This is a brief in opposition to a criminal defendant's motion to release real and personal property subject to forfeiture under 18 U.S.C. § 981(a)(1)(C) as the proceeds of fraud, and under 18 U.S.C. § 982(a)(1) as property involved in money laundering.

The real property was not seized but was named in the indictment and is subject to a notice of *lis pendens.* The personal property comprises Bank Accounts named in the indictment by the grand jury as property involved in the money laundering offense, and seized pursuant to a warrant issued by a court pursuant to 21 U.S.C. § 853(f) based on probable cause to believe that the accounts contained fraud proceeds and were involved in money laundering.

The brief explains why the notice of *lis pendens* is appropriate as long as the real property is named in the indictment, why the defendant cannot challenge the probable cause for the seizure of the Bank Accounts unless he satisfies the *Jones-Farmer* rule, and why in all events there is probable cause for the forfeiture under both the proceeds and money laundering theories.

GOVERNMENT'S OPPOSITION TO MOTION TO RELEASE SEIZED ASSETS

SUMMARY OF THE ARGUMENT

The real property is subject to notices of *lis pendens* but has not been seized or restrained. Thus, the only assets at issue in Defendants' motion for the release of seized assets are the two Bank Accounts.

The Bank Accounts were named in the Indictment when the grand jury found probable cause to believe that they were subject to forfeiture as property involved in the money laundering conspiracy alleged in Count __. Thereafter, the accounts were seized pursuant to warrants issued by a magistrate judge who independently found probable cause to believe that they were subject to forfeiture both as proceeds of fraud and as property involved in money laundering, based on the evidence set forth in an agent's affidavit. In light of those two probable cause findings, Defendants have no right to make a pre-trial

challenge to the Government's continued possession of their property unless they establish that they have no other assets with which to retain counsel to assist in their defense, and show that there are grounds to believe that the court and/or the grand jury erred in finding probable cause. Defendants have not made either showing.

Defendant have made no effort whatsoever to show that they lack other funds with which to retain counsel and it seems unlikely that they will be able to do so. Nor have they shown any reason to believe that the probable cause findings made by the grand jury and independently by Judge _____ were in error. On the latter point, the thrust of their argument is that the Government cannot trace the seized property to the proceeds of the alleged fraud. But this argument fails 1) because tracing is not part of the probable cause analysis; and 2) even if tracing were required to establish probable cause under the proceeds theory, the same property would be subject to forfeiture under the money laundering theory even if only part of it were traceable to the proceeds of the fraud.

Thus, the motion for the release of the seized assets must be denied.

FACTS

On _____, 2014, the grand jury returned an indictment listing the Bank Accounts as property subject to forfeiture because the funds in those accounts were involved in the money laundering conspiracy alleged in Count __.

The grand jury also listed four parcels of real property as property subject to forfeiture because it was involved in the money laundering offense.

The next day, _____, 2014, Magistrate Judge _____, issued warrants authorizing the seizure of the two accounts based on probable cause to believe that the funds in those accounts were subject to forfeiture as the proceeds of various fraud offenses, and as property involved in money laundering. None of the parcels of real property was listed in the seizure warrants. The only action the Government took with respect to the four parcels was to file notices of *lis pendens*. Accordingly, at present, the only assets falling within the scope of Defendants' motion are the two Bank Accounts.

DISCUSSION

A. The filing of a lis pendens is neither a seizure nor a restraint.

The Government filed the notices of *lis pendens* on the four parcels of real property to put potential buyers on notice that a grand jury has named the parcels as property subject to forfeiture in a criminal indictment. The Government, however, took no steps either to restrain the property pursuant to a pre-trial restraining order, *see* 21 U.S.C. § 853(e), or to take it into the Government's possession pending trial, *see* 21 U.S.C. § 853(f); 18 U.S.C. § 985.

