

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2011

4 (Argued: January 5, 2012 Decided: August 17, 2012)

5 Docket No. 11-3-cr

6 - - - - -
7 UNITED STATES OF AMERICA,

8 Appellee,

9 v.

10 JOSEPH CONTORINIS,

11 Defendant-Appellant.

12 - - - - -
13 B e f o r e: WINTER, HALL, and CHIN, Circuit Judges.

14 Appeal from a conviction by a jury in the United States
15 District Court for the Southern District of New York (Richard
16 J. Sullivan, Judge), for conspiracy to commit securities fraud
17 and insider trading. Appellant challenges the jury
18 instructions, admission of evidence concerning the trading
19 activity of other alleged tippees, and the amount of the
20 forfeiture order. We affirm the conviction, vacate the
21 forfeiture order, and remand.

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15

16 WINTER, Circuit Judge:

17 Joseph Contorinis appeals from his conviction by a jury
18 before Judge Sullivan for conspiracy to commit securities fraud
19 and insider trading and from the district court's forfeiture
20 order in the amount of \$12.65 million. Appellant claims error
21 in: (i) a jury instruction that allegedly did not adequately
22 convey the definition of material, nonpublic information; (ii)
23 the admission of evidence of contemporaneous trades by
24 individuals who received inside information from the same
25 source as appellant; and (iii) the amount of the forfeiture
26 order entered by the district court. We hold that the district
27 court properly instructed the jury on the definition of
28 material, nonpublic information and acted within its discretion
29 in admitting evidence concerning the trades by other
30 individuals. However, we conclude that the court erred in
31 ordering appellant to forfeit gains acquired by his employer
32 but not by him. We therefore affirm appellant's conviction but
33 vacate the forfeiture order and remand for further proceedings.

1 BACKGROUND

2 Given the jury's verdict, we view the evidence and
3 inferences drawn therefrom in the light most favorable to the
4 government. United States v. Chavez, 549 F.3d 119, 124 (2d
5 Cir. 2008).

6 During the relevant time period, appellant was employed,
7 with Michael Handler, as a co-portfolio manager of the Jeffries
8 Paragon Fund ("Fund"). The Fund invested in companies in the
9 retail and personal products sectors. As portfolio managers,
10 Handler and appellant made investment decisions but did not
11 control disbursements of profits.

12 Sometime in 2000, appellant met and befriended Nicos
13 Stephanou, who became an investment banker in the Mergers and
14 Acquisitions group at UBS in 2002. Thereafter, appellant and
15 Stephanou spoke on the telephone often, sometimes as much as 75
16 times a month. Stephanou regularly provided confidential
17 information to several friends. These "tippees" included a
18 California employee of a semiconductor company, an individual
19 working in an import/export business in New York, and two
20 individuals living in Cyprus.

21 On September 2, 2005, Albertsons grocery store chain
22 ("ABS") announced that it was exploring options to increase
23 shareholder value, including a possible sale of the company.
24 Appellant then purchased a large amount of ABS stock on behalf
25 of the Fund. On the same day, Stephanou was assigned to a team

1 at UBS that was to represent a potential purchaser of ABS.
2 Stephanou testified that he informed appellant of his role, and
3 that appellant asked Stephanou to keep him informed about the
4 deal.

5 Subsequently, on November 22, Stephanou received
6 information suggesting that it was then more likely than not
7 that an acquisition of ABS would occur. Stephanou conveyed
8 that information to appellant and his other friends. On the
9 same day, appellant purchased 250,000 shares of ABS on behalf
10 of the Fund. He testified that this purchase was motivated by
11 a worse than expected earnings report by ABS. Stephanou's
12 other tippees also purchased shares around this time.

