IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PACNET SERVICES LTD., **Plaintiff-in-Interpleader,** **v.** **OFFICE OF FOREIGN ASSETS CONTROL of the UNITED STATES DEPARTMENT OF THE TREASURY, JOHN DOE DEFENDANTS 1 –73,** **Defendants/Claimants-in-Interpleader.**	Civil Action No.: 17-cv-06027

REPLY BRIEF IN SUPPORT OF PACNET SERVICES LTD.'S MOTION FOR AN ORDER (1) TO SHOW CAUSE WHY THE U.S. DEPARTMENT OF THE TREASURY SHOULD NOT BE HELD IN CONTEMPT AND (2) FOR SANCTIONS

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PacNet Services Ltd. ("PacNet") respectfully submits this reply to OFAC's Memorandum of Law in Opposition to PacNet's Motion for an Order (1) To Show Cause Why the U.S. Department of the Treasury Should Not Be Held in Contempt and (2) For Sanctions (the "OFAC Opp'n") and to the Memorandum of Law of the United States of America in Opposition to PacNet's Motion (the "USA Opp'n").[1] The government's two briefs underscore its use of incomplete and misleading information to abuse its authorities and these proceedings.

INTRODUCTION

In its two oppositions to PacNet's Motion, the United States argues that: (1) OFAC had nothing to do with seizures of PacNet funds by the USPIS and DOJ; (2) OFAC should not be sanctioned because OFAC was not ordered explicitly to do anything; (3) the United States' seizures were authorized; and (4) all claims to PacNet's funds should be heard in largely unrelated criminal cases. All the while, the United States is relying on *ex parte* filings that have not been disclosed to PacNet or any other party, which has prevented them from fully responding to the government's filings. The United States makes no effort to explain why its actions have been shrouded in secrecy or why it concealed its actions until after briefing on PacNet's Motion to Compel the U.S. Department of Treasury's Compliance with Interpleader Deposit Order or Consolidate Actions ("Cross-Motion"). It is now apparent that the United States believes it can destroy a business, take its assets, and damage the lives of numerous individuals while disregarding constitutional and statutory limitations – all while failing to fully inform the Court and other litigants of its tactics.

On February 9, 2018, this Court held a pre-motion hearing with respect to OFAC's Motion to Dismiss and PacNet's Cross-Motion. ECF No. 136. During that hearing, the Court

[1] PacNet has submitted only a single reply brief to the two oppositions filed by the United States. All capitalized terms herein have the meanings ascribed to them in PacNet's Motion.

asked: "Where is all this money?" ECF No. 136 at 4:18. Counsel for the Government did not respond, but counsel for PacNet explained that approximately "half of the interpleader fund is sitting in the Court's registry right now" and "the Department of Justice or the U.S. Postal Inspector Service seized the remainder of the money that was to be used to fund the interpleader." *Id.* at 4:20–5:6. Counsel for the Government did not clarify this statement or suggest that it was incorrect in any way. Later, on April 5, 2018, the deadline for PacNet's reply in support of its Cross-Motion, the same attorney for the Government sent a letter to the Court indicating that the U.S. Postal Inspection Service had seized the interpleader funds that had been placed in the Court's registry and had transferred them to the U.S. Marshals Service's seized asset deposit fund. ECF No. 137. After receiving that letter, which was the most recent example of a long-running pattern of bad faith acts by the Government, PacNet filed the instant motion.

Rather than admit its gamesmanship, the Government doubles down. In an effort to avoid consequences for its misuse of its powers, it cites overruled case law in support of the inaccurate proposition that "the government may forfeit the proceeds of an entire conspiracy" and attempts to play a shell game with the federal entities involved.[2] The Government further

