

APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: <i>United States of America v. Sanchez, et al.</i> , No. 22-11923, 2023 WL 5844958 (11th Cir. Sept. 11, 2023)	App. 1
APPENDIX B: Judgment, <i>United States of America v. Sanchez, et al.</i> , No. 22-11923 (11th Cir. Sept. 11, 2023)	App. 14
APPENDIX C: Order Denying Motion to Reconsider, <i>United States of America v. Carlos Quispe Cancari</i> , No. 21-cr-20134 (S.D. Fla. Apr. 7, 2022)	App. 16
APPENDIX D: Order Granting Final Order of Forfeiture, <i>United States of America v. Carlos Quispe Cancari</i> , No. 21-cr-20134 (S.D. Fla. Mar. 7, 2022)	App. 31
APPENDIX E: Order Granting Motion to Dismiss 21 U.S.C. § 853(n) Petition, <i>United States of America v. Carlos Quispe Cancari</i> , No. 21-cr-20134 (S.D. Fla. Feb. 17, 2022)	App. 37
APPENDIX F: Order Granting Preliminary Order of Forfeiture, <i>United States of America v. Carlos Quispe Cancari</i> , No. 21-cr-20134 (S.D. Fla. Aug. 26, 2021)	App. 53
APPENDIX G: Order Denying Petition for Rehearing, <i>United States of America v. Sanchez, et al.</i> , No. 22-11923 (11th Cir. Nov. 21, 2023)	App. 57

App. 1

[DO NOT PUBLISH]

**In the
United States Court of Appeals
For the Eleventh Circuit**

No. 22-11923

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS SANCHEZ,
JAQUELINE YUPANQUI PALACIOS,
EXCENTRIC IMPORT & EXPORT CORPORATION,

Petitioners-Appellants,

CARLOS QUISPE CANCARI,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cr-20134-CMA-1

(Filed Sep. 11, 2023)

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

This case is about third parties who claim an interest in property subject to criminal forfeiture. Luis

App. 2

Sanchez, Excentric Import and Export Corporation, and Jaqueline Yupanqui Palacios appeal the preliminary and final orders of forfeiture in Carlos Quispe Cancari's criminal case, as well as the district court's orders dismissing their third-party petition and refusing to grant relief from that dismissal.

Their appeal falls short. We dismiss the petitioners' challenge to the preliminary forfeiture order for lack of jurisdiction and affirm the district court's other orders.

I.¹

Cancari was arrested at the Miami airport when he arrived on a cargo plane from Bolivia on February 4, 2021. Law enforcement seized narcotics and \$9,000 in cash during his arrest. Cancari told the officers that the money belonged to Mr. Sanchez. Cancari was later charged with drug offenses, and his indictment included forfeiture allegations pursuant to 21 U.S.C. section 853. Cancari pleaded guilty, admitting that the "\$9,000 in United States currency" that the government had seized was "subject to forfeiture."

The district court entered a preliminary order of forfeiture. The order stated that it was "final" as to Cancari and that, "upon adjudication of all third-party interests," the district court would enter a final order

¹ We accept the factual allegations in the petition as true. Fed. R. Crim. P. 32.2(c)(1)(A).

App. 3

of forfeiture “in which all interests w[ould] be addressed.”

The government posted notice of the pending final order of forfeiture on an official website from September 25 through October 24. The government also sent notice to Mr. Sanchez’s counsel, delivered on October 29, outlining Mr. Sanchez’s right to participate in the forfeiture proceedings.

On November 23, Mr. Sanchez, Excentric, and Ms. Palacios jointly petitioned the district court under 21 U.S.C. section 853(n) for release of the \$9,000. They attached to the petition signed affidavits from Mr. Sanchez and Ms. Palacios. The district court denied their petition without prejudice for not including a memorandum as required by the local rules, and, in light of the government’s non-opposition, granted the petitioners an extension of time to revise their petition. On December 17, the petitioners filed a revised petition (which included a memorandum), alongside the signed affidavit from Mr. Sanchez and a new signed affidavit from Ms. Palacios. However, the revised petition, like the original petition, was only signed by the petitioners’ counsel—not the petitioners.

The revised petition alleged that Mr. Sanchez was a part owner of Excentric, a Florida company that sold electronics to Latin American clients including Ms. Palacios, a Bolivian resident operating a Bolivian electronics company. The petition explained that Ms. Palacios owed Excentric “for merchandise previously purchased,” so she’d “sent payment of the \$9,000.00

U.S. dollars to Ex-centric with [d]efendant Quispe Cancari who was traveling from Bolivia to Miami.” The money came from “earnings and working capital from [Ms. Palacios’s] electronics business,” and had “no relationship” to Cancari’s drug offenses. None of the petitioners had any idea Cancari was transporting narcotics.

The district court granted the government’s motion to dismiss the petition because Mr. Sanchez and Ex-centric lacked Article III standing and the three petitioners lacked statutory standing. The district court also dismissed the petition because the petitioners hadn’t signed the petition, as required by section 853(n)(3), and the attached signed affidavits that they had attached to the petition didn’t cure that mistake. The district court refused to grant the petitioners’ request for leave to amend their petition because the statute authorizing third-party petitions in criminal forfeiture proceedings only allowed petitions to be filed during a thirty-day window, which had long passed by.

The district court issued a final order of forfeiture, declaring that “all right, title, and interest in the [c]urrency is hereby finally forfeited.” The petitioners then filed a motion under Federal Rule of Civil Procedure 60, seeking relief from the dismissal of their petition and from the final forfeiture order. The district court denied the motion, and the petitioners timely appealed.

II.

The petitioners appeal the preliminary order of forfeiture, the dismissal of their petition, the final order of forfeiture, and the denial of their rule 60 motion. Their appeal focuses on two issues: (1) whether the district court erred in issuing the preliminary order of forfeiture; and (2) whether the district court erred in dismissing their section 853(n) petition.² We discuss each in turn.

The Preliminary Order of Forfeiture

The petitioners argue that the district court erred in issuing the preliminary forfeiture order because the government never established a nexus between the seized cash and Cancari’s crime. The government responds that the petitioners lack Article III standing to challenge the preliminary order of forfeiture. “We review de novo questions about our subject matter jurisdiction, including standing.” *United States v. Davenport*, 668 F.3d 1316, 1319 (11th Cir. 2012) (cleaned up).

² The petitioners raise a third issue—the constitutionality of section 853—but we don’t address it because it wasn’t properly raised in the district court. The petitioners’ only mention of this constitutional issue in the district court was in their reply brief supporting their rule 60 motion. The district court declined to address the belatedly raised issue, and so do we. See *United States v. Lewis*, 115 F.3d 1531, 1539 (11th Cir. 1997) (“This [c]ourt will generally not address an issue not decided by the district court” and “therefore do not reach the merits of the defendant’s constitutional challenge.” (cleaned up)).

App. 6

We begin by summarizing the relevant legal framework. Under section 853 and “Federal Rule of Criminal Procedure 32.2, criminal forfeiture is split into two phases: the first phase concerns the defendant’s ownership of the property to be forfeited, and the second phase concerns any third party’s ownership of that property.” *United States v. Amodeo*, 916 F.3d 967, 972 (11th Cir. 2019). When “a criminal defendant pleads guilty and agrees to the forfeiture, the district court must promptly enter a preliminary forfeiture order.” *Id.* (citing Fed. R. Crim. P. 32.2(b)(1)–(2)). At that point, “the preliminary forfeiture order becomes final *as to the defendant*” but “remains preliminary as to third parties until the [section 853(n)] ancillary proceeding is concluded.” *Id.* (quoting Fed. R. Crim. P. 32.2(b)(4)(A)).

“The ancillary proceeding exists to determine whether a third party has an interest in the property that the defendant has already forfeited—not to relitigate the preliminary order’s finding of forfeitability.” *Id.* “Nowhere do the provisions [of section 853(n) or rule 32.2] grant petitioners a private cause of action or right to appeal a court’s ruling outside of an ancillary forfeiture proceeding.” *United States v. Cone*, 627 F.3d 1356, 1358 (11th Cir. 2010). In fact, “[s]ection 853 affirmatively bars interference by non-party petitioners outside of the ancillary proceeding.” *Id.* (citing 21 U.S.C. § 853(k)). Because “[a]n ancillary proceeding constitutes the sole means by which a third-party claimant can establish entitlement to return of forfeited property,” third-party claimants “lack[] standing

to challenge the validity of [a preliminary order of forfeiture's] determination of forfeitability,” and so we must dismiss third-party challenges to preliminary orders of forfeiture for lack of jurisdiction. *See Davenport*, 668 F.3d at 1320–21; *see also, e.g., Cone*, 627 F.3d at 1359 (dismissing appeal because third-party petitioner lacked standing to challenge district court’s preliminary order of forfeiture).

