

TESTIMONY OF

MARCUS ASNER

Before the U.S. House of Representatives Committee on Natural Resources
Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs

Oversight Hearing on

The 2008 Lacey Act Amendments

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Introduction

Mr. Chairman, Ranking Member, and members of the Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, thank you for inviting me to appear before the Subcommittee today to address the topic of the 2008 Amendments to the Lacey Act.

I am a partner in the New York office of Arnold & Porter LLP where I routinely advise companies on Lacey Act and other environmental and criminal matters. Although I am advising several clients on legal matters relating to the Lacey Act, I am appearing today in my personal capacity and not on behalf of Arnold & Porter or any client.

For nine years (2000-2009), I served as an Assistant United States Attorney (AUSA) in the Southern District of New York where I was Chief of the Major Crimes Unit from 2007 to 2009. When I was an AUSA, I led the investigation and prosecution of *United States v. Bengis*, one of the largest Lacey Act cases in history, involving the smuggling of massive quantities of illegally harvested rock lobster from South Africa. Since I joined Arnold & Porter in 2009, I have counseled clients on a wide variety of Lacey Act issues, including assisting clients in complying with the 2008 Amendments. I have written extensively on the Lacey Act, and I have been invited to speak at numerous domestic and international meetings concerning environmental crime. In the past year or so, for example, I have spoken on Lacey Act issues at the World Fisheries Conference, the Forest Legality Alliance, INTERPOL, and the Boston Seafood Show.

Today, I will explain my thoughts on how the 2008 Lacey Act Amendments have contributed to reducing the international trade in illegal plants and plant products, and in the process have served American businesses and consumers and helped the environment. I also will address some of the concerns raised by critics of the 2008 Amendments.

Discussion

The 2008 Lacey Act Amendments prevent illegal plants and plant products from flooding the U.S. market, disrupts criminal organizations, and reduces corruption in foreign countries, which in turn levels the playing field for legitimate businesses and improves our national security. The Lacey Act supports U.S. consumers who have an interest in a sustainable supply of natural resources and in worldwide ecological health, which plays a key role in U.S. and worldwide economic and social stability. It also protects the victims of environmental crimes.

I want to emphasize upfront that I am well aware of the challenges companies face as they determine how to meet the requirements of the Lacey Act, and understand both sides of the debate over how best to shape Lacey Act requirements. I regularly advise clients in various industries, so I know firsthand that compliance can be challenging, especially at first, and especially for small businesses with limited resources seeking to navigate foreign legal systems. Companies that never before had to concern themselves with issues of provenance in their supply chains now are having to develop compliance programs to make a good faith effort to ensure that the goods they bring to the United States are legal.

Despite the challenges faced by lawful importers, I believe that the Lacey Act is a vital enforcement tool that *protects* U.S. interests in the aggregate. From my perspective as someone who has been involved in Lacey Act enforcement and compliance for over a decade, the 2008 Amendments are serving U.S. and global interests by helping to reduce the trade in illegal wood and wood products.

Moreover, in my experience from the last few years, companies are overcoming the challenges, setting up compliance programs, and learning to become more adept at complying with the 2008 Amendments to the Lacey Act. That companies are becoming better at compliance does not surprise me. In other areas, United States companies long have faced laws that regulate overseas behavior. Seafood importers have had to comply with the Lacey Act for decades, and many U.S. companies have to deal with Committee on Foreign Investment in the United States (CFIUS) regulations and the Foreign Corrupt Practices Act. Experience in these other areas teaches that complying with new laws and regulations can be burdensome at first, but that, over time, companies learn and become better at working within the new regulatory framework.

Benefits of the 2008 Lacey Act Amendments

Passed in 1900, the Lacey Act is the United States' oldest wildlife protection law. Its original goals were to address issues including the interstate shipment of unlawfully killed game, the introduction of harmful invasive species, and the killing of birds for the feather trade. The Act has been amended several times and broadened to combat trafficking in illegal wildlife, fish, and—as of 2008—plants and plant products. During its long tenure, the Lacey Act has been successful in the areas of wildlife and fish. In light of the enormous problems of illegal logging and unsustainable harvesting, along with the related human toll (such as the toll of corruption and forced labor) and environmental impacts (such as deforestation, destruction of biodiversity, wildlife displacement, erosion, climate change, and loss of local livelihood), the 2008 addition of protections for plants and plant products was a natural and welcome extension of the Act.

The Lacey Act is an important tool for law enforcement in the ongoing effort to combat sophisticated criminal organizations and to protect legitimate businesses and U.S. consumers. Lacey Act prosecutions have been used to disrupt large-scale criminal organizations with illegal behavior extending beyond fish, wildlife, and plant violations. When I was a prosecutor, I experienced firsthand how the Lacey Act can be used as a tool to (1) dismantle criminal operations and deter illegal activities that are having economic and environmental impacts; (2) protect U.S. interests; and (3) protect the victims of environmental crimes. I will discuss each of these benefits in turn.

Dismantle Criminal Operations and Deter Illegal Activities

I first became involved with the Lacey Act around 2002 when I started working on the investigation of the Bengis international criminal organization. The Bengis organization engaged in a massive scheme to smuggle into the United States and sell to U.S. consumers (at a significant profit) rock lobster that had been illegally harvested in South Africa. The scheme, which spanned over a decade, had a devastating impact on the South African rock lobster population. The Bengis scheme involved (among other things) numerous violations of South African fishing and customs laws, bribery of South African fisheries inspectors, submission of false shipping documentation, smuggling of contraband into the United States, sale of illegal seafood to U.S. consumers, circumvention of U.S. immigration laws, spoliation of evidence, and the use of United States banks to transfer criminal proceeds. The United States and South Africa worked together closely on the investigation and prosecutions, which ultimately led to the dismantling of the Bengis organization. In the United States, five members of the organization were arrested; all ultimately pleaded guilty and the main players were sentenced to prison. The defendants also forfeited \$7.4 million to the U.S. In 2011, the Court of Appeals for the Second Circuit ruled that South Africa is a victim entitled to restitution for the defendants' crimes, and in 2012, a magistrate judge in the Southern District of New York recommended that South Africa be awarded \$55.9 million in restitution from the defendants.

The *Bengis* case provides just one example of how the Lacey Act can serve as a powerful enforcement tool in the fight against criminal activity in cases where actors import into the United States illegal goods covered by the Act. It is important to remember, however, that the Lacey Act also protects innocent actors. A person who innocently imports illegally harvested wood is innocent under the Lacey Act.¹ She only would be guilty of a felony if she actually *knew* the wood was illegal.

In cases where a person, in the exercise of due care, *should have known* that wood she imported had been stolen, the Lacey Act establishes a middle ground—a misdemeanor. In my experience, misdemeanor prosecutions under the Lacey Act are rare. Prosecutors typically focus their limited resources on more serious felony investigations and prosecutions. In this, as in any other lawful industry, legitimate businesses and law-abiding citizens understandably take pains to ensure that they are buying legal goods, whether those goods are wood, seafood, wildlife, or some other commodity such as food, diamonds, or electronics. It is in this respect that the due care standard in the Lacey Act serves an important role in reinforcing lawful behavior, and in leveling the playing field between legitimate companies that invest resources to try hard to do the right thing, and companies that are utterly indifferent to whether the goods they are importing and supplying to the American consumer are legal or illegal.

