IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA Plaintiff, v. ALL ASSETS LISTED IN ATTACHMENT A, AND ALL INTEREST, BENEFITS, AND ASSETS TRACEABLE THERETO, Defendants *in Rem*.	)	The Honorable Liam O'Grady Civil No. 1:2014-cv-00969

CLAIMANTS' BRIEF IN OPPOSITION TO THE UNITED STATES' MOTION TO STRIKE CERTAIN VERIFIED CLAIMS

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INTRODUCTION

With its Motion to Strike ("Motion"), the United States Government is seeking to ward off inquiry by this Court into essential legal questions, including whether the Court has jurisdiction over the relevant subject matter; whether it has jurisdiction over the relevant foreign assets; whether the foreign assets at issue are traceable to any alleged crimes; and whether the alleged crimes even amount to crimes. Only by invoking "fugitive disentitlement" might the Government skip past glaring, fatal defects in its supposed case for civil forfeiture and obtain an unjust result that should otherwise be beyond reach. If the Government has its way, then it will win from this Court an order calling for forfeiture of tens of millions of dollars in Claimants' foreign assets without the Court so much as permitting adversarial contest on the obvious, fundamental jurisdictional and merits questions otherwise looming before it.

According to the Government's Motion, the fugitive disentitlement doctrine yields this disquieting result, depriving Claimants of threshold standing to contest forfeiture of their own assets abroad and trumping even threshold inquiry into jurisdiction. But the Government thereby distorts the concept of "fugitive" status beyond recognition. These Claimants never fled the United States to evade prosecution. To the contrary, they remain precisely where they have long been residing and carrying out the very business enterprise that the Government characterizes as criminal—in New Zealand (as to most of the Claimants). Nor have these Claimants altered their plans so as to avoid return to the United States. To the contrary, they are simply maintaining the pre-indictment *status quo* and following the rule of law by invoking their rights under the laws and procedures of their home countries, where they had long planned to remain. Nor are these Claimants reaching out to assert claims over U.S. assets without physically coming here to litigate for them. To the contrary, the Claimants are simply defending against forfeiture of the *New Zealand* and *Hong Kong* assets that are right where they are or had generally been residing,

and are otherwise theirs to claim and to use. There is no precedent and certainly no good reason for the Court in these circumstances to apply fugitive disentitlement, which remains subject to its sound discretion even if otherwise applicable.

The Government's Motion is misconceived procedurally and substantively in multiple respects. As to proper procedure, no motion to strike can defeat this Court's inquiry into subject-matter and personal jurisdiction under Article III, which is a first-order imperative. Nor can fugitive disentitlement defeat Claimants' *standing*, which flows from their obvious interests in their own assets, as courts uniformly agree. Instead, fugitive disentitlement would at most be an issue for summary judgment, which should be informed by appropriate discovery. Ultimately, however, there is no question that the Court will need to adjudicate the core merits, because at least one of the Claimants, Mona Dotcom (currently separated from Kim Dotcom), is not a fugitive by anyone's account and presses the same arguments for dismissal that the Government urges the Court to ignore as to other Claimants. The only sound way to put off adjudication of the merits would be to stay these proceedings altogether, consistent with the parallel criminal case that remains in a state of indefinite suspension. To move forward as the Government urges simply by ruling these Claimants disentitled at the threshold, however, would be unsustainable.

The Government's substantive account of fugitive disentitlement is likewise unsustainable when measured against statute, precedent, and the Constitution. The express statutory predicate for fugitive status requires that the claimant be abroad "in order to avoid criminal prosecution." 28 U.S.C. § 2466(a)(1). The *sine qua non* of any such determination is that the individual is being prosecuted for conduct that is indeed a crime under U.S. law—which secondary copyright infringement is not. Again, no court has ever found that predicate satisfied in circumstances like these. Adopting the Government's sweeping definition of "fugitive"—

which encompasses anyone who is outside the United States while attempting to state a claim inside the United States—would deny any meaning to the express limitation of the statute. What is worse, it would violate the United States Constitution, particularly the Due Process Clause of the Fifth Amendment, the Right to Jury Trial under the Seventh Amendment, and the Excessive Fines Clause of the Eighth Amendment, all of which are squarely implicated by the Government's grab for civil forfeiture and none of which Claimants have waived.

Finally, it bears noting that the Government's instant position poses grave institutional concerns. Not only does it seem doubtful that this Court can exercise *in rem* jurisdiction over assets located beyond its jurisdiction, *see R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999), but the Government's position stands to exacerbate the doubt: It would have this Court adjudge New Zealand assets forfeit for no reason other than that Claimants remain engaged before New Zealand courts. It would, in essence, have this Court treat sister courts in New Zealand as though they are nothing more than refuge for fugitive scofflaws. The U.S. Court would be asking sister courts in New Zealand to respect and comply with its order demanding forfeiture of New Zealand assets while disavowing analysis of whether it even has any jurisdictional or substantive warrant for so ordering. We submit that the golden rule of "do unto others as you would have them do unto you" deserves much the same place in regulating judicial affairs as it does in regulating human affairs. The Government's instant position is as anathema to international comity between sister courts and orderly relations between sister sovereigns as it is to Claimants' constitutional rights and any semblance of justice. We respectfully submit that, were the Court to find Claimants disentitled and order forfeiture on that basis, there is every prospect that foreign courts will, consistent with foreign laws and treaties, *see infra* at §§ I(B)(1),

IV(B)(4), decline to credit that on faith. As such, following the Government's urging would risk issuing an advisory opinion forbidden by Article III.

ARGUMENT

Animating the Government's Motion is a sudden perceived need for speed. As the Government notes in its Motion (Dkt. 39 at 2), it has assured New Zealand courts, *see* Affidavit of G Wingate Grant dated 7 March 2014 at paragraph 4[1], that this Court will conclude forfeiture proceedings by April 18, 2015. Making that pledge, however, was both presumptuous and inconsistent with the Government's own conduct in this case. To note the obvious, *the Government* elected to initiate a criminal prosecution in the first instance, despite a statutory provision, 18 U.S. C. § 981(g), that calls for automatic stay of civil forfeiture; *the Government* then elected to wait for *more than two years* before first attempting civil forfeiture; and *the Government*, we have now learned, then attributed the target assets to the *wrong banks* in seeking civil forfeiture (Dkt. 42), after which it amended its listing just this past week.

In these circumstances, the Government has no basis to complain or to fault anyone other than itself for the prospect that this proceeding—which implicates tens of millions of dollars in assets, the interests of 12 different claimants, and novel, important factual and legal questions—may run beyond April 2015. Notably, the parallel criminal proceedings seem sure to continue beyond that date, even though they were initiated in 2012 and involve claims by innocent users who remain eager to recover their files. Certainly the Government's newfound desire to accelerate things here is no warrant for dispensing with either proper procedure or the substantive rights of these Claimants. Indeed, we continue to submit respectfully (*see* Dkt. 20 at 29) that the best course would be simply to stay this proceeding, consistent with the status of the

[1] Attached as Exhibit J to the Declaration of Craig C. Reilly

criminal proceeding, the relevant statute, and the state of inactivity that the Government embraced for years before first bringing this case in July 2014 (Dkt. 1).

