

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

UNITED STATES OF AMERICA,)	
)	
)	
Plaintiff,)	
)	
v.)	POSITION OF THE UNITED STATES
)	WITH RESPECT TO SENTENCING AND
)	MOTION FOR EVIDENTIARY
(1)CHRISTOPHER WILLIAM SMITH,)	HEARING
)	
)	
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 position with respect to sentencing regarding the above-captioned case. The United States also hereby moves pursuant to LR 83.10(f) for an evidentiary hearing to resolve various contested enhancement and related issues, as described herein.

I. INTRODUCTION

The United States has reviewed the presentence report (PSR) in the above-referenced case and does not object to the factual findings or to the guideline conclusions found by the U.S.

Probation Officer. Indeed, the Probation Officer found that each of the enhancements described herein should apply to increase the defendant's sentencing guideline range.¹

This position pleading will primarily emphasize the guideline analysis applicable to the misbranded drug counts (referred to as "Group 2" in the PSR). Although the defendant was convicted of all nine counts of the Third Superseding Indictment, the guideline analysis is driven by his conviction on the three counts of introduction of misbranded drugs into interstate commerce and aiding and abetting the same (Counts 5-7), in violation of 21 U.S.C. §§ 331(a), 333(a)(2), 353(b)(1), and 18 U.S.C. § 2. Moreover, as discussed further below, the United States concurs in the Probation Officer's conclusion that the applicable guideline range is 360 months to life imprisonment.²

¹The Probation Officer also concluded that various alternative enhancements should also apply, with the exception of one: committing a portion of the scheme outside the country, pursuant to U.S.S.G. § 2B1.1(b)(9)(B). The Probation Officer did not address that alternative enhancement one way or the other. That alternative enhancement is discussed below.

² The defendant's ultimate sentence is also subject to a statutory mandatory minimum sentence of 20 years based on his conviction of operating a continuing criminal enterprise, in violation of 21 U.S.C. § 848.

II. STATEMENT OF FACTS

A. Smith Engaged in Pre-Pharmacy Internet Scams

Long before Christopher Smith established his illegal online pharmacy, he was already an experienced Internet scam artist. Beginning at least in the 1990s, when he was in his teens, and continuing well into his 20s, Smith sold a wide variety of dubious if not outright fraudulent products through large-scale unsolicited email (spam) campaigns. The products Smith spammed included human growth hormones, penis enlargement pills, "pheromone" concentrate, and an online gambling casino (in which winners were not paid their winnings). Smith also set up a fake escrow service to receive proceeds from the purported sales of Dell laptops and plasma TVs. Customers who paid Smith never received any product.

On November 20, 2002, one of the victims of his scams, Time Warner, obtained a permanent injunction against Smith, his business at the time, Rizler, Inc., and others from the U.S. District Court for the District of Minnesota (Case No. 0:01cv1077 (DDA/FLN)), enjoining them from selling cable TV descramblers which illegally stole cable signals.

While there were very few laws governing spam email campaigns until the CAN-SPAM act was passed in late 2003, Smith nonetheless engaged in a wide-variety of illegal activity surrounding his spamming endeavors. For example, in addition to defrauding customers out of their money as discussed above, Smith stole email

accounts and used computer programs to obtain customer account information and passwords. He also set up fake email accounts using stolen credit numbers, and in turn used those fake email accounts to spread his spam.

B. Smith Started India-Based Online Pharmacy

But it was not until early 2004 when Smith hit upon his most lucrative scam of all: selling prescription drugs over the Internet. Smith began his online pharmacy scheme by importing prescription drugs directly from India. He distributed those drugs to customers without requiring a prescription and without the involvement of any physician. Smith marketed the prescription drugs through web sites and through spam emails.

C. Smith Shifted to U.S. Based Online Pharmacy

Smith's overseas Internet pharmacy was successful but not without its problems, and starting in about July 2004, Smith began shifting his Internet pharmacy to the United States where he could maintain more control over the operation. Smith also initiated a series of steps to make his online pharmacy appear legitimate to customers and regulators. The online pharmacy began operating under the name Xpress Pharmacy Direct, among others.