[2] For example, OFAC seeks to retreat from prior admissions that its sanctions were an exercise of law enforcement authority by contending directly the opposite – that "OFAC's designation was not 'an exercise of law enforcement authorities.'" OFAC Opp'n at 2. But that bald assertion is impossible to square with the Government's assertions elsewhere that PacNet's funds are forfeitable under criminal statutes, USA Opp'n at 2, and the declaration of Todd Conklin, Deputy Associate Director of the Office of Global Targeting at OFAC, that "based on the evidentiary record compiled by OFAC, OFAC determined" that PacNet "engaged in an ongoing pattern of serious criminal activity . . . ." Conklin Decl. ¶ 3. As stated in government press releases the purpose of the sanctions against PacNet was to support law enforcement. For example, in discussions with PacNet, Deputy Associate Director Todd Conklin explained how OFAC used sanctions of innocent third parties to support law enforcement efforts against top-level individuals or leaders. *See, e.g., United States v. Marllory Chacon Rossell*, Case No. 11-cr-20582-JEM (S.D. Fla.), ECF No. 47 at 9 (noting the use by OFAC of its designation authority to sanction without evidence of criminal involvement a teenage daughter of a criminal defendant); "The Guatemalan Trafficker Who Confessed to the DEA," republished at InSight Crime (Mar. 30, 2015) available at: https://www.insightcrime.org/news/analysis/the-guatemalan-trafficker-who-confessed-dea/. He described those third parties as "collateral damage." Mr. Conklin and OFAC similarly have treated PacNet and its employees as "collateral damage" and continue to do so in their pursuit of direct mail fraud defendants.

demonstrates its lack of candor by contending that its seizure of the funds in the Court registry was permitted by a December 12, 2017 seizure warrant without regard to subsequent court conferences and scheduling orders, at which the Government's attorney remained conspicuously silent about the current disposition of the funds subject to the interpleader action. The United States has abused this Court by using it as a vehicle to assist in a miscarriage of law. The Court should put an end to such gamesmanship, abuse of process, and bad faith by imposing appropriate sanctions.

ARGUMENT

I. The Government Is in Contempt

A. The Government Has Violated and Impeded the Court's Orders

The Government contends that it cannot be held in contempt because the Court orders at issue did not "impose any obligations on OFAC or the United States, generally," OFAC Opp'n 10–11, and because the funds at issue "were seized by the government pursuant to duly authorized seizure warrants," USA Opp'n 2. Neither contention is persuasive.

Although the Court's orders may not *expressly* require the Government to undertake any particular affirmative actions, the Government has violated the orders by seizing the funds that were the subject of those orders and impeding the full implementation of the orders. The Scheduling Order and the Interpleader Deposit Order directed, *inter alia*, that PacNet deposit the subject funds in the court registry and that PacNet and the Government brief the proper manner in which the Court should resolve the competing interests over those funds. The Government intentionally prevented implementation of the Scheduling Order and Interpleader Deposit Order by barring PacNet from fully depositing the funds, seizing the funds from the Court registry, attempting to prevent the Court from resolving how the competing interests should be resolved,

and failing to inform the Court and the parties of the nature and extent of its conduct. Such intentional interference with the Court's orders, and the unilateral attempt to deprive the Court of jurisdiction, constitutes contempt and should be sanctioned. Indeed, in a similar context, a court of this District found parties to be in contempt where they "knowingly and intentionally obstructed and frustrated the effectuation" of the court's auction order by orchestrating the removal of assets before the auction took place. *Gasser v. Infanti Int'l, Inc.*, No. 03-cv-6413, 2008 WL 2323367 (E.D.N.Y. June 2, 2008). The Second Circuit affirmed that decision. *Gasser v. Amboy Nat. Bank*, 507 F. App'x 19 (2d Cir. 2013).

The Government's argument that it was permitted to seize the funds placed in the Court registry because it received an *ex parte* seizure order in December 2017 highlights the underhanded nature of the Government's actions and the Government's lack of candor to the Court. If the Government already had received an order to seize the funds in the Court's registry prior to the February 9, 2018 hearing with full and transparent disclosure to the Court, then why did the Government not explain as much during the hearing, especially when the Court asked about the location of the funds? Why did the Government wait to reveal this information until the deadline for PacNet's reply in support of its motion to consolidate? The answer appears to be that the Government does not want to have to defend the substance or legality of its actions, but instead wishes to abuse sealed proceedings to avoid defense of its actions on the merits.

