IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 11-2145

UNITED STATES OF AMERICA,

Appellee,

- vs -

TROY SOLOMON

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

APPELLANT'S BRIEF

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SUMMARY OF CASE/ REQUEST FOR ARGUMENT

Houston, Texas pharmacy owner Troy Solomon appeals his convictions for conspiracy, and aiding and abetting the illegal distribution of prescription medications, as well as conspiracy to commit money laundering. The Government contended that Solomon acquired hydrocodone, alprazolam, and promethazine with codeine from a Belton, Missouri pharmacy for several Houston doctors, whose prescriptions were illegitimate. Solomon appeals because no evidence was presented that the patients' prescriptions were medically unnecessary or that they were written outside the range of acceptable medical practices; and, there was no evidence that these medicines were given to anyone other than the patients. In short, there was no evidence presented about the "national standard of care" which is an element of these prosecutions, nor its breach. Solomon also challenges the forfeiture amount assessed.

Given that this appeal was consolidated with that of Solomon's co-defendant, and that the Government has cross-appealed both of their sentences, the undersigned requests 30 minutes or more for oral argument.

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Prior Related Appeals:

There are no "prior" appeals. But there are three related (consolidated) appeals and cross-appeals:

United States v. Troy Solomon, 11-2240 (X-appeal)

United States v. Christopher Elder, 11-2057 & 11-2239 (X-appeal)

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JURISDICTIONAL STATEMENT

The Honorable Fernando J. Gaitan, United States District Court Judge for the Western District of Missouri, presided over Appellant Solomon's jury trial and sentencing. The District Court's jurisdiction was predicated upon 28 U.S.C. 1355(a), as well as 18 U.S.C. 1956, 21 U.S.C. 841 and 21 U.S.C. 846. Jurisdiction in this Court derives from 28 U.S.C. 1291.

The judgment of the District Court was rendered on May 16, 2011, and is final. A Notice of Appeal was then filed and served upon Appellee's counsel within ten days, on May 19, 2011, as required by F.R.A.P. 4.

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STATEMENT OF ISSUES ON APPEAL

Issue 1. **There was insufficient evidence of conspiracy and illegal distribution of prescription narcotics by Appellant (a pharmacy owner) and his co-defendant (a physician). The Government produced no patients to testify that they failed to receive their prescribed medicines. And, the Government elicited no expert testimony that the prescriptions shown to the jury were issued for other than a legitimate medical purpose, not in the usual course of professional practice (i.e., the national standard of care, which is an element of these prosecutions).**

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

United States v. Katz, 455 F.3d 1023 (8th Cir. 2006)

United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994)

United States v. Paskon, 2008 Westlaw 2039233, (E.D. Mo. 2008)

Issue **2. There was insufficient evidence that Appellant conspired to commit money laundering. The Government's evidence was only that Appellant, a Houston pharmacy owner, mailed cash to the Missouri**

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pharmacy which he contracted to fill many of his own customers' prescriptions.

Cuellar v. United States, 553 U.S. 550, 128 S.Ct. 1994, 170 L.Ed.2d 942 (2008)

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

United States v. Rockelman, 49 F.3d 418 (8th Cir. 1995)

United States v. Santos, 128 S.Ct. 2020, 553 U.S. 507, 170 L.Ed.2d 912 (2008)

***Issue 3*. There was insufficient evidence upon which the District Court could formulate a forfeiture amount, given that the Government only provided the Court with the gross sales of the Missouri pharmacy for one year, without breaking out dollar amounts corresponding to illegal pharmaceutical sales.**

United States v. Huber, 404 F.3d 1047 (8th Cir. 2005), *aff'd* 462 F.3d 945 (8th Cir. 2006)

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STATEMENT OF THE CASE

Houston, Texas pharmacy owner Troy Solomon was charged with one count of conspiring to distribute controlled substances; ten counts of aiding and abetting their distribution; and, one count of conspiring to commit money laundering. (See Record On Appeal[1] 39-76, Indictment; see also ROA 135, Jury Instruction 18) The Government contended that Mr. Solomon acquired hydrocodone, alprazolam, and promethazine with codeine from The Medicine Shoppe in Belton, Missouri in order to fill illegitimate prescriptions written by several Houston doctors. While no evidence was presented that these medicines were given to anyone other than the actual patients, or that the patients' prescriptions were medically unnecessary, a jury convicted Solomon and co-defendant Dr. Christopher Elder on June 30, 2010. Mr. Solomon was sentenced on May 16, 2011 to 24 months in prison, a $5,000.00 fine, and a forfeiture judgment of $991,114.00. (ROA 203-07)

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[1] The Record on Appeal refers to the documents provided directly from the District Court, hereinafter "ROA."

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Mr. Solomon seeks this Court's review because there was no evidence that the medications dispensed from his pharmacy were given to anyone other than the intended patients; nor any evidence that prescriptions Solomon filled were prescribed by Dr. Elder and others outside the range of acceptable medical practices.

STATEMENT OF FACTS

General Background:

In October, 2005, the Missouri Board of Pharmacy inspected The Medicine Shoppe, a Belton, Missouri pharmacy owned and operated by Mary Lynn Rostie. (Trial Transcript pages 136; 141; 318; 413)[2] The inspectors found documents showing that Ms. Rostie was filling large amounts of prescriptions for hydrocodone, alprazolam, and promethazine with codeine (cough syrup), issued by doctors in Houston, Texas, for their patients in Texas and Louisiana. Rostie informed the inspector that this block of business had been brought to her by Cynthia Martin, an

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[2] "Trial Transcript" will hereafter be abbreviated as "Tran." followed by the page number(s). While the Trial Transcript is divided into seven volumes, its pages are consecutively numbered through these volumes, pages 1 through 1,501.

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acquaintance of Troy Solomon. The DEA conducted another search, May 10, 2006, seizing boxes of stored prescriptions and other documents. (Tran. 108-111)

Meanwhile, Mr. Solomon was working in Houston as a full-time pharmaceutical equipment sales representative for MP TotalCare. He agreed to a side-venture partnership with Houston attorney/pharmacist Philip Parker. Together they opened Ascensia Nutritional Pharmacy, which was located in the same building as the South Texas Wellness Center, a pain management and chiropractic clinic, where one of the physicians was Dr. Christopher Elder. But Mr. Solomon's and Mr. Parker's agreement called for Parker to run Ascensia, while Solomon continued working at MP TotalCare. Parker delegated many of Ascensia's daily office duties to Mr. Delmon Johnson. (Tran. 1074-1092; 1217-1223)

The process of prescription-filling went like this: After Dr. Elder examined patients and prescribed medications for their health needs, the patients often took their prescriptions over to Ascensia. The prescriptions were then faxed up to The Medicine Shoppe in Belton, oftentimes in the evening from Mr. Solomon's home while he finished his reports for MP

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TotalCare. (Tran. 136-37; 167; 171) Ms. Rostie's pharmacy techs would, in turn, fill the prescriptions and send them down to South Texas Wellness or Ascensia, where patients would come to retrieve and pay for their medicines. (Tran. 137-38; 141; 148-151; 174) Solomon then sent payment back up to Rostie, through Martin (who was entitled to a broker's fee).

The Government seemed to focus its case on volume. It claimed that in 2005, Ascensia and The Medicine Shoppe were the largest purchasers of hydrocodone in their areas, and The Medicine Shoppe grossed $2,943,653.37. (Tran. 604-09, 890)

The Government's Case-in-Chief:

The Government opened its case by calling Donna Kerste and Jill Gerstner, two employees of The Medicine Shoppe. Jill Gerstner was a pharmacy technician who filled prescriptions received from Houston. She stated that Cindy Martin brought in the prescriptions and payments, which she gave to Lynn Rostie. (Tran. 148-49) Gerstner testified that when personal information like a patient's birth date or address was missing, she or Rostie would send a request to Houston for the data, and would receive a response back, often from Troy Solomon. (Tran. 154, 163-164, 166-181;

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Government Exhibits 49, 51, 456, 458-462, 466-67, 516, 520)[3] In those conversations, he never gave indication that there might be something illegal afoot, and he never gave or offered directions to the pharmacists. He simply answered questions they posed to him. The prescriptions were then filled, shipped and distributed to their patients. (Tran. 195-198) Ms. Gerstner and Ms. Rostie also faxed refill requests to Mr. Solomon for Dr. Elder to sign. (Tran. 169-170, 174-75, 177-78; 209-211)

Ms. Gerstner identified prescriptions for approximately 26 patients, and acknowledged that many more existed which were written by another Houston physician, Dr. Peter Okose, bundled alphabetically. (Tran. 151-166; 179-190; see also Govt. Ex's 1-7, 12, 31, 32, 520-527) She had kept a journal tracking prescriptions shipped to Houston, and their corresponding payments. (Tran. 190-93)

Later, Mary Lynn Rostie (owner of The Medicine Shoppe) testified. She said that Cindy Martin approached her in August, 2004. Ms. Martin said that her friend, Troy Solomon, was looking for a pharmacy which

[3] The parties submitted all 1,149 Government Exhibits on a CD, in place of an Appendix.

