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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-02/03,05-CR-W-FJG
	)	
CYNTHIA S. MARTIN,	)	
TROY R. SOLOMON, and	)	
DELMON L. JOHNSON,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

This matter is currently before the Court on the following motions:

1. Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57);

2. Defendant Delmon Johnson's Motion to Quash Indictment (doc #64);

3. Defendant Troy Solomon's Motion to Quash Indictment (doc #65); and

4. Defendant Troy Solomon's Motion to Dismiss Count Two for Failure to State an Offense (doc #98).

For the reasons set forth below, it is recommended that these motions be denied.

I. INTRODUCTION

A. The Indictment

On February 6, 2008, the Grand Jury returned a twenty-four count Indictment against Mary Lynn Rostie, Cynthia S. Martin, Troy R. Solomon, Christopher L. Elder and Delmon L. Johnson. The indictment charges in part as follows:

Controlled Substances Act

1. The Controlled Substances Act (CSA) and the Code of Federal Regulations (CFR) govern the manufacture, distribution and dispensing of controlled substances in the United States.

2. Under federal law, a physician can only issue a prescription for a controlled substance if it is issued for a legitimate medical purpose, and in the usual course of the physician's professional practice. A prescription that does not meet these requirements is an invalid prescription. "An order purporting to be a prescription, issued not in the usual course of professional treatment ... is not a prescription within the meaning and intent of the CSA and the person knowingly filling such a purported prescription, as well as the person issuing it shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." 21 C.F.R. § 1306.04(a).

3. This regulatory framework places a similar burden on pharmacists. While the responsibility for the proper prescribing and dispensing of controlled substances rested initially with the physician, the regulation imposes a "corresponding responsibility" upon the pharmacist who fills the prescription. 21 C.F.R. § 1306.04(a).

4. The CSA separates controlled substances into five drug schedules – Schedules I, II, III, IV, and V – based upon the substances' potential for abuse, among other things. Abuse of Schedule III controlled substances may lead to moderate or low physical dependence or high psychological dependence. Abuse of Schedule IV and V controlled substances may lead to more limited physical dependence or psychological dependence compared with the drugs or other substances in Schedule III. 21 U.S.C. § 812.

Charged Controlled Substances

5. Hydrocodone is the generic name for a prescription painkiller. Drug products containing hydrocodone are classified under the CSA as Schedule III controlled substances, based on their potential for abuse and physical and psychological dependence. When hydrocodone is legally prescribed for a legitimate medical purpose, it is typically used to combat acute, severe pain under the careful supervision of a treating physician. Accordingly, the prescription is usually for a modest number of pills to be taken over a short period of time. Lorcet is a brand name for a Schedule III controlled substance containing hydrocodone. Dosage units are normally expressed in milligrams with the first number being hydrocodone and the second number being Acetaminophen: i.e., a drug prescribed as Lorcet 10/650 contains 10 milligrams of hydrocodone and 650 milligrams of Acetaminophen; and a drug prescribed as Lortab 10/500 contains 10 milligrams of hydrocodone and 500

milligrams of Acetaminophen.

6. Alprazolam, more commonly referred to by one of its brand names, Xanax, is the generic name for an addictive prescription sedative and anti-anxiety agent that is classified as a Scheduled IV controlled substance.

7. Promethazine with codeine, the generic name for a Schedule V narcotic sometimes branded as Phenergan with Codeine, is used for the temporary relief of coughs and upper respiratory symptoms associated with allergy or common cold. A commonly known substance which contains codeine in liquid form is promethazine with codeine syrup.

The Co-Conspirators and Their Entities

8. MARY LYNN ROSTIE, a/k/a Lynn Rostie, a pharmacist licensed in Missouri since 1970, was the co-owner of Rostie Enterprises, LLC, d/b/a The Medicine Shoppe, which was located in Belton, Missouri. MARY LYNN ROSTIE, a/k/a Lynn Rostie, filled prescriptions and then shipped the prescriptions via Federal Express (FedEx) to Houston, Texas.