B. The Government's Is Engaging in an Inappropriate Shell Game

PacNet has sought a show cause order against the United States. The Government argues that OFAC should not be held in contempt because OFAC "has no involvement or control over the seizure of funds conducted by USPIS." OFAC Opp'n at 1. Ignoring the fact that OFAC also is represented by the U.S. Attorney's Office and is an arm of the Federal Government, the Government contends further that "the warrant seizures were obtained by the USPIS and the U.S. Attorney's Office for the Eastern District of New York without involvement or coordination with OFAC." USA Opp'n at 10. Such arguments beg the question posed by the Court at the February 9th hearing: "[A]re there two governments here?" ECF No. 136 at 5:15–16. No: just one government pretending that its executive agencies are all separate, unrelated entities. Those agencies have acted in a coordinated fashion to violate PacNet's rights and disregarded the legal process and schedules established by this Court.

The Department of Justice has appeared in this case, through the same counsel, on behalf of both "OFAC" and on behalf of the "United States of America." The Department of Justice, without intervening separately, has filed multiple briefs in this case on behalf of the United States. The United States should not now be heard to argue that its constituent agencies are separate and unrelated. As the court stated in *Paunescu v. I.N.S.*, 76 F.Supp.2d 896, 903 n.2 (N.D. Ill. 1999): "[D]efendants have tried to deftly transfer blame and responsibility from one governmental entity to another. The court will not allow defendants to play this shell game. The INS, the FBI, and the State Department are all arms of the United States of America." In similar cases, U.S. courts have ordered the return of seized funds because the Government engaged in a forfeiture shell game "[r]ather than openly defending its purported interest in the money." *See, e.g., United States v. Cills*, 698 F. Supp. 22, 24 (D.P.R. 1988). By attempting to shield its misdeeds behind a shell game, the Government puts at issue the extent to which the seizures and

violations of the Court's orders were acts of isolated agencies as it now contends, rather than the concerted multiagency activity it touted previously, which included announcement of the seizure of a PacNet bank account.[3] The government's shell game should not be allowed.

C. The United States' Seizure of the Interplead Funds Was Illegal

i. The Government Ignores Supreme Court Precedent

The United States claims that its seizure of PacNet funds through a separate criminal case was not contemptuous because "the government may forfeit the proceeds of an entire conspiracy against a co-conspirator charged in a criminal case." In so arguing, the United States relies exclusively upon 2006 and 2012 cases which were decided prior to, and overruled by, *Honeycutt v. United States*, 137 S. Ct. 1626, 1631–34 (2017). *See* USA Opp'n at 15–16, citing *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) and *United States v. Watts*, 477 F. App'x 816, 817–18 (2d Cir. 2012). *Honeycutt*, which PacNet cited in its opening brief and the Government does not even attempt to address, expressly held that federal law "requires the defendant to forfeit only his interest in the [criminal] enterprise" and that "Congress did not authorize the Government to confiscate substitute property from other defendants or coconspirators." 137 S. Ct. at 1632–33. Accordingly, "forfeiture pursuant to § 853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime." *Id.* at 1635. The United States does not address this controlling precedent at all.

The Government's action also disregards precedent of the Court of Appeals for the Second Circuit and other courts implementing the Supreme Court's ruling in *Honeycutt* and applying it to forfeitures under § 981 and § 982. *See United States v. Fiumano*, 721 F. App'x 45,

[3] "OFAC closely coordinated today's action [against PacNet] with the Consumer Protection Branch of the Department of Justice and the U.S. Postal Inspection Service." OFAC Statement, "Treasury Sanctions Individuals and Entities as Members of the PacNet Group" (Sept. 22, 2016), available at https://www.treasury.gov/press-center/press-releases/Pages/jl5055.aspx (last visited Mar. 2, 2018).

51–52 (2d Cir. 2018) (summary order) (vacating forfeiture order pursuant to 18 U.S.C. § 981(a)(1)(C) imposing joint and several liability on defendant); *United States v. Brown*, 714 F. App'x 117, 118 (3d Cir. 2018) ("*Honeycutt* applies with equal force to § 982(a) … the imposition of joint and several liability in the forfeiture money judgment was an error which requires remand…"). The property of PacNet, which is not a co-conspirator or criminal defendant in any pending action, cannot be forfeited in the separate criminal proceeding based on a claim of joint and several liability.

