

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Nos. 11-2057 / 11-2145

UNITED STATES OF AMERICA,

Appellee,

v.

**CHRISTOPHER ELDER and
TROY SOLOMON,**

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION
HONORABLE FERNANDO J. GAITAN, JR., CHIEF DISTRICT JUDGE

BRIEF FOR THE UNITED STATES

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SUMMARY OF THE CASE

Appellants Christopher Elder and Troy Solomon appeal from their convictions following a jury trial of one count of conspiracy to distribute controlled substances (both defendants); eight counts of distribution of controlled substances (both defendants); two counts of distribution of controlled substances (Solomon only); and one count of conspiracy to commit money laundering (Solomon only).

In their four points on appeal, Elder and Solomon are claiming there was insufficient evidence to support the jury's verdicts, the defendants should have been severed for trial, and the district court erred in the money judgment amount. The record shows, however, that there was sufficient evidence that the drugs were dispensed other than for a legitimate medical purpose and not in the course of professional practice, and the evidence demonstrated that Solomon mailed the proceeds of illegal narcotics sales to Missouri to fund further drug distribution activity and to conceal the source of the funds. Furthermore, the court properly denied Elder's severance motion, and the forfeiture amount was supported by the evidence. This Court, therefore, should affirm the convictions.

The Government requests 15 minutes for oral argument.

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STATEMENT OF THE ISSUES

I.

Whether sufficient evidence supported the conclusion that the drugs were dispensed other than for a legitimate medical purpose and not in the course of professional practice, where the prescriptions written were entirely

fraudulent ones not based on any doctor-patient relationship, but instead were written as part of a massive drug diversion scheme.

Cases

United States v. Armstrong, 550 F.3d 382 (5th Cir. 2008)

United States v. Smith, 573 F.3d 639 (8th Cir. 2009)

II.

Whether sufficient evidence exists to support Solomon's money laundering convictions, where the evidence demonstrated that Solomon mailed the proceeds of illegal narcotics sales to Missouri to fund further drug distribution activity and to conceal the source of the funds.

Cases

United States v. Baker, 63 F.3d 1478 (9th Cir. 1995)

United States v. Spencer, 592 F.3d 866 (8th Cir. 2010)

United States v. Warshak, 631 F.3d 266 (6th Cir. 2010)

III.

Whether the forfeiture money judgments in the amount of \$991,114 imposed against Elder and Solomon should be affirmed.

Cases

United States v. Marquez, 605 F.3d 604 (8th Cir. 2010)

United States v. Spano, 421 F.3d 599 (7th Cir. 2005)

United States v. Huber, 404 F.3d 1047 (8th Cir. 2005)

IV.

Whether the district court abused its discretion when it denied Elder's motion for severance, where Elder suffered no prejudice to his right to a fair trial.

Cases

United States v. Payton, 636 F.3d 1027 (8th Cir. 2011)

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United States v. Midkiff, 614 F.3d 431 (8th Cir. 2010)

STATEMENT OF THE CASE

On February 6, 2008, a grand jury returned an indictment charging appellants Christopher Elder and Troy Solomon, and others, with one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 841(b)(2), 841(b)(3), and 846 (both defendants); eight counts of distribution of controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(D), 841(b)(2), and 18 U.S.C. § 2 (both defendants); two counts of distribution of controlled substances, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(3), and 18 U.S.C. § 2 (Solomon only); and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Solomon only). (D.E. 1.)¹ Following a jury trial involving only Elder and Solomon, on June 30, 2010, the jury returned guilty verdicts on all counts in which each defendant had been charged. (D.E. 350, 356, 357.) These proceedings were held before the Honorable Fernando J. Gaitan, Jr., Chief District Court Judge for the Western District of Missouri.

On May 3, 2011, Judge Gaitan sentenced Elder to 15 months of incarceration, and a two-year term of supervised release. (D.E. 438.)

¹“D.E.” refers to the District Court for the Western District of Missouri’s ECF docket entry number for the referenced document for Case No. 08-00026-03/04-CR-W- FJG.

The district court further ordered Elder to pay a forfeiture money judgment of \$991,114, a fine of \$4,500, and a \$100 special assessment on each count. (D.E. 438, 440.)

On May 19, 2011, Judge Gaitan sentenced Solomon to 24 months of incarceration and a two-year term of supervised release. (D.E. 449.) The district court further ordered Solomon to pay a forfeiture money judgment of \$991,114, a \$5,000 fine, and a \$100 special assessment on each count. (D.E. 444, 449.)

Elder filed a timely notice of appeal on May 9, 2011. (D.E. 441.) Solomon filed a timely notice of appeal on May 19, 2011. (D.E. 447.)

The Government filed protective notices of appeal in both cases on June 1, 2011. (D.E. 454, 455.) However, the Government has elected not to pursue its cross-appeals.

STATEMENT OF THE FACTS

A. Cynthia Martin Meets Troy Solomon

Cynthia Martin was charged in the indictment in this case. She pled guilty pursuant to a plea agreement in December 2008. (Tr. II at 340.)² Martin agreed to cooperate with the Government. (Tr. II at 342-43.)

Martin lived in Belton, Missouri. (Tr. II at 335.) She worked for Treasury Drug for 12 years, eventually becoming the assistant manager. (Tr. II at 336-37.) She met Lynn Rostie at Treasury Drug in the mid-1990s. (Tr. II at 241-42, 337.) Martin and Rostie became friends and kept in touch after Martin left Treasury Drug. (Tr. II at 337.)

In 1997, Martin started work at CIT, which provided financing for manufactured home dealers, RV dealers, and boat dealers. (Tr. II at 338.) She became a credit manager for CIT. (Tr. II at 338.) Martin first met Troy Solomon while working at CIT in 2000. (Tr. II at 339-40.) Martin first met Solomon by phone when Solomon submitted a loan application for a customer of the manufactured home dealership Solomon worked for. (Tr. II at 339.)

²“Tr.” refers to the trial transcript in this case. The roman numeral denotes the transcript volume, followed by the page number where the testimony appears.

Martin and Solomon continued to have telephone contact between 2000 and 2002. (Tr. II at 339-40.)

Martin and Solomon first met in person in Dallas, Texas, in May 2002, at a training conference. (Tr. II at 344.) Martin had taken a job with Countrywide Home Loans by then. (Tr. II at 345.) Solomon was not attending the conference but came up just to see her. (Tr. II at 345.) Solomon and Martin began an intimate romantic relationship at that time. (Tr. II 345.)

Martin made an in-court identification of Solomon. (Tr. II at 345-46.)

Martin met Solomon in New Orleans over Memorial Day weekend in 2002. (Tr. II at 346-47; Govt. Exh. 1177, 1179.)³ Martin paid for Solomon's travel on their trips together at Solomon's request, so that Solomon's wife, Lucy, would not know about the travel. (Tr. II at 349-50.) Solomon reimbursed Martin for these expenses by paying cash, and Solomon paid for trip expenses in cash. (Tr. II at 350.)

Martin traveled to Houston and Galveston with Solomon over the July 4th weekend in 2002. (Tr. II at 350-51; Govt. Exh. 1176.) Martin took pictures of Solomon on the New Orleans and Houston trips. (Tr. II at 352-53;

³“Govt. Exh.” refers to a Government Exhibit. All admitted Government Exhibits have been provided to the Court on CD-ROM discs pursuant to a stipulation among the parties to these appeals.

Govt. Exh. 1180, 601.) While in Houston, Solomon showed Martin the exterior of a house he claimed was his. (Tr. II at 355.) Solomon said he would send Martin pictures of the house, and Martin received pictures from Solomon thereafter. (Tr. II at 356.) Government Exhibit 1185 is the envelope the pictures arrived in, with a return address of “5833 Sunforest, Houston, Texas.” (Tr. II at 356-57; Govt. Exh. 1185.) The pictures inside the envelope depicted the interior of a house with Solomon appearing in some of the pictures. (Tr. II at 357-58; Govt. Exh. 1183.1-1183.11.)

In August 2002, Solomon came to Kansas City to visit Martin. (Tr. II at 358.) Martin paid for Solomon’s travel to Kansas City by credit card and Solomon reimbursed her in cash. (Tr. II at 357-58.) Martin and Solomon’s romantic relationship ended after the Kansas City trip in August 2002. (Tr. II at 359.) They remained friendly and still had telephone conversations about business topics. (Tr. II at 359-60.) During the period August 10, 2004, through November 25, 2005, there were 476 telephonic contacts between Martin and Solomon. (Tr. II at 230; Govt. Exh. 1111.) During the period August 10, 2004, through September 7, 2007, there were 820 telephonic contacts between Martin and Solomon. (Tr. II at 230; Govt. Exh. 1111.)

B. The South Texas Wellness Center Opens and Ascensia Nutritional Pharmacy Is Planned

South Texas Wellness Center (STWC) started operation in approximately April or May 2004. (Tr. III at 472-73.) The clinic was operated by Pleshette Johnson-Wiggins (known then as Johnson) and her mother, Ada Johnson. (Tr. III at 472.) Ada Johnson served as the clinic director and oversaw day-to-day operations. (Tr. III at 472.) Johnson-Wiggins is a licensed chiropractor. (Tr. III at 469.)⁴ STWC was located at 3003 South Loop West, Suite 415, Houston, Texas, on the 4th floor of a professional office building. (Tr. III at 473.)

Johnson-Wiggins was introduced to Solomon because she and Ada Johnson were looking for investors in STWC. (Tr. III at 477-78.) The introduction took place in mid-2004, before Elder was hired at STWC. (Tr. III at 478.) Solomon invested \$25,000 to \$30,000 into STWC in cash. (Tr. III at 478.) No written agreement was entered into to memorialize the investment, but the Johnsons had an oral agreement with Solomon to pay him back once the clinic became profitable. (Tr. III at 479.) Solomon paid the investment in cash payments at different times and in different amounts. (Tr. III at 479-80.)

⁴Johnson-Wiggins testified at trial pursuant to a grant of immunity. (Tr. III at 470.)

The Johnsons would tell Solomon how much they needed and he would pay them. (Tr. III at 480.) The Johnsons counted the money but did not give Solomon a receipt. (Tr. III at 480.) Solomon brought the money himself to STWC. (Tr. III at 481.) The payments started in mid-2004, and ended three to four months after that. (Tr. III at 482.) Solomon did not receive an ownership interest in STWC. (Tr. III at 482.)

When STWC started as a business, Solomon's Ascensia Nutritional Pharmacy (ANP) was not in the building. (Tr. III at 491.) Johnson-Wiggins became aware of ANP being in the same building when construction started. (Tr. III at 491-92.)

Quan Pham is a pharmacist. (Tr. III at 559.) In June 2004, Pham answered an advertisement for a pharmacist position. (Tr. III at 559-60.) She met about the position with Solomon and Philip Parker. (Tr. III at 560.) She made an in-court identification of Solomon. (Tr. III at 560-61.) Solomon and Parker said they wanted to open a door-closed pharmacy that fills prescriptions by fax and then delivers them; no customers come to the pharmacy. (Tr. III at 561.) Pham helped Parker and Solomon fill out application paperwork and allowed her name to be used as the pharmacist-in-charge. (Tr. III at 562.) ANP did not open for business until mid-December 2004. (Tr. III at 562-63.)

C. STWC Hires Elder, and Martin Introduces Solomon to Rostie

STWC needed a medical director to do physical medicine and rehabilitation with Medicare and Medicaid and for other specialties, like family medicine. (Tr. III at 475.) Elder was the second medical director hired for STWC. (Tr. III at 474.) Johnson-Wiggins made an in-court identification of Elder. (Tr. III at 475.)

STWC had hours of operation of roughly 9:00 a.m. to 4:00 p.m. (Tr. III at 475.) Elder's hours at STWC when he started were two days a week in the morning, but over time his hours became less frequent. (Tr. III at 476.) Not a lot of patients would come into STWC, and Elder did not see a lot a patients, some days seeing none. (Tr. III at 476-77.)

Mary Lynn Rostie, referred to as Lynn Rostie, attended the UMKC School of Pharmacy and was first licensed as a pharmacist in 1974. (Tr. II at 238.) After starting as an employee, Rostie purchased The Medicine Shoppe pharmacy located at 547 North Scott in Belton, Missouri, on July 1, 2001. (Tr. I 135; Tr. II at 239.) She was the owner and pharmacist in charge at The Medicine Shoppe. (Tr. I at 136.) Rostie was named in the indictment in this case. She pled guilty pursuant to a plea agreement to conspiracy to distribute

drugs and conspiracy to commit money laundering and agreed to cooperate with the Government. (Tr. II at 240-41.)

In August 2004, Martin lost her job with Countrywide. (Tr. II at 360.) Shortly after that, in August 2004, Solomon contacted her to discuss a business proposition. (Tr. II at 360.) At that time, Solomon worked for a pharmaceutical company selling diabetic meters and monitor strips. (Tr. II at 360.) Solomon asked Martin if she knew any pharmacists who might be interested in mail ordering prescriptions for doctors who had high-profile customers who wanted confidentiality. (Tr. II at 360-61.) Martin then contacted Rostie at The Medicine Shoppe pharmacy in Belton, Missouri, and met with her at her place of business. (Tr. II at 242; 361.) Martin provided Rostie with her Countrywide business card, and on the back she wrote down (832) 794-0470 as a contact number for Solomon. (Tr. II at 242-43, 361-62; Govt. Exh. 602.) Martin also wrote down her own number. (Tr. II at 363; Govt. Exh. 602.) The business card included a list of medications: Lorcet 10/650 #120; Lortab 10/650 #120; Xanax 2 milligram #90; and promethazine. (Tr. II at 243-44, 362; Govt. Exh. 602.) Martin knew that these were pain medications. (Tr. II at 363.) Solomon explained that the medications were for athletes. (Tr. II at 363.)

Rostie then had at least two telephone conversations with Solomon in which they discussed the price of the drugs and how to get them to Houston. (Tr. II at 245.)

D. Prescriptions and Cash Payments Are Sent to Missouri

Martin did not expect any further involvement with the matter, she expected Rostie to contact Solomon and decide whether to do business with him. (Tr. II at 363-64.) Martin, to her surprise, later received a UPS envelope full of money as payment for the prescriptions. (Tr. II at 364-66.) The earliest UPS envelope recorded was received September 2, 2004. (Tr. II at 365; Govt. Exh. 915.) Government Exhibit 915 through Government Exhibit 941 are the UPS records of these shipments. (Tr. II at 365.) After she received the first money shipment, Martin called Solomon, who told her to take the money to Rostie. (Tr. II at 365-66.) Martin took the money to Rostie without argument. (Tr. II at 366.)

Rostie was paid for the prescriptions in cash. (Tr. II at 258.) Martin would bring the cash in an envelope, sometimes within a shopping bag. (Tr. II at 258-59.) Other employees saw Martin come into The Medicine Shoppe to visit Rostie. (Tr. I at 140.) Martin would count the cash, take out her commission, then take the cash to Rostie in its envelope or in a bag from

Lendcare, the company she worked for. (Tr. II at 369.) The amounts would be between \$5,000 and \$15,000. (Tr. II at 259.) Rostie found the payment arrangement to be suspicious. (Tr. II at 259.) Rostie was supposed to receive a check from the STWC for the first shipment, but when no such check arrived she was told that a check would be sent to Martin to cash to make the process quicker. (Tr. II at 259-60.)

