UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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| RAMON RIVERA,<br><br>Plaintiff,<br><br>vs.<br><br>RONNIE A. CARTER, Acting Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF); JOHN A. TORRES; Special Agent in Charge, ATF Los Angeles Field Division; ERIC H. HOLDER, United States Attorney General,<br><br>Defendants. | Case No. 2:09-cv-2435-FMC-VBKx<br><br>ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION |

This matter is before the Court on Plaintiff Ramon Rivera's Motion for Preliminary Injunction (docket no. 16), filed on May 15, 2009. The Court has read and considered the moving, opposition, reply, and supplemental documents submitted in connection with this motion. This matter was heard on June 22, 2009, at 10:00 a.m, at which time the parties were in receipt of the Court's tentative Order. Following oral argument, the matter was taken under submission. The Government filed its Supplemental Brief on July 6, 2009, and Plaintiff filed his Supplemental Brief on July 13, 2009. The Government thereafter filed Objections and a Motion to Strike Portions of Plaintiff's Supplemental Brief on July 15, 2009. Plaintiff filed

a Response to the Government's Objections and Motion to Strike on July 17, 2009. For the reasons and in the manner set forth herein, the Court now issues the following Order GRANTING Plaintiff's Motion for Preliminary Injunction.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 9, 2008, an indictment was filed in *United States v. Cavazos, et al.*, Case No. 2:08-cr-1201-FMC, wherein the Government alleged members of the Mongols Motorcycle Club violated RICO and various other criminal statutes. In count 85 of the indictment, the Government seeks forfeiture of the "MONGOLS" trademark or service mark (Registration No. 2916965) owned by the Club.[1] Pursuant to the Government's Ex Parte Application for Post-Indictment Restraining Order dated October 17, 2008, the Court issued an Order Restraining Sale or Transfer of Trademark on October 21, 2008, and an Amended Order Restraining Trademark on

[1] The unincorporated association, Mongol Nation Motorcycle Club ("Mongol Nation"), owns two registered marks. The first mark is the word, "MONGOLS" (Registration No. 2916965), which is a collective membership mark used for "association services, namely promoting the interests of persons interested in the recreation of riding." (Welk Decl. in Support of Opp'n, Ex. B.) The second mark is an image that depicts an individual seated on a motorcycle, and contains the initials, "M.C." (Registration No. 3076731). (Blair-Loy Decl., Ex. 3 at 22.) The Court's Amended Order only applies to the first mark, Registration No. 2916965. Though the Government has since sought to forfeit the second mark as well, the Government has not moved for a post-indictment restraining order in connection with the second mark. Accordingly, this Order applies only to the first mark.

October 22, 2008 ("Amended Order").

The Amended Order enjoins the defendants in the criminal action, their agents, servants, employees, family members, and those persons in active concert or participation with them from taking any action that would affect the availability, marketability or value of the MONGOLS trademark. The Amended Order also orders these same persons to surrender for seizure all products, clothing, vehicles, motorcycles, books, posters, merchandise, stationery, or other materials bearing the MONGOLS trademark, upon presentation of a copy of the Amended Order. ATF agents have in fact seized items bearing or displaying the trademark from persons not charged in *Cavazos*. (Compl. ¶ 13.)

Plaintiff Ramon Rivera is a member of the Mongols Club. He has not been charged in *United States v. Cavazos, et al.*, Case No. 2:08-cr-1201-FMC. (Compl. ¶ 16.) As a Club member, Plaintiff has often worn a jacket or shirt displaying the collective membership mark, both at Club activities and elsewhere. (Compl. ¶ 19.) To Rivera, his display of the mark affirms his membership in the Club, and symbolizes unity and brotherhood with his friends and fellow Club members. (Compl. ¶ 20.) Plaintiff has personal knowledge that if law enforcement officers saw him wearing items displaying the Mongols mark, the officers would confiscate those items. (Compl. ¶¶ 14-15.) Due to the Government's threat of seizing items displaying the mark, and its actual seizure of such items, Plaintiff is chilled and deterred from publicly wearing or displaying any item bearing the mark and is currently refraining from doing so. (Compl. ¶ 21.)

