

United States v. Peterson

United States District Court for the Southern District of New York

October 28, 2011, Decided; October 28, 2011, Filed

04 Cr. 752 (DC)

Reporter

820 F. Supp. 2d 576 *; 2011 U.S. Dist. LEXIS 126028 **

UNITED STATES OF AMERICA - against - RICHARD PETERSON, a/k/a "Robert James," Defendant. GREGORY CREW, Claimant.

Subsequent History: Later proceeding at [United States v. Crew, 2012 U.S. App. LEXIS 26912 \(2d Cir., Sept. 18, 2012\)](#)

Prior History: [United States v. Peterson, 2010 U.S. Dist. LEXIS 56951 \(S.D.N.Y., June 9, 2010\)](#)

Core Terms

forfeiture, properties, renovations, forfeited, vest, proceeds, community property interest, governmental interest, transferred, couple, fraudulent, rent, domestic partnership, contributed, Indictment, Sentencing, registered, fraudulent conveyance, registration, domestic, parties, subject to forfeiture, forfeiture statute, forfeiture order, district court, criminal act, third party, constituting, convincing, combined

Case Summary

Overview

The services defendant's domestic partner provided, combined with his financial contributions and the promises he and defendant made to each other, established a community property interest under Marvin. Therefore, the forfeiture order was adjusted to account for the domestic partner's community property interest in the San Francisco property. After the \$156,857.04 in fraudulent proceeds that defendant invested in the San Francisco property was deducted under [21 U.S.C.S. § 853\(a\)\(1\)](#), the domestic partner was entitled to a one-half interest in the remaining equity in the property.

Outcome

Forfeiture order was adjusted.

LexisNexis® Headnotes

Criminal Law &
Procedure > Sentencing > Forfeitures > General
Overview

[HN1](#) [📄] **Sentencing, Forfeitures**

The United States may seek forfeiture of any property constituting or derived from proceeds obtained directly and indirectly as a result of a fraud offense. [18 U.S.C.S. § 982\(a\)\(2\)\(A\)](#). Such forfeitures are governed by [21 U.S.C.S. § 853](#) and [Fed. R. Crim. P. 32.2](#), and they are elements of the defendant's sentence, rather than elements of the underlying crime. That means that, at the forfeiture phase of the trial, the government need only establish its right to forfeiture by a preponderance of the evidence, the standard applicable at sentencing. To determine if the government has satisfied its burden, the court may consider the record, any written plea agreements or stipulations, and any additional information submitted by the parties and accepted by the court as relevant and reliable. [Fed. R. Crim. P. 32.2\(b\)\(1\)\(B\)](#).

Criminal Law &
Procedure > Sentencing > Forfeitures > General
Overview

[HN2](#) [📄] **Sentencing, Forfeitures**

After the court enters a forfeiture order based on a criminal conviction, third parties may petition the court to adjudicate their interests in the property subject to forfeiture and to amend the forfeiture order. [21 U.S.C.S. § 853\(k\), \(n\)](#). That proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property. [Fed. R. Crim. P. 32.2](#), advisory committee note (b) (2000).

Criminal Law &
 Procedure > Sentencing > Forfeitures > General
 Overview

[HN3](#) [↓] **Sentencing, Forfeitures**

To prevail under [21 U.S.C.S. § 853\(n\)](#), a third party must establish, by a preponderance of the evidence, or, with respect to a "Marvin claim" by clear and convincing evidence, that either: (1) he is a bona fide purchaser for value of the properties, [21 U.S.C.S. § 853\(n\)\(6\)\(B\)](#); or (2) he has a legal interest in the properties that renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in him rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts giving rise to the forfeiture, [21 U.S.C.S. § 853\(n\)\(6\)\(A\)](#). State law determines whether claimants have a property interest, but federal law determines whether or not that interest can be forfeited.

Criminal Law &
 Procedure > Sentencing > Forfeitures > General
 Overview

Real Property Law > Ownership & Transfer > General
 Overview

[HN4](#) [↓] **Sentencing, Forfeitures**

A property may not be forfeited when it has been validly transferred to a third party. Under California law, however, a court may void fraudulent conveyances and constructive fraudulent conveyances. [Cal. Civ. Code § 3439.04\(a\)\(2\)\(B\)](#). Voidable conveyances are those made with the intent to delay or defraud creditors, or without receipt of equivalent value when the transferor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due. [Cal. Civ. Code § 3439.04\(a\)\(2\)\(B\)](#). Pleading guilty to a fraudulent scheme is sufficient to establish the actual intent to hinder, delay, or defraud creditors, and thereby provides a basis for a court to determine that a related transfer is a fraudulent conveyance.

Criminal Law &
 Procedure > Sentencing > Forfeitures > Defenses

[HN5](#) [↓] **Forfeitures, Defenses**

The general rule is that, as against a grantor's creditors, a fraudulent conveyance is void and leaves title in the grantor as

though no conveyance has been attempted. The rights of such transferees who are not bona fide purchasers are expressly subject to forfeiture under [21 U.S.C.S. § 853\(c\)](#) and [21 U.S.C.S. § 853\(n\)\(6\)](#).

