

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CASE No. 10-cr-20403

v.

HON. NANCY G. EDMUNDS

D-1 KWAME M. KILPATRICK,

D-2 BOBBY W. FERGUSON,

Defendant.

GOVERNMENT'S MEMORANDUM REGARDING FORFEITURE
AND RESTITUTION AS TO DEFENDANTS KWAME M.
KILPATRICK AND BOBBY W. FERGUSON

I. INTRODUCTION

Forfeiture and restitution serve different purposes and are not mutually exclusive. As the Sixth Circuit, in *United States v. Boring*, 557 F.3d 707, 714 (6th Cir. 2009), stated

. . . [f]orfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realized from his illegal activity. Given their distinct nature and goals, restitution is calculated based on the victim's loss, while forfeiture is based on the offender's gain.

II. FORFEITURE MUST BE ORDERED AS PART OF THE DEFENDANTS' SENTENCES

A. Background.

The Fourth Superseding Indictment in this case contains Criminal Forfeiture Allegations providing notice to the defendants that upon conviction the United States intends to seek, among other things, criminal forfeiture pursuant to 1963(a)(1)-(3), 18 U.S.C. §§ 981(a)(1)(C) and 28 U.S.C. § 2461(c), including a money judgment for the amount of proceeds obtained as a result of defendants violations. (Id.). The government subsequently filed the Government's First Forfeiture Bill of Particulars (Forfeiture BOP), which itemized specific assets to be forfeited. (Dkt. # 75).

After a lengthy trial, Defendants Kwame M. Kilpatrick ("Kilpatrick") and Bobby W. Ferguson ("Ferguson") were convicted by a jury of RICO conspiracy, extortion and bribery.

Thereafter, on March 12, 2013, a stipulation was filed in which Ferguson agreed to forfeit the property listed in the Forfeiture BOP pursuant to 18 U.S.C. § 1963, 18 U.S.C. § 981(a)(1)(c) and 28 U.S.C. § 2461(c):

Equipment

1. Caterpillar Inc. Excavator, Model 313BSR, Serial Number: 9PR00381;
2. Caterpillar Inc. Articulated Truck, Model D350EII, Serial Number: 02XW00157;

3. Caterpillar Inc. Medium TTT, Model D5MLGP, Serial Number: 3CR01244;
4. Caterpillar Inc. Track Excavator, Model 330 CLCQG, Serial Number: DKY00724;
5. Caterpillar Inc. Skid Steer Loader, Model 216, Serial Number: 4NZ02280;
6. Caterpillar Inc. Skid Steer Loader, Model 226, Serial Number: 5FZ01246;
7. Caterpillar Inc. Skid Steer Loader, Model 216C, Serial Number: 4NZ04400;
8. Caterpillar Inc. Articulated Truck, Model D350EII, Serial Number: 02XW00162;
9. Caterpillar 314 Excavator, Model 314CLCRHQ, Serial Number: PCA01039;
10. Caterpillar Excavator, Model 345 BL, Serial Number: 4SS01551;
11. Caterpillar Excavator, Model 330BL, Serial Number: 6DR03990;
12. Caterpillar Model IT38GII, Serial Number: CSX00680;
13. Caterpillar Inc. Skid Steer Loader, Model 216C, Serial Number: 4NZ04971;
14. Caterpillar Inc. Skid Steer Loader, Model 226, Serial Number: 5FZ00627;
15. Caterpillar Backhoe Loader, Model 420DC4XE, Serial Number: FDP05060;
16. Caterpillar Track Excavator, Model 321C LCR, Serial Number: MCF00496;

