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

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

ORDER

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

1. Defendant Elder's Motion for Severance Pursuant to Rule 8(b) and Rule 14, Federal Rules of Criminal Procedure (doc #22);

2. Defendant Solomon's Motion to Transfer Venue and Sever (doc #31);

3. Defendant Johnson's Motion to Transfer Venue and Sever (doc #33);

4. Defendants Solomon's and Johnson's Joint Amended Motion to Transfer Venue and Sever (doc #162);

5. Defendants Solomon's and Johnson's Joint Second Amended Motion to Transfer Venue and Sever (doc #175);

6. Motion for Leave to File Out of Time and an Extension of Time in Which to File Government's Response to Defendants Solomon's and Johnson's Joint Second Amended Motion to Transfer (doc #178); and

7. Defendant Elder's Motion for Change of Venue (doc #182).

For the reasons set forth below, the motions to transfer venue and sever are denied.

I. INTRODUCTION

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.[1] Defendant Solomon is charged in Counts One through Twelve of the indictment. Defendant Elder is charged in Counts One and Three through Ten of the indictment. Defendant Johnson is charged in Counts One, Two and Seven through Ten of the indictment.

The indictment charges in part as follows:

COUNT ONE
(Conspiracy to Distribute Controlled Substances)

* * *

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, CHRISTOPHER L. ELDER, 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, an unindicted co-conspirator, to knowingly and intentionally distribute, dispense, and possess with intent to distribute and dispense Schedule III, IV, and V controlled substances, including but not limited to, hydrocodone, a Schedule III controlled substance, both in its generic name and brand name forms, such as Lortab and Lorcet; alprazolam, a Schedule IV controlled substance, in its generic form and brand name forms, such as Xanax; and promethazine with codeine, a Schedule V controlled substance, in its generic form and brand name forms, such as Phernergan with codeine; other than for a legitimate medical purpose and not in the usual course of professional practice–thus rendering them unlawful and invalid prescriptions–a violation of Title 21, United States Code, Section 841(a)(1).

Manner and Means

During and course and in the 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, CHRISTOPHER L. ELDER, and DELMON L. JOHNSON, with others known and unknown to the Grand Jury:

a. Defendant ELDER wrote unlawful and invalid prescriptions

[1]Defendants Rostie and Martin have entered guilty pleas.

for thousands of dosage units of Schedule III, IV, and V substances ("drugs"). These prescriptions were unlawful and invalid because defendant ELDER issued them not for a legitimate medical purpose and outside the usual course of professional practice.

b. Defendant SOLOMON obtained the unlawful and invalid prescriptions, as well as authorization for refill orders from defendant ELDER and would send by facsimile transmission a copy of the prescriptions and refill order re-authorizations to defendant ROSTIE at The Medicine Shoppe.

c. Defendant ROSTIE ordered and received quantities of controlled substances–including hydrocodone, a Schedule III controlled substance–that defendant ROSTIE knew exceeded the quantities of controlled substances needed for the use in the course of the legitimate pharmaceutical practice of The Medicine Shoppe.

d. Defendant ROSTIE filled the unlawful and invalid prescriptions written by defendant ELDER and had the controlled substances delivered via FedEx to defendants ELDER and SOLOMON at 3003 S. Loop West, Suite 415, Houston, Texas (the location of South Texas Wellness Center) and at 3003 S. Loop West, Suit 450, Houston, Texas (the location of Ascensia Nutritional Pharmacy).

e. Defendant ROSTIE filled prescription orders that bore the signature and DEA number of Dr. B, a medical doctor licensed in Texas, and shipped the controlled substances to defendant SOLOMON.

f. Numerous packages were sent via United Parcel Service from Houston, Texas to defendant MARTIN.

