IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-03/05-CR-W-FJG
	)	
TROY R. SOLOMON, and DELMON L. JOHNSON,	)	
	)	
	)	
Defendants.	)	

GOVERNMENT'S RESPONSE TO DEFENDANTS TROY SOLOMON'S AND DELMON JOHNSON'S SECOND AMENDED MOTION TO TRANSFER

The United States of America, by and through its undersigned counsel, respectfully submits this response to defendants Troy R. Solomon's and Delmon L. Johnson's Joint Second Amended Motion to Transfer Venue and Sever pursuant to Rule 21(b), Federal Rules of Criminal Procedure (Doc. 175).[1] As set forth more fully below, the defendants have not met their burden of showing that they are entitled to a transfer, and accordingly this motion should be denied:

I. BACKGROUND

On February 6, 2008, a federal grand jury in the Western District of Missouri returned a 24-count indictment charging Troy R. Solomon ("Solomon"), Delmon L. Johnson ("Johnson"), and three additional defendants with crimes related to the illegal distribution of controlled substances by The Medicine Shoppe pharmacy in Belton, Missouri to Solomon and Johnson in Houston, Texas. Count One charges all five named defendants with conspiring to distribute controlled substances. Count Two charges certain defendants, including Solomon and Johnson,

[1] The government's response addresses the defendants' second amended motion to venue because the defendants raise the same arguments as in their amended motion to transfer venue (Doc. 162).

with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Counts Three through Twelve charge certain defendants with substantive counts of illegal distribution and dispensation of schedule III, IV, and V controlled substances, in violation of 21 U.S.C. § 841(a)(1).

II. DISCUSSION

Solomon and Johnson (collectively "defendants") move for transfer of venue from the Western District of Missouri to the Southern District of Texas, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. (Defs.' Sec. Am. Mot. to Transfer (Doc. 175), at 3.) No good reasons exist for a discretionary transfer of trial venue to the Southern District of Texas, while many good reasons support the choice of the Western District of Missouri as the superior trial venue.

"The question of transfer under Rule 21(b), for the convenience of parties and witnesses *and in the interest of justice*, is one involving a realistic approach, fair consideration and judgment of sound discretion on the part of the district court." *United States v. Phillips*, 433 F.2d 1364, 1368 (8th Cir. 1970)(emphasis added). "Defendants bear the burden of justifying such a transfer." *United States v. Stein*, 429 F.Supp. 2d 633, 645 (S.D. N.Y. 2006). Defendants' request to transfer trial of this case to the Southern District of Texas is an appeal to the Court's discretion. *United States v. McGregor*, 503 F.2d 1167, 1169 (8th Cir. 1974)("the grant of transfer under [Fed.R.Crim.P. 21(b)] is a matter of the discretion of the district judge.").

It should be noted that venue is proper in the Western District of Missouri. Title 18, United States Code, Section 3237(a) provides, in pertinent part:

> Any offense against the United States begun in one district and completed in another, or committed in more than one district and completed in another, or committed in more than one district, may be . . . prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce . . . is a continuing offense and . . . may be . . . prosecuted in any district from, through, or into which such commerce, [or] mail matter moves.

18 U.S.C. § 3237(a). "Further, although separate proof of an overt act is not a necessary element of a drug conspiracy under 21 U.S.C. § 846, venue is proper in a conspiracy case in any jurisdiction in which an overt act in furtherance of the conspiracy was committed by any of the conspirators." *United States v. Morales*, 445 F.3d 1081, 1084 (8th Cir. 2006) (citations omitted). Further, a money laundering conspiracy can be prosecuted in any district where the object of the conspiracy would have been carried out or where an overt act occurred. 18 U.S.C. § 1956(i)(2).

In this case, each charged conspiracy is a continuing offense and may be prosecuted in any district in which any portion of the offense occurs. 18 U.S.C. § 3237(a). Venue in conspiracy cases exists in every place where co-conspirators plan, agree, or commit an overt act in furtherance of the conspiracy, and the actions of any co-conspirator will establish the basis for venue over all others. *Hyde v. United States*, 225 U.S. 347, 363 (1912); *United States v. Overshon*, 494 F.2d 894, 900 (8th Cir. 1974). Thus, venue for prosecuting the conspiracies alleged in counts one and two is appropriate in the Western District of Missouri because both counts explicitly charge numerous overt acts in furtherance of the conspiracy that occurred within the Western District of Missouri. *See Cabrales v. United States*, 524 U.S. 1 (1998)(recognizing that the district court properly denied a pretrial motion to dismiss a conspiracy charge based on improper venue, and further recognizing that counts subject to pretrial dismissal for improper

venue did not contain a conspiracy charge); *see also United States v. Overshon*, 494 F.2d 894 (8th Cir. 1974) (upholding assertion of venue for conspiracy count); *United States v. Kim*, 246 F.3d 186, 193, n.5 (2d Cir. 2000)(summarily rejecting challenge that venue was improper for conspiracy counts).