Criminal Law &
 Procedure > Sentencing > Forfeitures > General
 Overview

[HN6](#) [↓] **Sentencing, Forfeitures**

Forfeitable property is divided into two categories under [21 U.S.C.S. § 853](#): offense property and substitute property. [21 U.S.C.S. § 853\(a\)\(1\)](#), (p). Offense property is any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of the crime. [21 U.S.C.S. § 853\(a\)\(1\)](#); [18 U.S.C.S. § 982\(a\)\(1\)](#). Substitute property includes assets that have been transferred to a third party or dissipated or otherwise cannot be located. [21 U.S.C.S. § 853\(p\)](#). Additionally, as the United States Court of Appeals for the Second Circuit has held that [21 U.S.C.S. § 853](#) allows for partial forfeitures, part of a property or asset can constitute offense or substitute property.

Criminal Law &
 Procedure > Sentencing > Forfeitures > General
 Overview

[HN7](#) [↓] **Sentencing, Forfeitures**

Government interests in forfeitable property vest at different times, depending on the property's categorization. [21 U.S.C.S. § 853\(c\)](#), (n)(2). For offense property, the government's interest vests retroactively to the date of the original criminal act. [21 U.S.C.S. § 853\(c\)](#). In contrast, the statutory provision regarding substitute assets does not explicitly provide for relation back. [21 U.S.C.S. § 853\(n\)\(2\)](#). The United States Court of Appeals for the Second Circuit has not ruled on when the government's interest in substitute assets, pursuant to [21 U.S.C.S. § 853](#), vests. Other circuits are split as to whether the government's interest in substitute property relates back to the date of the act giving rise to the forfeiture, or whether vesting occurs upon conviction because until then the government has only a speculative future interest. District courts in the Second Circuit agree that the government's interest in substitute assets does not vest on the date of the underlying offense, but disagree on when such interests vest. Allowing a defendant, notified by an indictment that his property is subject to forfeiture, to dissipate those assets before conviction would undermine the statute's purpose. The

United States District Court for the Southern District of New York finds that the government's interest in substitute assets vests upon the issuance of the grand jury indictment.

Family Law > Cohabitation > Domestic Partners > Registration

[HN8](#) **Domestic Partners, Registration**

Under California's Domestic Partnership Act rights are not granted retroactively to previously existing partnerships unless they were registered before January 1, 2005.

Family Law > Cohabitation > Domestic Partners > Property

[HN9](#) **Domestic Partners, Property**

The California Supreme Court in Marvin upheld an unmarried couple's right to contract for property acquired during the relationship as it saw fit, including exchanging a community property right for domestic services. The court did so after finding that the parties had entered into an oral agreement that while they lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined. Those so-called "Marvin claims" often rest on oral or implied contracts, including those where the parties never bothered to actually spell out the terms of their agreement or the consideration therefor. Those claims routinely withstand challenges under California's Statute of Frauds, as courts employ equitable estoppel based on the same consideration underlying the implied agreement. [Cal. Civ. Code § 1624\(a\)](#). Marvin does not create a community property interest in all property held by either party; rather, Marvin allows the parties to contract for individual property as they see fit.

Contracts Law > Contract Formation > Consideration > General Overview

Family Law > Cohabitation > Domestic Partners > Property

[HN10](#) **Contract Formation, Consideration**

Because Marvin claims are rooted in contract, not family law, the parties must demonstrate an intent to agree and an exchange of consideration. That consideration can consist of financial contribution or more abstract services. Because

Marvin claims are challenges to legal title, they must be proven by clear and convincing evidence. [Cal. Evid. Code § 662](#). A proper Marvin claim, which covers same-sex couples, thus requires clear and convincing evidence that: (1) the parties intended to contract for a shared interest in the property; and (2) adequate consideration was provided for the interest. Equal payments are not required for a Marvin claim.

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For Claimant: Steven L. Kessler, Esq., LAW OFFICES OF STEVEN L. KESSLER, New York, New York.

Judges: DENNY CHIN, United States Circuit Judge.

Opinion by: DENNY CHIN

Opinion

[*578] CHIN, Circuit Judge

On July 19, 2005, defendant Richard Peterson pled guilty to wire fraud and engaging in the business of insurance after having been convicted of a felony involving dishonesty or breach of trust. See [United States v. Peterson, No. 04 Cr. 752\(DC\), 2010 U.S. Dist. LEXIS 56951, 2010 WL 2331990, at *1 \(S.D.N.Y. June 9, 2010\)](#). Nearly five months later, on December 5, 2006, Peterson signed a Post-Plea Sentencing Stipulation ("Sentencing Stipulation") whereby he agreed to forfeit to the United States all of his right, title, and interest in the property located at: (1) **[*579]** 763-765 Clayton Street, San Francisco, California (the "San Francisco Property"); and (2) Unit #14, Windsor Village, Grand Cayman Islands, British West Indies (the "Grand Cayman Property"). *Id.*

On March 13, 2007, I sentenced Peterson to 120 months' imprisonment and entered a Preliminary Order of Forfeiture/Final **[**2]** Order of Forfeiture covering his interest in the San Francisco and Grand Cayman Properties. *Id.* The government then sent notice to all persons and entities with a purported interest in any of the forfeited properties. *Id.* Gregory Crew, Peterson's long-term domestic partner, filed a timely petition, pursuant to [21 U.S.C. § 853](#), asserting claims to both the San Francisco and Grand Cayman Properties.

In October 2010, I held a two-day hearing to resolve Crew's claims. I reserved decision as to whether Crew held a valid interest in either property. For the reasons set forth below, I conclude that Crew, who has lived in, maintained, and helped

improve the San Francisco Property since the early 1980s, has a community property interest in the San Francisco Property, but not in the Grand Cayman Property. The following constitute my findings of fact and conclusions of law.

