THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	CASE NO. CR20-0174-JCC ORDER

This matter comes before the Court on the Government's motion for entry of a combined preliminary order of forfeiture and an order of forfeiture. (Dkt. No. 140.)

I. PROPERTY AT ISSUE

The Government seeks to forfeit to the United States, Defendant Eric Shibley's interest in the following property (collectively, the "Subject Property"):

1. $49,500.86 in U.S. funds, seized on or about May 29, 2020 from Navy Federal Credit Union account #******7528, held in the name of Eric R. Shibley MD PLLC ("Subject Property 1");

2. $100,000.00 in U.S. funds, seized on or about May 29, 2020 from Wells Fargo account #******2378, held in the name of ES1 LLC ("Subject Property 2");

3. $804,816.63 in U.S. funds, seized on or about May 27, 2020 from Wells Fargo account #******3536, held in the name of The A Team Holdings LLC ("Subject Property 3");

4. $114,440.00 in U.S. funds, seized on or about June 30, 2020 from Verity Credit Union account #***5390, held in the name of Dituri Construction LLC ("Subject Property 4");

5. $114,743.59 in U.S. funds, seized on or about June 30, 2020 from Verity Credit Union account #***5320, held in the name of SS1 LLC ("Subject Property 5"); and

6. A sum of money in the amount of $254,199, reflecting the remainder of the proceeds the Defendant personally obtained from the offenses ("Subject Property 6").

II. DISCUSSION

The Government's motion is undisputed, except for Subject Property 2. ES1 LLC ("ES1") has filed an appearance in this case and objects to forfeiture of that property. (Dkt. Nos. 141, 142.) For the reasons explained below, the Court OVERRULES the objection and GRANTS the Government's motion.

ES1 is an entity controlled by Mr. Shibley, which the jury found was involved in Mr. Shibley's illegal activity. (*See* Dkt. Nos. 123 at 19, 128 at 5 (jury instructions and completed verdict form).) ES1 argues that forfeiture of Subject Property 2 is improper because ES1 has filed for bankruptcy protection; therefore, it argues, Subject Property 2 belongs to the bankruptcy estate, should be turned over to the debtor, and is protected against forfeiture by the automatic bankruptcy stay. (Dkt. No. 142 at 2–3 (citing 11 U.S.C. § 362(a)(3)).)[1]

Critically, Mr. Shibley himself does not contest the forfeiture, and ES1 does not assert that Subject Property 2 lacks a sufficient nexus to a criminal offense, only that the bankruptcy proceeding prevents its forfeiture. (*See generally* Dkt. No. 142.) Nor has any party requested a hearing on the issue. (*See id.*) Thus, no hearing will be held. *See* Fed. R. Crim. P. 32.2(b)(1)(B).

[1] The Court takes judicial notice that ES1 voluntarily filed for Chapter 11 bankruptcy on November 19, 2021, a day after a jury found Mr. Shibley guilty on seven counts of wire fraud, three counts of bank fraud, and five counts of money laundering. (Dkt. No. 128); *In re ES1 LLC*, Case No. BK21-12109-CMA, Dkt. No. 1 (Bankr. W.D. Wash. 2021). This timing appears to be coincidental, as ES1's bankruptcy counsel told the bankruptcy court during a phone conference that the timing was based on an upcoming scheduled foreclosure sale. *See In re ES1 LLC*, BK-21-12109-CMA, Dkt. No. 25 (audio recording).

Criminal forfeitures are governed by Federal Rule of Criminal Procedure 32.2, and by 21 U.S.C. § 853. *See* 18 U.S.C. § 982(b)(1) (providing that 21 U.S.C. § 853 governs forfeiture proceedings arising from, among other offenses, wire fraud and bank fraud). Under § 853(k)(1), "no party claiming an interest in property subject to forfeiture . . . may intervene in a trial or appeal of a criminal case regarding the forfeiture of such property." And Federal Rule of Criminal Procedure 32.2(c)(1) suggests that a third party asserting an interest in property to be forfeited must do so by filing a petition to commence an ancillary proceeding as prescribed by statute. *See also* § 853(n). Thus, ES1's participation at this juncture is premature and improper.