9. CYNTHIA S. MARTIN introduced TROY R. SOLOMON to MARY LYNN ROSTIE, a/k/a Lynn Rostie. CYNTHIA S. MARTIN delivered cash payments for the filled prescriptions to MARY LYNN ROSTIE, a/k/a Lynn Rostie. At all relevant times, CYNTHIA S. MARTIN resided in Belton, Missouri.

10. TROY R. SOLOMON was the agent for CHRISTOPHER L. ELDER. At all relevant times, he worked in Houston, Texas.

11. CHRISTOPHER L. ELDER was a physician licensed in Texas. ELDER practiced medicine in Houston, Texas. ELDER worked part-time at South Texas Wellness Center in Houston, Texas, from approximately August 2004 to January 2005. ELDER worked for Westfield Medical Clinic in Houston, Texas, from approximately February 2005 to March 2006.

12. DELMON L. JOHNSON was the manager of Ascensia Nutritional Pharmacy. DELMON L. JOHNSON signed for numerous prescription orders delivered from The Medicine Shoppe to South Texas Wellness Center and Ascensia Nutritional Pharmacy.

13. An unindicted co-conspirator was a physician licensed in Texas and practiced medicine in Houston, Texas.

Other Entities

14. Allen Bank and Trust Company was a financial institution, the deposits of which were then insured by the Federal Deposit Insurance Corporation and which engaged in and the activities of which affected interstate commerce.

15. Bank of America was a financial institution, the deposits of which were then insured by the Federal Deposit Insurance Corporation and which engaged in and the activities of which affected interstate commerce.

16. McKesson Corporation was a wholesale distributor of controlled and non-controlled drugs which sold these drugs to pharmacies to then dispense the medications to patients. In 2004 and 2005, McKesson Corporation sold controlled substances to The Medicine Shoppe.

17. Federal Express (FedEx) was a private carrier of parcels and mail to customers located throughout the United States.

18. United Parcel Service (UPS) was a private carrier of parcels and mail to customers located throughout the United States.

The Medicine Shoppe Hydrocodone Purchases

19. From January 1, 2004 to September 30, 2005, The Medicine Shoppe purchased a very high amount of hydrocodone products from wholesale distributors. During this time period:

a. The Medicine Shoppe purchased 2,833 bottles of hydrocodone 10/650mg tablets, 500 count. This equals 1,416,500 dosage units.

b. The Medicine Shoppe purchased 1,054 bottles of hydrocodone 10/500mg tablets, 500 count. This equals 527,000 dosage units.

20. In comparison among the six retail pharmacies located in Belton, Missouri, during the same 21-month time period, The Medicine Shoppe purchased approximately 12,278 grams of hydrocodone and the second highest purchaser bought approximately 1,532 grams of hydrocodone.

* * *

COUNT TWO

(Conspiracy to Commit Promotional/Concealment Money Laundering)

The Grand Jury re-alleges and incorporates by reference herein all of the allegations contained in paragraphs 1 through 20 of the Indictment, and further alleges:

From at least in or about August 2004, the exact date being unknown to the Grand Jury, and continuing through October 2005, said dates being approximate, in the Western District of Missouri, and elsewhere, MARY LYNN ROSTIE, a/k/a Lynn Rostie, CYNTHIA S. MARTIN, TROY R. SOLOMON, and DELMON L. JOHNSON, defendants herein, did knowingly and intentionally combine, conspire, confederate and agree with each other and other persons known and unknown to the Grand Jury, to conduct financial transactions affecting interstate commerce in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i) and (B)(i), which transactions involved the proceeds of specified unlawful activity, that is, conspiracy to illegally distribute and dispense controlled substances in violation of Title 21, United States Code, Section 846, with the intent to promote the carrying on of the specified unlawful activity and knowing that the transactions were designed in whole and in part to conceal and disguise the activity and that while conducting and attempting to conduct such financial transactions, the defendants knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity.

During the course of the conspiracy to distribute hydrocodone, alprazolam, and promethazine with codeine, defendant ROSTIE, made gross sales of at least $991,114 from filling the unlawful and invalid prescriptions and distributing these controlled substances.

