IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

UNITED STATES' MOTION FOR IMMEDIATE RESTRAINT AND ITEMIZATION OF ASSETS

The United States moves for an order immediately restraining assets in which Mr. Nacchio has an interest, equal to a value of $52,007,545.47, for a temporary period until forfeiture issues can be resolved, and also directing him to provide a sworn itemization of all assets in which he may have an interest.

INTRODUCTION

Pending before the Court is the United States's motion pursuant to Fed. R. Crim. P. 32.2(b) for a money judgment against Defendant Nacchio in the amount of $52,007,545.47, which represents the proceeds of the sales charged in Counts 24 through 42. In connection with the forfeiture of Defendant's criminal proceeds, the United States

is entitled to seize property subject to forfeiture to prevent its alienation and to seek to identify and locate any additional property in which Mr. Nacchio has an interest. *See* Fed. R. Crim. P. 32.2(b)(3).

The United States is concerned about whether, with further delay, there will be assets to satisfy any forfeiture (as well as any fines). Accordingly, the United States seeks two things in this motion. First, the United States seeks temporary restraint of certain assets, to ensure that the forfeiture related to Defendant's conviction does not go unsatisfied. As described generally below — and as set forth in more detail in the attached declaration of Dana Chamberlin — the United States' information about Mr. Nacchio's assets indicates that he has property interests in various substantial assets. *See* Ex. 1. The United States requests that certain of these assets — up to the amount of the proceeds of the offense — be immediately restrained, to maintain the status quo temporarily until the forfeiture issues can be resolved.

Second, the United States requests that Mr. Nacchio be required to promptly provide a sworn itemization of any assets in which he may have an interest, including any assets held by his wife, and the assets of any Nacchio family foundation or trust. This itemization will greatly facilitate the identification of any criminal proceeds.

A table of contents is provided on the following page.

TABLE OF CONTENTS

STATEMENT OF RELEVANT FACTS

Below is a summary of facts relating to (a) the original location of Mr. Nacchio's criminal proceeds in 2001, (b) the circumstances relating to his abrupt transfers of assets to his wife in 2002, and (c) other real and personal property that Mr. Nacchio and his wife appear to own at the current time. These facts are set forth in more detail in the attached declaration of Dana Chamberlin. *See* Ex. 1.

A. The original location of the criminal proceeds

The proceeds of the trades at issue in Counts 24-42 were deposited into various accounts held by Mr. Nacchio. Attached is a chart showing these original accounts. *See* Ex. 1, Attachments 1-2. In brief, Mr. Nacchio deposited (a) the proceeds of his trade on April 26, 2001 (corresponding to Count 24) into an account he held at Donaldson Lufkin & Jenrette; (b) the proceeds of his trade on April 27, 2001 (corresponding to Count 25) into an account he held at Bear Stearns; and (c) the proceeds of the trades he made between April 30, 2001 and May 29, 2001 (corresponding to Counts 26-42) into an account he held at Salomon Smith Barney. *See* Ex. 1 at ¶¶ 4-7.

B. Mr. Nacchio's 2002 efforts to transfer all assets out of his name

1. Events prior to the transfers

In July 2001, Mr. Nacchio and others were sued in a class action, which, *inter alia*, challenged Mr. Nacchio's insider sales from April 26, 2001 through May 15, 2001

(corresponding to Counts 24 through 35). See Ex. 1at ¶ 9 & Att. 3 at ¶ 51.

In February 2002, Qwest and Mr. Nacchio became the subject of intense scrutiny. In February 2002, the SEC issued a subpoena to Qwest. On February 12, 2002, that inquiry was reported on the front page of the New York Times. The article stated that Qwest had received a subpoena from the SEC about transactions with Global Crossing and whether they "were sham transactions to create the appearance of revenue that did not exist." The SEC subpoena was also reported in USA Today, the Denver Post, and the Denver Rocky Mountain News. The Denver Rocky Mountain News reported that Qwest had received the subpoena on Friday, February 8, 2002, and had two weeks — *i.e.*, until Friday, February 22, 2002 — to comply. *See* Ex. 1 at ¶ 10 & Atts. 4-7.

Press reports relating to Qwest's past business practices and accounting followed in the next few days. *See* Ex. 1 at ¶¶ 11-15 & Atts. 8-12. For example, on February 15, 2002, the New York Times reported on the front page of its business section that Qwest was moving to shore up its finances. The article stated, "Investors have become concerned that the company's accounting, though apparently violating no laws, may have exaggerated its success," and included a picture of Mr. Nacchio. *See* Ex. 1 at ¶¶ 13 & Att. 10.

On February 19, 2002, another class action was filed against Mr. Nacchio and others. The complaint highlighted the issues identified in a recent Wall Street Journal

article. *See* Ex. 1 at ¶ 16 & Att. 13 at ¶¶ 44-45.

2. Mr. Nacchio's transfers of assets out of his name

Starting on February 19, 2002, Mr. Nacchio abruptly transferred assets out of his name. On February 19, 2002, Mr. Nacchio spoke about this asset transfer with his financial advisor, David Weinstein from Ayco Asset Management. Mr. Weinstein set down the details in a memorandum, where he reported the following:

> Rob suggested Joe get assets out of his name. Joe is in the process of transferring his accounts from his name to Anne's name. Joe wanted to know what I thought about that and from a liability perspective.

See Ex. 1 at ¶ 18 & Att. 14. The same day, Mr. Nacchio memorialized transfers from several accounts in his name into accounts in the name of his wife, Anne Esker. *See* Ex. 1 at ¶¶ 19-21. The total amount transferred between brokerage accounts during this late February 2002 / early March 2002 time frame pursuant to the authorizations totaled at least $133,495,931. *See* Ex. 1 at ¶ 22. Mr. Nacchio also transferred a real property interest to Ms. Esker during this time period. *See* Ex. 1 at ¶ 23. The deed was signed by both Mr. Nacchio and Ms. Esker, and was witnessed by his brother, Richard F. Nacchio. *See id.*

3. Events in 2002 following the transfers

On June 10, 2002, David Weinstein spoke to Anne Esker. He reported, "Anne wanted to know if they should notify their property and casualty insurance agent about all

the lawsuits regarding the SEC." *See* Ex. 1 at ¶ 24 & Att. 24.

