[**DRAFT**]

GOVERNMENT'S OPPOSITION TO DEFENDANT AMOR'S MOTION FOR THE RELEASE OF FUNDS

The United States of America, by its counsel, opposes Defendant Alejandro Amor's Motion for the Release of Funds. In support of its opposition, the Government says the following.

BACKGROUND

On March 3, 2016, the Government filed a motion for a money judgment equal to the proceeds of the Defendant's offense, and for the forfeiture of substitute assets needed to satisfy the judgment. (Doc. 460).[1]

The motion asserted that the proceeds of the offense were equal to the loss to the Department of Education, which amount was estimated to be $4.6 million. Motion at 8. Finally, the motion included a proposed Order of Forfeiture. (Doc. 460-1).

On April 15, 2016, the Government filed a Supplemental Brief in support of its forfeiture motion (Doc. 475) to address issues raised by the Defendant in his sentencing memorandum (Doc. 474).

In its Supplemental Brief, the Government argued that it is entitled to the gross receipts of the Defendant's fraud, not just his net profits, Supp. Br. at 3-6, and that he is liable for the forfeiture of *all* proceeds of the offense that were

[1] The motion was based on 18 U.S.C. § 981(a)(1)(C) (authorizing the forfeiture of fraud), 28 U.S.C. § 2461(c) (making the criminal forfeiture procedures in 21 U.S.C. § 853 applicable), 21 U.S.C. § 853(p) (authorizing the forfeiture of substitute assets), and Rule 32.2(b), F.R.Crim.P. (setting forth the procedure for entering a forfeiture order in a criminal case).

obtained by co-conspirators or others who acted in concert with him, including the corporation that he controlled, and not just the proceeds that the Defendant obtained personally, Supp. Br. at 6-7.

Finally, the Supplemental Brief argued that any property of the Defendant is subject to mandatory forfeiture as a substitute asset. Supp. Br. at 7-8.

Defendant did not respond directly either to the Government's forfeiture Motion or to its Supplemental Brief, but he did respond indirectly by filing a Motion for Release of Funds. (Doc. 480). In that motion, he argued: 1) that his forfeiture liability is limited to the fraction of the proceeds that he personally received and does not include proceeds received by Fast Train II, the corporation that the Defendant and others controlled; 2) that any funds that exceed the amount of his personal liability that the Government is now holding for forfeiture as substitute assets must be released; and 3) that even if all of the property currently in the Government's possession or under its control were subject to forfeiture as substitute assets, the Supreme Court's decision in *Luis v. United States* requires that it be released to pay the expenses of his appeal.

For the following reasons, none of the Defendant's arguments for the release of the funds is well-taken.

DISCUSSION

A. The Defendant is Liable for the Forfeiture of All of the Proceeds of His Offense

1. **A defendant is jointly and severally liable to forfeit proceeds obtained by third parties with whom he acted in concert.**

Defendants who are convicted of a criminal offense are jointly and severally liable to forfeit *all proceeds* of that offense, including proceeds obtained by co-conspirators or others with whom the defendant acted in concert. *United States v. Black*, 526 F. Supp.2d 870, 878 (N.D. Ill. 2007) ("As a general rule, co-venturers in a criminal scheme—whether labeled as co-schemers, co-conspirators, or aiders and abettors—are jointly and severally liable for all proceeds generated under a fraud scheme"). Thus, contrary to the Defendant's view, criminal forfeiture is *not* limited to the value of the proceeds that the defendant may have personally obtained. As the court held in *Black,* "those involved in any sort of concerted action are together liable for its effect," and thus are liable for the forfeiture of all its proceeds. 526 F. Supp.2d at 878.

Many of the joint and several liability cases are conspiracy cases in which forfeiture liability has been imposed on the ground that each member of a conspiracy is liable for the acts of the others. *See United States v. Caporale,* 806 F.2d 1487, 1506 (11th Cir.1986) ("imposition of joint and several liability in a forfeiture order upon RICO co-conspirators is not only permissible but necessary in these circumstances to effectuate the purpose of the forfeiture provision"); *United States v. Nagin,* 810 F.3d 348 (5th Cir. 2016) ("As a general matter, co-conspirators subject to criminal forfeiture are held jointly and severally

liable for the full amount of the proceeds of the conspiracy"); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (all co-conspirators are jointly and severally liable for the amount of the forfeiture regardless of how much or how little they benefitted from the conspiracy); *United States v. Candelaria-Silva*, 166 F.3d 19, 44 (1st Cir. 1999) (even minor participants in drug conspiracy are jointly and severally liable for forfeiture of the full amount of the proceeds). *Cf. United States v. Browne*, 505 F.3d 1229, 1279 (11th Cir. 2007) (following *Caporale* and holding that RICO defendants are liable for the full amount of proceeds even if the amount obtained by one was not foreseeable to the other).

In other cases, however, defendants have been found liable to forfeit the proceeds obtained by all persons who acted in concert with them, whether they were convicted as co-conspirators or not. Thus, in *Black* the court held that the defendants were jointly and severally liable because they jointly participated in a scheme to defraud. *See also United States v. Reiner*, 397 F. Supp. 2d 101, 108, 110 (D. Me. 2005) ("principles of vicarious liability for forfeiture by co-conspirators extend equally to an aider and abettor"; person who did not receive prostitution proceeds is liable for forfeiture under § 2253 for the amount received by a third party), aff'd, 500 F.3d 10 (1st Cir. 2007).

Indeed, even the conspiracy cases have emphasized that it is the joint action of the defendants that justifies holding each defendant liable for the forfeiture of the proceeds of the offense, whether they were obtained by the defendant himself or by his co-actors. *See United States v. Olguin*, 643 F.3d

384, 398-99 (5th Cir. 2011) (the provision authorizing the forfeiture of funds obtained "directly or indirectly" is the statutory basis for joint and several liability, making each defendant liable for the proceeds obtained by his co-conspirators whether or not he obtained any of the funds himself); *United States v. Capoccia*, 402 Fed. Appx. 639, 640 (2d Cir. 2010) (the definition of proceeds in § 981(a)(2)(A), including property obtained "directly or indirectly," allows the forfeiture of all proceeds whether or not they ever came into the possession of the defendant, his assignees, or his co-conspirators); *United States v. George*, 2010 WL 1740814, *1 (E.D. Va. Apr. 26, 2010) (property obtained "directly or indirectly" includes property defendant obtained herself as well as property obtained by third parties acting in concert with her).

2. A defendant is also liable for proceeds obtained by a corporation that he dominated or controlled.

Finally, defendants have been found liable to forfeit proceeds that they caused to be paid to third parties over whom they exercised dominion or control. For example, in *United States v. Peters*, 732 F.3d 93, 102-04 (2nd Cir. 2013), the Second Circuit held that because the forfeiture statute makes a defendant liable for property obtained "directly or indirectly," he is liable for proceeds obtained by a corporation that he dominated or controlled, even if he did not obtain the money himself. In such a case, the court continued, it is not necessary for the Government to satisfy state law requirements regarding the piercing of the corporate veil. 732 F.3d at 103. Rather, the point is that if the defendant controls

or dominates the corporation and its assets, he has effectively obtained the money paid to the corporation for himself. 732 F.3d at 104.

Similarly, in *United States v. Perry,* 2014 WL 7499372 (E.D. Va. Dec. 22, 2014), the court held that it was not necessary to pierce the corporate veil to find the defendant personally liable for fraud proceeds paid to a corporation over which the defendant "exercised complete and unfettered dominance." 2014 WL 7499372 at *2. *See also United States v. Zai*, 932 F. Supp.2d 824, 829 (N.D. Ohio 2013) (proceeds of defendant's bank fraud were forfeitable even though they were paid to corporation in which defendant had an interest); *United States v. Huber*, 243 F. Supp. 2d 996, 1004 (D.N.D. 2003) (forfeiture verdict properly included proceeds that defendant did not receive personally because he directed them to a partnership that he controlled with his brother), aff'd, 404 F.3d 1047 (8th Cir. 2005).

3. The cases cited by the defendant are distinguishable.

The Eleventh Circuit's holding in *United States v. Rouhani,* 598 Fed Appx. 626 (11th Cir. 2015), is not to the contrary. In that case, the defendant, who was convicted of wire fraud, appealed from an order directing him to forfeit $28,640.09 in proceeds that were paid to a corporation but not to him personally. 598 Fed. Appx. at 633. The Court of Appeals reversed the forfeiture order, noting that unlike *Peters,* where the court awarded the forfeiture judgment "after a detailed factual analysis of the relationship between the defendant and the corporation" that received the fraud proceeds, the trial judge made no such

findings regarding Rouhani's relationship to the corporation. 598 Fed. Appx. at 633 n.1. In the instant case, like *Peters* but unlike *Rouhani*, the record is replete with evidence regarding the relationship between the Defendant and his corporation.

