

No. 17-2842
(Consolidated with No. 17-3317)

In the
UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

MICHAEL SEGAL,

Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois
Case No. 02 CR 112
The Honorable Ruben Castillo, Presiding
Petition to Reverse July 12, 2017 and August 16, 2017 Orders

REPLY BRIEF OF DEFENDANT-APPELLANT MICHAEL SEGAL

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I. Introduction.

The Government has elected not to address the principal arguments raised in Segal's Appellate Brief. Instead, it has put all of its eggs in one basket -- namely, that Segal's Motion to Modify Forfeiture Order ("Segal's Motion") and this appeal are too late. To the extent the Government touches on the issues raised in Segal's appeal, it argues that Segal is trying to either: (a) modify the \$15 million amended forfeiture judgment, or (b) undo or rescind the Stipulation to Settle Certain Forfeiture Claims with the Government ("Settlement Stipulation").

Although the title of Segal's Motion was unartfully labeled as a motion to modify, the relief requested did not seek to modify the \$15 million forfeiture judgment, but instead asked the district court to exercise its Federal Rule of Criminal Procedure ("FRCP") 32.2 duties to ensure the Settlement Stipulation resulted in Segal paying his \$15 million forfeiture, but not more. Segal only asked, in the alternative, to modify the Settlement Stipulation on the basis that it was unconscionable and lacked consideration. Thus, the heart of this appeal concerns whether the Government received far more than the \$15 million it was entitled. The evidence, which the Government has failed to rebut demonstrates that the Government has received almost \$20 million more than it should have received.

It is undisputed that, as part of the Settlement Stipulation, Segal paid his \$15 million personal forfeiture in full. The Settlement Stipulation also resulted in an enormous windfall to the Government since the Government received Segal assets totaling more than \$35 million, instead of the \$15 million to which it was

entitled. The district court erred when it failed to exercise its independent duties pursuant to FRCP 32.2 to prevent this excessive forfeiture, and instead, allowed the Government to receive the enormous windfall.

Segal's Motion requested that amounts already collected by the Government pursuant to the Settlement Stipulation in excess of \$15 million be remitted to Segal. In addition, Segal requested that the Government be required to refund the more than \$4,000,000 Segal "paid" to the Government to purchase assets the Government had no right to "sell" to Segal. As demonstrated below, the district court had jurisdiction to entertain these arguments in the first instance, and Segal's appeal of these issues was timely. The district court's July 12, 2017 and August 16, 2017 Orders should be reversed.

II. Response to the Government's "Statement of the Case."

The Government ignores the evidence in the record and mischaracterizes Segal's arguments. For example:

- Page 7 – The Government claims that its agents spent 15 months gathering information for the forfeiture proceeding, including detailed financial and title information about all the corporate and personal assets it could locate. The Government later refers to four pages of schedules listing assets which the Government had located that were available to satisfy Segal's personal forfeiture judgment. What the Government does not acknowledge is that the information contained within those schedules was not accurate. For example, the Government fails to acknowledge that the ownership information on earlier versions of these schedules shows that Segal personally owned virtually all the scheduled assets, which is consistent with the position the Government took with the jury (*i.e.*, that the restrained assets were owned by Segal, not Near North), but later (after Segal's personal forfeiture was reduced to \$15 million) changed. (R. 2093.) The district court found these schedules unreliable when it heard the Oak Bank issue on remand, and then ruled in Segal's favor on that issue.

- Pages 10 and 21 – At page 10, the Government claims that Segal received assets worth approximately \$8.45 million as part of the Settlement Stipulation. At page 21, the Government cites to oral argument it previously made to the district court that Segal “got eight-and-a-half million dollars.” Nothing in the record supports these valuations, or that these assets should have been on the negotiating table in the first place.
- Page 11 – The Government, citing to Paragraph 10 of the Settlement Stipulation, states that Segal agreed that the Government would keep the assets listed on Exhibit A, and not Exhibit B, “as part of the enterprise forfeiture.” This is a complete misstatement. Segal never agreed to such a statement, nor does Paragraph 10 of the Settlement Stipulation say that. The Settlement Stipulation makes no reference to asset ownership.
- Page 18 – The Government argues that the motions filed by Myron Cherry on behalf of Joy Segal and Michael Segal sought “to vacate Segal’s forfeiture order and both Segals’ settlement agreements.” This is not true. After this Court affirmed the \$15 million forfeiture order (*U.S. v. Segal*, 644 F.3d 364 (7th Cir. 2011)) and certiorari was denied, Segal never sought to modify the forfeiture order. Rather, the relief sought was a return of Segal assets exceeding the \$15 million forfeiture judgment. Although Segal disclaimed interest in those assets as part of his settlement, that conduct resulted in the Government receiving an excessive forfeiture to which it was not entitled and which the district court should have exercised its own independent duty to prevent. The fact that Segal sought to enforce the Settlement Stipulation with respect to the assets he was to receive is of no consequence and is not inconsistent with the ruling he is seeking here.
- Page 23 – The Government criticizes Segal for not discussing the “dozens of filings by the parties dealing with the remand of the forfeiture issue and the details of the assets, or the court’s decision reducing the forfeiture from \$30 to \$15 million in August 2009.” This “fact” is not relevant to any issue on appeal. As explained above, Segal has never sought to modify the \$15 million forfeiture judgment.

