

District of Columbia district court issues protective order prohibiting deposition of government counsel, but allows claimant to serve additional limited interrogatories on government. Bagudu asserted a claim to assets allegedly stolen from Nigeria and laundered through U.S. banks by Nigeria's former de facto president Sani Abacha and Bagudu's brother, Abubakar. Bagudu served a deposition notice on Daniel Claman, the government's supervisory trial counsel. Bagudu claimed Claman, who was the lead attorney responsible for the investigation of the Abacha matter prior to the filing of this case, had information essential to Bagudu's defenses to the forfeiture action. In response, the government moved for a protective order to preclude the deposition. Claman worked at DOJ's Money Laundering and Asset Recovery Section and met with foreign law enforcement officials who were also investigating the Abacha matter. Bagudu asserted the government delayed bringing this proceeding for tactical reasons, resulting in prejudice to his claim. Thus, relevant documents and witnesses were no longer available and his due process rights under the Fifth Amendment were violated. The government argued much of the information sought could be obtained by other means, was privileged or irrelevant, or was not crucial to Bagudu's defenses. The court noted a substantial risk that questioning Claman about nonprivileged matters, such as what he conveyed to or learned from his foreign counterparts during his investigation, could lead to the revelation of privileged work product, including his legal theories of the case. Claman also was allegedly involved in the drafting of a complaint and in the government's decision whether to file this action, a topic which Bagudu specifically sought to probe. Hence, the deposition could present a unique opportunity for harassment, and could be used to disrupt and delay the case, drawing the parties (and the court) into disputes regarding collateral matters related to assertions of privilege, scope, and relevancy. The deposition of trial counsel also would strain the adversarial process itself. Given the government's significant interests in precluding the deposition of its trial counsel, the risk of encountering privilege and work-product issues, and Bagudu's diminished need to depose Claman due to the availability of other, less burdensome sources, including the government's Rule 30(b)(6) witness, the court found that the deposition would entail an inappropriate burden or hardship and granted the protective order. Nevertheless, the court said Bagudu could submit limited additional interrogatories to the government regarding certain communications it had with foreign officials. *United States v. All Assets Held in Account No. XXXXXXXX*, No. CV 13-1832 (JDB), 2019 WL 95605 (D.D.C. Jan. 3, 2019).

New York district court refuses to amend criminal forfeiture judgment based both on the merits and procedurally, since neither FRCP 60(b) nor habeas can be used for such an amendment. Pursuant to Federal Rule of Civil Procedure 60(b), defendant Munson sought to amend the \$46.2 million forfeiture order entered against him after he was convicted of drug conspiracy because he did not personally obtain all of the property used to calculate the forfeiture amount. The court stated that when faced with a Rule 60(b) motion challenging a criminal judgment, the district court may either treat the motion as a petition under 28 U.S.C. §2255 or deny it as beyond the scope of the rule. However, a habeas petition cannot be used as a vehicle to challenge non-custodial components of a criminal sentence, such as restitution or forfeiture. Therefore, the motion could not be converted to a habeas petition and the defendant could not use Rule 60(b) to challenge the forfeiture order. Nevertheless, any challenge to the forfeiture order also failed on the merits. Munson asserted the court held him jointly and severally liable for the forfeiture funds for marijuana he did not personally distribute or derive a benefit from. The

court said that simply was not true. The forfeiture order was based solely on marijuana that the defendant personally acquired and distributed. The court stated that it avoided any double counting and used a conservative estimate for the value of marijuana proceeds the defendant personally received. *United States v. Munson*, No. 06CR143 (JGK), 2019 WL 188493 (S.D.N.Y. Jan. 14, 2019).

