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

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

UNITED STATES' REPLY SUGGESTIONS TO THE DEFENDANTS' SUGGESTIONS IN OPPOSITION TO THE UNITED STATES' MOTION FOR DETERMINATIONS CONCERNING THE REPRESENTATION OF DEFENDANTS SOLOMON AND JOHNSON

The United States of America submits the following suggestions in reply:

Reply Suggestions

I. Defendant Solomon's independent representation nullifies defendant Solomon's and Johnson's waivers of joint representation, and constitutes a serious process error.

Defendant Solomon's engagement of separate counsel who owe no duties to defendant Johnson renders the waivers of joint representation a nullity, and creates a gravely serious process error which endangers the legitimacy of the outcome of the trial.

As demonstrated at the hearing, Mr. Lewis's independent representation of defendant Solomon creates a procedural issue of some significance. No party has the right to have two attorneys each examine witnesses during a trial. Nor is it clear how far defendant Solomon intends to take this dual representation during the trial. Will he ask for each attorney to have their own strikes from the jury panel? Or to be allowed to give opening statements and closing

arguments? The United States will absolutely oppose any such requests, and any procedure in which both Mr. Lewis (or Ms. Ruden) and Mr. Bannwart both examine the same witness.

The procedural issue illustrates at a fundamental level the substantive conflict issues raised by the current representation of defendants Solomon and Johnson. Defendants who share representation are required to enter waivers because the joint representation inherently limits the scope of an attorney's representation of each individual client. The attorney cannot pursue defenses for either client that conflict with the interests of the other. The attorney gives one opening statement and one closing argument for both defendants. If one or both defendants testify, the attorney cannot cross-examine on behalf of his or her other jointly represented client.

Defendant Solomon's engagement of his own counsel renders these waivers meaningless. If allowed to have independent representation, defendant Solomon waives nothing. His attorney can, indeed, must if so instructed, pursue defenses that are inconsistent with defendant Delmon Johnson's interests. If defendant Delmon Johnson testifies, then defendant Solomon's attorney can cross-examine him.

By the same token, defendant Delmon Johnson gains nothing by his waiver. Defendant Johnson's attorney cannot pursue any defense inconsistent with defendant Solomon's interests, and he cannot cross-examine his own client, defendant Solomon, on defendant Johnson's behalf.

In short, allowing the current representation situation to continue would be a process error of the first magnitude, and the result of any trial infected by such an error must be in serious doubt on appeal or on collateral attack. As far as government counsel can ascertain, this type of representation arrangement is unprecedented, and the government would submit that such arrangements do not occur because it is obvious upon reflection that they eviscerate the whole

purpose of waivers pursuant to Fed. R. Crim. P. 44(c) and create such inherent risks of unwaivable conflicts that they cannot be allowed.

Consequently, either Mr. Lewis and Ms. Ruden must withdraw and leave Mr. Bannwart as the counsel for both defendants (putting aside the other issues with Mr. Bannwart's representation, discussed in the United States' initial pleading and below); or defendant Johnson must obtain independent counsel (who cannot be Mr. Bannwart because of Mr. Bannwart's representation of defendant Solomon, both in this proceeding and previously).

II. An actual conflict exists because the United States has extended a plea offer to defendant Delmon Johnson.

On April 14, 2009, the United States formally offered defendant Johnson a plea agreement. The terms of the agreement are such that attorney Bannwart cannot advise defendant Johnson concerning the merits of the agreement without creating an actual conflict of interest in his concurrent representation of defendants Solomon. Consequently, for the reasons set forth in the United States' motion and supporting suggestions, defendant Johnson should at the very least be afforded the opportunity to discuss the merits of accepting a plea with an attorney who is unburdened by conflict-of-interest. Absent such an opportunity, it will be impossible for defendant Johnson to make a fully informed and intelligent choice concerning the merits of entering into the plea agreement, and as to the wisdom of continuing in his waiver of separate representation.

III. Mr. Bannwart may need to be disqualified because he may become a fact witness, and because he had a business relationship with certain witnesses.

