

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

UNITED STATES OF AMERICA,            )  
                                                  )  
                                          Plaintiff,            )  
                                                  )  
                                          v.                            )        No. 08-00026-03/04-CR-W-FJG  
                                                  )  
TROY R. SOLOMON and                    )  
CHRISTOPHER L. ELDER,                )  
                                                  )  
                                          Defendants.                    )

**MOTION OF THE UNITED STATES FOR AN ORDER OF FORFEITURE,  
WITH SUGGESTION IN SUPPORT**

The United States of America respectfully moves this Court, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and Fed. R. Crim. P. 32.2, for a Preliminary Order of Forfeiture in the above-captioned cases and in support thereof represents to the Court the following:

1. On February 5, 2008, a federal grand jury sitting in the Western District of Missouri returned an Indictment against Defendants Christopher Elder, Troy Solomon, and others.
2. The Indictment contained a forfeiture allegation seeking forfeiture pursuant to 18 U.S.C. § 853 of United States Currency in the amount of \$991,114.00, in the form of a money judgment, and of substitute assets.
3. The Indictment alleged in Count One that defendants Elder and Solomon, with others, had conspired from August 2004, through October 2005, to dispense and distribute hydrocodone and other Schedule III, IV, and V, controlled substances, other than for a legitimate

medical purpose and not in the usual course of professional practice, in violation of 21 U.S.C. §§ Sections 841(a)(1), 841(b)(1)(D), 841(b)(2), 841(b)(3), and 846. Count Two alleged that Solomon conspired with others during the same time period to commit money laundering, in violation of 18 U.S.C. § 1956. Counts Three through Ten charged Elder, Solomon, and others with distribution of controlled substances in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(D), 841(b)(2), and 18 U.S.C. § 2. Counts Eleven and Twelve charged Solomon and another person with distribution of controlled substances. On July 12, 2010, following a trial, a jury returned verdicts of guilty as to Solomon on Counts 1,2, and 3-12, and as to Elder on Counts 1 and 3-10.

5. Rule 32.2(b) of the Federal Rules of Criminal Procedure provides that:

(b) Entering a Preliminary Order of Forfeiture.

(1) Forfeiture Phase of the Trial.

(A) Forfeiture Determinations. As soon as practical after a verdict or finding of guilty . . . on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

(B) Evidence and Hearing. The court's determination may be based on evidence already in the record, including any written plea agreement, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. If the forfeiture is contested, on either party's request the court must conduct a hearing after the verdict or finding of guilty.

(2) Preliminary Order.

(A) Contents of a Specific Order. If the court finds that

property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

## ARGUMENT

### **I. A Money Judgment Forfeiture Should Be Entered As To Defendants Solomon and Elder.**

A money judgment forfeiture should be entered against both Defendants Solomon and Elder based on their conviction on Count One of the Indictment. Federal law authorizes the forfeiture of “[a]ny property constituting or derived from, any proceeds the person obtained, directly or indirectly, as the result of any such violation [of the Title 21, Subchapter II]”, and “any of the person’s property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, any such violation . . . .” 21 U.S.C. §853(a)(1) and (2).

Criminal forfeiture may take the form of a money judgment forfeiture. *See* Fed. R. Crim. P. 32.2(b)(1)(A); *United States v. Loren Jennings*, 487 F.3d 564, 585, 586 (8th Cir. 2007)(affirming money judgment for amount of proceeds defendant derived from “honest services” mail fraud scheme); *see also United States v. Huber*, 404 F.3d 1047, 1056 (8th Cir. 2005) (“Forfeiture under section 982(a)(1) in a money-laundering case allows the government to obtain a money judgment representing the value of all property ‘involved in’ the offense, including ‘the money or other property being laundered.’”).

Criminal forfeiture is a part of sentencing, it is not a substantive element of the offense.

*Libretti v. United States*, 516 U.S. 29, 38-39 (1995). Since criminal forfeiture is an aspect of sentencing, the preponderance of the evidence standard of proof applies. *Huber*, 462 F.3d at 949 (rejecting argument that defendant was entitled to have the jury decide forfeiture beyond a reasonable doubt); *United States v. Bieri*, 21 F.3d 819, 822 (8th Cir. 1994)(preponderance of the evidence standard applies to criminal forfeiture).

Criminal forfeiture is a mandatory part of sentencing. *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied.”); *United States v. Bieri*, 68 F.3d 232, 235 (8th Cir. 1995) (under section 853(a)(2), criminal forfeiture of property used to facilitate a drug trafficking offense “is mandatory, not discretionary”).

The defendant does not have a right to have a jury determination of the amount of a money judgment forfeiture. There is no constitutional right to a jury in the forfeiture phase of the trial. *Libretti*, 516 U.S. at 49 (“the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection”); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (a defendant has no sixth amendment right to have the jury determine what property is subject to forfeiture; the Supreme Court’s decision on that issue was not altered by *Apprendi* or *Booker*; therefore, the district court’s disregard of the jury’s special verdict and its recalculation of the amount subject to forfeiture did not violate defendant’s sixth amendment rights).

Rule 32.2(b) of the Federal Rules of Criminal Procedure does, however, give the defendant and the government the right to request that the jury be retained to “determine the forfeitability of specific property.” The defendant must make a specific request that the jury be

retained for this purpose. *United States v. Hively*, 437 F.3d 752, 763 (8th Cir. 2006) (defendant waived his right to have the jury determine the forfeiture by not making a specific request to have the jury retained for that purpose). The issue in the forfeiture phase of the trial is limited to the question of whether “the government has established the requisite nexus between the property and the offense.” Fed. R. Crim. P. 32.2(b)(1)(A). Where the government is seeking a money judgment forfeiture, there is no nexus determination to be made, and the defendant is not entitled to a jury determination of the forfeiture. *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (the defendant’s right under Rule 32.2(b)(4) is to have the jury determine if the Government has established the required nexus between the property and his crime; the rule does not give the defendant the right to have the jury determine the amount of a money judgment); *United States v. Roberts*, 631 F. Supp. 2d 223 (E.D.N.Y. 2009) (following *Tedder*; there is no right to a jury under Rule 32.2(b)(4) where the Government is seeking only a money judgment); *United States v. Reiner*, 393 F. Supp. 2d 52, 56-57 (D. Me. 2005).

A money judgment forfeiture should be entered against Defendants Solomon and Elder in the amount of \$991,114.00. The Declaration of U.S. Attorney’s Office Financial Analyst Lori Nelson is being filed with this motion. The Declaration sets forth that the government’s investigation determined that co-conspirator Rostie made gross sales of controlled substances to defendant Solomon totaling \$991,114.00 during the life of the conspiracy. Declaration at ¶¶ 11-12.

The proposed amount of \$991,114.00 of gross sales from the Medicine Shoppe to the Houston conspirators is a reasonable measure of the conspiracy’s value, and perhaps the most

conservative one.<sup>1</sup> This figure is a precise reflection of the value of the drugs illegally dispensed in this case pursuant to the fraudulent prescriptions provided to Rostie by the Houston conspirators.

Based on the evidence introduced at trial and each defendant's convictions on Counts 1 through 6 of the Indictment, and the Declaration of Lori Neson, the United States requests that the Court enter a money judgment forfeitures against both defendant SOLOMON and defendant ELDER in the amount of \$991,114.00 pursuant to which they will have joint and several liability

Criminal forfeiture is an aspect of criminal sentencing, and a forfeiture must be entered at or before sentencing. Therefore, the government seeks the entry of a money judgment forfeiture at this time, which judgment the United States requests be made a part of each defendant's sentence and included in the criminal judgment. *See* Fed. R. Crim. P. 32.2(b)(4)(A) and (B).

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<sup>1</sup>For example, using the estimated street price for the approximately 2 million dosage units of hydrocodone alone produced by the conspiracy would result in gross sales of at least 2 to 4 million dollars.

WHEREFORE, the United States moves this Court for a Preliminary Order of Forfeiture ordering a money judgment forfeiture in the amount of \$991,114.00.

Respectfully submitted,

Beth Phillips  
United States Attorney

*/s/ James Curt Bohling*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was delivered on October 25, 2010, 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.

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