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could fill prescriptions for doctors with whom he worked in Houston. (Tran. 241-43) Eventually, Ms. Rostie spoke twice with Mr. Solomon directly, concerning prices and shipping details. When the prescriptions began arriving, Rostie filled them. Missing or incomplete information was provided by Mr. Solomon, who said he could get that for her more quickly than if she called the physicians directly. Rostie then shipped the medicine to Houston, using her FedEx account. (Tran. 243-58, 263) Rostie was paid by Martin, who cashed checks and removed $5 per prescription as her fee for introducing the parties. (Tran. 258-261)

On cross-examination, Rostie conceded that *none* of the prescriptions shown by the prosecution to her on direct exam had been invalid. (Tran. 266-70, 283) Signatures on refill requests did not have to be Dr. Elder's, and could be an agent of his. (Tran. 264-66; 279) (Applicable state regulations (like those in Texas) didn't require addresses or birth dates or dates of prescription, but rather only the patient's name, the medicine identified, and the doctor's signature. (Tran. 266-67, 961-62))

After Dr. Elder left South Texas Wellness Center in January, 2005, Rostie continued to fill prescriptions for Drs. Okose and Botto. She

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generated refill requests and sent them to Solomon, asking him to check with the doctors if refills would be permissible. She generated a form listing all patients whose original prescriptions would soon be running out, which listing could then be placed in front of a physician who could sign off for refills groups at a time. (Tran. 273-79; 297-98)

Ms. Rostie had confirmed by telephone with Dr. Elder, himself, (and later, with Dr. Okose) that these were *all* legitimate prescriptions. (Tran. 286-87, 290) She had been implored by Mr. Solomon to ensure that all prescriptions and all administration behind them were legitimately handled. (Tran. 296) In this regard, one time Rostie found a patient of Dr. Elder receiving the same prescription twice, duplicated by Dr. Okose. Mr. Solomon instructed her *not* to fill *either* prescription. (Tran. 287-88)

Cindy Martin testified after Rostie. Martin - who had worked with Rostie in a pharmacy back in the early 1990's - met Troy Solomon in 2000 when she worked for a financier and he sold manufactured homes. They had a brief affair, but remained good friends. (Tran. 337-360, 388-89) Approximately two years later, Solomon asked if she knew of any pharmacists who might be interested in handling prescriptions by mail for

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high profile customers who wanted confidentiality concerning their medications. Martin then contacted former co-worker Rostie, who was now running The Medicine Shoppe. Rostie agreed to fill Solomon's prescriptions. He sent payments to Martin, via UPS, and told her to take out a $5 finder's fee per script, and then deliver the money to Rostie. (Tran. 360-69) Martin said that Solomon warned her not to deposit more than $10,000.00 into the bank at any one time. Martin claimed she became concerned about the arrangements a few months later, in December, 2004 or January, 2005 when orders increased. And, she spoke to Solomon in October, 2005, when the Missouri Board of Pharmacy performed its inspection, as well as in May, 2006, when the DEA conducted its search. Solomon assured her nothing was amiss. (Tran. 370-77, 384-86)

Frank Van Fleet, the Missouri Board of Pharmacy investigator who examined the records of The Medicine Shoppe in October, 2005, testified next. While auditing the store's records, he came upon a bundle of 56 prescriptions for different patients, but all written by Dr. Okose, preprinted for the same two types of medicine, Lorcet 10/650 mg, and Soma, 350 mg. Van Fleet felt that this was unusual. Also, of the 56 patients, 32 had the last

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name of Johnson. Another bundle of Dr. Okose's prescriptions were for patients from Texas and Louisiana. (Tran. 416-17, 419-20; Govt. Ex's 1085, 1086) He sent a letter to Dr. Okose's office, seeking verification and clarification. Dr. Okose's office manager wrote back, confirming the prescriptions, but Van Fleet called the DEA anyway. (Tran. 420-23)

Van Fleet summarized The Medicine Shoppe's "prescriptions dispensed": Between September, 2004 and October, 2005, the pharmacy filled 4,466 prescriptions for hydrocodone 10-500 mg; 11,985 prescriptions for hydrocodone 10-650 mg; 2,861 prescriptions for alprazolam 2 mg. (Tran. 424-26, 442; Govt. Ex. 1091) Dr. Okose wrote 10,959 hydrocodone prescriptions (new orders and refills). Dr. Elder wrote 15,504 prescriptions for hydrocodone, alprazolam, and promethazine. (Tran. 427-29; Govt. Ex. 1092) Seven prescriptions written by Dr. Elder for Lorcet and Xanax were all for the same strength and quantity (for patients Adams, Bram, Knack, Paz, Perry, Ruffin and Saliba). (Tran. 423-24; Govt. Ex's 1089, 1090)

On cross-examination, Van Fleet acknowledged that Dr. Elder was a pain management specialist, and that hydrocodone and alprazolam can be prescribed together to alleviate pain and the anxiety that goes with it.

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(Tran. 434, 437-38) But Van Fleet found it unusual that refill authorization requests were faxed to Mr. Solomon rather than the doctors, themselves. (Tran. 439-440) However, he did not conduct any investigation into the prescriptions, nor did he call Dr. Elder or Mr. Solomon to gather any information or assurances from them. (Tran. 445-48)

The Government then presented Bhagirath Parikh who owns a Houston UPS store, and who confirmed that Solomon sent 19 mailings to Cindy Martin in 2004 and 11 more in 2005. (Tran. 456-463, 468)

The owner of the South Texas Wellness Center, chiropractic doctor Pleshette Johnson-Wiggins, then took the stand. She appeared under an immunity grant. (Tran. 470-72) She testified that Dr. Elder saw only 4-5 patients per day, two days per week, and sometimes he had no patients at all. (Tran. 476-77) Meanwhile, Mr. Solomon was one of her investors, infusing approximately $30,000.00 into South Texas. (Tran. 477-480, 483, 485, 548-551, 553-55) In the middle of 2004, Ascensia Nutritional Pharmacy opened on the same floor as South Texas Wellness Center. Soon, shipping boxes began arriving, and occasionally employees of South Texas might sign for deliveries if no one from Ascensia was around to do so. Solomon

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told Dr. Johnson that the boxes contained vitamins and supplements. She never tried to verify this. (Tran. 491-94) But Solomon was only infrequently present at Ascensia once it was up and running, as he was also working full-time in his pharmaceutical sales job. Phillip Parker was Ascensia's daily manager. (Tran. 549; see also p. 564)

South Texas was not making a large profit, so Dr. Johnson eventually decided the arrangements were no longer viable. Towards the end of 2004, Dr. Elder left his position with South Texas, and Mr. Solomon then pulled out as an investor. (Tran. 488-89, 522-25)

Initially, Dr. Johnson told her patients that they could fill their prescriptions next door at Ascensia. (Tran. 513-14) Later, she instructed that prescriptions not be given to patients, but instead faxed directly to pharmacies, to avoid patients taking their scripts and duplicating them. This change in procedure came about in 2005, after Dr. Elder's tenure. (Tran. 514-15)

In October, 2006, a grand jury subpoena for Dr. Elder's patient records was served on South Texas. Dr. Johnson looked for 110 of the patients' files but could not locate them. She called Dr. Elder who told her

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that he had the charts, but that they were destroyed when his vehicle was stolen and vandalized. (Tran. 502-07; Govt. Ex. 1198) Johnson claimed that the files belonged to Dr. Elder, not the clinic. (Tran. 533-34) {Later, a June, 2007 affidavit was introduced in which Dr. Elder stated he never had these patient records in his possession because they belonged to South Texas and were maintained by the Johnsons. (Tran. 634-35; Govt. Ex. 1047)}

Former Ascensia Pharmacist Quan Pham testified next. She had been hired by Phillip Parker in June, 2004, to assist in opening a "door-closed" pharmacy which fills orders received from physicians, and sends that medicine onto another pharmacy. Ms. Pham worked with Parker to get all licensing, and was the pharmacist when the business officially opened that December. (Tran. 558-563) She confirmed Mr. Solomon was only at the office perhaps an hour per day. Indeed, it was Parker who ordered the stock, set the pricing, and set up the computer system. Parker also, along with Delmon Johnson, brought in the prescriptions to fill. (Tran. 564-66, 578-580) Prescriptions were then boxed up and delivered to the physicians' offices for dispensing to their patients, or often, Delmon Johnson would deliver prescriptions to patients, directly. (Tran. 567-68, 583)

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Parker brought Ms. Pham prescriptions for hydrocodone and soma, in groups of 150 to 200 at a time, written by Dr. Okose. This did not happen daily. Rather, when Pham finished filling a batch, soon she would receive more. She often had questions about some of the prescriptions, so she called Dr. Okose frequently. He complained that she was calling him too much, so after a while she was told by Parker to give her questions to Parker or Solomon and let them call. (Tran. 566-571, 585) At one point, Pham had concerns about not seeing the patients for whom she filled prescriptions, so she actually contacted 3 patients to verify that they were indeed receiving their pills. Though she initially testified that she was able to speak with only one patient, Pham later admitted telling agents she had actually confirmed that all three patients she contacted received their medicine. In January, 2005, Ms. Pham resigned from Ascensia. (Tran. 571-74, 583, 589-93)

DEA diversion control agent June Howard followed. She testified that between January and October, 2005, Ascensia was the largest purchaser of hydrocodone in its zip code, buying 3,557,900 units, second in the State of Texas. Correspondingly, The Medicine Shoppe (Rostie

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Enterprises) was the largest purchaser of hydrocodone in Missouri, buying 1,932,300 units. Between August 1, 2004 and December 31, 2004, Ascensia was fifth of nine pharmacies in its zip code, buying 7,000 units of hydrocodone. Meanwhile, The Medicine Shoppe was the third largest purchaser in Missouri, buying 223,900 units. (Tran. 604-09; Govt. Ex's 1118, 1119, 1173, 1174, 1175, 1200, 1201) However, these numbers are not correlated in any way to the physicians who may have prescribed the dosages behind the orders purchased by Ascensia or The Medicine Shoppe, though analyst Howard had the capability to run numbers for doctors who purchased drugs under their own DEA number. She just wasn't asked by the prosecution to do so. (Tran. 613-621)

The Government then introduced into evidence approximately 44 prescriptions written by Dr. Elder while he was working at Westfield Medical Clinic around the end of January, 2005. Ascensia pharmacist Sunny Chin was on the stand, and stated that Dr. Elder worked with low income patients in the neighborhood, and that the pharmacist knew the patients who brought in prescriptions from Dr. Elder to be filled. He saw nothing at all irregular about their prescriptions. And, in Texas up until

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2008, no address or date of birth was required on the prescription. (Tran. 621-28; Govt. Ex's 261-305) {Mr. Chin's assistant, Magdalena Ortega, then echoed Mr. Chin's observations that all of the prescriptions seemed legitimate, and there was nothing unusual about a pain management physician like Dr. Elder writing a series of prescriptions for the same medication, for different patients. (Tran. 637-647)}

Westfield Medical Clinic's director, Diane Hearn, testified next. She hired Dr. Elder, who began working there on February 1, 2005. None of the clinic's patients had insurance, so this was a cash business. Dr. Elder worked there full-time, four-and-a-half days each week, seeing 40-50 patients daily. He was paid $30 per patient, so he earned approximately $8,000.00 per week, and was given a 1099 at the end of his year there, for $200,000.00. (Tran. 648-651, 669-673) Dr. Elder requested that he be given a photocopy of all prescriptions he wrote, so that he could track how many patients he saw because he was paid per visit. (Tran. 653-54, 665)

Ms. Hearn also testified that she received a request for 110 patient files from the Government in late 2006. She was unable to locate any of these files. But a comparison of Hearn's subpoena and that given to Dr.

