IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 16-130**
CHARLES M. HALLINAN **WHEELER K. NEFF**	**:**	

GOVERNMENT'S REPLY TO DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO FORFEITURE

The United States of America, by and through its attorneys, Louis D. Lappen, United States Attorney for the Eastern District of Pennsylvania, and Maria M. Carrillo, Assistant United States Attorney for the District, pursuant to the Court's order, hereby submits in support of its motion for a preliminary order of forfeiture this reply to the defendants' proposed findings of fact and conclusions of law.

I. DEFENDANT HALLINAN MUST FORFEIT THE GROSS PROCEEDS OF THE HALLINAN PAYDAY LENDING ORGANIZATION

A. Introduction

The RICO forfeiture statute, 18 U.S.C. § 1963(a)(3), provides that a defendant convicted of a RICO offense "shall forfeit" any property constituting "proceeds" that the defendant obtained from the collection of an unlawful debt.[1] In this case, the evidence proved that from

[1] The phrase "shall forfeit" makes clear that the forfeiture is mandatory once the court determines the value of the proceeds that the defendant obtained. *Alexander v. United States*, 509 U.S. 544, 562 (1993) ("[A] RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under [section] 1963"). *Cf. United States v. Blackman,* 746 F.3d 137, 143 (4th Cir. 2014) (For forfeiture pursuant to 18 U.S.C. § 981(a)(1)(c), "[t]he word 'shall' does not convey discretion. The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. . . . Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error."); *United States v. Newman*, 659 F.3d 1235,

2007 to 2013, defendant Hallinan obtained at least $490 million from the Hallinan Payday Lending Organization ("Hallinan PDL"), that was the RICO enterprise in Count One. Thus, the Government seeks the forfeiture of the $490 million as the proceeds of the RICO offense.[2]

Defendant Hallinan argues that the term "proceeds," as used in Section 1963, refers only to the net profits of his offense. Defendant Hallinan Proposed Findings of Fact and Conclusions of Law, Dkt. No. 328 (hereafter "Hallinan Brief") at 3. He does not dispute that Hallinan PDL made at least $490 million in gross receipts.[3] He argues, however, that the cost of providing the loan principal ($422 million), and the direct costs for advertising, promotional expenses, credit card collection fees and similar expenses ($59 million) should be subtracted from the gross receipts, leaving only $9 million subject to forfeiture as the net profits of his offense. Hallinan Brief at 2.

Defendant's view that the property subject to forfeiture in a RICO case is limited to the defendant's "net profits" is at odds with the legislative history of the RICO statute, with the public policies underlying the concept of criminal forfeiture, and with virtually all of the case law on this point. Indeed, with the exception of the Seventh Circuit, every appellate court that

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1240 (9th Cir. 2011) (Where forfeiture was sought pursuant to 18 U.S.C. § 981(a)(1)(C) and 18 U.S.C. § 982 in two criminal cases, "shall order" requires that the district court must impose criminal forfeiture, subject only to statutory and constitutional limits.)

[2] For simplicity, in this brief, we use round numbers to discuss the amount subject to forfeiture as the proceeds of defendant's offense. The Government has determined that defendant Hallinan obtained *more* than $490 million in gross proceeds, and is in the process of quantifying the additional amount. As set out in the Government's motion for preliminary order of forfeiture, $490 million of customer debits was processed through Intercept, the third party processor of ACH transactions. Intercept was the only processor of customer ACH payments. There were, however, other third party processors responsible for credit and debit card payments. The trial evidence established that Evo/Power Pay was one such company. Collection agencies were also used to recover payments from delinquent customers, and at times, customers made payments directly to the Hallinan PDL companies by money orders or personal checks. The Government is in the process of determining the additional gross proceeds obtained from these avenues.

[3] The $490 million was the gross proceeds collected through Intercept, *see* footnote 2, *supra*.

has addressed the issue – whether in the context of the RICO statute or any other criminal forfeiture provision enacted by Congress -- has held that when the term "proceeds" is undefined in the applicable statute, it means "gross proceeds" *not* "net profits." Accordingly, defendant Hallinan's limited view of what is subject to forfeiture as the proceeds of his offense should be rejected as contrary to well-established law.

B. All but one of the appellate courts hold that "proceeds" means "gross proceeds" not "net profits."

The First, Eighth, Ninth and District of Columbia Circuits have all held that "proceeds" means "gross proceeds" in RICO cases. *United States v. Hurley*, 63 F.3d 1, 21-22 (1st Cir. 1995); *United States v. Simmons*, 154 F.3d 765, 770-71 (8th Cir. 1998); *United States v. Christensen,* 828 F.3d 763, 822 (9th Cir. 2015); *United States v. DeFries*, 129 F.3d 1293, 1315 (D.C. Cir. 1997).

Using much of the same reasoning, the Second, Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits have held that "proceeds" means "gross proceeds" in drug and white collar cases as well. *United States v. Peters*, 732 F.3d 93, 101 (2nd Cir. 2013);[4] *United States v. Heilman*, 377 Fed. Appx. 157, 211 (3d Cir. 2010); *United States v. McHan*, 101 F.3d 1027,

[4] The Second Circuit in *United States v. Lizza Industries, Inc.*, 775 F.2d 492 (2d Cir. 1985), held that under 18 U.S.C. § 1963(a)(1), a defendant is liable for the forfeiture of gross profits, not net profits, in keeping with the " 'unprecedented scope for an assault upon organized crime and its economic roots.' " *Id. quoting Russello*, 464 U.S. at 21. The court then affirmed the district court's calculation of gross profits which did not include the direct costs. *Lizza*, 775 F.2d at 495, 497. Defendant Hallinan relies on *Lizza* because it subtracts direct costs, which is what he asks this Court to do. Although the court in *Lizza* did affirm the reduction of gross proceeds by the direct costs, it never held that it *must* be done. *United States v. Ofchinick*, 883 F.2d 1172, 1182 (3d Cir. 1989). It did clearly hold that gross proceeds are recoverable and for this principle it has been cited and relied on. *See Hurley,* 63 F.3d at 20-21 (following *Lizza*, gross proceeds forfeitable in RICO)*; United States v. Hatfield*, 795 F. Supp. 2d 219, 223-24 (E.D.N.Y. 2011) (recognizing that in *Lizza*, the Second Circuit held that RICO forfeiture depends on 'gross, rather than net profits.') *citing Lizza*, 775 F.2d at 498. Notably, the court in *United States v. Masters*, 924 F.2d 1362, 1370 (7th Cir. 1991) expressly rejected the *Lizza* holding of gross profits. The defendant relies most heavily on *Masters* for its argument in favor of net proceeds, *see* infra, and *Masters* found that *Lizza* did not support the net proceeds position.