Illinois district court denies motion to dismiss third-party petitions that were filed 38 and two days late, respectively, based on good cause. Daniel Spitzer pled guilty and Alfred Gerebizza was found guilty on fraud charges. Both sentences included forfeitures of the defendants' interests in property: for Spitzer, property in North Barrington, Illinois, and for Gerebizza, property in Phelps, Wisconsin. The two defendants' spouses filed claims in connection with the forfeitures. The government moved to dismiss both claims as untimely. Spitzer was ordered to forfeit \$34 million. The preliminary order of forfeiture identified the North Barrington property as a substitute asset available to partially satisfy the forfeiture judgment and forfeited Spitzer's interest in the property to the United States. On May 21, 2015, the government filed a motion for a final order of forfeiture. The motion stated that notice of the forfeiture had been served on Judy Spitzer, though it did not provide the date of service. The motion further stated that no claims had been filed other than a claim by Lake County for delinquent property taxes and that the time for filing claims had expired. On the same day the government filed the motion, Judy filed a verified claim to the property and a statement that she opposed its forfeiture. The government stated that Judy had received direct notice on March 14, making her claim due no later than April 13, 2015, 30 days later. Her claim, filed on May 21, was 38 days too late. Judy argued she had prepared a verified claim on April 29, 2015 but that "due to an apparent e-filing mishap," it was not filed until May 21. The government replied that still would have been untimely. The court held that what happened was the equivalent of the filing of a late answer to a complaint in a civil case, leading to an order of default (though here, not even that happened). Under Rule 55©, "good cause" permits setting aside of a default or late answer. Based on Judy's documents, she had at least a facially legitimate claim to the property, in her capacity as trustee of the trust that held title. The court concluded there was good cause to allow Judy's late claim and proceed to determination of the matter on the merits and denied the government's motion to dismiss. Gerebizza's spouse Shirley was required to file a petition to adjudicate the validity of her interest in the property by June 5, 2016. On June 7, 2016—two days late—Shirley filed a petition for remission or mitigation of the forfeiture, claiming that she was the lawful owner of the property. The government also moved to dismiss Shirley's petition as untimely. The court held that Shirley asserted her interest only two days late; asserted a legitimate claim to the property; and allowing dismissal of her claim would permit the government to take the property free and clear of her claim, which could work a substantial injustice. The government did not allege any prejudice by the two-day-late filing. The court therefore found good cause and denied the motion as to Shirley, too. *United States v. Spitzer et al*, No. 10 CR 651, 2019 WL 277741 (N.D. Ill. Jan. 22, 2019).

New York district court dismisses third-part petitioner's bonafide purchaser claim but allows superior interest claim to proceed. Defendant and the government agreed to a Consent Preliminary Order of Forfeiture in which he agreed to forfeit his right, title, and interest in 62 East 131 Street, New York, New York. Petitioners alleged Binyan Or is the assignee of a

promissory note, which was in default, secured by a mortgage on the property that has also been assigned to Binyan Or. The government contended that title to the property vested in the United States on November 5, 2009, when it was purchased with proceeds of Defendant's crimes and moved to dismiss the petitions. The government argued that 21 U.S.C. §853(n)(6)(A) protects only interests that were both vested or superior to the defendant's rights and held by the particular petitioner at the time the rights of the United States properly vested in the defendant's property pursuant to Section 853©, and that the statute preempted any contrary principles of state law. The court said this interpretation was inconsistent with the plain language of the second prong of the statute, which focuses on the superiority of the interest to that of the defendant at the time of the crime, rather than on the identity of the holder of the interest at that time. The government also asserted, at oral argument, that §853(n)(6)(A) should be limited to persons who themselves held superior interests prior to the act giving rise to forfeiture, while Section 853(n)(6)(B)'s bona fide prospective purchaser rule was the only available avenue for a petitioner who acquired an interest in the property after the act giving rise to forfeiture. The court said, however, that §853(n)(6)(A)'s protection of superior interests is not tied to the timing of the acquisition; it is available to the holder, or the assignee, of an interest superior to or separate from that held by the criminal defendant, whereas Section 853(n)(6)(B) is available to a petitioner who, without notice of the forfeiture, acquired the interest of the defendant after the government's interest vested, or who acquired an otherwise inferior interest. The government's interpretation of §853(n)(6)(A) could lead to the incongruous result of allowing the holder of a pre-existing lien on a property subject to forfeiture to retain a security interest in the property following the act giving rise to the forfeiture, but would effectively bar him from alienating the interest. Interpreting this statute to allow the Government to extinguish a pre-existing lien interest held by an innocent third-party that was never part of the property interest held by the criminal defendant raised constitutional takings issues that a court should seek to avoid in interpreting any ambiguity in the statute. The court found that Petitioners stated a plausible claim that they held a mortgage interest in the property that was superior to that of Defendant at the time of the act giving rise to forfeiture. The government also moved to dismiss Petitioners' claim that they were bona fide purchasers for value. The assignment to Petitioners, however, was executed almost a year after the government filed its notice of pendency, which provided Petitioners with constructive notice, at the time of purchase, that the government was seeking forfeiture of the entire parcel. Although the notice of pendency expired before Petitioners recorded the assignment in 2015, their delay of several years in recording did not relieve them of constructive notice of a document that would have been revealed through a title search at the time of their purchase. Thus, they were not bona fide purchasers for value within the meaning of New York law, and the court dismissed the petition to the extent it was based on Section 853(n)(6)(B). *United States v. Rodriguez-Perez*, No. S38 10 CR 905-LTS, 2019 WL 188400 (S.D.N.Y. Jan. 11, 2019).

Louisiana district court dismisses third-party petitions that were unverified and disallows late-filed verification. This ancillary proceeding adjudicating third party rights to forfeitable property arose from a Honduran money laundering conspiracy. The defendant pled guilty to a conspiracy charge and acknowledged that nine parcels of real estate in St. Tammany Parish identified in the Notice of Forfeiture contained in the superseding bill of information were purchased with criminal proceeds in transactions intended to disguise the illegal source of funds.

The court issued a preliminary order of forfeiture. After Defendant's family members filed *pro se* third-party petitions as to three out of the properties, the government moved to strike the petitions and sought a final order of forfeiture, arguing the petitions were not signed and sworn under penalty of perjury, mandating dismissal. One petitioner filed a response in which he swore to the statements in his petition (and its accompanying response) under the penalty of perjury; the other did not amend her petition. The court noted that while at least one court considering a *pro se* petition has held that such a defect can easily be cured by amendment, it nevertheless found no reason to create an exception to the statutory requirements, requiring strict compliance. It said the notice served on the claimants clearly informed them that any petition must be timely filed and that the petition signed under penalty of perjury. Even assuming the amendment satisfied the sworn requirement, the amendment still violated the statutory deadline contained in 21 U.S.C. §853(n)(2), which had expired months before the petitioner submitted his amendment (which he styled as a response to and petition to dismiss the government's motion to strike). Further, both third party petitioners failed to state a claim for relief. Neither alleged either (a) an interest acquired prior to the conduct for which Defendant was convicted, nor (b) a subsequent interest perfected in a bona fide transaction without knowledge of the criminal conduct. One petitioner merely requested leniency due to the dire circumstances of her and her three children if the properties were forfeited since she and her children resided in one of the properties. However, she did not assert that she had any legal interest in any of the properties. The other petitioner failed to identify sufficient facts that would give rise to a legal interest in the three properties, but merely sought to contradict the facts Defendant acknowledged under oath when he pled guilty. The only question at this stage was whether the petitioner stated a claim under either §§853(n)(6)(A) or (B). There was no dispute that the contested properties came into the petitioner's possession only after the start of the money laundering conspiracy. Accordingly, the court granted the motion to strike both petitions and issued a final order of forfeiture. *United States v. Zelaya Rojas*, No. CR 18-86, 2019 WL 302832 (E.D. La. Jan. 23, 2019).