Before her initial meeting with Rostie, Solomon told Martin that she was a broker on the prescriptions and that she should receive a commission. (Tr. II at 366.) Martin and Rostie agreed to a \$5 commission per prescription for Martin. (Tr. II at 260, 366.) Martin thought initially that Rostie would pay her the commission, but in fact Solomon instructed her to take her share out of the cash packages once Rostie or Gerstner had told her what the commission would be, before delivery of the remaining cash to Rostie. (Tr. II at 261, 366-67.)

The cash started small in the beginning but became larger over time. (Tr. II at 367.) Martin received a cash shipment once or twice a week from September 2004 through October 2005. (Tr. II at 367-68.) The cash was in denominations of \$20s and \$5s and consisted of old bills banded with rubber bands or bank bands. (Tr. II at 368.)

Martin discussed issues related to the payments with Jill Gerstner, the pharmacy technician at The Medicine Shoppe, and with Solomon, but rarely with Rostie. (Tr. II at 369-70.) Gerstner would tell Martin how many prescriptions had been sent out. (Tr. II at 370.) Solomon would tell Martin when to expect the next money envelope. (Tr. II at 370.) Solomon told Martin not to deposit more than \$10,000 cash into a bank at any one time because it was a big flag. (Tr. II at 370-71.) Martin did not report her commission to the Internal Revenue Service, which was wrong. (Tr. II at 371.)

On September 9, 2004, Rostie sent an invoice for shipped hydrocodone and Alprazolam to STWC. (Tr. II at 262; Govt. Exh. 1197.) No more invoices were sent to STWC because Solomon requested they be sent to him. (Tr. II at 262.)

Jill Gerstner testified that in August 2004, The Medicine Shoppe started filling prescriptions for doctors in Houston, Texas, after Cindy Martin had a meeting with Rostie. (Tr. I at 149.) Martin was a frequent visitor during this time period. (Tr. I at 149.) Martin would bring in prescriptions and payments for prescriptions. (Tr. I at 149.)

By December 2004, to January 2005, Martin realized that something was wrong, but she was making a substantial amount of cash and was unwilling to report the situation to law enforcement and have it stopped. (Tr. II at 371-72.)

The last UPS receipt for a cash shipment is dated October 19, 2005. (Tr. II 372-73; Govt. Exh. 941.) The shipping address on that receipt is 5833 Sunforest, which is the same address as the envelope with pictures Solomon sent her in 2002. (Tr. II at 373; Govt. Exh. 941, 1185.)

From August 2004, to October 2005, The Medicine Shoppe's total deposits equaled \$2,943,653.37. (Tr. IV at 889-90; Govt. Exh. 1143.)

Bagirath "Bobby" Parikh owns a UPS store at 13280 Northwest Freeway, Houston, Texas 77040. (Tr. III at 456.) Parikh knows Solomon and made an in-court identification of him. (Tr. III at 457.) Government Exhibit 915 is a UPS shipping record dated September 2, 2004, of a package sent next day air and due for delivery on September 3, 2004. (Tr. III at 457-58.) The package was sent from Troy Solomon at 7914 Chategu Point Lane, Houston, Texas, 77041, to Cindy Martin, 7906 East 159th Street, Belton, Missouri, 64102-5360. (Tr. III at 458.) The total shipping charge was \$22.36. (Tr. III at 458.)

Government Exhibit 916 is a UPS record for a shipment on September 30, 2004, from Solomon at 5833 Sunforest, Houston, Texas 77092, to Lynn Rostie at The Medicine Shoppe, 547 North Scott, Belton, Missouri. (Tr. III at 458-59.) This package weighed 1/4 pound. (Tr. III at 459; Govt. Exh. 916.) Government Exhibit 922 is a UPS record for a package sent from Solomon to Martin that weighed 1.51 pounds. (Tr. III at 459; Govt. Exh. 922.) Government Exhibit 924 is a UPS record for a shipment of a box, 14 inches by 8 by 3 in size, weighing 2.8 pounds, from Solomon at the 3833 Sunforest address to Martin. (Tr. III at 459-60.)

Solomon was a regular customer of the UPS store and the actual sender of the 30 shipments reflected in the records. (Tr. III at 462-63.) The shipments were already packaged when Solomon brought them in; UPS employees only had to put a label on them. (Tr. III at 463.) Solomon had a credit card on file with the UPS Store which was charged for the shipments. (Tr. III at 465.)

The first prescriptions sent from Missouri to The Medicine Shoppe were 544 original prescriptions written by Christopher Elder. (Tr. II 246.) Through counsel, Elder stipulated at trial that he wrote the original prescriptions that were in evidence from The Medicine Shoppe. (Tr. III at 664; Tr. IV at 900-02.) Rostie had a telephone conversation with Elder and Solomon in which

Elder confirmed that the prescriptions were legitimate ones for his patients.
 (Tr. II at 286-87.) Government Exhibit 1116 is a chart depicting the grouping
 by date dispensed and type of drug for the 544 original prescriptions written
 by Elder and filled at The Medicine Shoppe in Missouri (Tr. IV at 748-49):

CHRISTOPHER ELDER WRITTEN PRESCRIPTIONS DATE RANGE: AUGUST 17, 2004 to OCTOBER 20, 2004 FILLED AT THE MEDICINE SHOPPE IN BELTON, MISSOURI			
Date of Written Prescriptions	Total Number of Patients	Number of Patients Prescribed Both Hydrocodone (120) and Alprazolam (90) Products	Number of Patients Prescribed Promethazine With Codeine (240 ML)
AUGUST 17, 2004	78	63	15
AUGUST 31, 2004	51	51	0
SEPTEMBER 8, 2004	53	53	0
SEPTEMBER 9, 2004	30	30	0
SEPTEMBER 14, 2004	65	65	0
UNDATED (FILLED AT TMS SEPTEMBER 22, 2004)	63	63	0
SEPTEMBER 30, 2004	56	56	0
OCTOBER 19, 2004	69	55	14
OCTOBER 26, 2004	79	53	26

Government Exhibit 1117 is a chart tracking the refills for the groups of patients identified in Government Exhibit 1116. (Tr. III at 749-50.) The prescriptions were refilled as a group up to 10 to 12 times during the life of the conspiracy, meaning that by October 2005 a single Elder prescription could produce over 1,200 tablets of hydrocodone. (Tr. III at 750-51.)

Government Exhibit 1 is the prescription for Amanda Allen, a patient listed in the indictment, whose address, 451 Makey Road, Houston, Texas, is invalid. (Tr. III 725-26.) Allen's address information came to The Medicine Shoppe listed with other Elder patients on a fax sent by Solomon. (Tr. III at 726; Govt. Exh. 49.1.) Government Exhibit 1 includes DEA number and the doctor, Christopher Elder, at 3003 South Loop West, Suite 415, Houston, Texas 77045. (Tr. I at 154.) In the same way, other patients named in counts in the indictment have invalid addresses supplied on lists of addresses faxed to The Medicine Shoppe by Solomon, including Lindsay Lewis (Tr. III at 726; Govt. Exh. 2, 49.1); Mark Ivey (Tr. III at 727-28; Govt. Exh. 3, 51.1); and Cheryl Zarsky (Tr. III at 728-29; Govt. Exh. 4, 51.1). (Tr. II 217-21; Govt. Exh. 1172.)

Government Exhibit 5 is a prescription for Hazel Hollis, written by Elder, for hydrocodone 10/650 and Xanax, dated September 14, 2004, and

filled at The Medicine Shoppe. (Tr. I at 160-61; Tr. III at 753-54, 756.) The date of the Hollis prescription was September 14, 2004, but Hollis had died on March 9, 2004. (Tr. III at 754; Govt. Exh. 5, 33.)

Government Exhibit 6 is an original prescription for Mary Gaitan Perez, written by Elder, for Lorcet 10/650 and Xanax, two milligrams, written September 14, 2004, and filled at The Medicine Shoppe. (Tr. I at 163; Tr. III at 754-56.) Gerstner verified Government Exhibit 6 with Solomon by telephone, telling him how much was filled and the total amount of money the prescriptions cost. (Tr. I at 163.) Perez died May 21, 2004, but the date of her prescription was September 14, 2004. (Tr. III at 755; Govt. Exh. 5, 34.)

In the Government's rebuttal case, Doris Cooks testified that her name was used on a prescription written by Elder at STWC and sent to Missouri, Government Exhibit 37.13, and her driver's license was also sent to Missouri, Government Exhibit 1188.8. (Tr. VI at 1374-77.) Cooks testified that she had never seen Elder, or been to STWC, or had a pharmacy in Missouri fill a prescription for her, or ever taken at least one of the drugs on the prescription. (Tr. VI at 1376-80.)

Rostie verified the prescriptions with Solomon, including dates as the original prescriptions were undated, and Solomon told her what date to

use. (Tr. II 248-49.) For example, Government Exhibit 36.21 is an original prescription in the name of Sue Gibson dated August 17, 2004, for hydrocodone 10/650 and Alprazolam 2 milligrams. (Tr. II at 246-47.) Rostie verified the prescription by phone with Solomon on August 18, 2004, and indicated that the substitution of the generics hydrocodone and alprazolam was okay for the brand names Lortab and Xanax. (Tr. II at 247.) The prescription was filled August 18, 2004. (Tr. II at 247-48.) Government Exhibit 38 consists of prescriptions faxed from Solomon to The Medicine Shoppe, and same prescriptions in the original, written by Elder and filled by Rostie on September 1, 2004, after verification by telephone with Solomon. (Tr. II at 250-52; Govt. Exh. 38.) Government Exhibit 37 consists of prescriptions written by Elder on August 31, 2004, and filled by Rostie on September 1, 2004, after verification by telephone with Solomon. (Tr. II at 252-53; Govt. Exh. 37.) Government Exhibit 42.51 is a prescription written by Elder for Lorcet 10/650 and Xanax 2 milligrams. (Tr. II at 253; Govt. Exh. 42.51.) Rostie filled in the date written as September 14, 2004, on instruction from Solomon, resulting in the date written and the date filled being the same date. (Tr. II at 253-54; Govt. Exh. 46.51.)

Gerstner, who was a pharmacy technician and The Medicine Shoppe's assistant manager, talked to Solomon by telephone whenever there were shipments going out or if Solomon wanted to verify receipt of a fax. (Tr. I at 148, 163-64.) Gerstner was primarily responsible for processing the Texas prescriptions. (Tr. I at 137-38.) Gerstner updated Solomon on when shipments were going out and how much was owed on the account. (Tr. I at 164.) Between August 16, 2004, and October 26, 2005, there were 12 telephonic connections where Solomon's home number called The Medicine Shoppe; 34 where The Medicine Shoppe called Solomon's home number; 122 fax-to-fax connections from Solomon's home fax to The Medicine Shoppe; and 85 fax-to-fax connections from The Medicine Shoppe to Solomon's home fax number. (Tr. II at 230-231; Govt. Exh. 1113.) Between July 23, 2004, and February 23, 2006, there were 141 telephone connections between Solomon's cell phone and The Medicine Shoppe, and 173 telephone connections between The Medicine Shoppe and Solomon's cell phone. (Tr. II at 232; Govt. Exh. 1194.)

Solomon sent Rostie a list of addresses or driver's licenses with addresses because the original prescriptions did not have address information. (Tr. II at 249-50.) Government Exhibit 49 is a fax list of information for patients that was missing from the prescriptions, such as address, city, state,

zip, and date of birth. (Tr. I at 166) Solomon's name is listed on the fax header of Government Exhibit 49. (Tr. I at 166) Gerstner would contact Solomon to provide the information if it was missing on the prescriptions, and Solomon would fax it. (Tr. I at 167.) The first three numbers of the originating fax on Government Exhibit 49 are 281, the last four are 9912. (Tr. I at 167.) The fax was dated October 19, 2004, and relates to prescriptions written by Elder, including Amanda Allen. (Govt. Exh. 49.) The fax is handwritten with two columns on each page divided with a line down a middle and lines drawn across to form seven boxes on each side, 14 total on each page. (Govt. Exh. 49.) Each box contains the name, address, and date of birth of each patient, and each box also includes a notation for the drug the patient received. (Govt. Exh. 49.) The patients are grouped by drug with only one type of drug appearing on each page, so that pages one and two are all denoted "L/C," for Lorcet (a hydrocodone product), pages three and five are all "L/T," for Lortab (a different hydrocodone product), and page four are all "Prometh [c with a line over it] 8 oz," for Promethazine with Codeine, a cough syrup. (Govt. Exh. 49.)

DEA Diversion Investigator Judy Watterson testified that an example of Solomon's handwriting is found on Govt. Exh. 1885, the envelope sent to Martin containing photographs. (Tr. IV at 814.) The return address contains

a distinctive “HOU” written as an abbreviation for “Houston,” and this usage is consistent with other known writings of Solomon. (Tr. IV at 814.) The same “HOU” appears on the Amanda Allen entry and other entries on that fax sheet with addresses. (Tr. IV at 815; Govt. Exh. 49.) In addition, Government Exhibit 1188 is an envelope mailed from Houston to The Medicine Shoppe that contained photocopied driver’s licenses for patient identification and addresses. (Tr. IV at 822.) On Government Exhibit 1188, Houston was abbreviated “HOU,” and the envelope was incorrectly addressed to “Lynn Rostic” rather than Lynn Rostie. (Tr. IV at 822.) UPS records admitted through UPS Store owner Bobby Parikh contained the same misspelling, and Parikh testified that Solomon sent the UPS shipments. (Tr. IV at 822-23; Govt. Exh. 916.)

Government Exhibit 51 is a handwritten fax with names. (Tr. I at 167-68.) Government Exhibit 51 is dated October 24, 2004, and relates to Elder’s original prescriptions. (Govt. Exh. 51.) Government Exhibit 51 follows the same pattern as Government Exhibit 49. Page one of the eight-page fax is Lortab only, pages two through five are all Lorcet only, pages six and seven are Promethazine with codeine, and page eight is split with the top six entries

on the page being Promethazine with Codeine and the bottom four being Lorcet. (Govt. Exh. 51.)

Government Exhibit 37.66 is a prescription written by Elder, dated August 31, 2004, and filled September 1, 2004, for Cache Doria Perry. (Tr. III at 720-21.) The patient's address on the prescription is "5833 Sunforest Drive, Houston, Texas," the same address that appears on the return address of Government Exhibit 1185, which is the envelope in which Solomon mailed photographs to Martin. (Tr. III at 720.) Solomon was the owner of 5822 Sunforest and in 2004 and 2005 Delmon Johnson and Parker lived at that address. (Tr. III at 721.) Cache Doria Perry, the patient listed on Government Exhibit 37.66, did not live at that address. (Tr. III at 721.)

Government Exhibit 37.64 is a prescription written by Elder for Lorcet and Xanax, dated August 31, 2004, for patient "Cecilia Paz," at the address "1305 7th Street, Corpus Christi, Texas." (Tr. III at 723-24.) Government Exhibit 35.67 is a prescription attributed to Dr. Juan Botto, for promethazine with codeine, undated but notated by Rostie with the date January 5, 2005, also written for "Cecilia Paz" now at the address "1210 7th Street, Houston, Texas." (Tr. III at 724.)

