No. 22-

IN THE

Supreme Court of the United States

PAVEL IVANOVICH LAZARENKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 18 U.S.C. § 982, which incorporates portions of 21 U.S.C. § 853, Congress established procedures governing criminal forfeiture of a person's property. Congress created a distinction between "tainted" property that is derived from criminal activity and "untainted" property that is not. The statute affords property owners additional protections before the government can forfeit untainted property.

The Third, Fifth, and Tenth Circuits have honored the distinction between tainted and untainted property. Under their precedents, untainted property can only be substituted to satisfy a criminal forfeiture judgment when tainted property becomes unavailable to satisfy the judgment. The Ninth Circuit below disagreed. Joining the First Circuit, it held that either tainted or untainted property may be forfeited as substitute property. This case presents an ideal vehicle to address this Circuit split and resolve two significant questions:

Whether property can be forfeited as substitute property under § 853(p) without first determining whether it is tainted or untainted.

Whether untainted property can be forfeited when tainted property is available.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- U.S. Court of Appeals for the Ninth Circuit, Nos. 21-10225 & 21-10250 (consolidated), *United States v. Lazarenko*, judgment entered September 12, 2022.

- U.S. District Court for the Northern District of California, No. 3:00-cr-00284, *United States v. Lazarenko*, criminal forfeiture order entered August 6, 2021, and modified August 20, 2021.

Related proceedings also include the following:

- U.S. District Court for the Northern District of California, No. 3:00-cr-00284, *United States v. Lazarenko*, amended judgment entered November 24, 2009.

- U.S. District Court for the District of Columbia, No. 1:04-cv-00798, *United States v. All Funds on Deposit at Bank Julius Baer & Co., Ltd.*, pending.

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PETITION FOR A WRIT OF CERTIORARI

Pavel Lazarenko respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

INTRODUCTION

When imposing a sentence on a person convicted of certain offenses, a district court "shall order that the person forfeit to the United States any property, real or personal involved in such offense, or any property traceable to such property." 18 U.S.C. § 982(a)(1). Such assets are considered "tainted" by the crime. The procedures governing this forfeiture appear in 21 U.S.C. § 853. Sometimes, the defendant engages in an act or omission that makes the tainted property unavailable. In that instance, the government may substitute it with "any other property of the defendant." 21 U.S.C. § 853(p)(2).

Pavel Lazarenko, former prime minster of Ukraine, was originally charged with 53 counts of money laundering, wire fraud, and transporting stolen property. Only eight of those counts withstood trial and appeal. The California district court ultimately entered a $22,851,000 criminal forfeiture judgment against Mr. Lazarenko for funds connected to those convictions.

Meanwhile, the government filed a *civil* forfeiture action against Mr. Lazarenko in Washington, D.C. for additional funds it alleged were connected to the criminal charges and the counts of conviction. As part of the District of Columbia action, the government restrained various bank accounts containing more than $230 million—more than enough to satisfy the criminal forfeiture judgment.

The government has not been able to prove that *all* of the $230 million is tainted, however. In particular, Mr. Lazarenko moved for summary judgment in the District of Columbia action arguing the government could not prove that certain accounts worth $2 million were tainted. Without that proof, Mr. Lazarenko should have been able to keep those accounts as his *own* property.

The government had other plans. Instead of moving forward on the merits of Mr. Lazarenko's District of Columbia motion, the government went back to the criminal court in California to go after that $2 million. The government asked the California district court to forfeit those accounts as "substitute property" under 21 U.S.C. § 853(p). It then asked the District of Columbia court to stay consideration of Mr. Lazarenko's motion for summary judgment while the government was pursuing substitution in California.

That maneuver contravenes the statute. A criminal forfeiture judgment must be satisfied by tainted assets first. Only if that fails can the government seize *untainted* property as a substitute under § 853(p).

That should have prevented the government from forfeiting the $2 million. If those accounts were *untainted*, they could not be forfeited while ample tainted property had already been frozen in the civil action. If those accounts were *tainted*, as the government had claimed in the District of Columbia, then the government would need to prove as much, not forfeit them as substitute property under § 853(p)(2).

But the California district court misunderstood the statute. Relying on the "any other property" language in 21 U.S.C. § 853(p), the district court held that regardless of whether or not the $2 million was tainted, it could be forfeited as substitute property. The Ninth Circuit affirmed. Accordingly, no court has determined on the merits whether or not the $2 million is tainted or untainted.

The holding below is incorrect. It ignores the plain text of § 853 and erases the procedural boundaries Congress placed between assets connected to crime and a person's other, untainted property. Under the Ninth Circuit's interpretation, the government can use untainted assets to satisfy a judgment, even when more than sufficient tainted assets are still available to satisfy its judgment. A court need not even first decide on the merits whether the "substitute property" is tainted or untainted, the court held.

As a result, the government stands to forfeit all of Mr. Lazarenko's tainted assets *plus* some of his untainted property. That ruling hands the government a windfall at the expense of the property rights of individuals and their legally obtained assets and denies the due process rights of individuals to a determination on the merits whether the property is tainted or untainted.

OPINIONS BELOW

The district court's preliminary order of forfeiture of assets is unreported but is reprinted in the appendix hereto ("App.") at App. 12a-31a. The district court's order granting the government's motion to correct the preliminary order is unreported but is reprinted at App. 7a-11a.

The memorandum decision of the Ninth Circuit affirming the district court's orders is unreported but is reprinted at App. 1a-6a.

JURISDICTION

The Ninth Circuit issued its memorandum decision affirming the district court's forfeiture orders on September 12, 2022. On December 8, 2022, this Court extended the deadline to file this petition until January 10, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 18 U.S.C. § 982 and 21 U.S.C. § 853 are reproduced at App. 32a-50a.

STATEMENT OF THE CASE

Background

Mr. Lazarenko was a high-ranking Ukrainian politician who ultimately became Prime Minister. *United States v. Lazarenko*, 564 F.3d 1026, 1030 (9th Cir. 2009). However, he fell out of favor with the dominant pro-Russian party and fled to the United States after surviving an assassination attempt.

a. The California Criminal Forfeiture Judgment

Upon reaching America, Mr. Lazarenko and a co-defendant were charged with numerous crimes. *Ibid.* at 1032. However, Mr. Lazarenko was acquitted of most.

Ibid. The only convictions that remained were eight money laundering convictions related to funds obtained from the co-defendant. N.D. Cal. ECF 1555 at 1-2. For those convictions, the government requested that the district court assess a criminal money judgment against Mr. Lazarenko in the total amount of $22,846,000, instead of a forfeiture judgment for specific property. 2-ER-145. The money judgment, the government alleged, represented a sum of "funds involved in Lazarenko's criminal money laundering activities." 2-ER-144. The district court granted the government's request, ultimately adjusting the forfeiture to $22,851,000 after Mr. Lazarenko's appeal. N.D. Cal. ECF 1555 at 8.

b. The Washington, D.C. Civil Forfeiture Action

The government then brought an *in rem* civil forfeiture action in the District of Columbia against funds owned by Mr. Lazarenko. D.C. ECF 1. The government restrained about $230 million of Mr. Lazarenko's property, alleging that these funds related to the money laundering convictions. D.C. ECF 1 at 7-8.

Mr. Lazarenko moved for summary judgment as to two accounts worth $2 million, on the ground that the government's own expert could not trace the $2 million to any criminal activity. D.C. ECF 1257.

c. The Proceedings Underlying This Appeal

The District of Columbia district court entered an order *sua sponte* requiring the government to file a sur-reply in opposition to Mr. Lazarenko's summary judgment motion. D.C. ECF 1394. The government then moved in the

California district court to forfeit the same $2 million in assets as "substitute property" under 21 U.S.C. § 853(p). App. 12a-13a. The government simultaneously asked the District of Columbia district court to "hold in abeyance further consideration" of a decision on the merits of Mr. Lazarenko's motion for summary judgment. D.C. ECF 1436.

