IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 05-cr-00545-EWN

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

SUR-RESPONSE TO THE REPLY OF THE UNITED STATES IN SUPPORT OF ITS MOTION FOR ENTRY OF A MONEY JUDGMENT

INTRODUCTION

The government has moved for a money judgment against Mr. Nacchio in the amount of $52,007,545.47, which represents the total amount of money generated by the sale of his Qwest stock corresponding to the counts of conviction. U.S. Motion for Entry of Money Judgment (April 26, 2007) [Doc. No. 412]. The government relies principally on 18 U.S.C. § 981(a)(1)(C), which provides that property "which constitutes or is derived from proceeds traceable to" a securities fraud offense is subject to forfeiture.

In its Reply In Support of Motion For Money Judgment (July 17, 2007) [Doc. No. 443], the government argues that the entire $52 million should be

forfeited, even though it concedes that Mr. Nacchio only obtained $28 million, because: 1) the purpose of criminal forfeiture is punishment (this argument is repeated several times); 2) the definition of proceeds pursuant to 18 U.S.C. § 981(a)(2)(A), which the government claims provides for forfeiture of gross sales proceeds, applies to the circumstances of this case; 3) forfeiture of gross proceeds is consistent with Congressional intent; 4) forfeiture of gross proceeds is consistent with Tenth Circuit precedent; and 5) forfeiture of the gross amount is consistent with Webster's preferred definition of "proceeds."

The government's arguments for forfeiture of the entire or gross amount of money generated by the sales are without merit because: 1) § 981 is actually a civil forfeiture statute, but even accepting some punitive aspect, there is no justification for punishing Mr. Nacchio under the circumstances of this case by sentencing him to the maximum period of incarceration permitted pursuant to the Sentencing Guidelines, imposing the maximum fine amount of $19 million, and adding another $52 million in forfeiture, which in total would result in exacting from Mr. Nacchio over $42 million more than he obtained from the subject sales, and just less than $70 million more than he gained from the essence of the offense for which he was convicted; 2) the definition of proceeds pursuant to 18 U.S.C. § 981(a)(2)(A) does not apply to this case;[1] 3) the

[1] Pursuant to § 981(a)(2)(A), the proceeds, however they are further defined, must first be "obtained." This point was fully addressed in Mr. Nacchio's Response to the government's motion [Doc. No. 440], and will not be further addressed in this Sur-Response, except to note that nowhere in § 981(a)(2)(A) does the word "gross" appear – it provides only that forfeiture under this subsection not be "*limited* to the net gain or profit realized from the offense."

Congressional intent relied upon by the government concerned RICO forfeiture provisions that involve wholly different issues than are present here, moreover, such intent was expressed prior to the enactment of the statutory forfeiture provisions applicable here, which provide for and define the nature and extent of the forfeiture; 4) there is no Tenth Circuit precedent involving the applicable forfeiture provisions at issue here, and the precedent relied upon by the government interpreted a drug forfeiture statute that is not analogous and completely irrelevant to the facts of this case; and 5) the dictionary definition of "proceeds" is irrelevant since Congress has defined the term in the context of the applicable forfeiture statute.

Mr. Nacchio maintains the correctness of the positions advanced in his Response to Motion of the United States for Entry of Money Judgment (July 6, 2007) [Doc. No. 440] ("initial Response"), and will only further address the above first two points of the government's argument.

1. The Civil Forfeiture Provision At Issue Here Does Not Provide For Forfeiture of "Gross Proceeds"

18 U.S.C. § 981 is clearly identified as a civil forfeiture statute, which since enactment of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), the government has been authorized to pursue through the criminal process. Congress accomplished this administrative change by amending 18 U.S.C. § 2461, which was clarified by further amendment in 2006.[2]

[2] The 2000 amendment to 28 U.S.C.§ 2461 added language that provided in relevant part that:

> If a forfeiture of property is authorized in connection with a violation of an Act of

Mr. Nacchio maintains, as set forth more fully in his initial Response, that the civil nature of the statute bears significance in this analysis, however, as recognized by the U.S. Supreme Court case cited by the government, *United States v. Bajakajian*, 524 U.S. 321, 331, 118 S.Ct. 2028, 2035 (1998), "some recent federal forfeiture laws have blurred the traditional distinction between civil *in rem* and criminal *in personam* forfeiture." The government relies upon *Bajakajian* to support its claim that the traditional and primary purpose of criminal forfeiture is punitive, which it then parlays into the argument that Mr. Nacchio should be required to forfeit as much as possible. In citing *Bajakajian,* the government has put the cart before the horse. *Bajakajian* actually stands for the proposition that forfeitures are fines if they constitute punishment for an offense, and therefore, could violate the Excessive Fines Clause of the Eighth Amendment if the forfeiture is grossly disproportional to the gravity of the defendant's offense. *Id.* at 324-28. Here, the extent of the punishment requested by the government by way of forfeiture and fines is so punitive that it would violate the Constitution.