As courts have recognized, the Government has a legitimate interest in filing a notice of *lis pendens* on property subject to forfeiture to prevent a third

party from contesting the forfeiture as a bona fide purchaser for value in the post-trial ancillary proceeding pursuant to 21 U.S.C. § 853(n)(6)(B). *United States v. Parrett*, 530 F.3d 422, 428-29 (6th Cir. 2008). To the extent that the *lis pendens* might therefore discourage a third party from attempting to purchase the real property from the defendant, it has an indirect impact on the defendant's ability to alienate his property. But a notice of *lis pendens* is neither a seizure nor a restraint on the property owner's use and enjoyment of his property, and does not implicate his due process rights. *See United States v. Borne,* 2003 WL 22836059, at *2-3 (E.D. La. Nov. 25, 2003) (the filing of a *lis pendens* is not a prejudgment seizure); *United States v. Jefferson,* 632 F. Supp. 2d 608, 617 (E.D. La. 2009) (same; following *Borne*). *Compare* 18 U.S.C. § 985 (setting forth the due process protections that apply when the Government seeks to seize real property for forfeiture prior to trial). Indeed, as the district court held in *Jefferson,* a notice of *lis pendens* "is in fact one of the less restrictive means of preserving the Government's interest" in that it allows the defendant to continue to use and enjoy the property. 632 F. Supp.2d at 617. *Cf. Diaz v. Paterson*, 547 F.3d 88, 98 (2d Cir. 2008) (the effect of a *lis pendens* "is simply to give notice to the world of the remedy being sought" in a pending lawsuit; the owner of the property "continues to be able to inhabit and use the property, receive rental income from it, enjoy its privacy, and even alienate it"; thus, a *lis pendens* "is deemed one of the less restrictive means of protecting a disputed property interest", citing *United States v. James Daniel Good Real Property,* 510 U.S. 43 (1993)).

Because the filing of a notice of *lis pendens* does not affect a defendant's right to due process, a defendant has no right to challenge the basis for the filing of the *lis pendens* in a pre-trial hearing; that the property was named in an indictment as property subject to forfeiture is enough. *United States v. Register*, 182 F.3d 820, 836 (11th Cir. 1999) (because filing a *lis pendens* does not implicate due process rights, no post-filing hearing is required to determine if the *lis pendens* should be removed); *United States v. Bohling*, 321 Fed. Appx. 855, 858 (11th Cir. 2009) (same; following *Register*).[1]

Accordingly, Defendant's motion for the return of seized assets has no application to the notices of *lis pendens* filed on the four parcels of real property.

Motion for the release of the Bank Accounts should be denied

[1] If the court were to assume *arguendo* that a notice of *lis pendens* is either a seizure or restraint, it would still be subject to the *Jones-Farmer* rule, and Defendants' attempt to challenge the basis for the notice would fail for the reasons discussed in Part B. *See United States v. Clark*, 717 F.3d 790, 801 n. 7 (10th Cir. 2013) (assuming arguendo that filing a *lis pendens* is a "restraint" triggering the defendant's rights under *Jones-Farmer*, but acknowledging the case law holding that a *lis pendens* is not a restraint within the meaning of § 853(e); citing Stefan Cassella, *Asset Forfeiture Law in the United States*, § 17-8); *United States v. Buholtz*, 2011 WL 4100918, at *3 (E.D. Tex. Aug. 31, 2011) (assuming arguendo that a *lis pendens* is a seizure or restraint, court applies *Jones-Farmer* rule and denies defendant's request for a probable cause hearing); *United States v. Wijetunge,* 2015 WL 6605570, at *10 (E.D. La. Oct 28, 2015) (same).

