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F# 2018R01047

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
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UNITED STATES OF AMERICA,

Case No. 19-CR-582 (DRH)

- against -

FRANCES CABASSO, et. al.

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S  
MOTION FOR INTERLOCUTORY SALE OF PROPERTY

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PRELIMINARY STATEMENT

The United States of America, by its attorney, Seth D. DuCharme, Acting United States Attorney for the Eastern District of New York, Claire S. Kedeshian, Assistant United States Attorney, of counsel, submits this memorandum of law, along with the Declaration of Dennis Crennan, a Senior Inspector with the United States Marshals Service, dated January 15, 2021 (“USMS Decl.”), and proposed Interlocutory Sale Order (“Proposed Order”), in support of its motion for interlocutory sale of property pursuant to Rule 32.2(d)(7) of the Federal Rules of Criminal Procedure (“F. R. Crim. P.”) and Rule G(7)(b) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the “Supplemental Rules”).

In this motion, the government seeks to proceed with the interlocutory sale of an approximately seventy-foot luxury recreational yacht named “Tranquilo,” registered in the name of the Aventura Group, Inc., an entity owned and controlled by the defendant Frances Cabasso, bearing hull identification number XAX68S47C606, and Coast Guard Number 1194245, which was seized on November 7, 2019 pursuant to a court-authorized seizure warrant (“the Yacht”). This asset was included in the forfeiture allegations of the defendant’s pending criminal indictment.

As of December 31, 2020, approximately \$56,625.85 in maintenance and storage costs relating to the Yacht have accrued. These expenses continue to accrue and will continue to accrue until there is a disposition of this asset. Further, in addition to these reoccurring expenses, in November 2019, around the time the Yacht was seized, the United States Marshals Service (“USMS”) was informed that the Yacht was estimated to have a value of approximately \$649,000. An appraisal received by the USMS, dated June 23, 2020, estimated the value of the

Yacht to be approximately \$625,000. In short, over an approximate eight month period, it appears that the Yacht has decreased \$24,000 in value while the maintenance and storage costs are continuing to be incurred.

In these circumstances where the asset is depreciating and large expenses are continuing to be incurred with respect to the storage and maintenance of the asset, F. R. Crim. P. Rule 32.2(b)(7) and Supplemental Rule G(7)(b) authorize the government, pursuant to a court order, to proceed with an interlocutory sale in order to prevent further dissipation and to preserve the value of the forfeitable Yacht pending resolution of the criminal proceedings.

#### FACTUAL AND PROCEDURAL BACKGROUND

As alleged in the Indictment, the defendants Jack Cabasso and Frances Cabasso, their entity Aventura Technologies, Inc. (“Aventura”), along with others, engaged in an extensive and lucrative fraudulent scheme to unlawfully import into the United States unmarked and fraudulently marked goods, including but not limited to security and surveillance camera equipment, and defraud the United States by falsely representing that Aventura was a woman-owned business. See Indictment, Docket Entry No. 55, at ¶¶ 19-30. As further alleged in the Indictment, the defendants Jack Cabasso and Frances Cabasso siphoned millions of dollars out of Aventura through shell entities under their control and laundered those funds through the purchasing of various assets including, but not limited to, the Yacht. See Id. at ¶¶ 31-32.

The pending Indictment charged the defendants Jack Cabasso, Frances Cabasso, and their entity Aventura, along with others, with multiple substantive counts of mail and wire fraud conspiracy in violation of 18 U.S.C. §§ 1349 (Counts One and Two); unlawful importation of goods in violation of 18 U.S.C. § 545(Count Three); and money laundering conspiracy in

violation of 18 U.S.C. § 1956(h)(Count Four). The Indictment also included criminal forfeiture allegations predicated on each of those substantive criminal charges pursuant to 18 U.S.C. §§ 981(a)(1)(C), 982(a)(2), 982(a)(1), 981(b), 21 U.S.C. § 853(p), and 28 U.S.C. § 2461(c). Id. at ¶¶ 41-46. Among the defendants' assets specifically included in the Indictment as subject to forfeiture is the Yacht. Id. at ¶¶ 41(m); 43(m) and 45(m).