FINDINGS OF FACT

A. Crew's Relationship with Peterson

Crew and Peterson lived together as a couple for more than two decades at the San Francisco Property (Tr. 10-11).¹ They also vacationed, both together and separately, at the Grand Cayman Property, a condominium owned by DH Consultants, a company controlled by Peterson. (Tr. [**3] 68-72, 183-84).

Crew and Peterson met at a party in San Francisco in 1980. (Tr. 10). They began dating, and less than a year later Crew moved in with Peterson. (Tr. 10-11). At the time, Peterson was renting an apartment in the San Francisco Property, which has three residential units. (Tr. 45, 169). As Crew explained, the couple agreed two years later that "we would share in everything" and "[w]hat was his was mine and vice versa." (Tr. 19). At the time, California did not allow same-sex couples to register their relationship and its laws did not [**4] change in this respect for more than two decades. See [Cal. Fam. Code § 297.5\(c\)](#).

Nonetheless, Crew and Peterson held themselves out as a committed couple all these years. (Tr. 12-14, 19, 32). For example, in 1991, Crew's employer, American Airlines, first offered employees the opportunity to designate beneficiaries to their 401(k) retirement accounts and life insurance policies. (Tr. 262-63; CX 8). Since 1991, Crew has listed Peterson as his beneficiary. (Tr. 262-63; CX 8). In 1998, when American Airlines began offering employees with a same-sex partner the same family medical benefits available to employees with a spouse, Crew registered Peterson. (Tr. 34). On the registration forms for these policies, Crew stated that his domestic partnership with Peterson began on May 1, 1981. (CX 8).

¹References are as follows: "Tr." to the transcript of the hearing conducted on October 25 and 26, 2010; "CX" and "GX" to claimant's and government's exhibits at the October 25-26, 2010 hearing; "Plea Tr." to the transcript of Peterson's plea allocution; "Sen. Tr." to the transcript of Peterson's sentencing; "POF" to this Court's Preliminary Order of Forfeiture/Final Order of Forfeiture of March 13, 2007; "Sentencing Stipulation" or "Stip." to Peterson's Post-Plea Sentencing Stipulation of December 5, 2006; "PSR" to the Presentence Report dated December 9, 2005; and "Indictment" to the grand jury indictment of Peterson issued on July 28, 2004.

On January 1, 2005, the California Domestic Partners Rights and Responsibilities [**580] Act of 2003 went into effect. The law provides same-sex couples who register their partnerships with "the same rights, protections, and benefits" as married couples. [Cal. Fam. Code § 297.5\(c\)](#). Peterson and Crew registered as domestic partners with the State of California two months later. (CX 7).

B. San Francisco Property

In [**5] January 1982, Peterson purchased the San Francisco Property.² (Tr. 46; CX 6). Crew and Peterson continued to live together in their apartment, and rented out the other two units. (Tr. 48-49). Crew contributed to household expenses, including the portion of the mortgage not covered by the rental income, as well as phone bills, insurance, taxes, and utilities, though there were periods when these payments were sporadic because Crew's ability to contribute financially fluctuated. (Tr. 13-14, 32, 48-49, 211, 259).³ While the exact amount is unclear, from the time he moved in until the early 2000s, Crew paid, after the rental income was applied, roughly 40 percent of the cost of home ownership. (Tr. 205).

In addition, Crew was deeply involved in major renovations to the San Francisco Property. In 1986, he arranged and oversaw the first of a series of renovations, which [**6] included repainting all three units, installing new carpets, and fixing the kitchens and bathrooms. (Tr. 150-52). Five years later, Crew supervised a second substantial renovation of the apartment in which he and Peterson lived. (Tr. 152). This project involved installing a new kitchen and bathrooms, purchasing and installing new appliances, and knocking down and installing new walls. (Tr. 152). Crew contributed about \$15,000 towards this work. (Tr. 152-53). Two years later, Peterson took out a \$400,000 home equity loan, secured by the newly renovated San Francisco Property. (Tr. 53). Throughout the 1990s, some of the money that Crew contributed to the household was used to help pay down this loan. (Tr. 53-54).

From about March 2002 through at least October 2003, the couple undertook a third renovation, this time fixing the two rental units. Crew again supervised the entire project. (Tr. 60-65). He spent between \$10,000 and \$15,000 on the renovation. (Tr. 154). The total cost exceeded \$150,000, with

²Although Peterson testified that Crew contributed "a couple of thousand" to the \$15,000 down payment he gave to the San Francisco Property's former owner (Tr. 50-51), Crew did not claim he did so (Tr. 20-22). I find that Crew did not contribute to the down payment.

³By 1986, the mortgage was paid off in its entirety. (Tr. 52).

most of the funds coming from proceeds of Peterson's criminal activities. (Stip. 3 ("[H]e used proceeds of his criminal acts ... to pay the mortgage on, and renovate" the San Francisco Property.); [**7] CX 5 (copies of checks used to pay for the renovations); Tr. 60-65).

While Peterson contributed more in terms of money, Crew made some financial contributions and was principally responsible for the upkeep of the San Francisco Property. (Tr. 52, 65, 151-53).

