

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: November 15, 2006 Decided: August 2, 2007)

5 Docket No. 05-6887-cv

6 -----
7 DSI ASSOCIATES LLC,

8 Movant-Appellant,

9 - v -

10 UNITED STATES OF AMERICA,

11 Plaintiff-Appellee,

12 ALLEGHENY ENERGY, INC., ALLEGHENY ENERGY SUPPLY COMPANY, LLC,
13 MERRILL LYNCH & CO., and MERRILL LYNCH CAPITAL SERVICES, INC.,

14 Interested-Party-Appellees.

15 DANIEL L. GORDON,

16 Defendant.

17 -----
18 Before: McLAUGHLIN and SACK, Circuit Judges, and RAKOFF,
19 District Judge*.

20 Appeal from an order of the United States District
21 Court for the Southern District of New York (Gerard E. Lynch,
22 Judge) denying a motion to intervene brought by movant-appellant
23 DSI Associates under Federal Rule of Civil Procedure 24 to

* The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

1 contest a portion of the forfeiture order that was included in
2 the defendant's sentence.

3 Affirmed.

4 DAVID J. MONZ, Updike, Kelly & Spellacy,
5 P.C. (Barbara A. Frederick, of counsel)
6 Hartford, CT, for Movant-Appellant.

7 BARBARA A. WARD, Assistant United States
8 Attorney for the Southern District of
9 New York (Michael J. Garcia, United
10 States Attorney, and Katherine Polk
11 Failla, Assistant United States
12 Attorney, of counsel), New York, NY, for
13 Plaintiff-Appellee.

14 JOHN GUELI, Shearman & Sterling LLP
15 (Stuart J. Baskin and Ladan F. Stewart,
16 of counsel), New York, NY, for
17 Interested-Party-Appellees Merrill Lynch
18 & Co. and Merrill Lynch Capital
19 Services, Inc.

20 SACK, Circuit Judge:

21 To resolve this appeal, we must determine whether a
22 general creditor may intervene in a criminal forfeiture
23 proceeding to assert its alleged rights to property subject to a
24 criminal order of forfeiture or challenge the underlying validity
25 of the forfeiture order, and if so, how.

26 **BACKGROUND**

27 On December 19, 2003, the defendant, Daniel L. Gordon,
28 pled guilty in the United States District Court for the Southern
29 District of New York (Gerard E. Lynch, Judge) to three counts of
30 an information (the "Information") charging him with undertaking
31 an elaborate scheme to defraud his employer, Merrill Lynch
32 Capital Services, Inc., and Merrill Lynch & Co. (collectively

1 "Merrill Lynch") of many millions of dollars. Count One charged
2 him with wire fraud in violation of 18 U.S.C. § 1343. Count Two
3 charged him with laundering the proceeds of the wire fraud in
4 violation of 18 U.S.C. § 1956(a)(1)(B)(I). And Count Three
5 charged him with conspiring to falsify Merrill Lynch's books and
6 records in connection with the sale of its energy trading unit,
7 Global Energy Markets ("GEM"), in violation of 18 U.S.C. § 371.¹
8 The Information also included "forfeiture allegations" relating
9 to the fraudulently obtained money.

10 According to the Information, in or before 2000,
11 Merrill Lynch entered into a \$500 million long-term energy call
12 agreement with the Williams Energy Marketing and Trading Company.
13 Merrill Lynch sought insurance to hedge against that obligation.
14 In response, Gordon used an entity he had created and operated,
15 Falcon Energy Holdings, S.A. ("Falcon"), to negotiate a
16 fraudulent energy insurance contract with Merrill Lynch. On or
17 about August 25, 2000, Merrill Lynch entered into the purported
18 11-year energy insurance agreement with Falcon, transferring
19 approximately \$43 million, its only payment pursuant to that
20 agreement, to Falcon's bank account, which Gordon had opened for
21 it in Switzerland.²

¹ Gordon had created GEM for Merrill Lynch in or about 1998, and thereafter had acted as its president.

² According to the Information, on or about January 8, 2001, Allegheny Energy Services Corporation ("AES") acquired GEM from Merrill Lynch and formed a new entity called Allegheny Energy Supply Company, LLP ("Allegheny"). Gordon served as the president of Allegheny from the company's inception until about

1 At about the same time, Gordon incorporated Ostrich
2 Capital Partners, Inc. ("Ostrich"), in the Marshall Islands. On
3 or about September 21, 2000, Gordon transferred approximately \$33
4 million from the Falcon account in Switzerland to an Ostrich
5 account at the same bank. Gordon subsequently made several
6 additional transfers from the Falcon account to accounts in the
7 United States, including a total of \$30 million to a bank account
8 in New York in the name of Kings Holdings, LLC ("Kings
9 Holdings"), a Delaware corporation, all the outstanding shares of
10 which Gordon owned. These transfers underlie the money
11 laundering charge against Gordon.

