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

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-04-CR-W-FJG
	)	
CHRISTOPHER L. ELDER,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S ANSWER OPPOSING THE GOVERNMENT'S MOTION SEEKING A MONEY JUDGMENT FORFEITURE AND A DEMAND FOR HEARING WITH SUGGESTIONS IN SUPPORT OF HIS MOITION IN OPPOSITION

THE COUNT ONE CONSPIRACY:

The evidence considered in a light most favorable to the government established the following key points:

1) Doctor Elder worked at South Texas Wellness Center (STWC) from the Summer of 2004 until approximately January 1, 2005.

2) Doctor Elder wrote numerous prescriptions while at STWC, the originals of which were in the records of the Medicine Shoppe in Missouri when that facility was searched in May of 2006.

3) Doctor Elder specifically wrote "no refills" on prescriptions he issued to patients while at STWC.

4) Pleshette Johnson, a co-owner manager at STWC, testified that Dr. Elder saw real patients while employed at STWC, as did Elder in his own defense.

5) Doctor Morgan, a government pain management expert, testified that Elder's prescription practices were "unusual" but also admitted that he too had been duped by patients using false identification and that it is not an uncommon practice in the pain management field.

6) Pleshette Johnson, produced no patient records for the patients Elder saw while he was employed and could only speculate as to the absence of such records even though the records were clearly the property of the clinic.[1]

7) Doctor Elder was paid as a contract employee and received a 1099 from STWC for 2004 for a few thousand dollars which he declared on his 2004 tax return.

8) Scheduled prescription drugs were shipped from Missouri to Texas to the STWC over the course of the entire conspiracy including the

[1] This court will recall it denied defendant's motion to suppress the search of the STWC on the grounds that Doctor Elder had no expectation of privacy (standing) in those records because they were not his and belonged to the clinic.

January through October 2005 period after he left and were signed for by various STWC employees and in only one instance by "Chris."

9) Money was paid by defendant Solomon to defendant Martin in cash which was delivered to Rostie in Missouri over the entire period charged for which Martin received a cut.

10) Massive numbers of refills were generated via fax from the basement of defendant Solomon's home and sent back to Missouri, in direct response to refill requests generated by Rostie.

11) The refill faxes authorized refills for scripts written by Dr. Elder which indicated "no refills authorized," and most of this conduct occurred after January 1, 2005, the date Dr. Elder left STWC.

12) The initials on the refill authorizations were not written by Dr. Elder.

13) Defendant Elder subsequently went to work for Dianne Hearn as an employee at her clinic, Westfield Medical, where he saw real patients and was paid a salary which was also reflected on his 2005 tax return.

14) Patients at Westfield filled their prescriptions in many instances at a pharmacy located in the same shopping mal as Westfield.

15) Duplicate Xerox copies of prescriptions of Westfield patients written by Doctor Elder subsequently were faxed to Missouri and were in the records of the Medicine Shoppe and seized.

16) After Doctor Elder left STWC, his name remained on the door at STWC without his knowledge or permission and during the following 10-month period the issuing physician was Doctor Peter Okose.

17) During the entire period of the conspiracy Doctor Elder and defendant Solomon maintained periodic telephone contact with each other.

18) No government witness except Rostie ever talked to Elder during the conspiracy period and Rostie only talked to someone who claimed to be Elder during a three way telephone conversation once and maybe one other time.

19) No witness was produced who claimed to have ever purchased Elder-generated medication illegally in the Houston area.

20) No evidence was offered to show definitively what happened to the medications after they were signed for in Texas.

21) No financial net worth investigation was done as to Doctor Elder to determine if his accumulated assets exceeded his accountable income from practicing medicine.

22) Defendant Elder was not charged with nor was he determined to be guilty of money laundering.

23) No direct financial benefit to Elder was establish during the trial except that he received compensation for writing prescriptions as a physician.

THE MARTIN DISPARITY:

The government now seeks a money judgment against Doctor Elder in an amount representing the total sum of money sent by Defendant Solomon to Defendant Rostie via the courier services of Defendant Martin. That amount is alleged to be $991,114.00. The government points to the testimony at trial of witness Lorie Nelson as preponderance evidence to support this claim. Ms. Nelson has also provided an affidavit which essentially summarizes her testimony at trial but otherwise provides no new insight into the financial transactions between the various defendants (See doc. 384). A separate motion has been filed against defendants Rostie and Martin, citing their plea agreements.

