

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNITED STATES OF AMERICA

v.

**CASE NO. 6:10-cr-232-35DAB
(Forfeiture)**

DAVID A. SMITH

UNITED STATES' MOTION FOR SUMMARY JUDGMENT

The United States of America, by and through the undersigned Assistant United States Attorney, hereby moves the Court, pursuant to Federal Rule of Civil Procedure 56, for Summary Judgment on Joseph Connolly's claim to approximately \$1,662,715.50 seized from Forex Capital Markets Account No. 1000056010 held in the name of TCI FX Traders LTD because there are no genuine issues of material fact. In support of its motion, the United States submits the following memorandum of law.

MEMORANDUM OF LAW

I. STATEMENT OF UNDISPUTED FACTS

Procedural History

On August 18, 2010, a twenty-three count Indictment was returned against David A. Smith (Defendant). Doc. 1. Counts One through Four charged Defendant with wire fraud, in violation of 18 U.S.C. § 1343; Count Five charged Defendant with conspiracy to commit money laundering offenses, in violation of 18 U.S.C. § 1956(h); and Counts Six through Twenty-three charged Defendant with concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(I). *Id.*

As the result of the wire fraud violations in Counts One through Four and the money laundering violations in Counts Five through Twenty-three, the Forfeiture Allegations of the Information sought the forfeiture of Defendant's interest in any property constituting or derived from proceeds obtained directly or indirectly as a result of the wire fraud violations and any property, real or personal, involved in or any property traceable to such property as the result of the money laundering violations. *Id.* at pp.13 - 15.

On March 28, 2011, the United States and Defendant entered into a plea agreement. Doc. 25. As part of his plea agreement, Defendant agreed that he is liable for the forfeiture of "any and all assets and property, or portions thereof, subject to forfeiture, pursuant to 18 U.S.C. §§ 981(a)(1)(C), 982(a)(1), and 28 U.S.C. § 2461(c), whether in the possession or control of the United States or in the possession or control of the defendant or defendant's nominees." *Id.* at p. 11. On March 29, 2011, Defendant pled guilty to Counts One through Twenty-three of the Indictment. Doc. 26. Thereafter, on August 4, 2011, the United States filed, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), 18 U.S.C. § 982(a)(1), and Fed. R. Crim. P. 32.2(e)(1)(B), a Motion for Preliminary Order of Forfeiture seeking the forfeiture of, in relevant part, Defendant's interest in approximately \$1,662,715.50 seized from Forex Capital Markets Account No. 1000056010 held in the name of TCI FX Traders LTD (TCI FX Traders' Account). Doc. No. 41. The Court orally granted the motion for preliminary order of forfeiture at Defendant's sentencing on August 11, 2011, and entered the written order on August 19, 2011. Doc. 64.

On September 7, 2011, Joseph Connolly (Petitioner), as liquidator for TCI FX Traders LTD (TCI FX Traders), filed a claim to contest the forfeiture of the funds held in the TCI FX Traders' Account.¹ Doc. 66. The claim does not specify whether Petitioner is seeking relief pursuant to 18 U.S.C. § 853(n)(6)(A) or (B). *Id.* Petitioner filed an amended claim on September 23, 2011 to comply with the requirement of 18 U.S.C. § 853(n)(3) that the claim be filed under penalty of perjury. Doc. 68.

Overview of Scheme

For more than three years, Defendant executed a scheme to defraud thousands of investors located in the Middle District of Florida and elsewhere out of over \$220 million. Doc. 25 at p. 18. In addition to defrauding those investors, Defendant conspired to launder the proceeds received and participated in the laundering of millions of dollars of proceeds obtained as a result of his fraud. *Id.* Specifically, beginning no later than February 2005, and continuing until on or about July 15, 2008, Defendant executed a scheme to defraud thousands of investors in Olint, Olint Corporation, Olint TCI and TCI FX Traders, by operating a massive Ponzi scheme, in which Defendant paid returns to separate investors from their own money or money paid by subsequent investors, rather than from any profit actually earned. *Id.* at p. 20.