I. THE COURT SHOULD ADJUDICATE CLAIMANTS' MOTION TO DISMISS BEFORE MAKING ANY FINDING UNDER 28 U.S.C. § 2466.

Several questions raised in Claimant's Motion to Dismiss ("MTD") are necessarily antecedent to any determination under 28 U.S.C. § 2466. First, the question whether the Government's complaint falls within this Court's subject-matter jurisdiction must "be decided before any other matter." *United States v. Wilson*, 699 F.3d 789, 793 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2401 (2013). If not, then this Court has no power under Article III to proceed any further. Second, the question whether this Court has *in rem* jurisdiction over the property at issue must likewise be decided, consistent with the limits of Article III, before this Court reaches other questions. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999). Third, the MTD must be decided in any event, regardless of fugitive disentitlement, because the MTD was filed on behalf of Claimant Mona Dotcom (Dkt. 39 at 1), whose claim the Government neither can nor is purporting to strike and who raises the same merits questions as all the rest. As a result, any decision on fugitive disentitlement would be moot. For all these reasons, this Court should rule on the MTD before making any findings under 28 U.S.C. § 2466.

A. The Claimants' Challenge To Subject-Matter Jurisdiction Must Be Resolved Before Fugitive Disentitlement.

Federal courts have an inherent, Article III duty to address their subject-matter jurisdiction before anything else. Under our Constitution, "jurisdictional limits define the very foundation of judicial authority." *Wilson*, 699 F.3d at 793. These constitutional limits on jurisdiction do not bend for congressional statutes, much less for arguments about fugitive disentitlement. To the contrary, because fugitive disentitlement is left to judicial *discretion*, 28 U.S.C. § 2466, it would be all the more inappropriate to elevate it above the constitutional

mandate to consider jurisdiction first and foremost. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007).

Although the Government argues that fugitive disentitlement "must be addressed before the court considers any motion filed by the claimant" (Dkt. 39 at 7), it fails to acknowledge contrary authority holding that, "while a decision on disentitlement could be made prior to reaching waivable or discretionary threshold issues, it never could pretermit the bedrock determination of subject matter jurisdiction." *United States v. $6,976,934.65 Plus Interest*, 486 F. Supp. 2d 37, 39 (D.D.C. 2007). Indeed, even if Claimants' neither filed the MTD nor raised concerns about subject-matter jurisdiction, this Court would be obligated to consider any such concerns *sua sponte*. *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). In sum, defects in subject-matter jurisdiction have been identified in the MTD (Dkt. 20 at 6-14), and those defects transcend the Government's Motion; the Court would risk trespassing beyond Article III and established jurisdictional limitations were it to ignore them. *See Wilson*, 699 F.3d at 793.

B. The Claimants' Challenge To *In Rem* Jurisdiction Must Be Resolved Before Fugitive Disentitlement.

As with defects in subject-matter jurisdiction, defects in *in rem* jurisdiction must be decided at the threshold, before proceeding any further. *See Ruhrgas*, 526 U.S. at 584 ("Personal jurisdiction, too, is an essential element of the jurisdiction of a district court, without which the court is powerless to proceed to an adjudication.") (quotations omitted). Thus, in the criminal context, the Seventh Circuit went so far as to issue a writ of mandamus directing a district court to entertain a challenge to personal jurisdiction from an overseas defendant *before* reaching fugitive disentitlement. *See In re Hijazi*, 589 F.3d 401, 408, 414 (7th Cir. 2009). In the context of civil forfeiture, of course, the equivalent question is not whether the Court has personal jurisdiction over the Claimants, but whether the Court has *in rem* jurisdiction over the Defendant

Assets.[2] On this point, controlling precedents from the Fourth Circuit indicate that this Court must ensure that two distinct, essential predicates to *in rem* jurisdiction are both in place: first, there must be "minimum contacts" under *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002); second, there must be sufficient control over the *res* to ensure redressability under *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999). Here, neither exists.

1. The Defendant Assets Lack Sufficient Minimum Contacts With The Forum For This Court To Exercise Jurisdiction.

The Fourth Circuit applies the "minimum contacts" test from *International Shoe Company v. Washington*, 326 U.S. 310 (1945), when evaluating *in rem* jurisdiction. *See Harrods*, 302 F.3d at 224. Claimants respectfully challenge whether the necessary minimum contacts exist between the Eastern District of Virginia (where none of the assets are) and assets located in New Zealand and Hong Kong. (Dkt. 20 at 14-17.) This challenge has all the more force following the Supreme Court's recent instruction that courts must heed "international comity" when assessing jurisdiction. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014). The Supreme Court in *Daimler* reversed the Ninth Circuit specifically because "[o]ther nations do not share the uninhibited approach to [] jurisdiction advanced by the Court of Appeals." *Id*. Ongoing legal proceedings in New Zealand and Hong Kong have turned up grave concerns about the Government's legal premises as well as its conduct of this case. *See Her Majesty's Attorney General v Kim Dotcom*, CA 420/2013 [2014] NZCA 19 [19 February 2014] at para [116] (noting, *inter alia*, "the removal of [evidence] from New Zealand [by United States authorities] was not authorised and was accordingly unlawful"), *granted discretionary review in Dotcom and Others v Attorney General* [2014] NZSC 52 [5 May 2014]); *see also In re Kim Dotcom, et al.*

[2] The Defendant Assets themselves are not fugitives and cannot be disentitled. *See* 28 U.S.C. § 2466 (providing mechanism to disentitle "a person").

[2014] H.C.M.P. 116/2012 at para [14] (finding failure by U.S. to disclose information required by Hong Kong law); Press Release, New Zealand Parliament, Prime Minister requests inquiry (Sept. 24, 2012) (acknowledging that "the GCSB had acted unlawfully while assisting the police" and apologizing).[3] Ordering forfeiture of foreign property, without even hearing jurisdictional and merits questions, would inflame these concerns.

Similarly, suits against foreign corporations demand heightened scrutiny of "minimum contacts." *See Asahi Metal Indus. Co. v. Superior Court of California, Solano Cnty.*, 480 U.S. 102, 114 (1987) (plurality opinion); *see also J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2794 (2011) (Breyer, J., concurring). Especially because Megaupload is incorporated in Hong Kong, this Court should at a bare minimum identify requisite minimum contacts with the target assets abroad before asserting *in rem* jurisdiction over them.

2. The Government's Position Undercuts The Assurance Of International Cooperation On Which Any *In Rem* Jurisdiction Would Be Predicated.

Moreover, the Fourth Circuit has identified geographic outer bounds of *in rem* jurisdiction as fixed by Article III. The Court cannot adjudicate the status of property outside its control, where any such adjudication will be nothing more than advisory and thus forbidden by Article III. *See Muskrat v. United States*, 219 U.S. 346, 362 (1911) (federal judicial power is limited to actual cases or controversies). Specifically, where "the *res* is not in the court's actual or constructive possession . . . the court may not adjudicate rights to the *res* and effectively bind others who may have possession." *R.M.S. Titanic*, 171 F.3d at 964. Accordingly, "the limits of *in rem* jurisdiction, as traditionally understood, are defined by the effective limits of sovereignty itself," *id.* at 965, and "Article III of the Constitution . . . do[es] not amount to an attempt by the

[3] These are attached as Exhibits K through N to the Declaration of Craig C. Reilly.

United States to extend its sovereignty over persons (*in personam*) or things (*in rem*) beyond the territorial limits of the United States." *Id.* at 961.