In the District of Columbia action, the government had argued for more than fifteen years that these two accounts were connected to Mr. Lazarenko's criminal activity and convictions, though, notably, the government had never traced those funds. D.C. ECF 1257. Yet in the California action below, the government switched positions, arguing that the accounts were forfeitable as substitute property, not as a tainted asset. App. 23a-24a.

Rather than address the government's position change, the district court below held it made no difference. App. 24a-25a. By its reasoning, the accounts were forfeitable as substitute property under 21 U.S.C. § 853(p) whether they are tainted or untainted. App. 25a. Nor did it matter that there were plenty of other tainted assets restrained in the District of Columbia action to satisfy the government's judgment. App. 22a. Rather than paying down the judgment with those tainted assets first, the district court held that it was proper for the government to use untainted, private property instead. App. 22a.

d. The Court of Appeals Decision

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, the Court of Appeals for the Ninth Circuit affirmed. App. 1a-6a. It agreed with the district court's conclusion "that

'any other property' of the defendant may be substituted, whether it is tainted or not." App. 4a. The Ninth Circuit further held that "[n]othing in the text suggests" that the $2 million could not "be used as substitute property because other assets more directly traceable to [Mr. Lazarenko's] crimes [we]re still available." App. 4a.

REASONS FOR GRANTING THE PETITION

The distinction between tainted and untainted property is "an important one, not a technicality. It is the difference between what is yours and what is mine." *Luis v. United States*, 578 U.S. 5, 16 (2016). Tainted property—property obtained as a result of crime—belongs to the government as soon as the crime is committed. 21 U.S.C. § 853(c). Untainted property, in contrast, "belongs to the defendant, pure and simple." *Luis*, 578 U.S. at 12.

Congress allows the government to forfeit a defendant's untainted property under narrowly prescribed conditions. First, the government must show that the defendant rendered his tainted assets unavailable. 21 U.S.C. § 853(p)(1). Then, and only then, can the government look to the defendant's other property to fill the gap the defendant created. *Honeycutt v. United States*, 581 U.S. 443, ----, 137 S. Ct. 1626, 1634 (2017). That is, when tainted property becomes unavailable, the defendant's untainted property becomes a substitute for the missing property.

Accordingly, at least three Circuit Courts of Appeal, including the Third, Fifth, and Tenth, have required the government to respect the statutory distinction between tainted and untainted property in criminal forfeiture proceedings. These courts have held that if an asset is

traceable to the crime, then the government can forfeit it as tainted property under a variety of statutes, such as § 982. If the asset is not traceable to the crime, then the government cannot forfeit it except, where appropriate, as substitute property under § 853(p). In other words, a given asset cannot logically be both forfeitable as tainted property *and* a substitute asset at the same time. "To allow such an anomaly would render the substitute assets provision meaningless." *United States v. Bornfield*, 145 F.3d 1123, 1139 (10th Cir. 1998).

The Ninth Circuit below rejected this distinction drawn by Congress and recognized by other Circuits. The court did not require the government to explain or prove on the merits whether the targeted property was tainted or untainted. Instead, the court held, *any* property of the defendant may be substituted, whether it is tainted or not. The government need not even try to trace the property since it can substitute it regardless, even when it holds more than sufficient tainted assets to satisfy its judgment.

By ruling this way, the Ninth Circuit joined the First Circuit in ignoring the statutory distinction between tainted and untainted property. *See United States v. Saccoccia*, 564 F.3d 502 (1st Cir. 2009). The *Saccoccia* court rejected the idea that the character of the asset determines which statutory forfeiture procedures apply. *Ibid.* at 506-07. To be clear, everyone agrees that if an asset is tainted, it can be forfeited under an applicable forfeiture provision like § 853(a) or § 982(a). But according to the First Circuit, and now the Ninth Circuit, *any* asset may be forfeited as substitute property under § 853(p), so long as it had not already been forfeited before.

Yet, the distinction between tainted and untainted property matters. "Forfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime." *Honeycutt*, 581 U.S. ---, 137 S. Ct. at 1635. (The same analysis would apply to a forfeiture of tainted property under any other applicable forfeiture statute, including 18 U.S.C. § 982.) Therefore, the government must first seize tainted property to satisfy a criminal judgment before it can move to substitute property. Substitute property, after all, is the defendant's *own* property. By definition, it has no provable connection to the crime. Yet, the Ninth Circuit did not require the government to satisfy the criminal forfeiture judgment from tainted assets first, before turning to untainted property. Nor did it require the government to prove on the merits whether the property was tainted or untainted.

Equating tainted and untainted property, like the Ninth Circuit did, causes significant problems. Tainted and untainted property enjoy different procedural protections. Tainted property may be restrained pre-conviction, while untainted property may not. *Luis*, 578 U.S. at 10. The government must comply with stricter notice requirements for untainted property than for tainted property. *See United States v. Erpenbeck*, 682 F.3d 472, 478 (6th Cir. 2012). A third-party possessor must prove that it was a bona fide purchaser for value of tainted property but can keep untainted property without offering such proof. *See United States v. Jarvis*, 499 F.3d 1196, 1203 (10th Cir. 2007). And an intermediary in certain money laundering transactions can *never* have his untainted property seized, only tainted property. *Bornfield*, 145 F.3d at 1139.

Yet the Ninth Circuit ignored these distinctions. It permitted the government—which had already frozen all of Mr. Lazarenko's tainted and possibly tainted assets in a civil action—to then chase his *untainted* assets to satisfy the criminal forfeiture judgment. Under its ruling, the government can now "double up" its collection by satisfying a criminal forfeiture judgment with assets unrelated to the crime, while pursuing a separate civil forfeiture proceeding to collect any actually tainted funds.

Until this case, only the First Circuit had allowed the barrier between tainted and untainted property to be breached. Now the Ninth Circuit has joined it. This Circuit split merits resolution.

A. Congress Established a Comprehensive Procedural Scheme for Criminal Forfeiture

The criminal money laundering statute, 18 U.S.C. § 982, incorporates certain forfeiture procedures of the Comprehensive Drug Abuse and Control Act of 1970. *See* 18 U.S.C. § 982(b)(1). For example, the statute authorizes restraining orders and establishes procedures for vindicating third-party rights. *See ibid.* § 853(c), (n).

The statute also explains the limited circumstances in which the government may seek the forfeiture of "substitute property." *Ibid.* § 853(p). The government may pursue substitute property only if it shows that any property described in § 982(a) (that is, tainted property) has been rendered unavailable by an act or omission of the defendant. *Ibid.* § 853(p). In that event, the court "shall order the forfeiture of *any other property of the defendant*, up to the value of any property" rendered unavailable. *Ibid.* (emphasis added).

B. At Least Three Circuits Have Reaffirmed that Tainted Property Is Forfeitable Via § 982(a), While Untainted Property May Be Forfeited As Substitute Property Only Via § 853(p).

At least three Circuit Courts of Appeal have required the government to pursue tainted property first and only then forfeit untainted property via § 853(p).

In *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996), the Third Circuit rejected the government's attempt to seize untainted assets in a wire fraud and money laundering prosecution under 18 U.S.C. § 982. The defendant owed more than $1.6 million in criminal forfeiture. *Ibid.* at 1081. The district court ordered the forfeiture of jewelry that had been purchased with funds from an account that included commingled tainted and untainted funds. *Ibid.*

On appeal, the defendant argued that the government could forfeit the jewelry—if at all—only under § 853(p), as the funds used to purchase it were not traceable to the crime for which he had been convicted. *Ibid.* at 1084. The government insisted that there was no need for strict tracing under the statute; it could choose whether to pursue forfeiture of such assets under § 982 *or* § 853(p). *Ibid.*

The Third Circuit sided with the defendant, holding that "the government's position is internally inconsistent." *Ibid.* at 1086. "The substitute asset provision comes into play only when forfeitable property cannot be identified as directly 'involved in' or 'traceable to' money laundering activity." *Ibid.* If, instead, assets are traceable to the

crime, "then the substitute asset provision should have no applicability whatsoever." *Ibid.* The government's contrary "alternative paths to forfeiture" theory was "illogical." *Ibid.*