That’s what we must do here. Because the petitioners’ sole means to establish their entitlement to the \$9,000 is the ancillary proceeding, they lack standing to challenge the preliminary forfeiture order. We dismiss their appeal of the preliminary order of forfeiture for lack of jurisdiction.

The District Court’s Dismissal of the Petition

Rule 32.2 allows district courts to grant motions to dismiss section 853(n) petitions “for lack of standing, for failure to state a claim, or for any other lawful reason.” Fed. R. Crim. P. 32.2(c)(1)(A). When a rule 32.2 “motion to dismiss is filed before discovery or a hearing, it should be treated like a motion to dismiss a civil complaint under Federal Rule of Civil Procedure 12(b).” *United States v. Marion*, 562 F.3d 1330, 1342 (11th Cir. 2009) (quotation omitted).

The petitioners contend that the district court erred in dismissing their petition by wrongly: (1) finding that Mr. Sanchez and Excentric lacked Article III standing to file the petition; (2) finding that the petitioners lacked statutory standing under section 853(n);

and (3) denying them leave to file an amended petition, which would've added their signatures. We address these arguments one by one, reviewing the district court's Article III and statutory standing rulings de novo, see *Davenport*, 668 F.3d at 1319, and denial of leave to amend for abuse of discretion, *United States v. \$125,938.62*, 370 F.3d 1325, 1329 (11th Cir. 2004).

1. Article III Standing

The petitioners argue that the district court erred in finding that Mr. Sanchez and Excentric lacked Article III standing to petition for the \$9,000. Claimants in federal court must have Article III standing, a requirement deriving from the constitutional mandate that federal courts' jurisdiction is limited to adjudicating "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. The first element of Article III standing is a "particularized injury," which in forfeiture proceedings hinges on "whether the litigant has an interest in the property subject to the forfeiture." See *Amodeo*, 916 F.3d at 971 ("[A]bsent an interest in that property, there is no case or controversy.

The interest must be either "an ownership or possessory interest in the property seized." *United States v. Five Hundred Thousand Dollars*, 730 F.2d 1437, 1439 (11th Cir. 1984); see also *United States v. Timley*, 507 F.3d 1125, 1129 (8th Cir. 2007). Because the interest must be in the *specific property* seized, a criminal defendant's *general creditors* don't have standing to claim an interest in any particular asset subject to

forfeiture. *See United States v. Watkins*, 320 F.3d 1279, 1283 (11th Cir. 2003) (explaining that because general creditors only “enjoy a legal interest in the entire estate of the debtor,” they aren’t entitled to repayment from the value of “any one specific asset” belonging to the debtor); *see also United States v. White*, 675 F.3d 1073, 1080 (8th Cir. 2012) (“[A] general creditor does not have standing to claim an interest in a particular forfeited asset.”).

The petition doesn’t allege that Mr. Sanchez or Excentric had either an ownership interest or a possessory interest in the seized cash. Rather, the petition (and incorporated memorandum) alleged that Ms. Palacios was the “[o]wner/[b]ailor” of the cash—which Cancari “possessed” as Ms. Palacios’s “bailee”—while Mr. Sanchez and Excentric were merely Ms. Palacios’s general “creditors.” So, although the petition does allege that Ms. Palacios owes Mr. Sanchez and Excentric money because they’re her “creditors,” the petition doesn’t allege that Mr. Sanchez and Excentric have a legal interest in Ms. Palacios repaying them from *the specific cash* she had placed in Cancari’s possession. *See Watkins*, 320 F.3d at 1283 (“[G]eneral creditors cannot point to any one specific asset and claim that they are entitled to payment out of the value of that specific asset.”).

Because the petition doesn’t allege that Mr. Sanchez and Ex-centric had an ownership or possessory interest in the seized currency—and instead only alleges that they’re Ms. Palacios’s general creditors—they haven’t alleged facts sufficient to show Article III

standing. And because Mr. Sanchez and Excentric lacked Article III standing, we needn't examine whether they had statutory standing and should've been granted leave to add their signatures to the petition. We address these arguments only as to Ms. Palacios, who the district court found (and the government doesn't dispute) has Article III standing.

2. Statutory Standing

Ms. Palacios argues that the district court erred in finding that she lacked statutory standing. Statutory standing differs from Article III standing in that it doesn't ask whether there's a redressable injury, but whether a party "has a cause of action under the statute." *See Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118, 128 & 128 n.4 (2014). The statute here, 21 U.S.C. section 853(n), provides that "[a]ny person, other than the defendant, asserting a *legal interest in property which has been ordered forfeited* . . . [may] petition the court for a hearing to adjudicate the validity of his alleged interest." 21 U.S.C. § 853(n)(2) (emphasis added).

Ms. Palacios has alleged a "legal interest" in the \$9,000 that's "been ordered forfeited," *id.*, which is all that is needed to establish statutory standing at the pleading stage, *see Lexmark*, 572 U.S. at 140 (showing that statutory standing at the motion-to-dismiss stage is established through allegations—not evidence). The petition and incorporated memorandum alleged that Ms. Palacios had a legal interest in the money as the

“[o]wner/[b]ailor”, and the allegations showed that there were two jurisdictions under which her legal interest was created or otherwise protected: Bolivia and Florida. The petition identified Ms. Palacios as a Bolivian resident, operating a Bolivian company, and alleged that she gave \$9,000 of “earnings and working capital” from her company to Cancari, “who was traveling from Bolivia to Miami.” Cancari was supposed to deliver the cash to Mr. Sanchez (a Florida resident) and Excentric (a Florida corporation), but the government seized the funds when Cancari landed in Florida.

The district court faulted Ms. Palacios for not specifically citing which jurisdictions—and which laws from those jurisdictions—created her property rights. But, whatever law applied, Ms. Palacios did not have to allege in the petition the legal basis for her interest in the money. *See Glynn Env’t Coal., Inc. v. Sea Island Acquisition, LLC*, 26 F.4th 1235, 1240 (11th Cir. 2022) (“Only factual allegations, and not legal conclusions, are relevant” at the motion-to-dismiss stage.); *PBT Real Est., LLC v. Town of Palm Beach*, 988 F.3d 1274, 1286 (11th Cir. 2021) (explaining that, because motions to dismiss concern “*factual* allegations,” courts must deny a motion to dismiss that argues the claimant pleaded an “imperfect statement of the legal theory supporting the claim” (citation omitted)). It was enough, at the pleading stage, that she alleged she had an interest in the money as an owner or bailor.

3. Failure to Sign Petition and Leave to Amend

Although Ms. Palacios had standing to sue under section 853(n), she didn't comply with an unambiguous pleading requirement laid out by the statute: the requirement that she sign the petition. 18 U.S.C. § 853(n)(3) (requiring petitions "be signed by the petitioner under penalty of perjury"). Ms. Palacios admits that she didn't comply with the plain text of this pleading requirement because she never signed the petition—only her lawyer did.

Even so, she argues, the district court erred in denying her motion to amend the petition to add her signature. The district court refused to do so because the statutory window for filing third-party petitions had closed.

Section 853(n) provides that a third party "asserting a legal interest in property which has been ordered forfeited" must file their petition within "*thirty days of the final publication of notice or his receipt of notice . . . , whichever is earlier.*" 18 U.S.C. § 853(n)(2). We've described this window as establishing a "*mandatory 30-day period for filing third-party petitions.*" *Davenport*, 668 F.3d at 1323 (emphasis added).

By the time Ms. Palacios sought leave to add her signature to the petition the mandatory thirty-day deadline had long since passed. Given the language of the statute and our case law, we cannot say that the district court abused its discretion when it enforced this congressionally prescribed, "mandatory" thirty-day window and denied leave to amend. *See id.*; *see*

App. 13

also United States v. Snipes, 611 F.3d 855, 864 (11th Cir. 2010) (stressing that the Supreme Court has “strictly construed” clear statutory filing periods as “absolute” deadlines).

III.

The petitioners’ appeal of the preliminary order of forfeiture is **DISMISSED** for lack of jurisdiction. The other orders on appeal are **AFFIRMED**.

