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

UNITED STATES OF AMERICA, **v.** **RYAN YOUNG,** **also known as "Richard Cullen,"** **Defendant.** ******* **PACNET SERVICES, LTD., CHEXX (AMERICAS) INC., and ACCU-RATE CORP.** **Petitioners.**	18-CR-46 (JMA) Judge Joan A. Azrack

MOTION TO GRANT PETITION TO ADJUDICATE INTEREST PURSUANT TO 21 U.S.C. § 853(n) AS UNOPPOSED AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

I. INTRODUCTION

PacNet Services, Ltd. ("PacNet Services"), Chexx (Americas) Inc. ("Chexx"), and Accu-Rate Corporation ("Accu-Rate") (collectively, "PacNet" or "Petitioners"), by and through counsel, hereby move the Court for an order granting Petitioners' Verified Petition for Ancillary Proceedings to Adjudicate Interest Pursuant to 21 U.S.C. § 853(n) (Dkt. No. 17, "Petition") as unopposed. As discussed in greater detail herein, because the Government's deadline to file a responsive pleading or move to dismiss (or otherwise respond to) the Petition has come and passed, it is appropriate for the Court to grant the Petition as unopposed.

Furthermore, justice requires that this Court compel the Government to keep its word to PacNet as expressed in the Government's September 19, 2017 Agreement and October 6, 2017

specific federal license which authorized and directed PacNet to interplead the subject property into this Court's registry. In the words of Justice Sotomayor, writing just last month for the U.S. Supreme Court, "a principle as old as the Nation itself" is that "[t]he Government should honor its obligations." *Maine Community Health Options v. United States*, 590 U.S. ___, 140 S. Ct. 1308, 1331 (Apr. 27, 2020).

For the reasons discussed herein and in the Petition, the Court should enter an Order as requested in the Petition (i) amending the Preliminary Order of Forfeiture in the above-captioned matter (Dkt. No. 15, "Preliminary Order") by striking paragraphs (c) through (g) of that Order; (ii) requiring that the property identified in those paragraphs be deposited in the interpleader account maintained in the Court's registry for the interpleader action, Case No. 17-cv-6027 (E.D.N.Y.), in sufficient amount to satisfy the terms of the Government's September 2017 Agreement with PacNet; (iii) requiring that any remaining funds be returned to Petitioners; and (iv) awarding attorney's fees and costs relating to the Petition pursuant to federal law, including 28 U.S.C. § 2412.

II. BACKGROUND

On February 28, 2020, counsel for Petitioners filed the Petition. *See* Dkt. No. 17. Counsel for Petitioners served counsel for the United States and for Defendant Ryan Young via U.S. Mail on the same date. *See id.* at 51 (Certificate of Service). Counsel for the United States was affirmatively placed on notice of the Petition no later than March 3, 2020, when the Petition was docketed by the Court, triggering email notification to all parties registered with the Electronic Case Filing system on that date. *See id.* (Docket Text). Shortly thereafter, on March 13, 2020, counsel for Petitioners engaged in communication with Assistant United States Attorney Tanisha Payne regarding the Petition, further evidencing the fact that the Government has been well-aware

of the Petition since it was filed. Several times during the month of April, counsel for Petitioners and the Government again discussed the matter, including discussion regarding the return of the subject funds to the Court's registry for resolution through the pending interpleader action in No. 17-cv-6027. In short, nearly 90 days have elapsed since Petitioners filed their Petition.

III. ARGUMENT

A. The Government Has Not Responded to the Petition Within the Time Required by Rule.

The Second Circuit has held that petitions filed under 21 U.S.C. § 853(n) are governed by timelines applicable to civil lawsuits. *United States v. Bradley*, 882 F.3d 390, 393 (2d Cir. 2018). In *Bradley*, the Second Circuit considered the applicable deadline for an appeal of an order stemming from the resolution of an ancillary proceeding brought under § 853(n) where the petitioners filed their notice of appeal within 60 days of the trial court's memorandum opinion denying their claim but beyond 60 days of the trial court's order formally denying their claim. The Court of Appeals in *Bradley* agreed with the Government's position that time deadlines governing § 853 proceedings must be applied strictly according to rules applicable to civil proceedings.