## II. LEGAL STANDARD

In order to obtain a preliminary injunction, the moving party must demonstrate "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the moving party's] favor." *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008); *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007) (citing

*Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)). "These two options represent extremes on a single continuum: 'the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.'" *Id.* (citing *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)).

An alternative interpretation of the test requires: "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Id.* (citing *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)). A district court has great discretion in determining whether to grant or to deny a TRO or preliminary injunction. *See Wildwest Institute v. Bull*, 472 F.3d 587, 589-90 (9th Cir. 2006).

## III. DISCUSSION

Plaintiff moves for a preliminary injunction to prevent the Government from seizing items of personal property for the sole reason that they bear the collective membership mark at issue. Plaintiff contends the Government lacks the statutory authority to seize his property, and even if statutory authority existed, seizure would be barred by the First Amendment.

### A. Government's Objections and Plaintiff's Standing

The Government objects and moves to strike two portions of Plaintiff's Supplemental Brief in Support of his Motion for Preliminary Injunction. The Government argues Plaintiff lacks Article III standing to challenge the forfeitability of the registered mark because he has no ownership interest in the mark, and because he is not a party to the criminal action. However, the Government's ability to seize Plaintiff's property is premised upon the forfeitability of the mark. Plaintiff is entitled to challenge the alleged forfeitability because it directly impacts his personal rights, and because nobody else has challenged the forfeitability of the mark. *See*

*LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1153-54 (9th Cir. 2000) (plaintiff had standing to challenge the government's censorship of a third party where the third party was not "likely to litigate this issue").

The Government objects to Plaintiff's arguments concerning the Government's post-forfeiture rights in the collective membership mark. The Government objects for lack of relevancy. To the extent the arguments are not relevant, the Court will disregard them. In all other respects, the Government's objections are hereby OVERRULED.

The Government also contends Plaintiff is prohibited from bringing this action pursuant to 18 U.S.C. § 1963(i) and because Plaintiff claims no interest in the mark. Section 1963(i) provides:

> Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may –
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> > (1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or
> >
> > (2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

18 U.S.C. § 1963(i). It is undisputed that Plaintiff has no interest and claims no interest in the property sought to be forfeited. The express terms of the statute therefore do not bar Plaintiff's action. Furthermore, the Government acknowledges Plaintiff will be unable to participate in any post-forfeiture ancillary proceeding because he claims no interest in the collective membership mark. If Plaintiff were denied standing for having no interest in the mark, Plaintiff would be denied any opportunity to challenge the potential seizure of his property and the governmental intrusion upon his rights. Plaintiff cannot be left without any remedy and must, therefore, have standing to pursue his claims in this case.

**B. Likelihood of Success**

Plaintiff advances both statutory and constitutional arguments in support of its likelihood of success on the merits.

**1. Statutory authority**

Plaintiff's Motion for Preliminary Injunction raises two statutory issues that control whether the Court should enjoin continued seizure of items bearing the collective membership mark: (a) whether the RICO forfeiture provisions permit forfeiture of the collective membership mark under the circumstances of the *Cavazos* indictment, and (b) even if the mark is forfeitable, whether criminal forfeiture statutes authorize seizure of property belonging to third parties without a showing that seizure is necessary to preserve the availability of the mark for permanent forfeiture.

**a. RICO forfeiture provisions**

Plaintiff contends that the RICO forfeiture statute does not authorize forfeiture of the collective membership mark, because none of the defendants named in the *Cavazos* indictment has any ownership interest in the mark. Prior to discussing the scope and reach of the RICO forfeiture provisions, a brief overview of RICO's substantive provisions is helpful.

In general, RICO makes it unlawful for any "person" to benefit from, acquire an interest in, or participate in an "enterprise" engaged in a pattern of racketeering activity.[2] 18 U.S.C. § 1962.[3] RICO does not impose criminal liability on the RICO

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[2] As defined in section 1961, a "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C.

enterprise if it is not named as a "person." The Ninth Circuit has held that while a corporation-enterprise cannot be named as a RICO defendant under section 1962(c) – participating in a racketeering enterprise – it can be named as a RICO defendant

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§ 1961(3), (4).

