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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-21010-CR-MARTINEZ

UNITED STATES OF AMERICA,

vs.

JOEL ESQUENAZI, and
CARLOS RODRIGUEZ.

Defendants.

_____/

**UNITED STATES' MOTION FOR ENTRY OF FORFEITURE MONEY JUDGMENT
AT SENTENCING AND INCORPORATED MEMORANDUM OF LAW**

The United States of America (hereinafter, the "United States" or the "Government"), by and through its undersigned attorney, hereby respectfully requests that the Court enter a personal forfeiture money judgment against the defendants, Joel Esquenazi and Carlos Rodriguez, jointly and severally, in the amount of \$3,093,818.50 in United States currency at their sentencing hearing scheduled for October 25, 2011. Furthermore, the Government respectfully requests that the Court announce such forfeiture money judgment as part of the defendants' respective sentence and include it in the Judgment in this case, either directly or by reference, pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure (hereinafter, "Fed. R. Crim. P."). The Government submits an incorporated memorandum of law and a proposed order of forfeiture herewith.

MEMORANDUM OF LAW

A. BRIEF PROCEDURAL HISTORY

1. A federal grand jury sitting in the United States District Court for the Southern District of Florida returned a twenty-one (21)-count true bill of indictment on December 9, 2009 (D.E. No. 3)(hereinafter, the “Indictment”) charging the defendants with certain criminal violations.

2. The Indictment charged the defendants with having committed a violation of Title 18, United States Code, Section 371 (conspiracy to violate 15 U.S.C. § 78dd-2(a)(Federal Corrupt Practices Act (hereinafter, the “FCPA”)) and conspiracy to violate 18 U.S.C. § 1343 (wire fraud))(Count 1), violations of Title 15, United States Code, Section 78dd-2(a)(FCPA)(Counts 2-8), a violation of Title 18, United States Code, Section 1956(h)(money laundering conspiracy)(Count 9) and violations of Title 18, United States Code, Section 1956(a)(1)(B)(i)(money laundering)(Counts 10-21).

3. The Indictment also alleged that upon conviction of any of the violations alleged in Counts 1 through 8 of the Indictment, the defendants shall forfeit to the United States any property, real or personal, which constitutes or is derived from proceeds traceable to such violations, pursuant to Title 18, United States Code, Section 981(a)(1)(C).¹ Additionally, the Indictment alleged that upon conviction of any of the violations alleged in Counts 9 through 21 of the Indictment, the defendants shall forfeit to the United States any property, real or personal, involved in such violation or any

¹ 18 U.S.C. § 982(a)(1)(A) is the relevant forfeiture statute to be applied upon conviction of a conspiracy to violate 18 U.S.C. § 1343 (wire fraud), as opposed to conspiracy to violate 15 U.S.C. § 78dd-2(a)(FCPA), as alleged in Count 1 of the Indictment. Section 982(a)(1)(A) provides that upon conviction of such violation, the defendant shall forfeit “any property constituting, or derived from, proceeds [the defendants] obtained directly or indirectly, as the result of such violation.”

property traceable to such property. The Government, although not required by Fed. R. Crim. P. 32.2, provided notice of its intent to seek a forfeiture money judgment against the defendants, jointly and severally, upon their conviction of the violations alleged in the Indictment as part of their respective sentence.² Furthermore, although the Government specified the amount of the forfeiture money judgment that it would seek upon conviction of the defendants, the Court is not necessarily limited by that amount when it issues its forfeiture order. *See United States v. Decent*, 292 F.3d 703, 706 (11th Cir. 2002)(because forfeiture is part of sentencing, modification of amount Government is seeking as money judgment is not an improper amendment to the indictment); *see also United States v. Rosin*, 263 F. App'x 16, 38 (11th Cir. 2008)(unpublished)(same; in determining the amount of a money judgment, the District Court was not limited to the amount specified in the forfeiture allegation of the indictment).