The evidence at the hearing established that Mr. Bannwart played a central role in offering legal advice and services to defendant Troy Solomon and Ascensia Nutritional

Pharmacy during the period of the conspiracy charged in the indictment. The uncontroverted evidence at the hearing was that defendant Solomon provided a total of $25,000 in cash during 2004 to Ada and Pleshette Johnson to assist them with paying the expenses of their business, South Texas Wellness Center. The evidence at trial will establish that defendant Solomon had no known legitimate source for these cash payments, and that defendant Solomon and defendant Christopher Elder directed the shipment of narcotic drugs from the Medicine Shoppe Pharmacy in Belton, Missouri, to defendant Elder at South Texas Wellness Center, where they were signed for by Ada and Pleshette Johnson and other South Texas Wellness Center employees. The boxes of drugs would then be picked up by defendant Delmon Johnson, or otherwise delivered to Ascensia Nutritional Pharmacy.

Within this context, the evidence at the hearing demonstrated that defendant Solomon's efforts to gain an ownership interest in South Texas Wellness Center were coordinated through his attorney, Mr. Bannwart. An important meeting on the subject was held at Mr. Bannwart's office, and in his presence, and Mr. Bannwart drafted papers creating the corporation in which defendant Solomon would have an interest.

The confounding effect that Mr. Bannwart's role as defendant Solomon's transactional attorney during the conspiracy period may have is illustrated by the transcript of the hearing before the Court on October 21, 2008, the relevant portion of which is marked as Government's Exhibit 2 for the April 14 hearing. During the October 21 hearing, the Court and Mr. Bannwart discussed the issue of whether defendant Solomon had legal standing to challenge a search of South Texas Wellness Center. In the course of this discussion, Mr. Bannwart never revealed to the Court that he had been personally involved in the negotiations between defendant Solomon

and the Johnsons on this very point, or that he drafted corporate papers that would have given defendant Solomon such an interest had the Johnsons accepted them. On page 4 of the transcript, Mr. Bannwart represented to the Court that, "at one time Mr. Solomon was a partial owner of South Texas Wellness Center." Mr. Bannwart's statement is in direct opposition to Pleshette Johnson's testimony that she and Ada Johnson had rejected defendant Solomon's request for part ownership of the clinic, and had done so during the meeting at Mr. Bannwart's office and in Mr. Bannwart's presence.

Where Mr. Bannwart's representations to the Court are so starkly at odds with the other evidence in the case, the likelihood of Mr. Bannwart becoming a trial witness becomes very high. In addition, the United States is concerned that this example is only the tip of the iceberg of the factual matters as to which Mr. Bannwart may have information, given his close relationship to defendant Solomon and Ascensia Nutritional Pharmacy during the charged period of the conspiracy.

Moreover, the evidence at the hearing established that Mr. Bannwart had, at the very least, a commercial relationship with Ada and Pleshette Johnson and their clinic during this time, as a result of the referral of personal injury patients from the clinic to Mr. Bannwart. The evidence demonstrated that where Mr. Bannwart was successful in winning a recovery for a South Texas Wellness Center patient, the portion of that recovery that represented South Texas Wellness Center's costs were sent to the clinic by Mr. Bannwart. While it is unclear whether this business relationship rose to the level of actual representation of the clinic by Mr. Bannwart, the existence of the financial relationship alone is troubling on its own merits within the context of the case.

In addition, the evidence concerning "the judge" creates additional issues. At the very least, the trial evidence will be that defendant Solomon has repeatedly contacted potential witnesses, subporned perjury, and attempted to dissuade cooperation with the investigation of his activities. In the case of Lillian Zapata, defendant Solomon referred to "Anthony" as an attorney who would shield him from liability for his actions, and defendant Solomon had previously referred to "Anthony" as a "judge" in Zapata's presence. Zapata believed that "Anthony" refers to Anthony Bannwart. Completely independently, Cynthia Martin received a telephone call on July 20, 2006, from defendant Solomon and a man referred to as the "judge" in which both men encouraged her to lie in the proffer session scheduled for the next day. Ms. Martin thought there were differences between Mr. Bannwart's voice and the voice of the "judge."

This evidence is highly probative of defendant Solomon's consciousness of guilt in this matter. The evidence once again highlights that Mr. Bannwart's close relationship with defendant Solomon during the conspiracy period is a threat to the integrity of the trial and has a high likelihood of causing Mr. Bannwart to become a witness.

CONCLUSION

The United States respectfully requests that this Court disqualify attorney Bannwart, and allow defendant Johnson to hire new counsel or to seek the appointment of new counsel.

Respectfully submitted,

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By

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on April 20, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record:

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