NOT FOR PUBLICATION

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PAVEL IVANOVICH LAZARENKO, AKA Pavlo Ivanovych Lazarenko, Defendant-Appellant.	No. 21-10225 21-10250 D.C. No. 3:00-cr-00284-CRB-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted August 12, 2022
San Francisco, California

Before: RAWLINSON, BADE, and BRESS, Circuit Judges.

Defendant-Appellant Pavel Ivanovich Lazarenko appeals the district court's preliminary order of criminal forfeiture and order correcting the preliminary order of criminal forfeiture. We have jurisdiction under 28 U.S.C. § 1291. We review the district court's interpretation of federal forfeiture law de novo and its factual findings for clear error. *United States v. Hernandez-Escobar*, 911 F.3d 952, 955

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

(9th Cir. 2018). We affirm.

1. Lazarenko challenges the district court's conclusion that he made property subject to forfeiture unavailable for one of the reasons listed under 21 U.S.C. § 853(p)(1). The district court did not err.

First, the district court did not violate the "merger of judgments" rule when it considered the underlying counts of conviction to determine whether the unavailable property was traceable to Lazarenko's criminal activity and therefore subject to forfeiture. Section 853(p) requires the court to first consider whether tainted property has been dissipated. 21 U.S.C. § 853(p)(1); *United States v. Nejad*, 933 F.3d 1162, 1166 (9th Cir. 2019). The district court appropriately consulted the indictment and underlying convictions to verify that the unavailable property was forfeitable and thus subject to substitution. *See* 21 U.S.C. § 853(a), (p).

The district court also did not err in concluding that $2,033,602.80 located in Lazarenko's BancBoston Robertson Stephens account had been made unavailable under § 853(p)(1). The record supports the district court's finding that Lazarenko commingled the illicit $2.3 million deposit with other funds such that it could not "be divided without difficulty," that part of the deposit could not "be located upon the exercise of due diligence," and that part of the deposit had been transferred to third parties. 21 U.S.C. § 853(p)(1)(A)–(B), (E). Further, Lazarenko is incorrect

that the district court's order violated the "relation-back doctrine." All the acts and omissions that led to the unavailability of the funds took place after the unlawful deposit in September 1998, and thus *after* the government's interest in the property vested under § 853(c).

The district court also did not err in finding that Lazarenko diminished the value of his Novato, California mansion by $760,900. The record reflects that Lazarenko's failure to maintain the premises while he still owned and controlled the property caused it to diminish in value by at least that amount.

2. Lazarenko argues that the district court improperly forfeited funds held in Guernsey and Liechtenstein bank accounts as substitute property under § 853(p)(2) even though the government has argued those funds are tainted in a separate civil forfeiture proceeding in the District of Columbia, contending that substitute property may not itself be tainted property. This argument is foreclosed by the text of § 853(p)(2), which states that once the government has established that the defendant made forfeitable property unavailable, "the court shall order the forfeiture of *any other property* of the defendant." 21 U.S.C. § 853(p)(2) (emphasis added). Thus, the district court was correct to conclude that "any other property" of the defendant may be substituted, whether it is tainted or not. *See Nejad*, 933 F.3d at 1165; *see also* 21 U.S.C. § 853(o) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").

Switching gears, Lazarenko argues that the funds in his Guernsey and Liechtenstein bank accounts cannot be used as substitute property because other assets more directly traceable to his crimes are still available. This argument fails for the same reason as the preceding argument: The text of § 853(p) provides that substitution is authorized once "*any* property" is made unavailable, at which point "*any* other property of the defendant" may be substituted "up to the value of any" unavailable property. *Id.* § 853(p)(1)–(2) (emphases added). Nothing in the text suggests the limitation Lazarenko seeks, and interpreting the statute as he suggests would hardly amount to "liberally construe[ing]" it. *Id.* § 853(o); *see also Olympic Forest Coal. v. Coast Seafoods Co.*, 884 F.3d 901, 906 (9th Cir. 2018) ("[T]he term 'any' [is] broad and all-encompassing.").[1]

3. Lazarenko also raises three equitable arguments against the preliminary order. None has merit.

Lazarenko's judicial estoppel argument fails because there is no inconsistency in the government's position. *See United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008). Section 853(p) allows "any other property of the defendant" to be forfeited as substitute property, so it does not matter whether the

[1] We also note that the record casts doubt on Lazarenko's representation that the assets he would prefer the government to seize are in fact available. *See United States v. All Assets Held at Bank Julius*, 244 F. Supp. 3d 188, 194 (D.D.C. 2017); *United States v. All Assets Held at Bank Julius*, 959 F. Supp. 2d 81, 114 (D.D.C. 2013).

Guernsey and Liechtenstein funds are tainted or untainted.

Lazarenko is incorrect that the election of remedies doctrine bars the government from seeking to civilly forfeit the Guernsey and Liechtenstein funds in one proceeding and then to criminally forfeit them as substitute property in another. These remedies are not "repugnant and inconsistent with each other," *Teutscher v. Woodson*, 835 F.3d 936, 956 (9th Cir. 2016), because the government may "pursue both civil forfeiture and criminal forfeiture at the same time" and "may pursue civil forfeiture even after a failed criminal prosecution," *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1150, 1152 (9th Cir. 2011).

The district court did not abuse its discretion by declining to apply the first-to-file rule because the criminal proceedings commenced four years before the civil proceedings. *See Kohn L. Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1239–41 (9th Cir. 2015).

4. Last, we reject Lazarenko's argument that the district court did not have jurisdiction to enter the corrected order after he filed his first notice of appeal. "The filing of a notice of appeal . . . does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure Rule 35(a)." Fed. R. App. P. 4(b)(5).

AFFIRMED.