I am sensitive to the fact that some companies find the due care standard to be confusing and would prefer that “due care” be defined using a checklist or a set of bright line rules that would apply across all fact patterns and industries. While I understand why these comments are being

¹ Of course, the fact that the person is innocent in this example does not change the fact that the wood in fact was stolen. Under well-established U.S. property law, stolen property ordinarily will be returned to the rightful owner, even if the person possessing the wood is innocent.

made, I believe that much of the anxiety about the due care standard is misplaced. Legitimate companies in a wide variety of industries routinely exercise due care in policing their supply chains, because they take seriously the goal of providing consumers with legal goods. In my view, the flexible “due care” standard is actually better for companies because it enables them to mitigate risk in ways that are appropriate for their particular operations and supply chains. Moreover, there is nothing particularly new about the due care standard. Like the similar “reasonable person” standard relied upon elsewhere in U.S. law, the due care standard is a necessary and common element in the American legal system, arising in a wide variety of situations, ranging from the concepts of negligence in tort law, to negligence-based Clean Water Act violations. The Lacey Act’s due care-based standard has functioned effectively for many years. In fact, seafood importers have been working with the due care standard under the Lacey Act ever since 1969.

Requiring that companies exercise “due care” in selecting and managing their imports plays a significant role in deterring illegal activity. The standard places the responsibility on law-abiding companies to take a critical look at and understand their own supply chains, and it also prevents unscrupulous companies from devising ways to circumvent, perhaps through technicalities, any due care “checklist” or bright line rules that otherwise might be devised. In my own practice, I often counsel clients on ways to create their own compliance programs, so they can make a good faith effort to ensure that their supply chains are legal and can demonstrate due care in those efforts. The Compliance Program outlined in the Gibson Guitar Criminal Enforcement Agreement has provided a useful model, and various industries are creating their own models from which individual companies can draw. In circumstances where they deem additional protections are needed, clients are further protecting themselves by demanding and obtaining warranties and indemnification from their suppliers. These are good developments. As a result of the 2008 Lacey Amendments, I find that companies increasingly are focused on actively monitoring their own supply chains and creating compliance programs that enable them to ensure that the paper, lumber, and other plant products they supply to the American consumer come from legal sources. This is transforming a market in which honest, legitimate companies (who worked hard to ensure the legitimacy of their supply chains) previously were at a competitive disadvantage to companies who were allowed to get away with a “no questions asked” approach to the legality of their supply.

Nor is the focus on supply chains limited to the Lacey Act. Supply chain due diligence increasingly has become a priority for companies in all sectors. In addition to the health and safety and counterfeiting issues with which we are all familiar, and the conservation and law enforcement goals of the Lacey Act and similar enactments, Congress has acted repeatedly since the 2008 Lacey Act amendments to require more transparency in supply chain issues. For example, there have been new statutory and regulatory requirements to prevent U.S. Government contractors from using human trafficking victims when performing government contracts.

Protect U.S. Interests and Reduce Corruption

According to a 2012 UNEP and INTERPOL report, “illegal logging accounts for 50-90 per cent of the volume of all forestry in key producer tropical countries and 15-30 per cent globally.

Meanwhile, the economic value of global illegal logging, including processing, is estimated to be worth between US \$30 and US \$100 billion, or 10-30 per cent of global wood trade.”² Not only is the U.S. one of the world’s leading producers of products like wood flooring and hardwood plywood, but it is also one of the largest consumers.³

The mere presence of illegally procured wood in the international marketplace affects the competitiveness of legitimate U.S. producers. The United States’ GDP of timber-related manufacturing was valued at \$77 billion in 2009.⁴ According to a 2004 report, illegal logging depresses U.S. prices by about 2-4% which translates to about \$1 billion in annual losses to the U.S. market from lower prices and reduced market share.⁵ Evidence presented in the *Bengis* case revealed that illegal operations are able to sell larger quantities of goods at lower prices than their legitimate competitors.⁶ This illegal advantage in turn adversely affects competitors’ business and customer relations. Meanwhile, overharvesting activities seriously affect the worldwide and U.S. market’s supply. As a result, any reduction in market price in the short-term due to the influx of illegal goods is short-lived, and prices will increase in the long-term as supply is depleted due to unsustainable practices. By reducing the amount of illegally harvested wood and other plant products in the international marketplace, the Lacey Act benefits U.S. companies and consumers. By reducing the demand for illegal and unsustainably harvested goods, the Act also helps to protect the global supply of natural resources upon which American consumers depend.

The Lacey Act also helps reduce corruption and promote the rule of law in foreign countries, which in turn helps to level the playing field for U.S. companies and enhances our national security. There is a close link between corruption and natural resources crime. In his Statement for the Record on the 2012 Worldwide Threat Assessment of the U.S. Intelligence Community, the Director of National Intelligence included “environmental crime” in the list of ways in which transnational organized crime threatens U.S. national interests:

Illicit trade in wildlife, timber, and marine resources constitutes a multi-billion dollar industry annually, endangers the environment,

² UNEP and INTERPOL, *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering in the World’s Tropical Forests* (2012), available at http://www.unep.org/pdf/RRALogging_english_scr.pdf.

³ USITC, *Wood Flooring and Hardwood Plywood: Competitive Conditions Affecting the U.S. Industries* at 1-1 (Aug. 2008), available at <http://www.usitc.gov/publications/332/pub4032.pdf>.

⁴ U.S. Census Bureau, *Statistical Abstract of the United States* at 563 (2012) (Table 883), available at <http://www.census.gov/compendia/statab/2012edition.html>.

⁵ Seneca Creek Associates, LLC and Wood Resources International, LLC, “*Illegal*” *Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry* at ES-2, 26 (Nov. 2004), available at <http://www.illegal-logging.info/uploads/afandpa.pdf>; Pervaze A. Sheikh, Cong. Research Serv., R42119, *The Lacey Act: Compliance Issues Related to Importing Plants and Plant Products* 12 (2012), available at <http://www.fas.org/sgp/crs/misc/R42119.pdf>.

⁶ Government’s Memorandum of Law in Opposition to Defendants’ Joint Motion for a Departure from the Applicable Sentencing Guidelines Range at 15-17, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. May 26, 2004).

and threatens to disrupt the rule of law in important countries around the world. These criminal activities are often part of larger illicit trade networks linking disparate actors—from government and military personnel to members of insurgent groups and transnational organized crime organizations.⁷

The U.N. Office on Drugs and Crime’s report, *Illegal Logging in Indonesia: The Link Between Forest Crime and Corruption*, notes:

Illegal logging [in Indonesia] relies on corruption to stay in business. It depends on the complicity of officials throughout the entire production chain from forest to port, including forest rangers, local government, transport authorities, police and customs. Organized criminal groups are involved in transporting illegal timber, as well as endangered species, out of the country and across multiple borders . . .

Environmental crime, such as this illegal logging in Indonesia, is becoming increasingly organized and transnational in nature and can be seen, just as drug and firearm trafficking, as one of the most significant areas of transborder criminal activity, threatening to disrupt societies and hinder sustainable development.⁸

Corruption related to environmental crimes presents a threat to the United States’ interests generally, and to U.S. companies specifically. By providing an enforcement tool for federal prosecutors on the one hand and encouraging the creation of compliance programs that help identify issues in the supply chain on the other, the Lacey Act helps to reduce the specter of corruption, and ultimately fosters an environment favorable to legitimate American businesses.

Protect Victims of Environmental Crimes

Penalties under the Lacey Act protect victims by deterring the theft of fish, wildlife, and plants and plant products. Moreover, just as property laws protect owners’ rights by requiring the return of stolen art or an autographed baseball stolen from your home, the Lacey Act protects the rights of victims of illegal harvesting and trade, whether such victims are in the U.S. or abroad.