* * *

Overt Acts

In furtherance of the conspiracy, and to accomplish its object, the following persons performed the following overt acts, among others, within the Western District of Missouri and elsewhere:

a. In or before August 2004, defendant MARTIN introduced defendant SOLOMON to defendant ROSTIE for the purpose of obtaining controlled substances from defendant ROSTIE.

b. Between on or about September 1, 2004, and October 25,

2005, three patients had controlled substance prescriptions filled on multiple dates after they had died. These prescriptions were issued by defendant ELDER and filled by defendant ROSTIE.

c. From October 2004 through December 2004, multiple patients of defendant ELDER had prescriptions filled for 120 tablets of hydrocodone and 90 tablets of alprazolam on the same days. Beginning on December 1, 2004, the same patients began having prescriptions filled for 240 ml of promethazine with codeine syrup in addition to the first two controlled substances on the same days.

* * *

g. From on or about January 4, 2005, through on or about September 22, 2005, the defendants ROSTIE and SOLOMON, using Dr. B's DEA registration number and prescription pad, ordered, filled, and shipped 170,280 milliliters of promethazine with codeine syrup, a Schedule V controlled substance.

h. On or about May 10, 2006, defendant ROSTIE possessed prescriptions issued by defendant ELDER on prescription pacs of Westfield Medical Clinic and dated February 1, 2005 (approximately 71 prescriptions), and February 2, 2005 (approximately 61 prescriptions).

i. On or about May 10, 2006, defendant ROSTIE possessed handwritten notes concerning the pricing of hydrocodone (10/500mg and 10/650mg), alprazolam, and promethazine with codeine. Some of the notes refer to an unindicted co-conspirator and defendant ELDER.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(D), 841(b)(2), 841(b)(3), and 846.

COUNT TWO
(Conspiracy to Commit Promotional/Concealment Money Laundering)

* * *

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.

* * *

COUNTS THREE THROUGH SIX
(Distribution of Controlled Substances)

* * *

On or about the dates set forth below, in the Western District of Missouri, and elsewhere, MARY LYNN ROSTIE, a/k/a Lynn Rostie, TROY SOLOMON and CHRISTOPHER ELDER, defendants herein, aiding and abetting each other and others, both known and unknown to the Grand Jury, did knowingly and intentionally distribute and dispense Schedule III and IV controlled substances, as set forth below, other than for a legitimate medical purpose and not in the usual course of professional practice:

* * *

COUNTS SEVEN THROUGH TEN
(Distribution of Controlled Substances)

* * *

On or about the dates set forth below, in the Western District of Missouri, and elsewhere, MARY LYNN ROSTIE, a/k/a Lynn Rostie, CHRISTOPHER L. ELDER, TROY R. SOLOMON, and DELMON L. JOHNSON, defendants herein, aiding and abetting each other and others, both known and unknown to the Grand Jury, to knowingly and intentionally distribute and dispense Schedule III, Schedule IV, and Schedule V controlled substances, as set forth below, other than for a legitimate medical purpose and not in the usual course of professional practice:

* * *

COUNTS ELEVEN AND TWELVE
(Distribution of Controlled Substances)

* * *

> On or about the dates set forth below, in the Western District of Missouri, and elsewhere, MARY LYNN ROSTIE, a/k/a Lynn Rostie, and TROY R. SOLOMON, defendants herein, aiding and abetting each other and others, both known and unknown to the Grand Jury, to knowingly and intentionally distribute and dispense a Schedule V controlled substance, as set forth below, other than for a legitimate medical purpose and not in the usual course of professional practice:
>
> * * *

(Indictment at 5-13)

II. DISCUSSION

Defendant Elder argues that he is misjoined with the other defendants because they are all charged with conspiracy to commit money laundering, a conspiracy to which he is not connected. (Defendant Elder's Motion for Severance (doc #22) at 1-2) Further, defendant Elder argues that he will be prejudiced if he is subjected to a lengthy trial in which a substantial portion of the evidence focuses on the more sinister crime of money laundering. (Id. at 3)

Defendants Solomon and Johnson request a severance[2] and that their case be transferred to the Southern District of Texas, Houston Division. (Motion to Transfer Venue and Sever (doc #31 and doc #33); Joint Amended Motion to Transfer Venue and Sever (doc #162); Joint Second Amended Motion to Transfer Venue and Sever (doc #175)) Defendants Solomon and Johnson argue that the alleged criminal activity occurred in the Southern District of Texas. Further, defendants Solomon and Johnson argue that the remaining defendants, exonerating documents and witnesses are all found in the Southern District of Texas.

