

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES)	
)	
v.)	
)	
WILLIAM SINGER,)	No.: 1:19-cr-10078-DJC
)	
Defendant, and)	
)	
JOHN B. WILSON,)	
)	
Movant.)	

**[PROPOSED] BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF MOVANT JOHN B. WILSON’S MOTION TO ADJUDICATE THIRD-
PARTY PETITION FOR RETURN OF FUNDS**

Amicus Curiae New England Legal Foundation submits this brief in support of Movant John B. Wilson’s Motion to Adjudicate Third-Party Petition Return of Funds.

I. Corporate Disclosure Statement of New England Legal Foundation

Amicus curiae New England Legal Foundation (“NELF”) states, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

II. Interest of New England Legal Foundation

NELF is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF’s membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights.

NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF's interest in this case is that of ensuring individuals, corporations, businesses and other entities are not deprived of due process of law in the forfeiture process. NELF's brief offers both statutory and constitutional analysis that it believes is distinct from the arguments already set forth by the parties and will assist the court in resolution of the matter, NELF has appeared regularly as amicus curiae before the courts in cases involving interpretation of statutes that may affect the rights of parties not to be deprived of property without due process of law.

III. Argument

The Relevant Constitutional and Statutory Framework Demands That This Court Adjudicate Mr. Wilson's Claim To The Forfeited \$1,000,000

Pursuant to the Fifth Amendment to the United Constitution: "No person shall...be deprived of life, liberty, or property, without due process of law..." The Supreme Court has long held that: "An elemental and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Supreme Court has "described the root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis in original) (internal quotations and citations omitted).

These constitutional principles must be applied upon this Court's interpretation of the criminal forfeiture statute at issue here, 21 U.S.C. § 853, as it applies to third party claimants.

That statute requires:

(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.

In this case, the Government argues that it was not required to send the Preliminary Order of Forfeiture issued on September 10, 2023, or the Court's order that the Government "shall give, to the extent practicable, direct written notice to any person alleged to have an interest in the Properties to be forfeited." (D.E. 43). The Government appears to argue that it was not required to provide "direct written notice" because: (1) it published notice of the order and (2) Mr. Wilson cannot be said to have "alleged an interest that is the subject of the order." As set forth below, both premises are faulty.

A. The Statute, Consistent With The Demands Of Due Process, Required The Government To Provide "Direct Written Notice" To Mr. Wilson

"Forfeitures of property are not favored, *United States v. One Ford Coach*, 307 U.S. 219 [1939], and this Court, as well as others, is sensitive to the mandate which requires the government to provide adequate notice to potential claimants in forfeiture proceedings." *United States v. Estevez*, 845 F.2d 1309 (7th Cir. 1988). If the government is aware of a person who has alleged an interest in the property, the statute requires "direct written notice" to that person.

Although a cursory reading of the statute's language may suggest that, upon publication, the Government "may also" provide written direct notice, this language has been held to mandate

direct disclosure. *See United States v. Erpenbeck*, 682 F.3d 472 (6th Cir. 2012). The *Erpenbeck* court reviewed Section 853(1): “Except to the extent that they are inconsistent with this section, section 881(d) of this title shall also apply to criminal forfeiture under this section.” Section 881 which governs forfeiture under violation of the customs laws “requires the government to publish notice and send direct written notice...” *Erpenbeck*, 682 F.3d at 475. Although the court noted the suggestion of a “tension” between the two statutes, it found that the criminal forfeiture language in subsection (n) expressed that direct written notice was a “substitute” for publication and not vice versa. *Id.* at 476. *See also Mullane*, 339 U.S. at 309-310 (publication not sufficient under the due process clause of the Fourteenth Amendment; actual notice to known beneficiaries required, particularly when their identities and addresses were known); *United States v. Giraldo*, 45 F.3d 509 (1st Cir 1995) (government’s sending notice to defendant’s home address insufficient under criminal forfeiture statute where government knew that defendant was incarcerated).

The *Erpenbeck* court, 683 F.3d at 475, held that reading the statute to not require direct written notice “would raise serious, likely devastating constitutional objections.” “When the government knows not whom the forfeiture affects constructive notice by publication suffices. But that is not true when the government knows or reasonably should know whom to notify. *As to them, the government must attempt to provide direct notice of the proceeding.*” *Erpenbeck*, 682 F.3d at 476 (internal citation omitted) (emphasis added). The court’s holding was buttressed by Fed. R. Crim. P. 32.2(b)(6) which requires the government to “publish notice of the order [of forfeiture] and send notice of any person who reasonably appears to be a potential claimant with standing to contest the forfeiture.” *Id.* (Emphasis added).

As the Government here knew that the Bank of America account had contained Mr. Wilson's funds (which were never distributed, apparently as directed, to Stanford or Harvard), it was required to provide direct written notice to him. The Government, not Mr. Wilson, "has the burden of establishing compliance with statutory notice provisions," *id.* at 479, and here has failed to do so.

B. Mr. Wilson Had a Known Interest in the Funds

In his submissions, Mr. Wilson has argued that the funds that he provided to KFW were held in either a constructive or resulting trust. The factual determination as to these theories are rooted in Massachusetts state law. In Massachusetts: "As a remedial device, a constructive trust has no elements, but is instead a 'flexible tool of equity designed to prevent unjust enrichment resulting from fraud, a violation of a fiduciary duty or confidential relationship, mistake, or other circumstances.' *Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 246, 867 N.E.2d 300 (2007) (quotation omitted)." *Sacco v. Circosta*, 2018 Mass. App. Unpub. LEXIS 454, *4 (2018). "Unlike a constructive trust, a resulting trust pivots on the key element of intention. The party who furnishes consideration must not intend to do so as a gift or advancement to the one who takes legal title to the property." *Maffei*, 449 Mass. at 253-254.

In this case, the Government received monies from a Bank of America account maintained by Key Worldwide Foundation ("KWF") which the Government describes as a 'sham charity [William] Singer used in furtherance of the scheme.' (D.E. 114, p. 1). KFW received \$1,000,000 from Mr. Wilson only after Mr. Singer began cooperating with the Government and purportedly solicited at the direction of the FBI. *See United States v. Pizarro-Berrios*, 448 F.3d 1, 10 (1st Cir. 2008) (cooperating witness ceased to be substantively in a conspiracy once cooperation began). Moreover, the Government alleged in its third and fourth superseding

indictments that Mr. Wilson had provided the \$1,000,000 to KFW to be provided, per agreement with Mr. Singer, as donations to Harvard and Stanford. The Government did not direct KFW or Mr. Singer to in fact distribute those funds, and having directed Mr. Singer (the cooperator) to solicit those funds, the Government knew or should have known that they were held in trust.

If the Court finds, *e.g.*, that the \$1,000,000 was held in a constructive trust, the “large majority of courts ...have determined (1) a constructive trust, despite being an equitable remedy, constitutes a ‘legal right, title or interest in...property’ under § 853(n)(6)(A), and (2) that a constructive trust can render a forfeiture order invalid pursuant to that subsection.” *United States v. Shefton*, 548 F3d. 1360 (2008). *See also United States v. Herbawi*, 972 F. Supp. 171, 174 (W.D.N.Y. 1997) (“courts have held that a constructive trust, if proven, may establish an interest in the property superior to that of the defendant.”). Moreover, the Government’s argument that Mr. Wilson has an administrative remedy to petition the Attorney General has been rejected in cases where statutory notice was required. *See, e.g., id.* at 172.

C. The Forfeiture Statute, By Its Terms, Does Not Reach Mr. Wilson’s Funds

Besides failing to provide the notice as required by the statute and due process, the Government simply did not meet the elementary statutory requirements for criminal forfeiture as to Mr. Wilson’s funds. Section 853(a) (emphasis added) is specific in describing the property that is subject to criminal forfeiture:

Any person *convicted of a violation* of this title or title III punishable by imprisonment for more than one year *shall forfeit* to the United States, irrespective of any provision of State law—

- (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
- (2) any of the person’s property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
- (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title (21 U.S.C. 848), the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against,

and property or contractual rights affording a source of control over, the continuing criminal enterprise.

In this case, the Government knew that the Bank of America account had contained \$1,000,000 that had been solicited from Mr. Wilson only after any alleged “conspiracy” ended since Mr. Singer was acting as a cooperator for the Government. *See, e.g., Pizarro-Berrios*, 448 F.3d at 10. The Government should have limited its forfeiture demand to any monies existing in that account (or other accounts) prior to Mr. Singer’s cooperation. Because Mr. Wilson ultimately was not convicted of any crime for which forfeiture applied and because the \$1,000,000 received in the account by nature could not constitute proceeds of a crime, the Government was not entitled to forfeit the \$1,000,000 in funds written on checks from Mr. Wilson.