⁷ *Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community, Before the S. Select Comm. On Intelligence*, 113th Cong. 5-6 (2013) (statement of James R. Clapper, Director of National Intelligence, *available at* <http://www.intelligence.senate.gov/130312/clapper.pdf>. The Statement also noted that “[t]ransnational organized crime (TOC) networks erode good governance, cripple the rule of law through corruption, hinder economic competitiveness, steal vast amounts of money, and traffic millions of people around the globe.” *Id.* at 5.

⁸ U.N. Office on Drugs and Crime, *Illegal Logging in Indonesia: The Link Between Forest Crime and Corruption* (2010), *available at* <http://www.unodc.org/unodc/en/frontpage/2010/June/illegallogging-in-indonesia-the-link-between-forest-crime-and-corruption.html>.

The Lacey Act helps ensure that victims of Lacey Act crimes receive compensation. If someone snuck onto my land in Irving, Texas, cut down my trees, and then sold them to an unwitting buyer in Oklahoma, I would want my trees back, even if the gentleman in Oklahoma had purchased the timber innocently. The Lacey Act provides a mechanism by which I could get my trees back and the trespassing thieves could be prosecuted. When coupled with a charge of conspiracy under Title 18, the Lacey Act supports compensation to victims in the form of restitution under 18 U.S.C. §§ 3663 & 3663A. The *Bengis* case illustrates this point. The Court of Appeals ruled in that case that South Africa should be awarded restitution as compensation for the lobster stolen as part of the scheme. By protecting the property rights of victims of environmental crimes, the Lacey Act provides justice to victims and deters future criminal activity. I will discuss this aspect of the Lacey Act further below in connection with the discussion of the “innocent owner” defense.

Responses to Concerns

I am aware of a number of concerns that have been voiced about the Lacey Act, many of which appeared in the various changes that were proposed last year in the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act. The RELIEF Act, among other things, would have altered the Lacey Act’s forfeiture provision to include an “innocent owner” defense, removed or limited some of the Act’s provisions for plants and plant products imported before 2008, narrowed the categories of foreign laws that trigger violations and modified the declaration requirements. I am sympathetic to the challenges that legitimate businesses, particularly small companies, face in complying with the Lacey Act, especially when they are operating in foreign countries with unfamiliar legal systems. I expect that some of the same concerns may be raised in this hearing, so I would like to focus on some of these proposals in my testimony today.

Forfeiture and the Proposed “Innocent Owner” Defense

According to press reports, following the well-publicized seizures of wood at Gibson Guitar’s facilities, a common complaint was that Gibson’s wood was seized and held even though Gibson purportedly had not “had its day in court to defend itself,”⁹ and that Gibson was the victim of an abuse of governmental power. However, as my co-authors and I explained in an article published in Bloomberg BNA’s Daily Environment Report, if you look at the law and what happened in the Gibson proceedings, it becomes clear that Gibson in fact did have its day in court, exactly as contemplated in the law.¹⁰ In addition, based on the facts that emerged, Gibson

⁹ Tina Korbe, *Video: The Great Gibson Guitar Raid . . . Months later, still no charges*, Hot Air (Feb. 23, 2012, 3:40 PM), <http://hotair.com/archives/2012/02/23/video-the-great-gibson-guitar-raid-months-later-still-no-charges/>; see also John Roberts, *Gibson Guitar Case Drags On With No Sign of Criminal Charges*, FoxNews.com (Apr. 12, 2012), <http://www.foxnews.com/us/2012/04/12/gibson-guitar-case-drags-on-with-no-sign-criminal-charges/>.

¹⁰ Marcus A. Asner, Maxwell C. Preston and Katherine E. Ghilain, *Gibson Guitar, Forfeiture, and the Lacey Act Strike a Dissonant Chord*, Bloomberg BNA’s Daily Environment Report (also published in the Daily Report for Executives, White Collar Crime Report, and the International Environment Reporter) (Sept. 4, 2012), available at http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP.BloombergBNA%27sDailyEnvironmentReport_090412.pdf.

had illegally imported highly protected wood, ignoring the results of their own due diligence, and the actions taken by the government in response were reasonable.¹¹ Gibson is therefore a prime example of the proper functioning of the Lacey Act. The Gibson case aside, however, a more fundamental point is that adding an innocent owner defense to the Lacey Act would be inconsistent with widely-used federal forfeiture procedures, would undermine the deterrent effect of the provisions, and potentially would defeat the fundamental property rights of the victims of environmental crimes. If such an amendment were to be enacted, those in possession of stolen wood would have unique rights to keep that wood despite the illegality of its procurement, which is fundamentally at odds with the law that applies across the board in other stolen property contexts.

Seizure and Forfeiture Under the Lacey Act

It is well settled that the federal government may seize property upon a showing of probable cause that the property is illegal. The process is straightforward. Someone who believes that her property has been wrongfully seized may file a motion in federal court asking the court to review the evidence and determine whether the property is contraband or should be returned.¹² Even if that person does not pursue the return of the seized property in this manner, the government generally must follow a formal forfeiture process in order to keep it. Goods seized pursuant to the Lacey Act may fall into one of two categories of contraband. Those involving violations of procedural requirements, such as failing to obtain proper permits, are considered “derivative contraband.” On the other hand, those for which possession or exportation is banned are considered “contraband *per se*.”¹³ For example, a country like Madagascar bans the harvest of ebony and the export of any ebony products in unfinished form except when the supplier has special authorization from the government. In that situation, unfinished Malagasy ebony seized from someone in the United States who imported that ebony from a supplier who did not have that special authorization is contraband *per se*.

The forfeiture procedures that apply to goods seized under the Lacey Act are the same Civil Asset Forfeiture Reform Act (CAFRA) procedures that govern forfeiture actions under a wide variety of laws.¹⁴ The government must provide notice and an opportunity for a hearing at which the forfeiture may be contested. If the party fails to timely respond, the property is deemed administratively forfeited. If the party elects to file a claim within the 60-day period, the

¹¹ Criminal Enforcement Agreement Between U.S. Dep’t of Justice and Gibson Guitar Corp. (July 27, 2012), *available at* <http://www.fws.gov/home/feature/2012/USvGibsonGuitarAgreement.pdf>.

¹² Specifically, the person seeking the return of their property may file a motion in federal court pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure. *See United States v. 144,744 Pounds of Blue King Crab*, 410 F.3d 1131 (9th Cir. 2005) (holding that goods seized under the Lacey Act are contraband).

¹³ *See Helton v. Hunt*, 330 F.3d 242, 247 (4th Cir. 2003) (*citing One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965), and quoting *Cooper v. City of Greenwood*, 904 F.2d 302, 305 (5th Cir. 1990); *see also Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1210-11(N.D. Cal. 2009).

¹⁴ 18 U.S.C.A. § 983.

government must commence judicial forfeiture proceedings, during which the party may present evidence and argue that the property should be returned.¹⁵ The government must demonstrate by a preponderance of the evidence that the property is subject to forfeiture,¹⁶ and that the government had probable cause to believe that the property was subject to forfeiture in the first place.¹⁷ These procedures were followed in Gibson, and normal forfeiture proceedings in federal court were ongoing when the Criminal Enforcement Agreement was reached.