12 On or about November 14, 2000, Gordon used funds from
13 Kings Holdings' New York bank account to purchase from the
14 appellant DSI Associates LLC ("DSI") seventy percent of the
15 outstanding shares of Daticon, Inc. ("Daticon"), a private
16 document-management services company located in Connecticut.
17 Kings Holdings acquired 7,923 of the 11,318 outstanding shares of
18 Daticon from DSI for nearly \$23 million in cash and an unsecured
19 promissory note of \$4 million. Gordon became chairman of
20 Daticon's board of directors and received a salary and other
21 income from the company from sometime in 2000 to sometime in
22 2002. DSI continued to hold thirty percent of Daticon's
23 outstanding shares.

24 The Criminal Investigation and the Promissory Note

September 2002, shortly after Gordon terminated the Falcon
contract.

1 After learning of Gordon's scheme, representatives of
2 the United States Attorney's office in Manhattan negotiated with
3 representatives of DSI with a view toward finding a neutral third
4 party to purchase all the shares of Daticon -- those held by
5 Kings Holdings and those held by DSI. The government intended to
6 seize Kings Holdings' portion of the proceeds in a forfeiture
7 proceeding as part of its planned criminal prosecution of Gordon.

8 On July 18, 2003, while negotiations with the
9 government were proceeding, DSI filed suit against Kings Holdings
10 and Gordon in Connecticut state court. DSI alleged that the two
11 had defaulted on the unsecured promissory note that was a part of
12 the consideration they paid to DSI for the Daticon stock. At the
13 same time, DSI sought and received an ex parte prejudgment
14 attachment on \$5 million worth of Kings Holdings' assets.

15 On August 6, 2003, DSI and Kings Holdings settled their
16 dispute and terminated the Connecticut proceedings. Under the
17 settlement, the prejudgment attachment was vacated and in its
18 place Kings Holdings executed a non-negotiable, unsecured demand
19 promissory note for \$2.5 million (the "Settlement Note" or the
20 "Note"). The settlement agreement provided that the Settlement
21 Note could be enforced by a claim against the proceeds of a sale
22 of Daticon, except in the event that the government placed any
23 such proceeds in an escrow account or initiated a forfeiture
24 proceeding against Kings Holdings. The parties had received
25 notice from the government, however, that it intended to initiate

1 forfeiture proceedings that would include any Daticon sale
2 proceeds. They therefore agreed that if DSI attempted to collect
3 on the Settlement Note from the proceeds of the sale of Daticon
4 after such a proceeding had been initiated, it would do so within
5 the "context of" the criminal forfeiture proceeding unless the
6 United States Attorney for the Southern District of New York
7 "consented to any other means of collection." Letter Agreement
8 dated Aug. 6, 2003, at 1.

9 In September 2003, pursuant to an arrangement with the
10 government, Kings Holdings and DSI sold their shares of Daticon
11 to a neutral third party³ with the active monitoring and approval
12 of the government. Approximately \$22.9 million of the sale
13 proceeds were immediately placed in a government account pending
14 forfeiture proceedings. Approximately \$6.5 million of the
15 proceeds were deposited in an escrow account (the "Escrow
16 Account"), to be held there until the end of the following year,
17 to provide for post-acquisition contingencies specified in the
18 purchase agreement, which primarily related to the anonymous
19 third-party purchaser. The remaining \$6 million was transferred
20 into a separate escrow account (the "Separate Escrow Account")
21 until December 26, 2003, to be available in the event that post-
22 acquisition challenges arose relating to Gordon's ownership and
23 control of Kings Holdings. If no challenges were made by that

³ The third party is not, to our knowledge, identified in the material submitted to us on appeal.

1 date, the money would be transferred from the Separate Escrow
2 Account to a government account awaiting forfeiture.

3 On October 15, 2003, after making a demand for payment
4 in full of the Settlement Note, DSI filed another complaint in
5 Connecticut state court based on the Note. DSI applied to the
6 court for a second ex parte prejudgment attachment order against
7 the sale proceeds that had been put into escrow funds in the
8 amount of \$2.5 million, plus interest. That day, the Connecticut
9 court entered a prejudgment attachment for \$2.5 million against
10 the Separate Escrow Account.⁴ On December 26, 2003, when no
11 claims other than those embodied in the court's attachment order
12 on the \$6 million Separate Escrow Account funds had been made,
13 that amount less the \$2.5 million that remained the subject of
14 the prejudgment attachment was paid into the government account.
15 The \$2.5 million apparently remains in the Separate Escrow
16 Account.

