20-1212(L)

20-1265(XAP)

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: 650 FIFTH AVENUE COMPANY and RELATED PROPERTIES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR CLAIMANTS-APPELLANTS ALAVI FOUNDATION AND 650 FIFTH AVENUE COMPANY

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CORPORATE DISCLOSURE STATEMENT

The Alavi Foundation is a not-for-profit corporation organized under the laws of New York. The Alavi Foundation has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

The 650 Fifth Avenue Company is a partnership organized under the laws of New York. The 650 Fifth Avenue Company has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

Through this interlocutory appeal, Claimants Alavi Foundation ("Alavi") and the 650 Fifth Avenue Company (the "Fifth Avenue Company" or the "Partnership") seek review of a narrow issue, but one that will have immense consequences on the future litigation of the underlying forfeiture action if the District Court's error is not corrected. Specifically, the court below (Preska, J.) held that the Partnership's real property—an office building located at 650 Fifth Avenue in midtown Manhattan (the "Building")—was unlawfully seized in violation of 18 U.S.C. § 985 and binding Supreme Court precedent, and it directed the Government to return to Claimants all rental income that had been generated by the Building from December 12, 2019 through the date of any eventual determination, after an appropriate hearing, that there is probable cause that the Building is subject to forfeiture. But the actual date on which the Building was unlawfully seized (and from which date rental income started to be wrongfully withheld) was nearly two years earlier. The District Court erred in not releasing withheld rental income from the beginning of the unlawful seizure.

On September 29, 2017—more than seven years after the Government and Claimants jointly proposed a framework (the "Prior Framework") whereby the Fifth Avenue Company managed the Building and had access to its net rental income subject to the oversight of a court-appointed monitor (the "Monitor")—the District Court entered a highly restrictive protective order (the "September 2017 Order") that removed all management rights from Claimants and prevented Claimants from having any access to the Building's rental income. The basis for the September 2017 Order was a jury verdict forfeiting the Building to the Government. This Court briefly stayed the September 2017

Order, giving Claimants temporary access to rental income generated by the Building, but in January 2018, it continued the severe restrictions on Claimants' management of the Building and re-imposed the prohibition on the release of rental income to Claimants based on the judgment of forfeiture entered in the District Court.

On August 9, 2019, however, this Court vacated that judgment of forfeiture due to multiple grave errors and a lack of fair and procedurally adequate process. *In re 650 Fifth Ave. & Related Properties*, 934 F.3d 147, 173 (2d Cir. 2019) ("[G]etting to any outcome requires a fair and procedurally adequate process, something that has been lacking in this case. There are no shortcuts in the rule of law."); *see also Havlish v. 650 Fifth Ave. Co.*, 934 F.3d 174 (2d Cir. 2019). The Court held that the District Court, among other things, (1) failed to determine whether each item of evidence the Government seized in a flagrantly unlawful search of Claimants' offices would have been inevitably discovered, (2) improperly deprived Claimants of discovery relevant to their statute of limitations defense, and (3) erred by prohibiting certain of Alavi's former board members from testifying at trial despite having previously invoked their Fifth Amendment privilege, and by precluding Claimants from eliciting at trial evidence of the Government intimidation that led those and other witnesses to invoke the privilege. *In re 650 Fifth Ave.*, 934 F.3d at 154.

Notwithstanding Claimants' successful appeal, immediately upon issuance of the mandate, the Government once again sought to deprive Claimants of their ownership rights with respect to the Building, including their right to receive the Building's ongoing rental income. On the date the mandate issued, the Government moved the District Court on an expedited basis for entry of the December 2019 Order, which it described as containing terms that "mirror

those of the Court of Appeals' orders" and necessary to "maintain the *status quo*." (A-393-94.) The Government did not mention that "the Court of Appeals' orders" had been based on the forfeiture judgment the Court of Appeals had vacated. The District Court entered the December 2019 Order on the same date that the Government requested it, before Claimants had an opportunity to challenge its entry. (A-420-32.)

Claimants promptly moved to modify or vacate the December 2019 Order, arguing that the Order constituted a seizure of the Building without constitutionally- and statutorily-required process because there was no judgment of forfeiture and there had never been a probable cause hearing that would support a pretrial seizure. The District Court agreed. As relief for the violation, in orders issued on February 13 and March 2, 2020, the District Court directed the Government to release to Claimants the Building's rental income generated from the date the mandate issued (which was also the date of entry of the December 2019 Order) until any eventual determination of probable cause after a hearing. (SPA-1-2; SPA-3-21.) The District Court later clarified that it intended to return management rights to the Fifth Avenue Company as well. (SPA-23.)