In addition to this judicial avenue of challenge, the law provides an administrative appeal process whereby a party can appeal directly to the agency that seized the goods, seeking remission or mitigation of forfeiture.¹⁸ Under the Fish and Wildlife Service's regulations, for example, a party may file a petition seeking remission or mitigation of administrative forfeiture with Solicitor of the Department of Interior.¹⁹ If the Solicitor finds that there are sufficient "mitigating circumstances," the Solicitor may remit or mitigate the forfeiture upon reasonable terms and conditions.²⁰ As a result, not every contested seizure will require the involvement of federal courts.

Innocent Owner Defense

Some have suggested including an "innocent owner" defense to forfeiture. Proponents have argued that companies that unknowingly possess illegally harvested wood should be able to obtain the return of that illegal wood (regardless of its legality) because they were unaware, despite exercising due care, that the wood was illegal. While I am sympathetic to the truly innocent owner in such a situation and recognize that some importers could face forfeiture under difficult circumstances, I am also sympathetic to crime victims. I am concerned that such a defense would not only undermine the effectiveness of the Lacey Act, but it also would be inconsistent with basic U.S. property principles.

My concern is that providing an innocent owner defense for the purchaser or importer of illegal goods and allowing the "innocent owner" to keep what is not lawfully hers not only decreases companies' incentives to ensure that their goods are legal, but it also deprives lawful owners of their right to have their property returned. If a thief steals my autographed baseball and sells it to an innocent collector who has no idea that it was stolen, that does not change the fact that it is still my baseball and I have a right to get it back. The illegal intervening activity does not extinguish my property right in the baseball. We naturally feel sorry for the collector, of course, who was duped into buying the baseball from the thief, but that does not mean he should get to keep my baseball; instead, his recourse is to seek compensation from the thief and make sure that he has a valid supplier next time. The same concept applies to goods imported in ways that

¹⁵ See 18 U.S.C.A. § 938(a)(3), (a)(4)(A) (contemplating claims pursuant to Supplemental Rules); Fed. R. Civ. P. Supplemental Rule G(5).

¹⁶ See 18 U.S.C.A. § 983(c)(1).

¹⁷ See 19 U.S.C.A. § 1615.

¹⁸ See 16 U.S.C.A. § 3374(b).

¹⁹ 50 C.F.R. § 12.24.

²⁰ 50 C.F.R. § 12.24(f).

violate the Lacey Act. The individuals, states, or countries whose resources have been illegally obtained have a right to the return of their property or to monetary compensation for property that was lost. The intervening illegal activity does not extinguish those property rights, regardless of who knew what along the way. It is the importer's responsibility to know its suppliers and put measures in place to ensure that its goods are legal. Just as a legitimate art gallery requires evidence of provenance before purchasing paintings or artifacts, or a seller of name-brand shoes needs comfort that it is not buying counterfeits, companies that are dealing in goods covered by the Lacey Act are responsible for knowing their supply chains and, if appropriate, demanding contractual warranties to protect themselves.

The strong incentive in the Lacey Act to use due care is causing this positive shift in the marketplace. Introduction of an innocent owner provision would have the opposite effect of encouraging companies to know as little as possible about their supply chains. In addition, basic property rights are fundamental to the law of our country. Any proposed changes to the Lacey Act must be consistent with these longstanding legal principles. An innocent owner defense that deprives the rightful owner of his or her property clearly is not.

Indeed, if the committee were inclined to consider any changes to the Lacey Act, I think it would make most sense to *strengthen* the Act's protections of victims and property rights, by making it easier for victims to recover for Lacey Act violations. One simple idea would be to expand the list of crimes covered by the federal restitution statutes, 18 U.S.C. §§ 3663 & 3663A, so that it explicitly would cover the Lacey Act. That fix would help facilitate the return of stolen articles to their rightful owner in cases where the evidence establishes a substantive Lacey Act violation, but fails to support a charge under Title 18 (for example, where the defendant acted alone and therefore did not violate the federal conspiracy statute, 18 U.S.C. § 371). Congress also could support the rights of crime victims further by creating a rebuttable presumption that, once articles have been shown to violate the Lacey Act and are forfeitable, such articles will be deemed to be the property of the state or country of origin, absent a showing of superior title. The state or country where the fish, wildlife, plant or plant product was illegally taken would be deemed a "victim" entitled to restitution.

Plants and Plant Products Imported Before 2008

Some have expressed concern that the Lacey Act might cover plants and plant products that were harvested before the Lacey Act was amended in 2008, noting that innocent owners of antique musical instruments or furniture technically face exposure under the Lacey Act. I am sympathetic to such concerns. Of course, as I explained above, truly innocent owners of pre-2008 plants or plant products cannot be prosecuted under the Lacey Act. Helpfully, the U.S. Fish and Wildlife Service further has clarified that "individual consumers and musicians *are not* the focus of any U.S. Fish and Wildlife Service law enforcement investigations pertaining to the Lacey Act, and have no need for concern about confiscation of their instruments by the U.S. Fish and Wildlife Service."²¹ More fundamentally, however, as with the "innocent owner" proposal

²¹ U.S. Fish & Wildlife Service, *Where We Stand: The Lacey Act and our Law Enforcement Work* (Sept. 22, 2011) (available at <http://www.fws.gov/news/blog/index.cfm/2011/9/22/Where-We-Stand-The-Lacey-Act-and-our-Law-Enforcement-Work>).

discussed above, I am concerned about how any change addressed to pre-2008 articles would square with our general obligation under the U.S. legal system to protect the rights of property owners. I am equally concerned that any such change would have the unintended effect of excusing illegal activity and perpetuating the presence of illegal goods in the market, all to the detriment of American interests. For example, it would be hard to be sympathetic to someone who knowingly imported wood that was illegally harvested from a World Heritage Site in 2007 who now wants to profit from its sale. Moreover, because of difficulties in dating wood, constructing a “pre-2008” exception could inadvertently help criminals launder wood that in fact was harvested and imported after 2008, because defendants could demand that the United States affirmatively prove in a criminal case that the wood is harvested or imported after 2008. Accordingly, while I understand why these issues have been raised, I again urge the committee to be cautious in proposing any such change to the Lacey Act.

Scope of Foreign Laws

Some have expressed concern over the scope of foreign laws that could trigger a Lacey Act violation. Again, I believe that much of the anxiety about the scope of foreign laws is misplaced. The categories of foreign laws at issue in the Lacey Act are set out clearly in the Act. Legitimate companies in a wide variety of industries routinely must navigate local and foreign laws. Seafood companies complying with the Lacey Act have been navigating foreign laws for decades. Moreover, the fact that a particular foreign law may be ambiguous, unclear or difficult to discern, bears on the due care analysis and may suggest that a company did not knowingly import illegal goods (which is what happened with some of the wood at issue in Gibson). More fundamentally, however, in my experience, legitimate businesses take seriously their obligations to comply with local and foreign laws. They ask adequate questions and, to gain comfort with their compliance with U.S. law, they track their due diligence in such a way that they can demonstrate their good faith if questions arise later. In this respect, businesses that work with foreign suppliers are in the best position to ask the relevant questions and require that their suppliers make sure the goods are legal.

Declaration Requirement

Finally, some concerns have been raised that the declaration requirement is burdensome and creates a collection of paper that serves no purpose. The declaration requirement is one of the key elements of the 2008 Amendments because it forces importers to examine their supply chains, ask questions, and obtain information to ensure that everything is legal. While it has been reported that there currently is a backlog in processing some of the declarations filed by paper means, approximately 80% of the declarations are filed and processed successfully by electronic means. More fundamentally, the declarations provide information that protects innocent companies and helps in the investigation and prosecution of criminal organizations. Indeed, the defendants’ paper trail in *Bengis* provided crucial evidence leading to the dismantling of the criminal scheme.