Finally, defendant Elder requests that his case be transferred to the Southern District of

[2]Defendants Solomon and Johnson do not specify from which defendants they wish to be severed.

Texas, Houston Division. (Defendant Elder's Motion for Change of Venue (doc #182) at 6) Defendant Elder argues that he will incur witness travel and lodging expenses in excess of $30,000 if the case is tried in Missouri. (Id. at 2) Further, defendant Elder argues that he is a practicing physician with an active practice and that his practice will suffer if the case is tried in Missouri. (Id. at 3)

A. Motions For Severance

1. Defendants Are Properly Joined In This Action

Rule 8(b), Federal Rules of Criminal Procedure, establishes the requirements for joinder of defendants. Defendants are permitted to be joined where "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." This rule is to be liberally construed in favor of joinder. See United States v. Jones, 880 F.2d 55, 62 (8th Cir. 1989).

The question of whether joinder is proper is to be determined from the face of the indictment, accepting as true the factual allegations in the indictment. See United States v. Massa, 740 F.2d 629, 644 (8th Cir. 1984), cert. denied, 471 U.S. 1115 (1985). See also United States v. Willis, 940 F.2d 1136, 1138 (8th Cir. 1991), cert. denied, 507 U.S. 971 (1993)("the indictment on its face revealed a proper basis for joinder"); United States v. Jones, 880 F.2d 55, 62 (8th Cir. 1989)("the superseding indictment reveals on its face a proper basis for joinder").

Accepting as true the factual allegations in the indictment, it is clear that the charges in Count One (that all defendants conspired with each other and others to distribute controlled substances), Counts Three through Six (that defendants Elder and Solomon, aiding and abetting each other and others, distributed controlled substances) and Counts Seven through Ten (that defendants

Elder, Solomon and Johnson, aiding and abetting each other and others, distributed controlled substances) satisfy the requirement that defendants are alleged to have participated in the same act or in the same series of acts constituting an offense. There is no misjoinder in this case.

2. Defendant Elder Is Not Prejudiced By The Joinder[3]

Defendant Elder argues that he would be prejudiced by a joint trial for the following reasons:

> ... defendant would further assert that there is real prejudice from subjecting him to a lengthy trial in which a substantial portion of the evidence focuses on the more sinister crime of money laundering. The charge itself implies lying and deception and serious devious acts designed to convert ill gotten gain into a more legitimate form so that the perpetrators can put the illegal funds into the normal and legal stream of commerce. Doctor Elder is charged with abusing his power as a physician to write prescriptions that he knew or should have known were excessive. The indictment alleges no connection between this alleged offense committed by he and the other four and their separate crime of money laundering for which he had no knowledge and did not participate in. The prejudice resulting from a joint trial will be substantial. ...

(Defendant Elder's Motion for Severance (doc #22) at 3)

Rule 14(a) of the Federal Rules of Criminal Procedure provides:

> If the joinder of offenses or defendants in an indictment ... appears to prejudice a defendant ... the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

A motion to sever is addressed to the discretion of the trial court. See Zafiro v. United States, 506 U.S. 534, 541 (1993); United States v. Shivers, 66 F.3d 938, 939 (8th Cir.), cert. denied, 516 U.S. 1016 (1995).