Currency and Monetary Instruments

1. Ten Thousand Dollars (\$10,000.00) in U.S. Currency from Merrill Lynch Account Number 689-29664 in the name of Bobby Ferguson;
2. Twenty Thousand Dollars (\$20,000.00) in U.S. Currency from Merrill Lynch Account Number 689-29665 in the name of Bobby Ferguson;
3. Thirty Five Thousand Eight Hundred Sixty Dollars (\$35,860.00) in U.S. Currency from Merrill Lynch Account Number 689-29666 in the name of Bobby Ferguson;
4. Thirty Five Thousand Eight Hundred Sixty Dollars and Twenty Three Cents (\$35,860.23) in U.S. Currency from Merrill Lynch Account Number 689-29667 in the name of Bobby Ferguson;
5. Twenty Five Thousand Dollars (\$25,000.00) in U.S. Currency from the liquidation of First Independence Bank Cashier's Check Number 16533,

- dated March 30, 2007, in the amount of \$25,000.00, payable to Bobby Ferguson;
6. Fifty Thousand Dollars (\$50,000.00) in U.S. Currency from the liquidation of First Independence Bank Cashier's Check Number 15916, dated May 19, 2006, in the amount of \$50,000.00, payable to Bobby Ferguson;
 7. One Hundred Thousand Dollars (\$100,000.00) in U.S. Currency from the liquidation of PNC Bank Cashier's Check Number 133620, dated November 16, 2010, in the amount of \$100,000.00, payable to Bobby W. Ferguson;
 8. One Hundred Thousand Dollars (\$100,000.00) in U.S. Currency from the liquidation of PNC Bank Cashier's Check Number 133621, dated November 16, 2010, in the amount of \$100,000.00, payable to Bobby W. Ferguson;
 9. Sixty Thousand Dollars (\$60,000.00) in U.S. Currency from the liquidation of PNC Bank Cashier's Check Number 288201, dated January 19, 2011, in the amount of \$60,000.00, payable to LaCresha A. Borgus;
 10. Twenty Two Thousand Four Hundred Three Dollars and Forty Five Cents (\$22,403.45) in U.S. Currency from Fifth Third Bank Account Number 7914058479 in the name of G.B. Utilities;
 11. One Thousand Five Hundred Fifteen Dollars and Eighty Six Cents (\$1,515.86) from Charter One Bank Account Number 4512083005 in the name of Four Children Enterprises, LLC;

Real Property

1. Real property located at **18944 Bretton Drive, Detroit, Michigan**, and being more fully described as:

Lot 1791, Rosedale Park No. 2, as recorded in Liber 40 on Page 46 of Plats, Wayne County Records.

Commonly known as: 18944 Bretton Drive, Detroit, Michigan.

Tax Parcel ID: Ward Number 27, Item Number 061328 and

Ward Number 22, Item Number 011845

2. Real property located at **1001 W. Jefferson, Suite 5I (also known as 300 Riverfront, Suite 5I), Detroit, Wayne County, Michigan** being more fully described as:

Unit 47, RIVERFRONT TOWERS, a Condominium according to the Master Deed recorded in Liber 41783, Pages 152 through 262, both inclusive, Wayne County Records, and described as Wayne County Condominium Subdivision Plan No. 813, as amended by First Amendment to Master Deed recorded in Liber 42595, pages 81 through 110, both inclusive, and by Second Amendment to Master Deed recorded in Liber 43421, pages 1 through 30, both inclusive, and by Third Amendment to Master Deed recorded in Liber 43914, Pages 221 through 236, both inclusive, and by Fourth Amendment to Master Deed recorded in Liber 44757, Pages 105 through 131, both inclusive, together with an undivided interest in the common elements of said condominium as set forth in said Master Deed, as amended, and as described in Act 59 of the Public Acts of Michigan of 1978, as amended.

Commonly known as: 1001 W. Jefferson, Suite 5I, also known as 300 Riverfront, Suite 5I, Detroit, Michigan

Tax Parcel ID: Ward 06, Item 000002.047

Ferguson acknowledged that there is a substantial nexus between the violations charged in the Fourth Superseding Indictment and the property identified (above) in the Forfeiture BOP.

In addition to the above specific property, which Ferguson has stipulated to forfeit, the government seeks a forfeiture money judgment against both defendants Ferguson and Kilpatrick in an amount that represents the total amount of proceeds

obtained as a result of defendants' RICO conspiracy and extortion offenses, for which defendants shall be jointly and severally liable.¹

B. Forfeiture is Mandatory.

Forfeiture under the RICO statute is mandatory. *United States v. Corrado*, 227 F.3d 543, 552 (6th Cir. 2000). Pursuant to 18 U.S.C. § 1963(a)(1)-(3), a defendant convicted under 18 U.S.C. § 1962 “shall forfeit” to the United States: (a) any interest he has acquired or maintained in violation of 18 U.S.C. § 1962; (b) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise named which defendant established, operated, controlled, conducted or participated in the conduct of, in violation of 18 U.S.C. § 1962; and (c) any and all property constituting, or derived from, any proceeds obtained, directly or indirectly, from the racketeering activity. The defendants' convictions on Count 1 subjects them to the forfeiture provisions set forth in 18 U.S.C. § 1963(a)(1)-(3).

Forfeiture is also mandatory upon conviction of interference with commerce by extortion, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c). As a result of Kilpatrick's convictions on Counts 2 through 5, and 9 (extortion), and Ferguson's convictions on Counts 2 through 5, and 7 through 9 (extortion), each of

¹ The amount owed by the defendants on the money judgment will ultimately be reduced by the amount obtained by the government resulting from the specific forfeited assets listed in the Forfeiture BOP once the forfeiture of those assets becomes final and the non-cash assets are liquidated.

them must forfeit to the United States an amount which constitutes the amount of proceeds derived from their violations. 18 U.S.C. § 981(a)(1)(c); 28 U.S.C. § 2461(c).

C. The Court Must Determine the Amount to be Forfeited.

Pursuant to Rule 32.2(b), Federal Rules of Criminal Procedure and 18 U.S.C. § 1963, in any criminal case in which the government seeks the forfeiture of the defendant's property as a consequence of the defendant's convictions, the Court must determine the forfeitability of the property after a verdict or finding of guilt. If the Court finds that the property sought by the government is subject to forfeiture, it must enter a forfeiture order without regard to the interest of any third party in the property. *Id.* at 32.2(b)(2).

Where the government seeks a money judgment, “the court must determine the amount of money that the defendant will be ordered to pay.” Rule 32.2(b)(1)(A), Federal Rules of Criminal Procedure. In determining the amount of the money judgment, the Court need only make a reasonable estimate of the proceeds obtained as a result of a defendant’s criminal activities. *United States v. Basciano*, 2007 WL 29439 at *3-4 (E.D.N.Y. 2007).

When making forfeiture decisions, the Court’s determination may be based on evidence already in the record or on evidence or information presented by the parties at a hearing, including hearsay evidence. Federal Rule of Criminal

Procedure 32.2(b)(1)(B); *United States v. Ivanchukov*, 405 F.Supp.2d 708, 709 n.1 (E.D.Va. 2005) (because forfeiture is part of sentencing, reliable hearsay is admissible to establish the forfeitability of the property). Furthermore, because forfeiture is part of a sentence on a count of conviction, and not a substantive offense, the standard of proof regarding the forfeitability of property in a criminal case is preponderance of the evidence. *United States v. Basciano*, 2007 WL 29439 at *2.⁴

D. Forfeiture of the Specific Assets and a Forfeiture Money Judgment in the Amount of \$9,654,553 Should be Ordered.

A defendant convicted under RICO of obtaining government contracts through extortion must forfeit the *gross* revenues received under the contracts without deduction for any costs incurred. *United States v. Maricle*, 2010 WL 1253077, *2-3 (E.D. Ky. Mar. 25, 2010)(the appropriate measure of “proceeds” for purposes of RICO forfeiture is the gross revenues, or total amounts received, under the city or county contracts). Likewise, under 18 U.S.C. § 981(a)(2)(A), the term “proceeds” means any property obtained as a result of an offense, and *is not limited to the net gain or profit realized from the offense*. Thus, whether or not a

⁴To meet its burden in the instant case with regard to the amount of the money judgment, the government relies on (1) the defendants’ convictions, (2) the facts presented at trial, (3) information contained in the Presentence Investigation Reports for Kilpatrick and Ferguson, (4) Ferguson’s Forfeiture Stipulation, and (5) information provided in the Government’s Sentencing Memorandum for each defendant.

defendant shares the proceeds obtained from his offense with other persons, the entire amount obtained from the offense is forfeitable.

In the instant case, the government seized specific property from Ferguson which the government seeks to forfeit. Ferguson agreed in a Forfeiture Stipulation, filed on March 12, 2013, to forfeit this specific property upon his conviction.

Specifically, Ferguson agreed:

to forfeit to the United States, without contest, all right, title and interest in the properties listed in the Government's First Forfeiture Bill of Particulars, and any right, title or interest that any of his companies, heirs, successors or assigns, have or may have in the said properties, upon Defendant's conviction on one or more of the violations of 18 U.S.C. § 1962(d) (RICO conspiracy), 18 U.S.C. § 666(a) (bribery) and 18 U.S.C. § 1951 (extortion) set forth in the Fourth Superseding Indictment.

(Dkt. #279).

In addition to ordering the forfeiture of the specific property identified in the Forfeiture BOP, the Court must impose a forfeiture money judgment against Kilpatrick and Ferguson and must determine the amount that each defendant will be ordered to pay. Rule 32.2(b)(1)(A), Federal Rules of Criminal Procedure.

Both defendants could be required to forfeit the total amount obtained as a result of the RICO violation (Count 1), namely, the \$73,845,578 in contract revenues which were the subjects of the racketeering trial. *United States v. Boring*,

557 F.3d 707, 714 (6th Cir. 2009) (where defendant overbills Government agency, the order of restitution must be limited to the victim's loss – i.e., the excess payment that defendant received through fraud; this contrasts with forfeiture which, because it is intended to be punitive, allows forfeiture of the entire payment to the defendant, irrespective of the victim's loss). The government, however, has chosen to seek a conservative money judgment in the amount of \$9,654,553, which, as explained in the Government's Sentencing Memorandum as to Defendant Bobby W. Ferguson, is the low end of Ferguson's estimated profits on the contracts of conviction. The government believes this amount constitutes a very reasonable estimate of proceeds obtained as a result of Kilpatrick's and Ferguson's RICO violation (Count 1). Kilpatrick and Ferguson will be jointly and severally liable to pay this amount. *United States v. Corrado*, 227 F.3d at 558 (co-conspirators in a RICO enterprise should be held jointly and severally liable for the reasonably foreseeable proceeds of the enterprise, and are not limited to amounts each defendant personally obtained).⁵

With regard to each of the extortion convictions, the money judgments as to each defendant should be broken down as follows:

⁵*United States v. Corrado*, 286 F.3d 934, 93738 (6th Cir.2002) (*Corrado II*) (holding that a RICO forfeiture verdict may provide for joint and several liability and that conspirators are liable even for proceeds of crimes not part of the conspiratorial enterprise).

<u>Count</u>	<u>Defendant</u>	<u>Money Judgment</u>
2 & 3	Kilpatrick & Ferguson	\$2,082,431
4	Kilpatrick & Ferguson	\$1,349,206
7 & 8	Ferguson	\$1,700,000
9	Kilpatrick & Ferguson	\$1,153,213

Each of these amounts are included in the money judgment on Count One, and therefore, would not be collected in addition to the amounts owed under Count One assuming that all counts of conviction are affirmed on appeal, if any appeal is filed.

For the above reasons, the government requests the Court to order that Defendant Ferguson forfeits the specific assets listed in the Forfeiture BOP, and that Defendants Kilpatrick and Ferguson must pay the following amounts based upon the following counts of conviction:

<u>Count</u>	<u>Defendant</u>	<u>Money Judgment</u>
1	Kilpatrick & Ferguson	\$9,654,553
2 & 3	Kilpatrick & Ferguson	\$2,082,431
4	Kilpatrick & Ferguson	\$1,349,206
7 & 8	Ferguson	\$1,700,000
9	Kilpatrick & Ferguson	\$1,153,213

III. RESTITUTION SHOULD BE PAID TO THE CITY OF DETROIT

The Mandatory Victims Restitution Act of 1996 (“the MVRA”), 18 U.S.C. § 3663A, requires a defendant convicted of “an offense against property under [Title 18 of the United States Code]...including any offense committed by fraud or deceit” to pay restitution to the “victim” of the crime. *Id. at 3663A(a)(1)*,

(c)(1)(A)(ii). The crimes of conviction in this case, including extortion and racketeering conspiracy, are offenses against property. The MVRA defines a “victim” of an offense as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered...” § 3663A(a)(2), and a government agency can be a victim. *United States v Sapoznik*, 161 F.3d 1117, 1121 (7th Cir. 1998).

There are judicially created exceptions to the MVRA. For example, courts may except a victim from court-ordered restitution based upon a “victim’s willingness as a participant in a scheme and whether he or she shared the same criminal intent as the defendant from whom restitution is sought.” *United States v. Lazar*, 770 F.Supp. 2d 447 at *8 (D. Mass. 2011). In a complex racketeering case involving a pay-to-play system of obtaining municipal contracts, as is the case here, some of those victimized also willingly participated in pay-to-play as a cost of doing business, thereby shutting out other contractors who did not want to participate in a tainted system like this. However, it is beyond question that the City of Detroit and its citizens were the clear cut victims of the defendants’ crimes.

Section 3663A(b)(1) provides that, in the case of a crime which results in loss or damage to property, the victim is entitled to either the return of the property, or, if the return of the property is impractical, the value of the property. “A restitution award need only be a reasonable estimate of the victim’s actual

losses.” *United States v Germosen*, 139 F. 3d 120, 129-130 (2nd Cir. 1998); *United States v Leahy*, 464 F. 3d 773, 794 (7th Cir. 2006)(where loss is “inherently difficult to quantify,” upholds district court’s determination that defendant owed 10% of contract value).

Another reason that the City of Detroit should be the recipient of restitution in this case is the inherent difficulty in determining the identities of all of the other victims of this complex racketeering scheme, as well as quantifying the restitution amount they are due. Congress plainly intended that sentencing courts not become embroiled in intricate issues of proof, as it provided that the MVRA is to be inapplicable if the court finds that the determination of complex factual issues related to the cause or amount of the victims' losses would unduly burden the sentencing process. *See*, 18 U.S.C. § 3663A(c)(3)(B). This provision reflects Congress's intention that the process of determining an appropriate order of restitution be "streamlined," Senate Report at 20, 21, *reprinted in* 1996 U.S.C.C.A.N. at 933, 934, and that the restitution "determination be made quickly," *id.* at 20, *reprinted in* 1996 U.S.C.C.A.N. at 933. Accordingly, the Senate Report stated that cases "in which the victim's loss is *not clearly* causally linked to the offense, should not be subject to mandatory restitution," *id.* at 19 (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. at 932, and expressed the intent that courts order full restitution to all identifiable victims of covered offenses,

while guaranteeing that the sentencing phases of criminal trials do not become for the purpose of determining facts and issues better suited to civil proceedings, *id.* at 18, *reprinted in* 1996 U.S.C.C.A.N. at 931.

For the above reasons, the government requests that the court enter an order of restitution against defendants Kwame Kilpatrick and Bobby Ferguson on behalf of the City of Detroit in the amount of **\$9,654,553**. As documented more fully in its sentencing brief for defendant Bobby Ferguson, this amount reflects the *minimum* profits from the extorted and steered contracts that were the subjects of their convictions.

Respectfully submitted,

BARBARA L. McQUADE
United States Attorney

s/LINDA AOUATE
Assistant United States Attorney

October 7, 2013

s/R. MICHAEL BULLOTTA
Assistant United States Attorney

October 7, 2013

s/MARK CHUTKOW
Assistant United States Attorney

October 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2013, the foregoing was electronically filed using the ECF system which will send notification of such filing to all ECF participants.

Respectfully submitted,

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