13 On December 6, Stephanou learned that the likelihood of
14 the deal had been drastically reduced. Nevertheless, appellant
15 purchased 126,000 shares of ABS the following morning. He
16 testified that he believed that offers at the end of the
17 bidding period, December 7, the next day, would increase the
18 stock price. Appellant became unavailable for a few hours, and
19 Handler began to sell ABS stock. Handler testified that he
20 sold the stock because he mistakenly believed the bidding
21 period was over. When appellant became available, appellant
22 continued to sell. The Fund sold the vast majority of its
23 position in ABS on December 7, closed out its long position on
24 December 8, and then briefly went short. Appellant made the
25 lion's share of these trades. The other tippees also closed
26 out their positions in ABS during the same time frame.

1 On December 9, Stephanou was told that the deal was back
2 on and could be announced on the 19th. That day Stephanou
3 purchased shares of ABS, and several of his tippees did as
4 well. Two days later, Stephanou was involved in a conference
5 call discussing the details of the proposed transaction.
6 Immediately following that call, Stephanou spoke with
7 appellant, and the Fund purchased over \$38 million of ABS the
8 next day.

9 Stephanou testified that he learned on December 17 that
10 the deal was going to happen and would be announced later in
11 the week. Phone records showed that Stephanou spoke with
12 appellant several times over the next two days. The Fund
13 purchased over 300,000 shares of ABS between December 19 and
14 20. On December 21, several media outlets reported that talks
15 had broken down and that the deal was unlikely to occur.
16 Stephanou testified that he repeatedly relayed information
17 about the deal to appellant. Phone records showed several
18 calls between the two during this time. Until the media
19 reports, the details looked positive, but ultimately it was
20 determined that antitrust concerns in the Chicago market would
21 hold the deal up. Stephanou then advised appellant that the
22 transaction was not going forward. The next day, December 22,
23 Stephanou sold his position in ABS, shorted the stock, and
24 advised appellant and the other tippees of the moribund status
25 of the deal. The Fund also sold all of its stock in ABS, and

1 the other tippees did the same. However, media reports in the
2 morning of December 22 stated only that the deal was uncertain,
3 but not necessarily dead. Only after the markets closed on
4 December 22, and Stephanou, his other tippees, and the Fund had
5 sold all their ABS shares, did ABS announce that talks about
6 the sale had been terminated. ABS stock dropped in price
7 significantly the next morning.

8 In late December and into early January 2006, Stephanou
9 received reports that the acquisition of ABS was back on track.
10 In response, he purchased ABS stock on January 11. He also
11 informed appellant that the deal was gaining traction and that
12 a transaction would likely be announced in the coming weeks.
13 On that day, appellant purchased approximately 1.1 million
14 shares of ABS stock for the Fund. Stephanou's other tippees
15 also bought ABS stock at this time. In his testimony,
16 appellant attributed the purchase to a belief that comments by
17 the CEO of one of the would-be purchasers implied that ABS
18 would be acquired. On January 12, appellant purchased 900,000
19 additional shares of ABS. Then, on January 13, the New York
20 Post announced that negotiations had reopened and the Fund
21 purchased another 200,000 shares, bringing its holdings to over
22 2.3 million shares. The Fund sold 500,000 shares two days
23 later but then repurchased them the following day. Finally,
24 the sale of ABS was announced on January 23 and the Fund sold
25 its entire ABS holdings that day, reaping a net profit of

1 approximately \$3 million through its December and January
2 trades. Stephanou testified that, beginning in September,
3 2005, and ending in January, 2006, he had kept appellant
4 informed of the status of the deal and expected date of the
5 announcement.

6 Prior to trial, appellant objected to evidence about the
7 trades of Stephanou's other tippees. In denying appellant's
8 motion to exclude that evidence, the court stated that it had
9 considered the parties' arguments concerning district court
10 opinions in United States v. Marcus Schloss & Co., Inc., 710 F.
11 Supp. 944 (S.D.N.Y. 1989) (excluding evidence of trades by
12 others), and United States v. Ballesteros Gutierrez, 181 F.
13 Supp. 2d 350 (S.D.N.Y. 2002) (admitting such evidence), and
14 concluded that the reasoning in Ballesteros was more fitting in
15 this case. The court found that the trading patterns of the
16 other tippees were probative because they tended to show that
17 the trades of the tippees were more consistent with the sharing
18 of inside information than with independent investment
19 decisions. Based on the balancing done in Ballesteros, the
20 court saw no reason to exclude the evidence under Rule 403 but
21 stated that it was open to a limiting instruction. No such
22 instruction was requested.