The declaration requirement is requiring companies to ask new questions and gather new information about the plants and plant products they have been using for years. This can be a difficult and slow process, which is why APHIS has been working with industries to phase in

enforcement and providing resources to help companies understand and comply with the declaration requirement.²² In addition to setting up a website dedicated to Lacey Act compliance and resources, APHIS has issued guidance to address potential difficulties in identifying the genus and species of certain categories of plants and plant products. For example, the guidance includes a provision stating that items manufactured prior to the 2008 Amendments for which, despite the exercise of due care, it is impossible to identify certain information, the importer may identify the genus as “Special” and the species as “PreAmendment.”²³ APHIS has also stated that it does not require a declaration for most personal shipments or for musical instruments transported for performances.²⁴

To further ease compliance with the declaration requirement and improve enforcement capabilities, APHIS requires funding that will allow it to streamline the process so that submitting the declarations and accessing the information in real time is more efficient for industry and the agencies alike. Already with the limited funding APHIS received for the first time last year, it soon will be piloting a web-based interface designed to offer a viable alternative to submission of the 20% of declarations that are still being filed by paper means.

Fully funding APHIS, the Fish and Wildlife Service, and other key agencies so they can effectively implement and enforce the Lacey Act will ensure that it is less burdensome to companies and that it achieves the goals of curbing illegal trade as envisioned in the law.

Conclusion

The Lacey Act provides an important tool that helps enforcement officials fight crime, corruption, and the theft of plants and plant products for the benefit of American interests. I have advised companies in various industries on Lacey Act compliance, including clients in the paper industry, book publishing, and the cosmetic industry, and I am cognizant of the challenges faced by serious law abiding American companies that are trying to do the right thing. Still, the fact that compliance is challenging does not mean that we should ignore our supply chains. We owe it to our country, our legitimate businesses, and American consumers to get this right. We especially owe it to our children and grandchildren who will be facing worldwide shortages in natural resources and greater environmental degradation if we fail to invest the time and energy to make sure we protect our forests, fish and wildlife from the threat of illegal harvesting.

Thank you again for inviting me to appear today. I would be happy to answer any questions.

²² See Elinor Colbourn and Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, STO36 ALI-ABA 365, 373-77 (Apr. 26, 2012).

²³ APHIS, Lacey Act Plant and Plant Product Declaration Special Use Designations (Sept. 19, 2012), available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/lacey-act-SUD.pdf.

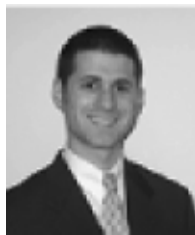
²⁴ APHIS, Lacey Act Amendment: Complete List of Questions and Answers (Feb. 16, 2012), available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf.

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DUE PROCESS

SUSTAINABILITY

Gibson Guitar, Forfeiture, and the Lacey Act Strike a Dissonant Chord



BY MARCUS ASNER, MAXWELL PRESTON, AND
KATHERINE GHILAIN

The Department of Justice (DOJ) announced on Aug. 6, 2012, that it had entered into a criminal enforcement agreement with Gibson Guitar Corp. regarding allegations that Gibson engaged in conduct that violates the Lacey Act, 16 U.S.C. § 3371, *et seq.*, and other civil and criminal laws.¹ This Agreement brought to a conclusion a controversial investigation and set of legal proceedings that have been ongoing for almost three years. As part of the Agreement, Gibson will pay

¹ Press Release, U.S. Dep't of Justice, Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations (Aug. 6, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html>. See also 152 DEN A-9, 8/8/12.

a penalty of \$300,000 and make a \$50,000 “community service payment” to the National Fish and Wildlife Foundation. Gibson also agreed to forfeit quantities of wood seized by the U.S. Fish & Wildlife Service (FWS), and to cooperate with government investigations and prosecutions concerning the Lacey Act. Further, Gibson will implement a rigorous “Lacey Act Compliance Program,” detailed in the Agreement, “to enhance [Gibson’s] current due care standards when purchasing wood products.”

The Gibson seizures and subsequent civil litigation resulted in a heated and, we believe, often regrettably uninformed, debate—in the media, on the Internet, and in Congress—regarding the proper scope of federal power and the adequacy of due process protections. The government’s authority to seize and forfeit wood under the Lacey Act has taken center stage in the con-

trover, and has led to proposed legislation that would alter significantly the Act's forfeiture provisions. While all statutes no doubt have room for improvement, we believe it is important for lawmakers and stakeholders to consider any proposed amendment with accurate facts at their fingertips. In this article, we seek to cut through the rhetoric and examine the claims of due process deprivation, both in the abstract and in the specific context of Gibson. Our hope is that, by setting straight the facts, we may be able to help further an informed debate.

I. The Gibson Guitar Controversy

The Gibson seizures arose out of a federal investigation into alleged violations of the Lacey Act, a law which prohibits, among other things, trade in plants and plant products that have been taken, transported, or sold in violation of law, including the law of other countries.² Over the past three years, federal officials seized guitars and wood products from Gibson on three occasions. The wood at issue allegedly had been obtained in violation of the laws of Madagascar and India.

Gibson hired a lobbying firm to argue its case in the press and to advocate for amending the Act.³ The ensuing media storm led some members of Congress to advocate pulling back on key provisions and to propose amendments designed to accomplish this goal. The Retailers and Entertainers Lacey Implementation and Enforcement Fairness (RELIEF) Act, H.R. 3210, for example, would, among other things, remove or limit some of the Act's provisions for plants and plant products imported before 2008, narrow the categories of foreign laws that trigger violations, and alter the Act's forfeiture provision to include an "innocent owner" defense.⁴ Proponents of the Lacey Act have been equally vociferous, emphasizing that the Act is designed to even the playing field for American businesses, root out criminal enterprises, and protect the world's natural resources, including the wood supply needed for American business and consumers.⁵ The forfeiture provision, for example, helps reduce trafficking in illegal re-

sources and encourages importers to inquire about their sources.

A common complaint about the enforcement action was that Gibson's wood was seized and held even though Gibson had not "had its day in court to defend itself,"⁶ and that Gibson was the victim of an abuse of governmental power.⁷ Henry Juskiewicz, Gibson's CEO, asserted:

[S]ome government bureaucrat—without due process—has declared that [the seized] raw material [was] illegal. Because they said it was illegal, they seized it, and their position is they will never release it under any circumstances.

We've attempted to litigate and the courts have generally supported the government's position, but we haven't been charged with anything. The government was so aggressive they put our business in jeopardy and they could have put us out of business without any type of hearing. . . . It goes against the Fifth Amendment. It goes beyond a wood issue or Lacey Act. . . . [I]t is rather frightening.⁸

In the Agreement, Gibson now for the first time states that it "accepts and acknowledges responsibility" for its conduct relating to the Madagascar wood. Gibson concedes that Madagascar sought to address illegal ebony logging with local laws prohibiting the harvest of ebony and the export of already harvested ebony except as "finished products." Gibson admits that one of its representatives knew about the relevant law and informed Gibson's management. Gibson nevertheless continued to order Malagasy ebony fingerboard blanks (rough, sawn, unfinished pieces of wood used to make fingerboards), without further investigation. Gibson now acknowledges that it "should have taken a more active role and exercised additional diligence with respect to documentation of legal forestry practices."

The government has backed off of its claims concerning the Indian wood, however, agreeing with Gibson that "certain questions and inconsistencies now exist regarding the tariff classification of ebony and rosewood fingerboard blanks pursuant to the Indian gov-

² For further information on the history and scope of the Lacey Act, see Marcus A. Asner et al., *The Lacey Act Gives Gibson Guitar the Blues*, 6 WHITE COLLAR CRIME REPORT (BNA) No. 25 (Dec. 16, 2011).

³ Anita Wadhvani, *Music Row Spent \$4 million on Lobbying in 3 Months*, The Tennessean (Nov. 20, 2011), <http://www.tennessean.com/article/20111120/BUSINESS/311200042/Music-Row-spent-4-million-lobbying-3-months>; Jonathan Meador, *Does Gibson Guitar's Playing the Victim Chord Stand Up to Scrutiny?*, Nashville Scene (Oct. 20, 2011), <http://www.nashvillescene.com/nashville/does-gibson-guitars-playing-the-victim-chord-stand-up-to-scrutiny/Content?oid=2656825> (discussing the Gibson controversy).

⁴ RELIEF Act, H.R. 3210, 112th Cong. (2012); Freedom from Over-Criminalization and Unjust Seizures Act of 2012, S. 2062, 112th Cong. (2012); Freedom from Over-Criminalization and Unjust Seizures Act of 2012, H.R. 4171, 112th Cong. (2012); see also Annie Johnson, *Gibson Pushing for Guitar Battle in Court*, Nashville Business Journal, June 1, 2012, <http://www.bizjournals.com/nashville/print-edition/2012/06/01/gibson-guitar-battle-in-court.html> (discussing legislative efforts).

⁵ See Letter from 350.org et al. to the United States House of Representatives (June 6, 2012) available at http://switchboard.nrdc.org/blogs/jschmidt/Don't_Weaken_Lacey_June_2012.pdf; Meador, *supra* note 3.

⁶ Tina Korbe, *Video: The Great Gibson Guitar Raid . . . Months later, still no charges*, Hot Air (Feb. 23, 2012, 3:40 PM), <http://hotair.com/archives/2012/02/23/video-the-great-gibson-guitar-raid-months-later-still-no-charges/>; see also John Roberts, *Gibson Guitar Case Drags On With No Sign of Criminal Charges*, FoxNews.com (Apr. 12, 2012), <http://www.foxnews.com/us/2012/04/12/gibson-guitar-case-drags-on-with-no-sign-criminal-charges/>.

⁷ See, e.g., Meador, *supra* note 3; Harvey Silverglate, *To the CEO of Gibson: It's Not Just a War Against Capitalism*, Forbes (July 30, 2012, 11:17 AM), <http://www.forbes.com/search?q=To+the+CEO+of+Gibson%3A+It%27s+Not+Just+a+War+Against+Capitalism> (arguing DOJ is engaged in a "war against all of civil society" by over-enforcing "incomprehensibly vague and broad criminal statutes").

⁸ Robert Archer, *Q&A: Henry Juskiewicz, CEO, Gibson Guitar*, CEPro, May 7, 2012, http://www.cepro.com/article/print/qa_henry_juskiewicz_ceo_gibson_guitar/. See generally Henry Juskiewicz, *Gibson's Fight Against Criminalizing Capitalism*, The Wall Street Journal, July 19, 2012, <http://online.wsj.com/article/SB10001424052702303830204577448351409946024.html> (arguing that the federal government is hurting the economy through "overcriminalization" of business activity).

ernment's Foreign Trade Policy." Gibson will file petitions for remission regarding the seized Indian wood, which DOJ states it does not oppose.

Despite the Agreement, the debate over the Lacey Act and the government's actions has continued.⁹ The future of efforts to amend the Lacey Act remains to be seen.

II. Procedures Protecting a Claimant's Rights

A short review of the law of seizures and forfeiture will help shed light on Gibson's claim that it was denied due process of law.

It is well-settled that the federal government may seize property upon a showing of probable cause that the property is illegal. However, the U.S. Constitution prohibits the government from permanently depriving persons of property without providing adequate procedural due process.¹⁰ A person seeking return of seized property may contest the seizure, and if the government intends to permanently keep seized property, it generally must follow specific forfeiture procedures.¹¹

A. Procedures Underlying Seizures

Validly issued search warrants authorize an executing officer to seize evidence, suspected contraband (*i.e.*, property that is illegal to possess), or other instrumentalities of a crime.¹² And a court may issue a warrant upon a showing a probable cause.¹³ "Pre-deprivation [due] process is not required[, however,] for the seizure of suspected contraband or the fruits of a crime. . . . To hold otherwise would require notice to the property owner and a hearing before a search warrant is executed."¹⁴

A person seeking the return of federally seized property may file a motion in federal court pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, which requires the court to "receive evidence on any factual issue necessary to decide the motion." Where property was seized as alleged contraband, one issue that the court must consider is whether the property was truly

⁹ *Gibson Comments on Department of Justice Settlement*, Aug. 6, 2012, <http://www2.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlement.aspx>; Geert De Lombaerde, *I Don't Retreat from Any of My Prior Commentary*, Nashville Post, Aug. 7, 2012, <http://nashvillepost.com/taxonomy/term/18031> (reactions to Agreement).

¹⁰ U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); *see, e.g., Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).

¹¹ *See, e.g., 18 U.S.C.A. § 983* (procedures governing civil forfeiture proceedings). *But see infra* Part II.B. (discussing *per se* contraband and summary forfeiture).

¹² *See Fed. R. Crim. P. 41(c)(2)* (authorizing seizure of contraband); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-301 (2008).

¹³ U.S. Const. amend. IV ("no Warrants shall issue, but upon probable cause"); Fed. R. Crim. P. 41(d) (procedure for obtaining warrant).

¹⁴ *Hentz v. Ceniga*, 2009 BL 49318, at *14-15 (D. Or. Mar. 3, 2009).

contraband.¹⁵ If the court grants a Rule 41(g) motion, the property is returned.¹⁶

B. Procedures Underlying Forfeiture

Even if a party fails to file a Rule 41(g) motion, the government generally must follow a formal forfeiture process to permanently keep seized property. Goods seized pursuant to the Lacey Act for allegedly failing to comply with foreign procedural requirements (*e.g.*, failing to obtain proper permits) fall into the category of "derivative contraband"—property that is illegal to possess due to the manner in which it was used, possessed, or acquired.¹⁷ Derivative contraband may not be forfeited without due process.¹⁸

On the other hand, property that is intrinsically illegal to possess (*e.g.*, illegal drugs or weapons)—"contraband *per se*"—can be forfeited summarily, without any procedural protections, "because one cannot have a property right in that which is not subject to legal possession."¹⁹ Contraband *per se* also includes (at least according to one court) goods seized pursuant to the Lacey Act where possession or exportation of such goods is banned by a foreign country.²⁰

1. Administrative and Judicial Forfeiture

The principal federal forfeiture procedures are set out in the Civil Asset Forfeiture Reform Act (CAFRA).²¹ Pursuant to CAFRA, a federal agency that seizes property typically must give notice, within sixty days, to the party from whom the property was seized.²² If the party fails to file a timely claim to the property, it is deemed administratively forfeited, and the government may keep it without further process.²³

If a party elects to file an administrative claim, the government must commence judicial forfeiture pro-

¹⁵ *Mendoza v. United States*, 2011 BL 335354, at *1 (S.D.N.Y. Apr. 4, 2011) (prevailing on Rule 41(g) motion requires demonstrating property is not contraband).