1041-42 (4th Cir. 1996); *United States v. Olguin,* 643 F.3d 384, 400 (5th Cir.2011); *United States v. Logan,* 542 Fed. Appx. 484, 498 (6th Cir. 2013); *United States v. Keeling*, 235 F.3d 533, 537 (10th Cir. 2000); *United States v. Porcelli*, 440 Fed. Appx. 870, 879 (11th Cir. 2011).[5]

Only the Seventh Circuit takes the defendant's view that criminal forfeiture is limited to "net profits," *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991), and as discussed below, that view has been expressly rejected by the other appellate courts.

The earliest cases looked to the legislative history of the RICO statute and concluded that Congress expressly intended the term "proceeds" to mean gross proceeds, not net profits. In *Hurley,* for example, the First Circuit said the following: "[RICO's] legislative history explains *without qualification* that 'the term 'proceeds' has been used [in 18 U.S.C. § 1963(a)(3)] in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits.'" *Hurley,* 63 F.3d at 21 (emphasis added), quoting S. Rep. No. 98-225, 98th Cong., 2d Sess. (1984) at 199 (reprinted in 1984 U.S. Code Cong. Administrative. News 3182). Given this history, as well as Congress's instruction that RICO be broadly interpreted, the court concluded that "the broader definition of 'proceeds' seems to us a rather easy call." *Id.*

Likewise, in *Simmons,* the Eighth Circuit held that the legislative history "indicate[s] that Congress meant the word 'proceeds' to be read more broadly than merely 'profits'" and that "Congress has explicitly directed that RICO 'shall be liberally construed to effectuate its remedial purposes.'" *Simmons,* 154 F.3d at 771, citing provisions of RICO quoted in *Russello v. United States,* 464 U.S. 16, 27 (1983). The Ninth and District of Columbia Circuits said the

[5] The 11th Circuit has also affirmed a case where gross proceeds were recovered in a RICO forfeiture. *See*, *United States v. Acuna*, 313 Fed. Appx. 283, 299 (11th Cir. 2009) (forfeiture of $642 million not excessive in a RICO case where forfeiture represented the gross proceeds of the gambling enterprise during the time of the defendant's leadership).

same thing in *Christensen,* 828 F.3d at 822 (following *Simmons*), and *DeFries*, 129 F.3d at 1314, respectively.

The Second Circuit in *Peters* found the Eighth Circuit's rational in *Simmons* to be persuasive when it held that "proceeds" in 18 U.S.C. § 982, the forfeiture provision in a bank fraud case, means gross receipts. *Peters*, 732 F.3d at 101.

The Fourth Circuit applied RICO's legislative history to the parallel forfeiture provision of the Continuing Criminal Enterprise statute ("CCE") found at 21 U.S.C. § 853 and concluded that "gross proceeds" are forfeitable in drug cases. *McHan,* 101 F.3d at 1042. The Third Circuit noted that Congress's instruction that the statute be liberally construed supported the finding that "proceeds" in 21 U.S.C. § 853 means "gross proceeds" are forfeitable in drug cases. *Heilman*, 377 Fed. Appx. at 43. Not only is *Heilman* consistent with all the other circuits, except for the Seventh Circuit, its holding is particularly instructive here.

C. The *Heilman* analysis conclusively demonstrates that gross proceeds applies here.

The significance of *Heilman* cannot be overstated on this issue. The Third Circuit engaged in a meticulous analysis of the meaning of "proceeds" in the forfeiture provisions of the Comprehensive Drug Abuse Prevention and Control Act, found at 21 U.S.C. § 853. *Heilman*, 377 Fed. Appx. at 210. [6] It began with the plain meaning of the word which it determined could mean both receipts and profits. *Id.* Since the statutory language was susceptible to different interpretations, it looked to the surrounding words and provisions for context. *Id*. The Court

[6] The Third Circuit addressed but did not resolve the issue regarding the deduction of direct costs under 18 U.S.C. § 1963 in *United States v. Ofchinick,* 883 F.2d 1172, 1182 (3rd Cir. 1989) (finding it unnecessary to decide if direct costs must be deducted because defendant, who has the burden of going forward on the issue, failed to present evidence of his direct costs). The case involved Section 1963(a)(1) which, prior to the enactment of Section 1963(a)(3), was the vehicle by which proceeds were forfeited in RICO cases.

determined that defining proceeds as profits would make no sense in light of the other provisions of the statute because:

> another provision in 853(a) permits the imposition of a fine against a defendant who 'derives profits or other proceeds' in an amount 'not more than twice the gross profits or other proceeds.' 21 U.S.C. § 853(a). If 'proceeds' means profits, then the fine would be imposed against a defendant who 'derives profits or other [profits]' (brackets in the original) and should be no greater than 'twice the gross profits or other [profits],' (brackets in original) rendering the provision redundant. Because we cannot define a statutory term in a manner which renders it superfluous, we conclude that 'proceeds,' in §853(a) means 'receipts.'

Id. at 211. RICO forfeiture has the same fine provision as the one in 21 U.S.C. § 853(a).[7] The relevant language mirrors 21 U.S.C. § 853(a) and states:

> In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

18 U.S.C. § 1963(a).[8] If this Court were to adopt the definition of proceeds advocated by defendant Hallinan, it would render the word "proceeds" superfluous in the fine provision, just as

[7] Title 21 U.S.C. § 853 is the forfeiture provision for the entire Comprehensive Drug Abuse Prevention and Control Act of 1970 ("Controlled Substances Act"), of which the CCE is a part. Due to the similarity in the RICO forfeiture and statutes, courts consistently held that case law under one is persuasive for the other, and vice versa. *United States v. Totaro*, 345 F.3d 989, 994 (8th Cir. 2003); *United States v. Gilbert*, 244 F.3d 888, 907, n. 47 (11th Cir. 2001); *United States v. White*, 116 F.3d 948, 950 (1st Cir. 1997) ("[C]ourts have consistently construed the RICO forfeiture statute, 18 U.S.C. § 1963, and the statute governing drug-related forfeiture, 21 U.S.C. § 853, in *pari passu*. We join these courts in holding that case law under 18 U.S.C. § 1963 is persuasive in construing 21 U.S.C. § 853, and vice versa.") (citations omitted)); *McHan*, 101 F.3d at 1042 ("we generally construe the drug and RICO forfeiture statutes similarly");*United States v. Libretti*, 38 F.3d 523, 528, n. 6 (10th Cir. 1994), aff'd 516 U.S. 29 (1995); *United States v. Ripinsky*, 20 F.3d 359, 362 n.3 (9th Cir. 1994); *United States v. Lavin*, 942 F.2d 177, 185, n.9 (3d Cir. 1991); *see also United States v. Benevento*, 663 F.Supp. 1115, 1118, n.2 (S.D.N.Y. 1987), *aff'd per curiam*, 836 F.2d 129 (2d Cir. 1988) (citing decision under RICO forfeiture statute in construing narcotics forfeiture statute, reasoning that the forfeiture statutes parallel each other.)

