

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 10-00320-17-CR-W-DGK
)	
GILBERT LUPERCIO,)	
)	
Defendant.)	

**MOTION OF THE UNITED STATES FOR A PRELIMINARY
ORDER OF FORFEITURE, WITH SUPPORTING SUGGESTIONS**

The United States of America, by its undersigned counsel, respectfully submits its Motion for a Preliminary Order of Forfeiture in the above-entitled case for the reasons set forth in the following supporting suggestions. A proposed order is submitted with this motion.

SUPPORTING SUGGESTIONS

1. On November 18, 2010, a federal grand jury sitting in the Western District of Missouri, returned a two-count Indictment against the defendant Gilbert Lupercio. Count One charged that the defendant Gilbert Lupercio did knowingly and intentionally combine, conspire, confederate, and agree with others, both known and unknown to the grand jury, to distribute (1) five (5) kilograms or more of cocaine, a Schedule II controlled substance; (2) fifty (50) grams or more of cocaine base (a/k/a “crack”), a Schedule II controlled substance; and (3) One hundred (100) kilograms or more of marijuana, a Schedule I controlled substance, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846.

2. Count Two of the Indictment charged that the defendant Gilbert Lupercio and others, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, did knowingly and intentionally combine, conspire,

confederate and agree with others, both known and unknown to the grand jury, to conduct financial transactions, which in fact involved the proceeds of a specified unlawful activity, to wit: the conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and 846; and with the intent to promote the carrying on of that specified unlawful activity, in that cash obtained from drug sales was used, in whole or part, to purchase additional drugs for sale, promoting the drug conspiracy, in violation 18 U.S.C. §§ 1956(a)(1)(A)(I) and (h).

3. The Forfeiture Allegation of the Indictment sought forfeiture, pursuant to 21 U.S.C. § 853, of any property, real or personal, constituting or derived from proceeds obtained, directly or indirectly, and all property used, or intended to be used, in any manner or part, to commit, and to facilitate the commission of the violation, including but not limited to:

2006 Chrysler 300m, VIN: 2C3LA63H064101918.

The Forfeiture Allegation also sought a personal money judgment against the defendant for \$950,000 in United States currency in that such sum in the aggregate, constitutes or is derived from proceeds traceable to offenses alleged in Count One of the Indictment.

4. On May 14, 2012 , the defendant Gilbert Lupercio entered into a plea agreement with the United States in which he agreed to plead guilty to the lesser included charge in Count One and Count Two of the Indictment charging violations of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846 and 18 U.S.C. § 1956(a)(1)(A)(I) and (h) and to forfeit to the United States the above-described property, and consented to the entry of a money judgment in the amount of \$950,000.

5. The Court's jurisdiction in this matter is founded upon 21 U.S.C. § 853, which provides that:

Any person convicted of a violation of this subchapter...punishable by imprisonment for more than one year shall forfeit to the United States,....

(1) any property constituting, or derived from any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation,

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person to forfeit to the United States all property described in this subsection.

6. In discussing 21 U.S.C. § 853 and the related provision for forfeiture under 18 U.S.C. § 1963 (RICO), the Senate Report notes that this language "emphasizes the mandatory nature of criminal forfeiture, requiring the Court to order forfeiture in addition to any other penalty imposed." S. Rep. No. 225 98th Cong., 2d Sess. 200, 211, reprinted in 1984 U.S. Code Cong. & Ad. News 3383, 3394. Thus, according to the relevant statute, the Court must enter a Preliminary Order of Forfeiture in favor of the United States and against the defendant's interests in property found to have been acquired, maintained, or used in violation of the underlying forfeiture statute. Alexander v. United States, 509 U.S. 544, 562-563 (1993); United States v. Monsanto, 491 U.S. 600, 606-607 (1989); United States v. Carpenter, 317 F. 3d 618, 626 (6th Cir. 2003); United States v. Hill, 167 F.3d 1055, 1073-74 (6th Cir. 1999); United States v. Bieri, 68 F.3d 232, 235 (8th Cir. 1995).

7. The forfeiture of a certain proceeds dollar amount, as here, is considered an in personam money judgment against the defendant that can be satisfied from any property held by or for the benefit of the defendant. United States v. Benevento, 663 F. Supp. 1115 (S.D.N.Y. 1987); United States v. Robilotto, 828 F.2d 940 (2d Cir. 1987); United States v. Navarro-Ordas, 770 F.2d 959, 970 (11th Cir. 1985); United States v. Conner, 752 F.2d 566 (11th Cir. 1985);

United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985).

8. Rule 32.2 (b)(1)(A) and (B), 32.2(b)(2)(A) and (B), and 32.2(b)(3), Federal Rules of Criminal Procedure, provide that:

(b)(1)(A) As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or *nolo contendere* is accepted, on any count in an Indictment or information 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 of money that the defendant will be ordered to pay.

(b)(1)(B) The court's determination may be based on evidence already in the record, including any written plea agreement, and 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.

(b)(2)(A) If the court finds that property is subject to forfeiture, it shall promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(b)(2)(B) Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).

(b)(2)(C) If, before sentencing, the court cannot identify all the specific property subject to forfeiture or calculate the total amount of the money judgment, the court may enter a forfeiture order that:

- (i) lists any identified property;
- (ii) describes other property in general terms; and
- (iii) states that the order will be amended under Rule 32.2(e)(1) when

additional specific property is identified or the amount of money judgment has been calculated.

(b)(3) The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

9. Based upon the evidence set forth in the plea agreement, the United States has established the requisite nexus between the property and the offense to which the defendant Gilbert Lupercio has pleaded guilty. Accordingly, that property is subject to forfeiture to the United States pursuant to 21 U.S.C. § 853. Also, based upon the evidence set forth in the plea agreement, the Government has shown that the defendant Gilbert Lupercio received \$950,000 as a result of drug trafficking. Therefore, the United States has established the requisite nexus for a money judgment in that amount against the defendant Gilbert Lupercio.

10. Upon the issuance of a Preliminary Order of Forfeiture and pursuant to 21 U.S.C. § 853, the United States will publish for at least 30 consecutive days on the government's official web site, www.forfeiture.gov, notice of the Preliminary Order of Forfeiture, notice of the United States Marshal Services' intent to dispose of the property in such manner as the Attorney General may direct and notice that any person, other than the defendant Gilbert Lupercio, having or claiming a legal interest in the property must file a petition with the Court (and serve a copy on Bruce Rhoades, Assistant United States Attorney) within thirty (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier. This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury and shall set forth the

nature and extent of the petitioner's right, title or interest in the forfeited property and any additional facts supporting the petitioner's claim and the relief sought. The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the Preliminary Order of Forfeiture, as a substitute for published notice as to those persons so notified.

11. In accordance with the provisions of 21 U.S.C. § 853 and Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, the United States requests that it be permitted to undertake whatever discovery is necessary to identify, locate, or dispose of property subject to forfeiture, or substitute assets for such property.

WHEREFORE, the United States respectfully requests that this Court enter a Preliminary Order of Forfeiture forfeiting to the United States the property described in the Forfeiture Allegation of the Indictment and order the United States Marshals Service to seize and maintain custody of the forfeited property and dispose of it in accordance with the law. The United States further requests the Court to enter an order directing a money judgment in the amount of \$950,000 against the defendant.

Respectfully submitted,

David M. Ketchmark
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By

/s/ Bruce Rhoades
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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2012, the foregoing motion was electronically filed with the Clerk of the Court using the CM/ECF system for electronic delivery to all counsel of record.

/s/ Bruce Rhoades
Bruce Rhoades
Assistant United States Attorney