Defendants offer several reasons why the two Bank Accounts should be released. First, they say that there was no probable cause to believe that the underlying crime giving rise to the forfeiture was committed, and that therefore the seizure of the two accounts was illegal. To the extent that Defendants are arguing that the seizure violated their rights under the Fourth Amendment, their remedy is the motion to suppress. In short, a Fourth Amendment violation has evidentiary consequences, but it has no bearing on the Government's right to pursue the forfeiture of the property based on untainted evidence, and thus is not, by itself, a reason why property must be released to the defendant pretrial. *United States v. Cosme,* 796 F.3d 226 (2nd Cir. 2015) (an illegal seizure does not preclude the forfeiture of the property nor require its immediate return); *Baranski v. Fifteen Unknown Agents*, 401 F.3d 419, 435-36 (6th Cir. 2005) (an illegal seizure has no effect on a criminal forfeiture); *United States v. White,* 2014 WL 3898378, at *6 (D. Md. Aug. 7, 2014) ("the illegal seizure of property does not immunize that property from forfeiture as long as the Government can sustain the forfeiture claim with independent evidence").[2]

Alternatively, if Defendants are arguing that the assets must be released because the grand jury lacked probable cause to believe the underlying crime was committed when it returned the indictment, their argument would be

[2] By analogy, the illegal arrest of a defendant may have evidentiary consequences – *e.g.*, the suppression of his confession – but it does not bar his prosecution nor require his immediate release from custody.

foreclosed by the Supreme Court's decision in *Kaley v. United States,* ___ U.S. ___, 134 S. Ct. 1090 (2014) (holding that a defendant contesting the pre-trial restraint of his property for forfeiture cannot look behind the grand jury's probable cause finding that the underlying crime was committed). Thus, Defendants cannot seek the release of the seized accounts by challenging the probable cause for the underlying fraud.

Finally, Defendants argue that the seized accounts should be returned because the Government cannot establish probable cause to believe either that they are traceable to the scheme to defraud, or that they were involved in the money laundering conspiracy. This argument fails because Defendants cannot satisfy either of the requirements of the *Jones-Farmer* rule.

The *Jones-Farmer* rule

It is well-established that there is no automatic right to a pre-trial challenge to the probable cause for the seizure or restraint of property subject to forfeiture. To the contrary, if the property has been seized or restrained based on a finding of probable cause made by a judge or by a grand jury – and in this case, we have both -- the defendant has no right to challenge the probable cause for the seizure or restraint unless he makes two showings: that the continued unavailability of his property is infringing on his Sixth Amendment right to have counsel of his choice represent him in a criminal case, and that there is reason to believe that the court and/or the grand jury erred in making the probable cause

finding that led to the seizure or restraint of his property.[3] This commonly known as the *Jones-Farmer* rule. *See United States v. Jones,* 160 F.3d 641, 647 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, and that there is bona fide reason to believe the restraining order should not have been entered); *United States v. Farmer,* 274 F.3d 800, 804-05 (4th Cir. 2001) (following *Jones;* same two-part test applies where property defendant says he needs to hire counsel in criminal case has been seized or restrained in related civil forfeiture case).

The *Jones-Farmer* rule reflects the need to balance the Government's right to avoid the premature disclosure of its evidence and witnesses prior to trial against the defendant's right to have access to his property when he needs it to preserve his constitutional right to counsel. *Cf. Kaley v. United States,* ___ U.S. ___, 134 S. Ct. 1090 (2014) (in support of its holding that the defendant has no right to a judicial redetermination of the grand jury's finding of probable cause when his property is restrained pre-trial, the Court explains that the Government should not have to choose between preserving the property and giving the defendant a "sneak preview" of its case and strategy beyond what the criminal rules or due process requires). As one district court recently said in response to

[3] Most courts hold that the *Jones-Farmer* rule applies even if the property was initially seized without a warrant while others hold that the Government must seek judicial approval to maintain possession of property following a warrantless seizure, but that debate has no relevance to the instant case.

a motion much like the one Defendants have filed in this case, "the Government has a significant interest in securing the availability of forfeitable assets and in avoiding an unnecessary hearing regarding the basis for seizure of those assets which hearing would at least partially overlap with issues it must prove at trial. Such interest weighs against conducting an evidentiary hearing." *United States v. Wijetunge,* 2015 WL 6605570, at *5 (E.D. La. Oct 28, 2015).