App. 14

**In the
United States Court of Appeals
For the Eleventh Circuit**

No. 22-11923

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS SANCHEZ,
JAQUELINE YUPANQUI PALACIOS,
EXCENTRIC IMPORT & EXPORT CORPORATION,

Interested Parties-Appellants,

CARLOS QUISPE CANCARI,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cr-20134-CMA-1

JUDGMENT

(Filed Sep. 11, 2023)

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

App. 15

Entered: September 11, 2023

For the Court: DAVID J. SMITH, Clerk of Court

App. 16

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 21-20134-CR-ALTONAGA**

**UNITED STATES
OF AMERICA,**

Plaintiff,

v.

CARLOS QUISPE CANCARI,

Defendant. _____ /

Re:

**EXCENTRIC IMPORT & EXPORT
CORPORATION, LUIS
SANCHEZ, and YAQUELINE
YUPANQUI PALACIOS,**

Third-Party Petitioners. _____ /

ORDER

(Filed Apr. 7, 2022)

THIS CAUSE came before the Court on Third-Party Petitioners, Excentric Import & Export Corporation, Luis Sanchez, and Yaqueline Yupanqui Palacios's Motion for Relief from Order Dismissing Their Petition with Verified Claims and From Final Order of Forfeiture [ECF No. 48], filed on March 7, 2022. The Government filed a Response [ECF No. 49], and Petitioners

filed a Reply [ECF No. 52]. For the following reasons, the Motion is denied.

I. BACKGROUND

Defendant, Carlos Quispe Cancari, was arrested at Miami International Airport upon his arrival aboard a cargo plane traveling from Bolivia on February 4, 2021. (*See* Pet. [ECF No. 37] 2). During his arrest, law enforcement seized \$9,000.00 in U.S. currency along with illegal narcotics. (*See id.*). According to Petitioners, Defendant informed law enforcement that the money belonged to Sanchez. (*See id.*).

One month later, a federal grand jury returned an Indictment [ECF No. 12] charging Defendant with conspiracy to import controlled substances, in violation of 21 U.S.C. section 963; importation of a controlled substance, in violation of 21 U.S.C. section 952(a); conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. section 846; and possession with intent to distribute a controlled substance, in violation of 21 U.S.C. section 841(a)(1). (*See generally* Indictment).

On July 1, 2021, U.S. Customs & Border Protection (“CBP”) mailed Sanchez a notice of seizure advising that the \$9,000 had been seized and describing the procedures to claim the money. (*See* Pet. 2). Sanchez filed a verified claim for the money with CBP on July 13, 2021. (*See id.*).

Defendant and the Government entered into a Plea Agreement [ECF No. 22] and a Factual Proffer [ECF No. 23] on July 21, 2021. Defendant agreed to plead guilty to conspiracy to import cocaine, in violation of 21 U.S.C. sections 952(a) and 963. (*See* Plea Agreement ¶ 1). Defendant also agreed to forfeit the seized funds under 21 U.S.C sections 853(a)(1) and (a)(2). (*See* Plea Agreement ¶ 15). The Factual Proffer does not mention the seized funds. (*See* Factual Proffer 1).¹

The Court entered a Preliminary Order of Forfeiture [ECF No. 28] on August 26, 2021 against Defendant's interest in the funds under 21 U.S.C. section 853. (*See generally* Prelim. Order Forfeiture). Defendant was found guilty of conspiracy to import cocaine and sentenced on September 29, 2021. (*See* J. [ECF No. 31] 1). Defendant's sentence included criminal forfeiture of the seized funds. (*See id.* 7).

The Government posted notice of the criminal forfeiture on an official government website from September 25, 2021 through October 24, 2021. (*See* Decl. Publication [ECF No. 32]). The Government also sent correspondence to Sanchez's counsel, advising of his rights regarding the seized funds. (*See* Pet. 3).

On December 17, 2021, Petitioners filed a Petition for Release of Property and Request for Hearing Pursuant to 21 U.S.C. [Section] 853(n). They argued "all

¹ The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

three [Petitioners] have an interest in the \$9,000 superior to Defendant [sic]” and thus sought an amendment to the Preliminary Order of Forfeiture under 21 U.S.C. section 853(n)(6)(A). (Pet. 8 (alterations added); *see also id.* 4–5). They alleged Palacios is a Bolivian resident and customer of Excentric, a Florida corporation that sells electronics and is partly owned by Sanchez. (*See id.* 4). According to Petitioners, Palacios sent the funds with Defendant to give to Excentric as payment for merchandise previously purchased. (*See id.*).

The Government sought dismissal of the Petition for failing to satisfy the pleading requirements of 21 U.S.C. section 853(n)(2) and for lack of constitutional and statutory standing. (*See generally* Mot. Dismiss Pet. [ECF No. 41]). The Court granted the Government’s Motion to Dismiss the Petition, finding: (1) Sanchez and Excentric failed to show constitutional or statutory standing because they were general creditors of Palacios (*see* Feb. 17, 2022 Order [ECF No. 45] 5–6); (2) all Petitioners failed to establish statutory standing because they did not identify the law of the jurisdiction their property rights were allegedly created under (*see id.* 6–7); and (3) Petitioners failed to comply with the statutory requirements of section 853(n)(3) by failing to sign the Petition and instead attaching internally inconsistent sworn affidavits from Palacios and Sanchez (*see id.* 7–11). The Court denied leave to amend, relying on “persuasive authority holding that a third-party petitioner may not amend a claim to correct a defect under section 853(n)(3) after the 30-day deadline for filing a petition has passed.”

(*Id.* 11 (citing *United States v. Lamid*, 663 F. App'x 319, 324–25 (5th Cir. 2016); *United States v. Chicago*, No. 15-00168, 2017 WL 1024276, at *7 (S.D. Ala. Mar. 16, 2017))).

Thereafter, the Government filed a Motion for Final Order of Forfeiture [ECF No. 46], which the Court granted (*see* Mar. 7, 2022 Order [ECF No. 47]).

Petitioners then filed the present Motion, seeking relief from the February 17, 2022 Order dismissing their Petition and from the March 7, 2022 Order granting the Government's Motion for Final Order of Forfeiture. (*See* Mot. 1). Petitioners rely on Federal Rules of Civil Procedure 60(b)(1), (b)(2), (b)(3), and (b)(6). (*See* Mot. 3–4).

II. STANDARD

Federal Rule of Civil Procedure 60(b) “sets forth the grounds on which a court, in its discretion, can rescind or amend a final judgment or order.” *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679 (11th Cir. 1984). Pertinent here, a court may relieve a party from a final order for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . .

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b) (alteration added).

Although the Rule “should be construed in order to do substantial justice, . . . this does not mean that final judgments should be lightly reopened.” *Griffin*, 722 F.2d at 680 (alteration added; citation omitted). Indeed, “[t]he desirability for order and predictability in the judicial process speaks for caution in the reopening of judgments.” *Id.* (alteration added).

III. DISCUSSION

Mistake & Excusable Neglect. One of the reasons the Court dismissed the Petition is that Petitioners failed to sign it, in violation of 21 U.S.C. section 853(n)(3). (*See* Feb. 17, 2022 Order 7–11). As discussed in the Order dismissing the Petition, courts require strict compliance with the pleading requirements of section 853(n)(3). (*See id.* 8 (collecting cases)). And while Petitioners argued this requirement should be excused because they attached signed affidavits, these affidavits did not contain the same facts alleged in the Petition and even contradicted the Petition in some respects. (*See id.* 9–10).

Petitioners now seek relief under Rule 60(b)(1), maintaining they did not sign their Petition due to their counsel’s mistake or his excusable neglect. (*See*

Mot. 4). As support, Petitioners cite inapt civil forfeiture cases that have little to do with failing to sign a petition under section 853(n)(3). (*See id.* 4–5 (citing *United States v. \$125,938.62*, 370 F.3d 1325, 1329 (11th Cir. 2004); *United States v. One (1) 1979 Mercedes 450SE*, 651 F. Supp. 351, 354–55 (S.D. Fla. 1987); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989))). Petitioners do cite one case — for the first time in their briefing on a Rule 60(b) Motion — where a magistrate judge excused a failure to sign a petition under section 853(n)(3). (*See* Mot. 4, n.2; Reply 2 (citing *United States v. Rivarola*, No. 13-cr-20657, R. & R. [ECF No. 65] 8, filed July 15, 2014 (S.D. Fla. 2016))).