As set forth in the USMS Decl., the Yacht was seized by the USMS pursuant to a court-authorized seizure warrant on or about November 7, 2019 from a marina located in Long Island, New York. See USMS Decl. at ¶ 4-5. At the time it was seized, the Yacht had an appraised value of approximately \$649,000. Id. at ¶ 6. Since that time, the Yacht has been maintained and stored by the USMS at secure marinas. Id. at ¶ 7. As of December 31, 2020, the maintenance and storage costs for the Yacht totaled approximately \$56,625.85. Id. at ¶ 8. Such maintenance and storage costs will continue to accrue until the final disposition of this criminal case. Id. at ¶ 8. Moreover, a June 23, 2020 appraisal of the Yacht, indicates that its fair market value is approximately \$625,000. Id. at ¶ 9.

In light of the ongoing nature of this criminal case, which has already been agreed by the parties and deemed by the Court to be complex, it is highly improbable that this criminal case, and any related determination of assets subject to forfeiture, including the Yacht, will be resolved against the defendants without considerable further depreciation to this asset and significant future costs associated with maintaining and storing it.

## GOVERNING LEGAL FRAMEWORK

Criminal forfeiture proceedings are governed by Fed. R. Crim. P. Rule 32.2. Fed. R. Crim. P. Rule 32.2(b)(7) provides:

Interlocutory Sale. At any time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.

Fed. R. Crim. P. 32.2(b)(7), specifically references Supplemental Rule G(7) of the Federal Rules of Civil Procedure. Supplemental Rule G(7), which is entitled “Preserving, Preventing Criminal Use, and Disposing of Property Sales,” governs the interlocutory sale of property subject to civil forfeiture proceedings. Therefore, the federal rules governing interlocutory sales of forfeitable property, whether they are being pursued in the context of a criminal forfeiture (assets of defendants) or civil forfeiture (in rem actions against a res), proceedings, are the same.

In this regard, Supplemental Rule G(7)(b), which is entitled “Interlocutory Sale or Delivery,” provides, in pertinent part:

- (i)     Order to Sell. On motion by a party. . . , the court may order all the property sold if:
    - (A)     the property is perishable or at risk of deterioration, decay, or injury by being detained in custody pending the action;
    - (B)     the expense of keeping the property is excessive or is disproportionate to its fair market value;

. . . or

  - (D) the court finds other good cause.
- (ii)    Who Makes the Sale. A sale must be made by a United States agency that has authority to sell the property, by the agency’s contractor, or by any person the court designates.

- (iii) Sale Procedures. The sale is governed by 28 U.S.C. §§ 2001, 2002, and 2004, unless all the parties, with the court's approval, agree to the sale, aspects of the sale, or different procedures.
- (iv) Sale Proceeds. Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.

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Supp. R. G(7)(b).

Thus, the requirements of an interlocutory sale are satisfied if the property is "at risk of deteriorating" or "the expense of keeping the property is excessive or disproportionate to its fair market value." Supp. R. G(7)(b)(i)(A) or (B).

## ARGUMENT

### THE COURT SHOULD AUTHORIZE THE INTERLOCUTORY SALE OF THE YACHT

Fed. R. Crim. P. Rule 32.2(b)(7) and Supplemental Rule G(7) expressly provide that the court may order an interlocutory sale if the property in a criminal forfeiture proceeding is “liable to deterioration” or “the expenses of keeping the property are excessive or disproportionate.” United States v. Esposito, 970 F.2d 1156, 1160 (2d Cir. 1992)(quoting Supp. R. E(9)(3), predecessor to Supp. R. G(7)(b)(i)); United States v. Swartz, 391 F. Supp. 3d 199, 214-215 (N.D.N.Y. 2019)(quoting Supp. R. G(7)(b)(i)(A)-(D)). In determining whether to order such a sale, the court enjoys “considerable discretion, which implies a deferential standard of appellate review.” United States v. Approximately 81,454 Cans of Baby Formula, 560 F.3d 638, 641 (7th Cir. 2009).