17 Gordon's Guilty Plea, Forfeiture,
18 and Ancillary Proceedings

19 Meanwhile, on December 19, 2003, Gordon pled guilty to
20 all three charges contained in the Information. Pursuant to a
21 written plea agreement, he agreed to forfeit the \$43 million he

⁴ Although the record reveals that the prejudgment attachment order was in the amount of \$2.75 million, the district court and the government treated the attachment as one for \$2.5 million. See Preliminary Order of Forfeiture, dated Feb. 9, 2004, at *4, Final Order of Forfeiture, dated Oct. 24, 2005, at *4. Because \$2.5 million remains in the Separate Escrow Account and no party challenges the propriety of that amount, we, too, assume that \$2.5 million is the proper amount subject to the state court attachment.

1 initially received pursuant to the fraudulent scheme, as well as
2 any interest in property derived from proceeds traceable to the
3 wire fraud offense or involved in the money laundering offense.
4 On February 20, 2004, as part of Gordon's sentence, the district
5 court entered a Preliminary Order of Forfeiture requiring the
6 defendant to forfeit \$43 million and any right, title, and
7 interest in specific property described in the Preliminary Order.

8 Title 21 U.S.C. §§ 853(n)(1) and (2) set forth the
9 procedure for asserting, in an ancillary proceeding, a third-
10 party claim with respect to property subject to a criminal order
11 of forfeiture:

12 (1) Following the entry of an order of
13 forfeiture under this section, the United
14 States shall publish notice of the order and
15 of its intent to dispose of the property in
16 such manner as the Attorney General may
17 direct. The Government may also, to the
18 extent practicable, provide direct written
19 notice to any person known to have alleged an
20 interest in the property that is the subject
21 of the order of forfeiture as a substitute
22 for published notice as to those persons so
23 notified.

24 (2) Any person, other than the defendant,
25 asserting a legal interest in property which
26 has been ordered forfeited to the United
27 States pursuant to this section may, within
28 thirty days of the final publication of
29 notice or his receipt of notice under
30 paragraph (1), whichever is earlier, petition
31 the court for a hearing to adjudicate the
32 validity of his alleged interest in the
33 property. . . .

34 21 U.S.C. § 853(n)(1), (2).

1 Pursuant to section 853(n) (1), the government sent
2 notice to counsel for Merrill Lynch, Allegheny, and DSI, as
3 "person[s] known to have alleged an interest in the property that
4 is the order of forfeiture." 21 U.S.C. § 853(n) (1). Under the
5 statute, the recipients of the notice had thirty days in which to
6 "petition the court for a hearing to adjudicate the validity of
7 his alleged interest in the property." Id. § 853(n) (2).

8 The substantive portion of section 853(n) provides:

9 (6) If, after the hearing, the court
10 determines that the petitioner has
11 established by a preponderance of the
12 evidence that--

13 (A) the petitioner has a legal right,
14 title, or interest in the property, and
15 such right, title, or interest renders
16 the order of forfeiture invalid in whole
17 or in part because the right, title, or
18 interest was vested in the petitioner
19 rather than the defendant or was
20 superior to any right, title, or
21 interest of the defendant at the time of
22 the commission of the acts which gave
23 rise to the forfeiture of the property
24 under this section; or

25 (B) the petitioner is a bona fide
26 purchaser for value of the right, title,
27 or interest in the property and was at
28 the time of purchase reasonably without
29 cause to believe that the property was
30 subject to forfeiture under this
31 section;

32 the court shall amend the order of forfeiture
33 in accordance with its determination.

34 (7) Following the court's disposition of all
35 petitions filed under this subsection, or if
36 no such petitions are filed following the
37 expiration of the period provided in
38 paragraph (2) for the filing of such
39 petitions, the United States shall have clear
40 title to property that is the subject of the
41 order of forfeiture and may warrant good

1 title to any subsequent purchaser or
2 transferee.

3 Id. § 853(n) (6), (7).

4 Merrill Lynch and Allegheny filed timely petitions in
5 response to the section 853(n) notice, asserting a prior superior
6 interest in some of the forfeited property. See id.
7 § 853(n) (6) (A). On June 10, 2005, the district court endorsed a
8 Stipulation and Order of Settlement that provided for Merrill
9 Lynch and Allegheny to split the final amount forfeited -- except
10 for \$10 million to be kept by the government⁵ -- in return for
11 the withdrawal of their petitions. The stipulation also provided
12 that Merrill Lynch and Allegheny would divide equally the \$2.5
13 million that remained in escrow pending resolution of the
14 Connecticut state court proceeding if and when those funds were
15 transferred from the Separate Escrow Account into the government
16 account.

17 On October 24, 2005, the district court sentenced
18 Gordon to 42 months' incarceration and entered a Final Order of
19 Forfeiture.

20 DSI's Motion to Intervene

⁵ The government kept \$5 million in cash and held an additional \$5 million, which it had permitted Gordon's wife to pay to it in exchange for title to a condominium that had been subject to forfeiture.

