

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:
	:
-v.-	:
	:
ALBERTO WILLIAM VILAR and	:
GARY ALAN TANAKA,	:
	:
Defendants.	X

PAUL MARCUS, et al.,	:
	:
Petitioners.	:
-----X	

05 Cr. 621 (RJS)

MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S MOTION TO DISMISS THE THIRD-PARTY PETITIONS OF PAUL MARCUS, THE DEANE J. MARCUS TRUST, THE STEVEN E. MARCUS TRUST, THE CHERYL MARCUS-PODHAIZER TRUST, THE EVE S. MARCUS CHILDREN'S TRUST, ALFRED HEITKONIG, E. RONALD SALVITTI, AND LAURANNE CHRISTOV

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– Of Counsel –

The United States of America (the “Government”), by and through its attorney Audrey Strauss, Acting United States Attorney for the Southern District of New York, respectfully submits this memorandum of law in support of its motion to dismiss, pursuant to Rule 32.2(c)(1)(A) of the Federal Rules of Criminal Procedure and Rule 12(b)(1) of the Federal Rules of Civil Procedure, the third-party petitions (the “Petitions”) of Paul Marcus, the Deane J. Marcus Trust, the Steven E. Marcus Trust, the Cheryl Marcus-Podhaizer Trust, and the Eve S. Marcus Children’s Trust, (collectively, the “Marcus Claimants”), Alfred Heitkonig, E. Ronald Salvitti, and Lauranne Christov (together with the Marcus Claimants, the “Petitioners”) as to the assets subject to the Second Preliminary Order of Forfeiture as to Substitute Assets (Dkt. No. 848) (the “Additional Assets”).

PRELIMINARY STATEMENT

The Petitioners assert claims to the Additional Assets, worth approximately \$54 million and currently held at J.P. Morgan Securities LLC in the name of the Trustees of the Amerindo Advisors (UK) Ltd. Ret. Benefits Scheme (the “Benefits Scheme”). None of the Petitioners, however, has alleged a valid legal interest in the Additional Assets as required for standing to contest the forfeiture under Title 21, United States Code, Section 853(n)(2), and accordingly the Petitions should be dismissed.

The Petitioners previously filed petitions in these ancillary proceedings asserting an interest in approximately \$12.7 million in United States currency (the “Substitute Assets”) subject to the Preliminary Order of Forfeiture as to Substitute Assets entered by the Court on August 2, 2019 (respectively, the “First Marcus Petition,” the “First Heitkonig Petition,” the “First Salvitti Petition” and the “First Christov Petition.”). The Government filed a motion to dismiss Petitioners’ claims to the Substitute Assets for lack of standing because they all lack any

legal interest in the Substitute Assets, as opposed to general creditor claims against the Defendants and Amerindo. That motion is currently pending with the Court (the “First Motion to Dismiss”) (Dkt. Nos. 867 & 868). Petitioners’ claims to the Additional Assets are essentially a restatement of the claims they asserted against the Substitute Assets, fail to demonstrate any specific legal interest in the Additional Assets, and are subject to dismissal for the same reasons.

Accordingly, the Court should dismiss all Petitioners’ claims for lack of standing.

BACKGROUND

The background of this criminal case and the parallel SEC Action is set forth in the Government’s Memorandum filed in support of the First Motion to Dismiss (Dkt. No. 868 at 2-5). The procedural history relevant to the Additional Assets is set forth below.

On or about December 6, 2019, the Government moved the Court seeking the forfeiture of all of Defendants’ right, title and interest in the Additional Assets. *See* Government’s Motion in Support of Proposed Second Preliminary Order of Forfeiture as to Substitute Assets (Dkt. No. 845).¹ The Court entered the order on December 9, 2019, and the Petitioners each filed a timely petition with respect to the Additional Assets. (Dkt. Nos. 863, 865, 892 (the “Second Christov Petition”)²; Dkt. No. 869 (the “Second Heitkonig Petition”); Dkt. No. 878 (the “Second Marcus Petition”); and Dkt. No. 890 (the “Second Salvitti Petition”)).³

¹ As of October 31, 2019, the Additional Assets were collectively valued at approximately \$54 million in United States currency.

² Three versions of Lauranne Christov’s petition were filed on the Court docket. The version filed on January 16, 2020 (Dkt No. 865) is the most complete, and therefore the Government refers to that version throughout when referring to the Christov Petition.

³ In addition to the petitions described below, three other petitions were filed by the current trustees of the Benefits Scheme, by James Stableford, and by Debra Mayer and Lisa Mayer. The petitions are not addressed by this motion to dismiss.

The Second Heitkonig Petition appears to be a verbatim recitation of the First Heitkonig Petition.

The Second Christov Petition is a near verbatim restatement of the First Christov Petition, with the notable exception of an increase in the amount claimed from \$1.2 million to \$2.3 million. It does not set forth any new factual allegation that Christov holds a legal interest in the Additional Assets but relies once again on an Interim Award received by her husband against Amerindo Investment Advisors Inc. (Second Christov Petition at 1-2).

The Second Marcus Petition asserts that funds provided by Amerindo Technology Growth Fund (“ATGF”) investors, including the Marcus Claimants, were used by the Defendants to purchase securities that were then held by the Benefits Scheme. (Second Marcus Petition ¶¶ 6-8,15-18). Based on these allegations, the Marcus Claimants assert an interest in an unspecified amount of the Additional Assets, requesting that the Court “recognize fully the interests of Petitioners in any portion of the Additional Assets traceable to monies invested with Defendants by Petitioners and other Claimants.” (Second Marcus Petition ¶ 19.)