By all available indications, the only answer the Government might offer to this fundamental problem is to predict that New Zealand and Hong Kong would implement any forfeiture ordered by this Court. Assuming *arguendo* such speculation might ever be credited (and we respectfully submit it cannot be under *R.M.S. Titanic*), it would be thoroughly undermined by adopting the Government's position. If the Claimants are ignored because they are deemed disentitled as fugitives, then there is compelling reason to doubt that foreign enforcement will ensue. To begin with, courts in New Zealand will not enforce foreign forfeiture orders unless the foreign court (*i.e.*, this Court) exercised proper jurisdiction, and entry of the judgment is not contrary to New Zealand's public policy. *See* Andy Glenie & Georgia Dunphy, *Kicking Off in Kiwi Courts?*, The New Law Journal, Mar. 28 2013, *available at* http://www.newlawjournal.co.uk/nlj/content/kicking-kiwi-courts (Exhibit O.). Moreover, other commonwealth authority specifically rejects fugitive disentitlement. *See Polanski v. Condé Nast Publications Limited* [2005] UKHL 10 at para [26] ("Such harshness has no place in our law . . . [o]ur law knows no principle of fugitive disentitlement.") [4] If this Court follows the Government's urging, (Dkt. 39 at 7), deeming Claimants disentitled and ignoring jurisdictional objections along with the merits, then that will be a recipe for New Zealand courts to refuse to enforce—thereby leaving this Court's order advisory and nothing more.

More generally, the Government would have this Court give short shrift to the role of foreign courts and foreign law in protecting their own nationals and assets. By the Government's account (Dkt. 39 at 12), any "claimants who are fighting extradition on the criminal charges . . .

[4] Attached as Exhibit R to the Declaration of Craig C. Reilly

are fugitives." It would not be surprising to see a New Zealand court take umbrage at that account—and for the same New Zealand court to take a dim view of any order that denounces as "fugitives" from justice those who have called upon that court to adjudicate protections guaranteed by New Zealand law and treaty. Likewise, if this Court's judgment brushes aside treaty rights that New Zealand has secured for its residents, such a judgment stands to be ruled unenforceable as contrary to New Zealand's public policy. *See* Glenie & Dunphy, *supra*.

Consistent with *R.M.S. Titanic*, adjudicating a *res* in this profile does not fly: there is no valid Article III basis to adjudicate the status of the Defendant Property so long as the prospects of foreign acquiescence in disposing of the property remain questionable, as they would here, particularly if the Court finds disentitlement under 28 U.S.C. § 2466.

C. Claimant Mona Dotcom's Motion To Dismiss Must Be Resolved Regardless Of Fugitive Disentitlement.

The Government has moved to disentitle only 11 of the 12 Claimants. (Dkt. 39 at 1 n.1.) Mona Dotcom, the estranged wife of Kim Dotcom, has not been indicted for any copyright crimes and cannot be deemed a fugitive, by anyone's account. Because she has filed a Verified Claim asserting her interest in the Defendant Assets (Dkt. 14), she has independent and unquestioned standing to press the MTD. (*See* Dkt. 20 at 6).

It is clear that, even if a claimant is disentitled, a non-fugitive spouse may still assert claims to defendant property. *See United States v. Salti*, 579 F.3d 656, 671 (6th Cir. 2009) (wife found to have third-party standing to bring claim regardless of any subsequent disentitlement of husband). Thus, Mona Dotcom would retain standing to litigate the merits of civil forfeiture even if the other Claimants fell away as disentitled. And, if Mona Dotcom prevails in her arguments, then *all* of the relevant property must be released, even if it benefits disentitled Claimants. In a case where the Government's forfeiture case is ruled fatally deficient, forfeiture

cannot occur *regardless of whether the owner's claim has been heard*. *See United States v. One 2003 Mercedes Benz CL500*, 2013 WL 5530325, at *13 (D. Md. Oct. 3, 2013) (assets *in rem* could not be forfeited where government failed to satisfy its burden for default judgment).

Thus, even if this Court were to reach questions under 28 U.S.C. § 2466, the Government would remain obliged to respond to the MTD as to Mona Dotcom. In this posture, it only makes sense for the Court to decide the MTD. Otherwise, the Court may spend time and energy wrestling with the merits of thorny disentitlement issues that have no bearing on either the merits issues it must ultimately resolve or the implications its resolution has for all Claimants.

II. ABSENT A DECISION ON CLAIMANTS' MOTION TO DISMISS, THE COURT SHOULD STAY THE CIVIL FORFEITURE PROCEEDINGS

To the extent that the Court may be disinclined to rule on Claimants' MTD at this stage, the right course would be simply to stay the civil forfeiture proceedings pending the outcome of the parallel criminal proceedings. Notably, even if the Government succeeds in having the Claimants adjudged disentitled, that would not end the civil forfeiture litigation. Rather, a finding of disentitlement merely permits the Government to seek a default judgment, without ending the Court's inquiry into the merits. *See United States v. Assorted Money Orders Totaling One Hundred Thirty Eight Thousand Four Hundred Dollars ($138,400) in U.S. Currency*, 2010 WL 1438901, at *1 (E.D. Mich. Apr. 9, 2010). If the Government fails to carry the burdens associated with obtaining default judgment, then forfeiture would still be denied. *See One 2003 Mercedes Benz CL500*, 2013 WL 5530325, at *13. Moreover, even if a default judgment issues, that would mark the beginning, not the end, of foreign enforcement efforts before courts that are liable to be skeptical (*see supra* at § I(B)(2)). If aggrieved following those, the Government could return to this Court yet again seeking forfeiture, this time criminally. To proceed in this posture would waste judicial resources and enable what appears to be gamesmanship by the

Government as it attempts to take multiple bites at defenseless apples. Other courts have rightly conserved resources and shut such gamesmanship down simply by staying civil forfeiture until criminal proceedings conclude. *See United States v. 3039.375 Pounds of Copper Coins*, 2011 WL 2581196, at *2 (W.D.N.C. June 29, 2011); *see also* 18 U.S. Code § 981(g).

III. FUGITIVE DISENTITLEMENT CANNOT BE INVOKED ON A MOTION TO STRIKE.

Filing a motion to strike for disentitlement is improper for several reasons. First, the motion is improper because fugitive disentitlement does *not* go to *standing*. *See United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d 103, 112 (E.D.N.Y. 2007) ("[F]ugitive disentitlement motion is a different motion on a different ground (fugitive disentitlement versus standing) made pursuant to a different rule (Rule 56 as opposed to Rule [G])."). Contrary to existing precedent, the Government has moved to strike pursuant to Rule G based on inapposite provisions of 28 U.S.C. § 2466. (Dkt. 39 at 1-2). Because Claimants satisfy the requirements for Rule G standing, the Government's Motion is procedurally misplaced and due to be denied. Alternatively, this Court should at most convert the Motion to a request for summary judgment under Rule 56 and open appropriate discovery. *See United States v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 38 (D.D.C. 2007).

A. The Government's Motion Should Be Denied Because The Claimants Satisfy The Rule G Standard.

Although the Government has filed its Motion (*see* Dkt. 39 at 1, 7) as one to strike pursuant to FED. R. CIV. P. SUPP. R. G(8) (contemplating motion to strike "because the claimant lacks standing,") fugitive disentitlement does not go to standing. *See All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. at 112. Instead, such questions at most go to summary judgment. *See infra* at § III(B).

All that matters under Rule G is whether a forfeiture claimant has threshold standing. And the answer is yes for any claimant who demonstrates "an ownership, possessory, or security interest in the specific property that is the subject of the forfeiture action." *United States v. 12636 Sunset Ave., Unit E-2, W. Ocean City, Md.*, 991 F. Supp. 2d 709, 711 (D. Md. 2014). Here, the Government's Complaint *affirmatively alleges* that the Claimants have ownership interests in the contested property. *See, e.g.* Complaint ¶¶ 7, 43-86. Indeed, all of the Defendant Assets have been frozen for more than two years precisely because the Government alleges they belong to the Claimants. (*See* Dkt. 1 at 18-24). As explained in Claimants' MTD and not contested by the Government here, the Claimants have demonstrated that they have real and concrete interests in the target assets. (Dkt. 20 at 6.) That demonstration forecloses a motion to strike pursuant to Rule G; the Government cites no precedent holding otherwise.

