Nos. 12-56922, 13-55555, 13-55556

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, AKA SEAL A,
Plaintiff-Appellant

v.

CHRISTOPHER KIM, AKA CHRIS KIM, AKA KJ KIM, AKA KYUNG JOON KIM; BORA LEE; OPTIONAL CAPITAL, INC., AKA OPTIONAL VENTURES; FIRST STEPHORA AVENUE, INC.; ERICA M. KIM; ALEXANDRIA INVESTMENT, LLC; SE YOUNG KIM; YOUNG AI KIM,
Claimants-Appellees,

LAW OFFICE OF ERIC HONIG,
Intervenor-Appellee,

and

475 MARTIN LANE, BEVERLY HILLS, CALIFORNIA, REAL PROPERTY LOCATED AT, AKA SEAL A,
Defendant.

ON APPEAL FROM THE JUDGMENTS OF
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT UNITED STATES OF AMERICA

KATHRYN KENEALLY
Assistant Attorney General

GILBERT S. ROTHENBERG (202) 514-3361
THOMAS J. CLARK (202) 514-9084
MELISSA BRIGGS (202) 514-3557
Attorneys, Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:
ANDRÉ BIROTTE, JR., *United States Attorney*
SANDRA R. BROWN, *Assistant United States Attorney*

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GLOSSARY

Abbreviation	Definition
CAFRA	Civil Asset Forfeiture Reform Act of 2000
EAJA	Equal Access to Justice Act
GAO	General Accounting Office
I.R.C.	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Kim claimants	Christopher Kim, Bora Lee, Erica Kim, First Stephora, Inc., Alexandria Investments, LLC, Se Young Kim, and Young Ai Kim

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ARGUMENT

Appellees do not dispute that the Kim claimants' assignments of the CAFRA attorney's fee awards failed to comply with *any* of the

requirements of the Anti-Assignment Act, 31 U.S.C. § 3727. R.Br. 42-43.[1] Because the assignments did not comply with the Act, they are not enforceable against the United States.

I. The Anti-Assignment Act invalidates the Kim claimants' assignments of their CAFRA attorney's fee awards

A. The Anti-Assignment Act applies to the Kim claimants' assignments of attorney's fees awarded under CAFRA

The plain language of the Anti-Assignment Act defines an assignment as a transfer or assignment of "any part of a claim against the United States Government or of an interest in the claim." 31 U.S.C. § 3727(a)(1). The assignments at issue here – purporting to assign the Kim claimants' claim for any fee awards the Court might order the United States to pay – fall within the scope of the plain language of the statute. *See* Br. 23-24. The Supreme Court has repeatedly invalidated assignments of claims against the United States by litigants to their

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[1] "ER" references are to appellant's consecutively paginated excerpts of record. "Doc." references are to the docket entries as numbered by the clerk of the District Court. "SER" references are to the appellees' supplemental excerpts of record." "Br." references are to the Government's opening brief. "R.Br." references are to the appellees' response brief. "A.Br." references are to the brief of the amicus curiae National Association of Criminal Defense Attorneys.

attorneys for failure to comply with the Act. *See* Br. 40-43; *Nutt v. Knut*, 200 U.S. 12, 19-20 (1906); *Calhoun v. Massie*, 253 U.S. 170, 175 (1920).

Appellees contend (R.Br. 24-30) that the Anti-Assignment Act does not apply to assignments of fee awards under CAFRA (28 U.S.C. § 2465(b)(1)(A)) because the defendants in civil forfeiture proceedings do not assert a claim against the United States. The authorities upon which they rely, however, hold only that the Anti-Assignment Act does not apply to agreements assigning portions of the *seized assets* in a forfeiture proceeding. Those authorities reason that, in such a proceeding, the defendants are not asserting a claim against the Government, but are defending against the Government's claim that the assets in dispute are subject to forfeiture. Here, the Government seeks to invalidate the assignments of the attorney's fee awards – which *are* claims against the United States for the payment of money – not assignments of the assets that were seized and were at issue in these forfeiture actions. In fact, the Government conceded below that, by reason of the Kim claimants' assignments, Honig acquired a valid attorney's lien in the seized assets that was superior to the tax liens

against the five Kim claimants with tax debts. *See* Br. 52, ER-165-67. That concession is consistent with the case law upon which the appellees rely. Under the plain text of the Anti-Assignment Act and long-standing Supreme Court case law, however, the Act applies to the assignments of the CAFRA fee awards.