C. Grand Cayman Property

In 1991, Peterson established a company called DH Consultants in the Grand Cayman Islands. (Tr. 69). Using Peterson's funds, DH Consultants then purchased the Grand Cayman Property for \$325,000 that same year. (Tr. 71). The Property's associated fees, about \$10,000 per year, were mostly paid with the proceeds of long-term rentals, though Crew apparently paid certain fees in 2002 and 2003, as well as the utilities during some of his visits. (Tr. 71-72). [**581] Peterson and Crew did not spend much else on the Grand Cayman Property. (Tr. 72).

D. Property Transfers

In late 2002, Crew was hospitalized for three weeks with life-threatening complications from a long-term illness. (Tr. 74). His poor health condition caused Crew and Peterson to plan for Crew's well-being in the event of Peterson's death.⁴ (Tr. 158). In December 2002, Peterson instructed his representative in the Cayman Islands to transfer ownership of the condominium [**8] to Crew. (Tr. 70). The transfer was executed that same month. (CX 1).

Although Crew knew the Grand Cayman Property was owned by a corporation, he never questioned why he received it. (Tr. 185, 187). He did acknowledge that he suspected that Peterson had "influenced" the transfer. (Tr. 185). And while the transfer deed states that \$355,000 was given for the Grand Cayman Property, as Crew and Peterson both acknowledge, Crew paid nothing. (Tr. 72, 185).

In October 2003, a grand jury sitting in the Southern District of New York subpoenaed Peterson for documents relating to fraudulent insurance policies he issued from 2000 through

2003. (PSR ¶ 32). That same month, Peterson executed a quitclaim deed transferring title of the San Francisco Property to Crew in exchange for \$100 in cash. (CX 2). The transfer was, according to Crew, part of a plan to avoid inheritance taxes that he would owe upon Peterson's death. (Tr. 157). After the transfer, the City of San Francisco re-assessed [**9] the property, increasing its value from \$239,260 to \$1,530,000. (CX 11). The annual property tax subsequently rose from \$3,000 to \$20,000. Crew unsuccessfully challenged the increase. (Tr. 166-67).

In early 2004, Crew and Peterson resumed renting the two newly-renovated units, charging more than double the prior rent. (Tr. 65). Rent was paid directly to Crew, who deposited the funds into his personal checking account. (Tr. 159). Beginning in May 2004, Crew made the home equity loan payments on the San Francisco Property from this account. (Tr. 159-61; CX 17). Crew still lives in the San Francisco Property, collects rent from the tenants, and pays the mortgage". (Tr. 10, 65, 159-61).

DISCUSSION AND CONCLUSIONS OF LAW

A. General Forfeiture Principles

HNI[↑] The United States may seek forfeiture of "any property constituting or derived from proceeds obtained directly and indirectly" as a result of a fraud offense. [18 U.S.C. § 982\(a\)\(2\)\(A\)](#). Such forfeitures are governed by [21 U.S.C. § 853](#) and [Federal Rule of Criminal Procedure 32.2](#), and they are elements of the defendant's sentence, rather than elements of the underlying crime. [Libretti v. United States, 516 U.S. 29, 38, 116 S. Ct. 356, 133 L. Ed. 2d 271 \(1995\)](#); see [18 U.S.C. § 982\(b\)\(1\)](#); [**10] [Fed. R. Crim. P. 32.2](#). This means that, at the forfeiture phase of the trial, the government need only establish its right to forfeiture by a preponderance of the evidence, the standard applicable at sentencing. See [Willis Mgmt, Ltd., v. United States, 652 F.3d 236, 241 \(2d Cir. 2011\)](#). To determine if the government has satisfied its burden, the court may consider the record, any written plea agreements or stipulations, and any additional information submitted [**582] by the parties and accepted by the court as relevant and reliable. See [Fed. R. Crim. P. 32.2\(b\)\(1\)\(B\)](#); [Libretti, 516 U.S. at 43](#) (observing stipulation of facts and defendant's agreement to forfeit could satisfy-government's burden).

On March 13, 2007, pursuant to [18 U.S.C. § 982\(a\)\(2\)\(A\)](#), I entered a Preliminary Order of Forfeiture/Final Order of Forfeiture for the San Francisco and Grand Cayman Properties as "property constituting or derived from proceeds

⁴ Whether Peterson transferred property due to concerns about taxation and estate planning, or whether he was attempting to shield these assets from creditors, is ultimately not relevant to the issues before this Court.

obtained directly and indirectly" [**11] as a result of fraud offenses. (POF 1). In light of Peterson's Sentencing Stipulation and the substantial evidence in the record, I found that the government established its right to forfeiture under a preponderance of the evidence. (POF 2-4).

[HN2](#)^[↑] After the court enters a forfeiture order based on a criminal conviction, third parties may petition the court to adjudicate their interests in the property subject to forfeiture and to amend the forfeiture order. [21 U.S.C. § 853\(k\), \(n\)](#); see [Pacheco v. Serendensky, 393 F.3d 348, 351-52 \(2d Cir. 2004\)](#). "This proceeding does not involve relitigation of the forfeitability of the property; its only purpose is to determine whether any third party has a legal interest in the forfeited property." [Fed. R. Crim. P. 32.2](#), Advisory Committee Note (b) (2000); see also [United States v. Andrews, 530 F.3d 1232, 1236-37 \(10th Cir. 2008\)](#); [United States v. Porchay, 533 F.3d 704, 710 \(8th Cir. 2008\)](#).