> Congress, and any person is charged in an indictment . . .with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment . . .and upon conviction, the court shall [issue a forfeiture order]. . . .

In 2006, the language of 28 U.S.C. § 2461 was clarified as follows:

> 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 . . . [and i]f the defendant is convicted . . .the court shall [issue a forfeiture order]. . .as part of the sentence in the criminal case. . . .

Regardless of whether the applicable provision is described as civil or criminal, punitive or remedial, it is clear that 18 U.S.C. § 981(a)(1)(C) does not provide for the forfeiture of "gross proceeds" or "gross receipts."[3] This is especially telling since several of the provisions of 18 U.S.C. § 981(a)(1) do so provide. See, 18 U.S.C. § 981(a)(1)(D) and (E), which identify specific offenses affecting or involving financial institutions; and § 981(a)(1)(F), which identifies specific offenses relating to stolen motor vehicles. Congress obviously recognized important differences in the nature and extent of forfeitures in different contexts, including its intent to require forfeiture of "gross" proceeds in certain situations, and not in others. The general language of the applicable forfeiture provision does not, therefore, require the forfeiture of gross proceeds or receipts.

As part of CAFRA, Congress also added a definition of "proceeds" to 18 U.S.C. § 981(a), which provides in relevant part that:

> (A) In cases involving illegal goods, illegal services, [and] unlawful activities . . . the term "proceeds" means 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 fro the offense.
>
> (B) In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term

[3] 18 U.S.C. § 981(a)(1)(C) provides that the following property is subject to forfeiture:

> Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of [enumerated sections of Title 18] or any offense constituting "specified unlawful activity" (as defined in section 1956(C)(7) of this title), or a conspiracy to commit such offense.

> "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.
>
> (C) In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

18 U.S.C. § 981(a)(2).

Even though it seems clear that the definition provision of subsection (a)(2)(C) is not applicable here, certainly the government can not dispute the fact that both subsections (B) and (C) do not require the forfeiture of "gross proceeds or receipts." These different definitions make even more clear that the nature and extent of what is subject to forfeiture in the various types of cases covered under § 981(a)(1)(C) can not be automatically lumped together with cases interpreting the purpose of other statutory forfeiture provisions that provide for different amounts of forfeiture in different types of cases.

2. 18 U.S.C. § 981(a)(2)(A) Does Not Apply Here

The government asserts that § 981(a)(2)(A) applies rather than § 981(a)(2)(B), and relies primarily upon the argument that the term "specified unlawful activity" used in one subsection of § 981 as a shorthand method of referring to a very long list of particular offenses, is synonymous with the words "unlawful activities" used in another subsection, and in the completely different context of defining the term "proceeds." The government, and the district court opinion it cites in support of its position, *United States v. All Funds on Deposit in*

United Bank of Switzerland, 188 F. Supp. 2d 407, 410 (S.D.N.Y. 2002), have taken an overly simplistic approach that is not warranted.

18 U.S.C. § 981(a)(1)(C) lists offenses for which the provision provides for forfeiture. Congress, as part of CAFRA in 2000, made forfeiture available in an additional long list of specific criminal offenses by using the shorthand term "'specified unlawful activity' (as defined in section 1956(c)(7) of this title)." The term "specified unlawful activity" does not provide any common description of the type or nature of the criminal offenses being added. The list goes on for more than a page and includes offenses as varied as the criminal code itself.

By contrast, 18 U.S.C. § 981(a)(2) provides three different definitions of the term "proceeds" used in § 981(a)(1)(C). The three subsections clearly attempt to describe different types of cases in order to distinguish between the nature and amount of forfeiture that Congress intended to provide for different types of offenses. The first two subsections draw a distinction between cases involving "illegal goods, illegal services, [and] unlawful activities" from those involving "lawful goods or lawful services that are sold or provided in an illegal manner." Compare, 18 U.S.C. § 981(a)(2)(A) and § 981(a)(2)(B). Congress very easily could have used the same term, "specified unlawful activity" in the definition section of 981(a)(2)(A) if it intended to incorporate all of those same offenses into this category of cases. It did not.