There are two problems with *Rivarola*. First, it cannot be construed as persuasive authority. Under the Federal Magistrates Act, a district judge may designate a magistrate judge to submit recommendations for the disposition of motions, “[b]ut the district judge retains ‘ultimate adjudicatory power over dispositive motions’ and the ‘widest discretion’ over how to treat a report and recommendation of a magistrate judge.” *Gonzalez v. United States*, 981 F.3d 845, 851 (11th Cir. 2020) (alteration added; quoting *Williams v. McNeil*, 557 F.3d 1287, 1291 (11th Cir. 2009)). A report and recommendation, alone, contains no presumptive weight. *See id.* While the magistrate judge in *Rivarola* may have excused the petitioners’ mistake, the district judge expressly “decline[d] to adopt the Report and Recommendation . . . filed [t]herein by [the magistrate judge.]” No. 13-cr-20657, Order of Re-Referral [ECF

No. 74] 2, filed Nov. 30, 2015 (S.D. Fla. 2016) (alterations added). Granted, the district judge only denied the report and recommendation because the magistrate judge failed to hold a hearing as is required under 21 U.S.C. sections 853(n)(2)–(5) (*see id.* 1), but absent a change-of-heart from the district judge, the report and recommendation never became final, let alone persuasive. *See Glover v. Ala. Bd. of Corrs.*, 660 F.2d 120, 122 (5th Cir. Unit B 1981) (“Only a district court can make a magistrate [judge]’s decision final[.]” (alterations added; collecting cases)).

Second, *Rivarola* is factually distinguishable. There, the petitioners provided supplemental materials that “fully clarif[ied] the circumstances” surrounding the petition. *Rivarola*, No. 13-cr-20657, R. & R. 8 (alteration added). Here, Petitioners’ sworn affidavits did not contain the same facts alleged in the Petition and actually created more confusion, as they contradicted the Petition. Given these distinctions, the Court affords no weight to the report and recommendation in *Rivarola*.

Notwithstanding *Rivarola*’s flaws, it is unclear why Petitioners’ counsel is informing the Court of the prior case for the first time on a Rule 60(b) Motion, despite counsel’s involvement in the case.² In any event, the Court follows the weight of authority in holding strict compliance with section 853(n)(3) is required. (*See* Feb. 17, 2022 Order 8 (collecting cases)).

² Petitioners’ counsel filed the unsigned petition in *Rivarola*. (*See* Mot. 4 n.2).

Petitioners fare no better under Eleventh Circuit precedent. The Eleventh Circuit has “held that a district court does not abuse its discretion in declining to grant relief under Rule 60(b)(1) based on an attorney’s misinterpretation of a procedural rule, where ample caselaw exists to put the attorney on notice that his interpretation is mistaken.” *United States v. Davenport*, 668 F.3d 1316, 1324 (11th Cir. 2012) (citing *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993)). As the Court previously stated, section 853(n)(3) is “an unambiguous federal rule[.]” (Feb. 17, 2022 Order 9 (alteration added; quotation marks omitted; quoting *United States v. Owens*, No. 1:09-cr-0089, 2010 WL 583910, at *3 (S.D. Ind. Feb. 12, 2010))). And the caselaw is abundant and clear — the requirement that a third-party petition for a section 853(n) hearing must be signed under penalty of perjury is not a mere technical requirement that courts easily excuse. (See *id.* 8 (collecting cases that dismissed unsigned petitions)). The Court will not excuse Petitioners’ counsel’s misinterpretation of an unambiguous federal rule. See *Davenport*, 668 F.3d at 1324.

Petitioners’ Rule 60(b)(1) argument is denied.

Newly Discovered Evidence. After the Court dismissed the Petition, Petitioners’ counsel obtained Defendant’s Affidavit (see Mot., Ex. A [ECF No. 48-1] 2), wherein Defendant attests that Palacios entrusted the \$9,000 to him so he could bring it to Sanchez. (See Mot. 5). Defendant also states the \$9,000 are unrelated to his drug crimes and he was not the owner of the money. (See *id.*).

“A Rule 60(b)(2) motion is an extraordinary motion[,] and the requirements of the rule must be strictly met.” *Motes v. Couch*, 766 F. App’x 867, 869 (11th Cir. 2019) (alteration added; citing *Waddell v. Hendry Cnty. Sheriff’s Off.*, 329 F.3d 1300, 1309 (11th Cir. 2003)). To prevail, the movant

must show (1) that the evidence was newly discovered since the trial, (2) due diligence on the part of the movant to discover the new evidence, (3) that the evidence is not merely cumulative or impeaching, (4) that the evidence is material, and (5) that the evidence is such that a new trial would probably produce a new result.

Id. (citation omitted).

For starters, Defendant’s Affidavit is not newly discovered evidence, nor was it diligently obtained. Petitioner’s counsel received notice of this forfeiture proceeding on October 29, 2021, at the latest. (*See* Resp. 3). As Petitioners note, their counsel spoke to Defendant via telephone twice before the Court dismissed the Petition on February 17, 2021. (*See* Mot. 2 n.1). Petitioners fail to explain why they waited nearly four months — and only until after the Petition was dismissed — to obtain Defendant’s affidavit. *See Waddell*, 329 F.3d at 1310 (holding that proffered testimony was not newly discovered evidence because the plaintiff had the opportunity to depose the witness before the entry of summary judgment).

This is perhaps beside the point, however, because Defendant's Affidavit does not change the outcome of this ancillary proceeding. *Motes*, 766 F. App'x at 869 ("Evidence that would not produce a new result does not meet the [Rule 60(b)(2)] requirements." (alteration added; citation omitted)). The Affidavit simply repeats several of the allegations contained in the Petition that the Court already accepted as true. (See Feb. 17, 2022 Order 4 (stating the Federal Rules of Civil Procedure motion-to-dismiss standard applies)). The Affidavit does not change that Petitioners failed to sign the Petition, that Sanchez and Excentric are general creditors of Palacios and thus have no standing, and that Petitioners failed to explain what jurisdiction Palacios's property rights were created under. Consequently, Petitioners' Rule 60(b)(2) argument fails.

Misrepresentation or Misconduct by Opposing Party. Petitioners accuse the Government of "misconduct[.]" (Mot. 6 (alteration added; citing Fed. R. Civ. P. 11(b))). They claim the Government made a "misrepresentation to the Court" when it "argued that Defendant Cancari was the owner of the \$9,000.00." (*Id.*). This assertion is meritless.

The supposed "misrepresentation" the Government made was merely a legal argument — one backed by persuasive authority. (*Id.*). The Government stated:

[T]he Petition and Palacio's [sic] affidavit essentially claim that Palacio [sic] gave the Currency to the Defendant and acknowledge that the Defendant possessed the Currency when it was seized. Indeed, there is no dispute that

the Currency, when seized, was lawfully in the Defendant's possession. Therefore, title to the money passed to the Defendant regardless of where it was derived.

(Mot. Dismiss Pet. 15 (alterations added)).

Certainly, this was a good-faith argument considering the Government cited secondary authority indicating the possession of cash "is prima facie evidence of ownership." (*Id.* (citing 53A Am. Jur. 2d Money §§ 17, 21 (2014))). The Government also cited an analogous district court case to support its position. (*See id.* (citing *United States v. Tarraf*, 725 F. Supp. 2d 625 (E.D. Mich. 2010))). In its Response, the Government confirms the argument on this issue "was made in good faith and accurately reflects relevant law from other jurisdictions pertaining to ownership or title to currency." (Resp. 9). Altogether, there is no indication the Government made this argument in bad faith.

The Court takes allegations of misconduct seriously. Petitioners' Rule 60(b)(3) argument is rejected.

Any Other Reason that Justifies Relief. Petitioners make a last-ditch effort for relief under Rule 60(b)(6). (*See* Mot. 7–8).

"Rule 60(b)(6) provides a catch-all, authorizing a court to grant relief from a judgment for 'any other reason that justifies relief.'" *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1355 (11th Cir. 2014) (quoting Fed. R. Civ. P. 60(b)(6)). "Relief under Rule 60(b)(6) is an extraordinary remedy which may be

invoked only upon a showing of exceptional circumstances.” *Gill v. Wells*, 610 F. App’x 809, 811 (11th Cir. 2015) (quotation marks and citation omitted). “Even when the movant shows exceptional circumstances, the decision whether to grant the requested relief is a matter for the district court’s sound discretion.” *Id.* (quotation marks and citation omitted).

To grant Petitioners relief, the Court would need to be satisfied that: (1) Sanchez and Excentric have constitutional and statutory standing despite asserting in the Petition they were creditors of Palacios; (2) Petitioners have statutory standing despite failing to identify the laws of the jurisdiction in which their property interests were created; and (3) Petitioners may amend section 853 petitions after the filing deadline.