¹ According to Petitioner, TCI FX Traders had approximately 60 investors. However, only approximately 30 remain as creditors of the company. In the event Petitioner prevails, the subject funds will be disbursed to those 30 investors, and potentially, to one other unsecured creditor of TCI FX Traders. In the event the United States prevails, the United States will be seeking permission from the Attorney General to use the funds forfeited in this case to pay *all* of the victims back, to the extent possible, through the remission process. See 18 U.S.C. § 981(d) and 21 U.S.C. § 853(i)(1), as incorporated by 28 U.S.C. § 2461(c).

Defendant solicited prospective clients to open trading accounts with Olint, Olint Corporation, Olint TCI, and TCI FX Traders, based upon, among other things, his promise to use investors' funds to engage in foreign currency trading (Forex), and representations that by investing in Forex trading through him, clients could expect a high return on their investment each month, with only twenty percent of their investment at any risk. *Id.* at p. 21. To induce new and continued investments by clients and prospective clients, Defendant created client account statements each month showing purported profits in varying amounts of no less than five percent monthly, but on average, ten percent each month, and never with a loss during any monthly reporting period. *Id.* at pp. 21-22. Defendant also verbally conveyed to potential and current investors that he had never suffered a loss during a single trading period and that he had always experienced gains. *Id.* at p. 22. In actuality, Defendant knew those representations were false. *Id.* at p. 21.

Defendant failed to honor his promises to his clients by, among other things, failing to invest their funds in Forex trading as he had promised. *Id.* at p. 22. Contrary to his promises that he would use client funds to invest in Forex trading on their behalf, and would engage in certain Forex trading strategies, Defendant used most of the investors' funds to meet the periodic and specific redemption requests of other investors. *Id.* at pp. 22-23. For example, Defendant transferred funds deposited by Olint TCI and TCI FX Traders clients to individual Olint and Olint Corporation investors to meet specific redemption requests of Olint investors. *Id.* at p. 23. In addition, Defendant transferred millions of dollars invested by his clients to his personal bank accounts and used those funds to finance a lavish and expensive life-style from which

he and others received millions of dollars in goods, services, and other benefits. *Id.*

TCI FX Traders

On or about August 15, 2006, Defendant created TCI FX Traders, with a registered office in Providenciales, TCI. Doc. 25 at p. 19. According to its prospectus, TCI FX Traders was “an open ended investment company . . . established for the purpose of trading international currencies with the object of obtaining constant above average absolute return.” Doc. 68 at ¶ 7. TCI FX Traders was licensed by the Financial Services Commission (FSC) of the TCI and conducted trades between January 2007 and July 2008. *Id.*

The Board of Directors for TCI FX Traders consisted of Defendant and another individual who was a resident of TCI (co-director). Doc. 25 at p. 19; Doc. 68 at ¶ 8; October 7, 2008 Sworn Statement of the co-director, attached as Exhibit A at p. 5. Defendant was responsible for setting up, maintaining and running the trading accounts and all aspects of dealing with the platform I-Trade FX, on which TCI FX Traders traded its clients’ funds. *Id.* at pp. 6 & 8. Indeed, the co-director did not have the time to dedicate to TCI FX Traders on a full-time basis, so he spent about two days a week monitoring the local operations of TCI FX Traders, reporting to administrators, and answering clients’ questions. *Id.* at p. 8.

Funding of Account Sought for Forfeiture

Up until February 2008, Defendant carried out the trading of both TCI FX Traders and Olint through I-Trade FX, a trading platform located in Lake Mary, Florida.² Doc. 28, Ex. 4 at ¶ 10; Doc. 1 at p. 7. While funds from both companies were supposed to have been kept separate, Defendant commingled Olint and TCI FX Trader's funds at I-Trade FX. Doc. 68, Ex. 4 at ¶ 13. Additionally, while trading at I-Trade FX, Defendant covered up the poor trading of TCI FX Traders to recruit more investment funds for the company. *Id.* at ¶ 17. Defendant further fraudulently supplied TCI FX Traders with falsified I-Trade FX statements describing TCI FX Trader's monthly trading activity. *Id.* Indeed, Defendant used funds from Olint to give credibility to the inaccurate and inflated figures in the monthly trading statements. *Id.* Defendant did the same with respect to the trading accounts and records of Olint. *Id.*