D. Smith Recruited Single Physician to Issue Sham Prescriptions

In the July 2004 time frame, Smith enlisted a single physician, co-defendant Philip Mach, to issue sham prescriptions after appearing to "review" the customer orders. The customer

orders, which were primarily for the addictive pain killer, hydrocodone, were obtained primarily through Smith's various Internet web sites (xpress-rx.com was the main site) or telemarketing call centers, including call centers in Burnsville, Minnesota and the Dominican Republic. Smith also maintained a customer service center based in the Philippines run by his associate (hereinafter, "Philippines associate").

Using a computer log-on system that was directed by Smith, Mach approved the orders in large batches at a time, rarely rejecting any orders, and most of those he did reject were ultimately approved. Over time, he approved a total of more than 70,000, in quantities of upwards of hundreds of orders per day. At Smith's direction, Mach had no face-to-face, telephone, or other contact with the customers apart from a limited online questionnaire completed by customers. There was no effort by Smith's online pharmacy to verify the customer's medical complaint, obtain an adequate patient medical history, or perform any sort of examination or testing before approving the orders. No medical records were obtained from the customers or their primary care physicians, and none of this customer information was ever verified. Many customers made up the information or simply left portions of the questionnaire blank. No one was required to have a prior prescription.

Throughout the entire duration of his online pharmacy, Smith was only able to retain one physician, Dr. Mach, for the purpose of

making his online pharmacy appear, at least on the surface, to be legitimate. But Smith, who was in charge of setting up and managing the entire online pharmacy operation, knew there was no legitimacy. On several occasions, Smith even obtained prescription drugs for himself and family members, using a facsimile signature of Mach that was on file and bypassing even the minimal questionnaire process.

E. Smith Employed Telemarketers to Push Drugs to Addicts

Smith's Burnsville call center business was known as Online Payment Solutions, a business which Smith incorporated in Minnesota. The call center employed telemarketers practically around the clock, and Smith directed them to "sell, sell, sell," to existing and prospective customers.

Smith recognized from very early on that many of his customers were addicts, but to Smith, that just meant repeat sales, and he exploited their addictions by having his telemarketers place frequent calls, asking, "Are you ready for a refill?" Smith encouraged his telemarketers to sell multiple drugs to customers at one time, and he advised them that there was no problem placing multiple orders for hydrocodone-based drugs all on the same day, so long as the orders were for different brand names (e.g., Norco, Vicodin, etc.). At Smith's direction, the amount of "medical" information that customers were provided was minimal and of no

consequence, except insofar as it made the operation appear to have some legitimacy.

F. Smith Recruited a Few Small Pharmacies By Lying About Operations

Smith took other steps to make his business appear legitimate. Because his online pharmacy did not have a license from the U.S. Drug Enforcement Administration ("DEA") to distribute controlled substances, Smith needed licensed U.S. pharmacies to fill the prescription drug orders. Smith intentionally targeted small, struggling independent pharmacies because he believed they would not be inclined to ask many questions and would quickly become economically dependent on him.

Even the handful of pharmacies that agreed to work with him, however, asked some questions, and to allay their concerns, Smith repeatedly lied about how his operation worked. For example, in the pharmacy contracts, on his web sites, and in other communications, Smith falsely told pharmacies that he had numerous physicians and pharmacies located throughout the United States, that his online pharmacy employed an FDA-approved online questionnaire, and that there was meaningful communication between the prescribing physicians and the customers placing orders.³

³The misrepresentations to pharmacies dovetailed the misrepresentations that Smith made to the public via his web sites and in communications by telemarketers. The web site misrepresentations included statements that Xpress Pharmacy Direct employed a "third-party physician's network," a "network

Despite these lies, most prospective pharmacies and physicians that he tried to recruit flat out refused, in many cases advising him or his associates that his operation was illegal.

In what became a critical point for Smith's illegal enterprise, in February and March 2005, the DEA issued a directive to pharmacies throughout the United States, warning that

[a] patient completing a questionnaire that is then reviewed by a physician, hired by or working on behalf of an Internet pharmacy, does not establish a doctor/patient relationship. A consumer can more easily provide false information in a questionnaire than in a face-to-face meeting with the physician. It is illegal to receive a prescription for a controlled substance without the establishment of a legitimate doctor/patient relationship, and it is unlikely for such a relationship to be formed through Internet correspondence alone.