[HN3](#)^[↑] To prevail under [§ 853\(n\)](#), a third party must establish, by a preponderance of the evidence, or, with respect to a "Marvin claim," as discussed below, by clear and convincing evidence, that either: (1) he is a bona fide purchaser for value of the properties, [21 U.S.C. § 853\(n\)\(6\)\(B\)](#); [**12] or (2) he has a legal interest in the properties that "renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in [him] rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts" giving rise to the forfeiture, [21 U.S.C. § 853\(n\)\(6\)\(A\)](#).

Pursuant to [21 U.S.C. § 853\(n\)\(6\)\(A\)](#), Crew argues that the forfeiture order is invalid in whole, or in part, as to both properties, because: (1) both properties were transferred to him before any government interest vested; (2) the registration of Crew and Peterson's domestic partnership in the State of California created a community property interest superior to the government's interest; and (3) under [Marvin v. Marvin, 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 \(Cal. 1976\)](#), Crew's nearly thirty-year partnership with Peterson established a community property interest by implied contract that is not subject to forfeiture. Crew's assertions of ownership and interest in the properties are governed by California law. See [United States v. Hooper, 229 F.3d 818, 820 \(9th Cir. 2000\)](#) ("State law determines whether Claimants have a property interest, but federal [**13] law determines whether or not that interest can be forfeited."). I address each of these claims in turn.

B. The Claims

1. Property Transfers

a. Applicable Law

[HN4](#)^[↑] A property may not be forfeited when it has been validly transferred to a third party. [United States v. Schwimmer, 968 F.2d 1570, 1580 \(2d Cir. 1992\)](#) (applying [18 U.S.C. § 1963](#)). Under California law, however, a court may void fraudulent conveyances and constructive fraudulent conveyances. [Cal. Civ. Code § 3439.04\(a\)\(2\)\(B\)](#) (effective Jan. 1, 2005). Voidable conveyances are those made with the intent to delay or defraud creditors, or without receipt of equivalent value when the transferor "[i]ntended to incur, or believed [**583] or reasonably should have believed that he . . . would incur, debts beyond his . . . ability to pay as they became due." [Cal. Civ. Code § 3439.04\(a\)\(2\)\(B\)](#). Pleading guilty to a fraudulent scheme is "sufficient to establish the actual intent to hinder, delay, or defraud creditors," and thereby provides a basis for a court to determine that a related transfer is a fraudulent conveyance. [In re Slatkin, 525 F.3d 805, 814 \(9th Cir. 2008\)](#).

b. Application

Peterson's fraudulent activities giving rise to the forfeitures began [**14] in 2000 and he pled guilty on July 19, 2005. (Stip. 1; Indictment 2, 5-6). In December 2002 and October 2003, respectively, Peterson transferred the Grand Cayman and San Francisco Properties to Crew. (CX 1-2). Peterson's guilty plea establishes the actual intent required by California law, thus voiding both transfers as fraudulent conveyances and rendering them forfeitable.

Even assuming that actual intent to defraud was not established, Peterson transferred both properties for well below their actual value: \$100 in cash for the San Francisco Property and nothing for the Grand Cayman Property. This was during a period when his criminal activities were beginning to unravel, and when he "[i]ntended to incur, or . . . reasonably should have believed that he . . . would incur, debts beyond his . . . ability to pay as they became due." [Cal. Civ. Code § 3439.04\(a\)\(2\)\(B\)](#). Regardless of whether Peterson and Crew actually believed they were engaged in some ill-advised tax planning, a claim which I reject, both transfers are void as fraudulent or constructively fraudulent conveyances.

Accordingly, Crew, who is no longer arguing that he is a bona fide purchaser (Tr. 5-6), did not acquire a sufficient [**15] interest to defeat the forfeiture by virtue of the transfers. See [Nicolos v. Grover, 186 Cal. App. 3d 858, 231](#)

Cal. Rptr. 79, 81 (Cal. Ct. App. 1986) HN5^[↑] ("The general rule is that, as against a grantor's creditors, a fraudulent conveyance is void and leaves title in the grantor as though no conveyance has been attempted."); see also *Hooper, 229 F.3d at 823* ("The rights of such transferees who are not bona fide purchasers are expressly subject to forfeiture under §§ 853 (c) and 853(n)(6).").

2. Registration of the Domestic Partnership

As the transfers were not valid, I turn to Crew's next claim -- that the registration of his domestic partnership with Peterson partially invalidated the forfeiture order because it occurred before Peterson pled guilty, thereby creating an interest superior to the government's interest. To resolve this issue, this Court must determine: (1) whether the properties in question constitute offense property or substitute property under *21 U.S.C. § 853*; and (2) when the government's interest in substitute and offense property vests.

a. Offense and Substitute Property

i. Applicable Law

HN6^[↑] Forfeitable property is divided into two categories under *21 U.S.C. § 853*: offense property and substitute ^[**16] property. *21 U.S.C. § 853(a)(1), (p)*. Offense property is "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly," as the result of the crime. *21 U.S.C. § 853(a)(1)*; see *18 U.S.C. § 982(a)(1)*. Substitute property includes assets that have been transferred to a third party or dissipated or otherwise cannot be located. *21 U.S.C. § 853(p)*. Additionally, as the Second Circuit has held that § 853 allows for partial forfeitures, part of a property or asset can constitute offense or substitute property. See *Pacheco, 393 F.3d at 355* (discussing ^[*584] constitutional concerns of not allowing partial forfeitures).

