

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 05-282 (MJD/JJG)

UNITED STATES OF AMERICA,)	
)	
)	
Plaintiff,)	
)	
v.)	UNITED STATES' RESPONSE TO
)	DEFENDANT'S POSITION
)	REGARDING SENTENCING
(1) CHRISTOPHER WILLIAM SMITH,)	
)	
)	
Defendant.)	

The United States of America, by and through its attorneys Rachel K. Paulose, United States Attorney for the District of Minnesota, and Assistant United States Attorney, Nicole A. Engisch, hereby submits this response to the Defendant's Position Regarding Sentencing for the limited purpose of addressing three issues: 1) the loss amount enhancement, 2) the violation of a prior order enhancement, and 3) the downward variance sought by the defendant. The United States reserves the right to respond to the defendant's other arguments at the evidentiary hearing and/or at sentencing.

I. DISCUSSION

A. The Defendant's \$24 Million In Sales Is the Appropriate Loss Amount

The PSR concludes and the government contends that the proper measure of loss in this case is the \$24 million that the defendant gained from his fraudulent sales of prescription drugs without a valid prescription. Smith responds that because his scheme defrauded government agencies, there is no monetary loss. For support of this argument, the defendant relies primarily on United States v. Andersen, 45 F.3d 217, 221-22 (7th Cir. 1995) (where customers who purchased veterinary drugs were "well aware that the drugs they were purchasing were not approved by the FDA," the court held that the defendant's gain was not an appropriate measure for determining loss).¹ As will be discussed below, the Andersen case, which took a minority view, was decided prior to a 2001 clarification of U.S.S.G. § 2B1.1 that makes it clear the defendant's sales are the proper loss calculation in cases charging FDA and related violations. Therefore, this Court should reject the defendant's "no loss" argument.

First, the majority of courts to address the question have held that the defendant's gain should serve as the loss amount in

¹ Smith also cites United States v. Kimball, 291 F.3d 726 (11th Cir. 2002), but the appellate court in that case declined to express an opinion on whether it was inappropriate to equate the loss amount with the defendant's gain. Id. at 734 n. 4.

cases involving FDA and related violations. See, e.g., United States v. Munoz, 430 F.3d 1357, 1370-73 (11th Cir. 2005) (where the defendants "conspired to mislead buyers by informing them that [the drugs] did not require prescriptions," the loss was equal to the defendant's gain); United States v. Milstein, 401 F.3d 53 (2d Cir. 2005) (in case involving misbranded drug and other FDA charges, court held that the loss amount was the defendant's total sales because illegally sold prescription drugs had no value); United States v. Gonzalez-Alvarez, 277 F.3d 73, 77-80 (1st Cir. 2002) (where customers reasonably believed they were purchasing milk that was compliant with government regulations, they were denied the benefit of their bargain, and loss should be calculated based on the amount paid the defendant); United States v. Bhutani, 266 F.3d 661, 669-70 (7th Cir. 2001) (where "consumers bought drugs under the false belief that they were in full compliance with the law," "the defendant's gain is the appropriate measure of the loss"); United States v. Haas, 171 F.3d 259 (5th Cir. 1999) (where the loss to customers is incalculable, the court can rely on the gain the defendant received from defrauding the FDA by importing Mexican drugs without incurring the costs associated with regulatory approval); United States v. Marcus, 82 F.3d 606, 610 (4th Cir. 1996) (where "consumers did not receive what they bargained for--an FDA-approved drug of known safety and efficiency," the defendant's gross sales were the appropriate

measure of the actual loss suffered by consumers . . ."); United States v. Cambra, 933 F.2d 752, 756 (9th Cir. 1991) ("There is no meaningful distinction between the government as victim and individual consumer victims"; district court properly held that the defendant "intended to profit from his activity and that at least federal agencies were defrauded by his acts. Adjusting the guideline range based on the amount involved [the defendant's gain] is therefore appropriate"); But See United States v. Chatterji, 46 F.3d 1336, 1341-42 (4th Cir. 1995) (finding the defendant's gain was not an appropriate measure of loss in case where the customers received drugs that, despite fraudulently-obtained FDA approval, did not harm customers and were exactly what the defendant represented the drugs to be).

The analysis of the majority view makes sense here. Smith's customers were duped by the defendant's misrepresentations and online pharmacy structure into believing they were legally purchasing prescription drugs with a valid prescription. Because there was no valid prescription and the drugs were sold illegally, the customers were deprived of the benefit of their bargain.

