UN TED STATES COURT OF APPEALS
FOR THE SECOND C RCU T

Augus Term, 2021

(Argued: Apr l 4, 2022 Dec ded: May 5, 2023

Docke No. 19-2822 (L , 21-334 (CON

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NTED STATES OF AMERICA,

Appellee,

v.

SWARTZ FAMILY TRUST, ORIENTA INVESTORS, LLC,

Claimants-Appellants,

CHRISTOPHER SWARTZ,

Defendant.

____

Before:

CALABRESI, LYNCH, a d LOHIER, *Circuit Judges*.

I plead g gu l y o wire fraud a d ax evas o , Chr s opher Swar z agreed o forfe o he Gover me h s eres s Jreck Subs, a fra ch sed cha of sa dwich shops ha he used o perpe ra e h s fraud. Cla ma s-Appella s he Swar z Family Trus a d Or e a I ves ors, LLC f led h rd-par y pe o s asser g a eres he forfe ed proper y. The ed S a es D s r c Cour

for the rther tr ct of w York (Hurd, J.) gra ted the Gover me t' mot o to d m i the pet t o , f d g that the Tru t' pet t o wa ot ubm itted before the th rty-day deadl e to f le uch pet t o exp red a d that Or e ta fa led to tate a cla m u der the forfe ture tatute, 2 U.S.C. § 853( ), a e ther the holder of a tere t uper or to the Gover me t or a a bo a f de purcha er for value. The tr ct Court al o de ed Or e ta' mot o for reco derat o , a well a Or e ta' mot o for leave to ame d t pet t o . We co clude that the Tru t' pet t o wa correctly d m i ed a u t mely, a d that Or e ta' pet t o doe ot tate a cla m. We rema d, however, to allow the tr ct Court to further co der Or e ta' mot o for leave to ame d t pet t o w ith re pect to t cla m that t a bo a f de purcha er for value. Accord gly, the judgme t of the tr ct Court **AFFIRMED** part a d **VACATED** part, a d the ca e ofar a t relate to Or e ta **REMANDED** for further proceed g to perm it the tr ct Court to reco der whether Or e ta hould be gra ted leave to ame d t bo a f de purcha er cla m.

ELISSA HART-MAHAN, Attor ey (v d A. Hubbert, Act g A s ta t Attor ey Ge eral, S. Robert Lyo , Ch ef, Cr m i al Appeal & Tax E forceme t Pol cy Sect o , Kat e Bagley, Jo eph B. Syver o , Attor ey , *on the brief*), Tax v o , U nited State partme t of Ju t ce, *for* A nto ette T. Baco , Act g U nted State Attor ey for the rther tr ct of w York, Syracu e, , *for Appellee* Un ted State of Amer ca.

STEVE L. KESSLER, Law Off ce of Steve L. Ke ler, w Rochelle, , *for Claimant-Appellant* Swartz Fam ily Tru t.

SCOTT M. KESSLER, Akerma LLP, w York, Y (Jacquel e M. Ara go, Akerma LLP, Miam i, FL, Kather e E. G idd g , Akerma LLP, Tallaha ee, FL, *on the brief*), *for Claimant-Appellant* Or e ta I ve tor , 1 LLC.

1 LOHIER u t *Judge*:

2 w Christopher S rtz an entrepreneur from Waterto Ne York

3 masterminded a years-long scheme centered on his o ership and control of

4 Jreck Subs ("Jreck" or the "Asset") a franchised chain of sand ch shops popular

5 in Central and Northern Ne York. After his arrest S rtz pleaded guilty in

6 2016 to re fraud and tax evasion and agreed th the Government to forfeit his

7 interests in Jreck. Four claimants including Claimants-Appellants the S rtz

8 Family Trust (the "Trust") and Orienta Investors LLC ("Orienta") filed petitions

9 asserting an interest in Jreck Subs. The Government moved to dismiss the

10 petitions. In the t challenged orders before us the United States District Court

11 for the Northern District of Ne York (Hurd J.) dismissed the petitions filed by

12 the Trust and Orienta after concluding that (1) the Trust's petition s untimely

13 and (2) Orienta's petition failed to state a claim either that Orienta had a superior

14 interest in Jreck or that it had a legal interest in the property as a bona fide

15 purchaser for value. The District Court also denied Orienta's request for leave to

16 amend its petition as ll as Orienta's subsequent motion for reconsideration of w

17 the dismissal of its petition. The Trust and Orienta appealed challenging the

1 District rt s dgment dismissing the petiti ns and, in Orienta s case, the

2 denial f its m oti n f r rec nsiderati n.

3 y We c ncl de that b th petiti ns were pr perl dismissed and that it was

4 n t err r f r the District rt t c nsider the rec rd f Swartz s criminal

5 pr ceedings, incl ding his plea agreement, in determining that the Asset was

6 s b ect t f rfeit re. However, the technical basis f r the District rt s

7 dismissal f Orienta s b na fide p rchaser claim pers ades s t remand the case

8 ins far as it relates t that claim in rder t give the District rt an

9 pp rt nit t rec nsider whether t grant Orienta leave t amend the claim.

10 Acc rdingl , the dgment f the District rt is AFFIRMED in part and

11 VACATED in part, and the case relating t Orienta is REMANDED f r f rther

12 pr ceedings t permit the District rt t rec nsider whether Orienta sh ld be

13 granted leave t amend its b na fide p rchaser claim.

14 **BACKGROUND**

15 The f ll wing backgr nd is based primaril n the District rt s y

16 recitati n f the facts as s pplemented b the rec rd f Swartz s criminal

17 pr ceeding, and is f c sed nl n the aspects f Swartz s scheme that impact y

18 the viabilit f the wnership claims f the Tr st and Orienta.

1 - **I. Fact a ac ro nd**

2 - Swartz engaged in a decades long criminal scheme involving frequent
3 transfers of Jreck's ownership among several entities created by Swartz and
4 others. After the scheme unraveled, Swartz admitted that these transfers, along
5 with "multiple name changes to businesses he controlled," were designed "to
6 make the traceability of ownership more difficult" and to complicate and
7 forestall "seizure and collection" by his creditors. App'x 54.