Even if ES1 had followed the correct procedure, its arguments fail. Courts generally prevent criminal defendants and debtors from using bankruptcy protections to short-circuit forfeiture proceedings. *See, e.g.*, *In re Chapman*, 264 B.R. 565, 572 (B.A.P. 9th Cir. 2001); *In re Thena, Inc.*, 190 B.R. 407, 411–13 (Bankr. D. Or. 1995) (analyzing 11 U.S.C. §§ 541(a) and (d) and holding that property seized before the debtor petitioned for bankruptcy does not become property of the bankruptcy estate).

For example, where, as here, the Government seizes property under a warrant before the debtor declares bankruptcy, (*see* Dkt. No. 41 at 2–3), the property does not even end up in the bankruptcy estate—only the right to challenge the forfeiture does. *See In re VPH Pharm., Inc.*, 2018 WL 3574721, slip op. at 2 (E.D. Mich. 2018) (citing *Thena*, 190 B.R. at 410). This happens because, under 11 U.S.C. § 541(d), property in which the debtor holds "only legal title and not an equitable interest" when it files for bankruptcy, becomes property of the bankruptcy estate "only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold"—and a debtor has no equitable interest in possessing or benefitting from property that was seized under a warrant. *See Thena*, 190 B.R. at 410.

Even if Subject Property 2 were part of ES1's bankruptcy estate, the automatic stay would not bar the Government's attempt to obtain it via forfeiture. Section 362(b)(4) of the

Bankruptcy Code exempts from the automatic stay an action by a governmental unit to enforce its "police or regulatory power."[2] *See Chapman*, 264 B.R. at 572 (holding that this exception exempted a civil forfeiture action from the automatic stay even before the Government obtained a forfeiture judgment). If that was true of the civil forfeiture action in *Chapman*, it is even more so for the post-conviction criminal forfeiture motion at issue here, which adjudicates only Mr. Shibley's interest in the Subject Property. *See id.* (stating the legal tests for application of the "police and regulatory power" exception).

Moreover, under the relation-back doctrine, title to forfeited property passes to the United States retroactively as of the date of the underlying offense, thus preceding any later-filed bankruptcy petition. *See, e.g.*, *In re Dreier LLP*, 452 B.R. 391, 411 (S.D.N.Y. Bankr. 2011) ("The relation-back doctrine can divest a bankruptcy estate of its property even though the estate was created *before* the forfeiture order was entered." (emphasis original)).

In *Chapman*, the Government sought civil forfeiture of a property allegedly used to grow marijuana. 264 B.R. at 569. The bankruptcy court reasoned that the automatic stay must apply to the civil forfeiture action because otherwise the Government could circumvent the Bankruptcy Code's distribution priorities via the relation-back doctrine, retroactively taking the property out of the bankruptcy estate. *Id.* at 572. The Bankruptcy Appellate Panel of the Ninth Circuit disagreed. It explained:

> There is no conflict between [the distribution priorities] and § 362(b)(4). Indeed, the conflict here arises because of the relation-back doctrine and the possibility that the Property, when all is said and done, may not be property of the estate. However, if that happens, it is because that is the appropriate result under the law. Under § 362(b)(4), the government is not stayed from pursuing the [civil forfeiture] Action to judgment even if the end result is that the Proceeds are not property of the estate.

Id.

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[2] The Government asserts that not only 11 U.S.C. § 362(b)(4) but also § 362(b)(1) exempts forfeiture proceedings from the stay. (Dkt. No. 143 at 5.) The Court need not determine whether subsection (b)(1) applies because the Court resolves this issue solely under § 362(b)(4).

In sum, Subject Property 2 is not part of ES1's bankruptcy estate, even if it were, the automatic stay would not apply, and in any event, the passing of title to the Government will relate back to the time of them underlying crimes once this preliminary order of forfeiture becomes final. Therefore, ES1's objection is OVERRULED.