Courts that have had an opportunity to address the interlocutory sale of seized assets that are forfeitable, such as vessels or vehicles, have relied on these specific factors of inherent deterioration, storage and maintenance costs, to approve interlocutory sales. See e.g., United States v. Any and All Funds in UBS, AG Account, 628 F. Appx. 296 (5th Cir. 2016)(per curiam)(affirming interlocutory sale of an air plane where air plane was found to be depreciating in value and had continuing storage costs); United States v. 4816 Chaffey Lane, 699 F.3d 956, 961 (6th Cir. 2012)(affirming interlocutory sale of a yacht where yacht owner was in default on a mortgage); United States v. 65441 Snai-A-Barr-Road, et. al., 2019 WL 1255278 at \* 2 (D. Kan. March 19, 2019)(ordering interlocutory sale of multiple vehicles where storage costs were 10-15% of value of the assets and continuing); United States v. King, 2010 WL 4749791, \*3 (S.D.N.Y. Nov. 12, 2010)(ordering interlocutory sale of horses to protect them from further

deterioration in value and so that the proceeds would be preserved); United States v. \$1,133,648 Seized from Bank of Hawaii, et. al., 2008 WL 687337 at \* 4 (D. Hawaii March 11, 2008)(ordering interlocutory sale of luxury cars, jewelry and artwork after finding that these assets were subject to deterioration and excessive maintenance and storage costs). Further, at least one court in this district has found that an interlocutory sale “for good cause” under Supplemental Rule G(7)(b)(i)(D) existed because “the property is subject to diminution in value.” See United States v. Real Property Located at 272 Old Montauk Highway (hereinafter “272 Old Montauk”), 298 F.R.D. 43, 50 (E.D.N.Y. 2014)(ordering interlocutory sale of real properties where loan against the real property was in default).

Here, as noted above, the Yacht, in an approximate eight month period, decreased \$24,000 in value since the time of seizure. See USMS Decl. at ¶¶ 6 and 9. In addition, the government continues to incur considerable costs related to the maintenance and storage of the Yacht. Through December 31, 2020, those costs were approximately \$56,625.85. See USMS Decl. at ¶ 8. Until there is a disposition of this asset in the criminal case, these costs will continue to accumulate. Thus, the requirements for an interlocutory sale outlined by the federal rules and applicable case law are satisfied.

I. The Interlocutory Sale Should Proceed In A Commercial Feasible Manner

Supplemental Rule G(7)(b)(ii) specifically directs that the interlocutory sale is to be conducted by the USMS or its contractor. Furthermore, pursuant to Supplemental Rule G(7)(b)(iii), the procedures for such an interlocutory sale are set forth in 28 U.S.C. §§ 2001, 2002,

and 2004.<sup>1</sup> The Court is at liberty to order the sale “upon such terms and conditions as the court directs.” 28 U.S.C. § 2001(a) and (b).

Here, so that the value of the Yacht will be preserved in accordance with the federal rules, the United States requests that the Court allow the USMS, or its contractor, to use the method of marketing and sale as would be used when complying with the applicable laws, policies and regulations for the sale and disposition of forfeited assets. See 21 U.S.C. § 853(i)(4) (providing for the disposition of forfeited property “by public sale or any other commercially feasible means...”); 21 U.S.C. § 881(e)(1)(B) (providing for the disposition or sale of forfeited property “by public sale or any other commercially feasible means”). In the context of interlocutory sales of potentially forfeitable assets, courts have approvingly applied the same method of sale the USMS has used for forfeited properties. See e.g., United States v. \$510,910, 2020 WL 3840502 (S.D. Ill. July 8, 2020)(approving and finding that a USMS on-line auction sale of a vehicle would yield the highest price and be the most efficient means of conducting the interlocutory sale); United States v. One 2005 Lagoon 440 Sailing Catamaran, 2017 WL 10573808 (C. D. Calif. Sept. 27, 2017)(approving and finding that a USMS on-line public auction sale of a boat would attract sufficiently qualified potential buyers and rejecting claimant’s proposal of a private sale); United States v. Real Property and Residence located at 4816 Chaffey Lane (“Chaffey I”), 2012 WL 529239 at \* 2 (E.D. Ky. Feb. 17, 2012)(granting government’s motion for interlocutory sale of a yacht and directing the USMS “to conduct the sale in a commercially reasonable manner taking into consideration the characteristics of the property