¹⁶ Fed. R. Crim. P. 41(g). The court may "impose reasonable conditions to protect access to the property and its use in later proceedings." *Id.*

¹⁷ *See United States v. 144, 774 Pounds of Blue King Crab*, 410 F.3d 1131, 1135 (9th Cir. 2005) (crabs seized pursuant to Lacey Act not inherently illegal to possess; were illegal because of failure to satisfy Russian reporting requirements); *cf. Conservation Force v. Salazar*, 677 F. Supp. 2d 1203, 1207 (N.D. Cal. 2009) (sport-hunted trophies are derivative contraband where imported without proper permits).

¹⁸ *See, e.g., Conservation Force*, 677 F. Supp. 2d. at 1210-11 (citations omitted).

¹⁹ *See Helton v. Hunt*, 330 F.3d 242, 247 (4th Cir. 2003) (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699-700 (1965) and quoting *Cooper v. City of Greenwood*, 904 F.2d 302, 305 (5th Cir.1990)); *see also Conservation Force*, 677 F. Supp. 2d. at 1210-11 ("[P]er se contraband may be summarily forfeited without any due process protections . . ."); *Lopez v. United States*, 2006 BL 102613, at *14 (D.D.C. Sept. 26, 2006) (illegal drugs); *United States v. Wilson*, 8 Fed. Appx. 593, 596 (8th Cir. 2001) (citation omitted) (heroin and sawed-off shotguns).

²⁰ *See United States v. Proceeds from Sale of Approximately 15, 538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 391 (S.D. Fla. 1993) (lobster tails intrinsically illegal because Turks and Caicos law prohibits possession of tails below certain weight).

²¹ *See 18 U.S.C.A. § 983*.

²² *See 18 U.S.C.A. § 983(a)(1)(A)(i)*.

²³ *See id.* § 983(a); 50 C.F.R. § 12.23 (describing administrative forfeiture by FWS but not amended since CAFRA).

ceedings.²⁴ During these proceedings, the party may present evidence and argue that the seized property should be returned pursuant to Supplemental Rule G(5).²⁵ To prevail, the government must demonstrate by a preponderance of evidence that the property is subject to forfeiture,²⁶ and that the government had probable cause to believe the property was subject to forfeiture when it commenced the proceedings.²⁷

2. Petitions for Remission

In addition to contesting forfeiture in court, a party also may appeal directly to the seizing agency for redress, seeking remission or mitigation of forfeiture. See 16 U.S.C. § 3374(b). Pursuant to regulations promulgated by the FWS, for example, a party may file with the Solicitor of the Department of the Interior a petition for remission or mitigation of administrative forfeiture. 50 C.F.R. § 12.24. If there are sufficient “mitigating circumstances,” the Solicitor may remit or mitigate the forfeiture upon reasonable terms and conditions, or may discontinue the administrative proceeding. *Id.* § 12.24(f). Petitions for remission or mitigation of judicial forfeiture also may be filed with the U.S. Attorney and decided by DOJ. See 28 C.F.R. §§ 9.4-9.5.

III. Seizure and Forfeiture of Wood and Wood Products from Gibson

On Nov. 17, 2009, FWS seized from a Gibson factory six guitars and ebony wood in various other forms.²⁸ The seized wood was allegedly harvested in and/or exported from Madagascar in violation of Malagasy law and, therefore, was seized as contraband under the Lacey Act.²⁹ We are unaware of Gibson taking any official action (*i.e.*, filing a Rule 41(g) motion or petition for remission) over the next nine months to seek return of the wood.

On Aug. 9, 2010, DOJ filed a complaint seeking judicial forfeiture of the seized wood (the “First Action”).³⁰ An extended period of legal wrangling followed. In accordance with the procedures of Supplemental Rule G(5), on Sept. 23, 2010, Gibson filed a claim contesting forfeiture.³¹ Gibson then filed a motion to dismiss the complaint on the ground that the wood was legal.³² The government opposed Gibson’s motion, arguing that

Gibson should be precluded from seeking dismissal on that basis until legality was determined.³³

On June 4, 2011, the government moved to strike Gibson’s claim, arguing that Gibson lacked standing to make the claim because the seized wood was contraband, and requested a hearing to establish Gibson’s lack of standing.³⁴ Gibson responded that it did have standing to contest the forfeiture because it had demonstrated a colorable interest in wood that might be legal. It maintained that the government had the burden of proving illegality, because the wood was derivative contraband rather than contraband *per se*.³⁵

Gibson meanwhile sought discovery, which prompted the government to seek to stay the First Action because “allow[ing] civil discovery in this case, at this time, [would] adversely affect the investigation and the prosecution of a related criminal investigation.”³⁶ CAFRA expressly permits DOJ to request a stay in this situation.³⁷ The parties then spent a few months trying unsuccessfully to resolve the dispute.³⁸

The dispute grew more complicated when, around July 29, 2011, Customs and Border Protection seized 25 bundles of Indian ebony en route to Gibson.³⁹ These bundles allegedly were exported from India in violation of Indian law, and were falsely labeled so as to appear legal. This seizure led to another judicial forfeiture action (the “Second Action”),⁴⁰ plus another search and a much-publicized third seizure on Aug. 24, 2011.⁴¹

On Sept. 28, 2011, the court denied all of the parties’ outstanding motions in the First Action, in light of an unspecified stay, and administratively closed the case.⁴² Gibson then filed a motion for reconsideration and to reopen the case on the ground that no stay actually was issued.⁴³ Meanwhile, the Second Action was stayed, pending a resolution in the First Action.⁴⁴ After a hearing in May 2012, the court granted Gibson’s motion in

³³ Plaintiff’s Preliminary Response to Claimant Gibson Guitar Corp.’s Motion to Dismiss, *Ebony Wood* (Nov. 18, 2010); Plaintiff’s Supplemental Response to Claimant Gibson Guitar Corp.’s Motion to Dismiss, *Ebony Wood*, (June 8, 2011).

³⁴ Motion to Strike Claims for Lack of Standing after a Hearing, *Ebony Wood* (June 4, 2011). The U.S. filed a supplemental response to Gibson’s motion to dismiss on June 6, 2011. Plaintiff’s Supplemental Response to Claimant Gibson Guitar Corp.’s Motion to Dismiss, *Ebony Wood* (June 6, 2011).

³⁵ Claimant Gibson Guitar Corp.’s Response to Plaintiff’s Motion to Strike, *Ebony Wood* (July 15, 2011).

³⁶ Memorandum of Law in Support of Motion to Stay, *Ebony Wood* (July 25, 2011).

³⁷ 18 U.S.C. § 981(g)(1).

³⁸ Renewed Motion to Stay, *Ebony Wood* (Sept. 20, 2011).

³⁹ Affidavit in Support of Application for Civil Forfeiture, *United States v. 25 Bundles of Indian Ebony Wood*, No. 3:11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

⁴⁰ Verified Complaint in Rem, *United States v. 25 Bundles of Indian Ebony Wood*, No. 3:11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

⁴¹ Affidavit in Support of Search Warrant # 11-MJ-1067 A, B, C, D, available at <http://www.motherjones.com/files/gibsonaffidavit.pdf> (last visited Aug. 3, 2012); Kate Sheppard, *Gibson’s Wood Problem: Is Your Guitar Solo Shredding the Rainforest?*, MOTHER JONES (Sept. 26, 2011, 2:30 AM), <http://www.motherjones.com/environment/2011/09/tea-party-gibson-guitar-wood> (discussing seizures and resultant outrage).

⁴² Order, *Ebony Wood* (Sept. 28, 2011).

⁴³ Claimant Gibson Guitar Corp.’s Motion to Reconsider and to Reopen Case, *Ebony Wood* (Oct. 7, 2011).

