UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL NO. 07-103
VERSUS	SECTION "L" MAG. (5)
JAMES G. PERDIGAO aka Jamie Perdigao	VIOLATION: 18 USC 1341, 1344, 2314, 1957 & 2, 26 USC 7201 & 7206 (1)

MOTION OF DEFENDANT RENEWING AND AMENDING HIS MOTION FOR AN ADVERSARY HEARING, SPECIFYING RELIEF DESIRED AND MOVING TO SCHEDULE PROCEEDINGS FOR RETURN OF PROPERTY

COMES NOW Defendant, JAMES G. PERDIGAO, by and through counsel, and hereby renews and amends "Defendant's Motion and Incorporated Memorandum for Adversary Hearing or, Alternatively, for Release and Exemption of Assets from Forfeiture to Pay Attorney's Fees, Defense Costs and to Deposit Federal Income Taxes" filed herein on July 10, 2007. DE 58.

Defendant more specifically moves this Court pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure for an Order directing the Attorney General, Plaintiff, United States of America, and its agencies, the United States Marshal's Service and the Federal Bureau of Investigation, to return his property which it is depriving him from possessing and using, to wit, the sum of $29,636,909.00, and interest which has been earned by or accrued upon that sum. (Defendant understands, of course, that considerable process may be required before all his property is returned to him. Yet, he objects to the government's holding his property and demands its return even if it takes an adversary evidentiary hearing, as prayed for below.)

Defendant further moves for an Order dissolving or modifying the protective Order entered herein on November 9, 2004, and extended from time to time thereafter, and directing

the Attorney General, Plaintiff, United States of America, and its agencies, the United States Marshals Service and the Federal Bureau of Investigation, to release and return to him and exempt from forfeiture at least $12,000,000 which he may use only to pay for (1) fees, costs and expenses arising from the defense of his liberty and property necessitated by this criminal case, (2) taxes which appear to be due and owing, and (3) reasonable expenses of living.

In the event the Court does not immediately order the return of property and exemption from forfeiture and the government does not voluntarily do so, then Defendant moves for an Order directing the government to make a full accounting for the Defendant's money setting forth with particularity the grounds and reasons for its contention that the property is subject to forfeiture, and so may be restrained on that basis, and addressing with specificity the factual and legal points raised in the Defendant's accompanying memorandum.

Likewise, in the event there is no immediate release of property and exemption from forfeiture, then Defendant moves pursuant to Rule 6(e)(3)(E) of the Federal Rules of Criminal Procedure for an Order directing disclosure to him of the instructions, if any, given to the grand jurors on issues of forfeiture and directing the United States Attorney and all court reporters taking down or otherwise recording the proceedings to cooperate fully in making this disclosure.

Additionally, also in the event there is no immediate release of property and exemption from forfeiture, Defendant moves pursuant to Rule 6(e)(3)(E), Federal Rules of Criminal Procedure, for an Order directing production to the presiding judge for in camera inspection of the record (1) of the testimony (minutes, notes, transcripts, tapes, etc.) and exhibits presented to the grand jurors about forfeiture issues, and (2) of the argument, comments or advice provided to them, or requests made of them, concerning such issues.

Finally, Defendant moves for an Order setting an adversary evidentiary hearing at which the Plaintiff, United States of America, will be called upon to justify its deprivation of Defendant's property.

Meanwhile, Defendant moves for an Order scheduling proceedings for return of his property and (1) directing the government to serve and file its accounting on or before October 17, 2008, (2) allowing Defendant until November 17, 2008, to make a full submission in support of his motion and file a complete supporting memorandum, (3) directing the Plaintiff, United States of America, to file and serve its legal response thereto, including any memorandum in opposition, by December 1, 2008, (4) allowing Defendant until December 15, 2008, to file any reply, (5) then directing the production of the requested materials related to the grand jury by December 30, 2008, and (6) thereafter, setting the motion for an adversary evidentiary hearing, if one is required.

In support of his motion, Defendant states that he is aggrieved as follows:

1. The basic facts are outlined in the Defendant's motion, now being amended and renewed, for release of his property and exemption of them from forfeiture.

2. Part of the argument for an adversary hearing to gain such relief is set forth in the memorandum submitted in support of that motion, although Fifth Circuit law has now advanced in his favor. United States v. Holy Land Foundation for Relief and Development, 493 F.3d 469 (5th Cir. 2007) (en banc).

3. Of key importance, the government has been holding the Defendant's property, about $29,636,909, since February 24, 2005. On information and belief, the U.S. Marshals Service has not placed these funds in an interest bearing account.

4. Defendant has asked the prosecution to release funds. On July 10, 2007, the "Defendant's Motion and Incorporated Memorandum for Adversary Hearing or, Alternatively, for Release and Exemption of Assets from Forfeiture to Pay Attorney's Fees, Defense Costs and to Deposit Federal Income Taxes" was filed. DE 58.

5. On July 27, 2007, the prosecution filed a Superseding Indictment. DE 62.

6. On April 3, 2008, the Court entered a Scheduling Order providing that the motion for release of assets from forfeiture will be reset after the motion for recusal is heard.

7. The motion for recusal is under submission on a motion for reconsideration. Nonetheless, the Defendant believes he should bring his motion for release of funds forward.