In response to that directive, most of the pharmacies working for Xpress Pharmacy Direct contacted Smith or his associates and indicated they would cease filling drug orders for the company unless they were assured the online business was legal. Smith, who was overheard reacting angrily to these letters and discussing plans to flee from authorities, ultimately arranged to have a false

of doctors," and that the information supplied by customers would be "reviewed by one of our physicians." Additional misrepresentations included statements that Xpress Pharmacy Direct had its own manufacturing laboratories ("our state of the art laboratories") to manufacture all major name brand pharmaceuticals, and that it had its own pharmacy ("our pharmacy") to fill the orders.

letter prepared and sent to the pharmacies. That letter, which was ultimately signed by Dr. Mach, falsely stated that Xpress Pharmacy Direct dispensed controlled substances based on a legitimate doctor-patient relationship formed through a review of medical records and through thorough communications between the patient and doctor and, thus, was not operating an illegal online pharmacy as described in the DEA directive.⁴ Smith knew none of this was true, but he hoped it would appease the pharmacies enough to keep shipping the drugs to his customers.

G. Smith Learned of Government Investigation and Expanded Into Canada

In the same general time frame as the DEA directive, Smith learned of the government's investigation into his illegal online pharmacy operation. Rather than change his ways or shut down entirely, he began to obstruct justice.

⁴Throughout the course of operating his online pharmacy, Smith received many other indicators that his operation was illegal. For example, he received warnings about the illegal nature of his business from various entities such as boards of pharmacies and MasterCard, and he possessed pleadings and research regarding various other online pharmacy operators (including Vincent Chhabra) who had been charged and convicted of crimes similar to those Smith was ultimately convicted of in this case. Rather than cease operations, in each instance, Smith resorted to additional lies and deception. As just one example, when Mastercard complained that sales of controlled substances such as hydrocodone were illegal, Smith created fake web sites that displayed no hydrocodone, and he stopped taking Mastercard sales for a time.

For example, after Smith learned of the government's investigation in about January 2005, he arranged to set up another online pharmacy in Montreal, Canada, at least in part to avoid the jurisdiction of the United States. He also began withdrawing large sums of cash, which he moved around to various locations, including safes and other storage facilities, in an effort to obstruct the government's investigation.

H. Smith Obstructed Justice By Destroying Returned Drugs

There were other instances of efforts to obstruct justice. Namely, when customers declined to accept prescription drug orders for various reasons, those drugs were returned to the Online Payment Solutions' premises, in violation of laws prohibiting the handling of such drugs other than by a licensed pharmacist. Smith ordered the drugs to be repackaged for possible resale. When a disgruntled, terminated employee filed a complaint with the Burnsville Police Department, describing the huge volume of drugs being maintained illegally on site, Smith hastily arranged to have employees remove the prescription drugs from the premises. Ultimately, when Smith learned of the government's investigation, he arranged to have the drugs destroyed.

I. Smith Conspired to Launder Money

Smith also engaged in a large scale money laundering conspiracy. Because Smith was prohibited from obtaining credit card merchant accounts in his own name, he arranged to disguise his

involvement in the prescription drug business in order to secure credit card accounts. Beginning in January 2005, Smith, working with others, arranged to establish a shell corporate entity, Rxorderfill.com, Inc., and bank accounts in the name of that entity.⁵ The proceeds from all credit card orders were then deposited into Rxorderfill.com's bank accounts. In turn, those funds were wired back to other bank accounts that Smith maintained in Minnesota at US Bank and Crown Bank. Funds that had been deposited into the US Bank account and Crown Bank account were used to pay the expenses of carrying on the business of Xpress Pharmacy Direct, including payments for Mach, pharmacies, and other expenses associated with the business locations. In addition, funds from these accounts were used to buy luxury vehicles and to otherwise engage in monetary transactions of greater than \$10,000.00.

J. Smith Obstructed Justice By Hiding Luxury Cars and Assets

From early 2004, through May 2005, Smith and others distributed and dispensed in excess of approximately 4 million units of hydrocodone-based controlled substances. During that same time period, Smith's gross sales totaled approximately \$24 million.