In reaching its decision to strictly apply the deadline applicable to appeals from an order denying a § 853 petition, the Court of Appeals, quoting an Eighth Circuit decision, observed that a § 853(n) proceeding "carries many of the hallmarks of a civil proceeding" and "bears few if any hallmarks of a criminal proceeding." *Id.* at 393 (quoting *United States v. Moser*, 586 F.3d 1089, 1092–93 (8th Cir. 2009)). The Court of Appeals in *Bradley* further observed that "[b]oth the applicable burden of proof (a preponderance of the evidence) and the underlying legal issue (the allocation of property interests) are civil in nature." *Id.* For that reason, the Second Circuit followed prior holdings by the Third and Ninth Circuits in applying the applicable civil deadlines and held that the petitioners' notice of appeal was time-barred, even where the petitioners had filed

their notice of appeal within 60 days of the trial court's written opinion. *Id.* (citing *United States v. Alcaraz–Garcia*, 79 F.3d 769, 772 n.4 (9th Cir. 1996); *United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991)).

The Second Circuit has previously found that a motion to dismiss a § 853(n) petition "should be treated like a motion to dismiss a civil complaint under Federal Rule of Civil Procedure 12(b)," further indicating that § 853(n) petitions are subject to the same rules as civil complaints. *Pacheco v. Serendensky*, 393 F.3d 348, 352 (2d Cir. 2004). And the Third Circuit in *Lavin*—on which the court in *Bradley* relied—explicitly referred to a § 853(n) proceeding as "a civil case" for purposes of calculating deadlines, on the rationale that civil cases include "any action that is not a criminal *prosecution*." *Lavin*, 942 F.2d at 181-82 (quoting 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* ¶ 204.08[1], at 4–29 (2d ed. 1991)) (emphasis in original).

Thus, because this ancillary proceeding is a "civil case," the Petition is properly treated as a complaint in a civil action. For that reason, pursuant to Fed. R. Civ. P. 12(a)(2), the Government's deadline to respond to the Petition was 60 days following service of the Petition. That deadline elapsed at least two weeks ago. The Government has had nearly 80 days to file a responsive pleading since Petitioners filed and served their Petition on February 28, 2020. By any calculation, the Government's 60-day deadline to answer, move to dismiss, or otherwise respond to the Petition has run, rendering an order granting the relief sought in the Petition particularly right and just under these circumstances.

The Government should not be excused for its non-response to the Petition. As evidenced by Government counsel communicating with counsel for Petitioners shortly after the filing of the Petition and again on several occasions in April, there is no dispute that the Government was aware of and actively considering the Petition dating to when it was filed. Furthermore, the Government

counsel has noted that she has been in communication about the matter with a Government lawyer of the Civil Division of the Department of Justice. Thus, the matter has not escaped attention due to inadvertence. Furthermore, the ongoing COVID-19 pandemic in no way excuses the Government's non-response, given that multiple Government counsel are well aware of these proceedings, which the Government initiated, and there is no general or specific tolling of any applicable deadlines in this case.[1]

Finally, the Government's repeated disregard of federal law and rules in attempting this forfeiture requires strict and immediate application of the time deadline imposed upon the Government to respond to the Petition. The Government has disregarded without explanation or argument the Supreme Court's unanimous opinion in *Honeycutt*, which bars any forfeiture claim against Petitioners' property in this criminal prosecution. In addition, the Government disregarded the plain command of Fed. R. Crim. P. 32.2(b)(6)(A) by failing to send notice of the Preliminary Order to Petitioners.

The circumstances of this matter lead most reasonably and directly to the conclusion that the Government has sought by gamesmanship to catch Petitioners unaware of its efforts to seize Petitioners' property through the prosecution of defendant Ryan Young. If the time requirements were strictly applied to deny the § 853 petitioner relief in *Bradley*, then the time requirements most certainly should be applied strictly against the Government here. Thus, the Court should enter an order granting the relief sought in the Petition without further delay.