During the course and in furtherance of the conspiracy, in addition to other acts, the defendants MARY LYNN ROSTIE, a/k/a Lynn Rostie, CYNTHIA S. MARTIN, TROY R. SOLOMON, and DELMON L. JOHNSON, with others known and unknown to the Grand Jury with the intent to promote the carrying on of the specified activity, and for the purpose to conceal and disguise the nature and source of the proceeds of the specified unlawful activity:

a. From on or about September 2, 2004, through October 31, 2005, approximately 70 packages were shipped via United Parcel Service from Houston, Texas to defendant MARTIN in Belton, Missouri. The invoices for these packages were sent using the address of 5833 Sunforest Dr., Houston, Texas. This address was the residence of defendant JOHNSON, and was owned by defendant SOLOMON. These packages are the only connection known between SOLOMON and MARTIN. In addition,

defendant MARTIN was the only known financial connection between defendants SOLOMON and ROSTIE.

b. The proceeds of this conspiracy are generated in Texas by defendants SOLOMON and JOHNSON through the sale of the filled prescriptions that are filled by defendant ROSTIE. A portion of these proceeds are then provided to defendant MARTIN as payment, both towards her own benefit, as well as to provide payments for the filled prescriptions as a continuance of the conspiracy. It is therefore believed that the proceeds are provided to defendant MARTIN in the packages sent via United Parcel Service in order to pay for additional prescriptions.

c. From October 8, 2004 through October 17, 2005, defendant MARTIN deposited miscellaneous United States currency into her personal checking account with the account number 003477654976 at Bank of America on 29 separate occasions totaling approximately $71,666.80.

d. From on or about September 2, 2004, through October 31, 2005, defendant MARTIN entered the business of defendant ROSTIE, at ROSTIE ENTERPRISES, LLC, d/b/a The Medicine Shoppe, and provided currency to defendant ROSTIE for payment on the account of South Texas Wellness Center. This currency represents proceeds of the illegal sale of hydrocodone, alprazolam, and promethazine with codeine.

e. From at least in or about August 2004, and continuing through on or about October 29, 2005, defendant ROSTIE, deposited into the business checking account of ROSTIE ENTERPRISES LLC, d/b/a The Medicine Shoppe with the account number 3501673 at Allen Bank and Trust Company gross sales of $991,114, which includes proceeds of the illegal sale of hydrocodone, alprazolam, and promethazine with codeine.

f. Defendant ROSTIE, using the mail services provided by Federal Express, then mailed the filled prescriptions to defendants SOLOMON and JOHNSON at the business locations of South Texas Wellness Center and Ascensia Nutritional Pharmacy in Houston, Texas.

All in violation of Title 18, United States Code, Section 1956(h).

* * *

COUNTS TWENTY-ONE THROUGH TWENTY-FOUR

(Concealment Money Laundering)

The allegations contained in Paragraphs 1 through 20 are realleged and incorporated by reference.

From in or about August 2004 through at least October 2005, the defendant, CYNTHIA S. MARTIN, maintained a bank account with the account number 003477654976 at Bank of America which account was used to receive funds from sales of illegally distributed and dispensed controlled substances.

From in or about August 2004 through at least October 2005, funds from this bank account were used to conceal or disguise the source of the illegal drug scheme.

On or about April 18, 2005, defendant CYNTHIA S. MARTIN deposited $1,800 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about April 28, 2005, defendant CYNTHIA S. MARTIN deposited $2,800 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about May 3, 2005, defendant CYNTHIA S. MARTIN deposited $1,240 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about May 16, 2005, defendant CYNTHIA S. MARTIN deposited $2,500 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about June 10, 2005, defendant CYNTHIA S. MARTIN made three deposits – one cash deposit of $3,325, one cash deposit of $3,000, and one cash deposit of $2,075 – totaling $8,400 in miscellaneous United States currency into the account of Cynthia Martin at Bank of America.