B. The modern practice of issuing payments without warrants does not permit the court to ignore the Anti-Assignment Act

After admitting that the assignments of the CAFRA fee awards do not comply with the requirements of the Act, appellees argue, without citation to any authority, that since there is "no longer such thing as a government warrant, the Act cannot apply to the assignments in the instant case." (R.Br. 43.) As we explained in our opening brief (Br. 34-35, 38-39), the Government no longer uses warrants to authorize the payment of funds from the Treasury. We noted that this modern practice raises the question whether *any* assignment today could possibly satisfy the terms of the Act. The General Accounting Office, for its part, has suggested that a Treasury check or a properly certified payment voucher might be the modern analog for the warrant for purposes of the Act. (*See* Br. 38-39) But, as we previously explained

(Br.39), this Court need not address that issue because the assignments here were plainly invalid for failure to comply with any of the Act's requirements.

Appellees would simply have the Court ignore the Anti-Assignment Act, and all of the Supreme Court case law interpreting it, because the Government no longer issues warrants. But the Court does not have that option. *Guo XI v. INS*, 298 F.3d 832, 839 (9th Cir. 2002) ("We cannot choose to ignore the language of the statute or the holding of the Supreme Court.") The Government's modern practice of issuing payments without warrants does not, as appellees would have it, constitute a repeal of the Act.

C. Because the fee assignments are invalid, there is no legal basis for the fee agreements to trump the Government's tax liens

Appellees argue that despite their failure to comply with the Anti-Assignment Act, they should prevail because of the superpriority accorded attorney's liens in § 6323(b)(8) of the Internal Revenue Code (26 U.S.C.), or alternatively, because the fee agreements immediately vested the right to payment to Honig upon entry of judgment. (R.Br. at 23-24, 52-54, 54).

As we explained in our opening brief (Br. 23 n. 4, 52), the Government's position here is dependent on the Court's determination that the assignments are invalid pursuant to the Anti-Assignment Act. If the Court agrees with us on that point, it would follow that Honig has no lien at all on the fee awards, and, *ipso facto,* could not have a lien that would take priority under § 6323(b)(8). If, on the other hand, the Court determines that the assignments are valid, then it would follow that Honig has a lien on the awards under California law, and the Government does not dispute that that lien would have priority over the federal tax lien. In short, this case turns solely on the validity of the assignments.

Appellees argue (R.Br. 22-23) that the federal tax liens did not attach to the attorney's fee awards because, in *United States v. $186,416 in U.S. Currency*, 642 F.3d 753, 757 (9th Cir. 2011), this Court held only that such awards are "payable to" the litigants – not that they "belong to" the litigants. This argument, however, cannot be reconciled with the Supreme Court's decision in *Astrue v. Ratliff*, 560 U.S. 586, 589 (2010), which dealt with fee awards under the Equal Access to Justice Act (EAJA). The Court there explicitly held "that a § 2412(d) fees

award is payable to the litigant and is therefore subject to a Government offset to satisfy a pre-existing debt that the litigant owes to the United States." *See also $186,416 in U.S.* Currency, 642 F.3d at 757. The fact that the EAJA fee award was "payable to" the litigant, rather than the attorney, meant that the award was subject to an offset for any debt that the litigant owed to the Government. It follows that, in this case, the federal tax liens attached to all property and rights to property belonging to the five Kim claimants who owe taxes, *see* I.R.C. § 6321, and thus attached to their right to receive payment of the CAFRA fee awards.[2]

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[2] Appellees are incorrect in their assertion that attorney's fees awarded under I.R.C. § 7430 (26 U.S.C.) "cannot be set off against the plaintiff's tax liabilities because those fees belong to the attorney, not the plaintiff." (R.Br. 35 n.4). Because of their similarity in language, this Court interprets I.R.C. § 7430 in accord with precedent governing attorney's fees awards under the Equal Access to Justice Act (*see Morrison v. Commissioner*, 565 F.3d 658, 663 n.4 (9th Cir. 2009)). Older decisions (such as *Marre v. United States*, 117 F.3d 297 (5th Cir. 1997), cited in R.Br. at 35 n.4) holding that fees awarded under § 7430 cannot be offset have been effectively overruled by the Supreme Court's decision in *Ratliff*.