[8] In addition, the language at issue in 21 U.S.C. § 853(a) is the same language used in 18 U.S.C. § 1963(a)(c): [the defendant shall forfeit] any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, [from the offense]. 21 U.S.C. § 853(a)(1); 18 U.S.C. § 1963(a)(3).

in 21 U.S.C. § 853(a), as the *Heilman* court found.[9] Such a result is unacceptable and nonsensical.

When finding that proceeds means gross proceeds, *Heilman* also specifically rejected the district court decision in *United States v. Millicia,* 769 F. Supp. 777 (E.D. Pa. 1991), upon which defendant Hallinan heavily relies. *Millicia* is an early decision from a district court in this circuit, giving a criminal defendant credit for his direct costs in a RICO case, and *Heilman* repudiates its conclusion.[10]

In *Heilman*, the Court concluded that defining proceeds as receipts or gross proceeds was consistent with the instruction that § 853 " 'shall be liberally construed to effectuate its remedial purpose.' " *Id.* at 43 *quoting* 21 U.S.C. § 853(o). Similar to 21 U.S.C. § 853, RICO forfeiture provisions are also to be broadly interpreted, as the Supreme Court and the Third Circuit have directed. *Russello,* 464 U.S. at 17, 27-28 (1983); *Ofchinick*, 883 F.2d at 1178 *quoting Russello*, 464 U.S. at 27-28.[11]

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[9] The 5th Circuit in *Logan* adopted this identical analysis when faced with the same question of gross v. net proceeds in § 853(a) case. 542 Fed. Appx. at 498. The First Circuit also applied this analysis to come to the same conclusion. *United States v. Bucci,* 582 F.3d 108, 123 (1st Cir. 2009).

[10] In his brief, Defendant Hallinan erroneously claims that *Heilman* "cited approvingly to a number of other cases, including *Millicia*, where courts have held direct expenses are deductible from gross proceeds in forfeiture proceedings." Hallinan Brief at 7. In fact, after listing cases adopting the majority rule that "proceeds" means "gross proceeds," the *Heilman* court said, "*But see … United States v. Millicia,* 769 F. Supp. 877 … ." The signal *"but see"* indicates, contrary to Defendant's representation, that the Third Circuit *did not* approve of the district court's decision in *Millicia.*

[11] The mandate to liberally construe 21 U.S.C. § 853 meant the rule of lenity was not appropriate in the analysis in *Heilman*. 377 Fed. Appx. at 157. Defendant Hallinan criticized the *Heilman* decision on this point, arguing that the rule of lenity applies at sentencing and the court was wrong to refuse to apply it. Hallinan Brief at 7. Defendant Hallinan misses the point. He fails to recognize that the court focused on the mandate to broadly interpret the forfeiture provisions as the reason to eschew the rule of lenity, a mandate that the Supreme Court has declared is present in RICO and its forfeiture provisions. *Russello*, 464 U.S. at 17, 27-28; *Ofchinick*, 883 F.2d at 1178 *quoting Russello*, 464 U.S. at 27-28

D. Purpose of criminal forfeiture supports the use of gross proceeds.

In addition to the legislative history, the courts have looked to the purpose of criminal forfeiture, its role as part of the punishment for committing a criminal offense, and at the perverse incentives that would be created if criminal forfeiture were limited to the profits that a criminal derived from his crime. Criminal forfeiture is a form of punishment, and from a pecuniary perspective, simply stripping a convicted criminal of the profits of his crime, and returning him to the position he was in before he committed his offense, constitutes no punishment at all. *Peters,* 732 F.3d at 101.

As the Second Circuit said in *Peters*, a broad reading of "proceeds" as "gross proceeds" is necessary to ensure that "forfeiture punishes all convicted criminals who receive income from illegal activity, and not merely those whose criminal activity turns a profit." *Peters,* 732 F.3d at 101, quoting *Simmons*, 154 F.3d at 771. *See Christensen,* 828 F.3d at 822 (following *Peters* and *Simmons*); *DeFries,* 129 F.3d at 1315 ("forfeiture under RICO is punitive . . . construing the statute more narrowly could hinder the actualization of this punitive intent").

The point is that a defendant who preys on vulnerable victims or otherwise flouts the law should be punished for doing so, whether his efforts result in economic gain or loss. Forfeiture of the gross proceeds of the offense is the way that this punishment is imposed. *See McHan*, 101 F.3d at 1042 ("The proper measure of criminal responsibility generally is the harm that the defendant caused, not the net gain that he realized from his conduct. Otherwise we would be rewarding . . . those who could adequately manipulate their books."); *Simmons*, 154 F.3d at 771 (following *McHan* and applying the point to RICO).

Moreover, forfeiture acts as a deterrent to those who might consider committing a similar crime in the future. Again, as the Second Circuit said in *Peters,* "returning a wrongdoer to the

economic position he occupied before he committed his criminal offense does not provide much of a deterrent to those who might be tempted to follow in his footsteps." *Peters,* 154 F.3d at 101. If the worst that can happen, from a pecuniary perspective, is the loss of the profit made from a criminal endeavor, the would-be criminal might be more likely to gamble that the scheme might pay off. On the other hand, the prospect of having to forfeit not only the profits of the scheme but all that the criminal invested in the enterprise would make many would-be criminals think twice about the risks involved in taking that road.

Finally, as the Fourth Circuit said in *McHan,* limiting the definition of "proceeds" to net profits would create "perverse incentives for criminals to employ complicated accounting measures to shelter the profits of their illegal enterprises." *McHan,* 101 F.3d at 1042. *See Peters,* 732 F.3d at 101 (same, quoting *McHan*); *Keeling*, 235 F.3d at 537 (same). As a matter of policy, it would be counterproductive to reward criminals who conduct there illicit schemes in a complex or sophisticated manner so as to disguise the realization of economic benefits, while punishing the less clever offenders whose gains are more obvious.

The reasoning of these cases applies with full force to defendant Hallinan. His claim, that it was necessary for him to make $422 million in unlawful loans and to spend $59 million on operating expenses in order to recover $490 million in gross proceeds means that the forfeiture should be limited to his $9 million profit, is no different from the claim of a drug dealer that because it was necessary for him to spend $x million to buy heroin or cocaine and $y million on airplanes and other distribution expenses, he should only have to forfeit the profit he made from his criminal enterprise. That argument has been soundly rejected time and again by every circuit but one. It runs counter to sound criminal justice policy, and it finds no support in the language of the statute or its legislative history. It should be rejected here.

E. Defendant's reliance on the Seventh Circuit cases has no merit.

Defendant Hallinan asks this Court to follow the Seventh Circuit's decision in *Masters* holding that criminal forfeiture under RICO is limited to the net profits of the RICO offense. Hallinan Brief at 5; *United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991). That decision, however, is disfavored by other circuits.

Masters, decided in 1991, was the first appellate decision to interpret the term "proceeds" in the RICO statute. Its holding, that criminal forfeiture is limited to the net profits of the defendant's offense, has spawned a series of cases with results that any objective observer would find surprising if not plainly contrary to public policy and common sense.

For example, in *United States v. Jarrett*, 133 F.3d 519, 530-31 (7th Cir. 1998), the court affirmed a forfeiture order that gave a heroin dealer credit for the cost of the heroin that he later sold. In *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003), another panel held that under Seventh Circuit law, a person paying a kickback to a corrupt public official was entitled to deduct the amount of the kickback as well as his office overhead expenses from the forfeiture of the proceeds he realized from the corrupt bargain. And in *United States v. Encinares,* 2015 WL 507530, *2 (N.D. Ill. Feb. 5, 2015), a district court, following *Genova,* held that the defendant in health care fraud case was entitled to credit for the kickback he paid to get undeserved Medicare payments. *See also United States v. Marcello*, 2009 WL 931039, *1 (N.D. Ill. Apr. 6, 2009) (applying *Masters*; gamblers convicted under RICO are entitled to credit for their "overhead expenses," including the cost of gambling machines and payments to bar owners); *United States v. McCarroll*, 1996 WL 355371, *8 (N.D. Ill. June 25, 1996) (defendant must be given credit for the cost of heroin sold).

The fact is that no other appellate court has followed *Masters* and at least four have expressly rejected it. *United States v. Simmons,* 154 F.3d 765, 770 (8th Cir. 1998) (collecting appellate cases on the gross v. net issue and declining to follow the Seventh Circuit); *United States v. Christensen,* 828 F.3d 763, 822 (9th Cir. 2015) (same); *United States v. Hurley,* 63 F.3d 1, 21 (1st Cir. 1995) (following RICO's legislative history and declining to follow the Seventh Circuit); *United States v. DeFries,* 129 F.3d 1293, 1314 (D.C. Cir. 1997) (describing the Seventh Circuit's statement in *Masters* as *dicta* and declining to follow it).

Significantly, *Masters* is not the law in the Third Circuit as discussed above. To the contrary, in *Heilman,* the Third Circuit specifically noted that its interpretation of proceeds was consistent with the interpretation of the *McHan* case, and rejected the holding in *McCarroll, supra,* one of district court cases from the Seventh Circuit following *Masters*.

F. Defendant Hallinan is mistaken: the Supreme Court's decision in *Santos* has no bearing on this case.

Defendant Hallinan also relies on the Supreme Court's decision in *United States v. Santos,* 553 U.S. 507 (2008), in which the Court, in a plurality opinion that has since been legislatively overruled, said that the term "proceeds" means "net profits" for some applications of the money laundering statute, 18 U.S.C. § 1956. Hallinan Brief at 5; *United States v. Santos,* 553 U.S. at 524 (Opinion of Justice Scalia) (finding that "proceeds" means net profits in gambling cases), legislatively overruled by 18 U.S.C. § 1956(c)(9), Pub. L. 111-21, 123 Stat. 1617 (2009). *See United States v. Gibson,* ___ F.3d ___, 2017 WL 5150282 (5th Cir. Nov. 7, 2017) ("Congress effectively overruled *Santos* by amending the statute to define "proceeds" more broadly, and that law took effect on May 20, 2009").

Because *Santos* dealt with the interpretation of the term "proceeds" in the money laundering statute and not in any forfeiture statute, the courts, including the Third Circuit, have

been unanimous in holding that *Santos* has no application in any case where it is *the forfeiture* of criminal proceeds, and not the laundering of those proceeds, that is at issue. *See Heilman,* 377 Fed. Appx. at 211 ("we are not bound by the Supreme Court's holding in *Santos*" in which "the Court was interpreting a different statute in a different section of the United States Code"); *Peters*, 732 F.3d at 100 (*Santos* does not apply to criminal forfeiture); *Christensen,* 828 F.3d at 823 (same; following *Peters*); *United States v. Bader*, 678 F.3d 858, 893-94 (10th Cir. 2012) (*Santos* does not require a determination that the proceeds of an offense were "net profits" for purposes of criminal forfeiture); *United States v. Bucci*, 582 F.3d 108, 123-24 (1st Cir. 2009) (*Santos* has no application in forfeiture cases; a drug dealer must forfeit the gross proceeds of his drug offense without any deduction for his expenses). Indeed, even the courts in the Seventh Circuit do not apply *Santos* to criminal forfeiture cases. *See United States v. Jarrett,* 803 F. Supp. 2d 938, 943-44 (N.D. Ind. 2011). Simply put, the same term can have different meanings depending on the context and the statute in which it is used, *Heilman,* 337 Fed. Appx. at 211, and that is the case here.

Moreover, Defendant cannot have it both ways. If the interpretation of the term "proceeds" in the money laundering statute applies to forfeiture, as he contends, then it is the present definition, not the interpretation in the 2008 decision in *Santos* that applies. As noted, Congress amended the money laundering statute in 2009 to define "proceeds" as "any property derived from or obtained or retained, directly or indirectly through some form of unlawful activity, *including the gross receipts of that activity*." 18 U.S.C. § 1956(c)(9) (2009) (emphasis added). So, if the money laundering definition of proceeds applies in forfeiture cases, it is the "gross receipts" of the offense that must be forfeited.

G. The forfeiture of gross proceeds does not violate the Excessive Fines Clause of the Eighth Amendment.

Defendant Hallinan invites this Court to hold that the forfeiture of gross proceeds in this case would violate the Excessive Fines Clause of the Eighth Amendment as applied by the Supreme Court in *Alexander v. United States,* 509 U.S. 544 (1993) and *United States v. Bajakajian,* 524 U.S. 321 (1998). Hallinan Brief at 8. This Court should reject the invitation because a forfeiture order for $490 million is appropriate here given the severity of the offense and the defendant's role in it.

