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

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No.: 1:05CR12
	)	
CHRISTOPHER J. BENYO,	)	
CHARLES E. JOHNSON, JR.,	)	
JOSEPH MICHAEL KENNEDY,	)	
JOHN P. TULI,	)	
KENT D. WAKEFORD and	)	
SCOTT E. WIEGAND,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT KENT WAKEFORD'S MOTION
TO VACATE *EX PARTE* RESTRAINING ORDER

FACTUAL BACKGROUND

Kent Wakeford has been charged in an indictment alleging *inter alia* that he was part of a conspiracy to commit securities fraud in connection with a publicly owned company named PurchasePro. Specifically, the indictment alleges that the Mr. Wakeford engaged in acts in furtherance of a scheme to report false earnings for PurchasePro and to thereby artificially inflate PurchasePro's stock price. During the period which is the focus of the indictment, Mr. Wakeford was a salaried mid-level manager at America Online, a company which did business with PurchasePro. Mr. Wakeford is not alleged to have owned any stock in PurchasePro. There are no allegations that Mr. Wakeford profited financially in any way from the alleged conspiracy. The only mention in the indictment of any thing of value received by any of the defendants is the assertion that the four PurchasePro defendants received retention bonuses totaling $2.3 million.

The indictment contains a notice that the Government intends to seek forfeiture of the proceeds of the alleged conspiracy. The notice implicitly indicates that the only supposed "proceeds" of the conspiracy are the retention bonuses paid to the four PurchasePro defendants. Despite the fact that Mr. Wakeford is not alleged to have received any portion of these "proceeds," is not alleged to have played any role in the payment of the bonuses nor even to have know of their existence, the Government contends he is personally responsible for forfeiture of the full $2.3 million in bonuses.

Immediately after Mr. Wakeford was indicted, and one day after he had self-surrendered, appeared in court with counsel and been released on his own recognizance, the Government filed an ex-parte application to restrain *all* of his assets. Although the terse memorandum of law submitted by the Government in connection with the *ex-parte* motion made it appear as if this were a routine exercise of the government's forfeiture authority, this is anything but the case. In order to obtain the pre-trial restraint of Mr. Wakeford's asset, the Government stitched together three sections of the Criminal Law, one section on the Judiciary Law and one section of the Food and Drug Law to create a forfeiture theory which has *never* been accepted, or even discussed, in any reported decision by any court in the United States.

Under the Government's theory, whenever a defendant is charged with a crime for which civil forfeiture is an available remedy (which, since August 2000, means most defendants in federal court), the Government is entitled to obtain an automatic *ex-parte* restraint of the defendant's assets up to the amount of the "proceeds" alleged in the indictment. As a practical matter, under this theory, the Government would have the authority in most cases to freeze all of the assets of most criminal defendants based upon nothing more than the fact that the defendant has been indicted. Fortunately for the presumption of innocence and the Constitution, Congress has never given the Government the power which it now seeks to exercise.

For the reasons set forth herein, and in the motion filed by defendant Christopher Benyo (which Mr. Wakeford has specifically moved to adopt in a separate pleading filed contemporaneously herewith), the Court should vacate the restraining order freezing all the assets of Mr. Wakeford.

ARGUMENT

A. CONGRESS HAS NOT AUTHORIZED THE FORFEITURE OF SUBSTITUTE ASSETS UNDER 28 U.S.C. § 2461(C).

The crux of the governments pre-trial restraint of Mr. Wakeford's assets is 28 USC § 2461(c). In order to understand why this section does not give the Government the power which it seeks to assert, it is necessary to understand the history of this section.

Ever since the American Revolution, the concept of criminal forfeiture has been regarded with deep suspicion. The First Congress explicitly rejected criminal forfeitures as punishments for federal crimes, *see* Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("No conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate"), and Congress reenacted this ban several times over the course of the ensuing two centuries. See Rev. Stat. § 5326 (1875); Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1159; Act of June 25, 1948, ch. 645, § 3563, 62 Stat. 837, codified at 18 U.S.C. § 3563 (1982 ed.); repealed effective Nov. 1, 1987, Pub. L. 98-473, 98 Stat. 1987.

Between 1790 and 1970, Congress provided for criminal forfeiture only once: to seize the life estates of Confederate soldiers. *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339, 19 L. Ed. 696 (1869). It was not until 1970 that Congress fully resurrected the English common law of criminal forfeiture, and then only with respect to organized crime and major drug trafficking offenses. See Organized Crime Control Act of 1970, 18 U.S.C. § 1963, and Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(a).

When Congress enacted these first two forfeiture laws, it gave the Attorney General the power to seize the actual proceeds derived from racketeering and major narcotics trafficking. In 1986, Congress amended these two forfeiture laws to provide for forfeiture of a new class of property, known as "substitute assets." Substitute assets were defined as any legitimate assets owned by the defendant; and they were made subject to forfeiture in the event that the actual proceeds of the drug trafficking or racketeering had been placed beyond the government's reach by the defendant.

In 1986, Congress also passed two new general forfeiture statutes covering both criminal and civil forfeitures. The civil forfeiture provision, 18 U.S.C. § 981, applied the concept of "tainted property" to civil proceedings and permitted the government to seize such property upon showing that it had become tainted through its connection with any one of a long list of federal crimes. The new criminal forfeiture statute, 18 U.S.C. § 982, expanded the penalty of criminal forfeiture to federal money laundering crimes and to a narrow range of other offenses. Although the new general criminal forfeiture law specifically called for the post-conviction forfeiture of both "tainted assets" and "substitute assets" it mitigated the harshness of substitute asset forfeiture by including a safeguard which prohibited the government from seizing substitute assets in certain circumstances. 18 U.S.C. § 982(b)(2). Thus, prior to 1990, the Government could seek civil forfeiture of "tainted assets" for a broad range of crimes, and it could pursue criminal forfeiture of both "tainted" and legitimate assets for a tightly delineated list of offenses, limited primarily to drug trafficking, RICO and money laundering.

In 1990, Congress broadly amended the forfeiture laws through the Civil Asset Forfeiture Reform Act ("CAFRA"). Pub L. No. 106-185, 114 Stat 202 (2000). CAFRA, expanded the list of crimes which could produce a "taint" on assets so as to make them amendable to civil forfeiture. By adding "specified unlawful activity" as defined by 18 U.S.C. 1956(c)(7), the list of crimes which could serve as the basis for a civil forfeiture was expanded to include some 200 to 300 offenses. 18 U.S.C. § 981(a)(1)(C). As a result, after CAFRA, virtually all of the most frequently charged federal crimes could trigger a civil forfeiture of tainted assets (but not of "substitute assets") In addition, CAFRA amended the general criminal forfeiture statute to add three new offenses (related to smuggling of aliens) to the tightly circumscribed list of crimes which could trigger a criminal forfeiture of both "tainted assets" and "substitute assets." 18 U.S.C. § 982(a)(6).

Also included in CAFRA was a provision which amended 28 U.S.C. § 2461. Prior to CAFRA, § 2461 (which is entitled "Mode of Recovery") stated that for forfeitures in which Congress failed to specify a mode of recovery, seizures on the high seas were to be enforced in an admiralty proceeding and that seizures on land were to be enforced in a proceeding which should conform as closely as possible to an admiralty proceeding. 18 U.S.C. § 2461(b). CAFRA added a new provision to this section. This provision, codified as 28 U.S.C. § 2461(c), states that if a civil forfeiture of tainted property is authorized in connection with a violation of an act of Congress, and no criminal forfeiture is authorized for such violation, then the civil forfeiture claim could be included as part of an indictment. Under this provision, the court was directed to order the forfeiture of the tainted property upon conviction of the substantive offense, and to follow "the procedures" set forth in the drug trafficking forfeiture statute (21 U.S.C. 853) in doing so.

For purposes of the present case, CAFRA thus effectuated three changes in the forfeiture laws: 1) it made civil forfeiture of *tainted assets* available under 18 USC § 981 for most of the commonly encountered federal crimes; 2) it slightly expanded the list of crimes under § 982 which could trigger a criminal forfeiture of both *tainted and substitute assets;* and 3) it permitted civil forfeitures to be included in a criminal indictment pursuant to 28 U.S.C. § 2461(c). The key issue in the present case is whether the third change, enactment of §2461(c), extended the concept of "substitute asset forfeiture" to the myriad of civil forfeiture provisions which, after CAFRA, could be included in indictments. Put another way, did Congress, in enacting § 2461(c), intend to add several hundred new offenses to the previously narrow list of offenses in § 982 which could trigger forfeiture of legitimate assets. In order for the Government to prevail, the answer to that question must be "yes." However, common sense and the plain wording of the relevant statutes dictate that the answer is most assuredly "no."

Since the disinterment of criminal forfeiture laws in 1970, Congress has carefully delineated the crimes which could serve as the basis for criminal forfeitures and thus the forfeiture of substitute assets. The initial list of offenses was limited to drug trafficking and racketeering. Sixteen years later, with passage of the general criminal forfeiture statute (18 U.S.C. § 982), the list was expanded to add money laundering, smuggling and bank fraud, along with a relatively small group of other offense generally related to computer hacking, explosives manufacturing and immigration fraud. As part of CAFRA, Congress added three more offenses related to alien smuggling to the list of crimes which could trigger substitute asset forfeiture. 18 U.S.C. § 982 (a)(6)(A). As part of the general criminal forfeiture statute, Congress included a safeguard which excludes the penalty of substitute asset forfeiture in certain instances. 18 U.S.C. § 982(b)(2).

It is utterly unreasonable to believe that Congress intended to completely subsume this meticulously delineated scope of substitute asset forfeiture in passing 28 U.S.C. § 2461(c). If, as contended by the Government, the penalty of substitute asset forfeiture is available under § 2461(c), then there is no distinction between a forfeiture brought under § 2461(c) and forfeiture brought under 18 U.S.C. § 982. This would mean that passage of § 2461 was the equivalent of adding hundreds of new offenses to section 982's list of offenses which could trigger forfeiture of legitimate assets. If Congress intended to add several hundred new crimes to the list of offenses which could trigger criminal forfeiture of legitimate assets, it could easily have done so by adding those offenses to the general criminal forfeiture statute, 18 U.S.C. § 982. However, in CAFRA, Congress added exactly three new offenses to § 982. If the Government's theory is correct, and forfeiture under § 2461(c) is identical to forfeiture under § 982, it is difficult to see why Congress bothered to amend § 982, since the three offenses it added, like most other crimes, also trigger a forfeiture under § 2461(c).

Contrary to the Government's claim, Congress clearly must have intended for there to be some distinction between a forfeiture under § 2461(c) and a forfeiture under 18 U.S.C. § 982. The only potential distinction is the availability to reach wholly legitimate assets of the defendant, a concept which, after all, is totally alien to the civil forfeiture scheme upon which § 2461(c) rests. It is inconceivable that, via an amendment to an obscure provision of the judiciary law and without any explanation or debate, Congress would have expanded the draconian penalty of legitimate assets forfeiture to most federal crimes. If Congress intended to effectuate such a dramatic expansion in U.S. forfeiture laws, and thereby erase 30 years of careful tinkering and calibration of the criminal forfeiture laws, it most certainly would not have done so in this fashion.

The indisputable fact is that Congress did *not* intend to expand the penalty of legitimate asset forfeiture to most federal offenses. The text of § 2461(c) confirms this. Section 2461(c) of Title 28 reads as follows:

> If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property *in accordance with the procedures* set forth in section 413 of the Controlled Substances Act (21 U.S.C. 853), other than subsection (d) of that section.

Section 2461(c) thus states that, where there is no criminal forfeiture authorized for violation of a federal statute, but there is a civil forfeiture authorized for such violation, the substantive civil forfeiture may be included in an indictment. It directs the Court, upon conviction, to order this substantive civil forfeiture, "in accordance with the *procedures*" contained in the drug trafficking forfeiture statute. Section §2461(c) therefore looks to the civil forfeiture statute to determine what property is subject to forfeiture and to the Controlled Substance Act to determine the procedures by which that property is to be forfeit upon conviction.

The meaning of the reference to "procedures" contained in 413 of the CSA is readily understood upon examination of that statute. Section 853 of Title 21, is divided into substantive provisions which define what assets are subject to forfeiture and procedural provisions which set forth how such assets are to be seized and disposed of. Paragraphs (a) and (p) are the substantive provisions, identifying what assets are subject to forfeiture following a conviction. Paragraphs (a)(1)(2) and (3) provide for the forfeiture of certain "tainted assets" and paragraph (p) provides for the forfeiture of "substitute assets." All of the other provisions of § 853 (except section (q) which does not relate to forfeitures), provide the procedural rules governing forfeitures, such as evidentiary presumptions, the availability of depositions and protective orders and the disposition of seized assets.

Congress's instruction to the Court in section § 2461(c) to order forfeiture of tainted property "in accordance with the procedure" of the CSA must be understood as meaning that the CSA governs only how the property is forfeit, not the scope of the forfeiture itself. The scope of the forfeiture is provided by the specific civil forfeiture law which triggers application of § 2461(c). In this case that means, 18 U.S.C. § 981(a)(1)(C), which permits forfeiture of "proceeds" traceable to a designated offense. Assuming for the sake of argument that the retention bonuses paid to the PurchasePro defendants constitute such "proceeds" Congress has explicitly stated that it is these assets alone which are subject to forfeiture. Since the bonuses constitute "fungible property" the Government could conceivably also seek forfeiture of any money found in the same account into which these "proceeds" were deposited pursuant 18 U.S.C. § 984(a)(2). However, since Mr. Wakeford is not alleged to have received any "proceeds" from any of the charged offenses, and none of bonuses paid to the PurchasePro defendants was ever deposited into Mr. Wakeford's bank accounts, the government has no basis to seek any forfeiture from Mr. Wakeford. Since none of Mr. Wakeford's assets are subject to forfeiture upon conviction, the Government has no legitimate basis to restrain those assets pending the outcome of the case against him.

B. THE RETENTION BONUSES RECEIVED BY THE PURCHASEPRO DEFENDANTS DO NOT CONSTITUTE FORFEITABLE PROPERTY

Even if the Government were correct in its novel claim that 28 U.S.C. § 2461(c) permits forfeiture of legitimate assets, there can be no dispute that a prerequisite to "substitute asset" forfeiture is the existence of "tainted assets" which can no longer be seized. In other words, substitute assets are secondarily forfeitable and only become subject to forfeiture when the tainted assets themselves have been made unavailable. If there are no "tainted assets" subject to forfeiture, then the issue of substitute assets forfeiture never comes into play.

Here, the only tainted assets identified by the Government are the retention bonuses alleged to have been received by the four PurchasePro defendants in April 2001. In order for these bonuses to be forfeitable, the Government must establish that they "constitute or [are] derived from proceeds traceable to . . . specified unlawful activity." 18 U.S.C. 981(a)(1)(C). The specified unlawful activity identified by the government is the alleged conspiracy to commit securities and wire fraud.

The indictment does not allege, nor has the government submitted any evidence to establish, that the retention bonuses paid the PurchasePro defendants were made in furtherance of the alleged conspiracy to inflate PurchasePro's earnings. If anything, the indictment strongly implies otherwise, as it indicates that defendants Johnson and Wiegand simply "caused PurchasePro to pay retention bonuses." This implies that Mr. Johnson and Mr. Wiegand had the authority to authorize these bonuses. If Johnson and Wiegand had the authority to cause PurchasePro to pay bonus to its officers, it cannot simply be inferred that there is any nexus between the payment of these bonuses and the alleged conspiracy. Indeed, the indictment is silent as to whether such bonuses were also paid to officers who were not alleged to have been part of the supposed conspiracy.

In order to show that assets received by a defendant are "tainted" and thus forfeitable, the Government must show that those assets would not have been acquired by the defendants "but for" the predicate illegal activity. *United States v. Horak*, 833 F.2d 1235, 1243 (7th Cir. 1987); *United States v. Modi*, 178 F. Supp. 2d 658, 662 (W.D. Va, 2001). Simply put, neither the indictment nor the Government's application for a restraining order indicate that the PurchasePro defendants received the stated retention bonuses due to their participation in the alleged predicate criminal activity. Indeed, there is no indication that the retention bonuses were related to any criminal conduct by the defendants.

Since the Government has failed to establish that there are any tainted assets subject to forfeiture pursuant to § 981(a)(1)(3), there is no basis for any pre-trial restraint of assets, much less the pre-trial restraint of substitute assets. Additionally, since Mr. Wakeford is not alleged to have received the bonuses, even if they constituted "proceeds" of the conspiracy, Mr. Wakeford would not be liable for such proceeds unless the Government establishes that it was reasonably foreseeable to Mr. Wakeford that the defendants would receive these bonuses. *United States v. Newsome*, 322 F.3d 328, 338 (4th Cir. 2003) (stating that a conspirator is only liable for conduct of a co-conspirator in furtherance of the conspiracy which is reasonably foreseeable to him).

