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United States District Court,
S.D. New York.
UNITED STATES of America
v.
Leonard KALISH, Defendant.

No. 06 Cr. 656(RPP).
Jan. 13, 2009.

West KeySummary**Forfeitures 180 3**

180 Forfeitures
180k3 k. Property Subject to Forfeiture. Most Cited Cases

Postal Service 306 52

306 Postal Service
306III Offenses Against Postal Laws
306k52 k. Penalties and Forfeitures. Most Cited Cases

The government proved by a preponderance of the evidence that $8.4 million and three specific items of property addressed in a Preliminary Order of Forfeiture constituted or were derived from proceeds traceable to a defendant's offenses of wire fraud and mail fraud. Therefore, the defendant's motion to vacate or modify the Preliminary Order of Forfeiture was denied. 18 U.S.C.A. §§ 1343, 1341.

OPINION AND ORDER

ROBERT P. PATTERSON, JR., District Judge.

***1** On July 3, 2008, this Court entered a Preliminary Order of Forfeiture stating, in part, that a forfeiture money judgment in the amount of $8.4 million shall be entered against the Defendant as part of his criminal sentence, subject to Defendant's right within 30 days to dispute the amount of fees fraudulently generated. On July 25, 2008, counsel for Defendant Leonard Kalish filed a letter with the Court requesting that the Court vacate or modify the Preliminary Order of Forfeiture. For the reasons set forth below, the Court finds that the Government has proven by a preponderance of the evidence that $8.4 million and the three specific items of property addressed in the Preliminary Order of Forfeiture constitute or are derived from proceeds traceable to the offense. The Defendant is entitled to deduction of "direct costs" but must submit a correct calculation of the "direct costs" to the Court within 10 days of this opinion.

I. BACKGROUND

On April 23, 2007, Defendant Leonard Kalish was convicted of wire fraud, 18 U.S.C. § 1343, mail fraud, 18 U.S.C. § 1341, and conspiracy to commit mail fraud and wire fraud, 18 U.S.C. § 371. The case involved an advance fee scheme. Defendant's business, The Funding Solutions ("TFS"), advertised itself as a conduit to private financing to individuals seeking commercial loans. Typically, potential clients would contact a loan officer or a vice president of TFS and, at his request, provide him with business plans, appraisals, environmental studies, balance sheets, financial projections, etc. for the proposed projects. After these documents were provided, TFS would send a form letter (a "Letter of Intent") to the potential clients with standard language stating that "[w]e have discussed and held preliminary meetings with investors [FN1] we would use to facilitate an acceptable proposal and secure a reasonable long-term financial commitment for the permanent financing ... In this transaction we would be performing as a conduit (originating, underwriting, and servicing) for one of our regular private investors ... It would appear from our preliminary review that the funds requested can be deployed ..." (Government Sentencing Submission dated October 26, 2007 ("Gov't Submission"), Ex. A.)

FN1. The evidence at trial indicated no such preliminary meetings with "investors" ever took place.

The Letter of Intent, which set forth the proposed loan amount, interest rate, and term, would require that potential clients visit the TFS office in Stamford, Connecticut for a personal interview before proceeding further with funding. There, potential clients would enter an anteroom, which was lined with tombstones that memorialized multi-million dollar loan transactions that TFS had purportedly helped

complete in the past. However, TFS never actually obtained funding for almost all of the transactions pictured on the office walls. Potential clients would meet with the loan officer (or vice president) and then with Defendant, who would give an explanation of TFS's business, which included materially false statements, including assurances that the fee to TFS would be fully refunded if TFS did not obtain actual funding. Defendant also misrepresented TFS's track record and the number of private investors with whom it had a relationship. At the end of the meeting, the potential clients were told that they would be advised of TFS's decision in about two days.

***2** Soon after the meeting at TFS's offices, TFS sent a form letter to the potential clients enclosing "our Fee Agreement for location of a Funding Source" (the "Fee Agreement"). (Gov't Submission, Ex. C.) Section C of the Fee Agreement states, "Client agrees that in partial consideration of the services to be rendered by TFS, Client shall pay to TFS a refundable, if TFS fails to deliver a *loan proposal,* consulting fee" of some variable amount ($50,000, $100,000, etc.) determined by Defendant. (*Id.* (emphasis added)). Notably, Section C of the Fee Agreement is the only place in the Fee Agreement where the undefined term "loan proposal" is used. By contrast, the Fee Agreement uses "commitment letter," a recognized term in financial transactions, throughout the entirety of the Agreement.

