Louisiana district court holds that civil forfeiture was not barred although criminal forfeiture was denied based on the same conduct. An indictment issued against defendants for multiple counts of conspiracy to operate an unlicensed money transmitting or servicing business, money laundering, failure to file Currency Transaction Reports, wire fraud, and drug conspiracy, with criminal forfeiture allegations under 18 U.S.C. §982 and 31 U.S.C. §5317. They pled guilty to conspiracy to operate an unlicensed bitcoin exchange business, and Randall Lord agreed to forfeiture of all interests he owned or controlled in any asset subject to forfeiture to the United States. The court denied the government's Motion for Preliminary Order of Forfeiture, however, because the defendants did not specifically plead guilty to a forfeitable offense since §982(a)(1) is only available when there is a conviction for a substantive violation, but not for a conspiracy. Therefore, no final order of forfeiture was ever entered related to the criminal prosecution. In each of their respective pleas, however, the claimants explicitly agreed to forfeit all interest in any asset subject to forfeiture directly, or as a substitute asset under 21 U.S.C. §853(p), and waived any constitutional and statutory challenges to any forfeiture carried out in accordance with their plea agreements. They also agreed to disclose the existence of all assets forfeitable to the United States, however they did not disclose the defendant property. The government filed a complaint for civil forfeiture and moved for summary judgment. After filing a claim, the claimant asserted he was careful in filing his claim of ownership and answer to say he did not intend to violate the terms of his plea agreement, which stated he would not oppose any proceedings against forfeitable assets carried out in accordance with the agreement. His concern was only to ensure that the property actually was subject to forfeiture within the terms of the plea agreement, particularly in light of the denial of the criminal forfeiture based on the same conduct and in the context of the same plea agreement. The court found that civil asset forfeiture under 18 U.S.C. §981 is distinct from criminal asset forfeiture under §982, and Congress clearly provided other means by which the government may recover assets arising from the same criminal activity. There also is a lower burden of proof placed upon the plaintiff in a civil action, and so the court's denial of the motion for forfeiture in the criminal case did not bar civil forfeiture. *United States v. $194,073.14 in United States Currency*, No. 5:19-CV-00837, 2019 WL 5405305 (W.D. La. Oct. 22, 2019).

First Circuit affirms district court holding that defendant "acquired" funds over which he exercised control and forfeiture was not excessive since the maximum fine authorized was more than twice the amount ordered. Carpenter's conviction for 19 counts of mail and wire fraud in 2008 was affirmed by in 2013. He then challenged on several grounds a forfeiture order entered against him in 2014 in the amount of over $14 million. This is the sum he obtained from only six of his investor/exchangor clients through his fraudulent scheme. He argued it was unfair to make him forfeit a much larger sum than he gained and/or than his clients lost. The court said that in doing so, the defendant lost sight of the fact that the purpose of forfeiture is not merely restitution or disgorgement of ill-gotten gains, but also to deter future illegality. There would be no effective deterrence if the sums forfeited were no greater than the sums he gained through his scheme. Forfeitures must have a greater bite than that in order to deter future illegality by Carpenter and by others, Carpenter also argued the district court lacked subject-matter jurisdiction to enter the forfeiture order because he filed his notice of appeal from the district court's February 26, 2014 sentencing judgment on March 17, 2014, before the court entered the order setting the amount of the forfeiture. His theory was that the filing of this earlier notice of

