

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-10039-CR-KMM

UNITED STATES OF AMERICA,

v.

DAVID W. SCHWARZ,

Defendant.

PRELIMINARY ORDER OF FORFEITURE AND MONEY JUDGMENT

This matter is before the Court upon the United States of America's Motion for Forfeiture of Property and Money Judgment Amounts. (Dkt. No. 133.) Based on the Motion and exhibits, and the entire record in this case including the trial evidence and testimony, and being fully advised in the premises, this Court finds as follows:

1. On March 3, 2017, Defendant David W. Schwarz, ("Schwarz" or "Defendant"), was convicted of four counts of the Indictment: conspiracy to commit bank fraud, 18 U.S.C. § 1349 (Count 1), two counts of bank fraud, 18 U.S.C. § 1344(2) (Counts 3–4), and interference with the administration of the Internal Revenue laws, 26 U.S.C. § 7212(a) (Count 8). (Dkt. No. 123.) Count 1 charged Defendant with participation in a conspiracy, and Counts 3 and 4 with participation in a scheme to defraud, related to the operation of Cay Clubs Resorts and Marinas, Inc. ("Cay Clubs").

2. The Indictment placed Defendant on notice that upon conviction of the conspiracy and bank fraud offenses, the United States would pursue forfeiture of "any property constituting or derived from proceeds the defendant obtained directly or indirectly as the result of such offense or a conspiracy to commit such offense." *See* Indictment, at 13–14. In addition, the United States

sought “a sum of money equal in value to the proceeds traceable to the offense(s).” *Id.* at 13. Furthermore, pursuant to a Bill of Particulars as to Forfeiture, filed October 14, 2016 (Dkt. No. 11), the United States placed Defendant on notice that the following properties were identified for forfeiture:

- a. The real property and appurtenances located at 8617 Vista Point Cove, Orlando, Florida 32836-6306; and,
- b. Unit D602, Building 2900, The Links North at Harbour Village, 4650 Links Village Drive, Ponce Inlet, Florida 32127.

3. At the conclusion of the trial, before the jury was excused, Defendant waived forfeiture presentation to the jury.

Forfeiture Is Mandatory For Each Count of Conviction

4. Defendant is subject to mandatory forfeiture for his convictions of conspiracy and bank fraud pursuant to 18 U.S.C. § 982(a)(2) and 28 U.S.C. § 2461. Both statutes use the word “shall.” *See United States v. Monsanto*, 491 U.S. 600, 607 (1989). Forfeiture is also mandatory pursuant to 28 U.S.C. § 2461(c). *See United States v. Brummer*, 598 F.3d 1248 (11th Cir. 2010) (finding that district court was required to direct forfeiture under 28 U.S.C. § 2461(c)).

For Counts 1, 3 and 4, A Forfeiture Money Judgment Shall Issue In The Amount of Proceeds Obtained Through the Fraudulent Scheme

5. For Counts 1, 3 and 4, the Court finds that Defendant must forfeit an amount equal in value to the amount of proceeds obtained fraudulently through the conspiracy and fraud scheme. Because Defendant was convicted of engaging in a conspiracy he is liable for the total amount of proceeds generated by the conspiracy as a whole. *See United States v. Browne*, 505 F.3d 1229, 1279–80 (11th Cir. 2007) (holding defendant liable for the conspiracy’s “common pool of proceeds”). Thus, Defendant’s liability is not limited to proceeds generated by the particular

conduct charged in the substantive counts of conviction.

