

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA     )  
  )  
                  v.                    )     1:11-cr-00094-JAW  
  )  
MICHAEL J. DEMARIA            )

**ORDER ON MOTIONS TO DISMISS CLAIM OF INTEREST  
AND MOTION FOR SUMMARY JUDGMENT**

After Michael J. DeMaria pleaded guilty to illegal gun possession charges, the United States sought forfeiture of his firearms and ammunition. His wife, Patricia DeMaria, objected to the forfeiture, claiming she has a marital interest in the property. The United States moved to dismiss or for summary judgment against her claim. The Court grants the motion as to property the United States seized before Ms. DeMaria initiated divorce proceedings, dismisses the motion as to property seized after she initiated divorce proceedings, and defers a part of the motion to allow her to clarify which firearm is hers.

**I. STATEMENT OF FACTS**

**A. Procedural Background**

On June 15, 2011, a federal grand jury charged Michael J. DeMaria in a two-count indictment with possession of firearms while addicted to or being an unlawful user of a controlled substance and possession of firearms while under a protection from abuse order. *Indictment* (ECF No. 26). On January 31, 2012, Mr. DeMaria entered into a plea agreement with the Government in which he agreed to a

forfeiture of numerous weapons, firearm parts, shells, cartridges, and other items from his cache. *Plea Agreement* at 3-8 (ECF No. 63) (*Plea Agreement*). Pursuant to that agreement, Mr. DeMaria entered a guilty plea to both counts on February 28, 2012. *Minute Entry* (ECF No. 70).

### **1. The Proposed Forfeiture**

In general, under 21 U.S.C. § 853(a)(2), a person convicted of a felony offense is required to forfeit to the United States “any of the person’s property used . . . in any manner or part, to commit . . . such violation.” 21 U.S.C. § 853(a)(2). Rule 32.2 sets forth a procedure for the Government to secure a criminal forfeiture under 21 U.S.C. § 853(a)(2). FED. R. CRIM. P. 32.2. Finally, Mr. DeMaria agreed in the plea agreement to waive any claim to the property subject to forfeiture. *Plea Agreement* at 3-7. Pursuant to 21 U.S.C. § 853(a)(2), Rule 32.2, and the terms of the plea agreement, the Government moved to forfeit all listed weapons, ammunition, and other items he was prohibited from possessing.

On February 28, 2012, the Court issued a preliminary order of forfeiture, itemizing fifty-nine firearms, parts, and ammunition subject to forfeiture to the United States. *Prelim. Order of Forfeiture* at 1-4 (ECF No. 71). The Order provided in part:

Any person, other than the defendant, asserting a legal interest in the Property may, within 30 days of the final publication of notice or receipt of notice, whichever is earlier, petition the Court for a hearing without a jury to adjudicate the validity of his/her alleged interest in the Property.

*Id.* at 5. On April 30, 2012, Attorney Suzanne Burke filed a claim against the weapons and ammunition on behalf of Patricia DeMaria, who had married Mr. DeMaria in 2009. *Cl. of Interest in Forfeited Prop.* (ECF No. 72) (*Cl.*). On May 1, 2012, the United States moved to dismiss the claim on the ground that she had failed to comply with the statutory requirements under 21 U.S.C. § 853(n)(3) because the petition was signed by Ms. DeMaria’s attorney, not Ms. DeMaria. *Mot. to Dismiss Cl. For Lack of Standing* (ECF No. 73) (*Gov’t’s First Mot.*).