B. If The Court Does Not Deny The Government's Motion, Then It Should At Most Convert It To Rule 56 Summary Judgment And Open Discovery.

A motion for disentitlement under 28 U.S.C. § 2466 properly belongs at summary judgment.[5] *See All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d at 112 (E.D.N.Y. 2007). Faced with a premature disentitlement motion, courts will convert the request to one for summary judgment and open appropriate discovery. *See United States v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 38 (D.D.C. 2007) (converting a motion

[5] Despite disagreeing over exactly which motion is appropriate for disentitlement, courts have universally rejected a motion to strike. *See United States v. Technodyne LLC*, 753 F.3d 368, 381 (2d Cir. 2014) (rejecting *both* a Rule G motion to strike and a Rule 56 motion as the proper posture for disentitlement). As the D.C. district court summed things up, "Essentially every court to have considered a disentitlement case—both under the common law and [§ 2466]—has treated the motion as something like a motion to dismiss, has looked to matters outside the pleadings, and has, where appropriate, allowed for the possibility of conversion to summary judgment." *United States v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 38 (D.D.C. 2007). Thus, the Government should bear the burden of proof, should have all inferences drawn against it, and should be made to afford opportunity for the Claimants to build their record on any facts potentially in dispute.

to dismiss for disentitlement into a motion for summary judgment and ordering discovery); *see also Salti*, 579 F.3d at 666 n.10 (overturning disentitlement and advising district court, on remand, to convert to summary judgment and open discovery).

Discovery permits courts "to make an informed finding as to all elements of fugitive disentitlement." *$6,976,934.65 Plus Interest*, 478 F. Supp. 2d at 46. Here, at least two questions relevant to fugitive disentitlement would require discovery: (1) whether the Claimants have requisite intent to avoid criminal prosecution; and (2) whether the Government has overreached.

1. Discovery Will Enable Claimants To Demonstrate Their True Intent In Not Entering The United States.

Claimants submit that they are entitled to discovery on the issue of intent. Before disentitlement can be ordered, a court must find that a claimant has "declined to enter or reenter the United States to submit to its jurisdiction" specifically "in order to avoid criminal prosecution." 28 U.S.C. § 2466. This element requires the Court to analyze the Claimant's intent in declining to enter the United States. *See United States v. $6,976,934.65, Plus Interest Deposited into Royal Bank of Scotland Int'l, Account No. 2029-56141070, Held in Name of Soulbury Ltd.*, 554 F.3d 123, 133 (D.C. Cir. 2009) (reversing district court order of disentitlement "[i]n light of the factual dispute regarding Scott's intent to avoid criminal prosecution") (decision referred to hereafter as "*$6,976,934.65, Plus Interest*"). When examining intent, "mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute. The alleged fugitive must have 'declined to enter or reenter' the country *in order to avoid* prosecution."[6] *Id*. at 132 (emphasis in original);

[6] In suggesting that mere contest of extradition suffices to establish requisite intent (Dkt. 39 at 12), the Government misrepresents the law. Contesting extradition demonstrates only that the defendant has notice of a warrant, quite distinct from requisite intent. *See United States v. Real Prop. Known as 3678 Waynesville Rd.*, 2007 WL 1982780, at *3 (S.D. Ohio July 6, 2007) (summarizing case law on the "notice" requirement). Indeed, courts have previously declined to

accord Salti, 579 F.3d at 664; *United States v. All Funds on Deposit at Old Mut. of Bermuda Ltd. Contract No. CX4011696 in Bermuda*, 2014 WL 1758208, at *6 (S.D. Tex. May 1, 2014).

By nonetheless insisting (Dkt. 39 at 12) that any "claimants who are fighting extradition on the criminal charges . . . are fugitives," the Government contravenes the express limitation of the statute as well as precedent that accords weight to that limitation. It does not suffice simply to observe that certain Claimants are contesting extradition (as will almost invariably be true when a criminal defendant who is not physically present in the United States contests civil forfeiture). The key factual question remains whether Claimants are acting specifically "in order to avoid criminal prosecution," 28 U.S.C. § 2466, or whether they have other motivations. Specific facts inform this determination, and they favor these Claimants.

When an alleged fugitive declines to enter the United States for business and personal reasons that predate and transcend any criminal prosecution, that indicates a lack of intent to avoid prosecution. *See United States v. The Pub. Warehousing Co. K.S.C.*, 2011 WL 1126333, at *4 (N.D. Ga. Mar. 28, 2011). Here, the Claimants have lived their entire lives outside the United States, were employed outside the United States, and founded and ran their companies outside the United States. Their businesses, like their families, their residences, and their lives, are all located abroad. *See, e.g.* Declaration of Kim Dotcom ¶¶ 10-11. Because full and fair analysis of fugitive disentitlement requires consideration of these facts, this Court should open discovery so as to enable Claimants to further build their record.

Based simply on the papers, however, the Government falls far short of carrying its burden to show that all the Claimants would be in the United States but for their intent to avoid

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apply disentitlement while extradition proceedings were underway. *See United States v. Bohn*, 2011 WL 4708799, at *2 (W.D. Tenn. June 27, 2011). In any event, Claimant's intent in invoking extradition protections can be developed during discovery.

criminal prosecution. To credit the Government's mere assertion that the Defendants are remaining abroad in order to flee the United States would negate any meaningful requirement of intent. Therefore, absent discovery, the Motion to Strike should be denied.

2. Possibilities of Government Overreach Should be Subject to Discovery.

Claimants are also entitled to discovery on the potential issue of Government overreach. When analyzing fugitive disentitlement, "[i]f there is evidence that the Government is overreaching . . . it may be appropriate to consider the merits of the civil forfeiture case in determining whether to apply the disentitlement doctrine." *United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d 103, 126-27 (E.D.N.Y. 2007); *see also United States v. $1,474,770.00 in U.S. Currency*, 538 F. Supp. 2d 1298, 1301 (S.D. Cal. 2008). As the *$1,474,770.00 in U.S. Currency* court noted, the Court should consider whether the record discloses underlying weaknesses in the Government's case. In a similar vein, Claimants deserve discovery into worrisome indicia of governmental overreach.[7]

To be clear, the Claimants are not asking for generic discovery into the Government's overall case, but discovery into those facts that go to whether "the Government is overreaching." *All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d at 126-27. Such inquiry seems likely to bear fruit, for all of the reasons noted in the MTD, which Claimants respectfully incorporate by reference. *See* (Dkt. 20). Furthermore, beginning in 2010, the Motion Picture Association of America ("MPAA") hired a former Assistant Attorney General, Cybele Daley, for lobbying purposes. *See* Declaration of Craig C. Reilly, Exhibit A[8]. Subsequent public lobbying disclosures (LD-2 Forms) indicate that Ms. Daley had access to a

[7] To the extent that the Government expresses concern about civil discovery interfering with its criminal case, the court in *3039.375 Pounds of Copper Coins* addressed that concern and noted it affords all the more warrant for staying civil proceedings. 2011 WL 2581196, at *2.

[8] Available at: http://www.businessweek.com/ap/financialnews/D9HTSJBO1.htm

budget of over $1 million a year, *see id*. at Exhibits B-H, to directly lobby attorneys at the Department of Justice, *see id*. at Exhibit B. Shortly after charges against Megaupload and the Claimants were filed, the popular press began reporting that the MPAA had pressured the Department of Justice to file those charges. *See Id*. at Exhibit I. Such matters deserve full and fair inquiry before tens of millions of dollars in assets are forfeited to the United States, at the urging of the Department of Justice, without allowing any adversarial contest.