1 On September 29, 2004, more than five months after the
2 thirty days in which to petition for relief under section 853(n)
3 had elapsed, DSI moved to intervene in Gordon's criminal
4 forfeiture proceeding pursuant to Rule 24 of the Federal Rules of
5 Civil Procedure. DSI proffered two principal arguments in
6 support of its motion: (1) the original \$4 million promissory
7 note used by Kings Holdings as consideration for the Daticon
8 shares (subsequently reduced to the Settlement Note) was not
9 tainted by the fraudulent scheme and therefore could not be
10 forfeited because the district court did not have jurisdiction
11 over the proceeds derived from, or traceable to, the equivalent
12 proportion of Daticon stock;⁶ and (2) the district court did not
13 have authority to enter an order forfeiting to the United States
14 property that was the subject of the Connecticut court
15 attachment. DSI conceded, however, that it was statutorily
16 barred from intervening in the criminal proceeding under the
17 terms of 21 U.S.C. § 853(k), which provides that, except as set
18 forth in section 853(n), no party claiming an interest in
19 property subject to forfeiture under section 853 may intervene in
20 a trial or appeal of a criminal case involving such forfeiture,
21 or bring an action against the government concerning the validity

⁶ As the district court phrased it, "DSI[] claims that because the promissory note was separate from the proceeds of Gordon's criminal activities, only the proceeds of the sale of 85% of Kings's Daticon shares . . . are forfeitable, and the proceeds of the sale of Kings's remaining 'untainted' shares remain available to satisfy DSI's claim against Kings." United States v. Gordon, 2005 WL 2759845, at *1, 2005 U.S. Dist. LEXIS 24897, at *3-*4 (S.D.N.Y. Oct. 13, 2005).

1 of the party's alleged interest in the property, after an
2 indictment or information alleging that the property is subject
3 to such forfeiture has been filed.⁷ DSI further conceded that,
4 as a general unsecured creditor, it did not have standing to
5 petition the court through the ancillary proceeding provided for
6 in section 853(n).

7 The district court addressed the merits of the motion
8 and denied it. First, it observed that despite the fact that
9 Kings Holdings paid for the Daticon shares with approximately \$23
10 million in cash that was traceable to the defendant's criminal
11 conduct and a \$4 million promissory note, DSI received all of the
12 Daticon shares due to it and therefore retained "no legally[]
13 cognizable interest in any portion of the [Daticon] shares," or
14 the proceeds thereof, because it was, as it readily admitted, a
15 general creditor with no specific claim on any of the forfeited

⁷ Section 853(k) states in full:

Except as provided in subsection (n) ["Third Party Interests"], no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

21 U.S.C. § 853(k).

1 property. United States v. Gordon, 2005 WL 2759845, at *2-*3,
2 2005 U.S. Dist. LEXIS 24897, at *7 (S.D.N.Y. Oct. 13, 2005). As
3 a general creditor, and as DSI and the government agreed, DSI did
4 not have standing to initiate a section 853(n) proceeding to
5 protect their interests.

6 Second, the district court pointed out that although
7 the Fifth Amendment's Due Process Clause requires that any person
8 who claims a legal interest in property subject to forfeiture
9 receive notice and an opportunity to be heard, due process does
10 not require "that persons claiming merely that they would be
11 advantaged in some way if the defendant were allowed to keep more
12 of his assets should be allowed to intervene to object to the
13 forfeitability of assets admittedly belonging to the defendant."
14 Id. at *3, 2005 U.S. Dist. LEXIS 24897, at *8. Assuming without
15 deciding that Federal Rule of Civil Procedure 24 was applicable
16 to Gordon's criminal proceeding, the district court therefore
17 concluded that DSI "ha[d] no right to intervene under Rule 24(a)
18 [of the Federal Rules of Civil Procedure], section 853(n), or any
19 other provision of law." Id., 2005 U.S. Dist. LEXIS 24897, at
20 *8-*9.

21 Third, the district court also denied DSI permissive
22 intervention under Rule 24(b), concluding that such intervention
23 would constitute an unwarranted interference in the
24 "expeditious . . . adjustment of rights as between the defendant
25 and the Government," which lies at the core of the criminal

1 forfeiture provisions. Id., 2005 U.S. Dist. LEXIS 24897, at *8-
2 *9.

3 Finally, the district court observed that DSI's motion
4 to intervene was not its only recourse in pursuing satisfaction
5 of the Settlement Note. Section 853(i) confers broad discretion
6 on the Attorney General to take any action "to protect the rights
7 of innocent persons which is in the interest of justice." Id.,
8 2005 U.S. Dist. LEXIS 24897, at *10 (quoting 21 U.S.C.
9 § 853(i)(1)) (emphasis and internal quotation marks deleted).
10 The district court further noted that the government had
11 specifically invited DSI to pursue such discretionary relief.
12 Id., 2005 U.S. Dist. LEXIS 24897, at *10.

13 DSI appeals.

14 **DISCUSSION**

15 On appeal DSI argues that it has standing to intervene
16 under Rule 24 of the Federal Rules of Civil Procedure. It
17 contends that the district court exceeded its statutory
18 forfeiture authority by including the untainted portion of the
19 proceeds of the Daticon stock sale in the forfeited property. It
20 further argues that to the extent that section 853(n) ancillary
21 proceedings provide the exclusive means of pursuing its interest
22 in the proceeds of the Daticon stock sale, the statute violates
23 the Due Process Clause of the Fifth Amendment of the
24 Constitution.⁸

⁸ The district court found, and DSI does not dispute, that DSI's original petition to the district court was untimely in light of the thirty-day limit provided by 21 U.S.C. § 853(n).

1 I. Standard of Review

2 We review the denial of a motion to intervene under
3 Rule 24 of the Federal Rules of Civil Procedure, whether as of
4 right under Rule 24(a) or by permission under Rule 24(b), for
5 abuse of discretion. See In re Holocaust Victim Assets Litig.,
6 225 F.3d 191, 197 (2d Cir. 2000). "Errors of law or fact may
7 constitute such abuse." SG Cowen Sec. Corp. v. Messih, 224 F.3d
8 79, 81 (2d Cir. 2000). We review de novo whether a party has
9 standing to petition the district court for a hearing under 21
10 U.S.C. § 853(n), and, of course, all questions of statutory
11 interpretation.⁹ United States v. Ribadeneira, 105 F.3d 833, 834
12 (2d Cir. 1997) (per curiam).

13 II. DSI's Motion to Intervene under Rule 24

Gordon, 2005 WL 2759845, at *2, 2005 U.S. Dist. LEXIS 24897, at *5-*6. The district court noted that other courts "have stated that such failure constitutes waiver of a party's right to assert an interest in forfeited property," id. at *2, 2005 U.S. Dist. LEXIS 24897, at *5, but did not rely on the untimeliness in denying the motion, see Fed. R. Crim. P. 32.2 Advisory Committee Notes, subdivision (c) ("[I]f a third party has notice of the forfeiture but fails to file a timely claim, his or her interests are extinguished, and may not be recognized when the court enters the final order of forfeiture."). The government does not argue on appeal that DSI's untimely petition acts as a waiver of its right to intervene. "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal." City of Syracuse v. Onondaga County, 464 F.3d 297, 308 (2d Cir. 2006) (quoting Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998)) (internal quotation marks omitted).

⁹ Our case law, and that of other circuits, generally characterizes our inquiry as one that determines whether a third party has "standing" to initiate an ancillary proceeding under section 853(n), and we use the term here accordingly. That inquiry, however, appears to be identical to one "on the merits" to determine whether a third party meets the statute's requirements.

1 A. Title 21 U.S.C. § 853

2 1. Section 853 is the Exclusive Means for
3 Third Parties to Intervene in Forfeiture
4 Proceedings.

5 It is well established that third parties may not
6 intervene during criminal forfeiture proceedings to assert their
7 interests in the property being forfeited. See 21 U.S.C.
8 § 853(k);¹⁰ United States v. McHan, 345 F.3d 262, 269 (4th Cir.
9 2003) (observing that section 853 "provides that, until this
10 sentence of forfeiture is entered, no party claiming an interest
11 in the forfeited property may intervene in the criminal case");
12 see also United States v. Gilbert, 244 F.3d 888, 910 (11th Cir.
13 2001) ("By specifically barring third-parties from intervening in
14 the criminal trial [through the analogous Racketeer Influenced
15 and Corrupt Organizations Law ("RICO") provision], 18 U.S.C.
16 § 1963(k), it is clear that Congress intended section 1963(l)
17 proceedings to provide the exclusive means for third-parties to
18 assert their claims to forfeited property."¹¹ Rule 32.2 of the
19 Federal Rules of Criminal Procedure, which pertains to procedures
20 related to criminal forfeiture, also prohibits a third party from
21 "object[ing] to [a] final [forfeiture] order on the ground that

¹⁰ See supra note 7.

¹¹ In Ribadeneira, we concluded that the two criminal forfeiture provisions, 18 U.S.C. § 1963 (forfeiture under RICO, 18 U.S.C. § 1962), and 21 U.S.C. § 853 (other criminal forfeitures) "are so similar in legislative history and in plain language as to warrant similar interpretation." Ribadeneira, 105 F.3d at 835 n.2.

1 the third party had an interest in the property." Fed. R. Crim.
2 P. 32.2(c)(2).

3 It is similarly well settled that section 853(n)
4 provides the exclusive means by which a third party may lay claim
5 to forfeited assets -- after the preliminary forfeiture order has
6 been entered. We have recognized that

7 [a]n ancillary proceeding [under § 853(n)] is
8 evidently the only avenue for a post-indictment
9 third-party claim to forfeited property, because
10 the statutory scheme bars commencement of "an
11 action at law or equity against the United States
12 concerning the validity of [a third party's]
13 alleged interest in the property . . . subsequent
14 to the filing of an indictment or information
15 alleging that the property is subject to
16 forfeiture under this section."

17 De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006)
18 (quoting 21 U.S.C. § 853(k)) (alterations and emphasis in
19 original); see also Libretti v. United States, 516 U.S. 29, 44
20 (1995) ("Once the government has secured a stipulation as to
21 forfeitability, third-party claimants can establish their
22 entitlement to a return of the assets only by means of the
23 hearing afforded under 21 U.S.C. § 853(n).").¹²

¹² Our conclusion is shared by those of our sister Circuits that have addressed this question. See United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007) ("The law appears settled that an ancillary proceeding constitutes the only avenue for a third party claiming an interest in seized property."); United States v. Soreide, 461 F.3d 1351, 1354 (11th Cir. 2006) ("[U]nder 21 U.S.C. § 853(n)(6), third party petitioners can establish their interest in forfeited property in only two ways.") (internal quotation marks and citation omitted); United States v. Puig, 419 F.3d 700, 703 (8th Cir. 2005) ("A § 853(n) ancillary proceeding is the only avenue by which a third-party claimant may seek to assert an interest in property that has been included in an indictment alleging that the property is subject to forfeiture."); McHan, 345 F.3d at 269 ("The petition authorized

1 2. DSI Lacks Standing Under 21 U.S.C.
2 § 853(n).

3 As the district court pointed out, "[w]hile DSI's claim
4 derives from the purchase of the shares [of Daticon], as a matter
5 of law, having failed to retain a security interest in the
6 shares, DSI is simply a general creditor of Kings [Holdings], and
7 its claim to any specific property Kings [Holdings] may possess
8 is no greater than that of any other such creditor." Gordon,
9 2005 WL 2759845, at *3, 2005 U.S. Dist. LEXIS 24897, at *7. DSI
10 does not assert otherwise. As a general creditor of Kings
11 Holdings and Gordon, DSI does not possess a "legal right, title,
12 or interest in the property" that was forfeited as required for
13 standing under section 853(n)(6)(A), nor can it show that it was
14 a bona fide purchaser for value of any such right, title or
15 interest, as required for standing under section 853(b)(6)(B).
16 See Ribadeneira, 105 F.3d at 836. Without possessing such an
17 interest "in" a "particular, specific asset" that is, or is part

by § 853(n) is the exclusive avenue through which a third party
may protect his interest in property that has been subject to a
forfeiture order."); United States v. Wade, 255 F.3d 833, 837
(D.C. Cir. 2001) ("A third party's only avenue for protecting his
interest is the procedure set forth in 21 U.S.C.
§ 853(n)"); United States v. Lavin, 942 F.2d 177, 187
(3rd Cir. 1991) (Becker, J.) ("Congress instead defined two
rather limited categories of third parties who are entitled to
petition the courts for a hearing to adjudicate the validity of
their interests in the forfeited property."); United States v. De
Ortiz, 910 F.2d 376, 383 (7th Cir. 1990) ("[O]nce the district
judge had ordered the money forfeited . . . , the money remained
subject to forfeiture unless and until that order was vacated and
a § 853(n) hearing was held."); see also United States v. Harris,
246 F.3d 566, 574-75 (6th Cir. 2001) (quoting with approval the
Third Circuit's approach in Lavin).

1 of, the forfeited property, DSI does not meet the statutory
2 requirements for initiating an ancillary proceeding under section
3 853(n). Id. at 835-37; see also United States v. Schwimmer, 968
4 F.2d 1570, 1580-81 (2d Cir. 1992) (holding that general creditors
5 lack standing under 18 U.S.C. § 1963(1)(6), the analogous
6 forfeiture statute under RICO, 18 U.S.C. § 1962).

7 3. Rule 24 Does Not Provide an Alternative
8 Means to Intervene.

9 DSI asserts, however, that it is not attempting to
10 employ a section 853(n) petition here. It is not looking to
11 "recover an alleged interest in forfeited property," Ribadeneira,
12 105 F.3d at 834, i.e., in its alleged interest in the funds
13 traceable to untainted shares of Daticon, for which section
14 853(n) would provide the proper mechanism. Instead, DSI
15 contends, its motion to intervene seeks to challenge the validity
16 of the forfeiture order as it was applied to those funds.

17 DSI cannot prevail, however, by reframing its argument
18 as one challenging the underlying validity of the forfeiture
19 order rather than the district court's denial of its efforts to
20 assert its property interest in the funds traceable to untainted
21 shares of Daticon. In either case, DSI is contending that the
22 remaining funds owing under the Settlement Note belong to it, not
23 Gordon. And the argument that the district court does not have
24 the authority to order those funds forfeited because they belong
25 to DSI is effectively the same argument as an assertion that DSI
26 has a superior interest in those funds. Both are forbidden by
27 section 853(k) unless they fall within the exception carved out

1 by section 853(n).¹³ See also Fed. R. Crim. P. 32.2 Advisory
2 Committee Note ("Th[e ancillary] proceeding does not involve
3 relitigation of the forfeitability of the property; its only
4 purpose is to determine whether any third party has a legal
5 interest in the forfeited property.") DSI's attempt to
6 participate in the forfeiture proceeding is thus foreclosed by
7 its acknowledged inability to meet the requirements of section
8 853(n). It may not bypass this procedure by employing the
9 Federal Rules of Civil Procedure, or, indeed, any other
10 mechanism.¹⁴

11 B. Due Process

¹³ DSI relies on United States v. Reckmeyer, 836 F.2d 200, 206, 208 (4th Cir. 1987) (commenting that "[s]erious due process questions would be raised . . . if third parties asserting an interest in forfeited assets were barred from challenging the validity of the forfeiture" and therefore construing the ancillary proceeding "to provide a means by which third persons who raise challenges to the validity of the forfeiture order could have their claims adjudicated"). There, the Fourth Circuit determined that general creditors have a legal interest in the debtor's property, but that such creditors have standing under section 853(n) only if they can show a legal interest in the particular property subject to forfeiture. Id. at 205-06. But DSI does not assert that it has standing under section 853(n). See also Ribadeneira, 105 F.3d at 836 n.4 ("We do not intend here to embrace the holding of Reckmeyer, which granted standing to unsecured creditors claiming under § 853 where all (as opposed to a part) of the assets of the debtor's estate have been forfeited.").

¹⁴ We therefore need not address whether a motion to intervene under the Federal Rules of Civil Procedure can ever be appropriate in a criminal proceeding. See United States v. White, 980 F.2d 836, 845 (2d Cir. 1992) (Kearse, J., dissenting) ("Although the Federal Rules of Civil Procedure do not apply to a criminal proceeding of their own force, there is no jurisprudential reason why a promulgating body cannot adopt some of those rules for application to criminal proceedings." (referring to Fed. R. Crim. P. 49(d) as doing so)).

1 DSI contends that if, as we have here and elsewhere
2 concluded, section 853(n) provides the exclusive means by which a
3 third party can challenge a forfeiture order in court, yet DSI
4 does not have standing to intervene under that section, DSI has
5 been deprived of a property interest without a meaningful
6 opportunity to be heard in violation of the Fifth Amendment's Due
7 Process Clause; in other words, that the failure of section 853
8 to provide general creditors with such an opportunity to be heard
9 renders the statutory scheme unconstitutional.¹⁵ This argument
10 depends on three premises: first, that DSI has a property
11 interest at stake that is subject to the requirements of due
12 process; second, that the forfeiture order deprives it of that
13 property interest; and third, that the deprivation has been
14 imposed without due process of law. As for the first, we assume
15 without deciding that DSI, through its attachment under
16 Connecticut law of the Settlement Note or otherwise, has a
17 property interest sufficient for it to invoke the Due Process

¹⁵ After oral argument, the government submitted a letter pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure to bring to our attention the Ninth Circuit's opinion in United States v. Lazarenko, 469 F.3d 815, as amended, 476 F.3d 642 (9th Cir. 2007). There, a third party attempted to set an immediate hearing on the propriety of the forfeiture order and challenge the preliminary order of forfeiture prior to the commencement of an ancillary proceeding under section 853(n). The court determined, however, that the third party did not have standing to do so because it could not allege sufficient injury-in-fact, id. at 650, and because it asserted a premature generalized grievance, id. at 652. Here, however, the district court had conducted ancillary proceedings under section 853(n) at the time DSI filed its motion to intervene. And DSI appeals a judgment of the district court denying its motion. DSI therefore has satisfied the standing concerns deemed dispositive in Lazarenko.

1 Clause.¹⁶ As for the second, we conclude that, whether or not it
2 does, DSI has not been deprived of any such property interest --
3 at least not yet. We therefore do not reach the third question,
4 whether, should the deprivation occur, it will violate the due
5 process guaranty.¹⁷

6 Section 853(n) may be DSI's exclusive path to challenge
7 the forfeiture order before the judicial entity which entered the
8 order, but it is not DSI's only course of action available under
9 the statute within which it may assert its interest in the
10 forfeited property. Under section 853(i), the Attorney General
11 maintains discretion to "take any . . . action to protect the
12 rights of innocent persons which is in the interest of justice
13 and which is not inconsistent with the provisions of this
14 section." 21 U.S.C. § 853(i)(1). This non-judicial remedy
15 confers upon the Attorney General the authority to rectify

¹⁶ Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). While state law creates the underlying substantive interest the plaintiff seeks to vindicate, "federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978) (citations omitted).

¹⁷ We therefore need not determine whether DSI actually received the required opportunity to be heard in the district court in this instance. We note, however, that, notwithstanding its untimely motion, Judge Lynch permitted DSI to submit a brief in support of its argument and carefully considered the merits of DSI's contention. That its challenge ultimately failed in this case is not a result of a deprivation of an opportunity to be heard by the district court.