ii. The Government Ignores Relevant Facts

Not only has the Government acted to seize PacNet's property contrary to the Constitution and federal law, the Government has done so in disregard of the fact that PacNet has not conspired with Ercan Barka and Ryan Young. In its pleadings here – and likely all its *ex parte* submissions to other judicial officers – the Government fails to inform the Court of undisputed, exculpatory facts which undercut fully the Government's claim to seize PacNet's property.[4] The United States simply ignores the undisputed fact that it has not charged or named PacNet (or any of its associated companies) as a co-conspirator in any action with Barka or Young—the criminal defendants in whose cases the Government filed Bills of Particulars identifying the seized funds *after* this interpleader action had been initiated and *after* the defendants pled guilty. *See* Complaint attached to Calhoun Decl. at Ex. A, and Information

[4] For example, beginning in at least January 2015, the PacNet Group submitted Suspicious Transaction Reports and other reports with the Canadian government revealing the conduct of Ercan Barka or companies allegedly operated or controlled by him and co-conspirators. Suspicious Transaction Reports ("STRs") are the Canadian equivalent of a Suspicious Activity Reports ("SARs") filed with the U.S. Government's Treasury Department. PacNet filed STRs in relation to the conduct of Mr. Barka with the Financial Transactions and Reports Analysis Centre of Canada, a Canadian federal government regulator. Such disclosure of information to the government defeats a claim of criminal conspiracy. *See, e.g.*, *United States v. Steele*, 685 F.2d 793, 801 (3d Cir. 1982) ("as a matter of law" an entity could not be a member of a conspiracy where it disclosed the alleged conspiracy to law enforcement officials).

attached at Ex. B. Instead, the Government asserts without any support that PacNet is a criminal co-conspirator and that its funds are all subject to forfeiture in those cases.[5] Such action flies in the face of fundamental fairness and long established federal law that criminal forfeiture is an *in personam* proceeding. *See* Dep't of Justice Asset Forfeiture Policy Manual at 125; *Honeycutt*, 137 S. Ct. at 1635 (noting the *in personam* nature of criminal forfeiture proceedings); *United States v. Bajakajian*, 524 US 321, 332 (1988). To the extent that the United States is relying upon sealed affidavits and filings to justify its noncompliance with the Court's Scheduling Order and Interpleader Deposit Order, the failure of those sealed materials to provide full and frank disclosure to the Court is material and undercuts reliance on any such document.

D. The Government's Use of Sealed Filings Was Unjustified and Does Not Insulate It from Compliance with the Court's Orders

The Government argues that its act of seizing funds held in the court's registry for an interpleader action "is consistent with at least one other case in this district involving similar circumstances." USA Opp'n at 12 (citing *E*Trade Securities LLC v. Weiner et al.*, Case No. 11-CV-1997 (DLI)). But *Weiner* does not provide support for the Government's actions in this matter. Unlike *Weiner*, the United States is a party to this action and specifically demanded that PacNet file this action and share information concerning this action with the United States Attorney's office so that it may participate in this action. In this context, the Government's use of secret pleadings and sealed affidavits to justify its efforts to undercut the very actions that it

[5] In addition to its disregard of the law and facts in relation to PacNet, the Government has acted in a contradictory fashion with regard to the property of the actual wrongdoers in the asserted fraud. For instance, in *United States v. Ressler*, Case No. 6:18-cr-00004-SEH (D. Mont.), defendant Ressler was convicted of conspiring to commit mail fraud as part of Barka and Young's criminal conspiracy. *See* Case No. 6:18-cr-00004-SEH, ECF Nos. 1, 5, 26. Although Ressler offered to pay restitution to victims in his Sentencing Memorandum (see Case No. 6:18-cr-00004-SEH, ECF No. 19 at 4), the Government sought no forfeiture or restitution from him. Here, in contrast the Government disregards the law, facts, and its contractual obligations to PacNet so that it can seize the property of PacNet in an unrelated criminal prosecution.

demanded are fundamentally unjust. The plaintiff-in-interpleader in *Weiner* voluntarily dismissed that action and the Government's seizure of the funds was never challenged.