Accordingly, as a threshold matter, the courts insist that before the defendant will be permitted to challenge the probable cause finding previously made by the court or the grand jury, he must demonstrate that without access to the seized or restrained property, he will not be able to retain counsel of his choice. *See United States v. Jones,* 160 F.3d at 647; *United States v. Bonventre,* 720 F.3d 126, 131 (2nd Cir. 2013) (a defendant is not entitled to a probable cause hearing unless he shows that his Sixth Amendment rights are implicated); *United States v. Kielar*, 791 F.3d 733, 739-40 (7th Cir. 2015) (defendant has no right to a post-restraint hearing unless he demonstrates with reliable evidence that he lacks other funds with which to retain counsel). *See also Kaley v. United States,* ___ U.S. ___, 134 S. Ct. 1090 ("To even be entitled to the hearing, defendants must first show a genuine need to use the assets to retain counsel of choice") (Roberts, C.J., dissenting). *See generally,* Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013), § 17-6 (explaining the *Jones-Farmer* rule).

In addition, even if he makes that showing, the defendant must show that there is reason to believe that the court and/or the grand jury erred in finding probable cause to believe that the property was subject to forfeiture. *See United States v. Wijetunge,* 2015 WL 6605570, at *10 (assuming *arguendo* defendant could make the Sixth Amendment showing, but denying the request for the hearing because he could not satisfy the second *Jones-Farmer* requirement); *United States v. Peppel*, 2008 WL 687125, at *2, at *6 (S.D. Ohio 2008) (defendant satisfies the first prong of *Jones* but he is not entitled to probable cause hearing because he cannot satisfy the second prong; there was no reason to believe the grand jury erred in finding that the restrained property was traceable to criminal proceeds); *United States v. St. George*, 241 F. Supp. 2d 875, 878-80 (E.D. Tenn. 2003) (defendant must make threshold showing that she lacks alternative source of funds to retain counsel and that there is reason to believe there is no probable cause for the forfeiture of the restrained property; denying hearing to defendant who failed to make second showing).

Thus, if Defendants cannot satisfy *both* of the *Jones-Farmer* requirements, their objection to the Government's attempt to forfeit their property must wait until they have been convicted and the Government seeks the entry of a forfeiture order in the forfeiture phase of the trial. *See* Rule 32.2(b) (providing for a post-

conviction finding of forfeitability by the court or the jury).[4] For the following reasons, Defendants have not made either showing.

Defendants cannot show that they lack other funds with which to retain counsel.

Before the Government is required to respond to a probable cause challenge to the restraint of property subject to forfeiture, the defendant must set forth in detail what access he has to funds or other property *other than the restrained property* that he could use to finance his defense. *See United States v. Jamieson*, 189 F. Supp. 2d 754, 757 (N.D. Ohio 2002) (following *Jones*; to satisfy Sixth Amendment requirement, defendant must show he has no access to funds from friends or family; Government has right to rebut showing of lack of funds if hearing is granted), aff'd, 427 F.3d 394 (6th Cir. 2005) (approving district court's decision to apply *Jones*, and noting that court gave defendant second chance to satisfy *Jones* and then had Government put on a witness to establish probable cause).

As the Second Circuit held in *Bonventre*, this means that the defendant must disclose his net worth, provide a comprehensive list of his assets, and explain how he has been paying his significant living expenses. *Bonventre*, 720

[4] In circuits that have not expressly adopted *Jones-Farmer*, district courts may apply the rule as the vehicle for applying the *Matthews v. Eldridge* due process test in the context of a challenge to the pre-trial restraint of assets subject to criminal forfeiture. *See Wijetunge,* 2015 WL 6605570, at *3.