4. On August 4, 2011, a petit jury found the defendants guilty of all of the violations alleged in the Indictment.

B. RELEVANT STATUTES AUTHORIZING FORFEITURE MONEY JUDGMENTS

1. The FCPA (Counts 1-8)

The relevant forfeiture statute applicable upon conviction of a violation of, or a conspiracy to violate, the FCPA (15 U.S.C. § 78dd-2(a)), as alleged in Counts 1 through 8 of the Indictment, is Title 18, United States Code, Section 981(a)(1)(C), which permits the Government to seek civil forfeiture of all right, title and interest belonging to a defendant so convicted in “[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense

² Fed. R. Crim. P. 32.2(a) provides, in pertinent part, that “[t]he indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.”

constituting ‘specified unlawful activity’ (as defined in section 1956(c)(7) of this title).” 18 U.S.C. § 981(a)(1)(C). A felony violation of the FRCP is included in the definition of “specified unlawful activity” in section 1956(c)(7). *See* 18 U.S.C. § 1956(c)(7)(D).

Although Title 18, United States Code, Section 981 only permits civil forfeiture, Congress’ enactment of Title 28, United States Code, Section 2461(c), effective August 23, 2000, makes criminal forfeiture available in every case in which there is no applicable criminal forfeiture statute, but for which civil forfeiture is legally authorized. *See United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008). Given that civil forfeiture is authorized in cases involving a violation, or a conspiracy to violate, the FRCP pursuant to Title 18, United States Code, Section 981(a)(1)(C), Title 28, United States Code, Section 2461(c) authorizes criminal forfeiture for such violations as well.

Moreover, not only is it clear that Title 28, United States Code, Section 2461(c) provides the Government with the authority to seek forfeiture of specified property in accordance with the Federal Rules of Criminal Procedure, “it is equally clear that the federal rules explicitly contemplate the entry of money judgments in criminal forfeiture cases.” *United States v. Padron*, 527 F.3d at 1162 (internal quotation marks omitted)(holding, among other things, that a district court is authorized to enter a forfeiture money judgment against a defendant upon conviction pursuant to 18 U.S.C. § 981(a)(1)(C), as made applicable by 28 U.S.C. § 2461(c)).

The operative word in determining the amount of a forfeiture money judgment to be entered upon conviction of a violation of, or a conspiracy to violate, the FCPA pursuant to Section 981(a)(1)(C) is “proceeds,” which is very neatly defined in Title 18, United States Code, Section 981(a)(2)(A)-(B).

2. Money Laundering Statutes (Counts 9-21)

Upon conviction of a violation of, or a conspiracy to violate, the federal money laundering statutes (18 U.S.C. § 1956), as alleged in Counts 9 through 21 of the Indictment, is Title 18, United States Code, Section 982(a)(1), the Government is permitted to seek criminal forfeiture of all right, title and interest belonging to a defendant so convicted in “in any property, real or personal, *involved in such offense*, or any property traceable to such property.” 18 U.S.C. § 982(a)(1)(emphasis added).

In addition to forfeiting specific property, a forfeiture money judgment is an authorized punishment that may be imposed against a defendant convicted of a violation of, or a conspiracy to violate, the federal money laundering statutes. *See United States v. Seher*, 574 F.Supp.2d 1368 (N.D.Ga. 2007)(entering a forfeiture money judgment in the amount of \$1,610,400 against an individual defendant convicted of violating 18 U.S.C. §§ 1956(h) and (a)(3)(B) pursuant to 18 U.S.C. § 982(a)(1)); *see also United States v. Seher*, 652 F.3d 1344, 1372 n.30 (11th Cir. 2009)(stating that the Eleventh Circuit has expressly rejected the argument that district courts lack the authority to enter forfeiture money judgments generally and specifically affirming forfeiture money judgments imposed for violations of the federal money laundering statutes).

Courts have broadly interpreted the phrase “involved in the offense” in calculating the amount of money a defendant will be ordered to pay as a forfeiture money judgment upon conviction of a money laundering offense pursuant to Title 18, United States Code, Section 982(a)(1) to encompass “the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.” *United States v. Puche*, 350 F.3d 1137, 1153 (11th Cir. 2003)(*quoting United States v. Bornfield*, 145 F.3d 1123, 1135 (10th Cir. 1998)(internal quotation marks omitted).

Further, the term “facilitate” in that context is defined broadly as well and means that in order to facilitate the money laundering offense, the property “need only make the prohibited conduct less difficult or more or less free from obstruction or hindrance.” *Id.* Although *mere* pooling or commingling of tainted and untainted funds in an account, without more, does not render the entire contents of that account subject to forfeiture, if a defendant pooled the funds in an effort to facilitate or disguise the illegal scheme, then forfeiture of commingled funds would be proper. *See United States v. Puche*, 350 F.3d at 1154 (*citing United States v. Bornfield*, 145 F.3d at 1135).