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<sup>1</sup> Title 28 U.S.C. § 2001 governs the sale of real property, but it is incorporated by reference in Section 2004 for the sale of personality.

“being sold” in order to alleviate any concerns that the yacht would be sold at a low price if sold in a forced sale); Swartz, 391 F. Supp. 3d 199, 216 (granting government’s motion for an interlocutory sale of an ongoing franchise entity and directing the government to submit a sales plan even in the face of opposition by a claimant); King, 2010 WL 4739791 at \* 5 (granting government’s motion for an interlocutory sale of horses and directing the government to submit a sales plan). By authorizing a sale of the Yacht in a commercial feasible manner, the government will attempt to maximize the existing value of this potentially forfeitable asset for later proceedings during the forfeiture phase of this matter.

Accordingly, pursuant to Supplemental Rule G(7)(b)(i)-(iv), the Proposed Order included with this motion provides for the USMS or its contractor to market and sell the Yacht in a commercially feasible manner and consistent with the laws, policies, and applicable regulations used by the USMS when selling forfeited assets. Further, following the same federal laws and procedures for disposing of any forfeited property and the applicable case law, the Proposed Order also provides for the costs, maintenance, storage and other related expenses associated with maintaining, marketing and selling the Yacht, to be deducted before the net proceeds are deposited into an interest bearing account in lieu of the Yacht. See 21 U.S.C. § 881(e)(2)(A)(i) (providing for all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs); 65441 Snai-A-Barr-Road, et. al., 2019 WL 1255278 at \* 3 (interlocutory sale order explicitly provided “The net sale proceeds (those proceeds remaining after costs of sale, storage costs, and other related expenses have been deducted...”) were to be deposited into an interest bearing account in lieu of the property until the conclusion of the judicial proceedings); \$510,910, 2020 WL 3840502 at \* 2 (interlocutory sale

order provided for government's costs and expenses); One 2005 Lagoon 440 Sailing Catamaran, 2017 WL 10573808 at \* 4 (interlocutory sale order provided for government's costs and expenses including those necessary for preparing the vessel for auction). Furthermore, and pursuant to Supplemental Rule G(7)(b)(iv), the Proposed Order provides for the net proceeds to be deposited by the USMS in an interest bearing account pending the conclusion of the criminal forfeiture aspects of this ongoing criminal case. In short, the government's proposed interlocutory sale of the Yacht will merely ensure that the net proceeds from such a sale are reduced to cash, preserved, and will remain available for potential forfeiture at the conclusion of these criminal proceedings.

II. Defendant Francis Cabasso's Opposition Is Unsubstantiated, Speculative and Unwarranted

In this case, prior to the government filing this motion, it attempted, without success, to obtain the defendant, Francis Cabasso's (hereinafter "defendant") consent to an interlocutory sale of the Yacht. Moreover, the defendant has already filed with the Court its opposition to the interlocutory sale of the Yacht. See Docket Entry No. 165. The government respectfully submits that defendant's opposition to an Interlocutory Sale of the Yacht is unsubstantiated, speculative and unwarranted.

As a threshold matter, defendant's legal argument in opposition is not supported by the applicable rules and case law. Contrary to defendant's contention, the proposed interlocutory sale need not wait until after a defendant has been convicted. Rather, the federal rules and applicable case law governing interlocutory sales of property expressly contemplate that such a motion is most appropriately made during the pendency of an ongoing judicial proceeding and prior to any conviction or determination of forfeitability. See Fed. R. Crim. P. 32.2(b)(7) ("At any

time before entry of a final forfeiture order, the court, in accordance with Supplemental Rule G(7) of the Federal Rules of Civil Procedure, may order the interlocutory sale of property alleged to be forfeitable.”)(emphasis added). Indeed, that is why it is interlocutory in nature.