⁴⁴ Order, *United States v. 25 Bundles of Indian Ebony Wood*, No. 3:11-cv-00913 (M.D. Tenn. Jan. 26, 2012).

²⁴ See 18 U.S.C.A. § 983(a)(3).

²⁵ See 18 U.S.C.A. § 983(a)(4)(A) (contemplating claims pursuant to Supplemental Rules); Fed. R. Civ. P. Supplemental Rule G(5).

²⁶ See 18 U.S.C.A. § 983(b).

²⁷ See 19 U.S.C.A. § 1615; *United States v. \$493,850.00 in U.S. Currency*, 518 F.3d 1159, 1169 (9th Cir. 2008) (Section 1615 requires probable cause under CAFRA).

²⁸ Verified Claim Contesting Forfeiture, *United States v. Ebony Wood in Various Forms*, No. 3:10-cv-00747 (M.D. Tenn. Sept. 23, 2010) [hereinafter *Ebony Wood*]; Motion to Strike Claims for Lack of Standing after a Hearing, *Ebony Wood* (June 4, 2011).

²⁹ The seized wood was “unfinished” ebony from Madagascar, which prohibits logging ebony and exporting “unfinished” ebony.

³⁰ Verified Complaint in Rem, *Ebony Wood* (Aug. 9, 2010).

³¹ Verified Claim Contesting Forfeiture, *Ebony Wood* (Sept. 23, 2010).

³² Motion to Dismiss, *Ebony Wood* (Oct. 14, 2010).

the First Action for reconsideration and to reopen the case, but declined to make any decisions on the merits.⁴⁵

All of this wrangling culminated in the Criminal Enforcement Agreement announced on Aug. 6.⁴⁶ As noted above, Gibson now effectively concedes that the Madagascar wood was illegal and may be forfeited. But Gibson prevailed with respect to the Indian wood; the government effectively agreed that the Indian government's position on the law was uncertain, and agreed to return the Indian wood after Gibson filed a proper petition for remission and mitigation.

IV. Conclusion

Cries that Gibson was denied due process have been invoked to gather support for amending the Lacey Act.⁴⁷ But closer scrutiny belies these claims. Despite the sometimes heated rhetoric and efforts to litigate this dispute in the press, Gibson in fact had available multiple avenues to contest forfeiture and seek the return of the seized wood. Some of Gibson's arguments prevailed; as noted, the government agreed to return the Indian wood following a petition for remission and mitigation. Gibson, represented by able counsel, elected to follow certain of these procedures and to forego others. Contrary to the claim that Gibson never "had its day in

court," it actually engaged in litigation and negotiations with DOJ for nearly two years, a process that resulted in what appears to be a fairly measured Criminal Enforcement Agreement.

There may well be ways to improve the Lacey Act, but a reasoned debate about any amendments should be guided by an understanding of the facts and the legal landscape. Any movement to amend the Lacey Act should consider the record of the Gibson legal proceedings and the resulting Criminal Enforcement Agreement. As detailed above, that record suggests that the procedures governing forfeiture under the Lacey Act are fairly well-tailored to achieve the Act's goals while simultaneously protecting due process and property rights.

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This article does not represent the opinions of Bloomberg BNA, which welcomes other points of view.

⁴⁵ Order, *Ebony Wood* (May 15, 2012).

⁴⁶ See *supra* note 1.

⁴⁷ See *supra* note 4.



With Gibson Settlement, 'Due Care' is Slightly More Clear

By: Marcus Asner, Samuel Witten & Katherine Ghilain
October/November 2012

The Criminal Enforcement Agreement that Gibson Guitar signed with the Department of Justice (DOJ) brings some clarity to the Lacey Act's mandate that companies ...

While not a binding legal precedent for other cases, the compliance program included in the Criminal Enforcement Agreement that Gibson Guitar recently signed with the Department of Justice (DOJ) brings welcome clarity to the Lacey Act's mandate that companies exercise "due care" when identifying the source of a wood product.

The Criminal Enforcement Agreement resolved a nearly three-year investigation and set of legal proceedings concerning wood that was allegedly illegally harvested and/or exported from Madagascar and India. Gibson promised to pay a \$300,000 penalty and a \$50,000 "community service payment," cooperate in Lacey Act investigations and prosecutions, and drop forfeiture challenges with respect to some of the wood previously seized by DOJ.

Perhaps most significant for the many industries directly affected by the Lacey Act—including wood flooring importers, manufacturers, distributors and installers—was the rigorous Lacey Act Compliance Program that Gibson was required to implement as part of the agreement. The compliance program provides some welcome clarity on the contours of the Act's much-discussed "due care" requirement.

The Lacey Act requires that companies exercise "due care" in identifying the source of their goods, but does not spell out what has to be done to meet this standard. According to DOJ, "due care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances," and it "is applied differently to different categories of persons with varying degrees of knowledge and responsibility." The standard is generally high in a commercial context. With few precedents for guidance, both regulators and affected industries naturally will look to the Gibson outcome for guidance and to supplement industry customs and standards.

Gibson's Program

As explained in section 2.3 of the Gibson Compliance Program, the Lacey Act due care requirement is designed to "minimize the risk of purchasing plant products that were harvested or traded illegally." To comply with this expectation, the program requires Gibson to follow these steps before buying any wood or wood product:

1. Work with suppliers to ensure they can implement Gibson's policies, which include procuring wood from either recycled sources or forests where legal harvest and chain of custody can be verified, and obtaining copies of all relevant import and export documentation and business or export licenses;
2. Ask questions to gather information about suppliers and the source of the wood and wood products to determine whether the products meet Gibson's requirements for known/legal wood products;

3. "... Conduct independent research and exercise care before making a purchase," which may include everything from Internet research to consulting with U.S. or foreign experts or authorities and making site visits;
4. Request sample documentation from suppliers to evaluate Lacey Act compliance and document validity;
5. Make a determination prior to making a purchase based on all of the information collected;
6. Maintain records of these efforts; and
7. Decline to pursue the purchase if there is any uncertainty of legality.

Section 3 of the Compliance Program sets forth Gibson's policies with respect to wood procurement, verification of foreign law and certifications/licenses, risk determinations, supply chain audits, employee training, record retention, and internal disciplinary actions for non-compliance.

Industry Implications

Gibson's Lacey Act Compliance Program is binding only on Gibson and it is not meant as an official DOJ pronouncement of what "due care" is supposed to mean in other cases. That said, in the absence of other notable precedents, Gibson's program, as a practical matter, helps articulate the industry standard for due care.

Companies engaged in the trade of wood should see the compliance program as a useful guide that may well help protect them from liability. There is no "silver bullet" solution to meeting the due care standard. But companies nevertheless would be well served to implement compliance programs reflecting procedures set out in Gibson's program, tailored to their own circumstances and supply chains. Adopting an appropriately adapted Gibson-style program will give a company a decent argument that it exercised "due care" and therefore complied with the requirements of the law, if it ever unwittingly ends up with some illegal wood and the feds come knocking. DOJ tries to take a consistent approach to enforcement, so the Gibson agreement, and particularly the compliance program, has practical precedential value, even if it is not binding as law on other companies and industries.

International attention on illegal harvesting and environmental commerce is likely to increase. That, in turn, will heighten companies' exposure to civil and criminal enforcement actions under the Lacey Act. Wood products companies would be wise to review their policies and procedures and ensure that they have in place comprehensive programs like Gibson's. This will help insulate them from Lacey Act liability and help further the sustainability of the natural resources that are critical to their operations.