D. The Government did not waive the protections of the Anti-Assignment Act

As we stated in our opening brief (Br. 50), and as appellees discuss (R.Br. 39-40), the Government may waive the protections of the Anti-Assignment Act. Whether the Government has done so must be determined "by an objective look at the totality of the circumstances." *Ins. Co. of the West v. United States*, 100 Fed. Cl. 58, 70 (Fed. Cl. 2011) (cited at R.Br. 39). Evidence of waiver of the Act must be "strong enough to show the requisite clear assent to the assignment"; thus, "ambiguity is poison to the sort of clarity required for a waiver of the Anti-Assignment Act." *Id.*

Here, because the United States has never claimed a tax lien on the property of Se Young Kim and Young Ai Kim, the Government was willing to honor the assignment of their fees to Honig. (*See* ER-253 ¶24.) As for the other five Kim claimants, appellees acknowledge that the Government has maintained that the assignments were invalid from the moment Honig sought a determination that his claim to the fee awards was superior to the tax liens. (R.Br. at 40.) Appellees point solely to two pleadings in which the Government agreed to make payments to Honig for his representation of Se Young Kim and Young

Ai Kim as evidence of the Government's waiver of the Act. (*See* R.Br.40, ER-249-264.) But the totality of the circumstances surrounding the language that appellees rely upon does not show a clear waiver. *See Ins. Co. of the West*, 100 Fed. Cl. at 70. Indeed, the very same pleading in which, according to appellees, the Government "admitted, recognized and ratified that the assignments were valid" (R.Br. 40) continued to press the Government's tax liens against the other five Kim claimants. *See* ER-249-254. Moreover, even under appellees' strained construction, the supposed waivers, coupled with the Government's continued litigation seeking to enforce its tax liens against the other five Kim claimants, shows, at best, an ambiguity of conduct that is "poison" to the waiver argument. *See Ins. Co. of the West*, 100 Fed. Cl. at 70. In short, the fact that the Government did not seek to invalidate the assignments under the Act as to Se Young Kim and Young Ai Kim does not constitute a waiver of the Act as to the other five Kim claimants.

E. Appellees' public policy arguments have been rejected by this Court and the Supreme Court

Appellees overstate the alleged harm that would result if this case were decided in favor of the Government. Contrary to their assertion, not all "innocent, impecunious property owners with solid defenses to

forfeiture" would suffer. (R.Br. 38). Only in cases where claimants owe debts to the Government does the Government's interest in invalidating fee agreements pursuant to the Anti-Assignment Act come into play. Indeed, in this very case, the Government did not assert tax liens against two of the seven Kim claimants and stipulated to payment of nearly half a million dollars in fees to counsel. (*See* ER-257-58 (showing payment of $71,967.14 in attorney's fees plus the release of $415,653.68 in funds deposited in the registry of the District Court to Honig).) Furthermore, as Honig did in this case, counsel may take a lien interest in the seized assets themselves to secure payment of fees from "innocent" property owners. *See* ER-229.

As we explained in our opening brief (Br. 44-45), the fact that the Anti-Assignment Act facilitates the enforcement of federal tax liens in this case is not a trick or a fortuity. Rather, the Government should not be required to pay over fees to litigants who owe tax debts to the United States. *See Astrue v. Ratliff*, 130 S. Ct. at 2524. If Congress had wished to prevent the Government from enforcing its debts – tax or otherwise – against attorney's fees awarded in CAFRA actions, it could have done so by drafting the statute to make attorney's fees directly payable to the

attorney, and not the claimants. *See id*. at 2527. The result appellees seek would require Congress to change the text of the Anti-Assignment Act, CAFRA, or both. Accordingly, "[i]f the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government." *Springer v. United States*, 102 U.S. 586, 594 (1881). *See also*, *Burrage v. United States*, 134 S.Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written – even if we think some other approach might accord with good policy." (internal quotations omitted)). [3]

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[3] Appellees' separation-of-powers argument is meritless and misstates the Government's position. The Government does not take the position that the Attorney General can decide whether or not to comply with judgments entered by District Courts by choosing not to "allow" claims. (R.Br. 45.) Rather, the Government's position is that Congress has imposed requirements in the Anti-Assignment Act, *none of which were met here*, that must be met for an assignment of a claim against the Government to be valid. One of the Act's requirements is that a warrant first be issued for payment before an assignment can be made. In its opening brief, the Government stated that pursuant to 28 U.S.C. § 2414, the Attorney General would be required to determine that no further review would be taken of a court's judgment before a decision is final and a payment warrant could issue, not that the Attorney General had the discretion to disobey court orders. (*See* Br. 39, R.Br. 45.)

II. The Government should not be estopped from enforcing its tax liens

A. Equitable relief is not warranted

Appellees argue that, even if their assignments are invalid, principles of judicial or equitable estoppel should prevent the Government from enforcing its tax liens against the CAFRA fee awards. The Anti-Injunction Act, however, is fatal to appellees' estoppel claim. That Act deprives the courts of jurisdiction to issue injunctions "restraining the assessment or collection of any tax." I.R.C. § 7421(a). *See Shannon v. United States*, 521 F.2d 56, 58 (9th Cir. 1975) ("Section 7421 not only prohibits suits to restrain the assessment or collection of tax, but also prevents the district court from granting such equitable relief"). In any event, even if the Anti-Injunction Act did not pose an insurmountable bar, appellees have failed to show that the elements of either judicial or equitable estoppel are present here.

1. The Government has not prevailed on inconsistent positions and thus should not be judicially estopped

In determining whether to apply the doctrine of judicial estoppel, this Court considers: "(1) whether a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has

successfully persuaded the court of the earlier position, and (3) whether allowing the inconsistent position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the opposing party.'" *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (internal citation omitted).

The appellees argue that the Government should be judicially estopped because it took inconsistent positions by first filing the CAFRA action and later asserting tax liens against five of the Kim claimants. (R.Br. 47-48.) The Government, however, does not act inconsistently when it first seeks forfeiture of assets that it believes were acquired with ill-gotten gains, and later seeks to collect taxes based on the (unreported) income that was used to purchase those assets. There is nothing inconsistent in those actions. In any event, even if those positions could be viewed as inconsistent, judicial estoppel cannot apply here for the simple reason that the Government was unsuccessful in its CAFRA action. *See Ibrahim*, 522 F.3d at 1009.

Likewise, appellees fail to show how the Government's change of position in the prior wrongful levy action can possibly give rise to a judicial estoppel claim with respect to their purported assignment of

attorney's fees.[4] Appellees do not allege, much less show, that the Government prevailed in the wrongful levy action by taking a position contrary to the one that it takes here.

2. Appellees have not established the "high threshold" required to justify application of equitable estoppel to the Government

Although the Supreme Court has declined to adopt a blanket rule that the Government can never be estopped, it has noted that it had "reversed every finding of estoppel [against the Government] that [it had] reviewed." *OPM v. Richmond*, 496 U.S. 414, 422 (1990). This Court, in turn, has established a "high threshold" that must be met before applying equitable estoppel against the Government. *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995). Under this Court's precedent, appellees must show that the Government both knew the relevant facts and intended that its conduct be acted on. *Baccei v. United States*, 632 F.3d 1140, 1147 (9th Cir. 2011). Appellees must also show that they were "ignorant of the true facts" and detrimentally relied on the Government's conduct. *Id.* Finally, appellees must show

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[4] The Government has already paid $79,880 in attorney's fees directly to counsel in connection with the wrongful levy action. *See* SER-30-40.

