No. 09-1389

In The
Supreme Court of the United States

HARBER CORPORATION, MABON CORPORATION, GATEX CORPORATION, PIEDADE PEDRO ALMEIDA, AVION RESOURCES LTD., FARES BAPTISTA PINTO, JOSE BAPTISTA PINTO NETO, TIGRUS CORPORATION, POMPEU COSTA LIMA PINHEIRO MAIA, AND ISABEL CRISTINA DURTA PINHEIRO MAIA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN FURTHER SUPPORT OF THE PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ARGUMENT

THIS CASE IS AN APPROPRIATE VEHICLE TO DECIDE TWO IMPORTANT AND UNRESOLVED ISSUES OF FEDERAL LAW CONCERNING THE RIGHTS OF PARTIES WRONGFULLY DEPRIVED OF THEIR PROPERTY TO RECOVER THEIR ATTORNEYS' FEES, COSTS, AND INTEREST

The Government concedes that there is "disagreement among the circuits on whether sovereign immunity bars recovery of interest on seized money." (Government Brief at 6). And, in a post-disposition motion filed in the Court of Appeals (App. 75-78), the Government stated that the issues raised here – petitioners' right to recover fees, costs, and interest pursuant to statute and common law – are of "first impression," "likely to recur," and have "divided the district courts." Nonetheless, the Government asks that *certiorari* be denied because, in its view, this case "is a poor vehicle" for resolving these issues.

Ironically, the Government's argument is based upon the sad fact that petitioners' funds, which were seized in 2002 and ordered released by a New Jersey District Court Judge in 2006, still have not been returned. After a journey through the New York State courts, which also ordered the funds released, the monies are being held by the Government again, this time pursuant to an *ex parte* Order entered by a District of Columbia District Court Judge in 2008 in a case entitled *In re Seizure Of Approximately $12,116,153.16 and Accrued Interest in United States*

Currency, Misc. Action No. 08-261 (RMC) (D.D.C.). This Restraining Order is based upon Mutual Legal Assistance Treaty (MLAT) requests made years earlier by authorities in Brazil in connection with unrelated proceedings involving Brazilian law. The Government suggests that in light of the Restraining Order, petitioners' claims to recover interest, costs, and attorneys' fees under 28 U.S.C. § 2465(b)(1) are "at best . . . premature." The Government has never disputed that it has earned, and continues to profit from, interest on petitioners' funds. Indeed, the very caption of the case in which the Restraining Order was granted reflects this fact.

The issues of petitioners' right to recover fees, costs, and interest under 28 U.S.C. § 2465(b)(1) or, in the alternative, to disgorge from the Government interest accrued on their funds, arises out of the ruling of the New Jersey District Court in 2006, which the Government did not appeal. These issues are ripe for review, are unrelated to the 2008 Restraining Order or the litigations pending in Brazil, and will not be mooted by the outcome of those proceedings.

Moreover, the Government fails to mention that the Restraining Order is baseless and illegal under an important ruling made on July 16, 2010, by the Court of Appeals for the District of Columbia Circuit in a case captioned *United States v. Opportunity Fund and Tiger Eye Investments, Ltd.*, Case No. 09-5065, 2010 WL 2794281 (D.C. Cir. July 16, 2010). The Court of Appeals, in an unanimous opinion by Judge Kavanaugh, held that the district courts have

no authority under 28 U.S.C. § 2467(d)(3), the federal statute relied upon by the Government, to restrain property at the request of a foreign nation before a foreign court has entered a final forfeiture judgment. The *Tiger Eye* case involved non-final *ex parte* Brazilian restraining orders, the same as are involved here, as the Government concedes.[1] See Government's Brief, at 3 (petitioners' funds are "*potentially forfeitable* to the Brazilian government") (emphasis added). Nonetheless, the Government has not yet returned petitioners' funds[2] and has not moved to dismiss the Restraining Order.