## **2. Patricia DeMaria’s Claim**

On May 8, 2012, Ms. DeMaria filed an amended claim of interest, this time signed and sworn to by Patricia DeMaria. *Am. Cl. of Interest in Forfe[i]ted Prop.* (ECF No. 74) (*Am. Cl.*). In her amended claim, Ms. DeMaria specified four asserted rights. *Am. Cl.* at 1. First, as regards a Walther P22, she said that the weapon belongs to her. *Id.* Second, as regards a .22 rifle and .30 caliber rifle, she claimed that those weapons belong to her brother. *Id.* Third, as regards the other weapons that belong to her husband, she said she believes that “a majority of them were purchased during the marriage,” and that “at least half” are marital property and subject to division by the Maine District Court. *Id.* Finally, as regards the other weapons, she maintained that because Mr. DeMaria owes her child support, she has “an equitable interest in to be used for the support of our child.” *Id.*

## **B. Pending Motions**

On May 9, 2012, the Government responded with another motion to dismiss, arguing that because Ms. DeMaria does not have a legal interest in the firearms

and ammunition other than a Walther P22 that she claims she owns, she lacked standing for the claim. *Mot. to Dismiss Cl. of Interest, or for Summ. J., for Lack of Standing* (ECF No. 76) (*Gov't's Second Mot.*). Ms. DeMaria filed an objection on May 30, 2012, *Objection to the United States of Am.'s Mot. to Dismiss* (ECF No. 78) (*Pet'r's Opp'n*), and the Government replied on the same day. *Gov't's Reply to Pet'r's Objection to Mot. to Dismiss Cl. of Interest, or for Summ. J., for Lack of Standing* (ECF No. 79) (*Gov't's Reply*).

### **1. The Government's First Motion to Dismiss**

The Government's first motion to dismiss was based on the failure of Ms. DeMaria's initial petition to comply with the statutory requirement in 21 U.S.C. § 853(n) that a third party who claims an interest in forfeited property must sign and file a claim petition "under penalty of perjury." 18 U.S.C. § 853(n)(3). *Gov't's First Mot.* at 2-3. As Ms. DeMaria cured this asserted defect by filing an amended claim signed under oath, the Court concludes that the Government's first motion to dismiss is moot and dismisses it without prejudice.

### **2. The Government's Second Motion to Dismiss**

In a nutshell, the Government says that other than the Walther P22 owned by Ms. DeMaria, the only possible legal basis for her claim rests upon Maine's marital property statute, which provides that "all property acquired by either spouse during the marriage is presumed to be 'marital property,' regardless of the form of ownership." *Gov't's Second Mot.* at 4. The Government argues, however, that the statute creates no present legal rights by one spouse in the property of the

other spouse in a pending divorce. *Id.* Instead, the Government maintains that a judicial determination that property is marital only allows the court to divide the marital property “as the court deems just,’ granting an equitable share to each spouse.” *Id.* (quoting *Long v. Long*, 697 A.2d 1317, 1320-21 (Me. 1997)). The Government cites case law from other jurisdictions for its position that a divorcing spouse has no legal interest based on state marital property laws in the forfeited property of the other spouse. *Id.* at 4-5.

### **3. Ms. DeMaria’s Response**

Ms. DeMaria objects. She says that once she initiated the divorce proceeding on January 6, 2011, her husband was, by Maine statute, prohibited by injunction of the divorce court “from transferring, encumbering, concealing, selling or otherwise disposing of the property of either or both of the parties, except in the usual course of business or for the necessities of life.” *Pet’r’s Opp’n* at 1-2 (quoting 19-A M.R.S. § 903(1)(B)(1)). Ms. DeMaria contends that this statutory prohibition and her marital rights to her husband’s property are sufficient to survive the Government’s motion to dismiss because the Court is required to view the allegations of her claim in the light most favorable to her. *Id.* at 3-4.

### **4. The Government’s Reply**

In its reply, the Government points out that the indictment alleged that Mr. DeMaria possessed seven of the forfeitable firearms between December 28, 2010 and January 1, 2011 and two of the firearms between May 18, 2011 and June 5, 2011. *Gov’t’s Reply* at 1. The Government reiterates that the Maine Supreme

Judicial Court has clarified that the “marital property” designation grants no present rights in the property during the marriage, but only directs a court to divide the property as it deems just upon divorce. *Id.* at 2. Furthermore, the Government observes that Ms. DeMaria still has a legal remedy under 21 U.S.C. § 853(i), which allows a claimant to file a remission petition with the Attorney General, and therefore cannot yet claim an equitable interest in the forfeitable property. *Id.* at 4.