Moreover, the *Rouhani* court cited with approval the Sixth Circuit's decision in *United States v. McLaughlin,* 565 Fed. Appx. 470 (6th Cir. 2014). In that case, the panel held that while holding a defendant liable for money paid to a corporation would be appropriate if the corporation were a "joint actor," the defendant's *alter ego,* or a co-conspirator, imposing such liability in the absence of such factors would not. 565 Fed. Appx. at 475-77.

Finally, *Rouhani, McLaughlin* and the Defendant all cite the Second Circuit's decision in *United States v. Contorinis,* 692 F.3d 136 (2nd Cir 2012), which is the seminal case on this point. *Contorinis* held that while a defendant would be liable to forfeit proceeds "received by others who participated jointly in the crime," the defendant in that case was not liable to forfeit the proceeds of his fraud scheme that were paid to a corporate employer that was unaware of the fraud scheme and was not a joint actor in perpetrating the offense. 692 F.3d at 147. Indeed, the Second Circuit itself, in later cases, has distinguished *Contorinis* and limited it to situations where the third-party corporation was uninvolved in the crime. *See United States v. Jiau,* 624 Fed. Appx. 771, 773 (2nd Cir. 2015) (implicitly distinguishing *Contorinis* in holding defendant liable for gains

realized by persons with whom she acted in concert, as the *dicta* in *Contorinis* approved).

4. **The defendant is liable for the proceeds received by Fast Train because he acted in concert with the corporation and exercised dominion and control over it.**

The lesson to be learned from all of these cases is this: if the corporation receiving the proceeds of the defendant's fraud is *not* a co-conspirator, *not* a party that acted in concert with the defendant, *not* the defendant's *alter ego*, and *not* an entity that he dominated and controlled, then imposing joint and several liability on the defendant for the forfeiture of the proceeds received by the corporation would be inappropriate. But if the corporation *was* a co-conspirator, *did* act in concert with the defendant, or *was* an entity that he dominated or controlled, the defendant should be found liable for the forfeiture of all criminal proceeds received by the corporation as property obtained directly or indirectly by him.

Here, the evidence adduced at trial established that the defendant acted in concert with Fast Train to obtain millions of dollars in fraud proceeds from the U.S. Department of Education. This is not a case like *Contorinis* where the corporation that received the benefit of the defendant's fraud was an innocent bystander, uninvolved in the perpetration of the acts that gave rise to the victim's loss. To the contrary, **[Insert facts from the trial record illustrating Fast Train's key role in perpetrating the offense]**

Defendants are responsible for the consequences of the acts of those with whom they act in concert, and are required to forfeit the proceeds of those acts. *United States v. Black*, 526 F. Supp.2d at 878. If two people act jointly to defraud a victim, they are each liable to forfeit the proceeds of the fraud, regardless of which of them pockets the money when it arrives. It can make no difference that one of the joint actors is a corporation. Accordingly, because the Defendant acted in concert with Fast Train in defrauding the Department of Education, he is responsible for the forfeiture of all proceeds that he *and Fast Train* obtained as a result of the offense.

In addition, the Defendant, like the defendants in *Peters, Perry, Zai* and *Huber*, is liable for the forfeiture of the proceeds obtained by Fast Train because he dominated and controlled the corporation. As the Second Circuit held in *Peters,* if a defendant exercises such control over a corporation and its assets that he has effectively obtained the money paid to the corporation for himself, he is liable for its forfeiture without the court's having to determine, in terms of state law, that the corporation is the defendant's *alter ego*. 732 F.3d at 104.

That is the case here. The evidence adduced at trial showed that the defendant controlled the affairs of Fast Train. **[Insert facts from the trial illustrating the defendant's control of the corporation.]**

Thus, as the court held in *Peters*, any money that Fast Train received was money that the Defendant received as well, and he is responsible for its forfeiture.

