

balance to be paid in cash.² Zinner contends that the forfeited property was worth far more than \$1,000,000 and that he therefore should have gotten a refund. In fact, the government realized substantially less than \$1,000,000 from the assets. Not only did the government fail to return any money to Zinner, its disposition of the forfeited property left him owing the government a substantial cash balance.

In his Motion, Zinner alleges that in disposing of the assets, the government acted improperly:

For reasons unknown to Petitioners, the government has deliberately caused several properties, which at the time of restraint and ultimate forfeiture were of substantial value, to be undervalued, devalued, and ultimately liquidated for far less than fair or proper market value. Moreover, in some instances, properties were turned over to third parties holding mortgages not only without any consideration for equity, but only after said third parties either threatened or did in fact file suit against the government to protect their interest and the reasonable value of the property against further diminution in value. In one instance involving the "Zinner Office Building", Petitioners were wrongfully left with a debt of over Seventy-five Thousand (\$75,000.00) Dollars after the government's actions, or failure to act to protect value, caused all equity in the real estate to be lost. Further, over One Hundred Thousand (\$100,000.00) Dollars worth of business equipment, furnishings, computer and phone systems which were at all times located in the "Zinner Office Building" were lost as a result of the government's acts.

(Deft.'s Mot. at 1-2.)

²On September 13, 1995, this Court entered an Order of Forfeiture which forfeited all right, title, and interest which Zinner had to certain assets. Supplemental forfeiture orders were entered thereafter.

Zinner alleges that, as part of the plea agreement, the prosecutors made "specific representations" to him that, any amount they received for the property in excess of One Million dollars, would be returned to him. (Deft.'s Reply at 3.) The government points out that there is no provision in the plea agreement for return of any excess; however, it concedes in its Memorandum of Law in response to Zinner's Motion that "the government would not be authorized to forfeit and retain any sum in excess of the amount specified in the forfeiture count of the indictment, that is, \$1,000,000." (Govt.'s Suppl. Resp. at 2.) There is no dispute that the government realized substantially less than \$1,000,000 from their disposal of the forfeited assets. The question this Motion poses is whether the government should have realized more and, if so, whether Zinner is entitled to the relief he seeks.

Zinner seeks "relief from the forfeiture obligation of One Million Dollars (\$1,000,000.00), under his plea agreement," "a determination as to the value of the assets at the time of restraint, and, whether there was reasonable consideration paid for the fair value of the assets forfeited," and a "determination as to whether or not the government caused certain assets to depreciate by failing to exercise due diligence in preserving then existing contractual relationships related to the properties." (Deft.'s Mot. at 2.) Ultimately, he seeks a money judgment against the government for the difference between the amount that was realized from the disposal of his property and

the amount that he says should have been realized. (Tr. of 11/12/97 at 192.) In addition, he seeks relief, presumably in the form of a money judgment, from his \$75,000 debt to the mortgagor of the "Zinner Office Building."³

II. DISCUSSION

A. Standing

The government's position is that Zinner lacks standing to raise this challenge to the forfeiture proceedings. It relies primarily on the RICO forfeiture statute, 18 U.S.C.A. § 1963 (West Supp. 1998), which provides in pertinent part:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned . . . , or both, and shall forfeit to the United States, . . .

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any --

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

³Zinner states that he seeks "relief" from that debt. Because the creditor is a private party, the only way the government could provide him with relief is to provide him with the money with which to pay the creditor.

18 U.S.C.A. § 1963 (West Supp. 1998). With respect to the property subject to forfeiture, "[a]ll right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section." 18 U.S.C.A. § 1963(c) (West Supp. 1998). With respect to the procedures for disposing of forfeited property,

the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States.

18 U.S.C.A. § 1963(f). The Attorney General is also authorized to compromise claims arising under the forfeiture section. 18 U.S.C.A. § 1963(g)(2).

The government's position is that Zinner retained no interest in the property and therefore cannot challenge its disposition. It points out that while there are provisions for the pre-indictment challenge to forfeiture or restraint of assets, there is no provision under 18 U.S.C.A. § 1963 for a defendant to challenge, contest or appeal a post-conviction final order of forfeiture. Zinner did not file a timely appeal to the forfeiture itself, and the government argues that he cannot challenge it now because his interest in the forfeited assets was

determined and extinguished by the Court's forfeiture Order.
(Govt.'s Suppl. Mem. at 5-6.)