Courts have recognized the preference in the federal system for joint trials of defendants who are indicted together. See Zafiro v. United States, 506 U.S. 534, 537 (1993). This is increasingly so when it is charged that defendants have engaged in a conspiracy. See United States v. Pou, 953

[3]Defendants Solomon and Johnson do not claim any prejudice from being joined with defendant Elder or with each other.

F.2d 363, 368 (8th Cir.), cert. denied, 504 U.S. 926 (1992). Notwithstanding this preference, the Supreme Court has cautioned that "a district court should grant a severance under Rule 14 ... if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro, 506 U.S. at 539. As set forth above, defendant Elder has been charged with conspiring with defendants Rostie, Martin, Solomon and Johnson to distribute controlled substances. Further, defendant Elder has been charged jointly with defendants Rostie, Solomon and Johnson with distribution of controlled substances. Defendant Elder is charged in nine of the twelve counts remaining for trial. The conspiracy to commit money laundering with which defendants Rostie, Martin, Solomon and Johnson are charged in Count Two is the laundering of the proceeds of the conspiracy to distribute controlled substances charged in Count One.

A defendant is not entitled to severance simply because the evidence against a codefendant is more weighty than the evidence against him or because evidence admissible against a codefendant may make his case more difficult to defend. In United States v. Willis, 940 F.2d 1136 (8th Cir. 1991), cert. denied, 507 U.S. 971 (1993), the court found:

> There can be little doubt that the joint trial made it more difficult for Willis [a minor participant charged in only two of thirty-two counts] to defend himself. The evidence clearly revealed that Duke was a major drug dealer with a "far-flung" operation. But difficulty alone is not a reason to reject joinder. A showing of clear prejudice must be made.

Id. at 1139. See also United States v. Pecina, 956 F.2d 186, 188 (8th Cir. 1992); United States v. Davis, 882 F.2d 1334, 1340 (8th Cir. 1989), cert. denied, 494 U.S. 1027 (1990).

Prejudice may occur if the jury is unable to compartmentalize the evidence against each defendant. See Willis, 940 F.2d at 1138. However, this potential problem can normally be resolved

through applicable jury instructions. See Pecina, 956 F.2d at 188 ("Disparity in the weight of the evidence as between ... parties does not entitle one to severance ... In addition, the district court gave precautionary instructions advising the jury of the proper use of evidence as related to each defendant and each charge"); United States v. McConnell, 903 F.2d 566, 571 (8th Cir. 1990), cert. denied, 498 U.S. 1106 (1991)("the roles of the individual [defendants] were sufficiently distinct that the jury, aided by the court's instructions, could compartmentalize the evidence against each defendant"); United States v. Jones, 880 F.2d 55, 63 (8th Cir. 1989); United States v. Jackson, 549 F.2d 517, 526 (8th Cir.), cert. denied, 430 U.S. 985 (1977).

There is no reason to question that any possible prejudice to defendant Elder resulting from evidence presented against defendants Solomon and Johnson cannot be resolved through precautionary jury instructions.

B. Motions To Transfer

The indictment alleges that defendants conspired to distribute controlled substances and to commit promotional/concealment money laundering "in the Western District of Missouri, and elsewhere." (Indictment at 5 and 8) Many of the overt acts listed in the indictment occurred at The Medicine Shoppe, located in Belton, Missouri. As set forth in United States v. Overshon, 494 F.2d 894 (8th Cir.), cert. denied, 419 U.S. 878 (1974):

> ... The applicable statute provides:
>
> > Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> 18 U.S.C. § 3237(a). Accordingly, it is settled law that venue as to prosecution of all members of a conspiracy lies either in the jurisdiction in which the conspiratorial

> agreement was formed or in any jurisdiction in which an overt act in furtherance of the conspiracy was committed by any of the conspirators. ...

494 F.2d at 900. See also United States v. Hull, 419 F.3d 762, 768 (8th Cir. 2005), cert. denied, 547 U.S. 1140 (2006)("In a conspiracy case, venue is proper in any district in which any act in furtherance of the conspiracy was committed by any of the conspirators even though some of them were never physically present there."); United States v. Kim, 246 F.3d 186, 193 n.5 (2nd Cir. 2001)(venue is proper in a conspiracy prosecution in any district in which an overt act was committed by any of the coconspirators). Given the allegations of the indictment, venue is certainly proper in the Western District of Missouri. Defendants Solomon, Elder and Johnson, however, request that the case be transferred to the Southern District of Texas.

Rule 21(b) of the Federal Rules of Criminal Procedure provides that "[u]pon the defendant's motion, the court may transfer the proceeding ... against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice." The decision whether to transfer a trial for convenience is addressed to the sound discretion of the court. See United States v. Maldonado-Rivera, 922 F.2d 934, 966 (2nd Cir. 1990), cert. denied, 501 U.S. 1211 (1991); United States v. Testa, 548 F.2d 847, 856 (9th Cir. 1977); United States v. McGregor, 503 F.2d 1167, 1169 (8th Cir. 1974), cert. denied, 420 U.S. 926 (1975); United States v. Phillips, 433 F.2d 1364, 1368 (8th Cir. 1970), cert. denied, 401 U.S. 917 (1971); United States v. Stein, 429 F.Supp.2d 633, 645 (S.D.N.Y. 2006). "Defendants bear the burden of justifying such a transfer." Stein, 429 F.Supp.2d at 645. See also In re United States, 273 F.3d 380, 388 (3rd Cir. 2001)("courts have held that the criminal defendant has the burden of making the case for transfer"); United States v. Testa, 548 F.2d 847, 857 (9th Cir. 1977)("[the defendant] did not carry the burden of demonstrating his need for transfer").

In support of transferring the case, defendants Solomon and Johnson provide the following argument in their second amended motion:

> ... Both defendants reside in Harris County, Texas, which is located in the Southern District of Texas, Houston Division. All of the allegations of wrongdoing involving these Defendants are intertwined with businesses, Ascencia [sic] Nutritional Pharmacy and South Texas Wellness Centers, which are also located in Harris County, Texas. All of the employees of said businesses and other witnesses whom Defendants will call to testify on their behalf are located in Harris County, Texas. In addition, all of the records of these businesses, as well as the other various medical facilities listed in the indictment, are located in Harris County, Texas.
>
> Further, after CYNTHIA MARTIN'S plea hearing of December 18, 2008, all of the remaining defendants in this case reside in or around Harris County, Texas. The witnesses, records, and other evidence relied upon by these defendants are also located in Harris County, Texas. ... [A]ll of the evidence seized from Ascensia Nutritional Pharmacy is kept and stored at the DEA's Houston Field Office. Without commenting on the validity of the indictment or the statements contained therein, these Defendants 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.
>
> * * *
>
> The facts underlying the Government's case deal with allegedly illegal prescriptions written by doctors from Houston, for patients from Houston, with most of the documentary evidence located in Houston, and with every remaining Defendant located in Houston. Given the volume of infractions alleged in the indictment, there are thousands of potential witnesses necessary to the defense, all of whom reside in or around Houston, Texas. Moreover, following Defendant CYNTHIA MARTIN's guilty plea, the Western District of Missouri has virtually no local connection with the facts underlying this case. Based on the witness list produced by the government, even a majority of the prosecution's witnesses reside outside the Western District of Missouri.