The Second Salvitti Petition asserts that Salvitti had purchased 91,993.83 shares of ATGF from the Defendants for a total of \$6,000,000. (Second Salvitti Petition at 1.) Further, while Salvitti has previously asserted that “[f]rom the time of Dr. Salvitti’s original wire transfer, through present, the funds have been wrongfully co-mingled into various accounts through multiple entities,” the Second Salvitti Petition now states, conclusorily, that the Additional Assets “are funds from the claimant’s direct contributions into the ATGF.” (*Compare* Second Salvitti Petition at 1 *with* Salvitti Opposition to the Government’s First Motion to Dismiss (the “Salvitti Opposition”, or “Salvitti Opp.”)(Dkt. No. 873) at 3.) Based on that assertion, Salvitti claims “his pro rata share of the interests and the profits of the Additional Assets.” *Id.*

ARGUMENT

As the Government previously argued in the First Motion to Dismiss, Petitioners have failed to allege any facts that would demonstrate they hold a legal interest in the Additional Assets. Petitioners lack standing to pursue their claims in this ancillary proceeding under Title 21, United States Code, Section 853(n)(2), and their respective petitions should be dismissed.

A. Applicable Law

The law applicable to this motion is set forth in the Government's briefs in support of the First Motion to Dismiss. (*See* Memorandum of Law in Support (Dkt. No. 868) ("Gov't Mem.") at 11-13; Memorandum of Law in Reply (Dkt. No.888) ("Gov't Reply") at 3.)

B. The Petitions Should Be Dismissed For Lack of Standing

For the same reasons set forth by the Government in its briefs in support of the First Motion to Dismiss, the Petitioners lack standing because they fail to demonstrate any legal interest in the Additional Assets.

The Second Heitkoning and Second Christov Petitions are functionally identical to their petitions with respect to the Substitute Assets, and should be dismissed on the same grounds. (*See* Gov't Mem. at 13-14; Gov't Reply at 7, 10.)

While the Second Marcus Petition addresses additional facts beyond their prior filings, these all regard the potential use of commingled Amerindo investor funds to purchase assets which were then transferred to the Benefit Scheme. Just as in the First Marcus Petition, the Second Marcus Petition does not allege any legal interest the Marcus Claimants, specifically, have in any of the Additional Assets, specifically, but rather asserts a general interest of all the investors collectively. For the same reasons that such allegations fail to establish a legal interest

in the Substitute Assets, which undisputedly include commingled investor funds, they similarly fail to do with regard to the Additional Assets. (*See* Gov't Mem. at 13-15; Gov't Reply at 2-6.)

Finally, the Second Salvitti Petition does include a new and relevant assertion: that “[t]he Additional Assets are the funds from the claimant’s direct contributions into the ATGF.” (Second Salvitti Petition at 1). But such a conclusory, unsupported assertion is not sufficient to meet Salvitti’s burden to demonstrate standing. *See Reserve Solutions Inc. v. Vernaglia*, 438 F.Supp.2d 280, 286 (S.D.N.Y. 2006) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)) (“In contrast to the standard for a motion to dismiss for failure to state a claim under Rule 12(b)(6), a ‘plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.’”) That is especially the case here, where the assertion contradicts Salvitti’s prior representation in the Salvitti Opposition that his contributions “have been wrongfully co-mingled into various accounts through multiple entities.” (Salvitti Opposition at 3.) Salvitti offers no factual allegations to explain either the basis for his conclusory assertion or the inconsistency between the Salvitti Opposition and the Second Salvitti Petition.⁴ Indeed, Salvitti’s own request for relief implicitly acknowledges that the assertion is false, as he claims he is “entitled to his pro rata share of the interests and profits

⁴ Even in the Rule 12(b)(6) context, these circumstances would be comparable to those “where a ‘plaintiff blatantly changes his statement of the facts in order to respond to the defendant[’s] motion to dismiss ... [and] directly contradicts the facts set forth in his original complaint,’ [and therefore] “a court is authorized ‘to accept the facts described in the original complaint as true.’” *Colliton v. Cravath, Swaine & Moore LLP*, No. 08 CIV 0400 (NRB), 2008 WL 4386764, at *6 (S.D.N.Y. Sept. 24, 2008), *aff’d*, 356 F. App’x 535 (2d Cir. 2009) (quoting *Wallace v. New York City Dep’t of Corr.*, No. 95 Civ. 4404, 1996 WL 586797, at *2 (E.D.N.Y. Oct. 9, 1996)). *See also Scarola Malone & Zubatov LLP v. Verizon Commc’ns, Inc.*, No. 14-CV-4518 PKC, 2015 WL 3884211, at *6 (S.D.N.Y. June 24, 2015), *aff’d sub nom. Scarola Malone & Zubatov LLP v. McCarthy, Burgess & Wolff*, 638 F. App’x 100 (2d Cir. 2016) (disregarding as “implausible and conclusory” allegations in the amended complaint that contradicted allegations of the original complaint).

of the Additional Assets.” (Second Salvitti Petition at 1.) If the Additional Assets *were* “the funds from the claimant’s direct contributions into the ATGF,” then Salvitti would be entitled to the Additional Assets in their entirety. His actual *pro rata* claim, by contrast, reflects the type of general creditor claim he actually possesses, which cannot support standing here. Accordingly, the Court should disregard Salvitti’s conclusory assertion that “the Additional Assets are the funds from the claimant’s direct contributions into the ATGF.”

Because Salvitti does not have a legal interest in the Additional Assets, his petition must be dismissed for lack of standing. (*See* Gov’t Mem. at 13-14; Gov’t Reply at 8-9.)

CONCLUSION

For the reasons set forth above, the Government respectfully submits that its motion to dismiss Petitioners’ claims should be granted.

Dated: July 10, 2020
New York, New York

Respectfully submitted,

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