## II. DISCUSSION

### A. Legal Standards

#### 1. Forfeiture Under 21 U.S.C. § 853

Where, as here, the Government has moved for criminal forfeiture of specific property and has “established the requisite nexus between the property and the offense,” the court issues a “preliminary notice of forfeiture ‘directing the forfeiture of specific property without regard to any third party’s interest in all or part of it.’” *United States v. Zorrilla-Echevarria*, 671 F.3d 1, 6 (1st Cir. 2011) (quoting FED. R. CRIM. P. 32.2(b)). Pursuant to the criminal forfeiture statute, the Government must then “publish notice” of the order and the intended disposition of property, 21 U.S.C. § 853(n)(1), which allows any third party asserting an interest in the forfeitable property to petition the court to be heard on his or her ownership interest in the property. 21 U.S.C. § 853(n)(2).

“If a third-party petition is filed, the court is to determine whether the third party has a valid interest in the property and amend, or leave unaltered, the final order of forfeiture as is appropriate.” *Zorrilla-Echevarria*, 671 F.3d at 6. To do this,

“the court must conduct an ancillary proceeding.” FED. R. CRIM. P. 32.2(c)(1); *see* FED. R. CRIM. P. 32.2 advisory committee’s notes on the 2000 amendments (explaining that since the enactment of 21 U.S.C. § 853(n) and the adoption of the 2000 amendments, “the ancillary proceeding has become the forum for determining the extent of the defendant’s forfeitable interest in the property” and it “allows the court to conduct a proceeding in which all third party claimants can participate and which ensures that the property forfeited actually belongs to the defendant”).

Rule 32.2 allows the Government to file a motion to dismiss a third-party petition in a forfeiture proceeding “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). “For purposes of the motion, the facts set forth in the petition are assumed to be true,” FED. R. CRIM. P. 32.2(c)(1)(A), and “[a] motion to dismiss a third-party petition prior to discovery or a hearing should be treated like a motion to dismiss a civil complaint under Federal Rule of Civil Procedure 12(b).” *Pacheco v. Serendensky*, 393 F.3d 348, 352 (2d Cir. 2004); *United States v. Salti*, 579 F.3d 656, 667 (6th Cir. 2009); *United States v. Marion*, 562 F.3d 1330, 1342 (11th Cir. 2009); *United States v. Stone*, 304 Fed. Appx. 334, 336 (5th Cir. 2008).

## **2. Third-Party Standing**

“Standing is a threshold consideration in all cases, including civil forfeiture cases.” *United States v. One-Sixth Share of James J. Bulger in All Present and Future Proceeds of Mass Millions Lottery Ticket No. M246233*, 326 F.3d 36, 40 (1st

Cir. 2003).<sup>1</sup> Furthermore, standing in forfeiture cases has “both constitutional and statutory aspects.” *Id.* “As to constitutional standing, ‘[i]t is well established that a party seeking to challenge a forfeiture of property must first demonstrate an ownership or possessory interest in the seized property in order to have standing to contest the forfeiture.’” *Id.* at 41 (quoting *United States v. 116 Emerson St.*, 942 F.2d 74, 78 (1st Cir. 1981)). To demonstrate constitutional standing, “a claimant generally need only show any colorable claim on the defendant property, a requirement that we have characterized as very forgiving.” *United States v. Union Bank for Sav. & Inv. (Jordan)*, 487 F.3d 8, 22 (1st Cir. 2007) (internal punctuation and citation omitted). The federal forfeiture statute “defines rules as to who may intervene and when they must do it.” *One-Sixth Share*, 326 F.3d at 40.

To evaluate a claim to forfeitable property, the Court engages in a two-step process. State law “determines [her] ownership interest . . . , but then federal law determines the effect of [her] ownership interest on [her] right to bring a claim.” *United States v. U.S. Currency, \$81,000.00*, 189 F.3d 28, 33 (1st Cir. 1999).