Once the Elder original prescriptions ended in October 2004, Rostie and Solomon began refilling the Elder prescription by fax communication, primarily. Rostie came up with the idea to send Solomon the faxes with the lists of prescriptions up for refill from The Medicine Shoppe printed reports after Solomon had called her to request that Rostie fill prescriptions that were up for refill. (Tr. II at 297.) Rostie sent refill authorization faxes in order to get the signature of the doctor to show actual authorization of the refills. (Tr. II at 263; Govt. Exh. 478.) Solomon requested that the faxes be sent to him, saying that the quickest way to go back and forth to the doctor was to go through Solomon. (Tr. II at 263.) Solomon requested that Rostie generate the refill requests on the Elder prescriptions. (Tr. II at 274.) No patients called Rostie and requested refills. (Tr. II at 277.)

Government Exhibit 456 is a 10-page fax dated November 12, 2004, from Rostie to Solomon requesting Elder's authorization for prescription refills for prescriptions originally written September 6, 2004, through September 13, 2004. (Tr. I at 169.) Government Exhibit 456 contains a list of prescriptions to be refilled by patient, quantity dispensed, and type of drug. (Tr. I at 170.)

Government Exhibit 458 is a fax dated November 12, 2004, from Solomon to Rostie, concerning prescription refills. (Tr. I at 170.) Government

Exhibit 458 was faxed from Solomon's fax number, (281) 469-9912. (Tr. I at 170-71.) The signature at the bottom of Government Exhibit 458 showed that the doctor had approved the prescriptions for refill.⁵ (Tr. I at 171.) The Medicine Shoppe filled the prescription on November 15, 2004. (Tr. I at 171.)

Government Exhibit 459 is another fax from The Medicine Shoppe with a print selected prescriptions report attached; the prescriptions are for hydrocodone and alprazolam. (Tr. I at 171-72.)

Government Exhibit 460 is an incoming fax on which Elder approved prescription refills which were filled by The Medicine Shoppe on November 30, 2004. (Tr. I at 172-73.) The note from Elder is "Prometh with codeine ok," meaning The Medicine Shoppe could fill the promethazine with codeine prescriptions. (Tr. I at 173)

Government Exhibit 461 was originally faxed from The Medicine Shoppe to Solomon at (281) 469-9912. (Tr. I at 173.) That fax was then faxed back to The Medicine Shoppe from South Texas Wellness Center at the number (713) 839-1520. (Tr. I at 173-74.)

⁵There was an issue at trial as to whether Elder had initialed all of the faxes, some of the faxes, or none of the faxes. The Government argued to the jury that the records supported the conclusion that Elder had at least initialed the refill faxes dated during the time Elder still worked at STWC. However, for reasons discussed below, ultimately whether Elder or another conspirator initialed the faxes is legally irrelevant.

On Government Exhibit 461, Gerstner referenced a telephone conversation between her and Solomon about sending a fax for refills. (Tr. I at 174-75.) Gerstner wrote on Government Exhibit 461, “PS, will you need prometh codeine with your hydro [hydrocodone], Alprazolam scripts?,” and written in response on the return fax was “Prometh with codeine all, pints on 14 with prometh codeine, per Troy.” (Tr. I at 175.)

Government Exhibit 462 is a fax back and forth with Solomon, faxed from the Houston number (281) 469-9912. (Tr. I at 175.) Gerstner asked Solomon to have Elder sign off on the refill authorizations, and the fax was returned with the sign off. (Tr. I at 175-76.)

Government Exhibit 466 is another refill authorization fax dated December 9, 2004. (Tr. I at 176.) The refilled prescriptions were shipped December 13, 2004, after receipt back of the fax from Houston approving the refills. (Tr. I at 176.)

Government Exhibit 467 is a refill authorization fax dated December 13, 2004, returned with approval for the refills. (Tr. I at 177.)

Elder left STWC toward the end of 2004. (Tr. III at 477.) After Elder stopped writing prescriptions for The Medicine Shoppe, Rostie also filled prescriptions for Dr. Peter Okose and Dr. Juan Botto. (Tr. II at 257.) Botto’s

prescriptions started in 2005. (Tr. II at 258.) Dr. Botto believed that his prescription pads had been stolen sometime in the past. (Tr. IV at 815.) Government Exhibit 35.1 is the first prescription in the series of the Botto prescriptions. (Tr. IV at 815.) There appears to be more than one set of handwriting on the prescription, with the text of the prescription section looking different from the address section. (Tr. IV at 816.) The address section abbreviates the city of Houston as “HOU” and appears similar to the envelope sent to Martin by Solomon, Government Exhibit 1185. (Tr. IV at 816.)

Rostie had a telephone conversation with Okose in which Okose assured her the prescriptions were legitimate. (Tr. II at 290.)

Frank Van Fleet is an inspector with the Missouri Board of Pharmacy. (Tr. II at 412.) On October 20, 2005, Van Fleet conducted a routine inspection of The Medicine Shoppe pharmacy in Belton, Missouri. (Tr. II at 413-14.) In his initial inspection, Van Fleet focused on the Okose prescriptions, which were faxed in groups to The Medicine Shoppe. When Van Fleet first looked at the controlled substances prescription files, he immediately noticed that the prescriptions were all written for the same quantity, Lorcet 10/650, the strongest possible schedule three prescription, from the same doctor, on the

same date, faxed from Houston Texas, all of which was unusual. (Tr. II at 416.)

Van Fleet found it very suspicious that the faxes from Houston for certain days that had all of the patients last names starting with only one or two letters of the alphabet. (Tr. II at 433-34.) For example, on Government Exhibit 1085, faxed prescriptions sent April 12, 2005, from Houston written by Dr. Okose, were all for the same quantity, strength, and directions, and 32 of the 56 names had the last name Johnson. (Tr. II at 419.) Government Exhibit 520 is a refill authorization fax dated April 12, 2005, from (281) 469-9912 for patients of Dr. Okose. (Tr. I at 179.) The fax includes prescriptions for numerous patients with the last name of “Johnson” or the letter “J” all written on the same date, April 7, 2005. (Tr. I at 179-81.) Similar examples include Okose prescriptions faxed April 16, 2005, with the patients’ last names starting with “T,” (Govt. Exh. 521), April 18, 2005, for the letter “J” (Govt. Exh. 522), April 18, 2005, for the letter “T” again (Govt. Exh. 523), May 20, 2005, for the letter “L” (Govt. Exh. 524), May 24, 2005, for the letter “M” (Govt. Exh. 525), June 6, 2007, for the letter “W” (Govt. Exh. 526), and June 14, 2005, for the letter “B.” (Govt. Exh. 527.)

Van Fleet also looked at the refill faxes. It was odd that every patient was getting refills at the same time, as opposed to individual patients requesting refills. (Tr. II at 429-30; Govt. Exh. 1098.)

In addition, DI Watterson reported that Okose patient Charles McKelvey died February 9, 2005, but had his prescription dated on May 24, 2005. (Tr. III at 756.) Okose patient Carol Danage died November 7, 2004, but had her prescription written on January 18, 2005. (Tr. III at 756.)

As a result of his findings at The Medicine Shoppe, Van Fleet faxed Government Exhibit 1087 as a letter to Robert Kleman, the office manager for Dr. Okose, asking about examples of the Okose prescriptions found at The Medicine Shoppe. (Tr. II at 420-21.) Kleman testified that he took Van Fleet's fax to Okose. (Tr. IV at 877-78.) A few hours later, Okose brought Kleman a typewritten letter, Government Exhibit 1088, and asked Kleman to send it to Van Fleet. (Tr. IV at 878.) In Government Exhibit 1088 Dr. Okose said that the prescriptions were legitimate and he approved the faxes, although the office no longer sends faxed prescriptions. (Tr. II at 422.) Van Fleet did not believe the response faxed back by Kleman and he contacted DEA Diversion Investigator (DI) Judi Watterson. (Tr. II at 423.) DI Watterson initiated a

federal investigation of the matter. (Tr. III at 691-92.) She is the chief case agent. (Tr. III at 692.)

Van Fleet ran reports from The Medicine Shoppe's records. Government Exhibit 1091 is a summary from The Medicine Shoppe's computer system for the prescribing of hydrocodone/APAP 10/500 for different time periods. (Tr. II at 424.) Over a 12-month period The Medicine Shoppe wrote 4,466 prescriptions for hydrocodone/APAP 10/500 resulting in 534,555 dosage units. (Tr. II at 425; Govt. Exh. 1091.) APAP is the pain reliever acetaminophen. (Tr. II at 427.) Over the 359 day period The Medicine Shoppe averaged 12.4 hydrocodone/APAP 10/650 prescriptions representing 1,489 tablets per day. (Tr. II at 425; Govt. Exh. 1091.)

Alprazolam is a Schedule IV drug used for anxiety. (Tr. II at 426.) For the 12-month period of the report The Medicine Shoppe prescribed 257,700 dosage units of Alprazolam 2 milligrams. (Tr. II at 426; Govt. Exh. 1091.)

Between January 1, 2005, and October 10, 2005, The Medicine Shoppe filled 5,933 new prescriptions for Dr. Okose for hydrocodone/APAP 10/500 and 10/650, all of which were cash prescriptions without insurance. (Tr. II at 426-27; Govt. Exh. 1092.)

Between January 1, 2005, and October 10, 2005, The Medicine Shoppe filled 14,636 new prescriptions and 15,504 total prescriptions for Dr. Elder for hydrocodone/APAP 10/500 and 10/650, Alprazolam, and promethazine with codeine, all of which were cash prescriptions without insurance. (Tr. II at 428-29; Govt. Exh. 1092.) Van Fleet, himself a pharmacist, testified that Promethazine with codeine is a cough medicine. (Tr. II at 436.) It would not be prescribed for pain. (Tr. II at 436-37.)

Between January 1, 2005, and October 31, 2005, Rostie Enterprises (The Medicine Shoppe in Belton) purchased 1,932,300 units of hydrocodone, making it the number one purchaser of hydrocodone in Missouri during that period, purchasing over a million more dosage units than the number two pharmacy. (Tr. III at 605-06; Govt. Exh. 1119.) The average purchase of hydrocodone for Missouri pharmacies during this time period was 93,799 units. (Tr. III at 609; Govt. Exh. 1201.) From August 1, 2004, through December 31, 2004, Rostie Enterprises purchased 223,900 units of hydrocodone, making it the third highest purchaser of hydrocodone among Missouri pharmacies during that time period. (Tr. III at 607; Govt. Exh. 1174.) The average for Missouri pharmacies purchases of hydrocodone during this time frame was 34,982 units. (Tr. III at 608-09; Govt. Exh. 1200.)

E. Medicine Shoppe Drug Shipments to Houston

The Medicine Shoppe sent the shipments of drugs to South Texas Wellness Center (STWC). (Tr. I at 174.) Solomon requested that the drugs be shipped to STWC Center. (Tr. II at 262-63.) Rostie had an account with FedEx that she used for these shipments. (Tr. II at 255-56.) As an example, Government Exhibit 621 is a FedEx shipment from Rostie at The Medicine Shoppe to Elder at 3003 South Loop West, Suite 415, Houston, Texas, for a shipment of drugs. (Tr. II at 257; Govt. Exh. 621.)

According to Johnson-Wiggins, the box deliveries to STWC started in the middle part of 2004. (Tr. III at 492.) Solomon had mentioned the boxes before the deliveries started and had asked that if there was no one at Ascensia Nutritional Pharmacy to receive the boxes if STWC could sign for them. (Tr. III at 493.) Solomon said the boxes contained vitamins and supplements. (Tr. III at 494.)

Elder received a FedEx box sometime in the middle part of 2004, addressed to him. (Tr. III at 497-98.) Elder took the box and left the STWC suite headed out to where the elevators and ANP were located. (Tr. III at 498.) According to a FedEx record keeper, a "C. Edon" signed for Government Exhibit 625, a FedEx delivery to South Texas Wellness Center, 3003 South

Loop West, Suite 415, Houston. (Tr. II at 324-25.) The FedEx delivery person sometimes puts their best guess as to the name of the signer into the record. (Tr. II at 327.)

On other occasions, when FedEx boxes came to STWC they were taken up to ANP by an STWC employee, Carlos. (Tr. III at 497.)

In 2004 and 2005, STWC had no relationship with an out-of-state pharmacy. (Tr. III at 513.) Original prescriptions like the ones found at The Medicine Shoppe would normally have been given directly to a patient to fill, but by sometime in 2005 STWC started faxing prescriptions directly to pharmacies in order to avoid problems with duplication of the prescriptions by patients. (Tr. III at 514-15, 540.) STWC never dispensed medicines to patients. (Tr. III at 557.) STWC never ordered medicines for patients, had them delivered back to clinic, and then dispensed to patients. (Tr. III at 557.) In an interview, Elder also said that he wrote prescriptions for patients at STWC and that the patients left with them. (Tr. IV at 795.)

At some point, the suite number on the shipments changed to Suite 450 rather than Suite 415. (Tr. II at 258.) Solomon instructed Rostie to make this change, telling her that there was no one at Suite 415 to sign for the packages in the morning. (Tr. II at 258.) In fact, on January 17, 2005, a FedEx box was

shipped to STWC at Suite 415, addressed to Elder. (Tr. III at 495-96; Govt. Exh. 682.) On January 18, 2005, the next FedEx box was shipped to the same address but a new suite number, 450. (Tr. III at 496; Govt. Exh. 683.)

Once ANP opened in December 2004, pharmacist Quan Pham only filled a few prescriptions written by Elder, for diet pills and hormone replacement. (Tr. III at 586.)

On September 28, 2005, ANP employee Lillian Zapata signed for a box addressed to Solomon at the South Texas Wellness Center, Suite 450. (Tr. IV at 848; Govt. Exh. 894.) Suite 450 was ANP's address. (Tr. IV at 848.) These packages were cardboard boxes a little bit bigger than a box that holds a refill of copy paper. (Tr. IV at 849.) She would let Delmon Johnson know when these boxes arrived. (Tr. IV at 850.) Some boxes Delmon Johnson opened and they contained prescription bottles from wholesalers; other boxes were placed in the pharmacy main office. (Tr. IV at 850.)

Delmon Johnson delivered prescriptions for ANP, but he did not deliver prescriptions that were not from ANP. (Tr. IV at 779.) Delmon Johnson did not make deliveries of controlled substances, including hydrocodone. (Tr. IV at 811-12.) According to Delmon Johnson, the boxes of drugs from Missouri were loaded into Solomon's car and Parker's car. (Tr. IV at 813.) Delmon

Johnson said that Philip Parker left ANP around April 2005, and was no longer physically present in the pharmacy after that time. (Tr. IV at 813.)