C. CONGRESS HAS NOT AUTHORIZED THE PRETRIAL RESTRAINT OF SUBSTITUTE ASSETS UNDER 21 U.S.C. § 853

As already discussed, the Government's forfeiture theory is predicated upon a novel application of 28 U.S.C. § 2461(c). The initial defect in the Government's theory is that since § 2461(c) adopts only the procedural elements of 21 U.S.C. § 853, it does not permit forfeiture of "substitute assets." However, this leaves open the question of whether the *pre-trial restraint* of substitute assets would be proper even if they were subject to forfeiture upon conviction.

Even a casual reading of 21 U.S.C. § 853, shows that the assets at issue here are not subject to pre-trial restraint. Paragraph (e)(1) of section 853 contains the authorization for pre-trail restraint of assets:

> 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 described in subsection (a)* for forfeiture under this section.

Section 853(e)(1) makes it clear that the only property which is subject to pre-trial restraint is “property described in sub section (a).” Subsection (a) of section 853 lists the following property:

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [a violation of Title 21 or Title 3 punishable by imprisonment for more than one year];
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, [a violation of Title 21 or Title 3 punishable by imprisonment for more than one year]; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of [Title 21], the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

None of the defendants in this case are charged with violations of either Title 21 or Title 3 of the United States Code. Accordingly, under the plain wording of section 853(a) and (e), none of their assets are subjected to pre-trial restraint.

The government will no doubt argue that the Court should simply ignore the unambiguous wording of § 853(a) and (e) and effectively rewrite them though interpretation to allow pre-trial restraint of assets other than proceeds of violation of Title 21 or Title 3. The Court should reject any such request to engage in the judicial amendment of an act of Congress. Moreover, even if the English language could be twisted so as allow § 853(e) to be read as permitting the pre-trial restraint of assets other than those shown to be the proceeds of violations of Title 21 or Title 3, it could never be so malleable so as to permit the pre-trial restraint of the assets at issue here, which are not alleged to be the proceeds of *any* criminal activity.

D. MR. WAKEFORD IS ENTITLED TO AN EVIDENTIARY HEARING TO CHALLENGE THE SUFFICIENCY OF THE GOVERNMENT'S FORFEITURE CLAIM.

"It is settled that the Due Process Clause requires a post-restraint, pretrial hearing in order to allow a defendant an attempt to rebut the government's probable cause for forfeiture, at least where substantially all of the defendant's assets have been seized and his ability to fund his defense is implicated." *United States v. Modi*,178 F. Supp. 2d 658, 660 (W.D. Va. 2001). Here, the government has obtained an ex parte restraint of all of Mr. Wakeford's assets. (Hugel Declaration at ¶¶ 2-3). The restraint of all of his assets impacts his ability to continue to fund his defense in this case. *Id.* at ¶ 4.

Moreover, as noted above, there is no indication in the indictment or in the Government's ex-parte motion papers of a factual basis for the government's contention that the $2.3 million in retention bonus received by the PurchasePro defendants constitutes "proceeds" of the alleged securities fraud conspiracy. Absent such a showing, none of Mr. Wakeford's assets could even potentially be subject to forfeiture, even if all of his legal arguments were mistaken.

Accordingly, in the event that the Court finds that the pre-trial restraint of Mr. Wakeford's untainted legitimate assets is theoretically permissible in a forfeiture claim brought under 28 U.S.C. § 2461(c), Mr. Wakeford is entitled, pursuant to the Due Process Clause of the Fifth Amendment to the United States Constitution, to an evidentiary hearing in which he can seek to rebut the factual basis of the Government's *ex-parte* pre-trial restrain of those assets. *United States v. Farmer*, 274 F.3d 800 (4th Cir.

2001) (finding that the Due Process Clause required an adversary hearing where Government restrained defendant's legitimate assets)

CONCLUSION

For the reasons set forth herein and in the accompanying affirmation and for the reasons set forth in the Memorandum of Law submitted on behalf of defendant Christopher Benyo, which Mr. Wakeford has expressly moved to adopt, the Court should vacate the restraining order entered on January 12, 2005, or in the alternative, hold an evidentiary hearing in order to determine whether there is a sufficient factual basis for the Government's pre-trial restraint of all of Mr. Wakeford's assets.

Dated: January 31, 2005

Respectfully submitted,
KENT WAKEFORD

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