Due to Defendant's mishandling of TCI FX funds, I-Trade FX closed TCI FX Traders' account and returned approximately \$10 million to Defendant via a TCI FX Traders' account he controlled in the TCI. Doc. 41 at fn 3; Doc 28, Ex. 4 at ¶¶ 18 & 20; Ex. A at p. 12. Thereafter, on or about March 4, 2008, Defendant directed the wire transfer of \$9 million of those funds to TCI FX Traders' Account. Doc. 41 at fn 3; Doc 28, Ex. 4 at ¶ 27; Ex. A at pp. 12 & 13. Defendant did trade those funds. *Id.* at p. 13. Defendant made a small profit at first, but after the first trading period, his mismanagement of funds started to cause trading losses. *Id.* Indeed, because

² Defendant was also the majority capital investor in I-Trade FX. Doc. 25 at p. 20; Doc. 68, Ex. 4 at ¶ 10.

Defendant had failed to put “stop losses”³ in place, the account value had fallen by approximately sixteen percent. *Id.* Having lost all confidence in Defendant’s trading ability, the co-director withdrew the money he had personally invested in the fund and advised other investors, including his friends and family, of his decision to do so. *Id.* As a result, approximately 80 percent of the investors withdrew their money while the other 20 percent remained invested in the hope that Defendant could make up their losses. *Id.* at p. 14. At this point, the co-director also attempted to sell his interest in TCI FX Traders to Defendant, but was unable to do so due to the actions of Defendant. *Id.* at pp. 13-14.

On July 9, 2008, an application for a restraint order was submitted by Detective Sergeant Willin Belliard with the Royal TCI Police Force, pursuant to section 43 of the Proceeds of Crime Ordinance 2007, TCI, to the TCI Supreme Court. See Belliard’s Application, attached as Exhibit B. As detailed in the application, Belliard sought to restrain the assets of TCI FX Traders based upon a money laundering investigation into Defendant for his involvement in operating a Ponzi scheme in connection with I-Trade FX. *Id.*; Doc. 68, Ex.2, at ¶ 5.

As a result of the application, on or about July 11, 2008, the TCI Supreme Court, issued an order restraining the assets of TCI FX Traders, as well as other property. See Restraint Order, attached as Exhibit C; Doc. 68, Ex.2 at ¶ 5; Ex. 4 at ¶ 29. At the time of the restraint, TCI FX Traders had approximately \$2.6 million – \$1,662,715.50

³ A stop loss is an exit order that is used to limit the amount of loss that a trader will take on a trade, if the trade goes against them. The co-director and investors believed that part of Defendant’s trading strategy was to have stop losses in place that would protect 80% of the vale of the fund. *Id.*; Doc. 25 at p. 21.

held in TCI FX Traders' Account, approximately \$900,000.00 held at TCI Bank Ltd, and a \$250,000.00 security deposit with the FSC. Ex. A at p. 16.

Concurrent with the restraint order, and because of concerns about the operations of TCI FX Traders, the FSC issued a notice requiring TCI FX Traders to cease trading activity. Doc. 68 at ¶ 9; Ex. 2 at ¶ 8. These events also coincided with the arrest of Defendant in the TCI based upon the above-referenced offenses.⁴ Doc. 68 at ¶ 9.

On or about July 24, 2008, approximately \$1,662,715.50 was seized from Forex Capital Markets Account No. 1000056010 held in the name of TCI FX Traders LTD pursuant to a civil seizure warrant issued by a United States Magistrate Judge in the Southern District of New York after a finding of probable cause that the funds were used or acquired as result of violations of 21 U.S.C. § 801 *et seq.* Doc. 41 at fn. 3; Doc. 68 at ¶ 9. The United States has maintained possession of the funds since the date of seizure.

On February 2, 2009, the Attorney General for the TCI petitioned for the winding up of TCI FX Traders on the basis of public interest arising out of the arrest of Defendant in the TCI pursuant to sections 92(f)⁵ and 94 of the Companies Ordinance 1981 (Cap 118), Laws of the Turks and Caicos Islands. *Id.* & Ex. 2 at ¶ 1 & Ex. 4 at ¶

⁴ On March 1, 2010, Defendant was formally charged with defrauding investors of TCI FX Traders from January 1, 2006 through July 31, 2008. See Information, attached as Exhibit D.

⁵ Section 92(f) of the Companies Ordinance specifically provides that a company can be wound up if “the company, being a financial institution licensed under the Banking Ordinance or under any enactment repealing or replacing that Ordinance, has had its licence to carry on banking business revoked.”