DI Watterson selected a group of patient names from the prescriptions written by Elder and sent to The Medicine Shoppe in Missouri, and she sent the list to both STWC and Westfield Medical Clinic (a later Elder employer, to be discussed below) and requested the return of any patient files for those names. (Tr. III at 730; Govt. Exh. 1198.) Neither STWC nor Westfield had any patient files in the names listed, and none were returned to Watterson. (Tr. III at 730-31.) Johnson-Wiggins testified that STWC received a request from the Government to produce patient files for the names listed on Government Exhibit 1198, pages three and four. (Tr. III at 502-03.) STWC was unable to locate the requested files. (Tr. III at 503-04.) The patient files were stored at STWC in a secured back office. (Tr. III at 503.) Patient files were created after they filled out an application, then filed alphabetically and pulled on subsequent visits. (Tr. III at 503-04.) Johnson-Wiggins asked Elder about the charts, and Elder said that they had been in his possession but that they had been lost when his vehicle was either set on fire or stolen. (Tr. III at 504-06.) Johnson-Wiggins asked Elder about why the Government might have requested these files, and Elder said he did not know. (Tr. III at 507-09.)

F. Elder and STWC, Relationship to Solomon

Solomon and Elder appeared to Johnson-Wiggins to be friends. (Tr. III at 486.) Elder may have mentioned socializing with Solomon. (Tr. III at 490.) Solomon would come to STWC and meet with Elder in one of the offices. (Tr. III at 491.)

When Elder started working at STWC, Solomon said he knew someone who could print prescription pads for Elder, and the pads were printed by Solomon's connection. (Tr. III at 509.) A box of prescription pads was provided to Johnson-Wiggins and her mother, Ada Johnson. (Tr. III at 509-10.) The prescriptions in evidence written by Elder were written on the prescription pads provided by Solomon. (Tr. III at 510; Govt. Exh. 37.01-37.81.) Each pad had 25 to 50 prescription sheets. (Tr. III at 510.) The prescription pads were locked up and Elder would request a new pad from Johnson-Wiggins or Ada Johnson when needed. (Tr. III at 510-11.) At times Elder would leave with the pad or forget to return it, and he would then request a new one the next day even though he saw very few patients in his practice. (Tr. III at 511.) Johnson-Wiggins questioned Elder about his need for a new pad, but Elder either said he had forgotten it or he would brush off the question. (Tr. III at 511-12.)

Solomon proposed to the Johnsons that income from STWC be shared among the Johnsons, Solomon, and Elder. (Tr. III at 484.) There were different percentages broken down depending on the different sources of revenue, including Medicare, weight management, and pain management. (Tr. III at 484.) The Johnsons discussed the proposal with Solomon and Elder at the clinic. (Tr. III at 485.) Solomon and Elder were the two people asking to receive a percentage of the clinic profits. (Tr. III at 485.) The Johnsons agreed to the revenue-sharing proposal but it did not last long. (Tr. III at 486.)

Elder left STWC in December 2004. (Tr. III at 525.) Solomon ceased being an investor in STWC at the end of 2004, about the same time that Elder left. (Tr. III at 489.)

Between August 3, 2004, and December 27, 2004, there were 549 telephone connections between Elder's cell phone and Solomon's cell phone, and 14 between Elder's cell phone and Solomon's home phone. (Tr. II at 231-32; Govt. Exh. 1193.)

G. The ANP Pharmacy in Houston

Quan Pham started working at ANP in the middle of December 2004, which is when ANP first opened for business. (Tr. III at 562-63.) Parker and

Solomon were the co-owners of ANP. (Tr. III at 564.) Delmon Johnson also worked at ANP as a guard when it first opened. (Tr. III at 563-64.)

Pham filled prescriptions for Dr. Okose that were delivered to ANP, not brought in by patients. (Tr. III at 565-66.) From her first day on the job, there would be 150 prescriptions waiting for her first thing in the morning. (Tr. III at 566.) The prescriptions were on pre-printed forms for hydrocodone and soma, with all 150 being for those two drugs. (Tr. III at 566-67.) It would take Pham all day to fill these prescriptions. (Tr. III at 567.) Once she filled one set of prescriptions, a new set of prescriptions would be provided for her to fill. (Tr. III at 571.) The number in the stack varied, from less than 150 to as many as 200. (Tr. III at 571.) Patients did not pick up these prescriptions. (Tr. III at 567.) Instead, the prescriptions were packed in a big box by Delmon Johnson and Solomon. (Tr. III at 56-687.) Solomon and Parker told Pham the prescriptions would be delivered to the doctor's office and dispensed to patients. (Tr. III at 567-68.) The type of box used was a brown colored shipping box. (Tr. III at 568.) Solomon and Delmon Johnson took the box when it was filled and completed. (Tr. III at 568; 588.)

Pham called Dr. Okose with questions on several occasions, but Parker told her Dr. Okose was upset because she was calling his office, and he asked her to ask Parker or Solomon the questions instead. (Tr. III at 570.)

Pham was uncomfortable filling the prescriptions without seeing the patients. (Tr. III at 571.) She raised her concerns to both Parker and Solomon, and they both told her it was alright to fill the prescriptions. (Tr. III at 572-73.)

On January 21, 2005, Pham resigned from ANP. (Tr. III at 573.) In her resignation, she said she was resigning because of an illness, although that was not in fact the case. (Tr. III at 573-74; Govt. Exh. 984.) She actually resigned because she was uncomfortable filling prescriptions for approximately 20,000 dosage units of Vicodin (hydrocodone) and several thousand dosage units of Soma each day, and she thought it was wrong. (Tr. III at 574.)

Robert Klemen worked for the Universal Medical Clinic owned by Okose. (Tr. IV at 870.) Okose was a general practitioner. (Tr. IV at 871.) In 2003, the practice turned into a pain management practice with an increasing caseload and cash as the method of payment. (Tr. IV at 872.) Okose opened up a second clinic down the street from the first clinic. (Tr. IV at 872.)

Klemen became the office manager for Universal Medical Clinic. (Tr. IV at 873.) In this capacity, Klemen handled the cash proceeds of the

clinic, which he turned over to Okose at the end of the day. (Tr. IV at 873.) The cash proceeds would total \$2,400 to \$3,500 per day. (Tr. IV at 873.) In a two-year period the clinic made around \$10 million. (Tr. IV at 875.) Okose would tell Klemen how much cash to deposit and then Okose would take the rest of the cash himself. (Tr. IV at 878-79.)

When Okose left town, he would leave an ample supply of pre-signed prescription pads for the physician's assistants to use. (Tr. IV at 875.) If they ran out, Klemen could go into the safe and retrieve more prescription pads. (Tr. IV at 875.)

Universal Medical Clinic did not dispense drugs to patients. (Tr. IV at 876.) Pharmacies did not make deliveries of controlled substances to the clinic. (Tr. IV at 876.) A slow day at the clinic was 75 patients, while a busy day was 200 patients. (Tr. IV at 874.) Patients were given a paper prescription which they could have filled anywhere. (Tr. IV at 874.)

Lillian Zapata applied in early 2005 for a position with ANP as a pharmacy technician. (Tr. IV at 827-38.) She interviewed with Solomon, Parker, and Delmon Johnson. (Tr. IV at 838.) She was hired as a pharmacy technician and started with ANP in January 2005. (Tr. IV at 839.) When

Zapata first started Quan Pham was the pharmacist-in-charge, but the overlap with Pham was for less than a month. (Tr. IV at 840.)

Zapata used large counting machines to automatically fill prescriptions more quickly than could be done manually. (Tr. IV at 839-40.) She would place the substances in the machines, which included Lortab, Lorcet, Xanax, Soma, and Amoxicillin. (Tr. IV at 840.)

After Pham left, it took at least a month for ANP to hire a new pharmacist. (Tr. IV at 841.) During that time, ANP had no pharmacist on the premises; Zapata filled the prescriptions without a pharmacist's approval. (Tr. IV at 841.) Zapata voiced her concerns about the absence of a pharmacist and about her role filling the prescriptions even though she was fresh out of pharmacy tech school. (Tr. IV at 841-42.) Solomon's response was that they were in the process of hiring a pharmacist. (Tr. IV at 842.) ANP hired a pharmacist, Bede Nduka, in about March 2005. (Tr. IV at 842.)

Solomon and Delmon Johnson directed Zapata to pre-fill prescriptions. (Tr. IV at 843.) Pre-filled prescriptions were vials filled with either Lortab, Lorcet, or Xanax before an actual prescription for a patient was submitted, which would then be stocked and shelved. (Tr. IV at 842-43.) Pre-filled prescriptions also included promethazine with codeine, which was a liquid

syrup. (Tr. IV at 843.) Zapata worked late one night and on weekends in order to pre-fill the vials. (Tr. IV at 843.)

Upon Zapata's arrival in the morning, Delmon Johnson would come from the office with a stack of prescriptions, usually about 120 of them. (Tr. IV at 844, 864.) All of the prescriptions came from Dr. Okose. (Tr. IV at 845.) They were written for Lorcet, Lortab, Xanax, and Soma. (Tr. IV at 844.) Zapata asked Delmon Johnson about these prescriptions, and she was told that the prescriptions were for patients of Okose who were too sick to come into the pharmacy, and that the prescriptions would be boxed up and delivered back to Dr. Okose's office. (Tr. IV at 845-46.) Zapata would prepare the prescriptions in individual bags, then place those bags into a small moving-type box, which Delmon Johnson would tape up. (Tr. IV at 846-47.) The box would be placed into a corner of the office and would be gone at some point. (Tr. IV at 847.)

At times the computer would kick back an Okose prescription because it was too soon to refill or the patient already had a prescription. (Tr. IV at 847.) Zapata would tell Delmon Johnson when this happened, and he would replace the rejected prescription with a new prescription from the office. (Tr. IV at 848.)

Bede Nduka, the pharmacist-in-charge at ANP, would work three to four hours a day. (Tr. IV at 850.) Nduka would sit in the back corner, sometimes on the phone. (Tr. IV at 851.) Nduka did not check the prescriptions filled by Zapata and he did not initial them. (Tr. IV at 851.) After Nduka's arrival, ANP started doing business with STWC patients who brought in prescriptions for Lortab and Lorcet. (Tr. IV at 851.) The patients would come in groups three to four times a day and meet with a "leader" who would actually pay for the prescriptions. (Tr. IV at 852.) Zapata described the patients who had the prescriptions in hand as "crackheads," and she found the situation suspicious. (Tr. IV at 852.) Solomon or Delmon Johnson would say to hurry up and fill their prescriptions because they did not want these kind of people in their lobby. (Tr. IV at 852.)

Zapata took a call from someone who identified himself as Okose, who asked for Nduka. (Tr. IV at 854.) Solomon said that Parker knew Okose first and he introduced Solomon to Okose. (Tr. IV at 854.) Solomon said Parker's name was used on business documents because he was an attorney, and if anything went down Parker's name would be on the business papers. (Tr. IV at 854.)

In late February or early March Zapata began dating Solomon. (Tr. IV at 854.) About a month later Solomon gave Zapata a car. (Tr. IV at 855.) Zapata would sometimes drive around with Solomon in his car, a BMW. (Tr. IV at 855.) On one occasion in April or May, Solomon drove to a part of Houston Zapata considered to be “ghetto,” where Solomon pulled over to the side and another vehicle pulled behind them. (Tr. IV at 855.) Solomon got out of the car, opened the back, took a box the size of a small moving box out, and handed it to a black male. (Tr. IV at 855-56.) Words were exchanged but Zapata did not know what was said. (Tr. IV at 855.) When Solomon got back into the vehicle, he said to Zapata, “I bet you didn’t know you were traveling with three million dollars.” (Tr. IV at 856.) Zapata was surprised by this statement. (Tr. IV at 856.) On other occasions Solomon said that he had made his first million by age 30, and he claimed that money was not an issue. (Tr. IV at 856.)

In the Spring of 2005, April or May, Solomon and Parker had an argument about Zapata’s timecard, which concluded with Solomon ripping up the timecard in front of Parker. (Tr. IV at 857-60.) Before the time of the argument Parker was in the office as much as Solomon and Delmon Johnson,

but after the argument he came to the office much less, perhaps two days a week. (Tr. IV at 858.)

Zapata left ANP's employment in October 2005. (Tr. IV at 856.) She left because what was going on in the pharmacy did not seem right, and because she fell out with Solomon. (Tr. IV at 856.)

Delmon Johnson testified in Solomon's case. (Tr. V at 996.) Johnson confirmed that he lived in the townhouse at 5833 Sunforest in Houston, which was owned by Solomon. (Tr. V at 1025.) Johnson lived there with Parker until Parker moved out. (Tr. V at 1026.)

Johnson confirmed that ANP did not open for business until late December 2004 and did not have patients or fill prescriptions before that time. (Tr. V at 1034.) Johnson said that Solomon and Parker had an argument in 2005 and that Parker came into the business less frequently after the argument. (Tr. V at 1027-29.) Johnson placed the argument as occurring in August, although he admitted he told DI Watterson in interviews a few weeks before trial that it happened in April. (Tr. V at 1028-29.)

Johnson recalled the FedEx packages, which he told DI Watterson he knew came from a pharmacy in Belton, Missouri. (Tr. V at 1030, 1034.) The packages started arriving in September even though ANP was not yet open for

business. (Tr. V at 1034-35.) Johnson signed for 69 of the packages himself. (Tr. V at 1030.) At first the packages were addressed to Elder, but later they were addressed to Solomon. (Tr. V at 1031.) Johnson would pick up the packages from STWC when instructed, and both Parker and Solomon gave him such instructions. (Tr. V at 1030-31.) Johnson placed the packages into Parker's car when Parker directed him to, and into Solomon's car when Solomon directed him to. (Tr. V at 1031-32.) He does not know where Parker or Solomon took the packages. (Tr. V at 1032.) He did not deliver any medication from the packages himself, or deliver any medication to any STWC patients. (Tr. V at 1032-33.)

Johnson also described that ANP filled the stacks of pre-printed Okose prescriptions for hydrocodone and alprazolam. (Tr. V at 1035-36.) ANP kept a supply of fairly sizeable boxes, and Johnson would assist in constructing a box and then filling it with hydrocodone and alprazolam prescriptions until it was full. (Tr. V at 1037-38.) Johnson then placed the filled boxes into Parker's car or Solomon's car. (Tr. V at 1038-40.) Johnson was told that the boxes were going to Okose's clinic, but he had no personal knowledge that the boxes were actually delivered there. (Tr. V at 1040-41.) Johnson did not

deliver any of these prescriptions himself, nor did he ever deliver any controlled substances under any circumstances. (Tr. V at 1041.)

Between January 1, 2005, and October 31, 2005, ANP purchased 3,557,900 units of hydrocodone, making it the top purchaser in its zip code, 77054. (Tr. III at 603-05; Govt. Exh. 1118.) Between January 1, 2005, and October 31, 2005, ANP was the second ranked pharmacy for hydrocodone purchases in the State of Texas. (Tr. III at 607-08; Govt. Exh. 1175.) The Texas state average for hydrocodone purchases by pharmacies from January 1, 2005, to October 31, 2005, was 93,799 units per pharmacy. (Tr. III at 609-10; Govt. Exh. 1201.)

Lori Nelson is a financial analyst for the United States Attorney's Office. (Tr. IV at 886.) According to her analysis, in 2005, Solomon's tax return showed on Schedule C pharmaceutical sales of \$93,750 and a business loss after expenses of \$1,300, with a total income for the year \$59,130 after wages are factored in. (Tr. IV at 891; Govt. Exh. 1121.) However, the total deposits for the LP Incorporated bank account in 2005 totaled \$718,094, with at least \$369,000 of that amount consisting of cash deposits. (Tr. IV at 891-92; Govt. Exh. 1121.) The deposits into the bank account are not reflected on Solomon's 2005 Schedule C. (Tr. IV at 891.) For the years 2004 and 2005, Solomon

reported a combined income of \$143,931, but had total deposits of \$739,644. (Tr. IV at 892.)