[1] The Chief Judge's recent order extending certain deadlines for forfeiture proceedings does not apply to any applicable deadlines related to the Petition. *See* Order Extending Certain Statutory Deadlines for Administrative and Judicial Forfeiture Proceedings, No. 20 Misc. 1074 (May 15, 2020), *available at* https://img.nyed.uscourts.gov/files/general-ordes/20mc1074order.pdf.

B. Justice Requires the Government to Keep its Word and to Return the Subject Funds to the Interpleader Account in the Court's Registry.

In addition to the fact that the Government has not responded to the Petition within the time required to do so, justice requires that the Petition be granted and the property identified in paragraphs (c) through (g) of the Preliminary Order of Forfeiture be returned to the interpleader account maintained in the Court's registry in Case No. 17-cv-6027. As the Government has acknowledged in oral argument before the U.S. Supreme Court, "Great nations, like great men [and women], should keep their word."[2] The time has come for the Court to compel the Government to keep its word and to abide by the terms of its September 19, 2017 Agreement with PacNet and its October 6, 2017 specific federal license by which it authorized and directed PacNet to interplead these funds.

The Government's abuse of process—beginning with the unlawful OFAC designation and extending to this forfeiture attempt—reveals an impermissible "coordinated action" by multiple U.S. Government agencies to engage in "impermissible gamesmanship." *United States v. Gorman*, 859 F.3d 706, 719 (9th Cir. 2017) (finding unreasonable seizure of property in second seizure which followed and built upon an initial unconstitutional stop). On September 22, 2016, without prior notice, warning, or opportunity to be heard, OFAC designated PacNet as a significant transnational criminal organization, thereby blocking all of PacNet's property, prohibiting U.S. persons from transacting with PacNet, and effectively ending PacNet's business. OFAC's designation was in violation of federal law, which expressly limited such designation to

[2] Oral Argument by the United States before the U.S. Supreme Court, *Food Mktg. Inst. v. Argus Leader Media*, Dkt No. 18-481 (April 22, 2019 Oral Argument) (referencing the Supreme Court's own statement in *C.I.A. v. Sims*, 471 U.S. 159, 175 n.20 (1985)).

multinational criminal organizations "such as" the Camorra (the Italian Mafia), the Yakuza (the Japanese Mafia), and Los Zetas (a notorious Mexico-based drug syndicate).

After investigating the matter further, the U.S. Treasury Department found PacNet to constitute a "disinterested stakeholder" and an appropriate party to serve as an interpleader plaintiff. The Treasury Department agreed to remove PacNet's designation upon PacNet's filing of an interpleader action to resolve any claims to funds between the Government and former clients of PacNet. Furthermore, on October 6, 2017, the Treasury Department issued PacNet a specific license to transfer the funds to the interpleader account, thereby representing to the Court that PacNet qualified to serve as an interpleader plaintiff. On October 18, 2017, Judge Garaufis of this Court granted PacNet's unopposed motion for leave to deposit the funds into the Court's registry. PacNet abided by its agreement with the Government and transferred the funds.

However, on April 5, 2018, the Government provided notice to PacNet that it seized those very funds from the Court's registry despite the facts that (i) the Government itself directed PacNet to interplead the funds pursuant to the September 2017 Agreement, (ii) the Government granted PacNet a license to enable it to do so, and (iii) the Court issued an unopposed order allowing PacNet to do so. The Government seized the funds secretly and *ex parte* in an apparent attempt to defeat the Government's own agreement with PacNet and in a coordinated action involving the Justice Department, the U.S. Postal Inspection Service, and the Treasury.