6. For Counts 1, 3 and 4, Defendant was convicted of conspiracy and scheme to defraud, which as defined in the Indictment encompasses a range of conduct between November 2004 and at least May 2011. Based on evidence introduced at trial, including testimony and voluminous exhibits, the Court finds that Cay Clubs operated as a mortgage fraud scheme from its inception. Defendant and his co-conspirator Fred Davis Clark, Jr. (“Clark”), utilized “same day flips” of condo units to inflate prices; insider sales whereby Defendant and Clark sold to insiders, and obtained bank loans at the same time; and, used Cay Clubs employees and agents to distribute false marketing materials to induce lending institutions and individual investors to purchase units. Defendant and Clark used numerous bank accounts and transfers of funds to conceal their receipt and control over the proceeds. The first seven transactions involved seven straw borrower mortgage frauds, and thereafter Cay Clubs mushroomed into a massive fraud scheme that continued for several years. Defendant served as the co-owner, and Chief Financial Officer. Defendant was entitled to take one-third of the proceeds while Clark was entitled to take two-thirds.

7. Through evidence adduced at trial, including testimony and numerous exhibits, as well as the report of forensic accountant Maria M. Yip, “Expert Report of Maria M. Yip dated October 17, 2013,” attached to the Government’s Motion (“Yip Report”), Cay Clubs “derived \$303.8 million from approximately 1,400 investors nationwide through the sales of units and membership dues.” The evidence at trial showed that Defendant and others committed bank fraud from the very inception of Cay Clubs, including by using straw borrowers and providing the cash to close for the first seven transactions at Cay Clubs. Defendant, Clark, and their

subordinates then fraudulently used those transactions in marketing materials, and other fraudulent marketing materials that included false and misleading information, to obtain additional sales. The evidence further showed that the marketing materials contained false and fraudulent representations as to how the investors' funds would be used, falsely claimed "appreciation" for prior sales that in fact never occurred, and loan documents submitted to lenders contained false and fraudulent information. Then, the conspirators used the proceeds of the bank loans for purposes other than what the investors were promised.

8. Evidence at trial showed that Defendant obtained millions of dollars from Cay Clubs for his own personal benefit. According to documents and testimony introduced at trial, Defendant personally derived approximately \$6.5 million in gross transfers and \$900,000 in salary payments between late 2004 and September 2007. According to documents and testimony introduced at trial, and the Yip Report, Defendant, Clark and their co-conspirators Barry Graham and Ricky Stokes derived more than \$37 million in payments from Cay Clubs. Clark also obtained a property portfolio he valued at approximately \$23 million during the conspiracy. These four conspirators alone reaped approximately \$57 million in cash and property, as well as other businesses such as a rum distillery, a gold mine, a coal reclamation project, aircraft, boats and even a houseboat manufacturing business.

9. The evidence at trial established that Defendant, Clark, and others participated in various acts of mortgage fraud in 2006 when Cay Clubs experienced financial difficulties. These fraudulently obtained mortgages allowed Cay Clubs to meet overdue commercial debt obligations and allowed Defendant and Clark to personally profit. All of the loans obtained during this aspect of the conspiracy were obtained by Clark, Defendant, and their subordinates by using the names of

Clark's family members or associates. Defendant provided the cash to close for the mortgage loans and funded the mortgage payments via transfers from the main Cay Clubs operating account, Cristal Clear Management.

10. Defendant, Clark, and their conspirators orchestrated a scheme that fraudulently obtained approximately \$303.8 million in proceeds from Cay Clubs investors (primarily in the form of bank loans), and this amount forms the basis of the forfeiture as to Counts 1, 3 and 4.

The Government Has Established the Requisite Nexus Between the Properties Identified For Forfeiture And Defendant's Conspiracy and Bank Fraud Crimes

11. The Court finds that in addition to determining the amount of and entering the requested money judgments, that each of the specific properties sought for forfeiture,

- a. The real property and appurtenances located at 8617 Vista Point Cove, Orlando, Florida 32836-6306; and,
- b. The real property and appurtenances located at Unit D602, Building 2900, The Links North at Harbour Village, 4650 Links Village Drive, Ponce Inlet, Florida 32127,

are subject to forfeiture since each of the properties constitutes proceeds of Defendant's criminal violations for Counts 1, 3 and 4 of the Indictment. The Court finds that the Government has shown through testimony and exhibits, including bank records, that funds from the fraud scheme were used to acquire or make substantial payments related to the properties. As the specific properties constitute proceeds within the meaning of 18 U.S.C. § 982(a)(2), they are forfeitable and the Court shall enter the requested order of forfeiture.