23 Appellant also objected to the jury charge on the basis
24 that the court's definition of "material, nonpublic
25 information" did not adequately explain when confirmation of

1 publicly known or rumored information can be considered
2 material and nonpublic.

3 The jury found appellant guilty of conspiracy and insider
4 trading on the counts relating to the trades made on December
5 22 and January 11. Appellant was sentenced to 72 months'
6 imprisonment and was ordered to forfeit approximately \$12.65
7 million -- the profits made by the Fund on appellant's trades
8 in his capacity as agent of the Fund.

9 This appeal followed.

10 DISCUSSION

11 a) Jury Instructions

12 We review jury instructions de novo to determine whether
13 the jury was misled or inadequately informed about the
14 applicable law. Henry v. Wyeth Pharm., Inc., 616 F.3d 134, 146
15 (2d Cir. 2010).

16 As pertinent here, the crime of insider trading required
17 the government to prove beyond a reasonable doubt that
18 Stephanou had a duty to UBS not to convey material, nonpublic
19 information about deals in progress to outsiders, See Dirks v.
20 SEC, 463 U.S. 646, 662 (1983), and that appellant received such
21 material, nonpublic information in breach of that duty and used
22 the information to trade relevant securities, see id. That
23 Stephanou had the requisite duty is not contested. However,
24 appellant testified that he never received any information from
25 Stephanou about deals Stephanou was working on and that

1 appellant's trades in ABS were based solely on information
2 available to the public or professional investors like himself.

3 Although appellant's denial of receiving any information
4 from Stephanou no doubt reduced the importance of the
5 definition of material, nonpublic information in the jury's
6 deliberations -- if it found appellant to be lying, the chances
7 of an acquittal would be low -- the government still had to
8 prove that the information Stephanou claimed to have given
9 appellant was material and nonpublic. Appellant claims that
10 the definition of material, nonpublic information given in the
11 district court's instructions was erroneous.

12 The pertinent instruction read:

13 Information is nonpublic if it was not
14 available to the public through such sources
15 as press releases, Securities and Exchange
16 Commission filings, trade publications,
17 analysts' reports, newspapers, magazines,
18 rumors, word of mouth or other sources. In
19 assessing whether information is nonpublic,
20 the keyword is "available." If information
21 is available in the public media or in SEC
22 filings, it is public. However, the fact
23 that information has not appeared in a
24 newspaper or other widely available public
25 medium does not alone determine whether the
26 information is nonpublic. Sometimes a
27 corporation is willing to make information
28 available to securities analysts, prospective
29 investors, or members of the press who ask
30 for it even though it may never have appeared
31 in any newspaper publication or other
32 publication. Such information would be
33 public. Accordingly, information is not
34 necessarily nonpublic simply because there
35 has been no formal announcement or because
36 only a few people have been made aware of it.
37 For example, if UBS policy was to give out
38 certain information to people who ask for it,

1 that information is public information.
2 Whether information is nonpublic is an issue
3 of fact for you to decide.
4

5 On the other hand, the confirmation by
6 an insider of unconfirmed facts or rumors --
7 even if reported in a newspaper -- may itself
8 be inside information. A tip from a
9 corporate insider that is more reliable or
10 specific than public rumors is nonpublic
11 information despite the existence of such
12 rumors in the media or investment community.
13 Whether or not the confirmation of a rumor by
14 an insider qualifies as material nonpublic
15 information is an issue of fact for you to
16 decide.
17

18
19

20 Within the particular context of the
21 purchase and sale of securities, "material"
22 information is information which a reasonable
23 investor would have considered significant in
24 deciding whether to buy, sell, or hold
25 securities, and at what price to buy or sell.
26