IV. FUGITIVE DISENTITLEMENT DOES NOT APPLY IN THIS CASE.

If the Court reaches the merits of fugitive disentitlement under 28 U.S.C. § 2466, then none of the Claimants—much less *all* of them—should be held "disentitled" as "fugitives."

Fugitive disentitlement requires that the Government prove five elements, the last of which requires that, "(5) the claimant has deliberately avoided criminal prosecution by leaving the United States, declining to enter or reenter the country, or otherwise evading the criminal court's jurisdiction." *$6,976,934.65, Plus Interest*, 554 F.3d at 128. The Government bears the burden of so proving. *See All Funds on Deposit at Old Mut. of Bermuda Ltd. Contract No. CX4011696 in Bermuda*, 2014 WL 1758208, at *7; *$6,976,934.65, Plus Interest*, 554 F.3d at 130 And all reasonable inferences must be drawn *against* the Government. *See $6,976,934.65, Plus Interest*, 554 F.3d at 132. Even if the statutory requirements are all met, "the decision whether to order disentitlement remains in the discretion of the trial court." *All Funds on Deposit at Old Mut. of Bermuda Ltd. Contract No. CX4011696 in Bermuda*, No. 2:13-CV-294, 2014 WL 1758208, at *4. Here, there are multiple reasons not to deem Claimants disentitled: the Government has failed to demonstrate the fifth statutory element; discretionary considerations weigh against disentitlement; and applying fugitive disentitlement as requested in this case would violate multiple provisions of the U.S. Constitution.

A. The Government Cannot Demonstrate That Claimants Deliberately Avoided Prosecution.

In determining whether a Claimant is out to avoid prosecution by remaining abroad, "mere notice or knowledge of an outstanding warrant, coupled with a refusal to enter the United States, does not satisfy the statute." *$6,976,934.65, Plus Interest*, 554 F.3d at 132; *accord Salti*, 579 F.3d at 664; *All Funds on Deposit at Old Mut. of Bermuda Ltd. Contract No. CX4011696 in Bermuda*, 2014 WL 1758208, at *6 (S.D. Tex. May 1, 2014). Rather, "avoiding prosecution [must be] *the* reason [Claimant] has failed to enter the United States." *$6,976,934.65, Plus Interest*, 554 F.3d at 132 (emphasis in original).[9]

The D.C. Circuit's decision in *$6,976,934.65, Plus Interest* addressed corresponding facts and is instructive. There, the claimant was a foreign corporation running a web-based business, whose majority shareholder was indicted based on the corporation's web-based conduct. *Id*. at 125. The shareholder had been living abroad for years preceding the indictment, and could not be extradited because he had renounced his U.S. citizenship for Antiguan citizenship. *Id*. at 125, 132. The Government argued that renouncing citizenship, coupled with failure to appear in the U.S. proved an intent to avoid prosecution; but the D.C. Circuit held it an abuse of discretion to apply disentitlement on those facts. *See Id.* at 133. Megaupload is similarly situated: it is a foreign corporation, whose web-based business led to an indictment against its majority shareholder, who has lived overseas since well before any charges were filed and is actively contesting extradition. *See* (Dkt. 39 at 13); *see also* Declaration of Kim Dotcom ¶ 6. The

[9] The weight of authority requires that the Government demonstrate that Claimants remain outside of the United States solely to avoid prosecution, *see $6,976,934.65, Plus Interest*, 554 F.3d at 132, *Salti*, 579 F.3d at 664, even though the Second Circuit recently split to go its own way. *See Technodyne LLC*, 753 F.3d at 384-85 (acknowledging break with D.C. Circuit). Notably, even the Second Circuit rejected the Government's effort to offload its burden of proof, *id.* at 377, and the Government fails to carry that burden here.

Government has no more proof here that "avoiding prosecution is *the* reason [Claimant] has failed to enter the United States" than it had in *$6,976,934.65, Plus Interest.* 554 F.3d at 132 (emphasis in original).

The Government also relies on selected statements by certain Claimants, (*see* Dkt. 39 at 11-13), but courts have declined to find the requisite intent for disentitlement on similar facts.[10] In particular, courts have declined to find disentitlement where: (1) the claimant appeared on a popular Canadian television show and stated "[Y]es, if I would go to the U.S., I would probably be arrested";[11] (2) the claimant "lives in Mexico and has always lived in Mexico";[12] (3) the party remained outside the United States for "business reasons";[13] and (4) the claimant "was in Vanuatu long before he was charged in this case, and there is no evidence that he ever left the United States to avoid prosecution."[14] The statements the Government cites by no means overcome the battery of indicators, including sworn testimony, that Claimants have motivations well removed from their alleged criminal status for remaining abroad. *See, e.g.* Declaration of Finn Batato ¶¶ 10-11 (founded business, married, and started a family in New Zealand, all prior to indictment). Claimants' lives, residences, families, careers, businesses and other commitments all are located outside the U.S., in their home countries. Declaration of Kim Dotcom ¶ 10 ("My family bought a home in New Zealand . . .").

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[10] Although Government cites *U.S. v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30 (D.D.C. 2007), (Dkt. 39, 7), the district court's finding of fugitive disentitlement in that case was reversed in *U.S. v. $6,976,934.65, Held in Name of Soulbury*, 554 F. 3d 123, 132 (D.C. Cir. 2009) for reasons that obtain here, as discussed *infra*.

[11] *$6,976,934.65, Plus Interest*, 554 F.3d at 125.

[12] *All Funds on Deposit at Old Mut. of Bermuda Ltd. Contract No. CX4011696 in Bermuda*, 2014 WL 1758208, at *6.

[13] *The Pub. Warehousing Co. K.S.C.*, 2011 WL 1126333, at *4.

[14] *Bohn*, 2011 WL 4708799, at *9.

Notably, Claimants have always resided outside the United States; their property at issue is all outside the United States; and Claimants' business was conducted outside the United States. *See* Declaration of Kim Dotcom ¶ 8 ("I have never visited the United States."). A district court that confronted the same combination of circumstances in *All Funds on Deposit at Old Mutual of Bermuda Ltd. Contract No. CX4011696 in Bermuda*, refused to find disentitlement because requisite intent was lacking.[15] *See* 2014 WL 1758208, at *6. Indeed, it should be beyond dispute that these Claimants retain business interests outside the U.S., just as they did in connection with Megaupload before prosecution even arose. *See* Declaration of Mathias Ortmann ¶ 10 ("working as Systems Architect, for . . . a New Zealand company in Auckland"). Courts recognize that those who operate businesses outside the U.S. and have business interests in continuing to do so lack requisite intent for disentitlement. *See The Pub. Warehousing Co. K.S.C.*, 2011 WL 1126333, at *4. Here, Megaupload, its subsidiary corporations, and the various Claimants have been extensively engaged in business in New Zealand, Europe, and Hong Kong, *see* (Dkt. 1 at 3-4), without ever opening a business office in the United States. In this respect, too, the Claimants are simply continuing their pre-prosecution *status quo*.

The Government's own actions have also necessitated that Claimants remain abroad. Actions it is pursuing in New Zealand would "allow[] NZ authorities to sell any seized assets associated with Megaupload," unless the Claimants defend themselves there. *See* Darren Palmer & Ian J. Warren, *Global Policing and the Case of Kim Dotcom*, 2(3) Int'l J. Crime Just. & Soc.