### **3. Legal Right, Title, or Interest Requirement**

The federal criminal forfeiture statute allows any third party who asserts a legal interest in forfeitable 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). Section 853 provides:

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<sup>1</sup> The First Circuit decided *One-Sixth Share* on events that took place before the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202. *See One-Sixth Share*, 326 F.3d at 41 n.3. The First Circuit has continued, however, to cite *One-Sixth* for its articulation of the principles of standing in the forfeiture context. *See United States v. Union Bank for Sav. & Inv. (Jordan)*, 487 F.3d 8, 22 (1st Cir. 2007).

If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner 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 which gave rise to the forfeiture of the property under this section . . .

the court shall amend the order of forfeiture in accordance with that determination.

21 U.S.C. § 853(n)(6)(A).<sup>2</sup>

**B. Patricia DeMaria’s Claim for her Walther P22**

The Government concedes that Ms. DeMaria’s claim for her Walther P22 is not subject to dismissal. *Gov’t’s Reply* at 1. However, two Walther, Model P22, .22 caliber handguns were listed in the indictment and subject to the preliminary order of forfeiture. Although Ms. DeMaria has an ownership interest in one of the handguns which has been ordered forfeited, she failed to specify which of the two Walther P22 pistols belongs to her. The Court therefore defers ruling on the dismissal of the Walther handguns and orders Ms. DeMaria to inform the Court which Walther P22 is hers.

**C. Patricia DeMaria’s Claim for her Brother’s Firearms**

In her amended claim, Ms. DeMaria attests that “a .22 rifle and .30 caliber belong to my brother.” *Am. Cl.* at 1. For support, she refers to an incident report attached to her original claim. *Id.* The report includes a partial transcript of an

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<sup>2</sup> Similarly, Section 853(n)(6)(B) applies to bona fide purchasers for value, but Ms. DeMaria does not claim to be a bona fide purchaser. *Pet’r’s Opp’n* at 3.

interview of Mr. DeMaria by investigators from the State Fire Marshal's Office and the Sheriff's Department in which Mr. DeMaria identifies the firearms as being his, except for the Walther P22, which he says is his wife's, and "the .22 rifle," which he says is "actually my brother in laws'." *Cl. Attach. 1 at 2.* Neither party further mentions Ms. DeMaria's attempt to claim the .22 (and a .30 caliber rifle) for her brother. However, "[p]rudential standing doctrine encompasses, among other principles, 'the general prohibition on a litigant's raising another person's legal rights.'" *Union Bank*, 487 F.3d at 22 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also 116 Emerson Street*, 942 F.2d at 78 ("It is well established that a party seeking to challenge a forfeiture of property must first demonstrate an ownership or possessory interest in the seized property in order to have standing to contest the forfeiture"). The Court concludes that Ms. DeMaria does not have standing to pursue a § 853(n) claim for her brother.

**D. Patricia DeMaria's Claim for her Husband's Firearms and Ammunition**

**1. "Legal Right, Title, or Interest" under Maine Law**

Ms. DeMaria claims that she has a "right, title, or interest" in her husband's firearms and ammunition on the premise that based on Maine's statutory law regarding the division of property between divorcing spouses, the property is marital property. *See* 19-A M.R.S. § 953. In general, Maine defines marital property as "all property acquired by either spouse subsequent to the marriage," but specifically excludes from this definition non-marital property, such as "property acquired by gift, bequest, devise or descent" and property an individual spouse

brought into the marriage. 19-A M.R.S. § 953(2). Under Maine law, the divorce court is required to “set apart to each spouse the spouse’s property” and “divide the marital property in proportions the court considers just after considering all relevant factors.” 19-A M.R.S. § 953(1).

Ms. DeMaria attests that she married Michael J. DeMaria on September 12, 2009 and initiated a divorce on January 6, 2011, *Am. Cl.* at 1, later representing that the “divorce proceedings have now concluded, but a decision has yet to be issued.” *Pet’r’s Opp’n* at 2. The question is whether any marital property right she may have in the forfeitable property under the State’s divorce law, constitutes a “right, title, or interest” under 21 U.S.C. § 853.