Petitioners contend — for the first time — that Sanchez and Excentric have constitutional standing because they had constructive possession of the money. (*See* Mot 8–9). This was not alleged in the Petition. And it was unclear whether they argued this in their Response to the Government’s Motion to Dismiss the Petition [ECF No. 42] because Petitioners simply regurgitated broad rule statements without really applying them to the facts. (*See id.* 3–5). It is unclear why this argument is now being made for the first time in a Rule 60(b) Motion.

Not only that, but Petitioners have still not answered the Court’s question about statutory standing: *what jurisdiction(s) were their alleged property rights*

created under? (See Feb. 17, 2022 Order 6). Petitioners continue to cite seemingly random case law, and now, Eleventh Circuit pattern jury instructions, without explaining what laws created their property rights. (See Mot. 8–9).

In any event, the Court is not convinced it could even grant Petitioners’ request for leave to amend their deficient and unsigned Petition. Petitioners have not rebutted the persuasive authority holding that third-party petitioners cannot amend a claim to correct a defect under section 853(n)(3) after the deadline for filing a petition has passed. (See Feb. 17, 2022 Order 11–12 (citing *Lamid*, 663 F. App’x at 324–25; *Chicago*, 2018 WL 1024276, at *7)).

Petitioners’ Rule 60(b)(6) argument is denied.

IV. CONCLUSION

A Rule 60 motion “is not an opportunity for the moving part[ies] and their counsel to instruct the court on how the court ‘could have done it better’ the first time.” *Pres. Endangered Areas of Cobb’s History, Inc. v. U.S. Army Corps of Eng’rs*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995) (alteration added). And yet, that is what Petitioners have done here.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion [ECF No. 48] is **DENIED**.

App. 30

DONE AND ORDERED in Miami, Florida, this
7th day of April, 2022.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
CHIEF UNITED STATES
DISTRICT JUDGE

cc: counsel of record

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 21-20134-CR-ALTONAGA**

**UNITED STATES
OF AMERICA,**

Plaintiff,

v.

CARLOS QUISPE CANCARI,

Defendant.

ORDER

(Filed Mar. 7, 2022)

THIS CAUSE came before the Court on the United States' Motion for Final Order of Forfeiture [ECF No. 46]. The Court has considered the Motion and finds as follows:

1. On March 9, 2021, a federal grand jury returned an Indictment charging Defendant, Carlos Quispe Cancari in Count 1 with conspiracy to import controlled substances in violation of 21 U.S.C. § 963. (*See* Indictment [ECF No. 12]).

2. The Indictment also contains forfeiture allegations, which allege that upon conviction of a violation of 21 U.S.C. § 963, the Defendant shall forfeit to the United States, pursuant to 21 U.S.C. §§ 853(a)(1) and (a)(2), any property the Defendant obtained which constitutes, or was derived from, proceeds obtained,

directly or indirectly, as a result of such violation, or any property the Defendant used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violation. (*See id.* at 3-4).

3. On July 21, 2021, the United States filed its Bill of Particulars as to Criminal Forfeiture which provides notice that upon Defendant's conviction in this case, the United States will seek criminal forfeiture of \$9,000 in United States currency seized from the Defendant on or about February 8, 2021 (the "Currency"). (*See* [ECF No. 20]).

4. On July 21, 2021, the Court accepted Defendant's guilty plea to Count 1 of the Indictment. (*See* Minute Entry [ECF No. 21]). As part of his guilty plea, Defendant agreed that the Currency was subject to criminal forfeiture to the United States pursuant to 21 U.S.C. § 853(a)(2), which provides that any of the Defendant's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of a violation of 21 U.S.C. § 963, among other violations in Title 21 of the United States Code, is subject to criminal forfeiture to the United States. (*See* Plea Agreement ¶ 15; 21 U.S.C. § 853(a)(2)).

5. In support of his guilty plea, the Defendant executed a Factual Proffer, and the Court found that there was a factual basis to support the Defendant's conviction. (*See* Factual Proffer [ECF No. 23]).

6. On August 26, 2021, the Court granted the United States' Motion for Preliminary Order of Forfeiture [ECF No. 27] and entered its Preliminary Order

of Forfeiture [ECF No. 28] criminally forfeiting the Currency to the United States subject to third party interests, if any.

7. On September 29, 2021, the Court imposed sentence in the Defendant's case, which included criminal forfeiture of the Currency. (*See* Sentencing Minutes [ECF No. 30]; Judgment [ECF No. 31]).

8. Notice of the criminal forfeiture was posted on an official government internet site (www.forfeiture.gov) for a period of thirty (30)-days, from September 25, 2021 through October 24, 2021. (*See* Decl. of Publication [ECF No. 32]; 21 U.S.C. § 853(n)(1); Fed. R. Crim. P. 32.2(b)(6)).

9. In an abundance of caution, the United States also sent direct notice of the criminal forfeiture to a Mr. Luis Sanchez, care of his attorney, Mr. Juan Berrio, Esquire, Berrio & Berrio P.A., by FedEx courier on October 28, 2021, which was delivered on October 29, 2021.¹ The notice advised that any person, other than the Defendant, asserting a legal interest in the Currency may petition the Court for a hearing to adjudicate the

¹ The Federal Rules require the United States to send direct notice to any person who appears to be a potential claimant to forfeited property. *See* Fed. R. Crim. P. 32.2(b)(6); *accord* 21 U.S.C. § 853(n)(1). United States Customs and Border Protection (CBP) advised that Mr. Berrio previously filed a claim for the Property on Sanchez's behalf in a nonjudicial (administrative) forfeiture proceeding. Therefore, the United States treated Sanchez as a "potential claimant" to the Property and sent him direct notice of the forfeiture as required. However, the notice states, "in no way is it intended to imply that the United States believes that [Sanchez has] a valid claim to the [Property]."

validity of that person's alleged interest, within 60 days of the first day of publication or within 30 days of receipt of notice, whichever is earlier. Fed. R. Crim. P. 32.2(b)(6); 21 U.S.C. § 853(n)(2). Therefore, the deadline for filing a petition claiming an interest in the Currency was on or before November 25, 2021, which is sixty (60) days after the first day of publication.

10. On November 24, 2021, Mr. Berrio, on half of Excentric Import & Export, Corporation ("Excentric"), Luis Sanchez ("Sanchez"), and Yaqueline Yupanqui Palacios ("Palacios") (collectively, the "Third-Party Petitioners") filed an Unopposed Motion for Extension of Time [ECF No. 35] seeking an enlargement of the deadline in which to file a petition claiming separate interests in the Currency to no later than December 17, 2021, which the Court granted on the same day. (*See* Court Order [ECF No. 36]).

11. On December 17, 2021, the Third-Party Petitioners filed their joint Petition for Release of Property and Request for Hearing Pursuant to 21 U.S.C. § 853(n) [ECF No. 37] (the "Petition") in which each petitioner claimed a separate interest in the Currency.

12. On January 10, 2022, the United States filed its Motion to Dismiss the Petition [ECF No. 41], which the Court granted on February 17, 2022, after the matter was fully briefed by the Parties. (*See* Order [ECF No. 45]).

13. The time for filing a petition claiming an interest in the Currency has expired, and no other petition or claim has been filed.

14. Pursuant to 21 U.S.C. § 853(n)(7), once all third-party petitions have been disposed of, “the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.” *Accord* Fed. R. Crim. P. 32.2(c)(2).

Accordingly, based on the foregoing, the evidence of record, and for good cause shown, the Motion [**ECF No. 46**] is **GRANTED**, and it is hereby **ORDERED** that:

1. Pursuant to 21 U.S.C. § 853, and Rule 32.2(c)(2) of the Federal Rules of Criminal Procedure, all right, title, and interest in the Currency is hereby finally forfeited to and vested in the United States of America.

2. Any duly authorized law enforcement official may seize and take immediate possession of the Currency, exercising all incidents of ownership with respect thereto, and dispose of such property in accordance with law.

3. The Court retains jurisdiction in this matter for the purpose of enforcing this Order.

App. 36

DONE AND ORDERED in Miami, Florida, this
7th day of March, 2022.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
CHIEF UNITED STATES
DISTRICT JUDGE

cc: counsel of record

App. 37

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 21-20134-CR-ALTONAGA**

**UNITED STATES
OF AMERICA,**

Plaintiff,

v.