But even if this case were arguably closer to the facts in Andersen and the other minority cases, such arguments would be academic. In one of the more recently decided cases, United States v. Milstein, 401 F.3d 53 (2d Cir. 2005), the court identified a critical 2001 application note that appears to have resolved the

matter for most FDA and related cases. As the Milstein court observed, in 2001, the fraud guidelines were clarified by the following commentary:

In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.

Id. (quoting Application Note 3.(F)(v) to U.S.S.G. § 2B1.1). Thus, the loss amount in Milstein was equal to the defendant's sales. Id.; see also United States v. Aronowitz, 151 Fed. Appx. 193, 194 (3d Cir. 2005) (in health care fraud case involving dentist who allowed dental assistants to do procedures he billed for, court rejected defendant's argument that there was no loss because patients were not harmed by the work done by the non-dentists; Application Note 3.(F)(v) was controlling and effectively overruled earlier case law relied upon by the defendant).

The conduct in this case falls within the language of this 2001 commentary. First, this case involves a scheme in which "goods were falsely represented as approved by a governmental regulatory agency" because Smith falsely represented on his web site and in contracts that his online questionnaire, and thus, by implication, his online pharmacy, was "FDA approved."

Second, this case involves a scheme in which "goods for which regulatory approval by a governmental agency was required . . . [and] was obtained by fraud" because Smith made numerous misrepresentations to brick and mortar pharmacies in an effort to lure them into supplying the prescription drugs which he in turn distributed.² Smith needed the pharmacies and their DEA licenses in order to secure the prescription drugs and in order to distribute them without drawing undue attention from regulators.³

Finally, while this case does not directly involve "services [that] were fraudulently rendered to the victim by persons falsely posing as licensed professionals," it involves closely analogous conduct. Namely, in this case, the central misbranding conduct involved Smith's misrepresentations that the prescription drugs were being sold with a valid prescription secured after proper review and approval by a physician. There was in fact a licensed physician involved, but for all intents and purposes, that individual did not act in a professional manner in reviewing the drug orders and issuing "prescriptions."

²The misrepresentations included lies about how many doctors were on board and about how they reviewed the customer orders, as well as the entirely false "Dr. Mach letter" prepared in April 2005 in response to the DEA directive.

³In a related case, Bernardette Hollis pled guilty to the offense of obtaining prescription drugs by fraud based on aiding and abetting this same conduct.

Thus, because this case falls within Application Note 3.(F) (v) to U.S.S.G. § 2B1.1, and based on the analysis of the majority of cases, the loss amount should be \$24 million, the amount customers paid Smith for the drugs.⁴

B. Because the Defendant Violated Orders That Were Prior to His Relevant Conduct, the Enhancement Applies

Defendant contends that he is not subject to an enhancement for violation of a prior order because there were no orders in place prior to the dates he engaged in introducing misbranded drugs into interstate commerce. Defendant's argument is without merit because it ignores principles of relevant conduct. Namely, "specific offense characteristics . . . are determined on the basis of 'relevant conduct,' not the acts underlying the offense of conviction." United States v. Killgo, 397 F.3d 628, 631 (8th Cir. 2005) (citing U.S.S.G. § 1B1.3(a)). Thus, the term "prior" in the prior order enhancement means prior to the defendant's entire course of conduct, not just prior to the counts of conviction. Id.

In this case, the defendant continued to engage in online

⁴This application note is consistent with other commentary to U.S.S.G. § 2B1.1 applicable to controlled substances cases sentenced under the fraud guidelines. See Application Note 3.(F) (vi) to U.S.S.G. § 2B1.1 ("[i]n a case involving controlled substances, loss is the estimated street value of the controlled substances."). Here, the "estimated street value" of the hydrocodone and other controlled substances sold by Smith is approximately \$24 million.

pharmacy activities throughout 2005 (when he set up an online pharmacy in the Dominican Republic at www.allpainmeds.com and at www.allusamedical.com), and into 2006, while he was housed at the Sherburne County Jail (when he set up an online pharmacy in the Phillipines at www.valuemedes.ph). He also continued to engage in obstructive conduct related to his online pharmacy activities (such as the plot to kill a witness) well into 2006. Thus, as previously argued, he engaged in a number of violations of orders that were prior to his relevant conduct. Any one of those violations, including Smith's violation of the Court's May 2005 injunction when he brazenly stole money from the receivership bank account, will justify this enhancement.

C. Defendant Is Moving For a Substantial Variance Not Justified By Extraordinary Circumstances

If the Court finds all of the enhancements found by the Probation Officer and argued by the government, the guideline range is 360 months to life. In that instance, the defendant seeks a downward variance to 240 months. The defendant, however, has not offered exceptional circumstances to justify such a substantial variance.

