No. 16-___

IN THE

Supreme Court of the United States

FINN BATATO; BRAM VAN DER KOLK; JULIUS BENCKO; MATHIAS ORTMANN; SVEN ECHTERNACH; KIM DOTCOM; MONA DOTCOM; MEGAUPLOAD LIMITED; MEGAPAY LIMITED; VESTOR LIMITED; MEGAMEDIA LIMITED; MEGASTUFF LIMITED, (CLAIMANTS)

Petitioners,

AND

ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO (*IN REM* DEFENDANTS),

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision below affirmed civil forfeiture *in rem* of foreign assets within the exclusive custody and control of courts in New Zealand and Hong Kong. The property owners include foreign nationals who, after being charged by the United States Government with criminal copyright infringement, stayed in their home countries and exercised their rights to contest extradition. At the pleading stage, the district court resolved factual disputes and made credibility determinations to find that these foreign nationals are fugitives who have the intent "to avoid criminal prosecution" under 28 U.S.C. § 2466, and therefore should be disentitled from contesting civil forfeiture. The following questions are presented in this case:

(1) Can a district court, consistent with Article III of the U.S. Constitution, exercise *in rem* jurisdiction over foreign property that is within the exclusive custody and control of foreign courts?

(2) Can a district court, consistent with 28 U.S.C. § 2466 and due process, resolve factual disputes and make adverse credibility determinations at the pleading stage in finding that a claimant is a disentitled fugitive?

(3) Should a foreign national residing abroad be deemed to have the intent "to avoid criminal prosecution" and be disentitled as a fugitive, consistent with 28 U.S.C. § 2466 and due process, merely because avoiding criminal prosecution is *a* reason (not the sole or primary reason) why the foreign national has not entered the United States while aware that he faces criminal prosecution here?

RULE 29.6 STATEMENT

Megaupload Limited's parent corporation is Vestor Limited. Megapay Limited's parent corporations are Vestor Limited and Megamedia Limited. Megamedia Limited's parent corporation is Vestor Limited. Neither Megastuff Limited nor Vestor Limited has a parent corporation. No publicly held corporation owns 10% or more of any of these companies' stock.

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PETITION FOR WRIT OF CERTIORARI

Finn Batato and the other Claimants respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit (1a–56a) is reported at 833 F.3d 413. The order denying rehearing *en banc* (152a–153a) is unreported. Appeal arose from multiple opinions and orders of the U.S. District Court for the Eastern District of Virginia (57a–151a), one of which is reported at 89 F. Supp. 3d 813, and the rest of which are unreported.

JURISDICTION

The Fourth Circuit entered judgment on August 12, 2016, and denied a timely petition for rehearing *en banc* on November 9, 2016. 1a, 152a. On January 26, 2017, the Chief Justice extended until April 7, 2017, the deadline for petitioning. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces U.S. CONST. Art. III § 2, 28 U.S.C. § 1355, and 28 U.S.C. § 2466. 154a–157a.

STATEMENT OF THE CASE

This case arises from a civil-forfeiture action related to a separate criminal case, in which the Government indicted a group of foreign defendants (Petitioners here)[1] on a novel theory of secondary criminal copyright liability. Because Petitioners are lawfully invoking their rights to contest extradition, the Government's novel theory for prosecuting has yet to be tested in the criminal case.

More than two years after filing the criminal indictment, the Government filed a separate civil action seeking forfeiture of Petitioners' foreign assets. When Petitioners submitted claims to those assets, the Government successfully moved to strike the claims at the threshold. According to the decisions below, Petitioners' participation in extradition proceedings—and failure to voluntarily leave their homes, families, and businesses to travel to the United States—has rendered them "fugitives" who seek "to avoid . . . prosecution" and who therefore should be "disentitled" from contesting forfeiture. 28 U.S.C. § 2466(a)(1). Civil forfeiture has been ordered for this reason alone.

This Court has previously admonished that the "harsh sanction" of fugitive disentitlement in a civil forfeiture action is "most severe and so could disserve the dignitary purposes for which it is invoked," because it "foreclos[es] consideration of claims on the merits." *Degen v. United States*, 517 U.S. 820, 827–29 (1996) (unanimously reversing resort to fugitive

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[1] Petitioners also include one unindicted person, Mona Dotcom, the estranged wife of one of the indicted foreigners, Kim Dotcom.

disentitlement under inherent authority). The Court noted that it "ha[d] held it unconstitutional to use disentitlement similar to this as punishment for rebellion against the United States," but left open the question of "whether enforcement of a disentitlement rule under proper authority would violate due process." 517 U.S. at 828 (citations omitted). Nonetheless, a divided panel of the Fourth Circuit affirmed civil forfeiture based on fugitive disentitlement.

The Fourth Circuit's panel decision added to one circuit split by affirming the exercise of *in rem* jurisdiction over foreign property within the exclusive custody and control of foreign courts.[2] It also compounded two other circuit splits by affirming forfeiture on the ground that the foreigners who own the property should, at the very threshold (without benefit of any discovery or evidentiary hearing), be deemed fugitives who are disentitled from defending their property against civil forfeiture—even while they are lawfully contesting their extradition to the United States through the courts in their home countries, pursuant to treaty rights.

If left undisturbed, the Fourth Circuit's decision enables the Government to obtain civil forfeiture of every penny of a foreign citizen's foreign assets based on unproven allegations of the most novel, dubious

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[2] Although the approximate value of the defendant assets at the outset of the criminal action was estimated at $75 million (4a–5a), their current value is more on the order of $40 million. *See* 5a, 51a (describing foreign releases for legal fees and living expenses). The Government has sought to forfeit up to $175 million by alleging that Megaupload had a "reported income in excess of $175 million." 4a; 4th Cir. Joint Appendix ("CAJA") at 24–25, 472.

United States crimes. And the Government can do so without affording a foreign defendant any opportunity to challenge in court whether the foreign assets are traceable to criminal conduct, whether the Government's allegations are sufficient to establish the charged crime, or even whether the charged "crime" is a crime at all. Civil forfeiture would be a *fait accompli* just as soon as the Government moves to strike a foreign claimant's initial submission, invokes fugitive disentitlement, and notes that the foreign claimant remains abroad while lawfully contesting extradition. By nonetheless affirming in all respects, the Fourth Circuit has ratified a worrisome new playbook for the Government to use against foreign nationals whom it indicts while they are abroad: *any* foreign defendant who dares exercise rights to contest extradition may be deemed a fugitive whose foreign assets are immediately forfeitable to the United States. In other words, according to the decision below, foreign defendants must either abandon their rights to challenge extradition or else forever forfeit their assets (and, correspondingly, their ability to fund a criminal defense).

A. The Criminal Proceedings

On January 19, 2012, the Government unleashed against Megaupload Limited, and its associated businesses and executives, what the Government has termed one of "the largest criminal copyright cases ever brought by the United States." CAJA 1359–61. Founded in 2005, Megaupload was a popular cloud storage website that had 66 million registered users worldwide. *See United States v. Kim Dotcom*, No. 1:12-CR-3, Superseding Indictment ¶¶ 2–3 (E.D Va. Feb. 16, 2012) ("Superseding Indictment"). Users up-

loaded files to the site and then obtained personal links to the files, which they could share with other users as and if they chose. CAJA 25–26.

The indictment contends that Megaupload encouraged its users to infringe copyrights. CAJA 26; Superseding Indictment ¶¶ 10–14. It is thus founded on the questionable legal premise that secondary copyright infringement may be prosecuted as a federal crime. *See* 117a–118a. Yet the criminal copyright infringement statute, 17 U.S.C. § 506(a), does not expressly encompass secondary liability. *See, e.g.*, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984) ("The Copyright Act does not expressly render anyone liable for infringement committed by another."); *Dowling v. United States*, 473 U.S. 207, 228 (1985) ("[T]he deliberation with which Congress . . . has addressed the problem of copyright infringement for profit, as well as the precision with which it has chosen to apply criminal penalties in this area, demonstrates anew the wisdom of leaving it to the legislature to define crime and prescribe penalties.").[3] Following the January

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[3] *See also, e.g.*, Jennifer Granick, *Megaupload: A Lot Less Guilty Than You Think*, STAN. CENTER FOR INTERNET & SOC'Y (Jan. 26, 2012), https://goo.gl/uWSISv; Anthony Falzone & Jennifer Granick, *Megaupload.com Indictment Leaves Everyone Guessing*, Parts I–II, DAILY JOURNAL (Mar. 14 & Apr. 6 2012), https://goo.gl/cGfqRl; Eric Goldman, *Comments on the Megaupload Prosecution*, TECH. & MKT'G LAW BLOG (Apr. 30, 2012, 9:30 AM), https://goo.gl/ZgHXkm; John Blevins, *Uncertainty as Enforcement Mechanism: The New Expansion of Secondary Copyright Liability to Internet Platforms*, 34 CARDOZO L. REV. 1821 (2013); Margot Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587 (2014).

2012 indictment, Megaupload's website was shut down and effectively destroyed, and the defendants' assets were frozen by court orders in New Zealand and Hong Kong. CAJA 19, 24–25, 35–54.

The indicted defendants include six foreign nationals who were associated with Megaupload and have uniformly resided and worked abroad. CAJA 19–24. Kim Dotcom is a German and Finnish Citizen who resides in New Zealand; he has never so much as visited the United States. CAJA 556–557. Finn Batato and Mathias Ortmann are German citizens who reside in New Zealand; Bram van der Kolk is a Dutch citizen who resides in New Zealand; Sven Echternach is a German citizen who resides in Germany; and Julius Bencko is a Slovak citizen who resides in the Slovak Republic. CAJA 558–567. None has ever been a citizen or permanent resident of the United States. CAJA 556–567.

After the indictment issued, the four executives residing in New Zealand—Kim Dotcom, Finn Batato, Mathias Ortmann, and Bram van der Kolk—were arrested (then released on bail) by New Zealand authorities. 131a–137a. The Government subsequently requested their extradition. *Id.* The four New Zealand executives have been opposing extradition in accordance with Article IX of New Zealand's International Extradition Treaty with the United States. *Id.* Sven Echternach and Julius Bencko have never been arrested (137a–142a); Germany and the Slovak Republic do not extradite their citizens to the United States.

For ease of reference we have shortened all website links in this Petition with Google's URL shortener, https://goo.gl.

Five years later, extradition proceedings remain ongoing in New Zealand. Most recently, on February 20, 2017, a New Zealand intermediate appellate court ruled that the four executives could be extradited to the United States.[4] Further appeals are expected to proceed. Meanwhile, the assets seized in 2012 remain frozen in New Zealand and Hong Kong, subject to the acknowledged "custody" and "control" of those nations' courts. 14a–16a.

B. The Civil Forfeiture Proceedings

The Government did not seek *civil* forfeiture of these assets at the time of the indictment. More than two years later, however, the Government grew frustrated by the fact that foreign courts were applying foreign law to release funds from the assets to cover Petitioners' reasonable living expenses and legal fees. Complaining that judicial orders in New Zealand and Hong Kong were causing "dissipation" of assets, the Government in 2014 initiated parallel civil *in rem* forfeiture proceedings in the Eastern District of Virginia. 143a–144a; CAJA 18.

In response to the civil forfeiture complaint, Petitioners timely filed verified claims asserting their interests in the *in rem* Defendant Assets. CAJA 66–108. Petitioners then moved to dismiss the Government's complaint for lack of jurisdiction as well as for failure to state a valid claim, contending, among other things, that federal courts cannot exercise *in rem* jurisdiction in civil forfeiture proceedings concerning property in the custody of foreign courts, and that the Government's allegations established neither a

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[4] *Ortmann v. United States*, [2017] NZHC 189 at paras [589–593], available at https://goo.gl/lgHyT0.

crime nor traceability of the *in rem* Defendant Assets to any crime. 110a, 120a–123a.

The Government moved to strike Petitioners' claims, arguing that the indicted Petitioners were subject to fugitive disentitlement under the Civil Asset Forfeiture Reform Act of 2000, 28 U.S.C. § 2466. CAJA 129–144; s*ee also* 89a (striking Petitioner Mona Dotcom's claim for lack of standing). According to the Government, foreign defendants who assert extradition treaty rights in foreign courts are fugitives who cannot oppose efforts here to deprive them of their foreign property. CAJA 131–134. Petitioners rejoined that applying fugitive disentitlement in their circumstances would violate their statutory as well as constitutional rights, not least because they do not qualify as fugitives under § 2466. CAJA 517–555.

The district court granted the Government's motions to strike. 107a–108a. It first ruled that the civil forfeiture statute, 28 U.S.C. § 1355, supplies *in rem* jurisdiction over the property at issue, even though that property falls within the exclusive custody and control of foreign courts. 120a–123a.

The court then made factual findings and credibility determinations adverse to Petitioners without discovery or an evidentiary hearing. 124a–151a. Individuals cannot be disentitled as fugitives unless found to have the requisite intent "to avoid criminal prosecution." 28 U.S.C. § 2466. Whether requisite intent exists entails a fact-bound determination, yet the district court found it could "make a decision regarding the claimants' intent based on the record before it." 127a–128a. The district court likewise drew adverse inferences against Petitioners. *E.g.* 142a

("The most likely meaning to be inferred from his statement that he was 'stuck' in Slovakia is that he was unable to travel without risking extradition to the United States."). And it made adverse credibility determinations (131a–142a), which the Fourth Circuit affirmed. 37–39a (rejecting Petitioners' declarations as "self-serving").

Based on its factual findings and credibility determinations, the district court adjudged all criminal defendants to be disentitled fugitives (107a–108a); ruled that Mona Dotcom lacks sufficient ownership of the New Zealand property to establish standing (89a–90a); determined the *in rem* Defendant Assets to be in default (68a–88a); issued final judgments of forfeiture (57a–67a); and declined to stay its judgment pending appeal (CAJA 17). Because Petitioners were all deemed ineligible to submit claims, their property was ordered forfeited without any discovery, evidentiary hearing, or meaningful contestation of the Government's case on the merits.

Despite two orders (one each for the New Zealand and Hong Kong assets) "exclusively" vesting "all right, title, and interest" in the *in rem* Defendant Assets to the Government (57a–67a), the New Zealand and Hong Kong courts have not, to date, enforced the forfeiture orders.[5]

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[5] A New Zealand court prohibited New Zealand authorities from applying to register the civil forfeiture judgment absent further order due, in part, to its concerns over fugitive disentitlement. *See Dotcom v. The Deputy Solicitor-General*, [2015] NZHC 1197 at paras [79, 134–135]. The Hong Kong Department of Justice has not applied to register the civil forfeiture judgment; it is barred from doing so until all appeals in the

C. The Fourth Circuit's Decision

A divided panel of the Fourth Circuit affirmed. *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016) (1a–45a). Starting with jurisdiction, the majority noted "a potential split in the circuit courts regarding how to interpret" § 1355. 7a–8a. Traditionally, a court exercising *in rem* jurisdiction "must have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated." 8a (citations omitted). The Third, Ninth, and D.C. Circuits have held that the 1992 amendments to § 1355(b) displaced this control requirement, whereas the Second Circuit has held that the control requirement persists. 7a–9a. (cataloguing the split).

The Fourth Circuit here sided with the Third, Ninth, and D.C. Circuits, concluding that the district court did not need control over the property in New Zealand and Hong Kong before exercising jurisdiction and ordering forfeiture under § 1355. 9a–16a. In so deciding, the panel majority reasoned that Article III's prohibition against rendering nonbinding advisory opinions is inapplicable because this prohibition "addresses itself" only "to maintaining the separation of powers between the branches of our own government," and is not implicated in international cases, even if a foreign court may not be bound by a judgment of a United States court. 15a.

Satisfied as to jurisdiction, the panel majority affirmed the district court's rulings striking all of Petitioners' claims. 45a. It held that due process was not violated by deeming Petitioners to be disentitled

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United States have concluded. *See* Hong Kong Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 § 28(3).

fugitives under 28 U.S.C. § 2466 and thereby denying them the opportunity to contest the civil forfeiture of their property. 16a–22a. The majority noted that § 2466 was passed in the wake of this Court's decision in *Degen*, 517 U.S. 820, which held that federal courts lack inherent authority to disentitle fugitives, while "expressly le[aving] open the question" of whether such disentitlement would be constitutional under the Due Process Clause if authorized by statute. 23a–24a (citing *Degen*, 517 U.S. at 828). Presented with the question left open in *Degen*, the panel majority held that § 2466 "predicates disentitlement on an allowable presumption that a criminal fugitive lacks a meritorious defense to a related civil forfeiture" and therefore does not violate due process. 30a.

Next, the panel majority addressed the intent requirement for fugitive disentitlement under § 2466. 31a–35a. The panel majority rejected Petitioners' argument that the statute applies only to an individual whose "sole or primary reason for being absent from the United States is evasion," as the D.C. Circuit and Sixth Circuit have held. *Id.* Instead, the panel majority adopted the position of the Second Circuit and held that the statute "must apply to people with no reason to come to the United States other than to face charges." 33a. Thus, per the decision below, a person can be designated a disentitled fugitive under § 2466, so long as his "specific intent" to avoid prosecution is one *possible* reason why he does not enter the United States, even if the "principal reason such a person remains outside the United States will typically be that they live elsewhere." 33a. Applying this substantive standard, the Fourth Circuit affirmed the district court's adverse factual

findings and credibility assessments surrounding each defendant's intent to avoid the United States, which were made based solely on the Government's affidavits, without any discovery or evidentiary hearing. 35a–39a.

Judge Floyd dissented, concluding that "Article III's prohibition against advisory opinions precludes the exercise of *in rem* jurisdiction over a *res*, including real property, entirely outside of the United States and beyond the control of the district court." 46a. In the view of Judge Floyd, therefore, all other issues were "moot." 56a.

REASONS FOR GRANTING THE PETITION

This case well warrants certiorari review. The Courts of Appeals have split over fundamental questions about how to apply the statute governing civil asset forfeiture, 28 U.S.C. § 1355, particularly in conjunction with the statute governing fugitive disentitlement, 28 U.S.C. § 2466. Since these statutes were enacted in 1992 and 2000, respectively, this Court has not had the opportunity to address either one. Taking the opportunity now may bring needed clarity to the jurisdictional, procedural, and substantive standards that govern civil forfeiture of foreign property and fugitive disentitlement.

Besides sowing doctrinal disagreement, the instant questions have sparked profound and mounting concerns. As Justice Thomas recently recognized, the entire civil asset forfeiture system, in which "police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses." *Leonard v. Texas*, 580 U.S. ___ (2017) (Thomas, J.) (concurring

in denial of certiorari). The Government's instant, successful invocation of fugitive disentitlement to justify civil forfeiture of tens of millions of dollars in foreign property based on novel, untested criminal allegations elevates such concerns to their zenith—and does so in a posture where international comity as well as constitutional rights are at stake.

I. THE FOURTH CIRCUIT'S EXERCISE OF *IN REM* JURISDICTION CONFLICTS WITH THIS COURT'S PRECEDENT AND FURTHERS A CIRCUIT SPLIT ON THE FIRST QUESTION PRESENTED

The Fourth Circuit held below that Article III permits the exercise of *in rem* jurisdiction over foreign property controlled by foreign courts. 11a–16a. This holding conflicts with the limits this Court has placed on *in rem* jurisdiction and with the position staked out by the Second Circuit. Indeed, the panel majority acknowledged that there is "a potential split in the circuit courts" regarding this issue (7a), and it drew a dissent urging a different result on precisely this ground (46a).

United States courts have long abided by a "general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." *Marshall v. Marshall*, 547 U.S. 293, 311 (2006). When a *res* is located abroad and under the control of foreign courts, those foreign courts have exclusive jurisdiction. *See, e.g.*, *The Apollon*, 22 U.S. 362, 370–72 (1824) (Story, J.); *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423, 432 (1813) (Marshall, C.J.).

This jurisdictional limitation effectuates Article III's mandate that a federal court not render a judgment unless it will bind the parties. "This Court early and wisely determined that it would not give advisory opinions," and "[i]t has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113–14 (1948) (collecting cases). As Judge Floyd explained in his dissent below, if a *res* is in the control of a foreign court, then an order from a federal court disposing of the *res* "cannot bind the property but, instead, merely advises the foreign sovereign that *does* control the property as to how a United States court believes the rights in the property should be settled." 54a. In other words, "[w]ithout control of the *res*, the district court's decision cannot bind the *res* and thus constitutes an advisory opinion prohibited by Article III." 51a.

A. The Second Circuit Recognizes That Article III Does Not Permit *In Rem* Jurisdiction Over Property In The Exclusive Custody and Control of Foreign Courts

In *Chesley v. Union Carbide Corp.*, 927 F.2d 60 (2d Cir. 1991), the Second Circuit expressly held that the longstanding rule barring United States courts from "assuming *in rem* jurisdiction over a *res* that is already under the *in rem* jurisdiction of another court" is "equally applicable to requested interference by American courts with a *res* under the jurisdiction of a foreign court." *Id.* at 66. Accordingly, federal jurisdiction could "not be exercised, directly

or indirectly," over property "in India under the supervision of the Supreme Court of India." *Id.* at 67.

The Second Circuit maintained this position after Congress in 1992 amended the civil asset forfeiture statute, 28 U.S.C. § 1355. In *United States v. All Funds on Deposit in any Accounts Maintained in Names of Meza or De Castro* ("*Meza*"), the Second Circuit explained that, "[a]lthough Congress certainly intended to streamline civil forfeiture proceedings by amending § 1355, even with respect to property located in foreign countries, we do not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction." 63 F.3d 148, 152 (2d Cir. 1995). Thus, notwithstanding the amendments to § 1355, "in order to initiate a forfeiture proceeding against property located in a foreign country, the property must be within the actual or constructive control of the district court in which the action is commenced." *Id.* at 153. In *Meza*, the Second Circuit determined that Article III's constructive control requirement was satisfied because the English *res* was subject to Britain's *mandatory* Mutual Legal Assistance Treaty obligations with the United States. *Id.*[6]

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[6] Subsequently, the Second Circuit addressed the narrow question whether Section 1355(b)(2) could apply retroactively to a forfeiture action concerning assets in Hong Kong and held that it could. *See United States v. Certain Funds (H.K. and Shanghai Banking Corp.)*, 96 F.3d 20, 24 (2d Cir. 1996). That opinion did not purport to address Article III, the prior *Meza* decision, or whether Hong Kong would in fact comply with a forfeiture order by effectuating forfeiture of foreign assets. *Id.* Notably, a subsequent Second Circuit panel could not possibly have overruled an earlier panel. *E.g. In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010).

Part and parcel of the same principle, the Second Circuit recently refused to give effect to a *Brazilian* judgment ordering the civil forfeiture of assets in *New York*. In *United States v. Federative Republic of Brazil*, the Second Circuit reiterated that, "for an action to be *in rem*, the property at issue generally must itself be located within the jurisdiction of the ordering court." 748 F.3d 86, 94–95 (2d Cir. 2014). Because the bank account at issue was located in New York, "it is by no means clear that the forfeiture provision of the Brazilian Judgment can reasonably be viewed as an *in rem* award." *Id.*

B. The Fourth Circuit And Three Other Circuits Have Split With The Second Circuit

In holding that the requirement of "exclusive custody and control" does not extend to civil forfeitures of foreign property, the Fourth Circuit broke from the Second Circuit and sided with the Third, Ninth, and D.C. Circuits. 6a–16a.

In *United States v. Approximately $1.67 Million (U.S.)*, the Ninth Circuit recognized that, "[u]nder the traditional paradigm, 'the court must have actual or constructive control over the *res* when an *in rem* forfeiture suit is initiated.'" 513 F.3d 991, 996 (9th Cir. 2008) (quoting *United States v. James Daniel Good*, 510 U.S. 43, 58 (1993)). But the Ninth Circuit then concluded that the 1992 amendments to § 1355 superseded that traditional paradigm: "The plain language and legislative history of the 1992 amendments makes clear that Congress intended § 1355 to lodge jurisdiction in the district courts without reference to constructive or actual control of the res." *Id.* at 998.

In reaching this decision, the Ninth Circuit noted that it was rejecting the Second Circuit's analysis in *Meza* and instead adopting "the analysis of the D.C. and Third Circuits," which in prior decisions had likewise "declined to follow the Second Circuit's *Meza* decision." *Id.* at 997–98 (citing *Contents of Account No. XXXXXXXX v. United States*, 344 F.3d 399, 403 (3d Cir. 2003); *United States v. All Funds in Account in Banco Español de Crédito Spain*, 295 F.3d 23, 26–27 (D.C. Cir. 2002)).

In this case, "[t]he district court adopted the majority approach"—*i.e.*, the approach taken by the Third, Ninth, and D.C. Circuits—and the Fourth Circuit "affirm[ed] that decision." 8a. In so doing, the Fourth Circuit contributed to a longstanding circuit split about the requirements for *in rem* jurisdiction, one that this Court should now resolve.

C. The Fourth Circuit's Decision Errs And Conflicts With This Court's Decisions

The premise underlying the decisions by the D.C., Third, Fourth, and Ninth Circuits is that § 1355 obviates the need for a federal court to have custody or control over a *res* before exercising *in rem* jurisdiction. The enactment of § 1355, however, cannot change the constitutional maxim that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972). Because Article III requires that a "court must have actual or constructive control of the *res* when an *in rem* forfeiture suit is initiated," *Republic Nat'l. Bank of Miami v. United States*, 506 U.S. 80, 87 (1992), a foreign court's exclusive control over a *res* precludes concurrent assertion

of jurisdiction here. *See, e.g.*, *The Apollon*, 22 U.S. at 370–72; *Williams*, 11 U.S. at 432.

That is why Judge Floyd correctly dissented in the Fourth Circuit opinion below. 46a. "The defendant in this action—the *res*—is outside of the United States and beyond the control of the district court. Absent control, no order of the district court can be binding on the *res*." 50a. Because "the *res* in this case is subject to the control of the courts of New Zealand and Hong Kong," those courts "with the authority vested in them by their own sovereigns, remain free to revise, overturn, or refuse recognition to the judgment of the district court." *Id.*

It is undisputed that the *res* in this case falls entirely within the custody and control of courts in New Zealand and Hong Kong. *See* 8a–16a, 29a, 122a. Indeed, the impetus for civil forfeiture was the Government's concerns that New Zealand and Hong Kong courts have been using their control to dissipate the assets at issue, contrary to the Government's wishes. *See, e.g.*, 5a, 29a, 143a–144a.[7] What is more, foreign compliance with the forfeiture judgment is especially unlikely because the judgment rests on *fugitive disentitlement*, a doctrine that "has no place" in Commonwealth law. *Polanski v. Condé Nast Publ'ns Ltd.*, [2005] United Kingdom House of Lords ("UKHL") 10 at ¶ 26 ("Such harshness has no place in our law . . . [o]ur law knows no principle of fugitive disentitlement."), available at https://goo.gl/S6Xr9y. Predictably, a New Zealand

[7] *See also* CAJA 130 ("[A] delay in this case could jeopardize forfeiture of the assets if foreign governments proceed to release the currently restrained assets despite the United States' requests to continue restraint").

court has declined to permit enforcement of the civil-forfeiture judgment at this time precisely because Petitioners have presented a "substantial position" that civil forfeiture, as premised on fugitive disentitlement, "has been obtained in circumstances that the New Zealand courts would consider would amount to a breach of natural justice." *Dotcom v. The Deputy Solicitor-General*, [2015] New Zealand High Court ("NZHC") 1197 at paras. [76–79, 83, 104(d), 134], available at https://goo.gl/USz0YW.

Thus, if the Fourth Circuit had correctly applied the control standard required by Article III, this case would be dismissed for lack of jurisdiction.[8] This Court should grant certiorari to resolve disagreement among the circuits and restore the jurisdictional limits Article III imposes on *in rem* actions concerning civil forfeiture of property in foreign countries.

II. THERE IS A CIRCUIT SPLIT ON THE SECOND QUESTION PRESENTED AS TO WHETHER FUGITIVE DISENTITLEMENT IS PROPERLY RESOLVED BASED ON THE PLEADINGS ALONE

The Fourth Circuit's opinion has deepened a vexing split among the circuits over the procedures that should attend determinations of fugitive disentitlement in connection with civil forfeiture. By resolving disputed issues of fact concerning Petitioners' status as disentitled fugitives under 28 U.S.C. § 2466 at the pleading stage—rather than at summary judgment

[8] Accordingly, if the Claimants prevail on this jurisdictional issue, then, as Judge Floyd observed in dissent below, the other questions would be "moot." 56a.

or after an evidentiary hearing—the Fourth Circuit has taken the approach of the Second Circuit, which has held that fugitive status under § 2466 must be resolved at the pleading stage. In opposition are the D.C. and Sixth Circuits, which call for such determinations to be made at summary judgment or after an evidentiary hearing.