That the Government continues to hold petitioners' funds illegally – which funds now have been ordered released by a United States District Court Judge, the Appellate Division of the Supreme Court of the State of New York, and the Court of Appeals for

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[1] The Government recognized in a jointly filed motion seeking a stay of an appeal taken to the Court of Appeals in *In re Seizure Of Approximately $12,116,153.16 and Accrued Interest in United States Currency*, Misc. Action No. 08-261 (RMC) (D.D.C.), that "[b]ecause the funds claimed ... are restrained pursuant to the same statutory provision [28 U.S.C. § 2467(d)(3)], this Court's decision in the *Tiger Eye* appeal may have a direct bearing on determining the outcome of this case. In particular, if the *Tiger Eye* District Court opinion is affirmed, the United States will likely have to move to dismiss the Restraining Order in this case."

[2] Contrary to the Government's statement in its Brief in Opposition at page 3, no part of the property seized from the petitioners has been forfeited. In fact, all seized property has been ordered released by rulings made by the New Jersey District Court and the Supreme Court of the State of New York.

the District of Columbia Circuit (under a controlling precedent) – hardly makes petitioners' claims to recover fees, costs, and interest for successfully contesting the forfeiture case the Government began in 2002 "premature."

The Government also contends that this case is not an appropriate one in which to resolve the issue of whether the Government can, when ordered to make restitution of funds seized illegally in a forfeiture case, be compelled as a matter of federal common law to disgorge interest constructively or actually received on the funds. The Government claims that because the five corporate petitioners "pleaded guilty in New York state court to banking law violations" and the individual petitioners are parties to pending legal proceedings in Brazil, "it is uncertain whether the balance of the equities would ultimately support an interest award in their favor."

The Government fails to mention that the pleas entered in New York by the corporate defendants were to a single misdemeanor charge of failing to have a money transmitting license under a New York Banking Law provision. They have never been accused of anything more than that throughout the years of litigation. The Government also overlooks that the entities entered *Alford* pleas (*United States v. Alford*, 400 U.S. 25 (1970)) to this count. They did not admit guilt to this charge and settled only after the New York prosecutor transferred the funds outside New York after he lost his appeal to the Appellate Division of the Supreme Court, which affirmed

an Order vacating the *ex parte* attachment of the funds. The corporate petitioners were not fined, were only ordered to pay a mandatory surcharge of $120.00, and were granted unconditional discharges. All charges against the individual defendants were dismissed with prejudice, as was the prosecutor's forfeiture action.

We fail to see how a tactical plea to a minor and inconsequential charge to avoid the expense of contesting what was by that time an essentially pointless prosecution, or the pendency of unrelated litigation in Brazil, could possibly disqualify petitioners from being eligible to receive the interest accrued on millions of dollars taken from them illegally by the Government more than eight years ago.

The Government also posits that "the importance of this issue has been significantly diminished" by the enactment of 28 U.S.C. § 2465(b)(1) in 2000, which provides that the United States "shall be liable" for attorneys' fees, costs, and interest to all claimants who substantially prevail "in any civil proceeding to forfeit property under any provision of Federal law." This is not true. The common law principle of restitution involved here is an important one and its application is not necessarily limited to seizures occurring in forfeiture cases. *See American Airlines, Inc. v. United States*, 77 Fed. Cl. 672, 2007 U.S. Claims LEXIS 236 (Ct. Fed. Claims 2007) (Government ordered to disgorge interest realized on illegally collected airline user fees), *aff'd*, 551 F.3d 1294 (Fed. Cir. 2008).

In addition, the scope of 28 U.S.C. § 2465(b)(1) is in open question that has confounded the lower courts. See *United States v. Moser*, 586 F.3d 1089 (8th Cir. 2009), *cert. denied*, No. 09-1230 (May 17, 2010). The Court of Appeals here held that despite its broad language this provision covers only claimants prevailing in *in rem* forfeiture cases. We believe this is erroneous and have asked the Court to grant *certiorari* to resolve the issue definitively.

However, if 28 U.S.C. § 2465(b)(1) is held to apply only to *in rem* forfeiture cases, the federal common law issue of whether the Government may be nonetheless compelled to disgorge interest on funds – an issue which has divided the Courts of Appeals for years – will continue to be of paramount importance to parties aggrieved by government seizures in *in personam* forfeiture proceedings, the type of forfeiture case now preferred by the Government. The statutory and common law issues thus dovetail. As both are raised squarely in this action, this case presents the Court with an excellent opportunity to clarify the law in this area.

CONCLUSION

Wherefore, the petition for a writ of *certiorari* should be granted.

Dated: New York, New York
August 9, 2010

Respectfully submitted,

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