

involved fraudulently obtaining over \$500 million of fuel tax credits from the Internal Revenue Service. ECF No. 135.

2. Count 25 of the Second Superseding Indictment charged Jacob and Isaiah Kingston with one of three money laundering conspiracies in which they transferred the proceeds of the mail fraud conspiracy in Count 1 in conceal and disguise money laundering transactions, and expenditure transactions in excess of \$10,000. Count 25 further alleged that the defendants “transferred Mail Fraud Proceeds from Washakie’s bank accounts to various bank accounts, including UFS’s bank accounts and accounts in their own names, including investment accounts at Merrill Lynch.” ECF 135 at 32. Count 25 further alleged that the defendants “transferred, and caused to be transferred, Mail Fraud Scheme proceeds from Washakie's bank accounts to the bank accounts of Order-related entities. *Id.* at 32.

3. The Second Superseding Indictment notified the defendants of the United States’ intent to seek forfeiture of “any property, real or personal, that constitutes or is derived from proceeds traceable to the conspiracy” and “any property, real or personal” involved in money laundering or traceable to such violations. *Id.* at 56-58.

4. The grand jury made a probable cause finding that certain properties were proceeds of the mail fraud conspiracy and involved in the money laundering. *Id.* at 56, 58. One class of those properties included twelve properties located in Box Elder County:

- (1) Parcel #07-090-0002;
- (2) Parcel #07-037-0001;
- (3) Parcel #08-041-0004;
- (4) Parcel #08-041-0019;
- (5) Parcel #08-041-0020;
- (6) Parcel #08-041-0025;
- (7) Parcel #08-041-0026;
- (8) Parcel #08-041-0027;
- (9) Parcel #08-041-0028;

- (10) Parcel #08-042-0018;
- (11) Parcel #08-045-0005; and
- (12) Parcel #08-052-0008.

Id.

5. On January 18, 2019, the United States filed Lis Pendens against these twelve parcels. Copies of the Lis Pendens are attached as Exhibit A.

6. On July 18, 2019, the United States filed a First Bill of Particulars identifying, among other properties, six additional properties located in Box Elder County it was seeking to forfeit in this criminal case ECF No. 437 for a total of eighteen properties:¹

- (13) Parcel #08-052-0005;
- (14) Parcel #08-052-0006;
- (15) Parcel #08-052-0012;
- (16) Parcel #08-052-0014;
- (17) Parcel #08-044-0004; and
- (18) Parcel #08-052-0004.

ECF No. 437.

7. On August 23, 2019, the United States filed Lis Pendens against (12) Parcel #08-052-0005, (14) Parcel #08-052-0006, (15) Parcel #08-052-0012 and (16) Parcel #08-052-0014. Copies of the Lis Pendens are attached as Exhibit B.

8. On August 27, 2019, the United States filed Lis Pendens against (17) Parcel #08-044-0004 and (18) Parcel #08-052-0004. Copies of the Lis Pendens are attached as Exhibit C.

9. Each of the Lis Pendens provided the following notice to third parties:

NOTICE IS HEREBY GIVEN that the foregoing action has been commenced and is now pending in the United States District Court for the Central District of Utah for the seizure, arrest, and forfeiture of the Defendant real

¹ Rule 32.2(a) requires that a defendant be put on notice in the indictment or information that the United States is seeking forfeiture as part of the sentence. Fed. R. Crim. P. 32.2(a). It is not necessary for the notice of forfeiture to identify the specific property to be forfeited. *Id.* If not included in the indictment notice of specific property can be provided in a bill of particulars filed with the court under rule Rule 7(c). *United States v. Moffitt*, 83 F.3d 660, 665 (4th Cir. 1996), *aff'g* 846 F. Supp. 463 (E.D. Va. 1994) (holding that the indictment does not need to include a list of each asset subject to forfeiture; under Rule 7(c), this can be done with bill of particulars).

property, together with all buildings, appurtenances, and improvements, with the United States as plaintiff.

.....

The United States seeks forfeiture of this property pursuant to the provisions of 21 U.S.C. § 853.