By resolving outcome-determinative factual and credibility disputes based on pleadings alone, without affording any discovery or evidentiary hearing, the approach taken in this case compounds due-process problems. *Cf. Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) ("[D]ue process does not countenance such swift passage from pleading to judgment in the pleader's favor[.]"); *United States v. Raddatz*, 447 U.S. 667 at 681 n.7 (1980) (To "reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal," "without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious [due process] questions."); *see infra* III.D.

A. The D.C. And Sixth Circuits Allow Fugitive Disentitlement Motions To Be Resolved After the Pleading Stage

In the D.C. and Sixth Circuits, courts treat a motion to strike on fugitive disentitlement grounds as a summary-judgment motion. They do so on the theory that determining whether a claimant is a disentitled fugitive is a fact-bound inquiry that requires de-

termining, among other things, whether the claimant has intent "to avoid criminal prosecution," § 2466.[9]

For example, in *United States v. Salti*, the Sixth Circuit reversed and remanded a district court's decision to strike at the pleading stage a claim in a civil-forfeiture proceeding by a person who was deemed a disentitled fugitive under § 2466. 579 F.3d 656 (6th Cir. 2009). The Sixth Circuit there emphasized that the district court's error was procedural: it had "improperly and prematurely weigh[ed] evidence to resolve a 'factual dispute regarding [the claimant's] intent to avoid criminal prosecution.'" *Id.* at 666. Although the district court might have reached the same outcome "at a subsequent stage" of the proceedings—namely, at summary judgment or after an evidentiary hearing—it was error for it to resolve such disputed factual issues at the pleadings stage. *Id.*

Similarly, the D.C. Circuit reversed and remanded after a district court had resolved at summary judgment a fugitive-disentitlement motion notwithstanding a genuine dispute of material fact over whether the alleged fugitive had the requisite intent to be disentitled under § 2466. *United States v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scot. Int'l, Account No. XXXX-XXXXXXXX, Held in Name of Soulbury Ltd.* ("*Soulbury*"), 554 F.3d 123 (D.C. Cir. 2009). In *Soulbury*, the Government had originally moved to strike the alleged fugitive's claim at the pleadings stage, but the district court, recognizing that it would be improper to resolve disputed factual issues at the pleading stage,

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[9] The next Question Presented goes to the substantive standard governing this intent element.

converted the Government's motion to one for summary judgment, 478 F. Supp. 3d 30, 45–46 (D.D.C. 2007), and then ultimately granted summary judgment to the Government, 520 F. Supp. 2d 188 (D.D.C. 2007). In reversing this judgment on appeal, the D.C. Circuit indicated that, insomuch as there was a "factual dispute regarding [the claimant's] intent to avoid criminal prosecution," the presence of this "genuine issue of material fact" rendered it inappropriate to grant summary judgment. 554 F.3d at 133.

True to the D.C. Circuit's instruction, the U.S. District Court for the District of Columbia just recently refused to disentitle a different set of claimants in a posture indistinguishable from that of these Claimants. In *United States v. Any & All Funds*, 87 F. Supp. 3d 163, 168 (D.D.C. 2015), the court explained that disentitlement was improper where "[the claimant] is a Thai native who has never lived in the United States and was outside the country when the indictment was issued." In so ruling, that court rejected the Government's argument that "the fugitive disentitlement doctrine applies to Siriwan because she moved to specially appear in the criminal case, contested extradition, and has moved to stay this case." *Id.* *Compare* 37a. (affirming disentitlement because "Finn Batato and Mathias Ortmann made statements in declarations that they were 'actively contesting the legal basis on which the United States has issued the indictment.'").

Thus, both the D.C. Circuit and Sixth Circuit apply settled summary-judgment standards to motions to strike on fugitive-disentitlement grounds. In those circuits, genuine disputes of material fact can-

not be resolved either at the pleading stage, *Salti*, 579 F.3d at 666, or at the summary-judgment stage, *Soulbury*, 554 F.3d at 133.[10] When there are factual disputes—say, about an alleged fugitive's intent—a motion to strike is treated as a motion for summary judgment, which carries with it normal rights to discovery and an evidentiary hearing, as appropriate. *See Salti*, 579 F.3d at 666 n.10 (approving of *Soulbury*, 478 F. Supp. 3d at 45–46). Summary judgment will then be granted only if there are no genuine issues of material fact. *See Soulbury*, 554 F.3d at 133.

B. The Second Circuit, As Now Joined By The Fourth Circuit, Eschews Using Summary Judgment To Resolve Fugitive Disentitlement Motions

By contrast, the Second Circuit has expressly rejected the approach of the D.C. Circuit and the Sixth Circuit, explaining that "[w]e are not persuaded [by *Soulbury* and *Salti*] that adherence to summary judgment standards in a § 2466 proceeding is appropriate." *United States v. Technodyne LLC*, 753 F.3d 368, 381 (2d Cir. 2014). The Second Circuit reached its position by relying on language in § 2466 which provides that a "judicial officer" is authorized to disentitle a fugitive "upon a finding" that the factual conditions for disentitlement are satisfied. *Id.* (quoting § 2466(a)). The Second Circuit concluded that "determinations as to disentitlement are not to be made under the standards governing summary

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[10] If there are no factual issues, then, as the Ninth Circuit has held, a motion to strike on fugitive-disentitlement grounds can be resolved at the pleading stage. *United States v. $671,160.00 in U.S. Currency*, 730 F.3d 1051, 1059 (9th Cir. 2013).

judgment" and that a district court could decide fugitive disentitlement on an early motion to strike, making "the requisite findings of fact," including truthfulness assessments, without "a trial with live witnesses." *Id.* at 381-82.

The Fourth Circuit has now taken the same approach as the Second Circuit by resolving at the pleading stage disputed issues of fact. Indeed, the Fourth Circuit here rejected all of Petitioners' challenges to the procedure employed by the district court, simply stating that "courts regularly impose procedural requirements that will control when and how a party may be heard." According to the decision below, fugitive disentitlement operates to obviate summary-judgment proceedings; the only way claimants might "have secured a hearing on their forfeiture claim" would be "by entering the United States." 26a (citing *Collazos v. United States*, 368 F.3d 190, 203 (2d Cir. 2004)).

This Court should dispel existing confusion and disagreement among the lower courts by resolving the extent to which summary-judgment procedures and standards apply to fugitive-disentitlement motions in civil-forfeiture proceedings.

C. The Fourth Circuit's Decision Breaks From Sister Circuits By Jettisoning Established Procedural Safeguards

The Fourth Circuit's approach in this case denies vital procedural safeguards to persons contesting civil forfeitures and exacerbates disparity between the circuits.

Discovery. Civil claimants should be entitled to discovery when seeking to prove they are not fugi-

tives. Intent must often be inferred from other evidence—including observations of third parties and documents that may be in parties' possession. *See generally*, *California Pub. Broad. Forum v. FCC*, 752 F.2d 670, 679 (D.C. Cir. 1985). Indeed, the Government relied here on third-party testimony as to the Petitioners' alleged intent. *See* 39a, 142a ("Bencko told a third party that . . ."). Nonetheless, the district court refused to permit Petitioners any discovery whatsoever—refusing even to permit so much as a deposition of the witness it relied on for disentitlement. 128a ("The claimants argue that discovery is required on two issues, the possibility of government overreach and the issue of the claimants' intent. The court disagrees.").

The availability of discovery in the context of fugitive disentitlement has occasioned further split. Specifically, the Ninth, Sixth, and the district court in the D.C. Circuit would all have permitted Petitioners to take discovery in order to gather evidence demonstrating they lacked the requisite intent to be fugitives. *See United States v. Real Prop. Located at Incline Vill.*, 47 F.3d 1511, 1520 (9th Cir. 1995) (finding disentitlement proper only after "the district court's February order reopening discovery and making all documents available"), *rev'd on other grounds by Degen*, 517 U.S. 820; *Soulbury*, 478 F. Supp. 2d at 44 ("The Court will convert the [G]overnment's motion to one for partial summary judgment, and will order limited discovery."); *Salti*, 579 F.3d at 666 n. 10.

If Petitioners had access to civil discovery here (as they would if the civil-forfeiture proceeding had been initiated in the D.C. or Sixth Circuits), they would

have been able to depose the third parties whose testimony the Government submitted in support of disentitlement. The denial of such discovery here prejudiced Petitioners and effectively disabled them from properly contesting the Government's allegations regarding their intent to avoid prosecution.

Evidentiary Hearings. A civil litigant accused of being a fugitive should be permitted to submit affidavit testimony on his own behalf without such testimony being disregarded as "self-serving." *See* 38a. Courts have long recognized that "a determination of credibility cannot be made on the basis of an affidavit. That is, a judge cannot take two affidavits which swear to opposite things and say, 'I find one of the affidavits more credible than the other, and therefore I shall accept it as true.'" *Durukan Am., LLC v. Rain Trading, Inc.*, 787 F.3d 1161, 1164 (7th Cir. 2015); *see also Blackledge v. Allison*, 431 U.S. 63, 82, (1977) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive[.]"). Instead, when faced with warring affidavits, a district court is expected to hold an evidentiary hearing. *Durukan Am.*, 787 F.3d at 1164.

Nonetheless, the Eastern District of Virginia and Fourth Circuit in this case made credibility determinations favoring the Government's affidavits over Petitioners' proffered affidavits without the benefit of an evidentiary hearing. 26a–30a; 131a–142a. The Fourth Circuit did not explain why it has disregarded the longstanding rule against crediting one dueling affidavit over another and making credibility determinations based on papers alone.

This split, too, grows from basic disagreement over whether summary-judgment standards govern

disentitlement. In the Sixth and D.C. Circuits, unlike the Fourth Circuit, dueling affidavits present factual disputes that are to be resolved following a hearing on the merits. *E.g. Salti*, 579 F.3d at 666.

Use of Inadmissible Evidence. A civil claimant should not be denied any claim to property based upon unexamined, unauthenticated hearsay. The Federal Rules of Evidence generally "apply to proceedings in United States courts[.]" Fed. R. Evid. 101; *Accord Legg v. Chopra*, 286 F.3d 286, 290 (6th Cir. 2002). At summary judgment, a motion must be supported by "facts that would be admissible in evidence[.]" Fed. R. Civ. P. 56. Indeed, courts have excluded evidence from fugitive disentitlement proceedings specifically because it was "hearsay." *E.g.*, *Incline Vill.*, 47 F.3d at 1516.

Nonetheless, the district court disentitled Petitioners, and the Fourth Circuit affirmed, based on rank double hearsay. *E.g.*, 39a, 142a ("Bencko told a third party that . . ."). Notably, the district court appeared to consider inadmissible evidence only when it went against the Claimants. In their briefing, the Claimants specifically raised the possibility of government overreach and requested discovery into the issue, but the district court found that mere allegations were not enough to justify discovery. 128a ("The allegations of government overreach are insufficient to warrant discovery."). The district court did not explain why Claimants' submissions outside of personal knowledge were mere "allegations," while the Government's double-hearsay declarations amounted to competent evidence. The Government's hearsay evidence would not have been admissible outside of the Second and Fourth Circuits.

Adverse Inferences. Disentitlement of the Petitioners below depended on adverse inferences drawn from statements submitted on the papers. *E.g.* 142a ("The most likely meaning to be inferred from his statement that he was 'stuck' in Slovakia is that he was unable to travel without risking extradition to the United States."); 35a–39a.

Those circuits that apply summary-judgment rules, however, would require that all inferences be drawn in claimants' favor. *E.g.*, *Salti*, 579 F.3d at 666 n. 10; *Soulbury*, 554 F.3d at 132. By drawing inferences against these Claimants without permitting live testimony, the Fourth Circuit has further deviated from summary-judgment standards as well as from the D.C. and Sixth Circuits.

III. THERE IS A THREE-WAY CIRCUIT SPLIT ON THE THIRD QUESTION PRESENTED AS TO THE SHOWING OF INTENT THAT IS PREREQUISITE TO FUGITIVE DISENTITLEMENT

Lifelong foreigners are not, by any fair measure, "fugitives" merely because they lawfully contest extradition. The opinion of the Fourth Circuit nonetheless reads the fugitive disentitlement statute, 28 U.S.C. § 2466, as calling for the contrary conclusion. 30a–35a. By equating persons who are absent with those who abscond, it has compounded what was already a pronounced three-way circuit split and has joined the Second Circuit in lowering the substantive bar for fugitive disentitlement below where two other clusters of circuits have set it—below the Fifth and Ninth Circuits, which apply a "totality of the circumstances" test to assessing fugitive intent, and even further below the D.C. Circuit and Sixth Circuit,

which ask whether avoidance of prosecution is "*the*" reason why criminal defendants are abroad.

Traditionally, "fugitives" were individuals who *fled* a jurisdiction to avoid criminal prosecution or sanctions and then eschewed lawful process. *E.g.*, 18 U.S.C. § 921(15) ("The term 'fugitive from justice' means any person who has fled from any State to avoid prosecution for a crime . . ."). Common law did not treat as "fugitives" people who had never previously entered the United States. *See Collazos*, 368 F.3d at 198–201. Section 2466(a)(1)(B) adopts a variation on that definition, permitting a district court to deem a person a fugitive who, "in order to avoid criminal prosecution," "declines to enter or reenter the United States to submit to its jurisdiction." This Court has not addressed this statute in the 17 years since its enactment. Meanwhile, circuits have fractured over the substantive standard that determines whether claimants in fact have the requisite intent "to avoid criminal prosecution," and demands of due process have been left up in the air.

A. The D.C. And Sixth Circuits Require Intent To Avoid Prosecution To Be *The* Reason A Defendant Does Not Enter The United States

In analyzing the text of § 2466(a)(1)(B), the D.C. Circuit has held that the Government must prove "that avoiding prosecution is *the* reason [an alleged fugitive] has failed to enter the United States." *Soulbury*, 554 F.3d at 132 (emphasis in original). "Mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute." *Id.* In *Soulbury*, the claimant was a criminal defendant who had

voluntarily left the United States years before his indictment, renounced his United States citizenship, and settled in Antigua (a country without an extradition treaty). *Id.* at 131–32. Even though the claimant had acknowledged the criminal charges in a television appearance, the D.C. Circuit concluded that the Government "has not satisfied its burden on summary judgment to show that [the defendant] remains outside the United States in order to avoid the pending criminal charges." *Id.* Simply put, he was not a fugitive.

The Sixth Circuit thereafter adopted the D.C. Circuit's rule, requiring the Government to prove "that avoiding prosecution is *the* reason [the individual] has failed to enter the United States." *Salti*, 579 F.3d at 664 (6th Cir. 2009) (quoting *Soulbury*, 554 F.3d at 132) (emphasis in *Soulbury* and retained in *Salti*). Applying this standard, the Sixth Circuit held in *Salti* that the district court had erred in ruling that a claimant was a fugitive under § 2466 because there was evidence indicating that the claimant may have had another reason for not entering the United States besides avoiding prosecution—specifically, a medical condition that impeded his ability to travel. *Id.* at 665–66.

Under the test espoused by the D.C. Circuit and Sixth Circuit, Petitioners in this case are not fugitives. They have bountiful reasons other than avoiding prosecution to remain in their foreign home countries: they have lived and worked abroad their entire lives, as they attested in sworn affidavits submitted to the district court. CAJA 556–567. Petitioners are not individuals who fled the United States—nor, for that matter, are they individuals

who routinely traveled to the United States and then ceased doing so in order to avoid prosecution. Instead, they are individuals who are doing nothing more than continuing to live their normal lives at home, in the communities where they live and work, among their friends, family, loved ones, and prized possessions. Just like the claimants in *Soulbury* and *Salti*, Petitioners' failure to leave their homelands to travel to the United States for the sake of confronting a criminal prosecution should not be equated with an "intent to avoid prosecution" for purposes of § 2466.

B. The Fifth And Ninth Circuits Require Intent To Avoid Prosecution To Be Proven By A Totality Of The Circumstances

The Ninth Circuit has acknowledged the D.C. Circuit's approach to § 2466, but adopted a somewhat more lenient "totality of the circumstances" standard. In *United States v. $671,160.00 in U.S. Currency*, the Ninth Circuit found a claimant to be a fugitive under § 2466 given the "totality of the circumstances." 730 F.3d at 1056. Specifically, the claimant had changed his travel patterns—he had engaged in "extensive travel to California prior to the issuance of the pending criminal charge," but ceased visiting after the criminal charges issued. That change, coupled with statements that he remained in Canada because the criminal matter "ma[d]e[] it impossible for him to return to the United States," sufficed to establish fugitive status under the totality-of-the-circumstances test. *Id.* at 1057.

Last year, the Fifth Circuit adopted the Ninth Circuit's totality-of-the-circumstances approach. In *United States v. 2005 Pilatus Aircraft, Bearing Tail*

No. N679PE, the Fifth Circuit approved fugitive disentitlement of a defendant who suddenly avoided any travel following his criminal indictment, after previously taking more than 100 trips to the United States. 838 F.3d 662, 664 (5th Cir. 2016). "[A] totality of the circumstances showed that Zarate deliberately remained away from the United States to avoid criminal prosecution." *Id.*

Under a "totality of the circumstances" test, too, Petitioners would not have been adjudged fugitives. Petitioners neither have a history of previous extensive travel to the United States nor have changed their behavior in any identified respect. Rather, Petitioners are remaining precisely where they have long been—in their home countries, abroad, where they live, work, and have families.

C. The Second Circuit, As Followed By The Fourth Circuit Below, Requires Intent To Avoid Prosecution To Be One Possible Reason A Defendant Has Not Entered The United States

The Second Circuit broke from the D.C. Circuit's articulation of fugitive intent in 2014. "To the extent that the D.C. Circuit's opinion in [*Soulbury*] was intended to mean that when a claimant declines to enter or reenter the United States the [G]overnment is required to prove that avoidance of criminal prosecution is his sole purpose, we respectfully disagree." *Technodyne*, 753 F.3d at 384–85. At the same time, the Second Circuit did not adopt the totality-of-the-circumstances test that is the law of the Fifth and Ninth Circuits. Instead, the Second Circuit ruled that the correct standard is "specific intent" to avoid prosecution. *Id.* The Second Circuit explained that

"a specific intent need not be the actor's sole, or even primary, purpose." *Id.* Individuals can be deemed fugitives under § 2466 in the Second Circuit so long as "*any* of their motivations for declining to reenter the United States was avoidance of criminal prosecution." *Id.* at 386 (emphasis added).

In this case, the Fourth Circuit purported to harmonize the various tests but ultimately adopted the Second Circuit's "specific intent" standard: "Because the plain language of the statute, the legislative intent, and the weight of persuasive authority all favor doing so, we adopt a specific intent standard for § 2466 and affirm the district court." 35a.

The Fourth Circuit's decision further cements the three-way split between (1) the sole intent approach in the D.C. and Sixth Circuits, (2) the totality-of-the-circumstances approach in the Fifth and Ninth Circuits, and (3) the "specific intent" approach in the Second and now the Fourth Circuits. This deep division—with multiple circuits aligned with each of the three factions—will not go away on its own. The time is ripe for this Court to resolve the fractured state of the law and announce a uniform intent standard for fugitive status under § 2466.

D. Disentitling Foreign Nationals' Claims To Their Foreign Assets Raises Serious Due-Process Concerns Under This Court's Precedent

By treating knowledge of the indictment combined with decision to remain abroad as adequate warrant for fugitive disentitlement, the Fourth Circuit has opened the door to disentitlement based on bare, untested allegations by the Government. No-

tably, even a special appearance through counsel in any civil forfeiture action, *e.g.*, to contest jurisdiction, would render any foreign defendant a defaulting fugitive. Mere appearance to advance a claim will afford conclusive proof that the criminal defendant has knowledge of the indictment while remaining abroad. Treating that *alone* as basis for disentitlement raises serious due-process concerns.

In *United States v. $40,877.59 in U.S. Currency*, the Seventh Circuit ruled that fugitive disentitlement in civil-forfeiture actions flatly violates due process. 32 F.3d 1151, 1157 (7th Cir. 1994). That decision has never been reversed. In it, the Seventh Circuit recognized this Court's teaching that, "notwithstanding an individual's status, where he is vulnerable to being sued, he has the right to defend himself in the action brought against him." *Id.* at 1153. "[T]o deny a person the right to defend himself or his property as punishment for contempt is a violation of due process." *Id.* at 1154 (citing *Hovey v. Elliott*, 167 U.S. 409, 413–14 (1897)). In applying that doctrine to fugitives, the Seventh Circuit relied on *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1870), which held that an alien enemy had the right to defend his property in a civil forfeiture. *$40,877.59*, 32 F.3d 1151 at 1153. Later, when this Court in *Degen* rejected the "harsh sanction" of disentitlement pursuant to a court's inherent authority, it did so in part to avoid the constitutional due-process question otherwise posed. 517 U.S. at 828.

Commentators have likewise noted the due-process problem that arises in the instant circumstances: "with artful pleading, the [G]overnment could confiscate all of a fugitive's property . . . all on

mere allegation." Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine Degen v. United States, 116 S. Ct. 1777 (1996)*, 87 J. CRIM. L. & CRIMINOLOGY 751, 772 (1997) (drawing upon *Windsor v. McVeigh*, 93 U.S. 274, 279 (1876); *$40,877.59*, 32 F.3d at 1155; *James Daniel Good*, 510 U.S. at 55).

Due-process considerations loom large in this context. In granting certiorari to review the Fourth Circuit's specific-intent standard, the Court may ensure that § 2466 is interpreted consistent with constitutional imperatives. *See also Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) ("The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts.").

CONCLUSION

In sum, this case poses questions that have divided the lower courts and carry important implications for federal jurisdiction, constitutional law, statutory interpretation, civil procedure, and international relations. At the same time, it affords this Court an opportunity to address concerns about civil forfeiture in an especially worrisome posture that invites abuse—where the Government is using untested criminal charges to seek forfeiture of foreign assets claimed by foreign nationals who have never resided in the United States. Granting certiorari in this case may enable this Court to bring clarity and uniformity to the law applied across lower courts, and to have say over when and how fugitive disentitlement may be properly invoked when criminal prosecutions and civil forfeiture intersect and extend overseas.

The petition should be granted.

Respectfully submitted,

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April 7, 2017

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1360

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FINN BATATO; BRAM VAN DER KOLK; JULIUS BENCKO; MATHIAS ORTMANN; SVEN ECHTERNACH; KIM DOTCOM; MEGAUPLOAD LIMITED; MEGAPAY LIMITED; VESTOR LIMITED; MEGAMEDIA LIMITED; MEGASTUFF LIMITED; MONA DOTCOM,

Claimants – Appellants,

and

ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO, in Rem,

Defendant.

CATO INSTITUTE; INSTITUTE FOR JUSTICE; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Amici Supporting Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:14-cv-00969-LO-MSN)

Argued: March 22, 2016
Decided: August 12, 2016

Before GREGORY, Chief Judge, and DUNCAN and FLOYD, Circuit Judges.

Affirmed by published opinion. Chief Judge Gregory wrote the majority opinion, in which Judge Duncan joined. Judge Floyd wrote a dissenting opinion.

ARGUED: Michael S. Elkin, WINSTON & STRAWN LLP, New York, New York, for Appellants. Jay V. Prabhu, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON BRIEF:** Craig C. Reilly, Alexandria, Virginia, for Appellants; Robb C. Adkins, San Francisco, California, Steffen N. Johnson, Christopher E. Mills, WINSTON & STRAWN LLP, Washington, D.C., for Appellant Megaupload Limited; David B. Smith, SMITH & ZIMMERMAN, PLLC, Alexandria, Virginia, for Appellants Julius Bencko and Sven Echternach; Ira P. Rothken, Jared R. Smith, ROTHKEN LAW FIRM, Novato, California, William A. Burck, Derek L. Shaffer, Stephen M. Hauss, QUINN EMANUEL URQUHART & SULLIVAN,

Washington, D.C., for Appellants Kim Dotcom and Megaupload Limited. Dana J. Boente, United States Attorney, G. Wingate Grant, Assistant United States Attorney, Karen L. Taylor, Assistant United States Attorney, Jasmine H. Yoon, Assistant United States Attorney, Allison B. Ickovic, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Ryan K. Dickey, Brian L. Levine, Senior Counsel, Computer Crime & Intellectual Property Section, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. Darpana Sheth, INSTITUTE FOR JUSTICE, Arlington, Virginia, Thomas K. Maher, NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, Durham, North Carolina, Ilya Shapiro, CATO INSTITUTE, Washington, D.C., for Amici Cato Institute, Institute for Justice, and National Association of Criminal Defense Lawyers.

GREGORY, Chief Judge:

The claimants in this case appeal from the district court's entry of default judgment for the government in a civil forfeiture action against funds deposited in the claimants' names in banks in New Zealand and Hong Kong. Default judgment was entered after the government successfully moved to disentitle the claimants from defending their claims to the defendant property under the federal fugitive disentitlement statute, 28 U.S.C. § 2466. The claimants appeal the judgment on several grounds, most prominent among them that the district court lacked jurisdiction over the defendant property because it resides in foreign countries, that fugitive disentitlement violates constitutional due process, and that disentitlement in this case was improper because the claimants are not fugitives from the law. Finding these arguments unpersuasive, we affirm the district court.

I.

On January 5, 2012, a grand jury returned an indictment against many of the claimants in this action, charging them with criminal copyright infringement and money laundering "with estimated harm to copyright holders well in excess of $500,000,000 and reported income in excess of $175,000,000." Gov't Br. 4. The claimants' alleged copyright infringement scheme, dubbed the "Mega Conspiracy," used public websites to facilitate the illegal reproduction and distribution of copyrighted movies, software, television programs, and music. The government estimates that the alleged criminal

conduct has caused billions of dollars in harm to the copyright holders.

Following the indictment, the district court issued restraining orders for assets in New Zealand and Hong Kong where most of the remaining identified proceeds resided. The High Court in Hong Kong responded almost immediately by issuing a restraining order against approximately $60 million in assets, while New Zealand first arrested several of the now-claimants, released them on bail, and then several months later, in April, registered restraining orders on $15 million in assets. New Zealand also scheduled extradition hearings for August 2012, but these hearings have been continued at least eight times at the claimants' request.

The New Zealand restraining orders could only remain registered for two years, after which they could be extended for up to one year. Recognizing that the restraints would run out on April 18, 2014, or if extended on April 18, 2015, the United States filed this civil forfeiture action against forty-eight assets restrained pursuant to the criminal indictment in the district court on July 29, 2014. Although restraining orders froze the assets in the lead up to this action, the New Zealand courts have routinely released funds to claimants for living and legal expenses. Some of these have been very substantial, including millions in legal fees for Kim Dotcom, and $170,000 per month for living expenses for the same claimant.

Most of the claimants in this case filed their claims together on August 28, and Mona Dotcom filed a spousal claim on September 1, 2014. The

claimants also filed a joint waiver of notice. The government subsequently moved to strike all the claimants' claims pursuant to 28 U.S.C. § 2466, the federal fugitive disentitlement statute. On February 27, 2015, the district court granted the motion to strike, having allowed claimants to appear and present arguments on the motion but not on the merits of the case. The government then moved for default judgment, which the district court granted on March 25, 2015, issuing forfeiture orders for the assets in New Zealand and Hong Kong. United States v. All Assets Listed in Attachment A, 89 F. Supp. 3d 813 (E.D. Va. 2015).

Claimants timely noted this appeal.

II.

The claimants' first challenge to the district court judgment contests that court's in rem jurisdiction over assets in foreign countries. The claimants make essentially several arguments which we will address in turn: first, the statute cited by the district court as establishing its jurisdiction speaks to venue rather than jurisdiction; second, that if that statute is jurisdictional, the case must still be justiciable, meaning the district court must have sufficient control over the res to render a binding opinion effecting title; and finally, that jurisdiction was improper because the district court did not have sufficient minimum contacts with the defendant property.

A.

The district court asserted in rem jurisdiction pursuant to 28 U.S.C. § 1355(b)(2).[1] There is a potential split in the circuit courts regarding how to

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[1] For convenience, the relevant portions of § 1355 are reproduced here:

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

(b) (1) A forfeiture action or proceeding may be brought in--

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District court for the District of Columbia.

* * *

(d) Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

interpret subsection (b): the Second Circuit has held that it merely makes venue proper in certain courts, while the Third, Ninth, and D.C. Circuits have held that it establishes jurisdiction in those courts.[2] The district court adopted the majority approach, and we affirm that decision.

