UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-20231-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA

vs.

CARLOS VAZQUEZ,

Defendant.
________________________________/

UNITED STATES OF AMERICA'S MOTION FOR
PRELIMINARY ORDER OF FORFEITURE

Pursuant to 18 U.S.C. § 982(a)(2)(A), and the procedures set forth in 21 U.S.C. § 853 and Rule 32.2 of the Federal Rules of Criminal Procedure, the United States of America (the "United States"), by and through the undersigned Assistant United States Attorney, hereby moves for the entry of a Preliminary Order of Forfeiture against Defendant CARLOS VAZQUEZ (the "Defendant") in the above-captioned matter. The United States seeks a forfeiture money judgment in the amount of $921,875 and the forfeiture of certain property in satisfaction thereof. In support of this motion, the United States provides the following factual and legal bases.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On April 15, 2021, a federal grand jury returned an Indictment charging the Defendant in Counts 1 and 2 with wire fraud in violation of 18 U.S.C. § 1343. Indictment, ECF No. 19. The Indictment also contained forfeiture allegations, which alleged that, upon conviction of a violation of 18 U.S.C. § 1343, the Defendant shall forfeit to the United States any property constituting, or derived from, proceeds obtained, directly or indirectly, as a result of such violation, pursuant to 18 U.S.C. § 982(a)(2)(A). *See id.* at 5 - 6.

On September 13, 2021, the Defendant pleaded guilty to Counts 1 and 2, more specifically to wire fraud, in violation of 18 U.S.C. § 1343. *See* Minute Entry, ECF No. 42; Transcript of Change of Plea, ECF No. 54.

The Report and Recommendation on Change of Plea recommended that the Defendant's guilty plea to Counts 1 and 2 of the Indictment be accepted, and a sentencing hearing was scheduled for November 16, 2021. *See* Report and Recommendation on Change of Plea, ECF No. 44; Notice of Sentencing Hearing, ECF Nos. 46 and 55.

In support of the guilty plea, the Defendant executed a Factual Proffer, and the Court found that there was a factual basis to support the Defendant's conviction. *See* Factual Proffer, ECF No. 43.

II. MEMORANDUM OF LAW

A. Directly Forfeitable Property

Any property constituting, or derived from, proceeds obtained, directly or indirectly, as a result of a violation of 18 U.S.C. § 1343, is subject to forfeiture to the United States. 18 U.S.C. § 982(a)(2)(A).

If a defendant is convicted of such violation, the Court "shall order" the forfeiture of property as part of the sentence. *See* 18 U.S.C. § 982(a)(2)(A); 28 U.S.C. § 2461(c). Criminal forfeiture is governed by the preponderance standard. *See United States v. Hasson*, 333 F.3d 1264, 1277 (11th Cir. 2003). Upon finding that property is subject to forfeiture by a preponderance, the Court:

> . . . must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be

> deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

Fed. R. Crim. P. 32.2(b)(2)(A). To the extent there is a third-party interest to any forfeited asset, such claims are addressed after the property is preliminary forfeited, in third-party ancillary proceedings. *See* 21 U.S.C. § 853(k), (n); Fed. R. Crim. P. 32.2.

B. Forfeiture Money Judgments

A forfeiture order may be sought as a money judgment. *See* Fed. R. Crim. P. 32.2(b)(1)(A), (2)(A); *see also United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008) (holding that Federal Rules of Criminal Procedure "explicitly contemplate the entry of money judgments in criminal forfeiture cases"). The forfeiture money judgment is final as to the defendant "[a]t sentencing—or at any time before sentencing if the defendant consents." *See* Fed. R. Crim. P. 32.2(b)(4)(A). No ancillary proceeding is required when forfeiture consists solely of a money judgment. *See* Fed. R. Crim. P. 32.2(c)(1). As additional property is identified to satisfy the forfeiture money judgment, the Court must order the forfeiture of such property. *See* Fed. R. Crim. P. 32.2(e)(1) ("[T]he court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that . . . is subject to forfeiture under an existing order of forfeiture but was located and identified after that order was entered; or . . . is substitute property . . . ."); *see also* Fed. R. Crim. P. 32.2(b)(2)(C).

