

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No. 8:09-cv-87-T-26TBM

ARTHUR NADEL,
SCOOP CAPITAL, LLC,
SCOOP MANAGEMENT, INC.

Defendants,

SCOOP REAL ESTATE, L.P.
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.
VICTORY IRA FUND, LTD,
VICTORY FUND, LTD,
VIKING IRA FUND, LLC,
VIKING FUND, LLC, AND
VIKING MANAGEMENT,

Relief Defendants.

**THE RECEIVER'S MEMORANDUM ON JURISDICTION AND RESPONSE
TO WELLS FARGO BANK AND TRSTE'S MEMORANDUM ON JURISDICTION**

Burton W. Wiand, as Receiver (the “**Receiver**”), filed a motion relating to claims determinations and the claims process (the “**Motion**”) (Doc. 675). TRSTE, Inc. (“**TRSTE**”) and Wells Fargo Bank, N.A., as successor to Wachovia Bank, N.A. (collectively, “**Wells Fargo**”), filed an objection and opposition (the “**Objection**”) to the Motion (Doc. 690). The Objection relates to a loan made by Wells Fargo to Receivership Entity Laurel Preserve, LLC, and secured by land in North Carolina commonly referred to in this Receivership as the “**Laurel Mountain Property.**” In the Objection, Wells Fargo argued in relevant part that this Court lacks jurisdiction over the Laurel Mountain Property because it is purportedly under the jurisdiction of the United States District Court for the Southern District of New York (the “**SDNY Court**”) pursuant to a preliminary criminal forfeiture order (the “**Preliminary Forfeiture Order**”), dated October 21, 2010 and filed December 2, 2010, in *United States v. Arthur Nadel*, Case No. 1:09-cr-00433-JGK (S.D.N.Y.) (the “**Nadel Criminal Action**”).

On February 3, 2012, the Court directed *inter alia* that Wells Fargo and the Receiver file supplemental memoranda of law regarding this Court’s jurisdiction over the Receivership property listed in the Preliminary Forfeiture Order (the “**Forfeited Assets**”) (Doc. 733). Because all of the Forfeited Assets are Receivership property, the issue raised by the Court impacts each of these assets. However, the Forfeited Assets comprise only a limited portion of all Receivership property.¹

¹ The following assets were included in the Preliminary Forfeiture Order: (1) the Marguerite J. Nadel Revocable Trust bank account (closed and funds transferred to Receivership); (2) 15576 Fruitville Road, Sarasota, FL (still controlled by Receiver); (3) 131 Garren Creek Road, Fairview, NC (still controlled by Receiver); (4) 45 lots in Thomasville, GA (sold in February 2010 (*see* Doc. 352)); (5) 33 acres in Grady County, GA (sold in April

On February 13, 2012, Wells Fargo filed its supplemental memorandum (Doc. 745) (the “**Supplemental Memo**”) and essentially argued that (1) the SDNY Court has prior exclusive jurisdiction over the Laurel Mountain Property; (2) the Receiver’s actions with respect to the Laurel Mountain Property are a “nullity;” and (3) this Court cannot obtain jurisdiction over the Laurel Mountain Property through a purported “secret agreement” between the Receiver and the U.S. Attorney’s Office for the Southern District of New York (the “**USAO**”). As demonstrated below, Wells Fargo’s arguments lack merit. In reality, this Court was authorized to, and properly exercised, jurisdiction and control over each of the Forfeited Assets. Wells Fargo’s arguments are nothing more than yet another effort to overcome its inexcusable failure to file claims in the claims process in this case.

