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 20 UNITED STATES OF AMERICA

21 UNITED STATES DISTRICT COURT
 22 FOR THE CENTRAL DISTRICT OF CALIFORNIA

23 UNITED STATES OF AMERICA,
 24 Plaintiff,
 25 vs.
 26 MONGOL NATION,
 27 an unincorporated association,
 28 Defendant.

) No. CR 13-106(A)-DOC
)
) **GOVERNMENT’S NOTICE OF**
) **MOTION AND MOTION FOR**
) **PRELIMINARY ORDER OF**
) **FORFEITURE AGAINST**
) **DEFENDANT MONGOL NATION**
)
) **DATE: February 28, 2019**
) **TIME: 8:00 a.m.**
) **LOCATION: Courtroom of the**
) **Hon. David O. Carter**

1 PLEASE TAKE NOTICE that on February 28, 2019, at 8:00 a.m., in
2 Courtroom 10D of the Federal Courthouse in Santa Ana, California, before the
3 Honorable David O. Carter, Plaintiff United States of America (“the government”),
4 will and hereby does move to request that the Court enter the proposed Preliminary
5 Order of Forfeiture (“POF”) lodged contemporaneously herewith, against
6 defendant Mongol Nation (“Defendant”), pursuant to Fed. R. Crim. P. 32.2 (“Rule
7 32.2”), 18 U.S.C. § 1963 (“§ 1963”), the guilty verdict entered against Defendant
8 on December 13, 2018, on Counts One and Two of the First Superseding
9 Indictment (“FSI”), for violations of Title 18 U.S.C. § 1962 (Docket Number
10 (“DN”) 311), and the jury’s forfeiture verdict against Defendant, entered on
11 January 11, 2019 (DN 350).

12 This motion is made following the conference of counsel pursuant to L.R. 7-
13 3, which took place on January 11, 2019.

14 The proposed POF orders the forfeiture of any and all right, title and
15 interests of Defendant in, associated with, or appurtenant to: (1) three federally
16 registered collective membership marks, referred to respectively below and in the
17 POF as the “Word Mark,” the “Center Patch Image,” and the “Combined Mark”
18 (collectively, the “Marks”); (2) items of tangible personal property bearing the
19 Word Mark and/or all or part of the Center Patch Image, which items were seized
20 by state, local or federal law enforcement agencies, and are currently in the custody
21 of the United States as a result of the investigation by the United States Bureau of
22 Alcohol, Tobacco, Firearms & Explosives into the racketeering and overt acts
23 alleged in the First Superseding Indictment, to include vests or “cuts,” patches,
24 clothing and documents; and (3) the firearms, ammunition and concealable body
25 armor entered into evidence in this action, all of which are more particularly
26 described in exhibit “A” to the proposed POF. The property described
27 immediately above is referred to collectively herein as the “Forfeitable Property.”
28

1 All of Defendant's right, title and interest in and to the Forfeitable Property
2 is subject to mandatory forfeiture as a result of Defendant's conviction of Counts
3 One and Two in the FSI and the jury's subsequent Special Verdict findings that the
4 Forfeitable Property represents either (1) an interest Defendant acquired or
5 maintained in violation of 18 U.S.C. § 1962, as charged in Count Two of the FSI;
6 or (2) an interest in, security of, claim against, or property or contractual right of
7 any kind that afforded a source of influence over any enterprise that Defendant
8 established, operated, controlled, conducted, or participated in the conduct of, in
9 violation of 18 U.S.C. § 1962, as charged in Count Two of the FSI; or (3) property
10 constituting, or derived from, any proceeds that Defendant obtained, directly or
11 indirectly, from racketeering activity, in violation of 18 U.S.C. § 1962, as charged
12 in Count Two of the FSI.

