IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**3:04-CR-240-P**
	§	
HOLY LAND FOUNDATION FOR	§	
RELIEF AND DEVELOPMENT (1)	§	**ECF**
also known as the "HLF"	§	
SHUKRI ABU BAKER (2)	§	
GHASSAN ELASHI (4)	§	
MUFID ABDULQADER (7)	§	
ABDULRAHMAN ODEH (8)	§	

GOVERNMENT'S MOTION TO DISMISS THE UNGARS' & RUBINS' ANCILLARY PETITIONS AND MEMORANDUM IN SUPPORT

Pursuant to Federal Rule of Criminal Procedure 32.2(c)(1)(A), the United States of America ("the Government") respectfully submits this motion and brief to dismiss the Ungars' and Rubins' petitions for an ancillary proceeding.

STATEMENT

The government in this case has sought forfeiture of the monies involved in defendants' illegal money laundering scheme in order to deprive defendants of their ill-gotten gains and to equitably compensate United States citizens who suffered death and injury from the terrorist organization that defendants funded. The Ungars and the Rubins (petitioners) are among those who stand to benefit from the forfeited funds. Petitioners, however, seek to defeat the Government's forfeiture in order to claim all of the forfeited

funds for themselves, to the exclusion of others who have similarly suffered from HAMAS[1] terrorism. While we sympathize with their plight, Petitioners have no legal claim to the forfeited funds and the law requires that their petitions be dismissed.

I. FACTUAL BACKGROUND

The International Emergency Economic Powers Act ("IEEPA") confers upon the President the authority to deal with threats to the national security or foreign policy of the United States. On January 23, 1995, pursuant to this authority, President Clinton issued Executive Order 12947, which, among other things, prohibited financial transactions with organizations and individuals named in the Annex to the Order, or organizations and individuals later declared to be Specially Designated Terrorists ("SDT's") by the United States Department of the Treasury. The order blocked all property subject to United States jurisdiction held in the name of an SDT or in which the SDT has an interest. The President designated HAMAS a Specially Designated Terrorist in the Annex to Executive Order 12947.

Defendants the Holy Land Foundation for Relief and Development ("HLF"), Shukri Abu Baker, Ghassan Elashi, Mufid Abdulqader, and Abdulrahman Odeh, with others, engaged in a money laundering conspiracy intended to promote the underlying unlawful activity of raising funds for Specially Designated Terrorist HAMAS. The

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[1]The Harakat al-Muqawamah al-Islamiyya is Arabic for "The Islamic Resistance Movement" and is known by the acronym "HAMAS."

HLF's main office for this fund raising was in Richardson, Texas. Funds were also raised in various satellite offices throughout the United States and then funneled back to the main office in Texas. Once obtained, the proceeds of these funds were either sent to HAMAS, invested to raise additional money for the scheme, or used to support the continued operation of the scheme in the form of operational expenses or employment costs of the employees needed to run the conspiracy. Regardless of their function, all funds were "involved in" the money laundering conspiracy and, by operation of law, title to the funds vested in the United States at the moment they became "involved in" the money laundering conspiracy, *i.e.*, beginning January 25, 1995, the date it became illegal to financially support HAMAS.[2]

HAMAS inflicted injuries and death upon the Ungars on June 9, 1996, and the Rubins on September 4, 1997. On March 13, 2000, the Ungars filed suit against HAMAS in Rhode Island federal court under 18 U.S.C. § 2333.[3] HAMAS did not answer the claim and the Ungars moved for a default judgment.[4] In July of 2001, the Rubins filed suit against Iran in the United States District Court for the District of Columbia. Later, in

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[2]*See* 21 U.S.C. § 853(c) and the final Superseding Indictment, Exhibit 2.

[3]Ungars petition, p. 4.

[4]The Ungars contend that they obtained a default judgment against HAMAS on January 27, 2004. The Fifth Circuit, however, has found that this default judgement was actually obtained in February of 2004.

May 2002, the Rubins filed suit against HAMAS in the United States District Court for the District of Columbia.[5]

On December 4, 2001, pursuant to Executive Orders (EO) 12947 and 13224, the Treasury Department's Office of Foreign Assets Control ("OFAC") designated HLF as a Specially Designated Terrorist ("SDT") (EO 12947) and a Specially Designated Global Terrorist ("SDGT") (EO 13224). Upon designation, HLF's property was blocked as a matter of law.[6]

Following HLF's designation, the FBI opened a criminal investigation of HLF. Previously, HLF had been the target of an intelligence investigation. Search warrants issued on April 10, 2002. On April 9, 2002, OFAC issued a license authorizing EGG Technical Services, Inc., a private storage contractor, to permit FBI agents to access, review, and copy property from HLF's office locations.[7]

On March 11, 2002, HLF's attorneys filed an action in the United States District Court for the District of Columbia challenging its designation and the blocking of its

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[5]Rubins' petition, p. 1. The Rubins and Ungars are represented by the same counsel. It is unclear what measures are in place to resolve this apparent conflict of interest.

[6]The blocking of these assets included those in Chase Bank of Texas which now account for approximately 95% of the funds currently located in the Southern District of New York. These were funds that HLF raised *in Texas* while committing its crimes *in Texas* and which were deposited in Chase Bank *of Texas.*

[7]Exhibit 3.

assets.[8] The district court rejected HLF's challenge on August 8, 2002.[9] That ruling was affirmed by the D.C. Circuit on June 20, 2003,[10] and the Supreme Court denied certiorari on March 1, 2004.[11]

On July 26, 2004, the Government filed a criminal indictment against HLF and its co-defendants which was unsealed the next day. The indictment contained an asset forfeiture allegation which applied to the property presently in dispute and operated as a declaration that the property belonged to the United States as forfeitable property due to the criminal activites of HLF and its co-defendants.[12] Thereafter, all other parties wanting to claim a valid interest in any assets in the name of HLF were statutorily barred from trying to "commence an action at law or equity" in any court. Each subsequent indictment has contained a notice of forfeiture that operates in the same manner.

Subsequent to the filing of the indictment in this case, the Ungars sought to commence actions "at law or equity" when they registered their default judgment in other judicial districts and then sought to collect upon those judgments by having writs issued

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[8] *Holy Land Foundation for Relief and Development v. Ashcroft*, 219 F. Supp.2d 57 (D.D.C., 2002).

[9] Id.

[10] *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003).

[11] *Holy Land Foundation for Relief and Development v. Ashcroft*, 540 U.S. 1218 (2004).

[12] *See* Original Indictment, Exhibit 1.

against property located in those districts. [13] In their Petition, the Ungars contend that they obtained Writs of Execution in three actions – one in the Southern District of New York dated on September 1, 2004; one in the Western District of Washington dated September 2, 2004; and one in the District of South Carolina, dated September 8, 2004.[14] The Rubins did not obtain a default judgment against HAMAS until September 10, 2004, after the filing of the indictment in this case.[15]

On September 23, 2004, OFAC issued a license authorizing the United States Department of Justice to pursue criminal forfeiture in this case. On September 24, 2004, prosecutors sought a restraining order from this court to preserve and protect both the assets and this Court's criminal asset forfeiture authority.[16] Financial institutions holding assets in the name of HLF then commenced Interpleader actions "at law or equity" against both the United States and the Ungars concerning the validity of their asserted property interests.

Upon learning of the Temporary Restraining Order ("Restraining Order"), the Ungars took an appeal directly to the Fifth Circuit. On April 4, 2006, the Fifth Circuit,

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[13] *See,* 21 U.S.C. § 853(k)

[14] Ungars' Petition, p. 13.

[15] Rubins' Petition, p. 5.

[16] The Ungars continue to complain that these orders were obtained *ex parte.* Yet, the Fifth Circuit has already decided that this was not improper. *United States v. Holy Land Foundation for Relief and Development*, 493 F.3d 469, 475 (5th Cir. 2007).

relying on *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), reversed the Restraining Order in *United States v. Holy Land Foundation for Relief and Development*, 445 F.3d 771, 777 (5th Cir. 2006) ("*Holy Land I*"). The Fifth Circuit subsequently granted a rehearing *en banc*. In the interim, Saturna Capital, transferred all its holdings in the name of HLF to the United States District Court for the Western District of Washington. On July 18, 2007, the full Fifth Circuit restored the restraining order *United States v. Holy Land Foundation for Relief and Development*, 493 F.3d 469, 477 (5th Cir. 2007) (Hereafter "*Holy Land II*") and barred the Ungars from further intervention in the case until the post-verdict 21 U.S.C. § 853 ancillary proceeding.

On November 24, 2008, a federal jury convicted defendants HLF, Shukri Abu Baker, Ghassan Elashi, Mufid Abdulqader and Abdulrahman Odeh of all charges against them in the Superseding Indictment including Count twenty-two, Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h).

Following the convictions, the jury returned a Special Verdict determining that $12,400,000.00 constituted or was derived from proceeds traceable to the commission of the offense alleged in Count 22 of the indictment. This is more commonly referred to as the money judgment.[17] On January 12, 2009, defendants Baker, Elashi, Abdulqader and Odeh filed a motion contesting forfeiture in the case based on an argument that the

[17]The term "money judgment" describes a defendant's continuing obligation to forfeit the money derived from the criminal offense, whether the defendant has retained the actual dollars in his possession or not.

Government was improperly seeking to forfeit substitute assets. This Court rejected the substitute assets argument on February 5, 2009 and issued a Preliminary Order of Forfeiture. The Court found, based on the evidence presented at trial,[18] the defendants' convictions, the jury's Special Verdict, and the information contained in the affidavit of Special Agent Alan Hampton of the Internal Revenue Service, that HLF's previously restrained bank accounts were assets directly "involved in" the money laundering conspiracy. Accordingly, the Court condemned and forfeited the property to the Government.

On February 19, 2009, the Government sent direct notice of this forfeiture by fax, regular mail, and certified mail to the Ungars through their attorney.

On March 16, 2009, the Government sent direct notice of this forfeiture to the Rubins through their attorney via fax, regular mail, and certified mail.

On March 23, 2009, and April 13, 2009, respectively, the Ungars and the Rubins filed what are essentially Petitions for an Ancillary Proceeding.

Even accepting all the facts stated in the Ungars' and Rubins' Petitions as true, each has failed to establish standing in this case or to state a recognizable property claim.

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[18] The Rubins' Petition (p. 27 n. 6) claims that the trial record does not contain any evidence regarding the specifically forfeited accounts. This claim is irrelevant because third parties are not permitted to attack or reopen the criminal proceedings. *See* Section III. A. *infra.*

II. STATUTORY BACKGROUND

21 U.S.C. § 853 is the central statute for criminal forfeiture procedure.[19] It was "enacted by Congress as part of the Criminal Forfeiture Act of 1984."[20] It is virtually identical to its forerunner, 18 U.S.C. § 1963, which enacted forfeiture for the Racketeer Influenced and Corrupt Organizations ("RICO") statute. Thus, cases interpreting 21 U.S.C. § 853 and 18 U.S.C. § 1963 will be cited in this brief without distinction.

While RICO forfeiture cases translate as precedent for § 853, one must be exceptionally careful when looking to civil forfeiture cases as precedent. Criminal and civil asset forfeiture share many similar concepts, but their method of application differs so greatly that one must carefully scrutinize civil cases before applying them as precedent to criminal asset forfeiture. Older civil cases require even greater scrutiny, because the Civil Asset Forfeiture Reform Act (CAFRA), became effective on August 23, 2000, and superimposed a new system of civil procedures, time frames, and burdens of proof on the old system.[21] Therefore, any civil opinion prior to CAFRA may no longer be valid precedent even for civil asset forfeiture.

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[19] The property in this case is subject to forfeiture under 18 U.S.C. § 982(a)(1). While 21 U.S.C. § 853 governs forfeitures under the drug abuse prevention and control laws, it is incorporated by reference in 18 U.S.C. § 982(b)(1), which extends § 853's forfeiture authority to most other criminal offenses.

[20] *United States v. McHan*, 345 F.3d 262, 267 (4th Cir. 2003).

[21] Civil Asset Forfeiture Act of 2000, Pub. L. No. 106-185 § 21, 114 Stat. 2002, 225 (2000). Section 21 made the act effective 120 days after it was signed. President Clinton signed CAFRA into law on April 25, 2000.

Within criminal forfeiture, the clarity of 21 U.S.C. § 853 has made any differences in interpretation between the Circuits minimal. This memorandum includes Second and Ninth Circuit precedents, along with Fifth Circuit law, to emphasize that Petitioners' claimed conflicts between these jurisdictions are either imagined or contrived.