As the Government properly points out, however, the Maine Supreme Judicial Court has written that “the ‘marital property’ designation grants no present rights in the property during the marriage but, on divorce, the court must divide all marital property ‘as the court deems just’ granting an equitable share to each spouse.” *Long v. Long*, 1997 ME 171, ¶ 8, 697 A.2d 1317, 1321. Under this rubric, the Court easily concludes that Ms. DeMaria does not have either a right or title in all of the forfeitable firearms.

The question narrows to whether she has an “interest.” Here, Ms. DeMaria asserts that under Maine law, once she filed the divorce complaint, she gained an “interest” in Mr. DeMaria’s firearms and ammunition by virtue of a preliminary injunction that the state divorce court issued, forbidding Mr. DeMaria from “transferring, encumbering, concealing, selling or otherwise disposing of the

property of either or both of the parties, except in the usual course of business or for the necessities of life.” *Pet’r’s Opp’n* at 1-2 (quoting 19-A M.R.S. § 903(1)(B)(1)).

However, because Maine law does not recognize “present rights” in marital property, Ms. DeMaria had no vested ownership interest in firearms Mr. DeMaria illegally possessed before she initiated the divorce proceedings. In Count I of the Indictment, the grand jury alleged, and Mr. DeMaria admitted, that he possessed seven firearms between December 28, 2010 and January 1, 2011. *Indictment* at 1-2. As there was no divorce pending on January 1, 2011, Ms. DeMaria cannot establish that “interest [in those firearms] was vested in [her] rather than the defendant.” *See* 21 U.S.C. § 853(n)(6)(A); *United States v. Kennedy*, 201 F.3d 1324, 1331 (11th Cir. 2000) (“Section 853(n)(6)(A) requires a third party petitioner to establish that he or she had an interest in the subject property that was vested in the petitioner 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 which gave rise to the forfeiture of the property under this section*”) (emphasis supplied); *see also Am. Guarantee & Liab. Ins. Co. v. Keiter*, 360 F.3d 13, 19 (1st Cir. 2004) (“under Maine law, ‘a non-owner spouse does not, absent a divorce situation, acquire by virtue of the marital relationship alone an interest, beneficial or otherwise, in the owner-spouse’s property”). The Court dismisses Ms. DeMaria’s claim of interest as to the seven firearms possessed by Mr. DeMaria prior to January 6, 2011.

## 2. The Equitable Claim

Ms. DeMaria's purely equitable claim—that Mr. DeMaria's child support obligations generate the equitable basis for a § 853 claim—fails because she has an adequate remedy at law. Although “an equitable interest can qualify as a legal interest for purposes of section 853(n)(6),” pursuant to Maine law, the award of equitable remedies is “conditioned on the unavailability of an adequate remedy at law.” *United States v. Wheaton*, No. 05-33-P-S, 2005 U.S. Dist. LEXIS 21956, at \*16-17 (D. Me. Sept. 28, 2005).

Ms. DeMaria still has an adequate remedy at law because she has the right either to file a petition for remission of the forfeiture under 21 U.S.C. § 853(i)<sup>3</sup> or to proceed to judgment in her divorce action and obtain an order justly dividing the marital property taking into account the value of the firearms and ammunition that she demonstrates are marital property. *Id.* at \*20-22. Therefore, her equitable claim fails.

## 3. The Maine Divorce Court Injunction and § 853's Legal Interest Requirement

This leaves the question of whether the state court injunction against Mr. DeMaria's transfer or sale of his property pending the divorce is sufficient to create a legal interest in the property for Ms. DeMaria under § 853 as regards those

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<sup>3</sup> Under 21 U.S.C. § 853(i), Ms. DeMaria may be considered merely a general unsecured creditor as regards the firearms and ammunition and under 28 C.F.R. § 9.2(g), a general unsecured creditor cannot file a petition for remission. *See United States v. Wheaton*, No. 05-33-P-S, 2005 U.S. Dist. LEXIS 21956, at \*18-19 (D. Me. Sept. 28, 2005). *But see* 11 USC § 507 (bankruptcy statute affording first priority status to domestic support obligations). If Ms. DeMaria is more than a general unsecured creditor by virtue of the injunction, she has a sufficient interest under § 853 to require a hearing.

firearms that Mr. DeMaria illegally possessed after the divorce was initiated. Ms. DeMaria filed for divorce on January 6, 2011 and she represents that the divorce court issued a section 903(1)(B)(1) injunction that same day. Count II alleges that Mr. DeMaria possessed firearms and ammunition between May 18, 2011 and June 5, 2011; *Indictment* at 2; at his guilty plea, Mr. DeMaria admitted (although the facts are rather intricate) that he possessed additional firearms and ammunition, which were uncovered by law enforcement on May 17-18, 2011, June 5, 2011, and June 8, 2011.<sup>4</sup> *Prosecution Version* at 3-9 (ECF No. 61). Thus, when Mr. DeMaria committed the Count II crime, the divorce court order would have effectively prevented him from transferring or selling the firearms or ammunition.

To answer this question, the Court turns to the First Circuit decision, *Davis v. Cox*, 356 F.3d 76 (1st Cir. 2004). In *Davis*, the First Circuit described the significance of a section 903 preliminary injunction:

The statutory direction for issuance of a preliminary injunction during pendency of the divorce proceeding, as well as the provisions for attachment and other specified remedies, reflect a clear legislative intent to prevent divorcing spouses from disposing unfairly *pendente lite* of marital assets that, upon divorce, the court must inevitably determine belong in equity to one or the other of them. Such assets, as already noted, include ones that are owned in the individual name of one or the other spouse. That such statutory restrictions come into existence upon the institution of a divorce proceeding indicates the Maine legislature's expectation that the filing of a divorce case—and not just the entry of judgment at the end of the case—will significantly affect each spouse's property rights.

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<sup>4</sup> On June 8, 2011, while in custody, Mr. DeMaria granted permission to the Government to search for additional firearms and ammunition on his property. Investigators recovered additional items, listed as 51-59 in the Preliminary Order of Forfeiture. Although these items were not charged against Mr. DeMaria and will not be used for sentencing purposes, they are still subject to forfeiture.

*Id.* at 85-86. Thus, under First Circuit guidance, a divorcing spouse’s interest in the other spouse’s property is not entirely inchoate because, once the injunction issues, it is sufficient to “significantly affect each spouse’s property rights.”

In *Davis*, the First Circuit addressed an argument similar to the one the Government is making here: that the actual division of the marital property does not take place until the divorce court’s judgment. 356 F.3d at 87. The *Davis* Court rejected the notion that the “freedom of an owner spouse to deal with separately-owned marital assets after commencement of divorce proceedings is no more limited than it ever was before.” *Id.* The First Circuit concluded that “[a] spouse . . . holds property subject to the non-owner spouse’s ‘right to equitable distribution’ upon divorce” and that “after a divorce proceeding has commenced the Maine courts will afford such reasonable protection as may be required to ensure that a non-owner spouse’s rights to equitable distribution are not thwarted by the owner spouse prior to the time the court can issue its decree dividing the property.”<sup>5</sup> *Id.* at 88.

Having defined Ms. DeMaria’s interest under Maine law, the Court turns to “the effect of [her] ownership interest on [her] right to bring a claim” under federal law. *U.S. Currency, \$81,000.00*, 189 F.3d at 33. In other words, whether the Maine injunction creates a significant enough legal interest to satisfy § 853’s requirement that the claimant have a “legal interest” in the forfeitable property. Section 853 does not define “legal interest.” 21 U.S.C. § 853(n); *United States v. Timley*, 507

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<sup>5</sup> The First Circuit later decided that the equitable interest created by an analogous New Hampshire divorce statute did not constitute a claim under 11 U.S.C. § 101(5) of the Bankruptcy Code. *Ford v. Skorich (In re Skorich)*, 482 F.3d 21 (1st Cir. 2007). But the Bankruptcy Code defines “claim” in a narrow and specific way, not found in § 853(n)(6)(A).

F.3d 1125, 1129 (8th Cir. 2007). Yet, using the ordinary meaning of the term, a preliminary injunction that “significantly affect[s] each spouse’s property rights” would seem to constitute a “legal interest” in the other spouse’s property within the meaning of § 853(n)(6)(A). *Id.* (“As § 853 does not define “legal interest,” it should be given its ordinary meaning”).

With the signs pointing strongly toward the divorcing spouse having a legal interest under a preliminary injunction in the property of the other spouse while a divorce is pending, the Court examines the Government’s cited authority to the contrary. The Government cites *United States v. White*, 779 F. Supp. 2d 984 (D. Minn. 2011) for the proposition that a marital interest under Minnesota law is not a legal interest under § 853. *See Gov’t’s Reply* at 4. The *White* Court had refused to extend the state’s statutory marital interest to federal forfeitures. In *White*, however, the district court was careful to note that the Minnesota statute expressly limits its applicability “only [f]or the purposes of Minnesota Statutes Chapter 518 (concerning marriage dissolution) and Chapter 518A (concerning child support).” *Id.* at 989. By contrast, in Maine, the divorce court’s preliminary injunction is intended to prevent any transfers while the divorce is pending and its effectiveness is not similarly limited.

The Government also cites for support *United States v. Browne*, 552 F. Supp. 2d 1342 (S.D. Fla. 2008), but *Browne* is clearly distinguishable because the spouse was relying on her marital property rights, which under New York law are purely ancillary to a divorce proceeding and the claimant spouse was still married and had

not filed for divorce. *Id.* at 1346-47. The same is true of *United States v. Toma*, No. 94 CR 333, 1997 U.S. Dist. LEXIS 11987, at \*6 (N.D. Ill. Aug. 6, 1997) (“Ana concedes that she and Raul are still married and does not contend any divorce proceedings were instituted”) and *United States v. Gamory*, No. 1:08-CR-153-1-TWT, 2010 U.S. Dist. LEXIS 103034, at \*5 (N.D. Ga. Sept. 28, 2010) (“because Pendarvis and Defendant Gamory are still married, she may not contest the forfeiture of property obtained during her marriage on the grounds that she has a legal marital interest in the property”). None of the Government’s cited authority addresses the situation here, where the claimant is in the process of obtaining a divorce and the divorce court has issued a preliminary injunction in favor of the claimant spouse—and against the defendant’s forfeitable property—to remain in effect during the pendency of the divorce proceedings. The Court concludes that by virtue of the preliminary injunction, Ms. DeMaria has a “legal interest” in her husband’s property that is sufficient to withstand dismissal of her claim and entitle her to a hearing.

**E. Right to a Hearing is not a Right to Recovery**

Ms. DeMaria is not home free. It is one thing to claim a legal interest sufficient to obtain a hearing; it is another thing to prove that a claimant has an interest superior to that of the Government. The statute itself creates a lower threshold to obtain a hearing than to prove the claim. Section 853(n)(2) requires that a claimant need only assert a “legal interest” in the forfeitable property to obtain a hearing; § 853(n)(6) requires that the claimant establish “by a

preponderance of the evidence” that the petitioner’s “right, title, or interest in the property” either “renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner 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 which gave rise to the forfeiture.” 21 U.S.C. § 853(n)(6). In

*Timley*, the Eighth Circuit observed:

Many courts have conflated § 853(n)(2) with § 853(n)(6). This is incorrect, as § 853(n)(6), by its language “after the hearing,” assumes that a claimant has standing to petition for an ancillary hearing. A more accurate reading treats § 853(n)(2) as requiring a showing of a “legal interest” to obtain an ancillary hearing and § 853(n)(6) as requiring a showing of a “superior legal interest” to prevail at the hearing.