30.

On April 3, 2009, the Supreme Court of the TCI issued an order placing TCI FX into liquidation. *Id.* Joseph Connolly was appointed as the official liquidator of TCI FX Traders. *Id.*, Ex. 2 at ¶ 14.

II. LEGAL ARGUMENT

A. Summary Judgment Standard

Although arising from a criminal forfeiture, ancillary forfeiture proceedings are civil in nature and thus, governed by the Federal Rules of Civil Procedure. *United States v. Gilbert*, 244 F.3d 888, 907 (11th Cir. 2001) (finding that an ancillary proceeding is civil in nature). Under Federal Rule of Civil Procedure 56(c), a district court shall grant summary judgment relief to the movant if “the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” The substantive law determines whether a fact is material. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 251-52 (1986). A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

Initially, the moving party must establish for the court the basis for the summary judgment motion, and identify those portions of the record of evidence which the movant believes demonstrates the absence of a genuine issue of material fact. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991). The movant may support its motion for summary judgment “with affirmative evidence demonstrating that

the non-moving party will be unable to prove its case at trial.” *Id.* However, it is unnecessary for the movant to negate its opponent's claim through affidavits or other similar material, if the non-moving party has the burden of proof at trial. *Id.*

Once the movant establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show that there is such an issue. *Id.* “If the non-moving party fails to 'make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof,' *Celotex v. Catrett*, 477 U.S. 317, 323 (1986) the moving party is entitled to summary judgment.” *Id.*

B. A Third Party's Right to Challenge Forfeiture

Congress has provided exclusive grounds for third parties to challenge the forfeiture of claimed interests – by proving by a preponderance of the evidence that they are an “innocent owner.” 21 U.S.C. § 853(n)(6) (adopting same standard as 18 U.S.C. § 1963(l)(6)). Specifically, third party petitioners must establish either (1) they had a right, title or interest that vested before the time of the criminal acts which gave rise to the forfeiture or was otherwise superior to that of Defendant at the time of the crime; or (2) they were bona fide purchasers for value of the right, title or interest in the property and were, at the time of purchase, reasonably without cause to believe that the property was subject to forfeiture. *Id.*; *United States v. Kennedy*, 201 F.3d 1324, 1334-35 (11th Cir. 2000) (a third party asserting an interest in criminally forfeited property is limited to showing superior title or status as bona fide purchaser for value).

To prevail on his claim, therefore, Petitioner bears the burden to establish by a preponderance of the evidence that he meets either prong of the statutory test outlined above. 21 U.S.C. § 853(n)(6). Because Petitioner cannot meet his burden, his claim must fail and the United States is entitled to judgment as a matter of law.

1. *Petitioner Cannot Establish a Vested or Superior Right, Title, or Interest in the funds held in TCI FX Traders' Account*

Pursuant to section 853(n)(6)(A), a third party petitioner must establish that “he or she had an interest in the subject property that ‘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.” *United States v. Kennedy*, 201 F.3d at 1334 (citing 21 U.S.C. § 853(n)(6)(A)) (emphasis added). Therefore, to prevail, claimants must be able to establish that they had a *pre-existing* interest in the subject properties that prevented the defendant’s interest from vesting. *See United States v. Watkins*, 320 F.3d 1279, 1282 (11th Cir. 2003) (in order to have a superior interest, the claimant must have had a legal right, title, or interest in the forfeitable property that preceded the commission of the crime that gave rise to the forfeiture of that property); *United States v. Carrie*, 206 Fed. Appx. 920, 922-23 (11th Cir. 2006) (because Government’s interest vested under the relation back doctrine when defendant acquired the property with criminal proceeds, claimant could not recover under section 853(n)(6)(A) unless he had an interest before that time) (emphasis added). Petitioner cannot show that he had an interest superior to that of Defendant in the funds held in TCI FX Traders’ Account at the time the wire fraud offenses took place. Indeed, as outlined below, such a showing cannot be made as a

matter of law because the funds held in TCI FX Traders' Account are directly traceable to wire fraud proceeds.

