IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA, Plaintiff,	)	Criminal Case 03-467-A
v.	)	Hearing: March 23, 2005
WILLIAM ELIOT HURWITZ, Defendant.	)	Senior Judge Leonard D. Wexler

UNITED STATES' MOTION FOR PRELIMINARY ORDER OF FORFEITURE

COMES NOW the United States, by and through its attorneys, Paul J. McNulty, United States Attorney for the Eastern District of Virginia, Karen L. Taylor, Assistant U.S. Attorney, Mark D. Lytle, Assistant U.S. Attorney, and Gene Rossi, Assistant U.S. Attorney, and hereby moves the court for a preliminary order of forfeiture, to include defendant's medical licenses from the District of Columbia, Maryland and Virginia, a money judgment of $195,206.12 and $219,769.84[1] seized by the government on or about December 23, 2002, from Defendant's Charles Schwab investment account # 46037221.

Procedural Background

On December 15, 2004, a jury sitting in the Eastern District of Virginia convicted Defendant William Eliot Hurwitz of fifty counts of drug trafficking, in violation of Title 21, United States Code. A forfeiture notice was included in the Second Superseding Indictment advising that the United States is seeking the forfeiture of $1,976,000 in U.S. currency and of $209,784 in

[1] The Indictment lists the amount seized as $209,784. In fact, $219,769.84 was seized from Charles Schwab.

Defendant's Charles Schwab investment account # 46037221, as well as his medical licenses, pursuant to 21 U.S.C. § 853(a). Defendant waived the right to request a jury determination of the forfeiture. Thus, this issue is now before the court to resolve.

Argument

1. Forfeiture is Mandatory

Forfeiture is a mandatory element of the sentence pursuant to 21 U.S.C. § 853(a)(1), which provides that any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of a violation of the Controlled Substances Act is subject to forfeiture. If such proceeds are unavailable pursuant to 21 U.S.C. §853(p), the court may order the forfeiture of substitute assets up to the value of the unavailable assets.[2] *See also United States v. Monsanto*, 491 U.S. 600, 606 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applie(s)"); *United States v. Johnston*, 199 F.3d 1015, 1022 (9th Cir. 1999) (criminal forfeiture is mandatory and designed to ensure that a defendant

[2] Title 21, United States Code, § 853(p) provides:

> If any of the property described in subsection (a) of this section [21 U.S.C. § 853(a)] as being subject to forfeiture, as a result of any act or omission of the defendant-
>
> (1) cannot be located upon the exercise of due diligence;
> (2) has been transferred or sold to, or deposited with a third person;
> (3) has been placed beyond the jurisdiction of the Court;
> (4) has been substantially diminished in value, or
> (5) has been commingled with other property which cannot be subdivided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

does not profit from his crimes), *cert. denied*, 530 U.S. 1207 (2000).

Since forfeiture is mandatory, the only subject of inquiry should be the amount of the forfeiture. *United States v. DeFries*, 909 F. Supp. 13 (D.D.C. 1995), *rev'd on other grounds*, 129 F.3d 1293 (1997). Fed. R. Crim. P. 32.2(b)(1) provides that "The court's determination may be based on evidence already in the record . . . or information presented by the parties at a hearing after the verdict or finding of guilt." *See also United States v. Merold*, 46 Fed. Appx. 957, 2002 WL 1853644 (11th Cir. 2002) (Table) (jury may rely on evidence admitted in the guilt phase of the trial), *cert*. *denied*, 538 U.S. 1018 (2003). Because forfeiture is considered part of sentencing, credible hearsay may also be considered. In *United States v. Uwaeme*, 975 F.2d 1016 (4th Cir. 1992), the court noted that for sentencing purposes, "the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has *sufficient indicia of reliability to support its probable accuracy*. U.S.S.G. § 6A1.3(a)." *Id.* at 1021. *See also United States v. Gaskin*, 2002 WL 459005 (W.D.N.Y. 2002) (in the forfeiture phase of the trial, the parties may offer evidence not already in the record; because forfeiture is part of sentencing, such evidence may include reliable hearsay), *aff'd*, 364 F.3d 438 (2d Cir. 2004); *United States v. Creighton*, 52 Fed. Appx. 31, 2002 WL 31689125 (9th Cir. 2002) (Table) (hearsay is admissible at sentencing and therefore may be considered in the forfeiture phase).

In a case such as this involving a conspiracy to distribute controlled substances, the defendant is liable for the entire amount of the proceeds obtained during the course of the conspiracy. The liability of one conspirator is not limited to property he or she actually acquired directly, but includes property derived by that defendant indirectly from those who acted in concert with him in furthering the conspiracy, making each defendant liable for his co-conspirator's receipts.

United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996), *cert. denied*, 520 U.S. 281 (1997).