ii. Application

The record, including the Sentencing Stipulation, demonstrates that equity in both the San Francisco Property and the Grand Cayman Property constitutes both offense and substitute property. Peterson stipulated that "he used proceeds from his criminal acts . . . to pay the mortgage, and renovate" the San Francisco Property. (Stip. 3). As for the Grand Cayman Property, Peterson admitted he invested a portion of the fraudulent proceeds "to pay for the upkeep" of the Grand Cayman Property, though the exact amount was not set forth

in ^[**17] the stipulation or addressed at the hearing. (Stip. 3). Peterson agreed to forfeit any offense property interest in the San Francisco and Grand Cayman Properties retroactive to this time. (POF 1; Stip. 4; Indictment 2). Accordingly, equity in both properties equivalent to the proceeds of Peterson's criminal acts invested in them is properly forfeited as offense property. See *21 U.S.C. § 853(a)(1)*. (POF 1).

The remaining equity in both properties constitutes substitute assets. In his stipulation, Peterson "agreed to forfeit all right, title and interest" in these substitute assets. (Stip. 4; see POF 2). These remaining assets are forfeitable to the extent that they were "property of the defendant" on the date that the government's interest in them vested. *21 U.S.C. § 853(p)(2)*; *Fed. R. Crim. P. 32.2(c)(2)*.

b. Vesting Time of Government Interests

i. Applicable Law

HN7^[↑] Government interests in forfeitable property vest at different times, depending on the property's categorization. See *21 U.S.C. § 853(c), (n)(2)*; *United States v. Parrett, 530 F.3d 422, 430 (6th Cir. 2008)*. For offense property, the government's interest vests retroactively to the date of the original criminal act. See *21 U.S.C. § 853(c)*. ^[**18] In contrast, the "statutory provision regarding substitute assets does not explicitly provide for relation back." *Parrett, 530 F.3d at 430*; see *21 U.S.C. § 853(n)(2)*.

The Second Circuit has not ruled on when the government's interest in substitute assets, pursuant to *21 U.S.C. § 853*, vests. Other "circuits are split as to whether the government's interest in substitute property relates back to the date of the act giving rise to the forfeiture," or whether vesting occurs only upon conviction because until then the government has only a "potential and speculative future interest." *Parrett, 530 F.3d at 430* (comparing Fourth and Tenth Circuit decisions).

Two district courts in this Circuit agree that the government's interest in substitute assets does not vest on the date of the underlying offense; these district courts, however, disagree on when such interests do vest.⁵ In *United States v. Salvagno*, a

⁵ Both district courts relied on the reasoning in *United States v. Gotti*, where the Second Circuit, interpreting similar language in the RICO forfeiture statute, *18 U.S.C. § 1963*, held that the law did not provide for pre-trial restraint of substitute assets. *155 F.3d 144, 149-50 (2d Cir. 1998)*. Other courts considering similar questions of when the government's interest in substitute assets vests often cite decisions

case involving the RICO forfeiture statute, [18 U.S.C. § 1963](#), the district court held that the government does not have superior [*585] rights to substitute assets until an order of forfeiture is granted. [No. 5:02 Cr. 051 \(LEK/RFT\), 2006 U.S. Dist. LEXIS 61471, 2006 WL 2546477, at *19 \(N.D.N.Y. Aug 28, 2006\)](#), [aff'd on other \[**19\] grounds, 343 F. App'x 702 \(2d Cir. 2009\)](#). In contrast, in [United States v. Kramer](#), the district court held that the government's interest in substitute assets does not vest until the defendant is convicted. [No. 1:06 Cr. 200\(ENV/CLP\), 2006 U.S. Dist. LEXIS 89034, 2006 WL 3545026, at *6-8 \(E.D.N.Y. Dec. 8, 2006\)](#).

Allowing a defendant, notified by an indictment that his property is subject to forfeiture, to dissipate these assets before conviction would undermine the very purpose of the statute. See [United States v. Monsanto, 491 U.S. 600, 613, 109 S. Ct. 2657, 105 L. Ed. 2d 512 \(1989\) \[**20\]](#) ("Whatever discretion Congress gave the district courts . . . that discretion must be cabined by the purposes for which Congress created it: to preserve the availability of property . . . for forfeiture.") (interpreting [21 U.S.C. § 853\(c\), \(e\)](#)); [In re Assets of Billman, 915 F.2d 916, 921 \(4th Cir. 1990\)](#) (holding that RICO forfeiture statute does not "permit a defendant to thwart the operation of forfeiture laws by absconding with RICO proceeds and then transferring his substitute assets to a third person who does not qualify as a bona fide purchaser for value"); [United States v. Norton, No. 2:99 Cr. 10078, 2002 U.S. Dist. LEXIS 17052, 2002 WL 31039138, at *4 n.7 \(W.D. Va. Sept. 3, 2002\)](#) ("[I]t is not unfair for [substitute assets under [21 U.S.C. § 853\(p\)](#)] to relate back to the date of public notice of the government's intent to obtain forfeiture.").