⁵Smith's masking of his involvement and creation of a shell entity in another name were consistent with other efforts Smith made to hide the corporate structure and location of his online pharmacy. For example, he advised telemarketers at his Burnsville location to tell anyone who asked that the company was located in Belize.

During the time frame of his Internet pharmacy business, Smith acquired a number of expensive luxury vehicles, including one or more of the following: Hummer, Cadillac, BMW, Mercedes, Lamborghini, Ferrari, and Jaguar. Smith also acquired a second home in Prior Lake, worth approximately \$1.1 million, for which he paid cash.

Over the course of several weeks in approximately March and April, 2005, Smith withdrew more than \$2,000,000 in U.S. currency from a Wells Fargo Bank account (in the name of another entity, Advanced Financial Svcs.) that contained deposits from drug sales made by his online pharmacy. The currency had been delivered, at Smith's direction, by Brinks armored truck. Smith moved the money into safes and other locations that he controlled.

In late May and early June 2005, Smith arranged for approximately \$400,000 to \$600,000 in U.S. currency, all derived from proceeds of his online pharmacy business, to be transported to Montreal, Canada, for his use and for purposes of going forward with plans to open up a new Internet pharmacy call center in Canada. The money was placed at Smith's direction in a safe in a Montreal apartment of an associate.

In about that same time frame, Smith began hiding his luxury cars by moving some of them to Canada and moving others to storage facilities secured in others' names.

K. Court Enjoined Smith's Online Pharmacy and Government Executed Search Warrants

On May 9, 2005, upon the government's motion in Case No. 0:05CV00895 (MJD/FLN), the Court entered a temporary restraining order ("TRO") which found probable cause to believe that Smith and his online pharmacy were violating the mail and wire fraud statutes. The TRO was filed under seal, but the next day, May 10, 2005, the government executed search warrants at Smith's business, home, and at a number of locations throughout the Twin Cities and in other states. On the day of the search warrants, the government served the TRO on Smith and others. The TRO shut down Smith's online pharmacy business, froze the company's bank accounts and assets, and enjoined Smith and other individuals and entities from continuing to operate another online pharmacy in violation of the mail and wire fraud statutes.

On May 20, 2005, following a hearing in which Smith, his counsel, and other parties appeared, the Court converted the temporary restraining order into a preliminary injunction.

L. Smith Started Up New Online Pharmacy in Dominican Republic

On May 24, 2005, within days of his court hearing, Smith traveled to the Dominican Republic for the purpose of setting up an Internet pharmacy that was a continuation of his Minnesota-based operation. On his trip to the Dominican Republic, Smith carried U.S. currency related directly to Online Payment Solutions and that

was subject to the Court's preliminary injunction. In the May and June 2005 time frame, Smith arranged to have others bring additional U.S. currency, related directly to Online Payment Solutions, to him in the Dominican Republic. Smith also arranged to obtain a copy of the customer database for his online pharmacy, despite the Court's preliminary injunction. The idea was for him to set up his lucrative business overseas where the U.S. authorities were without jurisdiction to shut him down.

On June 6, 2005, in an act that he later admitted was directly in violation of the Court's preliminary injunction, Smith made two withdrawals from Xpress Pharmacy Direct's U.S. Bank account (of \$1,000 each, plus transaction fees) by way of Xpress Pharmacy Direct cash card previously issued to Smith. Smith made the withdrawals from a casino located in Santo Domingo, Dominican Republic. The U.S. Bank account had been frozen by the Court's preliminary injunction, but was temporarily unfrozen by the receiver for the purpose of paying employees.

During this same June 2005 time frame, in anticipation of being charged with criminal offenses, Smith began making arrangements to flee from U.S. authorities, adopting a plan to relocate first in the Turks and Caicos and then to Honduras. Smith communicated his plans to his associate Scott Poe, but Poe began cooperating with the United States and did not go forward with

assisting Smith. Smith's flight plans were corroborated at trial with private jet records, among other things.