H. Events Related to Elder's Employment by the Westfield Medical Clinic in Houston

Diane Hearn was the director of the Westfield Medical Clinic at 11618 Aldine, Westfield, Houston, Texas. (Tr. III at 648.) Hearn was not herself a doctor or pharmacist. (Tr. III at 648.) The clinic opened in October 1998, and practiced pain management. (Tr. III at 648.)

Westfield hired Elder on February 1, 2005. (Tr. III at 649.) Elder stopped working at Westfield on March 9, 2006. (Tr. III at 649.) Elder was the only physician in the practice. (Tr. III at 649.) Elder brought no patients with him from his previous practice. (Tr. III at 650.)

Cheryl Floyd also worked at Westfield as a nurse. (Tr. III at 650.) The clinic saw 40 to 50 patients per day. (Tr. III at 651.) Floyd would take the patient's vital signs then take the patient back to see Elder. (Tr. III at 651.) Every patient had a file. (Tr. III at 651.) The employees of the clinic had access to the patient files. (Tr. III at 652.)

When Elder came to work at the clinic, he requested that a photocopy be made of each prescription, and Elder was given the copies of the prescriptions

at the end of the day. (Tr. III at 654.) This practice continued for a few months until Elder said it did not matter anymore. (Tr. III at 654.)

C&G Pharmacy is located at 11618 Aldine Westfield Road, Houston, Texas 77093. (Tr. III at 622.) Westfield Medical Clinic was right across the hall and next door to the C&G Pharmacy. (Tr. III at 623.) Most Westfield patients got their prescriptions filled at C&G because it was convenient. (Tr. III at 626, 655.)

Magdalena Ortega was a certified pharmacy technician who worked for C&G Pharmacy in Houston, Texas. (Tr. III at 630.) She was also a notary public in 2005 and 2006. (Tr. III at 630.)

Elder asked Ortega to notarize some documents, and she kept a record of those notarizations in her notary book. (Tr. III at 631; Govt. Exh. 1166.) The log contains verified examples of Elder's signature. (Tr. III at 631-32.)

Ortega notarized Government Exhibit 1047 for Elder, which was an affidavit relating to a grand jury subpoena he had received. (Tr. III at 633.) The affidavit was dated June 13, 2007. (Tr. III at 635.) In the affidavit, Elder said that he worked at STWC in 2004 and 2005, but that he did not maintain possession or control of any records generated during his employment contact with STWC, and that to his knowledge Ada and Pleshette Johnson had control

of any such records. (Tr. III at 634.) Elder said that, “I have no personal knowledge regarding the current whereabouts of the requested materials.” (Tr. III at 634; Govt. Exh. 1047.)

Ortega saw Elder’s prescriptions every day and she was familiar with his handwriting. (Tr. III at 635.) She identified Elder’s signature on one of the Westfield prescriptions. (Tr. III at 636; Govt. Exh. 1166.11.) Ortega said there was never any question about the authenticity of the Elder prescriptions that came through Westfield. (Tr. III at 636.)

Elder prescriptions from Westfield were also located in faxed form at the Medicine Shoppe in Missouri, and DI Watterson requested information on those patients from Diane Hearn at Westfield. (Tr. III at 731; Govt. Exh. 1076.) Hearn noted that Westfield in fact had charts for these patients. (Tr. III at 731; Govt. Exh. 1076.) However, Hearn noticed that there were copies missing of controlled substances prescriptions from the files. (Tr. III at 659-61; Govt. Exh. 1076.) Hearn noted the absence because Westfield’s practice was to place photocopies of the prescriptions in the patient file, and such photocopies were present in other files from the same period. (Tr. III at 661-62.)

Hearn testified that Westfield does not fax prescriptions. (Tr. III at 658.)

DI Watterson found 90 prescriptions where the original had been filled by C&G Pharmacy in Houston and a photocopy of the same prescription was found at The Medicine Shoppe in Missouri. (Tr. III at 739-40.) Government Exhibit 130, a Westfield Medical Clinic prescription, number 4030, written by Elder for patient Marvin Phillips for Soma and Xanax, was found as a faxed document at The Medicine Shoppe in Belton, Missouri. (Tr. III at 736.) Government Exhibit 130 is identical to Government Exhibit 346, which is the original of the same prescription produced by C&G Pharmacy in Houston, except that “Soma” had been crossed out on the Missouri faxed copy. (Tr. III at 736-37.) C&G Pharmacy actually filled the prescription for the patient Phillips. (Tr. III at 737.) Likewise, Government Exhibit 116, a faxed Westfield prescription found in Missouri written by Elder for patient Janice Jackson, was produced in the original as Government Exhibit 332 by C&G Pharmacy, and C&G had also filled that prescription. (Tr. III at 737-38.)

During an interview with Elder, Elder told DI Watterson that Government Exhibit 1048 was written in his handwriting. (Tr. III at 705-06.) Government Exhibit 1048 is a list of patient names, dates of birth, and address information that corresponds to the Westfield Medical Clinic prescriptions written by Elder, filled in the original by the patients at C&G Pharmacy, and

faxed by Solomon on February 3, 2005, to The Medicine Shoppe in Missouri. (Tr. IV at 706.) On cross-examination of Elder, it was established that the fax was sent by Solomon at 11:38 a.m., and the telephone records show Solomon called Elder at 11:07 a.m. that day, and again at 6:40 p.m. (Tr. VI at 1333-51, 1364-67; Govt. Exh. 1048, 605.235, Entry 391.)

In addition, DI Watterson found approximately 84 prescriptions written by Elder at Westfield where the original prescription was filled at C&G Pharmacy and a photocopy of the same prescription was found at Solomon's Ascensia Nutritional Pharmacy in Houston. (Tr. III at 740.) However, there was no overlap of patients between the 90 photocopied prescriptions in Missouri and the 84 at ANP in Houston. (Tr. III at 740.)

In one example of the C&G/ANP overlap, patient Frederick Oliverez had an original prescription from Westfield, written by Elder, filled by C&G Pharmacy. (Tr. III at 740-41; Govt. Exh. 409.) A photocopy of that same prescription was then filled by ANP under the name "Frederick Oliverez" on February 24, 2005. (Tr. III at 742-43; Govt. Exh. 219.) ANP then changed the name on the pharmacy sticker to "Frederick Olivarez" and filled the identical prescription on February 24, 2005, less than 10 days later, even though the prescription was for a 30-day supply of Lortab. (Tr. III at 742-44; Govt. Exh.

220.) The patient could not have had the prescription filled twice because he had to give up the original prescription to C&G Pharmacy. (Tr. III at 744.) Similarly, exactly the same pattern was seen for a patient named Romaro. (Tr. III at 744-46; Govt. Exh. 414, 229, 230.) DI Watterson found further examples of ANP fraudulently filling photocopied prescriptions with other Westfield/Elder patients. (Tr. III at 746.)

I. The May 3, 2006, Search Warrants

Government Exhibit 1191 shows the call activity from Solomon's cellular telephone records for May 3, 2006. (Tr. III at 716.) The search warrant on ANP and other locations was served first thing in the morning. (Tr. III at 716.) At 9:49 a.m., Solomon called Dr. Peter Okose. (Tr. III at 717.) Solomon then called Ada Johnson, the owner of STWC. (Tr. III at 717.) At 10:05 and 10:07 a.m. Solomon had telephonic contact with Okose again. (Tr. III at 717.) Solomon then had three phone calls with ANP office manager Delmon Johnson between 11:32 a.m. and 11:50 a.m., with one call being 17 minutes long. (Tr. III at 718.) At 11:58 a.m. Solomon had a three-minute call with Okose, followed by a six-minute call with Ada Johnson at 12:56 p.m., two more calls with Delmon Johnson, and another Okose call at 1:59 p.m. (Tr. III at 718.) At 2:33 p.m. is a call to Cindy Martin in Missouri, followed by two

calls with Elder. (Tr. III at 718-19.) That evening there were further telephonic contacts with Okose, Ada Johnson, Delmon Johnson, and Martin. (Tr. III at 719.)

J. Elder and Solomon's Statements

DI Watterson and DI Connie Overton interviewed Elder on October 25, 2006, at his medical office in Houston, Texas. (Tr. III at 692.) Elder said that he had worked for STWC for a few months, part-time, two to three days per week. (Tr. III at 694.) He said that the owners supplied him with prescription pads. (Tr. III at 695.) Elder could not remember how many patients he saw at STWC. (Tr. III at 695.) He said he left STWC because he did not get along with Pleshette Johnson and he wanted to start his own practice. (Tr. III at 695.)

Elder said STWC did not dispense medication to patients during his time there. (Tr. III at 696.) He said he did not know if the STWC charts included photocopies of patient's driver's licenses. (Tr. III at 696.)

Elder said that approximately 70 patients followed him from STWC to Westfield. (Tr. III at 699.)

Elder said that he prescribed Lortab, Lorcet, and Xanax. (Tr. III at 699.) He said he would not prescribe promethazine with codeine, but would instead

refer that patient to an internal medicine doctor. (Tr. III at 699-700.)

Promethazine with codeine is a codeine-based cough syrup. (Tr. III at 699.)

Elder said he met Solomon when he worked at STWC. (Tr. III at 700.)

Elder told Watterson his last contact with Solomon was around April 2005,

when he picked up his 1099 for tax purposes. (Tr. III at 700.) Elder said he

was not asked by Solomon to write prescriptions or to give prescriptions to

Solomon for the purpose of Solomon filling them on behalf of his patients.

(Tr. III at 700-01.) Elder said he had no knowledge of controlled substances

being shipped from The Medicine Shoppe in Belton to STWC. (Tr. III at 701.)

He denied any involvement in having prescriptions filled at The Medicine

Shoppe. (Tr. III at 702-03.) Elder said the patients took their prescriptions to

the pharmacy of their choice. (Tr. III at 703.) When asked about the FedEx

records of shipments to STWC, Elder denied signing for any of the packages

and said that if his name appeared on the records it was a forgery. (Tr. III at

701.)

When shown documents, Elder said some prescriptions contained his

handwriting but he was not sure about others. (Tr. III at 702.) Elder said that

he did write a handwritten list of patient names and addresses that Watterson

showed him. (Tr. III at 702.)

On May 3, 2006, a federal search warrant was served on Ascensia Nutritional Pharmacy (ANP). (Tr. III at 705.) On May 3, 2006, at 2:45 p.m., Solomon's cell phone received a five-minute incoming call from a phone number registered to Elder. (Tr. III at 703-04; Govt. Exh. 605.581, Entry 248.) At 2:51 p.m. on May 3, Solomon had a six-minute outgoing call to Elder. (Tr. III at 704; Govt. Exh. 605.581, Entry 249.) On May 4, 2006, at 6:21 p.m., there was a five-minute call between Solomon's cell phone and a phone registered to Elder. (Tr. III at 705; Govt. Exh. 605.582, Entry 310.) In his interview with Watterson, Elder had said his last contact with Solomon had been in April 2005. (Tr. III at 705.)

Government Exhibit 50.95 is a prescription written by Elder for promethazine with codeine from The Medicine Shoppe in Belton. (Tr. III at 706-07.) During the interview with Watterson, Elder said he did not prescribe promethazine with codeine. (Tr. III at 707.)

On cross-examination of Elder, it was established that in 2008 Elder had written a letter to the Texas Medical Board and told the Board that to the best of his knowledge, he had never served as a physician to the six patients listed in the Board's subpoena, where the six patients were the six patients listed in

the indictment in this case and were patients named in prescriptions written by Elder and filled in Missouri. (Tr. VI at 1361-64; Govt. Exh. 1221.)

DI Watterson interviewed Solomon at ANP on May 3, 2006, the day of the search warrant. (Tr. III at 708.) Solomon said he had been introduced to the Missouri pharmacy by a woman named Cindy, whose last name he did not remember, who he met at a convention in 2005. (Tr. III at 709-10.) Solomon said he faxed prescriptions to the Missouri pharmacy because ANP did not have a big enough line of credit to buy drugs from their wholesaler and he did not want to turn away business. (Tr. III at 710.) Solomon said the customers brought the prescriptions in to fax to Missouri and that the customers then picked the prescriptions up. (Tr. III at 711.) Solomon said the faxes were sent from both ANP and from his home at 10101 Chesterfield, Houston, Texas 77051. (Tr. III at 711.) Solomon gave Watterson his home telephone number as (281) 469-9912. (Tr. III at 712.) Solomon said it would take two or three days to turnaround filling the prescriptions. (Tr. III at 712.) Watterson asked Solomon why customers would wait that long when they could have the prescriptions filled immediately in Houston, and Solomon said ANP had loyal customers. (Tr. III at 712.) After initially not remembering, Solomon said that Elder and Okose were the physicians who had prescriptions filled in Missouri.

(Tr. III at 713.) Solomon denied paying for the prescriptions in Missouri, and instead said that Philip Parker paid for them. (Tr. III at 713.) Solomon said he thought the Missouri pharmacy had not been paid for the prescriptions because a woman called him about it, but he did not know why the pharmacy would continue to ship drugs without payment. (Tr. III at 713-14.) Solomon said he knew the Johnsons, but he had no explanation for why the Missouri drug shipments were going to STWC. (Tr. III at 714-15.)