The purpose of asset forfeiture is to dismantle criminal organizations and schemes by preventing defendants from resuming their criminal activities when they are released from prison, and to prevent defendants from benefitting from their ill gotten gains. In anticipation of forfeiture, criminals often transfer their property to third parties before a criminal prosecution is ever possible in order to avoid forfeiture if they are caught. To derail these efforts, Congress codified the "relation back doctrine."

1. The Relation Back Doctrine

The relation back doctrine is Congress's single greatest check against improper transfers of forfeitable property. The doctrine is embodied in 21 U.S.C. § 853(c) and mandates that "[a]ll right, title, and interest in [property subject to forfeiture] vests in the United States upon the commission of the act giving rise to forfeiture . . . ." Thus, at the very moment that property is used in or produced from a criminal act, title to the property vests in the United States.[22] With one exception, nothing a defendant or third party does

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[22] *United States v. Martinez*, 228 F.3d 587, 591 (5th Cir. 2000) (The vesting is instantaneous. "*United States v. Ginsburg,* [citation omitted] (rejecting argument that Congress intended to limit forfeiture to include only the property titled to defendant at the time of conviction). . . . Because the "relation back doctrine" operates to vest title in the Government to the proceeds of Martinez' RICO activities as of the time Martinez engaged in those illegal activities, these proceeds, and any property

after that point in time can defeat the government's "right, title, and interest" to the property. It does not matter how early or elaborately defendants scheme or how third parties attempt to remove property from forfeiture jurisdiction, the relation back doctrine renders such efforts useless.[23] That is why the relation back doctrine is to be "liberally construed to effectuate its remedial purposes."[24]

Conceptually, the relation back doctrine is analogous to an unknown title defect in property. To illustrate, assume for a moment that the forfeited property in this case is a house instead of money. The instant the house is used in the commission of a criminal act, the right to title of that property vests in the United States Government. Yet, if you went to check the deed on the property later that month, HLF would still have been listed as the titled owner of the house. All the world would think that the house belonged to

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purchased with the proceeds, never became community property [of defendant and his wife]."). *See also, United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007) (relation back doctrine vests the Government's interest in the property at the time the defendant commits the crime; "otherwise, a defendant could attempt to avoid criminal forfeiture by transferring his property to another party before conviction"); and *United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005).

[23] *Cf., United States v. Totaro*, 345 F.3d 989, 996 (8th Cir. 2003) (defendant's attempt to insulate his criminal proceeds from forfeiture by using them to pay off the mortgage on wife's property and make improvements thereto are void under the relation back doctrine); *United States v. Gilbert*, 244 F.3d 888, 902 n.38 (11th Cir. 2001) (Congress included the relation back provision to prevent a defendant from attempting to transfer his property to a third party prior to his conviction.) (This case has since been superseded on other grounds).; *United States v. Barnette*, 129 F.3d 1179 (11th Cir. 1997) (defendant remained obligated to forfeit value of stock he transferred to his wife to avoid forfeiture); and *United States v. Johnston*, 13 F. Supp. 2d 1316, 1317 (M.D. Fla. 1998) (attempt by defendant's partners to transfer all partnership assets to third party to frustrate the Government's right to forfeit defendant's 25 percent interest was void). For examples of reversal of third party attempts to remove property from asset forfeiture jurisdiction, *see* Section III. B., footnotes 132-136 *infra*.

[24] 21 U.S.C. § 853(o).

HLF. While the right to title of the property has vested in the Government, that interest has not been recorded with the property clerk and an unknown title defect has been created. (This is merely a variation on the kinds of issues which cause people to pay for title searches and to purchase title insurance when they buy a house). This title defect lays dormant so long as the Government does not seek to forfeit the property. Once the Government files an indictment seeking forfeiture, the title defect is exposed.

Congress created the relation back doctrine to recognize only two categories of property interests in criminal cases: (1) the bona fide purchaser for value; and (2) the prior superior legal interest which pre-dates the crime.[25] Courts are not permitted to expand on these categories, as:

> the legislature has carefully balanced the need to provide all potential third party claimants with an opportunity to contest the forfeiture against the government's need for certainty of title before it liquidates forfeited property. . . . if all but two types of interests in forfeitable property could be raised outside of the ancillary proceedings, it would prevent the government from obtaining the clear title that it is statutorily entitled to receive at the conclusion of the ancillary proceedings.[26]

For example, the Ninth Circuit has recognized that "[t]he criminal forfeiture statute . . . protects only two types of transferees of forfeitable property . . . *In the face of that clear direction, we are not at liberty to create other categories of transferee interests*

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[25] 21 U.S.C. §§ 853(c) and 853(n)(6)(a) and (b).

[26] *In re American Basketball League, Inc.*, 317 B.R. 121, 129-130 (Bankr. N.D. Cal. 2004).

that are protected from forfeiture."[27] All courts that have attempted to manufacture additional categories of property rights have ultimately seen their rulings overturned.

2. The Ancillary Proceedings

The Ancillary Proceedings begin when the Court issues a "Preliminary Order of Forfeiture."[28] Contained in the Order is a list of the property that the court has ordered forfeited to the Government. The Government is then permitted to seize the forfeited property while at the same time giving notice to third parties that it is time for any ancillary proceedings to begin. Once notice of forfeiture is given, the ancillary proceeding[29] consists of: (1) the filing of a third party petition, (2) the Government's Motion to Dismiss, (3) Discovery if permitted by the Court, (4) Motions for Summary Judgment, and (5) an ancillary hearing.

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[27] *United States v. Hooper*, 229 F.3d 818, 822 (9th Cir. 2000) (emphasis added). *See also United States v. Serendensky*, 2003 WL 21543519, at *6 (S.D.N.Y. 2003) (only two valid grounds for contesting a forfeiture, the court is not free to create new ones even for a sympathetic claimant); *Pacheco*, 393 F.3d at 353 (2d Cir.); *United States v. Lavin*, 942 F.2d 177, 185 (3d Cir. 1991) (only "two narrow classes of third parties;" all others must petition the Attorney General for relief); *United States v. Timley*, 507 F.3d 1125, 1130 (8th Cir. 2007); and *United States v. Kennedy*, 201 F.3d 1324, 1335 (11th Cir. 2000).

[28] The "Preliminary Order of Forfeiture" title often causes confusion to those unfamiliar with asset forfeiture law. Although labeled "preliminary," the order is a full order with regard to those who are ordered to release assets to the Government. The order also automatically becomes final as to defendants when their sentencing is completed (*see* Rule 32.2(b)(3)). At that point, the order remains "preliminary" only until third party claims are resolved through the Ancillary Proceeding process. The "Final Order of Forfeiture" is issued once all defendants have been sentenced and all ancillary claims have been resolved. (*See* Rule 32.2(c)(2)).

[29] "Ancillary proceeding" refers to the entire process for a third party claim while an "ancillary hearing" is a hearing that takes place near the end of the process if the third party's ownership claim survives a Motion to Dismiss and a Motion for Summary Judgment.

A third-party must file its petition under penalty of perjury and the party must personally sign the petition.[30] An attorney's signature is insufficient. These petitions must be filed within thirty days of the final publication of notice, or the receipt of actual notice, whichever is earlier.[31] Failure to file a timely petition or sign it properly may result in dismissal of that third party's claims.[32]

Petitioners must "set forth the nature and extent of their right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title or interest in the property, any additional fact supporting the petitioner's claim, and the relief sought."[33] All grounds for recovery must be stated within the thirty-day period. Once the thirty-day period has expired, petitioners cannot amend their petition to assert additional

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[30]For penalty of perjury *see*: *United States v. Perkins*, 382 F. Supp. 2d 146, 147 (D. Me. 2005); *United States v. BCCI Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Comm'n for BCCI (Overseas) Macau)*, 980 F. Supp. 1 (D.D.C. 1997); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Campaign Committee)*, 980 F. Supp. 16, 19 (D.D.C. 1997); *United States v. Freedman*, 2007 WL 1068484, *2 (S.D. Fla. 2007); and *United States v. Jamieson*, 2007 WL 275966, at *2 (N.D. Ohio 2007). For signed by the claimant *see*: *United States v. Speed Joyeros, S.A.*, 410 F. Supp. 2d 121, 124 (E.D.N.Y. 2006) (petition verified by a CPA but not by the petitioners) and *United States v. Wellington*, 2007 WL 81848, at *1 (N.D. Ohio 2007) (signed only by counsel).

[31]21 U.S.C. § 853(n)(2).

[32]*United States v. Brown*, 86 Fed. Appx. 749, 765-66 (5th Cir. 2004); *United States v. Grossman*, 501 F.3d 846, 848-49 (7th Cir. 2007); *United States v. Carmichael*, 440 F. Supp. 2d 1280 (M.D. Ala. 2006); *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1322 (M.D. Fla. 2001); *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of B. Gray Gibbs et al.)*, 916 F. Supp. 1270, 1274 (D.D.C. 1996); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Bank of California International)*, 980 F. Supp. 522, 528 (D.D.C. 1997); and *United States v. Lester,* 2008 WL 732897 (D. Kan. 2008).

[33]21 U.S.C. § 853(n)(3). *See also, Wellington*, 2007 WL 81848, at *1 (N.D. Ohio 2007) (Petition failed to specify the property claimed, the nature and extent of the claimant's interest, or the time and circumstances of the claimant's acquisition of that interest).

grounds for recovery.[34] Petitioners also may not use grounds stated in another third-party's timely filed petition as their own basis for recovery.[35]

Petitioners bear the burden of proving their right, title, or interest in the property by a preponderance of the evidence.[36] "[N]o hearing on the merits is necessary if the court can dispose of the claim on the pleadings as a matter of law" or by summary judgment.[37]

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[34] *Brown*, 86 Fed. Appx. at 765-66; *United States v. Soreide*, 461 F.3d 1351, 1355 (11th Cir. 2006) (claimant may not amend the petition that was based on section 853(n)(6)(B) to include grounds for recovery under section 853(n)(6)(A)); *United States v. Strube*, 58 F. Supp. 2d 576, 585 (M.D. Pa. 1999) (Amendment of claim to add a constructive trust theory after the 30-days was untimely); and *United States v. Watson,* 549 F. Supp. 2d 961, 964-65 (W.D. Mich. 2008) (third party cannot use Rule 59(e) to ask court to consider an alternative ground for recover--bona fide purchaser for value–not raised in his original petition).

[35] *Brown*, 86 Fed. Appx. at 765-66 (5th Cir. 2004) (Claimant could not assert that her late claim was merely an amendment to a timely petition filed by a corporation).

[36] *Pacheco v. Serendensky*, 393 F.3d 348, 351 (2d Cir. 2004); *Nava*, 404 F.3d at 1125 (9th Cir.); *United States v. Porchay,* 533 F.3d 704, 709 (8th Cir. 2008); *United States v. Saccoccia*, 354 F.3d 9, 13 (1st Cir. 2003); and *Gilbert*, 244 F.3d at 911.

[37] *Martinez*, 228 F.3d at 589-590 (5th Cir.). *See also* Federal Rule of Criminal Procedure 32.2(c)(1)(A)*; Pacheco*, 393 F.3d at 352; *Grossman*, 501 F.3d at 848; *United States v. Dempsey*, 55 F. Supp. 2d 990, 994 (E.D. Mo. 1998); *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of General Creditors)*, 919 F. Supp. 31, 36 (D.D.C. 1996); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 54-55 (D.D.C. 1999) (same); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banque Indosuez)*, 961 F. Supp. 282, 284 (D.D.C. 1997); *United States v. Jones*, 2005 WL 1806406, at *1 (W.D.N.C. 2005); *United States v. Trafigura AG,* 2008 WL 4057907 (S.D. Tex. Aug. 26, 2008); *United States v. Corpus*, 491 F.3d 205, 208-09 (5th Cir. 2007); *United States v. Brown*, 509 F. Supp. 2d 1239, 1241 (M.D. Fla. 2007; *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of People's Republic of Bangladesh and Bangladesh Bank)*, 977 F. Supp. 1, 6-7 (D.D.C. 1997); and *United States v. Harewood*, 2005 WL 2076543, at *2 (W.D.N.Y. 2005).

The sole function of an ancillary proceeding is to determine the ownership of the property by comparing each third party's claimed interest to the Government's.[38] The focus is not on the Government's ability to prove its property rights. That issue was already decided in the criminal proceeding *before* the court issued its Preliminary Order of Forfeiture and is now the settled law of the case. The focus is on "determining whether *a third party* has . . . an interest" in the property *superior* to the Government's.[39] That is why Congress requires third party petitions to "set forth the nature and extent of *the petitioner's* right, title, or interest in the property, the time and circumstances of *the petitioner's* acquisition of the right, title, or interest in the property, any additional facts supporting *the petitioner's* claim, and the relief sought."[40] To prevent courts from being harassed by legally creative property claims, Congress even took the unusual step of requiring these petitions to "be signed *by the petitioner* under penalty of perjury."