[3] Section 1962 provides in relevant part:

> (a) It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in . . . interstate or foreign commerce.
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> . . .
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> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
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> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(c), (d).

under section 1962(a) – receiving income and benefitting from racketeering activity. This occurs "when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering." *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1397 (9th Cir. 1986) (citing *Haroco, Inc. v. American National Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984)). In other words, under subsection (a), the RICO enterprise can be charged as a person who benefitted from the racketeering activity if it used proceeds from the racketeering activity in its operations. *Id.*

Returning to the forfeiture provisions at issue, the Government seeks forfeiture of the collective membership mark in count eighty-five of the *Cavazos* indictment. Count eighty-five relies solely upon the RICO forfeiture statute, 18 U.S.C. § 1963. Section 1963 provides, in relevant part:

> Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective of any provision of State law --
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> (1) any interest the person has acquired or maintained in violation of section 1962;
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> (2) any --
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> (A) interest in;
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> (B) security of;
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> (C) claim against; or
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> (D) property or contractual right of any kind affording a source of influence over;
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> any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and
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> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or

unlawful debt collection in violation of section 1962.

18 U.S.C. § 1963(a). In other words, section 1963(a) authorizes forfeiture of a RICO defendant's property acquired as a result of racketeering activity, a defendant's property interest in the RICO enterprise, and a defendant's property interests affording a source of influence over the RICO enterprise. The Court recognizes that section 1963 is designed to be broad in scope. *United States v. Busher*, 817 F.2d 1409, 1412 (9th Cir. 1987). "Section 1963 was designed to totally separate a racketeer from the enterprise he operates. . . . Thus, forfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise." *Id.* at 1413 (internal citations omitted).[4]

However, the RICO forfeiture provisions are not unlimited in scope. Specifically, it is well established that RICO forfeiture is an *in personam* action rather than an *in rem* action. *United States v. Angiulo*, 897 F.2d 1169, 1210 (1st Cir. 1990) ("RICO forfeiture, unlike forfeiture under other statutes, 'is a sanction against the individual rather than a judgment against the property itself.'"); *see also United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) (discussing *in personam* nature of the criminal forfeiture statutes, 18 U.S.C. § 1963 and 21 U.S.C. § 853, which act against a defendant's property as a penalty for his conviction, in contrast to civil

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[4] The court also noted that "[t]he purpose of RICO was 'to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.' . . . Section 1963 is the first modern statute to impose forfeiture as a criminal sanction directly upon an individual defendant rather than through a separate in rem proceeding against property involved in criminal conduct." *United States v. Busher*, 817 F.2d 1409, 1413 n.4 (9th Cir. 1987) (internal citations omitted).

forfeiture statutes such as 21 U.S.C. § 881, which operate *in rem* on the theory that the property itself is guilty of wrongdoing). For example, in the context of controlled substances, the civil forfeiture statute, 21 U.S.C. § 881, operates *in rem* to permit forfeiture of all proceeds traceable to an exchange for a controlled substance and all funds used to facilitate such an exchange. 21 U.S.C. § 881(a)(6).

In contrast, the RICO forfeiture statute operates *in personam* to permit forfeiture of a wide range of property belonging to a RICO defendant. Nonetheless, only a RICO defendant's property and his interest in the RICO enterprise is forfeitable. Property belonging only to the enterprise is not forfeitable unless a defendant has an interest in the property, previously had an interest in the property, or has a majority interest in the enterprise. *United States v. Busher*, 817 F.2d 1409, 1413 & n.7 (9th Cir. 1987) ("The problem of forfeiture of an entire enterprise is essentially limited to the situation where the convicted defendant owns substantially all of the stock of a corporation, or where the enterprise is a sole proprietorship. This is so because under section 1963 only the defendant's interest in the enterprise is forfeitable, not the enterprise itself."). However, a RICO defendant cannot shield his property from forfeiture simply by transferring tainted property to a third party. As soon as a RICO defendant commits the predicate act giving rise to forfeiture, all right, title, and interest in the property subject to forfeiture vests in the United States. 18 U.S.C. § 1963(c); *United States v. Pelullo*, 178 F.3d 196, 201 (3d Cir. 1999) ("The defendant's interest in the property is vested in the government nunc pro tunc the time at which the criminal activity occurred."). In this fashion, property in the possession of a non-defendant may be forfeited, but only if a RICO defendant previously had an interest in it, and transferred that interest to the non-defendant after committing the predicate act.