Rostie has agreed to a consent order in the amount stated above. Martin's plea agreement (Doc. 166) indicates that Martin has pled guilty to Counts One (drug

conspiracy) and Two (money laundering conspiracy). The factual statement she admitted to during her plea contained in her plea agreement supporting the Rule 11 plea to Count One clearly states that the gross sales during the conspiracy was the $991,114.00. In the same paragraph, the government agrees to limit her forfeiture exposure to only $660,742.00 under the theory that she joined an on-going conspiracy that had been in existence for five or six months.

After making this agreement with Martin, the government now contends that Doctor Elder is responsible for the gross proceeds jointly and severally with the remaining defendants without any regard or distinction as to his alleged active period of involvement in the Count One drug conspiracy and without regard to the utter absence of any direct evidence of the receipt by him of any proceeds whatsoever from the Count One conspiracy.

Martin admitted her full participation in the Count One drug conspiracy so it is therefore inexplicable as to why she is not being held responsible for the gross proceeds which passed between the conspirators under the theory advanced by the government against Elder which states that all involved are responsible for the gross proceeds other than one of equity.

LORIE NELSON TESTIMONY:

Ms. Nelson testified that she is a financial analyst with the United States Attorney's Office and had been so employed for five years (Tr. 886). Ms. Nelson

holds a Master's Degree in Accounting from Central Missouri State (Tr. 887). Ms. Nelson testified that she prepared charts using bank information gathered during the investigation (Tr. 888). Ms. Nelson said the purpose of this was to consolidate the financial information into "raw numbers" (Tr. Id.). The charts included a synopsis of Cynthia Martin's cash deposits over the time frame discussed in the trial (Tr. Id.). The figures represent money she stated came from Houston (Tr. 888-889). She also had charts showing the synopsis of Rostie Enterprises, DBA the Medicine Shoppe, for the period of the conspiracy which contained some overlapping months before and after (Tr. 889).

From August of 2004 through October of 2005 Rostie deposited $2,943,653.37 in the bank (Tr. 890). Ms. Nelson testified that she looked at cash deposits for Rostie for the period involved and testified as to those figures (Tr. 891-892). Ms. Nelson never testified as to the figure $991,114 now sought as a money judgment – that figure is a number that Ms. Rostie agreed to in her plea agreement as the amount of money she profited from through her dealings with Solomon and Martin from "summer of '04 through October of '05", as pointed out by Mr. Lewis during cross-examination of her (Tr. 307).

Ms. Nelson relied heavily on tax returns of all the defendants with the exception of defendant Elder (Tr. 889-892). She never requested Elder's tax returns because they " . . . were following, following the money from Texas to Missouri, and

then following the pharmaceuticals back to Texas" (Tr. 892-893). She admitted that even though the indictment was returned in 2008 and the investigation had started in 2006 and she knew what the charges were, she did not examine his tax returns (Tr. 892-893). Because the testimony is highly germane to the issue of financial gain, defendant will quote directly from the transcript:

> Q The theory is that Dr. Elder was involved with these other people in this massive scheme to generate huge amounts of income from Missouri, didn't it?
>
> A He was involved in the drug conspiracy side, yes.
>
> Q That was your theory?
>
> A Yes, correct.
>
> Q Don't you think it would have been important to get his tax returns and do a financial workup on him to see whether or not he in fact got any money, ma'am?
>
> A At the time of the investigation we knew that this was all flowing in cash, and we understood that payments were being made in cash. And we really didn't expect to find a trace of that cash at that time, and we did not do a financial investigation on Mr. Elder.
>
> Q You know what -- you're talking about a bank deposit method of investigation, right?
>
> A Correct.
>
> Q There's also the net worth basis of investigation in tax cases, isn't there, where you look to see whether or not the person's net worth, in other words, what they got, what they've spent, what they've acquired in cars and houses and what they've paid off in loans and that kind of

thing would show their net worth and then you would compare that to reported income for the year? You're familiar with that system of accounting?

A Yes, I am.

Q You could have done a net worth investigation on Dr. Elder, couldn't you?

A Yes, we could have.

Q And you could have told the jury, then, if you had done that whether he was living in a house out in that high dollar area that we heard Pleshette Johnson was living in versus the apartment he was living in?

A Yes, we could have.

Q You didn't do that, did you?

A No, sir.

Q Were you aware or did you find out that he was audited in 2004 and 2005?

A At a later date.

Q And in fact he had $5,000 on deposit with the IRS, and after the audit, they gave him back $250. Is that your recollection, something in that neighborhood?

A From what I have heard.

Q And that was the year that he got a 1099, his best year he'd had yet, he got a 1099 showing $200,000 worth of income which he paid close to $100,000 in taxes or something in that neighborhood?

A Okay.

Q All right. But you did not look into his finances?

A No, sir, I did not.

Q Now, you said that he wasn't a target early in the investigation.

A Financial target, sir.

Q Well, just a -- he was a target in the investigation?

A Correct.

Q To get a total picture of him, don't you think it would have been helpful after 2008, you got -- this is 2010 -- it doesn't show on my watch. This is 2010, 12:30 on June the 24th, you had all that time, over two years and some months to do a financial on him, didn't you?

A If it would have been approached to me to do one, I would have done so.

(Trial transcript, pages 890-895).

Doctor Elder offered undisputed evidence that he still has large student loans and a large mortgage and he denied any financial gain as a result of his dealings with these individuals except for wages he earned while doing his job as a pain management physician.

ARGUMENT:

When the government seeks to impose criminal forfeiture, Federal Rule of Criminal Procedure 32.2(b)(1) requires the sentencing court to "determine what

property is subject to forfeiture under the applicable statute." Under the Rule, the court's forfeiture determination "may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt." *U.S. v. Capoccia*, 503 F.3d 103 (2nd Cir., 2007). The government is not entitled to forfeiture of proceeds from uncharged violations regardless of whether they and the charged violations are part of a common scheme and there must be a requisite nexus between the conduct and the item or money to be forfeited. Id.

In this case the government has seen fit to lower the amount owed by Martin based on when she joined the Count One conspiracy. Frankly, this appears to be permissible based on *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir.1995) and should equally apply in Doctor Elder's case, assuming for argument purposes forfeiture is appropriate, which of course defendant believes is not the case.

Quoting from a district court case, *Caparotta*, 571 F.Supp.2d at 199-200, the Court in *U.S. v. Bucci*, 582 F.3d 108 (1st Cir., 2009) stated "[t]o become subject to a forfeiture under § 853, a defendant has to be convicted of a predicate crime under Title 21, and, upon such conviction, § 853 simply assures that a drug dealer is deprived of the economic power generated by illegally deprived wealth." This of course requires that the government prove by preponderance of the evidence the requisite nexus and is able to demonstrate by the same standard of proof that Doctor

Elder has in fact come into illegally obtained wealth of a specified amount that should be taken from him.

Various Circuits have held that § 853 permits imposition of a money judgment on a defendant who possesses no assets at the time of sentencing, assuming a proper nexus can be established and there is credible proof that the defendant profited from the criminal activity in some provable and recognizable manner. See *United States v. Awad*, No. 07-4483-cr (L) (2nd Cir. 3/11/2010) (2nd Cir., 2010) *United States v. Vampire Nation*, 451 F.3d 189, 201-02 (3d Cir. 2006); *United States v. Casey*, 444 F.3d 1071, 1077 (9th Cir. 2006); *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006); *United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000).

In the recent case of *U.S. v. Nguyen*, No. 08-3791 (8th Cir. 4/2/2010) (8th Cir., 2010) the Court discusses the concept of the forfeiture of substitute assets citing *United States v. Hatcher*, 323 F.3d 666, 673 (8th Cir. 2003). In *Nguyen*, the court goes into considerable discussion about the level of proof required to demonstrate that a ½ million dollar house should be subject to forfeiture as a substitute asset. The case is important in Doctor Elder's situation simply because it stands in stark contrast to what the government has and has not proven in this prosecution.

While forfeiture law continues to evolve (See *United States v. Santos*, ___ U.S. ___, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008) and can be complex in different settings e.g. general forfeitures under the drug statutes versus specific forfeitures

under the money laundering provisions, the underlying theme in all the cases seems to suggest these rules: 1) adefendant should not profit from unlawful conduct; 2) seized identified cash drug proceeds are obviously subject to forfeiture; 3) identified substitute assets purchased with drug proceeds should be and are equally forfeitable; 4) money judgments in money laundering cases are tied to the amount of identifiable laundered funds; 5) amounts forfeited by individual defendants must bear a reasonable nexus to their conduct; 6) all defendants need not be subject to the same amount of forfeiture based on equitable considerations; and, finally, 7) in a money judgment Under Title 21, there must be some showing that the defendant did indeed obtain unlawful profits from the illegal conduct in some identifiable amount – only then is he subject to a forfeiture money judgment – and it should be an amount reasonably related to the identified illegal conduct.

Applying the foregoing rules, it would appear that there is simply no credible evidence in this case to justify a forfeiture of any amount. Doctor Elder has no hidden assets, has paid substantial taxes on income earned in 2004 and 2005, and subsequent uncharged years, and his gain from the "scheme", considered in light most favorable to the government, is miniscule when compared to that reaped by the others involved, including un-indicted co-conspirator Okose.

WHEREFORE, defendant moves the Court to deny the government's request for a money judgment against Doctor Elder.

/s/
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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System November 18, 2010.

/s/
JOHN R. OSGOOD