[15] *All Funds on Deposit at Old Mutual of Bermuda* shines helpful light on the evidentiary standards applicable to foreign claimants. Initially, the Government made no showing that the Claimant had not always lived abroad, and the court rejected disentitlement. *See* 2014 WL 1758208, at *6. Then, a month later, the Government introduced evidence that the Claimant regularly, frequently, and recently traveled to the United States, thus demonstrating constructive flight, at which point a renewed motion was granted. *See* 2014 WL 4101212, at *2. Here, the Government has made no comparable evidentiary showing. To the extent that the Government may wish to do so, that only elevates the need for discovery, as discussed *supra* at § II.

Democracy 105, 108 (2013). The Government has also triggered an action in Germany against Claimant Echternach that now requires he remain in that country. *See* Declaration of Sven Echternach ¶ 6. In these circumstances, the Government cannot fairly fault Claimants for remaining right where they are.

Nor should the mere fact that certain Claimants may have previously visited the U.S. transform them into fugitives who supposedly are now fleeing prosecution. The Seventh Circuit reversed application of fugitive disentitlement to a foreign citizen who had visited the United States only once, holding that it violated due process. *See United States v. $40,877.59 in U.S. Currency*, 32 F.3d 1151, 1152 (7th Cir. 1994), *abrogated on other grounds by Degen v. United States*, 517 U.S. 820 (1996). To state the obvious, many people visit the United States at some point, then never return or wait many years to return for reasons unrelated to any criminal prosecution. People intent on staying home cannot fairly be equated with people intent on avoiding justice.

The Government is wrong to contend (Dkt. 39 at 3-5, 11-13) that resisting extradition establishes intent. To the contrary, the *Bohn* court acknowledged that several defendants had successfully resisted extradition yet refused to apply disentitlement. *See* 2011 WL 4708799.

B. The Court Should In Any Event Exercise Its Discretion To Deny Disentitlement.

Even assuming *arguendo* that the Government could sufficiently prove the statutory elements, "the ultimate decision whether to order disentitlement in a particular case rests in the sound discretion of the district court." *United States v. Salti*, 579 F.3d 656, 662 (6th Cir. 2009) (overturning disentitlement finding) (internal citation and quotation omitted). In this case, the Court has every reason to exercise its discretion to deny disentitlement. Without belaboring the points *supra*, the Court should not let the Government use disentitlement to cover up defects in

its case and to transform a highly questionable (to say the least) forfeiture of tens of millions of dollars of foreign assets into a *fait accompli*. *See The Pub. Warehousing Co. K.S.C.*, 2011 WL 1126333, at *4 (denying disentitlement where it would preclude jurisdictional analysis).

By the Government's conception, the fugitive disentitlement doctrine would be a device for U.S. prosecutors to deny due process around the world. A prosecutor need only (i) indict a foreign national and (ii) seek civil forfeiture of all the foreign national's foreign assets in order to subject the foreign national to a terrible dilemma: Either surrender to extradition or else surrender to civil forfeiture. In other words, "fugitive disentitlement" would become a "heads I win, tails you lose" license for the Government either to trample foreign extradition rights and procedures or else to engorge itself on foreign assets, without ever having to render a proper account in court. That is not fighting fair, but it is precisely what the Government is doing here.

Other courts have rejected such abuse of fugitive disentitlement. *See Pub. Warehousing Co. K.S.C.* 2011 WL 1126333, at *4; *see also Walsh v. Walsh*, 221 F.3d 204, 216 (1st Cir. 2000). The Seventh Circuit, in particular, has emphatically distinguished mere foreign nationals from true fugitives. *See In re Hijazi*, 589 F.3d 401, 409-10 (7th Cir. 2009). Judge Wood drove home the distinction for a unanimous panel (which included Judge Posner) to justify a writ of mandamus against a district court that had wrongfully applied fugitive disentitlement: "A non-fugitive foreign defendant is simply in a different position from that of a domestic defendant seeking more ordinary relief before arraignment. Hijazi's own case is even more deserving of relief since he surrendered himself to the authorities in the country in which he resides and in which his relevant conduct physically occurred."[16] The court also noted that fugitive

[16] To be sure, the Ninth Circuit recently declined to grant mandamus even in view of *In re Hijazi*. *See In re Han Yong Kim*, 571 F. App'x 556, 557 (9th Cir. 2014). In that non-

disentitlement concerns were rooted in mutuality—the idea that "if [a defendant] wants the United States to be bound by a decision dismissing the indictment, he should be similarly willing to bear the consequences of a decision upholding it." *Id*. at 413. Given the prospect of *future* extradition proceedings, however, Hijazi did face consequences from a refusal to dismiss the indictment. *Id*. at 413-414. These Claimants are indistinguishable in all material respects, especially insomuch as they will suffer the consequence of any adverse decision on forfeiture.

In no event should this Court apply fugitive disentitlement in such fashion or degree as to imperil established rights under the Fifth, Seventh, and Eighth Amendments, as well as the Supremacy Clause. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 437 (2000) (overruling statute that curtailed Fourth Amendment). As the Fourth Circuit has explained, "statute[s] must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (citation omitted). Applying 28 U.S.C. § 2466 as urged by the Government would not only raise serious constitutional concerns but affirmatively violate the Constitution.

1. Applying Disentitlement On These Facts Would Violate The Seventh Amendment.

Claimants in forfeiture proceedings have a right to a jury trial under the Seventh Amendment. *See United States v. One 1976 Mercedes Benz 280S, Serial No. 11602012072193*, 618 F.2d 453, 456 (7th Cir. 1980).[17] In the Fourth Circuit, any waiver of the Seventh Amendment must be knowing and voluntary. *See Leasing Serv. Corp. v. Crane*, 804 F.2d 828,

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precedential decision, the court did not disagree with the Seventh Circuit; rather, it denied relief based on the high bar set for mandamus. *See In re Han Yong Kim*, 571 F. App'x at 557.

[17] The Fourth Circuit has recognized this right to a jury trial in forfeiture proceedings. *Cf. United States v. 1966 Beechcraft Aircraft Model King Air A90 Cream with Burg & Gold Stripes SN:LJ-129, FAA REG:-333GG, Equipt*, 777 F.2d 947, 951 (4th Cir. 1985) ("[W]e conclude that Total Time and Sundance waived their right to a jury trial . . .") (emphasis added).

833 (4th Cir. 1986). A district court has only "narrow" discretion to find such waiver. *See Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503-04 (4th Cir. 1977). And the Supreme Court, for its part, has confirmed that "Congress . . . lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51-52 (1989).

Only if the right to jury trial is voluntarily waived is the Seventh Amendment taken out of play. *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986). A party who "appear[s] by counsel and file[s] an answer to the merits," has not waived the right *even if he is absent at trial*, absent an affirmative act of waiver. *See Bass v. Hoagland*, 172 F.2d 205, 207-10 (5th Cir. 1949) (upholding Seventh Amendment challenge even though "neither Bass nor his attorney appeared at the trial"); *accord Barber v. Turberville*, 218 F.2d 34, 37 (D.C. Cir. 1954). Had Claimants fled the U.S., that might constitute such an affirmative act, but Claimants have done no such thing. *Cf. United States v. Eng*, 951 F.2d 461, 466 (2d Cir. 1991) (waiver where defendant fled to France). It strains credulity to suppose that these Claimants have voluntarily waived anything. To the contrary, they are doing everything they can to defend their property and their liberty before this Court as well as the courts of their home countries.