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Johnson at the South Texas Wellness Center shows the Government simply gave the same list of patients to Ms. Hearn, *although these were patients from South Texas Wellness, not Westfield*. (Tran. 656-58; Compare names on Govt. Ex. 1196 against Ex. 1198; see also Tran. 730-31) In February, 2008, Ms. Hearn received another list of patients. For these names, she had all of their charts, but little or no prescription information. (Tran. 658-662; see also p. 731; see Govt. Ex. 1076)

As regards prescription writing, Ms. Hearn opined that Dr. Elder was actually a very strict physician from whom getting a prescription was tough. Ms. Hearn had experience with "pill mills" and she stated unequivocally that no such practice was occurring while Dr. Elder worked for her. "[H]e did it the right way . . . He insisted on it. He ran a tight ship." (Tran. 665-69, 673)

The Government's case continued with testimony from DEA diversion investigator Judi Watterson, the agent who received the initial call from Mr. Van Fleet. (Tran. 690-92) Ms. Watterson began by describing her October 26, 2006 interview of Dr. Elder in Houston. She verified that he is double board certified in pain management and in "physical medicine

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and rehabilitation," and confirmed his work history at both South Texas and Westfield. Dr. Elder estimated that 70 of his patients at the former followed him to the latter. (Tran. 693-99) Dr. Elder denied being asked by Mr. Solomon to write prescriptions for the purpose of having Solomon fill them for the patients. When showed prescriptions found at The Medicine Shoppe, Dr. Elder confirmed writing them, but denied initialing for refills on the fax transmittal sheets. (Tran. 700-02) Dr. Elder stated that the last time he spoke with Solomon was in April, 2005, but phone records showed that Solomon and Elder spoke for 11 minutes on May 3, 2006, the day of the Government's search at Ascensia, and again the next day. (Tran. 703-05) Watterson also testified to promethazine prescriptions written by Dr. Elder (which he had denied), and to faxes sent by Mr. Solomon to The Medicine Shoppe on February 3, 2005, containing prescriptions for Dr. Elder's South Texas patients, though this was two days after Dr. Elder began working at Westfield. (Tran. 705-07; Govt. Ex. 1048)

Ms. Watterson had also interviewed Troy Solomon on May 3, 2006, during the search of Ascensia. Solomon confirmed that he opened Ascensia in late 2004 with Phillip Parker, but then claimed he had met

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Cindy Martin at a convention in 2005, rather than years earlier as she had testified. Solomon acknowledged that it was Martin who connected him with The Medicine Shoppe. He admitted to faxing prescriptions up to The Medicine Shoppe, because Ascensia did not have the line of credit necessary to obtain wholesale pricing, whereas The Medicine Shoppe did. Solomon said that customers picked their prescriptions up at Ascensia. And, he explained to Watterson all of his due diligence in seeking reassurances from pharmacists and the Texas Board of Pharmacy that it was legal to fill prescriptions from out of state. He gave Watterson the names of Drs. Elder and Okose, and told her that Phillip Parker had been paying The Medicine Shoppe. (Tran. 707-713; see also 766-68)

The day of this interview, phone records show Solomon calling South Texas owner Ada Johnson, Dr. Okose, Dr. Cynthia McNeil, Delmon Johnson, Cindy Martin and Dr. Elder. (Tran. 716-719) However, it was established that Mr. Solomon was out of town the morning of the search, but came to Ascensia when asked to do so by agents. Solomon, of course, had not been tipped about the search, and was in Victoria, Texas, attending to his eldest son, who had just attempted suicide. (Tran. 760-62; 1166-67)

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Ms. Watterson next testified about finding a prescription filled by The Medicine Shoppe which was written by Dr. Elder for a patient named Cache Doria Perry, whose address was listed as the residence of Phillip Parker and Delmon Johnson, which was a townhouse owned by Mr. Solomon. A notation on the script by Lynn Rostie indicated "verified with Troy via phone." (Tran. 720-22; Govt. Ex. 37, p. 66)

Watterson then confirmed that she found one patient, Cecilia Paz, who received prescriptions from Dr. Elder in August, 2004, and later in January, 2005 from Dr. Botto, using two different addresses, one in Corpus Christi, and the other in Houston, listing a street address on 7th Street in both cities. (Tran. 723-725) Watterson testified that the names of patients Amanda Allen and Lindsay Lewis (counts 3 and 4) appeared on prescriptions with addresses that were on a list of four provided by the Postal Service as unverifiable. Two other patients' prescriptions, Mark Ivey and Cheryl Zarsky (counts 5 and 6), had address irregularities on their prescriptions. All four names appeared on faxes sent to The Medicine Shoppe from Solomon. (Tran. 726-729; but see 771-73)

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Watterson found prescriptions at The Medicine Shoppe written by Dr. Elder when he worked at South Texas, and at Westfield. (Tran. 730-31) She also found approximately 90 prescriptions that were both filled at C&G Pharmacy in Houston, and again at The Medicine Shoppe pursuant to photocopies faxed to Missouri. Then there were 84 more prescriptions filled at C&G which were later found repeated at Ascensia. (Tran. 736-746)

Ms. Watterson also put together several charts. The first depicted the frequency of cash deposits larger than $2,000.00 made by The Medicine Shoppe into its bank during 2004 and 2005. (Govt. Ex. 1109) The next chart showed 11 faxes were sent from The Medicine Shoppe to Ascensia between November 15, 2004 and March 25, 2005. (Govt. Ex. 1114) Watterson also charted the number of prescriptions written by Dr. Elder between August 17, 2004 and October 26, 2004, and when those were refilled by faxes, some up to 10-12 times. (Govt. Ex's 1116, 1117; Tran. 746-751)

Watterson's direct exam concluded with her confirming that four patients for whom prescriptions had been written were instead deceased. Two of these constituted counts 7-10 of the Indictment. (Tran. 752-56)

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On cross-examination, Watterson conceded that she interviewed many witnesses, including Ascensia employees Delmon Johnson, Lillian Zapata, and Nduke Bede, who all confirmed that Phillip Parker was running Ascensia, not Mr. Solomon, as he was still working full-time for MP TotalCare. (Tran. 782-85) Watterson was confronted with the fact that Amanda Allen's address, alleged to be "XXX Makey," was handwritten on a prescription, and then typed into a computer system. And while "XXX *Makey*" does not exist in the U.S Postal Service's computer system, Mr. Solomon's counsel suggested through reference to an exhibit that "XXX *Maxey*" does. This was important because the incorrect address for Ms. Allen on *Makey* constitutes Count 3 of the Indictment. (Tran. 772-73)

Watterson admitted that she had no proof that the *handwriting* on the faxes with Mr. Solomon's name on them was actually his. She conceded that Solomon very well may have been asked by Parker to simply send the faxes. (Tran. 782-84) Watterson also admitted that the lead prosecutor asked her to withhold two witness interview reports, one being that of The Medicine Shoppe pharmacy technician Jill Gerstner. Watterson had never been asked to do that in 24 years as a DEA agent. (Tran. 789-791)

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Watterson admitted that Dr. Elder was never found to have made any money off of this alleged prescription scheme, and actually received tax refunds for 2004 and 2005 after an IRS audit. (Tran. 797; see also pp. 894-95) In fact, even through his June, 2010 trial, Dr. Elder was permitted by the DEA to prescribe the same pain medications at issue in the case. (Tran. 808-09)

The Government also called former Ascensia employee Lillian Zapata. She started working there as a pharmacy technician in January, 2005. She claimed to have served as the only person filling prescriptions during the month between Ms. Pham's and Mr. Bede's tenures, but that was later shown to be an ambiguous estimate. She often pre-filled prescriptions, meaning that she loaded vials or bottles with medicine for storage on shelves, to be taken down when the stacks of physicians' prescription documents were brought in to her by Delmon Johnson. (Tran. 837-844, 864-65, 867-68) Ms. Zapata was told by Delmon that the medicines were then boxed up and delivered back to Dr. Okose, who distributed them to his patients. (Tran. 845-46) She also signed for FedEx deliveries, one of which was addressed to Troy Solomon, but to the address of South

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Texas down the hall. (Tran. 848-49) After pharmacist Bede began working with her, Zapata started observing more patients coming into Ascensia from South Texas. To her, they appeared to be "crackheads." She noticed that they came in with a person who would pay for their medicines, and then all leave. Mr. Solomon told her to fill their prescriptions quickly because he did not want that type of customer in his shop. (Tran. 851-52)

Zapata testified that Solomon told her Phillip Parker was the contact with Dr. Okose, and made their introduction. In fact, she told federal agents that Parker had the relationship with Dr. Okose, whereas Solomon only met him one time. And, she told them that the prescriptions on which she worked each morning were obtained by Delmon Johnson or Parker, not Solomon. She also claimed that Solomon told her Parker's name was on all documents because he was an attorney. (Tran. 854, 866)

Zapata dated Solomon in 2005, and claimed that one time she accompanied him on a car ride into a bad part of Houston, where he pulled over and gave a "small moving box" from the trunk to a man in a following vehicle. Solomon purportedly returned to his car and remarked, "I bet you didn't know you were riding with three million dollars." She

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later left employment with Ascensia (and ended her relationship with Solomon) in October, 2005. (Tran. 854-56)

The next witness was Robert Klemen, who worked for Dr. Okose since 1996. Dr. Okose transitioned to pain management in 2003, and opened a second clinic, which Klemen managed. (Tran. 869-870, 872-73) They treated between 50-75 cash patients per day, though some busier days saw them handle between two and four hundred patients who came in for assistance. The clinic averaged $5 million per year. (Tran. 873-75) It was a business practice of Dr. Okose to pre-sign prescriptions prior to leaving the office for out-of-town trips. While Dr. Okose kept plenty of cash on hand, no drugs were dispensed from this location. The DEA closed him down in 2006. (Tran. 875-76)