The amount of the money judgment should represent the full sum of directly forfeitable property, regardless of the defendant's ability to satisfy the judgment at the time of sentencing. *See United States v. McKay*, 506 F. Supp. 2d 1206, 1211 (S.D. Fla. 2007) (adopting the majority]rule); *see also United States v. Blackman*, 746 F.3d 137, 143-44 (4th Cir. 2014) ("The fact that a defendant is indigent or otherwise lacks adequate assets to satisfy a judgment does not operate to frustrate entry of a forfeiture order."). The Court determines the amount of the money judgment "based on evidence already in the record, including any written plea agreement, and any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable." Fed. R. Crim. P. 32.2(b)(1)(B). The Court in imposing a forfeiture money judgment may rely on an agent's reliable hearsay. *See United States v. Stathakis*, 2008 WL 413782, at *14 n.2 (E.D.N.Y. Feb. 13, 2008). The defendant's money judgment amount can be based on a reasonable estimate on the amount of property subject to forfeiture. *See, e.g., United States v. Roberts*, 660 F.3d 149, 166 (2d Cir. 2011); *United States v. Peithman*, 917 F.3d 635, 651 (8th Cir. 2019); *United States v. Vico*, Case No. 15-CR-80057-ROSENBERG/HOPKINS, 2016 WL 233407, at *7 (S.D. Fla. Jan. 20, 2016) (calculation of money judgment does not require mathematical exactitude; district court may make a reasonable extrapolation supported by a preponderance of the evidence).

C. Substitute Property

If directly forfeitable property is not available, the Court may order the forfeiture of substitute assets to satisfy a money judgment. *See* 21 U.S.C. § 853(p); Fed. R. Crim. P. 32.2(e); *United States v. Fleet*, 498 F.3d 1225, 1227-31 (11th Cir. 2007) (any property of the defendant may be forfeited as a substitute asset); *United States v. Knowles*, No. 19-14309, 2020 WL 3583413, at *1 (11th Cir. July 2, 2020) ("We've held that the word 'any' in § 853(p) is a broad word that 'does not mean some or all but a few, but instead means all . . . .'") (citing *Fleet*, 498 F.3d at 1229). Substitute assets are available for forfeiture upon a showing that, due to any act or omission of a defendant, directly forfeitable property:

(A) cannot be located upon the exercise of due diligence;
(B) has been transferred or sold to, or deposited with, a third party;
(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or
(E) has been commingled with other property which cannot be divided without difficulty.

21 U.S.C. § 853(p). The government may establish such unavailability through an agent's declaration. *See United States v. Seher*, 562 F.3d 1344, 1373 (11th Cir. 2009).

D. Difference Between Forfeiture and Restitution

Both forfeiture and restitution are mandatory in criminal cases. *See United States v. Brummer*, 598 F.3d 1248, 1250-51 (11th Cir. 2010) (the word "shall" does not convey discretion and the district court was required to order forfeiture of the property in accordance with Fed. R. Crim. P. 32.2); 18 U.S.C. § 3664(f)(1)(A) (requiring district courts to order restitution in the full amount of each victim's losses). Although sometimes conflated, forfeiture and restitution serve different purposes. "While restitution seeks to make victims whole by reimbursing them for their losses, forfeiture is meant to punish the defendant by transferring his ill-gotten gains to the United States Department of Justice." *United States v. Joseph*, 743 F.3d 1350, 1354 (11th Cir. 2014) (citing *United States v. Browne*, 505 F.3d 1229, 1281 (11th Cir. 2007), *United States v. Venturella*, 585 F.3d 1013, 1019-20 (7th Cir. 2009), and *Libretti v. United States*, 516 U.S. 29, 39 (1995)). Because of this distinction, the Eleventh Circuit has repeatedly held that district courts cannot use restitution to offset the forfeiture amount ordered, or vice versa. *See United States v. Hernandez*, 803 F.3d 1341, 1343-44 (11th Cir. 2015); *Joseph*, 743 F.3d at 1354 ("In light of the statutory framework governing restitution and forfeiture, we hold that a district court generally has no authority to offset a defendant's restitution obligation by the value of forfeited property held by the government, which is consistent with the approach taken by the Fourth, Seventh, Eighth, Ninth, and Tenth Circuits."); *United States v. Bane*, 720 F.3d 818, 827 n.8 (11th Cir. 2013); *United States v. Hoffman-Vaile*, 568 F.3d 1335, 1344-45 (11th Cir. 2009); *Browne*, 505 F.3d at 1281 (finding defendant's disgorgement of illicit profits did not divest the United States of its forfeiture interest in the full amount of offense).

