Eleventh Circuit affirms criminal forfeiture money judgment since it was more likely than not that she acquired or procured the $1.4 million in fraudulent tax refunds found in her possession. Defendant appealed the district court's amended forfeiture money judgment imposed after the original forfeiture money judgment was vacated and remanded in light of the Supreme Court's recent decision in *Honeycutt v. United States*. On remand, the district court entered an amended forfeiture money judgment in the amount of $1,457,293.95. On appeal again, Defendant contended that the amended judgment violated the Eighth Amendment's Excessive Fines Clause as grossly disproportionate to her offense and the district court misapplied the *Honeycutt* standard. By way of example, the Supreme Court suggested a college student delivering drugs for a "mastermind" should not be held liable for the entire $3 million drug scheme if the college student received only $3,600 for his participation. The mastermind, on the other hand, "ultimately 'obtains' " the $3 million, whether he receives it directly from drug purchasers or arranges to have purchasers pay the college student as an intermediary. Here, the district court properly found that Defendant personally obtained $1,457,293.95 as a result of her stolen identity refund fraud scheme. Based on her own admissions as part of her guilty plea and on an agent's testimony, it was more likely than not that she came into possession and enjoyment of, acquired, or procured the $1.4 million in fraudulent tax refunds found in her storage units, in her Mercedes, and in her purses. She had admitted that both she and her husband together electronically filed false tax returns using a laptop and a hot spot device, that she accessed the resulting fraudulently obtained refunds by loading them onto pre-paid debit cards, which she and her husband then had mailed to Florida, where the debit cards were "ultimately received by" both her and her husband. These facts were amply sufficient to support the district court's finding, by a preponderance of the evidence, that Defendant personally obtained those fraudulent refunds. Although Carlyle argues that nearly all of the proceeds from the scheme. Also Defendant did not present any evidence to support her claim that the proceeds could have ended up, and almost certainly did end up, in the pocket of the fraud scheme's leader, her husband. Absent some other evidence to the contrary, it was reasonable to infer from the evidence in the record that Defendant possessed and enjoyed the fruits of her own efforts. There also was no merit to her argument that her husband's forfeiture payments should have been offset against hers. Finally, Defendant's forfeiture money judgment was not grossly disproportionate to her offense. *United States v, Carlyle*, No. 18-11486, 2019 WL 2307959 (11th Cir. May 30, 2019).

Puerto Rico district court dismisses third-party petition of Subway restaurant company since franchise agreements did not transfer ownership of Subway's property rights to the defendant. After Peña pleaded guilty to bank fraud, the government moved for a preliminary forfeiture order that included Franchise and Sublease Agreements and business assets for two Subway restaurants. The Court authorized the government to seize both Subway premises and enjoined Peña from selling, transferring or taking any other action that would reduce the value of the assets. Doctor's Associates and Subway Realty requested relief from forfeiture on the grounds that it operates and franchises to others to operate sandwich shops under the trade name and service mark Subway®. Subway Realty rented locations for the two Subway restaurants. The government opposed Subway's motion. The court stated that the government's interests in Peña's property vested when Peña purchased the restaurants' ongoing business assets, goodwill and tangible personal property, when the Subway sublease was assigned to Peña, and when Subway entered into franchise agreements to operate the restaurants. To acquire the property

subject to forfeiture, Peña entered into two separate but related agreements. First, Peña subleased locations for the restaurants. Second, Peña and Subway entered into franchise agreements. The court held that section 853 compelled it to forfeit Peña's interests arising from the Subway franchise agreements. These interests vested when Peña committed bank fraud and he purchased both Subway restaurants' business assets, goodwill, and tangible personal property, and when he became the assignee of the Subway sublease and entered into the franchise agreements. The court recognized that the interests reserved by Subway in the franchise agreements remained the property of Subway. The Final Forfeiture Order pertained solely to Peña's interests. The government said it was not interested in operating Subway restaurant locations in Puerto Rico, but sought to ensure that Peña did not retain the right to operate the Subway franchises. Subway argued that its legal rights and interests were superior to those of defendant at the time of the commission of the acts that gave rise to the forfeiture, however it conflated its property with the rights conferred to Peña pursuant to the franchise agreements. Subway allowed Peña to access its proprietary "system" to prepare and sell sandwiches. The franchise agreements did not transfer ownership of Subway's property rights to Peña. Because the property subject to forfeiture and Subway's property are distinct, amendment of the preliminary forfeiture order was unwarranted. *United States v. Pena-Fernandez*, No. CR 18-426 (FAB), 2019 WL 2070743 (D.P.R. May 10, 2019).