C. RELEVANT CRIMINAL FORFEITURE PROCEDURE

1. Evidence

The Court’s determination of the amount of money that the defendants will be ordered to pay as a forfeiture money judgment “may be based on evidence already in the record . . . and on any additional evidence or information submitted by the parties and accepted by the [C]ourt as relevant and reliable.” Fed. R. Crim. P. 32.2(b)(1)(B). Neither the Federal Rules of Evidence, nor any other rule, prohibits the admission and use by the Court of hearsay statements or any other information which the Court accepts as relevant and reliable. *See* Fed. R. Evid. 1101(d)(3)(stating that the Federal Rules of Evidence are inapplicable in sentencing proceedings); *Libretti v. United States*, 516 U.S. 29, 38-41, 116 S.Ct. 356, 133 L.Ed2d 271 (1995)(holding that forfeiture is part of the sentencing process); *see also* Fed. R. Crim. P. 32.2(b)(1)(B)(providing that “any additional evidence or information submitted by the parties and accepted by the [C]ourt as relevant and reliable” may be used to form the basis on which the Court makes its determination regarding forfeiture).

2. Burden of Proof

Because forfeiture is a part of sentencing, the Government is only required to establish the amount of money the defendants will be ordered to pay as a forfeiture money judgment by a

preponderance of the evidence. *See United States v. Cabeza*, 258 F.3d 1256 (11th Cir. 2001)(citing *United States v. Dicter*, 198 F.3d 1284, 1290 (11th Cir. 1999)(the burden of proof on a forfeiture count is a preponderance of the evidence notwithstanding the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *see also United States v. Elgersma*, 971 F.2d 690, 694-696 (11th Cir. 1992) (holding that forfeiture is part of the sentencing process and not an element of the crime itself; accordingly, because due process does not require the beyond a reasonable doubt standard to apply to the sentencing process, Congress has the authority to apply (and did apply) a less strenuous standard of proof than the beyond a reasonable doubt standard to criminal forfeiture).

D. ARGUMENT

THE DEFENDANTS SHOULD BE ORDERED TO PAY \$3,093,818.50 IN UNITED STATES CURRENCY, JOINTLY AND SEVERALLY, TO THE UNITED STATES AS THAT IS AN AMOUNT OF MONEY EQUAL IN AGGREGATE VALUE TO THE PROPERTY, REAL OR PERSONAL, WHICH CONSTITUTES OR IS DERIVED FROM PROCEEDS TRACEABLE TO THE VIOLATIONS ALLEGED IN COUNTS 1 THROUGH 8 OF THE INDICTMENT, OF WHICH THE DEFENDANTS WERE CONVICTED, AND THE PROPERTY, REAL OR PERSONAL, INVOLVED IN THE VIOLATIONS ALLEGED IN COUNTS 9 THROUGH 21 OF THE INDICTMENT, OR PROPERTY TRACEABLE TO SUCH PROPERTY, WHICH THE DEFENDANTS WERE CONVICTED

The evidence, either already in the record or that the Government may submit at the defendants sentencing hearing, shows that Joel Esquenazi and Carlos Rodriguez authorized the payments of bribes on behalf of Terra Telecommunications Corporation (hereinafter, "Terra Telecom") to the Director of International Relations of Telecommunications D'Haiti, which was the Republic of Haiti's state-owned national communications company, in exchange for business

advantages to be bestowed upon Terra Telecom by Telecommunications D'Haiti. The business advantages included preferred telecommunications rates, reduced number of minutes for which payment was owed, and various credits toward sums owed by Terra Telecom to Telecommunications D'Haiti. This conduct, along with other behavior in which the defendants engaged, formed the factual basis for the violations alleged in Counts 1 through 8 of the Indictment. Indeed, as a result of this conduct, Terra Telecom did not have to pay approximately \$2.2 million (or \$2,200,000 in United States currency) in telecommunications charges. Therefore, \$2,200,000 in United States currency is an amount of money equal in value to the property, real or personal, which constitutes or is derived from proceeds traceable to the violations alleged in Counts 1 through 8 of the Indictment, of which the defendants were convicted, and the Court should order the defendants to pay such amount, jointly and severally, to the United States as a result.