In this case, all of the defendants named in the *Cavazos* indictment are individual members of the Mongol Nation Motorcycle Club ("Mongol Nation"). The indictment charges these "persons" with violating sections 1962(c) and 1962(d)

of RICO. The indictment does not charge the Mongol Nation with any RICO violation or any other crime; the Mongol Nation is not a defendant in *United States v. Cavazos*. Nonetheless, the Government seeks forfeiture of property belonging to the Mongol Nation. It is undisputed that the collective membership mark at issue was originally used by the Mongol Nation in approximately 1969, and registration of the mark was granted to the Mongol Nation in 2005. (Welk Decl. in Support of Supp. Opp'n, Exs. A, B.) At all times, the Mongol Nation and its successor, the Mongols Nation Motorcycle Club, Inc. ("Mongols Nation, Inc."), used the mark as a means of identifying club members, and have therefore maintained ownership of the mark (Guevara Decl. ¶¶ 6-7).[5] As a separate legal entity from their members, the club maintains exclusive ownership of the mark. *See* Cal. Corp. Code § 18110 ("Property acquired by or for an unincorporated association is property of the unincorporated association and not of the members individually."). The Government's evidence similarly affirms the notion that individual club members do not own any rights in the mark other than their limited license rights that the club may revoke. (Guevara Decl. ¶¶ 9-10.) The Government therefore seeks forfeiture of property belonging entirely to a third party non-defendant.

In its Application for Entry of Preliminary Order of Forfeiture as to Registered Trademarks (docket no. 2124), filed June 29, 2009, the Government contends the

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[5] In March 2008, the Mongol Nation attempted to assign the registered mark to Shotgun Productions, LLC, which Ruben Cavazos operated as the manager and CEO. However, there is no evidence concerning whether Shotgun Productions used the collective membership mark in any meaningful way. On October 14, 2008, a corrective assignment was recorded, transferring the registered mark back to the Mongol Nation.

collective membership mark is forfeitable under section 1963(a)(1). The Government contends its evidence and plea agreement with Ruben Cavazos establish that he acquired, maintained, and controlled the collective membership mark while he served as the National President of the Mongol Nation, or as the CEO and manager of Shotgun Productions, LLC. (Welk Decl. in Support of Application for Preliminary Order of Forfeiture, Exs. A-F.) The Government asserts the mark afforded a source of influence over the RICO enterprise and is also forfeitable under section 1963(a)(2). The Government also relies upon Federal Rule of Criminal Procedure 32.2(b) for the proposition that it need not establish the extent of a defendant's forfeitable interest in property at this time.

A collective membership mark is used by members of a cooperative, an association, or other collective organization to indicate membership in that organization. 15 U.S.C. § 1127. A collective membership mark is a subspecies of trademark, and when registered, is entitled to the same protections afforded a trademark. 15 U.S.C. § 1054. It is well recognized that an entity earns an exclusive right to a trademark only if the entity uses the mark in connection with its organization or product. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918) ("There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. . . . the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another's product as his; and it is not the subject of property except in connection with an existing business."). Similarly, "a trademark cannot be sold or assigned apart from [the] goodwill it symbolizes, *Lanham Act*, § 10, 15 U.S.C.S. § 1060. There are no rights in a trademark apart from the business with which the mark has been associated; they are inseparable." *Marshak v. Green*, 746 F.2d 927, 929 (2d Cir. 1984). In this manner, a trademark owner can only assign its mark to an entity performing a substantially

similar service or function. *See id.* at 930 ("The courts have upheld such assignments if they find that the assignee is producing a product or performing a service substantially similar to that of the assignor and that the consumers would not be deceived or harmed."). Any purported ownership of a mark without a corresponding use of the mark in its intended manner is therefore invalid as a matter of law.