27 Appellant argues that this jury instruction did not
28 properly inform the jury because it failed to include the
29 following language, or variations thereon:¹

¹ Appellant submitted two variations as proposed instructions:
Although information in a newspaper or an analyst report is public, an
insider's confirmation of published information may itself constitute
material nonpublic information if it discloses significant details that are
not apparent from what is public, such as the certainty that a rumored event
in fact will occur. However, if an insider simply repeats what has appeared
in the public press, the repetition of that information is not material
nonpublic information. A generalized confirmation of an event that is obvious
to every market participant who is knowledgeable about a company is not
material information. Speculative information also may not rise to the level
of materiality. It is a fact issue for you to decide whether Mr. Stephanou
was sufficiently different from the information that was available in the
marketplace to be material.

and

A generalized confirmation of an event that is obvious to every market
participant who is knowledgeable about a company is not material information.
Speculative information also may not rise to the level of materiality. It is
a fact issue for you to decide whether Mr. Stephanou provided Mr. Contorinis

1 A generalized confirmation of an event that
2 is fairly obvious to investors knowledgeable
3 about the company or the particular security
4 at issue -- here Albertsons or Albertsons
5 stock -- is not material information. In
6 order to be nonpublic and material,
7 information must be different from general
8 discussions in the marketplace at the time.
9 Even if an event, like a corporate merger,
10 may be important, information about that
11 event is not material unless it contains
12 something beyond what already was known to
13 the public from news articles, analyst
14 reports, or otherwise, and the additional
15 information likely would have been
16 significant to a reasonable investor. A
17 generalized confirmation of an event that is
18 fairly obvious to market participants who are
19 knowledgeable about a company is not material
20 information. Likewise, speculative
21 information is not material. The mere fact
22 that some discussion has taken place on
23 matters that may or may not occur is not
24 material unless it goes beyond speculation
25 and relates to existing facts.

26
27 In appellant's view, the critical omission in the
28 instructions given by the court was the lack of language
29 indicating that general confirmation of an event that is
30 "fairly obvious" to knowledgeable investors is not material,
31 nonpublic information. Conversely, he objects to the court's
32 instruction that stated, "[t]he confirmation by an insider of
33 unconfirmed facts or rumors -- even if reported in a newspaper
34 -- may itself be inside information. We disagree.

35

with any nonpublic information, and whether any such information was
sufficiently different from the information that was available in the
marketplace to be material.

1 We first discuss materiality and nonpublic status as
2 separate concepts. Information is material when there is a
3 substantial likelihood that a reasonable investor would find it
4 important in making an investment decision. See United States
5 v. Cusimano, 123 F.3d 83, 88 (2d Cir. 1997) (citing Basic Inc.
6 v. Levinson, 485 U.S. 224, 231-32 (1988)). To be material,
7 information must "alter[] the 'total mix' of information
8 available." Id. Of course, information is public if it is
9 available to the public through SEC filings, the media, or
10 other sources. See SEC v. Mayhew, 121 F.3d 44, 50-51 (2d Cir.
11 1997). As the district court instructed the jury, information
12 is also deemed public if it is known only by a few securities
13 analysts or professional investors. This is so because their
14 trading will set a share price incorporating such information.

15 While the concepts of materiality and nonpublic status
16 refer to different things, there is considerable overlap for
17 purposes of insider trading analysis. The content of a piece
18 of information may be of importance in affecting the share
19 price but so well-known that it does not alter the mix of
20 available information and is therefore not deemed to be
21 material. Conversely, the same information, if previously
22 unknown to the public, may alter substantially the mix of
23 information and thus be deemed very material. Information also
24 comes in varying degrees of specificity and reliability, and
25 the extent to which a newly reported item of information alters

1 the total mix may depend on the specificity or reliability of
2 that information. See id. at 52.