Two attachments accompanied the Fee Agreement. First, the "Underwriting Fee Guarantee" contained language assuring the clients that the advance fee was risk-free, and it ended with a boldfaced, underlined statement: "we will ***fully refund any and all fees."*** (*Id.*) The second attachment was a Funding Process Timeline, which understated the anticipated time frame for obtaining actual funding. For example, one version of the Funding Process Timeline estimated that funding could be obtained in approximately six to twelve weeks. (*Id.*)

Evidence at trial showed that shortly after signing and returning the Fee Agreement and paying the advance fee, the borrower would receive a "loan proposal" or "letter of interest"-not a commitment letter-from Kennedy Funding Inc. or, more recently, KSI Capital (owned by a former officer of Kennedy Funding) to seek financing from private investors. These loan proposals from Kennedy Funding and KSI Capital required an additional $10,000 upfront fee before the prospective client would receive the next document.

The would-be borrowers would then generally decide to look elsewhere for funding and ask for their fee to be refunded. However, Defendant refused, relying on Section C of the Fee Agreement and claiming he had satisfied his obligation to produce a "loan proposal." A few borrowers proceeded with Kennedy Funding or KSI, paid the additional fee, and Kennedy Funding or KSI, together with TFS, would get additional higher fees for finding financing. These borrowers would generally cease their efforts when they received a so-called "draft loan commitment" from Kennedy Funding or KSI. (Gov't Submission, Ex. E.) This form document stated that the amount of the loan that the prospective client would receive would be limited to a percentage (generally 60 percent) of the " 'quick sale value" of the collateral supporting the loan,[FN2] but that this value would be determined by the lender's own appraiser and only after the client signed a final commitment letter, which required borrowers to pay substantial additional fees to Kennedy or KSI and TFS. (Tr. 2414-2429.) In other words, even though Defendant had led the prospective borrowers to believe TFS would obtain a loan of a specified amount in return for the upfront fee, and even though the TFS Fee Agreement discussed a loan of a specific amount on specified loan terms, the Letter of Intent, loan proposal, or draft loan commitment did not commit Kennedy or KSI to fund a loan of the specific amount on the specified loan terms. According to Defendant, only five borrowers obtained funding for their projects after entering a fee agreement with TFS from 2000 to 2007. During that same period, TFS collected more than $8.4 million in fees from hundreds of other potential clients who did not receive funding.

> FN2. Although aware that the borrowers would be offered a loan based on a percentage of the "quick sale value" instead of the "market value" the Defendant did not advise would-be borrowers of this highly material condition.

II. PRELIMINARY ORDER OF FORFEITURE

***3** On July 3, 2008, this Court entered a Preliminary Order of Forfeiture ("Preliminary Order") stating that a forfeiture money judgment in the amount of

$8.4 million shall be entered against the Defendant as part of his criminal sentence and shall be included in the judgment of conviction therewith, subject to Defendant's right, at a court proceeding within thirty days after entry of the Preliminary Order, to dispute that the offenses of conviction fraudulently generated $8.4 million in advance fees.

The Preliminary Order also provides that, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461, and Rule 32.2(b)(1) of the Federal Rules of Criminal Procedure, all of Defendant's right, title, and interest in the Subject Property is forfeited to the United States for disposition in accordance with the law, and shall be applied to the money judgment in partial satisfaction thereof, subject to Defendant's right at a court proceeding on a date after the entry of this order to dispute that the Subject Property is traceable, directly or indirectly, to the offenses of conviction.

The Subject Property is defined in the Preliminary Order as:

a) the funds contained in Lehman Brothers Account No. 744-52365;

b) 2003 Mercedes S430 VIN WDBNG83J13A332739; and

c) 2004 Land Rover Range Rover VIN SALME11494A156511.

On July 25, 2008, counsel for Defendant Leonard Kalish filed a letter with the Court claiming:

First, that the Government has failed to prove by a preponderance of the evidence that S8.4 million constitutes or is derived from proceeds traceable to the offense, or that the three specific items of property subject to the Preliminary Order of Forfeiture constitute or are derived from proceeds traceable to offense pursuant to 18 U.S.C. 981(a)(1)(C);

Second, that any proceeds subject to forfeiture are subject to deduction of "direct costs" under 18 U.S.C. § 981(a)(2)(B);

Third, that the amount of the money judgment should be reduced by the amount of advance fees paid to TFS before August 23, 2000, which was the date on which 28 U.S.C. § 2461(c) was enacted;

Fourth, that for the Court to order any judgment would be an error because the Government did not seek a money judgment in the Indictment and that a money judgment is not authorized by Congress;

Fifth, that the Court should exercise its discretion and offset the forfeiture amount by the amount of restitution ordered at time of sentencing; and

Sixth, that the Court should stay execution of any forfeiture and the restitution order pending Defendant's appeal.

