IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

**UNITED STATES OF AMERICA,**

**V.**

**15-CR-227-A**

**RICHARD PETIX**

**Defendant.**

---

**GOVERNMENT'S MOTION FOR A PRELIMINARY ORDER OF FORFEITURE AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

The United States of America, by and through its attorneys, James P. Kennedy, Jr., Acting United States Attorney for the Western District of New York, Richard D. Kaufman, Assistant United States Attorney, of counsel, hereby makes and files this motion pursuant to Fed R.Crim.P. 32.2(b)(1) for a Preliminary Order of Forfeiture based upon the Forfeiture Allegations contained in the Indictment. In support thereof, the government offers the following Memorandum of Law, fully incorporating the attached affidavit of Department of Homeland Security (DHS), Homeland Security Investigations (HSI) Special Agent Brad A. Brechler, and all other pleadings and proceedings that have previously been made a part of this prosecution.

**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

## Federal Cases



## Federal Statutes

**Federal Rules**

## I. PRELIMINARY STATEMENT

On March 9, 2016, a federal grand jury returned a 2-count Superseding Indictment charging the defendant, Richard PETIX, with one count of making a materially false statement (18 U.S.C. §1001(a)(2)) and one count of operating an unlicensed money transmitting business (18 U.S.C. §1960) The Superseding Indictment also contained a forfeiture allegation seeking forfeiture of various electronic equipment and any U.S. currency involved in the defendant's illegal money transmitting business. (Docket No. 16).

On April 26, 2017, the defendant entered a Pimentel plea to the Indictment and admitted the conduct forming the basis of both the first and second counts of the Indictment. (Docket No. 69)

In accordance with Fed.R.Crim.P. 32.2(b)(1), upon a qualifying conviction, the Court must determine any property that should be forfeited and the amount of money that a defendant must forfeit. The applicable forfeiture statutory authority for unlicensed money transmitting businesses is 18 U.S.C. §982(a)(1).

## II. POST-VERDICT FORFEITURE PROCEEDINGS GENERALLY

Rule 32.2 of the Federal Rules of Criminal Procedure sets forth the post-verdict procedure for criminal forfeitures. Rule 32.2 (b) reads in part as follows:

> (1) **Forfeiture Phase of the Trial**.
>
> (A) **Forfeiture Determinations**. As soon as practicable after a verdict or finding of guilty . . . on any count in an indictment . . . regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount that the defendant will be ordered to pay.
>
> (B) **Evidence and Hearing**. The court's determination may be based on evidence already in the record, . . . and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request, the court must conduct a hearing after the verdict or finding of guilty.

Since forfeiture is considered part of the sentencing process, Libretti v. United States, 516 U.S. 29, 38-41 (1995); United States v. Bellomo, 176 F.3d 580, 595 (2d Cir. 1999), the rule imposes an obligation upon the sentencing court to:

> determine what property is subject to forfeiture under the applicable statute. Under the rule, the court's forfeiture determination may be based on evidence already in the record . . . or . . . on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

United States v. Capoccia, 503 F.3d 103, 109 (2d Cir. 2007).

Rule 32.2(b)(1) (B) specifically provides that evidence adduced at trial and during the forfeiture proceeding may be utilized to determine the forfeiture issues. Moreover, the government may proceed by proffer and because the Federal Rules of Evidence are inapplicable, the Court may consider reliable hearsay. United States v. Farkas, 474 Fed.

Appx. 349, 360 (4th Cir. 2012) (under Rule 32.2(b)(1)(B), the court may base its forfeiture determination on evidence already in the record and on any additional evidence or information submitted); United States v. Gaskin, 2002 WL 459005, *9 (W.D.N.Y. 2002), aff'd 364 F.3d 438 (2d Cir. 2004); Capoccia, 503 F.3d at 109; United States v. Nicolo, 597 F. Supp. 2d 342, 345 (W.D.N.Y. 2009) (the rules of evidence do not apply in the forfeiture phase of the trial; the court may rely on evidence from the guilt phase supplemented by an agent's affidavit); Fed. R. Crim. P. 1103(d)(3) (providing that the Rules of Evidence are inapplicable in sentencing proceedings).