3 In Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir.
4 1980), we held that a tip stating that an upcoming earnings
5 report would reflect lower sales was not material where that
6 fact was already common knowledge among analysts and the
7 company had previously stated that a decline in sales was
8 expected. Id. at 166. However, we indicated that if the tip
9 had included additional details, such as the expected amount of
10 the decrease, it would have been material. Id.

11 Similarly, a tip that provides additional reliability to
12 existing information about the status of a transaction based on
13 the source's access to inside information may be material
14 because it lessens the risk from uncertainty. See Mayhew, 121
15 F.3d at 52.

16 Insiders often have special access to information about a
17 transaction. Rumors or press reports about the transaction may
18 be circulating but are difficult to evaluate because their
19 source may be unknown. A trier of fact may find that
20 information obtained from a particular insider, even if it
21 mirrors rumors or press reports, is sufficiently more reliable,
22 and, therefore, is material and nonpublic, because the insider
23 tip alters the mix by confirming the rumor or reports. Id.

24 We conclude that the district court's instructions
25 adequately conveyed the applicable standards. The charge

1 informed the jury that for information to be material it must
2 be considered significant by reasonable investors. It conveyed
3 to the jury that material, nonpublic information is information
4 that either is not publicly available or is sufficiently more
5 detailed and/or reliable than publicly available information to
6 be deemed significant, in and of itself, by reasonable
7 investors.

8 To the extent that appellant's suggested charges focused
9 entirely on the content of reports or tips, excluding from
10 consideration the reliability of the source, they misstated the
11 law. See United States v. Abelis, 146 F.3d 73, 82 (2d Cir.
12 1998) (holding that defendant "bears the burden of showing that
13 the requested instruction 'accurately represented the law in
14 every respect and that, viewing as a whole the charge actually
15 given, he was prejudiced.'" (quoting United States v. Dove, 916
16 F.2d 41, 45 (2d Cir. 1990))) In other respects, the court's
17 instructions conveyed the substance of those requested by
18 appellant.

19 b) Evidence of Other Trades

20 Appellant also argues that the district court should have
21 excluded the evidence concerning trades of other individuals
22 under Fed. R. Evid. 403, which states that evidence may be
23 excluded if its probative value is "substantially outweighed by
24 a danger of . . . unfair prejudice, confusing the issues, [or]
25 misleading the jury."

1 Given the district courts' "broad discretion over the
2 admission of evidence," United States v. McDermott, 245 F.3d
3 133, 140 (2d Cir. 2001), we review evidentiary rulings only for
4 abuse of discretion. SR Int'l Bus. Ins. Co. v. World Trade
5 Ctr. Props., LLC, 467 F.3d 107, 119 (2d Cir. 2006). This
6 deferential standard is of particular importance with regard to
7 evidentiary rulings under Rule 403 because "[a] district court
8 is obviously in the best position to do the balancing mandated
9 by Rule 403." United States v. Salameh, 152 F.3d 88, 110 (2d
10 Cir. 1988).

11 On appeal, as in the district court, the parties'
12 arguments focus on which of the differing district court
13 opinions in Marcus Schloss and Ballesteros we should adopt.
14 However, we are skeptical as to whether a general rule, rather
15 than a case by case analysis, regarding admission or exclusion
16 of evidence of trades by other alleged tippees in insider
17 trading cases is appropriate. In Marcus Schloss and
18 Ballesteros, the evidence of other trades was relevant to the
19 extent of a particular conspiracy. See Marcus Schloss, 710 F.
20 Supp. at 951; Ballesteros, 181 F. Supp. 2d at 356.

21 Here, however, there is no allegation that appellant and
22 the other tippees were co-conspirators. Rather, the other
23 tippees were strangers to appellant. In that light, the
24 government's argument that the evidence of the other trades
25 tends to show that appellant traded on inside information

1 arguable contains a danger of substantial prejudice. Appellant
2 was a professional in the securities industry while the others
3 were not. Appellant's defense was that his trades were based
4 on information available to such a professional. The other
5 tippees' information may well have been entirely limited to
6 Stephanou's tips, a fact not easily litigated.