that the Government engaged in conduct going beyond mere negligence, that the Government's wrongful acts will cause serious injustice, and that the public's interest would not be damaged if the Government is estopped. *Id.*

Appellees argue in this regard that they are entitled to the extraordinary remedy of equitable estoppel because the Government "intentionally chose to litigate a civil forfeiture claim," and, when it lost, it "reversed course and filed tax levies." (R.Br. 51.) Appellees claim that if Honig knew "the government would pursue tax levies" he "obviously would not have agreed to take such a case and fruitlessly expend[ed] thousands of hours contesting forfeiture," and thus he "detrimentally relied on the government's conduct." (R.Br. 51.) Appellees assert that the Government's conduct in failing to file its tax levies until after it lost the civil forfeiture case "went beyond mere negligence."

In advancing these arguments, appellees fail to recognize that the Government could not possibly have "intentionally chosen" to litigate this civil forfeiture action rather than pursue its tax levies. These three civil forfeiture actions were filed in April and May 2004 and April 2005.

At that time, there were no "tax levies" that the Government could have pursued. As we showed in our opening brief (at 9), the IRS did not assess the tax liabilities of Christopher Kim and Bora Lee until April 7, 2009. Erica Kim's liabilities were assessed on various dates ranging from December 27, 2007 to November 17, 2008. The federal tax liens on their property did not arise until after the assessments were made, *see* I.R.C., §§ 6321, 6322, and the IRS had no authority to levy on their property until ten days after it issued notice of the assessments and demanded payment, *see* I.R.C. § 6331(a). If appellees' argument on this point were to prevail, the Government would effectively be barred from filing civil forfeiture actions until after the IRS has completed its tax examinations; otherwise, the Government may be estopped (or enjoined) from collecting taxes. Such a result would not be in the public interest, and, moreover, would be in direct contravention to the Anti-Injunction Act. In addition, the enforcement of the tax liens in this case is very much in the public interest, as the collection of taxes has long been held to be "important to the public welfare."[5] *Springer v. United States*, 102 U.S. at 594.

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[5] The Government contended that the assets it seized in the

(continued…)

B. Equity does not require that a greater share of the fees be awarded to counsel because the two corporations Honig represents are mere alter egos

Appellees also argue that the Government should be judicially estopped because it "cannot have it both ways" by contending that Alexandria Investments and First Stephora are alter egos of Christopher and Erica Kim while also counting them as represented parties for purposes of allocating the fee award. Even though they are alter egos of Christopher Kim and Erica Kim, Alexandria Investment, Inc. and First Stephora Avenue, Inc. are California corporations and parties that Honig represents to this day in this litigation. (*See* R.Br. at i.) Appellees fail to cite any apposite legal authority for their position that the corporations that are parties in a lawsuit and remain represented by counsel should be disregarded for purposes of allocating fees. All of the cases cited in appellees' brief (R. Br. 55-56) merely stand for the propositions – with which the Government agrees – that alter

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(…continued)
CAFRA actions were the fruits of illegal activity. *See United States v. 475 Martin Lane, Beverly Hills, Calif.*, 545 F.3d 1134, 1139 (9th Cir. 2008). Although the Government ultimately did not prove its forfeiture claims, it was entirely reasonable for the Government to investigate whether taxes were properly paid on the funds used to purchase the seized assets.

egos need not receive separate notices of deficiency and that individuals are liable for debts of their alter ego corporations. Thus, the Government has not taken (much less prevailed on) inconsistent positions that would prevent including the alter ego corporations as parties for purposes of allocating the attorney's fee awards among Honig's clients.

Accordingly, there is no merit to appellees' position that the Government should pay the difference between the 2/7th of the attorney's fee award it has already paid to compensate Honig for his representation of Se Young Kim and Young Ai Kim (the two Kim claimants against whom the Government has no tax claims), and 2/5th of the total (an additional $232,400.53) even if the Government prevails in this litigation.