Defendant's letter of July 25, 2008 argued that the forfeiture amount should be the same as the amount of loss to victims of the Defendant's fraudulent activity proved by the government at an evidentiary hearing pursuant to *United States v. Fatico,* 579 F.2d 707 (2d Cir.1978), prior to sentencing. Defendant provided a Declaration of Herald Price Fahringer, Esq., sworn to July 25.2008, attaching copies of Form 1099s as issued by the Defendant's company, TFS, from 2000 to 2006 to independent contractors (independent contractors were TFS loan officers/executives or outside mortgage brokers) for commissions paid totaling $4,548,045.

***4** On September 15, 2008, the Government filed a response consenting to a stay pending appeal of execution of the final forfeiture order, but opposing any stay of proceedings incident to the Preliminary Order. The Government argued that the Court should deny the balance of Defendant's requests.

On October 14, 2008, counsel for Defendant filed a letter further explaining his position with respect to the Preliminary Order.

III. DISCUSSION

a. The Government has established by a preponderance of the evidence that $8.4 million constitutes or is derived from proceeds traceable to the offense

Defendant argues that the amount subject to forfeiture should not exceed the loss and restitution amount found by the Court at a *Fatico* hearing, *i.e.,*

$1,199,239. However, as Defendant concedes, the amount of proceeds obtained by a defendant does not necessarily correspond to the amount of loss for purposes of sentencing. In determining the amount of forfeiture, the Court must consider the amount of proceeds gained by Defendant from his illegal activity. On the other hand, the Court's finding of victim loss under the Sentencing Guidelines was based on individual testimony and affidavits given by only a minority of the hundreds of victims of Defendant's scheme. Because many of the entities that paid advance fees to TFS no longer exist or were otherwise impossible for the Government to locate, the Government was only able to obtain testimony and affidavits from a subset of the victims for purposes of sentencing. Therefore, the loss calculation did not account for all losses to all victims, which is the amount relevant for forfeiture purposes.

The Government seeks forfeiture of all of the advance fees received by TFS on those proposed loans that Defendant has acknowledged did not get funding. The evidence at trial showed that borrowers were induced by fraudulent statements of Defendant and TFS's officers to enter into the Fee Agreement. Defendant has stated that the main object of TFS's business was to obtain advance fees, and any additional fees TFS obtained when a borrower decided to pursue financing through KSI or Kennedy Funding was "gravy." (Testimony of Joel Pondelik, Tr. at 1382.) The Government has established from TFS books and records that SS.4 million in advance fees were paid to TFS during the 2000 to 2006 period charged in the Indictment. In calculating the total amount of S8.4 million, the Government subtracted the fees TFS received from the five customers who, according to Defendant, received actual funding during that period. (Gov't Submission, Ex. F.) Since the only income of TFS was the fees obtained from would-be borrowers, the Government subtracted the fees received by borrowers who obtained some funding through Kennedy Funding or KS1 from the total deposits to calculate the proceeds derived from the scheme as SS.4 million. Defendant has submitted nothing challenging the Government's method of calculation. Thus, the Government has calculated the total proceeds derived by TFS from the scheme to defraud in a correct manner.

b. The Government has established by a preponderance of the evidence that the three specific items of property subject to the Preliminary Order of Forfeiture constitute or are derived from proceeds traceable to the offense

***5** The three specific items of property subject to the Preliminary Order of Forfeiture constitute or are derived from proceeds of the scheme to defraud. First, Defendant made monthly installment payments for the 2003 Mercedes ($839.00) and the 2004 Range Rover ($833.00) by checks drawn on the accounts of TFS, payable to the banks which financed the purchases. (Gov't Submission, Ex. H, N.) In May 2005, shortly after his arrest in this case, Defendant paid the outstanding balances on these automobiles-$51,853 (2003 Mercedes) and $33,455 (2004 Range Rover)-by checks drawn on an account of TFS funded by the fraudulently obtained advance fee scheme proceeds. (Gov't Submission, Ex. N.)

With respect to the Lehman Brothers Account # 744-52365, the Government has shown that TFS customers' fees were deposited, depending on the time period, into three different TFS accounts: Chase # 821500219665 ("TFS 9665"); Fleet # 9418176880 ("TFS 6880"); and Bank of America # 009421312652 ("TFS 2652"). (Gov't Submission, Ex. L.) Defendant signed every check drawn on these accounts. After an advance fee had been deposited into one of these accounts, Defendant typically transferred a large percentage of each fee-often 40 percent-to Chase Account # 777624389 in the name of Financial Services Inc. ("Financial Services 4389"), an account on which Lynne Kalish drew checks as an officer of Financial Services Inc. Specifically, $388,629 was transferred in 35 checks from TFS 9665 to Financial Services 4389 from March 2000 to March 2001, and $1,191,749 was transferred in 86 checks from TFS 6880 to Financial Services4389 from February 2001 to February 2005 for a total of $1.58 million. (Gov't Submission, Ex. N.)

During the same period, Lynne Kalish signed Financial Services checks for deposit in an account in her name at Fleet Bank Account # 9454950693 ("Lynne 0693"), totaling $680,000.[FN3] (Gov't Submission, Exs. M, O.) In addition to these transfers from Financial Services to Lynne Kaiish, Defendant transferred approximately $430,000 from the TFS accounts to the Lynne 0693 account. (Gov't Submission, Exs. N, O.) Also, Defendant transferred at least $230,000 from Fleet Account # 9433088758 in his name ("Leonard 8758") to the Lynne 0693 account. (Gov't Submission, Ex. P.) As Defendant had no apparent source of income during the time period other

than TFS, these funds are deemed proceeds of the TFS scheme.[FN4] Thus, funds totaling $1.34 million are traceable from TFS to the Lynne 0693 account.

FN3. Although the bank records of Financial Services Inc., a Nevada corporation, show that large checks were written from Financial Services to others, the Government has been unable to trace where several hundred thousand dollars in checks written from Financial Services to Lynne Kaiish were deposited.

FN4. The government does not have complete records for account Leonard 8758.

Once the advance fee proceeds were paid to the Financial Services Account, Lynne Kaiish would transfer funds to various investment accounts in her name, among other places. She made several transfers to investment accounts from the Lynne 0693 account. Specifically:

• From 2000 to 2002, $360,000 was transferred in 13 checks drawn on the Financial Services 4389 account to investment accounts at Prudential Securities in the name of Financial Services. (Gov't Submission, Ex. Q.)

***6** • From 2002 to 2004, $26,000 was transferred from Financial Services 4389 account to a Quick & Reilly investment account in Lynne Kalish's name. (Gov't Submission, Ex. R.)

• From 2002 to 2003, $1.3 million was transferred from the Lynne 0693 account to an investment account at Vining Sparks in Lynne Kalish's name. (Gov't Submission, Ex. S.)

• From 2003 to 2006, $1.4 million was transferred from the Lynne 0693 account to an investment account at Jeffries & Co. in Lynne Kalish's name. (Gov't Submission, Ex. T.)

These investment accounts were consolidated from time to time in the Quick & Reilly Account # 14205282 in Lynne Kalish's name, which became a Fleet account with the same number when Quick & Reilly was taken over by Fleet Bank, and which, in May 2005, became Bank of America account # J20-954390 when Bank of America merged with Fleet ("Lynne BOA Investment Account"). For instance:

• The Financial Services account was closed at Prudential and its securities were delivered to E Trade Securities in April 2002. (Gov't Submission, Ex. U.) In April 2002, the assets from the E Trade Securities account were delivered to the Lynne BOA Investment Account. (Gov't Submission, Ex. V.)

• According to Jeffries, all assets in the Jeffries account were delivered to the Lynne BOA Investment Account.

• According to Vining Sparks, it delivered all corporate bonds in that account to Lynne Kalish's account at Quick & Reilly at Leonard Kalish's direction, except for one bond it delivered to the Prudential account.

In June 2005, $2.53 million in assets in the Lynne BOA Investment Account were transferred to account # 74452365 at Lehman Brothers Inc. in Lynne Kalish's name. (Gov't Submission, Exs. X, Y.)

The bank records that the Government has obtained show that at least $1.7 million that began as fraud proceeds in the TFS accounts was transferred through a complex web of bank and investment accounts ultimately into the Lehman Brothers account. Defendant has not shown that other deposits were made into the investment accounts in Lvnne Kalish's name or that either Mr. or Mrs. Kalish had substantial income from other sources. Given this, and since the values of security and investment accounts rose substantially in the 2000 to 2007 period, it is a fair conclusion that the present balance in the Lehman Brothers account is attributable to appreciation made from the TFS proceeds in various investment accounts. Therefore, this Court finds that the entire $2.4 million in assets currently in the Lehman Brothers account constitutes or was derived from fraud proceeds and thus is forfeitable.

c. The proceeds subject to forfeiture are subject to deduction of "direct costs" under 18 U.S.C. § 981(a)(2)(B)

Defendant argues that the proceeds subject to forfeiture are subject to deduction of "direct costs," which in this case includes the compensation TFS paid to loan officers and vice presidents whose remunera-

tion was based on a percentage of the fees earned by TFS on a deal-by-deal basis. Defendant relies on 18 U.S.C. § 981(a)(2)(B), which provides that "[i]n cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term 'proceeds' means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services."

***7** The Government asserts that the applicable definition of "proceeds" is contained in 18 U.S.C. § 981(a)(2)(A), which provides for no similar deduction of direct costs in the context of "cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes." Section 981(a)(2)(A) defines "proceeds" as "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense." The Government argues that because mail fraud, wire fraud, and conspiracy to commit wire and mail fraud are all "specified unlawful activities" under 18 U.S.C. §§ 981(a)(1)(C), 1956(e)(7)(A), and 1961(1)(D), 18 U.S.C. § 981(a)(2)(A) applies.

The Government relies on *United States v. All Funds on Deposit in United Bank of Switzerland*, 188 F.Supp.2d 407 (S.D.N.Y.2002), which held:

> "Unlawful activities" is a term of art in CAFRA [Civil Asset Forfeiture Reform Act], at least so far as it pertains to that "specified unlawful activity" expressly identified in [section] 981(a)(1)(C) as referring to those unlawful activities defined in 18 U.S.C. § 1956(c)(7)-a category distinguished separately from the numerous other federal criminal violations reference elsewhere in [section] 981(a)(1)(C). With respect to these unlawful activities ..., the definition of the forfeitable proceeds is solely provided by [section] 981(a)(2)(A), and not in any respect by [section] 981(a)(2)(B), as shown by the fact that, whereas the latter refers to cases involving "lawful goods or lawful services," the former applies to cases involving "illegal goods, illegal services, [or] unlawful activities...."

Id. at 410. In short, *All Funds* found that the term "unlawful activities" as used in section 981(a)(2)(A) includes all *"specified* unlawful activit[ies]" as defined in 18 U.S.C. § 1956(c)(7). While mail fraud and wire fraud are "specified unlawful activities" under sections 1956(e)(7)(A) and 1961(1)(D), this Court disagrees with the *All Funds* reading of the statutes at issue. If Congress had meant "specified unlawful activity," a defined term in the money laundering statute, it would have used that precise term-as it did in section 981(a)(1) (C)-instead of the looser term "unlawful activities" used in section 981(a)(2)(A). Moreover, the *All Funds* reading of the statutes would render section 981(a)(2)(B) nugatory because almost every predicate crime listed in section 981(a)(1)(C) is also a "specified unlawful activity" listed in section 1956(c) (7), leaving only a handful of statutes involving counterfeiting, forgery, explosive materials, and fraudulent identification documents as possible candidates for the definition of "proceeds" given in section 981(a)(2)(B). Sections 981(a)(2)(A) and 981(a) (2)(B) should be read together, and both sections must have meaning.

***8** Therefore, the issue is whether this case involves "illegal services [or] unlawful activities," 18 U.S.C. § 981(a)(2)(A), or "lawful services that are ... provided in an illegal manner," 18 U.S.C. § 981(a)(2)(B). The statute provides no guidance as to whether an advance fee scheme engaged in by an unlicensed entity and in violation of the mail and wire fraud statutes is an "illegal service" or a "lawful service provided in an illegal manner," and neither party has convinced this Court that the case at issue falls squarely into one definition of "proceeds" rather than the other. Defendant cites *United States v. Santos*, --- U.S. ----, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008), which, while not directly on point, discusses Congress' ambiguous use of the term "proceeds" in 18 U.S.C. § 1956. The Court in *Santos* utilized the rule of lenity to approve the district court's determination that the term "proceeds" should be interpreted in favor of the defendant as "net proceeds." *Id.* at 2024-25. Here, the rule of lenity requires that the definition of "proceeds" be construed in favor of Defendant. Therefore, "proceeds" means net proceeds, "the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services." 18 U.S.C. § 981(a)(2)(B).

Exhibit 3 to Defendant's July 25, 2008 letter summarizes all sales commissions paid from 2000 to 2006, and Exhibits 4 through 10 are summaries of

these sales commissions by year. However, because the Government's calculation of proceeds ($8.4 million) does not include the fees TFS received from the five customers who received actual funding from 2000 to 2006, Defendant must provide to the Court, within 10 days of the date of this opinion, documentation detailing the amount of sales commissions paid, less the commissions paid by TFS from fees it received from the five customers who Defendant claims received actual funding (the "direct costs").

d. Defendant's retroactivity argument fails

Defendant argues that the amount of the money judgment should be reduced by the amount of advance fees paid to TFS before August 23, 2000, which was the date on which 28 U.S.C. § 2461(c)-the forfeiture provision invoked by the Government in this case-was enacted. However, Defendant's retroactivity argument is without merit. Count One, which charged a conspiracy from approximately 2000 through approximately 2006, "straddles" the effective date of the forfeiture statute at issue, and therefore does not violate the *ex post facto* clause. *See United States v. Schlesinger*, 396 F.Supp.2d 267, 279-80 (E.D.N.Y.2005) (no *ex post facto* violation when Section 2461(c) is applied to conspiracy that began before, but continued after, enactment of the statute); *United States v. Jennings*, 487 F.3d 564, 585-86 (8th Cir.2007) (holding that *ex post facto* clause does not bar forfeiture of earlier proceeds where fraud scheme continued after the effective date of Section 2461(c)).

e. The forfeiture allegation in the Indictment effectively seeks a money judgment and money judgments are permissible under the relevant statutes

***9** Defendant argues that the Government cannot obtain a money judgment in any amount because he claims that the Indictment does not seek a money judgment and that a money judgment is not authorized by Congress. These arguments are without merit. The Indictment specifically states:

> *FORFEITURE ALLEGATION*
>
> 22. As a result of committing the foregoing fraud offenses in violation of Sections 371, 1341, and 1343 of Title 18, United States Code, alleged in Counts One, Two and Three of this Indictment, LEONARD KALISH, the defendant, shall forfeit to the United States pursuant to 18 U.S.C. § 2461, all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses, and property traceable to such property, including but not limited to the following:
>
> a. United States currency representing the amount of proceeds obtained as a result of the charged fraud, for which the defendant and his co-conspirators are jointly and severally liable, including but not limited to all of defendant LEONARD KALISH's right, title, and interest in real property and appurtenances.
>
> *Substitute Assets Provision*
>
> 23. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:
>
> (i) cannot be located upon the exercise of due diligence;
>
> (ii) has been transferred or sold to, or deposited with, a third party;
>
> (iii) has been placed beyond the jurisdiction of the court;
>
> (iv) has been substantially diminished in value; or
>
> (v) has been commingled with other property which cannot be divided without difficulty,
>
> it is the intent of the United States, pursuant to 18 U.S.C. § 982(b), to seek forfeiture of any other property of said defendant up to the value of the forfeitable property described above.
>
> (See Indictment ¶¶ 22, 23.)

This forfeiture allegation provides sufficient notice that the Government will seek a money judgment because "United States currency representing the amount of proceeds obtained as a result of the charged fraud" is, in effect, a money judgment. Defendant cites no authority for the proposition that the Indictment must contain the precise words "money judgment" in order for a money judgment to issue.

Defendant's argument that Congress has not authorized money judgments in criminal forfeiture cases is also without merit. When a defendant lacks the

assets to satisfy the forfeiture order, a money judgment against the defendant is effectively an *in personam* judgment in the amount of the forfeiture order. As Defendant concedes, his argument that an *in personam* judgment is not authorized by Congress for forfeiture purposes in a criminal case is inconsistent with most caselaw. Although the Second Circuit has not addressed the issue, the First, Third, Seventh, and Ninth Circuit Courts of Appeals have rejected Defendant's argument. *See United States v. Candelaria-Silva,* 166 F.3d 19, 42 (1st Cir.1999) ("[a] criminal forfeiture order may take several forms. First, the government is entitled to an *in personam* judgment against the defendant for the amount of money the defendant obtained as proceeds of the offense"); *United States v. Hall,* 434 F.3d 42, 59 (1st Cir.2006) (holding forfeiture order valid where amount was greater than defendant's current assets); *United States v. Vampire Nation,* 451 F.3d 189, 201-02 (3d Cir.2006) (personal money judgment appropriate even where judgment exceeded available assets); *United States v. Baker,* 227 F.3d 955, 970 (7th Cir.2000) (finding that district court properly enforced the government's forfeiture award against Baker as a regular *in personam* judgment); *United States v. Casey,* 444 F.3d 1071, 1074-77 (9th Cir.2006) (holding that a forfeiture order for an amount greater than defendant's worth is appropriate because "[m]andatory forfeiture is concerned not with how much an individual has but with how much he received in connection with the commission of the crime").

***10** Defendant relies on *United States v. Croce,* 334 F.Supp.2d 781 (E.D.Pa.2004), a decision that the Third Circuit reversed, 209 Fed. Appx. 208 (3d Cir.2006), and whose analysis has been criticized in the circuit opinions cited *supra.* In reversing, the Third Circuit held that the district court in *Croce* had the authority to issue a forfeiture order for the full amount of the illegally obtained proceeds, even if the defendant did not currently possess that full amount at the time of sentencing. *Id.* at 213. The current statutory framework includes a "bridging" provision, 28 U.S.C. § 2461(c), that links civil forfeiture provisions, like 18 U.S.C. § 981, to criminal proceedings in certain circumstances:

> If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of the forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure. If the defendant is convicted of the offense giving rise to the forfeiture, the court shall order the forfeiture of the property as part of the sentence in the criminal case pursuant to the Federal Rules of Criminal Procedure and section 3552 of title 18, United States Code. The procedures in section 413 of the Controlled Substances Act (21 U.S.C. 853) apply to all stages of a criminal forfeiture proceeding, except that subsection (d) of such section applies only in cases in which the defendant is convicted of such Act.

28 U.S.C. § 2461(c). As the Third Circuit explained in *United States v. Vampire Nation,* the bridging provision provides that 21 U.S.C. § 853 govern the procedures related to executing an order of forfeiture, and "[g]iven that [section] 853 does not contain any language limiting the amount of money available in a forfeiture order to the value of the assets a defendant possesses at the time the order is issued, ... it [is] clear that an *in personam* forfeiture judgment may be entered for the full amount of the criminal proceeds." 451 F.3d at 201-02. Moreover, in analyzing the statute's purpose, many courts have found that limiting the forfeiture amount to those assets a defendant possesses at the time of sentencing "would offer a benefit to convicted defendants who succeed in concealing or spending assets that would otherwise be subject to forfeiture." *Croce,* 209 Fed. Appx. at 212. *See also United States v. Casey,* 444 F.3d at 1074 ("[r]equiring imposition of a money judgment on a defendant who currently possesses no assets furthers the remedial purposes of the forfeiture statute by ensuring that all eligible criminal defendants receive the mandatory forfeiture sanction Congress intended and disgorge their ill-gotten gains, even those already spent"). For the foregoing reasons, this Court does not find the district court's opinion in *Croce* persuasive, and thus Defendant's argument that money judgments are not authorized in criminal forfeiture cases fails.

f. Defendant's request to offset forfeiture amount by the $1.2 million in restitution is denied

***11** Defendant requests that the amount of forfeiture should be credited against his $1.2 million restitution obligation. However, as Defendant concedes, the law provides that restitution and forfeiture are different remedies, and therefore Defendant is subject to both restitution and forfeiture. *See United States v. Emerson,* 128 F.3d 557, 566-68 (7th

Cir.1997) (forfeiture and restitution are not mutually exclusive; defendant is not entitled to reduce restitution by the amount of forfeiture).

g. Defendant's request to stay proceedings incident to the Preliminary Order of Forfeiture is denied

Defendant's request to stay execution of any proceeding incident to the Preliminary Order of Forfeiture, including any ancillary proceedings initiated by Lynne Kalish or another third party asserting any purported interest in the property subject to forfeiture, is denied. The Court will address whether or not a stay of a final order of forfeiture will be granted after such final order is issued.

IV. CONCLUSION

For the foregoing reasons, the Government has established by a preponderance of the evidence that $8.4 million and the three specific items of property addressed in the Preliminary Order of Forfeiture constitute or are derived from proceeds traceable to the offense. Defendant is entitled to deduction of the commissions paid to independent contractor salesmen during the period of 2000 to 2006, less the commissions paid from fees of the five customers who received actual funding. Within 10 days of this opinion, Defendant must submit documentation detailing that amount.

IT IS SO ORDERED.

S.D.N.Y.,2009.
U.S. v. Kalish
Not Reported in F.Supp.2d, 2009 WL 130215 (S.D.N.Y.)

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History

Direct History

=> 1 **U.S. v. Kalish,** 2009 WL 130215 (S.D.N.Y. Jan 13, 2009) (NO. 06 CR 656 RPP)

Reconsideration Denied by

2 U.S. v. Kalish, 2009 WL 1437798 (S.D.N.Y. May 21, 2009) (NO. 05 CR. 656RPP)

Related References

3 U.S. v. Kalish, 626 F.3d 165 (2nd Cir.(N.Y.) Nov 24, 2010) (NO. 08-3374-CR, 09-4978-CR)

For Additional Opinion, see

4 U.S. v. Kalish, 409 Fed.Appx. 376 (2nd Cir.(N.Y.) Nov 24, 2010) (Not selected for publication in the Federal Reporter, NO. 08-3374-CR LEAD, 09-4978-CR CON)

5 U.S. v. Kalish, 403 Fed.Appx. 541, 84 Fed. R. Evid. Serv. 356 (2nd Cir.(N.Y.) Dec 14, 2010) (Not selected for publication in the Federal Reporter, NO. 08-3374-CR)

Court Documents

Trial Court Documents (U.S.A.)

S.D.N.Y. Trial Pleadings

6 UNITED STATES OF AMERICA, v. Leonard KALISH, and Joel Pondelik, Defendants., 2005 WL 5934845 (Trial Pleading) (S.D.N.Y. Jun. 16, 2005) **Indictment** (NO. 05656)

7 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2006 WL 5050870 (Trial Pleading) (S.D.N.Y. Oct. 18, 2006) **Indictment** (NO. RPP, S105656)

8 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204716 (Trial Pleading) (S.D.N.Y. Feb. 14, 2007) **Indictment** (NO. RPP, S305656)

S.D.N.Y. Trial Motions, Memoranda And Affidavits

9 UNITED STATES OF AMERICA, v. Leonard KALISH and Joel Pondelik, Defendants., 2006 WL 5050867 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Jan. 20, 2006) **Memorandum of Law in Support of Pretrial Motions** (NO. 05-CR-656, RPP)

10 UNITED STATES OF AMERICA, v. Leonard KALISH and Joel Pondelik, Defendants., 2006 WL 5050868 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Jan. 20, 2006) **Attorney's Declaration** (NO. 05-CR-656, RPP)

11 UNITED STATES OF AMERICA, v. Leonard KALISH and Joel Pondelik, Defendants., 2006 WL 5050869 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Jan. 20, 2006) **Facts** (NO. 05-CR-656, RPP)

12 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204707 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Feb. 6, 2007) **Affirmation of Herald Price Fahringer, Esq., in Support of Defendant's Pretrial Ions; and Request For Permission to File an Oversized Brief** (NO. 05CR656, S-1)

13 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204709 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Feb. 6, 2007) **Defendant Leonard Kalish's Supplemental Omnibus Motion** (NO. 05-CR-656, RPP)

14 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204711 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Feb. 17, 2007) **Defendant Leonard Kalish's Reply in Further Support of His Supplemental Omnibus Motion and Opposition to the Government's Intention to Offer Certain Evidence During its Case-In-Chief** (NO. 05-CR-656, RPP)

15 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204719 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Feb. 27, 2007) **Affirmation of Herald Price Fahringer, Esq., in Support of Defendant's Motion to Quash and to Adjourn the Trial** (NO. 05CR656, S-3)

16 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204704 (Trial Motion, Memorandum and Affidavit) (S.D.N.Y. Oct. 15, 2007) **Defendant Leonard Kalish's Memorandum of Law Regarding Sentencing Calculations and in Support of an Application to Recuse the Probation Officer** (NO. 05-CR-656, RPP)

S.D.N.Y. Trial Filings

17 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204714 (Trial Filing) (S.D.N.Y. Feb. 20, 2007) **Government's Proposed Examination of Prospective Jurors** (NO. RPP, S305656)

18 USA, v. KALISH, et al., 2007 WL 4204717 (Trial Filing) (S.D.N.Y. Feb. 26, 2007) **Jury Questionnaire** (NO. 05CR00656)

S.D.N.Y. Jury Instructions

19 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204712 (Jury Instruction) (S.D.N.Y. Feb. 19, 2007) **Defendant's Request to Charge** (NO. 05CR656, S-3)

20 UNITED STATES OF AMERICA, v. Leonard KALISH, Defendant., 2007 WL 4204715 (Jury Instruction) (S.D.N.Y. Feb. 20, 2007) **Government's Requests to Charge** (NO. RPP, S305656)

Dockets (U.S.A.)

S.D.N.Y.

21 USA v. KALISH ET AL, NO. 1:05cr00656 (Docket) (S.D.N.Y. Jun. 16, 2005)