This focus on the *petitioner's* ability to prove their claim to the forfeited property explains why the third party has the burden of proof in an ancillary proceeding. It also explains why Rule 32.2(c)(1)(B) does not permit discovery until *after* the Government's Motion to Dismiss, and why the facts petitioners set forth in their petitions are "assumed to be true" for purposes of a Motion to Dismiss. The Petitioner is expected to be familiar

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[38]*McHan*, 345 F.3d at 275 and *In re American Basketball*, 317 B.R. at 128 (Bankr. N.D. Cal.).

[39]Federal Rule of Criminal Procedure 32.2(b)(2) (Emphasis added).

[40]18 U.S.C. 853(n)(3).

with his own property claim and be able to produce sufficient evidence to survive a Motion to Dismiss. Discovery against the Government is unnecessary because the Government's property claim is not in dispute–only the supremacy of a petitioner's claim is in question.

III. SUMMARY OF THE ARGUMENT

Petitioners cannot prevail in this ancillary proceeding for three essential reasons. First, contrary to petitioners' assertions, nothing in Section 201 of the Terrorism Risk Insurance Act ("TRIA") abrogates criminal asset forfeiture law. TRIA and criminal asset forfeiture law operate in tandem, and the "notwithstanding" clause in Section 201 cannot be read to undo substantive areas of law that do not impinge on the substantive reach of TRIA.

Second, by operation of the relation back doctrine, "all right, title, and interest" in the forfeited property vested in the United States government when the defendants committed their crimes "beginning from on or about January 25, 1995.[41] Thus, petitioners, who obtained judgments years after the commission of the crimes have no claim to the property, let alone a claim superior to that of the United States. TRIA in this regard is of no relevance, since TRIA was enacted well after January 1995 when the crime was first being committed. In any event, by its own terms, TRIA applies only to the blocked assets of a terrorist party. Because the assets were already vested in the United

[41] *See* 21 U.S.C. § 853(c) and the final Superseding Indictment at Exhibit 2.

States by virtue of the relation back doctrine, the assets at issue were not those of a terrorist party. Nor can petitioners argue that the assets are not subject to the relation back doctrine because they are substitute assets, and not assets involved in the money laundering scheme. This Court has already found that these assets were directly involved in the crime, and petitioners lack standing to reopen and litigate this aspect of the criminal trial.

Third, on July 26, 2004, the date of the original criminal indictment, third parties claiming an interest in the property were legally barred from commencing actions which would interefer with the validity of the United States' interest in the property which was being litigated in the criminal proceedings.[42] In deference to the criminal proceedings, all three courts where Petitioners sought to commence turn-over proceedings recognized this legal bar and stayed the actions. Petitioners' Writs of Execution remain unperfected as the actions to which they pertain have been, and remain, stayed and have not been brought to conclusion. Moreover, the parties in two of the three courts recognized that the United States was an indespensable party to the proceedings, as demonstrated by the Interpleader Complaints that were filed naming the United States as a third-party defendant. These interpleader actions themselves constitute actions "commenced against the United States" and are explicitly barred by 21 U.S.C. § 853(k)(2). Consequently, even if perfected, the Writs of Execution that Petitioners proffer to establish both their standing

[42]*See* 21 U.S. §§ 853(k)(2), 853(c), 853(o), and the original indictment, p. 37, Exhibit 1.

and their claim to the disputed property cannot serve either function because they were obtained in violation of the legal bar against such actions set forth in 21 U.S.C. § 853(k)(2).

In short, even assuming the facts alleged in their petitions to be true, petitioners fail as a matter of law to establish standing or to state a cognizable claim to the forfeited assets. Moreover, Petitioners' overarching policy argument that TRIA must trump criminal asset forfeiture law lacks merit, as both statutory schemes are plainly compatible. The Court should therefore grant the government's Motion to Dismiss.

ARGUMENT

I. ASSET FORFEITURE LAW IS PROPERLY APPLIED TO THIS CASE AND IS NOT OVERRIDDEN BY SECTION 201 OF TRIA.

The Fifth Circuit has already ruled that 21 U.S.C. § 853 is the relevant procedural law for this case.[43] It is the only law expressly "designed to balance the Government's interest in efficient and orderly prosecution with the rights of defendants and third parties who claim an interest in forfeitable property."[44] It "strikes an appropriate balance . . . [and] spare[s] the Government from frivolous challenges that might impede its ongoing criminal investigations, but does so without jeopardizing the rights of property owners to

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[43] *See Holy Land II.* Petitioners have acknowledged this fact since they both filed their petitions "pursuant to 21 U.S.C. § 853(n)." (*See* Ungars' and Rubin's petitions p. 1).

[44] *Holy Land II,* 493 F.3d at 477.

access their assets in a timely fashion when necessary."[45] Examining *United States v. Monsanto,* 491 U.S. 600, 606-07 (1989), the court found that the "opinion . . . speaks in strong terms about the primacy we ought to give to the language of § 853. It states that 'the language of § 853 is plain and unambiguous: all assets falling within its scope are to be forfeited upon conviction,' and that 'Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied, or broader words to define the scope of what was to be forfeited.'"[46] Indeed, the Fifth Circuit found this preference for 21 U.S.C. § 853 so powerful that it overturned its established precedent of *United States v. Thier,* 801 F.2d 1463 (5th Cir. 1986).

After adopting 21 U.S.C. § 853 as the law of the case, the Fifth Circuit then looked to section 853(k) and barred the Ungars from further interference in the criminal proceeding, until "*after* the termination of the pending criminal case." The Court noted that, "[i]n the event of a conviction, the court will enter an order of forfeiture, which will transfer Holy Land's assets to the Government of the United States."[47] "It is plain, therefore, that if HLF is convicted and its assets are forfeited to the Government, the Ungars will receive notice of that occurrence."[48]

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[45] Id. at 475-76.

[46] Id. at 474 quoting *Monsanto*, 491 U.S. at 600, 606-07 and 615 n. 10.

[47] Id. at 477 (Emphasis in the original).

[48] Id. at 477-78.

Petitioners argue, as they did to the Fifth Circuit, that Section § 201 of TRIA overrides the criminal forfeiture statute. This argument fails, however, because the two statutes are perfectly compatible and serve different functions.

Under IEEPA's governing regulations, any transaction involving the blocked assets of terrorist parties is prohibited, unless the transaction is specifically licensed by OFAC.[49] For that reason, prior to TRIA, terrorism victims with a judgment against a terrorist party could not enforce their judgments against the blocked assets of the terrorist party.[50] Section 201 of TRIA, however, allows those with judgments against terrorist parties to attach the blocked assets of such parties, "notwithstanding any other provision of law."[51] Section 201 thus makes it easier for victims of terrorism with judgments against terrorist parties to satisfy their judgments because it permits those judgment creditors to attach the terrorist party's blocked assets.

Petitioners argue that this provision trumps time-honored criminal forfeiture provisions because those provisions interfere with petitioners' attempt to attach property under Section 201.[52] That argument fails because the "notwithstanding" clause in Section 201 does not have the overriding effect that Petitioners urge. In *Holy Land I* the panel

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[49]31 C.F.R. § 594.301.

[50]*See* 31 C.F.R. § 594.408.

[51]TRIA § 201(a).

[52]Ungars' Petition p. 20-21 and Rubins' Petition p. 19.

correctly found that there is no basis to conclude that Section 201 “preempts, trumps, or otherwise interferes with the operation of 21 U.S.C. § 853 criminal forfeiture provisions.”[53] As the panel observed, the “notwithstanding” language relied on by the Petitioners appears to target statutory or regulatory prohibitions on execution. The criminal forfeiture statute does not immunize HLF bank accounts from writs of execution. It merely freezes and preserves the accounts until the claims to them can be prioritized in ancillary proceedings. TRIA does not address these circumstances.[54]

A “notwithstanding” clause in a statute works in tandem with the substantive reach of the provision to which it is attached. Thus, the “provisions of the ‘notwithstanding’ section override conflicting provisions of any other section.”[55] For example, a statutory provision that establishes strict liability for damages (up to $100 million) caused by oil spills “[n]otwithstanding the provisions of any other law” overrides a prior statute that limits a vessel owner's liability “to the post-accident value of the vessel plus pending freight.”[56] Similarly, a statutory provision that authorizes the Under Secretary of

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[53] *Holy Land I,* 445 F.3d at 787.

[54] *Id. See also, Weininger v. Castro,* No. 05 Civ. 7214(VM), 2006 WL 3343131, at *24 (S.D.N.Y. Nov. 17, 2006) (“other courts examining the scope of TRIA § 201 (a) have concluded that the ‘notwithstanding any other provision of law’ language specifically addresses immunity”).

[55] *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 18 (1993) (holding that section of contract providing for rent adjustments based on specified formula is limited by another section of the contract imposing an independent cap on rent adjustments, “[notwithstanding any other provisions of this Contract” (emphasis omitted) (quotation marks omitted)).

[56] *Kee Leasing Co. v. McGahan (In re The Glacier Bay),* 944 F.2d 577, 579, 582-83 (9th Cir. 1991).

Transportation for Security to "employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment" of security screeners as the Under Secretary determines necessary "[n]otwithstanding any other provision of law" renders inapplicable the federal employment statutes that otherwise would apply to the Under Secretary's employment decisions.[57]

Section 201 of TRIA authorizes certain plaintiffs to attach the blocked assets of a terrorist party, "[n]otwithstanding any other provision of law." Thus, the provision overrides prior laws that limit the attachment and execution of blocked assets of terrorist parties. The provision therefore overrides Treasury Department regulations to the extent that they conflict with TRIA by prohibiting the attachment of terrorist party's blocked assets. The provision also overrides the immunities from attachment established by the Foreign Sovereign Immunities Act that would otherwise protect the property of state sponsors of terrorism from attachment.[58]

But Section 201 does not override other provisions of law that do not limit amenability of blocked assets to attachment or execution. The Fifth Circuit correctly summarized our position when it noted:

> The Government agrees that TRIA trumps previous laws that limit the attachment and execution of blocked assets, but maintains that the criminal

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[57] *Conyers v. MSPB,* 388 F.3d 1380, 1382 (Fed. Cir. 2004) (quotation marks and statutory citation omitted), *cert. denied*, 543 U.S. 1171 (2005).

[58] *See* 28 U.S.C. §§ 1609-1611; TRIA § 201(d)(4) (defining "terrorist party" to include state sponsors of terrorism).

> forfeiture statute is not such a law. . . .§ 853 does not "block" any of HLF's assets as that term is used in § 201(a). Rather, . . .the criminal forfeiture statute sets out a system whereby the court can distribute those funds in an appropriate manner. In short, § 853 does not say that the [Petitioners] cannot execute their judgment; it merely tells them when and how. Therefore, the two statutes do not conflict with one another, but work in tandem, and the "notwithstanding" clause should not be read to override § 853.[59]

Petitioners seem to recognize the limited nature of Section 201's "notwithstanding" clause. They spend pages establishing the fact that the President's exercise of his authority to block the assets of foreign nationals is based on national security and foreign policy concerns.[60] Having established this, the Petitioners suggest that, because TRIA Section 201 overrides the immunity from attachment created by a blocking order based on these weighty concerns, the "'notwithstanding' proviso must *a fortiori* trump any and every garden-variety 'provision of law' governing forfeitures."[61] Petitioners' interpretation of TRIA would not only have it trump asset forfeiture law, but also any procedural due process, rule of evidence, property law, or any other legal obstacle to their efforts.

Petitioners' argument is a non sequitur. As discussed earlier, Section 201 overrides any legal limitation on attachment or execution, regardless of the rationale underlying the limitation. It does not follow, however, that because Section 201 overrides a limitation

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[59] *Holy Land II,* 493 F.3d at 479.

[60] Ungars' Petition at p. 16-22 and Rubins' Petition p. 15-21.

[61] *Id.* at p. 20 and p. 18.

on attachment based on weighty national security and foreign policy concerns, the section also overrides other statutory provisions that do not limit attachment.

We do not dispute that the government's use of the criminal forfeiture statute can affect the Petitioners' ability to *successfully* attach HLF's assets. But that is not a basis for concluding that Section 201 overrides the criminal forfeiture statutory scheme. If it were, that logic also would be a basis for concluding that the employment law in *Conyers* overrides a criminal law that permits prosecution of a security screener for assault on another screener at work because prosecution would interfere with the Under Secretary's ability to discipline employees, something committed to his discretion by statute.[62] But that conclusion is plainly wrong. In this case, TRIA does not operate to vitiate asset forfeiture law, and thus the provisions of 21 U.S.C § 853 clearly apply to this case.

III. UNDER THE RELATION BACK DOCTRINE, PETITIONERS CANNOT ESTABLISH A PRIOR SUPERIOR INTEREST

As noted earlier, the relation back doctrine vests the Government with "[a]ll right, title, and interest" in disputed property at the time the criminal act is committed.[63] Therefore, Petitioners must prove that their property interest vested *before* HLF's crimes were committed for this Court to recognize their claims as a prior superior legal interest

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[62] *See Conyers,* 388 F.3d at 1382.

[63] *See* 21 U.S.C. § 853(c).

in the property.[64] As neither the Ungars nor the Rubins allege that they perfected any property interest prior to the crimes for which HLF was convicted, they cannot prove a property interest superior to the Government's.[65]

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[64]*Martinez*, 228 F.3d at 590 (5th Cir.); *Nava*, 404 F.3d at 1129 (9th Cir. claimant can recover under section 853(n)(6)(A) only if her interest vested before that time); *Hooper*, 229 F.3d at 820 (in 9th Cir. the temporal requirement in section 853(n)(6)(A) that claimant to show that the property interest was vested at the time the acts giving rise to the forfeiture); *United States v. Chavez*, 323 F.3d 1216, 1218-19 (9th Cir. 2003) (an interest that arises under a contingency agreement at precisely the moment that the property becomes subject to forfeiture is not sufficient); *United States v. Carmichael*, 419 F. Supp. 2d 1376 (M.D. Ala. 2006) (Government's interest vests when the crime giving rise to the forfeiture begins, not when it ends; third party who acquired lien on the property while the crime was in progress cannot prevail under section 853(n)(6)(A)); *Kennedy*, 201 F.3d at 1331 (property was involved in a money laundering offense before the wife's as tenancy by the entireties interest came into existence); *United States v. Carrie*, 206 Fed. Appx. 920, 922-23 (11th Cir. 2006); *Totaro*, 345 F.3d at 999; *United States v. Grossman*, 501 F.3d at 848; *United States v. Schecter*, 251 F.3d 490, 495-96 (4th Cir. 2001); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Amjad Awan)*, 3 F. Supp. 2d 31, 36 (D.D.C. 1998) (person who obtained loan from Defendant's bank account after Defendant engaged in racketeering activity could not recover); *United States v. BCCI Holdings (Luxembourg) S.A. (Petitions of People's Republic of Bangladesh and Bangladesh Bank)*, 977 F. Supp. 1, 11 (D.D.C. 1997) (holder of an option to buy defendant's property has no legal interest until the option is exercised); *United States v. Antonelli*, 1998 WL 775055, at *1 (N.D.N.Y. 1998) (Defendant's minor children—even though they may be his prospective heirs—had no legal interest in the residence Defendant used to commit his drug offense); *United States v. McClung*, 6 F. Supp. 2d 548, 550-551(W.D. Va. 1998) (Claimant must show interest prior to beginiing of conspiracy); *Perkins*, 382 F. Supp. 2d at 148-149; and *United States v. Schoenauer*, 237 F. Supp. 2d 1094, 1096 (S.D. Iowa 2002).

[65]*Speed Joyeros*, 410 F. Supp. 2d at 125 (E.D.N.Y. creditor who obtained a judicial decree affirming his debt and attached defendant's property may have acquired an interest in the specific asset, but "it comes too late in the day" to recover under section 853(n)(6)(A) which protects interests in effect when the property became subject to forfeiture); *Carmichael,* 440 F. Supp. 2d at 1282 (unsecured creditor who did not obtain a judgment lien until after the property became subject to forfeiture cannot recover under section 853(n)(6)(A) because he had no interest in the property at the time of the offense); *United States v. Hayes*, 2006 WL 1228972, at *4-5 (W.D. La. 2006) (judgment creditor who acquired an interest in the forfeited property immediately, by operation of state law, when defendant acquired it with his criminal proceeds, could not prevail under section 853(n)(6)(A) because the Government's interest in the proceeds—and hence in the property acquired with the proceeds—vested when the crime occurred; following *Hooper*); *McClung*, 6 F. Supp. 2d at 552 (judgment creditor who filed a lien against defendant's property but had not yet levied against it had not acquired a superior interest in the property at the time it became subject to forfeiture); *United States v. Frykholm*, 2002 WL 31526560, at *2 (N.D. Ill. 2002) (creditor who had a valid judgment against defendant, but who had not yet acquired a valid lien under state law before the Government's interest vested, could not recover under section 853(n)(6)(A)); and *United States v. Meister*, No. 4-97-CR-120-G, slip op. at 9 (N.D. Tex. May 18, 1999) (Tex. victim

A. Petitioners Cannot Relitigate the Criminal Proceedings In An Attempt to Avoid the Relation Back Doctrine

Recognizing the power of the relation back doctrine, the Rubins claim they have a right to reopen the criminal proceedings in an attempt to undermine the Preliminary Order of Forfeiture which finalized the activation of the relation back doctrine. Petitioners claim they should be able to relitigate this Court's finding that the assets were directly involved in the money laundering scheme and suggest that they are actually "substitute assets."[66] Petitioners suggest that the relation back doctrine does not apply to substitute assets.[67]

Their argument is irrelevant because the law does not permit them to relitigate the criminal proceedings. "[T]here is no provision in § 853(n) to relitigate the outcome of

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who did not obtain judgment lien against defendant's property until after it was used to commit the offense could not recover under section 853(n)(6)(A)).

[66]Rubins Petition, p. 26. Petitioners persist in claiming that the government was required to itemize the disputed property in the indictment's forfeiture allegation, and that the property referenced in that allegation can no longer exist because it had to have been sent overseas to HAMAS. They this proves the forfeited assets are substitute assets. Yet, the indictment is not required to itemize property subject to forfeiture. *See,* Advisory Committee Note to Federal Rule of Criminal Procedure 32.2 Commentary ("As courts have held, subdivision (a) is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself."). Petitioners' only new argument is the adoption of an apologist's argument whereby they claim that not all of HLF's property was illegal and that some was used for operating costs. Petitioners fail to understand that all property "involved in" a money laundering conspiracy is subject to forfeiture and not just the proceeds. Thus, even funds for operational costs would be forfeitable as direct assets when "involved in" a money laundering conspiracy.

[67]It is also not clear that this would make a difference. Contrary to Petitioners argument, there are courts which have held that the relation back doctrine applies to substitute assets. *Cf. McHan,* 345 F.3d at 271.

[the criminal] proceedings"[68] A third party has neither a right nor a reason to challenge a court's determination of forfeitability. "'[I]f the property really belongs to the third party, he will prevail and recover his property whether there were defects in the criminal trial or the forfeiture process or not; and if the property does not belong to the third party, such defects in the finding of forfeitability are no concern of his.'"[69] It is well established that "a third party has no right to challenge the preliminary orders's finding of forfeitability" and that the only issue in the ancillary proceeding is ownership.[70]

Third parties, therefore, cannot interfere in the process that leads to the Preliminary Order of Forfeiture or the order itself. Third parties may not object to the Government's Motion for a Preliminary Order Forfeiture or Government Motions to

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[68] *Porchay,* 533 F.3d at 710.

[69] *United States v. Andrews,* 530 F.3d 1232, 1237 (10th Cir. 2008).

[70] *Id. See also, Porchay,* 533 F.3d at 710; *United States v. Dejanu*, 163 Fed. Appx. 493, 498 (9th Cir. 2006) ("Whether the criminal forfeiture of the property was proper is not an issue subject to litigation by third parties in the ancillary proceeding"); *United States v. Lazarenko*, 2008 WL 3925656 (N.D. Cal. 2008) (following *Andrews, Porchay* and *Dejanu*; third party has no right to contest the forfeitability of the property or to raise other procedural defects in the forfeiture process such as statute of limitations or *res judicata*); and Advisory Committee Note to Federal Rule of Criminal Procedure 32.2 Commentary (The ancillary proceeding "does not involve relitigation of the forfeitability of the property; it only purpose is to determine whether any third party has a legal interest in the forfeited property.").

Amend it.[71] Third parties cannot object to the entry of an order of forfeiture.[72] And, third parties may not move to dismiss or quash a preliminary order of forfeiture.[73]

Third parties are not permitted to intervene in the criminal trial because they do not have standing.[74] For the same reason, third parties are not permitted to reopen and

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[71] *United States v. Faulk*, 340 F. Supp. 2d 1312, 1315 (M.D. Ala. 2004) (section 853(k) bars third parties from opposing a motion to forfeit substitute assets other than by filing claims in the ancillary proceeding); *United States v. Warshak*, 2009 WL 113232, at *3 (S.D. Ohio Jan. 14, 2009) (third party lacked standing to object to forfeiture of substitute assets on the ground that the Government was trying to circumvent a bankruptcy proceeding; its remedy is to file a claim in the ancillary proceeding or in the bankruptcy proceeding, or a remission petition with the Attorney General); *United States v. Bennett*, 2000 WL 1505986, at *2 (S.D.N.Y. 2000) (wife cannot object to amendment of order of forfeiture to include substitute assets except by filing claim in the ancillary proceeding); *McHan*, 345 F.3d 262 (it does not violate third party's due process rights to require that she wait to contest the forfeitability of property as a substitute asset until the ancillary proceeding); and *United States v. Ivanchukov*, 405 F. Supp. 2d 708, 713 n.12 (E.D. Va. 2005) (pursuant to Rule 32.2(b)(2), defense attorney cannot contest forfeiture of attorneys fee in the forfeiture phase of the case, but may do so in the ancillary proceeding).

[72] *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of ICIC Investments)*, 795 F. Supp. 477, 479 (D.D.C. 1992) (third party lacks standing to object to entry of order of forfeiture); and *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 42 (D.D.C. 1999) (same).

[73] *United States v. Farley*, 919 F. Supp. 276, 279 (S.D. Ohio 1996) (third party may not move to dismiss order of forfeiture; must file petition in ancillary proceeding).

[74] *Id*. Congress has codified this principle in 21 U.S.C. § 853(k)(1). *See also, Nava*, 404 F.3d at 1125 (9th Cir. finds section 853(k) "specifically bars third parties from intervening in the trial or the appeal of a criminal case to assert their interests . . ."); *DSI Associates LLC v. United States*, 496 F.3d 175, 183 (2d Cir. 2007) (Following other circuits in holding that "third parties may not intervene during criminal forfeiture proceedings to assert their interest in the property being forfeited . . ."); *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) (Section 853(k) makes it clear that the third party must wait until the ancillary proceeding to assert his rights); *United States v. Puig*, 419 F.3d 700, 703 (8th Cir. 2005) (Same); *United States v. Messino*, 122 F.3d 427, 428 (7th Cir. 1997) (Third parties must wait until the court has entered a preliminary order of forfeiture to challenge the forfeiture action); *United States v. Kramer*, 912 F.2d 1257, 1261 (11th Cir. 1990) (Same); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 42 n.8 (Same); *United States v. BCCI Holdings (Luxembourg) S.A. (In re Oppenheimer & Co.)*, 1992 WL 44321 (D.D.C. 1992) (Same); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of ICIC Investments)*, 795 F. Supp. 477, 479 (D.D.C. 1992) (third party lacks standing to object to entry of order of forfeiture); and *McHan*, 345 F.3d at 275 ("As we noted, Congress was particularly aware that, unlike in a civil forfeiture case where 'all

relitigate the Government's ability to prove that the property is subject to criminal forfeiture or the Court's decision on that issue.[75] Third parties lack the standing necessary to assert the property rights of a criminal defendant. Contrary to what petitioners have argued, they do not have standing to insinuate themselves into the criminal case and assert the property rights of the HLF.

When placed in the context of the present case, petitioners' lack of standing is self-evident. By operation of law, "all right, title, and interest" in forfeited property "vests in the United States upon the commission of the act giving rise to the forfeiture . . . ."[76] The act which gave rise to forfeiture of the property in this case was the defendants' money laundering conspiracy "[b]eginning from on or about January 25, 1995."[77]

Between 1995 and 2001, the Ungars and the Rubins did not even have a colorable claim to ownership of the forfeited property. During that time period, if HLF chose to transfer the property – by selling it, giving it away, or committing a crime which transferred it to the government by operation of law – the Ungars and Rubins would have had *no right* upon which to intervene and sue. They did not yet have any default

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parties with an interest in [the] civilly forfeitable property may participate in judicial forfeiture proceedings,' 'third parties with interests in criminally forfeitable property may not participate in the criminal trial.'" (citations omitted)).

[75] *See* Footnote 70 *supra.*

[76] *See* 21 U.S.C. § 853(c).

[77] *See* the final Superseding Indictment at Exhibit 2.

judgments. TRIA did not even exist. They had no interest upon which to establish standing.

The passage of TRIA did not grant the Ungars or Rubins any standing in that time period. TRIA does not contain any kind of retroactive provision for standing in the criminal proceeding *notwithstanding* petitioners' "normatively superior" claims to the contrary. Petitioners are clearly wrong when they claim that the criminal proceeding affected "their" property rights because they had *no* property rights in the time period of 1995 to 2001 when the property transferred to the government by operation of the relation back doctrine. If petitioners were permitted to reopen and relitigate the criminal proceeding, they would only be asserting the property rights of *HLF,* and the law does not give them standing to assert the property rights of another.[78]

The Rubins' reliance on the Fourth Circuit's decision in *United States v. Reckmeyer*, 836 F.2d 200, 206 (4th Cir. 1987) is misplaced.[79] *Reckmeyer* does not give petitioners a right to reopen the criminal proceeding "to challenge the underlying order of forfeiture."[80] The United States Supreme Court implicitly overturned that portion of

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[78]*Carrie*, 206 Fed. Appx. at 922-23 (third party cannot contest forfeiture in the ancillary proceeding on the ground that the forfeiture violated the constitutional rights of another party. Even if he had standing to assert those rights–which he does not–it would be unavailing, since a claimant who cannot establish a legal interest under section 853(n)(6)(A) or (b), cannot recover in any event). The Rubins openly acknowledge that their attempts to reopen the criminal proceeding are nothing more than an attempt to undercut the relation back doctrine. *See,* Rubins' Petition at 25-28.

[79]Rubins' Petition at 27.

[80]*Id.*

Reckmeyer in *Libretti v. United States*, 516 U.S. 29, 49 (1995), a fact that the Fourth Circuit itself recognized in *United States v. McHan*, 345 F.3d 262, 270 (4th Cir. 2003). *McHan*'s third party petitioners also claimed "that due process required that they, as third parties, be given an opportunity to interject themselves into the sentencing phase of the criminal case against [the defendant] because his sentence had the *potential* to affect their property interests." The *McHan* court noted, however, that the Supreme Court's recent decision in *Libretti* "emphasized that 'Congress has determined that § 853(n) . . . provides the means by which third-party rights must be vindicated.'"[81]

McHan went on to find that:

> ***The Supreme Court's rejection in Libretti of*** challenges similar to those made by petitioners in this case and ***our holding in Reckmeyer require[s] us to reject petitioners' claims that the statutory scheme denies them due process.*** Indeed, § 853(n) provides all of the process due. It requires that the petitioners receive notice of the order of forfeiture before its final implementation; that they be given a hearing; that they be allowed to present witnesses and evidence; and that they be permitted to cross-examine any witnesses who appear at the hearing. Due process does not require more. *See Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner") (internal quotation marks omitted).[82]

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[81]*McHan*, 345 F.3d at 270, quoting *Libretti*, 516 U.S. at 44. There is no reason to believe the Fifth Circuit would reach a different result as it has recently recognized that *Libretti* is still valid and binding precedent. *See United States v. Washington*, 131 Fed. Appx. 976, 977 (5th Cir. 2005).

[82]*Id.* (emphasis added. Westlaw KeyCite does not list *McHan* as recognizing *Reckmeyer*'s partial overruling. However, this is not legal authority and *McHan* clearly states *Reckmeyer* has been overruled).

McHan's rejection of *Rekmeyer* is unsurprising when one considers the Pandora's box of consequences that would occur if third parties were permitted to reopen and relitigate the criminal proceedings' determination of forfeiture. The forfeiture decision has to be based on a criminal conviction subject to asset forfeiture and "on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt."[83] Therefore, allowing a third party to reopen the forfeiture decision would allow them to reopen every part of the criminal case. Every suppression hearings would be subject to a "do-over." Every objection at trial would fall under third-party review. Even if a defendant were happy with the performance of his attorney, third parties could be permitted to "armchair quarterback" and question the competence or skill of defense attorneys on any issue that affected the forfeiture decision. Complete retrials might occur based on third party interference. Even if a defendant pled guilty and waived his right to appeal, third parties could challenge the plea, demand a trial, and

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[83] *See* Federal Rule of Criminal Procedure 32.2(b)(1). Note, the hearing mentioned in this quotation is a hearing held as part of a defendant's sentencing and should not be confused with the separate ancillary hearing that held at the end of the ancillary proceeding.

appeal.[84] Juries could also find themselves held hostage so that third parties could relitigate the same forfeiture decisions or submit new ones.[85]

The logistics of such a doctrine are daunting, and they do not even begin to take into account problems that would be created when more than one third party lays claim to the same property.[86] Add these issues to the mix, and criminal asset forfeiture would become so unmanageable that it could not be used. Yet, Congress and the courts have always shown a preference for criminal forfeiture over civil because it requires a finding of criminal wrongdoing beyond a reasonable doubt.

Faced with these untenable consequences, Congress chose not to sacrifice the finality of criminal judgments by giving third parties standing to relitigate the forfeiture decision. In 21 U.S.C. § 853(k)(1), Congress expressly barred third parties from access to the criminal proceedings.[87] They cannot object to the validity of a defendant's guilty

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[84] In fact, the defendant in *McHan* had pled guilty and the third parties in that case were trying to litigate the validity of that plea. *McHan*, 345 F.3d at 266.

[85] *See* Federal Rule of Criminal Procedure 32.2(b)(4). Jurors could be held three months because publishing the notice of forfeiture takes thirty days and people are permitted to file petitions for thirty days thereafter. 21 U.S.C. 853(n)(2). After that a court has 30 days to hold an ancillary hearing. 21 U.S.C. 853(n)(4).

[86] *Holy Land II* at 478. Fn. 13: "We suspect that potential conflicts of this sort were one reason that Congress chose to ban third-party intervention during the pendency of a criminal prosecution, and to move all such claims to a post-trial hearing instead. While this delay may impose a burden on the claimants, the countervailing benefits to the Government, the court, and even the claimants themselves, are obvious."

[87] Petitioners seem to be trying to do an "end-run" around 21 U.S.C. § 853(k)(1) and the Fifth Circuit's decision in *Holy Land II.* The Fifth Circuit barred them asserting an interest in the subject property until "*after* the termination of the pending criminal case." *Holy Land II*, 493 F.3d at 477 (emphasis in original). Yet, they now seek to reopen and relitigate the criminal case.

plea or attempt to overturn the forfeiture prior to the ancillary proceeding.[88] Nor can third parties request a jury on the forfeiture issue, as Congress has expressly barred that possibility in 21 U.S.C. § 853(n)(2).[89]

It is clear that Congress intended a quick and efficient proceeding, ancillary to the criminal trial, as opposed to the relitigation of the entire criminal case. Courts are expected to be familiar with the nature and extent of the Government's property claim because it had just been litigated in the criminal proceeding. Third party claims to the property are required to clearly state the nature and extent of their property interest as well as the time and circumstances under which it was acquired. The claims are filed under penalty of perjury so that they can be assumed to be true. In most cases, courts should be able to compare one property interest to the other, look at the law, and make a ruling without ever having to conduct the full ancillary proceeding.

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[88] *See,* footnote 70 *supra*. *See also, United States v. Serendensky*, 2003 WL 21543519, at *6 (S.D.N.Y. 2003) (third party has no right to raise challenges to the forfeitability of the property such as the defendant might have raised); *United States v. Ken International Co., Ltd.*, 113 F.3d 1243, 1997 WL 229114 (9th Cir. 1997) (unpublished) (Table) (Same); *United States v. Weidner*, 2004 WL 432251, at *1 (D. Kan. 2004) (the "ancillary proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property"); and *Strube*, 58 F. Supp. 2d at 587 (claimant could not challenge forfeiture on the ground that the preliminary order was inconsistent with the jury's special verdict); *United States v. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995); *Messino*, 122 F.3d at 428; *Kramer*, 912 F.2d at 1261; and *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 42 n.8.

[89] *Washington*, 131 Fed. Appx. at 977 (5th Cir. finds *Blakely* and *Booker* do not overrule the holding in *Libretti* that there is no Sixth Amendment right to a jury on the forfeiture issues in a criminal case).

Given the clear finality of the criminal proceedings, and Petitioners' lack of standing to reopen them, this Court's determination that the assets in question were involved in the money laundering scheme is final and unassailable. Petitioners cannot defeat the relation back doctrine by attempting to argue that the assets are instead substitute assets.

B. The Relation Back Doctrine Is Not Discretionary, and No Exception to The Doctrine Applies Here.

The Rubins cite a number of judicial decisions as justification for treating the relation back doctrine as some sort of flexible fiction which can be limited by courts whenever they feel like it.[90] All but one of these opinions, however, has been overruled, and the one viable decision that the Rubins cite does not address criminal forfeiture. In the 1980's era opinions cited by the Rubins, lower courts had created a nonexistent exception to the forfeiture statute for attorney fees. In the twin cases of *Monsanto* and *Caplin & Drysdale*, the Supreme Court strongly rebuffed such efforts as improper

[90]Rubins' Petition, p. 26. The Supreme Court has recognized that "§ 853(c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture. . .. We cannot believe that Congress intended to permit the effectiveness of the powerful 'relation-back' provision of § 853(c)... to be nullified by any other construction of the statute." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989). *See also Monsanto,* 491 U.S. at 613 ("We cannot believe that Congress intended to permit the effectiveness of the powerful 'relation-back' provision of § 853(c)... to be nullified by any other construction of the statute.").

judicial legislation.[91] Consequently, all of the Rubins' cited cases on this subject from the 1980's are dead letter law.[92]

Bailey is the only case the Rubins cite which has not been overruled. *Bailey*, however, is not a criminal asset forfeiture case. It is not even a civil asset forfeiture case. *Bailey* is civil *tort* case that was filed after its namesake attorney defied a court's Order of Forfeiture and dissipated millions of dollars in assets that had been ordered forfeited to the government. The *Bailey* court ruled against the Government only after finding a unique quirk in Florida tort law that it felt adversely affected the relation back doctrine. The facts of *Bailey* are too far removed from the present case to provide any useful persuasive authority. As explained above, Congress created only two categories of property interests that are recognized in criminal asset forfeiture: (1) the bona fide

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[91] *Monsanto*, 491 U.S. at 611 (1989) and *Caplin & Drysdale*, 491 U.S. at 622-623 (civil forfeiture of attorney's fees). *See also, United States v. Saccoccia*, 433 F.3d 19 (1st Cir. 2005) ("fees paid to attorneys from the criminal proceeds of their clients are not held sacred;" they may be "reached by the Government" under the forfeiture laws; citing *Caplin & Drysdale*); *United States v. McCorkle*, 2000 WL 133759 (M.D. Fla. 2000) ("the privilege to practice law is not a license to share in the proceeds of a fraud"); *United States v. Moffitt & Zwerling*, 846 F. Supp. 463, 467 (E.D. Va. 1994) (attorney's fee paid in cash in cardboard box forfeited); *United States v. Loren-Maltese*, 2006 WL 752958 (N.D. Ill. 2006); *United States v. Matta-Timmins*, 81 F. Supp. 2d 193 (D. Mass. 2000); *United States v. Register*, 182 F.3d 820, 835 (11th Cir. 1999); and *Cf. Casso v. United States*, 2001 WL 1517537 (E.D.N.Y. 2001). *Caplin* and some of the above cases are civil forfeiture, but the are only referenced here for the fact that attorneys fees are not excludable from forfeiture. Nevertheless, the DOJ takes such forfeiture seriously and requires the approval from the Criminal Division before such forfeiture may be undertaken.

[92] Westlaw KeyCite does not list the Rubins' cases as having been overturned simply because no Court has taken the time to recognize this. Ironically, the Rubins rely on case law which argues that attorney fees should be excepted from forfeitable assets while at the same time they complain that OFAC allowed the assets here to pay attorney fees in litigation defending HLF before a forfeiture case could be brought.

purchaser for value, and (2) a prior superior legal interest that pre-dates the crime.[93] Petitioners claimed interests do not satisfy the elements of either category.[94]

1. Petitioners Are Not Bona Fide Purchasers for Value

To establish themselves as bona fide purchasers, petitioners have to show three elements: (1) they have a legal interest; (2) that interest was acquired as a bona fide purchaser for value; and (3) at the time the interest was acquired the petitioner was reasonably without cause to believe that the property was subject to forfeiture.[95] To determine whether a petitioner is a bona fide purchaser for value, one looks to state commercial law.[96] Neither judgment creditors nor victims are considered bona fide purchasers for value.[97] Even judgment creditors who have secured a lien on the property

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[93] *See* Section II. 1. *supra* at p. 12

[94] 21 U.S.C. §§ 853(c) and 853(n)(6)(a) and (b); *See also, McCorkle*, 143 F. Supp. 2d at 1311; *Corpus*, 491 F.3d at 211 (5th Cir.); *Speed Joyeros*, 410 F. Supp. 2d at 121 (E.D.N.Y. claimants attempted to satisfy debt by attaching defendant's property but did not satisfy the requirements of section 853(n)(6)(A)); *United States v. Davis*, 2001 WL 47003, at *2 (S.D.N.Y. 2001) (wife's interest defined by state law, but federal law determines if the interest is sufficient to void the forfeiture); *United States v. Ida*, 14 F. Supp. 2d 454, 460 (S.D.N.Y. 1998) (titled owner of real property had standing, but he was a mere straw and therefore did not have a superior interest under subsection (n)(6)(A)); *Hooper*, 229 F.3d at 821 (9th Cir.); *United States v. Lester*, 85 F.3d 1409, 1412 (9th Cir. 1996); *Kennedy*, 201 F.3d at 1334; and *United States v. Alcaraz-Garcia*, 79 F.3d 769, 774 n.10 (9th Cir. 1996).

[95] *See, Timley*, 507 F.3d at 1130-31 and *United States v. O'Dell*, 247 F.3d 655, 685-86 (6th Cir. 2001).

[96] *United States v. Serendensky*, 2003 WL 21543519, at *5 (S.D.N.Y. 2003); *United States v. Harris*, 246 F.3d 566, 575 (6th Cir. 2001); *Lavin*, 942 F.2d at 185-86; and *McCorkle*, 143 F. Supp. 2d at 1325.

[97] *United States v. Mendez,* 2008 WL 3874318 (E.D.N.Y. 2008) (declining to give "bona fide purchaser for value" a meaning broader than required by commercial law); *United States v. Ribadeneira*, 105 F.3d at 836 (2d Cir.) (check holder); *McClung*, 6 F. Supp. 2d at 552 (even though the provision of medical services did constitute giving something of value, hospital does not qualify since they are an

are not bona fide purchasers for value.[98] Consequently, neither the Ungars nor the Rubins can be bona fide purchasers for value.

Both Petitioners also fail the third prong of the test, as they had reasonable cause to believe the property was subject to forfeiture at the time they claim to have acquired an interest in the property. Each had to have been aware of HLF's criminal status because both based the transfer of their default judgments on the decision in *Holy Land Foundation v. Ashcroft,* 219 F. Supp.2d 57 (D.D.C. 2002), 333 F.3d 156 (D.C. Cir. 2003), *cert. den.* 540 U.S. 1218 (2004), which established that HLF was properly designated as a Specially Designated Terrorist and a Specially Designated Global Terrorist. A petitioner who is aware of the defendant's potentially criminal conduct in

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unsecured creditor); *Lavin*, 942 F.2d at 185-87 (tort victims); *Campos*, 859 F.2d at 1238 (trade creditor); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1192 (D.C. Cir. 1995) (general creditors); *United States v. Watkins*, 320 F.3d 1279, 1283 (11th Cir. 2003) (unsecured creditor); *Carmichael,* 440 F. Supp. 2d 1280; and *McCorkle*, 143 F. Supp. at 1320-21 (unsecured creditor).

[98] *Meister*, No. 4-97-CR-120-G, slip op. at 12-14 (N.D. Tex.) (innocent victims who record judgment liens are not bona fide purchasers; remedy is to file remission petitions); *United States v. Jamieson*, 2007 WL 275966, at *2 (a person who converts his debt to a judgment and attaches a judgment lien to the defendant's property after it becomes subject to forfeiture cannot recover under section 853(n)(6)(B) because he is not a bona fide purchaser for value); *Strube*, 58 F. Supp. 2d at 581 (family members who obtained a judgment lien against defendant personally were general creditors and not bona fide purchasers of any interest in a specific parcel of property); and *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement),* 69 F. Supp. 2d 36, 62 (D.D.C. 1999) ("A creditor who [obtains] a judgment lien . . . against specific property is not a bona fide purchaser of that property because he has given nothing of value in exchange for the property interest. This is so irrespective of how the antecedent debt came into existence.").

connection with property cannot be willfully blind to it when they acquire their interest and then claim to be a bona fide purchaser for value.[99]

2. Petitioners' Legal Interest Is Inferior to That of the United States.

As neither the Ungars nor the Rubins are bona fide purchasers for value, the only recognized interest left to them is that of a prior superior legal interest. As explained above, however, and throughout the remainder of the government's opposition, Petitioners cannot establish a superior legal interest, because the relation back doctrine establishes the government's interest in the property at a time prior to any stated interest in the property by Petitioners.[100] Moreover, the operation of 21 U.S.C. § 853(k)(2)'s bar on legal proceedings after the filing of the indictment renders the Petitioners' claimed interests legally invalid in any event.[101]

C. Application of the Relation Back Doctrine Renders TRIA Inapplicable

Contrary to Petitioners' claims, the relation back doctrine eliminates all claimed conflicts with TRIA. As noted earlier, Section 201 of TRIA does not eliminate the

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[99] *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287, 296 (D.D.C. 1997) (given extensive public record of defendant's misconduct, claimant knew or should have known that defendant's assets were subject to forfeiture; standard is objective reasonableness); *McCorkle*, 143 F. Supp. 2d at 1328-31 (bank that exercises due diligence, knows that its customer is engaged in fraud and is under investigation by law enforcement, and knows that customer's account at the bank has been seized, yet proceeds to acquire an interest in the customer's property, is not "without cause to believe" that the property was subject to forfeiture); *United States v. Frykholm*, 362 F.3d 413, 416 (7th Cir. 2004); and *United States v. Cuartes*, 155 F. Supp. 2d 1338, 1343-44 (S.D. Fla. 2001).

[100] *See* Section II. 1. at page 10 *supra* and Section III. at page 25.

[101] *See* Section III. B. *infra*.

application of criminal asset forfeiture law.[102] In addition, application of the relation back doctrine means that TRIA would not apply to the assets in question.

TRIA, Section 201(a), provides that,

> Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism . . . the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment . . . .

As this provision makes clear, however, TRIA only authorizes the petitioners to execute or attach the assets *of that terrorist party* against which the plaintiff has a terrorism related judgment. Once the Preliminary Order of Forfeiture was issued, "the relation-back doctrine . . . operated to carry back the title of the United States to the time of the [criminal] act . . .and . . . divested [third parties] of their property interests."[103] Since the Government has title to the property pursuant to the relation back doctrine, TRIA has no current applicability because it "does not reach so broadly as to encompass confiscated property."[104] "[A]ny assets as to which the United States claims ownership are not included in the definition of 'blocked assets' and are not subject to execution or

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[102] *See* Section III. B. *supra*.

[103] Justice Scalia concurring opinion, *Buena Vista*, 507 U.S. at 136-137 (Emphasis added). *See also,* section 853(c) which specifically provides that "[a]ny [forfeitable] property that is ***subsequently transferred*** [after the commission of the crime] to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States . . "

[104] *Smith v. Federal Reserve Bank of New York*, 346 F.3d 264, 272 (2d Cir. 2003).

attachment under [TRIA § 201].”[105] The forfeited assets, therefore, are not the assets of "that terrorist party" against which the Petitioner have a judgment. Rather, they are the assets of the United States. TRIA is inapplicable and cannot serve as a basis for Petitioners' claim to the property.[106]

III. PETITIONERS LACK STANDING BECAUSE THEY HAVE NOT PERFECTED ANY CLAIM TO THE ASSETS AT ISSUE

In addition to the relation back doctrine, Petitioners' attempt to establish a claim superior to that of the United States fails for other reasons. First, Petitioners failed to perfect their default judgments prior to the indictment, and therefore are at most judgment creditors. Second, even if Petitioners had perfected their claim to the assets, 21 U.S.C. § 853(k)(2) barred Petitioners from commencing any action at law or equity with respect to their alleged interest in the property. Finally, contrary to Petitioners' assertion, this Court has in personam jurisdiction over the property rights at issue, including over assets not physically present in Texas.

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[105] Id. *See also,* Statement of Senator Harkin, 148 Cong. Rec. S11528 (Nov. 19, 2002).

[106] Petitioners cannot claim that this property transfer violated IEEPA because at the time the Preliminary Order of Forfeiture issued in this case, the Government already had an OFAC license authorizing criminal asset forfeiture which necessarily includes all property transfers through asset forfeiture's relation back doctrine. *See also*, Holy Land II, 493 F.3d at 477 (" *after* the termination of the pending criminal case. In the event of a conviction, the court will enter an order of forfeiture, which will transfer Holy Land's assets to the Government of the United States.")

A. Petitioners Are At Most Judgment Creditors With No Right to the Assets

Petitioners fail in their papers to document any claim to the property at issue. As part of their burden of proof, each Petitioner must establish his own individual standing in *each and every* financial account at issue.[107] Neither petition states the exact date on which the Petitioner claims to have obtained a right, title, or interest in *each* financial account. Both petitions give a broad overview of the New York proceedings, briefly discuss the assets in Washington, and barely mention assets elsewhere. While Petitioners discuss times and events in a random order, they fail to coherently set forth the nature and extent of their right, title, or interest in the property. It is each petitioner's burden to prove his claim to the property, and the Court should not be required to scavenge the four corners of their petition like a puzzle that needs to be assembled.

Even after such a scavenging, each petitioner appears at best to be a simple judgment creditor. Judgment creditors do not have standing to participate in an ancillary

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[107] *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Richard Eline)*, 916 F. Supp. 1286, 1289 (D.D.C. 1996) (claim that simply listed random legal phrases dismissed for failure to set forth nature and extent of legal interest in the forfeited property); *United States v. BCCI Holdings (Luxembourg) S.A. (Fourth Round Petitions of General Creditors)*, 956 F. Supp. 1 (D.D.C. 1996) ("the property belongs to me" is insufficient); *United States v. BCCI Holdings (Luxembourg) S.A. (Final Order of Forfeiture and Disbursement)*, 69 F. Supp. 2d 36, 55 (D.D.C. 1999); *United States v. Kokko*, 2007 WL 2209260, at *5 (S.D. Fla. 2007); *United States v. Edwards*, 2007 WL 2088608, at *2 (W.D. La. 2007); and *United States v. German*, 2006 WL 1098896 (W.D. La. 2006).

proceeding.[108] This rule does not change even if the third party is a victim of a tort or a crime.[109]

The Rubins actually label the nature and extent of their interest in the property as that of "judgment creditors."[110] Nearly all of the Rubins' petition, and most of their exhibits, appear to rely on whatever property interests the Ungars may have. The Rubins do not claim to have attached any of the forfeited assets themselves and have not perfected their default judgment in any way. As noted earlier, the Rubins cannot rely on another third party's claims to assert standing for their own property claims.[111]

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[108] *Corpus*, 491 F.3d at 211; *United States v. Fuchs*, 2005 WL 440429, at *2 (N.D. Tex. 2005) (person who has obtained a civil judgment but not perfected it against any specific asset, is an unsecured creditor without standing); *United States v. Schwimmer*, 968 F.2d 1570, 1581 (2d Cir. 1992); *Ribadeneira*, 105 F.3d at 836 (2d Cir.); *Speed Joyeros*, 410 F. Supp. 2d 121; *United States v. Agnello*, 344 F. Supp. 2d 360, 364 (E.D.N.Y. 2004); *United States v. Campos*, 859 F.2d 1233, 1238 (6th Cir. 1988); *Watkins*, 320 F.3d at 1283-84 (following *BCCI Holdings* and *Campos*; unsecured creditors lack standing to contest the forfeiture in the ancillary proceeding because they have no interest in the particular assets subject to forfeiture); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)*, 46 F.3d 1185, 1191 (D.C. Cir. 1995); *Perkins*, 382 F. Supp. 2d at 149 (following *Ribadeneira*; woman to whom defendant owed child support is likely an unsecured creditor without standing); *United States v. Butera*, 2006 WL 1195473, at *2 (S.D. Miss. 2006) (same); *United States v. Nnaji*, 2005 WL 1049905, at *1 (E.D. Mich. 2005); *United States v. McCorkle*, 143 F. Supp. 2d at 1319-20 ("a general creditor has no vested or superior interest in particular assets forfeited unless he not only has secured a judgment against the debtor, but also has perfected a lien against a particular item"); and *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Banca Nazionale Del Lavoro)*, 977 F. Supp. 449, 454-55 (D.D.C. 1997).

[109] *Corpus*, 491 F.3d at 211 (victim of fraudulent transfer of the property forfeited); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Central Bank of Peru)*, 814 F. Supp. 111, 115-16 (D.D.C. 1993) (victim of tortious interference); and *United States v. Eldick*, 223 Fed. Appx. 837, 839-40 (11th Cir. 2007) (a fraud victim has no interest in the property other than that of an unsecured creditor, which is insufficient for standing), following *United States v. BCCI Holdings (Luxembourg) S.A.,* 69 F. Supp. 2d 36, 59 (D.D.C. 1999).

[110] Rubins' petition, p. 1.

[111] *See* Footnote 35 *supra*.

As for the Ungars, the Fifth Circuit has already determined that they have only the minimal interests of simple judgment creditors with unperfected liens.[112] The Ungars dispute this claim and argue that the Fifth Circuit was mistaken regarding the application of New York law when it determined that their liens were unperfected. Even if one assumes that the Ungars are correct, a successfully perfected *lien* would be irrelevant for purposes of an ancillary proceeding as a lien merely records a claim to the property. It does not establish title or even entitlement to property. Thus, the Ungars have no property interest to assert in these proceedings.[113]

All three courts in which the Ungars sought to initiate turn-over proceedings stayed their hands in deference to the on-going criminal proceedings in this Court. Moreover, the parties in two of the three courts recognized that the United States was an indispensable party to the proceedings, as demonstrated by the interpleader complaints naming the United States as a third party defendant.[114] The writs of execution offered by the Ungars, therefore, cannot establish a superior claim to the disputed property, as no court has made a determination of legal ownership. Indeed, the proceedings brought to establish that ownership right are currently stayed, and the United States has not even

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[112] *Holy Land II* at 476-477.

[113] *See* Federal Rule of Criminal Procedure 32.2(b)(2) and (c).

[114] In South Carolina, the court stayed the action before an interpleader action could be filed.

answered the interpleader complaints. Having at best obtained Writs of Execution, and Petitioners have alleged nothing more, Petitioners cannot establish a superior interest.

In any event, regardless of whether the Petitioners obtained a perfected lien or something more, they would have no force because they were obtained in violation of 21 U.S.C. § 853(k)(2).

B. Petitioners' Alleged Writs of Execution Are Invalid Because, Upon Filing of the Indictment, Section 853(k)(2) Immediately Barred Actions Elsewhere

Once property becomes subject to forfeiture, courts have recognized that Congress intended section 853(n) to provide the "***exclusive*** means for third-parties to assert their claims to forfeited property."[115] The filing of an indictment with a forfeiture allegation operates not only as notice that property is subject to forfeiture, but also as a declaration that the United States owns the forfeitable property. Thereafter, any claim against the property is a claim against the United States.[116] Third parties are then

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[115] *Gilbert,* 244 F.3d at 910 (Emphasis added). *See also, United States v. Lazarenko,* 469 F.3d 815, 821 (9th Cir. 2006) ("The law appears settled that an ancillary proceeding constitutes the only avenue for a third party claiming an interest in seized property."); *United States v. McHan,* 345 F.3d 262,269 (4th Cir. 2003); *United States v. Wade,* 255 F.3d 833, 837 (D.C. Cir. 2001); *Messino,* 122 F.3d at 428; *Waterboro,* 64 F.3d at 756; and *Kramer*, 912 F.2d at 1260. *See also Libretti v. United States,* 516 U.S.29,44 (1995) ("Once the Government has secured a stipulation as to forfeitability, third-party claimants can establish their entitlement to return of the assets only by means of the hearing afforded under 21 U.S.C. § 853(n).").

[116] *Cf. United States v. Security Marine Credit Corp.,* 767 F.Supp. 260, 262 (S.D.Fla. 1991)("Though in the strictest sense Claimant's *in rem* foreclosure was brought against the property rather than against the United States, the court believes that the reach of 853(k) is broad enough to encompass third party *in rem* actions against property owned by the United States." "[O]nce the indictment issued" third party was "barred . . . from 'commencing any[y] action at law or equity against the United States concerning the validity of [its] alleged interest in the property . . . subject to forfeiture .

required to wait until after the criminal verdict to assert their interest in the property through an ancillary proceeding, which "assures a more orderly disposition of both the criminal case and third party claims" while remaining consistent with due process.[117]

Often, when an indictment reveals that property may be subject to forfeiture, defendants and third parties seek to avoid future forfeiture by bringing actions in other courts in order to claim the property before a criminal prosecution can result in an order of forfeiture that recognizes the United States' superior title. They seek to undermine an order of forfeiture before it can exist. Yet, "it would be a significant burden on the Government to have to defend the forfeiture order from attack by a third party during the course of an ongoing criminal prosecution."[118] It is also a significant burden on the judiciary, since the relation back doctrine can completely overturn all that is done in these collateral proceedings. As previously explained, the relation-back doctrine vests title to forfeitable property in the United States at the time of the commission of the

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. ."); *In re: Smouha*, 136 B.R. 921, 927 (S.D.N.Y. 1992) (Same); and *In re American Basketball*, 317 at 128-130 (Bankr. N.D. Cal.); *United States v. Phillips,* 185 F.3d 183, 187-188 (4th Cir. 1999)(United States stopped transfer of property attempted after indictment but before conviction as a fraudulent transfer. Later attempt at foreclosure also barred because once the indictment against defendant was issued, third party was barred from commencing new proceedings. "Although the foreclosure action was technically brought against [the defendant] and not the United States, subsection [853](c) provides that title to the properties at issue had already vested in the United States at the time of the foreclosure sale. Because the Government held title to the properties at the time of the sale, the foreclosure action constituted 'an action at law or equity against the United States' and was stautorily barred under § 853(k).").

[117]S. Rep. No. 98-225, at 207. *See also*, *Lazarenko,* 469 F.3d at 820-24 (9th Cir.) and *De Almeida,* 459 F.3d at 381 (2d Cir.).

[118]*Holy Land II* at 476. Fn. 10.

offense giving rise to forfeiture.[119] Any forfeitable property that is transferred to a third party after the commission of the crime "may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States," unless the third party can establish a superior interest or bona fide purchaser interest in ancillary proceedings.[120] Courts have consistently held that transfers of forfeited property to third parties can be voided under the relation back doctrine.[121] Indeed, if the third party has dissipated forfeitable property, the United States may commence a common law conversion action against the third party for recovery of the value of the property.[122]

To prevent "the creation of duplicitous and obfuscating litigation over property subject to forfeiture," 853(k)(2) is designed as a prophylactic measure and bars any future actions against the property after an indictment is filed alleging forfeiture.[123] At the beginning of a criminal case, 853(k)(2)'s bar against the commencement of third party actions acts *separately* and *independently* from the relation back doctrine.[124]

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[119] 21 U.S.C. § 853(c).

[120] *Id.*

[121] *See e.g., United States v. McCorkle,* 321 F.3d 1292, 1294 n.2, 1298 (11th Cir. 2003); *United States v. Bennett,* 252 F.3d 559, 563 (2d Cir. 2001); *Phillips,* 185 F.3d at 187-88; *United States v. De Ortiz,* 910 F.2d 376, 379-80 (7th Cir. 1990).

[122] See, *e.g., United States v. Saccoccia,* 354 F.3d 9, 14 (1st Cir. 2003); *McCorkle,* 321 F.3d at 1295 n.3; *United States v. Moffitt, Zwerling & Kemler,* 83 F.3d 660, 667-70 (4th Cir. 1996).

[123] *United States v. Security Marine Credit Corp.,* 767 F.Supp. 260, *263* (S.D.Fla. 1991).

[124] At the *end* of a criminal case, these sections *do* act in combination with the relation back doctrine as can be seen footnote 140, *infra.*

Although no defendant has been convicted and the forfeiture of the property has not yet been determined, 853(k)(2) combines with 853(l) to prevent all future actions against the property anywhere in the United States.

First, 21 U.S.C. 853(l) gives the criminal court national jurisdiction to enter orders over property "which *may be* subject to forfeiture . . . *without regard to the location of any property*."[125]

Second, 21 U.S.C. § 853(k) acts as a "[b]ar on intervention" and mandates that:

> *[e]xcept as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may–*
>
> (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
>
> (2) *commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment* or information *alleging that the property is subject to forfeiture* under this section.[126]

When 853(l) and (k)(2) are combined with 853(o)'s mandate that the provisions of 853 are to be "liberally construed to effectuate its remedial purposes," the criminal court has nearly plenary power over the assets. This allows the criminal court to maintain the property's status quo until the criminal proceeding can be finished; prevent the commencement of unnecessary litigation; and ensure that 853(n) remains the

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[125]Emphasis added.

[126]Emphasis added. When the Ungars' claims to the property were turned away in *Holy Land II*, the Fifth Circuit cited *both* sub-sections (1) *and (2)* of 853(k) as authority applicable in this case to deny the Ungars' appeal of the restraining orders. *Holy Land II*, 493 F.3d at 497.

exclusive process to challenge the Government's possession of the property. In essence, the criminal court becomes, as a matter of law, the *de facto* legal custodian (*in custodia legis)* of the property to the exclusion of all other courts .[127]

The only exception to the criminal court's judicial power over the property involves courts that have already asserted jurisdiction *prior* to the filing of the indictment. At the beginning of a criminal proceeding, 853(k)(2) only prevents parties from trying to *commence* new actions.[128] If actions are on-going at the time of indictment, those courts will retain jurisdiction over the property until and unless a Preliminary Order of Forfeiture forfeits the property to the United States. The separate courts can proceed in parallel so long as the previously commenced action does not seek to dissipate or release any forfeitable assets before the conclusion of the ancillary proceeding.[129]

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[127]853(k)(2) so clearly vests the criminal court with exclusive power over the property that some courts have found it to be jurisdictional in nature. *Cf. United States v. Datwani*, 2009 WL 961123 (D.P.R. April 8, 2009) (The bar against commencing an action outside of the ancillary proceeding is "absolute and prevents premature interference with forfeiture" and "other circuits have apparently imposed the restriction as a jurisdictional bar.") If true, the filing of an indictment gives the criminal court exclusive jurisdiction over third-party claims to the property to the exclusion of all other courts.

[128]853(k)(2) appears to operate on the assumption that cases filed before an indictment were not filed in an effort to evade forfeiture since the likelihood of forfeiture has not yet been revealed. However, at the *end* of a criminal case, 853(k)(2) does in combination with the relation back doctrine to divest courts of jurisdiction. *See,* footnote 140 *infra.*

[129]853(k)(2) prevents even this conflict, as the criminal court normally issues a temporary restraining order to prevent the dissipation of property. In order to challenge the temporary restraining order, the third parties would have to commence a new action against the temporary restraining order and this is forbidden by 853(k)(2) until the end of the criminal proceeding.

Despite these protections, many third parties have tried to bypass the ancillary proceeding mandated by statute by commencing proceedings in other courts despite the legal ban created by Section 853(k). All have failed. To avoid asset forfeiture, third parties cannot commence actions in state courts,[130] attempt to foreclose on a mortgage,[131] begin an Interpleader action,[132] take the property to bankruptcy court,[133] or begin other civil actions.[134] Even if the action does not specifically name the United States as a

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[130] *United States v. Compean*, 2006 WL 1737536, at *2 (S.D. Tex. 2006) (claimant was barred by section 853(k) from filing an action in state court to have the defendant's interest in the property declared void as the subject of a fraudulent transfer), *aff'd* in *Corpus*, 491 F.3d at 208 (5th Cir.).

[131] *United States v. Phillips*, 185 F.3d 183, 188 (4th Cir. 1999) (even though defendant has stopped paying mortgage; once the property is forfeited, it belongs to the Government under the relation back doctrine, and any attempt at foreclosure is barred by section 853(k)); *Pacheco,* 393 F.3d at 353 (2d Cir. finding same); *United States v. MacInnes*, 223 Fed. Appx. 549, 554 (9th Cir. 2007) (foreclosure sale is an "action against the United States" and is therefore barred by section 853(k)); *United States v. West*, 2007 WL 1100437, at *1 (E.D. Tenn. 2007); *JP Morgan Chase Bank N.A. v. Khalil*, 2006 WL 87599 (N.D. Ill 2006) (section 853(k) bars a third party from attempting to litigate in another forum); *United States v. Cheng*, 2006 WL 1133295, at *1 (N.D.N.Y. 2006); *Bank One N.A. v. Everly*, 2002 WL 31056716, at *1 (N.D. Ill. 2002) (Government can remove state foreclosure action to federal court where criminal case is pending, and move to dismiss foreclosure complaint as barred by section 853(k)); and *United States v. Security Marine Credit Corporation*, 767 F. Supp. 260 (S.D. Fla. 1991).

[132] *Johnson v. United States*, 2001 WL 1064505 (N.D. Ill. 2001) (third party may not file interpleader action to obtain judicial determination of ownership of funds subject to criminal forfeiture case) and *United States v. BCCI Holdings (Luxembourg) S.A. (In re Oppenheimer & Co.)*, 1992 WL 44321 (D.D.C. 1992) (third party may not file interpleader action when ordered to surrender forfeited funds to U.S. marshal).

[133] *In re: Smouha*, 136 B.R. 921, 926 (S.D.N.Y. 1992) (third party may not attempt to assert interest in defendant's forfeitable assets by initiating action in bankruptcy court); *In re American Basketball*, 317 B.R. at 121 (Bankr. N.D. Cal. finds section 853(k) bars a person from using bankruptcy proceedings to make a collateral attack on an order of forfeiture); and *In re Global Vending*, 2005 WL 2451763 (S.D. Fla. 2005) (bankruptcy trustee is barred by section 853(k) from obtaining the forfeited property by seeking a turnover order in the bankruptcy court).

[134] *Compean*, 2006 WL 1737536, at *2 (S.D. Tex. 2006) (state court judgment entered after the property was named in a federal criminal indictment was void), *aff'd* in *Corpus*, 491 F.3d at 208 (5th Cir.); *Bayview Loan Servicing, LLC. v. United States,* 288 Fed. App. 63, 65 (4th Cir. 2008) (motion for a

party, the action is prohibited under 853(k)(2). Artful pleading does not enable third parties to evade the process of 853(n).[135]

Once the first indictment was filed in this case on July 26, 2004, sections 853(k)(2), 853(o), and 853(l) barred any actions with respect to the property regardless of where the property was located. When the indictment was filed in this case, the courts in New York, Washington state, and South Carolina did not have custody of the property and no legal proceedings had been commenced against it. All assets were still deposited with the banks and financial institutions. Petitioners' Writs of Execution were each an "an action at law" commenced subsequent to the filing of an indictment in which the United States had already put the world on notice that the property may be subject to forfeiture.[136] Likewise, the banks' Interpleader cases in New York and Washington state are each "an action at . . . equity against the United States" commenced ***after*** the

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declaratory judgment); *Roberts v. United States*, 141 F.3d 1468, 1470-71 (11th Cir. 1998); *Miller v. United States*, 2004 WL 1335946 (N.D. Tex. 2004) (wife filed action against the United States in state court. Action was removed to federal court and dismissed); *Kennedy*, 201 F.3d at 1334-35 (state divorce decree could not defeat federal forfeiture of husband's one-half interest unless wife could satisfy requirements of section 853(n)(6)(A) or (B)); *37 Associates v. REO Construction Consultants*, 409 F. Supp. 2d 10 (D.D.C. 2006) (third party cannot file private lawsuit asserting superior title against the person who acquired the property from the Government following forfeiture); *Jebril v. Pettit*, 2007 WL 1017600, at *4 (E.D. Mich. 2007) (section 853(k) bars *Bivens* action against the U.S. Marshal); and *United States v. Walters*, 2002 WL 31929249 (D. Kan. 2002) (cannot use section 2255 petition in place of a petition pursuant to section 853(n)).

[135] *Cf.* the five prior footnotes *supra.*

[136] The Ungars claim the Writs of Execution which preceeded the Interpleader actions were filed in New York on August 10, 2004, Washington state on September 2, 2004, and South Carolina on September 8, 2004. *See* Ungars' Petition, p. 13. The Rubins actions were filed even later as they did not even obtain their default judgment against HAMAS until September 27, 2004. *See* Rubins' Petion, p. 5.

indictment was filed.[137] All these actions were legally void from the start because they were commenced after § 853(k)(2)'s absolute bar against post-indictment actions went into effect. Because the actions were statutorily prohibited, Petitioners' Writs of Execution are null and void. In any event, HLF's conviction would entitle the United States to regain the property in light of its superior interest.

Petitioners assert that 853(k)(2)'s prohibition against new actions was delayed just long enough for their collateral actions to be legal. Essentially, Petitioners assert that the the Restraining Order was the equivalent of a transaction in the blocked property that could not have any legal effect without an OFAC license. Petitioners then seek to transpose that reasoning to the filing of the indictment and argue that the asset forfeiture allegation in the indictment could have no legal effect in activating 853(k)(2) without an OFAC license.[138] Thus, Petitioners allege, even though their collateral actions were commenced after the filing of the Indictment, they were commenced before the OFAC license and were therefore legal.

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[137] *See* Footnote 132. Saturna Capital's release of funds to the District Court for the Western District of Washington for its Writ of Garnishment was also in violation of the law. While *Holy Land I* temporarily revoked this court's Restraining Order, it did not affect 21 U.S.C. § 853. *Holy Land II* recognized that 21 U.S.C. § 853 has applied to the disputed assets from the start. Thus, the Interpleader action in Washington was improperly commenced *after* the indictment activated § 853(k)(2). Further, the Washington court has not refused to release the funds there due to petitioners *in custodia legis* argument. Rather, Internal Revenue Service agents faxed this court's order to the Washington court. The judge there refused to consider the agent's faxed request as it was not done in the proper motion format.

[138] *See* Ungars Petition at 15, Rubins' Petition at 13-14.

Petitioners' logic is fundamentally flawed. Unlike the Restraining Order, the mere *act* of filing an indictment does not restrain or otherwise attempt to deal in the property. The ***filing*** of the indictment merely triggers 853(k)(2). Section 853(k)(2) does not restrain the blocked property. It merely designates the jurisdiction where the rights to the blocked property must be decided. Nor is the forfeiture allegation of an indictment a transaction or an attempt to deal in the blocked property. It is simply a notice of the United States' belief that 853(c) transferred title of the property to the Government when the criminal acts were committed, and that any action commenced against the property will be regarded as an action against the United States.[139] In short, Petitioners ascribe unwarranted meaning to the OFAC license, which serves a purpose wholly separate from the indictment.

Finally, separate and apart from the indictment, when the Preliminary Order of Forfeiture issued, the relation back doctrine acted to combine with section 853(k)(2) and retroactively nullified the orders of any collateral proceedings. When the Preliminary Order of Forfeiture issued, the relation back doctrine retroactively re-wrote history to transfer title of the disputed property to the United States effective on the date of the crime.[140] Section 853(k)(2) then operated to bar Petitioners' actions in New York,

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[139]As the criminal acts took place *before* the assets were blocked, IEEPA cannot apply to 853(c)'s transfer of all right, title, and interest in the property to the United States.

[140]Id. *See also*, Holy Land II, 493 F.3d at 477 (" *after* the termination of the pending criminal case. In the event of a conviction, the court will enter an order of forfeiture, which will transfer Holy Land's assets to the Government of the United States." (Emphasis in original)). Again, Petitioners cannot

Washington State, and South Carolina against property which now belongs to the United States.

C. This Court Retains Exclusive *In Personam* Jurisdiction Over All the Property Rights of the Assets

Petitioners' arguments demonstrate a "misunderstanding of jurisdiction issues in criminal proceedings," as they speak solely in terms of civil *in rem* concepts.[141] Yet, criminal forfeiture is *in personam*.[142] In terms of property, it is helpful to think of *in personam* jurisdiction as a jurisdiction over the defendants' property *rights* instead of the civil *in rem* jurisdiction over only the property itself.[143] Consequently, this Court has jurisdiction over HLF's property rights even if one assumes for the sake of argument that Courts such as the Southern District of New York have *in rem* jurisdiction over the actual property. Even if this Court could not transfer the actual property to the Government, it can still forfeit and transfer HLF's property rights to the Government.

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claim that this property transfer violated IEEPA because at the time the Preliminary Order of Forfeiture issued in this case, the Government already had an OFAC license authorizing criminal asset forfeiture which necessarily includes all property transfers through asset forfeiture's relation back doctrine. *See also*, Holy Land II, 493 F.3d at 477 (" *after* the termination of the pending criminal case. In the event of a conviction, the court will enter an order of forfeiture, which will transfer Holy Land's assets to the Government of the United States.")

[141] *United States v. Weiss*, 2005 WL 1126663 *8 (M.D. Fla. 2005) (that the defendant's property is the subject of a civil lawsuit pending in another court [SDNY] does not deprive the court in the criminal case of jurisdiction to order forfeiture of the property as part of the defendant's sentence), *aff'd,* 467 F.3d 1300, 1307 n.8 (11th Cir. 2006) (holding that the effect of the forfeiture is to give the Government the right to enforce its interest as property owner in the pending private lawsuit).

[142] Id. *See also, McHan*, 345 F.3d at 274-276; *Gilbert*, 244 F.3d at 919-20; and *Kennedy*, 201 F.3d at 1329.

[143] Id.

In the same manner, this Court now has *in personam* jurisdiction over all of petitioners' claimed rights to HLF property, because Petitioners submitted to the jurisdiction of this Court when they filed claims here to ***all*** HLF property. Even if one assumes this Court does not have *in rem* jurisdiction over all the disputed property, the Court now has *in personam* jurisdiction over all of petitioners' property rights.[144] The Court can still proceed with the ancillary proceeding and evaluate whether petitioners' property rights are superior to the government's. If the court finds in the government's favor, *res judicata* and rules against forum shopping dictate that petitioners cannot go back to New York, Washington, or South Carolina and relitigate the same issues through collateral attacks.[145] If Petitioners fail to comply with this Court's determination, the Court can enforce its order through contempt proceedings.[146]

IV. PETITIONERS HAVE AN ALTERNATIVE REMEDY

If this Court denies Petitioners claims, as it should, Petitioners may still receive some of the funds. During the *Holy Land I* and *Holy Land II* appeals, the Government represented that it would not be keeping these assets should they be successfully

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[144] Id.

[145] *United States v. Metsch & Metsch, P.A.*, 187 Fed. Appx. 946 (11th Cir. 2006); and *In re American Basketball*, 317 B.R. at 127-129 (Bankr. N.D. Cal.).

[146] *United States v. McCorkle*, 2000 WL 33725124, at *4 (M.D. Fla. 2000) (district court retains jurisdiction to hold third party in contempt for refusal to disgorge forfeited funds even though third party has filed notice of appeal); *contempt citation dismissed as moot*, *McCorkle*, 321 F.3d at 1299 and *Barnette*, 129 F.3d 9 (11th Cir. 1997) (wife held in contempt for failing to comply with order directing her to reveal location and value of forfeitable property transferred to her by defendant).

forfeited. Rather, in some form or fashion, the funds will be distributed to those American citizens who have been harmed by HAMAS. Even if Petitioners' claims are properly denied here, they will still be free to petition the Attorney General for Remission of the forfeited assets pursuant to 21 U.S.C. § 853(i) or to seek alternative relief.[147] As the government represented to the Fifth Circuit, the government intends to use the forfeited assets to equitably compensate United States citizens who have been harmed by HAMAS terrorist acts, pursuant to the Attorney General's authority to "grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section."[148] Accordingly, while Petitioners' rights to the assets are inferior to those of the government, the government fully intends to use the assets to

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[147] *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287, 301 n. 17 (D.D.C. 1997) (If remission is denied, third parties can petition the Worldwide Victims Fund).

[148] 21 U.S.C. § 853(i). Comprehensive Crime Control Act of 1984, section 413, originally codified at 21 U.S.C. § 853(j), now § 853(i). Section 1864(3) of Pub. L. 99-570 directed the substitution of "this subchapter" for "this chapter" in section 853(i), as the probable intent of Congress. *See also, DSI Associates LLC*, 496 F.3d at 183 (2d Cir.) ("This non-judicial remedy [of 853(i) confers upon the Attorney General the authority to rectify precisely the situation presented here: A third party that possesses an interest in forfeited property yet does not meet the standing requirements of section 853(n) may petition the Attorney General for redress in the 'interest of justice.'").

compensate those who suffered from HAMAS terrorism, including the Ungars and the Rubins, all of whom have suffered grave losses and are deserving of compensation.[149]

[149] *See, e.g., United States v. BCCI Holdings (Luxembourg) S.A. (Petition of American Express Bank II)*, 961 F. Supp. 287, 301 n. 17 (D.D.C. 1997) (Referencing Worldwide Victims Fund); the International Terrorism Victim Expense Reimbursement Program, the DOJ of Justice Programs, or the DOJ Office for Victims of Crime.

CONCLUSION

For all the foregoing reasons, the government's motion should be granted, and the petitions dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 15, 2009 true and correct copies of this Motion were served on counsel of record by electronically filing the pleading with the clerk of court for the U.S. District Court, Northern District of Texas using the ECF system.

/s/ **Walt M. Junker**
Special Assistant United States Attorney