A criminal forfeiture violates the Excessive Fines Clause of the Eighth Amendment if it is grossly disproportional to the gravity of the offense it is designed to punish. *United States v. Bajakajian,* 524 U.S. 321, 334 (1998). To determine whether the forfeiture was grossly disproportional, the courts examine three factors: (1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature and sentencing guidelines; and (3) the harm caused by the defendant. *Id.* at 337-342. *United States v. Cheeseman*, 600 F.3d 270, 282-284 (3d Cir. 2010); *United States v. Young*, 618 Fed. Appx. 96, 97 (3d Cir. 2015).

However, courts have held that in forfeiture cases involving proceeds, this analysis does not apply. *United States v. Sum of $185,336.07 U.S. Currency*, 731 F.3d 189, 194 (2d. Cir. 2013) ("the Eighth Amendment does not apply to forfeitures under 21 U.S.C. § 881(a)(6)"); *United States v. Betancourt*, 422 F.3d 240, 250-51 (5th Cir. 2005) ("the Eighth Amendment has no application to the forfeiture of property acquired with proceeds"; the forfeiture of a winning lottery ticket purchased with drug proceeds therefore could not violate the Excessive Fines Clause, regardless of the value of the lottery winnings; that the forfeiture greatly exceeded the maximum statutory fine is irrelevant); *United States v. Real Prop. Located at 22 Santa Barbara*

Dr., 264 F.3d 860, 874-75 (9th Cir. 2001) (the Eighth Amendment does not apply to the forfeiture of drug proceeds; all property traceable to such proceeds is forfeitable even though the property doubled in value due to appreciation); *United States v. Real Property…Parcel 03179-005R*, 287 F. Supp. 2d 45, 59-60 (D.D.C. 2003) (forfeiture of property purchased with criminal proceeds does not violate the Excessive Fines Clause even if the property has substantially appreciated in value; to hold otherwise would reward a defendant who invested his criminal proceeds by allowing him to retain the the capital gain); *United States v. One Parcel of Real Prop. Known as 16614 Cayuga Rd.*, 69 Fed. Appx. 915, 919-20 (10th Cir. 2003) (the forfeiture of proceeds can never be constitutionally excessive); *See also, United States v. One Parcel…Lot 41, Berryhill Farm*, 128 F.3d 1386 (10th Cir. 1997) (same, the forfeiture of proceeds can never be constitutionally excessive; collecting cases).

Even if the Eighth Amendment were to be applied in this case, a forfeiture order for the gross proceeds would not be excessive under the *Bajakajian* factors. The defendant is exactly the type of person at whom the RICO statute was directed. He established and operated a RICO enterprise for many years, and worked tirelessly to evade law enforcement. In addition, the legislative history and the statute itself demonstrate that RICO offenses are considered serious and of great importance. RICO violations carry a statutory sentence of twenty years' imprisonment and a fine up to twice the gross profits. 18 U.S.C. § 1963(a)(3). And the harm caused by defendant Hallinan was far-reaching and impactful. Bryan Smith, from Intercept, testified that the Hallinan PDL made approximately 1.4 million payday loans to customers across the country between 2007 and 2013, including to borrowers who lived in states where such loans were either prohibited or subject to regulations that Hallinan did not follow. The usurious loans caused financial hardship to his customers, like Dawn Schmitt, the teacher from Nebraska.

Layered on top of this financial harm by the defendant was the shameless fraud in the Indiana lawsuit and the international money laundering he used to commit it. Given these factors, a forfeiture order of $490 million based on gross proceeds is large, but also commensurate with the nature of the crime and the defendant's responsibility for it. *See*, *Acuna*, 313 Fed. Appx. at 299 (forfeiture of $642 million not excessive in a RICO case where forfeiture represented the gross proceeds of the gambling enterprise during the time of the defendant's leadership).

In addition, the courts that have addressed the issue of gross proceeds versus net proceeds, have agreed that there is no constitutional infirmity in ordering a defendant to forfeit the gross proceeds of his offense without credit for the costs that he incurred in bringing his criminal scheme to fruition. *See United States v. Porcelli,* 440 Fed. Appx. 870, 879 (11th Cir. 2011) (forfeiture of the gross amount of a bank fraud scheme without an offset for what it cost to keep the scheme going was not excessive, even though the difference between the gross receipts and the net proceeds was three times the maximum fine); *United States v. Sigillito,* 899 F. Supp.2d 850, 867-68 (E.D. Mo. 2012) (requiring a defendant to forfeit the gross receipts of an investment fraud scheme without credit for the money he returned to early investors as principal and interest is not grossly disproportional where the later investors lost tens of millions of dollars); *United States v. Tran,* 2013 WL 11320233, *8 (W.D. Va. Oct. 30, 2013) (forfeiture of gross proceeds of contraband cigarette sales, without credit for amount paid to ATF undercover for the cigarettes, does not violate the Eighth Amendment, even though it means defendant will be worse off than before she committed the crime).

The case most closely analogous to the instant one is the Eleventh Circuit's decision in *Porcelli.* There, the defendant was convicted under the mail fraud statute of defrauding distressed homeowners out of the equity in their homes through fraudulent lending practices.

Porcelli, 440 Fed. Appx. at 872. The Government sought, and the district court imposed, a forfeiture money judgment in the amount of $1.8 million, reflecting the gross amount that the defendant received in the course of the scheme. The defendant appealed, arguing that the forfeiture should be reduced by the $772,118 that he invested in the scheme by loaning money to the victims to pay off their first mortgages.

The Eleventh Circuit affirmed the forfeiture order. There was nothing grossly excessive, the court said, about holding a defendant criminally liable for the gross proceeds of his offense in this situation. The $772,118 that he invested in the scheme "was an integral part of Porcelli's scheme to defraud the victims . . . .," and as such, its forfeiture, along with his profits, was consistent with the statutory scheme and was not "grossly disproportional to the gravity of his offense." 440 Fed. Appx. at 879. The "grossly disproportional" standard, the court added, "acknowledges that proportionality analyses are inherently imprecise and best kept with the province of legislatures, not courts." *Id.,* quoting *United States v. Chaplin's Inc.,* 646 F.3d 846, 851 (11th Cir. 2011).

The same rationale applies here. Defendant Hallinan's extension of the loan principal was an integral part of the RICO conspiracy and led to the predatory interest which generated the profits for the business, and as such, the forfeiture of the principal amount, along with the profits is not disproportional to the gravity of defendant Hallinan's offense.

H. The principal for loans was comprised of reinvested proceeds from the prohibited states and as such is not a direct cost.

Even if this Court were to determine that net proceeds applies instead of gross proceeds, the principal used for the loans is not an excludable direct cost. The Government's evidence is that the loan principal used by the defendant over the course of the conspiracy was comprised of reinvested proceeds derived from the criminal conduct.

For several years prior to the beginning of the RICO conspiracy, defendant Hallinan established his PDL portfolios which were used in the "rent-a-tribe" scheme together with the GoldStarcash portfolio he purchased from Michael Kevitch.[12] The evidence was overwhelming that the "rent-a-tribe" scheme was used to facilitate the defendant's relentless lending in prohibited and regulated states. During the conspiracy, the portfolios experienced remarkable growth fueled by defendant Hallinan regularly reinvesting the profits as principal for new loans. These new loans were made largely in prohibited and regulated states.[13]

The profits were customer payments comprised of fees, interest, and principal. Whether the payments came from prohibited, regulated or permitted states was not considered when they were reinvested as new principal. In this manner, the profits from prohibited, regulated and permitted states were combined and were reinvested as principal for new loans in prohibited, regulated, and permitted states. The profits reinvested as new principal greatly increased in value due to the usury interest.

Proceeds which are invested continue to be proceeds, and remain forfeitable including with appreciation. *United States v. Swanson*, 394 F.3d 520, 529 n.4 (7th Cir. 2005) (a change in the form of the proceeds does not prevent forfeiture; property traceable to the forfeitable property is forfeitable as well); *Betancourt*, 422 F.3d at 251 (if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket

[12] Although the start date of the charged RICO conspiracy in Count One was 2007, the government presented evidence that from 1997 through 2006, Hallinan also received proceeds from illegal payday loans, first through sham contracts with County Bank of Rehoboth, Delaware (from 1997 through 2003), then without any bank or tribal affiliate (the first few months of 2004), and then through sham contracts with Scott Tucker and the Modoc Tribe of Miami, Oklahoma (2004 through 2006). Hallinan then used these proceeds to extend new loans during the charged conspiracy.

[13] The Government is prepared to supplement the record at the evidentiary hearing as needed be to prove defendant Hallinan's business practice of reinvesting the profits.

appreciated enormously when it turned out to contain the winning number); *United States v. Hill*, 46 Fed. Appx. 838, 839 (6th Cir. 2002) (stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares); *United States v. Real Prop. Located at 22 Santa Barbara Dr.,* 264 F.3d at 874-75 (all property traceable to the proceeds is forfeitable even though the property doubled in value due to appreciation)*; United States v. Hawkey*, 148 F.3d 920, 928 (8th Cir. 1998) (if property is subject to forfeiture as property traceable to the offense, it is forfeitable in full, including any appreciation in value since the time the property became subject to forfeiture; the reason for the appreciation does not matter).

Here, when defendant Hallinan reinvested his criminally derived proceeds as new principal, they did not cease to be forfeitable proceeds. To the contrary, the proceeds increased in value due to the usury interest. They were then reinvested, as new principal. Because this occurred over and over and over again from the inception of the business through the entire course of the conspiracy, the principal for the loans was not legitimate money and cannot be subtracted from the gross proceeds.

This is not only the law, it is a common-sense proposition. Defendant Hallinan should not be allowed to obtain money through unlawful loans, invest that money in more unlawful loans to earn even more money, repeat this cycle countless times, and then claim that the principal for the loans is legitimate and not forfeitable proceeds. The principal and profits are all forfeitable as criminally derived proceeds that appreciated through the usury interest.

I. Because principal for loans in lawful states was comprised of reinvested proceeds from loans in prohibited states, the proceeds from lawful states are forfeitable.

Defendant Hallinan claims that the Government must excise out the profits made from permitted states because those profits were not criminally-derived proceeds. Hallinan Brief at 7. The defendant is correct that the Government cannot forfeit the proceeds of legitimate business.

Simmons, 154 F.3d at 771 (explaining that only the gross proceeds of the illegal portion of the defendant's business was subject to forfeiture). However, as demonstrated above, the defendant routinely invested his criminally-derived proceeds as principal in permitted states (and prohibited ones). These proceeds then appreciated in value. The use of the criminally-derived proceeds as principal in permitted states did not render the dirty proceeds clean; to the contrary, the increase in value is also forfeitable for the reasons stated above. Defendant Hallinan's routine reinvesting of profits was not only a sound business practice which led to great success, it also ensured that there are no discernible legitimate proceeds. The gross proceeds are forfeitable without regard to whether loans were made in permitted states.[14]

II. THE 5th AVENUE PROPERTY AND THE SCHOOL ROAD PROPERTY ARE FORFEITABLE AS FACILITATING PROPERTY

The Government is seeking the forfeiture of defendant Hallinan's property at 400 S.E. 5th Avenue, Apt. 304N, Boca Raton, FL ("the 5th Avenue Property") and defendant Neff's property

[14] Defendant Hallinan complains that "[d]espite having access to the loan documents, the Government has made no effort to attempt to exclude from the calculation" the amount of money subject to forfeiture any receipts from loans "that were not unlawful" – i.e., loans made to borrowers who lived in states without usury laws. Hallinan Brief at 7-8. There are several flaws with this argument. First, the government does not have all of the loan documents. The government has only those records that were provided by Intercept and Hallinan's companies in response to grand jury subpoenas, and none of those records identify any legal payday loans: i.e., any loans made to borrowers in states without usury laws. Hallinan's companies did produce four spreadsheets of "leads" that were acquired from Apex 1 Lead Generators, Inc., a company founded in 2008 and owned by Hallinan (60%) and his employees, Michael Kevitch (30%) and Gary Gordon (10%). The government introduced redacted versions of these spreadsheets into evidence as Exhibits 297-R through 300-R. Collectively, the four spreadsheets identify 303,816 "leads" acquired by Hallinan's companies. Of that total, only 14,556 were identified as living in the six states where payday lending was neither prohibited nor regulated from 2007 through 2013 (Delaware, Idaho, Nevada, South Dakota, Utah, and Wisconsin). That figure represents only 4.79 percent of the 303,816 leads identified on Exhibits 297R-300R. It is reasonable to extrapolate that approximately 4.79 percent of the $490,904,533 in payday loan proceeds that Intercept transmitted to the Hallinan Payday Loan Companies came from legal payday loans. That figure is only $23,514,327.13, which would still leave $467,390,205 in proceeds from illegal payday loans. As explained in the text, however, it is impossible to identify even that $23,514,327.13 figure as constituting "legal proceeds" because of the manner in which proceeds from prior loans had been combined and reinvested without regard to the states where the borrowers lived.

at 118 School Road, Wilmington DE ("the School Road Property") as property affording a source of influence over the RICO enterprise. Property affords a source of influence over a RICO enterprise when it furthers the affairs of the enterprise, when the defendant uses the property to conduct the affairs of the enterprise or when the defendant uses the property *to facilitate* his conduct of the affairs of the enterprise. *United States v. Angiulo*, 897 F.3d 1169,1211, 1214-1215 (1st Cir.1990) (defendant's interest in a café was subject to forfeiture where defendant held meetings at café to discuss racketeering activities; seized cash could be forfeited as affording a source of influence).[15] Facilitation occurs when the use of the property makes the operation of the RICO enterprise "less difficult or more or less free from obstruction or hindrance." *United States v. Huber*, 404 F.3d 1047, 1060 (8th Cir. 2005).[16]

A. There was more than a substantial connection between the properties and the RICO enterprise.

Facilitation is proven when the degree to which the property facilitated the crime was "substantial." *United States v. Herder*, 594 F.3d 352, 364-65 (4th Cir. 2010). To satisfy the substantial connection requirement, the Government need not show that the property was integral, essential, or indispensable to the commission of the offense, but only that it made the crime less difficult to commit and that its use was not merely "incidental or fortuitous." *Id.* 364-65. *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (facilitating property is anything that makes the offense easier to commit or harder to detect; a dentist's office where illegal prescriptions were written was forfeitable because "it provided an air of legitimacy and protection from outside scrutiny").

[15] Additional supporting citations are found in the Government's earlier submission on forfeiture, the Motion for Preliminary Order of Forfeiture, and Proposed Findings of Fact and Conclusions of Law in Support ("Government's Motion for POF").

[16] Additional supporting citations are found in the Government's Motion for POF.

The Government's evidence as to the use of the 5th Avenue Property is that defendant Hallinan needed a fixed address to legally establish the component entities that were part of his RICO enterprise, and a place to receive business mail, and to register for tax and other business purposes. Further, he needed a location to conduct the business while in Florida, including to conduct telephone calls free from the curious ears of third parties, and to otherwise take care of the affairs of the RICO enterprise, which over a period of years, processed the receipt of at least $490 million in collections from unlawful debts. The 5th Avenue Property satisfied all of these important functions and undoubtedly made the RICO offense easier to commit, thereby rendering it forfeitable. Government's Motion for POF at 28-29. [17]

The School Road Property also served to legally form the companies by providing a registered address for the registered agent, who was defendant Neff. It also served as a place for business for defendant Neff in his capacity as counsel to the enterprise. Here, he could advise Hallinan as to the schemes they were conducting, and take care of the documents necessary to effect those schemes without discovery. Government's Motion for POF at 28-29.[18]

Defendant Hallinan characterizes the connection to the crime as tenuous and limited to the property's mailbox. Hallinan Brief at 9. This argument is unavailing. In *United States v. Heldeman,* 402 F.3d 220, 222 (1st Cir. 2005), the First Circuit held that the forfeiture of a residence where a physician wrote illegal prescriptions for steroids and painkillers satisfied the requirement because it served as his base of operations. It made no difference, the court said, that the offense could as easily have been committed in another place. *Id. See also*, *United States*

[17] Government's Motion for POF includes citations to the trial record in support of this position. The Government is prepared to supplement the record at the evidentiary hearing as to defendant Hallinan's use of the 5th Avenue Property.

[18] Government's Motion for POF includes citations to the trial record in support of this position.

v. Schifferli, 895 F.2d 987, 990-91 (4th Cir. 1990) (forfeiture of a dentist's office where illegal prescriptions were written was affirmed because the office "provided an air of legitimacy and protection from outside scrutiny.")

The use of the property as a base of operations free from outside scrutiny has been cited many times in support of the forfeiture of a residence in cases involving child pornography, even though the defendant used only a single room in his house to commit the offense. *See United States v. Hull*, 606 F.3d 524, 528 (8th Cir. 2010) (house where defendant used the computer to solicit sex from children and distribute child pornography was not merely the location where the offense occurred; it was "used to commit" the offense in the sense that it provided the defendant with privacy and freedom from outside scrutiny; thus its role in the offense was substantial and not "incidental or fortuitous").

Finally, property used to commit white collar crimes has been found to satisfy the substantial connection test if it served as a base of operations and provided the defendant with an address that he could use to perpetrate his scheme. *See United States v. Thornton,* 2012 WL 2866467, *2 (S.D. Miss. July 2, 2012) (defendant's residence forfeited as facilitating property under § 1028(b)(5) because defendant used the address to perpetrate the identity theft).[19]

The cases above suggest that the qualities that matter in determining whether the connection between the property and the offense was substantial, not merely incidental and fortuitous, include whether the use of the property was planned in advance or occurred

[19] Courts have found that the connection between the property and the offense is "merely incidental or fortuitous" even though the property satisfied the threshold requirement of making the crime easier to commit. *United States v. One 2011 Harley Davidson FLHX 103 Motorcycle,* 2013 WL 5330038, *4 (N.D. Ga. Sept. 20, 2013) (vehicle used to drive to site of drug deal); *United States v. One 1989 JaguarXJ6,* 1993 WL 157630, *3 & n.2 (N.D. Ill. May 13, 1993) (car driven to place where crime is committed does not have a substantial connection to the offense; it would be different if items used to commit the crime were found in the vehicle). That is not the case here.

fortuitously for no particular reason; whether it occurred on a one-time basis or played a continuing role in the operation of the illicit business over a period of time; whether use of the property allowed the defendant to consummate a particular aspect of his offense that would have been difficult to commit if, for example, he had no fixed address, or if his activities were visible to outsiders. In this case, the connection between the 5th Avenue Property and the offense includes all of these qualities, and was more than sufficient to establish it is forfeitable. Likewise, all of these qualities are present in the connection between defendant Neff's offense and the School Road Property, rendering it forfeitable.

