No. 091389 MAY 10 2010

In The
Supreme Court of the United States

HARBER CORPORATION, MABON CORPORATION, GATEX CORPORATION, PIEDADE PEDRO ALMEIDA, AVION RESOURCES LTD., FARES BAPTISTA PINTO, JOSE BAPTISTA PINTO NETO, TIGRUS CORPORATION, POMPEU COSTA LIMA PINHERIO MAIA, AND ISABEL CRISTINA DURTA PINHEIRO MAIA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents two important, unresolved, and recurring issues of federal law.

The first issue, on which the Courts of Appeals have split, is whether the Government, when it is ordered to make restitution of illegally seized funds to an innocent owner, may also be ordered, pursuant to a federal common law doctrine first recognized in *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995), to disgorge interest earned or realized on the funds. The Third Circuit declined to order the Government to disgorge interest here, thereby rejecting holdings of the Sixth, Ninth, and Eleventh Circuits and the Court of Federal Claims. Instead, it followed rulings made by the First, Second, Eighth, and Tenth Circuits.

The second issue involves the proper interpretation of an important remedial provision of federal forfeiture law, 28 U.S.C. § 2465(b)(1), which provides that the United States "shall be liable" for attorneys' fees and costs incurred by claimants who substantially prevail "in any civil proceeding to forfeit property under any provision of Federal law." The petitioners here, property owners who were not charged with any crime by the Government, successfully contested *in personam* forfeiture proceedings conducted by the Government under 21 U.S.C. § 853.

QUESTIONS PRESENTED – Continued

The Court of Appeals held that petitioners were not entitled to fees and costs because, in its view, the petitions to challenge the forfeiture, which they filed under 21 U.S.C. § 853(n), commenced proceedings to exclude property from forfeiture and therefore were not part of "a proceeding to forfeit property." This issue is presented in a pending petition for a writ of *certiorari*, which was filed on April 8, 2010, in *Jewell v. United States* (captioned below as *United States v. Moser*, 586 F.3d 1089 (8th Cir. 2009)).

PARTIES TO THE PROCEEDINGS

The petitioners are Avion Resources Ltd., Tigrus Corporation, Fares Baptista Pinto, Jose Baptista Pinto Neto, Pompeu Costa Lima Pinherio Maia, Isabel Cristina Durta Pinheiro, Piedade Pedro Almeida, Harber Corp., Gatex Corp., and Mabon Corp.

The respondent is the United States of America.

Maria Carolina Nolasco is the criminal defendant in this matter and is a party no longer interested in these proceedings.

CORPORATE DISCLOSURE

The following petitioners, which are corporations, hereby identify all parent corporations and any publicly held company that owns 10% or more of the corporation's stock: none.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of *certiorari* issue to review the final Judgment of the United States Court of Appeals for the Third Circuit.

OPINION AND JUDGMENT BELOW

The District Court's opinion, unofficially reported at 2008 U.S. Dist. LEXIS 93200 (D.N.J. Nov. 17, 2008), is reprinted in the Appendix ("Pet. App.") at Pet. App. 20-31. The opinion of the Court of Appeals is unofficially reported at 2009 U.S. App. LEXIS 26368 (3d Cir. Dec. 4, 2009) and is reprinted at Pet. App. 3-17.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the proceedings below pursuant to 28 U.S.C. § 1331, 21 U.S.C. § 853(n) and 28 U.S.C. § 2465(b)(1). Pet. App. 20. The Court of Appeals issued its Judgment on December 4, 2009. Pet. App. 1-2. A Petition for Rehearing and Rehearing *en banc* was denied by the Court of Appeals on February 9, 2010. Pet. App. 32-33. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In pertinent part, 28 U.S.C. § 2465 provides that:

> (b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for –
>
> (A) reasonable attorney's fees and other litigation costs reasonably incurred by the claimant;
>
> (B) post-judgment interest, as set forth in section 1961 of this title; and
>
> (C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale –
>
> (i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and
>
> (ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency,

or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

In pertinent part, 21 U.S.C. § 853 provides that:

(n) Third party interests.

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall 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.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because

the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonable without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

STATEMENT OF THE CASE

On June 27, 2002, the Government seized 39 individually owned bank accounts at Merchant's Bank of New York in New York City containing more than $21 million. Pet. App. 35. The seizures were made in connection with the arrest of Maria Carolina Nolasco, an officer of the Bank, on personal income

tax evasion and other charges, including a charge that she was personally operating a money transmitting business without a license required under state law in violation of 18 U.S.C. § 1960. Pet. App. 35. The owners of the 39 accounts, including the 10 petitioners herein, were not charged with any crime. No forfeiture or other proceedings concerning the seized funds were filed and no action was taken by the Government in the Nolasco case during the next two years.