M. Government Moved For Contempt, and Smith Was Placed on Electronic Monitoring

In June 2005, within a short time of learning that Smith had launched a new, Dominican Republic-based online pharmacy web site, the government sought to have Smith and others held in contempt for willfully violating the Court's preliminary injunction by setting up a nearly identical online pharmacy based in the Dominican Republic. (Case No. 0:05mc00041 (MJD)). The Court held a hearing on the matter on July 6 and July 7, 2005. Although the Court took the contempt matter under advisement at that time, it placed Smith on electronic monitoring and imposed conditions on Smith which prohibited him from using a computer or developing any new web sites.

N. Smith Was Indicted, Released to Halfway House, and Violated His Release Conditions

On August 24, 2005, Smith and others were indicted in this matter. Smith was released to 180 Degrees Halfway House. Within the first month of his stay at the halfway house, Smith was found with a contraband laptop computer and PDA.

On September 29, 2005, as part of a court proceeding to revoke his pretrial release, Smith admitted to violating conditions of his pretrial release. In addition to the computer and PDA that had been brought into the halfway house, Smith had been developing a

search engine web site in violation of the Court's orders. Smith was thereafter detained and remanded into the custody of the United States Marshals Service at the Sherburne County Jail in Elk River, Minnesota.

O. Smith Provided Family Members With Cash Subject to Court Order

At the time his business was enjoined and all the proceeds frozen by Court order, Smith secretly hid a large amount of cash (consisting of bank withdrawals that had been delivered by Brinks and that were covered by the Court's injunction). During Smith's detention at the Sherburne County Jail, Smith arranged through family members to provide large sums of cash to an associate of Smith's who was also one of his attorneys at the time (hereinafter, "attorney/associate"). Family members were also provided access to the cash, in violation of the Court's preliminary injunction. In fact, they used some of the cash to reimburse themselves after they paid for Smith's attorney fees. After the government learned about the cash, family members and the attorney/associate returned what was left to the government. On February 3, 2006, \$289,305.00 in U.S. Currency was surrendered to the IRS-CID; on March 24, 2006, \$139,720.00 in U.S. Currency was surrendered to the IRS-CID; on March 31, 2006, \$50,000.00 in U.S. Currency was surrendered to the IRS-CID; on April 10, 2006, \$90,000.00 in U.S. Currency was surrendered to the FBI.

P. Smith Arranged to Get Around Jail's Telephone Procedures to Make Unrecorded Calls

At the Sherburne County Jail, the defendant routinely violated the jail's rules and procedures, and he was the subject of numerous disciplinary actions. In particular, the defendant went to great lengths to bypass the jail's procedures for monitoring and recording his telephone calls. Specifically, the defendant misused other inmates' PIN numbers (which are used to keep track of which calls a given inmate makes), and he arranged to have his calls transferred from his attorney/associate to other persons via three way calling. None of these calls were recorded.

Ultimately, Smith got even more sophisticated, arranging to have a local phone number, (763) 219-8837, entered into the jail's system as a number purportedly associated with his attorney/associate. He then arranged to have calls made to that fake (763) attorney number forwarded, using Voice Over Internet Protocol, to his Philippines associate.

Smith's Philippines associate had worked for him and his online pharmacy until about the fall of 2005, providing customer support from the Philippines. Smith's relationship with his Philippines associate predated their work together on the online pharmacy. Indeed, she was involved with the defendant since at least 2002, helping him with call center services and with his spam email campaigns and related fraudulent businesses.

Q. Smith Lied to Government About the Use of Fake (763) Attorney Number

In about November/December 2005, officials at Sherburne County Jail discovered that the defendant was using the fake (763) attorney number and put a stop to it. During this same time frame, the defendant and the government had been negotiating a possible settlement of the indicted drug conspiracy case. On January 31, 2006, the government met with the defendant and his counsel. The government asked Smith about his use of the fake (763) attorney number and about the jail's separate discovery that Smith had his attorney/associate smuggle Xanax anti-anxiety medication into the jail for him. The defendant proceeded to tell the government, among other things, about a woman named "Baby" who lived in the Philippines and who was helping him do some research on Internet pharmacies so he could turn that information over to the government. Smith denied that "Baby" was his Philippines associate. Smith omitted any description of doing anything illegal with his Philippines associate, such as working with her to set up another online pharmacy.