On or about the dates set forth below as to each count, in the Western District of Missouri, and elsewhere, CYNTHIA S. MARTIN, defendant herein, did knowingly conduct and attempt to conduct financial transactions affecting interstate commerce, in the approximate amounts set forth below, which involved proceeds of a specified unlawful activity, that is illegal distributing and dispensing of controlled substances in violation of Title 21, United States Code, Sections 841(a) and 846, knowing that the transactions were designed in whole and in part to conceal and disguise, the nature, location, source, ownership and control of the proceeds of the

specified unlawful activity and that while conducting and attempting to conduct such financial transactions knew the property involved in the financial transactions, that is monetary instruments in the amounts set forth below:

Count	Date Listed on Check	Date Check Clears Bank	Type	Payee	Financial Transaction
21	04/11/05	4/18/05	Payment	Alenco	Check No. 2702 in the amount of $1,200 from Bank of America account of CYNTHIA S. MARTIN
22	05/24/05	5/31/05	Payment	Alenco	Check No. 2710 in the amount of $5,167 from Bank of America account of CYNTHIA S. MARTIN
23	06/27/05	6/03/05	Payment	Alenco	Check No. 2711 in the amount of $6,458 from Bank of America account of CYNTHIA S. MARTIN
24	06/10/05	6/13/05	Payment	MTS Automall	Check No. 2714 in the amount of $9,980 from Bank of America account of CYNTHIA S. MARTIN

All in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

(Indictment at 2-5, 8-10, 19-21)

B. The Statute

The relevant statute under which defendants Martin and Solomon are charged in Count Two (18 U.S.C. § 1956(h)–conspiracy to commit an offense defined in 18 U.S.C. § 1956(a)(1)(A)(i) and (B)(i)) and defendant Martin is charged in Counts Twenty-One through Twenty-Four (18 U.S.C. § 1956(a)(1)(B)(i)) provides:

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds

of specified unlawful activity–

> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
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> * * *
>
> (B) knowing that the transaction is designed in whole or it part–
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> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity ...
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> * * *
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.
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> * * *
>
> (h) Any person who conspires to commit any offense defined in this section ... shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1956(a)(1)(A)(i), (B)(i) and (h).

C. Standards for Evaluating a Motion to Dismiss

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ...." This Constitutional requirement is implemented by Rule 7(c)(1) of the Federal Rules of Criminal Procedure which specifies that "[t]he indictment ... must be a plain, concise, and definite written statement of the essential facts constituting the offense charged."

An indictment is sufficient if it: (1) contains the essential elements of the offenses charged;

(2) fairly informs the defendant of the charges against which he must defend; and (3) enables the defendant to plead an acquittal or conviction in bar of future prosecution for the same offenses. See Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. O'Hagan, 139 F.3d 641, 651 (8th Cir. 1998); United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993), cert. denied, 513 U.S. 831 (1994). The sufficiency of a criminal indictment is determined from its face. There is no summary judgment procedure in criminal cases nor do the rules provide for a pre-trial determination of the sufficiency of the evidence. See United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995); United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992). Indictments are normally sufficient unless no reasonable construction can be said to charge the offense. See O'Hagan, 139 F.3d at 651; United States v. Fleming, 8 F.3d 1264, 1265 (8th Cir. 1993).

II. DISCUSSION

Defendant Martin argues that Counts Two and Twenty-One through Twenty-Four should be dismissed because: (1) the indictment fails to allege in a sufficient manner that the defendant acted with an intent to conceal the nature, location, source, ownership, or control of the proceeds; and (2) the indictment fails to adequately allege that Counts Two and Twenty-One through Twenty-Four involved proceeds of an alleged conspiracy. (Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57) at 5-6) Defendant Solomon argues that Count Two should be dismissed because: (1) it fails to allege that the money referenced in Count Two constitutes profits; and (2) there are no allegations as to how the financial transactions promoted the carrying on of said specified unlawful activity. (Defendant Troy Solomon's Motion to Dismiss Count Two for Failure to State an Offense (doc #98) at 5) Defendant Martin also argues that the Allegation of Forfeiture as it relates to her should also be

dismissed as the amount requested is not pled to constitute profits. (Id. at 11 n.2)

Defendants Solomon and Johnson filed nearly identical Motions to Quash Indictment (doc #64 and #65). These motions adopt the arguments, authorities and evidence submitted by defendant Martin in support of her motion to dismiss.

The Court will address each of these arguments.