III. Argument.

A. There is No Basis To Dismiss Segal's Appeal.

1. The District Court Had Jurisdiction to Determine Whether the Government Proved The Required Nexus Between Segal's Offense and the Assets Subject to Forfeiture.

The Government argues that the district court lacked jurisdiction over Segal's Motion because the \$15 million forfeiture order was part of Segal's criminal sentence and thus, part of Segal's "core" criminal case. According to the Government, the forfeiture order cannot be altered at this late stage since that order became final in March 2012 after unsuccessful appeals. This argument fails because it completely ignores the fact that Segal was not and is not requesting that relief. No part of Segal's Motion seeks to alter Segal's sentence or the \$15 million forfeiture judgment. In fact, it is undisputed that Segal has satisfied all parts of his sentence including serving time in prison, forfeiting a \$250 million company, paying his restitution obligations and paying his \$15 million personal forfeiture obligation.

Even though Segal's \$15 million personal forfeiture is final, he still must be afforded his due process rights. The implementation of the forfeiture order is nevertheless subject to FRCP 32.2. Segal's Motion asked the district court to exercise its FRCP 32.2 independent duty to determine whether the Government proved the requisite nexus between Segal's offense and the assets he forfeited as part of the Settlement Stipulation. The court's duty does not disappear by simple operation of time. The cases relied upon by Segal demonstrate why the Government's argument is without merit. In *Beltramea*, the Eighth Circuit had full

authority to reverse a forfeiture order that was agreed to by all the parties and “final.” *U.S. v. Beltramea*, 785 F.3d 287, 291 (8th Cir. 2015). Likewise, in *Newman*, the Ninth Circuit upheld a district court’s decision to reject a “final” forfeiture stipulation to which all parties agreed. *U.S. v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011); *see also*, *U.S. v. Wendfeldt*, 2012 WL 2681842 (D. Nevada 2012)(same). Those courts did not lack jurisdiction to modify an otherwise final order implementing the collection of the amount called for in a forfeiture order. Neither did the district court. Here, the Government presents no countervailing authority.

The Government’s jurisdictional argument is nothing more than a straw man, which the district court ignored. This Court should do the same.

2. The Forfeiture Order Has Not Been “Satisfied” or “Extinguished.”

In something of a carry-over of its jurisdiction argument, the Government argues dismissal of Segal’s appeal is warranted because the district court could not supplement or modify Segal’s personal forfeiture order since the Settlement Stipulation has “extinguished” the forfeiture judgment and there is nothing left to modify. Thus, according to the Government, Segal’s Motion was moot. This argument suffers from the same problem as all the others: (a) Segal was not asking the court to modify the forfeiture order; and (b) the argument is directly contradicted by FRCP 32.2 and decided decisions of federal courts.

Decisions of the federal circuits cited by Segal have affirmed trial courts that modified forfeiture orders (or reversed trial courts for failing to modify forfeiture orders) that were agreed to by the parties and “final.” *See*, *Beltramea* and *Newman*.

In each of these cases, the court was faced with forfeiture orders that were just as “final” as the one here. Those trial courts had full power and authority to modify their own orders to comport with the court’s independent duty to determine if a nexus exists between specific property to be forfeited and the offense. Once more, the Government’s complete failure to distinguish this precedent or present any countervailing authority speaks volumes. This argument is of no merit and should be ignored.