Even if the Court were to accept the Government's evidence that Ruben Cavazos controlled the use of the mark during his tenure as National President, there is no support for the notion that a defendant's control of property belonging to a RICO enterprise is sufficient to establish a forfeitable ownership interest in the property.[6] In addition, there is no evidence that Ruben Cavazos owned a majority interest or any interest in the Mongol Nation that would equate to an ownership interest in the mark. There is no evidence that Shotgun Productions, LLC ever used the mark as a collective membership mark – to indicate membership in an organization substantially similar to that of the Mongol Nation. The purported assignment to Shotgun Productions, LLC is therefore without legal effect. Moreover, the Government's evidence demonstrates that the Mongol Nation began using the collective mark in approximately 1969, and either Mongol Nation or Mongols Nation, Inc. continues to use the mark to identify their members. (Guevara Decl. ¶ 6.) The Mongol Nation and Mongols Nation, Inc, by virtue of having used the collective membership mark since 1969, having registered the mark in 2005, and having continued use of the mark to identify members of the club, have acquired and

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[6] There is a legitimate reason not to reach a RICO enterprise's assets in every case. Though a RICO defendant may have controlled the enterprise's assets during his tenure, as long as those assets were lawfully obtained, the enterprise should be permitted to retain them once the RICO defendant is removed from the enterprise.

maintained exclusive ownership in the collective membership mark at issue.

The Government asserts that under Rule 32.2, it need not establish a defendant's ownership of property in order to obtain a preliminary order of forfeiture. The Court recognizes that Rule 32.2 does not require a court to determine a defendant's exact ownership interest in forfeitable property once he has entered a plea agreement. Determining the extent of a defendant's forfeitable interest in the property vis-à-vis innocent third parties should be decided in an ancillary proceeding after a preliminary order of forfeiture has been entered. *See* Fed. R. Crim. P. 32.2(b) Advisory Committee Notes (2000). Nevertheless, prior to entering a preliminary order of forfeiture for specific property, "the court must determine what property is subject to forfeiture under the applicable statute," and "whether the government has established the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1). As noted above, the RICO forfeiture statute relied upon in count eighty-five of the indictment acts *in personam* against the defendants named in *Cavazos*. Determining whether specific property is subject to forfeiture therefore requires the Court to first decide whether any defendant possesses a forfeitable interest in the specific property. If it is clear no forfeitable interest exists, the property is not subject to forfeiture, and a preliminary order of forfeiture should not be entered.

Here, the Government has failed to demonstrate that any forfeitable property interest exists in the collective membership mark. Given the evidence before the Court, neither Ruben Cavazos or any other member of the Mongol Nation possessed a forfeitable ownership interest in the mark. The mark has been and continue to be used exclusively by the Mongol Nation and Mongols Nation, Inc. Ownership of the mark therefore resides exclusively in these two entites. As these two entities have not been named as defendants in the *Cavazos* indictment, the Government cannot

seek forfeiture of their collective membership mark.[7] On this basis, the Court finds Plaintiff to have satisfied his burden of demonstrating a likelihood of success on the merits.

**b. Preservation of property for forfeiture**

In the alternative, even if the Court were to assume that the collective membership mark is subject to forfeiture, the Court finds no statutory authority to seize property bearing the mark from third parties. As discussed above, the

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[7] The factual circumstances of this case are analogous to the Eighth Circuit's discussion of the RICO forfeiture statute:

> Under § 1963(a), only defendants' interests in the RICO enterprise and the proceeds from their racketeering activity are subject to forfeiture. Though the indictment alleged that the Named Companies are an enterprise through which defendants conducted their racketeering activities, an allegation that an enterprise was used to commit RICO violations is not enough to make the *enterprise* forfeitable, only defendants' interests in that enterprise. RICO's criminal forfeiture is an *in personam* remedy to punish the RICO defendants. *See United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985). It does not permit the government to seize control of an enterprise that defendants used to accomplish their racketeering.

*United States v. Riley*, 78 F.3d 367, 370-71 (8th Cir. 1996).

Government seeks forfeiture of the collective membership mark pursuant to the RICO forfeiture statute, 18 U.S.C. § 1963. Assuming the mark is subject to forfeiture, the Government relies upon section 1963's authorization of a post-indictment restraining order to justify its seizure of property bearing the mark. To properly determine whether the seizures are justified, it is important to distinguish between the mark that is arguably subject to forfeiture and the specific items of property bearing the mark that belong to third parties. The Government does not seek forfeiture of each piece of property bearing the mark, but does seek seizure of each piece of property.