13 As explained in the attached memorandum, in light of the jury's verdicts,
14 entry of the proposed POF is mandatory pursuant to 18 U.S.C. § 1963(a) and (e),
15 and Rule 32.2(b)(2)(A).¹ This motion is supported by Defendant's conviction, the

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25 ¹ While the ultimate forfeiture of the Marks arguably presents potential
26 Constitutional issues, the government contends that the entry of the POF, which
27 does nothing more than forfeit the convicted defendant unincorporated
28 association's interest in the Forfeitable Property, does not implicate any
Constitutional concerns or issues.

1 **I.**

2 **INTRODUCTION**

3 Criminal forfeiture is a remedy governed entirely by statute and rule, both
4 substantively and procedurally. It follows a specific and well-defined process,
5 intended both to eliminate interference with the substantive criminal case by third
6 parties and protect the rights of potential third-party claimants (*i.e.*, non-
7 defendants) to forfeitable property. The criminal forfeiture process began here
8 with the December 13, 2018 conviction of the Defendant, followed by the jury's
9 January 11, 2019 finding of a nexus between the Defendant's conviction on Count
10 Two of the FSI and the Forfeitable Property. The jury having now returned a
11 Special Verdict re Forfeiture identifying specific property with a connection to the
12 RICO conspiracy, the entry of a preliminary order of forfeiture against Defendant
13 is mandatory, and must be entered promptly. *See* 18 U.S.C. § 1963(a) and (e);
14 Rule 32.2(b)(2)(A). By this application, the government requests that the Court
15 enter the proposed Preliminary Order of Forfeiture ("POF"), lodged
16 contemporaneously herewith, against defendant Mongol Nation, an unincorporated
17 association ("Defendant").

18 **II.**

19 **PROPERTY SOUGHT AND LEGAL BASIS**

20 **A. The Property Sought for Forfeiture**

21 The government sought the forfeiture of three basic categories of property in
22 this case: (1) all rights associated with the collective membership marks described
23 in the FSI and the government's Bills of Particulars, including what has been
24 referred to as the Word Mark (that is, the word "MONGOLS"), the Image Mark
25 (that is, the Center Patch Image), and the "Combined Mark," which contains both
26 the Word and Center Patch Image (collectively, the "Marks"); (2) items of personal
27 property bearing any of the Marks, or any portion of any the Marks, which items
28 are currently in government custody as a result of the government's investigation

1 of the racketeering and overt acts alleged in the FSI, including Mongols vests (or
2 “cuts”); and (3) particular firearms, ammunition and concealable body armor
3 admitted into evidence during the guilt phase of the trial. The jury concluded that
4 the government had established the requisite connection with respect to the Marks;
5 vests, patches, clothing and documents bearing any of the Marks or any portion of
6 any of the Marks, and all of the firearms, ammunition and body armor.

7 **B. Forfeiture Is an Aspect of Sentencing**

8 Criminal forfeiture is imposed on a convicted defendant as part of
9 sentencing. It is not an element of the underlying substantive offense. *See Libretti*
10 *v. United States*, 516 U.S. 29, 39 (1995) (“Our precedents have likewise
11 characterized criminal forfeiture as an aspect of punishment imposed following
12 conviction of a substantive criminal offense.”). It is an important sentencing tool,
13 carrying into effect Congressional intent to deprive criminals and criminal
14 organizations of the instrumentalities and profits of their illegal conduct. *See*
15 *Kaley v. United States*, 134 S. Ct. 1090 (2014) (forfeiture serves to punish the
16 wrongdoer, deter future illegality, lessen the economic power of criminal
17 enterprises, compensate victims, improve conditions in crime-damaged
18 communities, and support law enforcement activities such as police training);
19 *Caplin & Drysdale v. United States*, 491 U.S. 617, 630 (1989) (“a major purpose
20 motivating congressional adoption and continued refinement of the Racketeer
21 Influenced and Corrupt Organizations (RICO) and Continuing Criminal Enterprise
22 (CCE) forfeiture provisions has been the desire to lessen the economic power of
23 organized crime and drug enterprises”).