8 - Jreck was founded in the 1960s by five individuals, including Swartz's -
9 father, Thomas. Thomas purchased a minority interest in Jreck in 1972 and
10 acquired full ownership in 1991 by issuing promissory notes to the other four
11 founders. In 1996, the same year that Thomas was convicted of various financial -
12 crimes in federal court, see United States v. Pack, No. 96 CR 2, 1996 WL 760178,
13 at *1 (N.D.N.Y. Dec. 27, 1996), he transferred Jreck to Swartz. Swartz quickly
14 took the private franchise company public using a reverse merger and renamed
15 the new public company "Jreck Subs Group, Inc." -

16 In 2000 Swartz, by then Jreck's Chief Executive Officer and Director,
17 renamed the company "Ultimate Franchise Systems, Inc." Swartz then bought -
18 more restaurants by misappropriating funds from Ultimate Franchise,

1 improper e i pecia preferred tock to ew i ve tor a d i ui

2 promi or ote to other i ve tor . Swartz' effort re u ted i a dec i e i the

3 va ue of U timate Fra chi e tock. deed, u ti 2004, U ltimate Fra chi e ever

4 reported a operati profit or paid a i come tax.

5 I 2002 Swartz formed a ew compa , Grace Ve ture Group, c., a d

6 cau ed U ltimate Fra chi e to " e " a 80 perce t take i the A s et to Grace

7 Ve ture for ear $2 mi io , co i ti of a $1.3 mi io promi or ote a d a

8 purported $696,000 ca h pa me t rai ed from other ource . B 2004 Swartz had

9 cau ed U ltimate Fra chi e to write off the $1.3 mi io promi or ote i

10 excha e for a purported o e-time pa me t of $475,000 from Grace Ve ture to I

11 U ltimate Fra chi e. Swartz ater admitted that U ltimate Fra chi e did ot

12 actua keep the remai i 20 perce t take i the A s et becau e he u ed fu d I

13 fro ted b other i ve tor to acquire fu ow ner hip of the A s et u i a

14 promi or ote from Grace Ve ture that he ever i te ded to repa . A sa

15 re u t, Swartz ai ed fu co tro over the A s et at a ub ta tia di cou t. 2005 I

16 Swartz ou ht to co cea hi o oi co tro of the A s et from creditor b

17 a i i hi 100 perce t take i Grace Ve ture (a d thu the A s et) to the I

18 Swartz Fami Tru t.

1 A The Dis i u f und ha “[b]u f h[e] f audulen ansfe G ra e

2 Ven u es, Swa z w ould n have b ained full n A s l f he se a ha ime,”

3 and ha he ansfe “was in fa a sham ansa i n made in fu he an e f

4 he . . . f audulen s heme.” Sp. App’x 21. The Dis i u hus de e mined

5 ha A sse s en i e se ep esen ed p eeds f Swa z’s wi e s heme and was

6 f fei able in 2002, when G ra e Ven u es was f med, a he la es in 2005,

7 when Swa z assigned n l ve he sse he T us .

8 A By 2009 s me f Swa z’s edi s had filed lawsui s e ve hei

9 funds. In esp nse, as he Dis i u f und, Swa z en e ed in a $1.5

10 milli n deal wi h H olding api al G r up, In . (“H CG”), a p iva e equi y fi m,

11 whe eby: (1) Swa z ea ed seve al new en i ies, in luding J e k H oldings, LL ;

12 (2) Swa z and he T us ves ed wne ship f he sse in J e k H oldings;

13 (3) Swa z spli wne ship f he h lding mpany be ween he T us

14 (app xima ely 70 pe en) and an H CG en i y (app xima ely 30 pe en); and

15 (4) H CG l aned Swa z a leas $639,000 in ex hange f addi i nal p miss y A

16 n es.

17 In O be 2011 H CG sued Swa z f defaul ing n i s p miss y n es.

18 Swa z esp nded by enaming seve al f he J e k en i ies (f example, “J e k

1 Holdin came "Focu Acqui ition) and kin n w inv tor to uy out

2 HCG tak in th company. Swartz fri nd, "W.R., alon with on of W.R.

3 cli nt , "E.S.O., formed Ori nta, in which th y had qual tak , to inv t in th

4 HCG uyout. In May 2012 Ori nta purcha d HCG 30 p rc nt tak in Jr ck

5 Holdin /Focu Acqui ition and acquir d HCG promi ory not for

6 approximat ly $1 million.

7 ′ By 2013 th total amount of civil jud ment from claims rou ht y

8 variou l nd r and inv tor a ain t Swartz xc d d $6 million. In 2015, with

9 th h lp of Dan Patt r on, Swartz fath r-in-law and th Tru t v ntual

10 tru t , Swartz att mpt d to tak Jr ck Su pu lic a cond time throu h

11 anoth r r v r mer r. But th Gov rnment criminal pro cution pr v nt d

12 any pu licly trad d har from in old, and th pu lic off rin wa ′

13 unwound followin Swartz uilty pl a.