Though the District Court was correct in finding a due process violation, the relief it ordered was too narrow. It erred by limiting Claimants' relief to the rental income generated from December 12, 2019 forward. The income earned from January 5, 2018 through December 12, 2019 was *also* unlawfully withheld from Claimants on the basis of a procedurally improper seizure: the District Court has never held a pre-seizure hearing before depriving the Fifth Avenue Company of its ownership rights, and the Government never satisfied its burden of showing probable cause to seize the Building. The withholding of the Building's income from

January 5, 2018 through December 12, 2019 was premised on a forfeiture judgment that this Court vacated after holding that it was the result of an error-ridden trial that followed error-ridden pretrial proceedings.

The wrongfully withheld funds are urgently needed so that Claimants can pay long-outstanding legal fees for their successful appeals in this and related actions, as well as future legal expenses to continue to defend their property interests, including at an upcoming probable cause hearing. The Court should order the release of the Building's substantial net rental income from January 5, 2018 through December 12, 2019.

STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction over this forfeiture action under 28 U.S.C. § 1345, which gives district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States," and 28 U.S.C. § 1355, which grants district courts "original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any . . . forfeiture, pecuniary or otherwise, incurred under any Act of Congress." Claimants' appeal of the District Court's February 13, 2020 order was timely filed on April 10, 2020.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1), which allows for appeals from "interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." The statute also allows for appeals that have the practical effect of such an order, provided that the order "might have a serious, perhaps irreparable, consequence, and that the order can be effectually challenged only by immediate appeal." *Carson v. American Brands, Inc.*, 450

U.S. 79, 84 (1981) (quotation marks and citation omitted); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 411–12 (2d Cir. 1985).

Here, the District Court effectively enjoined Claimants from receiving rental income due them from January 5, 2018 through December 12, 2019. The February 13 and March 2, 2020 Orders (SPA-1-2; SPA-3-21) modified the December 2019 Order, which enjoined Claimants from exercising any of their ownership rights to their real properties. Those orders did not, however, dissolve the restraint on rental income that had been generated by the Building from January 5, 2018 through December 12, 2019 and placed in reserve. Unless that injunction is lifted, there will be serious and perhaps irreparable consequences to Claimants. Without those funds, Claimants will not be able to pay their counsel the outstanding fees owed them for their successful appeals, let alone fund their ongoing legal fees and expenses.[1] As a result, Claimants will either be left scrambling to find new counsel without the necessary means to do so, or face losing by default the properties the Government has unsuccessfully sought to forfeit on the merits for more than a decade. Time is of the essence, as multiple time-intensive steps must be taken pretrial, including litigating what evidence must be suppressed due to the Government's Fourth Amendment violations and taking significant discovery relating to Claimants' long-denied statute of limitations defense. Claimants require access to the rental income illegally

[1] Claimants' lawyers have not been paid for any services rendered after January 5, 2018 and are now owed millions of dollars in fees. (A-463.) Income from December 12, 2019 onward has yet to be released, and in any event will not be sufficient to pay counsel for their past work, let alone future work.

withheld between January 5, 2018 and December 12, 2019 to participate in those proceedings and to otherwise continue vindicating their rights in the District Court. The District Court's order is therefore appealable under 28 U.S.C. § 1292(a)(1).[2]

As an additional basis for jurisdiction, the Court's order is appealable under 28 U.S.C. § 1292(a)(2), which allows for appeals from "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." The Monitor effectively plays the role of a receiver here. The improperly withheld rental income from January 5, 2018 until December 12, 2019 is under the Monitor's control and Claimants have no access to it. The February 13 and March 2, 2020 Orders ratified the

[2] Pretrial forfeiture orders are frequently found to be appealable under this statute. *See In re Feit & Drexler, Inc.*, 760 F.2d at 412 (order that deprived defendant from the use and possession of her property was immediately appealable under § 1292(a)(1)); *see also United States v. 1407 N. Collins St.*, 901 F.3d 268, 271-72 (5th Cir. 2018) (court had jurisdiction over appeal from order refusing to lift pretrial restraints on seized property because "the district court's order has 'the practical effect' of granting or denying an injunction"); *United States v. Kaley*, 579 F.3d 1246, 1252 (11th Cir. 2009) ("Protective orders designed to preserve forfeitable assets . . . qualify as injunctions for the jurisdictional purposes of § 1292(a)(1)."); 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3922.3 (3d ed. 2019) ("Orders controlling the use of property involved in forfeiture proceedings have been held appealable, no doubt in part because of the drastic consequences threatened by modern uses of forfeiture.").