Arizona district court holds that given probable cause findings, pretrial restraints of attorney trust accounts did not offend the Fifth or Sixth Amendment. A federal grand jury returned a 100-count superseding indictment against Defendants alleging they engaged in criminal acts while operating of the website Backpage.com, including conspiracy, facilitating prostitution, money laundering, and forfeiture allegations. Among the assets Backpage stipulated to forfeit were attorney trust accounts. The government obtained ex parte seizure warrants for Defendants' trust accounts and informed counsel they can keep earned fees through November 30, 2018. Defendants argued that these seizures infringed on their Fifth and Sixth Amendment rights to due process and counsel of choice because the seizures were executed in a manner to avoid judicial review after the government led them to believe it would not be seizing trust accounts, and after Defendants had agreed to the proposed case management schedule without knowledge that the government would seek pre-trial forfeitures. They believed they were retaliated against for their "vigorous" assertion of their rights, while cooperating defendants were able to use tainted funds for their counsel. Defendants additionally argued that as employees of Backpage, they reasonably expected to receive attorneys' fees as a benefit, and sought dismissal of the indictment against them. Although there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, he still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice. Here, the government asserted the assets were tainted, and the court found probable cause that the assets will ultimately be proved forfeitable. Given the probable cause findings, pretrial restraints did not offend the Fifth or Sixth Amendment. While they might have a reasonable expectation that Backpage would fund their defense, that expectation did not extend to lawfully seized funds. In addition, their rights were not violated by the government's preferential treatment of cooperating witnesses, and neither the timing of the seizures, nor any other government actions, indicated a vindictive prosecution. *United States v. Lacey*, No. CR-18-00422-PHX-SMB, 2019 WL 1960001 (D. Ariz. May 2, 2019).

Florida district court dismisses petition of mortgage holder because its attorney had actual notice of proceeding and filing was nearly 11 months after the deadline and not verified. A federal grand jury returned an indictment against Defendants for conspiracy to commit health care fraud, including forfeiture allegations. The government filed a lis pendens in Miami-Dade County public records regarding real property. Defendants pleaded guilty and agreed to forfeit the property, and the court entered a Preliminary Order of Forfeiture. The government sent notice of the forfeiture action via FedEx to Caliber Homes, the mortgagee, setting forth the procedures for filing a petition in the ancillary proceeding. Caliber was required to file any petition under 21 U.S.C. §853(n) within 30 days, or by December 15, 2017. Caliber did not file a petition by that deadline, but on February 26, 2018, its counsel e-mailed the Assistant United States Attorney to ask for the government's position regarding Caliber's decision to initiate foreclosure proceedings against the property, and acknowledged her awareness of the forfeiture proceedings. The AUSA responded that the government had previously served it with notice of the forfeiture and opposed the filing of a foreclosure action as a result of the forfeiture. Caliber nevertheless filed a Mortgage Foreclosure Action in Miami-Dade County, and named the United States as one of the record owners as a result of the lis pendens. The government moved and was granted a Final Order of Forfeiture. Nearly 11 months after its deadline to file a petition expired, Caliber filed a petition in this case asserting an interest in the property as the holder of a mortgage. The Petition was not signed under penalty of perjury, as required by 21 U.S.C. §853(n)(3). Caliber moved to set aside the final order of forfeiture as void for lack of due process and/or excusable neglect. The court held that Caliber was barred from challenging the adequacy of the notice, since it had actual notice of the proceeding since at least February 2018, but filed nothing with the court before the entry of the final order of forfeiture six months later, and then waited another four months after that to file a motion to set aside that final judgment. On balance, the court also found that the factors did not favor reconsideration based on excusable neglect. Finally, federal courts recognize the impropriety of commencing a foreclosure action on property listed in an indictment under 21 U.S.C. § 853(k). The government thus was free to submit to the state court that it effectively quieted its title to the subject property by operation of federal law and seek appropriate relief in that forum. *United States v. Avila-Torres*, No. 17-20148-CR, 2019 WL 2177342 (S.D. Fla. May 20, 2019).

Utah district court strikes claimant's affirmative defense claiming fourth amendment violation because guns were seized from third party's facility and illegal seizure, standing alone, would not immunize property from forfeiture. The government filed this civil forfeiture action against four firearms seized during an ATF inspection of the Darkside Tactical facility because they were not registered in the National Firearm Registration and Transfer Record when originally transferred to the facility. The claimant gun owner's First Affirmative Defense claimed the ATF illegally searched Darkside and seized the firearms. The government filed a Motion to Strike Claimant's Defense under Federal Rules Civil Procedure 12(f), asserting the defense was insufficient. Claimant did not file a response. The court held that a third party's property, not Claimant's, was searched, so his Fourth Amendment rights were not infringed. Moreover, even if Claimant could plausibly have claimed his rights were violated, a claim of an illegal search and seizure was an insufficient defense because it was based upon a fruit-of-the-poisonous-tree doctrine that is insufficient to contest a civil forfeiture. A claim of illegal search and seizure will not prevent a forfeiture claim from succeeding. The illegal seizure

of property, standing alone, will not immunize property from forfeiture, so the court granted the motion to strike. *United States v. Patriot Ordnance Factory USA Mach. Gun, P-416 Rifle, Serial No. 08-00625*, No. 2:18-CV-285 TS, 2019 WL 1966442 (D. Utah May 1, 2019).