The Government argues in its Supplemental Brief that because the mark is subject to forfeiture and has been seized by the Government, the Government takes possession and control of the property. For example, "if the government seizes or restrains a securities account, the owner of the account is barred from conducting trades; if the government seizes or restrains a person's rights under a promissory note, the government assumes the owner's right to collect payments due under the note." (Supp. Brief at 11.) With the collective membership mark at issue, the Government contends that having seized it, the Government now possesses the same rights to control the mark as the original owner of the mark. This includes the ability to revoke any license previously issued to members of the Mongol Nation. However, the Government cites no authority for the proposition that it can exercise the full bundle of rights available to the original property owner in the context of a post-indictment restraining order. The examples provided involving the securities account and promissory note, do not support the Government's broad proposition. In both examples – the restrictions placed on the account and the collection of payments due – the actions taken by the Government were necessary to preserve the property's availability for forfeiture.

These actions are consistent with the notion that forfeiture statutes authorizing post-indictment restraining orders are designed to accomplish a limited purpose. For

example, the RICO forfeiture statute authorizing post-indictment restraining orders provides in relevant part:

> (d) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action *to preserve the availability* of property described in subsection (a) for forfeiture under this section --
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> > (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section

18 U.S.C. § 1963(d)(1)(A) (emphasis added). Other criminal forfeiture statutes authorizing post-indictment restraining orders are similarly designed to preserve the availability of property for forfeiture. *See, e.g.,* 21 U.S.C. § 853(e).

In construing the scope and meaning of a statute, the Court's purpose is to discern the intent of Congress in enacting a particular statute. *See Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982). The first step in ascertaining congressional intent is to look to the plain language of the statute. *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999) (citing *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999)). Here, the express terms of the statute strongly suggest that a restraining order or injunction entered pursuant to section 1963(d)(1) must be narrowly tailored to preserve the availability of property subject to forfeiture. Other courts have generally agreed.

The Second Circuit has noted that restraining orders authorized by section 1963(d)(1)(A) differ from typical injunctions issued in civil cases. Generally, civil injunctions are binding only on parties before the court, their agents, and those in active concert or participation with them who receive actual notice of the order. At a minimum, under those circumstances, the parties before the court have had an opportunity to litigate the merits of a civil injunction, and present any applicable

defense. *United States v. Regan*, 858 F.2d 115, 120 (2d Cir. 1988). Restraining orders pursuant to section 1963(d)(1)(A), however, are conducted ex parte, prior to any conviction, and are therefore "designed only to preserve property for forfeiture after a RICO conviction." *Regan*, 858 F.2d at 120. The Eighth Circuit similarly observed that preconviction restraints are extreme measures, and concluded, "[p]reconviction restraints may only be used to preserve the availability of property subject to forfeiture under § 1963(a)." *United States v. Riley*, 78 F.3d 367, 370 (8th Cir. 1996) (Section 1963(d)(1) "was added to RICO in 1984 to give the court power 'to assure the availability of the property [subject to forfeiture] pending disposition of the criminal case'") (citing S. Rep. No. 225, 98th Cong., 2d Sess. 204, reprinted in 1984 U.S.C.C.A.N. 3182, 3387).

Here, the Government fails to address in its Supplemental Brief how seizure of goods bearing the collective membership mark is necessary to preserve the availability of the mark for forfeiture.[8] Moreover, there is no evidence before the

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[8] The Government argued in its original Opposition that seizure of goods is necessary because the value of the mark could be diminished if it is used in a way that associates the mark with illegal conduct. (Opp'n at 9.) (citing *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972) ("To associate such a noxious substance as cocaine with plaintiff's wholesome beverage as symbolized by its "Coca-Cola" trademark and format would clearly have a tendency to impugn that product and injure plaintiff's business reputation.")). This may well be true for ordinary goods in ordinary commerce. However, in this case, the Government's evidence indicates the collective mark derives in part its notoriety, value, and "goodwill" from illegal conduct. (Welk Supp. Decl., Ex. A.) The Court finds it

Court that the existence of Plaintiff's property bearing the collective mark or Plaintiff's display of the mark in public would lead to a diminished value in the mark, or some other harm to the mark. Nothing suggests that seizure of Plaintiff's property would act to preserve the mark's value or its availability for forfeiture. Without any connection to the preservation of the mark, there is no statutory authority to seize Plaintiff's property through a post-indictment restraining order. On this alternative basis, the Court also finds Plaintiff to have satisfied his burden of demonstrating a likelihood of success on the merits.