While the Court agrees that Zinner has no standing to assert an interest in the forfeited property itself, or to contest the final order of forfeiture, it does not appear to the Court that he is attempting to do so; rather, he seems to be basing his claims on the government's alleged contractual obligations arising out of the plea agreement. The United States Court of Appeals for the Third Circuit ("Third Circuit") has recognized that,

[a]lthough a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards. . . . Courts should consider not only contract principles but also ensure that the plea bargaining process is "attended by safeguards to insure that the defendant [receives] what is reasonably due in the circumstances."

United States v. Badaracco, 954 F.2d 928, 939 (3d Cir. 1992) (quoting Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499 (1971)).

In a recent case, United States v. Isaac, 141 F.3d 477 (3d Cir. 1998), the Third Circuit recognized the government's duty of good faith in carrying out the terms of a plea agreement. In that case, the specific term at issue was the government's promise to file a motion for a downward departure if it determined that the defendant had "fulfilled his obligations of cooperation" as set forth in the plea agreement. Id. at 479. The Third Circuit held that the district court had authority to

review for good faith the government's refusal to file the motion. Id. at 484.

In this case, Zinner is, in effect, alleging the government's lack of good faith in disposing of the forfeited assets. He asserts that, if the government had acted in good faith, he would have had no remaining debt to the government or to the mortgagor of the "Zinner Office Building," and there would have been excess money to which he and his wife would have been entitled. There is no explicit promise in the plea agreement that the government would dispose of the assets in good faith, but there is an implicit term of good faith and fair dealing present in any contract. Isaac, 141 F.3d at 483 ("Since '[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance,' Restatement (Second) of Contracts § 205, determining whether an allegation of bad faith has been established is a common occurrence in the enforcement of contracts."). The Court concludes that, under the rule of Isaac, Zinner has standing to challenge whether the government abided by the terms of the plea agreement in its disposal of the forfeited property.

B. Jurisdiction

The government did not question this Court's jurisdiction to hear the Motion, but the Court raises it sua sponte, as it must when it appears there may be some doubt. If Zinner were merely seeking modification or correction of his

sentence of forfeiture, his request would come within this Court's jurisdiction over his criminal case; however, he also seeks a money judgment against the government, and for that, he must find another basis for this Court's jurisdiction.

Zinner invokes the Administrative Procedures Act ("APA"), 5 U.S.C.A. § 702 (West 1996), which waives the government's sovereign immunity and allows a person who has suffered a legal wrong as a result of the action of a government agency to seek judicial review of his claim against the United States, so long as the relief he seeks is other than "money damages." The APA provides in pertinent part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C.A. § 702.

At a hearing at which this Motion was discussed, the Court asked Zinner whether he sought, through this Motion, to obtain a money judgment from the government. Zinner replied that he did. (Tr. of 11/22/97 at 192.) Furthermore, he does not merely seek to have an amount credited against his debt to the government; if the value of the property exceeds \$1,000,000, and he claims that it does, he seeks a cash refund. With respect to

the \$75,000 which the Zinners owe the mortgagor of one of their properties, Zinner also evidently seeks a cash payment.

The initial question, then, is whether Zinner's claim for a money judgment against the government can come within the APA, or whether it is barred as a claim for "money damages." In Bowen v. Massachusetts, 487 U.S. 879, 108 S. Ct. 2722 (1988) the Supreme Court examined the meaning of "money damages" in section 702 of the APA. In that case, the court held that section 702 authorized the federal district court, rather than the United States Claims Court, to review a decision of the Department of Health and Human Services refusing to reimburse Massachusetts for a particular category of expenditures under its Medicaid program. It concluded that, in finding for Massachusetts, the district court had not awarded "money damages" under the APA even though its order could require the payment of money by the federal government. It further concluded that, even if the district court's order could be construed as a money judgment, it was for specific relief rather than for money damages and thus was within the court's jurisdiction under § 702. Bowen, 487 U.S. at 910, 108 S. Ct. at 2740.

The United States Court of Appeals for the Third Circuit, discussing Bowen, stated:

The Court distinguished actions at law for damages -- which are intended to compensate the plaintiff for injury to person, property, or reputation -- from equitable actions for specific relief -- which include the recovery of specific monies. . . . The Court concluded that the state did not seek money in compensation for the damages it had sustained but only

to enforce the statutory mandate itself, which happens to be one for the payment of money. The fact that the mandate is one for the payment of money must not be confused with the question whether . . . [it] is a payment of money as damages or as specific relief.