On June 13, 2002, Mr. Weinstein spoke to Mr. Nacchio and reported that Mr. Nacchio "told me he testified in front of the SEC on Tuesday and everything went well. They did not ask him questions about his trading in Qwest stock." *See* Ex. 1 at ¶ 25 & Att. 25.

On June 28, 2002, Mr. Weinstein spoke to Mr. Nacchio "on several occasions." Mr. Weinstein and Mr. Nacchio discussed the issue of distribution of Mr. Nacchio's deferred compensation balance. Mr. Weinstein reported, "Although Joe is aware of the 12 month lookback rule in the event of bankruptcy, as Joe put it, once the money is in his possession, he is one step ahead of the game!" *See* Ex. 1 at ¶ 26 & Att. 26.

On October 1, 2002, the Denver Post reported that Eliot Spitzer, New York Attorney General, had filed a lawsuit the previous day against Mr. Nacchio and others. *See* Ex. 1 at ¶ 30 and Att. 31. Also on October 1, Mr. Nacchio testified before Congress. The following day, the Denver Post reported that Mr. Nacchio had been questioned about some internal e-mails setting revenue targets. *See* Attachment 32.

On October 2, 2002, David Weinstein had an "emergency meeting with Joe [Nacchio]," with two others in attendance — "Eric" (last name unknown) and Robert Borteck (Mr. Nacchio's New Jersey estate planning attorney). Mr. Weinstein reported:

> The main focus of the meeting was to talk about asset ownership. Joe reviewed with us what is in his name and what is in Anne's

> name. The good news is that other than the IRA, AT&T 401k Plan and possibly one or two private equity deals, all the assets are in Anne's name.....
> * * *
> Rob's suggestion was to take the remaining assets and put them in a Family Limited Partnership or an LLC. The sole purpose would be to own the Private Equity Deals. Creditors cannot attach the underlying asset; they can only attach the partnership interest, which is basically meaningless....
> * * *
> One issue that was raised was whether creditor's [sic] can attach the IRA or 401k.... Initially, Joe wanted to close out the IRA and 401k Plan and pay the taxes and then get rid of the assets. Joe basically wants to have no assets in his name and he can then claim he is bankrupt.....

See Ex. 1 at ¶ 31 & Att. 33.

On October 4, 2002, Mr. Weinstein again spoke to Mr. Nacchio about ownership of assets. Mr. Weinstein stated that Mr. Nacchio "wanted to be assured we had documentation that the process started before September." He stated that "Joe also told me he sent a note directly to DLJ requesting for a second time, they change ownership of the other DLJ funds into Anne's name." *See* Ex. 1 at ¶ 32 & Att. 34.

On October 11, 2002, Mr. Weinstein reported,

> Joe called me at home on the evening. Apparently, Joe is going to be added to some type of class action lawsuit in Colorado early next week. Joe has decided to receive his 401k and IRA balances....The bottom line is Joe does not want creditors to attach any of his assets....

See Ex. 1 at ¶ 33 & Att. 35.

On or around October 14, 2002, counsel for Mr. Nacchio and other defendants in the consolidated class action were notified that the plaintiffs might file a motion seeking, among other things, to freeze Mr. Nacchio's insider trading proceeds. *See* Ex. 1 at ¶ 34.

On October 18, 2002, Mr. Weinstein reported as follows:

> On October 18th, I spoke to Rob Bortek. Joe was in his office yesterday. Joe is getting very paranoid. In fact, Joe is exploring the possibility of a divorce for financial reasons. The money that was transferred to Anne prior to March would then be considered an equitable distribution and not subject to the claims of creditors. It seems to me there is a certain element of 'fraud' involved in this technique, but Rob reiterated this is only at the exploratory stage.
>
> Joe then was thinking about buying a $20 million house in Florida. Florida real estate is not subject to the claims of creditors....

See Ex. 1 at ¶ 35 & Att. 37.

Sometime between October 29, 2001, and October 31, 2001, Mr. Weinstein spoke to Mr. Nacchio. Mr. Weinstein discussed a call he had received from Credit Suisse First Boston regarding why Mr. Nacchio was transferring ownership of an asset into Ms. Esker's name. Mr. Nacchio told Mr. Weinstein that Mr. Weinstein "should have put in the letter [to CSFB] that this was not the first request." *See* Ex. 1 at ¶ 37 & Att. 38.

On November 4, 2002, the plaintiffs in the consolidated class action against Mr. Nacchio and others filed a motion seeking, among other things, to freeze Mr. Nacchio's insider trading proceeds. *See* Ex. 1 at ¶ 39. Mr. Nacchio's counsel opposed the motion, and strongly criticized it for its "naked speculation that Nacchio may secrete his assets."

See id.; see also Ex. 1, Att. 39 at 17.

On November 13, 2002, Mr. Weinstein spoke to Mr. Nacchio. Mr. Nacchio "seemed somewhat interested" in a particular individual retirement account, but was "still concerned about the possibility of having additional assets in his name." *See* Ex. 1 at ¶ 40 & Att. 40.

C. Status of assets

1. The criminal proceeds

The last known status of the accounts into which the proceeds were deposited can be seen in Attachment 29.

In brief, the proceeds relating to Count 24 were transferred into accounts at two firms, one at Donaldson Lufkin & Jenrette (with a last known balance, as of 2002, of more than $13 million) and one at Fidelity (with a last known balance, as of 2002, of more than $1.8 million). The proceeds relating to Count 25 were transferred into a Bear Stearns account (with a last known balance, as of 2005, of more than $28 million). *See* Ex. 1 at ¶¶ 43-46 & Att. 29. The proceeds relating to Counts 26-42 were transferred into seven Salomon Smith Barney accounts, with an aggregate last known balance of more than $63 million, although it appears that over $12 million was transferred from those accounts to a Florida real estate firm in July 2005.

