

**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' MOTION FOR ENTRY OF MONEY JUDGMENT

The United States moves pursuant to Fed. R. Crim. P. 32.2(b)(1) for a money judgment against Defendant Nacchio in the amount of \$52,007,545.47, which represents the proceeds of the sales charged in Counts 24 through 42, the offenses as to which Defendant was found guilty.

I. Forfeiture is mandatory as to Counts 24 through 42.

Forfeiture as to Counts 24 through 42 is 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.”

In short, the offense in this case is one for which the forfeiture of property is authorized, so forfeiture is 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. The United States seeks an *in personam* money judgment.

The United States seeks forfeiture in the form of 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); *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”).

III. The United States seeks forfeiture of the gross proceeds of the trades at issue in Counts 24 through 42.

Federal Rule of Criminal Procedure 32.2(b)(1) provides in relevant part that “[i]f the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.” The United States requests, for Counts 24 through 42, a money judgment equal to the amount of the gross proceeds of the trades relating to those counts.¹

The amount of the proceeds of those trades is subject to forfeiture. *See* 28 U.S.C. § 2461(c) (providing in relevant part 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”); 21 U.S.C. § 853(a)(1) (providing for forfeiture of “any property constituting, or derived from, any *proceeds* the person obtained, directly or indirectly, as the result of such violation”) (emphasis added); *cf.* 18

¹ Defendant has long been on notice that, upon conviction of one or more of the fraud in the sale of securities offenses alleged, the United States will seek forfeiture of the proceeds of the sales. *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”).

U.S.C. § 981(a)(1)(C) (providing for forfeiture of “[a]ny property, real or personal, which constitutes or is derived from *proceeds* traceable to ... any offense constituting ‘specified unlawful activity’”).

The amount subject to forfeiture is the *gross* amount of the proceeds, not some smaller amount. *See United States v. Keeling*, 235 F.3d 533, 537 (10th Cir. 2000). In *Keeling*, the Tenth Circuit explained that “for purposes of § 853, ‘proceeds’ contemplates gross proceeds and not merely profits.” *Id.* at 537 (rejecting as “utterly without merit” a defendant’s argument that he should not be forced to forfeit the gross proceeds because the majority of the proceeds had not gone to the defendant). The Tenth Circuit explained that requiring forfeiture of the gross amount was in accord not only with “the legislative history and policies undergirding 21 U.S.C. § 853,” but also with the “purpose of forfeiture,” which “‘is to remove property facilitating crime or property produced by crime — all of which is tainted by the illegal activity.’” *Id.* (quoting *United States v. McHan*, 101 F.3d 1027, 1042 (4th Cir. 1996)); *see also United States v. Wilson*, 244 F.3d 1208, 1213 (10th Cir. 2001) (rejecting a defendant’s argument that a forfeiture amount should include a deduction for expenses, and explaining that this “argument regarding the use of gross proceeds instead of net profits fails from the start” under *United States v. Keeling*).

This determination by the Tenth Circuit — that forfeiture of the gross proceeds accords with congressional intent — is well supported. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess. (1984) at 199, *reprinted in* 1984 U.S.C.C.A.N. 3382 (noting that in the RICO statute, "the term 'proceeds' has been used in lieu of the term 'profits' in order to alleviate the unreasonable burden on the government of proving net profits"); *United States v. McHan*, 101 F.3d 1027, 1042 (4th Cir. 1996) (observing that the language used in 21 U.S.C. § 853 "closely tracks that of the RICO forfeiture provision"); *see also* Black's Law Dictionary 1204 (6th ed. 1990) (defining proceeds as "the sum, amount, or value of property sold or converted into money or into other property") (quoted in *McHan*, 101 F.3d at 1041).²

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) (in money laundering case, 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," as forfeiture is not intended to punish just those criminals whose activity turns a profit); *United States v. Whatley*, 133 F.3d 601, 606 (8th Cir. 1998) (recognizing the propriety of using gross receipts rather than net profits, and noting that 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, and noting that "a deduction for taxes could create unwarranted complexities in the administration of the statute. The

IV. The gross proceeds of Counts 24 through 42 is \$52,007,545.47.

Rule 32.2(b)(1) provides the following procedure for determination of a money judgment 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 sought, the court must determine what property is subject to forfeiture under the applicable statute.... 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 must determine the amount of money that the defendant will be ordered to pay. This determination is made pursuant to 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

amount of taxes that a person pays depends upon his or her other income as well as on the nature of deductions taken by the taxpayer"); *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) (observing that under the RICO statute, "proceeds" includes the gross amount, not just profits, and explaining that "[t]he point is borne out by imagining that [the defendant] had been caught with the \$136 million in cash or gold The cash or gold could surely be described as property representing 'proceeds'"); *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).

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 is plainly met by virtue of Defendant’s conviction beyond a reasonable doubt as to the trades executed in connection with Counts 24 through 42. Evidence of the gross proceeds of those counts was presented during the trial, through evidence of the trade confirmation for each sale. Attached is the declaration of Dana Chamberlin, who sets forth the calculation of the gross proceeds of the sales at issue, as derived from the trade confirmations. *See* Ex. 1 (Declaration of Dana Chamberlin). Ms. Chamberlin provides a chart identifying, for each sale at issue in Counts 24 through 42, the following information: the count, the trade date, the shares sold, the gross proceeds of the trade, and the admitted exhibit where this underlying information can be found. As her declaration demonstrates, the sum of the gross proceeds for Counts 24 through 42 is \$52,007,545.47. Because this information is derived directly from the trade

confirmations, the United States expects that this calculation of the amount of the gross proceeds should be undisputed.

CONCLUSION

The United States respectfully requests an *in personam* money judgment against Defendant in the amount of \$52,007,545.47, representing the gross proceeds of the trades as to Counts 24 through 42. A proposed order is attached.

Respectfully submitted this 26th day of April, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th 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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