IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	
JERRY PANTELIDIS	:	CRIMINAL NO. 01-0694

MEMORANDUM AND ORDER

Fullam, Sr. J. June 1 , 2005

On September 7, 2004, having heard argument on defendant's motion for return of property, this Court entered an Order releasing $150,000 in funds to the defendant and deferring judgment on the disposition of the remaining assets until the conclusion of the trial. Defendant has now pled guilty to the charges against him, obviating the need for a trial and allowing the Court to again consider defendant's request for the return of property.

The indictment charged the defendant with having made false statements to several federally-insured lending institutions for the purpose of obtaining lines of credit, and with having given false testimony during a bankruptcy proceeding. The fraudulent transactions occurred between 1997 and 1999, the defendant was indicted in 2001, and entered his guilty plea in January 2005. The length of this process was due both to an intervening appeal and frequent plea negotiations concerning the disposition of assets held in escrow.

The forfeiture notice in the indictment contains a figure of $637,441.40, representing defendant's total net proceeds from the sale of two properties purchased with loan money from the defrauded banks. After the indictment some funds in escrow were disbursed to third parties, leaving the breakdown of the remaining funds in escrow as follows: $87,973 from the sale of a property at 311 S. Juniper Street and $267,180 from the sale of a property at 1315 Walnut Street.

The government has proceeded with forfeiture under 18 U.S.C. § 982(a)(2), which states that the Court, upon imposing sentence on a person convicted of, among others, Sections 1014 or 1344 of that title, "shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation."

The disputed funds held in escrow are, so the government argues, "proceeds" of the defendant's criminal activity and thus properly forfeited under either 18 U.S.C. § 981 or § 982. While both parties agree that these funds were properly seized pre-trial, the question of whether those funds are properly considered "proceeds" must be addressed now that a guilty plea has been entered.

The government argues that it was entitled to either the full amount of the fraudulently obtained loan or the total

proceeds of the sale of any property purchased with that loan. In this case, the government contends that it chose the more conservative figure and sought only to forfeit the proceeds of the sales.

Defendant argues that the proceeds of all the sales belong to him, and relies on 18 U.S.C. § 981(a)(2)(C), which states that "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." Pantelidis argues that he, or his companies, repaid $589,949 on his $500,000 loan on Juniper Street and $2,366,791 on his $1,750,000 loan for the Walnut Street property, thus entitling him to an offset against forfeiture. Were that the case, defendant would be entitled to keep the remaining proceeds of the sales. However, the statute upon which defendant relies covers civil forfeiture and is not applicable to this circumstance.

Regardless of the application of the civil forfeiture statute, the government contends that defendant still would forfeit funds under his analysis. The government argues that it was entitled to seek forfeiture of the entire sale price of both properties and the fact it choose only to seek forfeiture of defendant's net proceeds does not change its entitlement to

forfeit the entire sale price, which would saddle defendant with forfeitable amounts of $360,051 on Juniper Street and $683,209 on Walnut Street, the total of which is far more than the $637,441.40 forfeiture sought in the indictment.

While the government is correct that it could have chosen to seek forfeiture of more funds than it did, the fact remains that the government is stuck with the number it chose in the indictment. Despite its current desire to do so, the government cannot now make an ex post facto change to the forfeiture amount pled in the indictment.

Accordingly, the actual amount forfeited in this case depends on a determination of what constitutes "proceeds" within the meaning of the statute. This determination is made utilizing a probable cause standard, i.e. is the information relied on by the government sufficient to allow a reasonable person to conclude that the property is the proceeds of illegal conduct. United States v. 6109 Grubb Rd., 886 F.2d 618, 621 (3d Cir. 1989).

While case law is sparse on the meaning of proceeds in § 982, the RICO forfeiture provision, 18 U.S.C. § 1963, also utilizes a proceeds analysis to determine what constitutes forfeitable property. In Russello v. United States, 464 U.S. 16, 29 (1983), the Supreme Court made clear that "proceeds" and "profits" are two different concepts. The legislative history

surrounding § 1963 indicates that Congress shared this view of the two terms, and "intended 'proceeds' to have a broader meaning that includes "'profits'." United States v. Saccoccia, 823 F.Supp. 994, 1002 (D. RI. 1993).

Despite the broad meaning attributed to the term "proceeds", one tainted infusion of funds into an otherwise legal transaction does not taint the entire transaction, nor does it subject the interest in the property to forfeiture. United States v. Eleven Vehicles, 836 F.Supp. 1147, 1154 (E.D. Pa. 1993). However, courts do not require tracing to be transaction specific. All that is required is a showing of "reasonable grounds to believe that the property probably was derived from the malfeasance." Id. (citing, United States v. 92 Buena Vista Ave., 937 F.2d 98, 104 (3d Cir. 1991)).

Based on the evidence of record in this case, I conclude that the government has met its burden of linking the proceeds from the sale of defendant's properties to the illegal activity. The money obtained through the fraudulent loan applications was used to purchase the properties in question in this case. Therefore, any profit defendant made from the sale of those properties stems from his acquisition of those properties with fraudulently obtained funds. For the purposes of 18 U.S.C. § 982, the $355,153 remaining in escrow constitutes forfeitable assets.

The sole remaining question is how much, if any, of those funds should be returned to defendant. Defendant argues that various costs, not appearing on the settlement sheet, fall under the category of necessary costs to generate income and can be offset against the amount subject to forfeiture. Such costs include, so defendant argues, $77,611.28 in interest paid to Regent Bank on the Juniper Street loan, $14,850 in loan origination fees, $91,938 in interest to First Republic bank on a loan to refinance Juniper Street, and over $600,000 in interest and fees associated with the Walnut Street property. Defendant argues that, if his deductions are accepted, the amount forfeitable is $0.

At oral argument, the government contended that defendant's list of offsets amounted to double deductions, a point that defense counsel contested. Counsel for the government did agree, however, that if defendant's argument is accepted the forfeitable amount would be $0.

I am inclined to agree with defendant's position on this issue. A defendant is entitled to subtract from the gross proceeds the "ordinary and necessary costs of generating the income." United States v. Genova, 333 F.2d 750, 761 (7th Cir. 2003). These ordinary expenses include the overhead costs of doing business, defined by Black's Law Dictionary as any cost not directly associated with the production of identifiable goods.

In this case, the payments of interest and closing costs fit this definition, as defendant could not have sold either property without the payment of those expenses and defendant never had the opportunity to spend those sums on personal items. See United States v. Elliot, 727 F.Supp. 1126, 1129 (N.D. Ill. 1989)(holding that money deducted as a cost of transaction was never received by a defendant and could not have been spent or utilized, thus it was not forfeitable).

In sum, I find that the disputed funds in this case are "proceeds" within the meaning of the statute and are subject to forfeiture. However, the offsets to which defendant is entitled exceed the amount of funds held in escrow. Accordingly, defendant is entitled to have all those funds still held in escrow released to him.

An Order follows.

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ORDER

AND NOW, this 1st day of June, 2005, upon consideration of Defendant's Motion for the return of property and the responses thereto, IT IS ORDERED that the motion is GRANTED. The government is directed to release all remaining funds held in escrow to Mr. Pantelidis.

/s/ John P. Fullam
John P. Fullam, Sr. J.