December 2019 Order's appointment of the Monitor as the caretaker for the illegally withheld income. *See Rosen v. Siegel*, 106 F.3d 28, 33 (2d Cir. 1997) (explaining that while "an order denying appointment of a receiver is normally not subject to interlocutory appeal, . . . an order appointing a receiver is appealable."); *see also Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 841 (9th Cir. 2009) (holding appealable under 1292(a)(2) an order appointing a receiver and requiring party to turn over past rents).

STATEMENT OF ISSUE PRESENTED

Where the District Court held that the Building had been unlawfully seized and rental income improperly withheld without the pre-deprivation process required by 18 U.S.C. § 985 and Supreme Court precedent, did the District Court err in failing to order the return of rental income earned during the entire period the Building was unlawfully seized without due process of law?

STATEMENT OF THE CASE

A. The Alavi Foundation and Fifth Avenue Company

The Alavi Foundation is a New York not-for-profit corporation that was organized over forty years ago with a charitable mission of promoting the study of Persian language, literature, and civilization in the United States. (08-cv-10934 (S.D.N.Y.) Dkt. 678 Ex. 19.) It owns several real properties throughout the United States that it permits religious, educational, and charitable organizations to use on a rent-free basis. These properties—located in California, Maryland, New York, and Texas—house community centers, out of which separate entities provide a range of religious, cultural, educational, and health care services. (*Id.* Dkt. 1125 at 8.) Alavi also owns a small parcel of real property in Virginia. (*Id.*)

In the 1970s, Alavi purchased property at 650 Fifth Avenue in Manhattan and constructed the Building on the site. (*Id.* Dkt. 1560 Ex. 6.) In 1989, Alavi transferred its ownership interest in the Building to a newly-created real estate partnership named the 650 Fifth Avenue Company. (*Id*. Ex. 10.) In exchange, Alavi received a 65% interest in the Partnership (later reduced to 60%). (*Id*. Exs. 10–11.) A newly-formed New York corporation named Assa Corporation ("Assa") contributed approximately $40 million to the Partnership in exchange for a 35% interest in the Partnership (later increased to 40%); Assa's funds were used to satisfy Alavi's then-existing mortgage loan (from Bank Melli) on the property. (*Id*. Exs. 9–11.) Alavi serves as the managing partner of the Fifth Avenue Company, though a professional real estate company handled, and continues to handle, the day-to-day management of the Building, including the collection of rents from commercial tenants and the oversight of the Building's operations. (*See id*. Ex. 10; *Id.* Dkt. 678 Ex. 50 ¶¶ 9–10.) Today, the Building is worth more than $500 million. (*Id.* Dkt. 2037 Ex. 1.)

B. Procedural History

1. The Government's Allegations

In 2008, the Government commenced this civil forfeiture action against Assa's properties, seeking forfeiture of, among other things, Assa's 40% interest in the Fifth Avenue Company. The Government alleged that Assa was owned by Bank Melli, an Iranian government-owned bank listed on the Department of Treasury's Specially Designated Nationals list, and was providing unlawful services for Bank Melli in violation of U.S. sanctions on Iran and the International Emergency Economic Powers Act ("IEEPA").

In November 2009, the Government amended the forfeiture complaint to include claims against properties

belonging to Claimants (the "Defendant Properties"). The Government alleged that Claimants had provided unlawful services to Assa, despite knowing that Assa was secretly owned by Bank Melli, since 1995, and therefore that all of the Defendant Properties were subject to forfeiture in their entirety.[3]

2. Protective Orders

On April 29, 2010, following a negotiated agreement between Claimants and the Government, the District Court entered a protective order appointing retired Magistrate Judge Kathleen A. Roberts as the Monitor of the Claimants' properties with authority to: (1) review and approve disbursements, agreements, and other activities of the Fifth