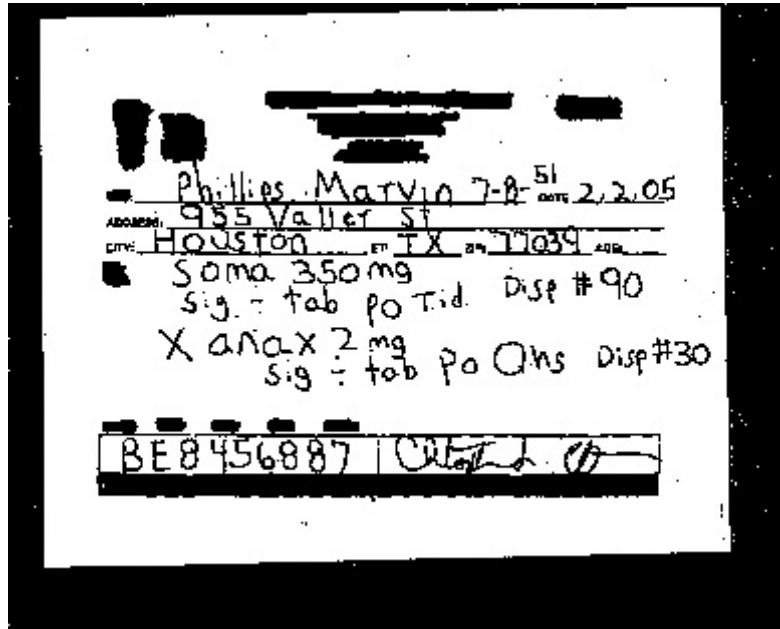
K. The Elder Handwriting Exemplars

Elder provided handwriting exemplars at the United States Attorney's Office in Kansas City, Missouri. (Tr. III at 732; Govt. Exh. 1052-1073.) Elder was instructed to provide the handwriting examples in cursive, but he said that he did not write in cursive. (Tr. III at 734-35.) The requested exemplars came from the actual prescriptions written by Elder. (Tr. III at 735.) Thus, the jury was shown Government Exhibit 130, the original prescription, which appeared like this:

WESTFIELD MEDICAL CLINIC 4030
1300 ALDRINE WESTFIELD BL.
HOUSTON, TEXAS 77029
TEL: 403-6448
FAX: 403-6449

FOR: Phillip Parker DOB: 7/5/51 DATE: 8/22/05
ADDRESS: 955 Valley St.
CITY: Houston ST: TX ZIP: 77029
R: Sum 350 mg 720 mg
Xanax 2 mg 15 mg
BE 6456 687 C. Parker

to compare to the exemplar written out by Elder using the same text, found at Government Exhibit 1054:



L. Dr. Morgan's Testimony

Dr. Richard Morgan is a 55-year old medical doctor from the Kansas City area. (Tr. V at 937.) He was employed by St. Joseph Pain Management Associates in Kansas City. (Tr. V at 937.) Dr. Morgan attended the University of Kansas for undergraduate and medical school. (Tr. V at 937-38.) Dr. Morgan did an anesthesia residency at St. Luke's Hospital and then a fellowship in critical care and pain management in the Mayo Clinic that he completed in 1985. (Tr. V at 938.) Since 1985, Dr. Morgan had been in private practice at St. Joseph's Medical Center in Kansas City, Missouri, in

anesthesia and pain management, although since 2007 he practiced pain management only. (Tr. V at 938.) Dr. Morgan also did palliative care medicine and hospice work, completing a board exam in those fields in 2008. (Tr. V at 938.) Dr. Morgan served as a medical director for Grace Hospice in Kansas City. (Tr. V at 938.) Dr. Morgan had pain management as a subspecialty of anesthesia awarded by the American Board of Medical Specialties. (Tr. V at 938.) Dr. Morgan is licensed in Missouri and Kansas. (Tr. V at 938.)

Differences exist between patients who present for pain medication treatment. (Tr. V at 940.) Patients may not be able to tolerate certain classes of medications. (Tr. V at 941.) Each medicine must be tailored carefully to insure that the proper medication is being provided for that individual patient. (Tr. V at 941.)

A prescription generally includes the patient's name, the date of prescription, the drug, the strength of tablet, number of tablets provided, instructions for use, and refills. (Tr. V at 943.) The address information was not required to be on the prescription in 2004. (Tr. V at 943.) The date of the prescription is important, particularly for drugs with potential for misuse or abuse, to track how many medications have been issued for that particular

patient for a period of time. (Tr. V at 943-44.) A prescription without a date is not a valid prescription. (Tr. V at 944.)

It was unusual to have prescriptions in which each batch of patients prescribed or filled on the same day have identical or nearly identical dose and tablet amounts in combination with another medication, also in identical dose and tablet amounts. (Tr. V at 944.) It would be extremely unusual to see such a prescribing pattern because patients require individualized prescriptions because of their age, allergies, side effects they may suffer, or because that particular medication may not be required for their condition. (Tr. V at 945-46.)

It is the practice within the medical community to keep medical records. (Tr. V at 946.) Medical records are kept to document examinations, medications taken by the patient, allergies, and follow-up on effectiveness and side effects of medication previously prescribed. (Tr. V at 947.) Lack of records for a patient who received opioid medications would be of concern, and there may be legal ramifications for failing to have records for such patients. (Tr. V at 947-48.)

Promethazine with codeine is a drug of abuse that is sometimes used in combination with other substances. (Tr. V at 949.)

Hydrocodone can cause serious overdose and have complications like other opioids. (Tr. V at 984.) Hydrocodone also contains APAP, or Tylenol, and excessive use of Tylenol can cause liver failure and be potentially toxic on a long-term basis. (Tr. V at 985.)

Referring to Government Exhibit 1116, 78 patients is a very high number of patients to see on a single day. (Tr. V at 986.) It would be highly unusual to see the prescribing patterns illustrated by Government Exhibit 1116 where all or most of the patients received hydrocodone product and Alprazolam. (Tr. V at 986-88.)

SUMMARY OF THE ARGUMENTS

First, the evidence in this case was sufficient to support the narcotics-related convictions of both appellants. The evidence demonstrated that a conspiracy existed to generate millions of dosage units of Schedule III and IV controlled substances for dispensation without a proper prescription and ultimately for distribution to the street. The evidence showed beyond question that every single one of the prescriptions sent to The Medicine Shoppe in Belton, Missouri, by the Houston-based conspirators were fraudulent, in that they were either written based on stolen identity information without any examination or relationship with a real patient, or they were duplicates of real prescriptions the patient had already had filled at a Houston-area pharmacy. Therefore, there was sufficient evidence to support the jury's verdicts of guilt for both Elder and Solomon, and the verdicts should be upheld.

Second, the evidence of money laundering violations by Solomon was also sufficient. Solomon generated hundreds of thousands of dollars of income not accounted for by his tax returns or his legitimate activities. There was evidence of his actual street distribution of drugs. He shipped by UPS almost \$1 million in cash consisting of small old bills to Missouri to pay for the Missouri prescriptions, and by doing so he promoted new drug offenses. His

circuitous, commercially unreasonable, methods of paying for the Missouri prescriptions can only be explained by his desire to conceal the source of the funds, underscored by his statements to the Missouri conspirators urging them to structure any cash deposits. The jury's verdict should be upheld.

Third, the money judgment in the amount of \$991,114 against both appellants should also be affirmed. This amount represents the dollar value of drugs actually illegally dispensed by The Medicine Shoppe for the Houston conspirators, and as such represents an appropriate but extremely conservative measure of the proceeds of the conspiracy. Neither appellant requested an oral hearing concerning the calculation of the money judgment amount at sentencing and that argument has therefore been waived. Under the law, whether either appellant actually pocketed this amount or had the money at the time of sentencing is irrelevant for purposes of imposition of the money judgment. Therefore, the amount of the money judgment was correct.

Lastly, the district court properly denied Elder's severance motion. Elder played a major role in the conspiracy, and all of the trial evidence would have been admissible in a separate trial against Elder as proof of the drug conspiracy. Consequently, severance was not warranted, and the district court's ruling should be affirmed.

ARGUMENTS

I.

Sufficient evidence supported the jury's guilty verdicts in that the drugs were dispensed other than for a legitimate medical purpose and not in the course of professional practice, where the prescriptions written were entirely fraudulent ones not based on any doctor-patient relationship, and were written as part of a massive drug diversion scheme.

In their first point on appeal, both Elder and Solomon allege that there was insufficient evidence for the jury to find them guilty of conspiracy. However, the evidence established that a conspiracy existed and that every single one of the prescriptions sent to The Medicine Shoppe in Belton, Missouri, by the Houston-based conspirators were fraudulent, in that they were either written based on stolen identity information without any examination or relationship with a real patient, or they were duplicates of real prescriptions the patient had already had filled at a Houston-area pharmacy. The jury's verdicts, were correct, and therefore, should stand.

A. Standard of Review

A motion for judgment of acquittal based upon sufficiency of the evidence should be denied if the record, "viewed most favorably to the government, contains substantial evidence supporting the jury's verdict, meaning evidence sufficient to prove the elements of the crime beyond a

reasonable doubt.” *United States v. Hodge*, 594 F.3d 614, 617-18 (8th Cir.), *cert. denied*, — U.S. —, 130 S.Ct. 3401 (2010). The court of appeals reviews *de novo* a denial by the district court of a motion for judgment of acquittal. *United States v. Renner*, 648 F.3d 680, 688 (8th Cir. 2011). In undertaking such a review, the court of appeals will “review a challenge to the sufficiency of the evidence deferentially, viewing the evidence in the light most favorable to the jury’s verdict, and affirm if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (quoting *United States v. Goodyke*, 639 F.3d 869, 872 (8th Cir. 2011)). “The standard of review concerning sufficiency of the evidence is very strict, and a jury verdict will not be overturned lightly.” *United States v. Morse*, 613 F.3d 787, 794 (8th Cir. 2010). The court of appeals does “not weigh the evidence or assess the credibility of the witnesses. The jury has the responsibility of resolving conflicts or contradictions in testimony, and we resolve any credibility issues in favor of the verdict.” *United States v. Ali*, 616 F.3d 745, 755 (8th Cir. 2010).

B. Discussion

1. *Sufficient evidence supported the conclusion that the drugs were dispensed other than for a legitimate medical purpose and not in the course of professional practice.*

Sufficient evidence in the record supported the jury's determination that the drugs in this case were prescribed other than for a legitimate medical purpose and not in the course of professional practice, and that the drugs had been dispensed or distributed. The jury was entitled to render their verdicts based upon all of the evidence in the record, not solely the testimony of Dr. Morgan, the Government's medical expert. The totality of the evidence in the record established that all of the prescriptions written in Texas and filled at The Medicine Shoppe in Belton, Missouri, whether written by Dr. Elder, Dr. Okose, or Dr. Botto, were fictitious, in that they were written without the patient's knowledge or consent, and they were not based upon any doctor-patient relationship. The drugs were diverted and never provided to the patients for whom the prescriptions had ostensibly been written. Consequently, the only inference possible is that these prescriptions were, by definition, illegitimate, and not written in the course of professional practice.

The arguments made by Elder and Solomon appear to assume that expert testimony is necessary to support a finding that prescriptions were not written for a legitimate purpose. In fact, "expert testimony is not always required in order to show that a physician is acting for other than proper medical purposes [in violation of § 841]." *United States v. Armstrong*, 550 F.3d 382, 388-89

(5th Cir. 2008),⁶ (quoting *United States v. Chin*, 795 F.2d 496, 503 (5th Cir. 1986)) . The *Armstrong* court explained that:

While expert testimony may be both permissible and useful, a jury can reasonably find that a doctor prescribed controlled substances not in the usual course of professional practice or for other than a legitimate medical purpose from adequate lay witness evidence surrounding the facts and circumstances of the prescriptions. *United States v. Rogers*, 609 F.2d 834, 839 (5th Cir.1980). There are § 841 cases in which the trier of fact does not need outside, specialized knowledge to understand the evidence or determine the facts. *See United States v. Word*, 806 F.2d 658, 663-64 (6th Cir. 1986) (finding that expert testimony about the usual course of professional conduct and legitimate medical purposes may help a jury, it was not necessary on the facts of the case on appeal); *United States v. Smurthwaite*, 590 F.2d 889, 892 (10th Cir. 1979) (finding expert testimony unnecessary to prove prescriptions were outside of professional practice where evidence included visits less than five minutes in length, charging patients per prescriptions, little or no physical examination of patients at initial or follow-up visits, and defendant had some knowledge that prescriptions pills were used for parties rather than weight-loss); *United States v. Larson*, 507 F.2d 385, 387 (9th Cir. 1974) (similar). Jurors have had a wide variety of their own experiences in doctors' care over their lives, thus and expert testimony is not necessarily required for jurors to rationally conclude that seeing patients for as little as two or three minutes before prescribing powerful narcotics is not in the usual course of professional conduct.

Id. at 389 (footnotes omitted).

⁶In *United States v. Balleza*, 613 F.3d 432, 433 n.1 (5th Cir. 2010), the Fifth Circuit listed *Armstrong* as one of several cases in which the court had, in *dicta*, erroneously stated that an proof of an overt act is necessary for a money laundering conspiracy. This clarification has no relationship to *Armstrong*'s central holding.

In *Armstrong* itself, the court concluded that no expert testimony was needed where the Government's evidence included a number of factors including, but not limited to, an extremely high volume of patients seen, phony preprinted medical comments placed in files, a lack of meaningful physical examination and documentation, and a cash-only payment policy. *Id.* at 389-90.

The Eighth Circuit discussed a related issue in the case of *United States v. Smith*, 573 F.3d 639 (8th Cir. 2009). The issue in *Smith* was whether a physician had violated the misbranding statute, 21 U.S.C. § 331(a), by issuing a prescription that was not valid. *Id.* at 650. In holding that a prescription has to be valid in order to avoid the misbranding statute, the court found helpful the following passage from *United State v. Nazir*, 211 F. Supp. 2d 1372 (S.D. Fla. 2002):

[T]he word prescription in § 353(b)(1), in common parlance, means only a bona fide order-i.e., directions for the preparation and administration of a medicine, remedy, or drug for a real patient who actually needs it after some sort of examination or consultation by a licensed doctor-and does not include pieces of paper by which physicians are directing the issuance of a medicine, remedy, or drug to patients who do not need it, persons they have never met, or individuals who do not exist.

Id. at 1375.

By analogy, where, as here, prescriptions are written for people who the doctor has never met, or are fraudulently duplicated prescriptions where the patient has filled the original themselves and has no knowledge of the duplicate, there can be no real issue of medical necessity.

The evidence against Solomon and Elder irrefutably established that the prescriptions filled by The Medicine Shoppe for Elder and Okose had no legitimacy whatsoever, as they were not written for any patient's actual medical treatment, but instead were false prescriptions written using patient identity information purloined from various sources. Dr. Morgan's testimony underscored this conclusion and assisted the jury in understanding the evidence.

The scheme in this case is best understood by examining Solomon's plan as a whole. It is clear from the evidence that the entire purpose of the Ascensia Nutritional Pharmacy (ANP) was to generate massive amounts of hydrocodone (Lorcet and Lortab, primarily), Alprazolam, and codeine cough syrup by fraudulently filling prescriptions, which would then be diverted to the street. However, Solomon wanted to get a head start on this scheme, as a time lag existed between the initial planning for ANP in the spring and early summer of 2004 and ANP actually opening its doors in December 2004. Thus,

Solomon contacted Martin and forged the supply connection with Rostie and The Medicine Shoppe in Belton, Missouri.

It becomes obvious on close analysis that Solomon and Elder's relationship with The Medicine Shoppe was highly suspicious. Solomon told Rostie and Martin that the prescriptions were being obtained out of town to protect famous people, such as athletes. But even a cursory review of the record evidence reveals that statement to be patently false. In 2006, Solomon told DI Watterson that he had loyal customers who were willing to wait several days to get their pain medications. But in the Fall of 2004 ANP was not even open yet. In fact, Solomon had no customers at all at that time, and even when ANP opened it was primarily a "closed-door" pharmacy with little walk-in business.

Elder played a critical role in the conspiracy, as the original prescriptions he wrote allowed Solomon to gain Rostie's trust and reel her into the scheme. There is no question that Elder wrote these 544 prescriptions as completely fraudulent prescriptions. He did not see or treat the persons named on the prescriptions (and thus, they were not really "patients"), but instead wrote the prescriptions out to Solomon's order.