(Joint Second Amended Motion to Transfer Venue and Sever (doc #175) at 1-3)

Defendant Elder provides the following argument in his motion for change of venue:

> Defendant Elder filed his initial [witness] list (doc. 149) on December 12, 2008. That list contains 27 names. Twenty-two of the 27 named witnesses reside in the Houston, Texas area. Four of remaining five witnesses are government agents and experts who have been endorsed by the government. The net result is that if the

> case is tried in Missouri, defendant Elder will incur witness travel and lodging expenses in excess of $30,000. Since this list was filed, defendant has identified a number of additional witnesses in Texas that he will endorse in a modified witness list.
>
> As of this filing, defendant's Private investigator has interviewed a number of Texas witnesses by telephone. These witnesses are essential to the defense and while counsel has fairly thorough reports supplied by his investigator, counsel does wish to conduct a pretrial witness interview of each of the proposed witnesses. This can best be accomplished from an efficiency standpoint as well as an economic one by conducting these interviews in the Houston area.
>
> The only remaining defendants for trial are residents from the Houston, Texas area. Counsel for two of the three remaining defendants reside in Texas. Defendant Elder is a practicing physician with an active practice. It is difficult for him to travel to Missouri without loss of income and extreme inconvenience. A number of his patients are spinal cord injury related patients and patients with permanent serious injuries that require constant pain management monitoring. Finally, counsel needs to work directly with defendant Elder to prepare him for testimony at his trial. This will require many evening hours of work which can best be accomplished if counsel is present in Houston, Texas at a central base of operation.
>
> Added to the mix is the pending investigation and likely prosecution of Doctor Peter Okose, a Houston area physician and alleged un-indicted co-conspirator in this case. The government has openly acknowledge[d] to counsel and this court that such an investigation is pending in the Houston US Attorney's office. Defendant has been provided partial discovery from the Houston office files and been informed that there are voluminous computer records of Ascensia pharmacy available for inspection and review in Houston. Again, this is a task that can best be accomplished in Texas while counsel is operating from a Texas base of operations.

(Defendant Elder's Motion for Change of Venue (doc #182) at 2-3)

The following provides a good starting point for the Court's analysis of a defendant's motion to transfer venue:

> At the outset it must be recognized that every litigation, particularly a criminal prosecution, imposes burdens upon a defendant and brings in its wake dislocation from normal occupational and personal activities. The burdens imposed and inconvenience suffered vary from case to case and from defendant to defendant within a case; it is a matter of degree depending upon a variety of circumstances. In this respect this case is no different from any other. The Court is satisfied that no matter where this trial is conducted, there will be inconvenience to the parties, their

> executives, their counsel and their witnesses. But mere inconvenience, interference with one's routine occupational and personal activities, and other incidental burdens which normally follow when one is called upon to resist a serious charge do not ipso facto make the necessary showing that a transfer is required in the interest of justice. As a general rule a criminal prosecution should be retained in the original district. To warrant a transfer from the district where an indictment was properly returned it should appear that a trial there would be so unduly burdensome that fairness requires the transfer to another district of proper venue where a trial would be less burdensome; and, necessarily, any such determination must take into account any countervailing considerations which may militate against removal.

United States v. Culoso, 461 F. Supp. 128, 136-37 (S.D.N.Y. 1978), aff'd, 607 F.2d 999 (2nd Cir. 1979). To determine whether defendants have met their burden of justifying a transfer, the Court should consider the following factors:

> (a) location of the defendants; (b) location of the possible witnesses; (c) location of the events likely to be at issue; (d) location of relevant documents and records; (e) potential for disruption of the defendants' businesses if transfer is denied; (f) expenses to be incurred by the parties if transfer is denied; (g) location of defense counsel; (h) relative accessibility of the place of trial; (i) docket conditions of each potential district; and (j) any other special circumstance that might bear on the desirability of transfer.

United States v. Stein, 429 F.Supp.2d 633, 645 (S.D.N.Y. 2006)(citing Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 243-44 (1964)). Defendants should support their motions to transfer with affidavits or other documents containing facts that would tend to establish the necessary elements for a transfer. See In re United States, 273 F.3d 380, 386 (3rd Cir. 2001).

