

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2018

5
6 (Argued: October 29, 2018 Decided: September 17, 2019)

7
8 Docket No. 17-2868, 17-2869
9

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12
13 UNITED STATES OF AMERICA,

14
15 *Appellee,*

16
17 v.

18
19 DORON FELDMAN,

20
21 *Defendant-Appellant.*
22

23
24 Before:

25
26 WALKER, LEVAL, and DRONEY, *Circuit Judges.*
27

28 Appeal from the denial by the United States District Court for the
29 Western District of New York (Frank P. Geraci, J.), of defendant Doron
30 Feldman's motion to stay and vacate a writ of execution on his retirement
31 account. Held, the district court's reasons for denying Feldman's motions
32 were erroneous. The order of the district court is VACATED and the case
33 REMANDED for factfinding, and reconsideration.
34

35 TIFFANY H. LEE, *for* James P. Kennedy,
36 United States Attorney for the Western
37 District of New York, United States
38 Attorney's Office, Rochester, NY,
39

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2 RANDALL ANDREOZZI, Clarence, NY, *for*
3 *Defendant-Appellant Doron Feldman.*
4

5 LEVAL, *Circuit Judge:*

6 Defendant Doron Feldman appeals from the September 5, 2017 order of
7 the United States District Court for the Western District of New York (Frank
8 P. Geraci, J.), reaffirming an earlier denial of Feldman's motions to stay and
9 vacate a writ of execution on Feldman's retirement account, known as the
10 Great Lakes Account (which had a balance of approximately \$1.131 million),¹
11 and seeking discovery in support of those motions. We conclude that the
12 district court's reasons for its rulings were erroneous. We therefore vacate the
13 court's orders and remand for factfinding and reconsideration of Feldman's
14 motions.

15 **BACKGROUND**

16 This appeal raises the question whether, by reason of undertakings and
17 representations made by the government to the defendant in the course of
18 plea negotiations for disposition of a criminal charge, funds forfeited by the

¹ In litigation documents, this account has been variously termed the "Great Lakes Anesthesiology Associates PC Retirement Plan," "Great Lakes Anesthesiology," and one of the "Sentinel Accounts." We refer to it as "the Great Lakes Account."

1 defendant pursuant to his plea of guilty should be credited to his obligation
2 under his sentence to pay restitution to the victims of his offense.²

3 On June 24, 2014, Feldman pleaded guilty to a one-count information
4 which charged him with having conspired with a fellow doctor, identified as
5 “Doctor 1,” and Debra Bulter, the Program Administrator of the Department
6 of Anesthesiology of Rochester University, to defraud the University.

7 Feldman’s plea was entered pursuant to a plea agreement he made with the
8 Office of the United States Attorney for the Western District of New York

9 (“the Office”). Feldman asserts that, in the negotiations that resulted in the

10 plea agreement, the Assistant United States Attorney (“AUSA”) in charge of

11 the prosecution, Richard Resnick, undertook to recommend to the responsible

12 decision-makers in the Department of Justice (“DOJ”) that, through a practice

13 known as “restoration,” the proceeds of Feldman’s forfeiture would be paid

14 to the victims of his crime and would thus reduce the amount of the

15 restitution obligation imposed on him. Feldman further asserts that Resnick,

16 while making clear that DOJ had absolute discretion to reject his

17 recommendation of restoration, nonetheless expressed optimism that it

² Feldman has not sought to withdraw his plea.

1 would accept the recommendation. Feldman also asserts that, during those
2 plea negotiations, the AUSA was aware of Feldman's Great Lakes Account
3 and its \$1,131,000 balance.

4 The government has not denied Feldman's factual assertions. (Indeed,
5 it has expressly confirmed that Resnick undertook to make the restoration
6 recommendation to DOJ.) The government argues, however, that those facts
7 are irrelevant to the outcome of this appeal for reasons explained below.

8 Feldman's plea agreement provided that he would plead guilty, would
9 forfeit the proceeds of three specified accounts (not including the Great Lakes
10 Account), which amounted in the aggregate to approximately \$1 million, and
11 would pay restitution to the University in the amount of \$1,460,000, the entire
12 amount of the loss the University sustained.