III. FINDINGS – PRELIMINARY ORDER OF FORFEITURE

The Court, having heard the United States' motion, as well as the evidence presented at trial, hereby FINDS entry of a Preliminary Order of Forfeiture regarding Subject Properties 1–5 is appropriate because:

A. Wire Fraud:

- The Defendant has been convicted of *Wire Fraud*, in violation of 18 U.S.C. §§ 1343 and 2, as charged in Counts 1–7 of the Indictment (Dkt. No. 31 at 9–13);
- Property that constitutes or is traceable to proceeds of a *Wire Fraud* scheme is subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C), by way of 28 U.S.C. § 2461(c);
- The evidence presented at trial established that Subject Properties 1–5 constitute or are traceable to proceeds of the Defendant's *Wire Fraud* scheme;
- The evidence in the record established the requisite nexus between Subject Properties 1–5 and the offense of conviction (*Wire Fraud*), pursuant to Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 32.2.(b)(1)(A)–(B).

B. Bank Fraud:

- The Defendant has been convicted of *Bank Fraud*, in violation of 18 U.S.C. §§ 1344(2) and 2, as charged in Counts 8–10 of the Indictment (Dkt. No. 31 at 14–15);
- Property that constitutes or is traceable to proceeds of a *Bank Fraud* scheme is subject to forfeiture pursuant to 18 U.S.C. § 982(a)(2);
- The evidence presented at trial established that Subject Properties 1–3 constitute or are traceable to proceeds of the Defendant's *Bank Fraud* scheme;

- The evidence in the record established the requisite nexus between Subject Properties 1–3 and the offense of conviction (*Bank Fraud*), pursuant to Fed. R. Crim. P. 32.2.(b)(1)(A)–(B).

C. Money Laundering:

- The Defendant has been convicted of *Money Laundering*, in violation of 18 U.S.C. §§ 1957 and 2, as charged in Counts 11–15 (Dkt. No. 31 at 16);
- Property involved in *Money Laundering* is subject to forfeiture pursuant to 18 U.S.C. § 982(a)(1);
- The evidence presented at trial established that Subject Properties 4–5 are involved in, or traceable to property involved in, one or more of the Defendant's *Money Laundering* offenses;
- The evidence in the record established the requisite nexus between Subject Properties 4–5 and the offense of conviction (*Money Laundering*), pursuant to Fed. R. Crim. P. 32.2.(b)(1)(A)–(B).

IV. FINDINGS – ORDER OF FORFEITURE

The Court also FINDS entry of an Order of Forfeiture regarding the sum of money in the amount of $254,199, reflecting the unrecovered proceeds of the Defendant's *Wire Fraud* and *Bank Fraud* schemes (Subject Property 6), is appropriate because:

A. Wire Fraud:

- The proceeds of *Wire Fraud*, in violation of 18 U.S.C. §§ 1343 and 2, are subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C), by way of 28 U.S.C. § 2461(c);

B. Bank Fraud:

- The proceeds of *Bank Fraud*, in violation of 18 U.S.C. §§ 1344(2) and 2, are subject to forfeiture pursuant to 18 U.S.C. § 982(a)(2);

C. **Based on the evidence presented at trial:**

- The Defendant obtained proceeds of approximately $2,821,200 from his *Wire Fraud* and *Bank Fraud* schemes;
- The Defendant withdrew approximately $200,000 of these proceeds in bulk cash;
- The United States seized a total of approximately $1,183,501.08[3] (Subject Properties 1–5) with seizure warrants;
- Financial institutions recovered a total of approximately $1,383,500; and
- A sum of money in the amount of $254,199 reflects the remaining unrecovered proceeds received by the Defendant.

V. ORDER

Now, therefore, the Court ORDERS as follows:

1. ES1's objection (Dkt. No. 142) is OVERRULED, and the Government's motion (Dkt. No. 140) is GRANTED.

2. Pursuant to 18 U.S.C. §§ 981(a)(1)(C), by way of 28 U.S.C. § 2641(c), 18 U.S.C. § 982(a)(1), and 18 U.S.C. § 982(a)(2), the Defendant's interest in the Subject Property is fully and finally forfeited, in its entirety, to the United States;