E. Property Subject to Forfeiture in Instant Criminal Case

At all material times, the Defendant is and was CEO and 100% owner of Big League L.L.C. ("Big League"). *See* Factual Proffer 1, ECF No. 43. On or about June 30, 2020, Defendant, with the assistance of Individual #1, submitted an application for a Paycheck Protection Program ("PPP") loan in the amount of $921,875 on behalf of Big League to a Georgia-based internet loan processor and PPP lender, Lender #1. *Id.* The note in the amount of $921,875 was executed on the same day and contained the Defendant's Docusign signature. *Id.* The Defendant and Individual transmitted in interstate commerce this PPP application from Miami, Florida to Georgia. *See id.* This PPP application contained materially false statements that Defendant and Individual #1 knew to be untrue at the time they submitted the PPP application, specifically:

- The application certifies that the applicant, Big League, was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC;
- The application state that Big League's Average Monthly Payroll was $368,750.00;
- The application state that Big League has 64 employees; and
- A purported IRS Form W-3 for the 2019 tax year was submitted in support of the application which claims Big League paid wages in the amount of $4,425,000.

See id. at 1 – 2.

As of February 15, 2020, Big League was not in operation and did not have employees or payroll. *See id.* at 2. Big League has never registered to file taxes in Florida with the Florida Department of Revenue. *Id.* Thus, the representations that Defendant and Individual #1 made to Lender #1 were false, and Defendant and Individual #1 intended to defraud Lender #1. *See id.*

A few days after reinstating Big League, on June 29, 2020, Defendant opened a Chase business account for Big League on which Defendant was the sole signatory. *Id.* Chase Bank's business records show that, on June 30, 2020, someone logged into Defendant's Chase Business account for Big League from the same IP address, 172.58.11.67, that was used to apply for the PPP loan that day. *Id.* A week later, on July 6, 2020, $921,875 in PPP loan funds were deposited into this Chase Bank account in Miami, Florida, from outside of Florida by Lender #1. *Id.*

Based on the record in this case, the total value of the proceeds traceable to the offense of conviction is $921,875, which sum may be sought as a forfeiture money judgment pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure.

In addition, also based on the record in this case, the following specific property is directly subject to forfeiture, pursuant to 18 U.S.C. § 982(a)(2)(A):

(i.) a cashier's check in the amount of $175,957.40, which represents proceeds obtained as a result of the wire fraud, in violation of 18 U.S.C. §1343, to which the Defendant pleaded guilty.

The Defendant turned over this cashier's check in the amount of $175,975.40 to the United States. *See* Presentence Investigation Report ¶15 (ECF No. 57). After the cashier's check in the amount of $175,975.40 is forfeited to the United States, this amount shall be credited toward the Defendant's forfeiture money judgment balance.

Accordingly, the Court should issue the attached proposed order, which provides for the entry of a forfeiture money judgment against the Defendant; the forfeiture of specific property; the inclusion of the forfeiture as part of the Defendant's sentence and judgment in this case; and permission to conduct discovery to locate assets ordered forfeited.

WHEREFORE, pursuant to 18 U.S.C. § 982(a)(2)(A), and the procedures set forth in 21 U.S.C. § 853 and Rule 32.2 of the Federal Rules of Criminal Procedure, the United States respectfully requests the entry of the attached order.

LOCAL RULE 88.9 CERTIFICATION

Pursuant to Local Rule 88.9, I hereby certify that the undersigned Assistant United States Attorney has attempted to confer with defense counsel, Albert Z. Levin, Esq., via e-mail on November 14 and 16, 2021; however, the undersigned Assistant United States Attorney was unable to confirm the Defendant's position to the relief sought herein.

Respectfully submitted,

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