14 **II. <u>Procedural History</u>**

15 On S pt mb r 19, 2016, Swartz pl ad d uilty to wir fraud in violation of ′

16 18 U.S.C. § 1343 and tax va ion in violation of 26 U.S.C. § 7201. Swartz al o

17 con nt d to th ntry of an ord r, pur uant to 18 U.S.C. § 981(a)(1)(C) and 28

18 U.S.C. § 2461(c), dir ctin th forf itur of "any and all int r t h had in th

1 Jreck S r nchi e, incl ding r nchi e right , tr demark , nd other r nd-

2 rel ted intellect l property. Sp. App'x 1 . A sp rt o hi ple greement,

3 Swartz dmitted th t he "w a in control o , nd exerci ed dominion over, the

4 Jreck S r nchi e etween 2002 nd 2015 nder v rio entity n me ," App'x

5 47, nd th t, in order to void hi creditor , he "contin ed to di g i e hi tr e

dominion over nd control o ine e ing l yer o nominee entitie ,

7 incl ding, t not limited to, the [] Tr t," App'x 54. In J ly 2017 Swartz w a

8 entenced to 150 month ' impri onment nd ordered to p y $21,041,249 in

9 re tit tion to the victims o hi r d nd $4, 19,340 to the Intern l Reven e

10 Service or t x ev ion.

11 6 On September 23, 201 , the Di trict Co rt entered prelimin ry order o

12 or eit re. A sreq ired y t t te, the Government eg n noti ying potenti l

13 cl imant o t the order. Among the cl imant were P tter on, y then the

14 Tr t' tr tee ("Tr tee"), who w a noti ied on Fe r ry 1 , 2017, nd Orient , 6

15 which received notice on J ne 5, 2017. Orient timely iled petition nder 21 6

1 U.S.C. § 853(n) on J ly 3, 2017, cl iming th t it h d cogniz le intere t in the

17 A s et.

1 5 On Augu 017 he Di ric Cour en ered an amended preliminary
order of forfei ure o add a money judgmen in he amoun of $1 3 00. The
3 en ry of he amended preliminary order of forfei ure purred he filing of four
pe i ion a er ing a claim o he A s e . A srelevan here on Augu 31 017 he
Tru moved for leave o file a pe i ion acknowledging ha he filing deadline
6 had pa ed and ha i pe i ion wa herefore un imely. A temp ing o redeem
7 i un imely filing he Tru filed a new pe i ion on Sep ember 1 017
8 purpor ing o re pond o he amended preliminary order of forfei ure in ead. 5
9 Orien a al o filed an amended pe i ion on Sep ember 1 017 af er receiving
10 no ice of he amended preliminary order of forfei ure.[1]
11 On Sep ember 6 017 he Governmen moved o di mi he Tru ' fir
1 pe i ion a un imely. Then on November 7 017 he Governmen moved for a
13 pro ec ive order. The Di ric Cour did no rule on he Governmen ' mo ion o
1 di mi . In ead on November 0 017 i denied he Governmen ' mo ion for
1 a pro ec ive order and direc ed he Governmen o re pond o he claim
16 ubmi ed by he Tru Orien a and wo o her pe i ioner . On December 0
17 017 he Governmen filed an omnibu mo ion o di mi all of he pe i ion

[1] Orien a' amended pe i ion merely added argumen regarding ano her pe i ioner Change Capi al. See App'x 390–91 39 –99.

1 includin rus 's p i ion for w hic i s ori inal mo ion o dismiss was s ill

2 ou s andin . On Marc 16, 2018, Go rnmen wi dr w i s mo ion o

3 dismiss Ori n a's p i ion, no in a "fur r fac ual d lopmen rou

4 disco ry" would b n d d o d rmin if Ori n a's p i ion s a d a claim.

5 App'x 986.

6 v A f w mon s la r, in May 2018, Go rnmen mo d und r F d ral

7 Rul of Criminal Proc dur 32.2(b)(7) for a cour -ord r d in rlocu ory sal of

8 Ass . For i s par , Ori n a mo d o njoin Go rnmen from amendin

9 c r ain ndor con rac s, ar uin a con rac amendmen s would d alu

10 Ori n a's in r s in Ass . On Au us 9, 2019, Dis ric Cour ran d v

11 Go rnmen 's mo ion o dismiss wi r sp c o rus 's p i ion, d ni d

12 Ori n a's mo ion for injunc i r li f, and ran d Go rnmen 's mo ion for

13 an in rlocu ory sal of Ass .[2]

14 v In July 2020, followin limi d disco ry, Go rnmen r n wed i s

15 mo ion o dismiss Ori n a's p i ion. On January 7, 2021, Dis ric Cour v

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[2] Al ou pr cis da Ass was sold is no n ir ly cl ar from r cord, r cord su s s a sal "clos d a nd of 2019 or ry b innin of 2020." App'x 1216.
v

1 dismissed ie ’s pe i io d, o Feb u y 23, 2021, de ied ie ’s

2 subseque mo io fo eco side io .

3 D This ppe l followed.

4 **D I SCUSSION**

5 D **I. Legal Standards**

6 D Fede l Rule of C imi l P ocedu e 32.2 d 21 U.S.C. § 853 gove

7 cill y p oceedi gs followi g c imi l fo fei u e. See U ri ed S es v. Wa s,

8 786 F.3d 152, 159–61 (2d Ci . 2015). U nde Rule 32.2(b)(2)(A), dis ic cou D

9 mus m ake i s i i i l fo fei u e de e mi io (h is, decide whe he p ope y is

10 fo fei ble) “wi hou eg d o y hi d p y’s i e es i he p ope y.” Fed. R. D

11 C im. P. 32.2(b)(2)(A). ce he dis ic cou de e mi es h he c imi l

12 defe d ’s i e es i he p ope y is fo fei ble, Sec io 853(c) p ovides h

13 “[ ]ll igh , i le, d i e es i p ope y [subjec o c imi l fo fei u e] ves s i

14 he U ri ed S es upo he commissio of he c givi g ise o fo fei u e.” 21

15 U.S.C. § 853(c). “[Sec io] 853(c) eflec s he pplic io of he lo g- ecog ized

16 d l wful p c ice of ves i g i le o y fo fei ble sse s, i he U ri ed S es, D

1 at the ti the i i nal a t giving ise t eitu e." Caplin & D rysdale,

2 Cha te ed v. United States, 4 1 U.S. 617, 627 (1 8).

3 9 The G ove n m ent m ust publi ize the de eitu e and, "t the extent

4 p a ti able, p vide di e t written n ti e t any pe s n kn wn t have alleged an

5 inte est in the p pe ty that is the subje t the de eitu e." 21

6 U.S.C. § 853(n)(1). Thi d parties m ay lai an inte est in the p pe ty orde e d

7 eitable unde Se ti n 853(n). A thi d pa ty "asse ting a legal inte est in

8 p pe ty whi h has been de ed eited t the United States pu suant t this

se ti n y, within thi ty days the inal publi ati n n ti e his e eipt

10 [di e t] n ti e . . . whi heve is ea lie , petiti n the u t a hea ing t

11 adjudi ate the validity his alleged inte est in the p pe ty." Id. § 853(n)(2).