A. Intent

Defendant Martin is charged with conspiracy to commit promotional/concealment money laundering in violation of 18 U.S.C. § 1956(h) (Count Two) and concealment money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2 (Counts Twenty-One through Twenty-Four). The intent required for a violation of these statutes is that a defendant act knowingly. See Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 6.18.1956B (18 U.S.C. § 1956(a)(1)(B)(i)) and 5.01 (18 U.S.C. § 2(a)) (2008); United States v. Evans, 272 F.3d 1069, 1082 (8th Cir. 2001)("[t]o convict [a defendant] of conspiracy to launder money [under 18 U.S.C. § 1956(h)], the government must establish that he knowingly joined a conspiracy to launder money").

The indictment does allege that defendant Martin acted knowingly. Count Two charges in part:

> ... [defendants Rostie, Martin, Solomon and Johnson] did knowingly and intentionally ... conspire ... to conduct financial transactions ... in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i) and B(i) ... with the intent to promote the carrying on of the specified unlawful activity and knowing that the transactions were designed in whole and in part to conceal and disguise the activity and that while conducting and attempting to conduct such financial transactions, the defendants knew that the property involved in the financial transactions represented the proceeds of some form of unlawful activity.

* * *

> During the course and in furtherance of the conspiracy ... [defendants Rostie, Martin, Solomon and Johnson] ... with the intent to promote the carrying on of the specified activity, and for the purpose to conceal and disguise the nature and source of the proceeds of the specified unlawful activity: [listing of acts taken in furtherance of the conspiracy].

(See Indictment at 8-9) Counts Twenty-One through Twenty-Four charge in part:

> ... [defendant Martin] did knowingly conduct ... financial transactions ... which involved proceeds of a specified unlawful activity ... knowing that the transactions were designed ... to conceal and disguise the nature, location, source, ownership and control of the proceeds of the specified unlawful activity ...

(See Indictment at 20)

Defendant Martin cites the case of United States v. Rockelman, 49 F.3d 418 (8th Cir. 1995), for the proposition that there is insufficient evidence of intent to conceal where a defendant does not attempt to disguise his identity or relationship to a purchase made with proceeds acquired through the sale of illegal drugs. (Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57) at 6) Defendant Martin argues that similarly to Rockelman, the indictment in this case does not allege on its face evidence of concealment of a financial transaction. (Id. at 7) The Court does not find Rockelman persuasive with respect to a motion to dismiss. The Rockelman court found insufficient evidence of intent to conceal after a trial. The Government has not yet had the opportunity to present its evidence in this case.

Defendant Martin's request that the indictment be dismissed on the basis that it does not allege in a sufficient manner that she acted with an intent to conceal the nature, location, source, ownership, or control of the proceeds must be denied. As set forth above, there is no summary judgment procedure in criminal cases nor do the rules provide for a pre-trial determination of the sufficiency of the evidence. See United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995); United

States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992). Whether the Government will introduce sufficient evidence of intent is a question that cannot be resolved prior to the Government's presentation of its case to the jury.

B. Proceeds

In United States v. Santos, 128 S.Ct. 2020 (2008), the Court examined whether the term "proceeds" as used in 18 U.S.C. § 1956(a)(1)(A)(i) should mean "receipts" or "profits." The Court determined the rule of lenity dictated that the term "proceeds" be defined as "profits."[1] Id. at 2025. Otherwise, the following "merger problem" exists:

> ... If "proceeds" meant "receipts," nearly every violation of the illegal-lottery statute would also be a violation of the money-laundering statute, because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery. Since few lotteries, if any, will not pay their winners, the

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[1]The Government asks this Court to limit the holding of Santos because only the plurality opinion favors an across-the-board definition of "proceeds" to mean "profits." (Government's Response to Defendant Martin's Motion to Dismiss Counts Two and Twenty-One Through Twenty-Four for Failure to State an Offense (doc #79) at 14-16) The plurality and dissenting opinions left the Court evenly divided between the view that "proceeds" means profits in all cases and the view that it means gross receipts in all cases. Justice Stevens provided the swing vote finding:

> The revenue generated by a gambling business that is used to pay the essential expenses of operating that business is not "proceeds" within the meaning of the money laundering statute. As the plurality notes, there is 'no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code, to radically increase the sentence for that crime.' Ante, at 2027.