One strong indication of the fraud scheme is that sheets of patient name and address information for the Elder prescriptions were faxed from Solomon's home fax machine to The Medicine Shoppe in Belton, Missouri. In some cases, Solomon mailed stacks of photocopied driver's licenses to The Medicine Shoppe. These sheets were organized by drug, suggesting that the names were provided to Elder by Solomon in order to write phony prescriptions to obtain specific drugs at specific times. (Govt. Exh. 43.1, 47.1, 49, 51.1, 51.07.) For example, the first set of prescriptions from Elder, filled about August 17, 2004, contained 15 prescriptions for cough syrup with codeine, and the names for these prescriptions are grouped together on the sheets sent to Missouri. The next six sets of prescriptions contain none for codeine cough syrup, but then the last two sets, filled October 19, 2004, and October 26, 2004, suddenly contain 14 and 26 such prescriptions, respectively. Such a pattern cannot have resulted from actual prescribing based upon the examination of real patients, which would have produced a random distribution of such prescriptions. Moreover, Elder told DEA investigators that he did not prescribe cough syrup with codeine to any patients.

In addition, the sheets sent from Solomon to The Medicine Shoppe contained different handwriting, some appearing to be Solomon's but other

handwriting clearly not Solomon's or Elder's. This pattern suggests that Solomon procured patient identity information from a variety of sources, then provided the names to Elder for the writing of the false prescriptions in those names.

The 544 prescriptions written in this case by Elder were supposedly for patients of South Texas Wellness Center. However, not a single medical file for any of these patients could be located in response to a grand jury subpoena. In about 2006, Elder told Pleshette Johnson that he had taken the files subpoenaed by the Government (about 100 of the 544) and placed them in his truck, where they had later burned in a fire. However, Elder later told the Texas Medical Board in a letter dated April 15, 2008, that he had never treated the six patients named in the Government's indictment and had no records for them. Dr. Morgan testified that the practice of physicians is to create and maintain medical records for the patients they treat, particularly where, as here, the physician is prescribing controlled medications. In contrast, the patient files at the Westfield Medical Clinic for patients Elder actually treated were readily located by Diane Hearn when the Government requested them.

Two of the patients for whom Elder wrote prescriptions had died before the supposed date of their examination by Elder. A third person for whom

Elder had prescribed, Dolores Cooks, testified at trial that she had never been a patient of Elder or of South Texas Wellness Center, that she had never seen the prescription written in her name, and that she did not use the pain medication supposedly prescribed for her by Elder. A number of the prescriptions contained invalid address information. In some cases, the same patient identity was used for different prescribing doctors. (Govt. Exh. 35.67 (Botto) and Govt. Exh. 37.64 (Elder).) One prescription listed the address of 3558 Sunforest Drive, Houston, Texas, a house owned by Solomon and occupied by Delmon Johnson and Phillip Parker.

Elder had access to South Texas Wellness Center prescription pads and he sometimes claimed to have misplaced pads, which contained 25 to 50 sheets per pad. Elder saw very few patients per day at South Texas, and he only worked there two a days a week and those were not full days. Johnson-Wiggins testified that some days he saw no patients. Yet the 544 prescriptions at issue in this case were filled between mid-September and the end of October 2004, a span of about six weeks. Elder would have to have treated about 90 patients a week to generate that volume, but from the evidence he treated only a fraction of that number. Moreover, when ANP finally opened in December

2004 very few Elder prescriptions were filled and those few were not for pain medications.

Solomon paid for The Medicine Shoppe prescriptions by sending large amounts of United States currency in small, used, bills, through UPS to an intermediary, Cindy Martin. Solomon counseled Martin to structure any cash deposits of the money, that is, break the deposits down into amounts less than \$10,000. Martin hand delivered these funds to pharmacist Lynn Rostie after withdrawing a percentage of the money for herself. At the same time, Solomon was providing cash payments to the Johnsons at STWC in a total amount of \$25,000 to \$30,000. Thus, even early on in the conspiracy, Solomon had access to large amounts of cash from unexplained sources.

The drugs from prescriptions filled by The Medicine Shoppe were shipped by Rostie, using Federal Express, to South Texas Wellness Center and, later, to the address of Solomon's pharmacy, Ascensia Nutritional Pharmacy. The boxes were either picked up by Delmon Johnson or delivered to Ascensia and Solomon. The boxes were not opened at South Texas Wellness Center and the drugs were not provided to any patient of the clinic. Instead, the boxes were loaded into either Solomon's car or Philip Parker's car and driven off the premises. The boxes were addressed to Elder. On at least one occasion Elder

received a box and took it out of STWC. Delmon Johnson and ANP did not deliver to patients prescriptions originating from other pharmacies and did not deliver controlled substances.

On February 1, 2005, Elder began work at the Westfield clinic in the north part of Houston, miles away from the building that housed South Texas Wellness Center and Ascensia. On that day, he prescribed Lortab or Vicodin for 41 of the 43 patients for whom he wrote prescriptions. Elder wrote prescriptions for 45 more patients on February 2, 2005. At Elder's request, Westfield staff photocopied these prescriptions and gave Elder a copy. On February 3, 2005, Solomon faxed photocopies of these prescriptions to The Medicine Shoppe in Missouri. Solomon also faxed a list written in Elder's handwriting containing the address information corresponding to the Westfield patients. The original prescriptions were all filled by the patients at C&G pharmacy, which was located in the same building as Westfield. Elder and Solomon had two telephone contacts on the day Solomon sent the fax to Missouri, right before the fax was sent and that evening. It is obvious from this episode that Elder was a full and knowing participant in the conspiracy throughout its life, as there can be no innocent explanation for providing both

the prescription photocopies and the corresponding identity information to Solomon other than for the fraudulent use of the prescriptions for diversion.

Elder's statements made during the course of the case are generally contradictory and confused. Elder told DI Watterson that 70 of his STWC patients followed him to Westfield, but in fact none of them did. Elder was equivocal in his interview with DI Watterson about whether he had written the prescriptions, but in 2008 he denied to the Texas Medical Board that he had written them and, consistent with that position but somewhat bizarrely, Elder appears to have deliberately attempted to disguise his handwriting when asked to give an exemplar. But at trial Elder changed his position again and admitted writing the prescriptions, in the face of overwhelming evidence that he was their author. But if, as Elder says, the patients were given those prescriptions and left STWC with them then it is not possible for them to have ended up in Missouri, and the STWC patient files would still exist. The only explanation is that, like Mrs. Cooks and the deceased patients, these people were never treated at STWC, and Elder wrote these prescriptions without ever seeing the people named in them and then gave them to Solomon.

Ascensia Nutritional Pharmacy also filled photocopied Westfield prescriptions provided by Elder to Solomon. The names on some of the

prescriptions were then slightly altered, and ANP filled the prescriptions again usually within about two weeks, even though the original prescription was for a 30-day supply. This activity is one of many indications that the fraudulent activities directed by Solomon at ANP were blatant and obvious.

Beginning in late December 2004 and continuing through October 2005, Solomon submitted thousands of prescriptions written by Dr. Peter Okose to be filled by The Medicine Shoppe. Eventually these prescriptions were submitted by fax. These prescriptions were often submitted in groups where all of the patients had the same last name (such as “Johnson”), or all of the patients’ last names began with the same letter (J or T or M, for example). The prescriptions were on pre-printed pads with standard dosages of hydrocodone and alprazolam. Large groups of patients received precisely identical prescriptions for hydrocodone, alprazolam, or cough syrup with codeine. Both Frank Van Fleet, Missouri Board of Pharmacy Inspector, and Dr. Morgan, testified that these prescribing patterns did not reflect legitimate medical care for real patients.

In the case of the Dr. Botto prescriptions, these prescriptions were written on stolen prescription pads, and appeared to have Solomon’s handwriting on them.

The conclusion that the Okose prescriptions were a little more than massive fraud is underscored by identical activity in Houston. Once Ascensia Nutritional Pharmacy opened for business in late December 2004, it began filling the same pre-printed controlled substance prescriptions for Dr. Okose as were seen in Missouri. The prescriptions came bundled in stacks of 100 to 200. The filled prescriptions were placed in boxes which were then placed in Solomon's or Parker's cars. Quan Pham was told that these prescriptions were to be delivered back to Okose's clinic, however, according to Okose's office manager, Okose's clinics did not dispense medications to patients and these boxes were never delivered to the clinics.

During the period of the conspiracy, The Medicine Shoppe in Belton filled prescriptions for over two million hydrocodone pills alone. It became one of the largest suppliers of hydrocodone in the state of Missouri. Likewise, in 2005 Ascensia became one of the largest suppliers of hydrocodone in the state of Texas despite having just opened its doors.

As can be seen from this review of just some of the evidence at trial, the evidence that these prescriptions were written not in the usual course of professional practice or for other than a legitimate medical purpose is definitive. Elder and Solomon appropriated the identities of patients from a

variety of sources and either wrote completely fictitious prescriptions, or duplicated prescriptions already filled by the patient on their own, solely for the purpose of obtaining drugs for diversion. Indeed, on cross-examination Elder stated that it would be “illegal” for a physician to write a prescription without actually examining a patient, and he agreed “that for a prescription to be a legal prescription written in the ordinary course of medical practice, you have to see the patient, you have to have an examination of the patient, and you have to issue your prescription in good faith based upon signs and symptoms that the patient is presenting.” (Tr. VI at 1302-03.)

In this case, there was substantial evidence of both dispensing and distribution. On the facts of this case dispensing and distributing are quite different activities, with important ramifications for different types of charges. As defined in Jury Instruction 42, dispense means “to deliver a controlled substance to an ultimate user by, or pursuant to a lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for delivery.” In this case, controlled substances were dispensed when pharmacist Rostie at The Medicine Shoppe in Belton filled the prescriptions mailed or faxed to her from Texas (including those prescriptions written by Elder) and

mailed the drugs back to Texas. As established above, every one of these prescriptions was written not in the usual course of professional practice or for other than a legitimate medical purpose. Consequently, the evidence supported the guilty verdicts against both Elder and Solomon on the drug conspiracy and substantive drug distribution counts based simply upon the prescriptions being filled by Rostie's pharmacy; no further evidence of diversion was required.

But in fact, there was overwhelming evidence that the drugs were actually diverted. This evidence is discussed in detail in response to Solomon's challenge to his money laundering convictions. The jury's verdicts should be upheld.

II.

Sufficient evidence existed to support the jury's money laundering guilty verdicts on Solomon, where the evidence demonstrated that Solomon mailed the proceeds of illegal narcotics sales to Missouri to fund further drug distribution activity and to conceal the source of the funds.

Solomon challenges his convictions on the money laundering counts.

For those counts, the Government had to establish that the cash mailed by Solomon to Cindy Martin in Missouri was the proceeds of a specified unlawful activity, to wit, the distribution of narcotics, and that the purpose of the financial transactions was to promotion, or concealment, or both. The evidence firmly established all of these predicates.

A. Standard of Review

The court of appeals will “review a challenge to the sufficiency of the evidence deferentially, viewing the evidence in the light most favorable to the jury’s verdict, and affirm if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Renner*, 648 F.3d 680, 688 (8th Cir. 2011) (quoting *United States v. Goodyke*, 639 F.3d 869, 872 (8th Cir. 2011)). “The standard of review concerning sufficiency of the evidence is very strict, and a jury verdict will not be overturned lightly.” *United States v. Morse*, 613 F.3d 787, 794 (8th Cir. 2010).

The court of appeals does “not weigh the evidence or assess the credibility of the witnesses. The jury has the responsibility of resolving conflicts or contradictions in testimony, and we resolve any credibility issues in favor of the verdict.” *United States v. Ali*, 616 F.3d 745, 755 (8th Cir. 2010).

B. Discussion

To start, the evidence discussed at length above, shows that the millions of dosage units of drugs involved in this case did not go back to the patients named on the prescriptions, but instead were taken to Ascensia Nutritional Pharmacy (ANP) and from there were driven away by Solomon and Parker. Delmon Johnson did not deliver either the prescriptions from The Medicine Shoppe or the ANP-filled prescriptions from Okose to patients, even though it would have been his job to do that.⁷ STWC did not dispense medication to patients. And, even though Solomon and Parker said that they were taking the Okose prescriptions to Okose’s clinic, in fact Mr. Klemen testified that the Okose clinics never received the prescriptions and did not distribute prescriptions to the patients, who took their prescriptions out in hand and had them filled at the pharmacy of their choice. The evidence in the case was

⁷In any event, given the number of prescriptions and the size of the Houston metropolitan area, delivering the prescriptions to more than a fraction of the patients would have been impossible.

absolutely definitive that not a single patient received either the STWC or the ANP-filled Okose prescriptions ostensibly written in the patient's name.

Moreover, Solomon paid for the Missouri prescriptions in cash, in \$10,000 to \$15,000 amounts per payment, in small bills. Over the course of the conspiracy this cash totaled in the hundreds of thousands of dollars. In addition, a financial analysis of Solomon's taxes and bank accounts demonstrated that in 2005 Solomon claimed \$59,000 in income but deposited over \$700,000 into his business account in that year, with at least \$369,000 of that amount in cash (financial analyst Lori Nelson testified that the cash deposits were almost certainly more than that amount). (Tr. IV at 891-92; Govt. Exh. 1121.) Solomon also paid \$25,000 to \$30,000 in cash to Pleshette Johnson-Wiggins and her mother during the conspiracy period.

This evidence provided an extremely strong circumstantial case that the controlled substances acquired by the conspiracy had been diverted and sold on the street. This conclusion was underscored by the direct evidence provided by witness Lillian Zapata. Ms. Zapata testified that she was present with Solomon when he drove to a bad part of town and met with a man there. Solomon took a box from his car and delivered it to the other person. He then told Zapata, "That's what three million dollars looks like," a comment the jury

could reasonably take to mean that Solomon had just completed a sale for a large quantity of drugs.

Consequently, the jury could reasonably conclude from the evidence that the thousands of dollars in small bills mailed via UPS by Solomon in Texas to Martin in Missouri represented the proceeds from the prior illegal sale of diverted drugs.

Unquestionably, Solomon's purchase of new drugs for diversion promoted the overall scheme. *United States v. Baker*, 63 F.3d 1478, 1494 (9th Cir. 1995) (paying supplier for more product is a transaction conducted with intent to promote). Solomon attempts to invoke the Supreme Court's decision in *United States v. Santos*, 553 U.S. 507 (2008), but *Santos* affords Solomon no basis for relief. *Santos* involved an illegal gambling operation, and holds that within that context proceeds refers to profits, not gross receipts. *United States v. Spencer*, 592, F.3d 866, 879 (8th Cir. 2010). *Santos* involved a 4-1-4 split of the Supreme Court, and the Eighth Circuit has held that, "Because *Santos* was a plurality opinion, its precedent is the narrowest holding that garnered five votes." *Id.* at 597 n.4. Consequently, the Eighth Circuit has determined that *Santos'* holding that proceeds means profit is binding precedent only in cases involving illegal gambling. *Id.* at 879-80.

Consequently, the Eighth Circuit has not applied *Santos* in other contexts, such as drug cases. *Id.*; *United States v. Williams*, 605 F.3d 556, 567-68 (8th Cir. 2010). Solomon’s case involves illegal drug dispensing and distribution, not illegal gambling offenses. *See United States v. Jennings*, 599 F.3d 1241, 1252 (11th Cir. 2010) (*Santos* not relevant to definition of proceeds from an insurance fraud scheme); *United States v. Thornburgh*, 645 F.3d 1197, 1209 (10th Cir. 2011) (“proceeds means profits . . . only where an illegal gambling operation is involved”) (emphasis in original); *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009) (“*Santos* has limited precedential value;” it applies only when the SUA is an unlicensed gambling operation).