12 The thi d-pa ty petiti n "shall set th the natu e and extent the petiti ne 's

13 ight, title, inte est in the p pe ty, the ti and m is u tan es the

14 petiti ne 's a quisiti n the ight, title, inte est in the p pe ty, any

15 additi nal a ts supp ting the petiti ne 's lai m , and the elie s ught." Id.

16 § 853(n)(3).

17 9 A thi d-pa ty petiti ne has nly tw o statut y g unds t asse t a legal

18 inte est in eited p pe ty. The petiti ne m ay sh w "that he p ssessed a

1 ‘supe e es ’ a he me f he ffe se u de § 853( )(6)(A),”

2 al e a vel “ ha he was a ‘b a f de pu chase f value’ eas abl wih u

3 cause bel eve ha he p pe was subjec f fe u e u de § 853( )(6)(B).”

4 Wa s, 786 F.3d a 175. “Be d h se w ol mi ed cla ms, he p v s

5 au h zes challe ges he f fe ab l f a defe da ’s p pe b

6 e es ed yh d pa es.” Id.

7 y If a h d pa f les a pe , he d s c c u de e mi es whe he he

8 h d pa has a val d e es he p pe . The d s c c u mus he y

9 e he ame d leave u al e ed he f al de f f fe u e, as app p a e. 21

10 U.S.C. § 853( )(6); Fed. R. C m. P. 32.2(c)(2); see Wa s, 786 F.3d a 160–61. Wh le

11 he s a u scheme a c pa es a hea g adjud ca e a h d-pa e es s

12 he p pe , see 21 U.S.C. § 853( )(2), Rule 32.2(c)(1)(A) pe mi s he d s c

13 c u , “ [a] mo , d smiss he pe f lack f s a d g, f fa lu e

14 s a e a cla m, f a he lawful eas ,” wih u a f mal hea g, Fed. R.

15 C m. P. 32.2(c)(1)(A); see Pachec v. Se e de sk , 393 F.3d 348, 352 (2d C . y

16 2004). Such a mo “sh uld be ea ed l ke a mo d smiss a c v l

17 c mpla u de Fede al Rule f C v l P cedu e 12(b).” Wa s, 786 F.3d a 161

18 (qu a ma ks mi ed). T su v ve he mo , “ he pe eed l s a e

1 enoug s o s e l im o relie is pl usible on i s e." Id. (le ned

2 up); see Fed. R. Crim. P. 2.2( )(1)(A) ("For purposes o e mo ion [o dismiss],

e s se or in e pe i ion re ssumed o be rue.").

4 We review dis ri our 's gr n o mo ion o dismiss ird-p r y

5 pe i ion de novo. Wa s, 786 F. d 161. We ssume ll s lleged in e

6 pe i ion re rue nd will irm dismiss l "only where e pl in i ils o

7 ple d ny u l on en llows e our o dr w e re son ble in eren e

8 e is en i led o relie ." Id. (quo ion marks omi ed).

9 3 **II. The Trust's Petition**

10 As previously des ribed, Se ion 85 (n)(2) requires ird-p r y

11 pe i ion be iled "wi in ir y d ys o e in l publi ion o no i e or [e

12 pe i ioner's] re eip o [dire] no i e, . . . whi ever is e rlier." 21 U.S.C.

1 § 85 (n)(2). T e Trus does no dispu e i re eived dire no i e o e

14 Dis ri Cour 's prelimin ry or ei ure order on Febru ry 16, 2017, when e

15 Trus ee signed or er i ied le er on ining e Governmen 's s u ory no i e. 3

16 See Trus Br. 52; App'x 279. By way o n ex use, e Trus ee sser s e was

17 in p i ed due o medi l ondi ion " e ime o e le er's re eip nd 3

18 or e weeks surrounding i s re eip ." App'x 279. Bu e dmi s e

1 “disc d th] G o nm ent’s c tifi d l tt by accid nt in May 2017,” aft h

2 had “ ain d his] c niti functi nin .” App’x 284. Th T ust’s p titi n was

3 n t fil d until Au ust 31, 2017, m o than six m onths aft th G o nm nt’s

4 i inal n tic and, n acc ptin th T ust ’s xcus , th m onths aft h

5 “disc d” th l tt in May 2017. This b i usly falls w ell aft th thi ty-day

6 p i d within which th T ust sh uld ha fil d its p titi n.

7 Und t d, th T ust a u s that its p titi n was n th l ss tim ly f

8 tw o p incipal as ns.[3] Fi st, th T ust c nt nds that th G o nm ent’s n tic f

9 th p limina y f f itu d was p matu b caus it was s nt b f Swa tz

10 was s nt nc d. S__ T ust B . 51–54. It is t u that th G o nm ent s d th

11 n tic f f f itu in F b ua y 2017 and that Swa tz’s s nt ncin (wh n th

12 d f f f itu w ould b c m e final as t him) happ n d in July 2017. But g

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[3] Th T ust alt nati ly ass ts that its p titi n was tim ely b caus (1) th G o nm ent aband n d its i inal m oti n t dismiss th T ust's p titi n b f filin its mnibus m oti n, and as a sult, (2) th T ust was p mitt d t liti at its p titi n f tw o y a s b f th Dist ict C u t dismiss d it. N eith f th s d l pm ents, h w e , sh ds li ht n wh th th p titi n its lf was untim ely. T th c nt a y, th p titi n was fil d as an xhibit al n with a m oti n f l a t fil an untim ely p titi n und Rul 60(b)(1) and (6) f th F d al Rul s f Ci il P c du . In its b i f in supp t f its Rul 60(b) m oti n, th T ust s u ht “ li f f m p p s d p titi n ’s failu t tim ely adh t th filin qui m ents f 21] U.S.C. § 853(n).” App’x 376. Th natu f th T ust’s qu st its lf und min s th T ust’s ass ti n that its p titi n was tim ely. But, f th as ns that f ll w, th T ust’s a um ents als fail n th m e its. g

