

**Ninth Circuit holds that defendant “obtained” all of the alleged fraud proceeds because he received and had control over the money before he paid a percentage of it to employees.**

Prasad was convicted of visa fraud and the district court entered a forfeiture in the amount of \$1,193,440.87. Prasad argued the district court erred in calculating the amount he was required to forfeit. Prasad owned and operated Maremarks, which he described as a “visa services company,” with which he filed petitions seeking H-1B status for nonimmigrant, foreign workers in specialty occupations – here software engineers – to come to the United States as Maremarks' employees. Prasad was required to establish that the H-1B beneficiary employees would fill specific, bona fide positions that were available at the time he filed the petitions, and that there was, or would be, a legitimate employer-employee relationship between Maremarks and the H-1B beneficiaries. He represented to Customs that there were existing positions available to the employees at Cisco Systems and Ingenuus Software, although there were no such positions available. Instead, after the petitions were approved, Maremarks assigned the H-1B beneficiary employees to work for other end-clients, who paid Maremarks as the employer of the H-1B beneficiaries, and Prasad paid the H-1B beneficiaries after taking a percentage for himself. Prasad did not dispute that Maremarks received \$1,193,440.87 from the end-clients but argued that the most the court could order him to forfeit was \$238,688.17, which was the estimated amount he kept after paying the beneficiary employees for the work they performed for the end-clients. In affirming, the appeals court held that Prasad possessed the full \$1,193,440.87, including the portions he paid to the H-1B beneficiaries, because he received and had control over the money before he paid a percentage of it to employees. Control over property connotes possession of it. The government traced those payments to Maremarks' bank account and established that Prasad was the sole signatory on that account. It did not matter that once Prasad paid portions of the funds to the beneficiaries and at that point no longer possessed those portions. The court thus concluded that Prasad “obtained” the \$1,193,440.87 that the end-clients paid to Maremarks. Also, the district court's construction of “proceeds” as “receipts” rather than “profits” was supported by the common meaning of the relevant statutory language. Congress's use of the phrase “proceeds obtained” demonstrated that the focus of forfeiture is whether the defendant obtained the property from the commission of the crime, not whether the defendant made a profit based on what he later chose to do with that property. *U.S. v. Prasad*, 18 F.4th 313 (9th Cir. 2021).

**New York district court holds that state constitution protecting pensions is preempted by federal forfeiture law.** As a result of his conviction, Gonzalez was subject to a money judgment in the amount of \$737,775, which was unpaid. The government moved pursuant to Fed. R. Crim. P. 32.2(e) and 21 U.S.C. §853(p) for the entry of a Preliminary Order of Forfeiture of Substitute Assets to include Gonzalez's pension benefits held by the New York State and Local Retirement System, which Gonzalez contested, arguing primarily that such forfeiture would violate due process concerns embodied in the Ex Post Facto Clauses of the U.S. Constitution, and that the delay in the government's filing of the motion unfairly penalized third parties such as Gonzalez's wife and victims of the instant offense to whom he owed restitution. The Supremacy Clause of the U.S. Constitution provides that “the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” As such, Articles of the New York Constitution, as state law, are therefore preempted if they are inconsistent with federal law. Article V, Section 7 of the New York State

Constitution states that “membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.” As the Second Circuit held, however, this section conflicts with federal law, which authorizes forfeiture irrespective of any provision of State law of any property derived from the crime of conviction. Gonzalez nevertheless argued the forfeiture here would violate the Ex Post Facto Clauses because federal forfeiture of his state pension would amount to a judicial enlargement of a criminal statute that inflicts a greater punishment than the law annexed to the crime when committed. As the text makes clear, however, the prohibition on Ex Post Facto laws is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government. The attachment of criminal penalties to what previous had been innocent conduct is not at issue here, as Gonzalez was protesting the enlargement of the criminal penalty he faced (here, forfeiture), not its applicability. The Indictment explicitly stated that if the government were unable to locate the forfeitable property described elsewhere in the Indictment, the government would seek forfeiture of any other property belonging to the defendant up to the value of the above forfeitable property. Therefore, New York law alone cannot shield the defendant's pension benefits from such a clear and broad federal forfeiture provision, wielded with the force of the Supremacy Clause. Also, timing of the government's motion was not an issue because the court may at any time may enter an order of forfeiture or amend an existing order of forfeiture to include property that is substitute property. *United States v. Efrain Gonzalez, Jr.*, 06-CR-726 (PKC), 2021 WL 5233321 (S.D.N.Y. Nov. 10, 2021).