"Under the traditional paradigm, 'the court must have actual or constructive control over the res when an in rem forfeiture suit is initiated.'" United States v. Approximately $1.67 Million, 513 F.3d 991, 996 (9th Cir. 2008) (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 58 (1993)). The question is whether § 1355—particularly the 1992 amendments which added subsections (b) and (d), authorizing district courts to issue process against property outside their districts—effectively dispenses with this traditional requirement. In the only circuit opinion to so hold, the Second Circuit said it does not do so with respect to property outside the United

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[2] There is only a "potential" split because the Second Circuit may have reversed itself following its decision in United States v. All Funds on Deposit in Any Accounts Maintained in Names of Meza or De Castro, 63 F.3d 148 (2d Cir. 1995). As the district court noted, a year after Meza the Second Circuit described § 1355(b) as an amendment "to provide district courts with in rem jurisdiction over a res located in a foreign country." United States v. Certain Funds Contained in Account Numbers 600-306211-006, 600-306211-011 & 600-306211-014 Located at Hong Kong & Shanghai Banking Corp., 96 F.3d 20, 22 (2d Cir. 1996). This language appears to at least abrogate Meza in the Second Circuit. If so, adopting the reasoning in Meza here would actually create a split between this Court and the Second, Third, Ninth, and D.C. Circuits.

States. United States v. All Funds on Deposit in Any Accounts Maintained in Names of Meza or De Castro, 63 F.3d 148, 152 (2d Cir. 1995). The Meza court read § 1355(b) to make venue proper in cases involving foreign property where the district court had control over that property. Id. at 151 ("Section 1355(b) addresses venue in forfeiture actions . . . ."). While subsection (d) establishes legal control over property located outside the court's jurisdiction but inside the United States, the Meza court held that a showing of control was still required for property outside the United States. Id. at 152.

This interpretation fails a closer textual analysis and runs contrary to the legislative history of the 1992 amendments. By its own terms, § 1355(d) only applies to "[a]ny court with jurisdiction over a forfeiture action pursuant to subsection (b)." § 1355(d) (emphasis added). The plain meaning of § 1355(d), therefore, renders the Meza court's finding that "[s]ection 1355(b) addresses venue" impossible—courts may acquire jurisdiction by operation of the provision. Although it would be clearer still for § 1355(b) to explicitly state its own jurisdictional nature, rather than merely saying that a "forfeiture action or proceeding may be brought in" those district courts it describes, the plain meaning of that language in the context of the entire statute is unmistakable.

The Meza court's interpretation, urged by the claimants here, also runs contrary to the legislative history of the 1992 amendments. When the amendments were introduced in the Money Laundering Improvements Act, Senator D'Amato

included an explanatory statement indicating that subsection (b) was intended to provide the federal district courts with jurisdiction over foreign property:

> Subsection (b)(2) addresses a problem that arises whenever property subject to forfeiture under the laws of the United States is located in a foreign country. As mentioned, under current law, it is probably no longer necessary to base in rem jurisdiction on the location of the property if there have been sufficient contacts with the district in which the suit is filed. See United States v. $10,000 in U.S. Currency[, 860 F.2d 1511 (9th Cir. 1988)]. No statute, however, says this, and the issue has to be repeatedly litigated whenever a foreign government is willing to give effect to a forfeiture order issued by a United States court and turn over seized property to the United States if only the United States is able to obtain such an order.
>
> Subsection (b)(2) resolves this problem by providing for jurisdiction over such property in the United States District Court for the District of Columbia, in the district court for the district in which any of the acts giving rise to the forfeiture occurred, or in any other district where venue would be appropriate under a venue-for-forfeiture statute.

137 Cong. Rec. S16640-01 (Nov. 13, 1992) (statement of Sen. D'Amato). The Meza court acknowledged, but did not analyze, this evidence of legislative history, which clearly weighs in favor of affirming the district court's interpretation of § 1355.

Because the plain meaning of the statutory text and the legislative history both support finding that 28 U.S.C. § 1355(b) is jurisdictional, we affirm the district court's holding to that effect. The district court was also correct to find that jurisdiction would lie if any of the acts resulting in the forfeiture action occurred within its jurisdiction. The court noted that the civil complaint and the related criminal indictment allege that there was a conspiracy between the indicted parties and that they used "over 525 servers located within the Eastern District of Virginia." All Assets Listed in Attachment A, 89 F. Supp. 3d at 823 (footnote omitted). The government furthermore contends, and the claimants do not deny, that the cost of using those servers ran into the "tens of millions of dollars over a period of years." Gov't Br. 18. This easily satisfies the relatively low standard set forth in § 1355, and so we affirm the district court's finding that it had jurisdiction under the statute.

B.

The claimants next argue that the district court's forfeiture order amounts to a nonbinding advisory opinion because foreign sovereigns must honor that order for it to have any effect on title to the res. The argument rests on two overlapping but distinguishable premises. The first is that principles of admiralty law which usually predicate in rem

jurisdiction on the court's control of the res apply equally to this case. This argument relies principally on our decisions in R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999) [hereinafter Titanic I], and R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521 (4th Cir. 2006) [hereinafter Titanic II]. The claimants' second premise is that Article III of the U.S. Constitution will not tolerate courts asserting in rem jurisdiction without "exclusive custody and control" of the res because such courts cannot "adjudicate rights . . . binding against the world," see Titanic I, 171 F.3d at 964, but are instead limited to rendering advisory opinions "subject to revision" by other governments, see Nashville, C. & St. L. Ry v. Wallace, 288 U.S. 249, 261-62 (1933).

This is essentially the same "lack-of-control" attack claimants launched against § 1355 as just discussed, but they attempt to reframe the argument as addressing more fundamental issues.

i.

The claimants' first argument fails because it confuses principles of admiralty law for principles of constitutional law. Both Titanic I and Titanic II describe jurisdictional principles governing admiralty courts and the law of the sea. The two crucial distinctions between these cases and the one before us are (1) that the Titanic cases based jurisdiction on the common law of admiralty whereas this case relies on § 1355, and (2) the Titanic cases involved a salvage and so no court could assert jurisdiction through exclusive control of the res, but here the res resides in two sovereign nations that are

cooperating with federal authorities from this country regarding the assets in question.

The claimants fail to acknowledge the most glaring problem with their reliance on Titanic I and Titanic II: the cases speak explicitly in terms of the jurisdictional limits of admiralty courts pursuant to "the common law of the seas." Titanic I, 171 F.3d at 960-61 ("Thus, when we say today that a case in admiralty is governed by the general maritime law, we speak through our own national sovereignty and thereby recognize and acquiesce in the time-honored principles of the common law of the seas.").

"Maritime law . . . provides an established network of rules and distinctions that are practically suited to the necessities of the sea," United States v. W.M. Webb, Inc., 397 U.S. 179, 191 (1970), and as one of our sister circuits has noted, "The general statute governing forfeiture actions states that '[u]nless otherwise provided by Act of Congress . . . in cases of seizures on land the forfeiture may be enforced by a proceeding in libel which shall conform as near as may be to proceedings in admiralty,'" United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 in Banco Espanol de Credito, Spain, 295 F.3d 23, 26 (D.C. Cir. 2002) (quoting 28 U.S.C. § 2461(b)). But of course, there is another statute—§ 1355—guiding the action here, and we have just described how that statute confers jurisdiction on the district court. Thus, absent the amendments to § 1355, there might be "little doubt that traditional rules of in rem jurisdiction developed under admiralty law would apply," id., but as things stand there can be no doubt

that § 1355 must prevail. As such, the cooperation (or lack thereof) of foreign nations in enforcing any of the district court's orders "determines only the effectiveness of the forfeiture orders of the district courts, not their jurisdiction to issue those orders." Id. at 27.

Finally, on this point, we note that admiralty cases involving salvages on the high seas (like the Titanic cases) necessarily involve difficult questions of previously owned property lost in shared international waters where no nation has sovereignty. Our opinion in Titanic I was crafted "to ensure that the conclusion that no nation has sovereignty through the assertion of exclusive judicial action over international waters does not leave the high seas without enforceable law." 171 F.3d at 968. These questions are not at issue here and there is no need to plumb their depths as the claimants invite us to do. Instead, we turn to the question of justiciability which involves related issues of control.

ii.

The claimants here argue that the district court is without jurisdiction because, without control of the res, it can only advise the courts of New Zealand and Hong Kong rather than disposing of the issues presented. It is among "the oldest and most consistent thread[s] in the federal law of justiciability . . . that the federal courts will not give advisory opinions," Flast v. Cohen, 392 U.S. 83, 96 (1968) (quotations omitted), and there are numerous cases holding that judicial decisions may not be rendered if they would be subject to revision by

another branch of government, e.g., Chicago & S. Airlines Co., 333 U.S. 103, 113-14 (1948). But this principle addresses itself to maintaining the separation of powers between the branches of our own government, not to concerns of sovereignty or international comity. See Courtney J. Linn, International Asset Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction over Foreign Assets Under 28 U.S.C. § 1355(b)(2), 31 Am. J. Crim. L. 251, 297-98 (2004) (collecting numerous cases, all addressing only revision by other branches of the United States government).

For a court to hear a case "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (quotations omitted). We need to not wade into the potentially thorny issues raised by claimants because this case meets the test articulated in Lujan—the foreign sovereigns have cooperatively detained the res by issuing orders restraining the defendant property pursuant to this litigation. By showing that the res was placed in custody in New Zealand and Hong Kong based on the district court's order, JA 468-69, the government has demonstrated that it is likely, rather than speculative, that these courts will honor a forfeiture order from the United States. While the claimants repeatedly point to foreign court releases of restrained funds, these simply do not prove that an order of forfeiture is unlikely to be honored.

The district court, also in reliance on the cooperation of Hong Kong and New Zealand, concluded its opinion would not be advisory and that

the court is capable of redressing the issue. We affirm that decision.

C.

The claimants next seek to challenge the district court's assertion of jurisdiction under the Due Process Clause of the Fifth Amendment. They argue that, regardless of any statute passed by Congress, a federal court cannot assert jurisdiction unless it is established that the defendant meets the "minimum contacts" test articulated by International Shoe v. State of Washington, Office of Unemployment Compensation & Placement, 326 U.S. 310 (1945) and its progeny, citing Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 224 (4th Cir. 2002). The district court held that the statute's requirement that this kind of in rem action be brought in "the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred," § 1355(b)(1)(A), "serve[d] much the same function as the minimum contacts test" and therefore analyzed only that question. J.A. 1963 n.10. While we disagree with the district court's analytical approach, its conclusion that the facts supporting statutory jurisdiction also establish sufficient contacts to meet due process, in this case, is affirmed.

While Congress has substantial power to set the jurisdiction of the federal courts, the Due Process Clause limits that power. The exact contours of that limitation are not entirely clear. In Shaffer v. Heitner, 433 U.S. 186 (1977), the Supreme Court held "that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." 433

U.S. at 212. The Court's insight was that "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of Pennoyer [v. Neff, 95 U.S. 714 (1878)] rest, [had become] the central concern of the inquiry into personal jurisdiction," and that similar concerns should govern in rem jurisdiction. Id. at 204. The Court rejected the narrow theory that in rem actions were strictly actions against property, concluding that "in order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing." Id. at 207 (quotation marks omitted). Thus the appeal of applying the minimum contacts test in in rem cases.

The Court's decision in Shaffer, however, emerged from a case that might be viewed as the inverse of what § 1355(b) contemplates: the property at issue was stock in a Delaware corporation that was, by virtue of state law, legally sited in the state of Delaware, while the owners of that stock had no other ties to the state. The Court determined that, despite the property being legally located in the state, the owners of that stock had insufficient contacts with Delaware for courts there to invoke quasi in rem jurisdiction over the underlying shareholder's derivative suit. Id. at 213. But § 1355(b) contemplates something completely different—a federal district court asserting in rem jurisdiction over property (which, in contrast to Shaffer, is central to the forfeiture action) located outside the forum.

Given that Shaffer provides only limited guidance as to how to proceed in this case, we assume without deciding that a traditional, state-based minimum contacts approach is appropriate in this case[3], as posited by the claimants. Applying that test we find that the contacts are sufficient and due process is not violated by the district court's assertion of jurisdiction.

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[3] "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution." J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 884 (2011). Given this principle, and based on the interplay between Federal Rules of Civil Procedure 4(k)(1)(C) and 4(k)(2), it has been held elsewhere that statutes expanding a district court's jurisdiction to the entire country may transform the minimum contacts test into a "national contacts" test. See Graduate Mgmt. Admission Council v. Raju, 241 F. Supp. 2d 589, 597 (E.D. Va. 2003) ("Rule 4(k)(2) was added in 1993 to deal with a gap in federal personal jurisdiction law in situations where a defendant does not reside in the United States, and lacks contacts with a single state sufficient to justify personal jurisdiction, but has enough contacts with the United States as a whole to satisfy the due process requirements."); see also Sec. Inv'r Prot. Corp. v. Vigman, 764 F.2d 1309, 1315 (9th Cir. 1985); F.T.C. v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981); cf. ESAB Grp., Inc. v. Zurich Ins. PLC, 685 F.3d 376, 391 n.8 (4th Cir. 2012) (declining to assess nationwide contacts pursuant to Rule 4(k)(2) because state long-arm statute authorized jurisdiction). It may therefore be possible for such a test to substitute in in rem actions like this one. Finding no need to rely on this test, however, we decline to express an opinion on the matter.

As in other cases we have decided in which websites and web transactions have been the asserted basis for jurisdiction, we will analyze the minimum contacts question by applying the factors commonly used for determining specific personal jurisdiction: "(1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state; (2) whether the plaintiffs' claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally 'reasonable.'" Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 397 (4th Cir. 2003).

As already mentioned, both the forfeiture complaint and the criminal indictment allege that 525 servers located within the Eastern District of Virginia were used in furtherance of the Mega Conspiracy. All Assets Listed in Attachment A, 89 F. Supp. 3d at 823. The government further alleges, and the claimants do not dispute, that these servers were "operated and closely controlled" by the claimants "at a cost of tens of millions of dollars over a period of years." Gov't Br. 18. We find that such contacts are sufficient to show the claimants "purposefully availed [themselves] of the privilege of conducting activities in the state." See Carefirst, 334 F.3d at 397.

The claimants argue, however, that "this Court has repeatedly dismissed 'as "de minimis" the level of contact created by the connection between an out-of-state defendant and a web server located within a forum.'" Appellants' Br. 17-18 (quoting Carefirst, 334 F.3d at 402). Besides not being a binding rule of

general applicability, the particular facts of this case warrant a different outcome than otherwise might be true. The quote they rely on is an unfortunate paraphrasing in our Carefirst opinion of a discussion contained in a footnote of another case, Christian Science Board of Directors of First Church of Christ, Scientist v. Nolan, 259 F.3d 209 (4th Cir. 2001). In Nolan we went to some lengths to note that we were not deciding the effect an in-forum server might have on jurisdiction as the case did not present those facts—the server involved was operated in California, not the forum state of North Carolina. Id. at 217 n.9. The Carefirst opinion therefore fails to adequately capture the impact of Nolan. Carefirst also does not purport to state a rule of general application, nor could it given that the reference is contained in dicta—Carefirst, like Nolan, did not involve an in-forum web server and so the Court had no opportunity to address the effect such a server might have on the jurisdictional question. Carefirst, 334 F.3d at 402 ("NetImpact merely facilitated the purchase of CPC's domain names and rented CPC space on its servers—which in fact were located not in [the forum state of] Maryland, but in Massachusetts.").

More to the point, this case does not involve a single server that happened to reside in the forum state. It involves hundreds of servers, closely controlled by the claimants, representing an investment of tens of millions of dollars. Moreover, whereas Carefirst and Nolan involved conspiracies in which a website was used to fraudulently solicit contributions from individuals, the type of conspiracy alleged in this case makes the servers a much more

integral aspect of the crime. The alleged Mega Conspiracy was a file-sharing scheme in which copyrighted files were illegally transferred to users around the world through the servers located in Ashburn, Virginia. The volume of data involved, while not disclosed in briefs to this Court, would necessarily have been orders of magnitude greater than that involved in Carefirst and Nolan. In those cases the defendants were alleged to be using the Internet to commit a traditional sort of fraud, and we decided the more important activity was "creating and updating the . . . website." See Nolan, 259 F.3d at 217 n.9. Here, the servers themselves held and allowed the transfer of the copyrighted material—they were the central conduit by which the conspiracy was conducted. The location of a substantial number of the servers in Virginia is clearly enough to demonstrate purposeful availment.

The second factor, whether the plaintiffs' claims arise out of those activities directed at the state, is easily met: the forfeiture action before this Court arises from the alleged illegal transfer of files conducted using the servers located in Virginia.

The third factor, constitutional reasonableness, is also met. To determine constitutional reasonableness, we look at "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." Burger King Corp. v.

Rudzewicz, 471 U.S. 462, 477 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)) (internal quotation marks omitted). This factor is largely used to police for exploitation of jurisdictional rules and ensure that defending a suit is not "so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent." Id. at 478 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)) (internal quotation marks omitted). The claimants do not argue that Virginia is any less convenient than any other available forum, and we perceive no evidence that the government filed where it did for any untoward purpose.

III.

The district court ordered the claimants disentitled from defending claims to the defendant property pursuant to the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 28 U.S.C. § 2466. The effect of the order was to prevent the claimants from using the U.S. courts to defend their claims to the property. The claimants argue that this application of 28 U.S.C. § 2466 violates the Due Process Clause of the Fifth Amendment by stripping them of their right to be heard. The claimants present arguments closely tracking those rejected by the Second Circuit in Collazos v. United States, 368 F.3d 190, 202-05 (2d Cir. 2004). The district court effectively adopted the reasoning of that case, holding that the claimants had waived the due process rights they claimed were violated by operation of § 2466. All Assets Listed in Attachment

A, 89 F. Supp. 3d at 832 n.21. We now affirm the district court's decision.

A.

Fugitive disentitlement began as a judicial doctrine allowing appellate courts to dismiss appeals from criminal fugitives who failed to surrender to authorities, holding that such failure "disentitles the defendant to call upon the resources of the Court for determination of his claims." See Molinaro v. New Jersey, 396 U.S. 365, 365-66 (1970). Prior to 1996, the courts of appeals were split on the question of whether fugitive disentitlement would also "allow a court in a civil forfeiture suit to enter judgment against a claimant because he is a fugitive from, or otherwise is resisting, a related criminal prosecution." Degen v. United States, 517 U.S. 820, 823 (1996) (citing as examples United States v. Eng, 951 F.2d 461 (2d Cir. 1991) (extending fugitive disentitlement to civil forfeiture); United States v. $40,877.59 in U.S. Currency, 32 F.3d 1151 (7th Cir. 1994) (declining to extend fugitive disentitlement to civil forfeiture); and United States v. $83,320 in U.S. Currency, 682 F.2d 573 (6th Cir. 1982) (same)).

In 1996, the U.S. Supreme Court struck a federal district court's use of disentitlement to strike a civil forfeiture claimant's defense on the grounds that he was a fugitive evading related criminal charges. Id. at 828. The Court was clearly conflicted over the interests presented by the disentitled party, the government seeking forfeiture, and the district court itself. It noted that "[t]he need to redress the indignity visited upon the District Court by Degen's absence from the criminal proceeding, and the need

to deter flight from criminal prosecution by Degen and others" were both "substantial" interests. Id. It also "acknowledge[d] disquiet at the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored." Id. On the other hand, the Court was even more concerned that "too free a recourse to rules" such as disentitlement that "foreclose[e] consideration of claims on the merits" might "disserve the dignitary purposes for which [they are] invoked," eroding respect for the courts. Id. It concluded that "[a] court's inherent power is limited by the necessity giving rise to its exercise" and that "[t]here was no necessity to justify the rule of disentitlement in [that] case." Id. at 829.

In the course of that opinion, the Supreme Court acknowledged that the answer might be different if civil disentitlement were authorized by statute. Id. at 828. The Court expressly left open the question of such a statute's constitutionality. Id. It was against this backdrop that CAFRA was enacted by Congress, and this appeal presents this Court with its first opportunity to pass upon that open question.

B.

The claimants argue that the district court was not constitutionally authorized to disentitle them from defending their property claims against the government's forfeiture action, regardless of any statute passed by Congress. They argue that "[t]he fundamental requirement of due process is the opportunity to be heard," Doolin Sec. Sav. Bank, FSB

v. FDIC, 53 F.3d 1395, 1402 (4th Cir. 1995) (quotations omitted), that disentitlement violates this precept, and that Degen confirms their position.

To begin, much of Degen's reasoning declaring judicial disentitlement unconstitutional centered on balance-of-powers concerns eliminated by the congressional authorization manifest in § 2466. The Degen Court noted that "[p]rinciples of deference counsel restraint in resorting to inherent power," 517 U.S. at 820 (emphasis added), and that "[t]he extent of [inherent judicial] powers must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority," id. at 823. It went on to expressly convey that were Congress or the Executive involved, the analysis would differ: "In many instances the inherent powers of the courts may be controlled or overridden by statute or rule." Id. We believe this is one such instance.

But more to the point, the claimants' argument fails primarily because § 2466 does not eliminate "the opportunity to be heard." Id. (emphasis added). The guarantees of due process do not mean that "the defendant in every civil case [must] actually have a hearing on the merits." Boddie v. Connecticut, 401 U.S. 371, 378 (1971). "What the Constitution does require is an opportunity . . . granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case." Id. (internal quotations omitted); see also James Daniel Good, 510 U.S. at 48 ("Our precedents establish the general rule that individuals must receive notice and

an opportunity to be heard before the Government deprives them of property."). A party's failure to take advantage of that opportunity waives the right it secures. See Boddie, 401 U.S. at 378-79.

The government points out that courts regularly impose procedural requirements that will control when and how a party may be heard, including requiring that an appearance be made in court. See id. ("A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance . . . ."). As was true of the claimant in Collazos, the claimants here "could have secured a hearing on [their] forfeiture claim any time . . . simply by entering the United States." 368 F.3d at 203. They declined to do so.

While the claimants correctly respond that § 2466 is no mere procedural requirement, their argument actually underscores the justification for disentitlement pursuant to statute. Whereas entering default judgment against a party for failure to meet a nonsubstantive requirement might produce the same result as in Degen, the refusal to face criminal charges that would determine whether or not the claimants came by the property at issue illegally supports a presumption that the property was, indeed, so obtained. Id. at 203-04. The very logic of fugitive disentitlement is that refusal to face and defend against charges, particularly in criminal court where procedural rights and the presumption of innocence favor the defendant, is "but an admission of the want of merit in the asserted defense." See Hammond Packing Co. v. Arkansas,

212 U.S. 322, 351 (1909). And the Supreme Court has long approved the power of the legislature to authorize dismissal on the creation of such a presumption. Id.

The distinction is made clearer by reviewing one of two nineteenth-century cases on which the claimants unsuccessfully rely, Hovey v. Elliott, 167 U.S. 409 (1897).[4] In that case the trial court used disentitlement as a punishment: it held the defendants in contempt for failure to deposit funds in the court registry pursuant to its order, and it punished them by striking their answer and entering default judgment against them. Id. at 411-12. The Supreme Court reversed, noting as axiomatic that courts must pursue and render justice rather than acting arbitrarily and becoming "instrument[s] of wrong and oppression." Id. at 413-14.

But in Hammond Packing the Court distinguished the situation in Hovey from one where a party creates an adverse presumption against itself. 212 U.S. at 349-50. The Court held that in the latter an answer may rightly be stricken and

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[4] The claimants also rely on McVeigh v. United States, 78 U.S. 259 (1870), but that case is simply inapposite. It involved the government's seizure of property from a former Confederate officer whose claim and answer were struck because, the trial court held, he was an enemy alien and could not seek relief in federal court. 78 U.S. at 261. But "while Mr. McVeigh could not undo his past support for the Confederacy in order to obtain a hearing on his confiscation claim," Collazos, 368 F.3d at 203, claimants here have had every opportunity to come into court and be heard.

default judgment entered because it is not an arbitrary punishment but the inevitable result of that presumption. Id. at 350-51 ("The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause."). In such a case, "the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver." Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982).

We make two final notes in support of our decision. First, there can be no doubt that the claimants' waiver was knowing. Section 2466 leaves the application of disentitlement to the court's discretion, see § 2466(a) (using "may" instead of "shall"), and in this case, the claimants were given a full opportunity to resist its application. Given their lengthy, and apparently expensive, intransigence with regard to the underlying controversy, it cannot be argued that they were unaware of the statute's consequences and therefore unable to waive. Cf. United States v. Eng, 951 F.2d 461, 466 (2d Cir. 1991), abrogated by Degen, 517 U.S. 820 ("The doctrine operates as a waiver by a fugitive of his due process rights in related civil forfeiture proceedings.").

Second, we are not certain that Degen cast as wide a net as the claimants argue. In that decision, the Supreme Court concluded that "[t]here was no

necessity to justify the rule of disentitlement in this case," 517 U.S. at 829 (emphasis added), and we have interpreted the opinion to mean only that courts acting on inherent authority "[can]not rely on the fugitive from justice doctrine to dismiss a civil forfeiture action merely 'because [the party] is a fugitive from, or otherwise is resisting, a related criminal prosecution,'" Jaffe v. Accredited Sur. & Cas. Co., 294 F.3d 584, 596 (4th Cir. 2002) (emphasis added) (quoting Degen, 517 U.S. at 823). These opinions appear to leave open the possibility that different circumstances could more readily justify disentitlement, statutory or otherwise.

In this case, the claimants readily concede that the property at issue is being spent rapidly, despite numerous orders attempting to restrain it. The government can therefore show a need, in this case, to use more extreme measures. Cf. James Daniel Good, 510 U.S. at 62 (holding that to show "exigent circumstances" sufficient to justify seizure of real property without notice or hearing the government must "show that less restrictive measures—i.e., a lis pendens, restraining order, or bond—would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property"). And the facts here are distinguishable from those in Degen, most notably in that the property is located outside the United States, complicating jurisdiction and the district court's ability to resolve these important issues. We have no need to re-open the debate on judicial disentitlement at this time. But these differences help demonstrate that notions of due process are not so rigid that they cannot be adapted

in light of a party's clear intent to use procedural guarantees to avoid substantial justice.

As § 2466 predicates disentitlement on an allowable presumption that a criminal fugitive lacks a meritorious defense to a related civil forfeiture, we find it does not violate the Due Process Clause of the Fifth Amendment and affirm the district court's decision.

IV.

Having established the constitutionality of § 2466, we now proceed to review its application in this case. The claimants principally challenge the district court's finding that each of them is a fugitive from law as defined by the statute. We address two[5] of their arguments: first, that § 2466 defines a fugitive as a person whose "sole" or "principal" reason for remaining outside the United States is to avoid criminal prosecution, and so the district court erred in adopting a lower "specific intent" standard; and second, that even if § 2466 only requires specific intent, the government has failed to prove the claimants intended to avoid the United States at all.

Finding none of their arguments persuasive, we affirm the decision of the district court.

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[5] The claimants also argue that the district court abused its discretion in deciding to disentitle them, but its brief on this point merely repeats arguments made elsewhere and we see no reason to repeat ourselves in response.

A.

The intent standard established by § 2466 is an issue of first impression in this Court. We review questions of statutory interpretation de novo. United States v. Ide, 624 F.3d 666, 668 (4th Cir. 2010).

A person is a fugitive subject to disentitlement if he or she,

> (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution--
>
> > (A) purposely leaves the jurisdiction of the United States;
> >
> > (B) declines to enter or reenter the United States to submit to its jurisdiction; or
> >
> > (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and
>
> (2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.

§ 2466(a). The dispute here is over the meaning of "in order to avoid criminal prosecution," which the claimants argue requires a showing that the individual's sole or primary reason for being absent from the United States is evasion. The district court, however, followed the reasoning of the Second and Ninth Circuits in holding that this phrase only requires a showing of specific intent. All Assets Listed in Attachment A, 89 F. Supp. 3d at 826 (citing

United States v. Technodyne LLC, 753 F.3d 368, 383¬84 (2d Cir. 2014); United States v. $671,160.00 in U.S. Currency, 730 F.3d 1051, 1056 n.2 (9th Cir. 2013)).

"The starting point for any issue of statutory interpretation . . . is the language of the statute itself." United States v. Bly, 510 F.3d 453, 460 (4th Cir. 2007). We have previously held that "a natural reading" of the words "in order to obstruct justice" in the U.S. Sentencing Guidelines meant that the conduct it modifies must have been committed "with the specific intent" to obstruct justice. United States v. Blount, 364 F.3d 173, 178 (4th Cir. 2004), vacated on other grounds, Blount v. United States, 543 U.S. 1105 (2005). In other words, "so long as the defendant had the specific purpose of obstructing justice" the intent requirement is met. Id.; cf. Specific Intent, Black's Law Dictionary (10th ed. 2014) (defining the term to mean "[t]he intent to accomplish the precise criminal act that one is later charged with").