1 that do ot d th ot c p matu . Th D i t ct Cou t wa qu d to
2 mak a p l mi a y fo f tu d t mi at o “[a] oo a p act cal aft . . . a
3 pl a of u lty . . . acc pt d,” F d. R. C m. P. 32.2(b)(1)(A), a d to “ t th
4 p l mi a y o d uff c tly adva c of t c to allow th pa t to
5 u t v o o mod f cat o b fo th o d b come f al a to th
6 d f da t,” F d. R. C m. P. 32.2(b)(2)(B). Rul 32.2 a d S ct o 853( ) al o
7 p mit th Gov me t to b a c lla y p oc d by ot fy th d pa t g
8 a oo a th p l mi a y o d of fo f tu t d. S F d. R. C m. P.
9 32.2(b)(3) (“Th t y of a p l mi a y o d of fo f tu autho z [th
10 Gov me t] . . . to comme c p oc d that comply w ith a y tatut
11 ov th d-pa ty ht .”); 21 U.S.C. § 853( )(1); U nt d Stat v. Ma o ,
12 562 F.3d 1330, 1339 (11th C . 2009) (“[O] c a p l mi a y o d of fo f tu
13 t d, wh th b fo o aft th t mec mi al jud me t t d, th
14 ov me t autho z d to comme c p oc d ov th d-pa ty
15 ht .”). Th dat of th d f da t’ t c l va t to th a c lla y g
16 p oc d o ly to th xt t that t xt u h th d f da t’ t t th
17 p op ty. F d. R. C m. P. 32.2(b)(4)(A), (c)(2); al o d. at (c)(4) (“A na c lla y g
18 p oc d ot pa t of t c .”).

1 . We conc e a e Governmen was no req ire o wai n i Swar z's

2 sen encing o begin no ifying po en ia pe i ioners of e pre iminary or er of

3 forfei re or abo e anci ary procee ing See Marion, 562 F 3 a 1339 ("[T e]

4 ir y- ay perio wi begin o r n from e riggering a e, even if i is before

5 crimina j gmen is en ere ") For e same reasons, we are no pers a e by

6 e Tr s 's re a e s gges ion a , aving receive irec no ice of e

7 pre iminary or er of forfei re, i wo ave been prema re for e Tr s o fi e

8 i s pe i ion before o er po en ia c aiman s a so receive no ice

9 T e Tr s 's secon response is a e Dis ric Co r 's A g s 15, 2017

10 amen e pre iminary or er of forfei re res ar e e ir y- ay c ock for a

11 ime y pe i ion T is response is no more pers asive an e firs T e amen e

12 pre iminary or er mere y a e a money j gmen An as R e 32 2 makes

13 c ear, "no anci ary procee ing is req ire o e ex en a e forfei re

14 consis s of a money j gmen " Fe R Crim P 32 2(c)(1); see a so Uni e S a es

15 v To iver, 730 F 3 1216, 1233 (10 Cir 2013) Re ying on ecisions nre a e o

16 forfei re, e Tr s co n ers a an amen e civi comp ain genera y

17 s perse es an voi s e ini ia comp ain pon service I arg es a e same

18 princip e s o app y o e Dis ric Co r 's amen e pre iminary or er of

1 forfei re We re npers ded by his n logy bec se i is he Tr s 's own

2 v pe i ion, no he co r -iss ed mended prelimin ry order of forfei re, h

3 oper es s he eq i len of ci il compl in in his c se See Uni ed S es

4 D a gerd s, 892 F 3d 545, 552 (2d Cir 2018) ("On mo ion o dismiss, § 853(n)

5 v pe i ion is e l ed on he s me s nd rd s ci il compl in on mo ion

6 nder R le 12(b)(6) " (emph sis dded)); Fed R Crim . P 32 2(c)(1)(A); 21 U S C

7 § 853(n)(7) Accordingly, we gree wi h he Dis ric Co r h he mended

8 prelimin ry forfei re order did no res r he Tr s 's hir y-d y ime period o

9 file i s pe i ion

10 For hese re sons we ffirm he Dis ric Co r 's j dgmen s o he Tr s v

11 **III. Orienta's Petition**

12 **A. Orienta's Statutory Standing to Petition**

13 Unlike he Tr s 's pe i ion, here is no q es ion h Orien 's pe i ion w as

14 imely filed For Orien , he ini i l q es ion is whe her i h s s ory s nding v

15 v o pe i ion he Dis ric Co r nder Sec ion 853(n)(2) S ory s nding is

16 "simply q es ion of whe her he p r ic l r pl in iff 'h s c se of c ion nder

17 v he s e '" Am Psychi ric Ass'n An hem He l h Pl ns, Inc , 821 F 3d 352, v

359 (2d 20 6) (quot ng Lexma k Int'l, In v Stat ont ol omponents, In ,

2 572 U S 8, 28 (20 4))

3 c In o de to have stand ng to b ng a la m unde Se t on 853(n)(2), a

4 pet t one must demonst ate a "legal nte est" n the p ope ty at ssue Watts,

5 786 F 3d at 60–6 ; 2 U S § 853(n)(2) "Whe e the pet t one has no val d

6 nte est n the p ope ty unde state law, the nqu y ends, and the la m fa ls fo

7 la k of stand ng " Watts, 786 F 3d at 6 (quotat on ma ks om itted)

8 c O renta asse ts two legal nte ests n the Asset: ( ) a se u ty nte est n the

9 Asset de ved f om the p om isso y notes t a qu ed f om H CG, and (2) an

0 equ ty owne sh p nte est based on ts sha es of J e k Hold ngs, wh h late

be ame Fo us A qu s t ons The Gove nment ag ees that O renta's se u ty

2 nte est n the Asset based on the p om isso y notes sat sf ed Se t on 853(n)(2)'s