F.3d at 133. *See United States v. Edwards*, 856 F. Supp. 2d 42, 45-46 (D.D.C. 2012) (defendant must disclose his assets, liabilities, and sources of income; say how much he has already paid counsel and how much more he needs); *United States v. Daugerdas*, 2012 WL 5835203, at *2 (S.D.N.Y. Nov. 7, 2012) (denying motion to release funds where it was "bereft of any sworn declaration that [Defendant] lacks the financial resources to hire counsel"; conclusory assertion is insufficient); *United States v. Egan*, 2010 WL 3000000, at *5-6 (S.D.N.Y. July 29, 2010) (denying defendant's request for a *Monsanto* hearing where defendant wanted to use the restrained assets for attorney's fees and living expenses even though he had considerable unrestrained assets at his disposal); *United States v. Hatfield*, 2010 WL 1685826, at *1-2 (E.D.N.Y. Apr. 21, 2010) (that defendant once had unrestrained funds to hire counsel does not matter; defendant met burden by showing that she exhausted all unrestrained funds before the trial was concluded).

As one district court held, a defendant who has retained a "cadre" of defense attorneys cannot satisfy this threshold requirement of *Jones-Farmer. United States v. Reese*, 858 F. Supp. 2d 1254, 1256 (D.N.M. 2012).

In this case, Defendants have made no effort whatsoever to demonstrate that they lack the funds with which to preserve their Sixth Amendment right to counsel. Indeed, nowhere in their memorandum of law do they even mention the *Jones-Farmer* rule or otherwise acknowledge that there is no automatic right to

contest the probable cause for the restraint or seizure of their property prior to trial unless their Sixth Amendment rights are implicated.

Because it is apparent that Defendants are represented by a "cadre" of defense lawyers who are unlikely to be working without compensation, and because they have made no showing that their Sixth Amendment rights are implicated, their attempt to contest the probable cause for the Government's continued possession of the Bank Accounts must be denied.

Defendants cannot show that the probable cause findings were in error.

Even if Defendants were able to satisfy the first *Jones-Farmer* requirement, they would not be able to satisfy the second one – *i.e.,* that there is reason to believe that the court and/or the grand jury erred in finding probable cause to believe that their assets were subject to forfeiture.

There are two bases for the Government's continued possession of the seized assets: that the accounts constitute the proceeds of the scheme to defraud ("the proceeds theory") and that they constitute property involved in the money laundering conspiracy ("the money laundering theory"). Defendants have not shown that there is any reason to believe that the court and/or the grand jury erred in finding probable cause as to either theory.[5]

[5] In a case like this one, where there were two probable cause findings, one by a court and one by a grand jury, relating to the forfeiture of the same property, it is unclear which finding the

With respect to the proceeds theory, the essence of Defendants' argument is that the Government cannot trace the fraud proceeds through the commingled Bank Accounts to the two accounts that were ultimately seized. In support, they cite *United States v. Voigt,* 89 F.3d 1050 (3d Cir. 1996), which took a narrow view of the Government's ability to forfeit property under a "proceeds theory" when commingled funds are involved.

The problem with Defendants' argument is that *Voigt* involved the Government's ability to establish the forfeitability of property *by a preponderance of the evidence* in the forfeiture phase of the criminal trial. This case, however, involves the Government's ability to establish *probable cause* for the forfeiture of the property *prior to trial*. Unfortunately for Defendants, strict tracing of the kind required by the Third Circuit in *Voigt* is not a requirement for establishing probable cause. To the contrary, for the purposes of preserving the property for forfeiture prior to trial, it is sufficient for the Government to show that the fraud proceeds were deposited in the commingled Bank Account in such quantity that there is a fair probability that the funds found in the Bank Account are traceable to the offense. *See United States v. Toran,* 2015 WL 1968698, at *6 (C.D. Ill. May 1, 2015) (showing that property was purchased with funds from a

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defendant must dispute in order to satisfy the *Jones-Farmer* requirements and establish the right to hearing. One court has held that it is the grand jury's finding that controls (at least where it occurred subsequent to the issuance of the seizure warrant), but that the court may nevertheless refer to the evidence in the affidavit in support of the seizure warrant as well. *See United States v. Wijetunge,* 2015 WL 6605570, at *7. For purposes of this motion, the Government assumes that the court will apply a similar rule.