Additionally, the evidence, either already in the record or that the Government may submit at the defendants sentencing hearing, shows that Joel Esquenazi and Carlos Rodriguez were responsible for paying bribes to officials at Telecommunications D'Haiti, and laundering the proceeds of such bribes, totaling \$893,818.50 in United States currency. This conduct, along with other behavior in which the defendants engaged, formed the basis for the violations alleged in Counts 9 through 21 of the Indictment. Therefore, \$893,818.50 in United States currency is an amount of money equal in value to the property, real or personal, involved in the violations alleged in Counts 9 through 21 of the Indictment, or property traceable to such property, of which the defendants were convicted, and the Court should order the defendants to pay such amount, jointly and severally, to the United States as a result.

E. CONCLUSION

For the reasons set forth herein the United States' hereby respectfully requests that the Court enter a personal forfeiture money judgment against the defendants, Joel Esquenazi and Carlos Rodriguez, jointly and severally, in the amount of \$3,093,818.50 in United States currency at their sentencing hearing scheduled for October 25, 2011, and to include such forfeiture money judgment when orally announcing the defendants' respective sentence and in the Judgment in this case, either directly or by reference, pursuant to Fed. R. Crim. P. 32.2.

Respectfully submitted,
WIFREDO A. FERRER
UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 21, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

By: s/Daren Grove
Daren Grove
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-21010-CR-MARTINEZ

UNITED STATES OF AMERICA,

vs.

JOEL ESQUENAZI, and
CARLOS RODRIGUEZ.

Defendants.

_____ /

ORDER OF FORFEITURE

WHEREAS, on August 8, 2011, JOEL ESQUENAZI and CARLOS RODRIGUEZ (hereinafter, the “Defendants”) were found guilty of all of the violations alleged in Counts 1 through 21 of the Indictment returned on December 8, 2009; and

WHEREAS, pursuant to Fed. R. Crim. P. 32.2, the United States moved for entry of a forfeiture money judgment against the Defendants, jointly and severally, in an amount equal in aggregate value to the property, real or personal, which constitutes or is derived from proceeds traceable to the violations alleged in Counts 1 through 8 of the Indictment and the property, real or personal, involved in the violations alleged in Counts 9 through 21 of the Indictment, or property traceable to such property.

WHEREAS, the Court finds that \$2,200,000 in United States currency is an amount of money equal in value to the property, real or personal, which constitutes or is derived from proceeds traceable to the violations alleged in Counts 1 through 8 of the Indictment, of which the Defendants were convicted; and

WHEREAS, \$893,818.50 in United States currency is an amount of money equal in value to the property, real or personal, involved in the violations alleged in Counts 9 through 21 of the Indictment, or property traceable to such property, of which the Defendants were convicted;

WHEREAS, Rule 32.2(c)(1) of the Federal Rules of Criminal Procedure provides that “no ancillary proceeding is required to the extent that forfeiture consists of a money judgment,”

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JOEL ESQUENAZI and CARLOS RODRIGUEZ, shall pay, jointly and severally, \$3,093,818.50 in United States currency to the United States;

IT IS FURTHER ORDERED that the United States District Court shall retain jurisdiction in this matter for the purpose of enforcing this Order of Forfeiture; and

IT IS FURTHER ORDERED that pursuant to Fed. R. Crim. P. 32.2(b)(3), this Order of Forfeiture shall become final as to the Defendants at the time of their respective sentencing, shall be announced as part of each of the Defendants’ respective sentence and shall be included in the Judgment in this cause; and

IT IS FURTHER ORDERED that the United States may, at any time, move pursuant to Fed. R. Crim. P. 32.2(e) to amend this Order of Forfeiture so as to substitute property having a value not to exceed the sum of \$3,093,818.50 in United States currency in satisfaction of the forfeiture money judgment in whole or in part; and

IT IS FURTHER ORDERED that the Clerk of the Court shall forward four certified copies of this Order of Forfeiture to the United States Attorney's Office, Southern District of Florida, Asset Forfeiture Division, 99 N.E. 4th Street, Miami, Florida 33132, Attention Assistant U.S. Attorney Daren Grove.

DONE ORDERED in Miami, Florida on this day of October, 2011.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

cc: AUSA Daren Grove (2 certified copies)