3 "statuto y stand ng" equ ement—that s, t pe m itted O renta to pet t on the

4 D ist t ou t to adjud ate the val d ty of that nte est unde Se t on 853(n)(2)

5 But the Gove nment ma nta ns that O renta's "owne sh p of sto k n a

6 o po at on that owns a o po at on that owns the Asset does not" onfe

7 statuto y stand ng to pet t on on that bas s Gov't B 58 The D ist t ou t

8 ag eed w ith the Gove nment that "the 35 pe ent equ ty owne sh p omponent

1 of [Or ’s] cl m would b subj c o d smiss l b c us Or , by s own

2 dmiss o , s mer ly sh r hold r l s wo corpor l v ls r mov d from

3 y l g l r s h Ass ”[4] Sp App’x 52 7 (quo o marks omi d)

4 We gr wih h D is r c Cour “Th x of p o r’s r s

5 forf d prop r y s d rmi d ccord c wih s l w” W s, 786

6 F 3d 161 R solv g h cho c -of-l w qu s o r l g o Or ’s l g l

7 r s h Ass s o sy sk Af r ll, Jr ck Hold gs d Focus

8 Acqu s o s r bo h corpor d D d w ar , bu Jr ck Hold gs pp rs o .

9 h v b formed New York, wh l h D is r c Cour fou d h h Ass

10 w as r sf rr d 2015 from Focus Acqu s o s o Focus Flor d , Flor d

11 comp y h Focus Acqu s o s fully own d A tf rs blush would s m h

12 D d w ar l w ppl s o d rmi wh h r Or ’s qu y own rsh p s

13 “l g l r s ” h Ass ; bu for u ly for us, ur s ou h h swer o

14 h qu s o s h s meu d r D d w ar , New York, or Flor d l w, hus

15 r l v g us of h du y o choos h ppl c bl l w I ll hr S s,

16 memb r of LLC h s o l g l r s h ss s h b lo g o h LLC S .

17 D d Cod A n 6, § 18-701 (“A memb r h s o r s sp c f c l m d

---

[4] R c ll h Or v u lly h d 35 p rc qu y s k Jr ck Hold gs/Focus Acqu s o s, h LLC wih s k h Ass .

1 liability a y Ar erty.”); N.Y. Ltd. Liab. C . LawA § 601 (“ erehasb

2 i terest i s e ifi r erty f the li ted liability a y.”); Fla. Stat.

3 § 605.A110(4) (“ erem f b li ted liability a y has i terest i a y

4 s e ifi li ited liability a y r erty.”). It f ll ws that Orie ta’s equity

5 i terest i Jre k H ldi gs r F us quisiti s is t a legal i terAest i the set

6 suffi ie t t fer statut ry sta di g t halle ge the f rfeiture f the sset. See

7 Stefa D. Cassella, SSET FORFEITURE L W IN THE UNITED ST ES, § 23-13(h) (3d

8 ed. 2022) (“Be ause they la k a y w nershi i terest i the assets f the

9 r rati , shareh lders d t have sta di g t halle ge the f rfeiture f

10 r rate assets. The rule is the sa f r e ers f a LLC.”); see als U nited A

11 States v. Walla h, 935 F.2d 445, 462 (2d Cir. 1991) (“[S]hareh lders d t h ld

12 legal title t a y f the r rati ’s assets. I stead, the r rati —the e tity A

13 itself—is vested with the title.”).

14 U nder these ir u ta es, we lude that Orie ta la ks sta di g u der

15 Se ti 853( )(2) t ursue a lai based its equity w nershi i terest i Jre k

16 H ldi gs/F us quisiti s. A

1 c **B. Ori s Sup rior I r s Cl im**

2 c The Distri t Court on luded that Orienta failed to state a plausible laim
3 that it enjoyed a superior interest be ause Orienta's se urity interest vested, at
4 the earliest, in 2009 (when HCG, from whom Orienta bought its stake, exe uted
5 its deal with Swartz),[5] and the Government's interest vested, at the latest, in 2005
6 (the last year that the Asset ould have be ome forfeitable as pro eeds of
7 Swartz's wire fraud s heme). On appeal, Orienta faults the Distri t Court for
8 relying on fa ts outside of the petition—namely, fa ts from the re ord of Swartz's
9 riminal pro eedings—to land on 2005 as the year the Asset be ame forfeitable.
10 We disagree.

11 To establish a superior interest laim under Se tion 853(n), a petitioner
12 must demonstrate that it "has a legal right, title, or interest in the
13 property . . . [that] was vested in the petitioner rather than the defendant or was
14 superior to any right, title, or interest of the defendant at the time of the
15 ommission of the a ts whi h gave rise to the forfeiture of the property." 21
16 U.S.C. § 853(n)(6)(A). "Be ause forfeitable property vests in the government

[5] Whether a potential laimant who a quired its interest from a third party may assert its laim as derivative of the preexisting owner's laim appears to be an open question in our Court. Be ause we on lude either way that Orienta's laim arose after the Government's interest vested, we need not, and do not, address the question. c

1 immedia e on he commission of a crimina ac , a hird ar ma revai

2 nder § 853(n)(6)(A) on es a ishing ha he had a ega in eres in he

3 forfei ed ro er efore he nder ing crime was commi ed—tha is, efore

4 he governmen 's in eres ves ed." Wa s, 786 F.3d a 166 (q o a ion marks

5 omi ed). Under R e 32.2( )(1)(B), "[ ]he co r 's de ermina ion" as o

6 forfei a i i "ma e ased on evidence a read in he [crimina] record,

7 inc ding an wri en ea agreemen " and "an addi iona evidence or

8 informa ion s mi ed he ar ies and acce ed he co r as re evan and b

9 re ia e." Fed. R. Crim. P. 32.2( )(1)(B); see Uni ed S a es v. Ca occia, 503 F.3d b

10 103, 109–10 (2d Cir. 2007) (ho ding ha a dis ric co r is ermi ed o consider

11 ria evidence in de ermining forfei re).