New Mexico district court denies stay and orders claimant to respond to special interrogatories despite pending motion to suppress. Claimant sought a stay of discovery because he had a pending motion to suppress, and also argued the government's Special Interrogatories went beyond the permitted scope of special interrogatories under Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Claimant did not timely object to the special interrogatories, nor did he show good cause for his failure to do so, so he waived any objections to the special interrogatories, including the objections that they are unnecessary to resolve his motion to suppress, exceed the scope of Supplemental Rule G, and amount to an intrusion of privacy or search and seizure without probable cause. Nevertheless, the court found that the government was entitled to explore Claimant's standing to intervene in the case at the earliest possible juncture. The government, however, failed to file a motion to compel him to answer them, so the court allowed him 21 days to answer the special interrogatories in full. *United States v. $145,000.00 in U.S. Currency*, No. CV 18-782 RB/KK, 2019 WL 1992914 (D.N.M. May 6, 2019).

North Carolina district court allows dog handler and forensic chemist to testify as experts for government, but denies claimant's expert testimony regarding government witness's likelihood of giving false testimony. The government filed a complaint for forfeiture against $307,970.00 in U.S. currency pursuant to 21 U.S.C. § 881(a)(6). The government sought to qualify two experts to help prove that the currency discovered in a vehicle bore a substantial connection to controlled substances, including Prevost as an expert on the meaning of certain behaviors of his police dog, Iko. Although Prevost was able to testify as a lay witness, claimants specifically sought to exclude his opinion testimony that, based on his training and experience as Iko's handler, Iko alerted to the presence of drugs on the exterior of the car and on the currency in the trunk of the car. The government also sought to qualify Furton as an expert in the area of chemistry and forensic science, to opine that "innocent contamination" of the currency could not explain detection of drugs by Iko, i.e., if a drug detection dog smells drugs on currency, the amount of drugs is not a residual amount found in the general population of currency, but instead residue resulting from recent illegal activity. Claimants sought to admit expert testimony of Lecci to opine that one of plaintiff's witnesses was unable to recall the events to which he will testify, and that he was likely to make false statements. The court held that the certifications and training and Iko and Prevost's field performance showed were sufficient indicia of Iko's reliability in detecting illegal narcotics. Although inconsistent explanations certainly provide ideal fodder for cross-examination. Prevost's alleged inconsistencies would go to the weight the fact finder should assign to his testimony, not his reliability. Also, Prevost's testimony and evidence of Iko's sniff was highly probative of a connection between the currency and illegal narcotics, an important fact for resolving the ultimate issue in this case. Claimants had video footage of the traffic stop, the ability to cross-examine Prevost, and the opportunity to call their own expert to interpret the evidence of the sniff. Thus, the court denied claimants' motion to exclude the expert testimony of Prevost and evidence of Iko. Furton principally opined that a positive alert to currency by a properly trained narcotics detection canine indicated that the

currency had recently, or just prior to packaging, been in close or actual proximity to a significant amount of narcotics, and was not the result of any alleged innocent environmental contamination of circulated currency by microscopic traces of cocaine. The court held that Furton could reasonably rely on Prevost's opinion, together with the other case materials, to assume Iko was properly trained and alerted to drugs. Furton's opinion fit the facts of the case, and therefore was relevant and met the admissibility requirements under Federal Rules of Evidence 702 and 403. As for Lecci, the court said Claimants could question the potential witness's veracity through rigorous cross-examination, and use other impeachment techniques as provided by the Federal Rules of Evidence. However, expert testimony was not the lens through which the jury should view credibility. Claimants argued Lecci's opinion would go to the witness's competency to testify, but Claimants conflated credibility, an issue of fact, with competency, a question of law. Lecci's testimony as to the witness's competency may be used in support of a motion to disqualify the witness pursuant to Fed. R. Evid. 104(a). Thus, since the jury has no role in determining competency, Lecci's opinions as to competency also would be unhelpful to the trier of fact. Consequently, the court excluded Lecci's testimony from presentation to the jury at trial. *United States v. $307,970.00 in U.S. Currency*, No. 4:12-CV-136-FL, 2019 WL 2173432 (E.D.N.C. May 20, 2019).