Santos, 128 S.Ct. at 2033 (Stevens, J., concurring). Based on the plurality opinion that "proceeds" always means "profits" and Justice Stevens' concurrence, the Court cannot agree with the Government that "profits" should not be used to define "proceeds" in this case. As at least a portion of the monies allegedly sent to defendant Martin were to pay for the filled prescriptions, these monies constitute the expenses of the underlying specified unlawful activity, that is the conspiracy to illegally distribute and dispense controlled substances, not "proceeds" within the meaning of the money laundering statute.

> statute criminalizing illegal lotteries, 18 U.S.C. § 1955, would "merge" with the money-laundering statute. Congress evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment, § 1955(a), but as a result of merger they would face an additional 20 years, § 1956(a)(1). Prosecutors, of course, would acquire the discretion to charge the lesser lottery offense, the greater money-laundering offense, or both–which would predictably be used to induce a plea bargain to the lesser charge.
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> The merger problem is not limited to lottery operators. For a host of predicate crimes, merger would depend on the manner and timing of payment for the expenses associated with the commission of the crime. Few crimes are entirely free of cost, and costs are not always paid in advance. Anyone who pays for the costs of a crime with its proceeds–for example, the felon who uses the stolen money to pay for the rented getaway car–would violate the money-laundering statute. And any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares. Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering. ...
>
> The Government suggests no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime. Interpreting "proceeds" to mean "profits" eliminates the merger problem. Transactions that normally occur during the course of running a lottery are not identifiable uses of profits and thus do not violate the money-laundering statute. More generally, a criminal who enters into a transaction paying the expenses of his illegal activity cannot possibly violate the money-laundering statute, because by definition profits consist of what remains after expenses are paid. Defraying an activity's costs with its receipts simply will not be covered.

Id. at 2026-27 (emphasis supplied).

Defendants Martin and Solomon argue that Count Two and defendant Martin argues that Counts Twenty-One through Twenty-Four should be dismissed as they do not involve "proceeds" of specified unlawful activity under the money laundering statute.[2] Under the Santos rationale,

[2]A person is guilty of a violation of 18 U.S.C. § 1956(a)(1)(A)(i) if (1) he engaged in a financial transaction; (2) the financial transaction involved the proceeds of specified unlawful activity; and (3) he intended to promote further acts of specified unlawful activity. See United States v. Huber, 404 F.3d 1047, 1057 (8th Cir. 2005); United States v. Cruz, 993 F.2d 164, 167

defendants argue that Count Two of the indictment does not adequately allege an offense because the indictment fails to allege that the money referenced constitutes profits. (Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57) at 10; Defendant Troy Solomon's Motion to Dismiss Count Two for Failure to State an Offense (doc #98) at 5) Count Two provides in part:

> b. The proceeds of this conspiracy are generated in Texas by defendants SOLOMON and JOHNSON through the sale of the filled prescriptions that are filled by defendant ROSTIE. A portion of these proceeds are then provided to defendant MARTIN as payment, both towards her own benefit, as well as to provide payments for the filled prescriptions as a continuance of the conspiracy. It is therefore believed that the proceeds are provided to defendant MARTIN in the packages sent via United Parcel Service in order to pay for additional prescriptions.
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> c. From October 8, 2004 through October 17, 2005, defendant MARTIN deposited miscellaneous United States currency into her personal checking account with the account number 003477654976 at Bank of America on 29 separate occasions totaling approximately $71,666.80.
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> d. From on or about September 2, 2004, through October 31, 2005, defendant MARTIN entered the business of defendant ROSTIE, at ROSTIE ENTERPRISES, LLC, d/b/a The Medicine Shoppe, and provided currency to defendant ROSTIE for payment on the account of South Texas Wellness Center. This currency represents proceeds of the illegal sale of hydrocodone, alprazolam, and promethazine with codeine.
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> e. From at least in or about August 2004, and continuing through on or about October 29, 2005, defendant ROSTIE, deposited into the business checking account of ROSTIE ENTERPRISES LLC, d/b/a The Medicine Shoppe with the account number 3501673 at Allen Bank and Trust Company gross sales of $991,114, which includes proceeds of the illegal sale of hydrocodone, alprazolam, and promethazine with codeine.