B. Plea Agreements

10. On July 19, 2019, defendants Jacob Kingston and Isaiah Kingston plead guilty to, among other charges, conspiracy to commit mail fraud that involved fraudulently obtaining over \$500 million of fuel tax credits from the IRS and conspiracy to commit money laundering.

ECF No. 439 (Jacob Kingston Plea Agreement); ECF No. 445 (Isaiah Kingston Plea Agreement).

11. As part of his plea agreement, Jacob Kingston admitted:

At all times relevant to the charges in the Second Superseding Indictment, I was the owner and Chief Executive Officer ("CEO") of Washakie Renewable Energy ("WRE"). I was the CEO and functional owner of United Fuel Supply ("UFS"). I created Washakie Renewable Energy in 2006 to 2007 to produce biodiesel. While WRE was capable of producing some amounts of biodiesel, in no year did WRE ever produce more than 8.5 million gallons. Starting in 2010, I began filing false claims for renewable fuel tax credits as charged in the Second Superseding Indictment and to fraudulently claim renewable identification numbers ("RINS"). I did so in agreement with my co-defendants Isaiah Kingston, Rachel Kingston, and Sally Kingston, and later with co-defendant Lev Dermen, aka Levon Termendzhyan. I was primarily responsible for the preparation and filing of Forms 8849, Claims for Refund of Excise Taxes, in the name of WRE and UFS.

[Count 1] [Counts 2 through 20] Starting in tax year 2010, I filed Forms 8849 claiming production and sale of renewable fuel, and I claimed RINS for fuel that I did not produce or sell for use as fuel. I agreed with the principals of Biofuels of Colorado, Montgomery Recycling, Aspen Biofuel, and Grease Depot to fraudulently file false claims for refundable fuel tax credits, by entering into toll processing agreements and creating backdated and false paperwork claiming that I produced fuel that I knew was not being produced. I also caused financial transactions to be created to reflect the false paperwork in order to further fraudulently claim that qualifying fuel was being produced and sold, when in fact I knew that qualifying fuel was not

being produced or sold. I admit to preparing or causing to be prepared and filing or causing to be filed the nineteen false Forms 8849 charged in Counts 2 through 20 in the Second Superseding Indictment. Those Forms were false in that they falsely claimed that WRE had produced and or blended and sold for use as fuel qualifying renewable fuel that WRE had not in fact produced or blended and sold for use as fuel.

ECF No. 439 at 7-8.

12. In his plea agreement, Isaiah Kingston admitted:

Starting in 2010, I participated in a scheme to file false claims for renewable fuel tax credits on behalf of WRE and to fraudulently claim renewable identification numbers ("RINs"), as charged in the Second Superseding Indictment. I did so together with my co-defendants Jacob Kingston, Rachel Kingston, and Sally Kingston, and, starting no later than 2012, with co-defendant Lev Dermen, whom I knew as Levon Termendzhyan.

Starting in tax year 2010, I know that WRE filed claims for renewable fuel tax credit, as well as RINs. I knew these claims were false because they falsely claimed that WRE had produced and/or blended qualifying renewable fuel and had sold it for use as fuel. With my co-defendants, Jacob Kingston, Rachel Kingston, and Sally Kingston, I agreed with the principals of Biofuels of Colorado, Montgomery Recycling, and Grease Depot to claim renewable fuel tax credits based on backdated documents and false invoices. I also engaged in financial transactions, the purpose of which was to give the false appearance that product was being bought and sold as described by the false invoices.

Id. at 7.

13. Both Jacob and Isaiah Kingston specifically admitted:

From April 2013 through December 2015, I agreed with co-defendant Jacob [Isaiah] Kingston to both spend some of our portion of the fraud proceeds in building up and supporting WRE, and the Order, and in some instances, to do so in concealed manners. For instance, on more than one occasion, we agreed to cycle funds through Order-related entities. I knew these funds were received by WRE based on its false claims for renewable fuel credits and RINs knowing them to be criminally derived. Some of these payments to Order-related entities were supported by inflated invoices, and the monies returned to Washakie were falsely characterized as draws or loans. These transactions included funds cycled to and through various entities including A-Fab Engineering, Fidelity Funding, Alliance

Investments, World Enterprises, AAA Security, American Digital Systems, Safeco Investments, Standard Restaurant Equipment, Attco Trucking, CCP Enterprise, and others as charged in Count 25 of the Second Superseding Indictment.