24 **C. The Broad Scope of RICO Forfeiture**

25 Both the Supreme Court and the Ninth Circuit have commented on the
26 broad, comprehensive reach of criminal forfeiture under the RICO Act. *See, e.g.,*
27 *Russello v. United States*, 464 U.S. 16, 26 (1983) (Congress enacted RICO “to
28 provide new weapons of unprecedented scope for an assault upon organized crime

1 and its economic roots”). The Ninth Circuit, citing *Russello*, has held that the
2 forfeiture provisions of §1963 are “purposely broad . . .[,] designed to totally
3 separate a racketeer from the enterprise he operates,” and that “forfeiture is not
4 limited to those assets of a RICO enterprise that are tainted by use in connection
5 with racketeering activity, but rather extends to the convicted person’s entire
6 interest in the enterprise.” *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir.
7 1987). “RICO’s forfeiture provision affords the trial court no discretion” and “is
8 quite literally without limitation” except, obviously, possible Constitutional
9 limitations. *Id.* at 1412-14.

10 Other Circuits have held the same. *See, e.g., United States v. Angiulo*, 897
11 F.2d 1169, 1211 (1st Cir. 1990) (“any interests in an enterprise, including the
12 enterprise itself, are subject to forfeiture in their entirety, regardless of whether
13 some portion of the enterprise is not tainted by the racketeering activity”); *United*
14 *States v. Segal*, 495 F.3d 826, 838-39 (7th Cir. 2007) (defendant’s entire interest in
15 the enterprise is forfeitable under § 1963(a)(2); if a business is forfeited, so are all
16 of its assets, including any subsidiary business that is wholly owned by the
17 forfeited business; there need not be an independent basis for the forfeiture of the
18 wholly-owned subsidiary); *United States v. Sarbello*, 985 F.2d 716, 724 & n.13 (3^d
19 Cir. 1993) (under RICO, 100 percent of a defendant’s interest in the enterprise is
20 subject to forfeiture, even if those “interests are acquired legitimately and the
21 enterprise is primarily engaged in legitimate activity”); *United States v. Anderson*,
22 782 F.2d 908, 918 (11th Cir. 1986) (“a defendant’s conviction under the RICO
23 statute subjects all his interests in the enterprise to forfeiture ‘regardless of whether
24 those assets were themselves ‘tainted’ by use in connection with the racketeering
25 activity”’), relying upon *United States v. Cauble*, 706 F.2d 1322, 1359 (5th Cir.
26 1983); *United States v. Porcelli*, 865 F.2d 1352, 1364 (2^d Cir. 1989) (“a RICO
27 enterprise found in violation of section 1962(c) is indivisible and is forfeitable in
28 its entirety”); and *United States v. Najjar*, 300 F.3d 466, 485 (4th Cir. 2002) (all of

1 the assets of a corporation convicted of a RICO offense are subject to forfeiture
2 under section 1963). *See also United States v. BCCI Holdings (Luxembourg) S.A.*
3 (*Petition of Pacific Bank*), 956 F. Supp. 5, 12 (D.D.C. 1997) (even untainted
4 property received by the enterprise after the racketeering activity had ceased is
5 subject to forfeiture under subsection (a)(2)(A) because “all of a RICO defendant’s
6 interests in an enterprise, including the enterprise itself, are subject to forfeiture in
7 their entirety, regardless of whether some portion of the enterprise is untainted by
8 racketeering activity”).

9 Criminal forfeiture is *in personam*, meaning that it may be imposed only
10 after a criminal conviction, and applies only to property of the convicted
11 defendant. *See United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007);
12 *United States v. Louthian*, 756 F.3d 295, 307 n.12 (4th Cir. 2014) (criminal and
13 civil forfeiture are “distinct law enforcement tools:” the former is an *in personam*
14 action that requires a conviction, and the latter is an *in rem* action against the
15 property itself); and *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir.
16 2006) (distinguishing civil and criminal forfeiture). For that reason, the proposed
17 POF forfeits only the defendant’s interest in the Forfeitable Property. Finally, the
18 extent of criminal forfeiture is determined by the conviction. The forfeiture must
19 correspond in nature and scope to the underlying criminal conduct of which the
20 defendant was convicted. *See United States v. Messino*, 382 F.3d 704, 714 (7th
21 Cir. 2004).

22 III.

23 APPLICABLE SUBSTANTIVE AND PROCEDURAL AUTHORITY

24 A. Substantive RICO Forfeiture Authority

25 The substantive forfeiture authority applicable here is found at 18 U.S.C. §
26 1963 (a) - (c), which describes the penalties for violation of the criminal RICO
27 statute. Subsection (a) authorizes the criminal forfeiture of
28

- 1 (1) any interest the person has acquired or maintained in violation of
2 section 1962;
- 3 (2) any –
 - 4 (A) interest in;
 - 5 (B) security of;
 - 6 (C) claim against; or
 - 7 (D) property or contractual right of any kind affording a source of
8 influence over; any enterprise which the person has established,
9 operated, controlled, conducted, or participated in the conduct
10 of, in violation of section 1962; and
- 11 (3) any property constituting, or derived from, any proceeds which the
12 person obtained, directly or indirectly, from racketeering activity or
13 unlawful debt collection in violation of section 1962.

14 Subsection (b)(2) provides that property subject to forfeiture includes
15 “tangible and intangible personal property, including rights, privileges, interests,
16 claims and securities.”

17 Subsection (c) provides that

18 All right, title, and interest in property described in subsection (a)
19 vests in the United States upon the commission of the act giving rise
20 to forfeiture under this section. Any such property that is
21 subsequently transferred to a person other than the defendant may be
22 the subject of a special verdict of forfeiture and thereafter shall be
23 ordered forfeited to the United States, unless the transferee establishes
24 in a hearing pursuant to subsection (1) that he is a *bona fide* purchaser
25 for value of such property who at the time of the purchase was
26 reasonably without cause to believe that the property was subject to
27 forfeiture under this section.

28 The Marks clearly fall within the scope of “property” as defined at 18 U.S.C.
§ 1963(b), which specifically provides for the forfeiture of intangible property,
including rights, privileges, interests, claims and securities. The government and
defendant stipulated that the Marsk had been in continuous use by the defendant
(in some form) since 1969. Registration of a mark provided additional protections

1 to defendant, and constitutes *prima facie* evidence of “the validity of the registered
2 mark and of the registration of the mark, of the registrant’s ownership of the mark,
3 and of the registrant’s exclusive right to use the registered mark,” each of which is
4 an element of ownership. *See* 15 U.S.C. § 1115(a); *In re International Flavors &*
5 *Fragrances, Inc.*, 183 F.3d 1361, 1366 (9th Cir. 1999) (“Trademark owners who
6 register their marks with the PTO are afforded additional protection [*i.e.*, rights and
7 privileges] not provided by the common law,” including the right to prevent others
8 from using the mark). This conclusion is bolstered by the overwhelming authority
9 concerning the extraordinarily broad reach of the forfeiture authority of § 1963.
10 *See Russello*, 464 U.S. at 26; *Busher*, 817 F.2d at 1413; *Angiulo*, 897 F.2d at 1211;
11 and *Segal*, 432 F.3d at 779.