**2. First Amendment**

As an initial matter, although Plaintiff advances constitutional arguments in support of his Motion for Preliminary Injunction, the Court adheres to the basic principle that if statutory grounds are sufficient to decide a matter, it need not reach the constitutional grounds for likelihood of success on the merits. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("'[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and

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unlikely that continued use of the mark in an illegal manner would act to diminish its value or notoriety. *See also L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 32 (1st Cir. 1987) ("Neither the strictures of the first amendment nor the history and theory of anti-dilution law permit a finding of tarnishment based solely on the presence of an unwholesome or negative context in which a trademark is used without authorization. . . . A trademark is tarnished when consumer capacity to associate it with the appropriate products or services has been diminished.").

swears an oath to uphold the Constitution.") (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S. Ct. 207, 211, 39 L. Ed. 297 (1895)).

Accordingly, the Court only makes the following observations regarding the application of the First Amendment to this case:

In light of additional facts disclosed at the hearing for this matter on June 22, 2009, it is now clear that seizure of property bearing the mark at issue would have serious First Amendment implications. At the June 22 hearing, the Government revealed for the first time that the mark it sought to forfeit was a collective membership mark. Previously, in its Ex Parte Application for Post-Indictment Restraining Order, the Government referred to the mark simply as a trademark, which was "purportedly for use in commerce in connection with promoting the interests of persons interested in the recreation of riding motorcycles." (Ciccone Decl. ¶ 4.) In contrast to commercial trademarks, which are used in commerce and generally not entitled to full First Amendment protections, collective membership marks are used by members of an organization to "indicat[e] membership in a union, an association, or other organization." 15 U.S.C. § 1127. The use and display of collective membership marks therefore directly implicate the First Amendment's right to freedom of association.

The Supreme Court has recognized that "'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.' This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). Furthermore, clothing identifying one's association with an organization is generally considered expressive conduct entitled to First Amendment protection. *See Church of American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206 (2d Cir. 2004) ("We agree with the

District Court that the regalia of the American Knights, including the robe, mask, and hood, are expressive; they are expressive in the way that wearing a uniform is expressive, identifying the wearer with other wearers of the same uniform, and with the ideology or purpose of the group."); *see also Truth v. Kent School Dist.*, 542 F.3d 634, 651 (9th Cir. 2008) (Fisher, J., concurring) ("There is no question that acts of expressive association are protected forms of speech under the First Amendment."). If speech is noncommercial in nature, it is entitled to full First Amendment protection, which prohibits the prior restraint and seizure of speech-related materials without a judicial determination that the speech is harmful, unprotected, or otherwise illegal. *Adult Video Ass'n v. Barr*, 960 F.2d 781, 788 (9th Cir. 1992) ("The First Amendment will not tolerate such seizures until the government's reasons for seizure weather the crucible of an adversary hearing.").[9]

The evidence currently before the Court further demonstrates that the items the Government seeks to seize are expressive and denote an association with the Mongol Nation. The stated purpose for registering the mark as a collective mark is "to indicate membership in an association of persons interested in the recreation of riding motorcycles." (Welk Decl. in Support of Opp'n, Ex. B.) Plaintiff affirms this purpose, and states his "display of the Image affirms my membership in the Club, [and] symbolizes unity and brotherhood with my friends and fellow Club members." (Rivera Decl. ¶ 11.) Similarly, the current National President of Mongols Nation, Inc. declares that the mark serves "as a means of identifying Club members and symbolizing their common interests and beliefs." (Guevara Decl. ¶ 6.) The Court agrees that the collective membership mark acts as a symbol that communicates a

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[9] *Adult Video Ass'n v. Barr* was vacated by the Supreme Court in *Reno v. Adult Video Ass'n*, 509 U.S. 917 (1993), but the Ninth Circuit's discussion of pre-trial seizures was re-adopted in *Adult Video Ass'n v. Reno*, 41 F.3d 503 (9th Cir. 1994).

person's association with the Mongol Nation, and his or her support for their views. Though the symbol may at times function as a mouthpiece for unlawful or violent behavior, this is not sufficient to strip speech of its First Amendment protection. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2003) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. . . . First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.").