7 However, the relevance of the other trades is not limited
8 to showing the motive for appellant's trades. Appellant
9 challenged Stephanou's testimony as to his conversations with
10 appellant, labeling him a "career criminal" and "a master liar"
11 who concocted a tale involving appellant to obtain a lighter
12 sentence.

13 Appellant's defense was not that he received information
14 from Stephanou about the ABS negotiations and that it was both
15 insignificant and a fraction of the information available to
16 him. Rather, appellant denied ever receiving any information
17 from Stephanou regarding any transaction on which Stephanou was
18 working. Given that testimony and litigating position, the
19 evidence of common trades had arguable probative value in
20 support of the credibility of Stephanou's testimony that he
21 shared common information with appellant and the others.

22 Admission of the evidence of other trades was thus a
23 paradigmatic case of weighing probative value and danger of
24 unfair prejudice that was within the considerable discretion of
25 the district court. It may well be that appellant was entitled

1 to a limiting instruction, but such an instruction was never
2 requested.

3 c) Order of Forfeiture

4 The final issue is whether the district court erred in
5 ordering appellant to forfeit \$12.65 million, the total amount
6 of profits made, and losses avoided, by the Fund in ABS trades.
7 Appellant, who was an employee and small equity owner of the
8 Fund, argues that he cannot be ordered to forfeit profits that
9 he never received or possessed. We agree.

10 In reviewing an order of forfeiture, we review the
11 district court's legal conclusions de novo and the factual
12 findings for clear error. United States v. Sabhnani, 599 F.3d
13 215, 261 (2d Cir. 2010). In the course of successful criminal
14 securities fraud prosecutions, a district court can order the
15 forfeiture of "[a]ny property, real or personal, which
16 constitutes or is derived from proceeds traceable to [the]
17 violation."² The definition of proceeds for insider trading
18 violations is "the amount of money acquired through the illegal
19 transactions resulting in the forfeiture, less the direct costs

² 18 U.S.C. § 981(a)(1)(C). Section 981(a)(1)(C) allows a court to order forfeiture for "any offense constituting 'specified unlawful activity' [as defined in [18 U.S.C. §] 1956(c)(7)]." Section 1956(c)(7)(A) incorporates "any act or activity constituting an offense listed in [18 U.S.C. §] 1961(1)." And § 1961(1)(D) lists "any offense involving . . . fraud in the sale of securities." While § 981(a)(1)(C) is a civil forfeiture provision, it has been integrated into criminal proceedings via 28 U.S.C. § 2461(c). This roundabout statutory mechanism allows a court to order forfeiture in criminal securities fraud proceedings.

1 incurred in providing the goods or services.”³

2 While the statute does not expressly identify the “whom”
3 that must do the acquiring that results in forfeiture,
4 “forfeiture” is a word generally associated with a person’s
5 losing an entitlement as a penalty for certain conduct. See
6 Hamilton v. Atlas Turner, Inc., 197 F.3d 58, 61 (2d Cir. 1999)
7 (discussing the difference between forfeiture and waiver). The
8 order in the present matter includes funds to which appellant
9 was never entitled. Because the “proceeds” sought by the
10 government here were “acquired” by the Fund over which