III. The constrained definition of "claim" advanced solely by the amicus brief ignores the plain language of the statute and recent precedent

Finally, we address an argument *not* made by the appellees, but advanced in the brief of their amicus. The amicus seeks to cabin the definition of "claim" in the Anti-Assignment Act solely to pre-existing claims against the Government; that is, claims in existence at the time

an assignment is made. (A.Br. 10-11.) Because the assignments here were executed before the Kim claimants had any claim against the Government for attorney's fees, the amicus contends, the Anti-Assignment Act does not apply.

The plain text of the Act does not support the limitation the amicus seeks to place upon it. The Act prohibits the "transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or the authorization to receive payment for any part of the claim." 31 U.S.C. § 3727(a); *see Spofford v. Kirk*, 97 U.S. 484, 488-89 (1878) (explaining that it is "impossible to use language more comprehensive" than the language of the Act: "[i]t strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself.") The inclusion of the assignment of contingent claims against the Government within the purview of the Act is in accord with all of the case law (ignored by the amicus) in which federal courts have routinely applied the Act to assignments from clients to their attorneys – prior to the commencement of litigation – of fee awards that had not yet been

granted. *See, e.g., Turner v. Commissioner of Soc. Sec.*, 680 F.3d 721, 725 (6th Cir. 2012) (explaining that, pursuant to the Anti-Assignment Act, the Government may void an agreement in which a litigant assigns an award so that the Government's right of offset may be protected); *Murkeldove v. Astrue*, 635 F.3d 784, 794 (5th Cir. 2011) (explaining that the Anti-Assignment Act is a defense the Government can assert in EAJA attorney's fee cases).[6]

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[6] Many lower courts, including several in this circuit, have invalidated assignments of fee awards under the EAJA where the assignments were made before the litigant had prevailed in the litigation. *See, e.g., Nicholas v. Colvin*, No. CV 12-2124-JPR, 2013 U.S. Dist. LEXIS 180475, 2013 WL 5310848 (C.D. Cal. Dec. 26, 2013); *Garcia v. Colvin*, No. 1:11-cv-01965-SKO, 2013 U.S. Dist. LEXIS 135975, 2013 WL 5347494 (E.D. Cal. Sept. 23, 2013); *Alexander v. Astrue*, No. CV11-02465-PHX-DGC, 2012 U.S. Dist. LEXIS 169575, 7-8, 2012 WL 5989450 (D. Ariz. Nov. 28, 2012); *Young v. Astrue*, No. CV-11-538-PHX-SMM, 2012 U.S. Dist. LEXIS 158926, 2012 WL 5416587 (D. Ariz. Nov. 5, 2012); *Castro v. Colvin*, No. 2:12-cv-174-DN-EJF, 2013 U.S. Dist. LEXIS 166671, 2013 WL 6173154 (D. Utah Nov. 22, 2013); *Blake v. Astrue*, No. 2:11-cv-2030, 2012 U.S. Dist. LEXIS 98843, 2012 WL 2918436 (W.D. Ark. July 17, 2012); *Thomas v. Astrue*, No. 7:09-CV-52, 2012 U.S. Dist. LEXIS 85346, 2012 WL 2343755 (M.D. Ga. June 20, 2012); *Burt v. Astrue*, No.08-1427, 2011 U.S. Dist. LEXIS 37887, 2011 WL 1325607, *7 n. 1 (E.D. Pa. Apr. 7, 2011); *Turner v. Astrue*, 764 F.Supp.2d 864,878-79 (E.D. Ky. 2010); *Vinning v. Astrue*, 668 F.Supp.2d 916, 929 (N.D. Tex. 2009).

Ignoring all of the recent case law applying the Anti-Assignment Act to such attorney's fee assignments, the amicus builds its argument on language from a handful of cases that are far removed from this case (and from the social security cases cited above). The cited language on which the amicus relies, limiting the Act's prohibitions to "claims existing at the time of the transfer" (A.Br. 10), seems to have its genesis in *Hobbs v. McLean*, 117 U.S. 567, 575 (1886). But the language in *Hobbs* upon which the amicus relies is dicta. The issue in *Hobbs* was whether two partners (McLean and Harmon) were entitled to recover from a third partner (Peck), in accordance with the terms of their partnership agreement, a portion of a judgment on a contract claim that the United States had paid to Peck. McLean and Harmon had sued Peck to recover the amount due to them. The dispute thus was between private parties and did not concern the United States. The Court held McLean and Harmon were entitled to recover the amount they claimed from Peck because they, rather than Peck, had contributed virtually all of the money to the partnership. 117 U.S. at 573. That holding had nothing to do with any purported assignment. After reaching its holding, however, the Court proceeded to reject an argument raised by