commingled Bank Account, at least 50 percent of which represented fraud proceeds, is sufficient to establish probable cause); *United States v. Cobb,* 2015 WL 518548, at *4 (D. Nev. Feb. 9, 2015) (for probable cause purposes, the Government is not required to trace every dollar in a seized Bank Account to an offense giving rise to forfeiture; it is sufficient if most of the money in the account is so traceable, and all of the money came from a similar source and was controlled by the same persons); *United States v. Dupree*, 2011 WL 3235637, at *10 (E.D.N.Y. July 27, 2011) (holding that if 20 percent of $1.75 million transferred to an account was forfeitable, Government had probable cause to seize $350,000, regardless of what fraction of the $1.75 remained in the account); *United States v. Kam*, 2011 WL 3039589, at *7 (E.D.N.Y. Mar. 18, 2011) (under the probable cause standard, the Government can restrain funds in a commingled account if there is a showing that criminal proceeds were deposited into the account and exceed the untainted funds; it is not necessary to trace the funds to the illegal activity).[6]

[6] Not all courts agree that *Voigt* was correctly decided even with respect to a finding made under the preponderance standard in the forfeiture phase of the trial. *Compare United States v. Smith,* 749 F.3d 465, 488-89 (6th Cir. 2014) (if an asset is derived from a Bank Account into which criminal proceeds greatly exceeding the value of the asset were deposited, the district court may infer that the asset is traceable to the criminal offense); *United States v. Hatfield*, 795 F. Supp. 2d 219, 245 (E.D.N.Y. 2011) (if proceeds of the sale of securities were part fraud and part legitimate, Government does not have to determine which part defendant used to acquire a traceable asset; if 40% of the proceeds were fraud, court will assume 40% of all assets acquired were fraud proceeds); *United States v. Capoccia*, 2009 WL 2601426, at *11 (D. Vt. Aug. 19, 2009) (explaining "lowest intermediate balance rule" and how it allows Government to trace proceeds through commingled accounts); *United States v. Haleamau*, 2012 WL 3394952 (D. Hawaii Aug. 1, 2012) (same).

Indeed, if the rule were otherwise, the Government would have no choice but to engage in a full-blown rehearsal of its case in chief just to preserve the proceeds of the crime for forfeiture. Such a rule would be inconsistent with the interests of justice. *See United States v. Simpson*, 2011 WL 195676, at *5-6 (N.D. Tex. Jan. 20, 2011) ("the Government should not be required to put on a dress rehearsal performance of part or all of its case-in-chief as the price for protecting its valid interest in preserving assets that are allegedly subject to forfeiture").

Here, the probable cause affidavit that was submitted in support of the seizure warrants set forth ample grounds to believe that millions of dollars in proceeds derived from Defendants' scheme to defraud were deposited, along with commingled funds, into the Bank Accounts. *See* Affidavit Special Agent _____ in Support of Application for Seizure Warrants. Thus, even if the Government were relying on the proceeds theory alone, Defendants would not be able to satisfy the second *Jones-Farmer* requirement. *See Wijetunge*, 2015 WL 6605570, at *9 (if, upon review of the application for the § 853(f) seizure warrant, the court finds probable cause to believe the property is subject to forfeiture, it necessarily finds that the defendant has not satisfied the second *Jones-Farmer* requirement).

The money laundering theory

Finally, even if Defendants were able to make a successful challenge to the forfeiture of the Bank Accounts under the proceeds theory, the accounts would remain subject to forfeiture under the money laundering theory.

Forfeiture under the money laundering theory is broader than forfeiture under the proceeds theory. While property forfeited under the proceeds theory must be traceable to the offense giving rise to the forfeiture, property forfeited under the money laundering theory need only have been involved in the money laundering offense. 18 U.S.C. § 982(a)(1). *See United States v. McGauley,* 279 F.3d 62, 75-76 (1st Cir. 2002) (distinguishing forfeiture under section 982(a)(1) from a proceeds forfeiture; the money laundering forfeiture is broader and is not limited to the proceeds being laundered); *United States v. Hawkey,* 148 F.3d 920, 927 (8th Cir. 1998) (when defendant is convicted of both section 1957 offense and the underlying SUA, forfeiture is properly imposed under the broader money laundering statute, section 982(a)(1), and is not limited to the forfeiture of proceeds under section 982(a)(2)); *United States v. Coffman*, 859 F. Supp. 2d 871, 875 (E.D. Ky. 2012) ("Money laundering forfeiture pursuant to § 982(a)(1) applies to a larger class of property than proceeds forfeiture under § 981(a)(1)(C) because it applies to more than just the laundered property or proceeds from the laundered property."), aff'd*,* 574 Fed. Appx. 541 (6th Cir. 2014); *United States v. Wijetunge,* 2015 WL 6605570, at *10 & n.60 (distinguishing *United States v.*

1980 Rolls Royce, 905 F.2d 89, 90 (5th Cir. 1990), limiting forfeiture under a proceeds theory to the part of the property traceable to the proceeds of the underlying offense).

Property subject to forfeiture in a money laundering case thus includes not only the proceeds of the underlying crime being laundered, but all other property that was the subject of the money laundering offense ("subject matter property"), including untainted property that is commingled with the criminal proceeds at the time the financial transaction occurred. For example, if a defendant commingles $100,000 in criminal proceeds with $100,000 in untainted money and transfers the entire $200,000 to another Bank Account in a manner that violates one of the money laundering statutes, the entire $200,000 is forfeitable as the subject matter (or "corpus") of the money laundering offense. *See United States v. Huber,* 404 F.3d 1047, 1058 (8th Cir. 2005) (the SUA proceeds involved in a financial transaction, as well as any clean money commingled with it, constitute the corpus of the money laundering transaction; both are subject to forfeiture); *United States v. Coffman,* 859 F. Supp. 2d 871, 877 (E.D. Ky. 2012) (following *Huber* and *Bank One;* explaining that untainted funds may be forfeitable either as the subject of a money laundering transaction or as facilitating property; when commingled funds are transferred in their entirety to another Bank Account, all of the funds are forfeitable as the subject of the transaction); *United States v. Overstreet,* 2012 WL 5969643 (D. Idaho Nov. 29, 2012) (commingled funds from

illegal gambling business and defendant's night club were forfeitable as the corpus of the money laundering transaction); *United States v. Funds on Deposit at Bank One, Indiana,* 2010 WL 909091, at *8 (N.D. Ind. Mar. 9, 2010) (following *Huber*; when defendant commingled drug proceeds with other funds in a Bank Account, and transferred the commingled funds to another account, and commingled them yet again before making a third transfer, all of the funds involved in the last transfer were forfeitable as property involved in violations of Sections 1956 and 1957).

In addition, the property involved in a money laundering offense also includes property that was *not* part of the money laundering transaction itself, but was used to facilitate that transaction even though it was external to it. Such property may include untainted funds that are in a Bank Account at the time a financial transaction takes place, and that are used by the defendant to conceal or disguise the criminal proceeds by making the tainted funds appear to be part of a legitimate transaction. *See United States v. Aguasvivas-Castillo,* 668 F.3d 7, 17 (1st Cir. 2012) (untainted property may be forfeited in a money laundering case "if the legitimate funds were somehow involved in the offense, such as by helping to conceal the illegal funds"); *United States v. McGauley*, 279 F.3d at 77 (withdrawal of $243,000 from various Bank Accounts that contained commingled funds, of which only $55,000 was fraud proceeds, supported forfeiture of entire amount because the clean money was used to conceal or disguise the tainted

funds); *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir. 1997) (entire Bank Account balance is forfeitable even though less than half the balance was criminal proceeds if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds; distinguishing cases where commingling of SUA proceeds with untainted funds was merely fortuitous). *See generally,* Stefan D. Cassella, *Asset Forfeiture Law in the United States, supra,* Ch. 27 (explaining the scope of forfeiture under the money laundering forfeiture statutes).