. . . [The State] is seeking funds to which a statute allegedly entitled it, rather than money in compensation for losses . . . suffered by virtue of withholding of those funds. According to the Court, [d]amages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.

Zellous v. Broadhead Assocs., 906 F.2d 94, 97 (3d Cir. 1990) (citing and quoting Bowen, 487 U.S. at 895, 901, 910, 108 S. Ct. at 2732, 2735, 2740) (internal quotations removed).

In this case, it is clear that Zinner seeks money damages, rather than specific relief. If the government had realized more than \$1,000,000 on his property and had failed to return to him the excess, then he would be seeking the specific relief of the disgorgement of that money. However, his claim is that the government mishandled and wasted his property so that the money that should have been realized was not, and as a result, he was left with substantial debts. He asks the Court to make an assessment of what the government should and would have realized, absent mismanagement, and to award him damages in the amount of the difference between what was and what should have been realized. Presumably he seeks credit for the amount he still owes the government and the balance in cash. In addition, he seeks the \$75,000 he owes the mortgagor of the "Zinner Office Building." The money payments Zinner seeks are ordinary money

damages and do not qualify as specific relief so as to come under the exception in Bowen. They therefore are excluded by section 702, and the APA cannot serve as a basis for this Court's jurisdiction.

Zinner also cites to the Tucker Act, 28 U.S.C.A. § 1346(a)(2), stating that, because his claim is for more than \$10,000, venue is improper in the United States Court of Claims and that therefore, this court must hear it. (Deft.'s Reply at 11.) In fact, he has it backwards, and the point relates to jurisdiction rather than venue. The statute provides that federal district courts have "original jurisdiction, concurrent with the United States Court of Federal Claims, of . . . [any] civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States," 28 U.S.C.A. § 1346(a) (West 1993 & Supp. 1998); see also Chabal v. Reagan, 822 F.2d 349, 353-54 (3d Cir. 1987). Zinner's claims for monetary relief are clearly in excess of \$10,000; his claim for relief of his \$75,000 debt on the "Zinner Office Building" by itself takes his monetary claims outside this Court's jurisdiction.

Under the Tucker Act, when a plaintiff has declaratory or injunctive claims as well as claims for monetary relief in excess of \$10,000, the federal district court can retain jurisdiction over the non-monetary claims if "the declaratory or

injunctive relief a claimant seeks has significant prospective effect or considerable value apart from merely determining monetary liability of the government." Hahn v. United States, 757 F.2d 581, 590 (3d Cir. 1985). Zinner's request to be relieved from his \$1,000,000 forfeiture obligation comes within this Court's jurisdiction, and the Court will retain jurisdiction over that claim only and will deny it. The rest of the relief Zinner seeks has no "significant prospective effect or considerable value apart from merely determining monetary liability of the government," id., and therefore falls outside the jurisdiction of this Court.

IV. CONCLUSION

The Court has jurisdiction over Zinner's request to be relieved of his forfeiture obligation and will deny the request because he has made no showing why that obligation should not be paid. With regard to Zinner's claims for money damages, because the damages he seeks are of a kind excluded by the APA, and because he seeks an amount in excess of \$10,000, this Court has no jurisdiction over them. If Zinner wishes to pursue the monetary claims, he will have to bring an action in the United States Court of Claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, : CRIMINAL ACTION
 : :
 : :
 : :
EDWARD M. ZINNER, : NO. 95-0048

O R D E R

AND NOW, this day of July, 1998, upon consideration of the Motion of Edward M. Zinner and Cindy Zinner for Hearing and Judicial Determination as to Government's Improper Disposal of Forfeited Assets (Doc. No. 197), the Government's Response (Doc. No. 207), the Government's Supplemental Memorandum of Law (Doc. No. 217), and the Zinners' Reply (Doc. No. 225), **IT IS HEREBY ORDERED** that:

1. Insofar as the Motion seeks relief from the amount of forfeiture in Edward M. Zinner's guilty plea agreement, the Motion is **DENIED**;
2. Insofar as the Motion seeks money damages, the Motion is **DISMISSED** for lack of jurisdiction.

BY THE COURT:

JOHN R. PADOVA, J.