[3] Starting in early 2009, a number of private judgment creditors also brought claims against Assa and Claimants, seeking to enforce existing judgments they had obtained against Iran (the "Creditor Actions"). In 2010, those actions were partially consolidated with the Government's forfeiture case against Claimants. In 2013, the District Court held that Assa's property interests, including in the Fifth Avenue Company, were subject to attachment and execution pursuant to the Terrorism Risk Insurance Act ("TRIA") and the Foreign Sovereign Immunities Act ("FSIA"), and that decision was affirmed on appeal. (*See* 17-3682 (Second Circuit), Dkt. 164-1.) In June 2017, after a bench trial that was consolidated with Claimants' jury trial against Government's, the District Court found that Claimants' property interests were subject to attachment and execution under the TRIA and the FSIA as well. The judgments entered in the Creditor Actions were appealed and vacated by this Court in tandem with the judgment of forfeiture obtained by the Government. *Havlish v. 650 Fifth Ave. Co.*, 934 F.3d 174.

Avenue Company in order to preserve its value; (2) review and approve disbursements by Alavi; (3) review and approve any decisions by Alavi pursuant to its obligations as managing partner of the Fifth Avenue Company; and (4) monitor the Fifth Avenue Company and the other Defendant Properties in order to preserve their value. (*See* A-342 (the "2010 Protective Order").) The 2010 Protective Order both preserved the value of the Claimants' properties (including the Building) and provided Alavi with its share of the Building's rental income to support its operations and legal defense. Indeed, as the District Court later recognized, Claimants would have been forced to close their doors if they were prohibited from accessing rental income generated by the Building. (A-354; A-462.) Under the negotiated arrangement, the 2010 Protective Order imposed limitations on and oversight over Claimants' exercise of their property rights and avoided the need for the Government to make the probable cause showing that would otherwise have been required by the U.S. Constitution, Supreme Court precedent, and applicable statutes. Until 2019, when this case was remanded a second time, the 2010 Protective Order and the other substantially similar orders that made up the Prior Framework had been in place at all times during this litigation during which the Building was not the subject of a forfeiture judgment. (*See* A-338-45; A-346-49; A-350-60; A-361-63; A-364-69.)

On September 29, 2017, following a trial and the return of a forfeiture verdict, the District Court issued an order (the "September 2017 Order"), which cut off Claimants' rights to manage and access funds from the Building. (A-386-91.) The September 2017 Order was grounded on the fact that Claimants' property had been adjudged forfeitable at trial. (A-387-91 (imposing severe restrictions based on "whereas" clauses noting that "the jury returned a verdict finding that . . . the Building is property involving in money laundering . . . and, in part, constitutes or is derived from proceeds traceable

to violations of the IEEPA . . . ; and, the Alavi foundation and the 650 Fifth Avenue Company are not innocent owners . . . of any of the Defendant Properties").) Additionally, in light of the verdict, the District Court ordered that the Building could be sold after six months. (A-385.)

Claimants appealed and sought an emergency stay of the judgment. On November 16, 2017, this Court granted Claimants' motion, staying the judgment of forfeiture and the sale of the Building, and authorizing the Monitor to make disbursements from the rental income to pay for, among other things, the minimal operations of the Alavi Foundation and Claimants' legal fees. (17-3258 (Second Circuit) Dkt. 94.) However, on January 5, 2018, upon a motion by the Government, the Court reconsidered its ruling concerning the release of funds from the Building's ongoing rental income and entered a protective order that again prohibited disbursements of funds from the Building to Claimants for any reason. (*Id*. Dkt. 114.) Upon Claimants' motion for a partial panel rehearing and clarification, this Court on February 13, 2018 issued an order clarifying that the January 5, 2018 order "did not have retroactive effect, and applied as of the date of its entry," meaning that Claimants' outstanding bills incurred up to that date could be paid, but going forward, Claimants' access to funds was completely frozen. (*Id.* Dkt. 138.) This Court's orders, just as the District Court's order following the trial, were grounded on the jury's verdict forfeiting Claimants' property. (*See id.* Dkt. 94.)

Accordingly, Claimants' access to the Building's rental income to pay attorneys' fees and other expenses was cut off with respect to fees and expenses incurred on or after January 5, 2018 (as well as all other rights of ownership of the Building). The fees incurred in litigating the two appeals this Court decided last August remain unpaid, as have the legal services incurred thus far on remand. There is no other

source of funds to pay for those outstanding fees or for Claimants' continued legal defense. (A-461-63.)

3. Current Posture

On August 9, 2019, this Court for the second time vacated the forfeiture judgment against Claimants. *In re 650 Fifth Ave.*, 934 F.3d 147 (2d Cir. 2019); *In re 650 Fifth Ave. and Related Props.*, 830 F.3d 66 (2d Cir. 2016). As mentioned above, it held that the District Court erroneously denied Claimants' motion to suppress evidence, improperly deprived Claimants of discovery relevant to their statute of limitations defense, and erred in multiple respects related to Fifth Amendment privilege invocations by Alavi's former board members. *See In re 650 Fifth Ave.*, 934 F.3d at 154. It further found that "a fair and procedurally adequate process . . . has been lacking in this case." *Id.* at 173.

After the Court's decision but before the mandate issued, Claimants asked this Court to restore the *status quo ante*, that is, to reinstate the Prior Framework—the framework that had been in place since April 2010 at all times when the Defendant Properties were not adjudged to be subject to forfeiture. (*See* 17-3258 (Second Circuit) Dkt. 320-2.) The Court denied the motion "without prejudice to [Claimants] raising the issue, including the scope of the management orders, before the district court." (*Id.* Dkt. 336.)

On the same day the mandate issued (December 12, 2019), without consulting with Claimants, the Government asked the District Court to "immediate[ly]" issue an order (the "December 2019 Order"), which mirrored the January 5, 2018 protective order entered by this Court prior to vacating the forfeiture judgment. (A-392.) Though the Government claimed to be preserving the "status quo" created by this Court's January 5, 2018 order cutting off Claimants' access to funds, (A-393), it ignored the fact that that order had been based on the judgment this Court had vacated. The

Government acknowledged that Claimants "oppose[d] some of the terms of the proposed order," but argued that "[d]isputes concerning the terms of the stay order c[ould] be resolved" by the District Court in further briefing. (A-393, 396.) Later that day, before hearing from Claimants, the District Court entered the Government's requested order. (A-420-32.)

Claimants moved to modify the December 2019 Order, arguing that the parties should return to the Prior Framework, which had effectively preserved the value of the Claimants' properties for years. More specifically, Claimants asked the District Court to either replicate the Prior Framework (to which Claimants indicated that they would consent) or, in the alternative, vacate the December 2019 Order and hold the pre-seizure hearing to which Claimants are entitled before any pretrial seizure can lawfully occur. (A-433-34; A-435-59); *see also* 18 U.S.C. § 985(d)(1)(B)(i).

In response, the Government argued that, despite its own agreement to the Prior Framework for years (and repeated approvals of it by the District Court), the Prior Framework was actually illegal. It further argued that the Building had not been seized at all because the rental income was under the Monitor's control, not the Government's, and that in any event the error-ridden trial was an adequate substitute for the due process protections required before a pretrial seizure can occur. At oral argument, Claimants specifically argued that because the forfeiture judgment had been vacated, there had been no valid finding of probable cause and the Government could not lawfully continue its seizure of the rental income withheld from January 5, 2018 through the present. (SPA-39, 52-53, 56, 67-68.)

On February 13, 2020, the District Court issued a short order, agreeing with Claimants that "[t]he restraints on the Building's rental income imposed by the [December 2019

Order] constitute a pretrial seizure of real property" and that the Government had not demonstrated probable cause and had "made no showing demonstrating that exigent circumstances exist." (SPA-1.) The District Court ordered that the funds generated during the unlawful seizure be returned to Claimants, but without explanation limited that relief to rental income generated on or after December 12, 2019—the date on which this Court issued the mandate and the District Court entered the December 2019 Order.[4] (SPA-2.) On March 2, 2020, the District Court issued an opinion providing greater detail regarding the reasons for its February 13, 2020 Order. (SPA-3-21.)

[4] The District Court found in the February 13, 2020 Order that the Government had failed to show exigent circumstances. (*See* SPA-1 ("The Government has made no showing demonstrating that exigent circumstances exist.").) The District Court reiterated that observation in the March 2, 2020 Opinion and Order. (SPA-13 ("[E]xigent circumstances have not been demonstrated to be present that would permit an *ex parte* judicial determination of probable cause.").) On February 28, 2020, however, the Government filed an *ex parte* application for pretrial seizure of future rental income generated by the Building based on purported exigent circumstances. Since Claimants had access—with the Government's consent and the District Court's approval—to rental income from the Building to pay for necessary expenses and fund their legal defense for the better part of a decade, the claim of exigency is disingenuous in the extreme. The Government's application was unsealed by the District Court, briefed by the parties, and remains pending. (*See* A-464; 08-cv-10934 (S.D.N.Y.) Dkts. 2200, 2205, 2214.)

SUMMARY OF ARGUMENT

Even though the District Court correctly held that restraints on Claimants' property ownership rights, including its access to rental income from the Building, constitute a "seizure" for which the Government has never established probable cause at a hearing or exigent circumstances, the District Court erred in releasing to Claimants rental income only from the final months of the unlawful seizure—from December 12, 2019 onwards. Claimants have been unable to access rental income generated by the Building since January 5, 2018, when this Court issued an order prohibiting the distribution of funds from the Building to Claimants for any purposes because Claimants' properties were adjudged forfeitable by a jury verdict.

However, in August 2019, this Court vacated the underlying judgment of forfeiture, holding that the record on which the judgment was issued was replete with errors and that Claimants were denied the fair and adequate process to which they were entitled under the law. As a result, the sole basis for this Court's restraint on Claimants' access to rental income on January 5, 2018 is now a legal nullity, and cannot serve as a substitute for the pre-seizure probable cause hearing that is required before the Government can lawfully seize Claimants' property. Accordingly, the rental income generated from January 5, 2018 until December 12, 2019 has been improperly withheld based on an unlawful seizure and must be immediately returned to Claimants.

ARGUMENT

The District Court Erred in Not Releasing Rental Income Generated Prior to the Issuance of the Mandate Vacating the Underlying Judgment

Section 985 of Title 18 of the United States Code—the section that governs civil forfeiture of "real property and interests in real property"—provides that "real property that is the subject of a civil forfeiture action shall not be seized before entry of an order of forfeiture." 18 U.S.C. §§ 985(b)(1)(A), 985(f)(1). Section 985 contains only two narrow exceptions to this prohibition on pre-judgment seizures: (1) where, upon the Government's application, the court conducts a pre-seizure probable cause hearing in which the property owner has a "meaningful opportunity to be heard," *id.* § 985(d)(1)(B)(i), or (2) where the court determines "that there is probable cause for the forfeiture and that there are exigent circumstances that permit the Government to seize the property without prior notice and an opportunity for the property owner to be heard." *Id.* § 985(d)(B)(ii).

Section 985 represents Congress's codification of the constitutional protections that the Supreme Court recognized in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), a case that presented circumstances strikingly similar to those at issue here. In *James Daniel Good*, the Government seized the claimant's rent-producing real property during the pendency of a civil action seeking to forfeit the property. *Id.* at 47. The Supreme Court concluded that, in the absence of exigent circumstances and a showing of probable cause, the Due Process Clause of the Fifth Amendment requires a hearing before the Government can seize real property. *Id.* at 61–62.

In *James Daniel Good*, the Government argued that no pre-seizure hearing was required because the "tangible effect" of the seizure was limited to interference with the claimant's receipt of rental income from the defendant property. *Id.* at 54. The Court rejected that argument, noting that "the right to receive rents" was one of the "valuable rights of ownership" of real property—in fact, it

"represent[ed] a significant portion of the exploitable value" of the real property. *Id.* The *James Daniel Good* Court's analysis on that point is consistent with Supreme Court precedent making clear that any "meaningful interference with an individual's possessory interests" in property is a "seizure" giving rise to constitutional protections. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *see also Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (rejecting the notion that only "complete, physical, or permanent deprivation[s] of real property" are subject to due process protections); *Pinsky v. Duncan*, 898 F.2d 852, 853–54 (2d Cir. 1990) (finding that the lack of pre-attachment notice ran afoul of landowner's right to due process because "attachment of real estate . . . has a significant impact on the owner's ability to exercise the full scope of his property rights."); *United States v. Land, Winston Cty.*, 163 F.3d 1295, 1298 (11th Cir. 1998) (holding that a seizure occurs when the "government has interfered with [the] right to occupy, use, enjoy, *or receive rents* from the defendant real property while the forfeiture actions is pending.") (emphasis added).[5]

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[5] The Government has attempted to distinguish *James Daniel Good* on the ground that it involved forfeiture under 21 U.S.C. § 881(a)(7), a statute providing for the forfeiture of real property facilitating drug crimes. (08-cv-10934 (S.D.N.Y.) Dkt. 2214 at 19–20.) But courts have uniformly applied *James Daniel Good*'s constitutional analysis to forfeiture claims brought under 18 U.S.C. § 981, the forfeiture statute on which the present action is based. *See, e.g.*, *United States v. 1184 Drycreek Rd.*, 174 F.3d 720, 728 (6th Cir. 1999); *United States v. 408 Peyton Rd., S.W.*, 162 F.3d 644, 645–46 (11th Cir. 1998); *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1315–16 (10th Cir. 1994); *United States v. 225 Cortland St.*, No. CV 99-4935 (JS), 1999 WL 962481 (E.D.N.Y. Sept. 15, 1999).

Following *James Daniel Good*, courts have concluded that the release of rental income generated during the period of illegal seizure is a necessary remedy for a seizure ordered without due process of law. *See 408 Peyton Rd.*, 162 F.3d at 652 ("[T]he proper remedy for a seizure in violation of the Fifth Amendment Due Process Clause is the return of any rents received or other proceeds realized from the property during the period of illegal seizure."); *see also 1184 Drycreek Rd.*, 174 F.3d at 728; *United States v. Marsh*, 105 F.3d 927, 932 (4th Cir. 1997); *United States v. All Assets & Equip. of W. Side Bldg. Corp.*, 58 F.3d 1181, 1193 (7th Cir. 1995); *United States v. 20832 Big Rock Dr.*, 51 F.3d 1402, 1406 (9th Cir. 1995); *United States v. 51 Pieces of Real Prop., Roswell, N.M.*, 17 F.3d 1306, 1316 (10th Cir. 1994); *United States v. Real Prop. Located at Incline Village*, 958 F. Supp. 482, 489–90 (D. Nev. 1997). Indeed, the return of unlawfully withheld rental income is available even when a real property is ultimately found to be subject to forfeiture. *See, e.g.*, *408 Peyton Rd.*, 162 F.3d at 652; *1184 Drycreek Rd.*, 174 F.3d at 728; *20832 Big Rock Dr.*, 51 F.3d at 1406; *51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d at 1316; *see also James Daniel Good Real Prop.*, 510 U.S. at 56 ("[T]he availability of a postseizure hearing may be no recompense for losses caused by erroneous seizure.").

In its March 2, 2020 Opinion and Order, the District Court for the most part agreed with Claimants' arguments. It concluded that the restrictions on Claimants' property rights, specifically Claimants' use and enjoyment of rental income from the Building, constituted a "seizure" of that property within the meaning of *James Daniel Good*. (SPA-13 ("(1)

Moreover, even if *James Daniel Good*'s constitutional analysis were limited to forfeitures under § 881—which it is not—§ 985's limitations on pre-judgment seizures nevertheless apply here.

the rental income generated by the Building is an interest in real property that places it within the ambit of Section 985; (2) the restraints imposed on the use of rental income in the protective order amount to a 'seizure' of the Building pursuant to the statute; and (3) exigent circumstances have not been demonstrated to be present that would permit an *ex parte* judicial determination of probable cause.").) The District Court rejected the Government's argument that the Building's rental income did not fall within the ambit of § 985, concluding that its "restrictive" interpretation "face[d] powerful headwinds in the caselaw" and "would render Section 985's 'interests in real property' language meaningless." (SPA-14-15.) Because there has never been a judicial finding of probable cause at a hearing at which Claimants were given a "meaningful opportunity to be heard," as required by § 985, the District Court concluded that the Building had been unlawfully seized and further that Claimants were entitled to the release of rental income generated by the Building unless and until it finds proper grounds for a seizure after such a hearing is held. (SPA-13 ("[G]iven the lack of pre-deprivation procedure afforded Claimants to this point, the Court grants Claimants' motion to modify the protective order to require the release of certain rental income generated by the Building to Claimants until a hearing can take place.").) The District Court later clarified that it also was returning management control over the Building to the Fifth Avenue Company, subject to the Monitor's oversight. (SPA-23-25.)

Despite its finding as to "the lack of pre-deprivation procedure afforded Claimants to this point," (SPA-13), however, the District Court directed only that "the Government must release to Claimants rental income generated by the Building between December 12, 2019, *i.e.*, the date of the issuance of the Second Circuit's mandate vacating the previous forfeiture judgment . . . and the date of any eventual judicial determination of probable cause."

(SPA-2.) The effective date of an illegal seizure is a question of law that must be reviewed *de novo*, *see United States v. Russo*, 74 F.3d 1383, 1389 (2d Cir. 1996) ("As our inquiry involves a question of law, we review under a *de novo* standard."), and the District Court erred in selecting December 12, 2019. Given its holdings that the Government unlawfully seized Claimants' property and improperly withheld rental income, the District Court should have ordered the release of the Building's rental income generated since January 5, 2018—the date on which Claimants' access to such income was cut off based on the unlawful seizure. The seizure did not begin on December 12, 2019; rather, the Building was seized in September 2017 based on a forfeiture judgment that this Court has since vacated, noting that "fair and procedurally adequate process . . . has been lacking in this case." *In re 650 Fifth Ave.*, 934 F.3d at 173.[6]

The flawed 2017 trial in this action (and the subsequent forfeiture judgment based on that trial) cannot serve as a substitute for the required pre-seizure probable cause hearing. Because this Court vacated the judgment of forfeiture upon which the seizure of the Building from September 2017 until December 12, 2019 was based, there was no valid "order of forfeiture" to justify the seizure under 18 U.S.C. § 985(b)(1)(A). The District Court's vacated 2017 forfeiture judgment is a legal nullity. *United States v. Ayres*, 76 U.S. (9 Wall.) 608, 610 (1869) (appellate order for "new trial has the effect of vacating the former judgment, and to render it null and void, and the parties are left in the same situation as if no trial had ever taken place"); *United States v. Lawson*, 736 F.2d 835, 837 (2d Cir. 1984) (same). For that

[6] Although the period of illegal seizure began in September 2017, Claimants already received a limited remedy of release of certain rental income between that date and January 5, 2018.

reason alone, the vacated judgment is insufficient to satisfy the due process requirements of *James Daniel Good* and § 985. The grounds for this Court's decision—which include this Court's specific holding that "fair and procedurally adequate process was lacking" in both the pretrial proceedings and the trial itself, *In re 650 Fifth Ave.*, 934 F.3d at 173—make reliance on the judgment that much more inappropriate. Accordingly, it is just as unlawful for the Government to withhold the Building's rental income from January 5, 2018 to December 12, 2019 as it was for the Government to withhold the income from December 12, 2019 forward, which the District Court has ordered to be released.

During oral argument below, the District Court expressed skepticism that it could find "unlawful" this Court's January 5, 2018 Order, which directed that none of the Building's rental income could be released to Claimants for any purpose. The District Court explained: "[I]t's awfully hard for me to think that a seizure that was ordered by the Court of Appeals somehow becomes unlawful later on when the Court of Appeals makes its decision." (SPA-80.) But this Court's decision vacating the underlying forfeiture judgment eliminated the sole basis for the seizure of the Building. There has never been a probable cause determination or pre-seizure hearing at which Claimants were given a meaningful opportunity to be heard. Claimants were not asking the District Court to "overrule" this Court; rather, they contended, based on this Court's vacatur of the judgment of forfeiture, that the District Court was required to release the rental income from the beginning of the seizure, not just from the date on which the mandate issued.

In light of this Court's holdings that the forfeiture trial and the proceedings leading up to it were afflicted by fundamental substantive and procedural defects, and that significant pretrial proceedings are needed before a second

trial can even be held, allowing the Government to continue to withhold unlawfully seized rental income from the Building would compound those defects. It would reward the Government's unseemly effort on remand to deprive Claimants of funds that are critical for their legal representation (funds that previously were accessible to them for years), thereby threatening to obtain by default the forfeiture judgment that the Government has been unable to obtain on the merits for more than a decade—the exact opposite of the "leveling [of] the playing field between the government and persons whose property has been seized" that Congress intended when it enacted asset forfeiture reform. *United States v. Real Prop. in Section 9, Town 29 N.*, 241 F.3d 796, 799 (6th Cir. 2001); *see also* H.R. Rep. No. 106-192 at 2 (1999), Civil Asset Forfeiture Reform Act. Rental income from the Building should be released for the entire period in which it was wrongfully withheld.

CONCLUSION

The rental income generated by the Building from January 5, 2018 to December 12, 2019 has been illegally withheld from the Claimants and should be returned to them immediately, so that they can continue to vindicate the rights that this Court found they were denied at trial.

Dated: April 16, 2020
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 7,239 words, calculated by the word processing system used in its preparation.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Local Rule 32.1(a)(2), and the type-style requirements of Fed. R. App. 32(a)(6), because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 12-point font.

Dated: April 16, 2020
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