F.Supp 757 (S.D. Tex 1959) (the United States is not a citizen for jurisdictional purposes); *Asbestos Workers Local No. 23 Pension Fund ex. Rel. Norcross v. United States*, 303 F.Supp2d 551 (M.D.Pa 2004) (diversity exists only among citizens of different states or "foreign states," not between a citizen of a state and the United States or agency thereof); *Commercial Union Ins. Co. v. United States*, 999 F.2d 581(C.A.D.C. 1993) (It is well established, however, that the United States is not a citizen for diversity purposes.) Consequently, there can be no jurisdiction under the federal interpleader statute where there are only two adverse claimants, one of which is the United States. This is not a circumstance that can be remedied or altered by any of the parties—there simply is no diversity between the defendants and there never can be. Because there is no diversity among the putative adverse claimants here, this Court is deprived jurisdiction to consider Plaintiff's interpleader action and GECU's Original Complaint for Interpleader and Declaratory Relief should be dismissed.

b. GECU Has Failed to Comply with the Jurisdictional Requirements of §1335 by Because It has Not Deposited the Contested Funds in the Court's Registry.

The Court is additionally or alternatively deprived jurisdiction in this matter because Plaintiff has not deposited the controverted funds into the registry of the Court. It is a jurisdictional requirement under §1335 that a plaintiff in a federal interpleader action deposit the disputed property into the registry of the Court. *Murphy v. Travelers Insurance Co.*, 534 F.2d 1155, 1159 (5th Cir. 1976). The entire amount of the property need not be deposited, *Id.*, provided some amount equal to or in excess of \$500 is placed in the registry of the Court. *Austin v. Texas-Ohio Gas Co.*, 218 F.2d 739,745 (5th Cir. 1955). Alternatively, a plaintiff may deposit

with the Court "bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper." 28 U.S.C. 1335(a)(2). In this case Plaintiff has deposited nothing into the Court's registry. Nor can it because it has already distributed funds and, as stated above, it no longer has possession of the funds as it is required to have for this Court to have jurisdiction. *General Atomic Co. et al., v. Duke Power Co., et al*, 553 F.2d 53, 5623 Fed. R. Serv.2d 703,709 (10th Cir. 1977). Such deposit is a jurisdictional prerequisite under the statute and absent a deposit by Plaintiff in excess of the jurisdictional amount, this Court lacks subject matter jurisdiction to consider Plaintiff's interpleader. Consequently, GECU's Original Complaint for Interpleader and Declaratory Relief should be dismissed.


CONCLUSION

Based on the foregoing, it is clear that the Court is deprived of subject matter jurisdiction to consider Plaintiff's Original Complaint for Interpleader and Declaratory Relief and this action should be dismissed.

Respectfully submitted,

JOHNNY SUTTON
UNITED STATES ATTORNEY

By:



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant United States Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(6) for Failure to State a Claim Upon Which Relief could be Granted was served by certified mail, return receipt requested on this 26th day of July, 2007 addressed as follows:

Fred J. Morton
1101 Montana Ave.
El Paso, TX 79902
Attorney for Plaintiff GECU

Ray Velarde
1216 Montana Ave.
El Paso, TX 79902
Attorney Frank B. Apodaca


CLAYTON R. DIEDRICHS
Assistant United States Attorney

AFFIDAVIT OF SPECIAL AGENT KAY LEE KENNEDY

I, Kay Lee Kennedy, hereinafter referred to as Affiant, do hereby swear to and affirm that I am a Special Agent (SA) with the Federal Bureau of Investigation (FBI) and have been so employed since January 22, 2006. I am currently assigned to the Public Corruption Squad of the El Paso Division which investigates local, state, and federal public corruption matters.

On May 21, 2007, at approximately 4:30 p.m., the Affiant, FBI Paralegal Specialist Rosa Sianez, and FBI Forfeiture Support Associates Data Analyst Denise Dominguez arrived at GECU (Government Employees Credit Union of El Paso and also known as Greater El Paso's Credit Union), 7227 Viscount Boulevard, El Paso, Texas 79925, to execute a seizure warrant for four specified checking and savings accounts, bearing the name FRANK B. APODACA. Affiant spoke with FERMIN ACOSTA, JR., GECU Senior Vice President of Administrative Services.

Affiant advised ACOSTA that she was executing a seizure warrant for the four accounts listed on the seizure warrant. The Affiant provided a copy of the seizure warrant with United States (US) District Judge Frank Montalvo's original signature to ACOSTA. The Affiant reiterated this document was a federal seizure warrant and asked if ACOSTA perhaps needed to fax this document to the legal department for review. ACOSTA replied that he was "the legal department." The Affiant then advised ACOSTA that APODACA's four accounts needed to be frozen immediately to prevent any further account activity since the federal government had seized these four accounts upon service of this seizure warrant.

The Affiant then asked ACOSTA if the check for the balance of APODACA's four accounts would be prepared by close of business that day. ACOSTA made a telephone call to an unknown person in front of the Affiant, Sianez, and Dominguez. During this telephone conversation, ACOSTA directed the unknown person on the telephone to place a hold on APODACA's four accounts, each of which ACOSTA identified by account number. ACOSTA specified placement of a "file maintenance hold" on APODACA's accounts so that no one could override the hold on APODACA's accounts. ACOSTA also directed the unknown person on the telephone to list himself and the Affiant as the contact persons for the order. Lastly, ACOSTA directed the unknown person on the telephone to contact him upon completion of the account hold placement.

ACOSTA then advised the Affiant that the check would likely be ready for pick-up the next day, May 22, 2007. The Affiant then asked for proof that APODACA's four accounts were indeed frozen and for a transaction report to prove no account activity occurred after the execution of the seizure warrant. ACOSTA stated he could not provide a transaction report nor could he provide anything as proof that the four accounts were indeed frozen. The Affiant stated she would write a statement stating that APODACA's four accounts were frozen and ACOSTA could sign it. On a copy of the warrant, the Affiant wrote:

21 May 2007

All four (4) accounts listed
below have been frozen
as of 1650.

Per Fermin Acosta, Jr.
Sr. Vice President,
Administrative Services,
GECU

The Affiant handed the copy of the warrant with her handwritten statement to ACOSTA for his signature and ACOSTA drew a line from the statement, wrote the phrase "In process" on the copy, and signed below that phrase with his signature and the date "5/21/07." ACOSTA then handed the additional seizure warrant copy with the Affiant's handwritten statement and ACOSTA's signature back to the Affiant. At that time, the Affiant noted the "In process" phrase written above ACOSTA's signature. The Affiant then told ACOSTA if APODACA's four accounts were not actually frozen at that time, she, Sianez, and Dominguez would remain at GECU until ACOSTA advised them APODACA's accounts were indeed frozen and that no further activity could occur within these accounts. ACOSTA then directed the Affiant, Sianez, and Dominguez out of his office and led them back out into the waiting area. The Affiant, Sianez, and Dominguez waited approximately five more minutes in the waiting area until ACOSTA returned to the waiting area and verbally advised them that APODACA's four accounts were frozen. ACOSTA advised the Affiant that he would telephone her the next day to arrange the pick-up time for the check containing the balance of APODACA's four GECU accounts.

At approximately 3:30 p.m. on May 22, 2007, FBI paralegal specialist Sianez, at the direction of Chris D. Clark, Chief Division Counsel (CDC) for the FBI El Paso Division, telephoned FRED MORTON, legal counsel for GECU, to confirm that the GECU check containing the balance of APODACA's seized accounts should be made payable to the United States Marshals Service (USMS). During this telephone conversation with MORTON, Sianez also confirmed GECU could notify APODACA of the federal seizure warrant seizing his four GECU accounts. Sianez also asked MORTON for the balance contained within APODACA's GECU accounts now seized by the federal government and MORTON advised the amount exceeded \$91,000 and that \$76,000 of the approximately \$91,000 seized balance was contained in a Certificate of Deposit (CD).

At approximately 4:00 p.m., on May 23, 2007 SAs Cordero and Mercado, Affiant and SA Sotelo met with Mr. ACOSTA at GECU. SA Cordero explained that in this investigation, seizure warrants were served on two different financial institutions, GECU and another bank. SA Cordero continued that the other bank readily complied with the seizure warrant while GECU demonstrated reluctance to comply with the seizure warrant in a timely manner. SA Cordero explained that immediately freezing the seized accounts in compliance with a federal court order prevents the account holder from attempting to thwart the FBI's efforts to seize the accounts by liquidating his or her accounts prior to their seizure by the FBI. SA Cordero commented that this explained why the FBI became concerned when ACOSTA demonstrated reluctance in complying with a time-

sensitive federal court order.

ACOSTA stated he had a check ready for pick-up containing the balance of APODACA's seized accounts. ACOSTA handed SA Mercado a cashier's check in the amount of \$14,405.76 and SA Mercado in turn handed this check over to Affiant. Affiant immediately recognized that the amount printed on this check greatly differed from the amount GECU legal counsel MORTON advised Paralegal Specialist Sianez that APODACA held in his seized GECU accounts as of the previous day, i.e., approximately \$91,000. Affiant expressed concern to ACOSTA that this check contained only approximately \$14,000 versus the approximately \$91,000 cited by MORTON, i.e., a difference of approximately \$77,000. SA Cordero asked ACOSTA if the approximately \$77,000 in question from APODACA's GECU accounts was still located at GECU. ACOSTA replied "no" and explained that a check for the approximately \$77,000 was issued the day before.

SA Cordero advised ACOSTA that a federal district court judge currently awaited notification from the United States Attorney's Office about any delay with the FBI's receipt of these seized monies from GECU. ACOSTA stated he could stop payment on APODACA's check and asked SA Cordero what he should do, whether he should stop payment on the check, and what SA Cordero would do if he put himself in ACOSTA's shoes. ACOSTA repeatedly referenced his 37 years of employment with GECU and his professional reputation and asked if he should bring in GECU's President and Chief Executive Officer (CEO) to join this meeting. SA Cordero replied he could not tell ACOSTA what to do. ACOSTA then stated he decided to stop payment on the check.

ACOSTA telephoned an unknown individual and ordered a stop payment on the check for approximately \$77,000 drawn from APODACA's account issued the day before. Later, ACOSTA telephoned an unknown individual and directed this unknown individual on the receiving end of his telephone call to make a cashier's check payable to the USMS for the same amount of the check for which he previously ordered stop payment on. Shortly thereafter, ACOSTA provided the Affiant with a cashier's check in the amount of \$75,936.53 made payable to the "US MARSHAL, WESTERN DISTRICT OF TEXAS."

Affiant, SAs Cordero, Mercado, and Sotelo left ACOSTA's office and exited the GECU building. Affiant returned to the offices of the El Paso Division of the FBI and placed the two cashier's checks in safekeeping until delivering the checks to the Asset Forfeiture Unit for subsequent surrender to the USMS.

I declare under penalty of perjury that the foregoing is true and correct.

26 JULY 2007

Date

Kay Lee Kennedy

KAY LEE KENNEDY

Federal Bureau of Investigation

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

GECU,
Plaintiff,
v.
UNITED STATES OF AMERICA and
FRANK B. APODACA
Defendants.

RECEIVED
JUL 26 4 2007
U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: [Signature]

CIVIL CAUSE NO. EP-07-CA-181-FM

ORDER DISMISSING COMPLAINT

ON THIS DAY came on to be considered the Motion To Dismiss Complaint filed by the United States by and through its United States Attorney Johnny Sutton. The Court, having considered the pleadings, evidence, and argument of counsel is of the opinion that the Motion To Dismiss Complaint is meritorious and should be granted. The Court finds that the United States has not waived its sovereign immunity from lawsuit in this particular instance by statute, and that plaintiff GECU has not alleged any waiver of sovereign immunity in its complaint by the United States. The Court further finds that plaintiff GECU does not meet the statutory requirements for filing an interpleader action in that it has not alleged that two or more claimants for the common fund exist, that plaintiff has the contested fund in its possession, that the claimants have a diversity of citizenship, nor that the plaintiff has tendered possession of the contested funds into the registry of the court. Therefore, as a matter of law, the court finds that it has no jurisdiction to entertain this interpleader action. Accordingly, it is

ORDERED that this case be and is hereby dismissed. Costs are awarded to the United States, the prevailing party.

SIGNED AND ENTERED THIS _____ DAY OF _____, 2007.

FRANK MONTALVO
UNITED STATES DISTRICT JUDGE