In fact, even while holding that the pretrial restraint of substitute assets under a RICO forfeiture statute was improper, which is not the issue here, the Second Circuit, in [Gotti](#), acknowledged that such restraint "might arguably serve the stated legislative purpose of preserving assets for forfeiture upon conviction." [155 F.3d at 150](#). To give full force to the criminal [**21] forfeiture statute, I conclude that the government's interest in substitute assets vests upon the issuance of the grand jury indictment.

ii. Application

Peterson was indicted on July 28, 2004; he pled guilty on July 19, 2005. (Indictment 1; Stip. 1-7). Crew and Peterson registered their domestic partnership with the State of

California on March 1, 2005. (CX 7). [HN8](#) Under California's Domestic Partnership Act, however, rights are not granted retroactively to previously existing partnerships unless they were registered before January 1, 2005. See [Velez v. Smith, 142 Cal. App. 4th 1154, 48 Cal. Rptr. 3d 642, 653-59 \(Cal. Ct. App. 2006\)](#). I find that the registration of Crew and Peterson's domestic partnership was grounded in genuine affection, and not merely an effort to transfer property subject to forfeiture. The registration, however, occurred after Peterson was indicted and does not provide Crew with a legal interest that can prevent forfeiture of either property.

3. Agreement Establishing a Community Property Interest

Lastly, Crew argues that his long-term partnership with Peterson established a community property interest in the San Francisco and Grand Cayman Properties by implied contract, and that this interest [**22] is not subject to forfeiture. For the reasons set forth below, and under the California Supreme Court case of [Marvin v. Marvin, 557 P.2d 106, 18 Cal. 3d 660, 134 Cal. Rptr. 815 \(Cal. 1976\)](#), I conclude that Crew properly asserts such an interest in the San Francisco Property, but not in the Grand Cayman Property.

a. Applicable Law

[HN9](#) The California Supreme Court in [Marvin](#) upheld an unmarried couple's right to contract for "property acquired during the [*586] relationship" as it saw fit, including exchanging a community property right for domestic services. [Id. at 116](#). The court did so after finding that the parties had "entered into an oral agreement that while [they] lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." [Id. at 110](#) (internal quotations marks omitted).

These so-called "[Marvin](#) claims" often rest on oral or implied contracts, including those where "[t]he parties never bothered to actually spell out the terms of their agreement or the consideration therefor." [Alderson v. Alderson, 180 Cal. App. 3d 450, 225 Cal. Rptr. 610, 616 \(Cal. Ct. App. 1986\)](#). These claims routinely withstand challenges under California's Statute [**23] of Frauds, as courts employ equitable estoppel based on the same consideration underlying the implied agreement. [Cal. Civ. Code § 1624\(a\)](#); see [Byrne v. Laura, 52 Cal. App. 4th 1054, 60 Cal. Rptr. 2d 908, 917 \(Cal. Ct. App. 1997\)](#) (employing equitable estoppel, to find [Marvin](#) claimant had seriously changed her position "by moving in with him, performing the duties of a spouse, and retiring from her job,"

relating to both statutes. See [United States v. Miller, 26 F. Supp. 2d 415, 432 \(N.D.N.Y. 1998\)](#) ("[T]he RICO forfeiture provision and the [§ 853](#) forfeiture statute are so similar in both legislative history and statutory language as to warrant similar interpretation.").

the very consideration that had supported the claim itself).

Marvin does not create a community property interest in all property held by either party; rather, Marvin allows the parties to contract for individual property as they see fit. Marvin, 557 P.2d at 116 n.10. Because Marvin claims are rooted in contract, not family law, the parties must demonstrate an intent to agree and an exchange of consideration. This consideration can consist of financial contribution or more abstract services. See Alderson, 225 Cal. Rptr. 2d at 616 (upholding Marvin claim where the consideration consisted of doing "whatever a wife does"); Della Zoppa v. Della Zoppa, 86 Cal. App. 4th 1144, 103 Cal. Rptr. 2d 901, 907 (Cal. Ct. App. 2001) (upholding a Marvin claim based on consideration of "preparing meals, managing the home generally, arranging for remodeling, [**24] including arranging for new carpeting, furniture, artwork and appliances in, and painting of, the home").

HNI0 [↑] Because Marvin claims are challenges to legal title, they must be proven by clear and convincing evidence. Cal. Evid. Code § 662 ("The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof."); Tannehill v. Finch, 188 Cal. App. 3d 224, 232 Cal. Rptr. 749, 751 (Cal. Ct. App. 1986) (holding that a Marvin claimant "was required to establish her claim by clear and convincing evidence."). A proper Marvin claim, which covers same-sex couples, see Whorton v. Dillingham, 202 Cal. App. 3d 447, 248 Cal. Rptr. 405, 409-10 (Cal. Ct. App. 1988), thus requires clear and convincing evidence that: (1) the parties intended to contract for a shared interest in the property; and (2) adequate consideration was provided for the interest,

b. Application

i. San Francisco Property

Crew and Peterson lived in the San Francisco Property for more than two decades, beginning in the spring of 1981. (Tr. 11). They held themselves out as, and in fact were, a couple all those years. As soon as they had the opportunity, they registered as domestic partners [**25] with Crew's employer, and later with the State of California. (Tr. 34, 262-63; CX 7-8). From 1981 forward, Crew and Peterson treated the San Francisco Property as their shared residence. They promised each other that "[w]hat was his was mine and vice versa," thus demonstrating an intent to own the home jointly. (Tr. 19). See Chiba v. Greenwald, 156 Cal. App. 4th 71, 67 Cal. Rptr. 3d 86, 92 (Cal. Ct. App. 2007) ("They [**587] allegedly agreed

to live together, cohabitate and combine their efforts and earnings, share equally any and all property accumulated as a result of their efforts whether individual or combined, and hold themselves out to the public as husband and wife.") (internal quotation marks omitted).