13 The written plea agreement, prepared by the government and signed
14 by the defendant, addressed the question of restoration in somewhat different
15 terms from those attributed by Feldman to AUSA Resnick. It stated that "the
16 government *may, in its discretion, recommend* to the Attorney General" that
17 funds forfeited by Feldman be applied, through restoration, to his restitution
18 obligation:

1 [I]t is understood by the defendant that the
2 government may, in its discretion, recommend to the
3 Attorney General that any of the forfeited proceeds be
4 remitted or restored to eligible victims of the offense,
5 pursuant to 19 U.S.C. § 981(e), 28 C.F.R. Pt. 9, and
6 other applicable law, it being understood that the
7 United [States]Attorney's Office has authority only to
8 recommend such relief and that the final decision of
9 whether to grant relief rests with the Department of
10 Justice, which will make its decision in accordance
11 with applicable law.
12

13 App'x at 34 (emphasis added). The agreement did not state that the U.S.
14 Attorney *would recommend* restoration; nor did it mention AUSA Resnick's
15 representation of optimism that the recommendation would be accepted. A
16 second pertinent provision, a merger clause, stated:

17 This plea agreement represents the total agreement
18 between the defendant, DORON FELDMAN, and
19 the government. There are no promises made by
20 anyone other than those contained in this agreement.
21 This agreement supersedes any other prior
22 agreements, written or oral, entered into between the
23 government and the defendant.
24

25 App'x at 35.

26 The plea agreement was accepted by the district court, and Feldman
27 pleaded guilty on June 24, 2014. On July 1, 2014, the district court entered a

1 preliminary order of forfeiture, and on October 27, 2014, a final order of
2 forfeiture.

3 On several occasions after the plea agreement was signed and the plea
4 and the final order of forfeiture were entered, the Office discussed with
5 Feldman its intention to recommend restoration to the Asset Forfeiture and
6 Money Laundering Section of the Criminal Division at DOJ (“AFMLS”), on
7 each occasion making clear that the ultimate decision rested with AFMLS.³

8 In an email to Feldman’s attorney on January 21, 2015, AUSA Resnick
9 wrote:

10 The amount we have seized [pursuant to the
11 forfeiture ordered by the court] is approximately one
12 million dollars. *I was told that after sentencing, we will*
13 *submit a formal restoration request package to the money*
14 *laundering section of DOJ and they will decide how much*
15 *can go toward restitution. We will ask for all of it and*
16 *hopefully they will approve.* But we will not know the
17 balance of the restitution amount until they decide,
18 which will be after sentencing. The balance should
19 hopefully be around \$460,000. If the restitution is paid
20 after sentencing, then it needs to be paid to the clerk's
21 office. If paid prior to sentencing, it will likely go
22 straight to the [insurer of the victim university].
23

³ This unit was later renamed the “Money Laundering and Asset Recovery Section.”
See DEPARTMENT OF JUSTICE, EQUITABLE SHARING WIRE (Nov. 16, 2017),
<https://www.justice.gov/criminal-mlars/file/1018236/download>.

1 App'x at 244 (emphasis added).

2 In another email to Feldman's attorney, dated January 28, 2015, Resnick
3 said, "I have been advised that while we will request that all of the seized
4 funds be used for restitution, there is no guarantee that DOJ in DC will
5 approve our request. We will make the request after sentencing." App'x at
6 243.

7 Feldman pleaded guilty to a separate tax charge on February 18, 2015,
8 pursuant to another plea agreement. Sentencing on both the tax charge and
9 the conspiracy charge took place the same day. Feldman was sentenced to
10 twenty-four months' imprisonment and ordered to pay the restitution
11 specified above (as well as restitution related to his tax offense). The ultimate
12 version of Feldman's presentence report ("PSR"), dated February 11, 2015,
13 which was presented to the court at sentencing, listed among Feldman's
14 assets the \$1.131 million Great Lakes retirement account at issue in this case.
15 The previous three versions of the PSR (dated December 24, 2014; January 12,
16 2015; and January 26, 2015) also listed the Great Lakes Account among
17 Feldman's assets.

1 At sentencing, AUSA Resnick “comment[ed] on the restitution issue” in
2 the following exchange with the district judge:

3 MR. RESNICK: The restitution amount of \$1.46
4 million is to be ordered. The Government – I just
5 wanted to clarify. The Government had seized
6 [though the forfeiture] approximately a million
7 dollars, a little less than a million dollars of Dr.
8 Feldman's assets when this case first started and we
9 were investigating it. Mr. Feldman has recently paid
10 the [victim university] about \$467,000. *We anticipate*
11 *applying the forfeited funds to the restitution amount, if*
12 *we get the approval from DOJ down in Washington.* But,
13 technically, the restitution has not been paid yet in
14 full. We're hoping that we can get that million
15 dollars in seized funds, you know, applied towards
16 the restitution amount, but we won't know that for
17 probably a month or two.

18 THE COURT: That was always the expectation?

19 MR. RESNICK: *Yes, that's the expectation. But it has*
20 *been provided to counsel many times that there's no*
21 *guarantee, you know, our hands are tied and we have to*
22 *do what DOJ provides. But we are going to ask that 100%*
23 *of it be applied towards the restitution amount.*

24
25 App'x at 124–5 (emphasis added).

26 In a letter to AFMLS dated March 4, 2015, another AUSA acting on
27 behalf of the Office, Grace M. Carducci, made the recommendation
28 envisioned in the plea agreement – that Feldman's forfeited funds be applied
29 to his restitution obligation. It appears that, under the Office's division of

1 responsibilities, AUSA Resnick exercised control over Feldman's prosecution,
2 while AUSA Carducci exercised control over forfeiture matters and AUSA
3 Kevin Robinson, assigned to the Office's Financial Litigation Unit, exercised
4 control over restitution. Carducci's March 4 letter to DOJ expressed the
5 Office's "request that the Chief of AFMLS exercise his/her discretionary
6 authority to authorize the restoration of forfeited property to compensate the
7 victims in the referenced case," and purported to enumerate the "assets
8 owned or controlled" by Feldman. App'x at 430, 432-33. Her enumeration of
9 Feldman's assets, however, was incomplete and did not include the Great
10 Lakes Account.

11 On August 7, 2015, Carducci, having realized the omission, sent
12 another letter to AFMLS. That letter began as follows:

13 Please allow this letter to serve as an addendum to the
14 restoration request that was submitted by my office
15 on March 5, 2015. *We believe the below addendum is vital*
16 *to the determination of our request, as the additional assets*
17 *may provide recourse reasonably available to other assets*
18 *from which the victim may obtain compensation for its loss*
19 *in this matter. ... We have become aware of additional*
20 *assets owned or controlled by the defendant, and*
21 *therefore, supplement ... with the information*
22 *italicized below.*
23

1 App'x at 434 (emphasis added). The letter then listed four Feldman accounts
2 not listed in her prior letter, including the Great Lakes Account. Feldman
3 points out that this letter was inaccurate in its contention that the Office was
4 previously unaware of the Great Lakes Account. He argues that the new letter
5 effectively constituted a revocation of the Office's request for restoration, in
6 stating that the "addendum [listing additional Feldman assets] is vital to the
7 determination of [the] request as the additional assets may provide recourse
8 reasonably available to other assets." App'x at 434.

9 On November 23, 2015, the Financial Litigation Unit moved for a writ
10 of execution on:

11 any and all account(s) in the name of defendant,
12 Doron Feldman . . . , over which the defendant has
13 signatory authority, either directly or as custodian,
14 authorized person, nominee, agent, power of
15 attorney, or through letters of direction, including
16 but not limited to deferred profit sharing plans and
17 individual retirement account(s) held with Sentinel
18 Benefits & Financial Group.
19

20 App'x at 143–44. The district court ordered execution on December 1, and the
21 U.S. Marshal shortly thereafter levied upon the Great Lakes Account in the
22 amount of \$1,150,475.98. On January 11, 2016, Feldman moved to stay the

1 execution and levy on the Great Lakes Account. A status conference was then
2 set for March 16, 2016.

3 Shortly before the conference was set to occur, on March 14, 2016,
4 AFMLS responded to AUSA Carducci's letters. AFMLS denied the request for
5 restoration. It explained:

6 Doron Feldman is independently capable of
7 satisfying the restitution order through bank and
8 investment accounts *discovered after the sentencing of*
9 *Feldman*. According to *Asset Forfeiture Policy Manual*
10 *(2013), Chap. 12, Sec. I.B.*, a request for restoration
11 should be denied if the victims have recourse
12 reasonably available to other assets from which to
13 obtain compensation for their losses.

14
15 App'x at 436 (emphasis added).

16 At the March 16, 2016 conference, Feldman's counsel told the court that
17 the Office "was aware of the [Great Lakes] pension account," but that AUSA
18 Robinson had informed him that "at the time the restoration request was
19 made to AFMLS [in March 2015] . . . , [AUSA Carducci] . . . wasn't aware that
20 the defendant had this pension account . . . with th[e] \$1.1 million valuation[,]
21 [a]nd it was not until [Robinson's] unit began their discovery work on the
22 collection that they discovered the existence of the account." App'x at 159. (If
23 AUSA Robinson made that representation to Feldman's counsel and intended

1 to convey that the Office had been unaware of the Great Lakes Account until
2 Robinson's unit began to investigate subsequent to March 2015, this would
3 unquestionably have been incorrect, as the Great Lakes Account was
4 referenced in the presentence report at least as early as December 2014.
5 Furthermore, the government has not denied Feldman's assertion that the
6 Office was aware of the Great Lakes account during the plea negotiations.)

7 The government explained to the district court that different attorneys
8 had worked on the prosecution, the forfeiture, and the restitution, and that
9 while AUSA Resnick, who prosecuted the criminal case, may (or may not)
10 have been aware of the Great Lakes Account, AUSA Carducci, who handled
11 the forfeiture, was not aware of it at the time she wrote the March 2015 letter
12 to AFMLS recommending restoration. Carducci stated to the court:

13 Rick Resnick did represent with plea
14 negotiations that he would make this restoration
15 request, which I indicated I would do based on the
16 information that I had. Sentencing went forward, and
17 I made th[e] [March 2015] request to AFMLS because
18 I did not know of this additional asset that was in the
19 presentence investigation report. Once I became
20 privy to that information, I am under an obligation to
21 make AFMLS aware of that. So once the PSR was
22 provided to me, I forwarded that information to
23 AFMLS. Once AFMLS found out about that
24 additional account, they denied that request.

1 So Rick Resnick did not hand me that PSR, you
2 know, directly after sentencing. But then I did become
3 aware of it, and as soon as I became aware of that, I
4 passed that information onto AFMLS. . . . Rick
5 Resnick doesn't know what AFMLS requires. I do,
6 that's my job. And to make that restoration request,
7 I'm under a duty to represent to them that the
8 defendant does not have any other assets with which
9 to pay restitution. As soon as I found out about that
10 account from the PSR—and I wasn't at sentencing and
11 didn't prepare for it, that's why I didn't know about
12 it—I wrote [the May 2015] letter to AFMLS and made
13 them aware of that.
14

15 App'x at 170.

16 Feldman's lawyer then asked why Carducci's division had commenced
17 collection actions on the Great Lakes Account before receiving a response
18 from AFMLS. App'x at 173. AUSA Robinson responded that his division, "the
19 Financial Litigation Unit, a totally different unit," was responsible for the
20 restitution process and the writ of execution. *Id.* At the time it attempted to
21 execute the writ, Robinson said, the Financial Litigation Unit "was not aware
22 of . . . a restoration request." *Id.* He explained: "[O]ur unit was simply
23 executing on the judgment issued by the Court which indicated that the
24 defendant owed restitution[,] [a]nd it was only after we made the—we filed
25 the writ that we've become aware of the restoration request." *Id.*

Feldman’s lawyer (understandably) commented, “Something doesn’t make sense here.” *Id.*⁴

On August 22, 2016, Feldman moved for discovery. On July 17, 2017, the district court denied Feldman's motion to vacate the writ of execution on the Great Lakes Account, as well as his motion for discovery. Feldman then moved for reconsideration, and on September 5, 2017, the district court reaffirmed its July order and denied Feldman's motion to vacate the writ of execution. Feldman filed this appeal.

DISCUSSION

Feldman contends, inter alia, that the government violated its obligations as part of the plea negotiations in at least two ways. First, after AUSA Resnick induced him to plead guilty and consent to forfeiture and restitution by undertaking that the Office would recommend restoration, AUSA Carducci, although initially making the recommendation of restoration, effectively withdrew that recommendation by her letter to AFMLS of August 7, 2015 , which implied that restoration would be inappropriate in view of Feldman's Great Lakes Account, enabling him to pay

⁴ AUSA Carducci responded, “It does make sense, sir.” *Id.*

1 restitution over and above the forfeiture. Second, Feldman contends that the
2 Office made a false or misleading representation when AUSA Resnick
3 expressed optimism that the Office's recommendation of restoration would be
4 accepted by DOJ. If, as AFMLS advised in its March 4, 2016 letter denying
5 restoration, DOJ's governing policy was to deny restoration "if the victims
6 have recourse reasonably available to other assets from which to obtain
7 compensation for their losses," App'x at 436, then the availability of recourse
8 to Feldman's Great Lakes Account effectively foreclosed DOJ's approval of
9 the restoration request, so that the expression of optimism was without
10 reasonable basis and arguably misleading.

11 The government's response to these arguments has not been to deny
12 the factual assertions on which they are based. Indeed, the government has
13 expressly confirmed that Resnick represented to Feldman that he would
14 recommend restoration. Its position has been rather that Feldman's
15 arguments are irrelevant because (i) the Office's undertaking to recommend
16 restoration was fulfilled by AUSA Carducci's March 4, 2015 letter
17 recommending restoration, (ii) the recommendation was never withdrawn,
18 and (iii) the merger clause incorporated into the plea agreement forecloses

1 Feldman’s reliance on Resnick’s oral representation of optimism, which is not
2 expressed in the written document.

3 The district court essentially adopted the government’s arguments as
4 its basis for denying Feldman’s motions for relief. While noting the
5 government’s acknowledgment of having represented to Feldman during the
6 plea negotiations that it would request restoration, the court found that
7 Feldman was not entitled to rely on these representations because “no such
8 promise was included in the written plea agreement and such a promise
9 would be incompatible with the plain language of the agreement that the
10 parties actually entered into.” App’x at 423–24. The court further found that
11 even if the Office *had* promised to recommend restoration, it fulfilled any such
12 promise by sending the March 5, 2015 letter to AFMLS, notwithstanding
13 Carducci’s August 7, 2015 addendum.

14 We do not believe this reasoning appropriately resolved the issues. To
15 say that Carducci’s March 5 letter made a restoration request, in accordance
16 with Resnick’s earlier commitment to do so, and that Carducci’s subsequent
17 letter “did not rescind” the request, is overly formalistic. If the fair inference
18 of Carducci’s August 7 follow-up letter was to communicate that, because of

1 newly acquired information, the Office no longer believed that restoration
2 was appropriate, the mere fact that the letter did not explicitly state that the
3 earlier recommendation was withdrawn would not bar the court from
4 reading the letter in accordance with its implication. Carducci's August 7
5 letter went considerably further than merely providing pertinent information.
6 It expressed the view that the information now being provided to AFMLS
7 (about the Great Lakes account) "is vital to [AFMLS's] determination." App'x
8 at 434. The mere fact that Carducci's August 7 letter did not characterize itself
9 as "rescind[ing]" the restoration request does not necessarily mean that it did
10 not effectively do exactly that. It may also be pertinent that Carducci's second
11 letter was arguably misleading in telling AFMLS that "[w]e [i.e., the Office]
12 have become aware of additional assets," App'x at 434, when, in fact, the
13 Office had been aware of the Great Lakes account long before Carducci wrote
14 her letter recommending restoration.

15 Furthermore, while the district court's analysis might have been
16 compelling with respect to a contract arising out of commercial negotiations
17 among private parties, we believe the court did not correctly apply the
18 standards that govern the interpretation of plea agreements with the

1 government. We have long recognized that plea agreements are significantly
2 different from commercial contracts. *See Innes v. Dalsheim*, 864 F.2d 974, 978
3 (2d Cir. 1988) (“Comparing a criminal defendant with a merchant in the
4 marketplace is an inappropriate analogy that we have rejected.”); *see also U.S.*
5 *v. Mozer*, 828 F.Supp. 208, 215 (S.D.N.Y. 1993) (“[A] prosecutor entering into a
6 plea bargain agreement is not simply a party to a contract. The [g]overnment
7 is required to observe high standards of integrity and honorable conduct, and
8 the supervisory power of the court is designed to insure that such standards
9 are observed.”). Our review of a plea agreement is not limited to its four
10 corners, *United States v. Graves*, 374 F.3d 80, 84 (2d. Cir. 2004), and we construe
11 them “strictly against the government.” *United States v. Vaval*, 404 F.3d 144,
12 152 (2d Cir. 2004). Government conduct in negotiating plea agreements must
13 “comport[] with the highest standard of fairness.” *Id.* Because such
14 agreements involve waivers of fundamental constitutional rights,
15 “prosecutors are held to meticulous standards of performance.” *Id.* at 153.
16 “[W]hen a plea rests in any significant degree on a promise or agreement of
17 the prosecutor, so that it can be said to be part of the inducement or
18 consideration, such promise must be fulfilled.” *Santobello v. New York*, 404 U.S.

1 257, 262 (1971); *see also United States v. Carbone*, 739 F.2d 45, 46 (2d Cir. 1984)

2 (“[O]nce a plea actually is entered, and was induced by a prosecutor’s
3 promise . . . that promise must be fulfilled.”).

4 “The prosecutor’s office is an entity and as such it is the spokesman for
5 the Government. A promise made by one attorney must be attributed . . . to
6 the Government.” *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citing
7 Restatement (Second) of Agency § 272). The Office, like all prosecutor’s
8 offices, carried the burden of “insur[ing] communication of all relevant
9 information on each case to every lawyer who deals with it.” *Id.*

10 Our relaxed approach to the parol evidence rule in this context applies
11 even when a plea agreement contains a merger clause. *Graves*, 374 F.3d at 84
12 (distinguishing between the “usual principles of contract law” for
13 interpreting an agreement with a merger clause and those applicable for
14 interpreting plea agreements with a merger clause). In unusual
15 circumstances, including, but not necessarily limited to, the failure of the
16 government to negotiate or act in good faith, the merger clause is not ironclad
17 and we consider the government’s oral and written statements in our
18 interpretive exercise. *Cf. In re Altro*, 180 F.3d 372, 375, 376 (2d Cir. 1999)

1 (refusing to interpret a plea agreement with a merger clause in accordance
2 with a defendant's mere "purported implicit understanding" in the absence
3 of a representation by the defendant that the government had made any
4 statement to induce his understanding).

5 In part because the district court neither allowed discovery nor
6 conducted an evidentiary hearing, the record does not furnish a basis for a
7 complete understanding of what happened in the course of the plea
8 negotiations and thereafter. Numerous potentially significant questions
9 remain unanswered. Feldman's evidence is sufficient in these circumstances
10 to require of the district court that it take evidence and make findings to
11 determine such questions as whether the merger clause should be strictly
12 enforced in accordance with its terms, whether the Office's undertaking to
13 recommend restoration was fulfilled, whether its expression of optimism that
14 its recommendation of restoration would be accepted was misleading, and
15 whether the defendant is entitled to any relief. We do not know exactly what
16 Resnick said to Feldman concerning the Office's recommendation, what
17 information the Office had requested about Feldman's finances when Resnick
18 said whatever he said, and what information Feldman had furnished at the

1 time Resnick spoke of the possibility of restoration of the forfeiture. These
2 issues may have a bearing on whether the merger clause should be strictly
3 enforced and, if not, whether Feldman is entitled to any relief. We intimate no
4 views as to the answers to these questions.

5 Nor do we imply in any way that the government is necessarily
6 permanently bound by everything it says in the course of plea negotiations. If,
7 prior to the conclusion of the agreement, the government wishes to retract
8 promises and representations earlier made, it is free to do so. However,
9 unlike civil commercial negotiations among private persons, the government
10 may need to make clear to the defendant that prior commitments have been
11 withdrawn. Depending on the circumstances, the government may not be
12 able to rely exclusively on omissions of prior undertakings and
13 representations from the four corners of the written agreement as effective
14 nullification of them.

15 For the reasons explained above, we hereby vacate the district court's
16 denial of Feldman's motions to stay and vacate the court's order of execution,
17 and direct the district court to take evidence and reconsider Feldman's

1 motions, while safeguarding Feldman's and the government's respective
2 interests in the Great Lakes Account.

3 CONCLUSION

4 The district court's orders denying the defendant's motions to stay and
5 vacate the court's order of execution on the Great Lakes Account are hereby
6 VACATED, and the case is remanded for further proceedings not inconsistent
7 with this opinion.