appeal divested the district court of jurisdiction to enter the May 23 forfeiture order. The court said Carpenter's use of the term "subject matter jurisdiction" was a misnomer, since the "divestiture rule" is not "jurisdictional," but is rooted in concerns of judicial economy, crafted by courts to avoid the confusion and inefficiency that would inevitably result if two courts at the same time handled the same issues in the same case. Application of the rule is not mandatory and efficiency concerns are central to determining whether to apply it. Here, forfeiture was a certainty; the only question was the amount. Moreover, there was no point to a remand, since the district court would almost certainly enter the same forfeiture order. Carpenter also argued the district court erred in ordering forfeiture because he never "acquired" the funds per §981(a)(2)(B) and so they were not proceeds. Carpenter's conviction arose out of how he solicited customers for and made misrepresentations about his intermediary company. Advertising and running such a business are not "inherently unlawful" activities, but Carpenter operated it in an illegal manner by misrepresenting to exchangors how their funds would be invested and investing contrary to those representations. The district court correctly concluded Carpenter "acquired" the exchangors' funds because he "exercised control" over the funds. Carpenter further argued the forfeiture order violated the Excessive Fines Clause of the Eighth Amendment. The court, however, concluded there was no disproportion, since Carpenter fraudulently represented to the exchangors how their money would be invested to induce them to use his company and then used their money to make risky investments. Also, even if the court accepted Carpenter's figure that the exchangors lost $9 million (instead of $14 million), the maximum fine authorized was twice this amount – $18 million. Finally, Carpenter's criminal conduct caused significant harm, since the exchangors were forced to sue civilly to recoup their losses and to testify in the criminal proceedings. *United States v. Carpenter*, No. 14-1641, 2019 WL 5287926 (1st Cir. Oct. 18, 2019).

Ohio district court strikes claim based on fugitive disentitlement doctrine where he made a conscious choice not to reenter the United States for the purpose of avoiding prosecution, since he was not prohibited from leaving Israel or detained in Israel, and presented no evidence that he was somehow incapacitated or otherwise unable to travel. The government filed a civil forfeiture complaint against 20 bank accounts, two real properties, three vehicles, and $91,500 in United States currency relating to the government's investigation of Sbeih and Osama Salouha, a claimant in a related case. Salouha allegedly illegally sold prescription drugs through the two pharmacies he owned in Ohio. Sbeih was a joint owner in one of Salouha's pharmacies, and they are alleged to have laundered the receipts from Salouha's illegal drug sales through their personal and business accounts. Sbeih and his wife filed verified claims to seven of the personal bank accounts held in one or both of their names. The case was then stayed for a year because of the related criminal investigation. Sbeih then was indicted for conspiracy to commit money laundering, conspiracy to defraud the IRS, and making and subscribing false income tax returns. When Sbeih failed to appear for his arraignment, the district court issued a warrant for his arrest. Meanwhile, the court lifted the stay on the civil forfeiture case and scheduled a status conference. Sbeih's counsel sought the court's permission for him not to attend the conference in person, as he was in Israel, alleging he was in danger of losing his Jerusalem permanent residency permit if he left Israel. The district court granted the motion, excusing Sbeih. The government filed a motion to strike Sbeih's claim pursuant to the fugitive disentitlement statute. The district court did not immediately rule on the issue and instead waited to see whether the Salouhas were able to

reenter the country, as they were reportedly stuck in Gaza. The government refiled its motion to strike, which the court granted. The court found that Sbeih has made a conscious choice not to reenter the United States for the purpose of avoiding prosecution, since he was not prohibited from leaving Israel or detained in Israel, and presented no evidence that he was somehow incapacitated or otherwise unable to travel. Sbeih's wife had returned to the United States and, although Sbeih argued that he had to stay in Jerusalem to care for his parents, he indicated he had siblings who remained in Jerusalem. Sbeih previously traveled to Jerusalem only every two or three years and, in 2011, during the pendency of legal proceedings regarding his residency, received permission to travel to the United States for four months. However, he now chooses not to return to the United States in the face of the pending criminal case. The district court thus held that Sbeih was not permitted to pursue a claim in the civil forfeiture action while at the same time purposefully avoiding the criminal case pending against him. On appeal, Sbeih argued he did not deliberately avoided prosecution by declining to reenter the United States – that he remained in Israel not to evade criminal prosecution, but to avoid losing permanent resident status in Jerusalem. The Sixth Circuit vacated and remanded for further proceedings, holding that the record was insufficient to conclude the Mr. Sbeih was not returning to avoid prosecution. On remand, however, the court held that Sbeih's asserted reason for not returning to the United States was no longer an issue, as he was granted a permanent residence visa in Israel almost 3 years earlier. He consistently maintained he would return to the United States once his residency petition was resolved, but he had not done so. Accordingly, the court found that Sbeih deliberately avoided prosecution by failing to reenter the United States, and struck his claims. *United States v. $525,695.24 Seized from JP Morgan Chase Bank Investment Acct #74068415*, No. 1:13 CV 1455, 2019 WL 5597772 (N.D. Ohio Oct. 30, 2019).

