

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 10-320-17-CR-W-DGK
)	
GILBERT LUPERCIO,)	
)	
Defendant.)	

**ORDER REQUESTING ADDITIONAL INFORMATION REGARDING PLAINTIFF’S
MOTION FOR PRELIMINARY ORDER OF FORFEITURE
AGAINST DEFENDANT LUPERCIO**

Now before the Court is the United States’ motion for a preliminary order of forfeiture against Defendant Gilbert Lupercio (Doc. 473). Among other things, the motion seeks the entry of a personal money judgment against Lupercio ordering him to pay \$950,000 to the United States. The Court has some concerns about this portion of the motion.¹

The relevant procedural history is as follows. On November 18, 2010, the Grand Jury returned an indictment against Defendant Lupercio and 18 others. The Indictment (Doc. 1) charged two counts of conspiracy and a criminal forfeiture allegation. The forfeiture allegation claimed that certain property and currency were used in, or derived from, the conspiracy charged in Count One and thus should be forfeited to the United States. The forfeiture allegation also sought “[a] sum of money equal to \$950,000 in United States Currency, representing the amount of proceeds obtained as a result of the offenses alleged in Count One.”

On May 14, 2012, Lupercio pled guilty pursuant to a written plea agreement (Doc. 440) to Count Two and to a lesser included charge on Count One. The plea agreement states that the defendant “agrees that the United States may institute civil, judicial or administrative forfeiture

¹ The Court has no concern with that portion of the motion seeking forfeiture of Defendant’s 2006 Chrysler 300m.

proceedings against all forfeitable assets in which the defendant has *an interest*, and that the defendant will not contest any such forfeiture proceedings” (emphasis added). However, the factual basis for the guilty plea set out in the plea agreement did not allege that Lupercio or the conspiracy derived \$950,000.

On October 25, 2012, the United States filed the pending motion for a preliminary order of forfeiture. In it, the United States notes that the Indictment’s forfeiture allegation sought a personal money judgment for \$950,000 as proceeds traceable to offenses alleged in Count One of the Indictment. It also asserts that “based upon 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.” Mot. (Doc. 473) at ¶ 9.

The Court has three concerns with respect to request for the entry of a personal money judgment against Lupercio in the amount of \$950,000. First, while Lupercio agreed in the plea agreement that the United States may institute forfeiture proceedings against “forfeitable assets” belonging to him, the plea agreement is silent as to the entry of any personal money judgment. It appears to the Court that a forfeitable asset is something like real property, personal property, cash, etc., things that are different than the entry of a personal money judgment. Consequently, the Court has concerns whether Lupercio agreed in the plea agreement to the entry of a personal money judgment against him, and, if he did not, whether the Court can or should enter a personal money judgment against the Defendant.

Second, although the Government alleges that the Defendant agreed in the plea agreement that he “received \$950,000 as a result of drug trafficking,” the Court has carefully reviewed the plea agreement and cannot find any statement that the Defendant received \$950,000 as a result of drug trafficking. Consequently, the Court is concerned that the requisite factual

nexus has not been established between the Indictment's forfeiture allegation and the Defendant's conduct.

Third, given that the contention in the forfeiture allegation is that the conspiracy as a whole generated \$950,000 in proceeds, not that Defendant Lupercio himself received \$950,000, the Court questions whether any monetary judgment it enters should be entered against Defendant Lupercio individually or against all Defendants jointly and severally. The Court notes that in a separate motion filed against ten other Defendants who have already plead guilty² the Government is seeking that the judgment be entered jointly and severally against all Defendants. Mot. for Prelim. Order of Forfeiture (Doc. 562) at 12. If Defendant Lupercio is liable for any personal money judgment, he should be liable only on a joint and several basis with his co-conspirators.

The Court orders the Government to submit an additional brief addressing these concerns. This brief shall be submitted on or before January 7, 2013, and shall not exceed ten pages. Alternately, the Government may simply dismiss that portion of its motion seeking entry of a personal money judgment against Defendant Lupercio.

If the Government submits a brief, Defendant shall have 14 days to submit a brief in response that does not exceed ten pages. If Defendant submits a response, the Government shall have seven days to submit a reply that does not exceed five pages.

IT IS SO ORDERED.

Date: December 4, 2012

/s/ Greg Kays
GREG KAYS, JUDGE
UNITED STATES DISTRICT COURT

² These Defendants are Juan Marron, Daniel Hernandez-Montoya, Mario Marron, Robert Olvera, Anthony Alvarez, Benito Gutierrez, John Gasca, Jr., Armando Mendez, Joseph Lopez, and Frank Alvarez.