While the location of the defendants remaining for trial weighs in favor of transferring the case to Houston, the other factors do not necessarily support transfer. With respect to the location of possible witnesses, defendants Solomon and Johnson provided no information in their various motions to transfer other than to state that "[a]ll of the employees of [Ascensia Nutritional Pharmacy and South Texas Wellness Centers] and other witnesses whom Defendants will call to testify on their behalf are located in Harris County, Texas" and that "there are thousands of potential witnesses

necessary to the defendants, all of whom reside in or around Houston, Texas." (Joint Second Amended Motion to Transfer Venue and Sever (doc #175) at 1-2 and 3) Case law is clear that when "witnesses were not named or otherwise described and the nature of their expected testimony was not disclosed" in a motion to transfer, there is no abuse of discretion when a court denies such a "motion based upon so inadequate a showing." Lindberg v. United States, 363 F.2d 438, 439 (9th Cir. 1966). See also In re United States, 273 F.3d 380, 386 (3rd Cir. 2001)(motion to transfer should contain "names and addresses of witnesses whom the moving party plan to call [and] affidavits showing the materiality of the matter to which these witnesses will testify"); United States v. Testa, 548 F.2d 847, 857 (9th Cir. 1977)(in order to carry burden of demonstrating need for transfer, defendant should indicate specifically who the witnesses were to be and the nature of their expected testimony); United States v. Culoso, 461 F. Supp. 128, 137 (S.D.N.Y. 1978)("it is not sufficient to make the bare assertion that a large number of defense witnesses from out of the District are needed at trial.") In his motion to transfer, defendant Elder is a bit more specific than defendants Solomon and Johnson, referencing his witness list and stating that 22 of the 27 named witnesses reside in the Houston area.[4] (Defendant Elder's Motion for Change of Venue (doc #182) at 2) However, as with defendant Solomon and Johnson, defendant Elder fails to set forth the expected testimony of the witnesses. Defendant Elder also fails to mention that eleven of the persons listed on his witness list are also listed on the Government's witness list. If called by the Government, defendant Elder would not have to bear the costs associated with bringing these witnesses to Kansas City. Defendant Elder further argues that the case should be transferred so that defense counsel could conduct a

[4]Actually 21 of the 29 named witnesses reside in Texas with one of these witnesses being the defendant, Christopher Elder. (See Defendant Elder's First Proposed Witness List (doc #149))

pretrial witness interview in Houston of each of the proposed witnesses and so that he could work directly with defendant Elder to prepare him for testimony at trial. These arguments carry no weight in that there does not appear to be any reason that defense counsel could not travel to Houston to conduct witness interviews and prepare defendant Elder to testify even if the trial were not held there.

With respect to the location of the events likely to be at issue, the indictment sets forth events which took place in both the Western District of Missouri and in Texas. Count One of the indictment alleges that unlawful and invalid prescriptions for controlled substances were faxed from Texas to Missouri, the prescriptions were filled in Missouri and then the controlled substances were shipped from Missouri to Texas. Count Two alleges that proceeds generated in Texas through the sale of the filled prescriptions were sent back to Missouri where the money was laundered. The Government advises that an inspector with the Missouri Board of Pharmacy uncovered the illegal drug operation during a routine inspection and relayed the information to the Kansas City field office of the Drug Enforcement Administration, which office was primarily responsible for the investigation. (See Government's Response to Defendants Troy Solomon's and Delmon Johnson's Second Amended Motion to Transfer ("Government's Response")(doc #181) at 7)

As for the location of relevant documents and records, defendants argue that all of the records of Ascensia Nutritional Pharmacy and South Texas Wellness Center are located in Texas. There has been no attempt by defendants to show how these documents are relevant to defending the charges brought against them. Defendant Elder argues that he has been informed that there are voluminous computer records of Ascensia Pharmacy available for inspection and review in Houston and that this task could best be accomplished in Texas while counsel is operating from a Texas base

of operations. Again, there does not appear to be any reason that defendant Elder's counsel could not travel to Houston to review these records. The Government advises that the bulk of the evidentiary documents upon which it will rely are located in the Western District of Missouri, not in the Southern District of Texas. (Government's Response (doc #181) at 7)