The Tenth Circuit came to a similar conclusion two years later in *Bornfield*, 145 F.3d 1123. There, the district court had granted *substitute* forfeiture of an asset alleged to be directly forfeitable under § 982(a). *Ibid.* at 1139. This "troubled" the Circuit Court, since an "asset cannot logically be both forfeitable and a substitute asset." *Ibid.* The substitute assets provision, the court reasoned, only applies to "other assets not already forfeitable" by dint of being traceable to the crime. *Ibid.* Thus, the district court erred by forfeiting tainted assets under § 853(p). *Ibid.*

The Fifth Circuit also agrees. In *United States v. Ayika*, 837 F.3d 460 (5th Cir. 2016), in a healthcare prosecution where the forfeiture arose under 18 U.S.C. § 982(a)(7), the Circuit Court vacated the district court's order forfeiting property that was not traceable to the crime without first affording the defendant the protections of § 853(p). *Ibid.* at 475. "[T]he Government cannot, consistent with the statutes, treat § 982(a)(7) and § 853(p) as interchangeable." *Ibid.*

C. Two Circuits Have Gone the Other Way, Finding § 853(p) to Apply to Any Property of a Defendant, Whether Tainted or Not

In 2009, the First Circuit chose not to follow the other Circuits, instead ignoring the statutory distinction between tainted and untainted property. *See United States v. Saccoccia*, 564 F.3d 502 (declining to follow *Voigt* or

Bornfield). The *Saccoccia* court, in the context of a RICO prosecution, rejected the idea that the character of the asset determines which statutory forfeiture procedures apply. If an asset is tainted, it can be forfeited under 18 U.S.C. § 1963. But the *Saccoccia* court held that *any* asset may be forfeited as substitute property under § 853(p), so long as it has not already been forfeited under § 1963.

The Ninth Circuit below took this position even further. According to the Ninth Circuit, the government need not bother with characterizing a substitute asset at all, let alone proving its character. So long as it can show that the defendant made a tainted asset unavailable, the government can then seek forfeiture of *any* asset of the defendant, whether tainted, untainted, or uncertain, in the government's sole discretion. And it may do so even if it already has enough tainted assets to satisfy its judgment.

D. The First and Ninth Circuit Opinions Are in Tension with This Court's Decisions in *Luis* and *Honeycutt*

In *Luis*, 578 U.S. 5 (2016), this Court held that the pretrial restraint of a criminal defendant's legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. *Id.* at 10. Along the way, the plurality opinion declared the distinction between tainted and untainted assets to be "an important one, not a technicality. It is the difference between what is yours and what is mine." *Ibid.* at 16. The concurring opinion agreed, noting that the common-law forfeiture "tradition draws a clear line between tainted and untainted assets." *Ibid.* at 28-29.

The next year, this Court reaffirmed the importance of those distinctions in *Honeycutt*, 581 U.S. 443, 137 S. Ct. 1626. There, a unanimous Court held that § 853(a) does not impose joint-and-several liability, but rather only forfeits the actual tainted assets traceable to a given defendant. *Ibid.* at 1633-34. Section 853(p), on the other hand, is the proper mechanism for the government to go after any other property of the defendant, up to the value of the tainted property, "*rather than the tainted property itself.*" *Ibid.* at 1634 (emphasis added).

The approaches taken by the First and Ninth Circuits are inconsistent with this Court's reading of the statutory scheme. The opinions in *Luis* and *Honeycutt* take pains to segregate the portions of the statute applicable to tainted assets from those applicable to substitute assets, but the First and Ninth Circuit conflate the assets classes and the statutory provisions.

Moreover, *Honeycutt* recognized that under the statute, criminal forfeiture "is limited to property the defendant himself actually acquired as the result of the crime." *Honeycutt*, 581 U.S. ---, 137 S. Ct. at 1635. Yet, as explained below, the Ninth Circuit's holding opens a loophole, allowing the government to exceed this amount.

E. Certiorari Is Warranted Because of the Practical Consequences of the Decision Below

The distinction between tainted and untainted property is important. Untainted property receives greater procedural protections than tainted property. Ignoring the distinction allows the government to seize untainted property to satisfy a criminal forfeiture

judgment even when there is tainted property available. Yet the government can always go after any surplus tainted assets in a civil forfeiture action. Only by strictly maintaining the boundaries between tainted and untainted assets can courts prevent the government from collecting twice and imposing a double punishment.

1. Maintaining the distinction between tainted and untainted assets prevents the government from doubling up its collection.

Under the Ninth Circuit's rule, the government can obtain a double collection of a criminal forfeiture judgment. Take this case for example. Mr. Lazarenko alleged that the $2 million at issue was not tainted. He also alleged that of the $230 million restrained in the civil forfeiture proceeding, there was at least $70 million in assets connected to the crime still available—more than enough to satisfy the criminal forfeiture judgment. N.D. Cal. ECF 1731 at 10. If the $2 million is applied to the criminal forfeiture order, Mr. Lazarenko will never be able to get it back. But the government can still collect the entirety of the $70 million of tainted assets in the civil forfeiture action.

The district court and the Ninth Circuit saw no problem with this result. By their reasoning, if any assets that were part of the original criminal forfeiture calculation go missing, the government can immediately seize a person's untainted assets to replace them, regardless of whether enough tainted assets exist to satisfy the judgment. But this interpretation misconstrues forfeiture law.

"[S]tart with the text." *King v. St. Vincent's Hosp*, 502 U.S. 215, 218 (1991). Mr. Lazarenko was convicted of

eight violations of 18 U.S.C. § 1956. N.D. Cal. ECF 1555 at 1. "The court, in imposing sentence on a person convicted of an offense in violation of [18 U.S.C. § 1956], shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. § 982. Right from the start, the text of the statute focuses on tainted assets.

So do the procedures for collecting these assets. When the government proves a money laundering count beyond a reasonable doubt, the forfeitable property is the amount of money underlying the conviction. *Voigt*, 89 F.3d at 1084. If the government cannot satisfy this amount with tainted assets, "the court shall order the forfeiture of any other property of the defendant." 21 U.S.C. § 853(p). But this untainted property may only be collected "up to the value of any property" that is unavailable. 21 U.S.C. § 853(p)(2). After all, "[f]orfeiture pursuant to § 853(a)(1) [or similar statute, like § 982] is limited to property the defendant himself actually acquired as the result of the crime," *Honeycutt*, 581 U.S. ---, 137 S. Ct. at 1635.

But the Ninth Circuit found a way for the government to exceed that amount. Focusing on the absence of specific tainted assets, it held that any difference could be made up with untainted assets, even when a surplus of tainted assets was available to satisfy the entire judgment.

This holding creates an improper imbalance between the government and the defendant. When the government uncovers more tainted assets than are necessary to satisfy a criminal forfeiture judgment, it can seize the remainder in a civil forfeiture action. *See Paret-Ruiz v. United States*, 827 F.3d 167, 171 (1st Cir. 2016). Yet when the assets that

comprised the initial criminal forfeiture judgment prove less than sufficient to satisfy it, the Ninth Circuit would deny defendants the same benefit. Rather than apply any surplus of tainted assets to the judgment, the Ninth Circuit permits the government to go straight after the defendant's private property. The end result: a double collection by the government.

This double collection violates both the text of the statute and this Court's interpretation of it. *See Honeycutt*, 581 U.S. ---, 137 S. Ct. at 1635. As the Third Circuit recognized, "[c]learly, if funds commingled in a bank account are sufficiently identifiable as to be considered 'traceable to' money laundering activity, then the substitute asset provision should have no applicability whatsoever." *Voigt*, 89 F.3d at 1086. The Ninth Circuit's failure to recognize this distinction and blurring of the lines between tainted and untainted assets creates a windfall for the government that cannot be justified by the statutory text.

2. Untainted property enjoys significant procedural safeguards that the holding below ignores.

There are at least four different procedural safeguards that apply to untainted assets. By equating tainted and untainted assets, the Ninth Circuit removed these safeguards, harming both defendants and third parties.