3. Pursuant to Fed. R. Crim. P. 32.2(b)(4)(A)–(B), the Preliminary Order will become final as to the Defendant at the time he is sentenced, it will be made part of the sentence, and it will be included in the judgment;

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[3] The Government's motion and proposed order each contain a typographical error in which this figure is listed as "$1,183.501." (*See* Dkt. Nos. 140 at 4, 140-1 at 4.) The Court arrived at what it believes to be the correct figure ($1,183,501.08) by calculating the sum of Subject Properties 1–5. It is not clear, however, whether the $200,000 that Defendant withdrew in cash is included either in the sum of Subject Properties 1–5 ($1.183 million) or in Subject Property 6 ($254,199 in unrecovered proceeds). The Court infers from the Government's arithmetic that one of either Subject Property 6 or the sum of Subject Properties 1–5 must include the $200,000 in cash. Otherwise, the Government's math does not check out. Paragraph 5 of Part V of this Court's order instructs the Government on how to address this issue, if appropriate.

4. The United States Marshals Service, and/or its authorized agents or representatives, shall maintain the Subject Property in its custody and control until further order of this Court;

5. As to Subject Property 6:

a. No right, title, or interest in the above-identified sum of money in the amount of $254,199 exists in any party other than the United States.

b. Pursuant to Fed. R. Crim. P. 32.2(e), in order to satisfy the sum of money, in whole or in part, the United States may move to amend this Order, at any time, to include substitute property having a value not to exceed $254,199;

c. The forfeiture of the $254,199 sum of money is separate and distinct from any restitution that is ordered in this case.

d. The forfeiture of the $254,199 sum of money is personal to the Defendant and, pursuant to Fed. R. Crim. P. 32.2(c)(1), no third-party ancillary process is required before forfeiting it.

e. The Court's ruling as to Subject Property 6 is based on the inference described in Footnote 3 of this order. If the Government believes the Court was incorrect in drawing this inference, the Government is ORDERED to submit, as soon as possible, but no more than three (3) days after this order, an amended calculation showing the correct figures, if any, so the Court can address the issue. *See* Fed. R. Crim. P. 36.

6. The Court will retain jurisdiction for the purpose of enforcing this Order and amending the Order as necessary pursuant to Fed. R. Crim. P. 32.2(e).

7. Pursuant to Fed. R. Crim. P. 32.2(b)(6) and 21 U.S.C. § 853(n), the United States shall publish notice of the Preliminary Order and the United States' intent to dispose of the above-identified property as permitted by governing law. The notice shall be posted on an official government website—www.forfeiture.gov—for at least 30 days. For any person known to have alleged an interest in this property, the United States shall, to the extent possible, also

provide direct written notice to that person. The notice shall state that any person, other than the Defendant, who has or claims a legal interest in this property must file a petition with the Court within 60 days of the first day of publication of the notice (which is 30 days from the last date of publication), or within 30 days of receipt of direct written notice, whichever is earlier. The notice shall advise all interested persons that the petition:

a. shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in this property;

b. shall be signed by the petitioner under penalty of perjury; and

c. shall set forth the nature and extent of the petitioner's right, title, or interest in this property, as well as any facts supporting the petitioner's claim and the specific relief sought;

8. If no third-party petition is filed within the allowable time period, the United States shall have clear title to this property, and the Preliminary Order shall become the Final Order of Forfeiture as provided by Fed. R. Crim. P. 32.2(c)(2);

9. If a third-party petition is filed, upon a showing that discovery is necessary to resolve factual issues that it presents, discovery may be conducted in accordance with the Federal Rules of Civil Procedure before any hearing on the petition is held. Following adjudication of any third-party petitions, the Court will enter a Final Order of Forfeiture, pursuant to Fed. R. Crim. P. 32.2(c)(2) and 21 U.S.C. § 853(n), reflecting that adjudication; and

10. The Court will retain jurisdiction for the purpose of enforcing the Preliminary Order, adjudicating any third-party petitions, entering a Final Order of Forfeiture, and amending the Preliminary or Final Order as necessary under Fed. R. Crim. P. 32.2(e).

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DATED this 21st day of January 2022.

John C. Coughenour
UNITED STATES DISTRICT JUDGE