8. The defense has engaged additional counsel to pursue that motion for release of funds from forfeiture. New counsel requires time to familiarize himself with the case and prepare for any hearing which the Court may afford. This renewed and amended motion, along with its memorandum of law, is the first step in what the Defendant hopes is an orderly process for ensuring that he enjoys his rights guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

9. This renewed and amended motion is supported by a memorandum of law which is titled "Preliminary" because there are many issues to be resolved and it will take time to sort them out.

10. This motion is also supported, in pertinent part, by the memorandum being filed contemporaneously in support of his motion for disclosure of unprivileged grand jury information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2008**,** I electronically filed the above and foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 26th day of September, 2008.

s/ William F. Wessel
WILLIAM F. WESSEL (8551)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL NO. 07-103
VERSUS	SECTION "L" MAG. (5)
JAMES G. PERDIGAO	VIOLATION: 18 USC 1341, 1344, 2314, 1957 & 2, 26 USC 7201 & 7206 (1)

PRELIMINARY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S RENEWED AND AMENDED MOTION FOR ADVERSARY HEARING, SPECIFYING RELIEF DESIRED AND MOVING TO SCHEDULE PROCEEDINGS FOR RETURN OF PROPERTY

This memorandum is respectfully submitted by defendant James Perdigao, through undersigned counsel, in support of his renewed and amended motion for adversary hearing specifying relief desired and moving to schedule proceedings for return of property. Although defendant attempts to address many of the deficiencies in the prosecution's ambitious forfeiture allegations, defendant reserves the right to supplement this preliminary memorandum of law to more fully apprise the court of the law which governs the prosecution's overreaching forfeiture attempts.

I. THE PROSECUTION IS UNLAWFULLY DEPRIVING DEFENDANT OF SIX MILLION DOLLARS WHICH ARE NOT EVEN ALLEGED TO BE SUBJECT TO FORFEITURE

The prosecution's most ambitious allegation of forfeiture in the Superseding Indictment demands "approximately $23,000,000.00." Notice of Interstate Transportation of Stolen Property Forfeiture, DE 62 at 17, ¶ 2. But the prosecution holds $29,636,909.00 of the defendant's funds. Thus, at the outset, the prosecution is obliged to return approximately $6,636,909.00 to him. It is simple math ($29,663,909 - $23,000,000 = $6,636,909).

The law is plain and simple as well. The Government cannot forfeit more property than it has alleged in its indictment. Therefore, the Government cannot now deprive the Defendant of more property than it has alleged in the indictment.

The two indictments tell the tale. The maximum forfeiture alleged in the original Indictment is "$30,000,000.00." Notice of Money Laundering Forfeiture, DE 23 at 15, ¶ 2. But the maximum forfeiture alleged in the second Superseding Indictment is the "approximately $23,000,000.00" figure. Again, the difference between $30 million and $23 million is $7 million. More importantly, the difference is that with this six or seven million dollars the accused stands a chance of being able to defend himself.

II. THE SUPERSEDING INDICTMENT DOES NOT ALLEGE THAT THE FORFEITURE CLAIMS ARE TO BE ADDED ONE UPON ANOTHER, IF THAT IS WHAT THE PROSECUTION INTENDS, AND SUCH MULTIPLE COUNTING OF THE SAME FUNDS IS FORBIDDEN AS A MATTER OF LAW

The prosecution may not hold on to the Defendant's money on the theory that if you could add the forfeiture counts together they would total in excess of $29,636,909, namely, the

sum of approximately $51,905,000.[1] You cannot add them on to each other. Double counting breaks forfeiture law. 2 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 13.02[6] (2007 ed.). E.g., United States v. Genova, 333 F.3d 750, 762 (7th Cir. 2003); United States v. Segal, 495 F.3d 824, 838-40 (7th Cir. 2007); United States v. Trost, 152 F.3d 715, 721 (7th Cir. 1998); United States v. Ford, 2003 U.S. App. LEXIS 10432 (6th Cir. May 22, 2003); United States v. Reiner, 297 F. Supp. 2d 101, 114 (D. Me. 2005); United States v. Tedder, 2003 U.S. Dist. LEXIS 27184 (W.D. Wis. July 28, 2003), aff'd, 403 F.3d 836 (7th Cir. 2005); Pacheco v. Serendensky, 393 F.3d 348, 355 (2d Cir. 2004); United States v. Ofchinick, 883 F.2d 1172, 1182 (3d Cir. 1989); United States v. Hosseini, 2007 U.S. Dist. LEXIS 60096, *23 (N.D. Ill. Aug. 16 2007); United States v. Russo, 2007 U.S. Dist. LEXIS 11075, *18 (S.D. Ala. Feb. 14, 2007); United States v. McKay, 506 F. Supp. 2d 1206, 1211 (S.D. Fla. 2007).

In the present case, the prosecution appears to subscribe to counting beyond double. It seeks forfeiture of the property transported in interstate commerce (funds wire transferred from

[1] The addition is simple, albeit prohibited:

Notice of Bank Fraud Forfeiture	$2,700,000 (approx.)
Notice of Mail Fraud Forfeiture	$7,000,000 (approx.)
Notice of Money Laundering Forfeiture	$19,205,000 (approx.)
Notice of Interstate Transportation of Stolen Property Forfeiture	$23,000,000 (approx.)
TOTAL:	$51,905,000 (approx.)

Louisiana banks to a New York bank) based upon the theory that it is stolen. Superseding Indictment, DE 62 at 17. Yet that is the theory of criminality under which the prosecution seeks forfeiture of the very same money as the proceeds of mail fraud and bank fraud. The money must be forfeited, the government claims, as the fruit of this fraud. The money which is transported must be forfeited again because it is the fruit of this underlying fraud which makes it "stolen."