The first safeguard, as recognized in *Luis*, is that the government cannot restrain untainted assets prior to trial, even though it can restrain tainted assets. *Luis*, 578 U.S. at 10. Under the second, the government faces stricter

notice requirements when seizing untainted property from third parties then when seizing tainted assets. *Erpenbeck*, 682 F.3d at 478. As for the third safeguard, a third party need not make an offer of proof to retain an untainted asset. *Jarvis*, 499 F.3d at 1203. In comparison, if the asset is tainted, the third party must demonstrate that he or she is a bona fide purchaser for value. 21 U.S.C. § 853(p). Fourth, if a defendant acts as an intermediary for money laundering transactions that involve less than three $100,000 transactions in a year, then the government can only seize tainted assets, not untainted assets. 18 U.S.C. § 982(b)(2); *see also Bornfield*, 145 F.3d at 1139.

Given these procedural safeguards, a court cannot simply ignore the question of whether forfeited assets are tainted or not, as the Ninth Circuit did in this case. For instance, if Mr. Lazarenko qualified for the exception in 18 U.S.C. § 982(b)(2), then none of his untainted assets could have been forfeited, regardless of whether any tainted assets were unavailable. Or suppose a third party laid claim to the $2 million at issue in this case. Whether the $2 million was tainted or not would affect both the proof required before the government could take the $2 million from the third party as well as the notice the government would be required to give.

Accordingly, even putting aside Mr. Lazarenko's interests, the Ninth Circuit's holding disadvantages third-party property rights. This Court should grant review to protect the procedural safeguards afforded to the owners of untainted property and interested third parties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 12, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-10225, 21-10250

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAVEL IVANOVICH LAZARENKO,
AKA Pavlo Ivanovych Lazarenko,

Defendant-Appellant.

August 12, 2022, Argued and Submitted,
San Francisco, California
September 12, 2022, Filed

Appeal from the United States District Court
for the Northern District of California.
D.C. No. 3:00-cr-00284-CRB-1.
Charles R. Breyer, District Judge, Presiding.

Before: RAWLINSON, BADE, and BRESS, Circuit Judges.

Appendix A

MEMORANDUM[1*]

Defendant-Appellant Pavel Ivanovich Lazarenko appeals the district court's preliminary order of criminal forfeiture and order correcting the preliminary order of criminal forfeiture. We have jurisdiction under 28 U.S.C. § 1291. We review the district court's interpretation of federal forfeiture law de novo and its factual findings for clear error. *United States v. Hernandez-Escobar*, 911 F.3d 952, 955 (9th Cir. 2018). We affirm.

1. Lazarenko challenges the district court's conclusion that he made property subject to forfeiture unavailable for one of the reasons listed under 21 U.S.C. § 853(p)(1). The district court did not err.

First, the district court did not violate the "merger of judgments" rule when it considered the underlying counts of conviction to determine whether the unavailable property was traceable to Lazarenko's criminal activity and therefore subject to forfeiture. Section 853(p) requires the court to first consider whether tainted property has been dissipated. 21 U.S.C. § 853(p)(1); *United States v. Nejad*, 933 F.3d 1162, 1166 (9th Cir. 2019). The district court appropriately consulted the indictment and underlying convictions to verify that the unavailable property was forfeitable and thus subject to substitution. *See* 21 U.S.C. § 853(a), (p).

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1. [*]This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The district court also did not err in concluding that $2,033,602.80 located in Lazarenko's BancBoston Robertson Stephens account had been made unavailable under § 853(p)(1). The record supports the district court's finding that Lazarenko commingled the illicit $2.3 million deposit with other funds such that it could not "be divided without difficulty," that part of the deposit could not "be located upon the exercise of due diligence," and that part of the deposit had been transferred to third parties. 21 U.S.C. § 853(p)(1)(A)—(B), (E). Further, Lazarenko is incorrect that the district court's order violated the "relation-back doctrine." All the acts and omissions that led to the unavailability of the funds took place after the unlawful deposit in September 1998, and thus *after* the government's interest in the property vested under § 853(c).

The district court also did not err in finding that Lazarenko diminished the value of his Novato, California mansion by $760,900. The record reflects that Lazarenko's failure to maintain the premises while he still owned and controlled the property caused it to diminish in value by at least that amount.

2. Lazarenko argues that the district court improperly forfeited funds held in Guernsey and Liechtenstein bank accounts as substitute property under § 853(p)(2) even though the government has argued those funds are tainted in a separate civil forfeiture proceeding in the District of Columbia, contending that substitute property may not itself be tainted property. This argument is foreclosed by the text of § 853(p)(2), which states that once the

government has established that the defendant made forfeitable property unavailable, "the court shall order the forfeiture of *any other property* of the defendant." 21 U.S.C. § 853(p)(2) (emphasis added). Thus, the district court was correct to conclude that "any other property" of the defendant may be substituted, whether it is tainted or not. *See Nejad*, 933 F.3d at 1165; *see also* 21 U.S.C. § 853(o) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").

Switching gears, Lazarenko argues that the funds in his Guernsey and Liechtenstein bank accounts cannot be used as substitute property because other assets more directly traceable to his crimes are still available. This argument fails for the same reason as the preceding argument: The text of § 853(p) provides that substitution is authorized once "*any* property" is made unavailable, at which point "*any* other property of the defendant" may be substituted "up to the value of any" unavailable property. *Id.* § 853(p)(1)-(2) (emphases added). Nothing in the text suggests the limitation Lazarenko seeks, and interpreting the statute as he suggests would hardly amount to "liberally construe[ing]" it. *Id.* § 853(o); *see also Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 906 (9th Cir. 2018) ("[T]he term 'any' [is] broad and all-encompassing.").[2]

2. We also note that the record casts doubt on Lazarenko's representation that the assets he would prefer the government to seize are in fact available. *See United States v. All Assets Held at Bank Julius*, 244 F. Supp. 3d 188, 194 (D.D.C. 2017); *United States v. All Assets Held at Bank Julius*, 959 F. Supp. 2d 81, 114 (D.D.C. 2013).

3. Lazarenko also raises three equitable arguments against the preliminary order. None has merit.

Lazarenko's judicial estoppel argument fails because there is no inconsistency in the government's position. *See United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008). Section 853(p) allows "any other property of the defendant" to be forfeited as substitute property, so it does not matter whether the Guernsey and Liechtenstein funds are tainted or untainted.

Lazarenko is incorrect that the election of remedies doctrine bars the government from seeking to civilly forfeit the Guernsey and Liechtenstein funds in one proceeding and then to criminally forfeit them as substitute property in another. These remedies are not "repugnant and inconsistent with each other," *Teutscher v. Woodson*, 835 F.3d 936, 956 (9th Cir. 2016), because the government may "pursue both civil forfeiture and criminal forfeiture at the same time" and "may pursue civil forfeiture even after a failed criminal prosecution," *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1150, 1152 (9th Cir. 2011).

The district court did not abuse its discretion by declining to apply the first-to-file rule because the criminal proceedings commenced four years before the civil proceedings. *See Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239-41 (9th Cir. 2015).

4. Last, we reject Lazarenko's argument that the district court did not have jurisdiction to enter the corrected

order after he filed his first notice of appeal. "The filing of a notice of appeal . . . does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure Rule 35(a)." Fed. R. App. P. 4(b)(5).

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 20, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 00-cr-00284-CRB-1

USA,

Plaintiff,

v.

LAZARENKO,

Defendant.