These proceedings have been needlessly complicated and costly because of the United States' use of sealed, *ex parte* proceedings that it later reveals piecemeal to PacNet when it deems convenient. Because the basis for the government's seizures have not been disclosed to PacNet, it cannot respond fully or adequately to the government's briefing in this matter. Based on the government's prior actions and what has been disclosed to date, PacNet contends it is likely that the United States has concealed material, exculpatory information from the court.[6] Full disclosure from the United States will show that the government's actions causing PacNet to marshal funds in this interpleader action and then seizing those funds resulted from continued coordination between OFAC and DOJ and were designed to undermine this action and the Court's orders. PacNet should have full access to the sealed filings and affidavits concerning the seizures and the documents evidencing coordination between DOJ, USPIS, and OFAC. When PacNet is on an equal factual footing with the government, PacNet should have an opportunity to supplement this brief.

E. The Unrelated Criminal Prosecutions Are Not A Proper Venue

The United States now suggests that claims to funds subject to forfeiture may only be made in criminal forfeiture proceedings pending against Young and Barka. *See* USA Opp'n at 15 (citing 21 U.S.C. § 853(k)). The criminal forfeiture statute, however, does not bar this interpleader action from moving forward. Section 853(k) prevents a party from (a) intervening in a criminal proceeding (which is not relevant) or (b) filing an action to determine ownership of disputed property after "the filing of an indictment or information alleging that the property is

[6] *See* Complaint at Section II, ¶¶ 30-37.

subject to forfeiture under this section." Here, no such indictment or information was filed against the property. Forfeiture was asserted against the funds only through the attempted use of the various bills of particular filed in February and March 2018, well after this interpleader action was instituted in October 2017. *See* Calhoun Decl., Exs. C-E. The criminal forfeiture laws do not bar the continuance of this action or resolution of the government's claims in it.

There is no judicial economy in forcing dozens of claimants to make claims in a separate, *in personam* criminal forfeiture proceeding when the necessary parties are already present here in the previously filed interpleader action. Rather than comply with its September 2017 Agreement and make a common-sense claim in this action to funds owed to Barka/Young, the United States has engaged in cloak and dagger schemes to seize PacNet's funds and deprive it and PacNet's creditors of the benefit of the September 2017 Agreement.

II. The Sanctions Requested in PacNet's Motion Are Appropriate

The Government also contends that sanctions are not warranted and that the Government should not be compelled to disclose (a) all declarations, affidavits, and materials filed in relation to the seizure of PacNet's accounts and funds that were on deposit with the Court registry or (b) all communications between OFAC, the U.S. Department of Justice, and the USPIS in relation to PacNet. OFAC Opp'n at 12–14. The Court should not heed such arguments.

As an initial matter, and as a Second Circuit case relied upon by the Government notes, "the district court has broad discretion to design a remedy that will bring about compliance" with the Court's orders. *Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc.*, 673 F.2d 53, 57 (2d Cir. 1982). Here, the sanctions proposed by PacNet will induce compliance with the Court's orders and will deter the Government from future violations of the Court's orders. The disclosure of the requested documents also will enable the Court, PacNet, and other parties to assess the Government's honesty in its pleadings, thereby enabling the Court to tailor additional sanctions,

as appropriate, to address the Government's contemptuous action.

Further, the Government argues that the seizure warrants were issued "upon a showing of probable cause to believe that the funds constituted or were derived from proceeds traceable to mail fraud, and property involved in money laundering," USA Opp'n at 2. PacNet, the other parties, and the Court should be able to assess whether those bald assertions are accurate and to challenge them, as appropriate. After all, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

CONCLUSION

We respectfully request that PacNet's Motion, and the relief requested therein, be granted and that the Court enter an order:

a. Granting PacNet's Motion and issuing to the United States an Order to Show Cause why it should not be held in civil contempt;

b. Requiring the United States to deposit with the Court registry all funds that the U.S. Government has seized from (i) PacNet's bank accounts with BMO Harris and Avidia and (ii) the Court registry;

c. Directing the disclosure of all communications between OFAC, the U.S. Department of Justice, and the U.S. Postal Inspection Service in relation to PacNet from April 2016 until the present, which will further demonstrate the Government's bad-faith and abuse of power;

d. Directing disclosure of all declaration, affidavits, and materials filed in relation to seizure of PacNet's accounts; and

e. Requiring the U.S. Government to pay PacNet's costs and attorney fees associated with this motion, any necessary oral argument or reply, and combatting the U.S. Government's inappropriate seizure efforts.

Dated: July 9, 2018 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 9, 2018, I served a copy of the foregoing document to the following by

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