The Supreme Court has set forth the following ten factors as ones that may be considered in deciding whether a case should be transferred pursuant to Rule 21(b): "(1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer." *Platt v. Minnesota Mining and Manufacturing Co.*, 84 S.Ct. 769, 771 (1964); *see United States v. McGregor*, 503 F.2d 1167, 1170 (8th Cir. 1974)(holding that the factors enumerated in *Platt* may be considered in deciding a transfer motion under Fed. R. Crim. P. 21(b)). "No one of these considerations is dispositive, and it remains for the court to try to strike a balance and determine which factors are of greatest importance." *United States v. Maldonado-Rivera*, 922 F.2d 934, 966 (2d Cir. 1990)(brackets, citation, and internal quotations omitted). Generally, however, "a criminal prosecution should be retained in the original district in which it was filed." *United States v. Thomas*, 2006 WL 2283772, at *2 (S.D.N.Y. Aug. 9, 2006)(citation omitted). Applying these factors to this case, the factors weigh against transferring the case to Houston, Texas.

1. Location of Defendants

Concerning the location of defendants, this factor is neutral at best. While it is true that defendants Solomon, Johnson and Elder are residents of the Southern District of Texas, this factor in and of itself does not justify transfer. "Criminal defendants have no constitutional right to have a trial in their home districts, nor does the location of the defendant's home have 'independent significance in determining whether transfer to that district would be in the interest of justice.'" *United States v. Manus*, 535 F.2d 460, 463 (8th Cir. 1976)(per curiam), 97 S. Ct. 766 (1977)(quoting *Platt*, 84 S. Ct. at 771-72). Although the defendants' co-conspirators Rostie and Martin have pleaded guilty, a trial in Houston would be an inconvenience for them because they will testify, pursuant to their cooperating plea agreements, as government witnesses at the trial. Moreover, co-defendant Elder has not joined the defendants' request to transfer the venue to Houston, Texas. Thus, the residence of defendants Solomon and Johnson is not a controlling factor.

2. Location of Possible Witnesses

Concerning the location of possible witnesses, the Western District of Missouri is more convenient for government witnesses. Many of the witnesses the government intend to call are located in the Western District of Missouri. Although defendants Solomon and Johnson assert that "thousands of potential witnesses necessary to the defense" are located in the Southern District of Texas (Defs.' Sec. Am. Mot. to Transfer, at 3.), the witnesses were not named or otherwise described and the nature of their expected testimony was not disclosed. *See Lindberg v. United States*, 363 F.2d 438, 438-39 (9th Cir. 1966)(finding no abuse of discretion in the denial of a Rule 21(b) motion for transfer where the defendant did not support his motion with a

showing of specific circumstances). Indeed, courts have required defendants support their motion to transfer with supporting documents and facts, such as: names and addresses of witnesses whom the defendants intend to call; affidavits showing the materiality of the matter to which these witnesses will testify; statements by the defendants of the business difficulties or personal hardships that might result from having to come to the district in which the case was indicted for trial; and other materials where appropriate. *In re United States*, 273 F.3d 380, 386 (3d Cir. 2001)(quoting *Plum Tree Inc. v. Stockment*, 488 F.2d 754, 757 n. 2 (3d Cir. 1973)). Furthermore, the government's potential key witnesses – cooperating defendants Rostie and Martin – reside in the Western District of Missouri. "While Rule 21(b) contemplates minimization of inconvenience to the defense, it has been recognized that some degree of inconvenience is inevitable, and that the government's inconvenience must be considered as well." *United States v. Testa*, 548 F.2d 847, 857 (9th Cir. 1977). Thus, this factor weighs against transfer.

3. Location of Events Likely to be in Issue

Concerning the location of events, this factor weighs in favor of retaining venue in this district. Defendants Solomon and Johnson argue they "have no connection to the Western District of Missouri, and will endure a substantial and unreasonable burden and inconvenience if forced to defend in said District." (Defs.' Sec. Am. Mot. to Transfer, at 2.) In the indictment, however, defendants are alleged to have caused to be delivered invalid prescriptions to The Medicine Shoppe (TMS) in Belton, Cass County, Western District of Missouri. TMS was owned and operated by co-conspirator Rostie. The indictment further alleges that defendants faxed refills to TMS. The invalid prescriptions were filled by co-conspirator Rostie and shipped

to the defendants – at the request of Solomon. In addition, Solomon shipped illegal cash proceeds to co-conspirator Martin, who in turn delivered the miscellaneous United States currency to co-conspirator Rostie. These business transactions occurred over a 15-month period. In addition, Solomon both initiated and received hundreds of telephone calls relevant to the charged conspiracies with Martin, Rostie, and other people located in the Western District of Missouri. Thus, the defendants freely and voluntarily drew upon the resources of the Western District of Missouri. By their actions, the defendants chose this district for the crux of their criminal activity. Accordingly, contrary to the defendants' belief, they have a connection to this district.

Additionally, an inspector with the Missouri Board of Pharmacy during a routine inspection uncovered the illegal drug operation. The inspector relayed this information to the Drug Enforcement Administration, Kansas City field office, which was primary responsible for the investigation.

4. Location of Documents and Records

Concerning the location of documents and records likely to be involved, this factor is not beneficial to transfer. The defendants do not identify the documentary evidence located in the Southern District of Texas. The bulk of the evidentiary documents upon which the government will rely are located in the Western District of Missouri, not in the Southern District of Texas, contrary to what the defendants alleged. For their part, the defendants do not identify the records that would be unavailable to them in denying a change of venue. Since there is a lack of evidence showing that *relevant* documents are located in Harris County, Texas, the location of the evidence does not favor transfer.

5. Disruption of Defendants' Business

Concerning the disruption of business, this factor does not justify transfer. Whether the trial is held in the Southern District of Texas or the Western District of Missouri, defendants Solomon's and Johnson's employment at Ascensia Nutritional Pharmacy will be disrupted. However, "mere [business] inconvenience ... [does] not ipso facto make the necessary showing that a transfer is required in the interest of justice." *United States v. Culoso*, 461 F.Supp. 128, 136 (S.D.N.Y. 1978), *aff'd*, 607 F.2d 999 (2d Cir. 1979). Besides, neither Solomon nor Johnson is a licensed pharmacist or a pharmacist technician, so the pharmacy will continue to function on a normal basis. Furthermore, the defendants will be able to maintain contact with their pharmacy through the use of modern technologies, such as e-mail and cellular telephone. Most significantly, the trial is expected to last no more than two weeks. As a result, the short length of the trial weighs in favor of this district.

6. Expenses to the Parties

Concerning the expense to the parties, this factor weighs in favor of maintaining venue in this district. As mentioned previously, the length of the trial will last no more than two weeks. The defendants are jointly represented by the same defense counsel; thus, greatly reducing legal expenses. In contrast, the caseload of assistant United States attorneys in the Southern District of Texas is extremely heavy, and therefore the government will not be able to simply transfer the case to a new assistant United States attorney to prepare for trial. The government's attorneys, investigators, and support staff would have to incur the expenses of travel and lodging in Houston, Texas. In addition, Elder will incur more expenses because his counsel will have to travel to Houston as well.

7. Location of Counsel

Concerning the location of counsel, this factor weighs against transfer. Although lead counsel for the defendants are in Houston, retained local counsel for them are in the Western District of Missouri. Furthermore, Elder's lead attorney and the government's counsel are located in the Kansas City, Missouri metropolitan area. Further, defense counsel for Rostie and Martin are located in the Western District of Missouri. It should be noted that Elder has not joined defendants Solomon's and Johnson's amended motion to transfer. Except for defendants Solomon's and Johnson's counsel, this district is more convenient for all other counsel. They would have to travel to Houston. This factor weighs against transfer.

8. Relative Accessibility of the Place of Trial

Concerning relative accessability of the place of trial, this factor is fairly balanced. Kansas City, Missouri is as accessible as Houston, Texas. Both locations have a metropolitan airport.

9. Docket Conditions

Concerning docket conditions of each district involved, this factor does not support transfer. The trial is scheduled for the joint criminal docket, beginning April 27, 2009. This will ensure that defendants will receive ample attention regardless of docket conditions. *See Stein*, 429 F.Supp.2d at 645. Further, all of the defendants are assigned to the same district court judge. The interests of judicial efficiency clearly militate in favor of retaining venue for trial here in the Western District of Missouri, where trial will be conducted by a judicial officer who will be well-versed in not only the relevant facts, but who will also be well-schooled in the relative culpability of and roles played by each defendant and prior proceedings. A new judge in the Southern

District of Texas, in contrast, would have to create room on his or her docket for this trial. As a result, this factor weighs against transfer.

10. Other Special Considerations

Concerning other special considerations, the trial of the defendants is more appropriate in this district. The motion to transfer is not supported by all of the remaining defendants in this case. F.R.Crim.P. 8(b) provides:

> The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in or more counts together or separately. All defendants need not be charged in each count.

Federal Rule of Criminal Procedure 14 governs the severance of both defendants and offenses in a single indictment.[2] A motion for severance is addressed to the discretion of the trial court. *Zafiro v. United States*, 506 U.S. 534, 541 (1993); *United States v. Shivers*, 66 F.3d 938, 939 (8th Cir. 1995). The United States Supreme Court has held that severance should be granted, "only if there is a serious risk that a joint trial would compromise a specific trial right of

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[2] Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Fed.R.Crim.P. 14.

a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 538.

To prevail on a severance motion, a defendant must show not simply prejudice but "clear" or "substantial" prejudice. *United States v. Mansaw*, 714 F.2d 785, 790 (8th Cir.1983). Severance will not be ordered by a mere showing that a particular defendant may have a better chance of acquittal if severed. *Zafiro*, 506 U.S. at 539; *United States v. Delpit*, 94 F.3d 1134, 1143 (8th Cir. 1996). The reasoning for this requirement of "clear" or "substantial" prejudice is founded in the need of society for speedy and efficient trials. *United States v. Gallo*, 763 F.2d 1504, 1525 (6th Cir. 1985). Any lesser standard would undermine this consideration and effectively nullify Federal Rule of Criminal Procedure 8. *United States v. Werner*, 620 F.2d 922, 926-28 (2d Cir. 1980).

The Eighth Circuit has adopted a strong policy in favor of having jointly indicted defendants tried together so as to promote judicial economy. *Shivers*, 66 F.3d at 939. A joint trial "gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." *United States v. Darden*, 70 F.3d 1507, 1527-28 (8th Cir. 1995). Additionally, joint trials serve the interests of justice by avoiding "the scandal and inequity of inconsistent verdicts." *Zafiro*, 506 U.S. at 537.

In the present case, it has not been shown by defendants Solomon and Johnson that they will suffer "substantial prejudice" in the joint trial of this matter. Equally important, neither defendant has demonstrated that any specific trial right he possesses is compromised; and neither defendant has shown that a denial of their motion would prevent the jury from making a reliable judgment regarding his guilt. *See Zafiro*, 506 U.S. at 538. Having alleged prejudice in

unsupported and conclusory terms and having failed to carry this "heavy" burden, severance in this matter would only result in forcing the government and the judicial system to expend limited resources presenting this case twice. *See United States v. Darden*, 70 F.3d at 1527.

Consequently, if this Court were to grant a severance to defendants Solomon and Johnson, multiple trials in multiple districts would cause great inconvenience to witnesses, considerable additional expense to the government, duplication of court time and effort, and the risk of inconsistent results. *See Stein*, 429 F.Supp.2d at 646.

Therefore, having weighed the consideration of the *Platt* factors in light of the principles of joinder and severance, defendants Solomon and Johnson have failed to meet their burden that the case would be better off in the Southern District of Texas. Accordingly defendants' amended motions to transfer should be denied.

III. CONCLUSION

For the reasons previously stated, the United States respectfully asks the Court to deny defendants' amended motions seeking a change of venue pursuant to Rule 21(b), and grant such other and further relief in favor of the United States as the Court finds just and proper.

Respectfully submitted,

John F. Wood
United States Attorney

By: /s/ ***Rudolph R. Rhodes, IV***

Rudolph R. Rhodes IV #39310
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 East 9th Street, 5th Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on February 10, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

Anthony L. Bannwart
7322 Southwest Frwy.
Suite 1510
Houston, Texas 77074

/s/ ***Rudolph R. Rhodes, IV***

Rudolph R. Rhodes IV
Assistant United States Attorney

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