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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA v. 1) CHRISTOPHER J. BENYO, 2) CHARLES E. JOHNSON, JR. 3) JOSEPH MICHAEL KENNEDY, 4) JOHN P. TULI, 5) KENT D. WAKEFORD, and 6) SCOTT E. WIEGAND, Defendants.	CRIMINAL NO. 1:05CR12

GOVERNMENT'S EX PARTE MOTION FOR
RESTRAINING ORDER AND BRIEF IN SUPPORT THEREOF

The United States respectfully requests that this Court enter an Order pursuant to Title 21, United States Code, Section 853(e)(1)(A), as incorporated by Title 28, United States Code, Section 2461(c), to restrain the alienation of assets that may be collected pursuant to a forfeiture judgment in this case. The government seeks the restraint of property which is subject to forfeiture pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), in that it constitutes substitute assets pursuant to Title 21, United States Code, Section 853(p), for proceeds traceable to wire fraud, in violation of Title 18, United States Code, Section 1343, and securities fraud, in violation of Title 15, United States Code, Section 78ff.

On January 10, 2005, a criminal indictment was returned by a grand jury sitting in the Eastern District of Virginia against defendants for wire fraud, in violation of Title 18, United States Code, Section 1343, and securities fraud, in violation of Title 15, United States Code, Section 78ff. A notice that the government is seeking forfeiture of substitute assets for the proceeds of wire fraud and securities fraud is included in the indictment returned January 10,

2005. The purpose of the requested order is to preserve the availability of assets so that they can be forfeited upon conviction of the defendants for wire fraud and securities fraud. A proposed Order is submitted herewith.

ARGUMENT

I. THE GOVERNMENT IS ENTITLED TO A RESTRAINING ORDER TO EFFECTUATE FORFEITURE OF ALL FORFEITABLE ASSETS

The assets the Government seeks to restrain is property subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) in that it constitutes proceeds of wire and securities fraud or is a substitute asset pursuant to 21 U.S.C. § 853(p).

The procedures governing the securing and disposition of assets forfeitable under 21 U.S.C. § 853 are specified in 21 U.S.C. § 853(c) and (e) through (p). Section 853(e)(1)(A) provides the Court with the authority to restrain assets upon the filing of an indictment or information. It provides, in pertinent part:

> (e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property . . . for forfeiture under this section--
>
> (A) upon the filing of an indictment or information charging a violation . . . for which criminal forfeiture may be ordered , . . . and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section;

Id. Thus, the indictment in this case serves as a basis for issuing the requested restraining order. Accordingly, this Court is authorized to issue the restraining order.

A restraining order is necessary and appropriate in this case. In the absence of a restraining order, there is a significant risk that the forfeitable assets will be dissipated and/or transferred to third parties. In United States v. Monsanto, 491 U.S. 600, 109 S.Ct. 2657 (1989), the Supreme Court concluded:

> § 853(e)(1)(A) is plainly aimed at implementing the commands of § 853(a) and cannot sensibly be construed to give the district court discretion to permit the dissipation of the very property that § 853 requires be forfeited upon conviction.

491 U.S. at 612-13. The Court further wrote:

> Whatever discretion Congress gave the district courts in §§ 853(e) and 853(c), that discreion must be cabined by the purposes for which Congress created it: "to preserve the availability of property . . . for forfeiture."

Id. at 613.

Pursuant to Title 21, United States Code, Section 853(e)(1), this Court may take any action to preserve the availability of forfeitable property. The requested restraining order is the best means of ensuring that the assets are available for forfeiture.

II. THE GOVERNMENT IS ENTITLED TO A RESTRAINING ORDER TO PREVENT THE DISSIPATION OF SUBSTITUTE ASSETS

The United States can obtain a personal money judgment against the defendant which can then be satisfied from any of the defendant's assets, including otherwise legitimate assets. Id. United States v. Billman, 915 F.2d 916, 920 (4th Cir.) (interpreting 18 U.S.C. § 1963), cert. denied, 500 U.S. 952 (1991) authorizes the restrain of substitute assets pretrial. Accordingly, any and all of the assets of the defendants may be considered substitute assets to satisfy a judgment of forfeiture.

The "substitute asset" provision of the drug forfeiture statute, codified at 21 U.S.C. § 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).

Because property that may have been unrelated to criminal activity still may be forfeited as a substitute asset, such property may be restrained. The government is entitled to a restraining order even prior to trial to preserve the availability of substitute assets that may be needed to satisfy any forfeiture judgment that may be entered. Billman, 915 F.2d at 921.

Numerous courts have recognized that money is fungible and therefore a forfeiture judgment against a defendant for a sum of money may be executed against any monies possessed by the defendant, whether or not connected to the offense of conviction itself.

> Since the forfeiture is in personam, it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forfeiture is not due until after conviction. Money is a fungible item. It matters not that the government received the identical money which the defendant received as long as the **amount** that was received in violation of the racketeering statute is known. The forfeiture in this case is for a specific amount of money. It is in personam and is a money judgment against the defendant for the same amount of money which came into his hands illegally in violation of Title 18, Section 1963(a)(1).

United States v. Connor, 752 F.2d 566, 576 (11th Cir.), cert. denied, 474 U.S. 821 (1985). See also United States v. Robilotto, 828 F.2d 940, 949 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); United States v. Ginsburg, 773 F.2d 798, 800-03 (7th Cir. 1985) (en banc), cert. denied, 474 U.S. 1011 (1986).

The reasoning of Connor, Robilotto, and Ginsburg has been accepted by the Fourth Circuit. Quoting Ginsburg, the Fourth Circuit stated:

> In order to truly separate the racketeer from his dishonest gains, therefore, the statute requires him to forfeit to the United States the total amount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession.

United States v. Amend, 791 F.2d 1120, 1127 (4th Cir.), cert. denied, 479 U.S. 930 (1986).

Moreover:

> The government is not required to trace the proceeds of the RICO offense into a specific bank account in order to execute a forfeiture judgment. . . Instead, a forfeiture money judgment can be satisfied out of any of the defendant's assets.

In Re Billman, 915 F.2d 916, 920 (4th Cir. 1990).

III. THE RETENTION ORDER IS TO BE ISSUED EX PARTE; THERE IS NO REQUIREMENT FOR AN ADVERSARY HEARING PRIOR TO ITS ENTRY

The United States is not serving this motion upon defendants as it is clear that the Court can enter this order ex parte. See, e.g., United States v. Monsanto, 924 F.2d 1186, 1192-92 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991). As noted above, 21 U.S.C. § 853(e)(1)(A) expressly authorizes the court to restrain the transfer of property "upon the filing of an indictment or information" charging a violation of a statute for which criminal forfeiture may be ordered and alleging that the property is subject to forfeiture. No requirement exists in that provision for notice or an evidentiary hearing prior to the issuance of the restraining order.

Should defendants establish the order restrains more property than can be forfeited, a hearing can be held after the order is entered and the Court can modify the order as needed. In this manner, defendants will be unable to dissipate assets to be forfeited while the restraining order is litigated.

WHEREFORE, the United States respectfully prays that the Court enter an order restraining assets in accordance with the proposed order pending resolution of the forfeiture issue in this criminal case.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: Charles Connolly
Charles Connolly
Dana Boente
Assistant United States Attorneys
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3771