3. Segal’s Notice of Appeal Was Timely Filed.

Segal’s notice of appeal was timely filed. As the Government acknowledges, on July 12, 2017, the district court issued a written opinion denying Segal’s Motion. On August 9, 2017, 28 days later, Segal filed a Rule 59(e) motion to alter or amend the July 12, 2017 Order. Federal Rule of Civil Procedure 59(e) permits a motion to amend to be filed no later than 28 days after entry of the judgment. Fed.R.Civ.P. 59(e). Thus, Segal’s August 9, 2017 motion to amend was timely. Moreover, because Segal timely filed his Rule 59(e) motion, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.” Fed.R.App.P. 4(A)(iv). In other words, the time for filing an appeal from the district court’s July 12, 2017 Order did not start running until the district court ruled on Segal’s August 9, 2017 Rule 59(e) motion. The district court denied Segal’s August 9, 2017 motion on August 16, 2017. Thus, the time for appealing both the district court’s July 12, 2017 and August 9, 2017 rulings began to run on August 16, 2017.

Segal timely filed his notice of appeal on September 6, 2017 – *i.e.*, within 60 days of the district court’s August 9, 2017 ruling.¹

According to the Government, Segal’s notice of appeal was untimely because: (1) Segal’s Motion and the district court’s July 12, 2017 Order denying that motion “grew out of Segal’s forfeiture sentencing proceeding and were therefore part of the ‘core’ of his criminal case”; and thus, (2) Segal had only 14 days (*i.e.*, the time frame within which a criminal defendant must file his notice of appeal), until July 26, 2017, to either file a notice of appeal or file a motion to reconsider which would toll the time for filing a notice of appeal until 14 days after the motion to reconsider is ruled upon. Contrary to the Government’s contentions, however, Segal’s Motion (and thus, the Court’s July 12, 2017 Order) did not grow out of Segal’s forfeiture sentence proceeding. As explained herein and in Segal’s Appellate Brief, Segal was not asking the district court to modify the \$15 million forfeiture judgment or his sentence. Rather, Segal paid that judgment. The reason for Segal’s Motion was that Segal was required to pay more than the \$15 million he was obligated to pay, and the district court failed to exercise its independent duties to ensure the Government did not receive the windfall that it received, regardless of whether Segal agreed to that or not.

As clearly stated in the authority relied upon by the Government, a number of proceedings involving criminal matters are treated as civil matters for purposes of Federal Rule of Appellate Procedure 4’s filing requirements because they are

¹ Even if Segal’s Rule 59(e) motion was not timely, which it was, Segal still filed a timely notice of appeal from the July 12, 2017 ruling by filing his notice of appeal from that order 56 days after it was entered, or within 60 days of that ruling. Fed.R.App.P. 4(a)(1)(B).

collateral to the criminal punishment. *See, e.g. United States v. Apampa*, 179 F.3d 555 (7th Cir. 1999) and *United States v. Lilly*, 206 F.3d 756, 760 (7th Cir. 2000).

Similarly, some courts have applied “the longer civil period even to orders involving [criminal] defendants, when the orders concern issues other than the conviction and punishment.” *Apampa*, 179 F.3d at 556. For example, “an order denying a motion for return of property has been deemed civil.” *Id.*, citing *United States v. Taylor*, 975 F.2d 402 (1992)(holding that Rule 4(a)’s timing requirements apply to an appeal from an order ruling on a criminal defendant’s motion for return of property). As this Court stated in *Lilly*, “to determine the character of an appeal, we must look to the ‘substance and context’ of the underlying proceeding.” *Lilly*, 206 F.3d at 761. From the substance and context of the proceeding in this case, it is clear that, contrary to what the Government urges this Court to find, this appeal is subject to Rule 4(a)’s 60-day filing requirement.²

Unlike the authority relied upon by the Government, Segal’s Motion did not seek to modify or amend any part of his sentence -- *e.g.*, the \$15 million forfeiture judgment order. Rather, Segal’s Motion concerns a settlement agreement which resulted in Segal overpaying the Government by millions of dollars more than the \$15 million he owed. Segal asked the district court to enforce its FRCP 32.2 duties and enter an order directing the Government to: (i) return to Segal all of Segal’s assets received in excess of \$15 million, (ii) provide an accounting of all additional monies received since February 13, 2013 as a result of the assets it received from

² Pursuant to Fed.R.App.P. 4(a)(1)(B), the notice of appeal may be filed by any party within 60 days after entry of the order appealed from if one of the parties is the United States.

Segal through the Settlement Stipulation, (iii) refund the \$2,043,780 Segal paid to the Government for the insurance policy which the Government did not own or control, and therefore had no ability to sell to Segal, (iv) refund the \$2,151,718 Segal paid to acquire his nonforfeitable ERISA accounts, (v) refund to Segal the \$345,000 which he paid to the Government for Joy Segal's East Bank Club limited partnership interest, and (vi) reimburse Segal for the substantial legal fees he incurred seeking to enforce his rights under the Settlement Stipulation and for seeking to have the district court perform its duties under FRCP 32.2. Segal's Motion in no way sought to modify the \$15 million forfeiture judgment.