Peck's "assignee in bankruptcy," which he made in an attempt to retain the benefit of the entire judgment for Peck's bankruptcy estate. That is, he argued that Peck's assignment to McLean and Harmon, in the articles of partnership, of amounts due under Peck's individual contract with the Government violated the Anti-Assignment Act. The Court explained that at the time the articles of partnership were executed, Peck had no contract with the Government, and there was no certainty that he would ever have one. *Id.* at 575. It was in that context that the Court said that when the partnership was formed, Peck had no claim against the Government that could be assigned, and so nothing in the partnership agreement stood in violation of the Act. The Anti-Assignment Act applies, the Court said, only to claims that may be presented for payment to the United States, or that may be prosecuted in court.

Here, in contrast with *Hobbs*, the Kim claimants had a claim against the Government, at the time the assignments were made, that they could (and, in fact, did) prosecute against the Government. Once they decided to contest the Government's forfeiture action, the matter was joined and they had a claim under CAFRA that they could assert

against the United States for attorney's fees. The Court recognized in *Hobbs* that the Anti-Assignment Act was "passed for the protection of the government." 117 U.S. at 576. As indicated, one of the purposes of the Act is to ensure that the Government need not pay a judgment to a litigant to the extent that litigant is indebted to the Government. This concern was not implicated in *Hobbs*. *See Hobbs*, 117 U.S. at 575; *see also Milliken v. Barrow*, 65 F. 888, 890 (E.D. La. 1895) (suit between private litigants in which one of the private litigants sought to invalidate the agreement)*; In re Sterling Navigation Co.*, 31 B.R. 619, 625 (S.D.N.Y. 1983) (Government not the party seeking to invalidate claim) (both cited at A.Br. 10-11).

Finally, the quoted language in the two Claims Court cases (*Rocky River Co. v. United States,* 169 Ct. Cl. 203 (1965); *Poorvu v. United States,* 420 F.2d 993 (Ct. Cl. 1970)), decided over 40 years ago, on which the amicus most heavily bases its arguments (A.Br. 10-11) is in direct conflict with the Federal Circuit's more recent decision in *Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1349 (Fed. Cir. 2002).[7] In

[7] In addition, in both *Rocky River* and *Poorvu*, the original leases that the court refused to invalidate and enforced in favor of an assignee

(continued…)

Fireman's Fund, the Federal Circuit invalidated the assignment of a future claim against the Government under the Act where the claim had not yet arisen when it was assigned. *Id*. at 1349.

In short, once the appellees decided to contest the Government's forfeiture claim, they had – and asserted – a claim against the Government, under CAFRA, to recover their attorney's fees. Just as in the social security cases cited above, that claim could be assigned only in accordance with the requirements of the Anti-Assignment Act. Appellees have not disputed that they failed to comply with those requirements, and so their assignments are invalid.

(…continued)
specifically stated that the rights granted by the Government "ran in favor of the owners, their heirs, successors and assigns."

CONCLUSION

The judgments of the District Court should be reversed.

Respectfully submitted,

KATHRYN KENEALLY
Assistant Attorney General

/s/ Melissa Briggs

GILBERT S. ROTHENBERG (202) 514-3361
THOMAS J. CLARK (202) 514-9084
MELISSA BRIGGS (202) 514-3557
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:
ANDRÉ BIROTTE, JR.
United States Attorney
SANDRA R. BROWN,
Assistant United States Attorney

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With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements of Federal Rule of Appellate Procedure 32(a)

Case Nos. 12-56922, 13-55555, 13-55556

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(s) /s/ Melissa Briggs

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I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 25, 2014. Counsel for the appellees has been served via the CM/ECF system.

/s/ Melissa Briggs
MELISSA BRIGGS
Attorney