Defendants argue that the untraceable or commingled funds in the Bank Account cannot be forfeited under the money laundering theory – even if Count __ is not dismissed from the indictment – because there is no showing that those funds facilitated the money laundering offense. But they are mistaken for two reasons.

First, the term "facilitating property" is defined broadly in the case law to mean any property that makes the offense less difficult to commit or more or less free from obstruction or hindrance. *United States v. Wyly*, 193 F.3d 289, 302 (5th Cir. 1999) (forfeiture under the facilitation theory is not limited to commingled money; facilitating property is anything that makes the money laundering offense less difficult or more or less free from obstruction or hindrance). That could easily apply to funds in a Bank Account in the name of a defendant's child that was chosen to give the criminal proceeds an aura of legitimacy or to make them

more difficult to locate and identify. *See United States v. Seher,* 562 F.3d 1344, 1369 (11th Cir. 2009) (clean money in Bank Account into which jeweler deposited money from drug dealers as part of concealment money laundering offense was forfeitable because it gave the transaction a facade of legitimacy).

Moreover, in *United States v. Wijetunge,* a case similar to this one, the court held that a defendant who purchased fraudulently-obtained tax refund checks and commingled them with legitimately-acquired checks in his Bank Account, and then moved the commingled funds through a series of Bank Accounts, would be required, upon conviction, to forfeit all of the commingled funds – *and all property traceable thereto* -- as property involved in a money laundering offense. The commingling, the court reasoned, facilitated the money laundering offense by concealing and disguising the tainted funds, and the Bank Accounts that later received those forfeitable funds would be subject to forfeiture as traceable property. *Wijetunge,* 2015 WL 6605570, at *9 (following *Tencer,* 107 F.3d at 1135). The commingled funds in both Bank Accounts would be subject to forfeiture for the same reasons.

Second, Defendants appear to be under the misimpression that the term "property involved" is *limited* to facilitating property. To the contrary, "property involved" *includes* facilitating property but as mentioned earlier, also includes commingled property that was the subject matter of the money laundering transaction. Consequently, commingled property may be subject to forfeiture as

property involved in the offense whether it facilitates the offense or not. *See United States v. Huber*, 404 F.3d at 1061 n.11 (facilitating property in a money laundering case is property that was not part of the money laundering transaction; property that is commingled with the SUA proceeds when the transaction took place is forfeitable not as facilitating property but as the subject matter or corpus of the transaction).

Here, the Affidavit established probable cause to believe that Defendants transferred commingled funds from the _____ Account to the Bank Account. Each transfer of the commingled funds constituted a money laundering offense, and the subject matter of each offense was the commingled funds. Thus, all commingled funds transferred to the Bank Account are subject to forfeiture as property involved in the money laundering conspiracy whether the commingling made the money laundering offense any easier to commit or not. *United States v. Huber*, 404 F.3d at 1058; *Coffman,* 859 F. Supp. 2d at 877; *United States v. Funds on Deposit at Bank One, Indiana,* 2010 WL 909091, at *8.

Finally, Defendants used the first Bank Account to open the second Bank Account which was funded at its inception and at all times thereafter exclusively with funds from the first Bank Account. Thus the funds in the second Bank Account are forfeitable for two reasons: as the property involved in the additional money laundering offenses that occurred when the commingled funds were transferred from the first account to the second account, and as property

traceable to funds in the first account that were forfeitable as property involved in the money laundering offenses that occurred when the commingled funds were transferred from the _____ Account to the first Bank Account in the first instance.

Accordingly, Defendants have failed to show any reason to believe that the court or the grand jury erred in finding probable cause to believe that the seized funds are subject to forfeiture. And because Defendants must satisfy both prongs of the *Jones-Farmer* rule to qualify for a hearing, their request for a hearing would have to be denied even if they were able to demonstrate at some future time that they lacked other funds with which to retain counsel.

CONCLUSION

For all of these reasons, Defendants' motion for the release of seized assets should be denied.