1 precisely the situation presented here: A third party that
2 possesses an interest in forfeited property yet does not meet the
3 standing requirements of section 853(n) may petition the Attorney
4 General for redress in the "interest of justice." As the Third
5 Circuit explained:

6 Congress did not intend section 853(n) to
7 serve as a vehicle by which all innocent
8 third parties who are aggrieved by an order
9 of criminal forfeiture can petition for
10 judicial relief. Rather, it seems to us that
11 Congress, in enacting section 853(n) (6) (A)
12 and (B), intended to accord standing to only
13 two narrow classes of third parties, and
14 intended to require all other third parties
15 to petition the Attorney General for relief.

16 United States v. Lavin, 942 F.2d 177, 185 (3rd Cir. 1991) (citing
17 21 U.S.C. § 853(i)) (emphasis in original); see also United
18 States v. BCCI Holdings (Luxembourg), S.A., 46 F.3d 1185, 1192
19 (D.C. Cir.), cert. denied sub nom. Chawla v. United States, 515
20 U.S. 1160 (1995) (concluding that the statutory scheme for RICO
21 forfeiture proceedings "directs parties without an interest in
22 specific property to seek relief from the Attorney General, not
23 the court adjudging the forfeiture"). Indeed, the District of
24 Columbia Circuit has similarly noted that while section 853 was
25 intended to provide certain third parties with additional due
26 process protections, "general creditors seem precisely the type
27 of innocent persons Congress had in mind" when it included the
28 non-judicial mechanism set forth by section 853(i) "to protect
29 the rights of innocent persons." Id. at 1192 (quoting 18 U.S.C.
30 § 1963(g) (1)) (internal quotation marks omitted).

1 As the district court rightly noted, DSI has not
2 demonstrated that any such a request would be futile. Indeed,
3 the government, which received \$10 million from the forfeiture,
4 specifically invited DSI to pursue this avenue of relief.

5 Perhaps at some future time DSI will be able to
6 establish that it has exhausted all possible avenues for relief.
7 If so, it might be able to argue persuasively that the
8 availability of a remedy through the executive branch under
9 section 853(i), and whatever other avenues it might pursue,¹⁸ is

¹⁸ We note that DSI has failed to demonstrate that Gordon is without assets not subject to forfeiture that could satisfy the Note. Cf. Reckmeyer, 836 F.3d at 206 (noting that in that case, unlike this one, the parties had agreed that the forfeiture order seized all of the defendant's known assets). It is not clear to us that DSI, as a general creditor, is unable to pursue Gordon personally for the payment of the money associated with the Note.

And while the issue was not briefed to us, we further note that DSI has not demonstrated that there was a procedural bar preventing it from converting its inchoate interest in the form of a state court prejudgment attachment into a "legal interest" under section 853(n) by "obtain[ing] some judgment and secur[ing] . . . those funds." United States v. Schwimmer, 968 F.2d 1570, 1581 (2d Cir. 1992). Under Connecticut law, it appears that DSI might perfect the prejudgment attachment by obtaining a judgment lien on the property in which it claims to have an interest. See Hartford Provision Co. v. United States, 579 F.2d 7, 10 n.3 (2d Cir. 1978) (noting that Connecticut follows "ancient and well-accepted principles" relating to attachments on personal property, such that levying an attachment creates a lien of an inchoate nature which "awaits the judgment of the court for its consummation.") (quoting Pratt v. Law, 13 U.S. [456, 497] (1815)). If it did so, DSI would "no longer [be] merely a general creditor." Schwimmer, 968 F.2d at 1581. It might then have a security interest that would confer upon it standing to make a claim under section 853(n). See also Reckmeyer, 836 F.2d at 205 ("Unsecured creditors may reduce their claims to judgment and thereby acquire a lien on all of the debtor's assets. This enforcement mechanism provides for the judicial enforcement of a legally cognizable right."). Upon successful completion of perfecting a judgment in state court,

1 insufficient to satisfy the Due Process clause. But inasmuch as
2 it has yet to demonstrate that it has finally been deprived of
3 property, we need not determine whether any such deprivation
4 would be constitutionally permissible.

5 **CONCLUSION**

6 We conclude that the district court acted within its
7 discretion in denying DSI's motion to intervene, and that the
8 denial did not violate the Fifth Amendment's Due Process Clause.
9 The order of the district court is therefore affirmed.

DSI might then file a Rule 60(b) motion to reopen the ancillary forfeiture proceeding in the district court and litigate its claim as to its property interest within the statutory scheme created by Congress. See United States v. Puig, 419 F.3d 700, 702 (8th Cir. 2005) (citing Fed. R. Crim. P. 32.2(c) Advisory Committee Notes) (noting that a third-party claimant may file a Rule 60(b) motion to reopen the ancillary proceeding allowed by 21 U.S.C. § 853(n)).