³ Id. § 981(a)(2)(B). We agree with our own prior non-precedential conclusion, consistent with that of the Tenth Circuit, that § 981(a)(2)(B) supplies the definition of “proceeds” in cases involving fraud in the purchase or sale of securities, see United States v. Mahaffy, No. 09-5349-cr, 2012 U.S. App. LEXIS 16072 at *58-59 (2d Cir. August 2, 2012) (“If the district court addresses the forfeiture issue again, with the same factual and legal bases, the proper measure of forfeiture . . . is . . . under § 981(a)(2)(B).”); United States v. Nacchio, 573 F.3d 1062, 1088-90 (10th Cir. 2009), and incorporate by reference the rationale contained therein. Section 981(a)(2)(B) applies to “cases involving lawful goods or lawful services that are sold or provided in an illegal manner.” A security is a “lawful good[]” for the purposes of § 981(a)(2)(B), the purchase or sale of which, if done based upon improperly obtained material nonpublic inside information, is “sold . . . in an illegal manner.” Further, the sale of a security is not an inherently unlawful activity, like say the sale of foodstamps, or a robbery, and thus insider trading is not “unlawful activity” as that term is used in § 981(a)(2)(A). See 1 David B. Smith, Prosecution and Defense of Forfeiture Cases, ¶ 5.03[2], at 5-62 (“The term ‘unlawful activities’ in section 981(a)(2)(A) was meant to cover inherently unlawful activities such as robbery that are not captured by the words ‘illegal goods’ and ‘illegal services.’”). United States v. Uddin, 551 F.3d 176 (2d Cir. 2009) is not to the contrary. That case involved the sale of foodstamps, which cannot be done lawfully, and therefore is properly considered an “unlawful activity” under § 981(a)(2)(A). Because § 981(a)(2)(B) defines “proceeds” as the “money acquired . . . less the direct costs incurred” it seems that the only money that should be subject to forfeiture in an insider trading case is money acquired when shares are traded based upon inside information at a gain. In cases where the securities are sold at a loss to avoid further losses, the direct costs associated with the sale, namely the cost of purchasing the securities sold, would exceed the “money acquired” in the sale. In this case, because the Fund and not appellant bore all direct costs, any money that appellant can fairly be considered as having “acquired” as a result of his insider trading activities may be subject to forfeiture under §981.

1 appellant lacks control, it is difficult to square the statute
2 with the forfeiture order.

3 Forfeiture of funds or property can be either civil or
4 criminal. In civil forfeiture, the United States brings a
5 civil action against the property itself as an in rem
6 proceeding -- "[i]t is the property which is proceeded against,
7 and . . . held guilty and condemned as though it were conscious
8 instead of inanimate and insentient." Various Items of
9 Personal Property v. United States, 282 U.S. 577, 581 (1931);
10 see also United States v. Davis, 648 F.3d 84, 92 (2d Cir. 2011)
11 (quoting same). In civil forfeiture proceedings, the burden
12 often rests on the claimant, who may be an innocent third
13 party, to prove that the property is not subject to forfeiture.
14 United States v. Parcel of Property, 337 F.3d 225, 229-30 (2d
15 Cir. 2003). The claimant's culpability is also often
16 irrelevant, Bennis v. Michigan, 516 U.S. 442, 446 (1996).

17 Forfeiture in criminal proceedings under 18 U.S.C. § 981
18 is an in personam proceeding. "The forfeiture serves no
19 remedial purpose, is designed to punish the offender, and
20 cannot be imposed upon innocent owners." United States v.
21 Bajakajian, 524 U.S. 321, 332 (1998). Criminal forfeiture
22 focuses on the disgorgement by a defendant of his "ill-gotten
23 gains." United States v. Kalish, 626 F.3d 165, 170 (2d Cir.
24 2010) (citing United States v. Emerson, 128 F.3d 557, 566 (7th
25 Cir. 1997); United States v. Various Computers & Computer

1 Equip., 82 F.3d 582, 588 (3d Cir. 1996)). Thus, the
2 calculation of a forfeiture amount in criminal cases is usually
3 based on the defendant's actual gain. See United States v.
4 McGinty, 610 F.3d 1242, 1247 (10th Cir. 2010) ("[R]estitution
5 is calculated based on the victim's loss, while forfeiture is
6 based on the offender's gain." (quoting United States v.
7 Webber, 536 F.3d 584, 603 (7th Cir. 2008))). This is
8 consistent with the purpose of criminal forfeiture, as endorsed
9 by the House Judiciary Committee when recommending the Civil
10 Asset Forfeiture Reform Act. H.R. Rep. No. 106-192, at 5
11 (1999) ("With the forfeiture laws, we can separate the criminal
12 from his profits. . . thus removing the incentive others may
13 have to commit similar crimes tomorrow.") (quoting Stefan
14 Cassella, Assistant Chief, Asset Forfeiture and Money
15 Laundering Section, Criminal Division, U.S. Department of
16 Justice in testimony before the committee); see also H.R. Rep.
17 No. 105-358, at 23 (1997) (same). District courts in our
18 circuit have echoed this view by concluding that "a defendant
19 may be ordered to forfeit all monies received by him as a
20 result of the fraud." United States v. Nicolo, 597 F. Supp. 2d
21 342, 347 (W.D.N.Y. 2009) (emphasis added) (citing United States
22 v. Uddin, 551 F.3d 176, 181 (2d Cir. 2009)).