B. Defendants conflate the substantial connection requirement with proportionality.

The defendants are correct that the cases interpreting the "affording a source of influence" provision in RICO limit the forfeiture of facilitating property to the portion of the property that was illegally used. *Angiulo*, 897 F.2d at 1211 (assets "affording a source of influence are only subject to forfeiture to the extent they are tainted by the racketeering activity); *United States v. Bangiyev,* 141 F. Supp.3d 589, 598 (E.D. Va. 2015) (same; following *Anguilo*). However, the proportionality analysis applies after the Government has established a substantial connection to the property which renders the property forfeitable, and only if the evidence shows that a portion of the property (not the entirety) was used to facilitate the RICO enterprise.[20]

In this case, the evidence demonstrates that the properties in their entirety were used. Defendant Hallinan used all of the Fifth Avenue Property and defendant Neff used all of the School Road Property to form the component companies of the RICO enterprise which were essential to its success. Government's Motion for POF at 28-29. [21]

[20] The defendants conflate substantial connection requirement for forfeitability with the proportionality analysis. Hallinan Brief at 9; Neff Brief at 5-6.

[21] Government's Motion for POF includes citations to the trial record in support of this position.

Because *all* of the properties were used to commit the offense, the proportionality requirement as defined in *Anguilo* has no bearing on the forfeiture of the properties.

However, if this Court determines that the defendants used the properties to facilitate the RICO enterprise, but not in their entirety, then *Anguilo* applies, and a proportionality analysis should be conducted.

C. The source of the funds used to acquire the property is irrelevant.

Defendant Hallinan argues that the 5th Avenue Property was acquired with lawful funds prior to the RICO conspiracy.[22] The fact that the property may have been acquired with legitimate funds some time ago is entirely irrelevant. The government's theory of forfeiture as it applies to the 5th Avenue Property is that it afforded a source of influence over the RICO enterprise, not that it was the proceeds of the racketeering activity. The term "property affording a source of influence" in RICO cases is the equivalent of the more familiar phrase "facilitating property" as it is used in many other criminal and civil forfeiture statutes. Facilitating property is forfeitable because it was used to commit, or to facilitate the commission of a criminal offense. *United States v. R.D., Box 1, Thomsontown,* 952 F.2d 53, 58, 56 n.3 (3d Cir. 1991) (residence pledged as collateral for home equity loan to finance drug deal forfeited as facilitating property under 21 U.S.C. § 881(a)(7) even though jury found it was not forfeitable as proceeds under § 881(a)(6)).

Whether it was acquired with criminally derived funds is irrelevant. Indeed, in most forfeiture cases in which property is forfeited under a facilitation theory, the property was not acquired with illicit funds but was legitimately derived property that the defendant chose to use to enhance his ability to commit his particular crime. If that were not the case, there would not

[22] Defendant Neff does not advance this argument.

be legions of cases in which residences, businesses, vehicles and even untainted funds in bank accounts are forfeited as facilitating property notwithstanding their legitimate acquisition.

D. Third-party interests are irrelevant at this stage in the proceedings.

Defendant Hallinan is mistaken when he argues that his wife's spousal interest in the 5th Avenue Property cannot be forfeited in his criminal case.[23] Federal Rule of Criminal Procedure 32.2 governs the procedure for the forfeiture in this case and could not be more clear on this point. Fed. R. Crim. P. 32.2.[24]

It reads in relevant part as follows: "The court must enter the [preliminary] order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c)." Fed. R. Crim. P. 32.2 (b)(2)(A); 18 U.S.C. § 1963(l); 21 U.S.C. 853(n); *United States v. Andrews,* 530 F.3d 1232, 1236 (10th Cir. 2008) (when the court determines the forfeitability of the property pursuant to Rule 32.2(b)(1), it does not – "and indeed may not" – determine the rights of third parties in the property; the ownership issue is deferred to the ancillary proceeding); *United States v. Lazarenko,* 476 F.3d 642, 648 (9th Cir. 2007) ("Upon a finding that the property involved is subject to forfeiture, a court must promptly enter a preliminary order of forfeiture without regard to a third party's interests in the property"); *United States v. Nicoll,* ___ Fed. Appx. ___, 2017 WL 4310005 (3rd Cir. Sept. 27, 2017) (explaining the difference between the forfeiture phase of the trial, which involves only the defendant and is for

[23] Defendant Neff does not advance this argument. Neff acknowledges that his wife has a third party interest.

[24] Rule 32.2 augments the other criminal forfeiture procedure found in 18 U.S.C. § 1963(l) and 18 U.S.C. § 853, all of which apply to this case.

the defendant's protection, and the ancillary proceeding, which is the only forum for litigating the rights of a third party).

Accordingly, even if defendant Hallinan had standing to assert his wife's interest in opposition to the forfeiture of the 5th Avenue Property, which he does not, he would not be permitted to assert that interest now. Rather, the proper procedure is for the Court to enter the preliminary order of forfeiture upon a finding that the property is subject to forfeiture and to allow defendant Hallinan's wife (or any other third party) to file a claim asserting her interest in the post-trial ancillary proceeding. *See United States v. Ayika,* 837 F.3d 460, 475 n.24 (5th Cir. 2016) (defendant cannot object to the forfeiture of property traceable to his offense on the ground that third parties have an interest in the property, citing Rule 32.2(b)(2)(A) and collecting cases); *United States v. Rivers,* 60 F.Supp.3d 1262, 1265 (M.D. Fla. 2014) ("any objection [the defendant] may have on the basis that a third party holds an interest in forfeitable property is not his objection to make"); *United States v. Overstreet*, 2012 WL 5969643 (D. Idaho Nov. 29, 2012) (because ownership issues must be deferred to the ancillary proceeding, defendant cannot oppose a forfeiture order on the ground that the property belongs to a third party); *United States v. Brown*, 2006 WL 898043, *5 (E.D.N.Y. 2006) (defendant cannot object to the forfeiture of real property involved in a money laundering offense on the ground that the property belongs to his wife; the proper procedure is for the court to enter a preliminary order of forfeiture as to the property and allow the wife to file a claim in the ancillary proceeding).

E. Substitute Assets

Finally, it is important to note that even if the Court were to find that the 5th Avenue Property and/or that the School Road Property was not substantially connected to the RICO offense, or that only a portion was forfeitable, the property (or the remainder of the property)

would nevertheless be subject to forfeiture pursuant to 18 U.S.C. § 1963(m) as a substitute asset, assuming the Court finds that the defendants are liable to forfeit the proceeds of the RICO offense in an amount that exceeds the value of the property. *See United States v. Voigt,* 89 F.3d 1050, 1088 (3d Cir. 1996) (order forfeiting jewelry as directly forfeitable property reversed on appeal, but Government remains free on remand to seek forfeiture of same property as substitute asset).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Government's Reply to Defendants' Proposed Findings of Fact and Conclusions of Law as to Forfeiture was served by electronic filing on:

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