I. THE SDNY COURT DOES NOT HAVE PRIOR EXCLUSIVE JURISDICTION OVER THE FORFEITED ASSETS, INCLUDING THE LAUREL MOUNTAIN PROPERTY

Wells Fargo argues the SDNY Court has exclusive jurisdiction over the Laurel Mountain Property pursuant to the “prior exclusive jurisdiction rule” because it purportedly obtained jurisdiction over that property before this Court did so. Supp. Memo at 4-5. Wells

2011 (*see* Doc. 620)); (6) Venice Jet Center (sold in January 2010 (*see* Doc. 321)); (7) the Laurel Mountain Property (still controlled by Receiver); (8) Tradewind, LLC and related aircraft (operating business in Receivership; aircraft have been sold or returned to lenders (*see* Docs. 108, 119, 433, 491, 581)); (9) Guy-Nadel Foundation, Inc. (accounts closed and funds transferred to Receivership).

At the relevant time, the Receiver identified for the U.S. Attorney’s Office that, based on his investigation as of that date, the Forfeited Assets were the ones funded with proceeds of Nadel’s scheme. Following that date, the Receiver continued his investigation and identified numerous other assets funded with scheme proceeds. As such, the Forfeited Assets do not include all of the properties in Receivership. Wells Fargo is simply wrong when it asserts that “all of the Nadel related property” was subjected to forfeiture. *See* Supp. Memo at 2.

Fargo misunderstands both the prior exclusive jurisdiction rule and the nature of the SDNY Court's jurisdiction. Specifically, the prior exclusive jurisdiction rule is concerned with comity and the prevention of conflicts between courts. As such, it only applies when two courts attempt to assert *in rem* jurisdiction over the same property. *See, e.g., United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 477 (1936) (holding rule applies “[i]f the two suits are in rem or quasi in rem . . .”). Here, as explained below, the SDNY Court only exercised *in personam* jurisdiction over Nadel's interests in the Forfeited Assets, while this Court exercised *in rem* jurisdiction over the actual Forfeited Assets. As such, this Court's jurisdiction has always been and continues to be appropriate because there are no conflicts. Indeed, this absence of conflict is further demonstrated by the following facts: (1) the SDNY Court and this Court share the same goal – recovering assets to compensate the victims of Nadel's Ponzi scheme; (2) the Receiver and the USAO have an understanding that their mutual goal would be most efficiently served by allowing the administration, liquidation, and distribution of recovered assets through the Receivership; and (3) neither the SDNY Court nor the United States has taken any steps to control any Forfeited Asset or objected to the Receiver's or this Court's control of those assets. Wells Fargo's self-serving attempt to undermine this Court's jurisdiction simply lacks merit.

A. This Court Has *In Rem* Jurisdiction Over Receivership Property; The SDNY Court Has *In Personam* Jurisdiction Over Nadel And His Forfeited Interests Therein

Wells Fargo incorrectly asserts that the SDNY Court has exercised “jurisdiction and control” over Receivership assets, including the Laurel Mountain Property. *See* Supp. Memo at 2. As an initial matter, neither the SDNY Court nor the United States has ever attempted

to assert control over any Receivership asset. *See* Morello Decl. ¶ 7 (Doc. 713). More importantly, there is a critical difference between the type of jurisdiction exercised by this Court and the type exercised by the SDNY Court. As explained below, those differences – which are conveniently ignored by Wells Fargo – completely undermine its argument.

This Court has *in rem* jurisdiction over the Laurel Mountain Property pursuant to 28 U.S.C. § 754.² *See, e.g., Terry v. June*, 2003 WL 22125300, *2 (W.D. Va. 2003) (“A court-appointed receiver may obtain in rem jurisdiction over any and all receivership property by complying with the procedural requirements of 28 U.S.C. § 754.”).³ In contrast, the SDNY Court has *in personam* jurisdiction over Arthur Nadel and his interests in the Forfeited Assets; it does not have *in rem* jurisdiction over the property itself. On April 28, 2009, Nadel was indicted on six counts of securities fraud, one count of mail fraud, and eight counts of wire fraud. On February 24, 2010, he pled guilty to all charges in the Indictment. Through 28 U.S.C. § 2461(c) and 18 U.S.C. § 981(a)(1)(C), a defendant who pleads guilty to such crimes is subject to criminal forfeiture pursuant to 21 U.S.C. § 853. *See, e.g., United States*

² Wells Fargo initially argued that the Receiver failed to comply with 28 U.S.C. § 754 and thus neither he nor this Court obtained “complete jurisdiction and control” over the Laurel Mountain property (*see* Doc. 690). The Receiver demonstrated this was false (*see* Doc. 712), and now Wells Fargo apparently concedes it was wrong (*see* Supp. Memo at 2 n.3).

³ With respect to the other Forfeited Assets, the Court obtained *in rem* jurisdiction because the Receiver either complied with 28 U.S.C. § 754 or such compliance was unnecessary because the property was located within this Court’s territorial jurisdiction. *See Gilchrist v. Gen. Elec. Capital Corp.*, 262 F.3d 295, 300-01, 302 (4th Cir. 2001) (noting that “district court’s *in rem* jurisdiction ordinarily extends ... to property within its jurisdiction” and that “when it appointed the receiver, the district court created a receivership estate over which it had *in rem* jurisdiction”); *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Co. 1995) (“Upon imposition of a receivership, all property in the possession of the debtor passes into the custody of the receivership court, and becomes subject to its authority and control.”).

v. Vampire Nation, 451 F.3d 189, 200 (3d Cir. 2006) (“[W]e read the plain language of § 2461(c), by virtue of the chain of cross-references leading to § 1956(c)(7) and § 1961(1), to explicitly permit criminal forfeiture for *general* mail fraud. . . .”); *United States v. Day*, 524 F.3d 1361, 1376 (D.C. Cir. 2008) (“We find that criminal forfeiture is available for general mail and wire fraud violations. . . .”).

As the Eleventh Circuit has explained, there are important differences between civil and criminal forfeiture. “The former type of forfeiture is a remedial action against property, whereas the latter is a punitive action against a defendant.” *United States v. Gilbert*, 244 F.3d 888, 918 (11th Cir. 2001).⁴

The classical distinction between civil and criminal forfeiture was founded upon whether the penalty assessed was against the person or against the thing. Forfeiture against the person operated *in personam* and required a conviction before the property could be wrested from the defendant. Such forfeitures were regarded as criminal in nature because they were penal; they primarily sought to punish. Forfeiture against the thing was *in rem* and the forfeiture was based upon the unlawful use of the *res*, irrespective of its owner’s culpability. These forfeitures were regarded as civil; their purpose was remedial.

Id. at 919 (citations omitted) (quoting *United States v. Seifuddin*, 820 F.2d 1074, 1076–77 (9th Cir.1987)). When criminal forfeiture occurs, “the property itself is not forfeited; rather, the defendant’s *interest* in the property is forfeited. If criminal forfeiture reached beyond that portion of the property that was owned by a defendant, such a form of forfeiture would be *in*

⁴ *Gilbert’s* discussion of when ancillary proceedings to adjudicate third party rights in forfeited property may begin (*see* 244 F.3d at 926) has been superseded by the 1996 amendments to Federal Rule of Civil Procedure 32(d) and the 2000 adoption of Rule 32.2, but that is not relevant here. *See United States v. Marion*, 562 F.3d 1330, 1340-41 (11th Cir. 2009).

rem, against the property, rather than *in personam*, against the defendant.”⁵ *Id.*; *see also United States v. Kennedy*, 201 F.3d 1324, 1329 (11th Cir. 2000) (“The criminal forfeiture provisions of section 853 authorize the government to seek forfeiture of a defendant’s interest in subject property.”). “Because the defendant is before the court, the court has the power to adjudicate *his* ownership interest in property, by virtue of the criminal charges against him.” *Gilbert*, 244 F.3d at 920; *see also Vampire Nation*, 451 F.3d at 202 (“In the interest of clarity, we emphasize that the District Court ordered a forfeiture judgment *in personam*. The *in personam* designation distinguishes this judgment from one *in rem*.”); *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) (noting that “criminal forfeiture is a sanction against the individual defendant rather than a judgment against the property itself”); *Day*, 524 F.3d at 1378 (citing *Hall*).

Here, the SDNY Court obtained *in personam* jurisdiction over Nadel through the Nadel Criminal Action, and pursuant to the Preliminary Forfeiture Order, Nadel forfeited his interest in the Forfeited Assets to the United States. However, neither the SDNY Court nor any other court except this Court has ever obtained *in rem* jurisdiction over Forfeited Assets. As explained below, there is no conflict between the actions taken by the SDNY Court pursuant to its *in personam* jurisdiction over Nadel and the actions taken by this Court

⁵ The limited nature of *in personam* criminal forfeiture is illustrated by the exemption from such forfeiture of property transferred to a bona fide purchaser for value who was reasonably without cause to believe that the property was subject to forfeiture. *See* 21 U.S.C. § 853(c); *Gilbert*, 244 F.3d at 920 (“[A]n order of forfeiture imposed upon a defendant as a penalty for his wrongdoing determines the government’s title in property only as against the named defendants, while civil forfeiture actions which are brought in the jurisdiction where the *res* is located are *in rem* and determine the government’s title in property as against the whole world.” (quotation omitted)).

pursuant to its *in rem* jurisdiction over Receivership property. Because there is no such conflict, this Court has and always has had jurisdiction over the Laurel Mountain Property and all other Forfeited Assets as of the time the applicable method for acquiring such jurisdiction was satisfied.

B. There Is No Conflict Between This Court's *In Rem* Jurisdiction Over Receivership Property And The SDNY Court's *In Personam* Jurisdiction Over Nadel's Interests Therein

As Wells Fargo's own authorities recognize, the prior exclusive jurisdiction rule is concerned with principles of comity and only applies where there is a conflict between two courts regarding a specific *res*. This is not the situation here. "If the two suits are in rem or quasi in rem, so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." *Bank of N.Y.*, 296 U.S. at 477. In such situations, "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other. . . ." *Id.* The purpose of this rule is to "conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States." *Id.* at 478; *Farmers' Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U.S. 51, 61 (1900) ("This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1173 (11th Cir. 1982) ("Principles of comity come into play when separate courts are presented with the same lawsuit."); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989) (noting that the rule "is a

prudential limitation applied by the Supreme Court in the interest of judicial harmony”);⁶ *see also Penn Gen. Cas. Co. v. Commw. of Pa.*, 294 U.S. 189, 195 (noting that purpose of rule is to “avoid unseemly and disastrous conflicts in the administration of our dual judicial system”).

Consequently, when – like the situation here – two courts do not both attempt to exercise *in rem* jurisdiction over a *res*, those courts may have concurrent jurisdiction, and the prior exclusive jurisdiction rule simply does not apply. *Id.* (holding that “if the two suits are *in rem* or quasi *in rem*,” one court must yield to the other, but if one court proceeds *in personam*, the courts have concurrent jurisdiction); *1st Nat’l Credit Corp. v. Von Hake*, 511 F. Supp. 634, 639 (D. Utah 1981) (holding that if one action is *in rem* and “one action is *in personam*, even though adjudicating, without physically controlling, a right in the *res*, [a] conflict does not exist” (quoting 1A Moore’s Federal Practice P 0.214 at 2502 (2d ed. rev. 1980))). And unless the proceedings in both courts are “*in rem* as to the same property, both courts may proceed to adjudicate the actions at their own pace.” *1st Nat’l Credit Corp.*, 511 F. Supp. at 639; *see also Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 64-65 (2d Cir. 1965) (holding no conflict exists where *res* is not basis of competing court’s jurisdiction but merely

⁶ Wells Fargo relies on the above-cited authorities in its Supplemental Memo. *See* Supp. Memo at 3 n.4, 4-5. But each of those cases is factually distinguishable from the situation here because in those cases, the courts in conflict attempted to assert *in rem* jurisdiction over the same asset. For example, in *One 1985 Cadillac Seville*, the United States brought an *in rem* civil forfeiture action directly against the property to be forfeited. 866 F.2d at 1145. Similarly, in *Farmers’ Loan & Trust*, “two sets of bondholders” sought to foreclose on the same mortgage and thus to assert control over the same *res*. 177 U.S. at 60, 62. That is not the case here: this Court exercises *in rem* jurisdiction over Receivership property and the SDNY Court exercises *in personam* jurisdiction over Nadel’s interests therein.

security for judgment); *Riehle v. Margolies*, 279 U.S. 218, 225 (1929) (“The establishment of a claim constituting the basis of the right to participate in the distribution of property in the possession of one court is often conclusively determined by a judgment obtained in another court.”); *NBC Universal v. NBCUNIVERSAL.COM*, 378 F. Supp. 2d 715, 717 (E.D. Va. 2005) (holding no conflict exists between related *in personam* and *in rem* actions).

Here, there is no conflict because this Court has exercised *in rem* jurisdiction over the Laurel Mountain Property and the rest of the Forfeited Assets and the SDNY Court (or any other court) has not. But even more broadly, there is no conflict between the two courts because the SDNY Court’s goals and the efforts of the USAO and the goals of this Court and the Receivership do not conflict. As explained in the Receiver’s reply to the Objection (Doc. 712) (the “**Reply**”) and in the accompanying declaration of Gianluca Morello in support of the Reply (Doc. 713) (the “**Morello Declaration**”), there is an understanding between the Receiver and representatives of the USAO that assets controlled by Nadel, including the Laurel Mountain Property, would be administered, liquidated, and distributed through the Receivership claims process to compensate victims. Contrary to Wells Fargo’s assertions, there is nothing unusual or improper about that arrangement. *See, e.g., United States v. Weiss*, 467 F.3d 1300, 1307 (11th Cir. 2006) (holding that receivership may be maintained at the same time as *in personam* forfeiture proceedings and that the United States may assert its interest in forfeited property through the receivership “should it choose to do so”); *S.E.C. v. Madoff*, 2009 WL 980288, *2 n.1 (S.D.N.Y. 2009) (suggesting that Attorney General delegate forfeited property to bankruptcy estate to save administrative costs, pursuant to the authority granted by 21 U.S.C. § 853(i)(1)). This understanding is the reason why no

representative of the United States has ever challenged this Court's jurisdiction over Receivership property and why the U.S. Marshalls Service has never attempted to possess or control any of the Forfeited Assets.

Moreover, there is nothing, nor has there ever been anything, "secret" about the Receiver's understanding with the USAO. As explained in the Receiver's Reply and the Morello Declaration, Wells Fargo received ample notice that the Court and the Receiver had asserted jurisdiction and control over the Laurel Mountain Property and established a claims process. *See* Reply (Doc. 712, Sections III and IV). The Receiver mailed notice of the claims process to hundreds of entities and individuals, including Wells Fargo. *Id.* The Receiver also published notice of the claims process in the *Wall Street Journal* and the *Sarasota Herald Tribune*. *Id.* In fact, representatives of the Receiver and Wells Fargo exchanged numerous communications regarding the Laurel Mountain Property – beginning no later than one month after this Receivership was commenced – and counsel for the Receiver specifically advised Wells Fargo with respect to the Laurel Mountain Property that its interests would not be considered by the Receiver and this Court unless it filed a claim. *Id.* Had Wells Fargo ever notified the Receiver of its intent to seek relief in the SDNY Court, the Receiver would have explained his arrangement with the USAO. Instead, Wells Fargo filed a petition in the SDNY Court in violation of the injunctive provisions of the Order Appointing Receiver without ever notifying the Receiver or this Court. Wells Fargo's assertion that the administration and liquidation of the Laurel Mountain Property through the Receivership rather than the SDNY Court's criminal forfeiture was a "secret" is nothing more than a fabrication, designed to divert attention away from its fatal failure to file a claim

in this proceeding. The only improper conduct has been Wells Fargo's.

In fact, consistent with the understanding between the Receiver and the USAO and to remove any doubt, the SDNY Court released the Laurel Mountain Property from forfeiture on February 9, 2012. *See* Supp. Memo at 9. And the Receiver understands that the United States shortly will move the SDNY Court to release all of the remaining Forfeited Assets from the Preliminary Forfeiture Order as well. *C.f. Penn Gen.*, 294 U.S. at 197 (court with exclusive jurisdiction (which the SDNY Court does not have) “can determine how far it will permit any other court to interfere.”). In short, this Court has had and continues to have requisite jurisdiction and control, and thus the claims process should proceed as requested by the Receiver so that Nadel's victims may finally receive distributions.

II. NO ACTION TAKEN BY THE RECEIVER WAS “A NULLITY”

Wells Fargo also argues that because this Court purportedly lacks jurisdiction over the Laurel Mountain Property, every action by the Receiver with respect to that property is “a nullity.” Supp. Memo at 7. Specifically, Wells Fargo argues the Receiver lacked authority to demand that it file a claim in the claims process. *Id.* Wells Fargo is wrong, and it failed to cite a single case supporting its argument. As explained above, because there is no conflict between the SDNY Court's *in personam* jurisdiction over Nadel and this Court's *in rem* jurisdiction over Receivership property, this Court's Receivership proceedings have always been appropriate, and at all relevant times it had jurisdiction over the Laurel Mountain Property. But even if the SDNY Court had *in rem* jurisdiction of the Laurel Mountain Property or any other Receivership *res* – which it never did – such jurisdiction would still not deprive this Court of its authority to establish the claims process and to require creditors,

including creditors claiming a security interest in Forfeited Assets, to file proof of claim forms by the bar date. As the United States Supreme Court explained,

an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determination of, the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding in personam.

Riehle, 279 U.S. at 224; *see Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1354 n.19 (11th Cir. 2003) (applying *Riehle*).

While it is often said that, of two courts having concurrent jurisdiction in rem, one first taking possession acquires exclusive jurisdiction, it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property.

Penn Gen., 294 U.S. at 198.

Here, the claims process seeks to determine the existence, validity, and amount of the Receivership Entities' indebtedness to potential creditors by requiring them to file proof of claim forms. The claims process is an *in personam* proceeding with respect to the Receivership Entities, at least until actual distributions are made. If Wells Fargo felt that it was required to protect its purported interest in the Laurel Mountain Property by seeking relief in the SDNY Court, it still should have filed a claim in the Receiver's claims process for a determination of the amount and validity of the alleged liability flowing to it from a Receivership Entity. *See Riehle*, 279 U.S. at 224 ("There is no inherent reason why the

adjudication of the liability of the debtor in personam may not be had in some court other than that which has control of the res. It is only necessary that in the receivership[,] proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them.”).

III. EVEN IF DETERMINATION OF WHICH COURT OBTAINED JURISDICTION FIRST WAS RELEVANT (AND IT IS NOT), THIS COURT OBTAINED JURISDICTION BEFORE THE SDNY COURT

As explained above, the prior exclusive jurisdiction rule does not apply here because this Court’s *in rem* jurisdiction over the Forfeited Assets does not conflict with the SDNY Court’s *in personam* jurisdiction over Nadel and his interests. But even if the rule did apply, contrary to Wells Fargo’s contention, this Court first obtained jurisdiction over the Forfeited Assets, including the Laurel Mountain Property.

As an initial matter, the relation-back doctrine codified in 21 U.S.C. § 853(c) does not help Wells Fargo. That doctrine specifies when title to forfeited property vests in the United States; it does not address when the Court administering the applicable forfeiture proceedings obtains jurisdiction over a defendant’s interest in the forfeited property. *See* Supp. Memo at 6; *United States v. Bailey*, 419 F.3d 1208, 1213 (11th Cir. 2005) (“[T]he relation-back doctrine operates *retroactively* to vest title in the Government effective as of the time of the act giving rise to the forfeiture. That is, it does not secretly vest title at the very moment of the act, but rather title vests at the time of the court-ordered forfeiture and then relates back to the act.” (citation and quotation omitted)).

Further, as explained in the Receiver’s Reply, the Court and Receiver obtained jurisdiction and control over the Laurel Mountain Property, at latest, on June 10, 2009,

pursuant to 28 U.S.C. § 754 – more than four months before entry of the Preliminary Forfeiture Order. *See* Reply (Doc. 712) at 1-3. In the Supplemental Memo, Wells Fargo contends the relevant event in the SDNY Court is not the entry of the Preliminary Forfeiture Order but rather the return of the Indictment against Nadel on April 28, 2009. *See* Supp. Memo at 5. Wells Fargo concludes that because Nadel was indicted before the Receiver complied with 28 U.S.C. § 754 in connection with the Laurel Mountain Property, the SDNY Court has prior exclusive jurisdiction – Wells Fargo’s argument compares apples to oranges. *See* Supp. Memo at 6-7. As the United States Supreme Court has explained,

when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession of the property and as authorized to proceed with the cause. Jurisdiction thus attaches upon the filing of the bill of complaint in court, at least where process subsequently issues in due course.

Penn Gen., 294 U.S. at 196 (citation omitted). The Complaint in this case was filed on January 21, 2009 – more than three months before Nadel was indicted.⁷ As such, this Court obtained constructive possession of all assets traceable to Nadel’s scheme, including the Laurel Mountain Property and the Forfeited Assets, well before the indictment. In addition, this Court obtained actual possession of the Laurel Mountain Property on June 10, 2009,

⁷ Wells Fargo also contends the SDNY Court’s jurisdiction “could have arguably vested as early as January 27, 2009,” when Nadel was arrested (Supp. Memo at 5), but the Complaint in this action was still filed almost a week before that date. Even if the criminal complaint against Nadel controls (an argument that Wells Fargo does not make) that document was filed in the SDNY Court on January 21, 2009 – the same day as the Complaint in this action. Because the complaints were filed concurrently, there is no basis to conclude that the SDNY Court obtained prior jurisdiction. In any event, as explained above, the issue of which court obtained jurisdiction first is moot because there is no conflict between this Court’s *in rem* jurisdiction over Receivership property and the SDNY Court’s *in personam* jurisdiction over Nadel and his interests.

pursuant to 28 U.S.C. § 754. The SDNY Court has never obtained actual possession of any Receivership property. To the extent priority of jurisdiction is relevant to this Court's inquiry (and, as explained above, it is not), this Court obtained jurisdiction before the SDNY Court.

CONCLUSION

For the foregoing reasons, the Objection should be denied, and the Court should grant the Motion and allow the claims process to proceed.

Respectfully submitted,

s/Jonathan B. Cohen

Jonathan B. Cohen, FBN 0027620

jcohen@jameshoyer.com

Sean P. Keefe, FBN 413828

skeefe@jameshoyer.com

JAMES, HOYER, NEWCOMER &

SMILJANICH, P.A.

One Urban Centre, Suite 550

4830 West Kennedy Blvd.

Tampa, FL 33609

Tel: (813) 397-2300

Fax: (813) 397-2310

-and-

Gianluca Morello, FBN 034997

gmorello@wiandlaw.com

Michael S. Lamont, FBN 0527122

mlamont@wiandlaw.com

Jared J. Perez, FBN 0085192

jperez@wiandlaw.com

WIAND GUERRA KING P.L.

3000 Bayport Drive, Suite 600

Tampa, FL 33607

Tel: (813) 347-5100

Fax: (813) 347-5198

Attorneys for the Receiver, Burton W. Wiand⁸

⁸ Wiand Guerra King P.L. participates in this filing only to the extent the issues raised by the Court with respect to its jurisdiction would impact Receivership property with no relation to Wells Fargo.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on February 24, 2012, I will mail the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participant(s):

Arthur G. Nadel, Register No. 50690-018
FCI BUTNER LOW
Federal Correctional Institution
P.O. Box 999
Butner, NC 27509

s/ **Jonathan B. Cohen** _____