5. There is no excess money to be released

Because the Defendant is liable to forfeit all of the proceeds of his offense, all of the property currently in the Government's custody or under its control will be needed to satisfy the forfeiture order as substitute assets. Therefore, contrary to the Defendant's argument, there are no excess funds that must be released.

B. The Supreme Court's Decision in *Luis v. United States* Does Not Apply to this Case

In the last two sentences of his motion, the Defendant suggests that the Supreme Court's decision in *Luis v. United States,* 578 U.S. ___, 136 S. Ct. 1083 (Mar. 30, 2016), compels the release of his property even if it is subject to forfeiture as substitute assets. For the following reasons, *Luis* is inapplicable to this case and does not support the Defendant's motion.

In *Luis v. United States,* the Government obtained a pre-trial restraining order preserving certain property for forfeiture as substitute assets in the event the defendant were convicted in a pending case. The Supreme Court ruled that the statutory authority to restraint substitute assets *prior to trial* must give way to the defendant's Sixth Amendment right to use his property "to pay a reasonable fee for the assistance of counsel." 136 S. Ct. at 1096.

First, *Luis* has no application to the instant case because it deals with an entirely different context. *Luis* involved the *pre-trial restraint* of substitute assets; the Defendant's motion seeks the release of substitute assets that have been restrained *after the defendant has been convicted.* For the reasons set forth

below, the Court's rationale for creating a Sixth Amendment exception to the restraint of substitute assets does not apply in the post-conviction context.

Moreover, extending *Luis* to the post-conviction context would be contrary to well-settled law and controlling precedent in the Eleventh Circuit.

The forfeiture of substitute assets is mandatory. *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary... [W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property"); *United States v. Garza*, 407 Fed. Appx. 322, 324 (10th Cir. 2011) (same; following *Alamoudi*). As the Eleventh Circuit held in *United States v. Fleet*, 498 F.3d 1225 (11th Cir. 2007), in light of the broad language that Congress chose in providing that *any property of the defendant* may be forfeited as a substitute asset, it is not for the courts "to strike a balance between the competing interests" or to carve out exceptions to the statute. 498 F.3d at 1231. Accordingly, in *Fleet,* the court held that a defendant's residence can be forfeited as a substitute asset notwithstanding state homestead and tenancy by the entireties laws. *Id.*

For the same reason, courts have held that defendants have no post-conviction right to exempt their property from forfeiture as substitute assets on the ground that they have a Sixth Amendment right to use the property to pay their defense attorneys. *See United States v. Turner*, 460 Fed. Appx. 346, 347 (5th Cir. 2012) (per curiam) (there is no exemption from the forfeiture of

substitute assets for funds the defendant says he needs to pay attorney's fees); *United States v. Numisgroup Int'l Corp.*, 169 F. Supp. 2d 133, 139 (E.D.N.Y. 2001) (Supreme Court's decision in *Monsanto* applies with even greater force to post-conviction restraint of property, including property forfeitable as substitute assets); *United States v. Stewart*, 1998 WL 961363, *3 (E.D. Pa. 1998) (*Caplin & Drysdale* applies to substitute assets), aff'd, 189 F.3d 465 (3d Cir. 1999); *United States v. O'Brien*, 181 F.3d 105, 1999 WL 357755 (6th Cir. 1999) (Table) (same).

The Defendant will no doubt argue that *Luis* undermines the rationale for these decisions. But when there is controlling precedent on an issue, as there is in this case, lower courts are not free to disregard it on the ground that the legal rationale for the precedent has been undermined by a later decision *on a related but separate issue. Cf. United States v. Sigillito,* 759 F.3d 913, 935-36 (8th Cir. 2014) (collecting cases holding that the lower courts continue to be bound by the Supreme Court's decision in *Libretti v. United States,* 516 U.S. 29 (1995), that there is no Sixth Amendment right to a jury trial in a criminal forfeiture case, even though the Court's later decision in *Southern Union Company v. United States*, ___ U.S. ___, 132 S. Ct. 2344, 2357 (U.S. June 21, 2012) (making the Sixth Amendment applicable to the determination of a criminal fine), appears to undermine *Libretti*'s rationale). Until the precedent that is precisely on point is overruled by a higher court, lower courts are bound by it. *Sigilitto*, 759 F.3d at 135-36.

Here, *Fleet* is a binding Eleventh Circuit precedent that is precisely on point. It holds that the courts are not free to create exceptions to the mandatory forfeiture of substitute assets to strike a balance between competing interests. 498 F.3d at 1231. Irrespective of what *Luis* says about the application of the Sixth Amendment in the pre-trial context, and irrespective of whether its reasoning might or might not undermine the rationale in *Fleet,* it is not concerned with the issue in *Fleet,* which dealt solely with the absence of any exceptions to the mandatory forfeiture of substitute assets in the post-conviction context. Accordingly, until and unless the Eleventh Circuit or the Supreme Court overrules *Fleet* it remains binding on this court.

In all events, it is unlikely that the Eleventh Circuit will hold that *Luis* requires it to overrule or amend its holding in *Fleet.*

The plurality opinion in *Luis* rested on two factors that do not apply, or apply very differently, in the post-conviction context. First, the court reasoned that there is a Sixth Amendment exception to the pre-trial restraint of substitute assets (what the Court referred to as "untainted" property), but not to the pre-trial restraint of property traceable to the offense ("tainted" property), <u>because the relation back doctrine applies to tainted property but not to untainted property</u>. 132 S. Ct. at 1092. What this means, the Court said, is that the Government has a vested interest prior to trial in the tainted property, but has no such interest in the untainted property. When the Government has no vested interest in the property, its interest

in preserving the property for forfeiture must give way to the defendant's Sixth Amendment interest in using "his property" to hire counsel.

The Court did not say when the Government's interest in a substitute asset does vest, but at the latest, it must vest when the defendant is found guilty of the offense giving rise to the forfeiture. At that point, with the defendant's conviction no longer a matter of speculation, the Government has a vested interest not only in forfeiting the tainted assets that are traceable to the offense, but also in the untainted property that is subject to forfeiture to satisfy whatever forfeiture judgment the court may impose. *Cf. United States v. Erpenbeck*, 682 F.3d 472, 477-78 (6th Cir. 2012) (the Government's interest in a substitute asset does not vest until it fails to collect the directly-forfeitable property, which is not until the defendant is convicted).

Here, the Defendant has been convicted and thus the Government's interest in his substitute assets has already vested. So the Supreme Court's first rationale for creating a Sixth Amendment exception to the restraint of substitute assets does not apply.

The Court's implicit second rationale for creating a Sixth Amendment exception in the pre-trial context rests on the principle that if a defendant has a Sixth Amendment right to use his funds to hire counsel of his choice, he must be allowed to exercise that right in time for it to do him some good – *i.e.,* prior to trial. Hence, a defendant's argument that he needs to use his untainted assets *right now* to retain counsel to represent him at trial carries more force than an argument

that he would like to use his untainted assets for some other purpose. Indeed, the defendant's need to access his untainted funds wanes with the advent of his conviction just as the Government's interest in preserving those funds waxes, and it endeavors to take all possible steps to ensure that the funds needed to satisfy the no-longer speculative forfeiture judgment remain available for that purpose.

Accordingly, because the defendant's desire to use his untainted funds to hire counsel to represent him on appeal carries a lower equitable imperative than his desire to use those funds to preserve this Sixth Amendment right to counsel at trial, while the Government's post-conviction obligation to preserve substitute assets is far stronger than its interest in preserving assets when the prospective of a conviction is uncertain and the defendant is presumed to be innocent, the Supreme Court's second rationale for creating a pre-trial Sixth Amendment exception to the restraint of substitute assets does not apply, or applies in very different way, in the post-conviction context.

Finally, in all events, the *Luis* decision applies only to the release of funds for "reasonable attorney's fees" and not, as the Defendant requests, "to engage professionals to assist him with his sentencing and appeal." Motion at 1. The Government is uncertain what "professionals" other than counsel the Defendant desires to retain. But such persons are presumably not attorneys and would accordingly fall outside the scope of the Supreme Court's decision in *Luis* even if were to be adopted by the Eleventh Circuit tomorrow and applied with full force in the post-conviction context.

Accordingly, for all of these reasons, the Defendant's suggestion that *Luis v. United States* requires the release of his substitute assets even if they are all needed to satisfy his forfeiture obligation should be rejected.

CONCLUSION

For all of these reasons, the Defendant's motion for the release of funds should be denied.

Respectfully submitted,