August 20, 2021, Decided
August 20, 2021, Filed

ORDER GRANTING MOTION TO CORRECT PRELIMINARY ORDER OF FORFEITURE

In concluding that the government could forfeit up to $2,283,602.80 in funds held in Defendant Pavel Lazarenko's Bank Julius Baer (BJB) Guernsey account and Liechtensteinische Landesbank AG (NRKTO) account, the Court stated that Lazarenko had diminished the value of his Novato, California mansion by at least $250,000 based on the cost of repairs. *See* Preliminary Order of Forfeiture (dkt. 1743) at 6 & n.6. As the government now

points out, the Court's reading of the record understated the amount by which Lazarenko diminished the mansion's value. The appraised value of the property was $4,800,000. *See id.* at 5 (citing Appraisal (dkt. 1738-1) at Appx. 121). The estimated cost of necessary repairs (which were not performed) was $1,010,900. *See* Armstrong Decl. (dkt. 1738-3) at 3-4. Thus, with the repairs, the property would have had a value of $5,810,900. The property sold for $5,050,000. *See* Preliminary Order of Forfeiture at 6 (citing Return on Final Order of Forfeiture (dkt. 1674)). Accordingly, the Court concludes that Lazarenko diminished the value of the Novato mansion by at least $760,900—the difference between the mansion's sale price and its estimated value had the repairs been performed. The government is entitled to forfeit up to $2,794,502.80 in funds held in the BJB Guernsey and NRKTO accounts. The preliminary order of forfeiture is hereby amended consistent with that determination (the Court otherwise retains and incorporates its reasoning and conclusions from that order).

For the foregoing reasons, the government has now established by a preponderance of the evidence that all funds frozen in:

a. Bank Julius Baer & Company, Ltd., Guernsey Branch in Guernsey, Channel Islands (identified by its number ending in -3445) held in the name of or for the benefit of Pavel Lazarenko (the BJB Funds); and

b. Liechtensteinische Landesbank AG in Liechtenstein (identified by its number ending in NRKTO 7541) held in the name of or for the benefit of Pavel Lazarenko (the NRKTO Funds);

(the subject property) is the defendant's property, and, as a result, the subject property (up to $2,794,502.80) can be forfeited as substitute property and applied against the $22,851,000 money judgment.

Accordingly, for the foregoing reasons and pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure,

IT IS HEREBY ORDERED that the Money Judgment and Supplemental Preliminary Order of Forfeiture entered on September 29, 2006 (dkt. 1080), is amended to include the subject property;

IT IS FURTHER ORDERED that the government may conduct discovery in order to identify, locate, or dispose of property subject to forfeiture in accordance with Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure;

IT IS FURTHER ORDERED that the defendant, Pavel Lazarenko, shall execute such documents and take such steps as may be necessary to facilitate the transfer of the BJB Funds and the NRKTO Funds to the United States, or the seizure or restraint of these assets, including through the withdrawal of any objections in foreign proceedings and the execution of any documents as the United States may direct that may facilitate the

continued restraint, seizure, or transfer of these assets to the United States;

IT IS FURTHER ORDERED that the United States, through its appropriate agency, shall publish on www.forfeiture.gov, a government website, for at least thirty days, notice of this Order and notice of the government's intent to dispose of the property in such manner as the Attorney General may direct, and shall provide notice that any person, other than the defendant, having or claiming a legal interest in the property, must file a petition with the Court and serve a copy on government counsel within (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier. This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, 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 forfeited property and any additional facts supporting the petitioner's claim and the relief sought. The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the Subject Property, as a substitute for published notice as to those persons so notified;

IT IS FURTHER ORDERED that the court maintain jurisdiction to enforce the Preliminary Order of Forfeiture, and to amend it as necessary, pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure; and

IT IS FURTHER ORDERED that, pursuant to Rule 32.2(b)(4) of the Federal Criminal Rules of Procedure, this Preliminary Order of Forfeiture is final as to the defendant upon entry.

IT IS SO ORDERED.

Dated: August 20, 2021

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 6, 2021

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 00-cr-00284-CRB-1

USA,

Plaintiff,

v.

PAVEL LAZARENKO,

Defendant.

August 6, 2021, Decided;
August 6, 2021, Filed

CHARLES R. BREYER, United States District Judge.

PRELIMINARY ORDER OF FORFEITURE OF ASSETS TO BE APPLIED TOWARD DEFENDANT'S MONEY JUDGMENT

In the 1990s, Defendant Pavel Lazarenko held various political positions in Ukraine, including First Vice Prime Minister and Prime Minister. During his "meteoric rise" to power, Lazarenko "formed multiple business

relationships and engaged in a tangled series of business transactions that netted him millions of dollars." *United States v. Lazarenko*, 564 F.3d 1026, 1029 (9th Cir. 2009). Eventually, Lazarenko was convicted on eight counts of money laundering. *See id.* at 1033-42; Amend. Judgment (dkt. 1574). His sentence included a $22,851,000 forfeiture money judgment. *See* Amend. Judgment.

Lazarenko has not paid most of that sum. Although the parties dispute how much Lazarenko owes on the money judgment, the parties agree that he owes at least $13,362,491.88. *See* Mot. (dkt. 1728) at 3; Opp. (dkt. 1731) at 12; Reply (dkt. 1732) at 1. According to the government, Lazarenko owes north of $19 million.[1]

The government now moves for a preliminary order of forfeiture against all funds on deposit in Lazarenko's Bank Julius Baer (BJB) Guernsey account and Liechtensteinische Landesbank AG (NRKTO) account. *See* Mot. at 1. The government represents that the total value of the BJB Guernsey and NRKTO funds is at least $2,010,000. *See* Mot. at 4. The government argues that these funds are forfeitable as "substitute property" under 21 U.S.C. § 853(p). *Id.* at 5.[2] The Court previously ruled that the government had not provided enough detail for the Court to decide its motion, ordered

1. The parties disagree regarding the amount that should be applied to the judgment based on the forfeiture and sale of Lazarenko's Novato, California mansion.

2. The government does not argue that these funds are tainted or assert any alternate basis for forfeiture.

the government to provide supplemental briefing and evidence, and permitted Lazarenko to file a supplemental response. *See* Order Re Supp. Br. (dkt. 1737) at 4 ("The BJB Guernsey and NRKTO funds may well be forfeitable as substitute property. The government must show why."). The Court now grants the government's motion and enters a preliminary order of forfeiture.

I. LEGAL STANDARD

Under the federal criminal forfeiture statute, any person convicted of certain offenses "shall forfeit to the United States . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a)(1). Directly forfeitable property is often referred to as "tainted" property because it is connected to, and thus tainted by, the underlying criminal conduct. *Honeycutt v. United States*, 137 S. Ct. 1626, 1634, 198 L. Ed. 2d 73 (2017).

Congress also "contemplated situations where the tainted property itself would fall outside the Government's reach." *Id.* Those circumstances arise when, because of the defendant's conduct, certain tainted property

> **(A)** cannot be located upon the exercise of due diligence;
>
> **(B)** has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

21 U.S.C. § 853(p)(1); *Honeycutt*, 137 S. Ct. at 1634 (explaining that the government must prove that at least one of these conditions "was caused by the defendant"). If the government shows as much, the court "shall order the forfeiture" of "any other property" belonging to the defendant, but only "up to the value" of the tainted property that has fallen beyond the government's reach for one or more of the enumerated reasons. 21 U.S.C. § 853(p)(2).

This other property is referred to as "substitute" property. *Id.; Honeycutt*, 137 S. Ct. at 1634. "A court may order forfeiture in the form of a personal money judgment against the defendant, and . . . the government may attempt to satisfy the judgment with any substitute property it locates in the future." *United States v. Nejad*, 933 F.3d 1162, 1165 (9th Cir. 2019).

II. DISCUSSION

Here, the government represents that the total value of the BJB Guernsey and NRKTO funds is at least $2,010,000. *See* Mot. at 4. So the Court must determine whether the government has shown that, because of

Lazarenko's conduct, any tainted property matching or exceeding $2,010,000 has fallen beyond the government's reach for one of the reasons enumerated in § 853(p)(1).[3] The government argues that Lazarenko (1) substantially diminished the value of a directly forfeitable Novato, California mansion by approximately $4,020,596.30, and (2) dissipated $2,033,602.80 in directly forfeitable funds previously located in Lazarenko's BancBoston Robertson Stephens (BBRS) account. *See* Gov Supp. Br. (dkt. 1738) at 8. The Court addresses these bases for forfeiting substitute property in reverse order. The Court concludes that the government has shown that more than $2,010,000 has fallen beyond the government's reach for one of the reasons listed in § 853(p)(1).

(A) BBRS Account Funds

The government argues that Lazarenko commingled and then transferred $2,033,602.80 in directly forfeitable property previously located in Lazarenko's BBRS account, such that the funds cannot reasonably be located upon the exercise of due diligence. *See id.*

One of Lazarenko's underlying convictions was based on the transfer of $2.3 million into the BBRS account in September 1998. *See Lazarenko*, 564 F.3d at 1037, 1047.

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3. Contrary to Lazarenko, *see* Lazarenko Supp. Br. (dkt. 1741) at 2, the statute does not require the government to show that other tainted property that could satisfy the forfeiture money judgment is unavailable. For that reason, the parties' dispute about whether tainted funds located in Antigua and Lithuania are available for forfeiture is beside the point. *See infra* part II.C.1.

An additional $200,000 deposit was made in October 1998; the funds were then commingled and invested in securities. Montemorra Decl. (dkt. 1738-5) ¶ 5; BBRS Monthly Statements (dkt. 1738-2) at Appx. 367-417. The account's value increased, but by the time the United States seized all funds in the account, only $266,307.20 remained. *See* Amended Judgment (dkt. 1555) at 10. The rest of the money had been transferred out of the account. *See* BBRS Monthly Statements at Appx. 367-417. $796,200 was transferred to six third party accounts around the world. Montemorra Decl. ¶ 6. And batches comprising another $2,150,000 had been transferred to a Wells Fargo account in Sacramento (apparently owned by Lazarenko) from April through December 1999. *Id.* ¶ 7. At least $766,026.90 of those funds was, in turn, used to purchase cashier's checks; another $826,254 was paid to third parties including law firms, schools, and insurance companies. *Id.* ¶ 11.

Based on this information, the government has shown that $2,033,602.80 from the BBRS account is forfeitable as substitute property. As an initial matter, the $2.3 million was commingled with $200,000 before being invested and later dispersed via transfers to various accounts. Therefore, the full amount not already recovered by the government-$2,033,602.80—was "commingled with other property" and cannot now be "divided without difficulty." 21 U.S.C. § 853(p)(1)(E).

Even if that were not the case, $2,033,602.80 was placed beyond the government's reach for other reasons listed in § 853(p)(1). $1,622,454 was transferred to

third parties either directly from the BBRS account or indirectly via the Wells Fargo Sacramento account, *see id.* § 853(p)(1)(B), and another $766,026.90 was used to purchase cashier's checks and thus cannot be located upon the exercise of due diligence, *see* 21 U.S.C. § 853(p)(1)(A). These sums similarly indicate that $2,033,602.80 of the previously directly forfeitable property fell beyond the government's reach for one or more of the listed reasons.

Therefore, based on Lazarenko's conduct with respect to the BBRS account funds, the government has shown that it is entitled to $2,033,602.80 of "any other" property belonging to Lazarenko. 21 U.S.C. § 853(p)(2).[4]

(B) Novato Mansion

The government argues that Lazarenko diminished the value of the Novato Mansion by over $4 million,

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4. Lazarenko argues that the government cannot show that Lazarenko dissipated these assets because other individuals (namely Michael Menko and Peter Kiritchenko) controlled Lazarenko's funds in the BBRS account. *See* Lazarenko Supp. Br. at 12. But if Lazarenko lacked control over these funds, it is because, at some point, he transferred that control to Menko and Kiritchenko. And if Lazarenko transferred the funds to third parties who then transferred them again, the funds were placed beyond the reach of the government because of Lazarenko's conduct. *See* 21 U.S.C. § 853(p)(1)(B). The § 853(p)(1)(B) transfer may have occurred earlier, but it still happened. Furthermore, given the multiple alternate bases for determining that the BBRS funds satisfy § 853(p)(1), the Court concludes that any delay by the government in seeking substitute forfeiture based on those funds did not prejudice Lazarenko. *See* Lazarenko Supp. Br. at 15-16.

"including past due taxes and penalties of $1,848,035.06, the cost of necessary repairs of $1,010,900, sales expenses and third party payments at settlement of $1,056,324.64, and U.S. Marshals Service costs of $105,336.60." Gov Supp. Br. at 8.

In 1998, Lazarenko purchased the Novato mansion for $6,450,000 with the proceeds of money laundering activities underlying one of Lazarenko's convictions. *See* Order re Mot. for Forfeiture (dkt. 1737) at 3 n.4. The mansion was thus directly forfeitable. *See* 21 U.S.C. § 853(a)(1). At Lazarenko's 2006 sentencing, the government obtained a money judgment of forfeiture for the appreciated value of the property—$7,900,000. Opp. at 13; Reply at 2. The government obtained a final order of forfeiture for the property in 2013. *See* Final Judgment of Forfeiture (dkt. 1626) at 1. Up until then, Lazarenko remained the owner of the property.

The government realized only $2,799,023.10 in net forfeiture from the sale of the property. *See* Return on Final Order of Forfeiture (dkt. 1674). One reason was the state of the mansion. When the U.S. Marshals Service was preparing to sell the property, it obtained an appraisal that detailed the property's maintenance issues and valued the property at $4.8 million. *See* Appraisal (dkt. 1738-1) at Appx. 121. The mansion needed repairs to its roof, windows, tennis court, electrical system, pool, landscaping, and other features. *Id.* at Appx. 126-27. Indeed, the appraisal determined that a buyer would have to spend "between $2 and $3 million dollars" on repairs. *Id.* at Appx. 127.

These issues were likely caused by Lazarenko's failure to maintain the mansion. In 2012, a newspaper described the mansion as abandoned, and at least one group of roughly 100 teenagers threw a party inside the neglected home. *See* Article (dkt. 1738-1) at Appx. 141-44. The U.S. Marshals Service spent $1,010,900 on repairs, but the home still sold for just $5,050,000. *See* Return on Final Order of Forfeiture.[5]

Therefore, because of Lazarenko's conduct, the Novato mansion was "substantially diminished in value" by at least the value attributable to the repairs performed by the U.S. Marshals Service—$250,000, the gap between the appraised value before any repairs and the sale price of the home. *See* 21 U.S.C. § 853(p)(1)(D).[6]

The Court need not consider whether Lazarenko diminished the value of the mansion by the full amount spent on repairs, or whether Lazarenko's additional

5. The Court rejects Lazarenko's argument that he should necessarily have received credit for $7,900,000 when the government forfeited the Novato mansion. *See* Opp. (dkt. 1731) at 13. Lazarenko owed the government $7,900,000 pursuant to a portion of the forfeiture money judgment based on Lazarenko's criminal activity in connection with the mansion. Lazarenko remains responsible for paying the leftover sum, at least to the extent that he caused the mansion to diminish in value.

6. The Court thus assumes without deciding that the government is not entitled to cost of repairs that did not (as it turned out) enhance the value of the property. *See* Lazarenko Supp. Br. at 8. But the Court finds that the difference between the appraisal value and the sale price was attributable to repairs performed by the government.

conduct (such as his failure to pay taxes on the home) resulted in further diminished value. The government represents that the total value of the BJB Guernsey and NRKTO funds is at least $2,010,000. *See* Mot. at 4. Based on the BBRS account funds and the value of repairs performed at the Novato Mansion, the government has shown that, because of Lazarenko's conduct, at least $2,283,602.80 has fallen beyond the government's reach for one of the reasons enumerated in § 853(p)(1).[7]

(C) Additional Issues

Lazarenko argues that the Court should deny the government's motion because other forfeitable funds are available in certain foreign bank accounts. *See* Opp. at 12. He also argues that forfeiture of the BJB Guernsey and NRKTO accounts is barred by "numerous" equitable doctrines. Opp. at 14. And he requests a hearing regarding the validity of a restraint on some of his assets. Opp. at 21. The Court addresses these points in turn.

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7. The Court rejects Lazarenko's argument that he could not have been responsible for the property because, for two significant chunks of time during his ownership of the property, he was in federal custody. *See* Lazarenko Supp. Br. at 9. The government was not obligated to move to forfeit the property earlier. *See id.* at 10-11. And in the meantime, as the true owner of the property, Lazarenko was responsible for its diminished value. Lazarenko acknowledges that the property had a caretaker, but does not explain why this caretaker failed to maintain the property. The Court thus finds that Lazarenko could have taken steps to maintain the property but did not.

Appendix C

1. Other Funds

Lazarenko argues that Lazarenko has forfeitable funds available in Antiguan and Lithuanian bank accounts, such that "substitution is not warranted." Opp. (dkt. 1731) at 12. The government argues that these funds are unavailable. *See* Reply (dkt. 1732) at 4-5. The Court need not resolve this dispute, which is irrelevant to the issue whether the government has shown that tainted property equaling or exceeding the amount that the government seeks as substitute property has been placed beyond the government's reach for one of the reasons listed in § 853(p)(1). *See Nejad*, 933 F.3d at 1165 (explaining that the government may satisfy a money judgment with "any substitute property it locates in the future"); 21 U.S.C. § 853(p)(2) (explaining that if the government identifies tainted property that has fallen beyond its reach for one of the listed reasons, the government can obtain "*any* other property" belonging to the defendant) (emphasis added); *supra* note 3.

2. Equitable Doctrines

Lazarenko argues that forfeiture of the BJB Guernsey and NRKTO accounts is barred by judicial estoppel and the election of remedies doctrine—and that, in the alternative, the Court should stay the government's motion under the first-to-file rule.

a. Judicial Estoppel

In 2004, the government initiated civil forfeiture proceedings in the U.S. District Court for the District of

Columbia against the BJB Guernsey account, asserting that funds in the account were traceable to the same unlawful activities described in the Second Superseding Indictment in the criminal case before this Court. *See* Opp. at 6. In June 2005, the government filed an amended complaint that also sought forfeiture of the NRKTO account funds. *See id.* These accounts have since been under court-ordered restraint. *See id.* at 6-7. For years, Lazarenko has been challenging the restraint, arguing that the government cannot show that the funds in the accounts are tainted. *See* Opp. at 7-8. That challenge remains pending in the D.D.C. proceedings. *Id.*

Lazarenko argues that the government is judicially estopped from obtaining the BJB Guernsey and NRKTO funds as substitute property because (1) the government's position that the funds constitute substitute property is inconsistent with its long-held position in the D.D.C. proceedings that the BJB Guernsey and NRKTO funds are directly forfeitable; (2) the government persuaded the D.D.C. court that the BJB Guernsey and NRKTO funds were tainted and obtained restraining orders to that effect; and (3) allowing the government to obtain the BJB Guernsey and NRKTO funds would give the government an unfair advantage because had these funds not been restrained as tainted property, Lazarenko could have used them to pay for his defense and other outstanding bills. *See* Opp. at 18.

The parties agree that the applicable test is whether (1) a party's later position is "clearly inconsistent" with its earlier position; (2) the party's prior position was

successful; and (3) allowing the inconsistent position would result in an "unfair advantage" or impose an "unfair detriment" on the opposing party. Opp. at 17 (citing *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1148 (9th Cir. 2011)); Reply at 8 (citing *United States v. Kim*, 806 F.3d 1161, 1167 (9th Cir. 2015)).

Forfeiture of the BJB Guernsey and NRKTO accounts is not barred by judicial estoppel because the government's position that the funds are forfeitable as substitute property is not inconsistent with the government's position in the D.D.C. proceedings. Under § 853(p), if "any" directly forfeitable property is placed beyond the reach of the government due to the defendant's conduct for one of the listed reasons, then the court shall order the forfeiture of "any other property" of the defendant up to the value of the property placed beyond the reach of the government. 21 U.S.C. § 853(p)(1), (2). The phrase "any other property" is most naturally read to mean any property of the defendant that has not been placed beyond the government's reach for one of the reasons enumerated in § 853(p)(1). Accordingly, the statute does not preclude courts from ordering the forfeiture of other tainted property as substitute property. The Court thus agrees with the First Circuit that "it makes no difference that this property could perhaps have been forfeited . . . as comprising or derived from the proceeds of the illegal activity. Because it was not forfeited, and there is still an unfulfilled judgment . . . this property may be forfeited in substitution." *United States v. Saccoccia*, 564 F.3d 502, 506 (1st Cir. 2009).[8]

8. Property cannot be simultaneously tainted and untainted. But that does not contradict the Court's reading of § 853(p), which

Because tainted property can be forfeited as substitute property under the statute, the government's position in the D.D.C. litigation is not inconsistent with the position that the government has taken here, and Lazarenko's judicial estoppel argument fails.[9]

b. Election of Remedies

Lazarenko argues that the government may not obtain the BJB Guernsey and NRKTO funds as substitute property because the government chose to pursue those

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permits both tainted and untainted property to be forfeited as substitute property. *See Saccoccia*, 564 F.3d at 506-507 ("[A]n asset cannot both be 'proceeds initially subject to forfeiture' and 'not proceeds initially subject to forfeiture' since on proposition is the negative of the other; but in our view assets in either category can be used as substitute assets . . . ."). To the extent the Tenth Circuit has held that an asset "cannot logically be both forfeitable and a substitute asset," *see United States v. Bornfield*, 145 F.3d 1123, 1139 (10th Cir. 1998), the Court disagrees. The Court also notes that *Bornfield's* broad language came in a unique context. The Tenth Circuit held that there was no "valid initial award of forfeiture," such that "the district court could not grant forfeiture pursuant to the substitute assets provision." 145 F.3d at 1139. Here, unlike in *Bornfield*, "there is no question that the monetary forfeiture judgment . . . is sound." *United States v. Smith*, 770 F.3d 628, 642 n.39 (7th Cir. 2014).

9. Lazarenko's argument that the doctrine of corporate standing must apply here based on a position that the government apparently took in the D.D.C. litigation, *see* Lazarenko Supp. Br. at 16-17, also fails to establish the elements of judicial estoppel because the argument does not address the government's success in advancing the position or whether the government has gained an unfair advantage.

funds via civil forfeiture proceedings in the D.D.C. litigation. *See* Opp. at 18 (citing *Teutscher v. Woodson*, 835 F.3d 936, 955 (9th Cir. 2016)).

This argument fails as well. "A party is bound by his election of remedies if three conditions are met: (1) two or more remedies existed at the time of the election, (2) these remedies are repugnant and inconsistent with each other, and (3) the party to be bound affirmatively chose, or elected, between the available remedies." *Teutscher*, 835 F.3d at 956 (cleaned up). The election of remedies doctrine "refers to situations where an individual pursues remedies that are legally or factually inconsistent" and "operates to prevent a party from obtaining double redress for a single wrong." *Id.* at 955 (cleaned up).

The doctrine does not apply here. Lazarenko acknowledges that the government "may bring civil forfeiture and criminal forfeiture cases involving the same property." Opp. at 19. And here, the government has stated that it will dismiss the BJB Guernsey and NRKTO funds from the civil forfeiture case if those funds are ultimately forfeited via the proceedings here. *See* Reply at 11. That means (i) the government's pursuit of the BJB Guernsey and NRKTO funds in this criminal forfeiture proceeding is not "legally or factually inconsistent" with its pursuit of the same funds via civil forfeiture proceedings in the D.D.C. litigation, and (ii) the government will not obtain "double redress for a single wrong." *Teutscher*, 835 F.3d at 955. Lazarenko argues that the D.D.C. proceedings have involved extensive discovery, Opp. at 19, but the doctrine does not apply when there is no inconsistency between the remedies pursued, *see Teutscher*, 835 F.3d at 955.

c. First-to-File Rule

Lazarenko next argues that this Court should stay this motion because the D.D.C. proceedings involve similar issues and have been pending for seventeen years. *See* Opp. at 20. Lazarenko relies on *Kohn Law Group, Inc. v. Auto Parts Manufacturing Mississippi, Inc.*, which explains that application of the first to file rule is discretionary. *See* 787 F.3d 1237, 1239 (9th Cir. 2015). Although the rule "should not be disregarded lightly," it should be applied only when doing so will "maximize economy, consistency, and comity." *Id.* (quotations omitted). "The first-to-file rule may be applied when a complaint involving the same parties and issues has already been filed in another district. Thus, a court analyzes three factors: chronology of the lawsuits, similarity of the parties, and similarity of the issues." *Id.* at 1240 (cleaned up).

Here, the Court declines to apply the first-to-file rule. For starters, the rule is not a natural fit given that proceedings here commenced years before the D.D.C. proceedings, even if the civil forfeiture complaint in the D.D.C. proceedings came before the forfeiture litigation at issue here. And here, it is more efficient for the Court to rule on the instant motion (after which the government will dismiss the subject property from the D.D.C. action if the subject funds are ultimately forfeited) than for the Court to wait an unknown length of time for potentially relevant rulings in the D.D.C. action.

It has been many years since this Court sentenced Lazarenko, and he still owes many millions of dollars on

the forfeiture money judgment. The Court declines to facilitate any further unnecessary delay.

3. Restrained Assets

Finally, Lazarenko argues that this Court should hold an evidentiary hearing to determine damages resulting from the restraint of the BJB Guernsey and NRKTO funds in the D.D.C. proceedings. *See* Opp. at 21-22. Lazarenko asserts that (i) the government restrained these assets by arguing that they were tainted, and (ii) by now arguing that the assets are substitute property, the government implicitly concedes that the assets should not have been restrained in the D.D.C. proceedings. *See* Opp. at 6-9, 21-23. But as the Court has explained, under § 853(p), substitute property can be tainted. *See supra* part II.C.2.A; *Saccoccia*, 564 F.3d at 506-07. Therefore, the Court denies Lazarenko's request for an evidentiary hearing.

III. CONCLUSION

For the foregoing reasons, the Court grants the government's motion for a preliminary order of forfeiture. The government has now established by a preponderance of the evidence that all funds frozen in:

a. Bank Julius Baer & Company, Ltd., Guernsey Branch in Guernsey, Channel Islands (identified by its number ending in - 3445) held in the name of or for the benefit of Pavel Lazarenko (the BJB Funds); and

b. Liechtensteinische Landesbank AG in Liechtenstein (identified by its number ending in NRKTO 7541) held in the name of or for the benefit of Pavel Lazarenko (the NRKTO Funds);

(the subject property) is the defendant's property, and, as a result, the subject property (up to $2,283,602.80) can be forfeited as substitute property and applied against the $22,851,000 money judgment.

Accordingly, for the foregoing reasons and pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure,

IT IS HEREBY ORDERED that the Money Judgment and Supplemental Preliminary Order of Forfeiture entered on September 29, 2006 (dkt. 1080), is amended to include the subject property;

IT IS FURTHER ORDERED that the government may conduct discovery in order to identify, locate, or dispose of property subject to forfeiture in accordance with Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure;

IT IS FURTHER ORDERED that the defendant, Pavel Lazarenko, shall execute such documents and take such steps as may be necessary to facilitate the transfer of the BJB Funds and the NRKTO Funds to the United States, or the seizure or restraint of these assets, including through the withdrawal of any objections in foreign proceedings and the execution of any documents as the United States may direct that may facilitate the

continued restraint, seizure, or transfer of these assets to the United States;

IT IS FURTHER ORDERED that the United States, through its appropriate agency, shall publish on www.forfeiture.gov, a government website, for at least thirty days, notice of this Order and notice of the government's intent to dispose of the property in such manner as the Attorney General may direct, and shall provide notice that any person, other than the defendant, having or claiming a legal interest in the property, must file a petition with the Court and serve a copy on government counsel within (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier. This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, 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 forfeited property and any additional facts supporting the petitioner's claim and the relief sought. The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the Subject Property, as a substitute for published notice as to those persons so notified;

IT IS FURTHER ORDERED that the court maintain jurisdiction to enforce the Preliminary Order of Forfeiture, and to amend it as necessary, pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure; and

IT IS FURTHER ORDERED that, pursuant to Rule 32.2(b)(4) of the Federal Criminal Rules of Procedure, this Preliminary Order of Forfeiture is final as to the defendant upon entry.

IT IS SO ORDERED.

Dated: August 6, 2021

/s/ Charles R. Breyer
CHARLES R. BREYER
United States District Judge

APPENDIX D — RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 982. Criminal forfeiture

(a)(**1**) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title [18 USCS § 1956, 1957, or 1960], shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

(**2**) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—

(**A**) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title [18 USCS § 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344], affecting a financial institution, or

(**B**) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 555, 842, 844, 1028, 1029, or 1030 of this title [18 USCS § 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 555, 842, 844, 1028, 1029, or 1030],

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(**3**) The court, in imposing a sentence on a person convicted of an offense under—

(A) section 666(a)(1) [18 USCS § 666(a)(1)] (relating to Federal program fraud);

(B) section 1001 [18 USCS § 1001] (relating to fraud and false statements);

(C) section 1031 [18 USCS § 1031] (relating to major fraud against the United States);

(D) section 1032 [18 USCS § 1032] (relating to concealment of assets from conservator, receiver or liquidating agent of insured financial institution);

(E) section 1341 [18 USCS § 1341] (relating to mail fraud); or

(F) section 1343 [18 USCS § 1343] (relating to wire fraud),

involving the sale of assets acquired or held by [the] the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate—

(A) section 511 [18 USCS § 511] (altering or removing motor vehicle identification numbers);

(B) section 553 [18 USCS § 553] (importing or exporting stolen motor vehicles);

(C) section 2119 [18 USCS § 2119] (armed robbery of automobiles);

(D) section 2312 [18 USCS § 2312] (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 [18 USCS § 2313] (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

Appendix D

(6)(A) The court, in imposing sentence on a person convicted of a violation of, or conspiracy to violate, section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act [8 USCS §§ 1324(a), 1324a(a)(1), or 1324a(a)(2)] or section 555, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546 of this title [18 USCS § 555, 1425, 1426, 1427, 1541, 1542, 1543, 1544, or 1546], or a violation of, or conspiracy to violate, section 1028 of this title [18 USCS § 1028] if committed in connection with passport or visa issuance or use, shall order that the person forfeit to the United States, regardless of any provision of State law—

(i) any conveyance, including any vessel, vehicle, or aircraft used in the commission of the offense of which the person is convicted; and

(ii) any property real or personal—

(I) that constitutes, or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the person is convicted; or

(II) that is used to facilitate, or is intended to be used to facilitate, the commission of the offense of which the person is convicted.

(B) The court, in imposing sentence on a person described in subparagraph (A), shall order that the person forfeit to the United States all property described in that subparagraph.

(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

(8) The court, in sentencing a defendant convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344 [18 USCS § 1028, 1029, 1341, 1342, 1343, or 1344], or of a conspiracy to commit such an offense, if the offense involves telemarketing (as that term is defined in section 2325 [18 USCS § 2325]), shall order that the defendant forfeit to the United States any real or personal property—

(A) used or intended to be used to commit, to facilitate, or to promote the commission of such offense; and

(B) constituting, derived from, or traceable to the gross proceeds that the defendant obtained directly or indirectly as a result of the offense.

(b)**(1)** The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(2) The substitution of assets provisions of subsection 413(p) [21 USCS § 853(p)] shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

Appendix D

21 U.S.C. § 853. Criminal forfeitures

(a) Property 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.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part [21 USCS §§ 841 *et seq.*], a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property". Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers. All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption. There is a rebuttable presumption at trial that any property of a person convicted of a felony under this title or title III is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this title or title III or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this title or title III.

(e) Protective orders.

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and

information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT. —

(A) IN GENERAL. — Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY. — Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution. Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property. Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving

rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General. With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this title, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 511(e) of this title (21 U.S.C. 881(e)), of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions. Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 511(d) of this title (21 U.S.C. 881(d)) shall apply to a criminal forfeiture under this section.

(k) Bar on intervention. Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders. The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions. In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may,

upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(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 reasonably 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.

(o) Construction. The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property.

(1) In general. Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property. In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction. In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites. The court, when sentencing a defendant convicted of an offense under this title or title III involving the manufacture, the possession, or the possession with intent

to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of title 18, United States Code [18 USCS §§ 3612 and 3664];

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18, United States Code [18 USCS § 3663A].