The total value of the accounts relating to Counts 24-42 (as of their last known

balances) was well more than $100 million, all held in the name of Anne Esker at the four firms – Donaldson Lufkin & Jenrette; Bear Stearns; Fidelity; and Salmon Smith Barney.

2. Real property

Mr. Nacchio and his wife hold at least four parcels of real property. Their primary residence appears to be at 1 Manor Hill Drive, Mendham, New Jersey. Mr. Nacchio holds a 50% undivided interest, and a 50% undivided interest is held by the Anne P. Esker Qualified Personal Residence Trust (with Anne Esker as trustee). The property appears to be worth about $3 million, with no mortgage. *See* Attachment 43. *See* Ex. 1 at ¶ 49.

A second property in which Mr. Nacchio and Ms. Esker hold an interest is located at 1125b Long Beach Boulevard, Beach Haven, Jersey. A 50% undivided interest is held by Anne Esker, and a 50% undivided interest is held by the Joseph P. Nacchio Qualified Personal Residence Trust, with Mr. Nacchio as trustee. The property appears to be worth over $2 million, with no mortgage. *See* Ex. 1 at ¶ 50.

A third property is located at 8 Drake Lane in Chester, New Jersey. This property was once jointly held by Ms. Nacchio and Ms. Esker, but in March 2002 Mr. Nacchio conveyed his interest to Ms. Esker. *See* Ex. 1 at ¶ 51. The value of this property is unknown.

A fourth property is located at 496 Mariner Drive in Jupiter, Florida. This

property was purchased in July 2005 and is held only in the name of Ms. Esker. As of July 2005, its value was approximately $9.5 million. *See* Ex. 1 at ¶ 52.

3. Personal property

As for personal property, at least four cars are registered to Mr. Nacchio and/or Ms. Esker. There appears to be (1) a 2007 BMW registered to Anne Esker; (2) a 2006 Porsche registered to Anne Esker; (3) a 2005 Mercedes-Benz registered to Anne Esker; and (4) a 1997 Porsche registered to Mr. Nacchio. *See* Ex. 53.

ARGUMENT

Mr. Nacchio has property interests that can satisfy his forfeiture obligations. The United States thus requests that the Court immediately restrain these interests — up to $52,007,545.47 — to temporarily preserve the status quo pending resolution of forfeiture issues, and also require Defendant to provide a sworn itemization of all assets in which he may have an interest.

I. Mr. Nacchio has property interests are subject to forfeiture.

There are two ways that the forfeiture can be satisfied. One possibility is to trace the forfeitable assets from the time of the offense to the present, and seize those assets. The other is to seek forfeiture of substitute assets. These approaches are described below.

A. The forfeiture may be satisfied with traceable proceeds.

One type of asset that may be seized in a forfeiture is an asset that can be traced to

the proceeds of the crime.

1. The proceeds belong to the United States.

Under criminal forfeiture rules, once Defendant was convicted of the criminal offenses, his interest in the criminal proceeds automatically became the United States' interest under a "relation back" provision in the criminal forfeiture statute. That provision states:

> All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. § 853(c); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989) (explaining that § 853(c) is a "relation back" provision that "reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture").

Accordingly, when Mr. Nacchio was convicted on Counts 24-42, the United States became the titled owner of the forfeitable funds *as of the date of the commission of those offenses*. This "relation back" of title to the funds means that even if Mr. Nacchio had later transferred those forfeitable funds to a third party, the funds still would belong to the

United States, because "any subsequent transfer of the property to a third party is subject to the superior title of the government." *Id.* at 1498; *see Caplin & Drysdale,* 491 U.S. at 627 (explaining that where § 853(c) applies, a defendant "cannot give good title to petitioner because he did not hold good title"). Such a third party transferee — *e.g.*, Mr. Nacchio's wife — could take valid title only in two very limited circumstances: if she can show that (1) she owned the property prior to the commission of the offense, or (2) she was a bona fide purchaser for value of the property. 21 U.S.C. § 853(n)(6).

In sum, the United States' title to the funds relates back to the date of commission of the offense, and defeats subsequent transfers by the defendant to third parties except in limited circumstances. Congress adopted this "relation back" provision to address "the inability of the government to prevent the transfer of potentially forfeitable property to third parties and to obtain any such property once it had been transferred." *United States v. Nichols*, 841 F.2d 1485, 1488-89 (10th Cir. 1988) (describing the legislative history of 21 U.S.C. § 853(c)). Here, § 853(c) permits the United States to succeed to Mr. Nacchio's interest in the forfeitable funds as of the time of the offenses, and then trace those forfeitable funds up to the present.

2. It appears possible to trace the proceeds.

Here, the facts indicate that it may be possible to trace some or all of the forfeitable proceeds.

As set forth above, in 2002 Mr. Nacchio transferred most or all of his funds to his wife. However, because title to the forfeitable proceeds vested in the United States immediately upon commission of the offense under § 853(c), the proceeds never became the property of Mr. Nacchio (or his wife). *See United States v. Martinez*, 228 F.3d 587, 590 (5th Cir. 2000) (explaining that because the forfeiture is deemed to have taken place immediately at the time of the offense, "neither [defendant] nor [his wife], individually or through the community, ever had title" to the proceeds); *United States v. Hooper*, 229 F.3d 818, 821 (9th Cir. 2000) (holding that because the "crimes had to have been committed before there could be any proceeds," the defendants' wives had "no community property interest at the moment the husbands violated the drug trafficking statute"); *accord United States v. Wahlen*, 459 F. Supp. 2d 800, 813-14 (E.D. Wisc. 2006); *United States v. Brooks*, 112 F. Supp. 2d 1035, 1040 (D. Haw. 2000).