(8th Cir. 1993). A person is guilty of a violation of 18 U.S.C. § 1956(a)(1)(B)(i) if (1) she conducted a financial transaction involving the proceeds of unlawful activity; (2) she knew the proceeds involved in the transaction were the proceeds of unlawful activity; and (3) she intended to conceal or disguise the nature, location, source, ownership or control of the proceeds of specified unlawful activity. See United States v. Pizano, 421 F.3d 707, 725 (8th Cir. 2005); United States v. Dugan, 238 F.3d 1041, 1043 (8th Cir. 2001).

> f. Defendant ROSTIE, using the mail services provided by Federal Express, then mailed the filled prescriptions to defendants SOLOMON and JOHNSON at the business locations of South Texas Wellness Center and Ascensia Nutritional Pharmacy in Houston, Texas.

(Indictment at 10)(emphasis added) Further, defendant Martin points out that Count Two, as well as Counts Twenty-One through Twenty-Four, reference gross amounts rather than the amount of profits. (Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57) at 10-11)

While it would seem that a portion of the alleged "proceeds" went to expenses, i.e. "payments for the filled prescriptions" and "payment on the account of South Texas Wellness Center," a portion of the "proceeds" might also be deemed profits. That part of the "proceeds" provided to defendant Martin as "payment ... towards her own benefit" could be seen as defendant Martin's share of the profits of the unlawful activity. Again, there is no summary judgment procedure in criminal cases nor do the rules provide for a pre-trial determination of the sufficiency of the evidence. Whether the Government will introduce sufficient evidence that the alleged laundered proceeds were profits of the unlawful activity is a question that cannot be resolved prior to the Government's presentation of its case to the jury. See United States v. Thompson, 2008 WL 2514090, *2 (E.D. Tenn. June 19, 2008)(motion to dismiss not well taken since government had not had an opportunity to meet its burden of proof that proceeds were profits).

Defendant Martin further argues that even assuming the deposits made into defendant's bank account were profits, there are no allegations in the indictment that the deposits were designed to conceal these profits. (Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57) at 11) Defendant cites the case of

United States v. Cuellar, 128 S.Ct. 1994 (2008), for the proposition that "merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money." (Id.) Again, the Court notes that the Cuellar court found insufficient evidence after a trial. The Government has not yet had the opportunity to present its evidence in this case. The Cuellar court found that a conviction required proof of a purpose to conceal or disguise the proceeds. 128 S.Ct. at 2005-06. As set forth above, the indictment in this case alleges that defendant Martin acted with a purpose to conceal and disguise the nature and source of the proceeds of the specified unlawful activity. Whether the Government will introduce sufficient evidence of a purpose to conceal is a question that cannot be resolved prior to the Government's presentation of its case to the jury.

Defendant Solomon further argues that there are no allegations in the indictment as to how the financial transactions promoted the carrying on of said specified unlawful activity. (Defendant Troy Solomon's Motion to Dismiss Count Two for Failure to State an Offense (doc #98) at 5) Contrary to defendant's argument, the indictment charges that defendants conspired "to conduct financial transactions ... with the intent to promote the carrying on of the specified unlawful activity." (Indictment at 9) The indictment further charges that a portion of the proceeds were used to "pay for additional prescriptions," as well as to provide payment to defendants Martin and Rostie (id. at 10), thus promoting the carrying on of the conspiracy to illegally distribute and dispense controlled substances. Whether the Government will introduce sufficient evidence as to how the financial transactions promoted further acts of specified unlawful activity is a question that cannot be resolved prior to the Government's presentation of its case to the jury.

C. Allegation of Forfeiture

In a footnote at the end of her motion, defendant Martin requests that the Allegation of Forfeiture as it relates to her also be dismissed. (Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57) at 11 n.2) Defendant's entire argument consists of the following: "The principles cited herein would also apply to the requested money judgment in the amount of $991,114.00. Said amount is not pled to constitute profits, nor is this amount of proceeds further explained or pled with any reasonable specificity." (Id.)

The portion of the Allegation of Forfeiture relevant to defendant Martin provides in part:

> The allegations contained in Count[ ] One ... of this Indictment are realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 21, United States Code, Section 853.
>
> Each defendant named herein shall forfeit to the United States all property, real and personal, constituting or derived from any proceeds the defendant obtained directly and indirectly as a result of the violation incorporated by reference in this Count and all property used, or intended to be used, in any manner or part, to commit, and to facilitate the commission of the violation incorporated by reference in this allegation, including but not limited to the following:
>
> Money Judgment
>
> As to defendants MARY LYNN ROSTIE, a/k/a Lynn Rostie, CYNTHIA S. MARTIN, TROY R. SOLOMON, CHRISTOPHER L. ELDER, and DELMON L. JOHNSON, jointly and severally, they shall forfeit any and all interest in approximately $991,114 in United States currency, and any interest and proceeds traceable thereto, in that at least this sum, in aggregate, was received in exchange for the unlawful dispensing and unlawful distribution of controlled substances or is traceable thereto.

(Indictment at 21)

The Allegation of Forfeiture is brought pursuant to 21 U.S.C. § 853. Section 853 provides in part:

(a) Property subject to criminal forfeiture

> Any person convicted of a violation of this subchapter ... punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law–
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

21 U.S.C. § 853.

The Allegation of Forfeiture against defendant Martin is brought as a result of the charges in Count One, that is Conspiracy to Distribute Controlled Substances, not the money laundering charges. The "principles cited herein" in defendant's motion dealt only with alleged deficiencies in the money laundering counts. The Government is seeking $991,114 in United States currency, and any interest and proceeds traceable thereto, as it alleges that at least this sum, in aggregate, was received in exchange for the unlawful dispensing and unlawful distribution of controlled substances. The Court finds that the Government has sufficiently pled the Allegation of Forfeiture.

D. Motions to Quash Indictment

Defendants Johnson and Solomon filed nearly identical Motion to Quash Indictment (doc #64 and #65) which basically track word-for-word their Motions for Bill of Particulars (doc #58 and #63). On October 1, 2008, the Court denied these Motions for Bill of Particulars as seeking evidentiary detail. The Motions to Quash Indictment list the same 49 particulars from the Motions for Bill of Particulars, but in the Motions to Quash Indictment, defendants assert that the indictment should be dismissed as insufficient for failing to state the listed particulars. There is no argument provided in the Motions to Quash Indictment. Rather, defendants "adopt[ ] by reference the arguments, authorities, and evidence submitted in Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One through Twenty-Four already on file with

this Court." (Defendant Delmon Johnson's Motion to Quash Indictment (doc #64) at 2; Defendant Troy Solomon's Motion to Quash Indictment (doc #65) at 2-3)

As set forth above, an indictment is sufficient if it: (1) contains the essential elements of the offenses charged; (2) fairly informs the defendant of the charges against which he must defend; and (3) enables the defendant to plead an acquittal or conviction in bar of future prosecution for the same offenses. See Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. O'Hagan, 139 F.3d 641, 651 (8th Cir. 1998); United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993), cert. denied, 513 U.S. 831 (1994). Evidentiary details need not be pled.

Given that defendants Johnson and Solomon provided no argument in support of their motions to quash other than to adopt the arguments made by defendant Martin in her motion to dismiss, and as the arguments submitted in defendant Martin's motion to dismiss have already been addressed and rejected, the Court does not deem any further discussion necessary with respect to defendants' motions to quash. These motions should be denied.

III. CONCLUSION

Based on the foregoing, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying Defendant Martin's Motion to Dismiss for Failure to State an Offense as to Counts Two and Twenty-One Through Twenty-Four (doc #57). It is further

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying Defendant Troy Solomon's Motion to Dismiss Count Two for Failure to State an Offense (doc #98). It is further

RECOMMENDED that the Court, after making an independent review of the record and

applicable law, enter an order denying Defendant Delmon Johnson's Motion to Quash Indictment (doc #64). It is further

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying Defendant Troy Solomon's Motion to Quash Indictment (doc #65).

Counsel are reminded they have ten days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections to same. A failure to file and serve timely objections shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

/s/ Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE