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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
ALEXANDER LEBED LARISA LEBED	:	NO. 05-362-01 and 02

MEMORANDUM

Baylson, J. **October 7, 2005**

The issue presented is whether a notice of forfeiture in connection with the charges of mail and wire fraud should be stricken from an indictment.

I. Summary of Allegations of Indictment

The Grand Jury indictment of Alexander Lebed and Larisa Lebed, spouses, charges the defendants with twenty-six counts of wire fraud in violation of 18 U.S.C. § 1343, eight counts of mail fraud in violation of 18 U.S.C. § 1341, and ninety-five counts of laundering monetary instruments over $10,000 in violation of 18 U.S.C. § 1957. Together, the allegations reflect a fraudulent scheme to receive and misappropriate approximately $13 million in federal Pell Grants awarded to students at CSC Institute, a private vocational school owned by the defendants. The indictment also includes two separate notices of forfeiture, the first based on the mail and wire fraud counts (which is the subject of the pending motion); the second stemming from the counts of laundering monetary instruments over $10,000 (which is concededly properly included in the indictment).

The assets at issue are contained in the first notice of forfeiture and include "$13 million

in proceeds," "all funds and securities up to the amount of $2,608,000.00 in Charles Schwab One Account Number 1102-8753," and twenty-three specific pieces of real estate. The Charles Schwab account was frozen by the Government in July 2004. Disbursements from the fund were permitted under an October 1, 2004 Stipulation Agreement approved by Judge Timothy Savage of this court.

II. Summary of Defendants' Motion to Strike Civil Forfeiture Count from Indictment and for the Discharge of Certain *Lis Pendens*

The Defendants argue in their Motion to Strike Civil Forfeiture Count from Indictment that there is a lack of statutory authority for criminal forfeiture in connection with 18 U.S.C. § 1341 (Mail Fraud) or 18 U.S.C. § 1343 (Wire Fraud). In addition to this primary issue, Defendants also argue for the discharge of the *lis pendens* recorded against the properties in the civil forfeiture Count of the indictment.

First, the Defendants argue that criminal forfeiture is not authorized for mail fraud and wire fraud, as it is only available in such cases when "affecting a financial institution." The Defendants also attempt to foreclose any attempt by the Government to utilize 28 U.S.C. § 2461(c), a portion of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which permits the inclusion of forfeiture in the indictment for violation of any act of Congress where "no specific statutory provision is made for criminal forfeiture upon conviction." Citing recent opinions in this district by Judge Dalzell, United States v. Croce, 334 F. Supp. 2d 781 (E.D. Pa. 2004) [hereinafter "Croce I"]; United States v. Croce, 345 F. Supp. 2d 492 (E.D. Pa. 2004) (Motion for Reconsideration) [hereinafter "Croce II"], Defendants argue that there is a statutory provision authorizing criminal forfeiture for mail and wire fraud, affecting a financial institution.

Therefore, § 2461(c) does not apply to allow criminal forfeiture of mail and wire fraud proceeds if there is no effect on a financial institution.

Second, Defendants contend that even if the mail and wire fraud statutes do authorize criminal forfeiture, assets listed in the first forfeiture count of the indictment (namely the Charles Schwab account and the twenty-three listed properties) are substitute assets and therefore not subject to pretrial restraint. As to the second contention, the Court has requested further briefing.

III. Summary of Government's Response to Defendants' Motion to Strike Civil Forfeiture Count from Indictment and for the Discharge of Certain *Lis Pendens*

Countering the Defendants' Motion, the Government makes three main arguments: (1) criminal forfeiture does apply in cases of mail and wire fraud; (2) the subject properties in the notice of forfeiture are not substitute assets and are therefore subject to pretrial restraint; and (3) *lis pendens* are not a restraint on property in any case.

In asserting the propriety of the invocation of criminal forfeiture for mail and wire fraud, the Government argues that United States v. Croce was wrongly decided and that 28 U.S.C. § 2461(c) allows for criminal forfeiture in this case. The Government takes an identical position to the one it has adopted in appealing the Croce decision to the Third Circuit, arguing that the legislative intent behind CAFRA clearly indicates a desire to provide for broader use of criminal forfeiture, including its application in all mail and wire fraud cases and not just for those affecting financial institutions. Section 2461(c) is set forth as a "gap-filling" provision designed to allow criminal forfeiture when civil forfeiture is authorized and to provide *procedures* for criminal forfeiture statutes "that do not have procedural provisions of their own." Gov't Resp. at 7–8. The Government also notes the sequence of statutory enactments and argues that CAFRA

served to authorize forfeiture for all types of mail and wire fraud. An amendment to the existing criminal forfeiture provision for mail and wire fraud (limited to instances in which the fraud affected financial institutions), the Government contends, was unnecessary due to the significant expansions of civil forfeiture as well as the enactment of the gap-filling provision in § 2461(c).

Next, the Government contends that pretrial restraint of the subject properties in the first notice of forfeiture is proper since they are not substitute assets but properties purchased directly with proceeds of the charged fraud; because the twenty-three properties in question can be traced to the funds allegedly acquired as proceeds of mail and wire fraud, pretrial restraint is permissible under the procedures invoked by § 2461(c). Finally, the Government argues that a *lis pendens* is not a preconviction restraint on property and, because there is still a right to transfer property, the twenty-three properties listed in the first notice of forfeiture are not restrained for the purposes of forfeiture under CAFRA.

IV. Summary of Defendants' Reply to Government's Response

Defendants argue that the Government's reliance on legislative intent does not stand up to the clearly unambiguous legislative language in § 2461(c). They claim that Congress specifically considered providing criminal forfeiture for mail and wire fraud but chose to do so only in situations when there was an adverse effect upon a financial institution. Defendants believe that CAFRA should not provide criminal forfeiture in an area where Congress refused to establish such a right, and there should be no criminal forfeiture in this case under the mail and wire fraud statutes.

Defendants also claim that aside from the $13 million, which could indeed be direct proceeds, all other items listed in the first notice of forfeiture are instead substitute assets not

subject to pretrial restraint. Finally, Defendants attack the Government's position as to the *lis pendens*, arguing that they are practical, if not formal, restraints. Because they prevent a seller from delivering clear marketable title, *lis pendens* operate as a restraint, preventing sale of the property as a practical matter.

V. Analysis

A. Forfeiture in General and for Mail Fraud and Wire Fraud

Congress has authorized different types of forfeiture of assets, civil forfeiture and criminal forfeiture. In its simplest terms, civil forfeiture is *in rem*, meaning that the government moves against specific items of property involved in wrongdoing (usually but not necessarily commission of a crime), and the burden of proof rests on the party alleging ownership. United States v. Sandini, 816 F.2d 869, 872 (3d Cir. 1987) ("The innocence of the owner is irrelevant -- it is enough that the property was involved in a violation to which forfeiture attaches."). Criminal forfeiture, however, is *in personam*, usually where a grand jury charges the criminal defendant as being the owner of the property. The goal of criminal forfeiture is punishment of the owner by taking the property, and the burden of proof is upon the government. See United States v. Kravitz, 738 F.2d 102, 106 (3d Cir. 1984).

In criminal forfeiture the Government still bears the burden of persuasion as to the forfeiture allegations after proving the guilt of a defendant as to the underlying offense. The burden to be applied depends on the specific criminal forfeiture provision in use. United States v. Voigt, 89 F.3d 1050, 1082 (3d. Cir. 1996) (burden of persuasion for criminal forfeiture under 18 U.S.C. § 982(a)(1) is the preponderance-of-the-evidence standard); United States v. Pellulo, 14 F.3d 881, 881 (3d. Cir. 1994) (RICO; reasonable doubt); Sandini, 816 F.2d at 870

(Continuing Criminal Enterprise; preponderance). The application of these differing burdens may depend on the specific facts of the case and the degree to which the identity of property subject to forfeiture arose in the course of proving the substantive criminal charge. In Voigt, the court noted that in the context of a RICO charge "a reasonable doubt burden of persuasion ensures greater accuracy in determining the scope of the property subject to forfeiture," since the amount and extent of property will often not be addressed in proving the RICO charge itself. Voigt, 89 F.3d at 1084. In the case of money laundering, however, the preponderance standard is sufficient at the forfeiture stage, since "the amount of the transaction that forms the basis of a substantive money laundering offense will be identified in the indictment and, thus, [the] connection to money laundering activity will have been proved beyond a reasonable doubt at trial." Id.

In this case, as noted above, the indictment contains two separate notices of forfeiture, the first, concerning mail and wire fraud, is based on 18 U.S.C. § 981 (civil forfeiture) and 28 U.S.C. § 2461; the second, concerning money laundering, is based on 18 U.S.C. §§ 982 (criminal forfeiture) and 1957(a). The Defendants concede the second notice of forfeiture under § 982 is proper, see Hr'g Tr. at 8:13, 10:25–11:1, Sept. 13, 2005.

Because criminal forfeiture is not automatic upon conviction, the government must still establish a sufficient nexus between the offense committed and the property to be forfeited. One of the leading cases decided by the Third Circuit on this topic is United States v. Voigt, 89 F.3d 1050 (3d Cir. 2003), addressing the standards of proof for criminal forfeiture under various statutes, including RICO (forfeiture provision at 18 U.S.C. § 1963), CCE (21 U.S.C. § 853), and money laundering (18 U.S.C. § 982). In addition to its discussion of burdens, Voigt also details

how the government seizes property in satisfaction of a criminal conviction for money laundering. The court narrowly interpreted the requirement in § 982(a)(1) that the property subject to forfeiture be "traceable to" money laundering proceeds. Id. at 1085. Because it is often difficult to determine the origin of funds when tainted monies are commingled with untainted ones, Voigt held that when such commingling does occur, it will be extremely difficult for the government to demonstrate the traceability of the money in the account (or of items purchased through withdrawals from the account). Id. at 1087. The Voigt court also suggested that a similar analysis would apply in the context of civil forfeiture. Id. at 1087 n.23;see also United States v. $ 8,221,877.16 in United States Currency, 330 F.3d 141, 158 (3d Cir. 2003) (noting in a civil forfeiture action stemming from a drug money laundering conspiracy that tracing "can prove difficult when the underlying property is funds that can be deposited in a bank account, withdrawn, and replaced with new, untainted funds, or may be commingled with untainted funds in one account").

Following Voigt, a number of cases further examined the issue of what assets are "traceable" to the criminal conduct for which the defendant was convicted. See, e.g., United States v. Stewart, 185 F.3d 112 (3d Cir. 2004). For example, in Stewart, the court clarified the distinction between direct forfeiture and forfeiture of substitute assets. The procedures used for criminal forfeiture under the money laundering statute are found in 21 U.S.C. § 853, with direct forfeiture provided for "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." 21 U.S.C. § 853(a). When, due to "an act or omission of the defendant" property in subsection (a) has been, *inter alia*, "commingled with other property which cannot be divided without difficulty," the substitute

asset provision of § 853(p) can be invoked to allow for an order of forfeiture "of any other property of the defendant." Id. at § 853(p)(1), (2). The Stewart court clarified the "divided without difficulty" language of § 853(p), holding that when it is possible to separate out the amount subject to forfeiture, commingling of tainted with untainted funds does not prevent direct forfeiture under § 853(a). 185 F.3d at 129–30.

Both 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1) make all "property involved" in a violation of either §§ 1956 or 1957 subject to civil and criminal forfeiture, respectively.[1] This is why, in the context of the money laundering statute, which is the subject matter of the second notice of forfeiture in this case, criminal forfeiture is concededly proper. See Stewart, 185 F.3d at 130; United States v. Pitt, 193 F.3d 751, 765 (3d Cir. 1999); Voigt, 89 F.3d at 1082. By way of background, it is relevant to note that the criminal forfeiture provision for money laundering was added by amendment in 1988, see Pub. L. No. 100-690, § 6463, 102 Stat. 4181, 4374 (1988). The legislative history confirms that Congress intended to provide for forfeiture under the 1988 amendment, noting that "It is the intent of Congress that a person who conducts his financial transactions in violation of the anti-money laundering statutes forfeits his right to the property involved . . . ." 134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

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[1] 18 U.S.C. § 981(a)(1)(A) provides:

> (a)(1) The following property is subject to forfeiture to the United States:
>
> (A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.

18 U.S.C. § 982(a)(1) provides:

> (a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

Thus, prior to the passage of CAFRA, the government was authorized to charge, in an indictment charging either money laundering or mail or wire fraud affecting a financial institution, that the defendant realized assets as a result of the criminal conduct. If the defendant was convicted and the Government then met its burden in establishing a nexus between the offense committed and the property forfeited, he would then be ordered to forfeit assets obtained as a result of (or traceable to) those specific criminal activities.

As noted above, there is no general criminal forfeiture provision attached to the mail and wire fraud statutes, but 18 U.S.C. 982(a)(2), enacted in 1989, does provide criminal forfeiture for various crimes (including mail and wire fraud) "affecting a financial institution."

B. Impact of CAFRA

The focus of Defendants' motion is the first notice of forfeiture and its use of CAFRA to provide criminal forfeiture in mail and wire fraud cases. The first relevant provision from the civil forfeiture statute is 18 U.S.C. § 981(a)(1)(C) which reads as follows:

> The following property is subject to forfeiture to the United States . . . Any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense.

"Specified unlawful activity" in § 1956(c)(7) in turn includes "any act or activity listed in section 1961(1) of this title." Section 1961, the first provision in the Racketeer Influenced and Corrupt Organizations Act Statute (RICO), specifically names both mail fraud and wire fraud in defining "racketeering activity," see 18 U.S.C. § 1961(1)(B), thus making the proceeds (and traceable derivations therefrom) subject to civil forfeiture under § 981.

The remaining analysis will be more helpful after a short summary of forfeiture

procedure. Largely unchanged since the late eighteenth century, civil forfeiture provisions were amended by CAFRA in an effort by Congress to provide additional procedural safeguards. The added protections included a uniform innocent owner defense for all federal civil forfeiture statutes, as well as expanded access to counsel in civil forfeiture proceedings. Louis S. Rulli, The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture, 14 Fed. Sent'g Rep. 87, 87–88 (2002). Infrequently used prior to 1970, criminal forfeiture was invoked more often after the enactment of two statutes targeting drug abuse and organized crime activities. See Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 853; Organized Crime Control Act of 1970, 18 U.S.C. § 1963; see also Rulli, supra, at 90–91, 96 n.40. Because criminal forfeiture permits prosecutors to achieve forfeiture of substitute assets in place of unavailable property, it serves in many ways as a more powerful tool for prosecutors than civil forfeiture.

In CAFRA, enacted in 2000, Congress in § 2461(a) provided for expansion of civil forfeiture as follows:

> Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

As noted in United States v. Thompson, 2002 WL 31667859 (N.D.N.Y 2002), the legislative history for this provision explains that numerous provisions of the United States Code provide for civil penalties without specifying "the mode of recovery or enforcement" and consequently the above provision was drafted to provide a mode of enforcement for the statutes. See 28 U.S.C.A. § 2461(a), History and Statutory Notes.

In addition to the greater procedural protections provided to citizens subject to civil forfeiture, § 2461(c) of CAFRA also clearly intended to expand opportunities for use of criminal forfeiture, making it available to prosecutors whenever civil forfeiture is allowed. Section 2461(c) is not accompanied by any explanatory language, but it provides 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 . . . .

With this background, Defendants' motion requires the Court to decide, apparently without any controlling precedent, first, whether property obtained by mail or wire fraud is subject to civil forfeiture under 18 U.S.C. § 981(a)(1)(C), and if so, secondly, whether the above-quoted provision of CAFRA will allow criminal forfeiture upon a conviction of mail or wire fraud. As to the first issue, § 981(a)(1)(C)'s cross reference to § 1956(c)(7), and the latter's cross reference to § 1961(1) (RICO) (mail or wire fraud) make clear that property obtained by mail or wire fraud is subject to civil forfeiture. In applying the second issue to the case at hand, the question becomes whether Congress intended to permit criminal forfeiture against these Defendants when there is no allegation that charges the mail or wire fraud affected a financial institution. The first notice of forfeiture depends not on a specific statute authorizing criminal forfeiture for mail fraud, but instead invokes civil forfeiture under the provisions of § 981(a)(1)(C) and the procedures allowed pursuant to § 2461(c) of CAFRA. Stated differently, the issue is whether CAFRA permits criminal forfeiture in cases of mail and wire fraud.

Croce I did not address this issue. It held that "§ 982 does not authorize [courts] to enter

forfeiture money judgments" and only permits forfeiture of specific items of defendants' property. 334 F. Supp. 2d at 794. Although Croce I broke new ground in holding that courts could not enter nonspecific and unlimited money judgments, Defendants rely heavily on Croce II, 345 F. Supp. 2d 492, in claiming that § 2461(c) does not allow criminal forfeiture of mail and wire fraud proceeds. In Croce II, Judge Dalzell, though not specifically confronted with this issue, stated in footnoted dictum that § 2461(c) would not apply in instances where the mail and wire fraud are of a type not specifically provided for in the criminal forfeiture statute (that is, "affecting a financial institution"). 345 F. Supp. 2d at 496 n.9. Because the indictment in this case does not allege that the mail and wire fraud involved a "financial institution," § 2461(c) is the only method by which the government can seek to include criminal forfeiture in the indictment for those crimes. With little relevant case law on this issue, a close examination of CAFRA and the interplay between § 2461(c) and current civil and criminal forfeiture statutes is necessary.

1. Plain Language

The applicability of § 2461(c) to mail and wire fraud *not* affecting a financial institution ultimately turns on statutory interpretation. The Defendants rely on the language of § 2461(c) "but no specific statutory provision is made for criminal forfeiture upon conviction." Because 18 U.S.C. § 982(a)(2)(A) provides for criminal forfeiture in specific instances of mail and wire fraud, i.e., those affecting financial institutions, Defendants argue that the plain meaning of 28 U.S.C. § 2461(c) prevents the inclusion of criminal forfeiture in all other mail and wire fraud cases.

In interpreting a statute a court must first rely on its plain language. See Virgin Islands v.

Knight, 989 F.2d 619, 633 (3d. Cir. 1993) ("It is axiomatic that statutory interpretation begins with the language of the statute itself."). Courts generally presume that Congress expressed its intent in the words used in the statute and "if the statutory language is unambiguous, the plain meaning of the words ordinarily is regarded as conclusive." Id. (citing Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

Defendants contend, because Congress, in CAFRA, did not specifically do anything to change the existing limitation of the applicability of criminal forfeiture in mail and wire fraud to cases in which the fraud affected a financial institution, that criminal forfeiture in all other types of mail and wire fraud continues to be foreclosed. However, looking at the plain language of § 2461(c), it seems reasonably clear that it applies when a substantive provision is made for civil forfeiture, but no specific statutory provision exists for criminal forfeiture. Thus, it has no application to mail and wire fraud affecting a financial institution, because a statutory provision for criminal forfeiture already exists. It is clear that prior to the passage of § 2461(c) criminal forfeiture was not possible upon conviction for mail and wire fraud when the fraud did not affect financial institutions.

The Court concludes the statutory language of § 2461(c) must be construed that where Congress has authorized civil forfeiture, but has not specifically provided for criminal forfeiture upon conviction, the indictment may now seek criminal forfeiture. Thus, by virtue of the cross reference from the civil forfeiture statute to the money laundering statute (§ 1956(c)(7)) and its cross reference to the RICO statute, criminal forfeiture may now be invoked for general instances of mail and wire fraud, since these crimes do not currently contain any specific statutory

provisions for criminal forfeiture.[2]

In Thompson, the court noted that in enacting § 2461(c), "Congress was merely filling a gap in the current law by providing that where a criminal forfeiture provision existed, but no mechanism for enforcement of that forfeiture was found in the statute, the provisions of 21 U.S.C. § 853 would fill the gap." Thompson, 2002 WL 31667859, at *3. Though the court in Thompson ultimately concluded that the crimes of which the defendant had been convicted *did* provide an existing mechanism for forfeiture, that is not so in this case. The civil forfeiture provisions for mail and wire fraud under § 981(a)(1)(C) contain no such mechanisms, and the gap-filling role of § 2461(c) thus provides for criminal forfeiture under the auspices of 21 U.S.C. § 853. Prior to 2000, Congress did specifically consider the mail and wire fraud statutes and chose to include a criminal forfeiture provision only for fraud affecting financial institutions. Upon its enactment in 2000, as part of CAFRA, § 2461(c) expanded criminal forfeiture opportunities for mail and wire fraud convictions by allowing institution of criminal forfeiture procedures where they had previously been absent.

This reading of § 2641(c) respectfully differs from the dictum in footnote 9 of Croce II. Congress's original decision, prior to the passage of § 2461(c), not specifically to authorize criminal forfeiture for mail and wire fraud which did not affect financial institutions, does not prevent Congress from expanding criminal forfeiture through CAFRA, and the language of § 2461(c) allows for this result, i.e., for allowing criminal forfeiture for all types of mail and wire

[2] The Court is following standard statutory construction by giving effect to all relevant statutes and the appropriate cross-references contained in the statutes. "[C]ourts should disfavor interpretations of statutes that render language superfluous." See Voigt, 89 F.3d at 1087 (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992)).

fraud, even those not affecting financial institutions.

2. Legislative Intent/Legislative History

In addition to the language itself, the intent underlying a statutory enactment is important to any interpretation effort. "In matters of statutory construction, we may consider the legislative history, as well as the 'atmosphere in which [the statute] was enacted.'" Tavarez v. Klingensmith, 372 F.3d 188, 190 (3d. Cir. 2004) (citing New Rock Asset Partners v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1498 (3d Cir. 1996)).

The Government responds to Defendants' interpretation of § 2461(c) with an examination of CAFRA's legislative history. It begins by setting forth the twin aims of CAFRA: (1) to "authorize[] criminal forfeiture when civil forfeiture is authorized;" and (2) to "make[] the criminal forfeiture procedures set forth in 21 U.S.C. § 853 applicable to criminal forfeiture cases that do not have procedural provisions of their own." Gov't Resp. at 7–8. Having established the goals of the legislation, the Government then argues that the language in § 2461(c) reading "no specific statutory provision is made for criminal forfeiture upon conviction" was meant to apply only to the second goal of CAFRA — that is to ensure that forfeiture procedures already in existence were not being overridden. The government asserts that the very purpose of CAFRA would be defeated if the Defendant's interpretation of the statute is followed. If the Defendant's interpretation prevails, "§ 2461(c) would not apply to any statute that contained criminal forfeiture authority but no forfeiture procedures. . . . That cannot be what Congress intended." Id. at 10.

The passage of CAFRA in 2000 included a broad expansion of both criminal and civil forfeiture. Section 2461(c) functioned to provide the government with an opportunity to utilize

criminal forfeiture in areas where it had previously been unavailable. Also, in amending the civil forfeiture statute, 18 U.S.C. § 981, Congress specifically removed the limiting language of "affecting financial institutions" for mail and wire fraud and inserted language permitting civil forfeiture for a whole host of crimes listed in 18 U.S.C. § 1956(c)(7). See Pub. L. No. 106-185, § 20, 114 Stat. 202, 224 (2000) (striking "or a violation of section 1341 or 1343 of such title affecting a financial institution" and inserting "or any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense").

Although no amendment was ever made to § 982(a)(2) removing the "financial institution" limitation, the Government contends, and it seems plausible, that the timing of the various enactments and amendments signals a congressional effort to permit criminal forfeiture in all mail and wire fraud cases. The 2000 amendment to § 981 expanding civil forfeiture, along with the implementation of § 2461(c) and its effort to make criminal forfeiture authority co-extensive with civil forfeiture, makes it unlikely that § 982(a)(2), having remained unchanged since implemented in 1989, was meant to continue to restrict criminal forfeiture in mail and wire fraud cases.

This conclusion is buttressed by the legislative history of CAFRA, which notes that a goal of the statute was to "expand[] the reach of federal criminal forfeiture, such as to crimes that frequently generate criminal proceeds." H. Rep. No. 105-358, at 35 (1997). To expand civil forfeiture for mail and wire fraud while keeping restrictions on criminal forfeiture in place would work against the very goals of the Act. Keeping this large-scale objective in mind, it is more likely that § 2461(c) was designed to expand criminal forfeiture to all types of mail and wire fraud, rather than to maintain the existing limitation found in § 982(a)(2).

The larger goals of CAFRA along with the amendments made to the civil forfeiture statute in 2000 lend further support to the conclusion that § 2461(c) does provide criminal forfeiture for mail fraud in cases where the fraud does not affect financial institutions. Therefore, we hold that § 2461(c) allows for criminal forfeiture in mail and wire fraud cases in which the fraud does not affect a financial institution, and thus Defendants' Motion to Dismiss the First Notice of Forfeiture will be denied.

C. Lis Pendens Do Not Qualify as a Restraint

While the Defendants contend that *lis pendens* serve as a practical restraint on property, see Def.'s Reply Br. at 11–12, it is generally accepted that *lis pendens* do not amount to a seizure of property. See, e.g., United States v. James Daniel Good Real Property, 510 U.S. 43, 58–59 (1993) (distinguishing between a seizure and a notice of *lis pendens*); United States v. Monsanto, 491 U.S. 600, 615 (1989) (noting that a seizure has the effect of removing the owner from the property).

In the specific context of forfeiture, *lis pendens* have been characterized as falling short of "restraint" or "seizure" in the context of pretrial restraint. United States v. Miller, 26 F. Supp. 2d 415, 432 n.15 (N.D.N.Y. 1998). Similarly, the Eleventh Circuit in an *en banc* decision addressed the issue of *lis pendens* and their effect upon the owners of such property. United States v. Register, 182 F.3d 820 (11th Cir. 1999) (en banc). Addressing the very argument put forth by Defendants as to the practical restraint instituted by *lis pendens*, the Register court wrote: "[T]he effect of a *lis pendens* on the owner of property . . . is constraining. For all practical purposes, it would be virtually impossible to sell or mortgage the property because the interest of a purchaser or mortgagee would be subject to the eventual outcome of the lawsuit." Id. at 836. The court

continued, noting, "Still 'the right to alienate the property . . . exists.'" Id. (quoting Chrysler Corp. v. Fedders Corp., 670 F.2d 1316, 1323 (3d Cir. 1982)). The Sixth Circuit characterized *lis pendens* in like manner, stating, "A *lis pendens* does not affect the use to which the property may be put during the pendency of the action. . . ." Aronson v. City of Akron, 116 F.3d 804, 811 (6th Cir. 1997).

Thus, in the context of forfeiture *lis pendens* simply do not rise to the level of restraint or seizure as set forth in 21 U.S.C. § 853(e), the relevant forfeiture procedures for pretrial restraint set forth under § 2461(c). Because we hold that *lis pendens* do not amount to an impermissible restraint on Defendants' assets, Defendants' Motion for the Discharge of Certain *Lis Pendens* is denied.

An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
ALEXANDER LEBED LARISA LEBED	:	NO. 05-362-01 and 02

ORDER

AND NOW, this 7th day of October, 2005, in consideration of Defendants' Motion to Strike Civil Forfeiture Count from the Indictment and for the Discharge of Certain Lis Pendens (Doc. No. 44) and in accordance with the foregoing Memorandum, it is hereby ORDERED that the Motion is DENIED. The Court continues to hold under advisement, pending further briefing, the Defendants' position that the assets identified in the first notice of forfeiture are substitute assets and, therefore, not subject to pretrial restraint.

BY THE COURT:

/s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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