Segal has complied with all aspects of his "core" criminal proceedings and those aspects of his case are long over. The issues raised here do not concern Segal's conviction or punishment, but instead are collateral to Segal's "core" criminal proceedings. Like *Taylor*, Segal seeks a return of his seized assets (which the Government acknowledges were substitute assets in the first place) which were not needed in order to pay the Government his \$15 million forfeiture obligation. Accordingly, Rule 4(a) applies, and Segal's notice of appeal of both the district court's July 12, 2017 and August 16, 2017 Orders was timely.

B. The Law of the Case Doctrine Cannot Apply Because Ownership of the Disputed Assets Was Never Adjudicated Despite the Requirement of FRCP 32.2(b)(1)(A).

The law of the case doctrine cannot apply to the issue of ownership of the disputed assets because the hearing intended to adjudicate ownership was never held. Nevertheless, the Government argues that prior district court rulings and this

Court's 2016 ruling enforcing parts of the Settlement Stipulation – none of which resolve who owned what – are dispositive of the ownership issue Segal raised below. According to the Government, the law of the case doctrine bars “Segal’s efforts to undo the settlement agreement” that he has consistently tried to enforce since 2013 in both the district court and this Court.

As an initial matter, this argument fails because Segal is not trying to vacate the Settlement Stipulation. Rather, Segal contends that the district court erred by allowing the Government to receive far more than the \$15 million it was entitled. Segal seeks a return of all of his assets in excess of the \$15 million Segal was required to forfeit.

The Government’s argument also fails because it does not account for the fact – well established in FRCP 32.2, *Beltramea*, *Newman*, and the other cases cited by Segal in his Appellate Brief and herein – that the district court had an independent duty to ensure Segal’s property rights were protected by determining who owned the disputed assets that were negotiated as part of the settlement regardless of when and if Segal ever raised that issue, and it committed plain error by failing to do so.³ This Court has the authority to correct plain error by the district court when that plain error was not brought to the trial court’s attention. *See, e.g., Capitol*

³ Although Segal agrees with the Government’s Standard of Review insofar as it states that the district court’s interpretation of the Settlement Stipulation concerning Segal’s civil forfeiture judgment is appropriate for *de novo* review, the Government completely ignores that the issues raised in Segal’s appeal concern the district court’s failure to enforce its FRCP 32.2 obligations with respect to the Settlement Stipulation which resulted in Segal grossly overpaying the Government to satisfy his \$15 million forfeiture judgment. A trial court’s failure to observe its FRCP 32.2(b)(1)(A) duty is reviewed for plain error. *Beltramea*, 785 F.3d at 291. Instead of acknowledging that the issues on appeal must be reviewed for plain error, the Government wrongly urges that a clearly erroneous standard applies.

Indem. Corp. v. Keller, 717 F.2d 324 (7th Cir. 1983). This, of course, is what occurred in *Beltramea*, where counsel for the defendant in the trial court made no objection to a forfeiture order, but the Court of Appeals nonetheless reversed due to the trial court's plain failure to exercise its FRCP 32.2(b)(1)(A) duty. *Beltramea*, 785 F.3d at 291. A plain error will be corrected at any time. Trial courts presiding over forfeitures must require the Government to prove up its case regardless of what position the defendant takes or when he takes it.

C. Judicial Estoppel Not Only Does Not Bar the Issues Raised in Segal's Appeal, But Also Support His Arguments. Further, the District Court Could Not Estop the Exercise of Its Own Independent Duty.

Ignoring all authority concerning FRCP 32.2, the Government also argues, relying on the district court's erroneous July 12, 2017 opinion, that Segal's claims are barred by the doctrine of judicial estoppel. According to the Government, the principles of judicial estoppel and basic fairness prevent Segal's current efforts to undo the settlement when he previously made efforts to enforce the settlement. In other words, the Government contends that Segal cannot enforce his Settlement Stipulation and then benefit from a FRCP 32.2 determination. But that is not what the cases (those same cases ignored by the Government) say. Again and again, the cases show that a trial court may – and indeed must – act independently to determine that the Government proves the nexus between an offense and specific property to be seized.

