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

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INTRODUCTION

The Government's reply (Dkt. 48-2) in support of its Motion to Strike ("Government's MTS") evidences an obvious misconception about the role and scope of fugitive disentitlement. By the Government's account, the doctrine amounts to a magic button that, whenever pressed, results in immediate, incontestable forfeiture of any and all *foreign* assets the Government may seek from a *foreign* national who is contesting extradition while asserting ownership interests at home—no matter the facts, law, equities, or procedures, rights, and courts engaged abroad.

Further still, the Government wants to use its expansive reading of fugitive disentitlement as a global sword for cutting off foreign proceedings that are not to its liking. This comes through loud and clear from its briefing. *See, e.g.*, Dkt. 48-2 at 36-37 ("More than $6 million of the restrained property in New Zealand has already been dissipated . . . and additional imminent requests for release are expected" while "[r]estrained property in Hong Kong remains under constant attack."); Dkt. 65 at 4 ("As of December 2014, more than NZ$1 million (currently US $770,000) in restrained funds were released to the Dotcoms as 'living expenses' by the New Zealand courts."). To be clear, the Government's grievance is *not* directed just against the Claimants—who are generally detained abroad, whose assets are restrained abroad, and who are using their assets only to the extent that the foreign courts now presiding over them see fit to award limited relief—so much as it is directed against the *foreign courts* that are continuing to have their fair say, if occasionally inconsistent with what the U.S. Government would prefer them to say. Although courts in New Zealand and Hong Kong are friendly to the United States, they have their own laws and their own views about, for instance, the import of binding treaty provisions, the presumption of innocence attaching to criminal defendants, and the imperative of funding adequate legal defense in a sprawling international case (or, more precisely, ever-

expanding series of cases) that the Government years ago called one of "the largest criminal copyright cases ever brought by the United States."[1]

The United States is thus trying to abuse the doctrine of fugitive disentitlement, transmogrifying it into an offensive weapon, a cover for precipitous, unjustified forfeiture, and a provocation for international discord. What fugitive disentitlement is actually meant to do, as the statute states, is simply to authorize a U.S. court—at its *discretion*, in appropriate cases, upon making necessary findings—to prevent someone who is actively out to avoid the reach of the United States "from using the resources of the courts of the United States." Thus, fugitive disentitlement is properly called upon for the sake of preserving "efficient, dignified operation of the courts," as the Supreme Court has said. *Degen v. United States*, 517 U.S. 820, 824 (1996). That is all it is meant to do. It is not meant to gratify a prosecutor's sudden perceived need for speed by superseding otherwise applicable timelines, procedures and rights. It is not meant to supply a substantive warrant for forfeiture where there is otherwise none. It is not meant to coerce a criminal defendant into buckling to extradition and surrendering valid defenses otherwise pending abroad. And it is certainly not meant to trump foreign courts and usurp foreign proceedings. In all of these respects, the United States Government appears badly mistaken and in need of correction.

Two other points demand correction before we turn to the important merits points that the Government would have the Court strike. First, the Government falsely accuses the Claimants, repeatedly, of "delaying" these proceedings. Not only should this accusation be irrelevant, in any event, to the Court's consideration of fugitive disentitlement, properly understood, but it is unfair and leveled with poor grace. The only "delay" attributable to Claimants has been a two-

[1] Press Release, Justice Department Charges Leaders of Megaupload with Widespread Online Copyright Infringement (Jan. 19, 2012), attached as Exhibit A.

week extension (Dkt. 31), to which the Government consented, for opposing the Government's MTS, and a one-week extension, particularly to accommodate the holidays (Dkt. 58), to which the Government also consented, to comply with the Court's order compelling an answer to the special interrogatories. Those modest extensions aside, Claimants' submissions seek only to vindicate their substantive rights and to insist upon fair procedure that is indispensable thereto. The Government, by contrast, delayed *more than two years* before first seeking civil forfeiture; it then delayed *some six months* before identifying the right assets (which Claimants agreed could happen by consent and without further disruption of the schedule); it also delayed *some two months* before moving to strike the claim of Mona Dotcom, even after indicating that motion would be forthcoming; and it has opted to further "delay [its] fuller response to Claimants' motion to dismiss until specifically instructed by the Court." Dkt. 48-2 at 19.[2] Lest there be any doubt, Claimants have long stood eager to litigate the merits of their claims through to final judgment and, if necessary, any appeal. If it is now unrealistic to expect that can occur before April 2015, then the Government has only itself to fault. The Government should not be pointing the finger of blame at Claimants or asking more of the Court. And the Government certainly should not count on its invocation of "fugitive disentitlement" to bail it out from its own delay by yielding a near-instantaneous forfeiture of tens of millions of dollars that are located abroad, have no ostensible connection to the U.S., and would allegedly be traceable to