a. Relation Back Doctrine

The government's right to property subject to criminal forfeiture vests at the time the act giving rise to the forfeiture is committed. 21 U.S.C. § 853(c); *see also United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989) (same); *United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007) (same); *United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) (Government's interest vested under section 853(c) at the onset of the drug conspiracy that the property facilitated); *United States v. One Silicon Valley Bank Account*, 549 F. Supp. 2d 940, 958 (W.D. Mich. 2008) (finding that the predicate criminal acts the defendant was charged with predated the commencement of the bankruptcy cases, so the debtors had ceased to have a legal interest in the seized assets prior to the commencement of the bankruptcy cases and, therefore, the claims of the bankruptcy trustees were dismissed); *United States v. Zaccagnino*, No. 03-10095, 2006 WL 1005042, *4 (C.D. Ill. April 18, 2006) (the Government's interest in laundered property vested when the money laundering offense took place; thus, the property never became part of a bankruptcy estate that was created when the defendant subsequently declared bankruptcy). Specifically, section 853(c) provides:

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

21 U.S.C. § 853(c).⁶ The statute makes clear that a third party who acquires an interest after that time can recover only if he or she is a bona fide purchaser pursuant to 21 U.S.C. § 853(n)(6)(B).

In the instant matter, the United States' interest in the funds occurred as soon as the funds were wire transferred to TCI FX Traders at Defendant's direction, i.e., when the wire fraud occurred. Petitioner's interest in those funds arose at the same time, i.e., when TCI FX Traders took possession of the funds. This is so because Petitioner stands in the shoes of the debtor and can take no greater rights than the debtor. See *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006) ("A trustee, as the representative of the estate, succeeds into the rights of the debtor-in-bankruptcy and has standing to bring any suit that the debtor corporation could have brought outside of bankruptcy."); *United States v. Rothstein (Petition of Chapter 11 Trustee of RRA, P.A.)*, No. 09-60331-CR, 2010 WL 2730749, *3 (S.D. Fla. July 9, 2010) (a bankruptcy trustee's interest in the debtor's property relates back to the date of the commencement of the bankruptcy proceeding; thus, the trustee can assert whatever rights the bankrupt person could have asserted in the ancillary

⁶ The relation back doctrine and its impact were clearly articulated by the U.S. Supreme Court, "[b]y the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although [its] title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith. *United States v. Stowell*, 133 U.S. 1, 16–17 (1890) (emphasis added).

proceeding).

Because the United States' and Petitioner's interests in the subject funds arose at the same time, Petitioner cannot have a pre-existing interest in the subject funds. Thus, Petitioner can only prevail in this action if he can establish that he is a bona fide purchaser for value reasonably without cause to believe the funds held in the TCI FX Traders' Account were subject to forfeiture at the time his interest in the properties arose.

b. A Third Party Can Never Have a Pre-Existing Interest in Proceeds Obtained from a Crime

Moreover, this Court has found that funds held in TCI FX Traders' Account were directly traceable to proceeds obtained from Defendant's wire fraud conspiracy. Consequently, Petitioner's interest in the funds held in TCI FX Traders' Account was necessarily acquired after the conduct giving rise to forfeiture. *See United States v. Eldick*, 223 Fed. Appx. 837, 840 (11th Cir. 2007) (if the forfeited property is traceable to the proceeds of the crime, the Government's interest under the relation back doctrine will always be superior to that of third party asserting an interest in the property under section 853(n)(6)(A)); *United States v. Carrie*, 206 Fed. Appx. at 923 (the Government's interest in property purchased with criminal proceeds vests as soon as the purchase is made; thus, just as a third party cannot assert an interest in the criminal proceeds themselves under section 853(n)(6)(A), neither can he assert an interest in property traceable to those proceeds); *United States v. Foley*, No. 04-CR-601072006, 2006 WL 6598110, *1 (S.D. Fla. Apr. 24, 2006), *aff'd*, 258 Fed. Appx. 246 (11th Cir. 2007) (even if bankruptcy trustee acquired some interest in the criminal proceeds by filing a bankruptcy petition, it would come too late to allow recovery under § 853(n)(6)(A); a

person cannot have pre-existing interest in criminal proceeds); *United States v. Rothstein*, No. 09-60331-CR, 2010 WL 4064809, *3 (S.D. Fla. Oct. 14, 2010) (a third party claimant cannot prove a superior interest in the proceeds of fraud); *United States v. Brown*, 509 F. Supp. 2d 1239, 1244 (M.D. Fla. 2007) (defendant's wife cannot contest forfeiture of his criminal proceeds under section 853(n)(6)(A) because, under the relation back doctrine, the Government's interest in the proceeds will have vested before any third party could have acquired any interest in them).