Ultimately, the Government's judicial estoppel argument fails because (a) the Government misunderstands who exactly is being estopped, and (b) the

Government's analysis does not begin with what the Government told the jury at trial were the assets owned by Segal. In this case, it is the district court that would be estopped from exercising its own duty pursuant to FRCP 32.2. As the cases show, this novel application of the judicial estoppel doctrine is inapplicable to the factual scenario now before this Court.

Moreover, if judicial estoppel bars someone other than the court, it bars the Government. As the Government points out, relying on *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785 (7th Cir. 2013), "judicial estoppel is a flexible equitable doctrine designed to prevent the perversion of the judicial process. The doctrine protects the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." The Government is the "chameleonic litigant" here.

As explained more fully in Segal's Appellate Brief, the Government had years to obtain evidence regarding the ownership and value of the assets it seized. The Government seized all of Segal's and Near North's books, records and computers (which, to this day, have never been returned) and issued subpoenas related to those assets. (R.2093, Ex. 14.) The Government possessed evidence to demonstrate the ownership of each of these assets. During the trial and the forfeiture hearing, the Government told the jury that the assets at issue were owned by Segal. (R.2093, 2093 at Ex. 13; Tr. 2620, 5201, 6085; Tr. Exs. 41, 247.) The Government never said that the assets were owned by NNNG. In fact, the Government focused on the fact that Segal owned all of these assets, and that these assets could be used as

substitute assets to satisfy Segal's forfeiture obligation. (Tr. 6085; R.2065, Ex. F.) Based on the Government's presentment of these facts, "the jury returned a forfeiture verdict finding Segal personally liable for \$30 million, representing proceeds and interest he acquired by virtue of the racketeering activity." (R.341, 347, 1483, 1706.) The Government ignores that it took this position at trial and the forfeiture hearing and used this evidence to obtain the result it wanted – Segal's forfeiture of all of his assets and a sentence of 10 years in prison.

The Government also completely ignores the misconduct it has engaged in since the trial and forfeiture hearing. After this Court remanded Segal's \$30 million personal forfeiture judgment "for a determination of what portion of the \$30 million was not reinvested in the enterprise, but rather went to benefit Segal personally," and only after the district court made it clear that the Government must present some evidence of the amounts that went to benefit Segal personally, the Government took an entirely contrary position concerning the ownership of Segal's assets than it previously took at trial and the forfeiture hearing. Knowing it would not be able to show that Segal received and retained \$30 million in personal benefits, the Government for the first time began claiming that assets it previously told the jury were owned by Segal (which statements the jury relied upon in convicting Segal), totaling at least \$28,339,461, were actually owned by Near North. As reflected in the chart set forth at page 17 of Segal's Appellate Brief, the Government went from claiming Segal owned assets totaling at least \$28,339,461 in 2007 to saying Segal owned assets totaling only \$16,022,451 in 2009 and ultimately,

only \$12,783,556.45 in 2013 in the schedules the Parties used to settle Segal's forfeiture obligation.

The Government should be judicially estopped from now taking a position that is entirely inconsistent with the position it took at trial and the forfeiture hearing, especially because it was that position that resulted in Segal's conviction.

D. There Is No Nexus Between the Property Segal Agreed to Release As Part of the Settlement Stipulation and Segal's Forfeiture Obligation.

The Government argues that Segal's reliance on FRCP 32.2(b)(1)(A) is misplaced for three reasons: (1) this argument was untimely because Segal already pursued a direct appeal, an appeal from the forfeiture judgment and an appeal from the Settlement Stipulation; (2) a nexus existed between the forfeited property and Segal's criminal conduct; and (3) in any event, the Government must only establish a requisite nexus between the property and the offense when the Government seeks forfeiture of specific property, and in this case, the Government only sought "a personal money judgment." Further, the Government contends that the remaining assets Segal seeks to regain were part of the enterprise forfeiture, and thus, FRCP 32.2(b)(1)(A) does not apply.

Other than citing to footnote 4 in the district court's July 12, 2017 opinion (*see*, Segal Appendix at A7), the Government fails to offer any explanation as to why it believes the district court correctly found that Segal's Motion was either untimely or that a nexus existed between the forfeiture and the offense. As Segal explained in his Appellate Brief, the district court's opinion, which barely touched on these

issues in a footnote, was wrong. For example, the fact that Segal did not raise his FRCP 32.2 argument until after three rounds of appeals had taken place is of no consequence. *See, e.g., Newman*, 659 F.3d 1235. Unlike Segal who did raise FRCP 32.2 arguments, the defendant in *Newman* never made a FRCP 32.2 argument. Nevertheless, the Ninth Circuit Court of Appeals *sua sponte* corrected the plain error that occurred on this basis in *Newman*.