[2] Those familiar with the criminal case pending here should have even greater difficulty understanding the Government's newfound concern with delay. In that case, Defendants Kim Dotcom and Megupload have made every effort to move the case forward consistent with their established rights and basic fairness, only to be opposed by the Government, which has steadfastly fought against, *e.g.*, preservation of probative evidence on servers; representation by counsel of choice; release of funds adequate to enable defense; service consistent with the letter of Rule 4; negotiated terms on which competent defense and fair, prompt trial might proceed; and even the return of files to innocent users. What is more, the Government's outright misconduct abroad has been faulted repeatedly by courts in New Zealand and Hong Kong, *see, e.g.* Dkt. 46-13, resulting in what it now complains of as "delays" in those proceedings abroad.

crimes only through theories that are (at best) novel, untested, and grist for numerous, complex, intensive factual and legal disputes.

Finally, the Government throughout its brief unfairly dubs the Claimants' "fugitives" based solely on their status abroad. Quoting a different case involving different circumstances, the Government submits that, "Surely, the prospect of a weak federal case would provide [Claimants] with all the more incentive to return to the United States to clear [their] name[s] and vindicate [their] purported property rights as to the in rem defendants." Dkt. 48-2 at 6 (quoting *United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-000338*, 617 F. Supp. 2d 103, 128–130 (E.D.N.Y. 2007)). Such reasoning is, with all due respect, the opposite of sure. If indicted by a foreign government for alleged crimes abroad, reasonable defendants cannot logically or fairly be expected to voluntarily uproot themselves, leaving behind, *e.g.*, their families, their homes, their vocations, their assets, in order to answer before a foreign court, no matter how "weak" the underlying case against them might be. And they certainly ought not be expected to do so in a case, like this case, where the Government has shot down every attempt to enable prompt, fair adjudication of their guilt or innocence—with the Government seeking, *e.g.*, to disqualify counsel of choice; to let critical evidence spoliate;[3] to forbid release of any funds for defense (even for corporate entities that will otherwise be left without any defense); and to reserve rights to detain individual defendants while withholding trial indefinitely, very likely for years, so long as any co-defendant remains engaged in extradition proceedings. In such circumstances, even the most law-abiding, innocent defendant has good reason to remain at home while the legal process unfolds. This makes it all the more imperative that the Government prove that these Claimants are where they are specifically "in

[3] *See*, *e.g. USA v. Kim Dotcom, et al.*, Crim. No. 1:12-cr-3 (Dkt. 176) (July 3, 2013) (detailing destruction of evidence on Leaseweb servers)

order to avoid criminal prosecution," in the sense that they would otherwise be here and, furthermore, that the circumstances commend application of fugitive disentitlement per the Court's discretion. 28 U.S.C. § 2466. Because the Government has not come close to offering such proof, there is no record at this point that might support application of fugitive disentitlement consistent with the statute, much less consistent with the U.S. Constitution and sound exercise of judicial discretion.

Below, we focus on bases for dismissal that should be considered in all events.

ARGUMENT

I. ABSENT STAY, CLAIMANTS' MOTION TO DISMISS MUST BE DECIDED.

The Government's motion remains out of place and overtaken by multiple issues raised by Claimant's Motion to Dismiss ("MTD"). *See* Dkt. 20 at 6-14, Dkt. 45 at 5-11.

A. Claimants' Motion To Dismiss Identifies Antecedent Questions Of Subject-Matter Jurisdiction.

As the Claimants noted, "subject matter jurisdiction must, when questioned, be decided before any other matter." Dkt. 45 at 5-6; *see United States v. $6,976,934.65 Plus Interest*, 486 F. Supp. 2d 37, 39 (D.D.C. 2007).[4] Although the Government argues that this Court *has* subject matter jurisdiction under 28 U.S.C. § 1355 (*see* Dkt. 48-2 at 14),[5] that would require "a violation of an Act of Congress." *United States v. $6,190.00 in U.S. Currency*, 581 F.3d 881, 885 (9th Cir. 2009); *see also* 28 U.S.C. § 1355(a). As the Claimants previously submitted (Dkt. 20 at 6-14), the Government's complaint does not colorably implicate any such law.