2. Petitioner Cannot Establish he is a Bona Fide Purchaser for Value without Reason to Believe the Funds in the TCI FX Traders' Account were Subject to Forfeiture

Section 853(n)(6)(B) applies to third party claimants who acquire their interests in property after the crime giving rise to the forfeiture. 21 U.S.C. § 853(n)(6)(B). It requires a petitioner prove: (1) a legal interest in the property; (2) that the interest was acquired as a bona fide purchaser for value; and (3) that the interest was acquired at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture. *Id.*; see *United States v. Kennedy*, 201 F.3d 1324, 1328-29 (11th Cir. 2000) (outlining elements of subsection (n)(6)(B)); *United States v. Brown*, 509 F. Supp. 2d at 1247 (denying claimant's motion for summary judgment because she could not satisfy any of the three requirements of section 853(n)(6)(B): that she was an owner, that she had given something of value, and that she was without reason to know the property was subject to forfeiture when she acquired her interest in it). As outlined below, Petitioner's claim must fail because he is not a bona fide purchaser for value and, at the time of the transfer, he was not reasonably without cause to believe the property was subject to forfeiture.

a. Petitioner is Not a Bona Fide Purchaser for Value

The bona fide purchaser provision comes from state commercial law and is an exception to the relation back doctrine. *United States v. Harris*, 246 F.3d 566, 575 (6th Cir. 2001) (bona fide purchaser provision comes from “hornbook commercial law”); *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1325 (M.D. Fla. 2001) (the bona fide purchaser provision in section 853(n)(6)(B) is a codification of the protection for bona fide purchasers in section 2-403 of the Uniform Commercial Code). Petitioner, standing in the shoes of the debtor, TCI FX Traders, can prevail only by demonstrating that he purchased his interest in investors’ funds for value in an arm's length transaction without knowledge that the property was subject to forfeiture.⁷ *See United States v. Reckmeyer*, 836 F.2d 200, 207 (4th Cir.1987) (the legislative history of section 853(n)(6)(B) indicates that Congress intended to protect bona fide purchasers who give value in an arm's length transaction).

In the instant matter, Defendant stole money from investors through TCI FX Traders, a purported investment company. Instead of investing funds as advertised, Defendant, through TCI FX Traders, solicited investors’ funds and then used those funds to pay back earlier investors to keep the scheme going and to enrich not only the corporation but himself with a lavish lifestyle. Consequently, TCI FX Traders was one of the many instrumentalities used by Defendant to defraud thousands of investors out of hundreds of millions of dollars. Accordingly, because TCI FX Traders accepted

⁷ Black's Law Dictionary defines an arm's length transaction as one “negotiated by two parties who are not related or not on close terms and who are presumed to have equal bargaining power.” Black's Law Dictionary (Pocket ed. 1996).

investors' funds to perpetrate a scheme and not in an arm's length transaction, TCI FX Traders is not a bona fide purchaser for value of the subject funds.

b. Petitioner Was Not Without Cause to Believe Property was Subject to Forfeiture

Because Petitioner is not a bona fide purchaser for value, the Court need not reach the "cause to believe" element. See *United States v. 10150 NW 133 Street, 278 Fed. Appx. 880, 883 (11th Cir. 2008)*⁸ (claimant's assertion that she did not know the money given to her by her daughter to buy property was fraud proceeds was irrelevant; because claimant gave nothing of value for the proceeds, she was not a bona fide purchaser under section 983(d)(3), and so could not contest the forfeiture of the property she acquired with the proceeds); *United States v. Soreide*, No. 03-60235-CR-COHN/SNOW, slip op. at 16-17 (S.D. Fla. Mar. 22, 2005) (wife gave no value for the property; therefore, it was unnecessary to decide if she had reason to know it was forfeitable). Regardless, Petitioner cannot establish that he was without cause to believe that the property was subject to forfeiture. To the contrary, the undisputed evidence establishes that TCI FX Traders knew the property was subject to forfeiture.