The term "unlawful activities" in the definition section is intended to describe a type of criminal activity rather than identify an entire list of specific

criminal offenses. Clearly, at least some offenses that are listed under the rubric of "specified unlawful activity" were meant to be excluded from those kinds of offenses referred to in the § 981(a)(2)(A) definition. Otherwise, there would be no reason to have § 981(a)(2)(B) or (C) definitions.[4] In fact, it is hard to imagine what types of offenses could be considered § 981(a)(2)(B) offenses, if not offenses relating to falsely classifying goods (§ 541) and smuggling goods (§§ 542, 545). Under the government's interpretation, these offenses would have to be §981(a)(2)(A) offenses because they are identified as "specified unlawful activity" pursuant to 18 U.S.C. § 1956(c)(7)(D). Moreover, "specified unlawful activity" includes mail fraud (§ 1341) and wire fraud (§ 1344). Certainly, § 981(a)(2)(B) offenses would have to include mail and wire fraud offenses "involving lawful goods or lawful services that are sold or provided in an illegal manner." The government's statutory interpretation would not allow for this.

It is also instructive that § 981(a)(2)(C), by definition, would have to include certain financial institution fraud offenses, such as 18 U.S.C. § 1344(2),[5] and offenses involving a false statement in a loan or credit application, such as

[4] It makes no sense that Congress reserved the definitions in § 981(a)(2)(B) and (C) for those relatively few offenses that were already separately listed in § 981(a)(1)(C). Several of these offenses, which include numerous counterfeit offenses (§§ 471-488), embezzlement and theft offenses (§§ 656, 657), and offenses relating to explosive materials, including their use to destroy buildings belonging to the United States (§§ 842, 844), are obviously not § 981(a)(2)(B) type offenses that involve lawful goods or services provided in an illegal manner.

[5] 18 U.S.C. § 1344(2) provides that it is unlawful to "obtain any of the moneys. . . under the custody or control of , a financial institution, by means of false or fraudulent pretenses, representations, or promises."

18 U.S.C. § 1014.[6] Both of these offenses are also included within the list of "specified unlawful activity." Under the government's view these, too, would have to be characterized as § 981(a)(2)(A) offenses. On the other hand, if the government's view was correct, there would be no reason to specifically include in the § 981(a)(2)(A) definition "health care fraud schemes" since offenses involving health care are specifically identified as "specified unlawful activity." See, 18 U.S.C. § 1956(c)(7)(F).

Since § 981(a)(2)(A) does not specifically cover insider trading, one is left with the common sense approach and the precedent of cases that have addressed similar issues in similar types of cases to determine whether an insider trading case is one "involving illegal goods" or "lawful goods. . .sold . . . in an illegal manner," which would thereby specifically provide for exclusion of the direct costs associated with selling the goods. The government contends that Mr. Nacchio's argument ignores the fact that what Mr. Nacchio did here was unlawful because of his bad intent. The government ignores that offenses involving lawful goods sold in an illegal manner will always require criminal intent, and will always be unlawful.

The three cases cited by the government in support of its position all involved the possession and distribution of illegal narcotics – clearly cases that if the § 981(a)(2) definitions applied, involve illegal goods and the application of § 981(a)(2)(A). As such, they are unhelpful in the context of the issue to be

[6] 18 U.S.C. § 1014, in sum and substance, makes it unlawful to knowingly make false statements on a loan application.

resolved here. By contrast, Mr. Nacchio cited *United States v. Elliott*, 727 F.Supp. 1126, 1128-29 (N.D. Ill. 1989), a case that specifically provided for the exclusion of the direct costs of commissions and interest in a case involving securities fraud.

The Court should find that 18 U.S.C. § 981(a)(2)(B) is applicable to the facts and circumstances of this case, and should, at a minimum, allow for the exclusion of direct costs, to include the cost of exercising Mr. Nacchio's options, which was approximately $7.315 million, and another $60,000, which was expended on commissions and fees.

Respectfully submitted this 23rd day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July 2007, a true and correct copy of the foregoing **SUR-RESPONSE BY JOSEPH P. NACCHIO TO THE REPLY OF THE UNITED STATES IN SUPPORT OF ITS MOTION FOR ENTRY OF A MONEY JUDGMENT** was served on the following via email and the USDC CM/ECF system:

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