In other words, the "approximately $7,000,000.00" claimed in the Notice of Mail Fraud Forfeiture, DE 62 at 15, ¶ 2, and the "approximately $2,700,000.00" claimed in the Notice of Bank Fraud Forfeiture, id. at 14, ¶ 2, are part and parcel of the "approximately $23,000,000.00" claimed in the Notice of Interstate Transportation of Stolen Property Forfeiture. Id. at 17, ¶ 2. The proceeds originated in the fraud counts are stolen funds moved out of state by wire transfer.[2]

Likewise, the prosecution seeks another forfeiture of the same funds because they were next moved out of country by wire transfer. Banking practice requires that funds being wire transferred from banks in Louisiana to a bank in Switzerland be routed through a bank in New York. But forfeiture law does not permit a cumulative forfeiture. E.g., United States v. Tedder, 2003 U.S. Dist. LEXIS 27184 (W.D. Wis. July 28, 2003) (holding that government may not increase amount of forfeiture by double counting under 18 U.S.C. § 1957; government found no

[2] To be clear, the funds wire-transferred from the two Louisiana banks to the Bank of New York included clean money legitimately earned by the defendant and saved away over the years. The prosecution's bid to forfeit clean money, based upon a theory of commingling funds, is raised below at Point IV.

case where court counted the same money twice or more to reflect multiple laundering transactions), aff'd, 403 F.3d 836 (7th Cir. 2005).[3]

Let us elaborate. Counts 41-50 (captioned "Money Laundering") allege that the property and funds wire transferred from a New York bank and deposited in a Swiss bank are proceeds "derived from specified unlawful activity, that is, the interstate transportation of money in the amount of approximately $19,205,000.00 that was stolen, converted, embezzled and taken by fraud." DE 62 at 10. The money which was moved from New York to Switzerland is the same as the money moved from Louisiana to New York, i.e., the underlying specified unlawful activity is the alleged mail fraud and bank fraud (plus the clean money earned by the defendant). So the prosecution appears to be counting the same fruit more than twice.

For that matter, the proceeds of the mail fraud seem themselves to have been counted and totaled in a duplicative fashion. The Notice of Mail Fraud Forfeiture, DE 62 at 14-15, relies not only on Counts 13-30 (captioned "Mail Fraud - False Billing Invoices Scheme") but also on Counts 56-59 (captioned "Mail Fraud - Filing False Louisiana State Income Tax Returns"). The theory of these state tax counts is that the Defendant filed false and fraudulent Louisiana Resident Individual State Income Tax Returns "which concealed his true income thereby effectively eliminating his Louisiana State personal income tax liability resulting in a loss of thousands of dollars of tax revenue to the Louisiana Department of Revenue, State of Louisiana."

[3] The court should not be alarmed by mention of a Swiss bank account. The funds were transferred with advice of counsel. The funds were moved from Louisiana, passed through a correspondent bank in New York, and arrived at a bank in Switzerland where they were held in the name of Defendant James Gunther Perdigao. The Credit Suisse account was not a secret, numbered bank account. Nor has the government charged that the wire transfers were designed to conceal or disguise the nature, location, source, ownership or control of the proceeds of the specified unlawful activity. The money laundering counts are predicated solely upon 18 U.S.C. § 1957 and not 18 U.S.C. § 1956.

DE 62 at 13, ¶ 2. No exact amount of tax revenue loss is alleged, but the "true income" concealed, of course, must be the proceeds of the alleged mail fraud and bank fraud schemes.

In conclusion, the Superseding Indictment resembles a wild machine which duplicates and recycles sums. First, the mail fraud forfeiture claim is built primarily upon the proceeds of an alleged false billing invoices scheme. The bank fraud forfeiture claim is built upon the proceeds of an alleged stolen checks scheme. These fraud proceeds then seem to be characterized as unreported "true income" and lumped into state tax counts as proceeds of that scheme. Those proceeds, or the value of the tax loss, is deemed to be a part of the mail fraud forfeiture. The pleading is convoluted. The reasoning is hard to follow, but it seems circular.

Second, in any event, the proceeds of all these schemes are next packed into the interstate transportation of stolen property forfeiture as the money wire-transferred from Louisiana to New York. Then these same proceeds are re-packed into the money laundering forfeiture as the funds transferred onward from New York to Switzerland.

Without an accounting by the prosecution one cannot determine exactly how many times and in how many ways it is counting the same money. But, for sure, neither the Superseding Indictment nor forfeiture law support creative mathematics by which any ultimate forfeiture would exceed the 23 million dollar figure alleged in the ambitious Notice of Interstate Transportation of Stolen Property.

The 23 million dollar figure itself is a stretch of the law. As a matter of law.

III. ON THE FACE OF THE NOTICES OF FORFEITURE FOR INTERSTATE TRANSPORTATION OF STOLEN PROPERTY, MAIL FRAUD AND BANK FRAUD IT IS PLAIN THAT THE PROSECUTION SEEKS FORFEITURE OF PROPERTY ON THE GRAND THEORY THAT IT IS "INVOLVED IN" THESE OFFENSES WHEREAS THE AUTHORIZING STATUTE LIMITS FORFEITURE JUST TO PROCEEDS OF OFFENSES

The Superseding Indictment reveals an ambition to forfeit property beyond the scope of what Congress has authorized. Let us start our discussion with the Notice of Interstate Transportation of Stolen Property Forfeiture. The forfeiture statute invoked in this part of the indictment allows forfeiture of "proceeds" of crime. 18 U.S.C. § 981(a)(1)(C). But the notice of forfeiture impermissibly expands the concept beyond the terms of the statute. See United States v. Santos, 553 U.S. ___, 128 S.Ct. 2020, 170 L.Ed. 2d 912 (2008).