Based on the foregoing, it is **ORDERED and ADJUDGED** as follows:

1. A forfeiture money judgment for \$303,800,000 is entered against Defendant **DAVID W. SCHWARZ** as to each of Counts 1, 3 and 4, as a sum of money equal in value to the

proceeds traceable to the offense, pursuant to Federal Rule of Criminal Procedure 32.2(b). The proceeds obtained from all properties seized and forfeited pursuant to this Order, minus the ordinary and necessary expenses incurred by the United States to protect the interests of the United States or third parties, shall be applied to Defendant's money judgment;

It is further **ORDERED and ADJUDGED** that:

2. The following property is hereby forfeited to the United States of America, pursuant to 18 U.S.C. § 982(a)(2) and 28 U.S.C. § 2461, as to Counts 1, 3 and 4, subject to any ancillary proceedings provided for by Federal Rule of Criminal Procedure 32.2 and 21 U.S.C. § 853(n):

a. The real property and appurtenances located at 8617 Vista Point Cove, Orlando, Florida 32836-6306; and,

b. The real property and appurtenances located at Unit D602, Building 2900, The Links North at Harbour Village, 4650 Links Village Drive, Ponce Inlet, Florida 32127.

3. The United States Marshal, or any other duly authorized law enforcement official, shall seize and take custody of the forfeited property pursuant to Federal Rule of Criminal Procedure 32.2 and the procedures set forth in 21 U.S.C. § 853(g), made applicable by 18 U.S.C. § 982(b) and 28 U.S.C. § 2461(c).

4. The United States shall publish notice of this Order in accordance with Federal Rule of Criminal Procedure 32.2(b)(6), and to the extent practicable, provide direct written notice to any known potential claimant. The United States shall state in the notice that any person, other than Defendant, having or claiming a legal interest in the property ordered forfeited by this Order, must file a petition with the Court within thirty (30) days of the final publication of the notice or receipt of actual notice, whichever is earlier; that the petition shall be for a hearing to adjudicate

the validity of the petitioner's alleged interest in the property; that the petition shall be signed by the petitioner under penalty of perjury, shall set forth the nature and extent of petitioner's right, title, and interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, and shall set forth any additional facts supporting the petitioner's claims and the relief sought.

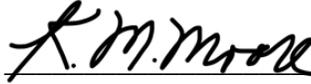
5. Upon adjudication of all third-party interests, if any, this Court will enter a Final Order of Forfeiture, pursuant to Federal Rule of Criminal Procedure 32.2 (c) and 21 U.S.C. § 853(n), in which all interests will be addressed. If no claims or petitions are filed within thirty (30) days of the final publication or receipt of actual notice, whichever is earlier, then, pursuant to Federal Rule of Criminal Procedure 32.2(c)(2) and 21 U.S.C. § 853(n)(7), this Order shall be deemed a final order of forfeiture, and the United States Marshal, or any other duly authorized law enforcement official, shall dispose of the property forfeited hereunder according to law.

6. Pursuant to Federal Rule of Criminal Procedure 32.2(b)(4), this Order of Forfeiture shall become final as to Defendant upon entry and shall be made a part of the sentence.

7. The United States may at any time move, pursuant to Federal Rule of Criminal Procedure 32.2(e)(1), to amend this Order to include property that is subject to forfeiture that was located and identified after the entry of this Order; or is substitute property that qualifies for forfeiture under an applicable statute, having a value not to exceed the money judgments, in whole or in part.

8. The United States District Court shall retain jurisdiction in this case for the purpose of enforcing this Order.

DONE and ORDERED, in Chambers, at Miami, Florida this 9th day of May, 2017.



K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

cc: Counsel of Record