Congressional intent also favors a specific intent requirement. The claimants' desired interpretation relies on words that are not in the statute: had Congress wanted to make § 2466 apply only where avoiding prosecution was the "sole" or "principal" reason for a person's absence from the United States, adding those modifiers to the statute would accomplish the goal easily.

Further, Congress clearly anticipated § 2466 would apply to individuals with no reason to come to the United States other than to defend against criminal charges. As the Second Circuit noted in

Collazos, "Subpart B also applies to persons who, qualifying in all four other respects for disentitlement, decline to 'enter' the United States' jurisdiction." 368 F.3d at 199. Because the subpart explicitly applies to both those refusing to "enter" and those refusing to "re-enter," § 2466(a)(1)(B), the court reasoned the former category could only be those who have never before entered the United States. Id. at 199-200 (finding the statute applies to persons who "may have never set foot within the territorial jurisdiction of the United States, know that warrants are outstanding for them and, as a result, refuse to enter the country" (emphasis added)). Such individuals will often be foreign nationals with no ties to the United States other than their alleged criminal conduct and the indictment describing it.

Because the statute must apply to people with no reason to come to the United States other than to face charges, a "sole" or "principal" purpose test cannot stand. The principal reason such a person remains outside the United States will typically be that they live elsewhere. A criminal indictment gives such a person a reason to make the journey, and the statute is aimed at those who resist nevertheless.

Finally, we note that this decision is consistent with the precedent in our sister circuits who have addressed the question. The Second and Ninth Circuits have explicitly adopted a specific intent standard for § 2466. See Technodyne, 753 F.3d at 384 (quoting $671,160.00, 730 F.3d at 1056 n.2, in adopting a specific intent standard). And while

claimants argue that the D.C. and Sixth Circuits have adopted a stricter standard, we interpret their decisions to be consistent with ours and those of the Second and Ninth Circuits.

In United States v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scotland International, Account No. 2029-56141070, Held in Name of Soulbury Ltd., 554 F.3d 123 (D.C. Cir. 2009), the court held that "the district court erred in concluding that the statute does not require the government to show that avoiding prosecution is the reason Scott has failed to enter the United States." 554 F.3d at 132. The claimants argue that the court's emphasis placed on the word "the" shows it was adopting a "sole" purpose standard. There are two problems with this interpretation. First, placing emphasis on "the" could simply demonstrate that the court was equating the intent standard with but-for causation. In other words, it is at least as likely that the Soulbury court meant that the government must show the claimant would enter the country and face prosecution if he did not specifically wish to avoid prosecution. Second, in Soulbury the government's only mens rea evidence was a television interview demonstrating the claimant's awareness of a warrant for his arrest in the United States. Id. at 129-30. This evidence was insufficient to show conclusively that avoiding prosecution was even a reason that the claimant remained outside the United States, and neither the district court nor the government had actually attempted to show intent, believing the requirement was met by showing mere "notice or knowledge." Id. at 132. The most that can be taken from the Soulbury decision, then, is that the

intent standard in § 2466 is more than knowledge. But the claimants are simply incorrect to assert that the opinion weighed in on the distinction between specific intent and sole intent at issue here—it did not.

The Sixth Circuit's opinion in United States v. Salti, 579 F.3d 656 (6th Cir. 2009), is similarly not in conflict with our own. That decision reversed disentitlement where the district court had found the claimant's poor health "irrelevant as a matter of law" on the question of intent. Id. at 665. The court said, "If Al Ammouri is indeed too sick to travel, such that his illness is what prevents him from returning to the United States, the Government has not shown as a matter of law that Al Ammouri's being in Jordan, and not the United States, is 'in order to avoid criminal prosecution.'" Id. at 665-66 (emphasis added). The court left open the possibility, however, that while poor health might be a reason for his absence, the government might still prove that avoiding prosecution motivated his absence, making him a fugitive subject to disentitlement, and so remanded the case for further proceedings. Id. at 666.

Because the plain language of the statute, the legislative intent, and the weight of persuasive authority all favor doing so, we adopt a specific intent standard for § 2466 and affirm the district court.

B.

The claimants' next contention is that the district court's findings of intent with respect to each of them

were erroneous. We review these findings for clear error, for while determining whether claimants are fugitives is a legal determination that would be reviewed de novo, Collazos, 368 F.3d at 195, the issue of claimants' intent is a factual predicate to the legal question, Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (holding that "[b]ecause a finding of intentional discrimination is a finding of fact," the standard of review is "clearly erroneous").

The claimants' principal argument is that the district court impermissibly relied on the fact that each of them is fighting extradition in finding specific intent. But the district court did not rely solely on this evidence—it merely considered it as a relevant part of a holistic analysis. And the weight of persuasive authority on this question clearly favors finding opposition to extradition relevant to the inquiry. E.g., Soulbury, 554 F.3d at 132 ("Likewise, under the third prong, Scott's renunciation of his U.S. citizenship is insufficient without some evidence that he took this action to avoid extradition." (emphasis added)); United States v. $1,231,349.68 in Funds, 227 F. Supp. 2d 130, 133 (D.D.C. 2002) (finding that the claimant was "continuing to avoid prosecution by opposing extradition" and that this conduct represented "precisely the type of situation that Congress intended to address when it enacted the Civil Asset Forfeiture Reform Act of 2000"); see also United States v. Real Prop. Commonly Known as 2526 155th Place SE, No. C07-359Z, 2009 WL 667473, at *1 (W.D. Wash. Mar. 12, 2009); United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338, 617 F. Supp. 2d 103

(E.D.N.Y. 2007). The claimants are unable to respond to the government's logical conclusion that a "three-year, multi-million-dollar quest to oppose coming to the United States is most surely relevant to their intent."

Moreover, the district court did not rely solely on the claimants' resistance to extradition. Instead, it reviewed each claimant and noted additional evidence of an intent to avoid prosecution. For example, Kim Dotcom posted a message to Twitter stating "HEY DOJ, we will go to the U.S. No need for extradition. We want bail, funds unfrozen for lawyers & living expenses." All Assets Listed in Attachment A, 89 F. Supp. 3d at 827. The court rightly found this and other public statements to strongly suggest Dotcom was resisting extradition to posture for criminal proceedings, using the ability to avoid prosecution as leverage. Finn Batato and Mathias Ortmann made statements in declarations that they were "actively contesting the legal basis on which the United States has issued the indictment." Id. The court found that this, combined with their opposition to extradition and statements that they would remain in New Zealand sufficient to show an intent to avoid prosecution. Other claimants were shown to have made statements that they were avoiding international travel to reduce their risk of extradition and the prospect of prosecution. Id. at 829.

The claimants' argument that they have legitimate reasons to remain where they are, such as jobs, businesses, and families does not disprove that avoiding prosecution is the reason they refuse to

come to the United States. As we have already rejected their argument for a "sole intent" standard, the existence of additional reasons to remain in one's home country are utterly unpersuasive because they do not contradict the evidence relied upon by the district court. In fact, their argument demonstrates another reason to reject that very high standard—almost any claimant could defeat disentitlement by merely asserting a self-serving reason to remain outside the United States. Under the claimants' preferred standard, the statute might easily be rendered a nullity.

Finally, we address the evidence of intent for two particular claimants who do not face extradition in their home countries. Claimant Sven Echternach argues that his "absence from Germany could lead to a default judgment, or potentially even a German arrest warrant in proceedings related to [the U.S. charges]," and that this is his reason for remaining there. Appellants' Br. 35 (internal quotations omitted). This assertion, however, is based on the testimony of Echternach's own attorney, and the district court spent considerable energy demonstrating that the scenario he described was highly doubtful, particularly because his trouble with German authorities is based on the crimes he is charged with in the United States. Id. at 829-31. The court noted that the attorney whose advice Echternach is following "has all but admitted that his advice is predicated on his desire, as a criminal defense attorney, to keep his client from traveling to a country where he will be arrested." Id. at 831. Moreover, the court found that Echternach specifically fled to his home country, stating that he

refuses to leave (despite wishing to travel internationally) because Germany does not extradite its nationals. Id. at 830.

Claimants also argue there is no evidence Julius Bencko returned to his home country of Slovakia, being driven across Europe from Portugal by a Portuguese national, to avoid prosecution. But Bencko told a third party that "he was 'stuck here in this post commie state . . . the sooner the USA will do some steps the soner [sic] they will let me go.'" Id. at 831 (quoting Bencko declaration). Bencko told this person that he would prefer not to travel outside the country but could if necessary and stated that he faced a fifty-five-year sentence in the United States. The district court did not abuse its discretion in finding these statements taken together showed intent to avoid prosecution.

V.

The claimants make two arguments regarding the effect of international law on the application of § 2466, which we now address. Both are questions of law which we review de novo. See United States v. Al-Hamdi, 356 F.3d 564, 569 (4th Cir. 2004).

First, they argue that disentitling New Zealand residents violates the Charming Betsy canon of interpretation which requires courts to interpret federal statutes "consistent with our obligations under international law," Kofa v. INS, 60 F.3d 1084, 1090 (4th Cir. 1995) (citing Murray v. The Charming Schooner Betsy, 6 U.S. 64, 118 (1804)), because it is inconsistent with the United Nations Convention Against Transnational Organized Crime ("UNTOC").

The relevant portion of UNTOC says,

> Any person whom [extradition] proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

UNTOC, art. 16, ¶ 13, Dec. 12, 2000, 2255 U.N.T.S. 209. The claimants argue that disentitlement prevents them from exercising their rights under New Zealand law and thereby violates the multinational treaty to which both the United States and New Zealand are parties.

None of the claimants' rather conclusory arguments made to this Court respond to the district court's ruling on this issue. It held that there was nothing inconsistent about allowing the claimants to pursue their rights in New Zealand courts, meanwhile subjecting them to default judgment in civil proceedings in the United States which they refused to defend: "That the exercise of their rights in new Zealand may cause disadvantages for the claimants with respect to litigation occurring in America does not mean they are being treated unfairly or that they are denied their enjoyment of rights in New Zealand." All Assets Listed in Attachment A, 89 F. Supp. 3d at 833 (emphasis added).

The claimants only answer is to misconstrue a New Zealand court opinion as declaring disentitlement unconstitutional. The opinion to which they refer was only deciding a motion to strike a request that their government's enforcement of restraining orders on funds (issued in response to orders from the United States district court) be made reviewable. JA 2199-200. The case did not hold American disentitlement unconstitutional or in violation of UNTOC, and the claimants' selective quoting of a passage noting the "the plaintiffs would say" that the lack of reviewability would be unconstitutional is, obviously, not persuasive. Compare Appellants' Br. 37, with JA 2200.

The claimants also argue that claimant Echternach cannot be disentitled pursuant to § 2466 because the Mutual Legal Assistance Treaty between Germany and the United States ("U.S.-German MLAT") prohibits "any penalty" or "coercive measure" for failure to answer a summons. See The German Mutual Legal Assistance Treaty, Ger.-U.S., Oct. 18, 2009, T.I.A.S. No. 09-1018 [hereinafter MLAT]. The U.S.-German MLAT was signed in 2003 and ratified in 2007, years after § 2466 was enacted in 2000. As such, claimants argue that the Supremacy Clause dictates that the treaty trumps the statute. See Vorhees v. Fischer & Krecke, 697 F.2d 574, 575-76 (4th Cir. 1983).

The district court expressed "serious doubts that this treaty bars application of the fugitive disentitlement statute against all [foreign nationals] who maintain fugitive status in Germany." All Assets Listed in Attachment A, 89 F. Supp. 3d at

833. The district court's doubts were well founded. As its title suggests, the U.S.-German MLAT adopts a framework for making international evidentiary and witness requests between the two countries. It is not concerned with criminal extradition between the United States and Germany. The treaty covers, for example, "transferring persons in custody for testimony or other purposes," MLAT, Art. 1(2)5., so if the claimants were arguing that Echternach was being disentitled for refusal to testify it might be on stronger ground respecting the relevance of the treaty. But because the U.S.-German MLAT does not restrict how the United States may act towards a criminal fugitive, there is no need to construe § 2466 consistent with its provisions, and the Charming Betsy canon is inapplicable. We therefore affirm the district court's decision.

VI.

The claimants' final argument is that the district court erred in striking the marital claims to the defendant property asserted by Mona Dotcom, the estranged wife of claimant Kim Dotcom. The court recognized Mrs. Dotcom's possessory interest in two assets—a vehicle and the house in which she resides—but struck her claims to fifty percent of marital property affected by this litigation, concluding she lacked standing. The claimants argue this was error because Mrs. Dotcom only needs to show a "colorable interest" in the property (based on New Zealand property law) to establish Article III

standing, and she has done so.[6] Both parties acknowledge that the New Zealand Property (Relationships) Act (1976) ("PRA") is controlling on the question of Mrs. Dotcom's alleged interest.

To summarize, Mrs. Dotcom's argument is that she and her husband are estranged, that New Zealand law gives her the right to assert a claim to the marital property and creates a presumption that she is entitled to half, and that New Zealand law also recognizes this status as establishing an actual interest in that property. The argument is no different from that rejected by the district court.

Article III standing requires a plaintiff to show "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 561. As the district court found after a thorough analysis of New Zealand property law, Mrs. Dotcom has failed to articulate such an injury because she has not asserted a nonhypothetical legal interest in the property. Instead, she is arguing that the

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[6] The Fourth Circuit uses a higher "dominion and control" test to determine Article III standing in criminal forfeiture cases. In re Bryson, 406 F.3d 284, 291 (4th Cir. 2005). We have used the same test an unpublished civil forfeiture case, United States v. 1077 Kittrell Street, 1991 WL 227792, at *1-2 (4th Cir. Nov. 7, 1991) (unpublished), and several of our district courts appear to have done the same, e.g., United States v. $104,250.00 in U.S. Currency, 947 F. Supp. 2d 560, 562 (D. Md. 2013). We need not resolve this issue because the district court correctly found Mrs. Dotcom did not even meet the lower of the two standards.

presumption of a fifty-percent share and the right to state a claim for division of the marital property establishes a "legally protected interest" in the property that is undermined by the disentitlement of her husband. It does not.

Actual legal interests under the PRA vest "only in the event of a future Court order or compromise" between the married parties. Comm'r of Police v. Hayward (unreported) High Court, Auckland, CIV 2011-404-002371, 10 June 2013, Venning J, at para 103 (N.Z.) ("Hayward I"). While the New Zealand Criminal Proceeds Recovery Act (2009) ("CPRA"), which controls asset forfeiture, statutorily defines an "interest" as including "a right to claim," Hayward v. Comm'r of Police [2014] NZCA 625 at para [33] White J for the Court (N.Z.) ("Hayward II"), it is the Article III definition of interest which controls standing. That is, New Zealand law determines the extent of Mrs. Dotcom's interest in the property, and Article III determines whether that interest is sufficient to create standing. The district court rightly concluded that a right to state a claim "does not rise to the level of a legal or equitable interest sufficient to satisfy Article III." JA 1995 (citing United States v. Schifferli, 895 F.2d 987, 989 n.* (4th Cir. 1990))

The district court concluded, rightly, that because the Dotcoms had neither adjudicated their rights to the marital property nor reached a binding settlement, Mrs. Dotcom had no actual interest in the property and had therefore failed to even "allege that she owns the property." Id. The claimants' argument to the contrary is built upon two major

errors. First, they argue that a New Zealand court declared that Mrs. Dotcom had an existing interest in the property, but failed to mention that the opinion was explicitly nonprecedential and that it recognized an interest in a claim, not an interest in property. See JA 1994-96. Second, the claimants misrepresent the holding in Hayward II, implying that it reversed Hayward I and broadened the definition of a marital property interest to include hypothetical claims to such property. It did not—it very clearly distinguished the two statutes.

Finding the district court's reasoning persuasive, we affirm the decision to strike Mrs. Dotcom's claims for lack of standing.

VII.

For the foregoing reasons, the district court opinion is affirmed in full.

AFFIRMED

FLOYD, Circuit Judge, dissenting:

The majority concludes that a district court may properly enter a forfeiture order against property entirely outside of the United States after barring foreign Claimants--who are also entirely outside of the United States--from defending the government's forfeiture claim. I respectfully dissent because I conclude Article III's prohibition against advisory opinions precludes the exercise of in rem jurisdiction over a res, including real property, entirely outside of the United States and beyond the control of the district court.

I.

I agree with the majority that 28 U.S.C. § 1355 is a jurisdictional statute. In enacting § 1355, Congress intended to fundamentally alter the law regarding in rem jurisdiction. But see United States v. All Funds on Deposit in Any Accounts Maintained in Names of Meza or De Castro, 63 F.3d 148, 152 (2d Cir. 1995) (reaching the opposite conclusion, i.e., that § 1355 is a venue statute, not a jurisdictional one). Congress hoped to abolish the traditional requirement of in rem jurisdiction that a court have actual or constructive control over the res. Compare 28 U.S.C. § 2461(b) (providing that "[u]nless otherwise provided by Act of Congress . . . in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty"[11]), with 28 U.S.C. § 1355(a), (b)(2) (providing district courts

[1] Admiralty law indisputably requires control of the res as a prerequisite to the exercise of jurisdiction.

"original jurisdiction" over forfeiture actions concerning property "located in a foreign country"). A congressional grant of jurisdiction to the courts remains, however, subject to constitutional constraints on the federal judicial power. My objection to the ruling of the district court, and to the holding of the majority, is not grounded in an objection to its claim of jurisdiction over the res pursuant to Congress's grant of that jurisdiction, but is rather grounded in justiciability concerns arising from Article III.[2]

"The jurisdiction of federal courts is defined and limited by Article III of the Constitution." Flast v. Cohen, 392 U.S. 83, 94 (1968). Article III limits federal courts to deciding "cases" and "controversies." See U.S. Const. art. III, § 2. These two words "have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." Flast, 392 U.S. at 94. Courts developed concepts of justiciability to express the limitations placed upon

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[2] None of the circuits to apply § 1355(b)(2) and cited by the majority considered challenges to the exercise of in rem jurisdiction based on Article III. The D.C. Circuit acknowledged that application of § 1355(b)(2) must conform with the Constitution, but declined any justiciability analysis because no claimant raised constitutional objections. United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278 in Banco Espanol de Credito, Spain, 295 F.3d 23, 27 (D.C. Cir. 2002) ("Unless the Constitution commands otherwise—and the claimant has raised no constitutional objections at all—the statute must be enforced.").

federal courts by Article III's case or controversy requirement. See id. at 95.

As one commentator cited by the majority notes, cases brought pursuant to § 1355(b)(2) implicate two distinct but related constitutional justiciability requirements--bindingness and redressability. See Courtney J. Linn, International Asset Forfeiture and the Constitution: The Limits of Forfeiture Jurisdiction Over Foreign Assets Under 28 U.S.C. § 1355(b)(2), 31 Am. J. Crim. L. 251, 297–99 (2004). In my view, bindingness presents the most serious problem here.[3]

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[3] This is not to say that I am convinced by the majority's treatment of the redressability issue, ante, at 15-16. Lujan v. Defenders of Wildlife requires that it be "likely" and not "merely speculative" that an injury will be redressed by a favorable decision of the court. 504 U.S. 555, 561 (1992) (quotation marks omitted). Both the district court and the majority concluded that the actions by the New Zealand and Hong Kong courts to restrain the defendant res render it probable that those courts will enforce a judgment of forfeiture. Perhaps. I note, however, New Zealand's repeated disbursement of large amounts of the restrained assets even after the issuance of the forfeiture judgment, the revocation (and subsequent reimposition) of the restraining order by a Hong Kong court, J.A. 738-39, and an order by a New Zealand court enjoining the registration of the U.S. forfeiture judgment, J.A. 2220.

Further--although this question may safely be left for another day--it seems to me that if a foreign sovereign were to refuse to cooperate, the probability that a § 1355 forfeiture judgment would redress the government's injury might slip from "likely" to "speculative." Such a refusal to cooperate by a foreign sovereign may deprive the government of standing to pursue the forfeiture action.

II.

The opinions of federal courts must be final and binding on the parties. "'[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.'" Flast, 392 U.S. at 96 (quotation omitted). Article III courts cannot render decisions subject to revision by another branch of government. See, e.g., Chi. & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 113 (1948) ("Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); Hayburn's Case, 2 Dall. 409, 410 n* (1792) (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts").

The advisory opinion prohibition is founded on the principle that federal courts may only issue judgments that are binding and conclusive on the parties. See Waterman, 333 U.S. at 113-14; Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249, 261–62 (1933) (explaining that a case was justiciable when it sought a "definitive adjudication" of a disputed right that would not be "subject to revision by some other and more authoritative agency"); Gordon v. United States, 69 U.S. 561, 561 (1864) (noting that the Constitution forbids federal courts from expressing opinions on a case "where its

judgment would not be final and conclusive upon the rights of the parties").[4] The revision of a court's judgment by "some other and more authoritative agency" renders the judgment an advisory opinion prohibited by Article III. See Wallace, 288 U.S. at 262.

The majority side-steps this concern by cabining it to the separation of powers context. One of the basic tenets of what constitutes a "case or controversy" cannot be elided so. The defendant in this action--the res--is outside of the United States and beyond the control of the district court. Absent control, no order of the district court can be binding on the res because the fate of the res is ultimately not in the hands of the district court. Instead, the res in this case is subject to the control of the courts of New Zealand and Hong Kong. The district court's forfeiture order therefore merely advises the courts of a foreign sovereign that (in the district court's view under the laws of the United States) the United States should have title to the res. Those courts, of course, with control of the res and with the authority vested in them by their own sovereigns, remain free to revise, overturn, or refuse recognition to the judgment of the district court. The decision of the

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[4] The Supreme Court has similar concerns with regard to in rem jurisdiction, observing that when a defendant ship leaves a port and the plaintiff no longer has a res from which to collect, courts may find the judgment to be "useless" and not adjudicate the case based on a "traditional, theoretical concern[] of jurisdiction: enforceability of judgments." Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 87 (1992).

district court regarding title in the res is thus subject to a "more authoritative agency" outside of the Article III hierarchy. Without control of the res, the district court's decision cannot bind the res and thus constitutes an advisory opinion prohibited by Article III.

The risk of revision to the district court's judgment is no mere hypothetical. As the government notes, "[d]espite the registration of the restraints, the New Zealand courts released" over $5 million for legal fees and living expenses. Gov't's Br. 7. Additionally, even after receiving the "final" forfeiture order from the district court, New Zealand courts granted Dotcom monthly releases of $135,000 for living expenses. Id. at n.5. In fact, the district court recognized that the foreign courts "may or may not" register its order and that "New Zealand courts may continue to litigate the issue of whether the assets will be forfeited." J.A. 1982. The government also concedes that "even with a valid forfeiture order, the fugitive's property may suffer no adverse effect." Gov't's Br. 20 n.13. In an in rem action, the district court cannot issue a judgment binding the res absent control of the res. Where, as here, a foreign sovereign controls the res because the res is located abroad, any in rem forfeiture order by a district court constitutes advice to the foreign sovereign regarding how it should vest title to the res.

III.

Our own precedent recognizes the Article III limits of in rem jurisdiction. We explored the interplay at length in our Titanic decisions. R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999)

(Titanic I); R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521 (4th Cir. 2006) (Titanic II). The Titanic cases involved disputes concerning the law of salvage as it applied to the wreck of the British passenger liner R.M.S. Titanic, which sank in the North Atlantic Ocean in 1912. As the majority notes, ante, at 12-14, the cases arose in admiralty and applied maritime law, and I readily accept that § 1355 attempts to divorce the in rem actions it authorizes from the traditional in rem principles of admiralty law. However, I part ways with the majority because I read the Titanic cases to contain principles both of admiralty law and of constitutional law.

What makes in rem actions problematic from an Article III standpoint is that "judgments in them operate against anyone in the world claiming against that property." Titanic I, 171 F.3d at 957. Without control of the property, the judgment cannot "operate against anyone in the world" claiming interest in the defendant property. Id. "Only if the court has exclusive custody and control over the property does it have jurisdiction over the property so as to be able to adjudicate rights in it that are binding against the world." Id. at 964 (emphasis added). When, as here, the res is not in the court's possession, "the court may not adjudicate rights to the res and effectively bind others who may have possession. Consequently, a court could not exercise in rem jurisdiction, as traditionally understood, so as to vest rights in property outside of its territory . . . ." Id. (citation omitted). "In rem jurisdiction, which depends on sovereignty over property, cannot be given effect to property beyond a nation's boundaries of

sovereignty." Id. at 966. Simply put, the res in this case is beyond the United States' sovereign territory and our courts cannot--absent control of the res--declare rights in it that are binding against the world.

Our decision in Titanic I emphasizes the importance of sovereignty--and control--for in rem actions. In Titanic I, we found the exercise of in rem jurisdiction proper because the court had constructive control over the wreck because it had a portion of the wreck in its control. The main body of the wreck itself was located in international waters, i.e., beyond the sovereign limits of any nation. Thus, although "the exclusiveness of any [in rem] order could legitimately be questioned by any other court in admiralty," we concluded that the court could, nonetheless, exercise an "'imperfect' or 'inchoate' in rem jurisdiction which falls short of giving the court sovereignty over the wreck." Id. at 967.

As Titanic II makes clear, the court's exercise of power in Titanic I was possible only because the wreck was outside the territorial limits of another sovereign. In Titanic II we announced the limits of constructive in rem jurisdiction grounded in the boundaries imposed upon courts by territorial sovereignty. We held that a court cannot exercise in rem or constructive in rem jurisdiction over property within the sovereign limits of other nations. Titanic II, 435 F.3d at 530. We held that a party "cannot come to a court in the United States and simply assert that the court should declare rights against the world as to property located in a foreign country."

Id. That is precisely what the government attempts to do in this case.

The majority is correct that the Titanic cases applied the traditional, admiralty-based law of in rem jurisdiction and is also correct that § 1355 attempted to alter that traditional law. What the majority fails to recognize, however, is that the traditional limits of in rem jurisdiction are also commanded by the Constitution's requirement that judgments by Article III courts be binding on the parties. Needless to say, this requirement cannot be waived by statute. Because the res is a party and because the judgment purports to adjudicate rights in the res binding against the whole world, control of the res is the sine qua non of in rem actions. Absent control, the court's judgment cannot bind the property but, instead, merely advises the foreign sovereign that does control the property as to how a United States court believes the rights in the property should be settled.

The possible cooperation of the foreign sovereign is irrelevant, contrary to the weight the district court and the majority place on that variable. Unlike the question of redressability, which is indeed a matter of probabilities, the requirement that a judgment be binding and conclusive on the parties is absolute. Consider the circumstances of Waterman, which articulated bindingness as an essential requirement of Article III's judicial power. In Waterman, the court of appeals determined that it had jurisdiction to review an order of the Civil Aeronautics Board awarding an overseas air route. 333 U.S. at 104-05. By statute, such orders were subject to presidential

approval and the order in question had been approved by the President. Id. at 110-11. The court of appeals determined that even after it reviewed the Board's order, its review would remain subject to the approval or disapproval of the President. Id. at 113. The Supreme Court held the judgment of the court of appeals to be advisory: "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government." Id. I see no valid reason why a court should be prohibited from giving advisory opinions to domestic branches of government and yet be permitted to issue advisory opinions to foreign sovereigns.

The Supreme Court has never given any indication that the bindingness concerns in Waterman could be cured by a court's determination that the other entity was "likely" to follow its decision. While a judgment may in fact have a higher chance of eventually being binding on the parties where the foreign sovereign has acted cooperatively, the U.S. judgment remains "subject to later review or alteration by [foreign] administrative action" and its bindingness remains--impermissibly--a question of probabilities.[5] See id. at 114.

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[5] It may be possible for the government to make a showing before the district court that the foreign sovereign would be compelled, by its own law, to give binding effect to a civil forfeiture judgment by a U.S. court. However, the government has made no such showing in this case sufficient to assuage Article III concerns.

IV.

The district court in this case did not have control of the res. The res is controlled by foreign sovereigns--New Zealand and Hong Kong. Therefore, the district court could not in my view issue an order as to the res which would be binding against the world. Foundational Article III principles preclude the court from entering a forfeiture order against the res in this case. I would reverse the district court on this basis and deem the other issues presented by this appeal moot.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Civil No. 1:14-cv-969
-v-	)	
	)	Hon. Liam O'Grady
ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO, Defendants *in rem*.	)	

AMENDED ORDER OF FORFEITURE AS TO ASSETS IN HONG KONG

WHEREAS, the Plaintiff filed a motion for default judgment, pursuant to Fed.R.Civ.P. 55(b)(2), and for an order of forfeiture as to certain assets in Hong Kong (Dkt. #96), pursuant to 18 U.S.C. § 981(a)(1)(C);[1]

[1] The forfeiture is based on 18 U.S.C. § 981(a)(1)(C), which authorizes forfeiture of property that is derived from proceeds traceable to any offense constituting specified unlawful activity. Section 1956(c)(7)(D) of Title 18, United States Code, defines "specified unlawful activity" and includes a violation of 18

AND WHEREAS, this Court ruled in an opinion of March 25, 2015, (Dkt. #101) that the government's motions for default judgment are granted.

Now deeming it proper so to do, IT IS ORDERED, ADJUDICATED and DECREED THAT:

1. The following property is forfeited to the United States pursuant to 18 U.S.C. § 981(a)(1)(C), and all right, title, and interest of the former owners is now vested exclusively in the United States of America:

BANK ACCOUNTS

All assets held in account number 7881380320, in the name of Megaupload Limited, at

DBS Bank (Hong Kong) Limited in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 59378921, in the name of Kim Tim Jim Vestor, at Citibank (Hong Kong) Limited, and all interest, benefits, or assets traceable thereto;

All assets held in account number 59378948, in the name of Kim Tim Jim Vestor, at Citibank (Hong Kong) Limited, and all interest, benefits, or assets traceable thereto;

All assets held in account number 23749938, in the name of Kim Tim Jim Vestor, at Citibank

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U.S.C. § 2319. Section 2319 sets forth the penalties for a violation of 17 U.S.C. § 506(a)(1) which criminalizes copyright infringement.

(Hong Kong) Limited, and all interest, benefits, or assets traceable thereto.

All assets held in account number 7883024440, in the name of Megapay Limited, at DBS Bank (Hong Kong) Limited in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 7881226160, in the name of Vestor Limited, at DBS Bank (Hong Kong) Limited in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 3520894, in the name of Megamedia Limited, at DBS Vickers (Hong Kong) Limited in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 813010204833, in the name of Mathias Ortmann, at The Hongkong and Shanghai Banking Corporation Limited (HSBC) in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 083643403833, in the name of Bram van der Kolk, at The Hongkong and Shanghai Banking Corporation Limited (HSBC) in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 491538187833, in the name of Echternach, Sven Hendrik Michael Thies at The Hongkong and Shanghai Banking Corporation Limited (HSBC) in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 083643379833, in the name of Julius Bencko, at The Hongkong

and Shanghai Banking Corporation Limited (HSBC) in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 503584435833, in the name of Batato, Finn Habib at The Hongkong and Shanghai Banking Corporation Limited (HSBC) in Hong Kong, and all interest, benefits, or assets traceable thereto;

All assets held in account number 954520008434, in the name of Mathias Ortmann, at Industrial and Commercial Bank of China (Asia) Limited (ICBC) in Hong Kong, and all interest, benefits, or assets traceable thereto.

2. The Attorney General or a designee shall seize and dispose of the defendant property in accordance with the law.

Alexandria, Virginia
Date: April 7, 2015.

/s/ *Log*
Liam O'Grady
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Civil No. 1:14-cv-969
-v-	)	
	)	Hon. Liam O'Grady
ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO, Defendants *in rem*.	)	

ORDER OF FORFEITURE
AS TO ASSETS IN NEW ZEALAND

WHEREAS, the Plaintiff filed a motion for default judgment, pursuant to Fed.R.Civ.P. 55(b)(2), and for an order of forfeiture as to certain assets in New Zealand (Dkt. #97), pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 985;[1]

[1] The forfeiture is based on 18 U.S.C. § 981(a)(I)(C), which authorizes forfeiture of property that is derived from proceeds traceable to any offense constituting specified unlawful activity. Section I956(c)(7)(D) of Title 18, United States Code, defines "specified unlawful activity" and includes a violation of 18

AND WHEREAS, this Court ruled in an opinion of March 25, 2015, (Dkt. #101) that the government's motions for default judgment are granted.

Now deeming it proper so to do, IT IS ORDERED, ADJUDICATED and DECREED THAT:

1. The following property is forfeited to the United States pursuant to 18 U.S.C. §§ 981(a)(1)(C) and 985 and all right, title, and interest of the former owners is now vested exclusively in the United States of America:

BANK ACCOUNTS

All assets held in account number 123107006652100, in the name of Kim Tim Jim Vestor, at ASB Bank Limited in New Zealand, and all interest, benefits, or assets traceable thereto;

All assets held in account number 011839015545900, in the name of Megastuff Limited, at ANZ National Bank Limited in New Zealand, and all interest, benefits, or assets traceable thereto;

All assets held in account number 3029340126642088, in the name of Bram van der Kolk, at The Hongkong and Shanghai Banking Corporation Limited (HSBC) in New Zealand, and all interest, benefits, or assets traceable thereto;

U.S.C. § 2319. Section 2319 sets forth the penalties for a violation of 17 U.S.C. § 506(a)((1) which criminalizes copyright infringement.

All assets held in account number 020192009920004, in the name of Cleaver Richards Limited Trust Account for Megastuff Limited, at Bank of New Zealand (BNZ), and all interest, benefits, or assets traceable thereto;

All assets held in account number 0301040943847002, in the name of Simpson Grierson Trust Account holder Kim Dotcom, at Westpac Banking Corporation in New Zealand, and all interest, benefits, or assets traceable thereto;

FINANCIAL INSTRUMENT

All assets held in holder number 14824385, in the name of Kim Dotcom, at Computershare Investor Services Limited, and all interest, benefits, or assets traceable thereto;

REAL PROPERTY

The property at 50 The Prom, Coatesville, Auckland 0793, New Zealand, being all that parcel of land on Certificate of Title number 341889, and all interest, benefits, or assets traceable thereto;

VEHICLES

2009 Calcite White Mercedes Benz E500 Coupe, VIN WDD2073722F019582, and including License Plate "FEG690", and all interest, benefits, or assets traceable thereto;

2005 Silver Mercedes Benz CLK DTM, VIN WDB2093422F165517, and including License Plate "GOOD", and all interest, benefits, or assets traceable thereto;

2010 Black Mini Cooper S Coupe, VIN WMWZG3200TZ03648, and including License Plate "1-, and all interest, benefits, or assets traceable thereto;

2010 Black Mini Cooper S Coupe, VIN WMWZG3200TZ03651, and including License Plate "V", and all interest, benefits, or assets traceable thereto;

2010 Mercedes Benz ML63 AMG, VIN WDC1641772A542449, and including License Plate "GUILTY", and all interest, benefits, or assets traceable thereto;

2011 Black Toyota Hilux, VIN MROFZ29G001599926, and including License Plate "FSN455", and all interest, benefits, or assets traceable thereto;

2010 Black Mercedes Benz CL63 AMG, VIN WDD2163742A026653, and including License Plate "HACKER", and all interest, benefits, or assets traceable thereto;

Victor Conti Dutch Angel — Bike, NZ ID# 546420, and all interest, benefits, or assets traceable thereto;

2004 Silver Mercedes Benz CLK DTM AMG 5.5L Kompressor, VIN WDB2093422F166073, and including License Plate "EVIL", and all interest, benefits, or assets traceable thereto;

2010 Black Mercedes Benz AMG, VIN WDD2120772A103834, and including License Plate "STONED", and all interest, benefits, or assets traceable thereto;

2009 Black Mercedes Benz ML63 AMG, VIN WDC1641772A486965, and including License Plate "MAFIA", and all interest, benefits, or assets traceable thereto;

1957 Black Cadillac El Dorado, VIN 5770137596, and all interest, benefits, or assets traceable thereto;

1959 Pink Cadillac Series 62 Convertible, VIN 59F115669, and all interest, benefits, or assets traceable thereto;

2010 Black Mercedes Benz S65 AMG, VIN WDD2211792A324354, and including License Plate "CEO", and all interest, benefits, or assets traceable thereto;

2010 Black Mercedes Benz CL65 AMG, VIN WDD2163792A025130, and including License Plate "KIMCOM", and all interest, benefits, or assets traceable thereto;

2008 Black Rolls Royce Phantom Coupe, VIN SCA2D68098UH07049, and including License Plate "GOD", and all interest, benefits, or assets traceable thereto;

2011 Black Mercedes Benz G55 AMG, VIN WDB4632702X193395, and including License Plate "POLICE", and all interest, benefits, or assets traceable thereto;

2011 Mercedes Benz G55 AMG, VIN WDB4632702X191902, and including License Plate "GDS672", and all interest, benefits, or assets traceable thereto;

2005 Silver Mercedes Benz A170, VIN WDD1690322J184595, and including License Plate "FUR252", and all interest, benefits, or assets traceable thereto; and

2005 Silver Mercedes Benz ML500, VIN WDC1641752A026107, and including License Plate "DFF816", and all interest, benefits, or assets traceable thereto.

2004 Silver Mercedes Benz CLK DTM Cabriolet, VIN WDB2094421T067269, and all interest, benefits, or assets traceable thereto;

MISCELLANEOUS

Four 2010 Sea-Doo GTX Jet Skis, VINS YDV03103E010, YDV00375L910, YDV00385L910, & YDV03091E010, and all interest, benefits, or assets traceable thereto;

Sharp 108″ LCD Display Television, and all interest, benefits, or assets traceable thereto;

Three Samsung 820DXN 82" LCD Televisions, and all interest, benefits, or assets traceable thereto;

Devon Works LLC, Tread 141 Time Piece, and all interest, benefits, or assets traceable thereto; and

In High Spirits by Olaf Mueller Photographs from the Cat Street Gallery, and all interest. benefits, or assets traceable thereto,

2. The Attorney General or a designee shall seize and dispose of the defendant property in accordance with the law.

Alexandria, Virginia

Date: March *27*, 2015.

/s/ *Log*
Liam O'Grady
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Civil No. 1:14-cv-969
-v-	)	
	)	Hon. Liam O'Grady
ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO,	)	
Defendants *in rem*.	)	

MEMORANDUM OPINION

This matter is before the court on plaintiff's motions for default judgment and forfeiture. (Dkt. Nos. 85, 96, 97). The government filed a verified complaint for civil forfeiture *in rem* on July 29, 2014 seeking forfeiture of the assets listed in Attachment A to the complaint. (Dkt. No. 1). The subject property is located in Hong Kong and New Zealand and was seized pursuant to restraining orders issued

by this court and registered in foreign courts.[1] On August 28, 2014, claims to the assets were filed by Finn Batato ("Batato"); Julius Bencko ("Bencko"); Kim Dotcom ("Dotcom"); Sven Echternach ("Echternach"); Bram van der Kolk ("van der Kolk"); Mathias Ortmann ("Ortmann"); and Megaupload Limited, Megapay Limited, Megamedia Limited, Megastuff Limited, and Vestor Limited ("the corporate claimants"). (Dkt. Nos. 3-9). By order dated February 27, 2015, this court granted the government's motion to strike those claims pursuant to the fugitive disentitlement statute, 28 U.S.C. § 2466. (Dkt. No. 82).

Mona Dotcom, the estranged wife of Kim Dotcom, also filed a verified claim to certain of the assets listed in attachment A on September 1, 2014. (Dkt. No. 14). On December 30, 2014, the government moved to strike Mona's claim to the assets on the ground that she lacked standing. On March 13, 2015, this court granted the motion in part, finding that Mona lacked standing to challenge the forfeiture of the assets listed in attachment A with the exception of two items of property.[2] The government has excluded these two items of property from its renewed motions for default judgment.

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[1] The full factual background of this case is discussed in the court's Memorandum Opinion dated February 27, 2015. (Dkt. No. 81).

[2] The court found that Mona does have standing to contest forfeiture of Vehicle 14 and Property 2 as identified in the Memorandum Opinion.

On October 10, 2014, all of the claimants filed a motion to dismiss and or stay the government's forfeiture action. (Dkt. No. 19). This motion has been denied as to the disentitled fugitive claimants, and as to Mona with respect to all property in attachment A except Vehicle 14 and Property 2.

I. STANDARD OF REVIEW

Rule 55 of the Federal Rules of Civil Procedure and Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions are applicable to this civil forfeiture action. *See United States v. $85,000 in U.S. Currency*, No. 10-371, 2011 WL 1063295, at *1 (D. Md. Mar. 21, 2011). Supplemental Rule G(4)(a) provides that a judgment of forfeiture "may be entered only if the government has published notice of the action within a reasonable time after filing the complaint or at a time the court orders." Supp. R. G(4)(a)(i). The notice must describe the property with reasonable particularity and state the time to file a claim and to answer. Supp. R. G(4)(a)(ii). The notice may be posted "on an official internet government forfeiture site for at least 30 consecutive days." Supp. R.G. (4)(a)(iii) (B). If the criteria for notice are met, as they are here, the entry of default judgment is a matter committed to the discretion of the trial court. *See Int'l Painters & Allied Trades Indus. Pension Fund v. Auxier Drywall, LLC*, 531 F. Supp. 2d 56, 57 (D.D.C. 2008) (citation omitted); *SEC v. Lawbaugh*, 359 F. Supp. 2d 418, 421 (D. Md. 2005) (citing *Dow v. Jones*, 232 F. Supp. 2d 491, 494 (D. Md. 2002)).

Federal Rule of Civil Procedure 55 permits the court to grant a motion for default judgment where

the well-pled allegations of the complaint establish plaintiffs entitlement to relief, and where a defendant has failed to plead or defend as provided by the rules. *See Music City Music v. Alfa Foods, Ltd*, 616 F. Supp. 1001, 1002 (E.D. Va.1985); Fed. R. Civ. P. 55. In the civil forfeiture context, default judgment is permitted where no potential claimant has filed a response to the complaint. *See United States v. All Funds on Deposit in Four Swiss Bank Accounts…and All Proceeds Traceable Thereto*, No. 1:11-cv-118, 2011 WL 7102568, at *2 (E.D. Va. Oct. 26, 2011) (Report and Recommendation) (citations omitted).

A defendant in default, and a claimant who fails to assert a claim *in rem*, is deemed to have admitted all of the plaintiffs well-pled allegations of fact, which then form the basis for judgment in the plaintiffs favor. *See Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780 (4th Cir. 2001) (citation omitted). *See also Partington v. Am. Int'l Specialty Lines Ins. Co.*, 443 F.3d 334, 341 (4th Cir. 2006) (stating that default has effect of admitting factual allegations in complaint); Fed. R. Civ. P. 8(b)(6) ("An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied"). "It remains, however, for the court to determine whether these unchallenged factual allegations constitute a legitimate cause of action." *See United States v. One 2003 Mercedes Benz CL500*, No. 11-3571, 2013 WL 3713903, at *4 (D. Md. Oct. 3, 2013) (quoting *Agora Fin., LLC v. Samler*, 725 F. Supp. 2d 491, 494 (D. Md. 2010)).

Civil forfeiture complaints must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. G(2)(f). At trial, the government is required to prove by a preponderance of the evidence that the defendant property is subject to forfeiture. 18 U.S.C. § 983(c). Accordingly, the government must state sufficient facts to support a reasonable belief that it will be able to prove forfeitability by a preponderance of the evidence. *See United States v. 2003 Mercedes Benz CL500*, No. 11-3571, 2013 WL 5530325, at *2 n.4 (stating that the government was not required to establish the forfeitability by a preponderance of the evidence to seek a default judgment. Rather the government had state sufficient facts to support a reasonable belief that it would be able "to prove forfeitability *at trial* by a preponderance of the evidence) (emphasis in original).

II. DISCUSSION

The government's first claim for relief in the forfeiture complaint seeks forfeiture under 18 U.S.C. § 981(a)(1)(C).[3] Pursuant to § 981(a)(1)(C), the

[3] The complaint also alleges that the assets are subject to forfeiture pursuant to § 981(a)(1)(C) and 18 U.S.C. § 2323 because the assets are traceable to violations of 18 U.S.C. § 2319; and pursuant to § 981(a)(1)(A) as property traceable to or involved in a money laundering offense in violation of 18 U.S.C. §§ 1956 and 1957. It is unnecessary to consider these arguments because the court finds that the complaint sufficiently alleges grounds for forfeiture based on the conspiracy.

government may obtain a decree for forfeiture of property that "constitutes or is derived from proceeds traceable to…any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense." 18 U.S.C. § 981(a)(1)(C). Section 1956(c)(7)(D) defines "specified unlawful activity" as, among numerous other offenses, a violation of 18 U.S.C. § 2319. 18 U.S.C. § 1956(c)(7)(D). Section 2319 sets forth the penalties for a violation of 17 U.S.C. § 506(a)(1), which criminalizes infringement of a copyright (A) for commercial advantage or private financial gain; (B) by reproducing or distributing infringing copies of copyrighted works with a value of over $1,000 in any 180-day period; or (C) by distributing a work being prepared for commercial distribution if the person knew or should have known that the work was intended for commercial distribution. 17 U.S.C. § 506(a)(1).

In order to establish a conspiracy under 18 U.S.C. § 371, the government must show "(1) an agreement between two or more people to commit a crime, and (2) an overt act in furtherance of the conspiracy." *United States v. Jackson*, No. 13-cr-129, 2013 WL 3197069, slip op. at *5 (E.D. Va. June 20, 2013) (citing *United States v. Ellis*, 121 F.3d 908, 922 (4th Cir. 1997). The forfeiture complaint alleges that from at least September 2005 until about January 20, 2012, disentitled claimants Dotcom, Batato, Bencko, Echternach, Ortmann, van der Kolk, Megaupload Limited, and Vestor Limited participated in a conspiracy to commit criminal

copyright infringement in the Eastern District of Virginia and elsewhere.[4] Complaint at ¶ 17. This court has already considered the sufficiency of the conspiracy allegations in the context of subject matter jurisdiction. *See* Mem. Op. at 5-9 (Dkt. No. 81). However, in determining subject matter jurisdiction, the court did not specifically examine the question of whether there are sufficient allegations to support the inference that there is a "substantial connection" between the assets and the alleged criminal activity. *See United States v. 2003 Mercedes Benz CL500b*, 2013 WL 3713903 at *4; *United States v. All Funds on Deposit in Four Swiss Bank Accounts…*, 2011 WL 7102568, at *3 (E.D. Va. Oct. 26, 2011) (citing *United States v. $3,000 in Cash*, 906 F. Supp. 1061, 1065 (E.D. Va. 1995)). *See also* 18 U.S.C. § 983(c)(3). The court will now make that

[4] Dotcom served as Chief Executive Officer of Megaupload Limited and later "Chief Innovation Officer" of the company. He was allegedly the head of the conspiracy. Megaupload Limited was the registered owner of Megaupload.com and Megaclick.com. Vestor Limited was the sole shareholder of the parent companies that owned Megavideo.com and other Mega websites. Allegedly, Batato was the Chief Marketing and Sales Officer for the Mega businesses; Bencko was the Graphic Director; Echternach was the Head of Business Development; Ortmann was the Chief Technical Officer; and van der Kolk was the "Programmer-in-Charge." Complaint, ¶117-15. Additionally, another individual named Andrus Nomm was indicted. He was Head of the Development Software Division for Megaupload Limited and he pled guilty to conspiracy to commit copyright infringement on February 13, 2015. Case No. 1:12-cr-003.

determination in assessing the government's motion for default judgment.

In cases involving "unlawful activities," such as those allegedly pursued by the conspirators, the civil forfeiture statute provides that "proceeds" means "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense." 18 U.S.C. § 981(a)(2)(A). The statute thus broadly treats as "proceeds," in this case, any "property" that was "obtained directly or indirectly[ ] as the result of the commission" of the alleged conspiracy to commit copyright infringement.[5] Property constitutes forfeitable proceeds if it would not have been received "but for" the occurrence of the illegal activities giving rise to the forfeiture. *See United States v. Farkas*, 474 F. App'x 349, 359-360 (4th Cir. 2012) (affirming district court's judgment that proceeds would not

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[5] Section 981(a)(2)(B) provides another definition of proceeds: "In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs." 981(a)(2XB). Even if this definition applied, the claimants would have the burden to prove costs. "If the claimant fails to prove direct costs, the government can forfeit the entire amount." *United States v. Sum of $70,990,605*, 4 F. Supp. 3d 189, 208 (D.D.C. 2014) (citation omitted). Here, there are no claimants to the property at issue as discussed above.

have been received but for fraud). *See also United States v. Ivanchukov*, 405 F. Supp. 2d 708, 712-13 (E.D. Va. 2005) (adopting a "but for" nexus test for illegal proceeds under the criminal forfeiture statute and noting the test's use in several other circuits); *United States v. Nicolo*, 597 F. Supp. 2d 342, 346 (W.D.N.Y. 2009) (holding that under § 981(a)(2)(A), "proceeds are property that a person would not have but for the criminal offense" (internal quotation marks, citation, and alteration omitted)).

The Conspiracy Allegations

The forfeiture complaint alleges that every time an Internet user uploaded a file, including infringing files, to the Megaupload website, the site reproduced the file on at least one computer server controlled by the Mega Conspiracy and provided the uploading user with a uniform resource locator ("URL") link allowing anyone with the link to download the file. Complaint, ¶ 18. Files uploaded by non-premium users were deleted if the files were not downloaded within a certain time frame. Superseding Indictment ("Indictment"), ¶ 7.[6] In other words, only relatively popular files uploaded by non-premium users could remain on the website. By contrast, when a popular file was uploaded by any type of user (premium or non-premium), that file remained on Mega-controlled computers and was available for distribution by anyone who could locate an active link to the file. *Id.* When an Internet user clicked on

[6] The complaint incorporates by reference the allegations in the superseding indictment. Complaint at ¶ 16.

a Megaupload.com link, the user was typically brought to a download page for the file. *Id.* at ¶ 9. The download page contained advertisements provided by Mega and encouraged users to purchase premium subscriptions to the website. *Id.* at 11$ 9-10. Videos could be viewed on Megavideo.com, owned by the Mega Conspiracy.

The complaint identifies premium subscriptions and online advertising as the conspiracy's two primary sources of revenue. Indictment at ¶ 4. The government's theory is that the conspiracy was designed to attract viewers who wished to view infringing content through the links provided by the Mega websites. Premium subscriptions to the Mega websites allowed Internet users to receive payments for uploading and advertising popular content, view videos with fewer wait and download times, upload and download videos with few, if any limitations, and watch movie-length videos without interruptions. Complaint at ¶ 38. Subscriptions to Megaupload.com could be purchased for approximately a few dollars per day or as much as $260 for a lifetime. Indictment at ¶ 4. The complaint states that the conspiracy made over $150 million in subscription fees collected from premium users. *Id.*

One of the key limitations on non-premium users was that they could only watch 72 minutes of video at a time on Megavideo.com. Indictment at ¶ 18. In order to watch videos for a duration exceeding 72 minutes, non-premium users were required to wait a certain amount of time. Since motion pictures are typically longer than 72 minutes, this model created

an incentive for viewers interested in watching films on the Megavideo site to become premium users. Users interested in viewing multiple episodes of television shows would also have an incentive to pay for a premium subscription. Other limitations on non-premium users included increased time to download content and at times the inability to download files over a certain size. Indictment at ¶ 10; Complaint at ¶ 38.

According to the government, viewers watching non-infringing videos would have little reason to purchase premium subscriptions. For example, the indictment references an email from a non-premium user that Dotcom forwarded to Ortmann and Echternach. The email stated that the customer needed to "find a new hobby because watching pirated material via [M]egavideo is now over-rated and ruined because of this video bandwidth limit." Indictment at ¶ 73iii. The limitations on access of non-premium members to the content available on the Mega sites would not have been particularly relevant to Internet users who wished only to view non-infringing content. By contrast, users who wanted to access copyrighted material would have a strong incentive to either upgrade to premium membership or discontinue using the Mega websites.

The other source of revenue for the conspiracy was advertising fees. Before any video could be viewed on Megavideo.com, users had to first view an advertisement. Indictment at ¶ 19. Originally, the Mega sites contracted with other companies to provide advertising. Eventually, a website called "Megaclick.com" was established to set up

advertising campaigns for all the Mega sites. *Id.* The government estimates that the conspiracy received over $25 million in online advertising revenues. *Id.* at ¶ 4.

The indictment lists numerous specific copyrighted materials that could be accessed from Mega website links.[7] The government has also presented communications in which the conspirators requested links to particular copyrighted materials. For example, Bencko sent an email asking van der Kolk to find links "again" to the copyrighted television show "The Sopranos." Indictment at ¶ 73gg. Bencko also sent van der Kolk an email requesting Megaupload links to the copyrighted series "Seinfeld". *Id.* at ¶ 73kk. The indictment also contains communications from users of the Mega websites to the conspirators referencing links to infringing files. On or about November 23, 2008, Dotcom received an email from a user complaining about the quality of videos that he or she was trying to watch of the copyrighted series "Dexter." *Id.* at ¶ 73jjj. The user had evidently accessed the Mega link from a referrer site. Dotcom forwarded the email to Ortmann, saying that they needed to solve the quality issue "asap" given that Dotcom had seen complaints about their video quality on many online forums. *Id.* On November 15, 2010, Batato forwarded an email from a customer to Ortmann. The email stated that the user had just paid for

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[7] *See, e.g.*, Indictment at ¶¶ 73r, s, u, nn, bbb, ddd, eee, fff, jjj, kkk, uuu, hhhh, jjjj, nnnn, tttt, vvvv, xxxx, aaaaa, ccccc, nth, kkkkk, mmmmm, rrrrr, sssss.

Mega's services and requested assistance in accessing episodes of a copyrighted television show, "Robin Hood." *Id.* at ¶ 731111. The user asked for his or her payment to be canceled if the issue could not be resolved. On August 11, 2011, Dotcom forwarded an email to Ortmann from a user who stated that he or she used to pay a monthly fee for Mega's services to watch television shows such as "Trueblood" and "Battlestar Gallactica." *Id.* at ¶ 73nm. The user wrote, "I don't mind your services be[ing] bogged down from time to time. I don't mind paying, but [I] need to get something for the service [I] pay for." *Id.*

The conspirators also allegedly took affirmative steps to conceal their illegal activity. They excluded infringing files from the "Top 100" list, which purported to list the most frequently downloaded files on Megaupload.com. Complaint at ¶ 32. According to the government, an accurate list would have consisted almost entirely of infringing content, so the conspirators "carefully curated" the list to make the site look more legitimate. *Id.* The government alleges that van der Kolk instructed an employee via email that the Top 100 list should contain only non-copyrighted files. Indictment at ¶ 73bbbb. He further instructed the employee to create fake accounts on the Megaupload and Megavideo sites to upload the files, making it appear that these files were uploaded by users rather than members of the conspiracy. *Id.*

The government alleges that the Mega Conspiracy intentionally relied on thousands of third party "linking" or "referrer" websites in order to

conceal the scope of the infringement conspiracy. *Id.* at ¶ 11. The referrer sites contained user-generated postings of links to files stored on Mega's servers. Although the conspiracy did not operate the third party websites, the links were created by the Mega websites and the files were stored on Mega's servers. The links directed users to Mega download pages to view the requested files. Further, the conspirators sometimes instructed customers to visit referrer sites to access Mega-created links to infringing content. *Id.* at ¶ 14. For example, in January 2010, Batato responded to a user email asking where to find links to full movies. He told the user to go to Mega's "referrer sites…Where are the movie and series links. You cannot find them by searching on [Megavideo] directly. That would cause us a lot of trouble ;-)." *Id.* at ¶ 73dddd.

Additionally, the content available from Megaupload.com was not publicly searchable on the website, although the members of the conspiracy could search for the Mega-created links on their websites and the files stored on their servers. *Id.* at ¶ 15. The content on the Megavideo site purported to allow users to search for files. However, the government alleges that the conspirators developed software to automatically mark all videos longer than 10 minutes—which would include virtually all commercial movies and television shows—as "private" to ensure that the videos would not be searchable or publically displayed on the front pages of Megavideo. Complaint at ¶ 33. These videos could only be located by members of the public through referrer sites.

The PayPal Account

The conspirators allegedly used a PayPal, Inc. account to receive payments for premium subscriptions and to make payments for operating expenses. The PayPal account allegedly received "in excess of $110,000,000 from subscribers and other persons associated with Mega Conspiracy." Indictment at ¶ 42. Users could also pay for access to the Megaupload website through a company called Moneybookers, which operates a similar online payment system to PayPal.

Operating expenses paid out of the PayPal account included payments to Carpathia Hosting, a company that operated many of the servers used by the Mega websites, and rewards payments to uploaders of popular content. *Id.* The government alleges that the Mega Conspiracy paid over $65 million "to hosting providers around the world for computer leasing, hosting, bandwidth, and support services." *Id.* at ¶ 73f. Under the Uploader Rewards program, the conspirators paid certain users who uploaded popular files. *See, e.g.*, Indictment at ¶¶ 73g, pp, qq, ppp, qqq, www, xxx. Rewards payments allegedly occurred from September 2005 until July 2011. An email from van der Kolk to Ortmann indicates that the conspirators were aware that they paid users who uploaded "copyrighted" and "illegal" files. Indictment at ¶ 73y. Between 2010 and 2011, PayPal sent Megaupload over 145 takedown notices referencing over 3,400 infringing links containing materials that had been downloaded nearly 800,000 times. Complaint at ¶ 41. Ortmann allegedly assured Paypal that the infringing files had

been removed or deleted and that 220 of the 330 registered users who uploaded the files had been blocked from the Mega websites. *Id.* The government claims that in reality, none of the infringing files were deleted, and as of January 19, 2012, the day before the conspirators were arrested, only about 18 of those 220 registered users had actually been blocked from the Mega websites. *Id.*

Further, when copyright holders complained that the Mega sites were infringing their material, the conspirators allegedly responded with false representations that the files had been removed and the users uploading the infringing material had been blocked. Indictment at ¶¶ 73ff, hh, ii. In actuality, the conspirators only removed particular links to the files. Complaint at ¶¶ 26-29. The actual infringing files remained on the Mega-controlled servers and could be accessed from other links. The conspirators also allegedly falsely represented to copyright holders that the Mega Abuse tool would allow owners of copyrighted material to directly delete files immediately. Indictment at ¶¶ 73ss, xx. Dotcom also instructed his co-conspirators not to delete links "reported in batches of thousands from insignificant" copyright holders, as that caused the Mega websites to lose "significant revenue." Indictment at ¶ 73nnn. He further instructed others not to delete "thousands of links" from a single source "unless it comes from a major organization in the US [sic]." *Id.* at ¶ 73ooo.

The PayPal account directly received the proceeds of the alleged conspiracy. Given that the account received payments from premium subscription users and advertising revenues, the government has

provided sufficient allegations at this stage that the funds in the PayPal account would not have been received but for the conspiracy to commit copyright infringement. The government reasons that users primarily chose to pay for premium subscriptions in order to view infringing content. Although the complaint concedes that it was "theoretically possible" that some users purchased premium subscriptions in order to view only non-infringing content, the government argues that there was little incentive for such users to purchase premium subscriptions given the Mega business model. Complaint at ¶ 39. Noninfringing materials, such as user-created home videos, were unlikely to be longer than 72 minutes in length. Moreover, the government offers evidence that the conspirators did not seek out non-infringing viewers for financial gain. For example, van der Kolk allegedly told Ortmann that " 'legit users' were not a source of revenue to the Mega Conspiracy, stating 'that's not what we make $ with :).'" *Id.* Van der Kolk also allegedly told Ortmann that "more than 90%" of the Mega Conspiracy's "profit" was derived from "infringing files." *Id.* On November 21, 2009, Ortmann told van der Kolk that Megavideo's public videos "could not possibly have generated any significant payments." *Id.*

The government has alleged sufficient facts to support a reasonable belief that the Mega websites were designed to distribute, reproduce, and facilitate access to copyrighted materials. With respect to advertising revenues, the popularity of the infringing content enabled the conspiracy to generate fees from advertisers. Since the most popular content on

Megaupload.com was allegedly copyright-infringing material, the advertising fees likely would not have been received but for the conspiracy to commit infringement. With respect to the premium subscription fees, it is likely that the fees were overwhelmingly and perhaps only paid by customers viewing infringing content. At this point, the government need only allege enough facts to support a reasonable belief that it will be able to show at trial by a preponderance of the evidence that the money in the PayPal account would not have been received but for the alleged conspiracy to commit copyright infringement and the acts committed in furtherance of that conspiracy. The court finds that this burden has been met. Next, the court will analyze the traceability of the assets in attachment A to the PayPal account. Because the government seeks the forfeiture of a large number of assets, certain of the assets are more fully identified in the Attachment to the Memorandum Opinion.

Bank Accounts

The government seeks the forfeiture of 18 bank accounts. The DBS 0320 account allegedly was a "funnel account" that received all the proceeds of the conspiracy and transferred those proceeds to other accounts in Hong Kong, New Zealand, and elsewhere. *See* Complaint, 44. From August 2007 to January 2012, the DBS 0320 account received 1,403 deposits totaling HKD 1,260,508,432.01 from the PayPal account. Complaint at ¶ 45. The DBS 0320 account also received transfers of $280,000 U.S. dollars and 3,980,311 Euro from the Moneybookers account. *Id.* at ¶ 46.

Bank accounts 1-12 and 16-17, identified in the attachment to this opinion, all received transfers from the DBS 0320 account. Account 13 received transfers from Account 9, which in turn received transfers from the DBS 0320 account. Accounts 14-15 received transfers from the DBS 0320 account and Account 4, which also received transfers from the DBS 0320 account.

Because these accounts are traceable to the PayPal account, the court finds that there are sufficient allegations to support the forfeitability of the funds in these accounts as proceeds of the conspiracy to commit copyright infringement.

Financial Instrument

The government seeks the forfeiture of one financial instrument. The Computershare account held in the name of Kim Dotcom holds government bonds with a face value of 10 million NZD, generating 6% interest annually and set to mature on or about April 15, 2015. *Id.* at ¶ 71. On November 10, 2010, 70 million HKD was transferred from Bank Account 1 to the ANZ 1200 account.[8] Five days later, 10,639,321.02 NZD was transferred from the ANZ 1200 account to the Computershare account for the purchase of the bonds. *Id.* at 71-72. Bank Account 1 contains funds constituting proceeds of the conspiracy, as discussed above. Because the funds used to purchase the bonds are traceable to the conspiracy, the court finds that there are sufficient

[8] The government does not seek the forfeiture of the ANZ 1200 account.

allegations to support the forfeitability of this financial instrument as proceeds of or property traceable to the conspiracy.

Real Property

The government seeks the forfeiture of the real property located at 5G the Prom, Coatesville, which is owned by Kim Dotcom. This property was purchased on or about November 19, 2011, together with a neighboring parcel, for a total of 4,333,000 NZD using funds from Bank Account 15. *Id.* at ¶ 76a. Because Bank Account 15 constitutes proceeds of the conspiracy as discussed above, this real property is also subject to forfeiture as property traceable to the conspiracy.

Vehicles

The government seeks the forfeiture of multiple vehicles purchased with funds from the above-listed bank accounts. Vehicles 1-8 were purchased using funds from Bank Account 14. Vehicles 9-16 were purchased using funds from Account 16. Vehicles 17-18 were purchased using funds from Account 17. All of these vehicles are thus forfeitable as property traceable to the alleged conspiracy.

The government also seeks the forfeiture of two vehicles that are not explicitly traced to any of the above-listed bank accounts. Both vehicles were purchased in May 2011 by van der Kolk, who allegedly had no other income during that time period. These vehicles are also forfeitable because the government's allegations raise the plausible inference that the money used to purchase the

vehicle is traceable to van der Kolk's role in the conspiracy.

Miscellaneous

The government seeks the forfeiture of various miscellaneous items of property traceable to the bank accounts discussed above. Four jet skis were purchased using funds from Account 14. Two sharp 108" LCD TV screens, three Samsung 82" LCD TVs, one Devon works time piece, and an artwork were purchased using funds from the DBS 0320 account. These items are therefore forfeitable as property traceable to the proceeds of the conspiracy.

III. CONCLUSION

For the reasons discussed above, the government's motions for default judgment are GRANTED. The defendant assets are hereby forfeited to the United States.

Date: March *25*, 2015
Alexandria, Virginia

/s/ *Log*
Liam O'Grady
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Civil No. 1:14-cv-969
-v-	)	
	)	Hon. Liam O'Grady
ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO,	)	
Defendants *in rem*.	)	

ORDER

Before the court is the government's motion to strike the verified claim of Mona Dotcom ("Mona") for lack of standing. (Dkt. No. 60). Mona opposed the motion, and the government replied. (Dkt. Nos. 73-75). The court heard oral argument on January 30, 2015. For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that the motion to strike (Dkt. No. 60) is GRANTED and DENIED in part. The court therefore strikes Mona's verified claim, (Dkt. No. 14), except as to her claims to Vehicle 14 and Property 2. Accordingly, since she

lacks standing to contest the forfeiture of the assets listed in Attachment A other than Vehicle 14 and Property 2, her motion to dismiss the forfeiture complaint (Dkt. No. 19) is DENIED with respect to all of the property in Attachment A except Vehicle 14 and Property 2.

Date: March *13*, 2015
Alexandria, Virginia

/s/ *Log*
Liam O'Grady
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Civil No. 1:14-cv-969
-v-	)	
	)	Hon. Liam O'Grady
ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO,	)	
Defendants *in rem*.	)	

MEMORANDUM OPINION

Before the court is the government's motion to strike the verified claim of Mona Dotcom ("Mona"). (Dkt. No. 60). The government filed a verified complaint for civil forfeiture *in rem* on July 29, 2014 seeking forfeiture of the assets listed in Attachment A to the complaint. (Dkt. No. 1). Mona Dotcom filed a verified claim to certain of the assets listed in Attachment A on September 1, 2014.[1] (Dkt. No. 14).

[1] On August 28, 2014, claims to the assets were filed by Finn Batato; Julius Bencko; Kim Dotcom; Sven Echternach;

On October 10, 2014, she and the other claimants filed a motion to dismiss and or stay the government's forfeiture action. (Dkt. No. 19).[2] On December 30, 2014, the government moved to strike Mona's claim to the assets on the ground that she lacks standing. (Dkt. No. 60). Mona opposed the motion, and the government replied. (Dkt. Nos. 73-75). The court heard oral argument on January 30, 2015.

I. BACKGROUND

The full factual background of this case is discussed in the court's Memorandum Opinion dated February 27, 2015. (Dkt. No. 81). Relevant to this motion, Mona Dotcom is the wife of Kim Dotcom ("Kim")[3] and she resides in New Zealand. Kim Dotcom and his alleged co-conspirators have been indicted in this district for conspiracy to commit copyright infringement, money laundering, and other offenses. In this civil forfeiture *in rem* action, the government seeks the forfeiture of assets that are

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Bram van der Kolk; Mathias Ortmann; and Megaupload Limited, Megapay Limited, Megamedia Limited, Megastuff Limited, and Vestor Limited. (Dkt. Nos. 3-9). By order dated February 27, 2015, this court granted the government's motion to strike and dismissed the claims of those claimants pursuant to the fugitive disentitlement statute, 28 U.S.C. § 2466, (Dkt. No. 82).

[2] This motion has been denied as to the Fugitive claimants, but remains pending as to Mona.

[3] Mona and Kim Dotcom are currently married, but she has represented to the court that she and Kim are separated and will be divorcing.

traceable to the alleged crimes. This court has disentitled Kim Dotcom and his alleged co-conspirators pursuant to the fugitive disentitlement doctrine. In her verified claim to the assets, Mona asserts a 50% marital interest in certain assets identified in Attachment A belonging to Kim.

II. MOTION TO STRIKE

The government contends that Mona Dotcom lacks standing to contest the forfeiture. Specifically, the government argues that: (1) under the New Zealand Property (Relationships) Act 1976 (N.2.) ("PRA"), Mona's interest is not quantifiable until there has been adjudication of her marital property rights; (2) it is not likely that Mona will be able to prove the affirmative defense of being an "innocent owner;" (3) Mona has already received transfers from Kim's assets sufficient to satisfy her marital interest; (4) her claim of de facto marriage is flawed: and (5) if forfeiture is ordered by this court, she may challenge the forfeiture in New Zealand.[4]

A. Standard of Review

Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions is applicable to this civil forfeiture action. Supplemental Rule G(8)(c) allows the government to move to strike a claim for lack of standing. In the

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[4] Because this matter is before the court on a motion for judgment on the pleadings, the court declines to address the government's arguments concerning merits issues (such as the "innocent owner" defense) that are not relevant at this stage of the proceedings.

civil forfeiture context, the government's motion to strike "may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of the evidence." Supp. R. G(8)(c)(ii)(B), Here, the government has moved for judgment on the pleadings.

When the government moves for judgment on the pleadings in a forfeiture proceeding, the claim of ownership will be scrutinized in a manner consistent with the principles of Fed. R. Civ. P. 12(c). The 2006 Advisory Committee Notes to Supplemental Rule G(8)(c)(ii)(B) provide guidance: "If a claim fails on its face to show facts that support claim standing, the claim can be dismissed by judgment on the pleadings."

In adjudicating a motion for judgment on the pleadings under Rule 12(c), the court should apply the same standard as when evaluating a motion to dismiss under Rule 12(b)(6). *See Burbach Broad. Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a [claim]; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). In deciding a Rule 12(b)(6) motion, a district court " 'must accept as true all of the factual allegations contained in the [claim]' and 'draw all reasonable inferences in favor of the [claimant].' " *Kensington*

Volunteer Fire Dep't, Inc. v. Montgomery Cnty., 684 F.3d 462, 467 (4th Cir. 2012) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435. 440 (4th Cir. 2011)). A court must grant a motion under Fed. R. Civ. P. 12(c) if it appears beyond a doubt that the non-moving party can prove no set of facts to support her claim. *See Bruce v. Riddle*, 631 F.2d 272, 273-274 (4th Cir. 1980); *see also United States v. 328 Pounds More or Less, of Wild Am. Ginseng*, 347 F. Supp. 2d 241, 244 (W.D.N.C. 2004).

B. Statutory Standing

Civil forfeiture claimants have the burden of establishing Article III and statutory standing. *See, e.g.*, *United States v. $50,000 in U.S. Currency*, No. 13-2754, 2014 WL 2575767, *2 (D. Md. June 6, 2014); *United States v. $7,000 in U.S. Currency*, 583 F. Supp. 2d 725, 728-729 (M.D.N.C. 2008). To establish statutory standing, the claimant must comply with Rule G(5) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions and 18 U.S.C. § 983(a)(4)(A). Section 983(a)(4)(A) provides that when the government files a complaint for forfeiture of property, "any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim" must be timely. Supplemental Rule G(5)(a) provides that a claim must: (1) "identify the specific property claimed;" (2) "identify the claimant and state [her] interest in the property;" (3) "be signed by the claimant under penalty of perjury;" and (4) "be served on the government." Supp. R.

G(5)(a). Courts generally require strict compliance with Rule G(5), but the Court may depart from it "in appropriate circumstances." *United States v. 328 Pounds More or Less, of Wild Am. Ginseng*, 347 F. Supp. 2d 241, 248 (W.D.N.C. 2004) (quoting *United Stales v. Amiel*, 995 F.2d 367, 371 (2d Cir. 1993)).

C. Article III Standing

In contrast to statutory standing, the requirements for Article III standing cannot be excused at the discretion of the district court judge. "In order to contest a forfeiture, a claimant first must demonstrate a sufficient interest in the property to give [her] Article III standing; otherwise there is no case or controversy, in the constitutional sense, capable of adjudication in the federal courts." *United States v. Real Property Described in Deeds Recorded at Book/Page 839/846…Henderson Cnty. Registry and Ins. Proceeds*, 962 F. Supp. 734, 736-737 (W.D.N.C. 1997) (internal citations and quotation marks omitted). Standing must be supported at each stage of the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To establish standing under Article III, a claimant "must allege a 'distinct and palpable injury to [herself]' that is the direct result of the 'putatively illegal conduct of the adverse party,' and 'likely to be redressed by the requested relief.' " *United States v. Cambio Exacto*, 166 F.3d 522, 527 (2d Cir. 1999) (internal citations omitted). In order to do so, the "claimant must have a colorable ownership, possessory or security interest in at least a portion of the defendant property." *United States v. $41,320 in U.S. Currency*, No. 12-1449, 2014 WL 6698426, *2

(D. Md. Nov. 25, 2014) (quoting *United States v. Munson*, Nos. 08-2065, 08-2159, 08-4326, 477 F. App'x 57, 62 (4th Cir. Apr. 17, 2012) (internal quotation marks omitted). "Courts generally do not deny standing to a claimant who is either the colorable owner of the property or who has any colorable possessory interest in it." *United States v. $7,000 in U.S. Currency*, 583 F. Supp. 2d 725, 729 (M.D.N.C. 2008) (internal quotation marks omitted).

D. Discussion

There is a split of authority regarding the proper showing of standing at the pleading stage in the civil forfeiture context. Some courts have held that a simple claim of ownership is sufficient. *See, e.g.*, *United States v. $196,969 U.S. Currency*, 719 F.3d 644, 646 (7th Cir. 2(113) (only a "bald assertion" of ownership is required). Other courts, including district courts within the Fourth Circuit, have required more than a "bald assertion of ownership." *See, e.g.*, *United Slates v. $18,690 in U.S. Currency*, 5:13-cv-026, 2014 WL 1379914, slip op. at *3 (W.D.V.A. Apr. 8, 2014) (granting government's motion to strike where claimant made only a "bare assertion of ownership" and therefore lacked standing); *United Slates v. $104,250 in U.S. Currency*, 947 F. Supp. 2d 560, 562-63 (D. Md. 2013) (granting government's motion to strike where the amended claim was "little better than a bald assertion of ownership"); *United Slates v. $7,000 in U.S. Currency*, 583 F. Supp. 2d 725, 728-34 (M.D.N.C. 2008) (granting government's motion to dismiss claim for lack of standing); *United States v. 328 Pounds More or Less, of Wild Am. Ginseng*, 347

F. Supp. 2d 241, 245-248 (W.D.N.C. 2004) (denying in part government's motion for judgment on the pleadings where certain claimants had provided more than a mere assertion of ownership); *United States v. Real Prop. Located at 5201 Woodlake Drive*, 895 F. Supp. 791, 794-795 (M.D.N.C. 1995) (granting government's motion to dismiss the claims for lack of standing).

Courts that have required evidence of an ownership interest have generally held that a claimant must state the source of the property and how she came into possession of it. *See, e.g.*, *United Slates v. $104,250*, 947 F. Supp. 2d at 565 (granting government's motion to strike where claim stated only that money seized in airport was proceeds of an investment in the entertainment industry and proceeds of claimant's mother's estate). In *United States v. $7,000*, the court noted that "[i]n applying the second test, courts 'generally look to dominion and control, such as possession, title, and financial stake, as evidence of an ownership interest.' *United States v. $7,000*, 583 F. Supp. 2d at 729 (citation omitted). The court found that "the Fourth Circuit would almost assuredly apply the 'dominion and control' test, which it has applied in an unpublished civil forfeiture opinion and in the criminal forfeiture context." *Id.* (citing *United States v. One Lot or Parcel of Ground Known as 1077 Kiltrell St.*, No. 90-7259, 1991 WL 227792, *2 (4th Cir. Nov. 7, 1991) ("Hare legal title, standing alone, is insufficient to confer standing upon a claimant"); *In re Bryson*, 406 F.3d 284, 291 (4th Cir. 2005); *United States v. Morgan*, 224 F.3d 339, 343 (4th Cir. 2000)).

1. Marital Interest

In her claim, Mona identifies her interest in each of the assets as a "50% marital interest…as the spouse of the owner, Kim Dotcom."[5] *See* Verified Claim of Mona Dotcom. Her response to the government's special interrogatories and her opposition memorandum shows that her "marital interest" is premised on New Zealand law,[6] particularly the distribution scheme of the New Zealand Property (Relationships) Act 1976 (N.Z.) ("PRA"). *See* Mem. in Opp'n, 14; Mona Dotcom's Response to Special Interrogatories 3-5 (stating that she has a marital interest in the assets pursuant to the PRA).

Under Section 11 of the PRA, there is a presumption that property classified as "relationship property" under the Act will be divided equally. "The PRA was enacted for the purpose of introducing an equal sharing relationship property regime based on recognition of contributions to the marriage or

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[5] There is one exception. With respect to a vehicle identified as "Vehicle 2" in her claim, Mona originally claimed that in addition to a "50% marital interest," she had paid for the purchase of that vehicle. *See* Verified Claim of Mona Dotcom, 4. However, in her opposition brief, she withdraws the purchase claim and asserts only her marital interest in the vehicle. *See* Mem. in Opp'n, 20.

[6] "…[I]t is appropriate to refer to state law in determining the nature of the property interest involved in a forfeiture proceeding." *United States v. $3,000 in Cash*, 906 F. Supp. 1061, 1065 (E.D. Va. 1995) (internal quotation marks omitted). Here, the relevant property law is the law of New Zealand.

partnership rather than of contributions to specific items of property." *Hayward v. Commissioner of Police* [2014] NZCA 625 at para [17] White J for the Court (N.Z.) ("*Hayward IT*"). In *Hayward*, the New Zealand High Court[7] favorably quoted scholarship stating that the relationship property regime created by the PRA "crystallises only in the event of a future Court order or compromise. Until then, the statutory relationship property regime has no immediate effect on the conventional proprietary interests of the parties in law and equity." *Commissioner of Police v. Hayward* (unreported) High Court, Auckland, CIV 2011-404-002371, 10 June 2013, Venning 1, at para 103 (N.Z.) ("*Hayward I*"). In the appeal from *Hayward I*, the New Zealand Court of Appeal held that the term "interest" under the New Zealand Criminal Proceeds (Recovery) Act 2009 (N.Z.) ("CPRA") "means not only a legal or equitable estate or interest in the property but also extends to a right, power or privilege in connection with the property." *Hayward II* at para [23] (N.Z.). *See also* CPRA 5(1) (N.Z.). The *Hayward II* Court stated that under the CPRA's broader definition of "interest," the ability of *a* spouse to make a claim under the PRA for division of property or a declaration as to the status or ownership of property is one of the rights in

[7] The New Zealand High Court has original and appellate jurisdiction over criminal and civil matters; the Court of Appeal is New Zealand's intermediate appellate court, hearing appeals from the High Court and other courts; the Supreme Court is New Zealand's final court of appeal. *See Courts*, MINISTRY OF JUSTICE, http://www.justice.govt.nz./courts (last visited Mar. 11, 2015).

connection with the property. *See Hayward II* at para [26] (N.Z.). In other words, a person's right to state a claim under the PRA, regardless of whether they have done so, constitutes an "interest" under the CPRA.

Mona argues that the language of a New Zealand court in a judgment on the Dotcoms' application for release of restrained assets demonstrates that she currently has a marital interest in the property. In the order, the New Zealand High Court stated that "Mrs. Dotcom has an interest in Mr. Dotcom's restrained property under the Property (Relationships) Act 1976. This is not in dispute." *Commissioner of Police v. Kim Dotcom* (unreported) High Court, Auckland. CIV 2012-404-33, 29 August 2012, Potter J, al para 73 (N.Z.), The High Court further stated that "Mrs. Dotcom is entitled…to apply for further orders from the Court, she being a person with an interest in the restrained property." *Id.* at para 76 (N.Z.). Although the High Court referred to the interest as one under the PRA, it is apparent that the court meant that Mona's right to apply for relief pursuant to the PRA granted her an "interest" under the CPRA.[8]

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[8] Further, Mona's expert, a New Zealand barrister and solicitor, stated in his affidavit that the High Court has already recognized a "clear interest in the property governed by the CPRA regime." Aff. of Aaron James Lloyd, ¶ 16(a). Although Lloyd argued that there is a presumption under NZ law that Mona will be entitled to 50% of the relationship property, he did not attempt to argue that the High Court's judgment constituted an adjudication of Mona's marital property interests under the PRA. *See id.* at ¶¶ 41-51.

The government argues that Mona lacks standing to contest the forfeiture of property belonging to her husband because her marital property rights have not yet vested under the relevant New Zealand statutes and her claimed interest is therefore too speculative. As support, the government cites a number of cases in which courts dismissed the claims of individuals who asserted an interest in a spouse's property, on the basis that the claimants lacked standing under the applicable state laws absent litigation of their marital property rights. *See United States v. Schifferli*, 898 F.2d 987, 989 n.* (4th Cir. 1990) (affirming district court's grant of summary judgment where wife lacked standing to contest the forfeiture of her husband's property under South Carolina law because a right in "marital property" did not vest until the commencement of marital litigation and no such litigation had begun); *United States v. 9844 S. Titan Court, Unit 9…*,75 F.3d 1470, 1478-1479 (10th Cir. 1996); *United States v. Premises Known as* 717 *S. Woodward St. …*, 2 F.3d 529, 535-536 (3d Cir. 1993); *United States v. Kermali*, No. 6:13-cr-150, 2014 WL 6601004, *2-3 (M.D. Fl. Nov. 12, 2014). *See also United States v. 998 Cotton St. …*, No. 1:11-cv-356, 2013 WL 1192821, *6-9 (M.D.N.C. Mar. 22, 2013).

Taking the facts in Mona's claim as true and making reasonable inferences in her favor, the court finds that Mona presently possesses a "right, power or privilege in connection with the property" pursuant to the CPRA. However, this broadly-defined "interest" does not rise to the level of a legal or equitable interest sufficient to satisfy Article III standing at this time. The problem with Mona's

claim is not that she merely offers a bare assertion of ownership. Rather, her claim is deficient because she does not actually allege that she owns the property. Mona's counsel admitted at oral argument that she has not sought a final adjudication of her marital property rights, nor has she reached a settlement agreement with Kim Dotcom. Because her claim asserts only a marital interest that has not yet ripened, Mona's claim fails to state facts supporting a reasonable inference that she currently has a legal or equitable interest in the property even under a standard requiring only a bare assertion of ownership.

2. Possessory Interest in Certain Property

A claimant need not allege an ownership interest to meet threshold Article III standing. *See, e.g.*, *United Suites v. $119,030 in U.S. Currency*, 955 F. Supp. 2d 569 (W.D. Va. 2013) ("Article III's standing requirement is…satisfied because an owner *or possessor* of property that has been seized necessarily suffers an injury that can be redressed at least in part by the return of the seized property") (emphasis added) (citation and internal quotation marks omitted).

With respect to two particular items of property, Mona argues that her claim is alternatively premised on a lawful possessory interest[9] rather than a

[9] Although Mona does not actually state her claim of a possessory interest in these two items of property within the four corners of her verified claim, the court will credit the arguments in her opposition memorandum. The government

marital interest. *See* Mem. in Opp'n, 19-20. She states that she is in possession of and exercises dominion and control over the vehicle listed in her claim as "Vehicle 14"[10] and the real property identified as "Property 2."[11] She resides in the home identified as Property 2 and Vehicle 14 was released to her pursuant to an order of the New Zealand High Court. *See* Order for Registration of Foreign Restraining Orders, Schedule 3, ¶ 1.3.3 (releasing vehicle to Mona). Mona has thus alleged sufficient facts in her opposition to support a reasonable inference that she is in lawful possession of Vehicle 14 and Property 2. As a lawful possessor, she will suffer an imminent injury if the properties are forfeited. Accordingly, Mona has standing to contest the forfeiture of those two items of property.

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does not dispute these assertions, and there is independent evidence of her possession of these two properties.

[10] Vehicle 14 is identified in Attachment A to the government's forfeiture complaint as "2010 Black Toyota Vellfire V6, VIN 7ATOH65MX11041670, and including License Plate "WOW", and all interest, benefits, or assets traceable thereto." *See* Attachment A, ¶ 39.

[11] Property 2 is identified in Attachment A to the government's forfeiture complaint as "The property at 51-1 The Prom, Coatesville, Auckland 0793,New Zealand, being all that parcel of land on Certificate of Title number 341890 on Deposit Plan 385357, and all interest, benefits, or assets traceable thereto." *See* Attachment A,T21, injury if the properties are forfeited. Accordingly, Mona has standing to contest the forfeiture of those two items of property.

With respect to a vehicle identified in her claim as Vehicle 15,[12] Mona argues in opposition that this vehicle is her separate property under the PRA because it was a gift to her. *See* Mem. in Opp'n, 20; Aff. of Mona Dotcom, ¶¶ 33-34. However, her verified claim makes no mention of this "interest in separate property," and unlike Property 14 and Vehicle 2, there is no independent evidence before the court that this vehicle was a gift. Accordingly, the court will not construe her verified claim as embracing this allegation of a separate interest in Vehicle 15.