This case differs markedly from those the Government relies upon, in which claimants typically opted to flee the United States upon learning their prosecution was imminent.[18] Indeed,

[18] *See United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338*, 617 F. Supp. 2d 103, 110 (E.D.N.Y. 2007) ("Kobi flew from the United States to Israel . . . [a]t that time, the United States . . . was investigating [him]"); *United States v. One 1988 Chevrolet Half-Ton Pickup Truck*, 357 F. Supp. 2d 1321, 1323 n. 4 (S.D. Ala. 2005) ("Aguila . . . was released that evening, and apparently returned to Mexico."); *United States v. All Right, Title & Interest in Real Prop., Appurtenances, & Improvements Known as 479 Tamarind Drive, Hallandale, Fla.*, No. 98 CIV. 2279 (RLC), 2005 WL 2649001, at *1 (S.D.N.Y. Oct. 14, 2005) ("Froom fled to Canada to avoid arrest"); *Collazos v. United States*, 368 F.3d 190, 209 n. 2 (2d Cir. 2004) (Katzmann, J., concurring) (Collazos was located in Mexico some time

in one case the Government relies upon where the claimant neither lived in the United States nor constructively fled, the finding of fugitive disentitlement was overturned on appeal precisely because there was no election to take constructive flight. *See $6,976,934.65, Plus Interest*, 554 F.3d 123, 132 (D.C. Cir. 2009) ("[T]he district court erred in concluding that the statute does not require the government to show 'that avoiding prosecution is *the* reason Scott has failed to enter the United States.'"). No court has suggested that continuing to reside in a foreign country should be equated with voluntarily waiving the right to go to a jury in order to contest forfeiture of foreign assets in that foreign country. This Court should not become the first, lest it trample the Seventh Amendment.

2. Applying Disentitlement To These Facts Would Violate The Eighth Amendment.

The Eighth Amendment's prohibition against excessive fines applies to civil forfeiture. *See Austin v. United States*, 509 U.S. 602, 622 (1993); see also *United States v. Taylor*, 13 F.3d 786, 790 (4th Cir. 1994) (Eighth Amendment protects specifically against forfeitures pursuant to 18 U.S.C. § 981). Because "Congress may not legislatively supersede [Supreme Court] decisions interpreting and applying the Constitution" *Dickerson v. United States*, 530 U.S. 428, 437 (2000), 28 U.S.C. § 2466 cannot obviate protections that the Eight Amendment affords these Claimants against excessive forfeiture. Here, for all the reasons noted in the MTD, (Dkt. 20),

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after she "appears to have been in the United States"); *United States v. All Right, Title & Interest in Real Prop. & Appurtenances Located at Trump World Towers*, No. 03 CIV. 7967 (RCC), 2004 WL 1933559, at *1 (S.D.N.Y. Aug. 31, 2004) ("Barbosa was erroneously released from custody . . .[and] by all accounts [] is in Portugal"); *United States v. Technodyne LLC*, 753 F.3d 368, 372 (2d Cir. 2014) ("Padma had an informal meeting with federal and local law enforcement officials. . . [then] Padma left the United States for India."). In other cases the Government cites where claimant did not actively flee, a finding of constructive flight hinged on claimants abandoning an established pattern of pre-indictment travel to the United States. *See, e.g. United States v. $671,160.00 in U.S. Currency*, 730 F.3d 1051, 1057 (9th Cir. 2013) ("Ionita's self-enforced absence from the United States stands in marked contrast to his extensive travel to California prior to the issuance of the pending criminal charge.")

forfeiture of tens of millions of dollars in assets would be grossly excessive relative to the alleged crimes. No statute obviates this constitutional problem or the Court's analysis thereof.

3. Applying Disentitlement On These Facts Would Violate The Due Process Clause Of The Fifth Amendment.

More fundamentally, applying fugitive disentitlement on these facts would violate the Due Process Clause, as the Seventh Circuit has held.[19] *See $40,877.59 in U.S. Currency*, 32 F.3d at 1152 (reversing disentitlement in forfeiture proceeding of foreign national who had visited the United States only once).[20] Given the civil nature of civil forfeiture, the Seventh Circuit observed that due process obtains no differently in this context than it does for other civil litigation. *Id.* at 1156. Although the absence of a civil litigant can justify dismissal if it prejudices the opposing party, there is no such prejudice where a claimant simply weakens his own case by failing to appear. *Id.* In that case, the Claimant was a foreign national who had visited the U.S. only once and had not fled. *Id*. Because there was no motive to evade prosecution through active flight, and the Claimant's physical absence posed no prejudice to the Government, it violated due process to deny hearings altogether. *Id.* The same should hold here.

The Sixth Circuit identified a separate due process violation associated with disentitlement, based on the rights of third parties. *See United States v. Eighty Three Thousand Three Hundred Twenty Dollars ($83,320) in U.S. Currency & Forty Dollars ($40) in Canadian Currency*, 682 F.2d 573, 577 (6th Cir. 1982) (reversing disentitlement order by district court on

[19] The decisions in *$40,877.59 in U.S. Currency* and in *Eighty Three Thousand Three Hundred Twenty Dollars ($83,320) in U.S. Currency & Forty Dollars ($40) in Canadian Currency* (cited in text) were abrogated by the Supreme Court in *Degen v. United States*, 517 U.S. 820, 828 (1996) based on separation of powers. The Supreme Court did not, however, address the relevant due process concerns at that time, nor has it since.

[20] In *Collazos v. United States*, 368 F.3d 190 (2d Cir. 2004), the Second Circuit found no due process violation on different facts: the alleged fugitive failed to appear at numerous depositions over two years of discovery. *Id*. at 194. The *Collazos* court did not look to either the Seventh or Sixth Circuits. The Fourth Circuit, for its part, has yet to address any such question.

due process grounds). The court noted that, where seized funds may belong to a legitimate business, creditors and customers may have legitimate claims to the funds. *Id*. If the primary claimant is disentitled, however, then the rights of the customers and creditors are extinguished without regard for any defense, thereby violating due process.

The reasoning in *$40,877.59 in U.S. Currency* and *Eighty Three Thousand Three Hundred Twenty Dollars ($83,320) in U.S. Currency & Forty Dollars ($40) in Canadian Currency* applies to this case and these facts. The Government faces no discernible prejudice from litigating this matter while Claimants remain abroad. On the other hand, forfeiture of the relevant assets here will override the constitutional rights and interests of Claimants as well as third-party creditors. *See, e.g.* Sup. Ind. ¶ 5 (Megaupload business expenses comprised "millions of dollars per month. . . including the leasing of computers, hosting charges, and Internet bandwidth"). Imposing disentitlement in these circumstances would violate due process.

4. Disentitlement of Foreign Claimants Would Violate the Supremacy Clause.

"The constitution of the United States declares a treaty to be the supreme law of the land." *United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801). When a treaty and statute may conflict, "the courts will always endeavor to construe them so as to give effect to both". *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). If there is an unavoidable conflict, however, then the later enactment will prevail, such that "[a] treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." *The Cherokee Tobacco*, 78 U.S. 616, 621 (1870).

The Government seeks extradition of several Claimants[21] from their home countries pursuant to the United Nations Convention Against Transactional Organized Crime

[21] The Government is attempting to extradite Finn Batato, Bram Van der Kolk, Kim Dotcom, and Mathias Ortmann.

("UNCTOC"). *See* (Dkt. 39 at 2) (extradition proceedings ongoing). UNCTOC Article 16 §3 provides that, "Any person regarding whom [extradition] proceedings are being carried out . . . shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in . . .which that person is present." New Zealand, where several Claimants reside, guarantees a domestic right to challenge property seizures. *See* Palmer & Warren, *supra*. The Government here asks the Court to penalize Claimants' invocation of domestic rights, contrary to UNCTOC's guarantee of Claimants' enjoyment of those rights. Because 28 U.S.C. § 2466 was enacted in 2000, *see Collazos*, 368 F.3d at 206, whereas UNCTOC was later enacted in 2005[22], the Government's argument falls on the wrong side of governing law. *See The Cherokee Tobacco*, 78 U.S. at 621. Even if did not squarely govern, however, UNCTOC's guarantee of "fair treatment in all stages of the proceedings" would at least commend denying disentitlement pursuant to this Court's discretion, so as to "give effect to both" treaty and statute. *See Whitney* 124 U.S. at 194. This consideration looms especially large issues given the weighty issues identified by the New Zealand courts that Claimants remain before. *See supra* § I(B)(1).