In addition, *Santos* does not apply to Solomon’s case because Solomon was convicted of using the proceeds of his completed drug offenses to promote new drug offenses. The money laundering transactions Solomon was convicted of related to payments for additional Schedule III and IV drugs to be dispensed illegally, delivered back to Houston, and then diverted and illegally distributed. In contrast, in *Santos*, the money laundering transactions related to payments to gamblers who had already placed their wagers, which related to a past completed crime. Under the circumstances of Solomon’s case, there is no merger concern and *Santos* has no application. *United States v. Brown*,

553 F.3d 768, 785 (5th Cir. 2008) (using proceeds of illegal drug sales to buy more drugs was not the “mere payment” of an expense, but was a transaction involving the profits of an earlier offense to commit a new offense); *United States v. Catapano*, 2008 WL 4107177, *4 (E.D.N.Y. 2008) (*Santos* applies to cases where the transaction relates back to the offense that generated the proceeds—i.e., to where there is a merger problem, not to cases where the defendant was using the proceeds of a completed crime to commit a new one, even if it is part of the same scheme; in the latter case, the defendant is using profits).

In addition to the promotion prong of money laundering, there was ample evidence from which the jury could find that Solomon intended to conceal the cash payments mailed by him through UPS to Martin. Rostie testified that prior to the first transaction with Solomon she expected to receive a check directly made out to her business as payment. Her expectation defines exactly what one would expect would occur in a normal business-to-business transaction. But here, Solomon elected to ship, via UPS, large quantities of cash, in small bills, to Martin, a third party who had no formal connection to The Medicine Shoppe, who then delivered that cash literally in paper bags to Rostie. No legitimate business would ever have paid for product in this

manner, as mailing cash does not create a proper record of the business transaction and exposes the purchasing business to risks of loss at every stage of the transaction. A reasonable jury viewing Solomon's convoluted method of paying for the Missouri prescriptions could come to no other conclusion than that he intended to conceal the source of the funds. *See United States v. Henry*, 325 F.3d 93, 104 (2d Cir. 2003) (elaborate transaction involving cash in paper bag, exchanged for cashier's check used to buy vehicle, showed intent to conceal); *United States v. Prince*, 214 F.3d 740, 768 (6th Cir. 2000) (directing victim to send money through third party and having third party convert it to cash and deliver it to defendant is an elaborate scheme designed to avoid a paper trail and shows intent to conceal or disguise). Solomon demonstrated his intent to conceal quite overtly when he counseled Martin to structure her cash deposits into the bank by breaking them down into amounts less than \$10,000, which is itself a felony violation of federal law. 31 U.S.C. § 5324.

Contrary to Solomon's claim, given the strong evidence of Solomon's intent to conceal, *Cuellar v. United States*, 553 U.S. 550 (2008), simply has no application here. *See United States v. Warshak*, 631 F.3d 266, 322 (6th Cir. 2010) (distinguishing *Cuellar* and *United States v. Faulkenberry*, 614 F.3d 573

(6th Cir. 2010); defendant did not conceal currency and FedEx boxes and send it from his business to his home address to make the transaction easier; it actually made it harder to conduct; he did it to conceal the nature, source or location of the money);

Altogether, the jury had substantial evidence from which it could reasonably conclude that Solomon had distributed the controlled substances obtained by the conspiracy through the writing of fraudulent prescriptions, that the cash he mailed to Cindy Martin in Missouri represented the proceeds of that illegal distribution, and that the purpose of the money laundering was both to promote new drug offenses and to conceal the source of the cash. This Court should uphold the jury's verdicts.

III.

The forfeiture money judgments in the amount of \$991,114 imposed against Elder and Solomon should be affirmed.

The forfeiture money judgments imposed against Elder and Solomon in the amount of \$991,114 (with joint and several liability for each defendant) should be affirmed. This amount represents a very low valuation of the total drug activity during the conspiracy. Whether Elder or Solomon actually received funds in this or any other amount is not relevant.

A. Standard of Review

The appellate court will review “factual findings for clear error but apply a *de novo* standard of review to [the issue] of whether or not those facts render the [asset] subject to forfeiture.” *United States v. Van Nguyen*, 602 F.3d 886, 903 (8th Cir. 2010) (quoting *United States v. Dodge Caravan Grand SE/Sport Van*, 387 F.3d 758, 761 (8th Cir.2004)).

B. Discussion

The two sections above set forth the overwhelming evidence that every single prescription submitted to The Medicine Shoppe in Missouri from the Houston conspirators was a fraudulent one, submitted solely to generate controlled substances to divert for illegal sale. For purposes of the forfeiture money judgment, the Government submitted the affidavit of Lori Nelson, a

United States Attorney's Office financial analyst.⁸ Ms. Nelson reviewed the business records of The Medicine Shoppe, which had been recovered from the business's computers by a DEA computer examiner. The \$991,114 figure submitted to the district court represented solely the drug sales related to the conspiracy:

Desfosses [the computer examiner] was able to extract prescription data, sort it by prescribing physician, and then transfer the data into a Microsoft Access database. This system was searchable by doctor name. By searching these records it was determined that \$525,621 worth of controlled substances were filled and sold using Dr. ELDER's name, \$452,538 worth of controlled substances were filled and sold for Dr. OKOSE, and \$12,955 worth of prescriptions were sold using Dr. Botto's name. These three amounts account for gross sales of \$991,114.

Nelson Affidavit at ¶ 12.

Elder and Solomon's objections to the affidavit have no merit. They argue that the business here was only "partly illegal," but the evidence at trial demonstrated beyond question that it was all illegal. The controlled substances provided by The Medicine Shoppe when filling the Houston prescriptions were all fraudulently obtained and were all diverted rather than going back to any patient (who were completely unaware that any prescription had been written

⁸The Government submitted the declaration to the district court as an attachment to its Motion for Forfeiture of Property, Docket Entry 384. The declaration is attached to this brief as Addendum A1.

in their name in the first place). There is no factual predicate in the record for Elder and Solomon's assertions. It is also clear that the \$991,114 only represents drug sales related to the Houston conspiracy, not sales to other The Medicine Shoppe customers.

Consequently, the \$991,114 represents proceeds of sales of these controlled substances from The Medicine Shoppe to the Houston defendants. As such, that amount is appropriate as the money judgment amount against Elder and Solomon. Essentially, this amount represents the proceeds from the "dispensing" prong of the drug conspiracy charges in this case. As explained above, the "dispensing" violations occurred at the point at which Rostie filled the illegal prescriptions. Thus, Rostie's gross sales on the Houston prescriptions provides the proper figure to value the "dispensing" prong of the conspiracy.

The money judgment amount imposed against Elder and Solomon represented a very conservative figure, as there were other legitimate bases for calculating that amount. The Government could have presented evidence of the street value of each of the 2 million dosage units diverted as part of the conspiracy as another measure of the appropriate amount of the money

judgment, and that figure, representing the “distribution” prong of the charged drug conspiracy, would have been far higher than \$991,114.⁹

As far as the issue of a hearing on the information in the affidavit, both Elder and Solomon waived any hearing at their sentencing proceedings. At Elder’s hearing, the Government offered to put on a witness as to the information in the affidavit if it was necessary, but counsel for Elder was satisfied to submit the issue to the district court on the briefs. (Elder Sent. Tr. 15-16.) At Solomon’s sentencing, Solomon’s counsel objected to the imposition of the forfeiture money judgment but at no time did Solomon request that live testimony be presented in support of the affidavit. (Solomon Sent. Tr. 57.)

Elders’s objections to the money judgment, essentially, that the evidence did not speak to whether he actually pocketed a share of the proceeds, are not well founded. It is well settled that a defendant is liable for the actions of a conspiracy that were reasonably foreseeable to him, unless the defendant affirmatively withdraws from that conspiracy. *United States v. Marquez*, 605 F.3d 604, 611 (8th Cir. 2010). Here, Elder never affirmatively withdrew from

⁹At Elder’s sentencing hearing, held on May 3, 2011, the Government presented the testimony of Houston police officer John Kowal that in 2004-05 hydrocodone sold illicitly in a bulk transaction sold for \$2.25 to \$2.50 per pill. (Elder Sent. Tr. 26.)

the conspiracy. Quite the opposite, the evidence showed that on February 1st and 2nd 2005, Elder's first days working at the Westfield Clinic, months after he had left the South Texas Wellness Center, Elder provided copies of controlled substance prescriptions to Solomon, and was in telephonic contact with Solomon around the time Solomon faxed those copied prescriptions to The Medicine Shoppe Pharmacy in Belton. In contrast to these late conspiratorial acts, Elder never took any affirmative action of any type to withdraw from the conspiracy.

As a co-conspirator, Elder's money judgment must reflect the money gained by the conspiracy as a whole, not simply funds that go to an individual defendant. *United States v. Royer*, 549 F.3d 886, 904 (2d Cir. 2008) (defendant convicted of RICO, conspiracy to commit securities fraud, and four counts of securities fraud must forfeit gain realized by himself and others to whom he gave inside information, not just the gain related to the four counts in which he profited personally; *United States v. Seher*, 574 F. Supp.2d 1368, 1370 (N.D. Ga. 2008) (defendant who conspired to launder \$1.6 million must pay \$1.6 million money judgment); *United States v. Corrado*, 227 F.3d 543, 554-55 (6th Cir. 2000) (*Corrado I*) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the

Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant); *United States v. Corrado*, 286 F.3d 934, 938 (6th Cir. 2002) (*Corrado II*) (same; because person who collected the proceeds was able to do so because of his participation in a scheme, all members of the scheme are jointly and severally liable). Here, Elder was deeply involved in the conspiracy and played a critical role in it, and he therefore should be held accountable for a money judgment reflecting the full amount of the conspiracy's gain. *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (all co-conspirators are jointly and severally liable for the amount of the forfeiture regardless of how much or how little they benefitted from the conspiracy); *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003) (because all co-defendants are liable for the sum of the proceeds realized by each other, the payer of a kickback to a city official is liable for what he received from the city as well as the amount of the kickback, and the city official is liable for the same).

Moreover, a defendant is liable for a money judgment for funds that he did not receive personally but instead directed to a third party. *United States v. Huber*, 243 F. Supp. 2d 996 (D.N.D. 2003) (forfeiture verdict properly included proceeds that defendant did not receive personally because he

directed them to a third party), *aff'd*, *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005). Consequently, the fact that Elder provided the false prescriptions but allowed Solomon and others to garner the proceeds of the resulting narcotics in no way vitiates Elder's responsibility to pay a money judgment. *United States v. Stivers*, Slip Copy, 2010 WL 2365307 (E.D. Ky. June 11, 2010) (co-conspirator jointly and severally liable for amount of forfeiture even if there is no evidence he personally benefitted from the conspiracy).

Finally, it is not required that the Government prove that a defendant has the amount of the money judgment in his possession. *United States v. Mislal-Aldarondo*, 478 F.3d 52, 73-74 (1st Cir. 2007) ("If the Government has proven that there was at one point an amount of cash that was directly traceable to the offenses, and that thus would be forfeitable under 18 U.S.C. § 982(a), that is sufficient for a court to issue a money judgment, for which the defendant will be fully liable whether or not he still has the original corpus of tainted funds—indeed, whether or not he has any funds at all.").

Solomon, like Elder, argues that there was insufficient evidence of his receipt of the proceeds of the conspiracy. For all the reasons set forth above, that argument should be rejected. In any event, there was substantial evidence

in the record that Solomon had sold drugs on the street and that he had received large amounts of proceeds from these illegal sales.

In addition, as to Solomon, the money judgment amount also represents the amount of money laundered by Solomon. The \$991,114 came from the United States currency mailed by Solomon using UPS to co-conspirator Martin, and as such those funds were the subject of the money laundering counts as to which Solomon has been convicted. The money laundering theory provides an alternate basis for the money judgment against Solomon. *United States v. Huber*, 404 F.3d 1047, 1056 (8th Cir. 2005) (“Forfeiture under section 982(a)(1) in a money laundering case allows the Government to obtain a money judgment representing the value of all property ‘involved in’ the offense, including the money or other property being laundered (the corpus) and any property used to facilitate the laundering offense”; in a conspiracy case, the corpus is the funds the defendant conspired to launder, including commingled clean money).

IV.

The district court did not abuse its discretion when it denied Elder's motion for severance, and Elder suffered no prejudice to his right to a fair trial.

The district court did not abuse its discretion when it denied Elder's motion for severance. Elder was a significant participant in the charged drug conspiracy, and all of the evidence admitted at trial would have been relevant and admissible in a trial of Elder alone.

A. Standard of Review

In reviewing a district court's denial of a motion for severance, even an abuse of discretion is not a sufficient ground for relief. *United States v. Payton*, 636 F.3d 1027, 1037 (8th Cir. 2011). Instead, an appellant must demonstrate that the joint trial "prejudiced his right to a fair trial." *Id.*

B. Discussion

Elder's major point in arguing for severance is that some of the evidence, and particularly the financial evidence, mentioned Solomon but not Elder directly. It is clear from the evidence, however, that Elder was a major participant in the conspiracy. His writing of blatantly fraudulent original prescriptions allowed Solomon to forge the supply relationship with Rostie, and in and of themselves resulted in the illegal dispensing and diversion of a

substantial number of Schedule III and IV drugs. Moreover, Elder again participated in the conspiracy in February 2005 when, after his first two days on the job at the Westfield Clinic, he provided Solomon with photocopies of prescriptions already filled by the patients using the original prescriptions, allowing Solomon to illegally generate more dosage units. In addition, STWC, Elder's place of employment, was used as the initial shipment location for the Missouri drug packages.

In any event, all of the evidence in the case would have been admissible against Elder in a separate trial. The evidence related to the overall fraudulent intent of the conspiracy, the actual distribution of drugs on the street, and the generation of cash proceeds from those sales. All of that evidence would have been admissible against Elder to demonstrate the existence of the drug conspiracy in which he was charged. *United States v. Midkiff*, 614 F.3d 431, 440-41 (8th Cir. 2010) (even if counts severed, evidence of the conduct charged in each count would have been admissible in a trial of the other). Indeed, "defendants who are jointly indicted on similar evidence should be tried together," *United States v. Dale*, 614 F.3d 942, 958 (8th Cir. 2010), as a joint trial "gives the jury the best perspective on all of the evidence and

therefore increases the likelihood of a correct outcome.” *Id.* (quoting *United States v. Darden*, 70 F.3d 1507, 1527-28 (8th Cir. 1995)).

CONCLUSION

This Court should affirm the judgments of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B) and contains 21,215 words. The brief was prepared using WordPerfect for Windows Version X4 software. In making this certification I have relied upon the word-count feature of WordPerfect for Windows, Version X4. Furthermore, the brief has been determined to be virus-free in compliance with Eighth Circuit Rule 28A(h).

/s/ *James Curt Bohling*

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2011, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. A paper copy will be served on participants in the case by U.S. Mail, postage prepaid, within five days of the Court's notice that the brief has been reviewed and filed.

I hereby certify that a copy of the Government's brief was mailed on November ___, 2011, to:

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