12 **B. Procedural RICO Forfeiture Authority**

13 Procedurally, criminal forfeitures are governed by 18 U.S.C. § 1963(e) -
14 (m), and Federal Rule of Criminal Procedure 32.2 (“Rule 32.2”), entitled “Criminal
15 Forfeiture.” While both set out procedural rules, Rule 32.2 is the primary source.
16 *See United States v. Marquez*, 685 F.3d 501, 509 (5th Cir. 2012) (reciting the
17 requirements in Rule 32.2 and holding that they are mandatory, and “not empty
18 formalities”). While § 1963 also includes procedural provisions, they are either
19 essentially identical to those in Rule 32.2, provide additional powers or authority
20 unique to RICO forfeitures (some of which are discussed below), or are
21 inapplicable to this particular case. Moreover, while the government does not
22 believe that any of the provisions of § 1963 are inconsistent with those of Rule
23 32.2, to the extent conflicts are found, Rule 32.2 governs. *See* 28 U.S.C. §
24 2072(b) (“All laws in conflict with [the Federal Rules of Criminal Procedure] shall
25 be of no force or effect after such rules have taken effect.”).

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1 IV.

2 **THE PRELIMINARY ORDER OF FORFEITURE AND ANCILLARY**
3 **PROCEEDING**

4 **A. Entry of the Preliminary Order**

5 The determination of the forfeitability of the property sought by the
6 government was made by the jury pursuant to Rule 32.2(b)(5). Following that
7 determination, the Court “must promptly enter a preliminary order of forfeiture . . .
8 directing the forfeiture of specific property” Rule 32.2(b)(2)(A). That order
9 forfeits any interest the defendant may have in the property described in the
10 preliminary order, becomes final with respect to the defendant at the time of
11 sentencing, but remains preliminary as to third parties until the ancillary
12 proceeding is concluded under Rule 32.2(c). Rule 32.2(b)(4)(A).

13 Under [the statutory forfeiture scheme first enacted in 1984, including
14 18 U.S.C. § 1963(l)], the court orders the forfeiture of the defendant’s
15 interest in the property - *whatever that interest may be* -- in the
16 criminal case. At that point, the court conducts a separate proceeding
17 in which all potential third party claimants are given an opportunity to
18 challenge the forfeiture by asserting a superior interest in the property.
19 This proceeding does not involve relitigation of the forfeitability of
the property; its only purpose is to determine whether any third party
has a legal interest in the forfeited property.

20 Advisory Committee Notes to Federal Rule of Criminal Procedure 32.2 (2000
21 Adoption) (emphasis added).

22 **B. The Ownership Determination**

23 Following entry of the POF, the second phase of the forfeiture proceedings
24 generally begins, to determine the existence and effect, if any, of alleged third
25 party rights in the property described in the POF. Rule 32.2(c); 18 U.S.C. §
26 1963(l); *Andrews*, 530 F.3d at 1236 (the purpose of the ancillary proceeding is to
27 determine whether any third party has an interest in the forfeited property and to
28 amend the preliminary order of forfeiture accordingly); *United States v. McHan*,

1 345 F.3d 262, 275 (4th Cir. 2003) (ancillary proceeding tests a third party's claim
2 of an ownership interest; it is not a civil forfeiture proceeding in which the
3 government is seeking to forfeit a third party's interest in property); *United States*
4 *v. Gilbert*, 244 F.3d 888, 909 (11th Cir. 2001) (ancillary proceeding creates an
5 orderly procedure whereby third parties who claim their property interests have
6 been forfeited in a criminal case can "challenge the validity of the forfeiture order
7 and establish their legitimate ownership interests"; discussing legislative history).
8 This process allows any purported third parties in interest to intervene in the case
9 and seek to validate their claimed rights in the property listed in the POF.

10 Ownership of the property listed in the POF is not an issue to be determined
11 before entry of the POF because forfeiture of the defendant's interest in property
12 found to have a nexus to the underlying violation for which he has been convicted
13 is mandatory. *Alexander v. United States*, 509 U.S. 544, 562 (1993) ("a RICO
14 conviction subjects the violator not only to traditional, thought stringent, criminal
15 fines and prison terms, but also mandatory forfeiture under § 1963"); *Nava*, 404
16 F.3d at 1124. The court need not define the defendant's interest before entering
17 the POF because it is impossible as a matter of law for the defendant to retain *any*
18 interest in property as to which the requisite nexus has been shown. "Thus, the
19 ancillary proceeding has become the forum for determining the extent of the
20 defendant's forfeitable interest in the property." Rule 32.2, Advisory Committee
21 Notes, 2000 Adoption. Rule 32.2 thus establishes the "more sensible procedure
22 [whereby] the court, once it (or a jury) determines that property was involved in
23 the criminal offense for which the defendant has been convicted, [orders] the
24 forfeiture of whatever interest a defendant *may have* in the property *without having*
25 *to determine exactly what that interest is.*" *Id.* (emphasis added).²

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27 ² The deferral of the ownership determination serves both the letter and spirit of the
28 forfeiture scheme. *See Andrews*, 530 F.3d at 1236 (once forfeitability is
determined, the court does not – "and indeed may not" -- determine ownership;

1 A defendant cannot object to the entry of a preliminary order on the ground
2 that the property at issue does not belong to it. *United States v. Schlesinger*, 396
3 F.Supp.2d 267, 273 (E.D.N.Y. 2005); *United States v. Nicolo*, 597 F. Supp. 2d 342,
4 346 (W.D.N.Y. 2009) (in the forfeiture phase of the trial, the court “is not to
5 consider potentially thorny issues concerning third party ownership of property
6 sought to be forfeited;” if the Government establishes the required nexus to the
7 offense, the property must be forfeited; if the property belonged to a third party, he
8 will have an opportunity in the ancillary proceeding to make that claim).

9 Pursuant to Rule 32.2(b)(6)(A), “if the court orders the forfeiture of specific
10 property [in a POF], the government must publish notice of the order and send
11 notice to any person who reasonably appears to be a potential claimant with
12 standing to contest the forfeiture in the ancillary proceeding.”³ “The notice must
13 describe the forfeited property, state the times under the applicable statute when a
14 petition contesting the forfeiture must be filed, and state the name and contact
15 information for the government attorney to be served with the petition.” Rule
16 32.2(b)(6)(B).⁴

17 _____
18 that issue is deferred to the ancillary proceeding); *Lazerenko*, 476 F.3d at 648;
19 *Gaskin*, 2002 WL 459005, at *9 n.4 (ownership is a question for the court alone to
determine in the ancillary proceeding), *aff’d*, 364 F.3d 438 (2d Cir. 2004).

20 ³ Publication notice is to be given as described in Supplemental Rule G(4)(a)(iii) of
21 the Federal Rules of Civil Procedure, and may be accomplished by any means
22 described in Supplemental Rule G(4)(a)(iv). Rule 32.2(b)(6)(C). An essentially
23 identical notice requirement is found at § 1963(l)(1). Here, the government intends
24 to publish notice on “an official internet government forfeiture site for at least 30
consecutive days” in accordance with Rule G(4)(a)(iv)(C).

25 ⁴ The applicable time period for a RICO criminal forfeiture is found at
26 § 1963(l)(2), which provides that “any person, other than the defendant, asserting a
27 legal interest in property which has been ordered forfeited to the United States
28 pursuant to this section may, within *thirty days of the final publication of notice or
his receipt of notice under paragraph (1), whichever is earlier*, petition the court

1 A petition must be signed under penalty of perjury and set forth the nature
2 and extent of the petitioner’s purported right, title or interest in the property, the
3 time and circumstances of the petitioner’s acquisition of the right, title or interest
4 in the property, any additional facts supporting the petitioner’s claim, and the relief
5 sought. 18 U.S.C. § 1963(1)(3).

6 If any third party files a timely ancillary petition asserting an interest in the
7 property to be forfeited, “the court must conduct an ancillary proceeding.” Rule
8 32.2(c)(1). That hearing “shall, to the extent practicable and consistent with the
9 interests of justice, be held within thirty days of the filing of the petition. The
10 court may consolidate the hearing on the petition with a hearing on any other
11 petition filed by a person other than the defendant under this subsection.”

12 § 1963(1)(4). However, the government may move prior to a hearing to dismiss a
13 petition for lack of standing, failure to state a claim, or “any other lawful reason”
14 (Rule 32.2(c)(1)(A)), and the Court may authorize pre-hearing discovery in
15 accordance with the Federal Rules of Civil Procedure (Rule 32.2(c)(1)(B)). The
16 exercise of either of these options will likely delay a hearing beyond the 30-day
17 window suggested in the Rule.

18 At the petition hearing, the petitioner may testify and present evidence and
19 witnesses on his own behalf, and cross-examine witnesses who appear at the
20 hearing. The United States likewise may present evidence and witnesses in
21 rebuttal to the petitioner’s evidence, and in defense of its claim to the property and
22 cross-examine witnesses who appear at the hearing. In addition to testimony and
23 evidence presented at the hearing, the court shall consider the relevant portions of
24 the record of the criminal case which resulted in the entry of the POF.

25 § 1963(1)(5).

26
27 _____
28 for a hearing to adjudicate the validity of his alleged interest in the property. The
hearing shall be held before the court alone, without a jury.” (Emphasis added).

1 The petitioner bears the burden of proof in the ancillary proceeding to prove
2 by a preponderance of the evidence either that

- 3
- 4 (A) the petitioner has a legal right, title, or interest in the property, and such
5 right, title or interest renders the [POF] invalid in whole or part because the
6 right, title or interest was vested in the petitioner rather than the defendant
7 or was superior to any right, title, or interest of the defendant at the time of
8 the commission of the acts which gave rise to the forfeiture of the property
9 under this section; or
- 10 (B) The petitioner is a bona fide purchaser for value of the right, title, or
11 interest in the property and was at the time of the purchase reasonably
12 without cause to believe that the property was subject to forfeiture under
13 this section.

14 § 1963(1)(6); *Nava*, 404 F.3d at 1125 (in ancillary proceeding, “the petitioner bears
15 the burden of proving his right, title, or interest”) (interpreting similar provision in
16 21 U.S.C. § 853(n)(6)); *United States v. Teadt*, 653 F. App’x. 421 (6th Cir. 2016)
17 (in an ancillary proceeding, the burden shifts to the petitioner to establish the
18 petitioner’s third party claim by a preponderance of the evidence).

19 A petitioner may not argue that the entry of the POF was improper or not
20 adequately supported by the evidence at trial. *See* Advisory Committee Note to
21 Rule 32.2 (“[The ancillary proceeding] does not involve relitigation of the
22 forfeitability of the property; its only purpose is to determine whether any third
23 party has a *legal* interest in the forfeited property.” (Emphasis added)); *United*
24 *States v. Dejanu*, 163 F. App’x. 493, 498 (9th Cir. 2006) (“Whether the criminal
25 forfeiture of the property was proper is not an issue subject to litigation by third
26 parties in the ancillary proceeding”); *United States v. Cooper*, 679 F. App’x. 738
27 (11th Cir. 2017) (third party cannot relitigate the merits of the forfeitability
28 determination).

Whether a third party petitioner has a valid right, title or interest in the
property described in the POF is determined according to state law. Federal law

1 determines whether any such interest is subject to forfeiture. *United States v.*
2 *Lester*, 85 F.3d 1409, 1412 (9th Cir. 1996) (court looks to state law to see what
3 interest the claimant has in the property and looks to the federal statute to see if
4 that interest is subject to forfeiture); *United States v. Kennedy*, 201 F.3d 1324,
5 1334 (11th Cir. 2000).

6 **C. Further Orders**

7 Finally, Section 1963(e) provides:

8 Upon conviction of a person under this section, the court shall
9 enter a judgment of forfeiture of the property to the United States
10 and shall also authorize the Attorney General to seize all property
11 ordered forfeited upon such terms and conditions as the court shall
12 deem proper. Following the entry of an order declaring the
13 property forfeited, the court may, upon application of the United
14 States, enter such appropriate restraining orders or injunctions,
15 require the execution of satisfactory performance bonds, appoint
16 receivers, conservators, appraisers, accountants, or trustees, or take
17 any other action to protect the interest of the United States in the
18 property ordered forfeited.

19 The Proposed POF does not include seizure authority (indeed, it explicitly
20 prohibits any seizures in furtherance of the POF in the absence of a further order
21 from this Court), but it does include restraint provisions preventing Defendant
22 from taking or attempting any action that might affect the availability,
23 marketability or value of the Marks, or any of them, including but not limited to
24 selling, conveying, transferring, licensing, distributing, bailing, assigning,
25 mortgaging, pledging, collateralizing, hypothecating, wasting, secreting, damaging,
26 diminishing the value of, conveying, encumbering, or otherwise disposing of the
27 Marks, or any of them, or any personal property bearing all or part of the Marks, or
28 any of them. It further provides that Defendant shall not (1) alter the terms of any
existing license or license agreement relating to the Marks, or any of them; (2)
purport to grant any ownership interest of any kind or nature in the Marks, or any

1 of them, to any person with a current license to possess or display the Marks; or (3)
2 grant any new license to any person allowing that person to possess or display the
3 Marks, or any of them.

4 These provisions will offset the potential prejudice to the government
5 resulting from the delay in the authorization of enforcement authority with respect
6 to the Marks, and will prevent Defendant from taking or attempting any action that
7 could result in the diminution of the rights and privileges forfeited.

8 **V.**

9 **THE FINAL ORDER OF FORFEITURE**

10 **A. Entry of the Final Order**

11 When all third party petitions have been adjudicated, the court must enter a
12 final order of forfeiture by amending the preliminary order of forfeiture as
13 necessary to account for any third-party rights. If no third party files a timely
14 petition, the preliminary order becomes the final order of forfeiture if the court
15 finds that the defendant had an interest in the property that is forfeitable under the
16 applicable statute.⁵ The defendant may not object to the entry of the final order on
17 the ground that the property belongs, in whole or in part, to a third party; nor may a
18 third party object to the final order on the ground that the third party has an interest
19 in the property. Rule 32.2(c)(2).⁶

20 ⁵ In making the determination whether the defendant is the owner of the property
21 described in the preliminary order, the court or jury “may rely upon reasonable
22 inferences. For example, the fact that the defendant used the property in
23 committing the crime and no third party claimed an interest in the property may
24 give rise to the inference that the defendant had a forfeitable interest in the
property.” Rule 32.2 Advisory Committee Notes (2000 Adoption).

25 ⁶ Section 1963(l)(7) provides that “following the court’s disposition of all petitions
26 filed under this subsection, or if no such petitions are filed following the expiration
27 of the period provided in paragraph (2) for the filing of such petitions, the United
28 States shall have clear title to property that is the subject of the [POF] and may
warrant good title to any subsequent purchaser or transferee.”

VI.

FORFEITURE TO BE ANNOUNCED AS PART OF SENTENCE

Pursuant to Rule 32.2(b)(4)(B), the Court must mention the forfeiture order when orally announcing the Defendant’s sentence, or otherwise ensure that the Defendant knows of the forfeiture at sentencing. The court must also include the forfeiture order, directly or by reference, in the judgment. The government recommends the following language be read to the Defendant at sentencing, and modified as necessary for inclusion in the judgment and commitment order:

Pursuant to 18 U.S.C. § 1963, the forfeiture allegation of the First Superseding Indictment, and the Bills of Particulars filed by the government, all of Defendant’s right, title and interest in the property described in the Preliminary Order of Forfeiture, entered on [DATE] as docket number [xxx] has been forfeited to the United States.

VII.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court forthwith enter the proposed preliminary order of forfeiture lodged herewith.

DATED: January 14, 2019

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