CARLOS QUISPE CANCARI,

Defendant. _____ /

Re:

**EXCENTRIC IMPORT & EXPORT
CORPORATION, LUIS
SANCHEZ, and YAQUELINE
YUPANQUI PALACIOS,**

Third-Party Petitioners. _____ /

ORDER

(Filed Feb. 17, 2022)

THIS CAUSE came before the Court upon the Government's Motion to Dismiss Petition for Release of Property and Request for Hearing Pursuant to 21 U.S.C. [Section] 853(n) [ECF No. 41]. Third-Party Petitioners, Excentric Import & Export Corporation, Luis Sanchez, and Yaqueline Yupanqui Palacios filed a Response [ECF No. 42]; to which the Government filed a Reply [ECF No. 44]. The Court has carefully

considered the Petition for Release of Property and Request for Hearing Pursuant to 21 U.S.C. [Section] 853(n) [ECF No. 37], the parties' written submissions, and applicable law. For the following reasons, the Motion to Dismiss is granted.

BACKGROUND

Defendant, Carlos Quispe Cancari, was arrested at Miami International Airport upon his arrival aboard a cargo plane traveling from Bolivia on February 4, 2021. (*See* Pet. 2). During his arrest, law enforcement seized \$9,000.00 in U.S. currency along with illegal narcotics. (*See id.*). According to Petitioners, Defendant informed law enforcement that the money belonged to Sanchez. (*See id.*).

One month later, a federal grand jury returned an Indictment [ECF No. 12] charging Defendant with conspiracy to import controlled substances, in violation of 21 U.S.C. section 963; importation of a controlled substance, in violation of 21 U.S.C. section 952(a); conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. section 846; and possession with intent to distribute a controlled substance, in violation of 21 U.S.C. section 841(a)(1). (*See generally* Indictment).

On July 1, 2021, U.S. Customs & Border Protection ("CBP") mailed Sanchez a notice of seizure advising that the \$9,000 had been seized and of the procedures to claim the money. (*See* Pet. 2). Sanchez filed a verified

claim for the money with CBP on July 13, 2021. (*See id.*).

Defendant and the Government entered into a Plea Agreement [ECF No. 22] and a Factual Proffer [ECF No. 23] on July 21, 2021. Defendant agreed to plead guilty to conspiracy to import cocaine, in violation of 21 U.S.C. sections 952(a) and 963. (*See Plea Agreement* ¶ 1). Defendant also agreed to forfeit the seized funds under 21 U.S.C sections 853(a)(1) and (a)(2). (*See Plea Agreement* ¶ 15). The Factual Proffer does not mention the seized funds. (*See Factual Proffer* 1).¹

The Court entered a Preliminary Order of Forfeiture [ECF No. 28] on August 26, 2021 against Defendant's interest in the funds under 21 U.S.C. section 853. (*See generally* Prelim. Order Forfeiture).

Defendant was found guilty of conspiracy to import cocaine and sentenced on September 29, 2021. (*See J.* [ECF No. 31]). Defendant's sentence included criminal forfeiture of the seized funds. (*See id.* 7).

The Government posted notice of the criminal forfeiture on an official government website from September 25, 2021 through October 24, 2021. (*See Decl. Public'n* [ECF No. 32]). The Government also sent correspondence to Sanchez's counsel, advising of his rights regarding the seized funds. (*See Pet.* 3).

¹ The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

Petitioners filed their Petition on December 17, 2021.² They argue “all three [Petitioners] have an interest in the \$9,000 superior to Defendant [sic]” and thus seek an amendment to the Preliminary Order of Forfeiture under 21 U.S.C. section 853(n)(6)(A).³ (Pet. 8 (alterations added); *see also id.* 4–5). They allege Palacios is a Bolivian resident and customer of Excentric, a Florida corporation that sells electronics and is partly owned by Sanchez. (*See id.* 4). According to Petitioners, Palacios sent the funds with Defendant to give to Excentric as payment for merchandise previously purchased. (*See id.*).

The Government seeks dismissal of the Petition for failing to satisfy the pleading requirements of 21 U.S.C. section 853(n)(2) and for lack of constitutional and statutory standing. (*See generally* Mot.).

LEGAL STANDARDS

Ancillary criminal forfeiture proceedings provide third parties the ability to challenge a criminal forfeiture order and establish their ownership interests. *See United States v. Hassan*, 411 F. Supp. 3d 1302, 1306 (M.D. Fla. 2019) (citing *United States v. Marion*, 562 F.3d 1330, 1336 (11th Cir. 2009)). These proceedings are governed by 21 U.S.C. section 853 and Federal Rule of Criminal Procedure 32.2. *See id.* at 1306–1307

² The Court granted Petitioners additional time to file their Petition. (*See* Nov. 24, 2021 Order [ECF No. 36]).

³ Petitioners do not argue they are bona fide purchasers under 21 U.S.C. section 853(n)(6)(B).

(citing *United States v. Davenport*, 668 F.3d 1316, 1320–21 (11th Cir. 2012)).

Section 853(n) allows any third party asserting a legal interest in forfeited property to “petition the court for a hearing to adjudicate the validity of his alleged interest in the property.” 21 U.S.C. § 853(n)(2). The statute “protects only two classes of petitioners, those whose legal interests in the property were superior to the defendant’s at the time the interest of the United States vested through the commission of an act giving rise to forfeiture and bona fide purchasers for value without knowledge of the forfeitability of the defendant’s assets.” *United States v. Watkins*, 320 F.3d 1279, 1282 (11th Cir. 2003) (alteration adopted; quotation marks and citation omitted); *see also* 21 U.S.C. § 853(n)(6).

Under Federal Rule of Criminal Procedure 32.2(c)(1)(A), the Government may move to dismiss a third-party petition “for lack of standing, for failure to state a claim, or for any other lawful reason.” *Id.* “For purposes of the motion, the facts set forth in the petition are assumed to be true.” *Id.* A motion to dismiss a third-party petition filed before discovery or a hearing “should be treated like a motion to dismiss a civil complaint under Federal Rule of Civil Procedure 12(b).” *Marion*, 562 F.3d at 1342 (quotation marks and citation omitted).

DISCUSSION

Standing. As threshold matters, a third-party petitioner must establish both constitutional and statutory standing. *See United States v. Tardon*, 493 F. Supp. 3d 1188, 1208–09, 1233–34 (S.D. Fla. 2020). The Government contends Petitioners have not established either. (*See* Mot. 11, 16). The Court agrees in nearly every respect.

Constitutional standing. A third-party petitioner must establish Article III standing. *See United States v. Weiss*, 467 F.3d 1300, 1308 (11th Cir. 2006) (citation omitted). “At the heart of Article III standing is the existence of an injury, not ownership.” *Via Mat Int’l S.A. Ltd. v. United States*, 446 F.3d 1258, 1262 (11th Cir. 2006). While an ownership interest in seized property can be evidence of an injury sufficient confer standing, “non-owners, such as bailees or those with possessory interests, can also have injuries resulting from the seizure of property that are sufficient to establish standing.” *Id.* at 1262–63 (citations and footnote call number omitted).

Petitioners allege Palacios is the owner and bailor of the seized funds. (*See* Pet. 7–8). As owner and bailor, Palacios has Article III standing. *See United States v. \$38, 000.00 Dollars in U.S. Currency*, 816 F.2d 1538, 1544 (11th Cir. 1987) (“There can be no doubt that Michael, as owner [and bailor] of the currency, has Article III standing[.]” (alterations added)).

Petitioners claim Sanchez and Excentric are creditors of Palacios. (*See* Pet. 8). In their Response,

Petitioners fail to explain they are anything other than general creditors of Palacios. (*See* Resp. 8). More importantly, Petitioners fail to explain how Sanchez or Excentric has an ownership or possessory interest *in the seized funds*, rather than merely being owed a debt by Palacios. (*See id.* 8–10).

Indeed, “general creditors cannot point to any one specific asset and claim that they are entitled to payment out of the value of that specific asset. General creditors instead enjoy a legal interest in the entire estate of the debtor.” *Watkins*, 320 F.3d at 1283 (quotation marks and citation omitted). Thus, as general creditors of Palacios’s estate, Sanchez and Excentric do not have an interest “in the seized property[,]” as is required for constitutional standing. *Tardon*, 493 F. Supp. 3d at 1208 (alteration added; quotation marks omitted; quoting *United States v. Timley*, 507 F.3d 1125, 1129 (8th Cir. 2007)); (*see also* Resp. 8 (collecting cases)).

To recap, Palacios has established constitutional standing, while Sanchez and Excentric have failed to meet their burden. *See Bischoff v. Osceola Cnty.*, 222 F.3d 874, 878 (11th Cir. 2000) (“The party invoking federal jurisdiction bears the burden of proving standing.” (citation omitted)). Sanchez and Excentric’s claims must be dismissed.

Statutory standing. A third-party petitioner must show statutory standing under 21 U.S.C. section 853(n)(2), which requires the petitioner be “[a]ny person, other than the defendant, asserting a legal

interest in property which has been ordered forfeited to the United States[.]” *Tardon*, 493 F. Supp. 3d at 1209 (alterations in original; emphasis omitted; quoting 21 U.S.C. § 853(n)(2)). “Because a legal interest is required to bring a claim under 21 U.S.C. [section] 853(n)(2), a court must first look to the law of the jurisdiction that created the property right to determine whether the claimant has a valid interest.” *Timley*, 507 F.3d at 1129–30 (alteration added; citation omitted). If the property right arises under state law, a court must “look[] to state law to determine whether the petitioner has a legal interest in the forfeited property.” *Hassan*, 411 F. Supp. 3d at 1307 (alteration added; citing *United States v. Shefton*, 548 F.3d 1360, 1364 (11th Cir. 2008)).

The Petition fails to identify the jurisdiction(s) that created any of Petitioners’ alleged property rights. (*See generally* Pet.). And while the Motion raises this issue (*see* Mot. 14), the Response still does not identify the jurisdiction(s) (*see generally* Resp.). Further complicating the matter, the Response cites a variety of case law from numerous different federal jurisdictions and seemingly random state jurisdictions including New Hampshire, Rhode Island, and Florida. (*See, e.g., id.* 4, 6 (citations omitted)).

It is possible that Palacios’s property right was created under Bolivian law, considering Palacios gave Defendant the money in Bolivia. (*See* Pet. 4). Yet, Petitioners do not cite Bolivian law, nor do they offer any alternative jurisdiction that Palacios’s property right could have been created under. Palacios’s claim thus

must be dismissed because she has failed to meet her burden of establishing statutory standing. *See Tardon*, 493 F. Supp. 3d at 1233.

The Petition similarly does not identify the law of the jurisdiction that Sanchez and Excentric’s property rights were allegedly created under. Regardless, they do not have statutory standing for the same reason they do not have Article III standing: as general creditors of Palacios, they only have an interest in Palacios’s estate, not in the specific property that was seized. *See Watkins*, 320 F.3d at 1283 (citation omitted). Consequently, they do not have a “legal interest” in the seized funds, and their claims must be dismissed. 21 U.S.C. § 853(n)(2); *see also United States v. Tarraf*, 725 F. Supp. 2d 625, 629–30 (E.D. Mich. 2010) (collecting circuit cases holding unsecured and general creditors do not have standing in forfeiture proceedings because they cannot assert a sufficient legal interest).

In short, the Petition must be dismissed because Petitioners have failed to meet their burden of establishing statutory standing. *See Tardon*, 493 F. Supp. 3d at 1233.⁴

⁴ The Court does not reach the issue of whether Petitioners have an interest “superior” to the Defendant under section 853(n)(6)(A). Section 853(n)(6)(A) “by its language ‘after the hearing,’ assumes that a claimant has standing to petition for an ancillary hearing.” *Timley*, 507 F.3d at 1130 n.2 (quoting 21 U.S.C. § 853(n)(6)); *see also Tardon*, 493 F. Supp. 3d at 1241 (citing *Timley*, 507 F.3d at 1130 n.2). Stated differently, “[section] 853(n)(2) [requires] an initial showing of a ‘legal interest’ to obtain an ancillary hearing and [section] 853(n)(6) [requires] showing . . . a ‘superior legal interest’ to prevail at the hearing.” *Timley*, 507

Pleading requirements. Petitioners did not sign the Petition. (*See* Pet. 10–11). Only Petitioners’ counsel signed the Petition. (*See id.*). Because Petitioners plainly failed to comply with section 853(n)(3), the Petition is due to be dismissed for this reason as well.

Third-party petitioners must satisfy certain pleading requirements:

The petition shall be *signed by the petitioner under penalty of perjury* and shall set forth the nature and extent of the petitioner’s right, title, or interest in the property, the time and circumstances of the petitioner’s acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner’s claim, and the relief sought.

21 U.S.C. § 853(n)(3) (emphasis added).

“Federal courts require strict compliance with the pleading requirements of [section] 853(n)(3), primarily because there is a substantial danger of false claims in forfeiture proceedings.” *United States v. Burge*, 829 F. Supp. 2d 664, 667 (C.D. Ill. 2011) (alteration added; citations omitted); *see also United States v. Avila-Torres*, No. 17-20148-Cr, 2019 WL 2177342, at *4 (S.D. Fla. May 20, 2019) (quoting *Burge*, 829 F. Supp. 2d at 667). “[F]ailure to comply with those requirements is grounds [sic] for dismissal.” *Avila-Torres*, 2019 WL 2177342, at *4 (alteration added; collecting cases).

F.3d at 1130 n.2 (alterations added). Petitioners fail to make the initial showing.

“The requirement that a third-party petition for a [section] 853(n) hearing must be signed under penalty of perjury is ‘not a mere technical requirement that we easily excuse.’” *United States v. Owens*, No. 1:09-cr-0089, 2010 WL 583910, at *2 (S.D. Ind. Feb. 12, 2010) (alteration added; quoting *United States v. Commodity Acct. No. 549 54930 at Saul Stone & Co.*, 219 F.3d 595, 597 (7th Cir. 2000)). This is because “[r]equiring the claimant to sign personally under penalty of perjury serves the government’s legitimate interest in protecting forfeited assets.” *United States v. Speed Joyeros, S.A.*, 410 F. Supp. 2d 121, 124 (E.D.N.Y. 2006) (alteration added). Consequently, other courts have dismissed petitions that were not signed under penalty of perjury by the petitioners. *See, e.g., Avila-Torres*, 2019 WL 2177342, at *5; *United States v. Zamora*, No. 14-20220-Cr, 2018 WL 4938717, at *2 (S.D. Fla. Aug. 8, 2018), *report and recommendation adopted by* 2018 WL 4938615 (S.D. Fla. Oct. 10, 2018); *United States v. Chicago*, No. 15-00168, 2017 WL 1024276, at *3 (S.D. Ala. Mar. 16, 2017); *Burge*, 829 F. Supp. 2d at 667; *Owens*, 2010 WL 583910, at *2–3.

The Government dedicates much of its Motion to arguing for dismissal due to Petitioners’ failure to sign their Petition. (*See* Mot. 11–13, 16–17). In their Response, Petitioners briefly address this argument in a footnote by conceding they did not sign the Petition but insisting the verified affidavits they submitted in support of their Petition are sufficient. (*See* Resp. 3 n.1). Petitioners’ counsel also attempts to shift the blame onto the Court for not providing “specific Third Party

[sic] Petition forms recommended for filing petitions pursuant to [section 853(n)]” on “th[e] Court’s website[.]” (*Id.* (alterations added)). But this “is no excuse for failing to follow the plain language of an unambiguous federal rule” such as section 853(n)(3). *Owens*, 2010 WL 583910, at *3 (citation omitted). Such failure is especially hard to excuse here, considering the Petition that Petitioners’ counsel signed recites section 853(n)(3) verbatim. (*See* Pet. 7 (“The petition shall be signed by the petitioner under penalty of perjury[.]” (alteration added))).

What is more, the affidavits cannot substitute for the Petition as Petitioners suggest (*see* Resp. 3 n.1) because the affidavits do not contain nearly the same detail or number of facts alleged in the Petition. (*See* Pet., Ex. C, First Palacios Aff. [ECF No. 37-1] 7–12; Pet., Ex. B, Sanchez Aff. [ECF No. 37-1] 5–6). Petitioners have thus failed to verify the version of facts asserted in the Petition, and the versions of facts provided in the affidavits fall far short of satisfying the pleading requirements provided in section 853(n)(3).

For starters, Palacios’s Affidavit states that “on January 26, [she] made the purchase of computer accessories, Invoice Number 570, in the amount of Ten Thousand Forty-Eight United States Dollars (USD \$10,048), the payment of which was made through [Defendant], who would be the person in charge of delivering the money to [Sanchez], who represent[ed Excentric.]” (First Palacios Aff. 7 (alterations added)). Although Palacios states when she purchased the goods from Excentric, she fails to identify when or where she

gave the money to Defendant, in violation of the pleading standards provided in section 853(n)(3). *See* 21 U.S.C. § 853(n)(3) (“The petition . . . shall set forth . . . the time and circumstances of the petitioner’s acquisition of the right, title, or interest in the property[.]” (alterations added)). And while Petitioners identify Defendant as a “bailee” or “agent” in the Petition (Pet. 8 (quotation marks omitted)), Palacios fails to describe her relationship to Defendant in her Affidavit, simply calling him a “third party” (First Palacios Aff. 7). *See* 21 U.S.C. § 853(n)(3) (“The petition . . . shall set forth the nature and extent of the petitioner’s right, title, or interest in the property[.] (alterations added)).

