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

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

UNITED STATES' SUGGESTIONS IN REPLY TO DEFENDANT ELDER'S SUGGESTIONS IN OPPOSITION TO THE MOTION OF THE UNITED STATES FOR AN ORDER OF FORFEITURE

The United States of America respectfully submits the following suggestions in reply to defendant Elder's suggestions in opposition to the United States' motion, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and Fed. R. Crim. P. 32.2, for a Preliminary Order of Forfeiture in the above-captioned case:

Reply Suggestions

Defendant Elder opposes the government's motion for preliminary order for a forfeiture money judgment, and lodges several legal objections. As explained below, Elder's objections lack merit. As a major participant in the drug distribution conspiracy in which he has been convicted, Elder should be required to pay the requested money judgment.

At trial, the government proved that Elder, co-defendant Troy Solomon, former co-defendants Cynthia Martin and Lynn Rostie, unindicted co-conspirator Okozie, and others, conspired to obtain hydrocodone and other controlled substances from the Medicine Shoppe Pharmacy in Belton, Missouri, for diversion for street sale in Houston, Texas. The evidence

demonstrated that Solomon provided lists of stolen identities to Elder, with the lists organized by drug, which Elder used to write approximately 544 false and fraudulent prescriptions. No records existed for these patients at South Texas Wellness Center, and the drugs once received in Texas were not provided to patients but were instead taken away by Solomon and other co-conspirators. The evidence overwhelmingly demonstrated that all of the prescriptions written for these patients were illegitimate.

The implication of these facts is inescapable: Elder sat down and wrote out from lists of names and drugs provided to him by Solomon (and possibly others) over 500 prescriptions that Elder knew were entirely fictitious. As a medical doctor Elder knew that his actions were in contravention of the law and of every ethical standard of his profession. Elder had to know that the only purpose for the creation of falsified prescriptions for controlled substances was to obtain those substances for diversion. Consequently, there can no question that Elder voluntarily and fully joined a large scale drug conspiracy, and furthermore, that his actions were central to the creation and success of that conspiracy.

Beginning later in the conspiracy, Dr. Peter Okoze wrote thousands of prescriptions for Solomon, all of them obviously falsified. The prescriptions were written in large batches for patients with the same last name or whose names began with the same letter. Moreover, the evidence at trial showed that the drugs obtained through these prescriptions were not provided to the patients, but instead were diverted by Solomon and others working with him.

Viewed against this backdrop, Elders's objections are essentially red herrings. It is well settled that a defendant is liable for the actions of a conspiracy that were reasonably foreseeable to him, unless the defendant affirmatively withdraws from that conspiracy. *United States v.*

Marquez, 605 F.3d 604, 611 (8th Cir. 2010). Here, Elder never affirmatively withdrew from the conspiracy. Quite the opposite, the evidence showed that on February 1st and 2nd 2005, Elder's first days working at the Westfield Clinic, months after he had left the South Texas Wellness Center, Elder provided copies of controlled substance prescriptions to Solomon, and was in telephonic contact with Solomon around the time Solomon faxed those copied prescriptions to the Medicine Shoppe Pharmacy in Belton. In contrast to these late conspiratorial acts, Elder never took any affirmative action of any type to withdraw from the conspiracy.

As a co-conspirator Elder's money judgment must reflect the money gained by the conspiracy as a whole, not simply funds that go to an individual defendant. *United States v. Royer*, 549 F.3d 886, 904 (2nd Cir. 2008) (defendant convicted of RICO, conspiracy to commit securities fraud, and four counts of securities fraud must forfeit gain realized by himself and others to whom he gave inside information, not just the gain related to the four counts in which he profited personally; *United States v. Seher*, 574 F. Supp.2d 1368, 1370 (N.D. Ga. 2008) (defendant who conspired to launder $1.6 million must pay $1.6 million money judgment); *United States v. Corrado*, 227 F.3d 543, 554-55 (6th Cir. 2000) (*Corrado I*) (all defendants in a RICO case are jointly and severally liable for the total amount derived from the scheme; the Government is not required to show that the defendants shared the proceeds of the offense among themselves, nor to establish how much was distributed to a particular defendant); *United States v. Corrado*, 286 F.3d 934, 938 (6th Cir. 2002) (*Corrado II*) (same; because person who collected the proceeds was able do so because of his participation in a scheme, all members of the scheme are jointly and severally liable). Here, Elder was deeply involved in the conspiracy and played a critical role in it, and he therefore should be held accountable for a money judgment reflecting

the full amount of the conspiracy's gain. *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (all coconspirators are jointly and severally liable for the amount of the forfeiture regardless of how much or how little they benefitted from the conspiracy); *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003) (because all codefendants are liable for the sum of the proceeds realized by each other, the payer of a kickback to a city official is liable for what he received from the city as well as the amount of the kickback, and the city official is liable for the same).

Moreover, a defendant is liable for a money judgment for funds that he did not receive personally but instead directed to a third party. *United States v. Huber*, 243 F. Supp. 2d 996 (D.N.D. 2003) (forfeiture verdict properly included proceeds that defendant did not receive personally because he directed them to a third party), *aff'd*, *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005). Consequently, here the fact that Elder provided the false prescriptions but allowed Solomon and others to garner the proceeds of the resulting narcotics in no way vitiates Elder's responsibility to pay a money judgment. *United States v. Stivers*, 2010 WL 2365307 (E.D. Ky. June 11, 2010) (coconspirator jointly and severally liable for amount of forfeiture even if there is no evidence he personally benefitted from the conspiracy); *United States v. Levesque*, 2008 WL 53876, at *5 (D. Me. 2008) (drug courier liable for forfeiture of $3 million in gross sales of marijuana, even though she was paid less than $100,000 for her role as a courier), *aff'd*, 546 F.3d 78 (1st Cir. 2008).

As explained in the affidavit accompanying the United States' motion, the $991,114.00 represents proceeds of sales of the controlled substances involved in the conspiracy from the Medicine Shoppe to the Houston defendants. As such, that amount is appropriate as the money

judgment amount against Elder, as it represents one rational way of valuing the conspiracy's gain. It is not required that the government prove that Elder has that amount in his possession. *United States v. Misla-Aldarondo*, 478 F.3d 52, 73-74 (1st Cir. 2007) ("If the Government has proven that there was at one point an amount of cash that was directly traceable to the offenses, and that thus would be forfeitable under 18 U.S.C. § 982(a), that is sufficient for a court to issue a money judgment, for which the defendant will be fully liable whether or not he still has the original corpus of tainted funds—indeed, whether or not he has any funds at all.").

Finally, Elder makes reference to co-defendant Cindy Martin, who agreed in her plea agreement to pay a money judgment of $660,742. Elder notes that allowing Martin to pay a lesser amount is "permissible," and asks as alternative relief that his money judgment be lowered in accordance with Martin's. However, there is no requirement that each co-defendant have equivalent money judgment, and Elder has cited to none. Elder and Martin are not similarly situated in many respects, including in their roles in the conspiracy and that Martin plead guilty and cooperated and Elder did not.

CONCLUSION

The United States requests that the Court enter the Preliminary Order of Forfeiture.

Respectfully submitted,

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/s/ James Curt Bohling

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on December 6, 2010, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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/s/ James Curt Bohling

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