Second Circuit reduces joint and several criminal forfeiture money judgment in half, but notes that defendant was active participant in scheme and thus liable for dissipated funds. Davenport and Tanner were ordered to forfeit $9,703,995.33 each rather than jointly and severally, for an approximate total of $19.4 million. Davenport argued his forfeiture order should be vacated in its entirety because the Supreme Court in *Honeycutt v. United States* prohibited joint and several forfeiture for co-conspirators. The court, however, reiterated that *Honeycutt*'s bar applied only to co-conspirators who never possessed the tainted proceeds of their crimes. When each co-conspirator acquired the full proceeds "as a result of the crime," each can still be held liable to forfeit the value of those tainted proceeds, even if those proceeds are no longer in his possession because they have been dissipated or disposed of by the defendant. Davenport's argument ignored that criminal forfeiture merges an in personam element with the traditional in rem nature of forfeiture, making it easier for the government to hold the defendant who acquired the tainted property responsible by allowing the government to seek "substitute property" under 21 U.S.C. §853(p) when the defendant no longer possesses the criminal proceeds. Davenport was an active participant in the unlawful activity that his money laundering was designed to conceal, rather than a mere intermediary in the money laundering scheme. But even if Davenport fell into the "mere intermediary" category of 18 U.S.C. §982(b)(2), that provision's safe harbor would not extend to him because at trial, the evidence showed that he wired a total of $9.7 million in four separate transactions, while the safe harbor is triggered only if the defendant engages in fewer than three such transactions. Although Davenport no longer possessed the

money he laundered, the government could seek "substitute property" and hold him liable together with Tanner to forfeit the laundered money he transferred to Tanner. As the government conceded on appeal, the total proceeds of the defendants' kickback scheme amounted to no more than $9,703,995.33. The court therefore held that it was error to order the defendants to forfeit double that amount, and remanded so the district court to impose that amount individually for each defendant. *United States v. Tanner*, No. 18-3598-CR, 2019 WL 5607685 (2d Cir. Oct. 31, 2019).

Ohio district court holds that delay of 20 months before filing civil forfeiture action was substantial and presumptively prejudicial. Chillicothe police officers executed a search warrant at a couples' residence and an additional property that they were in the process of purchasing. While officers did not find any drugs, they seized approximately $33,715 in cash and other personal property. The couple alleged they were both arrested and detained while the searches were conducted. They later brought an action in state court, in which the judge ultimately ordered the return of a cell phone and $715 seized from the wife. The judge denied replevin without prejudice as to all other requested items because there was an ongoing criminal investigation. When the couple filed this lawsuit, the City of Chillicothe had neither brought a formal forfeiture action nor charged them with any crimes, but before the hearing on their Motion for Preliminary Injunction, the Ross County Prosecutor brought an indictment against the husband for receiving proceeds of an offense subject to forfeiture proceedings, but again did not seek forfeiture. Months later, a state grand jury returned a new indictment against him that included a separate forfeiture specification. The couple sued the City, Chief of Police, and other officers alleging that the City's failure to bring a formal forfeiture action or return their property is a violation of their due process rights under the Fourteenth Amendment. The couple argued the State did not provide an adequate remedy because Ohio law does not provide a timeframe in which the state is required to bring a forfeiture action. The court said that Ohio had the opportunity to provide plaintiffs with adequate process – a forfeiture proceeding. Moreover, the mere presence of an indictment in state court did not deprive the court of authority to examine the contents of an indictment for purposes of ruling on a federal constitutional claim. The court said that a delay of 20 months was substantial and presumptively prejudicial. Defendants offered no explanation for the delay in bringing the indictment, other than being overworked and understaffed. Even so, courts have held that lack of funding and, possibly, the mismanagement of resources by the Public Defender cannot be an acceptable excuse for delay. Also, although the couple did not avail themselves of all possible avenues to seek return of their property, their actions were sufficient to show they adequately asserted their rights to the property. Finally, since the government's negligence caused the delay, the need to prove prejudice diminished as the delay increased. Although longer delays have been justified in prior cases, those delays have often been due to pending administrative and criminal proceedings, the claimant's own contributions to the delay, or because of the claimant's failure to timely demand return of the property. Therefore, because the plaintiffs showed a likelihood of success on the merits, they could rely on the due process violation to show irreparable harm. The court said it was at a loss to comprehend the state's failure to file civil forfeiture or request forfeiture in the first indictment. Since due process requires a meaningful hearing within a meaningful time, the court issued a preliminary injunction against forfeiture of the property. *Cremeans v. Taczak*, No. 2:19-CV-2703, 2019 WL 5420256 (S.D. Ohio Oct. 23, 2019).