In addition, when Ms. Esker received these abrupt gifts, she was neither a bona fide purchaser nor a party with a pre-existing interest in the property. *See United States v. Kennedy*, 201 F.3d 1324, 1335 (11th Cir. 2000) (holding that a defendant's gift of a house to his wife was void, and explaining that "[t]he criminal forfeiture provisions provide only two ways for third parties to establish their interest in forfeited property; and one of them is emphatically *not* that the criminal defendant gave the third party a gift.") (emphasis in original).

The fact that the proceeds moved into various accounts does not make them untraceable. *See United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1161 (2d Cir. 1986) (observing, in a drug case, that "[t]he cash in the hands of the bank does not cease to be 'traceable proceeds' just because it is commingled with the bank's other cash. Since commingled assets, traceable to drug proceeds, are forfeitable, the bank's money remains vulnerable to forfeiture when the money is moved into its account at a second bank or into a second bank's account at a third bank.").

In tracing the proceeds, various accounting methods are available to the United States. The Tenth Circuit has observed as a general matter that where a court seeks to trace funds, "[t]here are several alternative methods, none of which is optimal for all commingling cases; courts exercise case-specific judgment to select the method best suited to achieve a fair and equitable result on the facts before them." *United States v. Henshaw*, 388 F.3d 738, 741 (10th Cir. 2004) (in a suit to recover proceeds of property encumbered by tax liens, holding that "the Government had alternative approaches available to it for addressing the tracing question," and finding no error where there was no evidence of any inconsistency in methods applied in the case); *In re Moffitt, Zwerling & Kemler, P.C.*, 875 F. Supp. 1152, 1159-60 (E.D. Va. 1995) (observing in a criminal case involving forfeiture that "the government must be given some latitude in charting its way through a tangled web of financial transactions," and discussing three possible

tracing approaches), *aff'd in part and rev'd in part on other grounds by United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660 (4th Cir. 1996). Here, it appears that the proceeds are likely traceable. However, as set forth below, an itemization of assets would greatly assist in this task, as would discovery regarding these assets.

B. Mr. Nacchio also has substitute property.

If the United States is not ultimately able to trace the specific proceeds due to commingling, transfers, or other acts by Mr. Nacchio, it is entitled to satisfy the forfeiture through the "substitute" property interests of Mr. Nacchio.

1. Substitute property may be forfeited when proceeds cannot be traced.

If the United States shows that forfeitable property cannot be located due to an act or omission of the defendant, the court must order the forfeiture of other "substitute property of the defendant up to the value of the forfeitable property." 21 U.S.C. § 853(p)(2). Specifically, the statute mandates forfeiture of such substitute property upon a showing that the property,

> as a result of any act or omission of the defendant,
> (A) cannot be located upon the exercise of due diligence;
> (B) has been transferred or sold to, or deposited with, a third party;
> (C) has been placed beyond the jurisdiction of the court;
> (D) has been substantially diminished in value; or
> (E) has been commingled with other property which cannot be divided without difficulty.

21 U.S.C. § 853(p). *United States v. Bornfield*, 145 F.3d 1123, 1139 (10th Cir. 1998)

(explaining, in a money laundering case, that "[t]he substitute assets provision allows the forfeiture of other assets not already forfeitable when the forfeitable asset is unavailable due to some act or omission of the defendant").

If the United States is unable to follow the forfeitable proceeds, the United States can move to amend the preliminary forfeiture order to seek substitute property. *See* Fed. R. Crim. P. 32.2(e) ("On the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that: ... (B) is substitute property that qualifies for forfeiture under an applicable statute."); 21 U.S.C. § 853(p). The United States can then seek to satisfy the rest of forfeitable amount from the defendant's substitute property. *United States v. Wahlen*, 459 F. Supp. 2d 800, 814 (E.D. Wisc. 2006) (holding that after the forfeitable portion of the defendant's property was determined, the "untainted portions" of his property interest were subject to forfeiture as substitute assets).[1]

2. Mr. Nacchio has substantial substitute property interests.

Mr. Nacchio appears to have several substitute property interests from which the money judgment may be satisfied.

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[1] In seeking to satisfy a forfeiture, the United States is entitled to switch forfeiture theories as it deems appropriate to pursue substitute property. *See United States v. Candelaria-Silva,* 166 F.3d 19, 42 (1st Cir. 1999); *United States v. Voigt*, 89 F.3d 1050, 1088 (3d Cir. 1996); *United States v. Weiss*, 2005 WL 1126663, at *6-7 (M.D. Fla. 2005).

a. The 2002 transfer of assets was void under state law.

In determining what substitute property Mr. Nacchio has to satisfy a forfeiture, the Court must look to state law. In forfeiture cases, federal courts look to state law to define the defendant's ownership interest, then look to federal forfeiture law to determine which property interests are forfeitable. *United States v. Lester*, 85 F.3d 1408, 1414 n.9 (9th Cir. 1996).

Under state law, one issue that affects Mr. Nacchio's assets is whether his transfers to his wife were valid. Here, those transfers were void under New Jersey state law,[2] for several reasons.

First, Mr. Nacchio's transfers to his wife were void as fraudulent transfers under the Uniform Fraudulent Transfer Act ("UFTA"), which New Jersey has adopted. N.J.S.A. 25:2-20 *et seq*. Under the UFTA, a transfer of property is fraudulent to any creditor — even future creditors — if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." or (b) "[w]ithout receiving a

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[2] The United States is addressing New Jersey law at this stage because that is where the defendant (the grantor) the defendant's wife (the grantee), the defendant's financial advisor, and the defendant's estate planning lawyer were all domiciled in 2002 when the transfers took place. *See, e.g., GFL Advantage Fund, Ltd. v. Colkitt*, 2003 WL 21459716, at *3 (S.D.N.Y. June 24, 2003) (in analyzing a fraudulent conveyance, observing that the parties involved in the challenged transfer "would have a reasonable expectation that their activities would be governed by the law of the state in which they are located and reside").

reasonably equivalent value in exchange for the transfer" and the debtor "believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." N.J.S.A. § 25:2-25. If fraud is shown in either way, the creditor may obtain avoidance of the transfer, attachment of the asset transferred or other property of the transferee, or other remedies. N.J.S.A. § 25:2-29.