As consideration for this shared interest, Crew provided some financial contribution. (Tr. 205). While he never paid as much as Peterson, equal payments are not required for a Marvin claim. See Chiba, 67 Cal. Rptr. 3d at 92 ("The promise to perform these domestic services is lawful and adequate consideration" for a Marvin claim.); Alderson, 225 Cal. Rptr. at 616-17; Della Zoppa, 103 Cal. Rptr. 2d at 913. Crew oversaw three extensive renovations to the San Francisco Property, including one that resulted in [**26] a substantial increase in the rent the couple charged for the units. Moreover, Crew's non-financial contributions to the upkeep of the home exceeded those made by Peterson. The services Crew provided, combined with his financial contributions and the promises Crew and Peterson made to each other, establish a community property interest under Marvin. See id.

ii. Grand Cayman Property

In contrast, Crew fails to demonstrate that he and Peterson had an intent to establish a community property interest in the Grand Cayman Property. The fact that Peterson created a company, DH Consultants, to vest title suggests he did not intend for the condominium to be shared property. At the hearing, Crew acknowledged he took little to no interest in the ownership of the Grand Cayman Property. Tellingly, he admitted he did not know what DH Consultants was, or why the condominium was transferred to him. Crew even conceded that he did not even ask Peterson about the transfer, although he "had a sense that maybe he influenced it in some way." (Tr. 185).⁶

Whether or not Crew's very limited investment in the Grand Cayman Property could have served as adequate consideration for a Marvin claim is irrelevant where, as here, there is no clear intent to share the property. In addition, contrary to Crew's argument, any personal or community property interest in the Grand Cayman Property is not

⁶In Peterson's Sentencing Stipulation, Peterson agreed not to assist any third party with any claim to any property named in the forfeiture order, other than [**27] Crew's claim in the San Francisco Property. While I assume without deciding that Peterson did not violate this agreement by testifying at this hearing, the agreement demonstrates that his understanding as to the ownership of the Grand Cayman condominium differed from his understanding as to the ownership of the San Francisco Property. (Stip. 4).

protected by a Homestead Exemption. See *United States v. Lot 5, Fox Grove*, 23 F.3d 359, 363 (11th Cir. 1994); *United States v. Curtis*, 965 F.2d 610, 616 (8th Cir. 1992).

iii. Size of Crew's Community Property Interest in the San Francisco Property

As Peterson's partner for nearly thirty years, Crew properly asserts a community property interest in the San Francisco Property under *Marvin*. Crew's interest vested before the fraudulent activities at issue began.

Peterson invested \$156,857.04 in fraudulent proceeds to [**28] renovate the San Francisco Property, largely during a period in which his criminal activity was unraveling. This investment resulted in a doubling of the rent that Crew now collects. (See Stip. 3 (Peterson "used proceeds of his criminal acts ... to pay the mortgage on, and renovate" the San Francisco Property); Tr. 61-62 ("Q: Are you referring now to the 2002 renovations on the property? [*588] A: Yes. ... Q: And did you cause [CAS Construction Company] to be paid? A: Yes. Q: Okay. And how did you pay them? A: I paid them with a check from URS."); GX 19 (copies of checks from United Restaurant Services ("URS") to CAS Construction Company for renovations to the San Francisco Property from March 2002 through at least October 2003)). These funds are thus forfeited as offense property because they "constitut[e], or [are] derived from" Peterson's criminal activities. *21 U.S.C. § 853(a)(1)*.

After Peterson's investment of \$156,857.04 is deducted as fraudulent proceeds, Crew is left with a community property interest in the remaining equity in the San Francisco Property, but no such interest in the Grand Cayman Property.⁷ See *Pacheco*, 393 F.3d at 355 ("[W]e agree with those courts that

⁷The *Lester* decision, in which the Ninth Circuit held that *21 U.S.C. § 853(p)* does not extend to the community property interest of an innocent spouse in substitute property, is not controlling. *85 F.3d at 1413-15*. That case is factually different in that the community property at issue there was not, as here, directly linked to the criminal activity of one spouse. *Id. at 1411*. In fact, the *Lester* court explicitly noted that "this case does not involve the forfeiture of community property which is directly or indirectly linked to the criminal activity of the guilty spouse." *Id. at 1411 n.10*. Here, in contrast, the San Francisco Property was greatly improved by Peterson's direct investment of at least \$156,857.04 in fraudulent proceeds, an investment which continues to benefit Crew financially in increased rent. (Tr. 65). To hold otherwise, would unjustly enrich the couple for investments Peterson made while his criminal activity was unraveling. And this deduction, in no way, divests Crew of his "legitimate interest" in the San Francisco Property.

have suggested [**29] that the criminal forfeiture statute, *21 U.S.C. § 853*, permits partial forfeiture of real property.").

CONCLUSION

For the reasons set forth [**30] above, the forfeiture order is adjusted to account for Crew's community property interest in the San Francisco Property. After the \$156,857.04 in fraudulent proceeds that Peterson invested in renovations to the San Francisco Property is deducted, Crew is entitled to a one-half interest in the remaining equity in the property, but no interest in the Grand Cayman Property. The government shall submit a final order of forfeiture on notice forthwith.

SO ORDERED.

Dated: New York, New York

October 28, 2011

/s/ DENNY CHIN

DENNY CHIN

United States Circuit Judge

Sitting by Designation

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