U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

BGK:CSK
F. #2018R01064

July 1, 2024

By ECF

The Honorable Rachel P. Kovner
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. David Gentile and Jeffry Schneider
Criminal Docket No. 21-54 (RPK)

Dear Judge Kovner:

The government respectfully submits this letter in opposition to the defendants' letter dated June 10, 2024. (Docket Entry No. 367). In their letter, the defendants: (i) request that the Court have the trial jury determine the forfeiture allegation count in the Indictment against them; (ii) oppose the imposition of a forfeiture money judgment against them; and (iii) seek to have the forfeiture allegations dismissed.[1] *Id.* For the reasons set forth below, as well as the reasons set forth in the government's letter dated June 6, 2024 (Docket Entry No. 354), the defendants' argument are without merit, and their requests should be denied.

I. There Is No Right To A Jury Determination Of A Forfeiture Money Judgment

Pursuant to Fed. R. Crim. P. 32.2(b)(1), (b)(5) and binding Second Circuit law, any forfeiture money judgment determination against the defendants should be made by this Court and not the jury. Fed. R. Crim. P. 32.2 (b)(5) firmly establishes the determination of forfeiture money judgments. "If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." Fed. R. Crim.

[1] As the defendants' letter is a response from both defendants David Gentile and Jeffry Schneider, the government assumes that requests made solely in the name of defendant Schneider apply to both defendants.

P. 32.2 (b)(5). [2] See United States v. Fruchter, 411 F.3d 377 (2d Cir. 2005) (holding that a defendant does not have a Sixth Amendment right to a forfeiture jury determination); United States v. Blakstad, 2021 WL 5411162, at *4 (S.D.N.Y. Nov. 19, 2021) ("[W]here the Government seeks only a money judgment, the defendant has no right under Rule 32.2 or otherwise to a jury determination of the money judgment, nor [does] he have a separate right to challenge the government's election to seek a money judgment in lieu of a jury-determined forfeiture of specific property.").

While defendants acknowledge that the Supreme Court and Second Circuit cases all hold that a defendant has no Sixth Amendment right to have a jury determine criminal forfeiture, they rely on Southern Union Company v. United States, 567 U.S. 343, 347 (2012) in an effort to call into question those cases and the clearly established law that a defendant has no constitutional right to a jury determination when, as here, the government seeks a forfeiture money judgment. Defendants' arguments are without merit.

First, Southern Union was a case that dealt with whether a jury was needed to determine the criminal fine above the prescribed statutory maximum—not forfeiture. 567 U.S. 343, 347 (2012). Second, the Second Circuit has expressly rejected adopting the argument defendants now attempt to advance. United States v. Stevenson, 843 F.3d 80, 86 (2d Cir. 2016) (holding "For all of the reasons we explained in Fruchter concerning the differences between determinate sentencing and criminal forfeiture, it cannot therefore be said that Southern Union overruled Libretti."); United States v. Fruchter, 411 F.3d 377, 383 (2d Cir. 2005). See also, United States v. Perkins, 994 F. Supp. 2d 272, 274 (E.D.N.Y. 2014) (following appellate cases holding that Southern Union does not overrule Rule 32.2(b)(5) because Libretti is binding on the lower courts, and forfeiture has no statutory maximum). Third, nationally, courts have consistently held that Southern Union is inapplicable to forfeiture because forfeiture has no statutory maximum.[3] See, e.g., United States v. Eggleston, 823 F. App'x. 340, 348 (6th Cir.

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[2] The Advisory Committee notes specifically state: "[t]o the extent that the government is seeking a money judgment, such as a judgment for the amount of money derived from a drug trafficking offense or the amount involved in a money laundering offense where the actual property subject to forfeiture has not been found or is unavailable, the court must determine the amount of money that the defendant should be ordered to forfeit." 2000 Advisory Committee Notes to Fed. R. Crim. P. 32.2 (b).

[3] In their letter, defendants rely on McCracken v. Verisma Systems, 2018 U.S. Dist. LEXIS 146318, at *5 (W.D.N.Y. Aug. 28, 2018) to argue that this Court is not bound by other district courts or circuit courts for other circuits. (Docket Entry No. 367 at 1). The fundamental flaws with this argument is two-fold: (1) as set forth herein there is clear Second Circuit law that holds a defendant does not have a right to a jury determination on forfeiture when the government seeks a forfeiture money judgment; and (2) there can be no dispute that decisions in other cases from other districts or circuits, can be persuasive. O'Connell v. Hove, 821 F. Supp. 862, 866 (E.D.N.Y. 1993), aff'd, 22 F.3d 463 (2d Cir. 1994) ("Nevertheless, while this court technically is not bound by [an appellate decision from another Circuit], the fact that a federal

2020) (holding that Southern Union is inapplicable to forfeitures because "(1) forfeiture is not a fine and (2) there is no maximum for forfeitures"); United States v. Sigillito, 759 F.3d 913, 935-36 (8th Cir. 2014) (holding that Southern Union does not apply to criminal forfeiture because Libretti controls and that forfeiture has no statutory maximum); United States v. Simpson, 741 F.3d 539, 560 (5th Cir. 2014) (stating that criminal forfeitures are "indeterminate and open-ended" and that there is no statutory maximum that would be exceeded by any factfinding by the judge; so Southern Union does not apply); United States v. Phillips, 704 F.3d 754, 769-70 (9th Cir. 2012) (Southern Union does not apply to criminal forfeiture); United States v. Day, 700 F.3d 713, 732-33 (4th Cir. 2012) (Southern Union does not apply to forfeiture because there is no statutory maximum for forfeiture). Therefore, defendants' attempt to challenge the well-established law that a defendant does not have a right to a jury determination on forfeiture should be rejected by this Court.

II. The Government Has The Right To Pursue A Forfeiture Money Judgment

In the event of any of the defendants' convictions on any of the substantive counts One through Five of the Indictment, the government intends to seek personal money judgments against each of the defendants (rather than seek to forfeit specific potentially forfeitable assets).

The Second Circuit has expressly approved the government's decision to seek personal forfeiture money judgments against defendants and the district court's broad discretion in calculating a defendant's ill-gotten gains. See e.g., United States v. Mathieu, 853 F. App'x 739, 742 (2d Cir. 2021) (citing to Fed. R. Crim P. 32.2(b)(1)(A) and holding that when forfeiture is sought in the form a personal money judgment, the district court must determine the amount of money that the defendant will be ordered to pay); United States v. Walters, 910 F.3d 11, 32 (2d Cir. 2018) (holding district courts have broad discretion to determine illicit gains); United States v. Treacy, 639 F.3d 32, 48 (2d Cir. 2011) ("The calculation of forfeiture amounts is not an exact science," and therefore district courts "need only make a reasonable estimate of the loss, given the available information.").

In support of their argument that the government is not entitled to seek forfeiture money judgments against them and that the forfeiture allegations in the Indictment against them should be dismissed,[4] defendants attempt to rely on Honeycutt v. United States, 581 U.S. 443 (2017) and United State v. Awad, 598 F.3d 76 (2d Cir. 2010). (Docket No. 367 at 2). As set

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appellate court sitting en banc addressed the identical facts and arguments to those presented here is certainly persuasive.")

[4] Defendants fail to cite any case in support of their position that the forfeiture allegations should be dismissed. In any event, such a position is without legal merit. See e.g. United States v. Goff, 2016 WL 3264129 at * 7 (S.D.N.Y. 2016) (denying defendant's motion to dismiss forfeiture allegations).

forth below, defendants' reliance on these cases in order to challenge the government's right to seek forfeiture money judgments against them are misplaced and unwarranted.

In Honeycutt, the Supreme Court unanimously held that the government cannot hold all members of a conspiracy jointly and severally liable for a forfeiture money judgment in the full amount of the criminal proceeds derived by the conspiracy. Instead, the government must prove (by a preponderance of the evidence) what proceeds each member of the conspiracy obtained. Honeycutt, 581 U.S. 443 (2017). While in United States v. McIntosh, 2023 WL 382945 at * 2 (2d Cir. 2023), the Second Circuit has held that Honeycutt's prohibition of joint and several liability applies with equal force to the applicable forfeiture statutes in this case, namely 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c) and 21 U.S.C. § 853(p),[5] no reading of Honeycutt, precludes the government from pursuing personal forfeiture money judgments against defendants.

The fundamental flaw with defendants' argument and reliance on language in the Honeycutt decision that specifically discusses the substitute assets provisions in 21 U.S.C. § 853(p)(2), is that at this particular stage of the forfeiture proceedings (in the event of defendants convictions on any of the substantive counts in the Indictment), substitute assets are completely irrelevant. Lest there be any doubt, while the forfeiture of substitute assets of a defendant may be pursued for forfeiture if the elements of § 853(p)(1) (A) through (E) have been met,[6] at this stage substitute assets are not what the government is seeking against the defendants. In sum, the government intends to seek personal forfeiture money judgments against the defendants based on their ill-gotten gains in the event of their convictions and will be required to show the requisite nexus between the forfeiture money judgments and the offenses of conviction by a preponderance of the evidence. See Fed. R. Crim. P. 32.2(b)(1)(A). In short, nothing in Honeycutt precludes or limits the government from pursuing forfeiture money judgments against the defendants. Moreover, nothing in Honeycutt even suggests that any such forfeiture money judgment determination must be made by a jury.

Defendants also attempt to challenge the government's pursuit of forfeiture money judgments against them and pre-emptively contend that United States v. Awad should not apply to this case. Such a position is without merit. Indeed, Awad explicitly approved of the government's ability to seek forfeiture money judgments. In Awad, a narcotics conspiracy case, the Second Circuit, upheld the district court's imposition of forfeiture money judgments on the defendants at sentencing regardless of the defendants' assets at the time of sentencing. Id. 598 F.3d at 77 ("We hold that the district court properly imposed forfeiture money judgments as part of appellants' sentencings and that priority of an order imposed pursuant to 21 U.S.C. 853(a) does not depend on a defendant's assets at time of sentencing.") Moreover, the Awad court expressly acknowledged that criminal forfeiture constitutes a sanction against an individual

[5] See Indictment (Docket Entry No. 1) at ¶¶ 61-62.

[6] The government, of course, reserves its right to pursue the forfeiture of substitute assets of the defendants based on any facts that may be discovered. See 21 U.S.C. § 853(o) and (p).

defendant and that criminal forfeiture need not be traced to identifiable assets in a defendant's possession. Id. at 79.[7]

Conclusion

Accordingly, the government respectfully requests that, in the event that the defendants are convicted of any of the charged offenses at trial, the jury be dismissed and the Court make any forfeiture determination.

Respectfully submitted,

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[7] To the extent defendants appear to off-handedly argue that "Awad predates Honeycutt" (Docket Entry No. 367 at p. 2), is of no legal merit. Nothing in Honeycutt which precludes joint and several forfeiture liability can be read to overrule Awad which holds that forfeiture money judgments can be imposed on defendants at sentencing regardless of whether a defendant has forfeitable assets.