The forfeiture statute uses standard language to define the scope of the forfeiture: "Any property, real or personal, which constitutes or is derived from proceeds traceable to … any offense constituting 'specified unlawful activity' (as defined in § 1956(c)(7) of this title) . . . ." 18 U.S.C. § 981(a)(1)(C). The notice of forfeiture tracks this language and, then, asserts this forfeiture also includes property which was "involved in" the interstate transportation of stolen property offenses. DE 62 at 17, ¶ 2. The words "involved in" do not appear in the governing sub-paragraph of the statute invoked. Moreover, Congress placed this phrase into another forfeiture statute which is limited to money laundering offenses. 18 U.S.C. § 982(a)(1). By basic canons of statutory construction, including the principles of comparison and contrast, when Congress used the phrase in a provision setting the scope of forfeiture for one variety of offense (money laundering) and did not employ it for another variety (interstate transportation of stolen

property), it has excluded the phrase from the latter offense. What Congress has excluded, neither the Grand Jury nor the U.S. Attorney are free to employ. Further, if there were any ambiguity in the statutes, the rule of lenity would require that it be strictly construed in favor of the accused. Santos.

The Notice of Mail Fraud Forfeiture stakes out the same expansive claim. The same forfeiture statute is invoked. 18 U.S.C. § 981(a)(1)(C). The same "involved in" language is slipped into the pleading. See DE 62 at 15, ¶ 2.

We speak advisedly when we say it is "slipped in." The original Indictment correctly tracked the statutory language. DE 23 at 14, ¶ 2. The Superseding Indictment, however, tacks on the "involved in" language. (For the Court's convenience, a chart is attached hereto, as Exhibit A, illustrating the addition of the "involved in" theory to the scope of the forfeiture demanded and the narrow scope of what the statute truly allows.)

The Notice of Bank Fraud Forfeiture likewise newly states a claim for proceeds which is defined in terms of property which was "involved in" the offenses. (Exhibit B is a chart demonstrating this creative pleading.) The statute invoked for the bank fraud accusations, 18 U.S.C. § 982(a)(2), sets forth the authority for forfeiture of proceeds in language similar to that of 18 U.S.C. § 981(a)(1)(C) which governs interstate transportation of stolen property and mail fraud forfeitures. And the Superseding Indictment nonetheless employs the unauthorized "involved in" language.

Thus the Notice for interstate transportation of stolen property offenses seeks a forfeiture of "approximately $23,000,000.00" for proceeds "including but not limited to" anything which was "involved in" the offenses. (Exhibit C is a chart displaying the limited legal basis for this

claim.) The Notice for mail fraud seeks a forfeiture of "approximately $7,000,000.00" for proceeds "including but not limited to" anything which was "involved in" those offenses. And, the Notice for bank fraud forfeiture seeks a forfeiture of "approximately $2,700,000.00" for proceeds "including but not limited to" anything which was "involved in" those offenses. The pleading, on its face, reveals the legal overreaching of the prosecution. An accounting and a hearing is required to establish the extent of the overreaching.

For sake of completeness and candor, let it be said that the Notice for money laundering seeks a forfeiture of "approximately $19,205,000.00" for property "involved in" those alleged offenses and that this phrase actually appears in the governing statute, 18 U.S.C. § 982(a)(1). (Exhibit D shows the legal basis for the money laundering forfeiture statutes.) So the pleading, on its face, shows no overreaching here.

Having said that, we point out that the difference between $23,000,000 and $19,205,000 is $3,795,000. The difference between the sum the government is holding, $29,636,909, and the alleged $19,205,000 is $10,431,909. We are talking more than ten million dollars which needs to be freed promptly.

Coincidentally or otherwise, the difference between the prayer of the Notice of Money Laundering Forfeiture in the first Indictment ($30,000,000) and the prayer of the Superseding Indictment (approximately $19,205,000) is more than ten million dollars too. (Approximately $10,795,000.) With respect to money laundering forfeiture, although the government has retreated ten million dollars worth (see Exhibit D), it has not returned a single penny.

As stated at the start, all funds which are not alleged to be subject to forfeiture should be returned. Forthwith. In addition, all clean money in the funds wire transferred from Louisiana to New York and on to Switzerland should be returned.

IV. RELYING ON AN INAPPOSITE THEORY THAT CLEAN MONEY MUST BE FORFEITED IF IS "COMMINGLED" WITH DIRTY MONEY, THE PROSECUTION IS DEPRIVING DEFENDANT OF PROPERTY WHICH IS PROTECTED FROM CRIMINAL FORFEITURE

We gather that the prosecution thinks it can hold onto all of the Defendant's money by virtue of a theory that the Defendant placed tainted funds in bank accounts containing legitimate funds and, therefore, he will be punished by forfeiture of everything in the accounts. Any such theory must be exposed, whittled down to size, and analyzed.

To begin with, the prosecution cannot forfeit more than is alleged. The $23,000,000 prayer of the ITSP Notice is the maximum. See Points I and II above.

Further, ITSP offenses are punishable by forfeiture of proceeds but not by forfeiture of property "involved in" the prohibited transportation. See Point III above. The theory by which the commingling of clean money and dirty money may ever exact forfeiture of the whole bank account is a creature of statutes authorizing forfeiture of funds "involved in" an offense.

The only offenses in this case properly invoking the "involved in" basis for forfeiture, 18 U.S.C.§ 982(a)(1), are the 18 U.S.C. § 1957 money laundering counts. And the extent of the forfeiture alleged for money laundering is about $19,205,000. This number is more than ten million dollars short of the $29,636,909 which the government holds.

The $19,205,000 transferred from New York to Switzerland is merely the starting point of the analysis. The scope of forfeiture under the prong of 18 U.S.C. § 982(a) which allows forfeiture of funds "involved in" a money laundering offense is limited by United States v. Tencer, 107 F.3d 1120 (5th Cir.), cert. denied, 522 U.S. 960 (1997), Due Process of Law, the rule of lenity and common sense. In Tencer, our Court of Appeals faced a government claim for criminal forfeiture of an entire bank account made up of tainted and legitimate funds. The court concluded that "merely pooling tainted and untainted funds in an account does not, without more, render that account subject to forfeiture." 107 F.3d at 1134.

That something "more" must be a primary purpose to disguise the nature and source of the specified unlawful activity. 1 David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 5.01[1][c] at 5-16 (2007 ed.). Compare Tencer, 107 F.3d at 1135, with Cuellar v. United States, 553 U.S. ___, 128 S.Ct. 1994, 170 L.Ed. 2d 942 (2008). After the Supreme Court's unanimous decision in Cuellar, proving that primary purpose will be hard to do.

The something "more" also requires a substantial nexus by which the presence of the clean money in the account facilitates the crime involving the dirty money. See United States v. Loe, 49 F. Supp. 2d 514, 519 (E.D. Tex. 1999). In the present case, the Superseding Indictment alleges no design to disguise any tainted money being wire transferred to Switzerland by commingling it with legitimate money. This indictment alleges no such substantial nexus between the funds. Moreover, under the prosecution's view of the case, the amount of the supposedly tainted money exceeds the amount of the legitimate money. Thus, it makes no sense to argue that the primary purpose of the wire transfers to Credit Suisse was to disguise, conceal

or otherwise hide dirty money with clean money. Common sense says that the primary purpose of the money movements was to get the money--all of it--outside of the country.

V. SINCE THE ACCUSATIONS BEGIN YEARS BEFORE THE EFFECTIVE DATE OF CAFRA AND THE START DATE FOR THE STATUTE OF LIMITATIONS AND BECAUSE THE PRAYER FOR MAIL FRAUD FORFEITURE HAS BALLOONED BETWEEN INDICTMENTS, THERE IS FURTHER REASON TO QUESTION THE EXTENT OF THE FORFEITURE DEMANDS

There are many curious things about the pleadings in this case. Let's look at them now from the perspective of time frames.

The charges and forfeitures are governed by a five year statute of limitations. 18 U.S.C. § 3282(a). The original Indictment was dated and filed March 16, 2007. DE 23. The Defendant, therefore, cannot be prosecuted, tried or punished for any offense committed before March 16, 2002.

The effective date of the Civil Asset Forfeiture Reform Act is August 23, 2000. Therefore, as to forfeiture based upon interstate transportation of stolen property ("ITSP") and mail fraud offenses, no forfeiture is authorized for transactions completed prior to August 23, 2000. Otherwise, the law would be applied ex post facto and in violation of Due Process of Law. See 2 David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 13.01 at 13-9 & n.27 (2007 ed.).

In both the first and second indictments, the bank fraud is alleged to have begun as early as 1991 and continued to about October 2004. DE 23 at 2, part A.2, & at 3, part B; DE 62 at 2, part A.2 & at 3, part B. In both, the mail fraud is alleged to have begun as early as 1993 and

continued to about October 2004. DE 23 at 6, ¶ 2; DE 62 at 6, ¶ 2. The first indictment claims that as a result of a false billing invoices scheme Defendant obtained "approximately $2 million dollars" from clients Pinnacle and Boomtown. DE 23 at 6, ¶ 2. The second indictment, however, claims that as a result of the same false billing invoices scheme Defendant obtained "approximately $7 million dollars" from these clients. DE 62 at 6, ¶ 2. The notice of Mail Fraud Forfeiture in the first indictment specified no amount. DE 23 at 14-15. The Notice for the second indictment, though, demands the "approximately" seven million dollars aggregated since 1993. DE 62 at 15, ¶ 2.

The mysterious swelling in the amount demanded may be explained by a prosecutorial decision to ignore the statute of limitations and/or the protection of the Ex Post Facto clause of our Constitution. U.S. Const., art. I, § 9, cl. 3. Or it may be explained by a prosecutorial decision to disregard the legal work done--the cost to the service provider and the value to the client--and treat the entire billings as the measure of the crime and ensuing forfeitures.

Given these possibilities of overreaching and the indefiniteness of the accusations, this is another instance in which an accounting is in order. And, then, a hearing.

VI. THE AMOUNT OF FUNDS CLAIMED BY THE NOTICES OF FORFEITURE FOR INTERSTATE TRANSPORTATION OF STOLEN PROPERTY, BANK FRAUD AND MAIL FRAUD EACH EXCEED THE AMOUNT SPECIFIED IN THE UNDERLYING COUNTS FOR THE OFFENSES

"Defendant's Motion and Incorporated Memorandum for Adversary Hearing or, Alternatively, for Release and Exemption of Assets from Forfeiture to Pay Attorney's Fees, Defense Costs and to Deposit Federal Income Taxes" was filed on July 10, 2007. DE 58. There

Defendant made a prima facie showing of a good faith reason to believe the grand jury erred in determining that all the restrained assets are subject to forfeiture. This showing analyzed the Indictment and demonstrated that the amounts of the invoices, checks and wire transfers specified did not add up to the amount of funds being held by the government. Id. at 6-9 and Exhibit 3 (forfeiture spreadsheet).

On July 27, 2007, the Government filed a Superseding Indictment. DE 62. Although the numbers were shifted in the new accusation, the analysis remains pretty much the same. The prosecution is still depriving the Defendant of funds which exceed the amounts identified by the invoices, checks and wire transfers specified in the accusation.

Much is wrong with the pleading of forfeitures in this case. But let us start, for illustrative purposes, with an item that is right (on its face).

A. Money Laundering Forfeiture

The Notice of Money Laundering Forfeiture demands the sum of "approximately $19,205,000.00" and, significantly, is supported by transactions--wire transfer deposits in the Credit Suisse Bank--in amounts which add up to $19,205,000.00 Compare DE 62 at 10 with id. at 16, ¶ 2. (Exhibit E is a chart making the comparison of amounts enumerated in these substantive counts and the amount of the demand for forfeiture.)

B. Interstate Transportation of Stolen Property Forfeiture

A comparison of the Notice of Interstate Transportation of Stolen Property Forfeiture to the wire transfers enumerated in the substantive counts, however, tells a different story. The demand is for "approximately $23,000,000.00." The wire transfers total only $19,205,000.00.

In monetary terms, the difference between the demand and the wire transfers specified is approximately $3,795,000. (Exhibit F is a chart setting forth the ITSP computations.)

This analysis of prosecutorial over-demand does not address the general allegation added to the Superseding Indictment claiming that "[b]eginning at a time unknown but as early as 1991 and continuing through on or about October 2004" Defendant Perdigao transferred to unidentified bank accounts he controlled, in unidentified transfers, funds "totaling approximately $23 million dollars." DE 62 at 8, ¶ 2. But the failure of the Superseding Indictment to list any transactions accounting for the $3,795,000 indicates that the grand jury did not make any findings to support the overage.

C. Mail Fraud Forfeiture

Next, Exhibit G lays out the computations for the mail fraud forfeiture. The demand is "approximately $7,000,000.00." The invoices total merely $143,743.60. The difference between the sum prayed for and the invoices specified is about $6,856,256.40.

This analysis of the mail fraud over-demand does not address the general allegation (plumped up in the Superseding Indictment from $2 million dollars to $7 million dollars) claiming that "[b]eginning at a time unknown but as early as 1993 and continuing through on or about October 2004" Defendant was creating false and fictitious legal billing invoices "to obtain approximately $7 million dollars from Pinnacle and Boomtown." DE 62 at 6, ¶ 2. No invoices, dates or amounts are identified to account for the $6,856,256.40 difference.

This analysis also does not deal with the Louisiana state tax counts incorporated into the mail fraud forfeiture demand because Counts 56 through 59 allege an unquantified loss of "thousands of dollars" of state tax revenue. DE 62 at 13, ¶ 2.

D. Bank Fraud Forfeiture

Finally, Exhibit H compares the prayer for bank fraud forfeiture, "approximately $2,700,000.00," to the total amount of the checks enumerated in the counts, $1,059,977.22, and sets forth the difference of about $1,640,022.78.

Again, the reckoning cannot address unknown transactions. Count 1 claims, among other things, that part of a scheme to defraud Bank One ran from about the start of November 2003 through the end of August 2004 and that Defendant "stole approximately 2.2 million dollars in checks belonging to Adams and Reese" and deposited them into his Bank One accounts. DE 62 at 3-4, part B. In the absence of any pleading identifying such basics as what checks, from whom, what for, which deposits, in what amounts, and when, one is at a loss to understand why the $1,640,022.78 difference is legitimately subject to forfeiture. Difficulties like these demonstrate why the Federal Rules of Civil Procedure require that averments of fraud shall be stated with particularity. Fed. R. Civ. P. 9(b).

E. Conclusion

Analyzing the invoices, checks, deposits and transfers identified in the Superseding Indictment, one discerns demands which greatly exceed specifications. The apparent over-demands are staggering amounts. They total about $12,291,279.18.[4]

Given that the Superseding Indictment goes to the trouble of listing invoices, checks deposited, and funds wire transferred, one can infer that the Grand Jury was not presented discrete evidence about other transactions, was not instructed upon them, and did not deliberate upon them. There is good cause to believe the grand jury erred in determining the amount of Defendant's assets which are truly subject to forfeiture.

[4] Here is the addition:

ITSP (Exhibit F)	$3,795,000.00
Mail Fraud (Exhibit G)	$6,856,256.40
Bank Fraud (Exhibit H)	$1,640,022.78
TOTAL:	$12,291,279.18

VII. UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE DEFENDANT IS ENDOWED WITH RIGHTS TO HAVE HIS PROPERTY RETURNED TO HIM SO THAT HE MAY USE IT TO DEFEND HIMSELF, PAY HIS LIVING EXPENSES, AND REMIT HIS TAXES

On July 10, 2007, Defendant filed his original motion and memorandum seeking an adversary hearing or release of assets from forfeiture to pay attorneys' fees, defense costs and federal income taxes. DE 58. One week later, on July 17, 2007, our Court of Appeals rendered its en banc opinion in United States v. Holy Land Foundation for Relief and Development, 493 F.3d 469 (5th Cir. 2007). That opinion requires a reformulation of the test for securing a post-indictment adversary hearing when the government seeks to restrain an individual's private property.

The en banc court turned to the "time-honored" test of Mathews v. Eldridge, 424 U.S. 319 (1976), to determine when a hearing is required. 493 F.3d at 475. There are three factors to consider now, not just the two criteria articulated in United States v. Jones, 160 F.3d 641 (10th Cir. 1998), and in United States v. Prejean, 2005 WL 3543817 (E.D. La.) (Fallon, J.). Here is how the Court of Appeals put it in the Holy Land Foundation case:

> To determine when such a hearing is required, we consider the three Eldridge factors: the private interest that will be affected by the restraint; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the burdens that the hearing would entail. 424 U.S. at 335, 96 S.Ct. 893. As we observed in Melrose East Subdivision, circuits employing this test have found that a property owner's interest is particularly great when he or she needs the restrained assets to pay for legal defense on associated criminal charges, or to cover ordinary and reasonable

> living expenses. See Melrose East Subdivision, 357 F.3d at 499-500 (collecting cases).

493 F.3d at 475.

The new test is more favorable to the accused. The present renewed and amended motion for an adversary hearing points out a host of new reasons for questioning the prosecution's restraint of the Defendant's property. The prosecution, thus, should either release funds or account for what it is doing and prove, at an adversary evidentiary hearing, its entitlement to hold back funds.

CONCLUSION

The Defendant's renewed motion for an adversary hearing should be granted, as amended herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2008**,** I electronically filed the above and foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 26th day of September, 2008.

s/ William F. Wessel
WILLIAM F. WESSEL (8551)

LEGAL BASIS FOR FORFEITURE:
MAIL FRAUD ACCUSATIONS

Scope of Notice of Mail Fraud Forfeiture; First Indictment (Counts 13 – 30 & 56 – 59)	**Scope of Notice of Mail Fraud Forfeiture; Second Indictment (Counts 13 – 30 & 56 – 59)**	**Scope of Forfeiture Statute Invoked: 18 United States Code § 981(a)(1)(C)**
"…any and all property, real or personal, which constitutes or is derived from proceeds traceable to violations." Page 14, ¶ 2	"… any and all property, real or personal, which constitutes or is derived from proceeds traceable to violations of Title 18, United States Code, Section 1341, including but not limited to: approximately $7,000,000.00 in United States currency and all interests and proceeds traceable thereto in that such sum in aggregate is property which was involved in the aforesaid offenses or is traceable such property." Page 15, ¶ 2	"(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to … any offense constituting 'specified unlawful activity' (as defined in § 1956(c)(7) of this title) …."

EXHIBIT A

EXHIBIT A

LEGAL BASIS FOR FORFEITURE:
BANK FRAUD ACCUSATIONS

Scope of Notice of Bank Fraud Forfeiture; First Indictment (Counts 1 – 12)	**Scope of Notice of Bank Fraud Forfeiture; Second Indictment (Counts 1 – 12)**	**Scope of Forfeiture Statute Invoked: 18 United States Code § 982(a)(2)**
"… any and all property, real or personal which constitutes or is derived from proceeds obtained directly or indirectly, as a result of a violation of Title 18, United States Code, Section(s) 1344 (bank fraud.)" Page 13, ¶ 2	"… any property which constitutes or is derived from proceeds obtained directly or indirectly, as a result of violations of Title 18, United States Code, Section 1344, including but not limited to: approximately $2,700,000.00 in United States currency and all interests and proceeds traceable thereto in that such sum in aggregate is property which was involved in the aforesaid offenses or is traceable such property." Page 13, ¶ 2	"… any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation."

EXHIBIT B

EXHIBIT B

LEGAL BASIS FOR FORFEITURE:
INTERSTATE TRANSPORTATION OF STOLEN PROPERTY ACCUSATIONS

[NO INTERSTATE TRANSPORTATION OF STOLEN PROPERTY FORFEITURE ALLEGED IN FIRST INDICTMENT]	**Scope of Notice of Interstate Transportation of Stolen Property Forfeiture; Second Indictment (Counts 31 – 40)**	**Scope of Forfeiture Statute Invoked: 18 United States Code § 981(a)(1)(C)**
	"… any and all property, real or personal, which constitutes or is derived from proceeds traceable to violations of Title 18, United States Code, Section 2314, including but not limited to: approximately $23,000,000.00 in United States currency and all interests and proceeds traceable thereto in that such sum in aggregate is property which was involved in the aforesaid offenses or is traceable such property." Page 17, ¶ 2	"(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to … any offense constituting 'specified unlawful activity' (as defined in § 1956(c)(7) of this title) …."

EXHIBIT C

LEGAL BASIS FOR FORFEITURE:
MONEY LAUNDERING ACCUSATIONS

Scope of Notice of Money Laundering Forfeiture; First Indictment (Counts 41 – 50)	**Scope of Notice of Money Laundering Forfeiture; Second Indictment (Counts 41 – 50)**	**Scope of Forfeiture Statute Invoked: 18 United States Code § 982(a)(1)**
"… all property real or personal involved in the aforesaid offenses and all property traceable to such property including but not limited to the following property which was involved in the said violations of Title 18, United States Code, Section 1957, or is traceable such property, that is: $30,000,000.00 in United States currency and all interests and proceeds traceable thereto in that such sum in aggregate is property which was involved in the aforesaid offenses or is traceable such property," Page 15, ¶ 2	"… all property real or personal involved in the aforesaid offenses and all property traceable to such property including but not limited to the following property which was involved in the said violations of Title 18, United States Code, Section 1957 or is traceable such property, that is: approximately $19,205,000.00 in United States currency and all interests and proceeds traceable thereto in that such sum in aggregate is property which was involved in the aforesaid offenses or is traceable such property." Page 16, ¶ 2	". . . any property, real or personal, involved in such offense, or any property traceable to such property."

EXHIBIT D

AMOUNT OF FUNDS: COMPARISON OF VIOLATIONS ALLEGED TO FORFEITURES DEMANDED: MONEY LAUNDERING

	Violations in Counts 41-50; First and Second Indictments	Notice of Money Laundering Fraud Forfeiture; Second Indictment	Difference Between Notice of Forfeiture and Total Amounts Enumerated
Count	**Amount**		
41	$ 685,000.00		
42	3,145,000.00		
43	630,000.00		
44	1,130,000.00		
45	3,455,000.00		
46	585,000.00		
47	185,000.00		
48	2,670,000.00		
49	3,070,000.00		
50	3,650,000.00		
Total	$19,205,000.00	(approximately) $19,205,000.00	(approximately) $00.00

EXHIBIT E

EXHIBIT E

AMOUNT OF FUNDS: COMPARISON OF VIOLATIONS ALLEGED TO FORFEITURES DEMANDED:
INTERSTATE TRANSPORTATION FRAUD

	Violations in Counts 31-40; First and Second Indictments	Notice of Interstate Transportation Forfeiture; Second Indictment	Difference Between Notice of Forfeiture and Total Amounts Enumerated
Count	**Amount**		
31	$ 685,000.00		
32	3,145,000.00		
33	630,000.00		
34	1,130,000.00		
35	3,455,000.00		
36	585,000.00		
37	185,000.00		
38	2,670,000.00		
39	3,070,000.00		
40	3,650,000.00		
Total	$19,205,000.00	(approximately) $23,000,000.00	(approximately) $3,795,000

EXHIBIT F

EXHIBIT F

AMOUNT OF FUNDS: COMPARISON OF VIOLATIONS
ALLEGED TO FORFEITURES DEMANDED: MAIL FRAUD

	Violations in Counts 13 – 30 & 56 – 60; First and Second Indictments	Notice of Mail Fraud Forfeiture; Second Indictment	Difference Between Notice of Forfeiture and Total Amounts Enumerated
Count	**Amount**		
13	$ 994.20		
14	2,979.43		
15	1,386.22		
16	5,110.56		
17	5,256.68		
18	5,191.29		
19	5,306.02		
20	15,184.12		
21	15,626.43		
22	5,978.34		
23	4,206.61		
24	15,989.68		
25	16,400.46		
26	15,231.51		
27	11,084.74		
28	5,437.66		
29	5,699.08		
30	6,680.57		
56 – 59	No amounts alleged		
Total	$143,743.60	(approximately) $7,000,000.00	(approximately) $6,856,256.40

EXHIBIT G

EXHIBIT G

AMOUNT OF FUNDS: COMPARISON OF VIOLATIONS
ALLEGED TO FORFEITURES DEMANDED: BANK FRAUD

	Violations in Counts 1-12; First and Second Indictments	Notice of Bank Fraud Forfeiture; Second Indictment	Difference Between Notice of Forfeiture and Total Amounts Enumerated
Count	**Amount**		
1	$ 29,246.33		
2	47,518.64		
3	70,057.80		
4	47,355.00		
5	58,825.84		
6	49,651.53		
7	87,416.53		
8	53,337.69		
9	42,874.51		
10	30,328.00		
11	57,872.86		
12	485,492.49		
TOTAL	$1,059,977.22	(approximately) $2,700,000.00	(approximately) $1,640,022.78

EXHIBIT H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL NO. 07-103
VERSUS	SECTION "L" MAG. (5)
JAMES G. PERDIGAO	VIOLATION: 18 USC 1341, 1344, 2314, 1957 & 2, 26 USC 7201 & 7206 (1)

NOTICE OF HEARING

To: James R. Mann, AUSA
U.S. Attorney's Office
Hale Boggs Building
500 Poydras Street, Suite B-210
New Orleans, LA 70130

PLEASE TAKE NOTICE that the Renewed and Amended Motion for Adversary Hearing, Specifying Relief Desired and Moving to Schedule Proceedings for Return of Property filed herein by defendant James Perdigao, through undersigned counsel, will be brought for hearing before the Honorable Eldon Fallon, United States District Judge, 500 Poydras Street, New Orleans, Louisiana 70130 at 2:00 p.m. on December 17, 2008, or at such other date and time as may be set by the court.

WESSEL & ASSOCIATES
A LAW CORPORATION

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ATTORNEYS FOR DEFENDANT JAMES PERDIGAO

CERTIFICATE OF SERVICE

I hereby certify that on **September 26, 2008** I electronically filed the Notice of Hearing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to counsel registered with the court for receipt of pleadings by e-mail. I also certify that the foregoing and all attachments thereto have been served on all counsel of record by facsimile, electronic mail and/or by depositing same in the United States Mail, properly addressed and postage prepaid, this 26th day of September, 2008.

/s/ William F. Wessel

WILLIAM F. WESSEL (8551)