The burden of proof to be applied when determining a criminal forfeiture count is preponderance of the evidence. "[I]t is well settled in the Second Circuit that once the defendant is convicted of an offense on proof beyond a reasonable doubt, the Government is only required to establish the forfeitability of the property... by a preponderance of the evidence". United States v. Schlesinger, 396 F.Supp. 2d 267, 271 (E.D.N.Y. 2005) *aff'd* 514 F.3d 277 (2nd Cir. 2008); United States v. Stevenson, 834 F.3d 80, 85-86 & n. 3 (2d Cir. 2016); United States v. Peters, 732 F.3d 93 (2d Cir. 2013), cert denied 134 S.Ct. 2740 (2014). See also Bellomo, 176 F.3d at 595; Gaskin, 364 F.3d 438, 461-62 (2d Cir. 2004).

Rule 32.2 (b)(1)(A) of the Fed.R.Crim.P. specifically permits the government to obtain a money judgment. It is clear in this Circuit that the imposition of money judgments in criminal forfeiture cases is proper. Peters, 732 F.3d at 104 (affirming decision of the district court where in addition to imposing a term of imprisonment and restitution, the district court

ordered a money judgment forfeiture in the amount of $23,154,259.00); Schlesinger, (Government is entitled to a money judgment for the total amount of money defendant laundered through his business); United States v. Seabrook, 661 Fed App'x 84 (2d Cir 2016). See also United States v. Vampire Nation, 451 F.3d 189, 202 (3rd Cir. 2006) (expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an in personam order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentence; such a construction of the statute is consistent with the mandatory nature of criminal forfeiture and the provision in section 853 directing courts to liberally construe its provisions to effectuate their remedial purposes).

As it relates to a monetary judgment determination, the calculation of the forfeiture amount is not an exact science. "The court need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information." United States v. Uddin, 551 F.3d 176, 180 (2d Cir. 2009). "The calculation of forfeiture amounts is not an exact science." United States v. Treacy, 639 F.3d 32, 48 (2d Cir. 2011). A "court 'need not establish the loss with precision but rather need only make a reasonable estimate of the loss, given the available information.'" Id. (quoting United States v. Sabhnani, 599 F.3d 215, 261 (2d Cir. 2010)). The Court may "use general points of reference as a starting point for calculating the losses or gains from fraudulent transactions and may make reasonable extrapolations from the evidence established by preponderance . . . at the sentencing hearing." Id. Indeed, because the purpose of forfeiture is punitive rather than

restitutive, see Libretti at 41, district courts are not required to conduct an investigative audit to ensure that a defendant "is not deprived of a single farthing more than his criminal acts produced." United States v. Lizza Indus., Inc., 775 F.2d 492, 498 (2d Cir.1985) (making observation in context of forfeiture of racketeering proceeds); United States v. Jafari, 85 F. Supp.3d 679 (W.D.N.Y. 2015) (calculating the money judgment in a case in which the defendant has kept poor records and attempted to disguise the extent of her fraud, the court may extrapolate from the evidence introduced at trial to produce a reasonable estimate of the gross proceeds"), aff'd 663 Fed. Appx. 18 (2nd Cir. 2016).

## III. APPLICABLE FORFEITURE STATUTE AND LEGAL STANDARDS

"Criminal forfeiture under section 982 is a form of punishment, separate and apart from any restitutive measures imposed during sentencing." Peters, 732 F.3d at 98 "Criminal forfeiture focuses on the disgorgement by a defendant of his 'ill-gotten gains.'" United States v. Contorinis, 692 F.3d 136, 146 (2d Cir. 2012) (quoting United States v. Kalish, 626 F.3d 165, 170 (2d Cir. 2010)). It is also clear that a court may issue a judgment that includes both an order of forfeiture for specific property as well as a money judgment. Such a hybrid order is authorized. See United States. v. Hall, 434 F.3d 42, 60 fn.8 (1st. Cir. 2006) (citing cases).

### A. FORFEITURE IS MANDATORY

The clear language of 18 U.S.C. § 982(a)(1) reflects the mandatory nature of forfeiture once the factual predicates have been met. 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 applied…"); United States v. Newman, 659 F.3d 1235, 1240 (9th Cir. 2011) (following Monsanto); see also Alexander v. United States, 509 U.S. 544, 562 (1993) ("A RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under [section] 1963."); United States v. Poulin, 690 F. Supp. 2d 415, 420 (E.D. Va. 2010), aff'd. 461 Fed. Appx. 272 (4th Cir. 2012) ("The plain language of the statute provides that such forfeiture is mandatory") (citing with approval United States v. Patel, 2009 WL 1579526, at *20 (W.D. La. 2009) ("The mandatory language of this statute leaves the Court absolutely no discretion in imposing this portion of the sentence.")); United States v. Tardon, 56 F. Supp.3d 1309 (S.D. Fla. 2014) (§ 982(a)(1) makes criminal forfeiture mandatory in money laundering cases).

In determining how to impose forfeiture, the Court must first decide which "'property is subject to forfeiture under the applicable statute'" and as previously noted the Court's conclusion "'may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.'" Capoccia, 503 F.3d at 109 (quoting Fed. R. Crim P. 32.2(b)(1)).

**B. THE BREADTH OF SECTION 982(a)(1) FORFEITURE STATUTE**

The Superseding Indictment seeks forfeiture of and and all property, real or personal, involved in the offense of operating an unlicensed money transmitting business, or any property traceable to such offense. Here, the applicable criminal forfeiture statute, 18 U.S.C.

§ 982(a) provides in relevant part that "(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title [18 U.S.C. §§ 1956, 1957 or 1960], 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." The statute therefore requires the Court to order forfeiture of any real or personal property either "involved in" or "traceable to" the offense. See, e.g., Monsanto, 491 U.S. 600, 607 (1989) (finding that language mandating that "a sentencing court 'shall order' forfeiture of *all* property" created a mandatory obligation on the Court to order forfeiture of eligible property.) (emphasis in original).

Section 1960 is something of a hybrid between a currency reporting offense and a money laundering offense under §§ 1956 and 1957. As amended in 2001 by the USA Patriot Act, § 1960 makes it an offense to operate a money transmitting business without a State license or without registering the business with FinCEN even if they are already licensed to do business by the State in which they operation. See 31 U.S.C. § 5330 (2003) and regulations promulgated thereunder, 31 C.F.R. § 103.41 (2004). See § 1960(b)(1)(C). The forfeiture of all property involved in the illegal operation of the money transmitting business could include, of course, the business itself and all of its assets. See, United States v. Elfgeeh, 515 F.3d 100, 138-39 (2d Cir. 2008) ("statutes require forfeiture of all 'property…involved in' the offenses of which the defendants were convicted," therefore, property "involved in" defendants' §1960 violations are "not excludable" from the calculation of the forfeiture judgment amount).

Most federal criminal statutes now authorize the forfeiture of assets as part of the punishment that may be imposed when a defendant is convicted of a criminal offense. But not all forfeiture provisions are created equal. Most statutes authorizing forfeiture are narrow provisions that allow the government to confiscate the proceeds of the crime giving rise to the forfeiture, and the property that is directly traceable to it, but nothing more. Other statutes go a step further, permitting the forfeiture of facilitating property, like the drug smuggler's car or the counterfeiter's computer, that made the crime easier to commit or harder to detect.

In money laundering and Illegal money transmitting business forfeitures, however, the statutes are broader still, authorizing the forfeiture of any property "involved in" the money laundering offense. This means that in the appropriate circumstances the government can recover the money being laundered, the money or other property that is commingled with it or obtained in exchange for it when the transaction takes place, and other property that facilitates either the money laundering or Section 1960 offense. Examples include clean money the defendant used to conceal or disguise laundered funds, the legitimate business he used as a front for his money laundering or illegal money transfer operations, and real property, securities, and vehicles that are the subject of the financial transactions.

The term "involved in" encompasses much more than the mere proceeds of the underlying financial transactions. Based on the legislative history, several Courts of Appeals, including the Second Circuit in Elfgeeh, along with numerous lower courts, have determined that the term "property involved" should be read broadly to include the money or other

property being laundered, the corpus or subject matter of the money laundering offense and any property used to facilitate the offense[1]. No court has held to the contrary.

To appreciate the difference between the money laundering and illegal money transmitting business forfeiture statutes and their narrower cousins, consider a case in which the government is prosecuting a defendant for mail or wire fraud. Under the forfeiture statute for fraud offenses [18 USC § 981(a)(1)(C)], the government can only recover the proceeds of the fraud itself and the property directly traceable to it. If the defendant hides his fraud proceeds by investing them in a ranch, or uses the dirty money along with other funds to buy a bag of diamonds, the government can forfeit only the portion of the property traceable to the underlying crime. The ranch, in other words, would have to be sold, with the proceeds of the sale divided between the government and the defendant. The diamonds likewise would have to be apportioned so that the government took those traceable to the crime, and the defendant retained those acquired with clean money.

[1] 1) 134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). See United States v. Tencer, 107 F.3d 1120, 1134 (5th Cir. 1997) (discussing legislative history of 1988 amendment at 134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988)); United States v. Bornfield, 145 F.3d 1123 (10th Cir. 1998) (following Tencer); United States v. Hawkey, 148 F.3d at 927-28 (8th Cir. 1998) (following *Bornfield* and *Tencer*); United States v. McGauley, 279 F.3d at 76 n.14 (1st Cir. 2002) (following *Bornfield*, *Tencer*, *Baker*, and *All Monies* and citing legislative history); United States v. Baker, 227 F.3d 955 (7th Cir. 2000) (all real and personal property used to commit the money laundering offense is subject to forfeiture as property "involved in" the offense); United States v. All Monies in Account No. 90-3617-3, 754 F.Supp. 1467, 1473 (D. Haw. 1991).

But if the government prosecuted the investment of the fraud proceeds in the ranch or the diamonds as either a money laundering or 1960 offense, it could forfeit the property in its entirety as property involved in the violation, and the defendant would have no basis to object that the forfeiture should be cabined within the bounds of the narrower statute. See Elfgeeh, 515 F.3d at 139 (defendants convicted of operating an unlicensed money transmitting business in violation of section 1960 must pay a money judgment equal to the entire amount transmitted); United States v. $20,392.00 in U.S. Currency, 546 F. Supp. 2d 302, 305 (D.V.I. 2008) (defendant's guilty plea to operating an illegal money transmitting business in violation of section 1960 supports the entry of summary judgment for the Government in a parallel civil forfeiture case against the money she was in the process of transmitting); McGauley, 279 F.3d 62 (money laundering forfeitures are not limited to the proceeds being laundered); United States v. Hawkey, 148 F.3d 920, 927 (8th Cir. 1988) (distinguishing money laundering forfeitures under § 1957 with that of fraud proceeds); United States v. Louthian, 2013 WL 594232 (W.D. Va. Feb. 15, 2013) (noting that defendant convicted of health care fraud only liable for traceable proceeds, but noting that if he had been convicted of money laundering, all property purchased with commingled funds would have been forfeitable).

## C. WHAT PROPERTY IS "INVOLVED IN" AN UNLICENSED MONEY TRANSMITTING BUSINESS?

### 1. The Proceeds that are Involved in a 1960 Offense

In this case, the government seeks a monetary judgment of $189,862.96, the total value of bitcoins transmitted by PETIX. For example, the defendants in Elfgeeh (515 F.3d 100 at 138-139) were convicted after a jury trial of operating and conspiring to operate an unlicensed money-transmitting business. On appeal, the defendants argued that the $22,435,467 money judgment ordered, should not have included money received from third parties, and was constitutionally excessive. The Second Circuit decided that the arguments lacked merit, because the third party money constituted money "involved in" their convicted offenses, and the amount ordered forfeited was close to the total amount that had been transmitted as a part of the illegal business. See also, Nicolo, 597 F.Supp. 2d at 350, 351 ("the government is also entitled to forfeiture of all property that was either involved in the money laundering offense of which the defendant was convicted, or which is traceable to such property 18 U.S.C. § 982(a)(1)).

### 2. Forfeiture of Facilitating Property in an Unlicensed Money Transmitting Business

The case law applying forfeiture over facilitating property in illegal money transmitting businesses is scarce, and such forfeitures usually arises in the context of money laundering prosecutions, as well as child exploitation cases. As applies to the instant case, this category of property that facilitates the offense conduct is typically property that is external to the

money laundering offense. That is, facilitating property that is not directly involved with the financial transaction itself; rather, it is indirectly involved in the transaction because it makes the offense easier to commit or harder to detect.

For example, otherwise legitimate businesses are also often utilized to mask the true nature of (or serve as "fronts") for money laundering operations. See United States v. Garza-Gonzalez, 512 Fed. Appx. 60, 67 (2d Cir. 2013) (because defendant used his legitimate business to launder drug money, he must pay a money judgment equal to the total revenue from the business); United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 487 (2d Cir. 1995) (legitimate automobile business and associated real property used to sell stolen auto parts forfeitable). See also Hawkey, 148 F.3d at 928 (dicta) (if defendant had used a personal computer to facilitate the illegal monetary transaction in violation of section 1957, the computer would have been subject to forfeiture as facilitating property). Such are illustrations of external property that facilitate the commission of the money laundering offense without necessarily being part of the illegal financial transaction.

Likewise, facilitating property in a child pornography offense is not limited to property that is integral, essential or indispensable to the offense, but includes any property that makes prohibited conduct "less difficult or more or less free from obstruction or hindrance." See, Schlesinger, 396 F. Supp. 2d at 271 ("facilitation occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance"). Not only are the electronics used to download and store the child pornographic images subject to

forfeiture, but also the data housed within the electronic device is forfeitable in its entirety. See, United States v. Noyes, 557 Fed. Appx. 125, 127-28 (3rd Cir. 2014) (property forfeited under § 2253 is forfeited in its entirety; thus, when a computer is forfeited in a child pornography case, the data stored on the computer is forfeited as well). See also United States v. $7,000 in United States Currency, et al, 12 F. 3d 207 (5th Cir. 1993) (recording drug transactions on computer meets the substantial connection requirement of civil forfeiture).

## IV. EVIDENCE AND SUPPLEMENTAL INFORMATION SUPPORTS FORFEITURE

### A. ELECTRONIC EQUIPMENT

As explained in the Brechler affidavit[2], PETIX used each of the electronic devices to carry on his illegal money transmitting business. With respect to the ASUS laptop computer, model G752V, bearing serial no. FAN0CY92217844A, Brechler details how the officers observed PETIX in possession of the laptop while he was in a Buffalo, New York business, and observed, in plain view, "an open Electrum Bitcoin wallet displaying a recently signed transaction indicating that PETIX had just used the laptop to transfer 37 bitcoins." A forensic review of the laptop showed PETIX had transferred 88.2012 bitcoins worth approximately $30,783.69 between November 18, 2015 and December 4, 2015 (Brechler Aff. ¶¶9-12).

With respect to the Samsung Galaxy S5, model SM-S902L cellular telephone bearing IMEI number 990005823326880, Brechler's affidavit details how a forensic analysis

[2] References to the Affidavit of Special Agent Brad A. Brechler will be (Brechler Aff. ¶*).

determined that PETIX used the cellphone to contact others regarding the selling of bitcoins between November 18, 2015 and December 3, 2015. (Brechler Aff. ¶13).

With respect to the six (6) assorted thumb drives, Brechler's affidavit describes that a review of the thumb drives could not be completed, because PETIX had encrypted them, and has subsequently refused to provide access to them. (Brechler Aff. ¶14). As explained in Agent Brechler's affidavit, one thumb drive, black in color, was connected to the laptop at the time that officers witnessed him conducting his illegal money transmitting business. In addition to finding these devices with the defendant while he was actively operating his illegal business, thus suggesting that they were involved in the unlicensed money transmitting business, it is troubling that Petix having these devices is in direct violation of his terms of his supervisory release. (Brechler Aff. ¶ 15).

Finally, with respect to all of the above listed items, Brechler's affidavit establishes the nexus between the items and how they were used to further PETIX'S operation of his unlicensed money transmitting business. (Brechler Aff. ¶¶9-15). Without those devices, the defendant would not have been able to carry on his criminal activity.

### B. PROCEEDS INVOLVED IN PETIX'S SECTION 1960 OFFENSE

The amount of proceeds involved in the illegal money transmitting business can be determined through a review of the Brechler Affidavit along with the exhibits he references to substantiate the amount of money in and out through the accounts that PETIX controlled and the currency he received from some of his cutomers. (Brechler Aff. ¶¶ 16-25). From August 18, 2014 through December 3, 2015, the defendant transmitted the equivalent of at least $189,862.96 (Brechler Aff. ¶25).

PETIX chose to operate his business in clear violation of federal law. He has admitted doing so and now has to face the consequences. Crime has many risks, and one of those is that money launderers and those that operate unlicensed money transmitting businesses lose all of the property that they use in their business, and not just the profit they might make on their transactions. Thus, PETIX should forfeit his interest in any and all property and assets involved in his offense.

## V. CONCLUSION

There can be no dispute as to the mandatory nature of forfeiture in this case. The government has established the nexus between the electronic devices and PETIX's admitted criminal conduct. All of the devices were involved in his unlicensed money transmitting business and should be ordered forfeited. As for the amount of the money judgment, it should reflect all of the property and money that were involved in the defendant's conduct in operating his business. Based on Brechler's affidavit and PETIX's guilty plea on Count 2, the

government respectfully requests that the Court issue a Preliminary Order of Forfeiture directing that all of Richard PETIX'S right, title and interest in the Electronic devices and a money judgment in the amount of $189,862.96 or in an amount that the Court deems appropriate to be forfeited to the United States as property involved in the defendant's conviction pursuant to 18 U.S.C. § 982(a)(1) and for such further relief this Court deems just and proper.

DATED: Buffalo, New York, June 21, 2017.

JAMES P. KENNEDY, Jr.
Acting United States Attorney

s/RICHARD D. KAUFMAN
Assistant United States Attorney
United States Attorney's Office
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202
(716) 843-5871
richard.kaufman@usdoj.gov