More troubling still, Palacios’s Affidavit directly contradicts the Petition and Sanchez’s Affidavit. In her Affidavit, Palacios states she entrusted Defendant with the delivery of \$10,048. (*See* First Palacios Aff. 7). Yet, the Petition and Sanchez’s Affidavit assert Palacios sent \$9,000 with Defendant. (*See* Pet. 4; Sanchez Aff. 6).

In an attempt to fix this discrepancy, Petitioners attach a second Affidavit (*see* Resp., Ex. C, Second Palacios Aff. [ECF No. 42-3]) to the Response. This Affidavit inexplicably lowers the amount Palacios alleges she entrusted with Defendant to \$9,000. (*See id.* 1–2). Curiously, Petitioners do not even address why Palacios’s Affidavits are inconsistent.

Palacios also attached to her initial Affidavit the purported invoice from Excentric, which includes 19 line items totaling \$28,766.06 USD. (*See* First Palacios

Aff. 12). Adding to the confusion Petitioners have created, neither Palacios nor Sanchez explains how they arrived at the numbers \$10,048 or \$9,000 based on the invoice.

Altogether, Petitioners have failed to satisfy the pleading requirements provided in section 853(n)(3) because they failed to sign the Petition. Petitioners' signed affidavits do not rectify this mistake because courts require strict adherence to the pleading requirements and, in any event, the affidavits do not contain the same allegations asserted in the Petition and even directly contradict the Petition. For these reasons, the Petition must be dismissed.

Leave to amend. Petitioners request leave to amend if the Court dismisses their claims. (*See* Resp. 10). They cite two inapt cases for support. (*See id.*). First, they cite *United States v. \$260,242.00 U.S. Currency*, 919 F.2d 686, 688 (11th Cir. 1990), a civil forfeiture case that did not discuss section 853(n) or even a standard for evaluating amendment requests. *See generally id.* Second, they cite *Gonzalez v. City of Homestead*, 825 So. 2d 1050 (Fla. 3d DCA 2002), a state case that discusses state law and does not even mention amendment of a forfeiture petition. *See generally id.*

The Government provides persuasive authority holding that a third-party petitioner may not amend a claim to correct a defect under section 853(n)(3) after the 30-day deadline for filing a petition has passed. (*See* Reply 3 n.1). In *United States v. Lamid*, 663 F. App'x 319 (5th Cir. 2016), the Fifth Circuit affirmed the

district court’s denial of a third-party petitioner’s request for leave to amend his section 853(n) petition. *See id.* at 324–25. The Fifth Circuit held the district court correctly denied leave because any amendment would be untimely and thus futile. *See id.* at 325. In finding “the deadline in section 853(n)(2) is mandatory[.]” *id.* (alteration added; collecting cases), the Fifth Circuit relied on an Eleventh Circuit case “holding that if a third party fails to file a petition within the prescribed [30] days, her interest in the property is ‘extinguished[.]’”⁵ *Id.* (alterations added; quoting *Marion*, 562 F.3d at 1337).

Further, in *United States v. Chicago*, a third-party petitioner requested leave to amend her section 853(n) petition to satisfy the statutory requirements. *See* 2018 WL 1024276, at *7. The court denied the request because it was made outside the statutory 30-day period. *See id.* (collecting cases).

In sum, Petitioners provide no authority establishing they can amend their Petition after the statutory 30-day period in section 843(n)(2) expires, while the Government provides persuasive authority holding to the contrary. The Court is thus unconvinced

⁵ *Lamid* also relied on a Middle District of Florida case “finding that [a] *pro se* claimant’s petition, which was filed just thirty-seven days after she received notice of the forfeiture, was untimely[.]” 663 F. App’x at 325 (alterations added; citing *United States v. Negron-Torres*, 876 F. Supp. 2d 1301, 1305 (M.D. Fla. 2012)).

App. 52

Petitioners should be allowed to amend their Petition,
and their request is denied.

* * *

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion
[ECF No. 41] is **GRANTED**. The Petition [ECF No.
37] is **DISMISSED**.

DONE AND ORDERED in Miami, Florida, this
17th day of February, 2022.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
CHIEF UNITED STATES
DISTRICT JUDGE

cc: counsel of record

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 21-20134-CR-ALTONAGA**

**UNITED STATES
OF AMERICA,**

Plaintiff,

v.

CARLOS QUISPE CANCARI,

Defendant.

PRELIMINARY ORDER OF FORFEITURE

(Filed Aug. 26, 2021)

THIS MATTER is before the Court upon the United States of America's Unopposed Motion for Preliminary Order of Forfeiture [ECF No. 27] against Defendant **CARLOS QUISPE CANCARI**. The Court finds as follows:

1. On March 9, 2021, a federal grand jury returned an Indictment charging Defendant n Count 1 with conspiracy to import controlled substances in violation of 21 U.S.C. § 963, among other counts. (*See* Indictment [ECF No. 12]). The Indictment also contains forfeiture allegations, which allege that upon conviction of a violation of 21 U.S.C. section 963, Defendant shall forfeit to the United States, pursuant to 21 U.S.C. section 853(a)(1)-(2), any property Defendant obtained which constitutes, or was derived from, proceeds

obtained, directly or indirectly, as a result of such violation, or any property Defendant used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violation. (*See id.* at 3–4).

2. On July 21, 2021, the United States filed its Bill of Particulars as to Criminal Forfeiture which provides notice that \$9,000 in United States currency seized from Defendant on or about February 8, 2021 (the “Property”) are subject to criminal forfeiture to the United States upon the Defendant’s conviction in this case. (*See* [ECF No. 20]).

3. On July 21, 2021, the Court accepted Defendant’s guilty plea to Count 1 of the Indictment. (*See* Minute Entry [ECF No. 21]). As part of his guilty plea, Defendant agreed to the forfeiture of the Property. (*See* Plea Agreement ¶¶ 15–20).

4. In support of the guilty plea, Defendant executed a Factual Proffer, and the Court found that there was a factual basis to support the Defendant’s conviction. (*See* Factual Proffer [ECF No. 23]).

5. The Court set Defendant’s sentencing hearing in this case for September 29, 2021. (*See* Notice [ECF No. 24]).

Accordingly, based on the foregoing, the evidence in the record, and for good cause shown, the Motion [ECF No. 27] is **GRANTED**, and it is **ORDERED** that:

1. Pursuant to 21 U.S.C. section 853 the Property is forfeited to the United States of America.

App. 55

2. Any duly authorized law enforcement agency may seize and take possession of the Property according to law.

3. The United States shall send and publish notice of the forfeiture in accordance with Fed. R. Crim. P. 32.2(b)(6) and 21 U.S.C. section 853(n).

4. The United States is authorized to conduct any discovery that might be necessary to identify, locate, or dispose of the Property, and to resolve any third-party petition, pursuant to Fed. R. Crim. P. 32.2 and 21 U.S.C. section 853(m).

5. Pursuant to Fed. R. Crim. P. 32.2(b)(4) this Order is final as to the Defendant.

6. The Court retains jurisdiction in this matter for the purpose of enforcing this Order.

It is further **ORDERED** that upon adjudication of all third-party interests, if any, the Court will enter a final order of forfeiture as to the Property in which all interests will be addressed. Upon notice from the United States that no claims have been filed within 60 days of the first day of publication or within 30 days of receipt of notice, whichever is earlier, then, pursuant to Fed. R. Crim. P. 32.2(c)(2) and 21 U.S.C. section 853(n)(7), this Order shall become a final order of forfeiture and any duly authorized law enforcement agency shall dispose of the Property in accordance with applicable law.

App. 56

DONE AND ORDERED in Miami, Florida, this
26th day of August 2021.

/s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
CHIEF UNITED STATES
DISTRICT JUDGE

cc: counsel of record

App. 57

**In the
United States Court of Appeals
For the Eleventh Circuit**

No. 22-11923

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LUIS SANCHEZ,
JAQUELINE YUPANQUI PALACIOS,
EXCENTRIC IMPORT & EXPORT CORPORATION,

Interested Parties-Appellants,

CARLOS QUISPE CANCARI,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:21-cr-20134-CMA-1

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(Filed Nov. 21, 2023)

Before WILSON, LUCK, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.