**Texas district court denies government’s motion to dismiss its civil forfeiture action in favor of parallel criminal case since claimants incurred significant costs, government was not diligent in action and failed to sufficiently explain its dismissal.** The government filed a civil forfeiture action to recover \$448,840.92. Because it was pursuing the forfeiture in a parallel criminal proceeding, the government requested to dismiss the action and indicated that one claimant, Bittrex, agreed to bear its own cost and attorney's fees. Three other claimants filed a Verified Claim to Assert Interest in the seized currency and filed an objection to the government's Motion to Dismiss, contending they would suffer prejudice if the court dismissed the action. The government did not respond to this argument and made no mention of these claimants in its motion. Claimants argued that a prejudice analysis was proper because in civil forfeiture actions there is no traditional “defendant” and, if the court dismissed the action, Claimants would suffer the same type of prejudice a “defendant” would face in a different type of civil action – the type that Federal Rule of Civil Procedure 41(a)(2) seeks to prevent. The court agreed. The Fifth Circuit indirectly recognized a claimant as a “defendant” for purposes of Rule 41(a)(2). Claimants contended they incurred significant costs in the matter, and the government was less than diligent in its prosecution and had not sufficiently explained its need for dismissal. The first factor weighed against dismissal, since the large sum of money at issue represented a substantial interest for claimants, who had gone to great lengths to track the transfer and destination of the \$448,840.92. The second factor also weighed against dismissal because Claimants properly submitted a claim yet contended they received no communication from the government. Notably, the government communicated with claimant Bittrex. Such silence suggested a lack of due diligence. Further, the third factor weighed against dismissal, since the government wrote only one line to explain its need for dismissal and made no mention of what will happen to Claimants’ claims for the sum of money or its potential claims for costs and

attorney's fees. For these reasons, the court found Claimants would suffer legal prejudice upon dismissal of this action at this stage. *United States v. \$448,840.92 in United States Currency*, 4:21-CV-00202, 2021 WL 5578847 (E.D. Tex. Nov. 29, 2021).

**Ohio district court denies motion to stay execution of seizure warrant for defendant's boat since he failed to show entitlement to pre- or post-seizure hearing or that he lacked assets sufficient to provide for himself or his family.** Vaccaro was arrested pursuant to a criminal Complaint in the Eastern District of New York. He was released on a \$1 million secured bond. At that time a boat and a 2018 Rolls Royce were used as security for the Bond. After his indictment, Vaccaro filed a Motion to Amend Bond Conditions to reduce his Bond and to allow him to liquidate the boat so that he could pay his legal counsel through the proceeds of the sale of the boat. The government opposed, asserting that it might seek to obtain a seizure warrant for the boat for forfeiture. The court asked the parties to submit a proposal to the court regarding a proposed sale of the boat and detailing what assets would be included in any amendment to Vaccaro's bond, however the parties could not come to an agreement and counsel for Vaccaro moved to withdraw from the case. The government later filed a Superseding Indictment that included a forfeiture provision listing the boat. The government then obtained and executed a seizure warrant for the boat, and Vaccaro filed a motion asking the court to stay the execution of the seizure warrant and to hold a hearing to determine if the government had probable cause to seize the boat. He filed a Second Motion to Amend Bond Conditions but the government maintained its opposition to the return of the boat to Vaccaro. Vaccaro argued his Due Process rights were violated because the boat was seized without affording him prior notice and an opportunity to be heard. He also appeared to challenge the seizure warrant itself, alleging no probable cause was found concerning the boat in the first Indictment. First, the court found that Vaccaro was not entitled to prior notice or an opportunity to be heard prior to the seizure of the boat, and that the ex parte seizure of the boat was lawful. As to whether Vaccaro was entitled to a pretrial, post-seizure hearing on the probable cause basis for the seizure warrant, the court found Vaccaro was not entitled to a hearing since he did not contend he needed the boat to exercise his Sixth Amendment right to counsel. Instead, he argued that his sole source of income was the fees that he charges for chartering the boat. However, Vaccaro failed to provide any evidence that he lacked assets sufficient to provide for himself or his family. The government produced evidence to the contrary – that Vaccaro had another luxury yacht, which at the time was not subject to forfeiture. Moreover, Vaccaro did not argue, nor did he present any evidence, suggesting that the boat was purchased with untainted funds and should not have been included in the Superseding Indictment. Accordingly, he was not entitled to a pretrial, post-seizure hearing on the probable cause basis for the seizure warrant. Moreover, Vaccaro did not produce any evidence to establish that the government seized the boat to punish him, nor that the government's actions were unreasonable. Although the government allowed Vaccaro to retain the boat for a substantial period of time, the government was concerned about the boat's availability for forfeiture, given the fact that it may no longer be needed to secure Vaccaro's substantially reduced bond. The motions thus were denied. *United States v. Vaccaro*, 1:20 CR 392, 2021 WL 5316391 (N.D. Ohio Nov. 12, 2021).