Rule 32.2(b)(1) acknowledges that the government may obtain a money judgment: "If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." The court may order forfeiture of a sum of money representing the amount of money involved in the offense. *See United States v. Morgan*, 224 F.3d 339, 343 (4th Cir. 2000) (defendant ordered to forfeit all illegal proceeds from drug conspiracy regardless of fact that he no longer possessed total amount); *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1986)(en banc), *cert. denied*, 475 U.S. 1011 (1986)(involving criminal money laundering forfeiture); *United States v. Conner*, 752 F.2d 566, 576 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985).

Thus, a criminal forfeiture order may take several forms: money judgment, directly forfeitable property, and substitute assets. *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000); *United States v. Davis*, 177 F. Supp. 2d 470, 484 (E.D. Va. 2001) (following *Candelaria-Silva*), *aff'd*, 63 Fed. Appx. 76, 2003 WL 1871050 (4th Cir. 2003), *cert. denied*, 540 U.S. 895 (2003). *United States v. Tedder*, 2003 WL 23204849 (W.D. Wis. 2003) (same). *See also United States v. Iacaboni*, 363 F.3d 1, 6 (1st Cir. 2004) (court enters money judgment equal to sum of amounts involved in all money laundering transactions making up the conspiracy to launder gambling proceeds, including salaries paid to codefendants, overhead expenses, and payouts to winning bettors, even though defendant did not retain the money for himself), *cert. denied*, 125 S.Ct. 480 (2004); *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offense; the money judgment acts as a lien against the defendant personally for

the duration of his prison term and beyond), *cert*. *denied*, 531 U.S. 1151 (2001).

2. Amount of Forfeiture

The government submits that the defendant received criminal proceeds of at least $414,975.96 from the offenses of conviction. Defendant's total income from his medical practice during the time period of the criminal conspiracy (July 1998 through January 2003) was $1,976,076.00. *See* Affidavit of Special Agent Aaron Weeter (Attachment 1). Approximately 21% of the practice's patients had criminal drug histories. *See* Affidavit of Special Agent Weeter. Therefore, it is more likely than not such patients were not legitimate, in light of the evidence adduced at trial. Therefore, roughly 21% of defendant's total income from his medical practice during the time period of the criminal conspiracy, i.e., $414,975.96, is subject to forfeiture. The Government strongly objects to the defendant's unsupported allegation that only 5-10% of his practice were "creepy and seedy" drug dealers and abusers. The trial evidence revealed that the defendant's pain practice was ripe with a plethora of illegal patients.

Although this amount is an estimate, it has *sufficient indicia of reliability to support its probable accuracy* for sentencing purposes. *United States v. Uwaeme*, 975 F.2d 1016, 1021 (4th Cir. 1992). The *Uwaeme* court noted that for sentencing purposes, rough estimates are sufficient for determining factors such as drug quantity. *Id*. at 1019. *See also United States v. Roberts* , 882 F.2d 95, 106 (4th Cir. 1989) (hearsay sufficient evidence of drug quantity).

Since the standard of proof for forfeiture is preponderance, the government has met its burden in establishing the criminal proceeds from the offenses. *See United States v. Cherry*, 330 F.3d 658 (4th Cir. 2003) (the forfeiture phase is governed by the preponderance standard); *United States v. Tanner*, 61 F.3d 231 (4th Cir. 1995) (same), *cert*. *denied*, 516 U.S. 1119 (1996); *United*

States v. Elgersma, 971 F.2d 690 (11th Cir. 1992)(en banc).

The government is also entitled to forfeit any property that facilitated the offenses of conviction, pursuant to 21 U.S.C. § 853(a)(2). Clearly, defendant could not have committed these crimes without his medical licenses. Thus, his medical licenses facilitated the offenses and are therefore, forfeitable. *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes "rights, privileges, interests, claims, and securities"), *cert. denied*, 531 U.S. 828 (2000); *United States v. Dicter*, 198 F.3d 1284 (11th Cir. 1999) (same; the license is intangible property that made it possible for doctor to write illegal prescriptions).

Since the government has $219,769.84 currently in its possession, an additional $195,206.12 is needed as a money judgment. Because forfeiture is part of sentencing, modification of the amount the government seeks as a money judgment is not an improper amendment to the indictment. *United States v. Descent*, 292 F.3d 703 (11th Cir. 2002), *cert. denied*, 537 U.S. 1132 (2003).

3. Forfeiture of Substitute Assets

Forfeiture of substitute assets is appropriate because the original proceeds cannot be located upon the exercise of due diligence, other than the $219,769.84 previously seized. 21 U.S.C. § 853(p). *See* Affidavit of Special Agent Aaron Weeter. Thus, the $219,769.84 currently being held by the government should be forfeited to partially satisfy the total amount of the defendant's forfeiture debt, i.e., the $414,975.96 , leaving $195,206.12 as a money judgment.

WHEREFORE, the government requests the court to enter the proposed order of forfeiture and include in the judgment at sentencing forfeiture of a money judgment of $195,206.12, the $219,769.84 currently being held by the government, and defendant's medical licenses from the District of Columbia, Maryland and Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February ___, 2005, I served a copy of the foregoing by U.S. mail to:

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