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[4] The Government appears to acknowledge the primacy of motions questioning subject matter jurisdiction. *See* Dkt. 48-2 at 8 ("fugitive disentitlement doctrine . . . should be addressed before the Court considers any other *non-subject matter jurisdiction motion*") (emphasis added).

[5] The Government's reliance on 28 U.S.C. § 1345 fails, as that statute is limited to claims not otherwise covered by jurisdictional statutes. *See* 28 U.S.C. § 1345 ("Except as otherwise provided by Act of Congress . . ."). Here, Congress has, just as the Government notes, explicitly delineated the scope of forfeiture jurisdiction under 28 U.S.C. § 1355.

1. The Government Facially Lacks Statutory Basis For Its Claims Of Secondary Criminal Copyright Infringement.

Claimants have demonstrated that there is no such crime as secondary criminal copyright infringement (Dkt. 20 at 11). The Government does not try to argue otherwise, instead disavowing reliance upon any theory of secondary infringement (Dkt. 48-2 at 24). But its disavowal rings hollow: either the Government has indeed set out to plead the nonexistent crime of secondary copyright infringement, or else it has pleaded allegations that do not belong and that cannot make out a case of actual, direct criminal copyright infringement under U.S. law.

The Government's complaint is replete with allegations of secondary copyright infringement. *See, e.g.* Dkt. 1 at ¶ 20 ("aspect[s] of the MegaSites w[ere] carefully designed to encourage . . . wide-scale copyright infringement,"); *see also,* Dkt. 1 at ¶¶ 3, 8, 9, 23, 92 (all alleging either "encouragement" or "facilitation" of infringement). Overarching, generic "encouragement" or "facilitation" via a particular technology would, if anything, fall under the heading of secondary copyright infringement, as hitherto distinct from direct infringement. *Compare Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) ("One infringes contributorily by intentionally inducing or encouraging direct infringement,"); *with Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) ("The court is not persuaded by plaintiffs' argument that Netcom is directly liable for the copies that are made and stored on its computer."); *see also CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th Cir. 2004) (adopting the *Netcom* court's reasoning).

If the Government is *not* alleging secondary criminal copyright infringement, then all of its allegations about the general nature of Megaupload's business methods and technology have no place and should be struck. *See Stockart.com, LLC v. Caraustar Custom Packaging Grp., Inc.*, 240 F.R.D. 195, 199 (D. Md. 2006) (striking irrelevant paragraphs from copyright

infringement complaint). Those allegations only obscure the Government's conspicuous failure to allege how, when, where, and by whom sundry, specified works were *directly* infringed *with requisite criminal intent* by those *actually committing the infringement*. The "specific instances of Claimants directly infringing copyrighted works" cited by the Government similarly fall short. Dkt. 48-2 at 25-25 (citing Sup. Ind. ¶¶ 73(u), 73(gg), 73(kk), 73(ll), 73(nn), 73(bbb), 73(eee), and 73(fff), identifying nine works allegedly infringed, without specifying whether the alleged infringers had or had not in fact purchased the work or sponsored any unauthorized downloading). Even assuming, *arguendo*, those allegations are well pleaded, nine isolated instances would never entitle the U.S. Government to claim tens of millions of dollars of assets.[6]

Courts have previously rejected theories of civil copyright liability "that would hold the entire Internet liable for activities that cannot reasonably be deterred." *Netcom*, 907 F. Supp. at 1372; *see also LoopNet, Inc.*, 373 F.3d at 548 (citing *Netcom*). Yet the Government's case against Megaupload poses precisely that specter, and, what is worse, adds criminal fangs. By the Government's theory, if Megaupload knew 90% of its most popular files were infringing copyrights, then Megaupload is for that reason guilty of *criminal* copyright infringement. *See* Dkt. 48-2 at 21. Yet, the Second Circuit found similar facts insufficient for *civil* liability under the DMCA without something more. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 33 (2d Cir. 2012) ("[S]urveys [] estimated that 75–80% of all YouTube streams contained

[6] Nor can alleged reproduction of YouTube videos on Megaupload supply a case for direct criminal infringement. See Dkt. 48-2 at 22-23. The Government does not allege reproduction of any specific video, nor does it allege the authorization status thereof, even though YouTube's terms of service explicitly permitted some public copying. *See* Kincaid, J. "YouTube Kills Our Video Download Tool", Tech Crunch, Feb. 13, 2009; attached as Exhibit B (Quoting pre-2010 YouTube terms of service, "You shall not copy or download any User Submission *unless you see a 'download' or similar link displayed by YouTube* on the YouTube Website for that User Submission.") (emphasis added). Failure to allege that specific works that were not freely available justifies dismissal for lack of subject matter jurisdiction. *See Country Rd. Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003).