R. Smith Employed Another Fake Attorney Number to Call Philippines Associate

On March 3, 2006, a Sherburne County Jail Investigator discovered that the defendant was placing a number of calls using a number of different inmate PIN numbers to a new number, this time one with a (612) prefix, 612-465-8888. Calls to this number were

not being monitored and recorded, as the number had previously been entered into the jail's system as an attorney's number. Jail officials determined, however, that Smith was once again employing a scheme to misuse an attorney number to make non-attorney calls. As a result, the jail made the decision to record the calls Smith was making to 612-465-8888. But by that time, Smith had made about 63 calls to the fake (612) attorney number, starting as early as January 2006.

As a result of its investigation, the government determined that Smith, with the help of his Phillippines associate, had secured the use of the number 612-465-8888 by applying to use that number through a phone company, Integra. The calls were forwarded to the Philippines via Voice Over Internet Protocol (VOIP) through another company, Delta 3. The defendant determined that the number was in the jail's system as a blocked attorney number because it was formerly associated with a local law firm. That law firm had since relinquished the number.

S. Smith Plans to Kill a Witness

On March 4, 2006, at about 7:35 p.m., the defendant placed a call to 612-465-8888. In this call, the defendant and a female, later identified as his Phillippines associate, first discussed sending a threatening email to a witness in the defendant's upcoming trial in the drug conspiracy case. Smith stated:

. . . I think what we're gonna have to do . . . when we get a little closer to trial, you know? I think we're gonna have to . . . hire a private detective to get pictures of [the witness'] kids. And ah . . . we can do a little bit of emailing and electronic influence about a week before trial . . . Just let her know that, you know, if, if she wants to talk on the stand, that's perfectly fine, but we're also going to give her the option of picking which one of her kids she's going to sacrifice for doing so.

When his Phillipines associate asked, "Are you sure?," Smith responded, "What, you think I'm joking?" In response to her comment, "That's scary," Smith stated, "So is going to prison for 20 years . . . This is a kill or be killed world"

Smith and his Phillipines associate then moved on to discussing actually arranging to kill the witness. She said to Smith, "Well, she's lucky she's not here," meaning in the Philippines, to which Smith responded, "Because if she were there it would already be done." His Phillipines associate agreed: "Yeah." Smith then asked, "How hard is it for a, one of those kind of people to get a passport with a visa?" As the conversation continued, Smith made it clear exactly what sort of hit man services he needed, stating, "I mean you know what kind of services I'm looking for, right? I'm looking for like a full service." The defendant followed up with the statement that, "[t]here was a famous comment by Joseph Stalin, the most powerful man of the whole world, you want to know what it was? No man, no problem.'" To further clarify his intent, Smith stated, "I'm, I'm really not

joking. I got to get out of here.... I got to get out of here. That's the only way I can do it." And, as the conversation continued, he stated: "I'm more looking for the, uh, missing persons kind of thing, not, uh, not, you know what I mean, not, uh, something laying around to be stared at and . . . talked about."

In the call, his Phillippines associate offered various suggestions for how the killing could be done. She offered comments about passports, about finding someone in Mexico, China, Russia or already in the United States through her uncle, and finally, she discussed her dad's friend who provides these sorts of services for her family and who is professional, who gets the job done and then just leaves. The defendant agreed that her dad's friend would be the "perfect one" to kill the witness.

T. Smith and His Phillippines Associate discussed Tracking Device

In a call Smith placed to his Phillippines associate the next day, March 5, 2006, they discussed at length how to use GPS technology to employ a tracking device on a person's cell phone without the person's knowledge.

U. Smith Was Moved to Oak Park Heights

Shortly after the jail learned of Smith's plans to kill a witness, the jail shut down access to the 612-465-8888 from the jail and took away the defendant's phone privileges. Thus, Smith was no longer able to proceed with his plans to kill the witness or to discuss the topic further. Within a short time thereafter,

Smith was transferred to a maximum security facility at Oak Park Heights, and the Court entered an order placing restrictions on Smith's communication privileges.

V. Government Learned of Smith's Other Illegal Activities With His Phillippines Associate

The government's investigation further revealed that Smith had been working with his Phillippines associate and others, through the fake (612) attorney number, to place false orders for prescription drugs at local pharmacies. That is, Smith arranged for false prescriptions with forged doctor information to be transmitted to local pharmacies for the purpose of ordering prescription medication.