The Government should be compelled at this time to keep its promises to PacNet—as PacNet did to the Government—and to return the subject funds to the interpleader account maintained in the Court's registry. PacNet and its counsel have offered on multiple occasions to move forward on that path. Yet, the Government continues to engage in gamesmanship, most notably now by failing to provide PacNet with notice of the forfeiture in violation of a federal rule

requiring it to do so and using an unrelated criminal prosecution to seek a forfeiture of the funds. The Government also continues to disregard the unanimous Supreme Court rule of *Honeycutt v. United States*, 581 U.S. ___, 137 S. Ct. 1626 (2017), by asserting that its seizure of funds here is permissible under a conspiracy theory. Yet, the Supreme Court in *Honeycutt* held plainly that forfeiture "is limited to property the defendant himself actually acquired as a result of the crime" and that joint-and-several forfeiture liability is impermissible. *Id.*, 137 S. Ct. at 1634.

The simple fact is that there is no legal or factual basis for the Government to forfeit PacNet's funds, particularly in light of the U.S. Treasury Department's September 2017 Agreement with PacNet, its October 6, 2017 specific license to PacNet to initiate the interpleader action in this Court, and the Court's entry of an unopposed October 18, 2017 Order establishing that PacNet was an appropriate interpleader plaintiff and that the Court had jurisdiction to allow for the interpleader action. The Government's ongoing gamesmanship and abuse of process should be rejected and the Petition should be granted at this time.

IV. CONCLUSION

For the forgoing reasons, and for the reasons set forth in the Petition, the Court should enter an Order (i) amending the Preliminary Order by striking paragraphs (c) through (g) of that Order; (ii) requiring that the property identified in those paragraphs be deposited in the interpleader account maintained in the Court's registry in Case No. 17-cv-6027 (E.D.N.Y.) in sufficient amount to satisfy the terms of the Government's September 2017 Agreement with PacNet; (iii) requiring that any remaining funds be returned to Petitioners; and (iv) awarding attorney's fees and expenses relating to the Petition pursuant to federal law, including 28 U.S.C. § 2412.

Dated: May 19, 2020

/s/ Jeff Ifrah

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CERTIFICATE OF SERVICE

I hereby certify that, on May 19, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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I further certify that a copy of this document will be transmitted by United States mail to the following:

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UNITED STATES OF AMERICA, **v.** **RYAN YOUNG,** **also known as "Richard Cullen,"** **Defendant.** ******* **PACNET SERVICES, LTD.,** **CHEXX (AMERICAS) INC., and** **ACCU-RATE CORP.** **Petitioners.**	18-CR-46 (JMA) Judge Joan A. Azrack

ORDER ON MOTION TO GRANT VERIFIED PETITION FOR ANCILLARY PROCEEDINGS TO ADJUDICATE INTEREST PURSUANT TO 21 U.S.C. § 853(n)

PacNet Services, Ltd., Chexx (Americas) Inc., and Accu-Rate Corporation (collectively, "Petitioners") have moved for an order granting their Verified Petition for Ancillary Proceedings to Adjudicate Interest Pursuant to 21 U.S.C. § 853(n) (Dkt. No. 17) ("Petition"). The Court finds based on the record presented that granting Petitioner's motion is appropriate. For good cause shown therefore,

IT IS ORDERED:

1. The Petition is **GRANTED** as follows:

2. Paragraphs (c) through (g) of the Preliminary Order of Forfeiture in the above-captioned matter (Dkt. 15) ("Preliminary Order") are hereby stricken;

3. The property identified in paragraphs (c) through (g) of the Preliminary Order shall be deposited in the interpleader account maintained in the Court's registry in Case No. 17-cv-6027 (E.D.N.Y.) in sufficient amount to satisfy the terms of the Government's September 2017 Agreement with PacNet;

4. Any remaining funds shall be returned to the Petitioners; and

5. Attorneys' fees and costs related to the Petition are hereby awarded to Petitioners, and Petitioners shall submit within twenty (20) days a bill of Attorneys' fees and costs for the Court's consideration.

SO ORDERED, this ____ day of _____, 2020.

_____
Hon. Joan A. Azrack
United States District Judge