[infringing] material."). Because the Government recognizes no limiting principle, it is imperative that this Court impose one—as it can do only by reaching the merits.

The same defect disables the Government's theory of money laundering, as alleged in the superseding indictment and incorporated by reference in the complaint, because it is likewise premised upon secondary copyright liability. *See* Sup. Ind. ¶ 80 ("[Megaupload] intended to *promote* the carrying on of criminal copyright infringement") (emphasis added); *see also* Sup. Ind. ¶¶ 81, 90. If the Government now argues a theory of direct infringement, there is no explanation of how any direct infringement created "proceeds" at all, as required by 18 U.S.C. § 1956, much less monetary transactions "in excess of $10,000," or specific monetary transactions that took place "in the United States," as required by 18 U.S.C. § 1957.[7]

2. Allegations Of Aiding And Abetting Copyright Cannot Justify Civil Forfeiture.

The Government argues at length that "aiding and abetting" liability under 18 U.S.C. § 2 can form the basis for criminal copyright convictions. Dkt. 48-2 at 25-28. Even assuming that 18 U.S.C. § 2 may form the basis for criminal copyright liability, however, that cannot carry the instant action; the question is whether 18 U.S.C. § 2 can be the basis for *civil forfeiture*, and the answer to that is no. *Cf. $6,190.00 in U.S. Currency*, 581 F.3d at 885 (jurisdiction arises under § 1355 for violations of only of those statutes explicitly enumerated in 18 U.S.C. § 981).

The Government's reliance on 18 U.S.C. §§ 981, 985, and 2323 is misplaced. All told, those statutes authorize forfeiture for violations of over 60 other federal laws—but 18 U.S.C. § 2 is *nowhere* among them. Exclusion of 18 U.S.C. § 2 from such an extensive list indicates that

[7] The Government notes that Kim Dotcom opened an account in the name of "Kim Tim Jim Vestor," and posits that use of an alias would be consistent with "concealment" money laundering. Dkt. 48-2 at 32 n. 19. Because Kim Dotcom's legal name was in fact Kim Tim Jim Vestor prior to 2010, *see* Kim Dotcom's interrogatory response, attached as Exhibit C, the Government has alleged no concealment whatsoever.

Congress did not intend to allow forfeiture under 18 U.S.C. § 2.[8] *See Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers*, 414 U.S. 453, 458 (1974). The Supreme Court has similarly instructed "that a statute should be interpreted so as not to render one part inoperative." *S. Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n. 22 (1986). Here, 18 U.S.C. § 981 *explicitly* allows for forfeiture of "proceeds traceable to . . . a conspiracy to commit [enumerated] offense[s]." 18 U.S.C. § 981(a)(1)(C). The Government's preferred interpretation would render meaningless that inclusion of "a conspiracy to commit," for the criminal code includes a general conspiracy statute, 18 U.S.C. § 371, no less than it does a general aiding-and-abetting statute. The more sensible construction is that Congress did not intend for the general inchoate statutes, 18 U.S.C. §§ 2, 371, to form the basis for civil forfeiture unless otherwise specified, such that the inclusion of the "conspiracy" language in 18 U.S.C. § 981 and omission of any corresponding reference to 18 U.S.C. § 2 are each afforded proper meaning.

Finally, the Government's failure to adequately allege direct and willful infringement, let alone that Claimants set out specifically to assist such infringement, would be fatal in any event.

3. The Government Has Failed To Allege Copyright Infringement Within The Territorial Bounds Of The United States.

The Government cites a Federal Circuit decision in a civil case, which did not examine the distinct jurisdictional grant under forfeiture statutes, for the proposition that copyright extraterritoriality has "nothing to do with subject matter jurisdiction." Dkt. 48-2 at 14. But the Fourth Circuit has specifically framed the territorial limits of the Copyright Act as a "jurisdictional" feature. *See Nintendo of Am., Inc. v. Aeropower Co.*, 34 F.3d 246, 250 n. 5 (4th Cir. 1994) ("[A]n ultimately broad *jurisdictional* grant in the Lanham Act [] is not found in the

[8] The Government appeals to "plain meaning" of 18 U.S.C. § 2 as supplying basis for forfeiture. Dkt. 48-2 at 25. Because the word "forfeiture" appears nowhere in 18 U.S.C. § 2, however, there is no plain meaning to help its case.