⁸ Since the statutory language is now generally the same for civil and criminal forfeiture, both pre-and post-CAFRA judicial decisions under § 853(n)(6)(a)-(b) in criminal cases will apply as precedent for post-CAFRA civil cases under § 983(d)(2)-(3) *United States v. 6124 Mary Lane, San Diego, California*, No: 03CV580, 2008 WL 3925074, *2 (W.D.N.C. Aug. 20, 2008); see also *United States v. Real Property Located at 148 Maunalanikai Place in Honolulu, Hawaii*, Civil No. 07-00049 HG LEK, 2008 WL 3166799, *10 (D. Haw. Aug. 6, 2008) (same); *United States v. One 1996 Vector M12*, 442 F. Supp. 2d 482, 486 (S.D. Ohio 2005) (noting that to interpret section 983(d)(3), courts have turned to the definition of bona fide purchaser for value under section 852(n)(6)(B)).

To prevail as a bona fide purchaser for value without knowledge, the claimant must have an objectively reasonable belief that the property was not subject to forfeiture at the time it acquires its interest. See *United States v. Brown*, 509 F. Supp. 2d at 1247 (citing *United States v. Medina Cuartes*, 155 F. Supp. 2d 1338, 1343 (S.D. Fla. 2001) (“Actual lack of knowledge of forfeitability is not enough.”)). The proper test to be applied under the statute is not merely whether Petitioner had knowledge of the forfeitability of the asset but whether Petitioner had “an objectively reasonable belief that the property was not subject to forfeiture.” *Id.* at 1246 (internal citations omitted).

In cases where the claimant knew that the property was involved in criminal activity or purchased with the proceeds of criminal activity, courts have routinely struck an innocent owner defense. See *United States v. Once Parcel of Real Estate Located at 6640 SW 48th Street*, 41 F.3d 1448, 1452-53 (11th Cir. 1995) (person who acquires property knowing that it was used to commit an illegal act is not an innocent owner); *United States v. Frykholm*, 362 F.3d 413, 416 (7th Cir. 2004) (section 853(n)(6)(B) may not contain an affirmative duty to investigate, but a claimant who remains willfully blind cannot claim to have been without reason to know that the defendant's property was subject to forfeiture; third party who acquired an interest in defendant's property knowing that defendant had engaged in fraud and that the property was unencumbered by debt was on notice—or was willfully blind to the fact—that the property represented funds obtained from the fraud scheme). In this case, TCI FX Traders acquired the funds held in TCI FX Traders' Account knowing that those funds represented criminal proceeds. This is so because Defendant's knowledge of the scheme to defraud is imputed on the corporation.

In the Eleventh Circuit, “knowledge of an illegal activity may be attributed to a corporation when the knowledge was obtained by an agent acting within the scope of his or her employment and for the benefit of the corporation.” *United States v. Route 2, Box 472*, 60 F.3d 1523, 1527 (11th Cir. 1995). To be acting within his employment, the agent must have intended that his conduct produce some benefit to the corporation, even if the agent is the first beneficiary of his illegal conduct. *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984) (same). “[I]n general the servant's conduct is within the scope of his employment if it is of the kind he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master.” *Id.* at 823.

i. Defendant was Acting within the Scope of his Employment

Here, Defendant was acting within the scope of his employment while he was operating his scheme to defraud. Defendant’s role with TCI FX Traders was to set up, maintain, and run the trading activities of its investors. As part of his duties and as part of his scheme to defraud, Defendant solicited and caused others to solicit prospective clients to open trading accounts at TCI FX Traders based upon, among other things, his promise to use investors’ funds to engage in Forex trading and representations that by investing in Forex trading through him TCI FX Traders investors could expect a high return on their investment each month, with only twenty percent of their investment at risk. However, in actuality and as part of the scheme, Defendant made, and caused others to make, false representations concerning his investment strategies to clients and prospective clients, created fraudulent trading statements and advised potential and

current investors, and others, that he had never suffered a loss during a single trading period and had always experienced gains.

ii. Defendant Intended to Benefit not only Himself but TCI FX Traders

Defendant admittedly made false representations in order to induce new and continued investments by clients and prospective clients. By making these false representations, Defendant benefitted not only himself, but TCI FX Traders. To be sure, Defendant used corporate funds to purchase a \$2 million residence and other property in Providenciales, TCI and elsewhere; make a down payment for the purchase of a Lear jet; pay for frequent travel on the jet; host guests while paying all their expenses at hotels and restaurants; sponsor a Jazz Festival in Jamaica; purchase expensive vehicles for himself and others; purchase jewelry for himself and others; purchase expensive vacations in the Caribbean and the United States; make political contributions; and gamble at casinos. Doc. 25 at p. 23. Moreover, at the time the restraint order was obtained for the assets held by TCI FX Traders, it held approximately \$2.6 million in its name.⁹ Although TCI FX Traders never publicly disclosed its profit margins, it is beyond dispute that it was not operating as a non-profit organization and that Defendant's lies were designed to induce new and continued investments by clients.