Tenth Circuit affirms civil forfeiture judgment based on totality of suspicious circumstances. The court of appeals held that the government plainly carried its burden in proving $144,780 was subject to forfeiture under 18 U.S.C. §881(a)(6). Given the implausibility of Claimant's explanation for his trip, his false statement to police about the purpose of his trip, the large amount of cash involved, the method in which the currency was bundled and vacuum sealed, Claimant's borrowing $40,000 from a business associate with a promise to repay the loan with 50% interest in two months, the marijuana gleanings found in his rental vehicle, his drug-related criminal history, and the discrepancies between his alleged income and his tax returns, the government presented sufficient evidence showing Claimant intended to exchange the $144,780 for a controlled substance and the funds were substantially connected to illegal drug trafficking. Thus, the district court properly forfeited the currency to the government. *United States v. $144,780.00 in United States Currency*, No. 18-3201, 2019 WL 5294952 (10th Cir. Oct. 17, 2019).

New Jersey district court grants motion to compel responses to special interrogatories that were relevant to claimant's standing. The government filed a complaint seeking forfeiture of real properties alleging they were purchased with the proceeds of a securities fraud scheme perpetrated by Parmar, Zaharis, and Chivukula, who were indicted in related criminal proceedings. A number of parties, including Parmar and three LLC claimants, submitted verified claims setting forth their alleged interests in the defendant properties, asserting they were the purchasers of record of each property. Claimants filed a Rule 12(b)(6) motion to dismiss the complaint, arguing they purchased three of the four defendant properties with legitimately obtained funds prior to the alleged securities fraud scheme. In lieu of responding to the motion, the government exercised its right to serve Claimants with 12 special interrogatories seeking additional information about their interests in the properties. Claimants asserted blanket objections and failed to respond, so the government moved to compel responses. Claimants argued that they did not have to respond because the allegations of the civil forfeiture complaint itself established that they were the registered owners of the properties and thus had standing to contest forfeiture, and that the interrogatories went beyond the permissible scope of information that could be requested pursuant to Rule G(6). The Court rejects at the outset any argument that Claimants' motion to dismiss. As to their first blanket objection to the special interrogatories, the court said Claimants were correct that the complaint established they were the purchasers of record of each of the respective defendant properties. But possession of legal title to a defendant property does not necessarily end the Article III standing inquiry. A titleholder may still be a nominee who lacks standing. Also, courts have approved special interrogatories that inquire into a claimant's identity, its interest in the defendant property, and the circumstances surrounding its acquisition of the defendant property. The court thus allowed interrogatories seeking information relevant to Claimants' identities, their relationships to the defendant properties, the circumstances surrounding their acquisition of the defendant properties, and whether they were straw owners or in fact exercised dominion or control over the properties. To the extent one interrogatory asked Claimants to provide identification information about third parties which were not claimants in this action, the motion to compel was denied. As to interrogatories asking for the reasons Claimants acquired the properties and the reason the properties were purchased by an entity rather than an individual, the court said this information was not relevant to Claimants' standing, and Claimants did not have to respond. Finally, as to an interrogatory seeking

information about the identity of homeowners' associations who received fees or dues for the properties and the amount of fees owed, at least one such association had filed a verified claim for unpaid common charges and assessments and thus appeared to be the appropriate recipient of such questions, so the Claimants did not need to respond. *United States v. Real Properties*, No. CV 18-9293 (MCA), 2019 WL 4877490 (D.N.J. Oct. 2, 2019).