12 b We ho d ha a dis ric co r ma re on he record of a defendan 's

13 crimina roceedings o "de ermine wha ro er is s jec o forfei re nder

14 [Sec ion 853]." Fed. R. Crim. P. 32.2( )(1)(A). In addi ion, a dis ric co r ma

15 re on a re iminar order of forfei re in de ermining whe her a hird- ar b

16 e i ion s a es a c aim o he forfei a e ro er , so ong as he hird- ar

17 e i ioner has an o or ni o cha enge he fac a findings made in s or b

18 of he order af er i has een en ered. See Da gerdas, 892 F.3d a 557–58. The

1 Distri t rt s theref re entitled t rely n the fa ts ntained in b th the

2 preliminary f rfeit re rder and S rtz's plea agreement and ther riminal

3 pr eedings in n l ding that Orienta had failed t state a s peri r interest

4 laim t the sset—espe ially sin e Orienta's petiti n did n t hallenge any f

5 the fa t al findings in the preliminary rder that re relevant t de iding en h

6 the sset be ame f rfeitable. <u>See</u> <u>id.</u>; <u>United States v. 101 H o se , LL</u> , 22 F.4th

7 843, 848–49 (9th ir. 2022).

8 A s it did in the Distri t rt, Orienta als laims that it has a s peri r title

9 t the sset by virt e f a nstr tive tr st, i h "entitl[es] its benefi iary t

10 any pr perty a q ired by the se f f nds st len fr m him." <u>Watts</u>, 786 F.3d at

11 168. We easily reje t the laim that a nstr tive tr st exists in Orienta's fav r.

12 "[T]he la f nstr tive tr st d es n t ne essarily entitle every rime vi tim t

13 pri rity ver a defendant's ther general redit rs." <u>Fed. Ins. . v. United</u>

14 <u>States</u>, 882 F.3d 348, 373 (2d ir. 2018). "Rather, a nstr tive tr st atta hes nly

15 t the spe ifi pr perty appr priated fr m a laimant by the ffender r that an

16 be tra eable theret ." <u>Id.</u>; <u>see</u> <u>als</u> assella, <u>s pra</u>, at § 23-15(g). Be a se Orienta

17 d es n t allege that S rtz a sed its f nds t a q ire the sset, the Distri t rt

18 s right t reje t its nstr tive tr st laim.

1 **C. <u>Ori s Bo Fid Purch s r for V lu Cl im</u>**

2 Fina y, we address Orienta's c aim that it has a ega interest in the Asset
3 as a bona fide purchaser for va ue. To prevai on such a c aim, a petitioner must
4 estab ish by a preponderance of the evidence that it is "a bona fide purchaser for
5 va ue of the right, tit e, or interest in the property and was at the time of
6 purchase reasonab y without cause to be ieve that the property was subject to
7 forfeiture under this section." 21 U.S.C. § 853(n)(6)(B). A bona fide purchaser
8 c aim "a ow[s] a imited category of petitioners who acquired an interest in the
9 forfeited property <u>after</u> the government's interest vested to prevai at an anci ary
10 hearing." <u>Watts</u>, 786 F.3d at 169 (quotation marks omitted).

11 The District Court understandab y determined that Orienta's petition did
12 not state a bona fide purchaser c aim arge y, if not entire y, because Orienta
13 fai ed to describe its c aim as such and, to make matters worse, neg ected to cite
14 Section 853(n)(6)(B), which authorizes such a c aim. <u>See</u> Sp. App'x 50–51. We
15 agree with the District Court that Orienta's petition fai s to state a bona fide
16 purchaser c aim. Specifica y, Orienta does not a ege facts estab ishing that it
17 obtained a ega interest in the Asset "reasonab y without cause to be ieve that
18 the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(B). Orienta comes

1 closes o s bo f de purch ser cl m whe descr bes self s

2 “ oce v c m[]” of Sw ar z’s fr ud App’x 110 d lle es h Sw ar z

3 “fr udule ly duced Or e o e er o purch se reeme ” App’x 101.

4 Bu pe o er m ay be v c m of fr ud d s ll re so bly h ve c use o

5 bel eve h he purch sed proper y w as subjec o forfe ure — bec use s y he

6 pe o er ored red fl s or o herw ise c ed u re so bly comple he

7 de l.

8 , To suppor s cl m h “h d o re so o bel eve he Asse w as

9 co ec ed o y cr mi l c v y ” Or e lso po s o “ he secured o es ”

10 d “v r ous clos d due d l e ce docume s” ppe ded o s pe o .

11 Or e Br. 23–24. Bu o e of hese docume s es bl shes h Or e h d o

12 re so o bel eve h he Asse mi h be forfe ed.

13 I he l er ve Or e cl ms h he Gover me s jud c lly

14 es opped from r u h s pe o f ls o s e bo f de purch ser for

15 v lue cl m. I remi ds us h he Gover me lly moved o d sm ss ,

16 Or e ’s pe o 2017 lo w i h he o her pe o s h were f led bu h ,

17 f er Or e opposed he mo o he Gover me w i hdrew s mo o o

18 d smiss s o Or e w i hou prejud ce s h dd o l f c u l

1 deveelo w a s ecessary o reso olve e her Orie a's e i io s a ed a bo a

2 fide urchaser for value clai . I Oc ober 2019 he Gover ob ai ed a

3 order au hori i g discovery rela ed o Orie a's e i io , af er w ich he ar ies

4 ried, bu failed, o se le he case. The , i July 2020, he Gover oved o

5 dis miss he e i io a d s ay discovery.

6 z "The equi able doc ri e of judicial es o el rovides ha , '[w] here a ar y

7 assu mes a cer ai osi io i a legal roceedi g, a d succeeds i ai ai i g

8 ha osi io , he ay o hereaf er, si ly because his i eres s have cha ged,

9 assu me a co rary osi io , es ecially if i be o he rejudice of he ar y who

10 has acquiesced i he osi io for merly ake by hi m.'" U davi es v. Weeks

11 Mari e, I c., 418 F.3d 138, 147 (2d Cir. 2005) (quo i g Ne Ha shire v. Mai e,

12 532 U.S. 742, 749 (2001)). The doc ri e a lies if "1) a ar y's la er osi io is

13 clearly i co sis e wi h i s earlier osi io ; 2) he ar y's for mer osi io has

14 bee ado ed i so me wa y by he cour i he earlier roceedi g; a d 3) he

15 ar y asser i g he wo osi io s would derive a u fair adva age agai s he

16 ar y seeki g es o el." DeRosa v. Na 'l E velo e Cor ., 595 F.3d 99, 103 (2d z

17 Cir. 2010) (quo a io marks o i ed). "A dis ric cour 's decisio o i voke

1 judici opp i r vi wed for bu of di cr ion." A shmor v. CGI Grp., Inc.,

2 92 F. d 260, 271 (2d Cir. 2019).