III. CONCLUSION

For the foregoing reasons, the court finds that Mona Dotcom currently lacks Article III standing to contest the forfeiture on the basis of a marital interest in property belonging to Kim Dotcom. However, Mona has standing based on a possessory interest in Vehicle 14 and Property 2. Accordingly, it is hereby ORDERED that the motion to strike (Dkt. No. 60) is GRANTED and DENIED in part. The court therefore strikes Mona's verified claim, (Dkt. No. 14), except as to her claims to Vehicle 14 and Property 2. An appropriate order will issue.

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[12] Vehicle 15 is identified in Attachment A to the government's forfeiture complaint as "2011 Mercedes Benz G55AMG, VIN WDB4632702X191902, and including License Plate "GDS672", and all interest, benefits, or assets traceable thereto," *See* Attachment A, ¶ 40.

Date: March *13*, 2015
Alexandria, Virginia

/s/ *Log*
Liam O'Grady
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Civil No. 1:14-cv-969
-v-	)	
	)	Hon. Liam O'Grady
ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO,	)	
Defendants *in rem*.	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the court hereby ORDERS that the government's motion to strike (Dkt. No. 39) is GRANTED and all claimants are disentitled from litigating the civil forfeiture complaint pursuant to 28 U.S.C. § 2466. Accordingly, the court hereby strikes and dismisses the claims of Finn Batato; Julius Bencko; Kim Dotcom; Sven Echternach; Bram van der Kolk; Mathias Ortmann; and Megaupload Limited, Megapay Limited, Magamedia Limited, Megastuff Limited, and Vestor Limited. (Dkt. Nos.

3-9). Because the court has disentitled the claimants, the court also strikes and denies their motion to dismiss the forfeiture complaint or in the alternative stay the forfeiture action. (Dkt. No. 19.)[1]

Date: February *27*, 2015
Alexandria, Virginia

/s/ *Log*
Liam O'Grady
United States District Judge

[1] The motion to dismiss and/or stay the forfeiture action is not dismissed with respect to Mona Dotcom, a claimant who is also a party to that motion. The court has not yet ruled on the government's motion to strike Mona Dotcom's claim. (Dkt. No. 60).

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Civil No. 1:14-cv-969
-v-	)	
	)	Hon. Liam O'Grady
ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO,	)	
Defendants *in rem*.	)	

MEMORANDUM OPINION

Before the Court is the government's motion to strike the claims of Finn Batato ("Batato"); Julius Bencko ("Bencko"); Kim Dotcom ("Dotcom"); Sven Echternach ("Echternach"); Bram van der Kolk ("van der Kolk"); Mathias Ortmann ("Ortmann"); and Megaupload Limited, Megapay Limited, Megamedia Limited, Megastuff Limited, and Vestor Limited ("the corporate claimants"). *See* Mot. to Strike, 1. In this civil *in rem* action, the United States seeks forfeiture of the assets listed in Attachment A to the

complaint. All of the assets identified in Attachment A are located either in Hong Kong or New Zealand.

The government filed a verified complaint for forfeiture *in rem* on July 29, 2014. (Dkt. No. 1). On August 28, 2014, claims to the assets were filed by Batato, Bencko, Dotcom, Echternach, van der Kolk, Ortmann, and the corporate claimants. (Dkt. Nos. 3-9). On October 10, 2014, the claimants filed a motion to dismiss the forfeiture complaint or in the alternative stay the forfeiture action. (Dkt. No. 19). The government then filed a motion to set a briefing schedule, asking the court to consider the government's motion to strike before ruling on the motion to dismiss. (Dkt. No. 31). The court granted the government's request. (Dkt. No. 32). On November 18, 2014, the government moved to strike the claims of the claimants. (Dkt. No. 39).[2] The claimants opposed the motion and the government replied. (Dkt. Nos. 45, 46, 48, 66, 67).

I. BACKGROUND

On January 5, 2012, indictments were entered in this district against Batato, Bencko, Dotcom, Echternach, van der Kolk, Ortmann, Megaupload Limited, and Vestor Limited.[3] *See* Complaint, ¶ 16.

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[2] The government originally filed its motion to strike on November 17, (Dkt. No. 37), but was asked by the Clerk's Office to refile the motion due to an error involving a signature on the original document.

[3] An additional individual, Andrus Nomm, was named in the indictment and the civil forfeiture complaint. *See* Complaint, ¶ 14; Indictment, ¶ 1; Superseding Indictment, ¶ 37. Nomm was arrested on February 9, 2015 and pled guilty to

The indictment charged the defendants with multiple crimes, including conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d); criminal copyright infringement in violation of 17 U.S.C. § 506 and 18 U.S.C. § 2319; conspiracy to commit copyright infringement in violation of 18 U.S.C. § 371; aiding and abetting of copyright infringement in violation of 18 U.S.C. § 2; and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). On February 16, 2012, a superseding indictment was returned, adding wire fraud charges under 18 U.S.C. § 1343. *See* Superseding Indictment. In summary, the government alleges that the indicted defendants operated a scheme known as the "Mega Conspiracy," an international criminal conspiracy to profit from criminal copyright infringement and launder the proceeds. *See* Complaint, ¶ 2. The government asserts that the assets listed in Attachment A constitute proceeds of the conspiracy and are thus subject to forfeiture. *Id.* at ¶ 3.

On January 13, 2012, the New Zealand Ministry of Foreign Affairs and Trade received requests from the United States seeking the provisional arrest of the individual defendants in the criminal action for

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conspiracy to commit copyright infringement on February 13, 2015. He agreed to forfeit any assets obtained through the conspiracy to which he had an interest. Nomm was sentenced to one year and one day in the penitentiary and no fine. To date, he is the only one of the defendants in the criminal action to have been arrested by U.S. authorities. Case No. 1:12-cr-00003.

the purpose of extraditing them to the United States. *See* Affirmation of Bethany Ellen Madden, ¶ 2. On or about January 20, 2012, New Zealand authorities arrested Batato, Dotcom, Ortmann, and van der Kolk. *See* Declaration of FBI Special Agent Rodney J. Hays. They were released on conditions of bail. Bencko remains in Slovakia, his country of citizenship. Echternach is also in his country of citizenship, Germany.

On April 18, 2012, the New Zealand High Court[4] registered in New Zealand two restraining orders issued by this court, subject to conditions including monthly living allowance payments for Dotcom, his wife, and van der Kolk. *See* Order for Registration of Foreign Restraining Orders. The restraining orders were to expire on April 18, 2014. The New Zealand Court of Appeal issued a ruling extending the registration of the U.S. restraining orders to April 18, 2015. The evidence before this Court indicates that New Zealand law does not provide for further extension of the restraining orders.

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[4] The New Zealand High Court has original and appellate jurisdiction over criminal and civil matters; the Court of Appeal is New Zealand's intermediate appellate court, hearing appeals from the High Court and other lower courts; the Supreme Court is New Zealand's final court of appeal. *See Courts*, Ministry Of Justice, http://www.justice.govt.nz/courts (last visited Feb. 12, 2015).

II. SUBJECT MATTER JURISDICTION

A. Legal Standard

The claimants assert that this court lacks subject matter jurisdiction over the civil forfeiture complaint because the government has failed to allege violations of federal statutes.[5] Rule 12(b) of the Federal Rules of Civil Procedure and Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions are applicable to this civil forfeiture *in rem* action. Rule G(8)(b) authorizes a claimant to move to dismiss a forfeiture complaint pursuant to Rule 12(b). A motion made pursuant to Fed. R. Civ. P. 12(b)(1) challenges the court's jurisdiction over the subject matter of the case. Generally, the plaintiff bears the burden to establish and preserve jurisdiction. *See Kerns v. United States*, 585 F.3d 187, 194 (4th Cir. 2009); *see also Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

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[5] The claimants argue that because they have challenged subject matter jurisdiction, the court must decide their motion to dismiss before deciding the fugitive disentitlement issue. The Court agrees that "subject matter jurisdiction, when questioned, [must] be decided before any other matter." *United States v. Wilson*, 699 F.3d 789, 793 (4th Cir. 2012). However, subject matter jurisdiction may also be considered *sua sponse*. The court need not decide the claimants' motion to dismiss the complaint, which raises issues that go to the merits of the action, in order to resolve the jurisdictional questions. Disentitlement is a threshold issue that the court will resolve before reaching the merits of the case. *See United States v. S6,976,934.65 Plus Interest*, 486 F. Supp. 2d 37, 38 (D.D.C. 2007).

Subject matter jurisdiction over civil asset forfeiture actions is governed by 28 U.S.C. § 1345[6] and 28 U.S.C. § 1355(a). Section 1355(a) provides that "[t]he district courts shall have original jurisdiction…of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, *incurred under any Act of Congress*." 28 U.S.C. § 1355(a) (emphasis added); *United States v. Wilson*, 699 F.3d 789, 795 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2401 (2013) (holding that a procedural deadline for filing a civil forfeiture complaint in the Civil Asset Forfeiture Reform Act of 2000 is non-jurisdictional).

In *United States v. $6,190 in U.S. Currency*, 581 F.3d 881 (9th Cir. 2009), the Ninth Circuit considered a challenge to subject matter jurisdiction in a civil forfeiture case:

> Jurisdiction over civil forfeiture actions brought under 28 U.S.C. § 1355 is not premised on a federal indictment, but rather *on a violation of an Act of Congress*. *See* 28 U.S.C. § 1355(a); *see also United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361-63, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984) (holding that a claimant's assets were subject to forfeiture even though

[6] 28 U.S.C. § 1345 provides that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States." 28 U.S.C. § 1345.

> claimant was acquitted on federal criminal charges). *To bring a civil forfeiture proceeding under § 1355, the government is required only to show probable cause that the assets in question are traceable to a violation of an Act of Congress. See [United States v.J $493,850.00 in U.S. Currency*, 518 F.3d [1159], [] 1167-69 (holding that the Civil Asset Forfeiture Reform Act of 2000 did not alter the probable cause requirement).

$6,190 in U.S. Currency, 581 F.3d at 885 (emphasis added).

Courts within the Fourth Circuit have used a synonymous "reasonable belief" pleading requirement in examining motions to dismiss forfeiture complaints pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to this rule tests the sufficiency of a complaint. *See, e.g.*, *United States v. $15,860 in U.S. Currency*, 962 F. Supp. 2d 835, 838 (D. Md. 2013) ("For the government to meet the pleading requirements [of Fed. R. Civ. P. 12(b)(6)], it must state sufficient facts to support a reasonable belief based on the totality of the circumstances that the defendant property is linked to drug trafficking and, thus, subject to forfeiture") (citing *United States v. Mondragon*, 313 F.3d 862, 866-67 (4th Cir. 2002)). The *$15,860* court noted that its analysis would not change if it were to use the "probable cause" standard applied by the Ninth Circuit. *Id.* at 840 n.6.

B. Subject Matter Jurisdiction is Satisfied

The forfeiture complaint alleges that the named assets are subject to forfeiture pursuant to 18 U.S.C. § 981 and 18 U.S.C. § 2323, because the assets are traceable to copyright infringement, conspiracy to commit copyright infringement, and money laundering offenses.[7] 18 U.S.C. § 981(a)(1)(A) provides for forfeiture of property traceable to violations of 18 U.S.C. §§ 1956 and 1957. Section 1956(a)(1) prohibits the use of the proceeds of an unlawful activity where a person knows the illegal nature of the proceeds and conducts or attempts to conduct a financial transaction with the intent to promote carrying out a "specified unlawful activity" or with the knowledge that the transaction is "designed in whole or in part" to conceal the "nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1). Section 1956(a)(2) prohibits the transmission of such illegal funds into or out of the United States. 18 U.S.C. § 1957(a) prohibits engaging in a "monetary transaction in criminally derived property of a value greater than $10,000." 18 U.S.C. § 1957(a).

Section 1956(h) provides criminal liability for conspiracy to commit offenses described in §§ 1956 or 1957. Section 981 subjects to forfeiture any property traceable to "any offense constituting 'specified

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[7] The forfeiture complaint also incorporates by reference the allegations contained in the superseding indictment. *See* Complaint, ¶ 16.

unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense." 18 U.S.C. § 981(a)(1)(C). Section 1956(c)(7)(D) lists a number of offenses that constitute "specified unlawful activity," including offenses relating to copyright infringement under 18 U.S.C. § 2319. 18 U.S.C. § 1956(c)(7)(D).

Section 2319 sets forth the penalties for a violation of 17 U.S.C. § 506(a)(1), which criminalizes infringement of a copyright (A) for commercial advantage or private financial gain; (B) by reproducing or distributing infringing copies of copyrighted works with a value of over $1,000 in any 180-day period; or (C) by distributing a work being prepared for commercial distribution if the person knew or should have known that the work was intended for commercial distribution. 17 U.S.C. § 506(a)(1). Section 506(b) provides that forfeiture under the statute shall be governed by 18 U.S.C. § 2323. 17 U.S.C. § 506(b). Section 2323(a)(1) subjects to forfeiture any property used or intended to be used to commit an offense under § 506 or any proceeds obtained "directly or indirectly" from an offense prohibited by § 506. 18 U.S.C. § 2323 (a)(1).

The claimants argue that the government has not properly alleged a violation of any federal statute to support jurisdiction under § 1355. Specifically, they argue that the government has not adequately alleged criminal copyright infringement because the complaint only references acts of "secondary" infringement, rather than direct infringement. This argument refers to the government's allegations concerning the Mega business model, which involved

the claimants' alleged encouragement and facilitation of infringement by others. *See, e.g.*, Complaint, 20. The claimants argue that they cannot possibly be held criminally liable for acts that contributed to or facilitated infringement. Even assuming, *arguendo*, that only acts of contributory infringement are alleged in the forfeiture complaint, this argument ignores the complaint's allegations that the claimants engaged in a conspiracy to commit copyright infringement. Section 981(a)(1)(C) authorizes civil forfeiture of property traceable to, among numerous other offenses, copyright infringement or conspiracy to commit copyright infringement.

In order to establish a conspiracy under 18 U.S.C. § 371, the government must show "(1) an agreement between two or more people to commit a crime, and (2) an overt act in furtherance of the conspiracy." *United States v. Jackson*, No. 13-cr-129, 2013 WL 3197069, slip op. at *5 (E.D. Va. June 20, 2013) (citing *United States v. Ellis*, 121 F.3d 908, 922 (4th Cir. 1997). The forfeiture complaint has alleged that each of the individual claimants participated in a conspiracy to commit copyright infringement in the Eastern District of Virginia and elsewhere. Numerous alleged communications of the claimants have been presented, indicating that they had an agreement to engage in a business involving the Mega websites.

According to the complaint, every time an Internet user uploaded an infringing file to the Megaupload website, Mega reproduced the file on at least one computer server it controlled and provided

the uploading user with a uniform resource locator ("URL") link allowing anyone with the link to download the file. *See* Complaint, ¶ 18. The conspirators also allegedly provided monetary payments to the top uploaders of infringing content in order to encourage Internet users to upload infringing files onto the Mega sites. *Id.* at ¶ 20. In furtherance of the conspiracy, the claimants allegedly developed software to identify the most popular files uploaded to their sites, almost all of which were infringing, and to automatically reproduce those files to Mega's faster servers operated by Cogent Communications in Washington, D.C. *Id.* at ¶ 23. The government has alleged that the conspirators knew that these files were infringing copyrights, as evidenced by their exclusion of infringing files from the "Top 100" list. The "Top 100" list purported to list the most frequently downloaded files on Megaupload. *Id.* at ¶ 32. According to the government, an accurate list would have consisted almost entirely of infringing content, so the claimants "carefully curated" the list to make the site look more legitimate. *Id.* Additionally, the claimants regularly told copyright holders, including many U.S.-based organizations, that they would remove infringing content, when in actuality they only removed particular links to the files. *Id.* at 26-29. The actual infringing files remained on the Mega-controlled servers and could be accessed from other links. The indictment alleges that some of the communications to copyright holders were sent from computer servers located in the Eastern District of Virginia. *See* Superseding Indictment, ¶ 73.

Thus, the factual allegations in the complaint and the superseding indictment show that there was an agreement among the claimants to engage in the alleged Mega Conspiracy, and at least some overt acts in furtherance of the conspiracy occurred within this judicial district. The complaint states that the assets in question are largely traceable to funds received by a PayPal, Inc. account that was used by the Mega Conspiracy to receive subscription payments from users who viewed the infringing videos on the Mega websites. *See* Complaint, 11 40-45. This court is therefore satisfied that there are sufficient factual allegations to support either probable cause or a reasonable belief that the assets listed in Attachment A are traceable to a conspiracy to commit copyright infringement. Accordingly, this court has subject matter jurisdiction over the civil forfeiture complaint.[8]

III. IN REM JURISDICTION

A. Legal Standard

The claimants argue that *in rem* jurisdiction is lacking because the property is located in foreign countries. As the government notes, 28 U.S.C.

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[8] Having found that there is subject matter jurisdiction over the forfeiture complaint, the court declines to consider additional arguments by the claimants relating to the extraterritorial application of the criminal copyright statute, 17 U.S.C. § 506. The court also declines to examine whether forfeiture is supported by every charge listed in the superseding indictment. It is unnecessary to resolve those questions in order to determine that the court has subject matter jurisdiction over the forfeiture complaint.

§ 1355(b)(2) provides that "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought" in the district where any of the acts or omissions giving rise to the forfeiture occurred. 28 U.S.C. § 1355(b)(2).

Several federal appellate courts have held that § 1355(b)(2) provides for in rem jurisdiction over property subject to forfeiture that is located in another country. *See United States v. Approximately 1.67 Million in Cash*, 513 F.3d 991, 998 (9th Cir. 2008) ("The plain language and legislative history of the 1992 amendments makes clear that Congress intended § 1355 to lodge jurisdiction in the district courts without reference to constructive or actual control of the res"); *Contents of Account Number 03001288 v. United States*, 344 F.3d 399, 403-405 (3d Cir. 2003) (holding that the district court had jurisdiction "solely based on § 1355(b)(2)" to order the forfeiture of assets located in the United Arab Emirates); *United States v. All Funds in Account Nos. 747.034/278, 747.009/278, & 747.714/278*, 295 F.3d 23, 27 (D.C. Cir. 2002) ("Congress intended the District Court for the District of Columbia, among others, to have jurisdiction to order the forfeiture of property located in foreign countries," unless the

"Constitution commands otherwise"). The reasoning of these circuits is persuasive.[9]

B. The Jurisdictional Requirements of § 1355(b) are Satisfied

All of the property listed in Attachment A is located either in Hong Kong or New Zealand. The assets have been restrained pursuant to the legal processes of those countries at the request of the United States government. This forfeiture action thus concerns property located in foreign countries and detained pursuant to the legal processes of those countries. The forfeiture complaint and superseding indictment contain allegations that the conspiracy utilized over 525 servers located within the Eastern District of Virginia,[10] and received payments from within this district and elsewhere to a PayPal account. *See* Superseding Indictment, ¶¶ 39, 42. The claimants allegedly reproduced and stored infringing files on these servers and caused

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[9] The Second Circuit had taken a different approach and applied the traditional rules of admiralty to forfeiture actions, requiring that there be constructive or actual control over the *res* in order for the district court to exercise *in rem* jurisdiction. *See United States v. All Funds on Deposit... in Names of Meza or de Castro*, 63 F.3d 148, 152-153 (2d Cir. 1995). But a year later, that court held that the amendments to § 1355 "provide district courts with *in rem* jurisdiction over a *res* located in a foreign country." *United States v. Certain Funds Contained in Account Numbers...Located at the Hong Kong and Shanghai Banking Corp.*, 96 F.3d 20, 22 (2d Cir. 1996).

[10] The servers were operated by Carpathia Hosting and located in Ashburn, Virginia, which is within the Eastern District of Virginia. *See* Superseding Indictment, ¶ 39.

communications to be sent from servers in Virginia indicating that infringing files had been removed. *See* Superseding Indictment, ¶ 73. Therefore, the court finds that alleged acts in furtherance of the conspiracy to commit copyright infringement occurred within this judicial district. The alleged acts in furtherance of the conspiracy constitute acts giving rise to the forfeiture claim. Accordingly, there are minimum contacts between this jurisdiction and the defendant assets,[11] and this court has *in rem* jurisdiction over the assets listed in Attachment A pursuant to § 1355(b).

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[11] The claimants argue that there are insufficient minimum contacts between the assets and this forum. Ordinarily, the Due Process Clause requires that there be sufficient minimum contacts between a defendant (here, the assets) and the forum in order for a federal court to exercise jurisdiction. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 224 (4th Cir. 2002) (citing *Intl Shoe Co. v. Washington*, 326 U.S. 310, 316, (1945)). Section 1355(b)(2) only allows a forfeiture action concerning property located in a foreign country to be brought in a district court where any of the acts giving rise to the forfeiture occurred. Thus, § 1355's requirement that some act giving rise to the forfeiture must occur within the judicial district exercising jurisdiction serves much the same function as the minimum contacts test. The claimants also argue that the court should require a heightened level of contacts because the suit involves foreign corporations. *See* Opp. at 8. However, none of the corporations are *defendants* in this civil *in rem* action. Rather, the court is exercising *in rem* jurisdiction over the assets listed in Attachment A.

IV. THE FUGITIVE DISENTITLEMENT DOCTRINE

A. Statutory Prerequisites of § 2466

The fugitive disentitlement doctrine developed under the common law as a method to dismiss direct appeals from criminal defendants who were fugitives at the time of their appeal. *See, e.g.*, *United States v. Al-Kurdi*, 332 F. App'x 151, 152 (4th Cir. 2009) (invoking common law fugitive disentitlement doctrine to dismiss appeal of criminal defendant who was a fugitive during the pendency of his appeal). *See also Collazos v. United States*, 368 F.3d 190, 197 (2d. Cir. 2004) (discussing cases invoking the common law fugitive disentitlement doctrine). In *Degen v. United States*, 517 U.S. 820 (1996), the Supreme Court declined to extend the common law doctrine to allow courts to disentitle fugitive claimants in civil forfeiture actions.

In 2000, Congress comprehensively overhauled the civil asset forfeiture laws and specifically granted federal courts the authority to order disentitlement in civil forfeiture cases in the Civil Asset Forfeiture Reform Act ("CAFRA"). *See* 28 U.S.C. § 2466. That statute was designed to prevent the unseemly "spectacle" recognized in *Degen* of a "criminal defendant who, facing both incarceration and forfeiture for his misdeeds, attempts to invoke from a safe distance only so much of a United States court's jurisdiction as might secure him the return of alleged criminal proceeds while carefully shielding himself from the possibility of a penal sanction." *United States v. Technodyne*, 753 F.3d 368, 377 (2d Cir. 2014) (quoting *Collazos*, 368 F.3d at 200).

Section 2466 provides:

> (a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person—
>
> > (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution—
> >
> > > (A) purposely leaves the jurisdiction of the United States;
> >
> > > (B) declines to enter or reenter the United States to submit to its jurisdiction; or
> >
> > > (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and
> >
> > (2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.
>
> (b) Subsection (a) may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom subsection (a) applies.

At common law, courts generally did not consider as "fugitives" persons who had never previously entered the United States. *See Collazos*, 368 F.3d at

198-201. Subpart A obviously applies to traditional common law fugitives, persons who allegedly committed crimes while in the United States and who, upon learning that their arrest was sought, purposely fled the country. § 2466(a)(1)(A). Similarly, the "reenter" provision of subpart B extends disentitlement authority over another class of persons traditionally recognized as fugitives, persons who allegedly committed crimes while in the United States, but who were outside the country when they learned that their arrests were sought and who then refused to return to the United States in order to avoid prosecution. § 2466(a)(1)(B). However, subpart B also applies to persons who decline to "enter" the United States. *Id.* The plain meaning of this language is that a person who has never entered the United States but who declines to enter in order to avoid criminal prosecution may be a fugitive pursuant to § 2466. *See Collazos*, 368 F.3d at 198-201; *United States v. $6,100,000 on Deposit*, No. 07-cv-4430, 2009 WL 1809992, *4 (S.D.N.Y. 2009) (disentitling a claimant who had never been to the United States pursuant to § 2466).

Further, subpart C applies to persons who "otherwise evade[]" the jurisdiction of a United States court in which a criminal case is pending against them. 28 U.S.C. § 2466(a)(1)(C). "Evasion is an expansive concept" not limited to the deliberate flight referenced in § 2466(a)(1)(A) or the refusal to enter or reenter identified in § 2466(a)(1)(B). *Collazos*, 368 F.3d at 200 (internal quotation marks omitted). "Nothing in subpart (C) indicates that a person must have been within the jurisdiction of the

court at the time the crime was committed in order thereafter to evade jurisdiction." *Id.*

Claimants argue that the government cannot raise the fugitive disentitlement doctrine on a motion to strike. Numerous courts, however, have granted motions to strike the claims of a person determined to be a fugitive.[12] The Court is persuaded by their reasoning and finds that fugitive disentitlement can be ordered where the government has moved to strike the claim of an alleged fugitive. *See United States v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 38 (D.D.C. 2007) (holding that a motion pursuant to § 2466 is "properly treated as one to dismiss the

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[12] *See, e.g., United States v. Assorted Money Orders Totaling $138,400*, No. 07-13330, 2010 WL 1438901, *2 (E.D. Mich. Apr. 9, 2010) (granting government's motion to strike claim pursuant to fugitive disentitlement doctrine); *United States v. Vehicle 1995 Great Dane*, No. 98-40285, 2010 WL 1417841, *2 (E.D. Mich. Apr. 5, 2010) (granting government's motion to strike claim pursuant to fugitive disentitlement doctrine); *United States v. $1,474,770 in U.S. Currency*, 538 F. Supp. 2d 1298, 1302 (S.D. Cal. 2008) (granting government's motion to strike claim pursuant to fugitive disentitlement doctrine); *United States v. $1,278,795*, No. Civ-L-03-87, 2006 WL 870364, *2 (S.D. Tex. Mar. 30, 2006) (treating motion to strike claim pursuant to fugitive disentitlement doctrine as motion to dismiss and dismissing the fugitive's claim, as well as granting summary judgment on the merits); *United States v. One 1988 Chevrolet Cheyenne Half-Ton Pickup Truck*, 357 F. Supp. 2d 1321, 1333 (S.D. Ala. 2005) (granting government's motion to strike claim pursuant to fugitive disentitlement doctrine); *United States v. $1,231,349.68 in Funds*, 227 F. Supp. 2d 130, 133 (D.D.C. 2002) (granting government's motion to strike claim pursuant to fugitive disentitlement doctrine).

claim, on which the Court may consider matters outside the pleadings").[13]

B. Intent

The Fourth Circuit has not yet considered fugitive disentitlement pursuant to § 2466. Circuits that have weighed in have held that the statute's plain language identifies five prerequisites that must be met before a court may exercise its discretion to disentitle a claimant:

> (1) a warrant or similar process must have been issued in a criminal case for the claimant's apprehension; (2) the claimant must have had notice or knowledge of the warrant; (3) the criminal case must be related to the forfeiture action; (4) the claimant must not be confined or otherwise held in custody in another jurisdiction; and (5) the claimant must have deliberately avoided prosecution by (A) purposefully

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[13] The claimants argue that discovery is required on two issues, the possibility of government overreach and the issue of the claimants' intent. The court disagrees. The allegations of government overreach are insufficient to warrant discovery. The court also finds that it is able to make a decision regarding the claimants' intent based on the record before it. Moreover, it is unclear how discovery could help the claimants present evidence of their own intent. *See United Slates v. $671,160 in U.S. Currency*, 730 F.3d 1051, 1059 (9th Cir. 2013) ("[Claimant's] reasons for remaining in Canada lie exclusively in [his] mind and cannot be uncovered by requesting information from third parties").

> leaving the United States, (B) declining to enter or reenter the United States, or (C) otherwise evading the jurisdiction of a court in the United States in which a criminal case is pending against the claimant.

Collazos, 368 F.3d at 198. *See also Technodyne*, 753 F.3d at 378 (2d Cir. 2014); *United States v. $671,160 in U.S. Currency*, 730 F.3d 1051, 1055-1056 (9th Cir. 2013); *United States v. $6,976,934.65, Plus Interest*, 554 F.3d 123, 128 (D.C. Cir. 2009); *United States v. $6,190 in U.S. Currency*, 581 F.3d 881, 886 (9th Cir. 2009); *United States v. Salti*, 579 F.3d 656, 663 (6th Cir. 2009).

The parties primarily dispute the intent element, so the court will focus on that element first. Section 2466 does not specify the requisite showing of intent necessary to satisfy the fifth element of the test identified by the circuit courts. The statute provides that the alleged fugitive must have acted "in order to avoid criminal prosecution." § 2466(a)(1). Some courts have held that "[m]ere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute." *United States v. Bohn*, No. 02-20165, 2011 WL 4708799, *9 (W.D. Tenn. June 27, 2011) (finding insufficient evidence of intent where claimant was in Vanuatu long before he was charged and no other evidence showed that he remained there in order to avoid prosecution in the United States) (quoting *United States v. $6,976,934.65, Plus Interest*, 554

F.3d at 132);[14] *see also United States v. Salti*, 579 F.3d at 664. Other courts have emphasized that the intent of the alleged fugitive may be analyzed under the "totality of the circumstances." *Technodyne*, 753 F.3d at 378; *Collazos*, 368 F.3d at 201(finding that the totality of the circumstances indicated that the claimant made a conscious choice not to "enter or reenter the United States" to face criminal prosecution).

At least two circuits have explicitly held that a desire to avoid prosecution need not be the sole reason for the claimant's refusal to enter the United States. *See Technodyne*, 753 F.3d at 383-384 (2d Cir. 2014) (finding that the government was required to prove that the claimants remained outside of the United States with the "specific intent to avoid criminal prosecution," but refusing to "equate specific intent with sole, principal, or dominant intent"); *$671,160 in U.S. Currency*, 730 F.3d at 1056 n.2 (9th Cir. 2013) ("[Claimant's] desire to evade criminal prosecution need not be the sole motivating factor causing him to remain abroad, to the exclusion of all others"). Accordingly, the court finds that

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[14] The claimants argue that the D.C. Circuit's holding in *$6,976,934.65* requires the government to show that intent to avoid prosecution is the sole motivating factor behind a claimant's decision to remain outside of the United States. *See $6,976,934.65*, 554 F.3d at 132 (D.C. Cir. 2009) (finding that avoiding prosecution must be *"the* reason" the claimant refused to enter the United States) (emphasis in original). This court is persuaded by the decision of the Second Circuit in *Technodyne*, which rejected such an interpretation of the D.C. Circuit's opinion. *Technodyne*, 753 F.3d at 384.

while the government must show that the claimants possess a specific intent to avoid criminal prosecution, that intent need not be the sole reason the claimants declined to enter the United States.

None of the claimants dispute that they are aware of their indictments in this district. It is also beyond dispute that the criminal case is related to the forfeiture action. The assets sought in the civil forfeiture action are alleged to be proceeds of and property traceable to offenses charged in the superseding indictment. Further, the assets are subject to restraining orders issued by this court and registered in foreign courts in connection with the criminal action. None of the claimants are confined or otherwise held in custody in another jurisdiction. The claimants in this action dispute only the intent element. In short, they argue that the evidence before the court does not establish that they deliberately sought to avoid prosecution. For the reasons discussed below, the court finds that each claimant has deliberately declined to enter the United States in order to avoid criminal prosecution in this country.

Kim Dotcom[15]

Dotcom is a dual citizen of Germany and Finland, and he has never lived in or visited the United States. He is currently residing in New Zealand. Dotcom stated in his declaration that he learned of the indictment on January 20, 2012, when he was

[15] Kim Dotcom has been known by other names, including "Kim Schmitz" and "Kim Tim Jim Vestor." *See* Complaint, ¶ 7.

arrested in New Zealand pursuant to a request by United States authorities. *See* Decl. of Kim Dotcom, ¶ 3. The evidence before this court indicates that he has been released on bail since February, 2012. *See* Reserved Judgment of J. Dawson (granting bail to Dotcom). Dotcom has stated that he is not permitted to leave New Zealand, but it is apparent that he is only being held pursuant to the United States government's request for his extradition. *See* Dotcom's Response to Special Interrogatory No. 7. He cannot dispute that he is free at any time to submit to U.S. jurisdiction. *See 479 Tamarind Drive*, No. 98-cv-2279, 2005 WL 2649001 at *3 (S.D.N.Y. Oct. 14, 2005) (disentitling claimant who argued that he was bound by conditions of bond not to leave Canada where the evidence showed that he was arrested in Canada pursuant to an extradition request); *$1,231,349.68 in Funds*, 227 F. Supp. 2d at 130, 133 (D.D.C. 2002) (finding that claimant's arrest in Spain pursuant to extradition request was not custody or confinement for purposes of § 2466(a)(2)).

The record presents significant evidence that Dotcom has declined to enter the United States in order to avoid criminal prosecution. Dotcom stated that since his arrest, he has been "actively contesting the legal basis on which the United States has issued the indictment and [has] sought to enforce" his rights. *See* Decl. of Kim Dotcom, ¶ 5. On July 10, 2012, Dotcom sent a public message from his Twitter account stating, "Hey DOJ, we will go to the U.S. No need for extradition. We want bail, funds unfrozen for lawyers & living expenses." *See* Govt. Ex. B to Attach. 1. An article dated July 11, 2012 stated that Dotcom "said he would willingly go to the US [sic] if

he and his co-defendants were given a guarantee of a fair trial, money to pay for a defence [sic] and funds to support themselves and their families." *See* Govt. Ex. E to Attach. 1. In the article, Dotcom is quoted as saying that the government would not agree "because they can't win this case and they know that already." *Id.* (internal quotation marks omitted).

On June 5, 2014, Dotcom posted a Twitter message offering five million U.S. dollars to anyone with "anything to leak about the Megaupload case" that could result in his victory. *See* Govt. Ex. B to Attach. 1. Three days later, he posted a link to an article about his offer. Articles about Dotcom's offer reported that he was looking for information regarding unlawful or corrupt conduct by the United States government, the New Zealand government, spy agencies, law enforcement, and the motion picture industry in connection to his case. *See* Govt. Exhibits C, D to Attach. 1. Dotcom has not disputed that he has sought favorable conditions in connection with submitting to the jurisdiction of the United States. Indeed, in his response to the government's special interrogatories, Dotcom stated that his attorneys conveyed to the government that he would be willing to voluntarily come to the United States to stand trial, provided that the government agreed that he would be free on bail and have a portion of his seized assets released to fund living expenses and defense attorneys. *See* Dotcom's Response to Special Interrogatory No. 6. He indicated that it was his understanding that the government had rejected his offer. Thus, he has corroborated the evidence presented by the government.

Dotcom's response to the government's argument that he is deliberately avoiding prosecution is that he has never been to the United States. He asserts that he remains in New Zealand because that has been his place of residence since before he learned of the indictment, his family owns a home in that country and rents a neighboring home, and he intends to continue to live and work there. *See* Decl. of Kim Dotcom, ¶ 10. His work in New Zealand includes Internet entrepreneurship and founding a political party.

As demonstrated, Dotcom need not have previously visited the United States in order to meet the prerequisites of § 2466. The statute is satisfied where the government shows that the claimant is on notice of the criminal charges against him and refuses to "enter or reenter" the country with the intent to avoid criminal prosecution. Because the court assesses intent under the totality of the circumstances, it is certainly relevant that Dotcom has never been to the United States and that he has lived in New Zealand since 2011, where he resides with his family. This tends to show that he has other reasons for remaining in New Zealand besides avoiding criminal prosecution. However, the existence of other motivations does not preclude a finding that he also has a specific intent to avoid criminal prosecution. Dotcom's statements, made publicly and conveyed by his attorneys to the government, indicate that he is only willing to face prosecution in this country on his own terms. *See Technodyne*, 753 F.3d at 386 (2d Cir. 2014) ("The district court was easily entitled to view those [requests for bail], evincing the [claimants'] desire to

face prosecution only on their own terms, as a hallmark indicator that at least one reason the [claimants] declined to return in the absence of an opportunity for bail was to avoid prosecution"). Dotcom has indicated through his statements that he wishes to defend against the government's criminal charges and litigate his rights in the forfeiture action. If it is truly his intent to do so, then he may submit to the jurisdiction of the United States. *See 1,231,349.68 in Funds*, 227 F. Supp. 2d at 133 (stating that if the claimant truly intended to fight the charges as he stated, then he had a clear option to return to the United States).

The Corporate Claimants

Subsection b of § 2466 provides that a corporate claimant may be disentitled "if any majority shareholder, or individual filing the claim on behalf of the corporation is a person" for whom the statutory prerequisites are met. 28 U.S.C. § 2466(b). Kim Dotcom is the individual who filed the claims on behalf of Megaupload Limited, Megamedia Limited, Megapay Limited, Megastuff Limited, and Vestor Limited. *See* Verified Claim of Kim Dotcom on Behalf of the Corporate Claimants. There is also evidence that Dotcom is a majority shareholder of the corporate claimants. Because the statutory prerequisites have been satisfied with respect to Dotcom, the corporate claimants are also subject to disentitlement pursuant to § 2466(b).

Finn Batato and Mathias Ortmann

Finn Batato and Mathias Ortmann stated in their declarations that they learned of the indictments

against them when they were arrested on January 20, 2012 at Kim Dotcom's home. *See* Decl. of Finn Batato at ¶ 3; Decl. of Mathias Ortmann, ¶ 3. Batato and Ortmann remain in New Zealand subject to conditions of bail related to ongoing extradition proceedings. Both Batato and Ortmann are citizens of Germany. Neither has been a permanent resident of the United States. Batato stated in his declaration that since learning of the indictment, he has "been actively contesting the legal basis on which the United States has issued the indictment and [has] sought to enforce [his] legal rights." *See* Decl. of Finn Batato, ¶ 5. Ortmann made the same statement in his declaration. *See* Decl. of Mathias Ortmann, ¶ 5. Batato and Ortmann have each indicated that they plan to continue to live and work in New Zealand, where they are opposing extradition.[16] Their statements indicate that they wish to avoid prosecution in the United States by remaining in New Zealand. Batato and Ortmann are thus attempting to avoid criminal prosecution in the United States, while at the same time asserting their rights to litigate the criminal and civil forfeiture actions. It is apparent from the totality of the circumstances that Batato and Ortmann are refusing to enter the United States in order to avoid criminal prosecution.

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[16] Claimants argue that opposition to extradition is relevant only to the issue of whether a claimant is on notice of the criminal charges. The court disagrees, as intent is analyzed under the totality of the circumstances.

Bram van der Kolk

Bram van der Kolk stated in his declaration that he became aware of the indictment when he was arrested at his home on January 20, 2012.[17] *See* Decl. of Bram van der Kolk, ¶ 3. Since learning of the indictment, he has "been actively contesting the legal basis on which the United States has issued the indictment and [has] sought to enforce [his] legal rights." *Id.* at ¶ 5. He is a citizen of the Netherlands, and he stated that he has never resided in the United States. He has previously visited the United States for about five days in October 2009. *Id.* at ¶ 8. Van der Kolk is obviously opposing extradition, and he has admitted that he intends to remain in New Zealand while he contests the government's criminal action and civil actions. Like Batato and Ortmann, he is thus avoiding criminal prosecution in the United States while attempting to litigate the civil forfeiture action. It is apparent from the totality of the circumstances that van der Kolk is refusing to enter the United States in order to avoid criminal prosecution.

Sven Echternach

Sven Echternach is a citizen and resident of Germany. He has remained in Germany since late January 2012. Echternach has never been a permanent resident of the United States. On or about January 22, 2012, German authorities notified

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[17] Dotcom, Batato, and Ortmann were arrested at Dotcom's residence. Van der Kolk was arrested separately in New Zealand.

the United States government that Echternach had arrived in Germany from Manila, Philippines via the Frankfurt airport. *See* Declaration of FBI Special Agent Rodney J. Hays, ¶ 28. The United States government submitted a request to interview Echternach in Germany about his involvement in activities relating to the Megaupload business.[18] Echternach indicated that he would exercise his right not to give evidence if summoned for an interview.

On March 16, 2012, Echternach stated in a conversation with a third party that he hoped to talk to a lawyer soon in order to understand his defense strategy. *Id.* at ¶ 29. On May 17, 2013, Echternach stated that he was still not traveling, but he hoped that he would be able to travel again in a few months. According to the government, he has expressed hope in other conversations that the charges in the United States would be dismissed pursuant to motions of his counsel. *Id.*

Echternach has also stated that his counsel in Germany advised him that he must remain in that country to participate in the investigations occurring there. *See* Decl. of Echternach, ¶ 6. His Germany-licensed attorney, Klaus G. Walter, submitted an affidavit stating that he believed it was "more than likely that, should Mr. Echternach travel to the United States at the moment, he would be arrested and not be allowed to leave the United States and

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[18] Germany generally does not extradite its citizens to the United States.

return to Germany in a timely manner." *See* Decl. of Klaus G. Walter, ¶ 5. Walter stated that Echternach is under investigation for three different proceedings, two of which result directly from requests of United States authorities and one of which results "indirectly" from the U.S. investigations. *Id.* at 113-4. However, Echternach's own declaration stated only that he is "subject to criminal investigations in Germany based on the same allegations that have been made by the United States government in the criminal case and this civil forfeiture *case." See* Decl. of Sven Echternach, 116. He stated further that he has been advised not to travel to the United States so that he will be available to participate in the "proceedings in Germany that were instituted at the request of the United States government." *Id.* Walter opined that if Echternach were unavailable to participate in the German investigative proceedings, his absence could lead to "additional disadvantages" and could "even result in a German arrest warrant." *See* Decl. of Klaus G. Walter, ¶ 8. Alternatively, Echternach could apparently face a default judgment in the German proceedings.

These allegations fall short of supporting an argument that Echternach is in custody or confinement in Germany. In *United States v. All Funds on Deposit at…Account No. 600-00338*, 617 F. Supp. 2d 103, 124-125 (E.D.N.Y. 2007), the court held that the claimant was not in custody such that he could not return to the United States to face the criminal charges against him, where he was free on bond in Namibia pending resolution of an extradition proceeding. Similarly, in *$1,231,349.68 in Funds*,

227 F. Supp. 2d at 133 (D.D.C. 2002), the court held that the claimant's arrest in Spain did not constitute custody where he was arrested for conduct that related "specifically to the alleged criminal conduct for which he was indicted" in the United States. *See also Collazos*, 368 F.3d at 201 (holding that "nothing in the record indicate[d] that Ms. Collazos was ever confined, incarcerated, or otherwise unable to travel to the United States of her own volition in the months before the district court ordered disentitlement"). Although Echternach is not subject to extradition, the investigations occurring in Germany are evidently related to requests made by the United States government. Echternach is not incarcerated in Germany or subject to any court-ordered travel restrictions, nor is there any evidence other than Walter's opinion that he may not leave the country.

Echternach has emphasized that by remaining in Germany, he is choosing to live in his home country. That the claimant returned to his country of citizenship from the Philippines does not preclude a finding of disentitlement. *See United States v. $671,160 in U.S. Currency*, 730 F.3d 1051, 1056 (9th Cir. 2013) (affirming disentitlement of a claimant who returned to his home country). Echternach's reliance on his lawyer's advice evinces his intent to avoid prosecution in this country. Walter has all but admitted that his advice is predicated on his desire, as a criminal defense attorney, to keep his client from traveling to a country where he will be arrested. Echternach and Walter have thus conceded that at least one of Echternach's reasons for refusing to enter the United States is a desire to

avoid criminal prosecution here in favor of participating in the investigations occurring in Germany. Echternach's statements in 2013 regarding his hope that he would be able to travel again in a few months further support the conclusion that he has remained in Germany in order to avoid extradition to the United States. Under these circumstances, the court finds that Echternach is declining to enter the United States in order avoid criminal prosecution.

Julius Bencko

Julius Bencko is a citizen and resident of Slovakia.[19] He has never been a citizen or permanent resident of the United States. In his declaration, Bencko stated that after learning of his indictment while traveling in Portugal, he "returned to the Slovak Republic, where [he has] remained." *See* Decl. of Julius Bencko, ¶ 4. In January of 2012, Bencko was traveling through Spain and/or Portugal with a Portuguese national identified in the record as J.G. J.G. told Portuguese authorities that he drove Bencko across Europe and dropped him off at a train station in Bratislava, Slovakia. *See* Declaration of FBI Special Agent Rodney J. Hays, ¶ 20. J.G. stated that Bencko's intent was to take the train from Bratislava to the Slovakian town where he was born. *Id.*

There is no evidence that Bencko was subject to custody or confinement in Slovakia or otherwise

[19] Slovakia generally does not extradite its citizens to the United States.

unable to leave that country. In a March 2, 2012 conversation, Bencko told a third party that he was "stuck here in this post commie state…the sooner the USA will do some steps the soner [sic] they will let me go." *Id.* at ¶ 23. The most likely meaning to be inferred from his statement that he was "stuck" in Slovakia is that he was unable to travel without risking extradition to the United States.

On or about March 28, 2012, he told a third party that he would be able to come to Bratislava if needed, but that he would rather not travel. *Id.* at ¶ 25. In the same conversation, he indicated that he was facing a 55-year sentence in America. On or about April 5, 2012, Bencko told a third party that he could get his brother and another individual to pick the third party up from Vienna, but he "cannot (better not) cross the border" himself. *Id.* at ¶ 26. The third party responded that he or she did not want Bencko to "cross border and risk [sic]," and Bencko replied that he would not. *Id.* Viewing the totality of the circumstances, it appears that Bencko is deliberately refusing to travel outside of Slovakia in order to avoid the risk of extradition to the United States. He is thus declining to enter the United States in order to avoid criminal prosecution, while simultaneously attempting to assert a civil claim in the forfeiture action.

V. DISCRETIONARY ANALYSIS

Although the statutory prerequisites of 28 U.S.C. § 2466 have been met for each of the claimants, the court should also consider whether there are reasons

not to exercise its discretion to disentitle a fugitive.[20] Section 2466 does not enumerate any factors for courts to consider in analyzing whether to exercise their discretion. Courts that have engaged in a discretionary analysis have generally found that disentitlement should be applied. *See, e.g.*, *United States v. $6,100,000 on Deposit*, No. 07-cv-4430, 2009 WL 1809992, *5 (S.D.N.Y. June 24, 2009) (finding that appellate proceedings of claimant's co-defendant and the fact that the claimant's ex-wife had also filed a claim to the restrained assets did not weigh against application of fugitive disentitlement); *United States v. $1,474,770 in U.S. Currency*, 538 F. Supp. 2d 1298, 1302 (S.D. Cal. 2008); *United States v. All Funds on Deposit at…Account No. 600-00338*, 617 F. Supp. 2d 103, 125-128 (E.D.N.Y. 2007); *United States v. One 1988 Chevrolet Cheyenne Half-Ton Pickup Truck*, 357 F. Supp. 2d 1321, 1328-1333 (S.D. Ala. 2005).

The instant case presents facts of first impression. The government seeks the disentitlement of five corporate claimants and six individuals. Further, all of the assets identified in the forfeiture complaint are located in New Zealand and Hong Kong.[21] The government has argued that it will suffer significant prejudice if the claimants are

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[20] Section 2466 provides that a "judicial officer *may* disallow a person from using the resources of the courts of the United States." 28 U.S.C. § 2466 (emphasis added).

[21] The government indicated during oral argument that there are assets located in other countries as well, but those assets are not the subject of this litigation.

not disentitled, due to dissipation of the assets occurring in these countries. In New Zealand, Dotcom and van der Kolk have been able to successfully apply for release of funds from the restrained assets for living expenses and attorneys fees. The government represents that millions of dollars have been dissipated in Hong Kong and New Zealand pursuant to court orders in both countries. The court understands the government's concern, however, the assets at issue are located within the jurisdiction and control of courts in New Zealand and Hong Kong, and release of the assets has occurred pursuant to the legal processes of those nations.

Treaties

The claimants argue that application of § 2466 would violate the Supremacy Clause of the United States Constitution, due to the existence of treaties that were enacted after § 2466.[22] The two treaties

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[22] The claimants also raise a number of other constitutional arguments, asserting that disentitlement would violate their Seventh Amendment right to jury trial, the Eighth Amendment ban on excessive fines, and the Due Process Clause. The court rejects all of these arguments. The claimants are welcome to exercise the right to a trial in the civil forfeiture action, but they must submit to United States jurisdiction in order to do so. The court similarly rejects the argument that disentitlement and a subsequent order of forfeiture would violate the Eighth Amendment. *See United States v. All Funds on Deposit at...Account No. 600-00338*, 617 F. Supp. 2d at 130 (E.D.N.Y. 2007) (holding that fugitive claimant "waived his rights to press his Excessive Fines claim" "by failing to appear to face the criminal charges against him"). Finally, due process is not violated by imposition of the fugitive disentitlement doctrine. *See Collazos*, 368 F.3d at 205 ("In sum,

they point to are the United Nations Convention Against Transnational Organized Crime ("UNCTOC"), a multi-nation treaty to which the United States and New Zealand are parties; and the Mutual Legal Assistance Treaty ("MLAT") between the United States and Germany.

> UNCTOC Article 16, ¶ 13 provides that:
>
> > Any person regarding whom [extradition] proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.
>
> United Nations Convention Against Transnational Organized Crime, art. 16, ¶ 13, Dec. 12, 2000, 2255 U.N.T.S. 209.

According to the claimants, this provision means that the claimants currently residing in New Zealand (Dotcom, Batato, Ortmann, and van der Kolk) are entitled to take advantage of New Zealand

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because statutory disentitlement is itself preceded by notice and hearing [sic], and because such disentitlement does not impose a punishment but rather creates an adverse presumption that a claimant can defeat by entering an appearance in a related criminal case, we hold that 28 U.S.C. § 2466 does not violate due process by depriving a forfeiture claimant of property without a hearing").

laws that guarantee a domestic right to challenge property seizures. As support for this domestic property right, the claimants point to a law review article discussing litigation in the New Zealand courts regarding the legality of the search of Dotcom's home and the disclosure of evidence in the extradition proceedings.

The claimants may be entitled to litigate in New Zealand while they remain in that country, but nothing in this provision states that disentitlement cannot be ordered separately against a claimant who evades the jurisdiction of the United States. That the exercise of their rights in New Zealand may cause disadvantages for the claimants with respect to litigation occurring in America does not mean that they are being treated unfairly or that they are denied their enjoyment of rights in New Zealand. The court cannot conclude on the record before it that application of § 2466 would be unconstitutional. The court does not find a conflict between the statute and the treaty, and the Supremacy Clause is therefore not offended. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that when a treaty and a statute "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either").

Echternach argues that the Mutual Legal Assistance Treaty ("MLAT") between the United States and Germany trumps the disentitlement statute and therefore he cannot constitutionally be disentitled. Specifically, he references Article 4, ¶ 4 of the MLAT, which provides that:

> A person who is not a national or resident of the [country requesting extradition] and who does not answer a summons to appear in the [country requesting extradition] served pursuant to a request shall not by reason thereof be liable to any penalty or be subjected to any coercive measures.

Mutual Legal Assistance Treaty, art. 4, ¶ 4, U.S.-Ger., Oct. 13, 2003, T.I.A.S. 09-1018.

The court entertains serious doubts that this treaty bars application of the fugitive disentitlement statute against all individuals who are not nationals or residents of the United States and who maintain fugitive status in Germany. Moreover, fugitive disentitlement is not necessarily a penalty or coercive measure. In analyzing whether § 2466 violates due process, the *Collazos* court found that disentitlement pursuant to § 2466 is not a punitive deprivation of the right to be heard. Instead, the statute:

> establishes a presumption that a person who refuses to produce himself in connection with criminal charges relating to the civil forfeiture has no meritorious defense against the latter action. Because a person can defeat that presumption by appearing in the criminal case, a deliberate choice not to do so constitutes a knowing waiver of the hearing otherwise available by law.

Collazos v. United States, 368 F.3d at 205-206.

Following the reasoning of *Collazos*, the court finds that disentitlement is not a penalty or coercive measure such that it would conflict with the MLAT in the event the treaty is applicable to the present action.

Judicial Oversight of the Assets

The claimants urge the court to consider in its discretionary analysis the fact that New Zealand courts continue to litigate important issues related to forfeiture of the assets. The court certainly considers as relevant the significant oversight by the New Zealand courts over the assets located in that country. Although the restraining order related to the criminal charges will expire in April, the parties indicated during oral argument that there are multiple civil actions being litigated in New Zealand against the claimants by various members of the motion picture industry. It is the court's understanding that the New Zealand assets restrained in connection with the criminal action will remain under restraints pursuant to orders issued in those civil actions. It appears therefore that the assets held in New Zealand are subject to significant oversight by the New Zealand courts due to the civil litigation occurring there.

This court accords great respect to courts in New Zealand and Hong Kong and does not wish to interfere with litigation occurring in either country. Importantly, the court does not believe that an order of disentitlement will unduly interfere with the litigation in New Zealand. After the claimants are disentitled, the government may seek a default judgment in this action. If this court grants a

default judgment and orders forfeiture, that would not be the end of the matter. Because the assets are located in New Zealand, the government would have to present that order to the New Zealand courts, which may or may not choose to register an order of forfeiture issued by this court. The New Zealand Criminal Proceeds (Recovery) Act of 2009 ("CPRA") provides the procedure for registration of foreign forfeiture orders in New Zealand. Section 148 of that Act provides that:

> A person who claims an interest in property sought to be forfeited under a foreign forfeiture order registered in New Zealand may, before the date that is 6 months from the date on which the foreign forfeiture order is registered, apply to the High Court for an order if the person is a person to whom section 143(2)(a), (b), or (c) applies.

CPRA 2009 (NZ).

Section 143(2) provides that Section 148 is applicable if a person:

> (a)in a case where the foreign forfeiture order was made without a hearing in a court in the foreign country where it was made, was given no opportunity to make representations to the person or body that made the foreign forfeiture order;
>
> (b)in a case where the foreign forfeiture order was made at a hearing of a court in the foreign country where it was

> made, was not served with any notice of, and did not appear at, the hearing held in the court;
>
> (c)in any other case, obtains the leave of the court to make the application.

CPRA 2009 (NZ).

If this court after disentitling the claimants were to ultimately order a default judgment of forfeiture, the New Zealand courts may continue to litigate the issue of whether the assets will be forfeited. Thus, this court believes that disentitlement of the claimants in the United States will not unduly interfere with litigation occurring in New Zealand.

There is some evidence that the Hong Kong courts are also adjudicating issues concerning the restraint of the assets, primarily bank accounts located in Hong Kong. However, there is no evidence before this court that civil actions have been filed in Hong Kong against the claimants such that the Hong Kong courts are exercising jurisdiction over the assets to a comparable extent to the New Zealand courts. On this record, the court cannot conclude that disentitlement of the claimants would interfere with litigation occurring in Hong Kong.

VI. CONCLUSION

For the foregoing reasons, the court hereby ORDERS that the government's motion to strike (Dkt. No. 39) is GRANTED and all claimants are disentitled from litigating the civil forfeiture complaint pursuant to 28 U.S.C. § 2466. Accordingly, the court hereby strikes and dismisses

the claims of Finn Batato; Julius Bencko; Kim Dotcom; Sven Echternach; Bram van der Kolk; Mathias Ortmann; and Megaupload Limited, Megapay Limited, Megamedia Limited, Megastuff Limited, and Vestor Limited. (Dkt. Nos. 3-9). Because the court has disentitled the claimants, the court also strikes and denies their motion to dismiss the forfeiture complaint or in the alternative stay the forfeiture action. (Dkt. No. 19).[23]

Date: February *27*, 2015
Alexandria, Virginia

/s/ *Log*
Liam O'Grady
United States District Judge

[23] The motion to dismiss and/or stay the forfeiture action is not dismissed with respect to Mona Dotcom, a claimant who is also a party to that motion. The court has not yet ruled on the government's motion to strike Mona Dotcom's claim. (Dkt. No. 60).

APPENDIX I

FILED: November 9, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1360
(1:14-cv-00969-LO-MSN)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

FINN BATATO; BRAM VAN DER KOLK; JULIUS BENCKO; MATHIAS ORTMANN; SVEN ECHTERNACH; KIM DOTCOM; MEGAUPLOAD LIMITED; MEGAPAY LIMITED; VESTOR LIMTED; MEGAMEDIA LIMTED; MEGASTUFF LIMITED; MONA DOTCOM

Claimants - Appellants

and

ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO, in Rem

Defendant

CATO INSTITUTE; INSTITUTE FOR JUSTICE; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Amici Supporting Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Duncan, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. III § 2

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

28 U.S.C § 1355 – Fine, penalty or forfeiture

(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

(b)(1) A forfeiture action or proceeding may be brought in—

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.

(c) In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary

to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond.

(d) Any court with jurisdiction over a forfeiture action pursuant to subsection (b) may issue and cause to be served in any other district such process as may be required to bring before the court the property that is the subject of the forfeiture action.

28 U.S.C § 2466 – Fugitive disentitlement

(a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person—

(1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution—

(A) purposely leaves the jurisdiction of the United States;

(B) declines to enter or reenter the United States to submit to its jurisdiction; or

(C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and

(2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.

(b) Subsection (a) may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom subsection (a) applies.