Moreover, courts have granted the government’s motion for interlocutory sale of a forfeitable asset over a defendant’s objection, if, for example, as in this case, the asset is depreciating and the costs and expenses of maintaining the asset are disproportionate. See e.g. King, 2010 WL 4749791 at \* 1 (court granted government’s motion for interlocutory sale “pending the outcome of the case” and over defendant’s objection); One 2005 Lagoon 440 Sailing Catamaran, 2017 WL 10573808 at \* 2 (court granted government’s motion for interlocutory sale finding none of claimant’s objections persuasive); Chaffey I, 2012 WL 529239 at \* 1-2 (court rejected corporate owner of a yacht’s attempt to preclude government’s motion for interlocutory sale where corporation was solely held in the name of a criminal defendant). Here, the government has submitted a declaration from the USMS indicating that the Yacht has depreciated in value by approximately \$24,000 since it was seized pursuant to a court-authorized seizure warrant in 2019 and over \$56,000 in maintenance and storage costs have already been incurred and will continue to accrue. See USMS Decl. at ¶¶ 4-9. To the extent the defendant, without substantiation, may have a different opinion about the value of the Yacht and is not currently incurring any maintenance or storage costs are irrelevant.<sup>2</sup> See Supplemental Rule

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<sup>2</sup> Without any substantiation, defendant contends that because of its age the Yacht has not significantly depreciated and is in “excellent condition.” See Docket Entry No. 165. Meanwhile, without any substantiation, potential third-party petitioners to a potential partial ownership interest in the Yacht, have prematurely intervened in this ongoing criminal action, contend that the Yacht is in need of “more than \$165,000 in repairs.” See Docket Entry No. 163. Notwithstanding the validity of any of these speculative contentions, the government respectfully

G(7)(b). Furthermore, notwithstanding defendant's speculative and unsubstantiated opinion as to how the Yacht should be sold, as set forth in detail above, the government's proposal that the USMS use its expertise to dispose of this specific asset, so that it can be marketed and sold in a commercially feasible manner, at the highest possible price, and with the net proceeds to be deposited into an interest bearing account pending the final disposition of this ongoing criminal case, is reasonable and completely consistent with the applicable federal rules and case law. Accordingly, defendant's opposition to an interlocutory sale of the Yacht should be rejected by the Court.<sup>3</sup>

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submits that it has adequately met its burden of demonstrating that a motion for interlocutory sale is completely appropriate and warranted under the applicable rules and case law.

<sup>3</sup> Defendant's Fifth Amendment argument is also unwarranted. Lest there be any doubt, defendant will be given notice of the government's motion and any further opportunity to be heard, should the Court permit, in addition to her already filed missive with the Court. See Mullane v. Central Hanover Bank & Trust, 339 U.S. 309 (1950)(holding that due process requires adequate notice and an opportunity to be heard); United States v. Kolfage, 2020 WL 7342796 at \* 10-11 (S.D.N.Y. Dec. 14, 2020)(court rejected criminal defendant's due process arguments and denied defendant's motion to modify post-indictment restraining order).

