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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,
12 Plaintiff,

13 v.

14 IM EX TRADING COMPANY,
15 DAVID L. MAHONEY and
16 JAMES D. MAHONEY
17 Defendants.

No. CR-03-2213-EFS
No. CR-03-2214-EFS
No. CR-03-2215-EFS

DEFENDANTS' MOTION TO
DISMISS COUNTS 10, 15 AND 18
OF THE INDICTMENT

18 **I. INTRODUCTION**

19 The indictment contains three forfeiture counts – counts 10, 15 and 18.
20 The forfeitures ostensibly are based on Title 28 U.S.C. § 2461(c), a statute
21 passed as part of the Civil Asset Forfeiture Reform Act (CAFRA). We move
22 to dismiss the forfeiture allegations because CAFRA did not become law
23 until after the alleged criminal activity ended, and therefore imposition of a
24 criminal forfeiture under authority of section 2461(c) is barred by the *ex post*
25 *facto* clause of the Constitution (Art. I, § 9, cl. 3). Alternatively, we argue that
26 section 2461(c) does not apply to the wire fraud crimes charged in the
27 indictment.
28

1
2 Each of the forfeiture counts is identically worded and is based on the
3 same stated statutory authority.

4 Upon conviction of the offenses [sic] alleged in Count 1 [Count
5 11, Count 16] of this Indictment, Conspiracy, the defendants . .
6 . shall forfeit to the United States pursuant to 18 U.S.C. §
7 981(a)(1)(C) and 28 U.S.C. § 2461(c) any property constituting
8 or derived from proceeds obtained directly or indirectly as a
9 result of the said violation(s), included but not limited to the
10 following:

11 1. MONEY JUDGMENT

12 A sum of money equal to \$148,184.58 [\$105,069.73, \$9180.] in
13 United States currency, representing the amount of proceeds
14 obtained as a result of the offense of Conspiracy to Commit Wire
15 Fraud for which the defendants are jointly and severally liable.

16 The question presented in this motion is whether the government may rely on
17 section 2461(c).

18 **II. THE INDICTMENT**

19 The indictment contains three groups of charges. Each group is
20 parallel in structure. Each consists of a charge of conspiracy to commit wire
21 fraud, one or more substantive charges of wire fraud and a forfeiture count
22 tied to the conspiracy charge. The first group consists of counts 1 - 10, the
23 second consists of counts 11-15 and the third consists of counts 16-18.
24 Counts 10, 15 and 18 are the forfeiture counts.

25 This motion, as all *ex post facto* motions, hinges on the dates on which
26 the indictment alleges the conspiracies ended. The count 1 conspiracy is
27 alleged to have extended “through on or about August 30, 1999.” (Count 1,
28 at page 2.) The count 11 conspiracy is alleged to have extended “through
on or about December 1, 1999.) (Count 11, at page 9.) The count 16
conspiracy is alleged to have extended “through on or about November 30,
1999.” (Count 16, at page 13.) All three conspiracies ended before the
effective date of CAFRA and even before Congress passed that law.

1 **III. THE STATUTORY FORFEITURE SCHEME**

2 Before CAFRA became law, criminal forfeiture predicated upon wire
3 fraud was authorized by Title 18 U.S.C. section 982. Wire fraud forfeitures
4 were allowed by that law in only three situations: wire fraud affecting a
5 financial institution (section 982 (a)(2)(A)), wire fraud affecting the Resolution
6 Trust Corporation or the FDIC (section 982(a)(3)(F)), and wire fraud involving
7 telemarketing (section 982(a)(8)). The law as it existed before CAFRA did
8 not authorize criminal forfeitures for conduct alleged in this indictment, for the
9 alleged conspiracies do not charge any one of the three circumstances listed
10 in section 982.

11 CAFRA, and specifically Title 28 U.S.C. section 2461(c), broadened
12 criminal forfeiture law, allowing the government to include a criminal forfeiture
13 claim in an indictment in any instance in which the law authorized a civil
14 forfeiture for the same conduct, subject to one statutory limitation. In its
15 entirety, section 2461(c) reads:

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

26 Under the purported authority of section 2461(c), the indictment alleges a
27 right to forfeiture under 18 U.S.C. section 981(a)(1)(C). That latter section
28 authorizes civil forfeitures for wire fraud generally.¹

¹ Although the statutory path is a winding one, wire fraud may be a

1 **IV. APPLICATION OF SECTION 2461(c) WOULD VIOLATE THE EX**
2 **POST FACTO CLAUSE OF THE CONSTITUTION**

3 Congress enacted section 2461(c) as part of CAFRA on April 25, 2000
4 and specified that it would become effective 120 days later, *i.e.*, on August
5 23, 2000. (See, Exhibit 1 attached; *United States v. \$80,180.00 in U.S.*
6 *Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002).) Its application to crimes that
7 the indictment alleges were completed before the end of 1999 contravenes
8 the Constitution's prohibition of *ex post facto* laws. "The Ex Post Facto
9 Clause flatly prohibits retroactive application of penal legislation." *Landgraf*
10 *v. USI Film Products*, 511 U.S. 244, 266 (1994).

11 The Court of Appeals for the Ninth Circuit's most recent exposition of
12 the *ex post facto* clause may be found in *Brown v. Palmateer*, 379 F.3d
13 1089, 1093 (9th Cir. 2004)

14 A law violates the Ex Post Facto Clause if it is 1) retroactive – it
15 "applies to events occurring before its enactment," *Weaver v.*
16 *Graham*, 450 U.S. 24, 29 . . . (1981) and 2) detrimental – it
"produces a sufficient risk of increasing the measure of
punishment attached to the covered crimes." *Morales*, 514 U.S.
At 509 . . . , *Himes*, 336 F.3d at 854.

17 In the present case both factors are met: the government seeks to apply §

18 _____
19 section 981 civil forfeiture predicate. Section 981 provides for civil
20 forfeiture for violations of offenses constituting "specified unlawful
21 activity," as that term is defined in 18 U.S.C. § 1956(c)(7). Section
22 1956(c)(7)(A) includes in its definition of specified unlawful activity "any act
23 or activity constituting an offense listed in section 1961 [of Title 18]"
24 Section 1961(1), which defines "racketeering activity," includes violations
25 of 18 U.S.C. § 1343 (wire fraud) in its definition.
26
27
28

1 2461(c) retroactively, that is to alleged conspiracies that ended before the
2 statute became effective or was passed, and the new statute increases the
3 measure of punishment by adding a criminal forfeiture where none existed
4 previously under law.

5 That constitutional protection bars imposition of a criminal forfeiture for
6 a conspiracy that ended before a forfeiture statute's effective date. *United*
7 *States v. Colon-Munoz*, 192 F.3d 210, 227 (1st Cir. 1999), *cert. denied* 529
8 U.S. 1055 (2000). In that case the court considered amendments to 18
9 U.S.C. § 982 that increased the number of offenses listed as criminal
10 forfeiture predicates. The Court of Appeals concluded that the conspiracy
11 ended before the statute became effective and that its application was
12 barred by the *ex post facto* clause. *See also, United States v. MacDonald*,
13 607 F. Supp. 1183 (E.D. N. Car. 1985), holding that the *ex post facto* clause
14 barred the government from forfeiting book royalties under 18 U.S.C. § 3761
15 where the statute was passed after the alleged crimes occurred.

16 *The Court of Appeals for the Ninth Circuit reached a similar result in*
17 *United States v. \$814,254.76 in United States Currency*, 51 F.3d 207 (9th
18 Cir. 1995). There, a civil forfeiture statute was amended after a seizure and
19 the government sought to apply the new statute retroactively. "The parties
20 agree[d] that the forfeiture [could] only be upheld through the retrospective
21 application of" the new statute. *Id.*, at 208. The court rejected the
22 government's bid for retroactive application, concluding *inter alia*, that the
23 new statute "greatly increase[d] the risk" to the bank/claimant.

24 In considering financial penalties that attach to convictions, the Court
25 of Appeals has addressed the *ex post facto clause* in cases involving
26 restitution. The law is clear: an increased penalty cannot attach to a crime
27 that was completed before a new statute became law. So, for example, in
28

1 *United States v. Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997), the Court of
2 Appeals held that the *ex post facto* clause barred applying the MVRA
3 (Mandatory Victims and Restitution Act) to a defendant whose crimes were
4 completed before the statute's effective date. Later that court made it clear
5 that a continuing offense, e.g., conspiracy, that straddled the effective date
6 of the MVRA could be applied without violation of the *ex post facto* clause.
7 *United States v. Kubick*, 205 F.3d 1117, 1128-29 (9th Cir. 1999); *United*
8 *States v. Grice*, 319 F.3d 1174, 1177 (9th Cir. 2003).

9 On a motion to dismiss the Court must accept the facts as alleged by
10 the government in its indictment. *United States v. Jensen*, 93 F.3d 667, 669
11 (9th Cir.1996). Here the indictment is clear: all three conspiracies are alleged
12 to have ended well before both the passage and the effective date of
13 CAFRA. There is no allegation that the offenses straddled the effective date
14 of CAFRA, and therefore there is no permissible basis for retroactive
15 application of § 2461(c)'s forfeiture penalty. In fact, in a recent federal
16 prosecution in Texas, the Department of Justice's Enron Task Force
17 explicitly conceded the argument that we advance here.

18 In *United States v. Skilling and Causey*, Crim No. H-04-25, the
19 indictment alleged a criminal forfeiture based upon wire fraud conspiracy,
20 and the authority of section 2461(c). In other words, the government alleged
21 the same basis for forfeiture as in the case before this Court. The
22 government in that case acknowledged that the *ex post facto* clause would
23 bar the forfeiture for a conspiracy that ended before the effective date of
24 section 2461(c). In the Texas case, however, the government argued that the
25 alleged conspiracy continued after the effective date, making the new law
26 applicable.

27 . . . the criminal forfeiture of the proceeds of wire fraud and
28 security fraud – as charged in this case – was not permitted until

1 Congress both enacted 28 U.S.C. § 2461(c) and amended 18
2 U.S.C. § 981(a)(1)(C) as part of CAFRA, effective August 23,
3 2000. A statutory change allowing for the criminal forfeiture of
4 proceeds, where no such authority had previously existed, *does*
5 increase the severity of punishment for a crime and does,
6 therefore, implicate the ex post facto clause. . . .

7 Skilling is alleged to have engaged in a conspiracy that
8 commenced in or about late 1999 and continued until in or about
9 December 2001. The statutes at issue . . . became effective in
10 the midst of this conspiracy, on August 23, 2000. It is well
11 established that where a continuing offense such as a conspiracy
12 is still being carried on and continued after the date when a new
13 statute becomes effective, a provision imposing a greater penalty
14 for conspiracy does not violate the ex post facto clause.

15 Government's Supplemental Memorandum of Law in Support of Restraining
16 Order, at 21 -22 (attached as Exhibit 2).²

17 ² As the title of the government's pleading suggests, the issue was
18 joined on defendant's motion to set aside a restraining order based on the
19 criminal forfeiture charged in the indictment. Although the district court did
20 not lift the restraining order, it remarked:

21 The absence of authority supporting the Government's
22 possession [sic]; the Government's concession that the criminal
23 forfeiture of proceeds from wire fraud and securities fraud as
24 charged against Skilling was not permitted until Congress
25 enacted 28 U.S.C. § 2461(c), effective August 23, 2000;
26 [footnote omitted] and the Government's concession that "[a]
27 statutory change allowing for the criminal forfeiture of proceeds,
28 where no such authority had previously existed . . . does . . .
implicate the ex post facto clause," [footnote omitted] make the
court skeptical of the Government's argument that assets
acquired by Skilling prior to § 2461(c)'s effective date of August

1 In the present case, unlike the Enron Task Force case, the government
2 has not alleged that the conspiracies, or any one of them, extended past the
3 date on which CAFRA became effective, *i.e.*, August 23, 2000, and
4 therefore the argument made by the Enron Task Force is of no avail to the
5 government here.

6
7 **V. ALTERNATIVELY, THE FORFEITURE COUNTS SHOULD BE
8 DISMISSED BECAUSE SECTION 2461(C) IS INAPPLICABLE**

9 Earlier in this motion, at page 3, we referred to the statutory exception
10 in section 2461(c). The section does not apply where “. . . specific statutory
11 provision is made for criminal forfeiture upon conviction . . .” Two decisions,
12 and they are the only two of which we are aware that have addressed the
13 issue, have held that because Congress provided specific statutory authority
14 for some mail and wire fraud violations, in 18 U.S.C. § 982(a), section
15 2461(c) does not apply to other varieties of mail and wire fraud.

16 The first of the two decisions is *United States v. Grass*, 2002 U.S. Dist.
17 LEXIS 26045 (MD Pa. 2002). There the indictment included four wire fraud
18 counts and the government, as here, sought forfeiture via section 2461(c).
19 (Unlike the present case there was no *ex post facto* issue presented in
20 *Grass*.) The court rejected the government’s bid to apply section 2461(c),
21 because 18 U.S.C. § 982(a) contained specific statutory authorization for
22 some wire fraud violations.

23 _____
24 23, 2000, are subject to criminal forfeiture under that statute
[footnote omitted].

25 *United States v. Causey*, 309 F. Supp. 2d 917, 922 (SD Tex. 2004)

26
27 (emphasis added).
28

1 . . . the Government argues that, pursuant to 28 U.S.C. § 2461,
2 it may seek a criminal forfeiture under § 981(a)(1)(C) because
3 that section does not require that a crime affect a financial
4 institution in order to obtain a criminal forfeiture.

5 The court disagrees. The plain language of 28 U.S.C. § 2461(c)
6 allows the Government to seek criminal forfeiture when a criminal
7 statute contains a provision for civil forfeiture "but no specific
8 statutory provision is made for criminal forfeiture upon
9 conviction." See 28 U.S.C. § 2461(c); see also *United States v.*
10 *Thompson*, No. 02-CR-116, 2002 U.S. Dist. LEXIS 22732, at *6
11 (N.D.N.Y. Nov. 26, 2002). That is not the case here. Section
12 982(a)(2)(A) is a statutory provision for criminal forfeiture on
13 conviction of wire fraud. Moreover, that section contains a
14 specific description of the property that may be sought in a
15 criminal forfeiture under that statute; *i.e.*, property derived from
16 a wire fraud affecting a financial institution. Accordingly, by its
17 very terms, § 2461 is inapplicable to the instant matter. . . .

18 The more recent decision is *United States v. Croce*, 2004 U.S. Dist LEXIS
19 23495 (ED Pa 2004) at n.9.

20 . . . we read § 2461(c) as requiring criminal forfeiture only in those
21 cases where Congress had not specifically considered whether,
22 and to what extent, to authorize criminal forfeiture. In §
23 982(a)(2)(A), Congress clearly considered the circumstances in
24 which it intended to include criminal forfeiture among a convict's
25 punishments for mail fraud, and it concluded that criminal
26 forfeiture was only appropriate when the mail fraud affected a
27 financial institution (which Independence Blue Cross is not). It
28 seems highly unlikely that, in passing the broad language of §
2461(c), Congress intended to silently remove the limitations on
criminal forfeiture in mail fraud cases that it had carefully inserted
into § 982(a)(2)(A).

In both cases the courts ruled that the specific provision for criminal forfeiture
in 18 U.S.C. § 982 barred the application of section 2461(c) to other specific
mail and wire frauds, based on the exception written into section 2461(c). If
this Court applies the same analysis, the result should be dismissal of the
forfeiture counts because § 2461(c) is inapplicable.

VI. CONCLUSION

In the present case, unlike the *Colon-Munoz* case, there is no disputed
fact to be determined by the Court. The pleadings establish that the alleged
criminal activity ended months before section 2461(c) became effective.

1 Therefore it cannot be applied to the defendants because of the *ex post*
2 *facto* clause and should be dismissed. Even if the *ex post facto* clause was
3 not dispositive, we maintain that section 2461(c) cannot be applied in this
4 case because of the Congressional determination that it only reaches crimes
5 not otherwise addressed by criminal forfeiture statutes. Congress limited the
6 availability of criminal forfeiture to specific kinds of wire fraud cases and there
7 is no indication, as the court concluded in *Croce* that it intended section
8 2461(c) to “silently remove” the careful limitations crafted in section 982.

9 The three forfeiture counts of the indictment should be dismissed.

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11 Dated: _____

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13 Respectfully submitted:

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15 _____
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19
20 _____
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