Financial analyst Lori Nelson then testified, having summarized Cindy Martin's cash deposits between October, 2004 and October, 2005 ($71,666.80), and Rostie Enterprises' total deposits between August, 2004 and October, 2005 ($2,943,653.37). (Tran. 886, 888-890; Govt. Ex's 1143, 1145) She said that in 2004, Mr. Solomon filed a tax return which omitted $11,550 in income from Ascensia. In 2005, Mr. Solomon filed a return

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reflecting an income $59,130, while Ascensia's bank records reflected $718,094 deposited, $369,000 of which was cash. (Tran. 890-92; Govt. Ex's 1120, 1121) (Nelson wasn't asked by prosecutors to analyze Dr. Elder. (Tran. 892-96))

The Government's final witness was Dr. Richard Lloyd Morgan, a private practitioner in the Kansas City area who has had a pain management practice since 1985. (Tran. 937-38) Dr. Morgan testified that all medicines need to be carefully considered when prescribed, and tailored carefully for each patient. (Tran. 940-41) Dr. Morgan is only licensed in Missouri and Kansas. He stated that although addresses are not required for a valid prescription, the date of issuance is. (Tran. 938, 943-44) The Government had Dr. Morgan review the faxes in evidence, and then opine that since many of the prescriptions in each batch of patients were nearly identical (same medicine and same dosage and same combination), this was an unusual practice. He also found it unusual to prescribe hydrocodone along with promethazine, as both perform the same action, albeit differently. (Tran. 944-46; see also pp. 986-88, "highly unusual"; "extremely unusual") Dr. Morgan also said that a lack of patient records

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would be of concern. And, he concluded his direct examination by stating that promethazine can be abused. (Tran. 947-49)

On cross-examination, Dr. Morgan conceded that he had never testified before. And, he allowed that most people without any insurance or Medicare or Medicaid (cash patients) go to Truman Medical Center, not St. Joseph's where he works. (Tran. 950-52) Dr. Morgan agreed that there are symptoms (what the patient claims) and signs (what the physician observes), and that there is no such thing as a "pain meter" to make assessing pain easier. Dr. Morgan also discussed that seeing former patients may indeed take less time than meeting and evaluating new patients. (Tran. 955-58) And, Dr. Morgan agreed that while he is also an anesthesiologist who often administers Schedule II pain medications (the more potent opioids) with needles, the case at bar only dealt with less dangerous Schedule III and Schedule IV pain medications. (Tran. 959-961)

Dr. Morgan is not licensed in Texas, but he did look at the requirements for prescription writing in that state for the years 2004 and 2005. He agreed that only the patient's name, type and number of pills, and date, were required. Dr. Morgan admitted that he, himself, has

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forgotten to put the date on prescriptions. In that instance, the prescription is not *per se* invalid. Rather, the pharmacist simply needs to call the physician's office to acquire that information. (Tran. 938, 961-62)

While Dr. Morgan found the faxes sent to Texas from The Medicine Shoppe unusual, he admitted that the four prescriptions which constituted the first four substantive counts of the Indictment (Counts 3-6, corresponding to patients Amanda Allen, Lindsay Lewis, Mark Ivey, and Cheryl Zarsky; see also Govt. Ex's 1 through 4) were all indeed different. Not only were two written on October 19, 2004, and two were written on October 26, 2004, the directions for usage differed. And most importantly, Dr. Morgan agreed that "without having the full patient record and everything here to review today, you can't second guess what [Dr. Elder] did in those four cases." The prescriptions appear regular and there is "nothing unusual or sinister about them." (Tran. 963-67)

Dr. Morgan then examined a batch of Dr. Elder's prescriptions, and again commented that they were unusual in that they all called for the same drug, but he allowed that the medical community has recently begun to favor opioids as a treatment method because of documented problems

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(even death) resulting from the use of nonopiods. And, all of Dr. Elder's original scripts indicated "no refill," which is especially prudent in the case of new patients whose tolerance for the medication is not yet known to the physician. (Tran. 969-973; see also pp. 983-84)

Dr. Morgan also acknowledged that many patients treated for pain are dependent (as opposed to addicted) on their medications. And some present with false identification, such that they can scam a doctor for medicine. Dr. Morgan also stated that he takes cash from patients - often the more than 40 million uninsured in this country - and there is nothing wrong with doing so. He agreed that those poorer people statistically experience worse health problems, but they need treatment like everyone else. Often times, because more expensive diagnostic and treatment options, like MRI's, are not financially viable, medicines are instead prescribed. (Tran. 976-983) That concluded the Government's case.

Counsel for defendants then presented their motions for judgments of acquittal, which were denied. (Tran. 989-996)

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The Defendants' Evidence:

Because Mr. Solomon's appellate issues pertain to the sufficiency of the *Government's* evidence, a detailed recitation of defense witnesses' testimony serves no purpose. A brief summary is thus included for context, and readers' convenience.

Ascensia employee Delmon Johnson testified first. In 2004, attorney/pharmacist Phillip Parker had him build several pharmacies in Houston, including Ascensia. There, Johnson met Solomon. After the construction of Ascensia's offices, Parker hired and trained Johnson to stay on and run its daily operations. (Tran. 998-1002) At that time, Solomon was working full-time for MP TotalCare. Johnson confirmed that Solomon received repeated assurances from Parker that Ascensia's operation was lawful. Solomon only visited the pharmacy once or twice per week. (Tran. 1002-03, 1049-50)

When shipments from The Medicine Shoppe arrived at Ascensia and/or neighboring South Texas Wellness Center, Parker had Johnson load the boxes into Parker's car. (Tran. 1008-1011) Prescriptions from Dr. Okose were brought in by Parker, or faxed. And, after those were filled, they

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were boxed up and given to Parker, who said he was delivering them back to Dr. Okose for distribution to his patients. Solomon was uninvolved in this. (Tran. 1012-13, 1048) After Solomon terminated the partnership with Parker in September, 2005, he undertook the operation of Ascensia. Parker would still appear there from time to time, for another month or so. Unbeknownst to Solomon, Parker was building another pharmacy in a different part of Houston, extremely close to Dr. Okose's clinic. (Tran. 1015-1021)

On cross-examination, the prosecution reminded Johnson that he had earlier indicated the split between Solomon and Parker happened in April, 2005, not September. And, Johnson allowed that some of the Okose boxed prescriptions (*not* the earlier discussed FedEx packages) were loaded into Solomon's car, on one or two occasions. (Tran. 1028-1032, 1038, 1047-48)

Troy Solomon testified next, in his own defense. He is a Houston native and former police lieutenant for the Houston Community College System. Solomon pursued a career in sales, where he received recognitions and awards. (Tran. 1057-1074) Solomon met Phillip Parker through friends at church in 2003, when Solomon was working for MP TotalCare.

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A year or so later, they opened Ascensia as equal partners (though all initial start-up capital was Solomon's). (Tran. 1074-1087) In the fall of 2004, Solomon had a conversation with Cindy Martin, who he consulted about Ascensia's need for someone from whom they could purchase their medications. Martin told Solomon that she was going to work for Lynn Rostie as a sales rep, and would get a commission off of any transactions if Solomon would do business with Rostie. He contacted Rostie, they discussed Ascensia's needs, and Solomon verified that his pharmacy could buy its medications from this out-of-state supplier. (Tran. 1088-1092) Solomon brought this information to Parker, and thereafter acted as the go-between for Parker and Rostie in terms of transmitting prescriptions. Because Solomon was still working full-time, he'd finish his MPTC reports in the evenings at his home office, so Parker would often come over to use Solomon's fax machine to send prescriptions up to Rostie. Other times, Solomon would send the faxes for Parker. Solomon also sent UPS packages up to Rostie for Parker. (Tran. 1092-96)

By August, 2005, Solomon began having suspicions about Parker and the way he was conducting business. Solomon received a letter from the

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building manager complaining about customers loitering around Ascensia. And, some insufficient-funds notices arrived from the bank. Solomon confronted Parker and asked for financial information. Finally, Parker produced some tax documentation showing the large volume of gross receipts the shop was generating. Solomon personally took those records over to his own accountant, and then, on his advice, Solomon terminated with Parker. Solomon left MPTC to take over at Ascensia. (Tran. 1097-1104; see also Solomon Ex. 5)

Solomon conducted his own due diligence on Dr. Okose by driving by his clinic, where Solomon saw a large number of cars in the parking lot and deduced that Dr. Okose was running a successful practice. (Tran. 1106-07) However, Ascensia stopped filling volume orders from Dr. Okose when Solomon was alerted to problems by a relief pharmacist who worked temporarily for Solomon upon the recommendation of a Texas Board of Pharmacy inspector, with whom Solomon consulted during an inspection after Ascensia's pharmacist died in late autumn, 2005, after Parker had been asked to resign. (Tran. 1110-1112)

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Mr. Solomon concluded his direct testimony by reiterating his innocence of the charges levied against him. (Tran. 1112-13)

On cross-examination, Mr. Solomon again acknowledged that he had indeed faxed Dr. Okose's and Dr. Elder's prescriptions up to The Medicine Shoppe. When The Medicine Shoppe sent a fax to Solomon seeking Dr. Elder's signature for approval of refills, Solomon would give the fax to Parker, who would get the signature and return it to Solomon for re-transmission back to Belton. (Tran. 1128-1142; Govt. Ex's 40, 45, 47, 51, 544, 458, 460, 461, 462, 466, 467, 468, 470, 471, 472, 475, 476, 477, 478, 481, 482, 493, 495, 496, 497, 500, 501, 502, 503, 506, 508, 511, 512, 514, 515, and 516, or 37 faxes; see also Tran. 1160-61) And, Solomon admitted to sending Cindy Martin several UPS packages in September and October, 2005, after the split from Parker. But Solomon denied knowing that the packages contained cash payments. (Tran. 1143-46) (Mr. Solomon did not deny sending a total of 70 packages to Martin and Rostie in 2004, either, though he claimed some of the packages sent to Martin contained gifts and perfumes. (Tran. 1147-1155) Solomon would stop by Ascensia on his way

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home from MPTC, and take packages left by Parker to the UPS Store near Solomon's house. (Tran. 1162-65))

Dr. Elder also took the stand in his own defense. He attended medical school and completed his internship at the University of Pennsylvania. He then performed his residency at Baylor. He is double board certified in Physical Medicine and Rehabilitation, and in Pain Medicine. (Tran. 1204-1213)

In 2004, Dr. Elder was hired at South Texas Wellness Center. He did not know that the prescriptions he wrote were being faxed to Missouri. Dr. Elder stated that the patient files at South Texas were located behind the reception area. He was seeing 20-30 patients per day. He would hand his prescriptions to his patients, but then later that changed after Pleshette Johnson said that they would keep the original prescriptions in the patients' files while faxing them to the patients' pharmacies. This seemed odd, but he had seen this practice before. (Tran. 1225-28, 1324-26)

As for the prescriptions that were recovered in Missouri, Dr. Elder denied having ever placed dates or addresses on them. When asked about groups of 80-100 of his prescriptions all bearing the same date, Dr. Elder

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surmised that someone held back a batch and then faxed them all up to Belton at once. (Tran. 1228-1230)

And while Dr. Morgan criticized Dr. Elder's practice of prescribing the same medication to many different patients for apparently different maladies, Dr. Elder defended himself by reference to "A Pain Medicine Comprehensive Review," by Dr. Raj, a publication Dr. Elder testified was authoritative on the subject. That treatise suggests that ant-anxiety meds, like alprazolam, can be used to alleviate pain, in conjunction with other pain killers. (Tran. 1231-34; Elder Ex. 59) As such, Dr. Elder reiterated that while every patient is different, the same medication can be used to treat different ailments. (Tran. 1234-37)

As for the shipments of drugs from Missouri to Texas, Dr. Elder was unaware. (Tran. 1238-40) Corroborating this was evidence of Dr. Elder's e-mail address, which showed no history of him e-mailing any of the other people involved in this case. (Tran. 1241-43) Along these lines, Dr. Elder denied that he had written the initials approving refills which appeared on the 9 faxes sent between The Medicine Shoppe and Ascensia, seeking the doctor's approval while he was still working for South Texas, nor the 34

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faxes sent after he had already left. Dr. Elder left South Texas because he didn't enjoy working with the Johnsons, who tried to direct how Dr. Elder cared for patients. (Tran. 1244-47)

During 2004, Dr. Elder struck up a friendship with Mr. Solomon. Not only did Dr. Elder complain to Solomon about the Johnsons, but the two also talked about sports and other shared interests. (Tran. 1247-1250)

After Dr. Elder left South Texas, he went to work at Methodist Hospital, and then Westfield. There, Dr. Elder was paid based on the number of patients he examined. So that he could track his compensation, he asked for copies of prescriptions he wrote. He did this for two months until he was comfortable with clinic owner Diane Hearn. Dr. Elder never wrote a prescription for a non-existent patient. The patients for whom Dr. Elder wrote a prescription had the choice of any pharmacy to fill their order. Adjacent to Westfield was C&G pharmacy. Between Westfield and C&G, 8-10 people had access to Dr. Elder's prescriptions. As such, he had no idea how copies of his orders ended up in Missouri. Dr. Elder is particularly obsessive about putting "no refills" on every prescription he writes. Candidly, one of his three main reasons for doing this is to make

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the patient have to come back for another office visit. So, signing off on batches of refill orders for The Medicine Shoppe would have been financially counterproductive to that objective. (Tran. 1250-1265)

As for what was required for a valid prescription in Texas during 2004-05, Dr. Elder explained that a doctor simply needed to write: patient name; quantity of medication; instructions for dispensing; DEA number; but not necessarily a date, because so long as the drugs are not Schedule II, the prescription is valid for one year. Since C&G Pharmacy didn't even carry Schedule II substances, the date was irrelevant. Moreover, it was the pharmacist's obligation to call the doctor in cases where questions arose. In this vein, Dr. Elder never received a call from Lynn Rostie at The Medicine Shoppe. (Tran. 1267-69)

Dr. Elder was unapologetic for working at clinics which catered to cash paying patients. Between 40 and 50 million people in the United States have no insurance, and Dr. Elder's places of employment offered their services to economically disadvantaged patients in poor neighborhoods. Unfortunately, and without coincidence, these people have more health issues than affluent members of society. Knowing that

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drug abuse might be an issue with his patient base, but knowing that these people could not afford drug tests, Dr. Elder actually provided drug screening to his patients at Westfield, which enabled him to also ensure these people were compliant with his dosage instructions. (Tran. 1269-1277)

Turning specifically to the four patients whose prescriptions constituted Indictment Counts 6-10, Dr. Elder confirmed that they were indeed real patients. He did not place their addresses on their original prescriptions; it was not a requirement in Texas for the doctor to do so. The addresses were clearly filled in by someone else. (Tran. 1278-1280)

Dr. Elder proclaimed his innocence, and denied ever taking any patient files from South Texas, because it is the facility that owns the files, not the physician. Dr. Elder was a physician "locum tenens" at the time, meaning a doctor for hire, an independent contractor. As for Pleshette Johnson's claim that Dr. Elder kept files in his truck, which was later stolen, he denied this. (Tran. 1281-87) And in that regard, Dr. Elder flatly denied having ever signed for any of the boxes being shipped to South Texas. The

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one box ostensibly containing his signature is, in fact, not his writing. (Tran. 1287-88)

Dr. Elder also explained how it was possible that two deceased patients' names were used to procure prescriptions. Of the thousands of people he has examined, he is not infallible, and identity theft occasionally goes undetected by both the physician and his staff. (Tran. 1288-1291)

On cross-examination, Dr. Elder was unable, simply by looking at only the prescriptions for STWC patients, to recall any details about those people, 6 years later. (Tran. 1310-1313) In any event, his explanation for how they ended up in Missouri was that the Johnsons were somehow involved, since Pleshette admitted that she had faxed prescriptions to pharmacies and kept originals at the clinic. Dr. Elder never steered his patients to any one pharmacy over another. (Tran. 1313-18)

The Government showed Dr. Elder 41 prescriptions he wrote while at Westfield on February 1st and 2nd, 2005, which were filled next door at C&G Pharmacy, but which later on February 3rd were all being faxed to Missouri from Mr. Solomon's residence. (Tran. 1331-36; Govt. Ex's 261 & 52; 262 & 53) Dr. Elder had also prepared a list of those same patients, with their

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addresses and dates of birth, which was faxed to Missouri on February 3rd minutes after copies of the original prescriptions. But while Dr. Elder admitted to making the list so he could track his patient count for compensation purposes, he denied being involved in this faxing. (Tran. 1339-1349; Govt. Ex. 1048; see also Tran. 1365-67, 1370-71, discussing phone records showing 2 calls between Dr. Elder and Mr. Solomon on February 3rd)

Similarly, Dr. Elder denied having signed for two FedEx packages, contending that the signatures shown on the packaging slips were forgeries. (Tran. 1351-53; Govt. Ex's 625, 626) And he denied being a part of any scheme to have prescriptions filled in Missouri, sent back to South Texas, and then improperly distributed. (Tran. 1353-56)

And while the Government tried to argue that, using Dr. Johnson's estimate of Elder seeing 4-5 patients per day, it was impossible to have examined 544 patients in the 4 months Dr. Elder worked at South Texas, his attorney calculated that Dr. Elder would have only had to see 10.35 patients per day to reach 544, not even the 20-30 Dr. Elder had claimed earlier in his testimony. (Tran. 1324-28; pp. 1367-68)

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Prior to being indicted in this case, Dr. Elder was questioned by the Texas Medical Board about patients Amanda Allen, Lindsay Lewis, Mark Ivey, Cheryl Zarsky, Jean Greenwald and Alexander Thang. Having seen their prescriptions, Dr. Elder had testified earlier to having examined and treated these 6 individuals, though he had no specific recollection of them. Contrary to his trial testimony, Dr. Elder had answered the Texas Medical Board's inquiry in the negative, stating that, to the best of his knowledge, he had not been their physician. (Tran. 1361-64; Indictment, Counts 3-6, 11, 12; Govt. Ex. 1221)

The Government's Rebuttal Evidence:

The Government's rebuttal evidence consisted of one witness, Doris Crooks of Houston, who testified that she was never a patient of South Texas Wellness Center or Dr. Elder. She testified that she lost her license in the last week of September, 2004. However, her prescription (showing a slightly incorrect address) was filled at the end of August, and a copy of her license was found at The Medicine Shoppe. She could not explain how this happened. Though she allowed that it was possible someone had

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stolen her identity (since the copy of her drivers license was missing her picture). (Tran. 1376-1383)

Dr. Elder's Surrebuttal:

Dr. Elder was permitted to testify again afterwards, and reiterate that it is not unusual for people to use false identifications in order to obtain prescription drugs. Dr. Elder was adamant that every prescription shown to have been written by him was done after he met with an actual patient. (Tran. 1384-88)

The jury convicted both Mr. Solomon and Dr. Elder, and Mr. Solomon was then sentenced to 24 months in prison, a $5,000.00 fine, and ordered to forfeit $991,114.00. (ROA 203-07) Mr. Solomon appeals his conviction and the forfeiture order:

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ARGUMENTS AND AUTHORITIES

Summary:

The Government's theory of prosecution was essentially that since two people who sought prescriptions from Dr. Elder used deceased patients' names, and since Doris Crooks' identity may have been stolen, *all* of Drs. Elder, Okose and Botto's prescriptions were falsified and thus below the national standard of care. (See Tran. 1422-23)

However, the Government never provided any testimony or evidence about just what that national standard is. More importantly, Dr. Morgan, never testified that any standards were breached. Moreover, the Government never called a single patient of Drs. Elder, Okose or Botto. And no agents testified that any patients were non-existent, or that any of the medicines were ever found in the hands of any person who was not the intended recipient. Accordingly, Mr. Solomon's conspiracy and drug distribution convictions are unsupported by legally sufficient evidence.

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So, too, is his money laundering charge. Solomon mailed cash payments for the prescriptions filled in Missouri. Simply mailing cash does not constitute "concealment" under 18 U.S.C. 1956.

Finally, Solomon's $991,114.00 forfeiture amount was not substantiated, and no evidentiary hearing was held beforehand.

***Issue 1*. There was insufficient evidence of conspiracy and illegal distribution of prescription narcotics by Appellant (a pharmacy owner) and his co-defendant (a physician). The Government produced no patients to testify that they failed to receive their prescribed medicines. And, the Government elicited no expert testimony that the prescriptions shown to the jury were issued for other than a legitimate medical purpose, not in the usual course of professional practice (i.e., the national standard of care, which is an element of these prosecutions).**

Standard of Review:

The standard of appellate review applied to a claim that insufficient evidence was presented to support a guilty verdict is *de novo*. The evidence is viewed in the light most favorable to the verdict, giving it the benefit of all

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reasonable inferences. Despite this, if no reasonable jury could find the defendant guilty beyond a reasonable doubt, then a reversal is warranted. United States v. Smith, 573 F.3d 639, 657 (8th Cir. 2009); United States v. Spears, 454 F.3d 830, 832 (8th Cir. 2006). The analysis does not extend to weighing evidence or assessing witness credibility, or resolving conflicts or contradictions. Spears, 454 F.3d at 832.

Appellant filed motions for a judgment of acquittal at the close of the Government's case, and the close of all evidence. (Tran. 990-996, 1373-74; see also, United States v. Mitchell, 613 F.3d 862, 866 (8th Cir. 2010)("We review *de novo* the denial of a motion for judgment of acquittal.").)

The Elements of the Offenses Charged:

Count 1, "conspiracy to distribute and dispense controlled substances" (21 U.S.C. 846), requires proof of four elements: (1) two or more persons reached an agreement or came to an understanding to distribute of dispense Schedule III and/or Schedule IV and/or Schedule V controlled substances, other than for a legitimate medical purpose and not in the usual course of professional practice; (2) the defendant voluntarily and intentionally joined in the agreement or understanding; (3) the

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defendant, when he joined the agreement or understanding, knew its purpose; and, (4) the defendant or other person or persons who also joined in the agreement then also committed one or more overt acts. (ROA 139-141, Jury Instruction 22)

The elements of the distribution counts, 3 through 12, are: (1) the defendant distributed or dispensed a controlled substance; and, (2) the defendant knew at the time he was distributing or dispensing the controlled substance that it was for something other than a legitimate medical purpose, and not in the usual course of professional practice. (ROA 155-174, Jury Instructions 32-41; 21 U.S.C. 841(a)(1); (b)(2); and, (b)(3))

All of these charges additionally require that the Government adduce proof of the prevailing national standard of care for doctors prescribing these substances:

> The Federal Controlled Substances Act is not violated if a person distributes or dispenses controlled substances pursuant to a lawful prescription issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice. However, an order purporting to be a prescription that is

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> issued without a legitimate medical purpose and issued outside the usual course of professional practice is not a prescription within the meaning of the Federal Controlled Substances Act. "Usual course of professional practice" means that the practitioner acted in accordance with a standard of medical practice generally recognized and accepted in the United States. In issuing prescriptions, practitioners are not free to disregard prevailing standards of treatment.

(ROA 176-77, Jury Instruction 43)

The "National Standard" Requirement:

A conviction for illegal distribution of a Schedule III, IV or V controlled substance under 21 U.S.C. 841 requires proof beyond a reasonable doubt that the doctor allegedly involved "was acting outside the bounds of professional medical practice, as his authority to prescribe controlled substances was being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or dispensing controlled substances for other than a legitimate medical purpose, i.e., the personal profit of the physician." United States v. Smith, 537 F.3d at 657, *quoting* United States v. Katz, 455 F.3d 1023, 1028 (8th Cir.

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2006); see also, United States v. Moore, 96 S.Ct. 335, 423 U.S. 122, 46 L.Ed. 2d 333 (1975).

The jury instructions in the case at bar indeed included this requirement, that the Government demonstrate Dr. Elder's and Mr. Solomon's practices were in deviation from the national standards applicable to health care and prescription writing. (ROA 176-77, Jury Instruction 43)

The Government's Expert Never Mentioned a Standard of Care, or a Breach:

While the Government indeed called on Dr. Richard Morgan, he was never asked about whether any of the prescriptions underlying counts 3 through 12 were "issued without a legitimate medical purpose and issued outside the usual course of professional practice." (ROA 176-77, Jury Instruction 43) Nor was Dr. Morgan asked to articulate or expound upon the "standard of medical practice generally recognized and accepted in the United States," and he never testified that Dr. Elder disregarded "prevailing standards of treatment." (Id.)

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Dr. Morgan only testified that the faxes sent to Texas from The Medicine Shoppe were "unusual." (Tran. 944-46; see also pp. 986-88, "highly unusual"; "extremely unusual") But he also admitted that the four *prescriptions* which constituted counts 3-6, for patients Amanda Allen, Lindsay Lewis, Mark Ivey, and Cheryl Zarsky, were different as to date and dosage. Dr. Morgan agreed that "without having the full patient record and everything here to review today, you can't second guess what [Dr. Elder] did in those four cases." The prescriptions appear regular and there is "nothing unusual or sinister about them." (Tran. 963-67)

Dr. Morgan was not asked any questions regarding the patients or prescriptions comprising counts 7-12 (deceased patients Hazel Hollis and Mary Perez; Jean Greenwald and Alexander Zhang).

Just as importantly – perhaps even more so – no one testified that Troy Solomon, by faxing Dr. Elder's prescriptions to a Belton, Missouri pharmacy, was himself in violation of any national standard of care.

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The Type of Evidence that Case Law Requires the Government to Produce:

By contrast, the type of evidence the Government needed to produce on the national standard of care (in addition to testimony about what exactly the standard of care is, itself), is discussed in Smith, 573 F.3d at 657. The Government was required to prove that Dr. Elder did not conduct face-to-face meetings with his patients, and that Dr. Elder did not procure what is generally considered necessary information for prescribing an appropriate drug in an appropriate quantity.

In other words, the Government was required to prove beyond a reasonable doubt that there were never any established doctor/patient relationships. And, the Government had to prove that there were no legitimate prescriptions written, and the ones written were invalid.

Instead, the testimony was that Dr. Elder saw many patients at both South Texas and Westfield. (Dr. Johnson, Tran. 474, 476-77; Diane Hearn, Tran. 648-651, 669-673) And Dr. Elder's prescriptions complied with Texas' requirements at the time. (Dr. Morgan, Tran. 961-62)

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Additional evidence the Government would have had to produce to carry its burden on these issues would have been if Dr. Morgan testified that the number of prescriptions written by Dr. Elder were physically impossible to produce in connection with the number of patients seen in a given period of time. For example, in Smith, the physician who was employed by the defendant to write invalid prescriptions produced over 72,000 during the conspiracy, at a rate of over 1,000 per day at times. The expert in the Smith case testified as to the impossibility of those being legitimate if one takes into account an average doctor-patient consult lasting between twelve and twenty minutes. The expert also noted that the quantities of drugs prescribed were disproportionate to the medical conditions listed on the patients' "questionnaires." And then the physician, himself, also testified that his prescriptions were invalid and fabricated. Id., 573 F.3d at 657-58. See also, Moore, 96 S.Ct. at 338, 423 U.S. at 126, wherein "Dr. Moore's authorization by the FDA was revoked in the summer of 1971, and he does not claim that he was conducting an authorized maintenance program. . . . Respondent concedes in his brief that he did not observe generally accepted medical practices." Dr. Moore was

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writing over 100 prescriptions per day for 54 of the days in the 5 ½ month period covered by the Indictment. His patients received "only the most perfunctory examination." And, the patient received a prescription for "whatever quantity he requested." Id., 423 U.S. at 126-27, 96 S.Ct. at 338. Patients of the doctor also testified, describing the increase in their methadone dosages during their time with Dr. Moore. Id., at fn. 3.

In United States v. Katz, 455 F.3d 1023, 1028 (8th Cir. 2006), the Government , in alleging a violation of 21 U.S.C. 841 against a physician for prescribing Schedule III and IV substances, introduced into evidence 192 prescriptions corresponding to 15 patients. Three of the patients were undercover police officers who testified that they simply requested Xanax and Valium, and received prescriptions from Dr. Katz without any medical exam other than having their height, weight and blood pressure measured. Id., 445 F.3d at 1026. Twelve other patients testified to this same prescription method, which was then deemed to be "outside of the scope of legitimate medical practice and without a legitimate medical purpose" by an expert witness, Dr. Ted Parran. Id., at 1026-27. Dr. Katz' convictions were affirmed.

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By contrast, in United States v. Tran Trong Cuong, 18 F.3d 1132, 1141 (4th Cir. 1994), the Fourth Circuit reversed 80 conviction counts against a physician whose 20 patients never testified at trial. While some conviction counts were affirmed after an expert witness doctor testified that the charts for the corresponding patients showed prescriptions that were "totally unreasonable and are not the appropriate care in family practice," all counts for which patients were identified but did not testify were set aside:

> These challenged counts are those in which the patient who received the prescription did not testify. The government's case was made by the testimony of Dr. MacIntosh, copies of the prescriptions, and the introduction of exhibit 34, which is a summary report of the doctor's examination of 33 patient files taken from Tran's office. A review of this evidence persuades us that the government has not carried its burden of proving defendant's guilt on these counts beyond a reasonable doubt. Dr. MacIntosh described exhibit 34: "This is a summary report by me concerning charts that I reviewed that were furnished to me by you (The Assistant U.S. Attorney). I recorded the number of visits, the dates of the visits, what they were for and what was prescribed." Dr. MacIntosh discussed only a few of the patients in any detail. These included Emily Burns, Ronald Proffitt, and Donald Richmond, who all testified for the government. Dr. MacIntosh did not mention any of the 20 patients who did not testify, and who at four

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prescriptions each make up 80 of the counts contained in the indictment. He did not discuss these patients by name nor did he comment on the prescriptions they had received. He neither examined nor interviewed any of these patients. No effort was made by the prosecution to focus his testimony on any of these 80 counts. In discussing the case of Emily Burns, who testified, Dr. MacIntosh was asked if medications given to this patient were justified. He stated, "This individual case taken by itself could be justified. Taking all the other cases together, and following the pattern that I have been reading for the 16 hours that I read, I wouldn't think it was justified." He was later asked: "Doctor, you have determined and you testified today that the situation with Emily Burns was justified. Can you say that about any other patient here?" The doctor responded: "Well, some of the patients just had a few entries, there were just three or four entries. On that basis, I have no way of judging whether they were valid or not because there was not enough ongoing relationship."

The government has convicted the appellant of 80 counts based upon the summary report of 33 patient files prepared and submitted by its medical expert and the testimony of the medical expert that the drug prescriptions contained in these files were made for other than legitimate medical purposes and beyond the bounds of medical practice. Although the witness admitted that he did not have sufficient information from some of the charts to conclude that the prescriptions were improper, these charts were included in the exhibit and also formed the basis of separate counts in the

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> indictment, simply because they followed a pattern. This is not sufficient to convict a person of a felony, and it concerns us that, as to these 80 counts, defendant may have been found guilty of some counts by association - the association of the counts properly proved with those that were not.

As such, measuring the case at bar against these appellate precedents, there was no evidence that Dr. Elder violated the national standard of care. There was no testimony that Dr. Elder issued prescriptions outside the ordinary course of professional practice *and* without legitimate medical purposes. Accordingly, if Dr. Elder was not shown to have violated the national standard of care, then insufficient evidence similarly was adduced against Troy Solomon. His conviction can not stand if Dr. Elder's own conviction is infirm. Solomon was shown only to have faxed Dr. Elder's prescriptions to The Medicine Shoppe, and send payment for those medicines.

In fact, the Government's evidence in the case at bar would not even be sufficient to sustain a claim for civil injunctive relief. In United States v. Paskon, 2008 Westlaw 2039233, *p.6 (E.D. Mo. 2008), the United States District Court for the Eastern District of Missouri, the Honorable Carol E.

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Jackson, considered virtually all of the reported criminal prosecutions of physicians, nationally, for violations of 21 U.S.C. 841, before concluding that an injunction prohibiting Dr. Paskon from prescribing medications while awaiting prosecution was simply unwarranted in light of the paltry evidence the Government elected to offer at the evidentiary hearing on its claim:

> The record in this matter does not include evidence from patients or undercover agents. The government has provided the opinion of an expert witness that defendant's prescriptions are outside the scope of legitimate medical practice. Defendant has testified that he followed accepted guidelines for managing patients with chronic pain. The record thus presents genuine disputes of material fact that must be decided by the factfinder at trial.

In the case at bar, Dr. Morgan did not even testify that Dr. Elder's prescriptions were written outside the scope of legitimate medical practice. Dr. Morgan simply did not know. He had not examined any of Dr. Elder's patients identified on any of the prescriptions the Government offered into evidence, nor had Dr. Morgan reviewed any of the patients' charts. In other words, there is even less evidence in the case at bar than there was available to Judge Jackson of Missouri's Eastern District when she

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overruled the Government's civil request to shut down Dr. Paskon's practice.

The Lack of Evidence Against Elder and Solomon:

The Government never called patients Allen, Lewis, Ivey or Zarsky to testify. (Counts 3-6) The only testimony about these people came from Postal Inspector Jacque Leslie, who said that addresses on their prescriptions were non-existent in the USPS computer. (Govt. Ex. 1172; see also Tran. 217-222) Ms. Leslie did not say, however, that the people listed on the prescriptions reflecting these addresses were non-existent. No witness or case agent did. And, Dr. Morgan acknowledged that addresses were not even required on Texas prescriptions. (Tran. 961-62)

Likewise, patients Greenwald and Zhang were not asked to testify. (Counts 11, 12; prescriptions by Dr. Botto, Govt. Ex. 35, pages 5-8 of 90) As regards decedents Hollis and Perez (Counts 7-10), nothing was submitted other than their death certificates which pre-dated four prescriptions written in their names. (Govt. Ex's 5, 6, 33, 34, 243; Tran. 558, 752-55) The Government produced no evidence of these decedents having a pre-death doctor-patient relationship with Dr. Elder such that he would know that

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whoever appeared in his office, claiming to be Hollis or Perez, was actually not. (And, by extension, no evidence was produced to prove that Troy Solomon ought to have been on notice that the prescriptions in exhibits 5, 6 or 243 were illegitimate.) The anomaly that is Hollis and Perez – two deceased people whose identities may well have been stolen – is statistically insignificant, and more importantly, not entirely uncommon. (Tran. 979-980, Dr. Morgan admitting that people seeking medications have presented false identifications in his own practice)

Similarly, the Government never called Drs. Okose or Botto. And, despite the Government having literally hundreds of their prescriptions from which to select witnesses who might testify, not a single one of their patients took the stand.

No one testified about efforts to retrieve and evaluate any of the charts belonging to Okose or Botto patients. The only testimony in this regard was about failed efforts to obtain 110 charts for Dr. Elder's patients from South Texas. Dr. Pleshette Johnson claimed Dr. Elder told her he had taken some patient charts and put them in his truck. (Tran. 502-07; Govt. Ex. 1198) But there was no testimony that other South Texas charts

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belonging to Dr. Johnson or any other practitioner were located and examined, to support the inference that Dr. Elder either destroyed the 110 charts, or that the 110 patients were non-existent.

The Government's theory was that these medicines were being diverted away from the patients on the prescriptions, and sold on the street. (Tran. 1419, "It was going to the street."; Tran. 1496, "Those are the faces of your new prescription drug dealers.") Yet, there was no evidence from any Houston law enforcement personnel that even one single pill or drop of cough syrup – not one plastic pill vial or one syrup bottle – was *ever* recovered from *any* drug user in *any* investigation. That is telling. With the number of doses touted by the Government - 2,026,666 units of hydrocodone; 336,240 units of alprazolam; and, 1,727,381 milliliters of promethazine – not one vial or bottle was *ever* recovered from the hands of someone who was *not* the patient.

All totaled, the Government introduced 402 prescriptions as individual exhibits (Ex's. 52-452, 521.3, 530, 534, 1103), and countless others grouped together, as well as on lists (Ex's. 1-32, 35-51, 454, 455, 517-528, 539, 542, 986, 1085-1086, 1089-1090). But not one patient testified that they

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did not receive their medications. And Dr. Morgan did not examine a single one of these patients or read a single chart. He did not articulate for the jury what the national standard of care for prescription writing is, nor did he testify that Drs. Elder, Okose or Botto *violated* any standards. (The most he would say is that many of these prescriptions might be "unusual.") Accordingly, without evidence that these prescriptions were legally infirm, pharmacy owner Troy Solomon should not have been charged for simply faxing them from Texas to Missouri.

For all of these reasons, Mr. Solomon's convictions for counts 1 and 3 through 12 ought to be reversed because of insufficient evidence.

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Issue 2. **There was insufficient evidence that Appellant conspired to commit money laundering. The Government's evidence was only that Appellant, a Houston pharmacy owner, mailed cash to the Missouri pharmacy which he contracted to fill many of his own customers' prescriptions.**

Standard of Review:

The standard of review for this issue is identical to the preceding one, *de novo*. United States v. Smith, 573 F.3d 639, 657 (8th Cir. 2009).

Again, Appellant raised this issue in acquittal motions. (Tran. 990-996, 1373-74) And, he also challenged this Count pre-trial, in a dismissal motion. (ROA 77-82)

The Elements of the Offense Charged:

Mr. Solomon was charged in Count Two with conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Its elements are: (1) two or more persons reached an agreement or came to an understanding to commit money laundering; (2) the defendant voluntarily and intentionally joined in the agreement or understanding; (3) the defendant, when he joined the agreement or understanding, knew its purpose; and, (4) the

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defendant or other person or persons who also joined in the agreement then also committed one or more overt acts. (ROA 142-143, Jury Instruction 23)

"Money laundering" was then further defined as being one of two forms, as differentiated by two instructions. "Promotional money laundering" has four elements: (1) conducting a financial transaction by transporting currency through United Parcel Service and depositing said currency into a bank account; (2) the currency was the proceeds of unlawful distribution or dispensing, or conspiracy to distribute or dispense, controlled substances; (3) at the time of the transaction, the defendant knew the money represented the proceeds of unlawful activity; and, (4) the defendant conducted the financial transaction with the intent to promote the carrying on of the unlawful distribution or dispensing, or conspiracy to distribute or dispense, controlled substances. (ROA 151-152, Jury Instruction 30)

"Concealment money laundering" likewise has four elements: (1) conducting a financial transaction by transporting currency through United Parcel Service and depositing said currency into a bank account; (2) the

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currency was the proceeds of unlawful distribution or dispensing, or conspiracy to distribute or dispense, controlled substances; (3) at the time of the transaction, the defendant knew the money represented the proceeds of unlawful activity; and, (4) the defendant conducted the financial transaction with the intent to conceal or disguise the nature, location, source, ownership or control of the proceeds of unlawful distribution or dispensing, or conspiracy to distribute or dispense, controlled substances. (ROA 153-154, Jury Instruction 31)

There Was Insufficient Evidence of "Unlawful Distribution or Dispensing":

The Government contended that Solomon was guilty of conspiring to commit money laundering, by virtue of him simply mailing cash to Cindy Martin and Lynn Rostie to pay for the medicines The Medicine Shoppe mailed back.

If Mr. Solomon's convictions for counts 1, and 3 through 12 are overturned, so too then, must his money laundering conviction. The reason is that whether one looks to the "promotional" or "concealment" version of the jury instructions, an indispensable element of both is that the

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underlying controlled substance distribution be *unlawful*. (Element *Four*, Jury Instructions 30 and 31) Because there was insufficient evidence that the physicians' prescriptions were legally infirm, and since there was no evidence that any of the medicines ever landed in the hands of unintended recipients, the Government failed to carry its burden on the "unlawful" element of this charge.

However, even if somehow this Court affirmed Mr. Solomon's distribution convictions challenged in Issue 1, his money laundering conviction should be reversed.

There Was Insufficient Evidence of "Promotional" Money Laundering":

The Government only proved that the money Solomon sent to Cindy Martin and/or Lynn Rostie was payment for medicines. The Government did not show that any of these medicines mailed to Houston were (a) illegitimate or medically unnecessary for the persons to whom they were prescribed, or (b) that any of the medicines landed in the hands of anyone other than the intended recipients. Because no patients were called to testify, and since the Government did not trace the medicines to end-users, it can not be said which of the hundreds and hundreds of prescriptions

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presented at trial were illegitimate as opposed to legal. Correspondingly, the Government can not point this Court to any breakdown within the trial transcript or other evidence that shows which part(s) of each mailed payment were for illegitimate prescriptions ("promotional" laundering) as opposed to legal prescriptions (no laundering at all).

There Was No Evidence of "Concealment":

Mr. Solomon sent UPS packages to Martin and Rostie which contained cash for the medicines that they had shipped down to Houston. (Tran. 456-463, 468, 1095-96; see also UPS & FedEx records, Govt. Ex's 915-941) However, simply mailing cash in an envelope is not "concealment" money laundering. Fairly recently, the Supreme Court decided Cuellar v. United States, 553 U.S. 550, 128 S.Ct. 1994, 170 L.Ed.2d 942 (2008), which holds that simply hiding money in secret automobile compartments to transport it from Mexico to the United States was insufficient to support a "concealment" money laundering charge. The Court found that there was no evidence suggesting the transportation was designed to conceal anything about the money, including that it was obtained illegally. Instead, the "concealment" only served the goal of transportation: "There

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is a difference between concealing something to transport it, and transporting something to conceal it." Id., 128 S.Ct. at 2004-05.

Moreover, none of the documents accompanying these mailings concealed the parties' identities or contents. In United States v. Spencer, 592 F.3d 866, 880 (8th Cir. 2010), this Court stated that, "the money laundering statute does not require roof of intent to conceal the launderer's identity; it requires proof of intent to conceal the illegal nature or source of the funds." This Court asserted that qualification, citing United States v. Rockelman, 49 F.3d 418, 422 (8th Cir. 1995), wherein Rockelman's conviction was reversed "because, in addition to not concealing his identity, he purchased the property entirely with cash and did nothing to hide the fact that he was paying for his property in cash." Spencer, 592 F.3d at 880.

Applying Cuellar, Spencer and Rockleman, it is clear that there was no evidence of "concealment" money laundering in the case at bar. Not only was everyone properly identified on all packages in which cash payments were sent, but there was no evidence of any purchases made that were traceable to these monies.

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The "Proceeds" Requirement, and Santos:

In June, 2008, the United States Supreme Court handed down United States v. Santos, 128 S.Ct. 2020, 553 U.S. 507, 170 L.Ed.2d 912 (2008), which interpreted 18 U.S.C. 1956, the money laundering statute, in a gambling case. The central focus of the opinion was the definition of the word "proceeds." At stake was whether one could be convicted of money laundering based merely on having received or provided gross receipts to another, or whether "proceeds" should be restricted to a more narrow definition, in this case "profits" derived from the alleged illegal activity. In a plurality opinion, five Justices decided that "proceeds" means "profits" and not "gross receipts." The Justices ruled that "proceeds" shall not include amounts funneled back into the criminal enterprise, but can only include funds removed from the criminal activity as *profits*. The Supreme Court made clear that the act of simply paying for an illegal activity is not, itself, money laundering punishable as a separate criminal offense.

Since this decision, this Circuit has decided several money laundering cases, all rejecting the Supreme Court's "proceeds" definition, and claiming that the word "proceeds" only means "profits" in gambling

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cases, but means "gross receipts" in drug cases. This Court has made this distinction in conclusory fashion, and has never provided a rationale, be it from dictionary definitions or years of case law. There is simply no precedent in the English language for ascribing two such distinct meanings to "proceeds," dependent upon its context of gambling versus drugs. Accordingly, the following Eighth Circuit cases need to be re-visited: Spencer, 592 F.3d at 879-880, fn. 4 (8th Cir. 2010)("Santos does not apply in the drug context."); United States v. Williams, 605 F.3d 556, 567-68 (8th Cir. 2010)("We held that Santos does not apply in the drug context."); United States v. Mitchell, 613 F.3d 862, 867 (8th Cir. 2010); United States v. Clay, 618 F.3d 946, 954, fn. 6 (8th Cir. 2010). (Though Solomon raised Santos as a basis for dismissal pre-trial, ROA 79-82, he did not specifically seek a definition of "proceeds" in the jury instructions, so he accepts that "plain error" review might apply. Clay, 618 F.3d at 954, fn. 6. Nevertheless, since there is no logical justification for separate definitions of "proceeds" in gambling cases versus drug cases, the standard of review should be irrelevant.)

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Regardless of whether this Court applies the "proceeds" definition from Santos, though, Solomon's money laundering conviction is still invalid, as shown above.

Issue 3. **There was insufficient evidence upon which the District Court could formulate a forfeiture amount, given that the Government only provided the Court with the gross sales of the Missouri pharmacy for one year, without breaking out dollar amounts corresponding to illegal pharmaceutical sales.**

Standard of Review:

In the context of forfeiture analysis, a district court's factual findings are reviewed for clear error, but *de novo* review is applied to questions of whether or not those facts render an asset subject to forfeiture. United States v. Van Nguyen, 602 F.3d 886, 903 (8th Cir. 2010).

Appellant objected to the forfeiture amount and requested an evidentiary hearing. (ROA 198-200)

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The Lack of Evidence Concerning the Amount to be Forfeited:

Mr. Solomon submits that if his convictions are vacated, the District Court's $991,114.00 forfeiture order must be nullified. (ROA 201-202) However, the forfeiture order, alone, is infirm because the Government submitted no evidence supporting or explaining the forfeiture figure it sought.

Throughout trial, the only single mention of $991,114.00 was when Lynn Rostie acknowledged on cross-examination, simply, that she consented to a judgment in this amount as part of her plea agreement. (Tran. 306-07)

The only testimony concerning dollar amounts was provided by financial analyst Lori Nelson, who said that (a) Cindy Martin's cash deposits between October, 2004 and October, 2005 were $71,666.80, and (b) Rostie Enterprises' total deposits between August, 2004 and October, 2005 were $2,943,653.37. (Tran. 886, 888-890; Govt. Ex's 1143, 1145) No figures attributable to Lynn Rostie's dealings with Troy Solomon, as opposed to other pharmacies, other doctors, or even just attributable to the sales of other items in the store, such as over-the-counter medications, medical

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devices like sprain wraps, or even sales of food items and candies, were broken out by prosecutors. See, i.e., Tran. 138 discussing role of Medicine Shoppe tech Patty Webb, who filled only prescriptions for local customers from the Belton area.

In October, 2010, the Government urged to the District Court that the $991,114.00 figure was a "reasonable measure of the conspiracy's value." (ROA 191) Yet, Indictment page 10, Count 2(f) alleges that the $991,114.00 figure represents "gross sales . . . which includes proceeds of the illegal sales of hydrocodone, alprazolam, and promethazine with codeine." (ROA 48) This is repeated in the affidavit of Lori Nelson which the prosecutors prepared and had her sign, accompanying the Government's forfeiture motion. (ROA 195-197, para. 11; see also para. 3, "The information in this declaration has become known to me . . . through communications and reports from DEA diversion investigators with knowledge of this investigation.")

Nelson claimed that a report, prepared by a DEA computer forensic examiner named Danielle Desfosses, indicated that the hard drives for Rostie's store showed *gross* sales to Drs. Elder, Okose and Botto totaling

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$991,114.00. But as shown above, throughout trial the Government failed to show which prescriptions of these physicians were illegitimate, because none of their patients were called to testify, and no one testified that these patients were sought after, and found to be non-existent. Moreover, Desfosses report was not provided to the District Court, nor did she testify at trial. And, there was no evidentiary hearing granted on the Government's forfeiture motion. (See ROA 198-200, Solomon's opposition to forfeiture, and request for hearing; ROA 201-202, District Court's Order)

The Government's proposition that $991,114.00 represents a fair value is nothing more than a conclusion. Evidence that it was mathematically or empirically based was not provided to the Court, and Mr. Solomon had no opportunity to refute this arbitrary figure. Perhaps more importantly, no evidence was presented that any of this $991,114.00 went to, or benefited, Solomon. See United States v. Huber, 404 F.3d 1047, 1056-62 (8th Cir. 2005)(forfeiture amount determined using dollar amounts received and used by defendant, not gross proceeds figure of the larger scheme, especially when defendant's business is only partly illegal; remand

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for reduction of forfeiture), *affirmed after remand,* United States v. Huber, 462 F.3d 945, 953 (8th Cir. 2006).

For these reasons, the forfeiture order ought to be reversed, or at least, remanded.

CONCLUSION

In light of the foregoing arguments and authorities, Appellant Troy Solomon respectfully requests that this Court reverse his convictions and the District Court's $991,114.00 forfeiture order.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, I served two copies of the foregoing brief on counsel for the Government, Attorneys Curt Bohling and Rudy Rhodes, via United States Mail, postage pre-paid, by mailing these briefs to: 400 East 9th Street, Kansas City, Missouri 64106. A copy was also mailed to counsel for co-defendant Elder, who is Mr. Dennis Owens, 1111 Main Street, 7th Floor, Kansas City, Missouri 64105.

/s/ Jonathan Laurans
Jonathan Laurans

CERTIFICATE OF COMPLIANCE

I hereby certify that the above and foregoing complies with all page limitations and type-volume restrictions set by Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 13,976 words of monospaced type. This brief was typed on a computer utilizing Microsoft Word 6.0, but the format has been saved to allow for viewing and/or modification on a computer utilizing Microsoft Word 5.0. Furthermore, the electronically filed version of this brief has been checked for viruses by the undersigned. The sole privacy redaction needed to counsel's knowledge, was made.

/s/ Jonathan Laurans
Jonathan Laurans

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