III. Any Potential Third Party's Interest in the Yacht Must Await the Conclusion of  
These Ongoing Criminal Proceedings

Although Title 21, United States Code, Section 853(k), expressly prohibits any potential third party for intervening in these ongoing criminal proceedings, several district courts in this Circuit have indicated that to permit the interlocutory sale of an asset without providing a party asserting an interest therein with notice and an opportunity to be heard would raise due process concerns. See Swartz, 391 F. Supp. 3rd at 214-15 (in deciding a motion for interlocutory sale court must weigh competing interests); United States v. Maye, 2011 WL 2533020 \* 2 (W.D.N.Y. June 24, 2011) (finding that before the interlocutory sale of a luxury car any third parties should be permitted to intervene); King, 2010 WL 4739791 at \* 4 (“permitting the interlocutory sale of unique property without providing a party asserting an interest therein with notice and an opportunity to be heard would raise serious due process concerns.”). But see, 272 Old Montauk, 298 F.R.D. at 50 (denying a third party’s motion to intervene under F. R. Civ. P. Rule 24 in a civil forfeiture interlocutory sale proceeding). See also, United States v. Kolfage, 2020 WL 7342796 at \* 8 (S.D.N.Y. Dec. 14, 2020) (holding that third party petitioner is barred from intervening in an ongoing criminal proceeding under 21 U.S.C. § 853(k)).

Here, prior to the government filing this motion, while defendant has not consented to an interlocutory sale of the Yacht, potential third party petitioners, Eric Weinstein and his entity ISHine Florida Yachting, LLC, by and through counsel, have already communicated with the government, and also with the Court, indicating that they would not contest an interlocutory sale of the Yacht. See Docket Entry No. 163. The missive filed by potential third party petitioners (and the missive filed by defendant), should not be deemed or treated by the Court as any waiver of the government’s right to challenge any such third party claim on the

grounds that any such non-defendant claim in the Yacht fails to meet the requirements of 21 U.S.C. § 853(n)(2)-(6).<sup>4</sup>

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<sup>4</sup> 21 U.S.C. § 853 and F. R. Crim. P. 32.2 mandate a two-stage procedural framework for completing a forfeiture. See United States v. Wolf, 375 F. Supp. 3d 428, 435 (S.D.N.Y. 2019). First, the court must “adjudicate the government’s interest vis-a-vis the defendant ‘without regard to any third party’s interest in the property.’ ” United States v. Daugerdas, 892 F.3d 545, 549 (2d Cir. 2018) (quoting Criminal Rule 32.2(b)(2)(A)). Second, “before entering a final order of forfeiture, the court [must] resolve[ ] any third-party petitioner’s interests vis-a-vis the defendant.” Daugerdas, 892 F.3d at 549 (quoting 21 U.S.C. § 853(n)(6)(A)). At this second step, also referred to as the ancillary proceeding, “any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may ... petition the court for a hearing to adjudicate the validity of his alleged interest in the property.” 21 U.S.C. § 853(n); see also United States v. Chowaiki, 369 F. Supp. 3d 565, 572 (S.D.N.Y. 2019) (“Third parties claiming an interest in forfeited property may file petitions requesting a hearing.”). The sole purpose of the ancillary proceeding under Section 853(n) is to determine *ownership* of a forfeited asset. See United States v. Dupree, 919 F. Supp. 2d 254, 262-64 (E.D.N.Y. 2013) (Matsumoto, J.) (setting forth the statutory framework and procedures of ancillary proceedings). Further, Congress expressly noted when enacting the forfeiture provisions of § 853, that § 853(n)(6) “should be construed to deny relief to third parties acting as nominees of the defendants who knowingly engage in sham or fraudulent transactions.” S. Rep. No. 225, reprinted in 1984 U.S.C.C.A.N. 3182, 3392 n. 47. See United States v. Ida, 14 F. Supp. 2d 454, 460-61 (S.D.N.Y. 1998)(finding third party petitioner was a straw owner without legal right, title or interest to defeat forfeiture).

CONCLUSION

Accordingly, an interlocutory sale of the Yacht is appropriate and warranted under F.R. Crim. P. 32.2(b)(7) and Supplemental Rule G(7)(b) in order to protect its value for potential forfeiture at the conclusion of these criminal proceedings. For all of the foregoing reasons, the Court should grant the government's motion and authorize the interlocutory sale of the Yacht in accordance with F. R. Crim. P. Rule 32.2(b)(7) and Supplemental Rule G(7)(b). For the convenience of the Court, a Proposed Order is enclosed herewith.

Dated: Brooklyn, New York  
January 15, 2021

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