D. Mr. Wilson Should Not Be Found To Have Actual Notice Of The Forfeiture

As set forth above, the Government was required by statute and due process to provide direct written notice to Mr. Wilson of the forfeiture order, and the statute on its face does not authorize the forfeiture of these funds. As a result, the Court need not consider the Government’s arguments that the requirement for direct notice was obviated by Mr. Wilson’s alleged “actual notice” of the forfeiture of his funds. To the extent that the Court entertains this argument, however, consideration of all the factors militates against a finding that Mr. Wilson had “actual notice” of the forfeiture of his funds in the Bank of America account.

The Government argues that Mr. Wilson’s counsel’s review on PACER of Mr. Singer’s criminal docket which contains the Preliminary Order of Forfeiture constituted “actual notice” to Mr. Wilson that the \$1,000,000 was to be forfeited and that he then was required to make his claim. As pointed out by Mr. Wilson, however, there are several problems with this argument.

First, the preliminary order of forfeiture did not specifically state that the \$1,000,000 deposited in the KWF bank account by Mr. Wilson was included in the “properties” to be forfeited. (D.E. 43). Second, at the time the order issued, Mr. Singer already had voluntarily withdrawn (in March 2019) over \$5,000,000 from the listed account by means of a cashier’s check made payable to the United States Marshal’s Service. This withdrawal left less than \$5,000 in the account. The Preliminary Order of Forfeiture makes no reference to this withdrawal/funds transferred to the United States Marshal (nor does this information appear in the Government’s motion seeking the preliminary order). Mr. Singer’s voluntary decision to pay the Government proceeds KWF received from Mr. Wilson - - presumably to curry favor with the Government - - means that preliminary order did not include the Bank of America funds provided by Mr. Wilson at all.

Second, the preliminary order itself was directed at Mr. Singer himself and by virtue of Section 853(a), the order could only be directed to funds derived from a criminal violation. At the time Mr. Wilson provided the \$1,000,000 in funds to KWF, Mr. Singer no longer was part of a criminal conspiracy since he was actively cooperating with the Government (including making a request for funds from Mr. Wilson). Thus, Mr. Wilson’s counsel’s reading of the order cannot be said to have put Mr. Wilson on “actual notice” that his funds were subject to forfeiture in Mr. Singer’s case.

Third, soon after at the time the preliminary order issued (and before the deadline for objections to the preliminary order of forfeiture in the Singer case), Mr. Wilson faced a third superseding indictment. (United States v. Wilson, 1:19cr10080-LTS, D.E. 610). Four of the counts referenced the specific \$1,000,000 in total wire transfers. The Government specifically sought forfeiture against Mr. Wilson in this indictment based on these alleged criminal

violations. Thus, the specifics in the indictment, reasonably could be considered by Mr. Wilson as the extent of any forfeiture claims against him or his funds.

E. The First Circuit's Reversal of Mr. Wilson's Convictions Requires The Court's Consideration of Mr. Wilson's Claim

As the Court is aware, Mr. Wilson appealed the convictions that served as the basis for forfeiture allegations in his own case. The First Circuit vacated these convictions in *United States v. Abdelaziz*, 68 F.4th 1 (1st Cir. 2023). The court remanded the case to the district court. The Government filed a notice of dismissal of all counts supporting the forfeiture allegations on June 29, 2023 (*United States v. John Wilson*, 1:19cr100800-LTS, D.E. 2683). Pursuant to the superseding indictment, the Government was seeking forfeiture based on "convictions" returned on certain underlying offenses.

Once the First Circuit vacated the convictions and they were dismissed, Mr. Wilson was no longer subject to criminal forfeiture. The government's asserting that this Court should not hear Mr. Wilson's claim does not comport with fundamental fairness for an individual who has not been convicted of any crime. The criminal forfeiture statute is limited to a defendant who has been convicted of a crime and reaches only proceeds of that crime. In light of these circumstances, the Court should consider Mr. Wilson's claim for the return of the \$1,000,000. Such consideration comports with Section 853(o) which instructs that "[t]he provisions of this section shall be liberally construed to effectuate its remedial purpose." The purpose of forfeiture is to prevent a criminal defendant from keeping illegal gains. Here, Mr. Wilson does not have a criminal judgment against him and the money he sent to KWF at the behest of the cooperator, Mr. Singer, cannot be subject to forfeiture.

IV. Conclusion

For the reasons set forth above, NELF respectfully urges the Court to consider Mr. Wilson's motion to adjudicate the return of the \$1,000,000 in funds that the Government received.

Respectfully submitted,

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