With respect to the first possible method of proof — actual intent to defraud — New Jersey "state law recognizes that actual intent is difficult to prove but will be inferred from the existence of one or more 'badges of fraud.'" *Dobin v. Taiwan Machinery Trade Ctr. Corp. (In re Victor Int'l, Inc.)*, 278 B.R. 67, 84-85 (Bankr. D.N.J. 2002). "'Badges of fraud' represent circumstances that so frequently accompany fraudulent transfers that their presence gives rise to an inference of intent." *Gilchinsky v. National Westminster Bank*, 732 A.2d 482, 489 (N.J. 1999). "*Often a single one of them may establish and stamp a transaction as fraudulent*." *Id.* (emphasis in original) (internal quotation marks omitted). "N.J.S.A. 25:2-26 lists the 'badges of fraud' that New Jersey courts are to consider in determining whether a debtor conveyed property with the actual intent to place it beyond the reach of creditors." *Id.* These factors include:

a. The transfer or obligation was to an insider;

b. The debtor retained possession or control of the property transferred after the transfer;

c. The transfer or obligation was disclosed or concealed;

> d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> e. The transfer was of substantially all the debtor's assets;
>
> f. The debtor absconded;
>
> g. The debtor removed or concealed assets;
>
> h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

N.J.S.A. § 25:2-26.

Here, not just one, but *many* of these badges of fraud are present. These facts were contemporaneously documented, as set forth above. At a minimum, it appears Mr. Nacchio (1) transferred his assets to an insider, his wife, *see* N.J.S.A. § 25:2-22 (defining insider to include "a relative of the debtor"); (2) he retained control of the property after the transfer; (3) he concealed the transfers; (4) he had been sued prior to the transfers; (5) the transfers were of substantially all of his assets; (6) he did not receive consideration for the assets transferred; and (7) after the transfers were made, Mr. Nacchio made

himself effectively insolvent with respect to his substantial liabilities. Moreover, Mr. Nacchio actually made statements indicating his desire to make himself bankrupt and to avoid his creditors — even exploring the possibility of a divorce for such reasons.

In any event, it is not even necessary to prove actual intent. As noted, an alternative method of proof under the UFTA does not require any showing of actual intent, but only a showing that the debtor did not receive "reasonably equivalent value in exchange for the transfer" and that the debtor "believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due." N.J.S.A. § 25:2-25. The facts indicate that the 2002 transfers were also fraudulent under this standard.

Finally, the transfer also appears void under New Jersey's Fraudulent Conveyance Act. *See In re Buildings v. Jamie, Inc.*, 230 B.R. 36, 39 n.2 (D.N.J. 1998) (explaining that in adopting the Uniform Fraudulent Transfer Act, New Jersey did not repeal the Fraudulent Conveyance Act). That Act provides:

> Every conveyance, grant or alienation of real estate, or goods and chattels, or of any estate or interest therein, whether made by writing or otherwise, and every judgment and execution which have been or shall be contrived in fraud, covin or collusion, with intent to hinder, delay or defraud creditors and others of their lawful actions, debtors, damages, or demands, shall be deemed and taken (only as against those persons, their executors, administrators or assigns, whose actions, debts, damages or demands are or may be hindered or defeated by such covinous or fraudulent devices or practices) to be utterly void and of no effect, any feigned consideration, color or

other pretense to the contrary notwithstanding.

N.J.S.A. § 25:2-3. The New Jersey courts have explained that under this provision, "a subsequent creditor can impeach a voluntary conveyance by showing fraud in fact – *i.e.*, an actual fraudulent intent to defraud some creditor." *Yeiser v. Rogers*, 116 A.2d 3, 5 (N.J. 1955).

Mr. Nacchio's transfers thus may be set aside not only pursuant to the UFTA, but also pursuant to this Act. *Cf. Bridgman v. Christie*, 25 A. 939, 941 (N.J. Ch. 1893) (setting aside as fraudulent the debtor's abrupt grant of his property and stock to his wife, and observing that "[i]t has always been considered a badge of fraud that such a conveyance was made pending a suit against the grantor, particularly where the conveyance embraces all the debtor's real estate").[3]

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[3] As noted above, the United States has addressed New Jersey law at this stage because that is where the defendant, his wife, his financial advisor, and his estate planning lawyer were all domiciled in 2002 when the transfers took place. But the United States notes that even under the laws of New York (where the accounts were located), the result would almost certainly be the same. *See Nextwave Personal Comm., Inc. v. FCC (In re Nextwave Personal Comm., Inc.)*, 235 B.R. 277, 288-89 (Bankr. S.D.N.Y. 1999) (ruling that where it was not clear that a fraudulent conveyance issue was subject to New York's Fraudulent Conveyance Act or to the law of a state having adopted the Uniform Fraudulent Transfer Act, "a choice of law analysis is unnecessary ... since the fundamental legal principles would not change under any possible choice of law"), *aff'd*, 241 B.R. 311 (S.D.N.Y.), *rev'd on other grounds*, 200 F.3d 32 (2d Cir. 1999). *See also* N.Y. Dr. & Cred. Law § 273 (providing that where a conveyance renders a debtor insolvent, it is "fraudulent as to creditors without regard to his actual intent if the conveyance is made ... without a fair consideration"); § 276 (providing that a conveyance made with the intent to defraud "is fraudulent as to both present and future creditors").

b. Even if Ms. Esker acquired a legitimate interest in the property, Ms. Nacchio also retains an interest in it.

Even if the Court were to rule that Ms. Esker has an interest in the transferred property — despite the relation back provisions of federal law and the fraudulent transfer provisions of state law — Mr. Nacchio still retains a property interest in that property.

i) Mr. Nacchio has an interest in marital assets.

Mr. Nacchio has an interest in Ms. Esker's assets because her assets are marital property under New Jersey law.

New Jersey recognizes a protectable interest in marital property. This interest was discussed by the New Jersey Supreme Court in *Carr v. Carr*, 576 A.2d 872, 878-79 (N.J. 1990), where the court held that a spouse was entitled to a share of marital property even though her husband died before they were divorced. The court explained that "a spouse may acquire an interest in marital property by virtue of the mutuality of efforts during marriage that contribute to the creation, acquisition, and preservation of such property." *Id.* at 879. The court relied on its finding that even prior to divorce, a spouse has a "protectable" and "cognizable" interest in the marital property:

> We can thus discover in our matrimonial laws a confluence of legislative and judicial understanding, embodying a clear and strong public policy with respect to the cognizable rights of spouses in marital property. These rights arise from the marital relationship in which, presumptively, both parties contribute in varied ways to the creation, acquisition and preservation of their familial property and, thereby, secure a protectable interest to share, possess, and enjoy that

property.

Id. at 878.

Mr. Nacchio thus has a property interest in his wife's assets, and the United States can satisfy its money judgment from that interest. *United States v. Wahlen*, 459 F. Supp. 2d 800, 814 (E.D. Wisc. 2006) (ruling that the defendant's "marital property interest is subject to forfeiture as a substitute asset"). Indeed, recognizing this interest of Mr. Nacchio in his marital assets is also consistent with "the strong public policy of New Jersey that a person should not be permitted to profit as a result of his wrongdoing." *Wasserman v. Schwartz*, 836 A.2d 828, 838 (N.J. Super. 2001).

ii) Mr. Nacchio also has rights under divorce law.

Even if Mr. Nacchio did not expressly have rights under New Jersey law to the marital assets, it would be appropriate to look to New Jersey divorce law to determine what interest in that transferred property belongs to Defendant.

This approach — looking to state divorce law — was taken by the Eighth Circuit in a case where the court found that the defendant's wife legitimately acquired an ownership interest in a country estate, but that the defendant also owned a portion and had to forfeit all of his interest in the estate. *United States v. Totaro*, 345 F.3d 989, 995 (8th Cir. 2003). The court determined that in this situation, the district court could refer to divorce law to determine how much of an interest each spouse had in the estate:

> Because all of [the defendant's] interest must be forfeited, the court will have to sort out how much was his and how much was hers. The parties point to no other state or federal law, and this Court can think of none, which is better suited to our purposes than divorce law. In the absence of rules specifically designed for the forfeiture context, the best rules to apply to sort out the property rights of married people are found in the laws governing divorce – an established body of law designed to do just that.
>
> Indeed, the relationship of divorcees is analogous to the relative positions of the parties here. The government is stepping into [the defendant's] shoes and claiming his interest, and its interests are decidedly adverse to [his wife's].

345 F.3d at 999.

Here, the Court could refer to New Jersey divorce law, where both Mr. Nacchio and his wife are domiciled. Under New Jersey divorce law, each party is entitled to an "equitable distribution" of the real and personal property held by the spouses. N.J.S.A. § 2A:34-23 (authorizing the court in a divorce "to effectuate an equitable distribution of the property, both real and personal"); N.J.S.A. § 2A:34:23.1 (listing various criteria that must be considered by the court in making an equitable distribution of the property). In an equitable distribution, it is of little or no significance which spouse holds actual title to any property. *See In re Hill,* 342 B.R. 183, 197 (Bankr. D.N.J. 2006) ("Under New Jersey law, title to marital assets is irrelevant. Once a cause of action for equitable distribution accrues, each party has a claim for equitable distribution of all marital assets no matter whether title is held by one spouse or the other, or jointly.") (citing *Erlanger v. Erlanger*,

836 A.2d 859 (N.J. Ch. 2003) and *Tucker v. Tucker*, 298 A.2d 91 (N.J. Ch. 1972)); *In re Howell*, 311 B.R. 173, 178 (D.N.J. 2004) (observing that "principles of equitable distribution generally attribute little or no significance to which of the parties holds legal title to marital property") (citing *D'Arc v. D'Arc*, 395 A.2d 1270 (N.J. Ch. 1978), *aff'd*, 421 A.2d 602 (N.J. Super. 1980)).

This law shows that Mr. Nacchio clearly has interests to which he would be entitled upon divorce. Indeed, Mr. Nacchio was responsible for the vast majority of the income. Consideration of his interest is consistent with the understanding of the New Jersey Supreme Court, which has observed that "equitable distribution secures for the spouse 'what really belongs to him or her.'" *Carr v. Carr*, 576 A.2d 872, 878 (N.J. 1990) (quoting *Chalmers v. Chalmers*, 320 A.2d 478, 483 (N.J. 1974)); *see also Carr,* 576 A.2d at 875 & n.1 (discussing various circumstances where equitable distribution may precede a divorce).

3. Ms. Esker may be only a nominal owner.

Ms. Esker may have been granted nominal title to all of the forfeitable funds, but that nominal title may not be enough to show that she had a true interest in the property that could defeat forfeiture.

In enacting a "substitute property" provision in the RICO forfeiture provisions, 18 U.S.C. § 1963(m) — a provision that mirrors the substitute property provision at issue

here (21 U.S.C. § 853(m)) — the Senate stated that the provision "should be construed to deny relief to deny relief to third parties acting as nominees of the defendant ...." S. Rep. 98-225, 98th Cong. 1st Sess. 209 n.47, reprinted in 1984 U.S. Code Cong. & Admin. News, at 3392 n.47 (quoted in *United States v. Nichols*, 841 F.2d 1485, 1493 (10th Cir. 1988)).

Courts have thus found that where a third party has title under state law, that title does not end the inquiry; rather, the court must then examine whether the third party was merely a "nominal" or "straw" owner for the defendant. *See United States v. Bryson (In re Bryson)*, 406 F.3d 284, 291 (4th Cir. 2005) (affirming the district court's determination that the defendant's son "acted as his father's nominee and held only nominal title" to certain property); *United States v. Totaro*, 345 F.3d 989, 995 (8th Cir. 2003) (observing that "[o]ther courts have recognized straw or nominal owners may not defeat forfeiture").

It is not clear whether it was Mr. Nacchio or Ms. Esker who exercised "dominion and control" over the property. *Cf. United States v. Morgan*, 224 F.3d 339, 343 (4th Cir. 2000) (ruling that "the district court correctly found that [the defendant's wife] lacked dominion and control" over a joint checking account); *United States v. Ida*, 14 F. Supp. 2d 454, 459-60 (S.D.N.Y. 1998) (observing that for a claimant to avoid a showing that he or she was a straw, there must be "evidence of dominion and control or other indicia of true ownership'") (internal quotation marks omitted); *United States v. Sokolow*, 1996 WL

32113, at *17 (E.D. Pa. Jan. 26, 1996) (holding that a person "who holds merely bare legal title to property, and who does not exercise dominion or control over the property, does not have sufficient interest to challenge its forfeiture").

II. The Court should temporarily restrain assets in which Mr. Nacchio appears to have an interest to preserve the status quo until any forfeiture.

Temporary restraint of certain assets is warranted to ensure that the forfeitable funds are not transferred in such a manner that makes it difficult for them to be traced or reached upon entry of any money judgment.

A. Restraint is authorized by statute.

The Court has authority to restrain assets before issuance of a preliminary order of forfeiture. In fact, the issuance of an indictment alleging forfeiture provides authority to restrain such assets. The statute provides, in relevant part:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section [after filing of an indictment alleging forfeiture] ...

21 U.S.C. § 853(e)(1).

Various methods are available for pre-verdict restraint. The Court can require the defendant to deposit property with the Court, the Marshals Service, or the Treasury:

> Pursuant to its authority to enter a pretrial restraining order this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending

> trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

21 U.S.C. § 853(e)(4)(A). Such an order is not limited to property within the jurisdiction:

> The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be the subject of forfeiture under this section or which has been ordered forfeited under this section.

21 U.S.C. § 853(l).

If a defendant does not comply with such an order, the court can punish the defendant for being in contempt of court, or can take into account such conduct at sentencing:

> Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

21 U.S.C. § 853(e)(4)(B).

B. Temporary restraint is warranted here.

What the United States seeks here is temporary restraint of certain assets to maintain the status quo and ensure that the forfeitable funds are not transferred in such a manner that makes it difficult for them to be traced or reached upon entry of any money

judgment (or fines by the Court).

This concern is warranted by Mr. Nacchio's past actions — abruptly transferring more than $130 million in assets out of his name in 2002, with the clear intention of avoiding any claims of potential creditors and to make himself appear "bankrupt."

Temporary restraint of assets will not impose any significant and unwarranted hardship on Mr. Nacchio. The very size of the 2002 transfers to Ms. Esker — more than $130 million — make plain that Mr. Nacchio and his wife together hold assets that far exceed the $52 million that the United States is currently seeking in a forfeiture order. Mr. Nacchio and his wife also hold significant interests in real property and cars. These facts show that a temporary restraint of assets sufficient to satisfy any forfeiture and fines will not impose any hardship on them that impairs their ability to pay Mr. Nacchio's basic living expenses.

C. Restraint should cover forfeitable assets.

As for what to restrain, the United States observes that the last known status of the criminal proceeds was as follows: (1) the proceeds relating to Count 24 were transferred into accounts at two firms, one at Donaldson Lufkin & Jenrette (with a last known balance, as of 2002, of more than $13 million) and one at Fidelity (with a last known balance, as of 2002, of more than $1.8 million); (2) the proceeds relating to Count 25 were transferred into a Bear Stearns Account (last known balance, as of 2005, of more

than $28 million); and (3) the proceeds relating to Counts 26-42 were transferred into seven Salomon Smith Barney accounts, with an aggregate last known balance of more than $63 million.

Accordingly, the United States proposes that the Court temporarily restrain all accounts and assets held by or for Mr. Nacchio or Ms. Esker just at those four brokerage firms: (1) Donaldson Lufkin Jenrette, (2) Fidelity, (3) Bear Stearns, and (4) SSB – which has become Citigroup / Smith Barney.

The United States does not know whether these assets will be worth enough to cover the amount of the proposed money judgment ($52,007,545.47). If they relate to more than $52,007,545.47 of Mr. Nacchio's assets, he should be permitted to raise this issue with the Court.

If they are worth less than $52,007,545.47 of Mr. Nacchio's assets, the United States will promptly request that the Court restrain other substitute property of Defendant — *i.e.*, the properties and cars described above, as well as any other property interest that can be identified.[4] It would be reasonable to restrain such substitute assets

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[4] Mr. Nacchio's failure to disclose the location of the proceeds would alone be sufficient to satisfy § 853(p)(1), which defines when forfeiture of substitute property is permitted. *United States v. Loren-Maltese*, 2003 WL 291910 *1 (N.D. Ill. 2003) (observing that the requirement that the absence of forfeitable property must be due to an act or omission of the defendant can be satisfied by a showing that the defendant did not "make known to the government the location of any cash defendant derived from her racketeering"); *United States v. McHan*, 345 F.3d 262, 265-66 (4th Cir. 2003) (observing

temporarily, to maintain the status quo before the determination of a forfeiture amount. *See United States v. Ayala*, 2003 WL 23509658, at *3 (D.N.M. Dec. 18, 2003) (finding that substitute assets can be restrained pretrial, and citing cases on this issue); *United States v. McKinney (In re Assets of Billman)*, 915 F.2d 916, 921 (4th Cir. 1990) (holding that substitute assets are subject to pretrial restraint).

D. Any third party rights can be addressed in an ancillary proceeding.

The United States recognizes that the proposed restraining order may impinge on any interest that Ms. Esker — or any other third party — may claim in such property. However, this concern does not justify abandoning any restraint altogether. Her interest is affected only because of Defendant's interest in the property.

It is well recognized in the forfeiture context that the interests of third parties may be affected. Federal Rule of Criminal Procedure 32.2(c) provides the procedures for an ancillary proceeding, in which third parties may claim their ownership interests in the property at issue. In addition, the forfeiture statute sets forth procedures for third parties to claim their interests in property. *See* 21 U.S.C. § 853(n)(1)-(3).

Indeed, the only forum available for third parties to assert a property interest in forfeitable property is through an ancillary proceeding. *See* Fed. R. Crim. P. 32.2(c),

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that the district court granted the United States' motion to substitute assets, at least in part, due to defendant's refusal to give credible information concerning the disposition of the criminal proceeds).

(e)(2)(B); 18 U.S.C. § 853(n); *United States v. McHan*, 345 F.3d 262, 269 (4th Cir. 2003) ("The petition authorized by § 853(n) is the exclusive avenue through which a third party may protect his interest in property that has been subject to a forfeiture order.").[5]

Accordingly, it would be premature for any objection to be made on the ground that Mr. Nacchio lacks a property interest in the assets. Such objection can be made once a preliminary order of forfeiture is entered. *See United States v. Miller*, 26 F. Supp.2d 415, 432-33 (S.D.N.Y. 1998) (ruling that two defendants lacked standing to object to a pretrial restraining order on the ground that the property belonged to a third party, and also observing that third parties "may not litigate the issue of their ownership *interests* in the subject property prior to entry of an order of forfeiture") (emphasis in original).[6] As

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[5] *See also United States v. Totaro*, 345 F.3d 989, 993-94 (8th Cir. 2003) (finding that third parties who assert an interest in property forfeited in a RICO case may not intervene in the criminal case but instead must assert their claims in an ancillary proceeding, and also observing that case law pertaining to §1963(l) (applicable in RICO cases) and § 853(n) (applicable in this case) is persuasive because the statutes are identical); *United States v. Loren-Maltese*, 2003 291910, at *2 (N.D. Ill. Feb. 20, 2003) (observing that "the interest of third parties will be protected by the procedures available to any of them who desire to assert claims to any of the substitute assets").

[6] *See also* 2000 Adv. Comm. Notes to Fed. R. Crim. P. 32.2 (observing that it may not be clear whether a defendant "is the actual owner of the property," that "[t]he new rule resolves these difficulties by postponing the determination of the extent of the defendant's interest until the ancillary proceeding," and that under the new rule, the "defendant would have no standing to object to the forfeiture on the ground that the property belonged to someone else"); *United States v. Weidner*, 2003 WL 22176085, at *1 (D. Kan. Sept. 17, 2003) (defendant cannot object to the entry of a preliminary order of forfeiture on the ground that the property really belongs to a third party, because

the Court is aware, the United States has moved for such an order, and has requested that such an order be issued promptly. *See* Docket No. 418.

III. The Court should also order Defendant to itemize all property in which he may have an interest.

As discussed above and as detailed in the declaration of Dana Chamberlin, the United States can trace the criminal proceeds relating to Counts 24-42 through various accounts to Ms. Esker, but only through 2005 at the latest. *See* Ex. 1. The United States does not know the location of all of Mr. Nacchio's assets, or the location of the assets of his wife, and any family trusts and foundations.

This asset information is relevant and important, for several reasons. First, it is relevant to the current location of the criminal proceeds. To determine whether there are current assets are traceable to the original proceeds of the crime, it is necessary to know what accounts those funds were moved to, the value of those accounts, the ownership of those accounts, and other similar details.

Second, it is relevant in determining what substitute property will be available to satisfy any judgment. To establish the forfeiture of such substitute property, it will be necessary to determine whether the property "(A) cannot be located upon the exercise of

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determination of the extent of the defendant's interest in the property is postponed until the ancillary proceeding); *United States v. Saccoccia*, 62 F. Supp. 2d 539, 541 (D.R.I. 1999) (ruling that a defendant who claimed that the property did not belong to him lacked standing to object to forfeiture of such property).

due diligence; (B) has been transferred or sold to, or deposited with, a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty." 21 U.S.C. § 853(p). An itemization will assist the Court in determining whether any of these factors are present here.

Third, determining what property interests are Mr. Nacchio's — as opposed to those of his wife or some other third party — will require an examination of the circumstances of Mr. Nacchio's transfers of such assets, the identity of the persons who have exercised dominion and control over such assets, and other assets in which Mr. Nacchio may have an interest.

Once a forfeiture order has been entered, the United States can seek discovery into such matters, and the United States has requested that such an order be entered as soon as practicable. *See* Docket No. 418; Fed. R. Crim. P. 32.2(b)(1) (requiring entry of preliminary order of forfeiture "[a]s soon as practicable" after the verdict), (b)(3) (entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) ... to conduct any discovery the court considers proper in identifying, locating, or disposing of the property...."); 21 U.S.C. § 853(m) (authorizing depositions and subpoenas duces tecum after entry of a forfeiture order). However, at this time, given that the preliminary order has not yet been issued, there is good cause for the Court to direct Mr. Nacchio to

promptly provide an itemization of his and his wife's assets. Itemization will speed the process along, which serves the interests of Mr. Nacchio, any third parties (particularly any with a legitimate interest in the property), victims who are entitled to recovery, and the United States.

CONCLUSION

For the reasons stated, the United States seeks an order immediately restraining the accounts of Mr. Nacchio or his wife at Donaldson Lufkin Jenrette, Fidelity, Bear Stearns, and Citigroup. This restraint would be temporary, simply to preserve the status quo until such time as the forfeiture can be determined. If the restraint relates to more than $52,007,545.47 of Mr. Nacchio's assets, he should be permitted to immediately raise this with the Court. In the alternative, Mr. Nacchio should be directed to immediately deposit other assets in the Court registry, so long as such assets are equal to $52,007,545.47. In addition, Defendant should be directed to provide immediately a sworn itemization of any assets in which he may have an interest. This itemization should include not only his own assets, but also the assets of his wife and family and any family trusts or foundations. In addition, the United States should be permitted to commence discovery to identify sufficient assets to satisfy the forfeiture as well as any fines the Court may impose.

A proposed order is being submitted herewith.

Respectfully submitted this 18th day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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