ECF No. 439 at 10-11; ECF No. 445 at 9.

14. In addition, the defendants admitted:

I admit that the majority of the transferred funds from Washakie or UFS to Order- related entities were not through bona fide purchases for value. Specifically, I do not contest that approximately \$30 million in proceeds traceable to the mail fraud scheme or money laundering schemes to which I am pleading guilty were not bona fide purchases for value. I will not contest the United States' tracing of proceeds of the mail fraud scheme and/or proceeds involved in the money laundering schemes from Washakie and/or UFS to the properties listed in Exhibit A.² In addition, I do not contest that Washakie and/or UFS used false and/or inflated invoices to give the false appearance that transfers of mail fraud scheme and/or proceeds involved in the money laundering schemes were bona fide purchases for value.

ECF No. 439 at 15; ECF No. 445 at 14.

C. WRE Purchase of (11) Parcel #08-45-0005 and (18) Parcel #08-44-0004 with SUA Proceeds

15. On or about July 29, 2014, WRE purchased (11) Parcel #08-45-0005 and (17) Parcel #08-44-0004 from the Thora Allen Revocable Trust³ (hereinafter collectively referred to as "Group 1 Properties"). See copy of Warranty Deed attached as Exhibit E. As described by Special Agent Stephen Washburn's attached declaration and flow of fund charts attached as Exhibit F, a total of \$370,078.77 of the purchase of Group 1 Properties came from the criminal

² Among other properties, the properties listed in Exhibit A and attached to the plea agreements of Jacob Kingston and Isaiah Kingston included (1) Parcel #07-090-0002; (2) Parcel #07-037-0001; (3) Parcel #08-041-0004, (4) Parcel #08-041-0019; (5) Parcel #08-041-0020; (6) Parcel #08-041-0025; (7) Parcel #08-041-0026; (8) Parcel #08-041-0027; (9) Parcel #08-041-0028; (10) Parcel #08-042-0018; (11) Parcel #08-045-000; (12) Parcel #08-052-0008; (13) Parcel #08-052-0005; (15) Parcel #08-052-0006; (15) Parcel #08-052-0012; (16) Parcel #08-052-0014; (17) Parcel #08-044-0004; and (18) Parcel #08-052-0004.

³ See Group Map View of Group 1 Properties attached as Exhibit D.

proceeds of the crime of conspiracy to commit mail fraud charged in Count 1 and conspiracy to commit money laundering charged in Count 25 of the Second Superseding Indictment the criminal the proceeds from the crime of conspiracy to commit mail fraud charged in Count 1 and conspiracy to commit money laundering charged in Count 25 of the Second Superseding Indictment.

D. WRE Real Estate Holdings' Property Purchases.

16. On or about November 18, 2014, WRE Real Estate Holdings purchased from the Nish Family Land LLC (2) Parcel #07-037-0001 for \$2,000,000. See copy of Warranty Deed attached as Exhibit G.

17. On or about April 15, 2015, WRE Real Estate Holdings purchased from Lynn H. Richards and Christy Richards Parcel (1) #07-090-0002 for \$1,226,000. See copy of Warranty Deed attached as Exhibit H. As described by Special Agent Washburn's declaration and flow of fund charts, \$1,183,696.38 of the purchase price for this parcel came from the criminal proceeds from the crime of conspiracy to commit mail fraud charged in Count 1 and conspiracy to commit money laundering charged in Count 25 of the Second Superseding Indictment. (Parcel (1) #07-090-0002 and (2) Parcel #07-037-0001 are hereinafter collectively referred to as "Group 2 Properties".⁴

18. On or about March 20, 2015, WRE Real Estate Holdings purchased from Brothers Hays (3) Parcel #08-041-0004, (4) Parcel #08-41-0019, (5) Parcel #08-041-0020, (6) Parcel #08-041-0025, (7) Parcel #08-041-0026, (8) Parcel #08-041-0027, (9) Parcel #08-041-0028 and (10)

⁴ See Group Map View of Group 2 Properties attached as Exhibit D.

Parcel #08-042-0018 for \$432,400 (hereinafter collectively referred to as “Group 3 Properties”).⁵ See copy of Warranty Deed attached as Exhibit I. As described by Special Agent Washburn in his declaration and flow of funds chart, \$417,393.97 of the purchase price for Group 3 Properties came from the criminal proceeds of the crime of conspiracy to commit mail fraud charged in Count 1 and conspiracy to commit money laundering charged in Count 25 of the Second Superseding Indictment.

19. On or about April 1, 2015, WRE Real Estate Holdings purchased from Bruce C. Zundel and Belinda S. Zundel (12) Parcel #08-052-0008; (13) Parcel #08-052-0005, (14) Parcel #08-052-0006, (15) Parcel #08-052-0012, (16) Parcel #08-052-0014 and (18) Parcel #08-052-0004 for \$1,100,000 (hereinafter collectively referred to as “Group 4 Properties”).⁶ See copy of Warranty Deed attached as Exhibit J. As described by Special Agent Washburn’s declaration and flow of funds chart, \$1,058,031.23 of the purchase price for Group 4 Properties came from the criminal the proceeds from the crime of conspiracy to commit mail fraud charged in Count 1 and conspiracy to commit money laundering charged in Count 25 of the Second Superseding Indictment.

E. ECO RANCHES’ Purported Purchases of WRE and WRE Real Estate Holdings’ Properties.

Group 3 Properties

20. On February 10, 2016, several federal agencies executed a search warrant on Washakie, United Fuel Supply, and offices which were considered the headquarters of the “Order,” aka Davis County Cooperative Society. Because members of the “Order,” including

⁵ See Group Map View of Group 3 Properties attached as Exhibit D.

⁶ See Group Map View of Group 4 Properties attached as Exhibit D.

Defendants Jacob and Isaiah Kingston, as well as their father, John Daniel Kingston, who is believed to be associated with ECO RANCHES, were tipped off to the search warrant a week prior to the execution, the “Order” engaged in a massive effort to destroy and remove records from their several businesses and offices prior to February 10, 2016.

21. Months after the search warrant, on September 30, 2016, a Warranty Deed was recorded on Group 3 Properties transferring title from WRE Real Estate Holdings to ECO RANCHES for the purported purchase price of \$538,469. See copy of Property Detail Report attached as Exhibit K. The Warranty deed was signed by defendant Jacob Kingston on behalf of WRE Real Estate Holdings. See copy of Warranty Deed attached as Exhibit L.

22. On September 30, 2016, Security Investment Corporation (“Security Investment I”)⁷ recorded a Trust Deed on Group 3 Properties. See copy of Trust Deed attached as Exhibit M.

Group 1 Properties

23. On November 18, 2016, a Warranty Deed was recorded on Group 1 Properties transferring title from WRE to ECO RANCHES for the purported purchase price of \$454,563. See copy of Property Detail Report attached as Exhibit N. The Warranty Deed was signed by defendant Jacob Kingston on behalf of WRE. See copy of Warranty Deed attached as Exhibit O.

24. Security Investment I recorded a Trust Deed on Group 1 Properties on November 18, 2016. See copy of Trust Deed attached hereto as Exhibit P. As stated in Special Agent Washburn declaration, he was unable to find from his review of the WRE Wells Fargo bank

⁷ The Utah Division of Corporations and Commercial Code has no record for Security Investment I as an entity incorporated in Utah or a foreign corporation.

accounts ending in 0257, 2932, 2992, 8856, 8864, 8914 and 9829⁸ any transfer of funds from ECO RANCHES or Security Investment I to WRE for the purchase of Group 1 Properties.

Group 4 Properties

25. On November 28, 2016, a Warranty Deed was recorded on Group 4 Properties, transferring title from WRE Real Estate Holdings to ECO RANCHES for the purported purchase price of \$366,289. See copy of Property Detail Report attached as Exhibit Q. The warranty deed was signed by defendant Jacob Kingston on behalf of WRE Real Estate Holdings. See copy of Warranty Deed attached as Exhibit R.

26. Security Investment I recorded a Trust Deed on Group 4 Properties on November 28, 2016. See copy of Trust Deed attached hereto as Exhibit S.

Group 2 Properties

27. On November 28, 2016, a Warranty Deed was recorded on Group 2 Properties, transferring title from WRE Real Estate Holdings to ECO RANCHES for the purported purchase price of \$205,283.⁹ See copy of Property Detail Report attached as Exhibit T. The Warranty Deed was signed by defendant Jacob Kingston on behalf of WRE Real Estate Holdings. See copy of Warranty Deed attached as Exhibit U.

28. Security Investment I recorded a Trust Deed on Group 2 Properties on November 28, 2016. See copy of Trust Deed attached as Exhibit V.

⁸ These bank records cover the period from early 2015 to end of 2018.

⁹ While the United States was unable to trace dirty money to WRE Real Estate Holdings' purchase of (2) Parcel # 07-037-0001, the purchase by ECO RANCHES of (2) Parcel # 07-037-0001 together with the purchase of (1) Parcel #07-090-0002, resulted in a transaction with Parcel # 07-037-0001 as property involved in a money laundering transaction subject to forfeiture pursuant to 21 U.S.C. § 982(a)(1).

29. In his review of the Wells Fargo bank accounts mentioned above, Special Agent Washburn did find a bank check dated September 27, 2016 in the amount of \$448,893.37 made payable to WRE Real Estate Holdings, although the check does not indicate from whom the payment was made or whether the check relates to ECO Ranches purchase of Group 2, 3 or 4 Properties. See copy of bank check attached as Exhibit W.

30. On September 27, 2019, Security Investment Corporation NV (“Security Investment II”) was registered with the State of Utah as a foreign corporation from the State of Nevada.

31. On February 23, 2020, Katherine R. Young, as Trustee, and Security Investment II, as Grantee, commenced a nonjudicial foreclosure proceeding by recording Notices of Default against Group 1, 2, 3 and 4 Properties, declaring the promissory notes secured by these parcels in default.

32. On February 28, 2020, Substitutions of Trustee was recorded on Group 1, 2, 3 and 4 Properties identifying Katherine R. Young as successor trustee and Security Investment II as the beneficiary under the Trust Deed recorded on November 28, 2016. See copies of Substitutions of Trustee attached as Exhibit X.

33. On September 2, 2020, Katherine R. Young, as Trustee, and Security Investment II, as Grantee, recorded Notices of Trustee Sale of Group 1, 2, 3 and 4 Properties scheduling the Trustee’s Sale for September 25, 2020. See copies of Notices of Trustee’s Sale attached as Exhibit Y.

34. On September 25, 2020, Katherine R. Young, as Trustee, held a foreclosure sale and Security Investment II purchased Group 1, 2, 3 and 4 Properties with a credit bid for the balances owing under the delinquent promissory notes. *Id.*

35. On October 9, 2020, Katherine R. Young, as Trustee, recorded Trustee's Deeds of Sale conveying title of Group 1, 2, 3 and 4 Properties to Security Investment II as the highest bidder for each of the properties by credit bidding the balances owing under the respective trust deeds. *Id.* See copies of Trustee's Deeds Upon Sale attached as Exhibit Z.

ARGUMENT

Court Should Grant Motion of United States to Set Aside Security Investment II's Foreclosure Sales as Invalid Sales.

Security Investment II's nonjudicial foreclosure proceedings against Group 1, 2, 3 and 4 Properties violated 21 U.S.C. § 853(k); the foreclosure sales constituted an action against the forfeiture interests of the United States in these parcels and, therefore, are invalid. The only avenue available for Security Investment II to assert its interests in Group 1, 2, 3 and 4 Properties is in an ancillary proceeding by filing a petition in federal district court pursuant to 21 U.S.C. § 853(n).

A. Section 853(k) Barred Security Investment II from Foreclosing Properties.

To protect the forfeiture interests of the United States in criminally derived property, federal district courts have exclusive jurisdiction over property subject to forfeiture pursuant to 21 U.S.C. § 853(l):

The district court of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

As part of that protection, Congress made it clear when it passed 21 U.S.C. § 853 that all third parties were prohibited from taking any action against the United States' interest in property subject to forfeiture under 21 U.S.C. § 853(k) after an indictment has been filed. This section provides, in part:

Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may –

....

(2) Commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment . . . alleging that the property is subject to forfeiture under this section. (Emphasis added).

Federal courts have long recognized the impropriety of commencing a foreclosure action against property subject to forfeiture under 21 U.S.C. § 853(k). In *United States v. MacInnes*, 223 Fed. Appx. 549 (9th Cir. 2007), Washington Mutual held a foreclosure sale on a property upon which the United States had obtained a final order of forfeiture. U.S. Financial purchased the property at the foreclosure sale. In response, the United States filed a motion to set aside the foreclosure sale. In opposition to the motion, U.S. Financial made two arguments. First, because the United States had recognized the validity and priority of Washington Mutual’s promissory note and trust deed to the property, “it should be free to litigate to determine the extent of that interest.” *Id.* at 552.

Second, the foreclosure sale was not “an action . . . against the United States,” and even though the United States took title to the property, it took the property subject to Washington Mutual’s security interest and was “subject to the terms of the deed of trust” and those terms included the contractual right to foreclose the property if payments were not made under the note. *Id.*

The Ninth Circuit rejected both arguments and affirmed the district court’s order setting aside the foreclosure sale. The court held that the section 853(k) prohibition against further actions against the forfeiture interests of the United States includes foreclosure sales and Washington Mutual’s exercise of its “state law right to forfeiture violate[d] § 853(k).”

Id. at 553.

Rather, §853(k) extinguishes the right of lienholders and other interested parties to enforce their rights against the Government through separate civil litigation. (emphasis added). In its place it established an alternative remedy, § 853(n), the administrative remedies in 28 C.F.R. § 9.1 *et seq.*, and the benefit of having the most desirable of creditors, the federal government of the United States.

Id.

The court reasoned that:

In addition, in keeping with subsection (o)'s directive to construe section 853 'liberally . . . to effectuate its remedial purposes,' we believe that 'the validity of [the innocent person's] alleged interest in the property' is broader than U.S. Financial contends. That is, the 'validity' of the interest is more than mere recognition of a right in the Property. Rather, it is the entire bundle of rights that the party holds. Even while the Amended Order recognized that a right was valid, the extent of its validity can only be litigated in front of the district court pursuant to § 853(n). Therefore, the only right a party with an interest in the Property prior to forfeiture retains 'subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture,' 21 U.S.C. § 853(k)(2), is the right to petition the district court pursuant to section 853(n). (Emphasis added).

Id. at 852.

In reaching its decision, the Ninth Circuit joined the Fourth Circuit's decision in *United States v. Phillips*, 185 F.3d 183 (1999), where the court also held that a foreclosure sale which took place after the initiation of criminal forfeiture proceedings was invalid under section 853(k), finding that the foreclosure sale constituted "an action at law or equity against the United States" and was statutorily barred under section 853(k)(2). *Id.* at 187.

Similarly, in *United States v. Serendesky*, No. S200CR.320(JGK), 2003 WL 21543519 (S.D.N.Y. July 9, 2003), the court held that a state court mortgage foreclosure proceeding brought against property after the filing of an indictment alleging criminal forfeiture against the same property was barred by 21 U.S.C. § 853(k)(2). The *Serendesky* court noted that even if the foreclosure proceeding was valid under state law, it nevertheless

affected the Government's interest in the property and was therefore invalid under § 853(k)(2). *Id.* at * 4.

Likewise, the district court in *SKL Invs., Inc. v. United States*, 2014 U.S. Dist. LEXIS 121905 (W.D. Tenn. Sept. 2, 2014), found that section 853(k)(2) precludes state and local governments from selling property subject to a forfeiture interest of the United States to satisfy delinquent property taxes. The court reiterated the legal principle that the only recourse for a party with an interest in property subject to criminal forfeiture is through the procedures specified in 21 U.S.C. § 853(n). *Id.*

The protection section 853(k)(2) and the case law provide to the United States' forfeiture claims is required to fulfil the rest of the Congressional mandate behind 21 U.S.C. § 853. Before a third-party claimant can prevail against the forfeiture interest of United States in property, the third party must not only file a petition with the court pursuant to 21 U.S.C. § 853(n)(2), but also bears the burden of showing by a preponderance of the evidence that it has a legal interest in the property that existed before the crime giving rise to the forfeiture or its interest was obtained as a bona fide purchaser for value without knowledge of the forfeitability of the defendant's assets. *See* 21 U.S.C. § 853(6)(2).

Under the relation-back doctrine contained in 21 U.S.C. § 853(c), the United States' forfeiture interest in property vests at the time of the act giving rise to the forfeiture, unless a third party acquired the property some time thereafter as a bona fide purchaser for value. The Ninth Circuit held in *United States v. Hooper*, 229 F.3d 818, 822 (2000), that because the government's interest vests immediately "upon the commission of the act giving rise to the forfeiture," and because the criminal proceeds do not exist until that time, no third party can

successfully challenge the forfeiture of the proceeds of the crime unless the third party is a bona fide purchaser.

Here, the trust deeds on Group 1, 2, 3 and 4 Properties for Security Investment I were recorded on September 30, 2016 -- long after the criminal conduct in this case began in 2010, and just months after the execution of several search warrants on not only WRE but many other Order related businesses. When the grand jury returned the Second Superseding Indictment in this case in 2018, it found probable cause that the criminal conduct began in 2010 and twelve of the eighteen properties were purchased with criminal proceeds. Both Jacob Kingston and Isaiah Kingston admitted in their pleas that their criminal conduct began in 2010 and Group 1, 2, 3 and 4 Properties were purchased with criminal proceeds from their biofuel tax fraud scheme.

Security Investment II's foreclosure of Group 1, 2, 3 and 4 Properties is nothing more than a back-door attempt to circumvent the requirements of section 853(n) and receive an unlawful windfall of criminal proceeds even though it had notice of the United States' forfeiture claims to these properties.

Despite its efforts, Security Investment II has failed to recognize the futility of foreclosing Group 1, 2, 3 and 4 Properties. It is in no better position today than it was before the foreclosure. Assuming ECO RANCHES purchased Group 1, 2, 3 and 4 Properties, it purchased properties WRE and WRE Real Estate Holdings had purchased with criminal proceeds. See Declaration of Stephen Washburn and flow of charts attached as Exhibit F. When it purchased Group 1, 2, 3 and 4 Properties from ECO RANCHES at the foreclosure sale by credit bid, Security Investment II purchased the same parcels that had been purchased with criminal proceeds. Group 1, 2, 3 and 4 Properties after the foreclosure still represent the same criminal

proceeds but just now titled under the name of Security Investment II. The foreclosure sale did not magically transform the criminal proceeds into clean proceeds.

Proceeds mean property that a person obtained or retained as a result of committing a crime. *See* S. Cassella, *Asset Forfeiture Law in the United States* § 25-4 (2d. ed. 2016). Stated another way, proceeds are defined as the property a person would not have obtained or retained but for the commission of a crime. *Id*; *United States v. Lustyik*, 2015 WL 14677260 (D. Utah Mar. 30, 2015). Forfeiture includes property directly obtained from the crime giving rise to the forfeiture, and property that is obtained, directly or indirectly, from the property that is traceable to the crime. *Id*; *See* 21 U.S.C. § 981(a)(2)(A).

Proceeds remain proceeds even though the property may change from one form to another. *United States v. Hall*, 434 F.3d 42, 51 (1st Cir. 2006) (money remained drug proceeds after it was loaned to a third party, the loan was repaid, and the payments were deposited into a bank account and transferred to another account); *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); *United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (purchase of lottery ticket with drug proceeds that resulted in a winning ticket is traceable to the offense even though the value of the ticket appreciated enormously as the winning ticket); *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); *United States v. Lovett*, 964 F.2d 1029, 1039 (10th Cir. 1992) (loan proceeds issued in form of six checks represent SUA proceeds where the security for the loan was a CD purchased with SUA proceeds); *United States v. Schlesinger*, 396 F. Supp. 2d 267, 273 (E.D.N.Y. 2005) (if property

subject to forfeiture in a money laundering case has been sold, the proceeds of the sale are forfeitable under § 982(a)(1) as property traceable to the offense).

In the present case, the United States anticipates that Security Investment II will claim it sent notice of the foreclosure sales to the United States and it has waived its rights to complain now because it failed to object to the foreclosures. However, whether the United States received notice¹⁰ of the foreclosure sales is no defense to Security Investment II's violation of section 853(k)(2); it was statutorily prohibited from commencing nonjudicial foreclosure proceedings against the Group 1, 2, 3 and 4 Properties in the first place. As a matter of law, section 853(k)(2) extinguished Security Investment II's right to enforce its rights against the United States through separate civil litigation. The *MacInnes*, *Phillips*, *Serendesky* and *SKL Invs.* cases make it clear that Security Investment II's foreclosure sale constituted an action against the forfeiture interest of the United States in Group 1, 2, 3 and 4 Properties and violated section 853(k)(2). Security Investment II had notice that Group 1, 2, 3 and 4 Properties were subject to a criminal forfeiture proceeding and was barred from foreclosing its interests in the parcels. It was not free to exercise its state contractual rights to foreclose its interest in Group 1, 2, 3 and 4 Properties. Because it was statutorily barred from commencing and conducting the foreclosure sales, Security Investment II's foreclosure of Group 1, 2, 3 and 4 Properties is invalid as a matter of federal law. Any hardship caused by section 853(k) is ameliorated by section 853(n).

¹⁰ Once it became aware that Security Investments II had conducted foreclosure sales on Group 1, 2, 3 and 4 Properties, counsel for United States contacted Katherine Young, seeking verification that Security Investments II had sent notice of the foreclosure sales to the United States. Ms. Young provided the attached certified return receipt, attached as Exhibit AA. As shown by the return receipt, it was not by an employee of the United States Attorney's Office but signed by a postal delivery employee as evidence by the signature of "WSY" and the postal designation of "RT-114 CV-19."

B. The Ancillary Proceeding is the Only Forum for Security Investment II to Address its Interest in Group 1, 2, 3 and 4 Properties.

Security Investment II must wait until this Court enters a preliminary order of forfeiture and then file a petition with the Court before it can litigate the validity of its claims to Group 1, 2, 3 and 4 Properties in an ancillary proceeding. Subsection (n)(2) provides that its only avenue is in federal district court where the criminal case is pending:

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States 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 for a hearing to adjudicate the validity of his alleged interest in the property.

21 U.S.C. § 853(n)(2).

In the ancillary proceeding, Security Investment II will have the burden under subsection (n)(6) to establish at a hearing by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. § 853(n)(6).

The procedural protections provided by section 853(n) will afford Security Investment II's sufficient means to protect its lien interests in Group 1, 2, 3 and 4 Properties.

CONCLUSION

The Court should grant the motion of the United States and set aside Security Investment II's foreclosure sale of Group 1, 2, 3 and 4 Properties. Its right to commence and conduct

foreclose sales was extinguished and barred by section 853(k)(2). Therefore, the foreclosure sales were invalid. Security Investment II's only avenue for addressing its claims to the parcels is to file a petition with this Court after the entry of a preliminary order of forfeiture pursuant to section 853(n) and litigate its claims.

Dated this 7th day of January, 2022.

ANDREA T. MARTINEZ
United States Attorney

/s/ Cy H. Castle
Cy H. Castle
Assistant U.S. Attorney

Certificate of Service

I certify that on the 7th day of January 2022, I caused a copy of the foregoing to be a copy to be emailed to Katherine R. Young at katherine.young@kyounglaw.com.

I further certify that on the 7th day of January 2022, I caused a copy of the foregoing to be a mailed to the following:

Commercial Agent Services, LLC
Registered Agent for Security Investment Corporation NA
3212 South State Street
Salt Lake City, Utah 84115

Katherine R. Young, Attorney at Law
3212 South State Street
Salt Lake City, Utah 84115

/s/ Cy H. Castle

CY H. CASTLE

Assistant United States Attorney