Copyright Act. . . [thus] the Copyright Act is generally considered to have no extraterritorial application.") (emphasis added). Nor is the Fourth Circuit alone in this regard. *See, e.g., Palmer v. Braun*, 376 F.3d 1254, 1258 (11th Cir. 2004).

That leaves the Government claiming that the "predicate act doctrine" rescues its complaint. *See* Dkt. 48-2 at 20. Claimants respectfully question whether that doctrine could ever apply in the criminal context; regardless, the Government has not satisfied it in any event: the predicate act doctrine requires "ple[ading] that 'some act of infringement occurred in the United States[.]" Dkt. 48-2 at 21. The Government points to use of the Cogent servers, Dkt. 48-2 at 21, and duplication of YouTube videos, Dkt. 48-2 at 23, as acts of infringement that it has adequately pleaded as taking place within the U.S. These allegations, however, do not involve any direct infringement that might be criminal, and also are bereft of any specifics about where, or even when, the infringement occurred. Dkt. 20 at 7-10.[9]

4. Failure To Plead Traceability Of The Assets Is Glaring.

Having failed to allege so much as a single transaction in which Megaupload received illicit funds, the Government now asserts that, "[w]here a business is pervaded by fraud or criminality, all of its revenue may be deemed to be proceeds of the criminality." Dkt. 48-2 at 30. For this, the Government cites 18 U.S.C. § 981(a)(2)(A), and two cases interpreting that provision: *United States v. Farkas* and *United States v. $72,050.00 in U.S. Currency*. But *that* statute applies *only* to "cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes," 18 U.S.C. § 981(a)(2)(A), and the Government

[9] The Government adds nothing of substance by cryptically referencing "specific examples of individuals in the United States that were repeatedly paid 'rewards payments.'" Dkt. 48-2 at 22. Not only does this fail to allege direct infringement (as opposed to secondary copyright infringement) that might amount to an actual crime, it also says nothing about who committed any infringement, when, how, with what intent, as to what work, or *where* it may have occurred. *See* Dkt. 48-2 at 24.

cannot seriously maintain that cloud storage services are either inherently illegal or unlawful. *See United States v. Mahaffy*, 693 F.3d 113, 137 (2d Cir. 2012) (holding § 981(a)(2)(A) only "encompasses *inherently* unlawful activities, such as robbery") (emphasis added).[10]

Where, as here, the Government seeks forfeiture resulting from a service that is not *inherently* unlawful, forfeiture is limited to "the amount of money acquired through the illegal transactions resulting in the forfeiture[.]" 18 U.S.C. § 981(a)(2)(B). Accordingly, the Government "must demonstrate the property it has seized is traceable to conduct proscribed by [statute]." *United States v. Contents in Account No. 059-644190-69*, 253 F. Supp. 2d 789, 794 (D. Vt. 2003); *see also United States v. $1,399,313.74 in U.S. Currency*, 591 F. Supp. 2d 365, 369 (S.D.N.Y. 2008) (citing *United States v. Mondragon*, 313 F.3d 862, 865 (4th Cir. 2002)). Because the Government so clearly has not met that operative standard as consistently applied throughout the case law (Dkt. 20 at 26-27), it can only run from it.

B. The Absence Of Jurisdiction Over The Assets Amounts To A Constitutional Defect.

By the Government's account, the Court's *in rem* jurisdiction is not subject to constitutional constraints, but is solely a creature of statute. *See* Dkt. 48-2 at 16 ("The test for subject matter and in rem jurisdiction over forfeiture cases, however, is governed by 28 U.S.C. § 1355 —not a 'minimum contacts' test as Claimants [] suggest."). The Fourth Circuit, however, holds the opposite, specifically applying the "minimum contacts" test, as required by the Due Process Clause, to *in rem* jurisdiction. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 224 (4th Cir. 2002). The Government simply ignores that governing precedent. And the Government of course errs by suggesting that a congressional statute, 28 U.S.C. § 1355,

[10] Even if 18 U.S.C. § 981(a)(2)(A) applied, it would not support the Government's position. As the Seventh Circuit has held, "[if] a business has both lawful and unlawful aspects, only the income attributable to the unlawful activities is forfeitable." *United States v. Hodge*, 558 F.3d 630, 635 (7th Cir. 2009) (applying § 981(a)(2)(A)).

might trump a bedrock constitutional constraint. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Notably, the Government offers not so much as a colorable argument that Claimants' assets are traceable to or otherwise connected to this jurisdiction (Dkt. 45 at 8-10).

Beyond falling short on minimum contacts, the Government is unable to establish redressability for purposes of Article III, which requires "a *likelihood* that the requested relief will redress the alleged injury." *Id*. at 103-04 (emphasis added); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also R.M.S. Titanic*, 171 F.3d at 964. Where a non-party actor may "voluntarily elect" to arrive at a contrary result, as "it is legally entitled to do," "the alleged injury cannot be redressed." *Marshall v. Meadows*, 105 F.3d 904, 906-07 (4th Cir. 1997).[11]

The most the Government claims about likelihood of redress is that there is "reason [for this Court] to believe that some foreign courts are likely to honor its forfeiture order." Doc. 48-2 at 17. This is not enough. The Government has not begun to establish *likelihood* that a *specific* foreign court will honor *civil* (*i.e*., non-criminal), forfeiture of *specific* assets as required by Article III.[12] Most important, the Government has not even attempted to deny our point (Dkt. 45 at 8-10) that relying upon fugitive disentitlement to order civil forfeiture in this case would stand to *frustrate* compliance by New Zealand and Hong Kong courts—thus *affirmatively defeating* redressability. It follows that the Government's motion cannot possibly obviate the Court's

[11] The Fourth Circuit specifically holds that actual or constructive control over the *res* at issue in an *in rem* proceeding is essential to redressability as required by Article III. *See R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 964 (4th Cir. 1999).

[12] Instead, the Government attempts to gloss over what amounts to a jurisdictional gap by saying, in essence, "no one can ever know" about redressability, *see* Dkt. 48-2 at 13 ("Courts . . . can never be sure whether foreign nations will honor a particular forfeiture order"), and lamenting that "the restrained assets will be lost" absent further action by this Court. *Id*. But the cases the Government cites in support of its "who knows?" account of redressability come from *outside* the Fourth Circuit—and *even those* require the very "minimum contacts" that the Government claims it need not demonstrate. Moreover, they focus only on statutory jurisdiction under section 1355, without analyzing Article III's requirement of redressability.

consideration of whether it has jurisdiction over the assets. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) ("Article III jurisdiction is always an antecedent question," involving "constitutional elements of jurisdiction").

C. Granting The Government's Motion To Strike Will Not Conserve Judicial Resources So Long As Mona Dotcom's Claim Persists.

As the Supreme Court has explained, the goal of the fugitive disentitlement doctrine is to promote the "efficient, dignified operation of the courts[.]" *Degen*, 517 U.S. at 824; *see also* 28 U.S.C. 2466. That goal will not be accomplished so long as the Court must confront the same merits questions as posed by Mona Dotcom. Dkt. 48-2 at 18. Thus, the Government has no principled reason why the Court should use fugitive disentitlement to maximize the Government's recovery even where the doctrine would do nothing to minimize the judicial resources expended assessing the underlying case for forfeiture.

To be sure, the Government has just moved to strike the claims of Mona Dotcom (Dkt. 60), on the supposed ground that she lacks threshold standing. That motion will be the subject of a separate opposition (*see* Dkt. 61-63). Importantly, however, the Government argues that "Mona Dotcom has failed . . . to make a showing that these assets are not tainted[.]" Dkt. 60 at 24-25. Whether assets are tainted is of course a merits question, and the Government conserves no judicial resources by pressing such questions under the auspices of threshold standing.

II. FUGITIVE DISENTITLEMENT DOES NOT OBTAIN ON THIS RECORD, AT THIS STAGE.

In closing, we limit ourselves to brief observations about the Government's reply on fugitive disentitlement (Dkt. 48-2), with the understanding that hearing on January 16 will afford opportunity to expand in response to the Court's inquiries.

First, as to the warrant for discovery, it bears emphasizing that the Government is relying upon materials outside the pleadings to make its case for fugitive disentitlement, thereby

necessitating that Claimants be afforded like opportunity. *See United States v. $6,976,934.65 Plus Interest*, 478 F. Supp. 2d 30, 46 (D.D.C. 2007). Not only has the Government here invoked a variety of materials outside the pleadings,[13] but it has served interrogatories for the express sake of building a record for fugitive disentitlement. Dkt. 36 at 5. Claimants deserve a corresponding opportunity to develop their record, complete with supporting materials from third parties, including those who can, *e.g.*, corroborate Claimants' intent; confirm separate "interest in the funds" that implicate due process, *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, 576 (6th Cir. 1982); and attest to the Government's overreach and suspect motivations.

On this last point, the Court has before it uncontested evidence that the MPAA: (1) hired a former DOJ attorney to lobby the DOJ; (2) devoted a large budget to lobbying the DOJ for years; and (3) succeeded, according to press reports, in prompting indictment of Megaupload. *See* Dkt. 45 at 16-17. The Government denies none of those facts but dismisses the resulting concern as "unfounded conspiracy theories[.]" Dkt. 48-2 at 7. Google, for one, perceives foundation for such "conspiracy theories," having just recently sued Mississippi's Attorney General and alleged, *e.g.*, that the MPAA "launched a 'multi-pronged' campaign against Google, including *encouraging state attorneys general* to investigate Google."[14] The Mississippi Attorney General likewise seems to perceive foundation for such "conspiracy theorizing," as

[13] *See, e.g.*, Dkt. 39-17 (affidavit submitted in New Zealand proceeding with attached pictures); Dkt. 39-18 (affidavit submitted as testimony in foreign proceeding); Dkt. 48-2 at 7 n. 4 (referencing hearings in New Zealand); Dkt. 39-07 (news article); Dkt. 39-08 (same); Dkt. 39-09 (same); Dkt. 39-10 (same); Dkt. 39-11 (articles of incorporation); Dkt. 39-12 (same); Dkt. 39-13 (same); Dkt. 39-14 (same) Dkt. 39-15(same).

[14] *Google, Inc.* v. Jim Hood, 3:14-cv-981, Dkt. 3 at 11 (Dec. 19, 2014); *see* Exhibit D.

reflected in his December 23 press statement welcoming "additional time to attempt to reach an amicable resolution" with Google.[15]

Finally, the Government simply elides the constitutional problems raised by Claimants. The Government has no meaningful answer to all of the jurisprudence and authority Claimants have cited (Doc. 45 at 23-29) that point to specific rights under the Fifth, Seventh, and Eighth Amendments,[16] as well as specific MLAT provisions operative under the Supremacy Clause,[17] that would be violated were forfeiture ordered based on fugitive disentitlement. Notably, unlike in other cases applying fugitive disentitlement, the Government in this case identifies neither affirmative evasion by Claimants subsequent to their indictment nor any prejudice it faces from their absence. There are no circumstances and no legitimate interest to justify the draconian step of ruling Claimants' disentitled to contest forfeiture of their assets, as located abroad with them and under the control of foreign courts they are right now before. We respectfully submit that the Court cannot, and certainly should not, take that step by granting the Government's MTS.

CONCLUSION

For the foregoing reasons, Claimant respectfully urge the Court to consider and grant the Claimants' Motion to Dismiss, or, alternatively, to stay these proceedings.

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[15] Tsukayama, H. "Judge calls a time-out in fight between Google and Mississippi attorney general," Wash. Post, Dec. 23, 2014; attached as Exhibit E

[16] Although the Government argues that "Eighth Amendment challenges must be raised post-trial," Doc. 48-2 at 10, there would be no opportunity for that in the wake of a disentitlement ruling. Nor would postponing the analysis avoid the constitutional problem posed by an excessive forfeiture that is ordered without any regard for the merits.

[17] While asserting that there are "no treaty provisions" that apply to Claimants (Dkt. 48-2 at 12), the Government ignores the specific treaty provisions in both UNCTOC and the German MLAT we have identified as applicable. *See* Dkt. 45 at 27-29. Although the Government also warns that "Claimants would have this Court conclude that Congress intended to moot [disentitlement] doctrine as to every mutual legal assistance treaty ratified since CAFRA," it cites no other treaty that was ratified post-CAFRA and contains the on-point protection found in the German MLAT.

Dated: January 7, 2015

Respectfully submitted,

/s/ Craig C. Reilly

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[18] ***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 January 7, 2015, the foregoing was filed and served electronically by the Court's CM/ECF system upon all registered users, including:

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