Defendant Elder argues that there is a potential for disruption of his business if transfer is denied. The Government advises that the trial is expected to last no more than two weeks. (Government's Response (doc #181) at 8) Whether held in Missouri or Texas, defendant Elder's practice will be disrupted during trial. As set forth in United States v. Stein, "[e]very life is significantly disrupted during a trial wherever it is held. Besides the need to be in court every day, the evenings and weekends are usually consumed analyzing the evidence that has been admitted and preparing for the remainder of trial." 429 F.Supp.2d 633, 645 (S.D.N.Y. 2006)(quoting United States v. Wilson, 2001 WL 798018, *3 (S.D.N.Y. July 13, 2001)).

With respect to the expenses to be incurred by the parties if transfer is denied, defendant Elder argues that he will incur witness travel and lodging expenses in excess of $30,000 if the case is tried in Missouri. However, as set forth above, eleven of the persons listed on defendant Elder's witness list are also listed on the Government's witness list. If called by the Government, defendant Elder would not have to bear the costs associated with bringing these witnesses to Kansas City, thus substantially reducing the cost to Elder. While defendants Solomon and Johnson state that they "lack the financial resources to present a viable defense in the Western District of Missouri," they have provided no specific information for the Court to review regarding costs they will have to bear and their inability to bear these costs.

The remaining factors appear neutral. As for the location of defense counsel, defendant

Elder's counsel is located in Kansas City, while defendant Solomon's and defendant Johnson's counsel are located in Texas. The Court finds Kansas City and Houston equally accessible for trial. This case is currently scheduled for trial in Kansas City on the joint criminal jury trial docket commencing July 20, 2009. The Court is not familiar with the docket conditions in the Southern District of Texas.

Finally, this Court believes its familiarity with the facts of this case weighs in favor of retaining the case in this district. It would not be in the interest of judicial economy to burden another court with the trial of the remaining defendants. Further, two of the defendants have pled guilty and will be sentenced in the Western District of Missouri. Should any of the remaining defendants be found guilty at trial, it would promote consistency for all defendants who have either pled guilty or been found guilty to be sentenced by the same judge.

As set forth in United States v. McManus, 535 F.2d 460, 463 (8th Cir. 1976), cert. denied, 429 U.S. 1052 (1977), the government's choice of forum is ordinarily to be respected. See also United States v. Thomas, 2006 WL 2283772, *2 (S.D.N.Y. Aug. 9, 2006)(the general rule is that a criminal prosecution should be retained in the original district in which it was filed). Defendants, who bear the burden of justifying a transfer, have not convinced the Court that it should overturn the general rule. Therefore, defendants' motions to transfer must fail.

III. CONCLUSION

Based on the foregoing, it is

ORDERED that Defendant Elder's Motion for Severance Pursuant to Rule 8(b) and Rule 14, Federal Rules of Criminal Procedure (doc #22) is denied. It is further

ORDERED that defendant Solomon's Motion to Transfer Venue and Sever (doc #31) is

denied. It is further

ORDERED that defendant Johnson's Motion to Transfer Venue and Sever (doc #33) is denied. It is further

ORDERED that defendants Solomon's and Johnson's Joint Amended Motion to Transfer Venue and Sever (doc #162) is denied. It is further

ORDERED that defendants Solomon's and Johnson's Joint Second Amended Motion to Transfer Venue and Sever (doc #175) is denied. It is further

ORDERED that the Motion for Leave to File Out of Time and an Extension of Time in Which to File Government's Response to Defendants Solomon's and Johnson's Joint Second Amended Motion to Transfer (doc #178) is granted. The Government's Response to Defendants Troy Solomon's and Delmon Johnson's Second Amended Motion to Transfer (doc #181) shall be deemed properly filed. It is further

ORDERED that Defendant Elder's Motion for Change of Venue (doc #182) is denied.

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