*Timley*, 507 F.3d at 1130 n.2.

As Ms. DeMaria has not claimed that she was a bona fide purchaser for value, the defenses unique to that provision to the Government’s claim of superior legal interest are not applicable to her. *See* 21 U.S.C. § 853(n)(6)(B). Instead, she must convince the Court that she actually has a marital interest in specific firearms and ammunition—that they are in fact marital property—as opposed to a general assertion that Mr. DeMaria must have purchased at least half of the weapons and ammunition during her marriage. Furthermore, there is some question whether Ms. DeMaria can legally sustain a claim for personal property the possession of which is the crime itself—as opposed to property which facilitated the crime or was purchased from proceeds of the crime. *Timley*, 507 F.3d at 1130; *United States v. Hooper*, 229 F.3d 818, 821-22 (9th Cir. 2000) (holding that a third party can never

have a successful claim under § 853(n)(6)(A) if the property was the proceeds of an offense). But these are issues that the Court has yet to resolve and are for the hearing itself.

### III. CONCLUSION

The Court DISMISSES as moot the United States' Motion to Dismiss Claim For Lack of Standing (ECF No. 73). The Court DEFERS in part, GRANTS in part, and DISMISSES in part the United States' Motion to Dismiss Claim of Interest, or for Summary Judgment, for Lack of Standing (ECF No. 76).

The Court DEFERS ruling on the two Walther, P22 caliber pistols listed in the indictment because it is unclear which of these two firearms was owned by Ms. DeMaria. The Court ORDERS Ms. DeMaria, within one week of the date of this Order, to inform the Court whether she claims ownership in:

- 1) the loaded Walther, P22, .22 cal. pistol, serial number L149360; or
- 2) the Walther, P22, .22 cal. pistol, serial number L028666.

The Court will issue an amended Order, dismissing the Government's motion as to her Walther pistol and granting it as to the other Walther pistol found in Mr. DeMaria's possession.

The Court GRANTS the United States' Motion as regards Ms. DeMaria's claim of interest to the firearms belonging to her brother and DISMISSES that claim for lack of standing;

The Court GRANTS the United States' Motion and DISMISSES Ms. DeMaria's claim as regards the firearms and other munitions that are the subject of Count One and that the Defendant admitted to possessing before January 6, 2011:

- 1) the loaded Ruger, Model GP100, .357 mag. cal. revolver, serial number 172-65294;
- 2) the loaded Hatsan Arms Co., Escort Model, 12 gauge shotgun, serial number 043524;
- 3) the loaded Ruger, Model 10/22, .22 cal. rifle, serial number 118-92700;
- 4) the .30 cal. M-1 carbine, serial number 4299754; and,
- 5) the AR-10, (Olympic Arms, SGW), .223 caliber assault rifle, serial number F6030;
- 6) Miscellaneous gun barrels;
- 7) 9 boxes of shotgun shells (total: 45 rounds);
- 8) One firework; and,
- 9) 8 igniters for flash-bang training devices.

The Court DISMISSES the United States Motion to Dismiss Claim of Interest, or for Summary Judgment, as to the remaining firearms and ammunition listed in the Preliminary Order of Forfeiture. The Court further ORDERS that, pursuant to Federal Rule of Criminal Procedure 32.2(c), this matter be scheduled for a § 853 hearing at the mutual convenience of the Court and the parties.

SO ORDERED.

/s/ John A. Woodcock, Jr.  
JOHN A. WOODCOCK, JR.  
UNITED STATES DISTRICT JUDGE

Dated this 14th day of June, 2012

**Defendant (1)**

**MICHAEL J DEMARIA**  
*TERMINATED: 06/18/2012*

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**Claimant**

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**Claimant**

**STEPHEN C SMITH**

represented by **STEPHEN C. SMITH**  
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**Plaintiff**

**USA**

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