23 This general rule is somewhat modified by the principle
24 that a court may order a defendant to forfeit proceeds received
25 by others who participated jointly in the crime, provided the

1 actions generating those proceeds were reasonably foreseeable
2 to the defendant. United States v. Fruchter, 411 F.3d 377, 384
3 (2d Cir. 2005) (reviewing order of forfeiture under RICO
4 forfeiture provision); United States v. Warshak, 631 F.3d 266,
5 281-82, 333 (6th Cir. 2010) (affirming joint and several
6 forfeiture orders under 18 U.S.C. § 981). This extends to
7 forfeiture proceedings, where the general principle is that a
8 defendant is liable for the reasonably foreseeable acts of his
9 co-conspirators. See United States v. Jackson, 335 F.3d 170,
10 181 (2d Cir. 2003) ("Under well-established law, Jackson was
11 responsible not only for the cocaine that he himself conspired
12 to import but also for the cocaine his co-conspirators
13 conspired to import, provided he knew of his co-conspirator's
14 illicit activities or the activities were reasonably
15 foreseeable by him."). The extension of forfeiture to proceeds
16 received by actors in concert with a defendant may be deemed to
17 be based on the view that the proceeds of a crime jointly
18 committed are within the possessory rights of each concerted
19 actor, i.e. are "acquired" jointly by them and distributed
20 according to a joint decision. This view does not support an
21 extension to a situation where the proceeds go directly to an
22 innocent third party and are never possessed by the defendant.

23 Moreover, we are not aware of, and the government has not
24 cited, any decision standing for the proposition that a
25 defendant may be required to forfeit funds never acquired by

1 him or someone working in concert with him. Neither our
2 opinion in United States v. Royer, 549 F.3d 886 (2d Cir. 2008)
3 nor our summary order in United States v. Capoccia, 402 F.
4 App'x 639 (2d Cir. 2010) are to the contrary. In neither case
5 were we presented with a situation where a defendant had been
6 asked to forfeit funds that were never under his or his co-
7 conspirator's control. While "property need not be personally
8 or directly in the possession of the defendant, his assignees,
9 or his co-conspirators in order to be subject to forfeiture,"
10 Capoccia, 402 F. App'x at 640, the property must have, at some
11 point, been under the defendant's control or the control of his
12 co-conspirators in order to be considered "acquired" by him.
13 Finally, extending the scope of a forfeiture to include
14 proceeds that have never been acquired either by a defendant or
15 his joint actors would be at odds with the broadly accepted
16 principle that forfeiture is calculated based on a defendant's
17 gains. See McGinty, 610 F.3d at 1247. Therefore, we hold that
18 the district court erred in ordering appellant to forfeit funds
19 that were never possessed or controlled by himself or others
20 acting in concert with him, and remand to determine the proper
21 forfeiture amount.⁴

⁴ To what extent appellant's interest in salaries, bonuses, dividends, or enhanced value of equity in the Fund can be said to be money "acquired" by the defendant "through the illegal transactions resulting in the forfeiture," 18 U.S.C. § 981(a)(2)(B), we leave to the district court to decide on remand in a manner not inconsistent with this opinion.

CONCLUSION

We have reviewed appellant's other arguments and conclude that they are without merit. For the foregoing reasons, we affirm appellant's conviction, but vacate the order of forfeiture and remand for further proceedings in accordance with this opinion.