⁹ In the co-director's sworn statement, he indicates that of the \$2.6 million, the company had approximately \$100,000.00 of its own money and approximately \$2.5 million of client money. Ex. A at p. 16. However, title to investors' funds no longer belonged to the investors, but to TCI FX Traders. *Cf. United States v. Eldick*, 223 Fed. Appx. at 840 ("A fraud victim who voluntarily transfers property to the defendant has a cause of action in tort against the defendant but has no greater interest in the forfeited property than does any other general creditor. Title to the funds in question no longer belongs to the victim; it belongs to the defendant.").

Indeed, Defendant's lies did induce more business. Even after I-Trade FX returned money to Defendant, investors still allowed Defendant to invest their money at FXCM, and it even solicited new investors. Doc. 68, Ex. 4 at ¶ 27 ("TCI FX [Traders] moved its clients' funds to [FXCM] and continued to trade in foreign exchange and also took new investments totaling \$217,500 from six new clients."). Shockingly, after Defendant's mismanagement of investor funds at FXCM, which could have resulted in investors losing everything, some investors still allowed Defendant to continue trading on their behalf. The more Defendant lied, the more the corporation benefitted, and the more Defendant could enrich himself

iii. The Innocent Owner Defense does Not Apply when a Corporation has been Established to Serve an Employee's Illicit Activities

More specifically, an employee's knowledge of illicit conduct can be imputed to a corporation upon a showing that the "corporation was merely a 'sham' corporation, designed solely to protect an individual's illicit activities." *United States v. Route 2, Box 472*, 60 F.3d 1527. In *Route 2, Box 472*, the United States filed a civil complaint seeking forfeiture of a corporation's land, alleging that an officer and majority shareholder used the land to facilitate illegal drug trafficking. *Id.* at 1524-25. The Eleventh Circuit ultimately found that the United States had not established that the subject corporation was a sham because: 1) no evidence was offered to suggest that the corporation was something other than an entirely legitimate company, operating since its inception for the sole purpose of raising fish and livestock; 2) the officer and majority shareholder's marijuana cultivation took place separate and apart from the corporation; 3) there was no evidence that other members of the corporation were

aware of it; and 4) there was no evidence that the corporation reaped any benefit from the officer and majority shareholder's actions, or that there was an intent to benefit the corporation. *Id.* at 1527.

Such is not the case here. Defendant used TCI FX Traders solely to protect his illicit activities. While from the outside TCI FX Traders appeared to be a legitimate investment company, as discussed more fully above, it was nothing more than a sham company, designed to facilitate Defendant's scheme to defraud. TCI FX Traders was not separate and apart from the illegal activity, but an integral part of the illegal activity, that conducted no legitimate business because it was a fraud. But for TCI FX Traders, Defendant would not have had a platform to take money from investors and use it for his own personal benefit. Moreover, both the corporation and Defendant benefitted from Defendant's scheme to defraud. Consequently, TCI FX Traders was a sham corporation and Defendant's knowledge of the fraud is properly imputed to it.

III. CONCLUSION

WHEREFORE, because Petitioner cannot, as a matter of law, establish that he either (1) had a right, title or interest that vested before the time of the criminal acts which gave rise to the forfeiture or was otherwise superior to that of Defendant at the time of the crime; or (2) was a bona fide purchaser for value of the right, title or interest in the property and were, at the time of purchase, reasonably without cause to believe

that the property was subject to forfeiture, the United States of America respectfully requests this Court to grant the United States' Motion for Summary Judgment and deny the claim set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I further certify that I mailed on November 3, 2011, the foregoing documents and the notice of electronic filing by first-class mail to the following non-CM/ECF participant:

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