We conc ud h h Di ric Cour c d wi hin i di cr ion wh n i h d 3

4 h h judici opp doc rin do no pp y o pr v n h Gov rnmen

5 from rguing h Ori n ' p i ion f i d o bon fid purch r for

6 v u c im. In vo un ri y wi hdr wing i mo ion o di mi wi hou pr judic ,

7 h Gov rnmen did no conc d h h p i ion d uch c im. S 3

8 Merri Lynch, Pi rc , F nn r & Smi h, Inc. v. G eorgi di , 90 F.2d 109, 114 (2d

9 Cir. 1990) (conc uding h wh r h prior c w a "di mi d vo un ri y in

10 ccord nc wi h ipu ion," judici opp did no pp y). Nor did h

11 Di ric Cour dop or r y on h Gov rnmen ' wi hdr w a wh n i p rmi d

12 di cov ry r ing o Ori n ' c im o proc d.

1 3 Nor, for h ma r, did h Gov rnmen ob in ny unf ir dv n g

14 from cc ding o ome di cov ry b for r n wing i mo ion o di mi . Ori n 3

15 c ims o h v uff r d n "unf ir d rimen " du o incr d i ig ion co

16 oci d wi h ddi ion di cov ry. Bu " i ig ion" g n r co , o we

17 h v difficu y ing how ny ddi ion co Ori n may h v incurr d

18 con i u " n 'unf ir d rimen ' h wou d d o judici opp ." A shmor ,

923 F.3d 2 9 . . Fi lly, we re o persu ded by Orie 's u fou ded

2 sugges io h he Go er me wi hdrew i s mo io o dismiss o oid he

3 e ry of empor ry res r i i g order d o cceler e he i erlocu ory s le of

4 he Asse .

5 v **D. <u>Leave to Amend</u>**

6 v The Dis ric Cour dismissed Orie 's pe i io wi h prejudice d v

"refus[ed] o permi me dme o he pe i io " bec use " he 30-d y ime period

8 i which o file hird-p r y pe i io u der § 853( )(2) is ordi rily s ric ly

9 co s rued." Sp. App'x 52, 55. The Dis ric Cour 's disposi i e reli ce o Sec io

0 853( )(2), which pro ides h hird p r y mus file i s pe i io "wi hi hir y

d ys" of recei i g o ice, was mispl ced. The 30-d y de dli e is s ric bu o

2 lw ays f l. I is i e ded o promo e fi li y for he Go er me bec use "[i]f

3 o hird p r y files pe i io wi hi he prescribed ime (or o pe i io er

4 pre ils), he Go er me emerges wi h 'cle r i le o [he forfei ed] proper y.'"

5 <u>U ni ed S es . Br dley</u>, 882 F.3d 390, 393 (2d Cir. 20 8) (quo i g 2 U.S.C.

6 § 853( )( )). Where, s here, hird p r y files i s pe i io before he de dli e

d mo es promp ly o me d i , rejec i g le e o me d does o lw ys

8 fur her h purpose. R her, i limi ed circums ces, i may be ppropri e o

1 permi e pe i i er me d i s pe i i u side e 30-d y wi d w. See

2 D augerd s, 892 F.3d 552-53 & . (rem a di g ll w e pe i i er “ ry

3 cure e defec by ple di g ddi i l f c s b u e c mmi gli g f fu ds

4 s e c e ds ccurred,” eve ug e pe i i er did seek le ve me d

5 e dis ric c ur).

6 7 Orie imely filed i s i i i l pe i i , d b e Dis ric C ur d e

G over me u ders d i i e ded pursue i s cl im e Asse . Here, 7

8 wo i gs p e i lly ip e sc les i f v r f gr i g Orie le ve me d

9 i s b fide purc ser cl im. Firs , e Dis ric C ur b sed i s dismiss l f 7

10 cl im prim rily ec ic l issue: Orie d f iled describe i s b fide

11 purc ser cl im s suc d eglec ed ci e Sec i 853( )(6)(B), w hic

12 u rizes suc cl im. Sec d, e G over me ck wledged ddi i l

13 f c u l devel pme w as ecess ry res lve w he er Orie ’s pe i i s ed

14 b fide purc ser f r v lue cl im. U nder ese circums ces, i m ay be

15 “se sible give cl im a s e pp r u i y me d eir pe i i pr vide 7

16 i f rm a i s isfy [Sec i] 853( )(3) (if ey ve i).” U ni ed S es v.

1 Fur d , 40 F.4 56 , 5 9–80 (Cir. 2022) (fi di g e dis ric c ur d

18 erred i dismissi g, su sp e, pe i i i c r c erized s “c clus ry”

1 anmdare nd n r the d str ct c urt t “pr v de e ther a hear n r an

2 pp rtun tymte a nd the pet t n”).

3 w Because the D istr ct C urt bel eved that the statut rnyera rk

4 cate r cally precluded a mend nt a ter the 30-day deadl ne, t d es n t appear

5 t have c nswdered ethner a mend nt uld ther se have been pr per.

6 Acc rdwn ly, vacate amdare nd t the D istr ct C urt t rec ns der hether

7 Or enta sh uld be ranted leavmte a nd ts b na de purchaser cla .

8 w **CONCLUSION**

9 We have c ns dered the pet t nenrs’are n n maru nts and c nclude

10 that they are th ut r t reaband ned. See Un ted States v. Black, 918 F.3d

11 243, 256 (2d C r. 2019). F r the re n reas ns, theju d nt the D str ct

12 C urt s **AFFIRMED** n part and **VACATED** n part, and the case relat n t

13 Or enta s **REMANDED** r urther pr ceed n s t per t the D istr ct C urt t

14 rec ns der ethler Or enta sh uld be ranted leave t a nd tseb na de

15 purchasemcla w