Likewise, Claimant Echternach is protected by the German Mutual Legal Assistance Treaty ("MLAT")[23], which specifies that "A person who is not a national or resident of the Requesting State and who does not answer a summons to appear in the Requesting State . . . shall not by reason thereof be liable to any penalty or to be subjected to any coercive measures." Claimant Echternach is neither a resident nor a national of the U.S., which is acting as the Requesting State. *See* Declaration of Sven Echternach ¶ 6. Per the treaty, therefore, he can be neither subjected to the penalty of disentitlement, nor coerced into appearing in the U.S. under

[22] A copy of UNCTOC is attached as Exhibit P to the Declaration of Craig C. Reilly.

[23] A copy of the MLAT is attached as Exhibit Q to the Declaration of Craig C. Reilly.

threat of it. Similar to UNCTOC, the MLAT with Germany was enacted in 2003, years after 28 U.S.C. § 2466 was enacted, thereby making the MLAT the supreme law of the land. At the very least, the Court should be exercising its discretion so as to afford due weight to the MLAT.

V. FUGITIVE DISENTITLEMENT IS INAPPROPRIATE BECAUSE KIM DOTCOM HAS OFFERED TO COME TO THE UNITED STATES.

As a final matter, as the Government itself acknowledges, Kim Dotcom has offered to come to the United States to face charges, provided that he is permitted to mount a defense with use of his funds and to remain free from incarceration unless convicted. *See* (Dkt. 39 Attachment 1 ¶ 5). As the Government also acknowledges, if Kim Dotcom enters the U.S., he cannot be found a fugitive, nor can his corporations. (Dkt. 39 at 13-14); *see also $6,976,934.65, Plus Interest*, 554 F.3d 123, 133 (D.C. Cir. 2009). His prior offer places him outside the scope of disentitlement. *See United States v. Shapiro*, 391 F. Supp. 689, 690 (S.D.N.Y. 1975) (denying disentitlement when defendant would surrender pursuant to an amnesty program).

Indeed, Kim Dotcom meets all of the requirements that the Seventh Circuit identified in *In re Hijazi*—"he surrendered himself to the authorities in the country in which he resides and in which his relevant conduct physically occurred." 589 F.3d at 413-14, who is embracing, rather than fleeing, legal proceedings in his home country. *See* Declaration of Kim Dotcom ¶¶ 4-5. Beyond those facts, Kim Dotcom's willingness to forego extradition provided that he was assured of a fair fight here, with benefit of his chosen counsel, differentiates him from those who might be deemed fugitives. *See In re Hijazi*, 589 F.3d at 409-10.

In the context of asset forfeiture, courts have deferred decision on disentitlement until *after* fact discovery as to claimants who declare that they will later appear in the United States. *See United States v. 939 Salem St., Lynnfield, Ma.*, 2011 WL 3652525, at *3 (D. Mass. Aug. 19, 2011); *see also United States v. One Parcel of Real Prop. Located at 66 Branch Creek Drive,*

Jackson, Tenn., 2014 WL 6473212, at *7 (W.D. Tenn. Nov. 18, 2014). These courts have noted that "the incipiency of [a] forfeiture proceeding" demands that the court afford a defendant every opportunity to appear in the United States. *939 Salem St., Lynnfield, Ma.*, 2011 WL 3652525, at *3. Thus, disentitlement should be only a last resort—reserved for *after* discovery opens, then *only if* the Government cannot proceed in Claimants' absence. *Cf. Collazos*, 368 F.3d at 194.

Even if this court were to determine that Kim Dotcom is a fugitive, that status would end as soon as he enters the United States. "[A disentitled claimant] must simply submit to the jurisdiction of the court where he is criminally charged, and will then be free to press his claim to the seized property." *United States v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 45 (D.D.C. 2007); *see also United States v. $1,474,770.00 in U.S. Currency*, 538 F. Supp. 2d 1298, 1302 (S.D. Cal. 2008). Any determination that Kim Dotcom is a fugitive would be temporary at best, given his willingness to enter the U.S. Accordingly, any disentitlement order should be temporary or conditional, such that Claimant Kim Dotcom and the other Claimants remain "free to press his [or her] claim to the seized property" upon entering the U.S., whether voluntarily or through extradition. *$6,976,934.65 Plus Interest*, 478 F. Supp. 2d at 45. Or, to the extent these proceedings are to effectuate permanent, irreversible forfeiture, *see United States v. One Parcel of Real Estate at 3262 SW 141 Ave., Miami, Dade Cnty., Fla.*, 33 F.3d 1299, 1303 (11th Cir. 1994) (appeal dismissed for want of jurisdiction where "property has been sold and the proceeds disbursed completely"), that is all the more reason to stay these proceedings, at least until Claimants' status relative to the criminal proceedings is resolved.

CONCLUSION

For the foregoing reasons, the Government's Motion to Strike should be denied, or else all proceedings should be stayed.

Dated: December 8, 2014

Respectfully submitted,

/s/ Craig C. Reilly

Craig C. Reilly, Esq. (VSB # 20942)
111 Oronoco Street
Alexandria, Virginia 22314
TEL (703) 549-5354
FAX (703) 549-2604
craig.reilly@ccreillylaw.com
Counsel for Claimants[24]

Of Counsel for Claimants Kim Dotcom and Megaupload Limited:	*Local Counsel for Claimants Julius Bencko and Sven Echternacht:*
Ira P. Rothken (*pro hac vice*) Jared R. Smith (*pro hac vice*) ROTHKEN LAW FIRM 3 Hamilton Landing Suite 280 Novato, CA 94949 TEL (415) 924-4250 FAX (415) 924-2905 ira@techfirm.net jared@techfirm.net	David B. Smith SMITH & ZIMMERMAN, PLLC 108 North Alfred Street Alexandria, Virginia 22314 TEL (703) 548-8911 FAX (703) 548-8935 dsmith@smithzimmerman.com
William A. Burck (*pro hac vice*) Derek L. Shaffer (*pro hac vice*) Stephen M. Hauss (*pro hac vice*) QUINN EMANUEL URQUHART & SULLIVAN LLP 777 6th Street NW, Suite 1100 Washington, D.C. 20001 TEL (202) 538-8000 FAX (202) 538-8100 williamburck@quinnemanuel.com derekshaffer@quinnemanuel.com stephenhauss@quinnemanuel.com	

[24] ***Claimants:*** Kim Dotcom, Mona Dotcom, Julius Bencko, Sven Echternach, Mathias Ortmann, Finn Batato, Bram van der Kolk, Megaupload Limited, Megapay Limited, Vestor Limited, Megamedia Limited, and Megastuff Limited.

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users, including:

Dana J. Boente
UNITED STATES ATTORNEY
Karen Ledbetter Taylor
ASSISTANT UNITED STATES ATTORNEY
United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22304
Karen.Taylor2@usdoj.gov
Attorneys for the United States

/s/ Craig C. Reilly
Craig C. Reilly, Esq. (VSB # 20942)
111 Oronoco Street
Alexandria, Virginia 22314
TEL (703) 549-5354
FAX (703) 549-5355 (NEW)
craig.reilly@ccreillylaw.com
Counsel for Claimants