Prohibiting speech of this nature constitutes an attack on a particular viewpoint. *Sammartano v. First Judicial District Court, in and for the County of Carson City*, 303 F.3d 959, 971-72 (9th Cir. 2002). In *Sammartano*, the Carson City courthouse enacted a rule to prohibit admission of those with "clothing, attire or 'colors' which have symbols, markings or words indicating an affiliation with street gangs, biker or similar organizations," because "such clothing or attire can be extremely disruptive and intimidating, especially when members of different groups are in the building at the same time." 303 F.3d at 964. The Ninth Circuit reasoned that the rule singles out bikers and similar organizations for the message their clothing is presumed to convey, and held that the rule impermissibly discriminates against a particular point of view – the view of biker clubs as opposed to garden clubs and gun clubs. *Id*. at 971-72. In this case, the Government targets an even narrower group of individuals, a single motorcycle club. In addition, the Government has been seizing property, which imposes a greater restriction on individual rights than the denial of access to a public facility. Accordingly, the seizure of property bearing a Mongols membership mark should be considered viewpoint-discriminatory.

The Government's ability to seize property bearing the trademark acts as a prior restraint and cannot stand without a judicial determination that the speech is harmful, unprotected, or otherwise illegal. No such determination was ever sought by the Government, and no such determination was ever made by the Court. The

seizure of property is also viewpoint or content-based, which triggers strict scrutiny. *See Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996) ("If the statute is content-based, we apply strict scrutiny to determine whether the statute is tailored to "serve a compelling state interest and is narrowly drawn to achieve that end."). Though it is arguable whether a compelling reason exists to prevent the display of the Mongols trademark,[10] the seizure of all property bearing the mark cannot be considered the least restrictive alternative. For these reasons, the Court observes that the lack of statutory authority to seize Plaintiff's property is consistent with the First Amendment's right to freedom of association, which acts to protect Plaintiff's right to display the Mongols collective membership mark.

**B. Irreparable Harm and Balancing of Hardships and Equities**

Plaintiff has demonstrated a strong possibility of irreparable harm absent a preliminary injunction. Plaintiff is an active member of the Mongol Nation Motorcycle Club, and often wears a jacket or shirt bearing the collective membership mark to symbolize his unity and brotherhood with his fellow Club members. (Rivera Decl. ¶ 11.) Due to the Government's ability to seize and its seizures in the past, Plaintiff is currently chilled and deterred from exercising his right to wear and display the mark. (Rivera Decl. ¶ 12.) Absent a preliminary injunction, Plaintiff would continue to be chilled and suffer irreparable harm. *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) ("The loss of First Amendment

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[10] The Court understands that the mark at issue is often used to intimidate rival gang members and others, and that mere display of the mark may lead to violent encounters that endanger the public welfare. Nonetheless, these concerns are not sufficient to justify seizure of all items bearing the mark without a showing of imminent danger or violence under the circumstances.

freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)).

Similarly, the balance of hardships, equities and the public interest weigh in favor of relief to Plaintiff. The Government contends the public should not be exposed to a symbol that "stands for murder, violence and drug trafficking." (Opp'n at 7.) Nonetheless, as discussed above, even speech advocating unlawful conduct is afforded protection under the First Amendment. On balance, Plaintiff's hardship in not being able to express his views and the public interest in protecting speech outweigh the Government's interest in suppressing an intimidating symbol. *Sammartano v. First Judicial District Court, in and for the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles."). The Court therefore finds a preliminary injunction preventing the Government from seizing Plaintiff's property bearing the collective membership mark to be appropriate.

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## IV. CONCLUSION

For the foregoing reasons and in the manner set forth above, the Court hereby **GRANTS** Plaintiff's Motion for Preliminary Injunction (docket no. 16) to the extent described herein. The Court hereby preliminarily enjoins the Government, its officers, agents, servants, employees, and attorneys, and anyone in active concert or participation with any of the foregoing persons, from seizing, or asking or directing any other person or entity to seize, from Plaintiff any property or item bearing or displaying all or part of the collective membership mark at issue in *United States v. Cavazos*, Case No. 2:08-cr-1201-FMC.

**IT IS SO ORDERED.**

Dated: July 31, 2009

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT