

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**UNITED STATES' MEMORANDUM
REGARDING POTENTIAL FORFEITURE ISSUES**

The United States respectfully submits this memorandum to address potential procedural issues regarding forfeiture.

I. IF THERE IS A CONVICTION, FORFEITURE WILL BE MANDATORY.

In the event that the jury returns a guilty verdict on any counts, forfeiture as to those counts will be mandatory. 28 U.S.C. § 2461(c) provides, in relevant part, that where “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” and then “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” 28 U.S.C. § 2461.

The offenses at issue in this case are ones for which the “criminal forfeiture of

property is authorized.” *Id.* Section 981(a)(1), Title 18, United States Code, provides:

The following property is subject to forfeiture by the United States: –

* * *

(C) Any property, real or personal, which constitutes or is derived from proceeds traceable to ... any offense constituting ‘*specified unlawful activity*’ (as defined in section 1956(c)(7) of this title)...”

18 U.S.C. § 981(a)(1) (emphasis added).

The definition of “specified unlawful activity” states, in relevant part, that:

the term ‘specified unlawful activity’ means —

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31; ...

18 U.S.C. § 1956(c)(7). 18 U.S.C. § 1961(1), in turn, includes “(D) any offense involving ... fraud in the sale of securities.”

Accordingly, the offense in this case is one for which the forfeiture of property is authorized, and forfeiture is therefore mandatory. *See* 28 U.S.C. § 2461 (the “court *shall* order the forfeiture of the property as part of the sentence in the criminal case”) (emphasis added). The mandatory nature of forfeiture is further confirmed by the last sentence of section 2461(c), which provides that “[t]he 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 a violation of such Act.” Section 853, in turn, provides in relevant part that

Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year *shall* forfeit to the United

States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation;

21 U.S.C. § 853(a) (emphasis added); *United States v. Monsanto*, 491 U.S. 600, 606 (1989) (observing that in 21 U.S.C. § 853, “Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied”).

II. THERE WILL BE NO NEED FOR A JURY DETERMINATION ON FORFEITURE.

A. The United States will seek an *in personam* money judgment.

If the jury returns a verdict of guilty on any counts, the United States will seek an *in personam* money judgment against Defendant.

“A criminal forfeiture may take several forms [including] an *in personam* money 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) (observing that “[t]his position accords with the several appellate decisions that have addressed the question” and citing decisions from five other circuits); *see id.* (observing that *in personam* criminal forfeiture is a “sanction against the individual defendant rather than against the property itself”); *United States v. Vampire Nation*, 451 F.3d 189, 201-03

(3d Cir. 2006) (explaining that it is “clear that an *in personam* forfeiture judgment may be entered for the full amount of the criminal proceeds” and that forfeiture may take the form of an *in personam* judgment for a sum of money equal to proceeds defendant obtained from the offense “even where the judgment exceeds the defendant’s available assets at the time of conviction”); *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000); *United States v. Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999) (observing that “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”).

The United States intends to request, for any count on which the jury reaches a guilty verdict, an *in personam* money judgment equal to the amount of the gross proceeds of the sale relating to that count.¹ Where a money judgment is sought for violations of “specified unlawful activities” under 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), the amount subject to forfeiture is the *gross* amount of the proceeds. *See United States v. Keeling*, 235 F.3d 533, 537 (10th Cir. 2000) (finding that “for purposes of § 853, ‘proceeds’ contemplates gross proceeds and not merely profits”); S. Rep. No. 98-225, 98th Cong., 2d Sess. (1984) at 199, *reprinted in* 1984 U.S.C.C.A.N. 3182 (“the term ‘proceeds’ has been used in [criminal forfeiture statutes] in lieu of the term ‘profits’ in

¹ Defendant has long been on notice that, upon conviction of one or more of the fraud in the sale of securities offenses alleged, he shall forfeit the proceeds of the crimes of conviction. *See* Docket No. 1 (Indictment) at 6 (notifying Defendant of the United States’ intention to seek forfeiture of “\$100,812,582 in United States currency, representing the amount of proceeds obtained as a result of the offenses”).

order to alleviate the unreasonable burden on the government of proving net profits").² Defendant thus would not be entitled to any reduction or offset of the total monetary amount forfeitable because of taxes paid on those gross proceeds, the strike price paid to exercise the options, or any pre-existing value of the stock options exercised during 2001 in order to profit from illegal acts.

B. Rule 32.2 provides that the Court will determine the amount of a personal money judgment.

Rule 32.2(b)(1) provides the following general procedure for forfeiture issues following a guilty verdict:

As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is

² See also *United States v. Boulware*, 384 F.3d 794, 813 (9th Cir. 2004) (defendant must forfeit gross proceeds of fraudulent loan without credit for the amount he repaid); *United States v. Puche*, 350 F.3d 1137, 1154 (11th Cir. 2003) (affirming money judgment equal to the combined value of the commission paid to the money launderer and the untainted money used to facilitate the offense); *United States v. All Funds Distributed to Weiss*, 345 F.3d 49, 56 n.8 (2d Cir. 2003) (section 981(a)(1)(C) permits the forfeiture of all proceeds of specified unlawful activity); *United States v. Simmons*, 154 F.3d 765, 770-71 (8th Cir. 1998) (collecting cases and holding that "the better view is the one that defines proceeds as the gross receipts of the illegal activity"; forfeiture is intended to punish all those who receive income from illegal activity, not just those whose criminal activity turns a profit); *United States v. Whatley*, 133 F.3d 601, 606 (8th Cir. 1998) (recognizing propriety of using gross receipts rather than net profits, as the court is "not inclined to allow the defendants a profit for defrauding people or a credit for money spent perpetrating a fraud"); *United States v. DeFries*, 129 F.3d 1293, 1313-14 (D.C. Cir. 1997) (in RICO case, holding that the defendant was not entitled to any deduction on taxes paid on a salary subject to forfeiture); *United States v. McHan*, 101 F.3d 1027, 1041-42 (4th Cir. 1996) (gross proceeds forfeitable in drug case); *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995) (same in RICO/money laundering case); *United States v. Numisgroup International Corp.*, 169 F. Supp. 2d 133, 136 (E.D.N.Y. 2001) (money judgment may be based on the value of the gross proceeds derived from the offense and the value of the property used to facilitate or promote it).

sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the required nexus between the property and the offense. *If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.* The court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

Fed. R. Crim. P. 32.2(b)(1) (emphasis added).

The Court thus would need to determine the amount that Defendant should be ordered to pay. This determination would be made under a preponderance of the evidence standard. *See United States v. Keene*, 341 F.3d 78, 85-86 (1st Cir. 2001) (explaining that because forfeiture is not a separate charge but instead an aspect of punishment imposed following conviction, the applicable standard of proof is not proof beyond a reasonable doubt, and further noting that "other circuits have consistently refused to apply *Apprendi* requirements to criminal forfeitures") (citing cases); *United States v. Cabeza*, 258 F.3d 1256, 1257-58 (11th Cir. 2001) (explaining that because forfeiture is an aspect of the sentence, the burden of proof is a preponderance of the evidence); *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997) (observing that the burden of proof is preponderance of the evidence because criminal forfeiture is part of the sentence); *United States v. Wittig*, 2006 WL 13158, at *1 (D. Kan. 2006) (applying the preponderance standard to forfeiture proceedings). That standard will plainly be met by

virtue of defendant's conviction beyond a reasonable doubt as to any trades executed in connection with any counts on which the jury returns a guilty verdict.

C. Given the United States' request for a money judgment, there is no need for a jury decision on this issue.

There is no constitutional right to a jury determination on forfeiture issues. *See Libretti v. United States*, 516 U.S. 29, 48-49 (1995) (holding that it is "abundantly clear" there is no constitutional right to a jury on forfeiture issues in a criminal case). And where (as here) the government seeks an *in personam* money judgment, Rule 32.2, as adopted in 2000, makes clear that it is for the Court, not the jury, to determine the amount of money Defendant will be ordered to pay. *See* Rule 32.2 ("If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.").

In contrast, if the United States were seeking forfeiture of a specific item of property because of its nexus to the offense, the United States would need to establish a nexus between the offense and that specific property. *See* Fed. R. Crim. P. 32.2(b)(1) ("If the court seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense."). In such cases, where specific property is at issue, either party may request that the jury make that nexus determination. *See* Fed. R. Crim. P. 32.2(b)(4) ("Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense

committed by the defendant.”); 2000 Adv. Comm. Notes to Fed. R. Crim. P. 32 (“The only issue for the jury in such cases would be whether the government has established the requisite nexus between the property and the offense. For example, if the defendant disputes the government’s allegation that a parcel of real property is traceable to the offense, the defendant would have the right to request that the jury hear evidence on that issue, and return a special verdict, in a bifurcated proceeding that would occur after the jury returns the guilty verdict.”).

Consequently, the only right to a jury determination under Rule 32.2(b) arises where the United States is seeking direct forfeiture of a particular asset — not, as here, where it seeks an *in personam* money judgment. *United States v. Reiner*, 393 F. Supp. 2d 52, 55 (D. Me. 2005) (“Rule 32.2 makes no reference whatsoever to a jury’s role in a personal money judgment. . . . With no nexus determination to be made, there is no jury role.”); C. Wright *et al.*, 3 Federal Practice & Procedure § 546 (2007 ed.) (“Rule 32.2(b)(4) does not offer any jury trial right in regards to personal money judgments or substitute assets.”); *cf. United States v. Mislal-Aldarondo*, 478 F.3d 52, 73-75 (1st Cir. 2007) (observing that an *in personam* money judgment “is in contrast to where the government seeks forfeiture of ‘specific property,’ in which case the government has to show ‘a nexus between the property and the offense’” under Rule 32.2(b)(1)).

Accordingly, because the United States will request the entry of an *in personam* money

judgment, a jury determination is not required.³

CONCLUSION

As set forth above, if the jury convicts Defendant on one or more counts, forfeiture of the gross proceeds will be mandatory, the United States will seek an *in personam* money judgment as to those counts, and the Court will determine the amount of the money judgment. Because the United States would be seeking an *in personam* money judgment, Defendant would not be entitled to a jury trial.

If Defendant does believe that he is entitled to a jury trial, and the Court is convinced and desires jury instructions on this issue, the United States will have prepared proposed jury instructions addressing this issue. As the issue presented by Rule 32.2(b)(4) is narrow, these jury instructions would be brief. *See* 2000 Adv. Comm. Notes to Fed. R. Crim. P. 32 (“The only issue for the jury in such cases [*i.e.*, where a nexus to specific property is to be established] would be whether the government has established the requisite nexus between the property and the offense. For example, if the defendant disputes the government’s allegation that a parcel of real property is traceable to the offense, the defendant would have the right to request that the jury hear evidence on that

³ The United States observes that where directly traceable proceeds in the amount of the money judgment cannot be located, have substantially diminished in value, have been commingled with other property that cannot be divided without difficulty, or are otherwise unavailable, the government then may pursue any other property of the defendant as a substitute asset in order to satisfy the money judgment. 21 U.S.C. § 853(p); Rule 32.2(e)(1)(B). There is no right to a jury trial on these issues. *See* Fed. R. Crim. P. 32.2(e)(3) (“There is no right to a jury trial under Rule 32.2(e).”).

issue, and return a special verdict, in a bifurcated proceeding that would occur after the jury returns the guilty verdict.”).

Respectfully submitted this 13th day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 2007, I electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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