Likewise, as explained in Segal's Appellate Brief, the district court erred when it found "a nexus existed between the forfeited property and Segal's extensive criminal conduct." The amended forfeiture order required Segal to personally forfeit \$15 million. The evidence demonstrates that there was no nexus between the property Segal forfeited as part of the Settlement Stipulation and the criminal offense because the Settlement Stipulation allowed the Government to recover far more of Segal's assets than the \$15 million Segal was ordered to personally forfeit. In fact, the evidence shows that the Government collected at least \$35,280,063.91 from assets which the Government admitted at trial and during the forfeiture hearing were owned by Segal. The district court failed to enforce the \$15 million amended forfeiture judgment when it allowed the Settlement Stipulation to stand as is, which resulted in the Government retaining more than \$20 million than it was entitled to receive. (R.2065-1.)

The Government's argument that the district court's duties under FRCP 32.2 are irrelevant similarly fails. According to the Government, those duties do not apply because here, the Government only seeks "a personal money judgment," and

FRCP 32.2 duties only require a nexus between the property and the offense when the Government seeks forfeiture of specific property. This argument ignores the circumstances of this case. Here, Segal was required to personally forfeit to the Government \$15 million. Although Segal did have nearly enough in restrained cash to satisfy the entire \$15 million forfeiture amount, he was required as a precondition to the Government agreeing to settle to use certain of his other restrained assets to satisfy the \$15 million forfeiture amount in full. Accordingly, the Government was seeking forfeiture of certain specific property (*i.e.* the seized substitute assets) in order for Segal to satisfy his monetary forfeiture obligation. And when Segal forfeited certain assets to satisfy his \$15 million personal forfeiture obligation, the district court had a duty to ensure that forfeiture of those assets was sufficiently tied to Segal's forfeiture obligation. But here, the district court failed to do that. The Settlement Stipulation therefore resulted in the Government receiving assets worth substantially more than the \$15 million that Segal was personally obligated to pay.

The Government also argues that the district court correctly foreclosed Segal's attempt to repudiate the Settlement Stipulation when it concluded that doing so would be improper and unfair because: (1) the Settlement Stipulation "reasonably resolved" many unidentified complex issues concerning the forfeiture of Segal's assets; (2) Segal reached an arms-length deal with the Government to release all property listed on Exhibit A and not B; and (3) the fact that Segal believes four years later that he could have made a better deal does not change the

circumstances and permit the court to modify the agreement. According to the Government, these findings were amply supported by the record and Segal does not come close to showing these findings were clearly erroneous. Again, as explained above, the Government's argument misses the point. The issue is not whether the district court's findings were clearly erroneous. Rather, it is whether the district court committed plain error in failing to exercise its independent FRCP 32.2 duties. Segal's Appellate Brief demonstrates in detail how the district court committed plain error when it failed to exercise its FRCP 32.2 duties, including by allowing the Government to recover Segal's assets worth substantially more than the \$15 million he was required to forfeit.

The district court's findings were also wrong because it does not matter if the Settlement Stipulation resolved many complex forfeiture issues, nor does it matter if Segal reached an arms-length deal to give to the Government his assets worth substantially more than \$15 million. FRCP 32.2 requires the court to ensure a nexus between the property forfeited and the criminal conduct. *See, Libretti v. U.S.*, 516 U.S. 29 (1995); *Beltramea*, 785 F.3d 287; *Newman*, 659 F.3d 1235; *Wendfelt*, 2012 WL 2681842. The Government offers no contrary authority, but instead merely relies on the district court's findings. Because the district court failed to exercise its FRCP 32.2 duties, its findings must be reversed. Had it exercised those duties, the district court would have determined that the Settlement Stipulation resulted in an inaccurate and excessive forfeiture.

E. The District Court Erred When It Refused To Exercise Its FRCP 32.2 Duties, And Then Enforced the Settlement Stipulation, Despite the Unconscionable Circumstances.

In his Motion, Segal argued, in the alternative, that if the district court was not going to exercise its FRCP 32.2 duties and return to Segal those assets which resulted in an excessive forfeiture, the Settlement Stipulation should be deemed unenforceable because it is unconscionable. Segal also argued that the Settlement Stipulation was unenforceable under *Contempo Design Inc. v. Chicago and Northern Illinois District Counsel of Carpenters*, 226 F.3d 535 (7th Cir. 2000), both because there was no consideration, and Segal was forced to acquiesce its terms. Without addressing the arguments advanced by Segal, the Government focuses solely on the district court's July 12, 2017 opinion and argues that the district court correctly denied this alternative requested relief.⁴

According to the Government, the Settlement Stipulation was not so grossly and unconscionably one-sided in favor of the Government to be either procedurally or substantively unconscionable, and thus, unenforceable, because the district court correctly found that: (a) Segal is a highly intelligent, sophisticated businessperson, who had been a licensed attorney, certified public accountant and owner and sole shareholder of a successful company; and (b) Segal had skilled lawyers, who had been involved since shortly after Segal was convicted. Thus, the Government argues that the district court reasonably concluded that there was "nothing inherently

⁴ The Government does not address Segal's *Contempo* arguments at all. For the reasons set forth in his Appellate Brief, if this Court does not find that the district court erred in performing its FRCP 32.2 duties, then Segal respectfully requests that this Court find, in the alternative, that the Settlement Stipulation is unenforceable under *Contempo*.

unfair about the Settlement Stipulation or the process used to negotiate it.” (Gov. Brief at p. 45.) But the Government, like the district court, ignores the facts. Regardless of Segal’s and his lawyer’s experience and skillset⁵, Segal lacked the necessary tools to proceed to a hearing (*i.e.*, to pay his lawyers and hire experts), much less negotiate a fair settlement.

As explained more fully in Segal’s Appellate Brief, once the Government learned it would not recover \$30 million from Segal personally, it pursued strategies to make up for that loss. As the remanded forfeiture proceedings progressed, the Government took steps to convince the district court, through false evidence and misleading proofs, that most of the restrained assets belonged to Near North, as opposed to Segal, even though it took a directly contrary position at trial and the forfeiture hearing. The Government went from claiming Segal owned more than \$30 million in assets, to claiming, once that forfeiture judgment was reduced to \$15 million, that Near North owned most of those assets and those assets were therefore forfeit as part of the enterprise forfeiture.

As explained in his opening brief, the Government knew Segal had no money, could not hire experts, could not pay his lawyers, and had no ability to talk with the people who controlled the restrained assets. In essence, the Government knew that Segal had no choice but to settle if he wanted to recover any of his seized assets. Based on the Government’s ever-changing positions on Segal’s ownership of

⁵ Segal’s principal counsel for the previous eight years were Mr. Joyce and Ms. Doherty. Neither one of them had been paid any fees during that time period, although they unsuccessfully requested that the Government release funds several times, and neither one has a criminal law background.

restrained assets, if Segal proceeded to hearing, he risked losing everything and still owing the Government millions of dollars. Of course, this would not have been the case had the Government stuck with its original trial and forfeiture hearing position that Segal was the owner of all assets. The district court erred when it concluded the settlement negotiation process and resulting Settlement Stipulation were fair and conscionable.

The Government also argues that the district court properly rejected Segal's contentions that the Government knew the restrained assets belonged to Segal rather than Near North, since the district court presided over a three-month trial and knew that Segal's personal finances were "hopelessly muddled" with Near North's.⁶ Thus, the Government argues that the district court properly concluded that even if an asset was nominally held by Segal, it did not prove he owned it. This argument is again directly contrary to the position the Government took at trial and the forfeiture hearing – *i.e.*, that Segal owned all assets. And the evidence, as set forth in Segal's Appellate Brief, which the Government does not rebut, reveals that the Government did not change its position concerning the ownership of these assets until this Court remanded the forfeiture issue for a determination of the net

⁶ The Government argues that the trial included lengthy and detailed evidence of Segal's personal tax fraud. However, Segal has explained to this Court many times in prior appeals that despite being convicted of conspiring to defraud the IRS, the United States Tax Court subsequently found in the IRS's civil tax fraud case against Segal, which was based on the same facts as were alleged against Segal in this matter, that "there are no deficiencies in income tax due" from Segal, and further ruled that there was no civil fraud penalty. See, Segal Appendix at A14-15. Once again, the Government ignores the facts and circumstances surrounding this case in an effort to spin "facts" in its favor.

proceeds that went to benefit Segal personally, rather than being reinvested in Near North.

Even after the forfeiture issue was remanded, the Government maintained its position that Segal owned all assets and those assets would be needed to satisfy Segal's \$30 million personal forfeiture liability. When the district court made it clear that Segal would not be required to personally forfeit \$30 million to the Government, that is when the Government started taking a different position. As demonstrated in the chart at page 17 of Segal's Appellate Brief, the Government originally claimed that Segal owned all assets except Sheridan Road Lifestyles. In 2007, it claimed Segal owned assets totaling at least \$28,339,461. By January 2013, the Government claimed that Segal owned only \$12,873,556.45 in assets, whereas Near North (*i.e.*, the Government) owned \$33,838,290 in assets. (R. 2093-1 at Exs. 1-3 and 6.) The Government not only fails to rebut these facts, but it ignores these facts altogether. These facts demonstrate that the Government always believed, and indeed, told the jury who later convicted Segal, that Segal owned all of the assets until it realized it would no longer benefit from taking that position. The district court erred when it ignored these undisputed facts setting forth the Government's ever-changing positions on Segal's ownership of restrained assets, insinuating that Segal could not have been forced to settle.

The Government next argues that it could not have taken unfair advantage of Segal because Segal could have required the Government to prove the ownership of the assets in the evidentiary hearing, but instead chose to settle. But Segal's

Appellate Brief explains that without being able to pay experts and lawyers, Segal faced a substantial risk he would receive nothing and still owe the Government millions of dollars.

The Government further argues that the district court correctly found that the Settlement Stipulation resulted in clear benefits to Segal, by extinguishing his personal forfeiture liability and giving him access to approximately \$8 million. Segal's Appellate Brief explains how the district court made a manifest error in reaching this conclusion because the Government never had the power to transfer to Segal: (a) the insurance policies he "paid" for, valued at approximately \$2,043,780, because Near North did not own these policies; (b) \$2,151,716.47 from ERISA accounts, because those accounts are exempt from forfeiture and never should be been on the negotiating table, let alone restrained; and (c) Joy Segal's interest in the East Bank Club for \$345,000. In sum, of the \$8 million in benefits that the district court wrongly concluded Segal received, \$4,540,596 in assets never should have been on the negotiating table to begin with.⁷ Thus, Segal did not receive more than half of the benefits the district court found he received. The Government fails to respond to these arguments. Segal requests that this Court direct the Government to return to Segal the \$4,540,596 that he paid for those assets which the Government never had any right to restrain in the first place.

⁷ Not only did the Government not have the ability to transfer certain assets to Segal, but the assets identified in the Government's schedules which the Parties used to discuss settlement lacked supported valuations. For the reasons set forth herein and in Segal's Appellate Brief, Segal had no reasonable choice but to accept those arbitrary valuations to negotiate a settlement. He risked losing everything if he proceeded with a hearing.

CONCLUSION

Since day one, the Government has embarked upon a playbook of questionable due process tactics. The Government's conduct showed a planned pattern motivated by bad faith to make up for the \$15 million the Government lost when the amended forfeiture judgment was affirmed by this Court, starting with its motion to reconsider *en banc*, which was denied. Although this matter could have been resolved years ago with Segal's liquid assets alone, once the Government understood that the district court and this Court would reduce the \$30 million forfeiture judgment to \$15 million, it completely changed its position on the ownership of assets. The Government's position originally went from showing that Segal owned nearly \$30 million in assets at the time of trial to only \$12 million at the time the Parties negotiated a settlement. The Government, using its awesome bargaining power, ultimately took a position that was totally contrary to the position it took at trial. The Government would not have been able to accomplish this had Segal had access to funds to hire and pay experts and lawyers well-versed in criminal law.

For all of the foregoing reasons, Segal respectfully requests that this Court enter an order: (a) finding that the district court's refusal to enforce its FRCP 32.2 duties was plain error and further directing the Government to return to Segal all funds and assets received in excess of \$15 million, and additionally provide an accounting of all additional monies it has received since February 13, 2013; (b)

directing the Government to refund to Segal \$4,540,596 that Segal paid for the insurance policy, ERISA account funds and Joy Segal's East Bank Club interest, which the Government had no ability to transfer to Segal in the first place; and (c) reimburse Segal for the substantial legal fees he has incurred seeking to enforce his rights under the settlement and seeking to have the district court perform its duties under FRCP 32.2. If this Court finds no plain error in the district court's failure to perform its FRCP 32.2 duties, then Segal respectfully requests, in the alternative, that this Court find that the Settlement Stipulation is unconscionable, and thus, unenforceable.

DATED: October 10, 2018

Respectfully submitted,

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Edward T. Joyce

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Dated: October 10, 2018

CERTIFICATE OF SERVICE

I, Edward T. Joyce, an attorney, hereby certify that I caused a true and correct copy of the foregoing Reply Brief of Defendant-Appellant, Michael Segal, to be served upon:

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