As the Eighth Circuit has repeatedly held, the further a district court varies from the sentencing guideline range, the more compelling the justification based on the statutory factors must

be. “[A]bsent exceptional facts, the imposition of a sentence that is dramatically lower than that recommended by the guidelines is an abuse of the district court’s discretion.” United States v. Maloney, 466 F.3d 663, 668 (8th Cir. 2006); see also United States v. Bryant, 446 F.3d 1317, 1319 (8th Cir. 2006).⁵

Smith does not present exceptional facts but instead argues that a 360 month sentence is too long because it is based on a combination of charges brought by the government and is longer than other sentences imposed in other online pharmacy cases (where the defendants apparently were not subject to such a combination of charges).

In the government’s view, it may be problematic to vary a sentence based either on a comparison of other cases or based on a criticism of the government’s prosecutorial discretion to charge the case in a certain manner.⁶ The whole purpose of starting the

⁵This proportionality principle was left unaddressed by the Supreme Court’s recent decision in Rita v. United States, 127 S.Ct. 2456 (2007), which noted that it would be taken up next term in United States v. Gall. Id. at 2467. At present, the proportionality principle remains binding precedent in the Eighth Circuit.

⁶The government takes issues with defendant’s suggestion that he is at most facing 9 years for the misbranding counts. He was convicted of nine counts, and the Court is permitted to stack the statutory maximums for all of those counts to reach a final sentence within the applicable guideline range (which groups all of his offenses). See U.S.S.G. § 5G1.2. Even setting aside the CCE statutory maximum of life imprisonment and the conspiracy to distribute controlled substances count (which the government is dismissing), the Court could stack as follows: five years for

sentencing analysis with the guidelines is to avoid unwarranted sentencing disparities by ensuring that all defendants convicted of the same crimes and subject to the same enhancements will receive the same sentences. Where, as here, the parties know little about the facts and circumstances of defendants charged in other cases, including which sentencing enhancements were at issue, it is difficult to compare those defendants to Smith.

Indeed, comparing this defendant to other defendants in other cases is arguably akin to comparing a defendant to defendants charged and sentenced in state court. The Eighth Circuit has held that it is an abuse of the court's discretion and infringes on prosecutorial discretion to make such comparisons. United States v. McCormick, 474 F.3d 1012, 1014 (8th Cir. 2006) (holding that the district court lacked authority to vary downward from the guideline range after comparing the defendant's sentence to the sentence received by his accomplice in state court); United States v. Jeremiah, 446 F.3d 805, 807-08 (8th Cir. 2006) ("The District Court was neither required nor permitted under 3553(a)(6) to consider a potential federal/state disparity in imposing [the defendant's] sentence."); see United States v. Deitz, 991 F.2d 443, 448 (8th

each of three counts of distribution of controlled substances (15 years total), three years for each misbranding count (9 years total); 20 years for conspiracy to commit money laundering, for a grand total of 44 years.

Cir. 1993) ("Choice of forum . . . is a decision that lies safely within the realm of prosecutorial discretion, and the Guidelines were not designed to make inroads into this exclusive territory of the executive branch"); see also United States v. Blackford, 469 F.3d 1218, 1220 (holding that district court was not permitted to compare the defendant's case with other defendants who had received sentencing immunity because "any disparities arising from appropriate prosecutorial practices (or sentences resulting from those practices) are justified").

Even if the Court were to compare Smith with defendants in other online pharmacy cases, the comparison would nonetheless demonstrate why a 360 month sentence is reasonable. Namely, the defendant that Smith is arguably most like is Clayton Fuchs, who was also convicted of CCE for operating an illegal online pharmacy.⁷ Fuchs received a sentence of 240 months, but so far as the government is aware, Fuchs did not violate numerous court orders, obstruct justice in multiple ways, or plan to murder two individuals. If Smith is sentenced to 240 months, it will be as if all of his additional, serious conduct is of no consequence.

⁷Akhil Bansal was also convicted of CCE but has not yet been sentenced. The Fuchs and Bansal cases, as well as Smith's, demonstrate that CCE is an appropriate charge in certain online pharmacy cases. There is simply no reason why someone who pushes millions of dollars worth of narcotics to known addicts should be treated more leniently than someone who sells cocaine on the street.

Moreover, a sentence 240 months, the minimum sentence for conviction under CCE, is the same sentence Smith would have received if he had pled guilty prior to trial.

II. CONCLUSION

For all of these reasons and those set forth in the government's initial position pleading, the United States believes that a sentence of 360 months is reasonable.

Dated: July 25, 2007

Respectfully submitted,
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