After several of the petitioners filed equitable actions in the United States District Court for the Southern District of New York seeking to recover their property, the Government in September 2004 initiated criminal forfeiture proceedings aimed at the seized funds pursuant to 21 U.S.C. § 853. The forfeiture proceeding was filed in New Jersey, where Nolasco lived and was being prosecuted. The Government sought criminal forfeiture of the funds, an *in personam* proceeding that extends only to property owned by the criminal defendant, even though the funds were seized from petitioners' bank accounts and indisputably were not owned by defendant Nolasco.

It took until June 2006 for petitioners to obtain a ruling on the merits of their claims to recover their property: the District Court in New Jersey granted petitioners' motions for summary judgment prior to the date scheduled for oral argument and ordered the Government to return the funds. Pet. App. 32-54. The District Court ruled that "[a]fter four years, it is

neither legal nor just" to permit the Government to continue to retain possession of the seized property. Pet. App. 41. The Government did not appeal.

Nor did it return the funds to the petitioners. Rather, the Government caused a New York State criminal prosecution and forfeiture proceeding to be instigated against each of the 22 parties who had prevailed in the New Jersey District Court litigation. Pet. App. 61. The Government transferred petitioners' funds back to New York. The Government retained millions of dollars belonging to the other account parties who, for whatever reasons, did not file petitions challenging the forfeiture, even though those funds also were not owned by Nolasco and were thus not subject to forfeiture. Pet. App. 55-57.

After further extensive litigation in the courts of the State of New York, two separate *ex parte* Orders of Attachment of the funds issued by the New York State Supreme Court, New York County, were vacated and the funds again ordered released. A unanimous panel of the Appellate Division of the Supreme Court affirmed, holding that the attachment was done "without valid judicial sanction," was "extrajudicial" in nature, and accomplished "in contravention . . . of the order of the New Jersey federal court ruling that defendants were entitled to return of their money [and] without statutory authorization." *Morgenthau v. Avion Resources Ltd.*, 49 A.D.3d 50 (1st Dep't 2007), *rev'd on other grounds*, 11 N.Y.3d 383 (2008). Pet. App. 65, 69. As the case was being appealed further by the District Attorney

to the New York Court of Appeals, the funds were transferred out of New York to an account under the control of the Department of Justice in Washington, D.C., ostensibly pursuant to Mutual Legal Assistance Treaty (MLAT) requests received from Brazil, which had been made years earlier. Pet. App. 6. Applications to release the funds are *sub judice* before the United States District Court for the District of Columbia. *In re Seizure Of Approximately $12,116,153.16 and Accrued Interest in U.S. Currency*, Misc. Action No. 08-261 (RMC) (D.D.C.).

As the New York litigation was ongoing, petitioners filed a motion in the United States District Court in New Jersey under 28 U.S.C. § 2465(b)(1), which requires that the Court award attorneys' fees, costs, and interest on seized monies to any claimant who prevails "in any civil proceeding to forfeit property under any provision of federal law." Petitioners sought in the alternative to disgorge interest realized by the Government on their funds under the doctrine recognized in *United States v. 1461 W.42d Street*, 251 F.3d 1329 (11th Cir. 2001); *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995); *Carvajal v. United States*, 521 F.3d 1242 (9th Cir. 2008); and *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998).

The District Court denied the motion, holding that while the proceeding was civil in nature and petitioners clearly prevailed, the proceeding was not one "to forfeit property." Pet. App. 18-19. The Court declined to follow *United States v. D'Esclavelles*, 541

F. Supp. 2d 794 (E.D. Va. 2008), *rev'd on other grounds sub nom., United States v. Buk*, 2009 U.S. App. LEXIS 4502 (4th Cir. 2009), where the Court awarded fees and interest to a party prevailing in a proceeding under 21 U.S.C. § 853(n). Pet. App. 26-28. The District Court found that petitions filed under 21 U.S.C. § 853(n) "did not purport to forfeit property;" rather, they "served as an attempt to intervene in and block the Government's attempt to seize the property in the criminal forfeiture proceeding it initiated." Pet. App. 27. In so ruling, the District Court ignored the reality that the end result sought by the Government in the statutory process under 21 U.S.C. § 853, in which petitioners participated and prevailed, was to forfeit petitioners' property.

The Court of Appeals affirmed, agreeing with the Government's characterization of the proceedings as analogous to actions to "quiet title." Pet. App. 11. The Court noted that a 21 U.S.C. § 853(n) proceeding "cannot result in the forfeiture of a claimant's property;" rather, the "proceeding merely ensures that property belonging to a third-party claimant is not inadvertently forfeited as part of a criminal defendant's property." Pet. App. 11-12. According to the Court, before the third-party petitions are filed under § 853(n), "[f]orfeitability has already been proven," which it said "demonstrates that Section 853(n) ancillary proceedings exclude property from forfeiture and do not 'forfeit property' as required by Section 2465(b)." Pet. App. 12. The Court also said that a proceeding under § 853(n) "should be viewed as

part and parcel of the larger *criminal* forfeiture proceeding" even though the proceeding is "civil in nature." Pet. App. 12. Applying 28 U.S.C. § 2465(b) to such a proceeding would, in the view of the Court of Appeals, "frustrate Congress' intent to reform *civil* forfeiture proceedings." Pet. App. 13.

The Court of Appeals also held that the United States was not required to disgorge the interest it had earned on petitioners' funds, Pet. App. 15-17, declining to follow precedents from the United States Courts of Appeals for the Sixth, Ninth, and Eleventh Circuits, as well as a number of other courts, including the United States Court of Federal Claims. *See, e.g., Carvajal v. United States*, 521 F.3d 1242 (9th Cir. 2008); *United States v. 1461 W.42d Street*, 251 F.3d 1329 (11th Cir. 2001); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998); *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995); *American Airlines, Inc. v. United States*, 77 Fed. Cl. 672 (2007), *aff'd*, 551 F.3d 1294 (Fed. Cir. 2008). The Court held that this line of cases was "at odds" with the general "no interest" rule set forth in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). Pet. App. 16. There is now a substantial conflict on this issue among the Courts of Appeals.

The Court of Appeals designated its opinion in this case as "Not Precedential" under a local rule. Pet. App. 3, 5. The Government subsequently moved to publish the Panel's Opinion, contending that "[b]oth holdings decided issues of first impression in this Circuit." Pet. App. 75-78. The Government argued

that "the two issues resolved by the Panel are likely to recur," pointing out that because there are "numerous statutes giving rise to criminal forfeiture," publishing the Opinion "will ensure that district courts faced with [third party claims in *in personam* forfeiture matters] know the rules regarding whether attorney's fees and interest are available." Pet. App. 76-77. The Court of Appeals denied the Government's motion without comment.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD RESOLVE THE SPLIT AMONG THE COURTS OF APPEALS ON THE ISSUE OF WHETHER THE GOVERNMENT AS PART OF ITS OBLIGATION TO MAKE RESTITUTION CAN BE ORDERED TO DISGORGE INTEREST ON ILLEGALLY SEIZED FUNDS

The Courts of Appeals are sharply divided on the first issue presented by this case, which is whether the Government, when it is ordered to make restitution of funds seized in a forfeiture case to an innocent owner, may also be compelled to disgorge interest constructively or actually received on the funds without violation of its sovereign immunity. This issue should be heard and finally resolved by this Court.

The rule that the Government should not be permitted to retain interest actually or constructively obtained on funds illegally held was first recognized in a forfeiture case, *United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995), which was decided five years before the enactment of 28 U.S.C. § 2465(b)(1). There, the Court of Appeals first rejected the property owner's claim for pre-judgment interest on his funds, concluding that in the absence of a clear waiver of the Government's sovereign immunity, the "no interest" rule barred the claim, citing *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

However, the Court recognized that "not every payment of money by the government related to something it has seized can be characterized as a forbidden award of pre-judgment interest." Citing its holdings in *United States v. 1980 Lear Jet*, 25 F.3d 793 (9th Cir. 1994), and *United States v. Real Property Located at 41741 Nat'l Trails Way*, 989 F.2d 1089 (9th Cir. 1993), the Court found that "while sovereign immunity will prevent a simple claim for pre-judgment interest, the government is not always free to profit from wrongly seized property without recourse by the owner." The Court explained:

> We believe the law is reasonably clear: the government is not liable to suit for inchoate interest, as an item of damages in a forfeiture action. However, as a matter of practice, assets amenable to such treatment should be put to use, with their increase accruing ultimately to whatever party is

> found to have the right to the property. Where such a course has been followed, actually or constructively, as in this case, the government will not be allowed to retain the fruits, once the tree has been ordered returned to its owner.

United States v. $277,000 U.S. Currency, 69 F.3d at 1497. As the Ninth Circuit explained, the interest recovered is not "typical pre-judgment interest, but an aspect of the seized *res*, and thus the existing sovereignty bar to an award of pre-judgment interest did not enter the picture."

This issue has divided the Circuits. In addition to the Ninth Circuit, the Courts of Appeals for the Sixth and Eleventh Circuits have held that the Government may be ordered to disgorge interest earned on illegally seized funds. *See United States v. 1461 W.42d Street*, 251 F.3d 1329 (11th Cir. 2001); *United States v. Ford*, 64 Fed. Appx. 976 (6th Cir. 2003); *United States v. $515,060.42 U.S. Currency*, 152 F.3d 491 (6th Cir. 1998). The Seventh Circuit has recognized the disgorgement principle established in *United States v. $277,000 U.S. Currency* but has not yet taken a definitive position. *See United States v. Rand Motors*, 305 F.3d 770 (7th Cir. 2002) (Wood, J.). A number of lower courts have recognized that disgorgement may be ordered. *See, e.g., Hatalmud v. Riley*, 2005 U.S. Dist LEXIS 32303 (S.D.N.Y. 2005), *rev'd on other grounds*, 505 F.3d 139 (2d Cir. 2007); *United States v. Tencer*, 986 F. Supp. 361 (E.D.. La. 1997).

Four Courts of Appeals previously have held that sovereign immunity generally precludes the disgorgement of interest earned by the Government on illegally seized funds. *See Larson v. United States*, 274 F.3d 643 (1st Cir. 2001); *Ikelionwu v. United States*, 150 F.3d 233 (2d Cir. 1998); *United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843 (8th Cir. 1999); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610 (10th Cir. 2000), *cert. denied*, 534 U.S. 836 (2001).

This issue is potentially of importance in other contexts, where the Government has derived a benefit from funds taken from an owner and are later ordered returned. *See, e.g., American Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 2007 U.S. Claims LEXIS 236 (Ct. Fed. Claims 2007) (relying upon *United States v. $277,000 U.S. Currency* to order Government to disgorge interest realized on illegally collected airline user fees), *aff'd*, 551 F.3d 1294 (Fed. Cir. 2008).

The core concept here is restitution, which is designed to prevent the unjust enrichment of the defendant rather than compensate for a loss suffered by the plaintiff. *See City of Monterey v. Del Monte Dunes at Monterrey, Ltd.*, 526 U.S. 687, 710 (1999); *see also Bowen v. Massachusetts*, 487 U.S. 879, 893-894 (1988) ("Our cases have long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief

– which may include an order providing for . . . 'the recovery of specific property or monies'") (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)). Thus, as a general rule, "[w]henever the defendant holds money or property that belongs in good conscience to the plaintiff, and the objective of the court is to force disgorgement of his unjust enrichment, interest upon the funds or property so held may be necessary to force complete restitution." 1 D. Dobbs, *Law of Remedies* § 3.6(2), at 344 (2d ed. 1993).

The Government can of course be ordered to make restitution of property without violating its sovereign immunity. For example, the United States may be compelled by motion made pursuant to Fed. R. Crim. P. 41(g)[1] to return seized property. *See Adeleke v. United States*, 355 F.3d 144, 151 (2d Cir. 2004) ("Rule 41(g), which simply provides for the return of seized property, does not waive the sovereign immunity of the United States"). Where a criminal proceeding is not pending, a property owner

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[1] Federal Rule of Criminal Procedure 41(g) provides that:

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

may file an independent action to compel the United States to return property under the general equity jurisdiction of the district courts. *See Lavin v. United States*, 299 F.3d 123, 127 (2d Cir. 2002). These restitutionary claims lie against the United States as a matter of equity, if not constitutional imperative. *Cf. Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304-05 (1923) (the constitutional right to just compensation for private property taken by Government "rests on equitable principles" and thus includes interest from the date of the taking, without need for statutory authorization).

We submit that disgorgement of interest earned on funds taken and held by the Government is consistent with the equitable principles under which restitution of the property itself is ordered, and does not violate the sovereign immunity of the United States. This important and unresolved issue of law is worthy of review by this Court in this matter.

II.

THE COURT SHOULD RESOLVE THE ISSUE WHETHER CONGRESS INTENDED IN 28 U.S.C. § 2465(b)(1) TO DENY INNOCENT PROPERTY OWNERS WHO PREVAIL IN FORFEITURE PROCEEDINGS FILED BY THE GOVERNMENT UNDER 21 U.S.C. § 853 THE RIGHT TO RECOVER ATTORNEYS' FEES, COSTS, AND INTEREST

28 U.S.C. § 2465(b)(1) provides that a claimant who substantially prevails "in any civil proceeding to

forfeit property under any provision of Federal law" is entitled to recover his attorneys' fees and litigation costs. Furthermore, where the property seized by the Government was money, the statute requires the Court to award the prevailing party pre-judgment interest. This provision, part of the CAFRA remedial legislation enacted in 2000, was Congress's response "to public outcry over the government's too-zealous pursuit of civil and criminal forfeiture." *United States v. Khan,* 497 F.3d 204, 208 (2d Cir. 2007).

The Government's view, adopted by the Court of Appeals here, is that the phrase "any civil proceeding to forfeit property under any provision of Federal law" actually means that only claimants prevailing in *in rem* forfeiture cases, which are filed under 18 U.S.C. § 983, have the right to recover attorneys' fees, costs, and interest. If the holding of the Court of Appeals is allowed to stand, property owners prevailing in forfeiture proceedings filed by the Government under 21 U.S.C. § 853, which are *in personam* in nature, will have no right to be made whole.

The phrase "*in rem*" is not in 28 U.S.C. § 2465. Nor is there any reference in the statute, or the legislative history, to forfeiture proceedings filed under the *in rem* forfeiture statute, 18 U.S.C. § 983. Rather, Congress chose to use expansive, unrestricted language – "any civil proceeding to forfeit property under *any provision of Federal law*." If Congress intended only to grant claimants prevailing in *in rem* forfeiture actions the right to recover fees, costs, and

interest, it could have easily said so by using appropriate limiting language; for example, by providing that "fees, costs and interest shall be awarded to any claimant prevailing in a forfeiture proceeding filed under 18 U.S.C. § 983."

Congress's decision not to limit the remedy it created to a particular forfeiture statute or proceeding should be given effect. The plain words of the statute indicate that Congress intended to make innocent property owners aggrieved by baseless forfeiture cases whole, without limitation. Of course, as a remedial statute, 28 U.S.C. § 2465(b)(1) should be liberally and beneficently construed to carry out the reforms intended by Congress and to promote justice. *See Dennis v. Higgins*, 498 U.S. 439, 443 (1991); *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987).

The narrow interpretation given the statute by the Court of Appeals has created an anomaly in forfeiture law that is impossible to reconcile with Congressional intent. Successful claimants in *in rem* forfeiture cases filed under 18 U.S.C. § 983 have a statutory right to recover attorneys' fees and interest on seized funds. Successful claimants in *in personam* forfeiture cases filed by the Government under 21 U.S.C. § 853 have no such rights. Could Congress have intended this disparate treatment? The clear answer is no.

It would be peculiar to treat property owners contesting forfeiture cases differently. The lower

courts have noted that it is "fundamentally unfair for the availability of attorney's fees to hinge upon the choice of the U.S. to bring the action under the civil or criminal forfeiture statute." *United States v. Bachner*, 877 F. Supp. 625, 627 (S.D. Fla. 1995); *United States v. D'Esclavelles*, 541 F. Supp. 2d 794, 769 (E.D. Va. 2008) ("applicability of the attorney's fees provision of CAFRA turns on the status of the claimant and the nature of the proceeding for which attorneys' fees are sought, not on how the government chose to initiate the seizure"), *rev'd on other grounds sub nom., United States v. Buk*, 2009 U.S. App. LEXIS 4502 (4th Cir. 2009). The oddity of granting successful claimants in *in rem* forfeiture cases fees, costs, and interest and denying that to successful claimants in *in personam* forfeiture cases is manifest when it is realized that the Government now has complete discretion to file either an *in rem* or an *in personam* forfeiture proceeding in any case. *See* 28 U.S.C. § 2461(c). The Government in fact has shown a preference for pursuing forfeiture through *in personam* proceedings in recent years, a fondness likely to grow stronger if 28 U.S.C. § 2465(b)(1) is held not to apply to such cases.

It was well established by the time CAFRA was enacted in 2000 that petitions filed by property owners under 21 U.S.C. § 853(n) seeking to recover their property seized in *in personam* forfeiture proceedings were considered to be civil in nature. *See United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991) (holding that proceedings filed by third

party under 21 U.S.C. § 853(n) "are civil in nature . . . even though they derive from a prior criminal prosecution"); *United States v. Schwimmer*, 968 F.2d 1570, 1574 n.3 (2d Cir. 1992) (citing with approval the "well-reasoned analysis" of the Third Circuit in *Lavin*); *United States v. Alcaraz-Garcia*, 79 F.3d 769, 772 (9th Cir. 1996) ("we will follow the Third Circuit's approach [in *Lavin*] . . . and hold that the third party proceeding [under 21 U.S.C. § 853(n)] is civil in nature").

We must assume Congress was aware of these holdings when it drafted 28 U.S.C. § 2465(b)(1). *See Evans v. United States*, 504 U.S. 255, 259 (1992) (where appellate court decisions on a point of law exist, Courts will conclude that "Congress is aware of the prevailing view" when it amends a statute); *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (Court can presume that Congress is aware of settled judicial constructions of existing law).

Congress's choice of the broad language "any civil proceeding under any provision of Federal law" in 28 U.S.C. § 2465(b)(1) must be analyzed in the context of the established judicial view that proceedings filed by third party claimants in *in personam* forfeiture proceedings were civil proceedings, strongly indicating that Congress intended to treat prevailing claimants in such proceedings the same as prevailing claimants in *in rem* forfeiture proceedings. There is no indication in the statute or its scant legislative

history[2] that Congress intended disparate treatment of innocent property owners contesting forfeiture. Perhaps even more importantly, there is no reason why Congress would choose to make such a distinction either. Although the Government vigorously argues that Congress did not intend to grant fees to successful claimants in *in personam* forfeiture cases, it has yet to offer a reason why Congress would want to make such a distinction.

Furthermore, the statutory construction the Court of Appeals employed does not withstand analysis. The Court held that a 21 U.S.C. § 853(n) proceeding "cannot result in the forfeiture of a claimant's property;" rather, the "proceeding merely ensures that property belonging to a third-party claimant is not inadvertently forfeited as part of a criminal defendant's property." Pet. App. 11-12. The Court held that before the third party petitions are filed, "[f]orfeitability has already been proven," which it said "demonstrates that Section 853(n) ancillary proceedings exclude property from forfeiture and do not 'forfeit property' as required by Section 2465(b)." Pet. App. 12.

This is mere word-smithing and ignores the reality of *in personam* forfeiture proceedings. Property

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[2] The best the Government can muster is a comment by Senator Hatch that the bill contained a provision allowing property owners "who prevail against the government in civil forfeiture actions" to recover fees. There is no committee report or any other illuminating legislative history.

owners whose funds are seized in connection with a criminal prosecution of another party, and as to which an *in personam* forfeiture claim is filed under 21 U.S.C. § 853, are restricted by law to filing petitions seeking to recover their funds after the defendant has been convicted. *See* 21 U.S.C. § 853(k) (party claiming interest in property subject to *in personam* forfeiture case filed by Government may not intervene in case or file an action, other than a petition under 21 U.S.C. § 853(n), which is permissible only after preliminary forfeiture order is entered against the criminal defendant after conviction).

The Government does not obtain title to the property specified in the "preliminary order of forfeiture," Fed. R. Crim. P. 32.2(b), until a "final order of forfeiture" is entered, Fed. R. Crim. P. 32.2(c)(B)(2). Under 21 U.S.C. § 853(n)(7), a "final order of forfeiture" may only be entered *after* the Government provides notice of "its intent to dispose of the property" to any party "known to have alleged an interest in the property" that is the subject of the "preliminary order of forfeiture, and either (A) the time for a party claiming an interest in the property to "petition the court for a hearing to adjudicate the validity of his alleged interest in the property" has expired or (B) all petitions that have been filed are disposed by the Court.

Unquestionably, the Government does not and cannot obtain title to property in an *in personam* forfeiture case until it complies with the procedures provided in 21 U.S.C. § 853(n), including the Court's

disposition of all petitions filed by third parties claiming an interest in the property. Given that the Government cannot convert a "preliminary order of forfeiture" into a "final order of forfeiture" unless and until it completes the procedures and proceedings provided for in 21 U.S.C. § 853(n), proceedings under § 853(n) are by definition part of the proceedings "to forfeit property." *See United States v. Moser*, 586 F.3d 1089, 1095 (8th Cir. 2009) (expressing doubt that proceedings under 21 U.S.C. § 853(n) are not part of the proceedings to forfeit property, noting that "the government does not possess clear title to the seized property until after the conclusion of § 853(n) proceedings (or until after the posting of notice in the absence of any petitions)"), *petition for writ of certiorari filed sub nom., Jewell v. United States* (petition filed on April 8, 2010).

The view of the Court of Appeals that once a "preliminary order of forfeiture" has been entered "[f]orfeitability has already been proven" is dubious, at best. In reality, forfeitability is determined later, in the proceedings held on petitions filed under 21 U.S.C. § 853(n). It is true that the Court is supposed to assure itself before entering a "preliminary order of forfeiture" that the criminal defendant has an interest in the property, since criminal forfeiture is *in personam* in nature and only property in which the criminal defendant has an interest is subject to forfeiture. *See, e.g., United States v. Bajakjian*, 524 U.S. 321, 328 (1998); *United States v. Gilbert*, 244 F.3d 888, 919 (11th Cir. 2001); *United States v. Lester*, 85 F.3d 1409, 1413 (9th Cir. 1996).

However, there is no real procedure in the existing rules for the courts to make this determination before the "preliminary order of forfeiture" is entered. As David Smith, the leading forfeiture law commentator, notes in his treatise:

> *Unfortunately, the Rule [32.2 of the Federal Rules of Criminal Procedure] does not provide a procedure by which the court can determine whether the defendant had an interest in the property and, if so, what the extent of that interest is. Not surprisingly, most judges simply ignore the important safeguard that they must find the defendant had an interest in the property.* Rule 32.2(c)(2) provides that the 'defendant may not object to entry of the final order on the ground that the property belongs in whole or in part to a codefendant or third party.' As a practical matter, then, the only party that can assist the court in determining whether the defendant had an interest in the property is the government; and the government is all too happy to ignore the requirement that the court find that the defendant had an interest in the property.

2 D. Smith, *Prosecution and Defense of Forfeiture Proceedings* ¶ 14.08[2][a], at 14-109 (2009).

Thus, proceedings on claims filed under 21 U.S.C. § 853(n) are not just a part of the forfeiture proceedings; they are, in a very real sense, the forfeiture proceedings themselves. There usually is no reason why a criminal defendant would not agree to

forfeiture of property in which he has no interest, if that is what is sought by the Government. This is exactly what the criminal defendant acquiesced to here. Pursuant to a Plea Agreement, Maria Nolasco entered into a Consent Judgment providing for "the forfeiture of the bank accounts seized from her" even though those accounts were maintained *at a bank* and were titled to and owned by the petitioners, not Nolasco. Pet. App. 40-41, 44-45. The District Court did not hold a hearing or receive any evidence to determine whether Nolasco had any interest in the property.[3]

The issue whether property owners prevailing in *in personam* forfeiture cases are entitled to attorneys' fees and interest under 28 U.S.C. § 2465(b)(1) has received disparate treatment and inconsistent rulings in the lower courts, amplifying the need for this Court to accept this case for review. For example, in *United States v. Moser*, 586 F.3d at 1095, the Eighth Circuit concluded that "it is not entirely clear when we may characterize the forfeiture of property complete – after the extermination of the criminal defendant's rights (in which case the § 853(n) proceedings would not be 'proceedings to forfeit property') or after the

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[3] In fact, the Government never even alleged Nolasco had an interest in the seized funds, a defect only noted by the District Court when it was considering the petitions filed by the owners under 21 U.S.C. § 853(n). Nonetheless, the District Court allowed the Government to retain all funds seized from account holders who did not file petitions to recover their property. Pet. App. 55-57.

government secures clear title." Citing "the lack of a clear answer in the statutory text" and "strong arguments to support both positions as to whether a § 853(n) proceeding qualifies as 'any civil proceeding to forfeit property under any provision of Federal law,'" the Eighth Circuit in *Moser sua sponte* fell back on general principles of sovereign immunity to conclude that "we cannot say that Congress clearly and unequivocally waived sovereign immunity in this situation." *Id.*

A different analysis was used and a contrary result reached in *United States v. D'Esclavelles*, 541 F. Supp. 2d 794, 769 (E.D. Va. 2008), *rev'd on other grounds sub nom., United States v. Buk*, 2009 U.S. App. LEXIS 4502 (4th Cir. 2009). The District Court there conducted a thorough review and analysis of 28 U.S.C. § 2465 and the other forfeiture law amendments made in CAFRA and concluded that Congress intended to grant attorneys' fees to parties prevailing in proceedings held under 21 U.S.C. § 853(n). The Court found that "[b]ecause the purpose of the § 853(n) proceeding is to determine if the claimant's property is subject to government forfeiture, it is literally a 'civil proceeding to forfeit property under [a] provision of Federal law' as described in § 2465(b)(1)."

The Court in *D'Esclavelles* noted that its interpretation of § 2465(b)(1) was not only supported by the statute's plain language but also by language used elsewhere in CAFRA. The phrase in 28 U.S.C. § 2465(b)(1) – "any civil proceeding to forfeit

property" – appears only once in CAFRA, in § 2465(b)(1), the very provision at issue. In numerous other sections of CAFRA the phrase "civil forfeiture proceeding" was used. The Court found that Congress's decision to use distinct terminology in CAFRA's attorneys' fees provision, § 2465(b)(1), "strongly suggests that the phrase 'civil proceeding to forfeit property' is not interchangeable with 'civil in rem forfeiture proceeding,'" as the Government contends. 541 F. Supp. 2d at 797.

The Court in *D'Esclavelles* further explained that the applicability of § 2465(b)(1) turns on the "status of the claimant and the nature of the proceeding for which attorneys' fees are sought, not on how the government chose to initiate the seizure – thus the phrase *'under any provision* of Federal law.'" (emphasis in original). The court concluded that it made no difference that the petitioner's funds were seized in connection with a criminal forfeiture, because

> Petitioner was not a party to those proceedings and has not been accused of any criminal activity. It was only after the conclusion of the criminal forfeiture that Petitioner filed a petition, pursuant to 21 U.S.C. § 853(n), to recover the funds he invested in a proposed film production. As the hearing that followed was a "civil proceeding to forfeit property under [a] provision of Federal law," and Petitioner substantially prevailed, the government is liable for his attorneys' fees under the plain

> language of the statute. 28 U.S.C. § 2465(b)(1)(A).

United States v. D'Esclavelles, 541 F. Supp. 2d at 796. The analysis of the *D'Esclavelles* Court is cited with approval by the leading commentator. *See* D. Smith, 1 *Prosecution and Defense of Forfeiture Proceedings* ¶ 10.08, at 10-102.38(4) (2009).[4]

A contrary result was reached by a district court in *United States v. Gardiner*, 512 F. Supp. 2d 1270 (S.D. Fla. 2007). There, the Court declined an application for fees made under 28 U.S.C. § 2465 by a party which had filed a successful petition in *in personam* forfeiture proceedings conducted under 21 U.S.C. § 853. The Court held that the right to recover fees existed only in *in rem* forfeiture cases, but provided no analysis of the issue.

The importance of the right of private parties aggrieved by the unlawful seizure of their property by the Government in forfeiture proceedings to recover attorneys' fees, costs, and interest cannot be understated. Many if not most private parties cannot afford the extraordinary cost of hiring private counsel to challenge the Government to contest the seizure of their property. Aggrieved parties might be forced to accede to an unlawful seizure, even where it is clear

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[4] The Fourth Circuit's reversal in *D'Esclavelles* was on the ground that the claimant there should not have prevailed on his claim and thus he did not qualify for an award of attorneys' fees. The Court declined any further consideration of the fee issue.

the Government is acting unlawfully. This was the case for many parties whose funds were unlawfully seized by the Government here.

The Government is an intimidating adversary with unlimited resources. Even here, where millions of dollars belonging to parties not charged with any crime were unlawfully seized by the Government in a blatant misuse of a forfeiture action, many owners chose to say and do nothing. Those who had the temerity to challenge the Government have faced a withering counterattack and seemingly endless litigation in a variety of courts and jurisdictions. What if the amounts taken were not so large? Who could afford to take on the Government, or locate counsel willing to work on a contingent fee basis, if there were no right to recover fees?

Congress understood this when it enacted CAFRA forfeiture reform legislation in 2000. *See United States v. Certain Real Property*, 579 F.3d 1315, 1322-1323 (11th Cir. 2009) (CAFRA was intended to make forfeiture procedures "fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful Government seizures") (quoting H.R. Rep. No. 106-192 at 11 (1999)).

Under the holding of the Court of Appeals here, prevailing property owners in forfeiture cases that the Government elected to file on an *in personam* basis have no right to recover interest or recover attorneys' fees on their seized funds. They might, it is

true, try to recover fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. But this is quite a different thing. A fee award under EAJA is not specifically applicable to forfeiture proceedings, is not mandatory, is limited to cases where the Government's position is found not to be "substantially justified," applies only to parties meeting strict financial requirements, and fees of counsel are capped at modest statutory rates.

Parties who prevail on claims to recover their property in forfeiture cases *are entitled* under 28 U.S.C. § 2465(b)(1) to recover their attorneys' fees without regard to their net worth and without any cap on rates of counsel and without regard to the grounds for the Government's position. We can reasonably surmise that Congress did not graft on EAJA's various limitations to the remedy it created in 28 U.S.C. § 2465(b)(1) because a party who is forced to sue to recover property illegally seized by the Government is fundamentally different than a litigant who simply prevails against the Government in garden variety civil litigation to which EAJA generally applies.

Could Congress have intended that innocent property owners who prevail and recover their illegally seized property in an *in personam* forfeiture proceeding *might* only recover fees if they can satisfy all of EAJA's requirements while property owners who prevail and recover their property in *in rem* forfeiture cases are *entitled* to recover all their fees, costs, and interest under 28 U.S.C. § 2465(b)? The

cost of recovering one's own property illegally seized by the Government in forfeiture cases is no different whether the owner prevails in an *in rem* or an *in personam* forfeiture case ancillary to a criminal prosecution of another party. The wrong perpetrated on a property owner is the same regardless of the form in which the Government chose to pursue forfeiture. Congress's clear intent that citizens whose funds have been wrongfully seized in a forfeiture case be made whole should obtain under either scenario.

In sum, there is no indication that Congress intended to treat property owners who successfully recover their property differently depending upon the type of forfeiture case the Government chose to bring. Congress's inclusion of broad, open-ended language in 28 U.S.C. § 2465(b)(1) indicates claimants in both types of forfeiture cases are entitled to recover fees. There is no valid reason why Congress would have desired disparate treatment of innocent property owners in the two types of forfeiture proceedings. This Court should review this case to clarify that property owners who prevail in forfeiture proceedings governed by 21 U.S.C. § 853(n) are entitled under 28 U.S.C. § 2465(b)(1) to be made whole.

CONCLUSION

Wherefore, the petition for a writ of *certiorari* should be granted.

Dated: New York, New York

Respectfully submitted,

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