Moreover, Smith used the fake (612) attorney number in an elaborate scheme to set up (yet another) online pharmacy, located in the Philippines. His Phillippines associate was helping him to set up that business, namely, to establish a call center in the Philippines as well as a web site, despite court directives prohibiting Smith from doing so. When the government learned of the plans, it shut down the web site.

W. Smith's Plans to Kill Witness Were Corroborated

Smith was also working on his new Philippines' based online pharmacy with a family member and with his associate/attorney. That associate/attorney later cooperated with the government and

acknowledged that Smith specifically raised the idea of having one of his witnesses killed.

The government also heard from inmates at Sherburne County Jail about Smith's violent tendencies, plans to kill a witness, and offers to hire hit men. Specifically, Smith told one inmate he was interested in arranging to have a witness killed because that witness was planning to rat him out. Smith offered to pay money for these services. Smith told another inmate that one of his co-defendants would end up dead.

X. Smith Was Indicted in Separate Witness Tampering Case

On March 21, 2006, Smith was indicted in a separate case (Case No. 0:06cr00097 (MJD/JJG)), charging him with conspiracy to tamper with a witness and endeavoring to obstruct justice. The same conduct also serves as the basis for an obstruction of justice enhancement that the government is seeking in this case.

Y. Government Learned of Smith's Separate Plan to Kill His Wife

Smith's plans to kill the trial witness were not an isolated incident. After Smith's trial in the drug conspiracy case, a former Sherburne County jail inmate of Smith's contacted the government. The inmate stated that, in approximately December 2005, Smith asked the inmate if he would be willing to kill Smith's wife. Smith said he would pay the inmate \$60,000 to kill her and an additional \$20,000 to kill his wife's boyfriend. Smith told the inmate that he did not want his child around when the murders took

place. Smith arranged for the inmate to meet with another of Smith's family members while the inmate was out of jail on furlough. The inmate met with Smith's family member and discussed the details of the plan to kill Smith's wife and her boyfriend. The family member showed the inmate an envelop with a substantial sum of cash. The family member also gave the inmate Xanax and asked him to smuggle it into the jail for Smith. The inmate did not go forward with the plan. The inmate's girlfriend corroborated that the inmate did meet with Smith's family member while on furlough. Smith's family member refused to talk to the government about this topic.

Smith's plans to kill his wife were not surprising given Smith's long history of engaging in acts of domestic violence against his wife, including one instance in 2005 where Smith tried to run his wife off the road. Smith reported to at least one inmate of his concerns that his wife could be a damaging witness against him.

III. SUMMARY OF GUIDELINE ISSUES IN DISPUTE

A. The Fraud Guidelines, U.S.S.G. 2B1.1, Apply to the Misbranded Drug Counts

The defendant objects generally to the application of U.S.S.G. § 2B1.1 (the fraud guidelines) because he claims he was not convicted of fraud. His objections are without merit because the

misbranded drug counts are fraud-based and are subject to the guidelines set forth in U.S.S.G. § 2B1.1. Thus, the base offense for the misbranded drug counts is 6. See U.S.S.G. § 2B1.1(a)(2).

The misbranded drug charges required the government to prove and the jury to find that Smith acted with the intent to defraud or mislead.⁶ Thus, the fraud guidelines are the applicable guidelines. See, e.g., United States v. Kimball, 291 F.3d 726, 733 (11th Cir. 2002) (where defendant is convicted of distributing a prescription drug without a prescription with the intent to defraud or mislead, an essential element is fraud, including fraud against government agencies, and the proper guidelines section is § 2F1.1 (the predecessor to § 2B1.1)); United States v. Andersen, 45 F.3d 217, 219-20 (7th Cir. 1995) (§ 2F1.1, § 2B1.1's predecessor, applies to a wide variety of fraud cases, including Food, Drug and Cosmetics Act cases in which the defendant can be found guilty of defrauding individuals, regulatory agencies or both); see also United States v. Cambra, 933 F.2d 752, 755-56 (9th Cir. 1991) (because steroid offense brought under 21 U.S.C. §§ 331 and 333, et al., involved

⁶At trial, the government introduced evidence of countless instances of misrepresentations and fraudulent conduct by Smith as part of his distribution of misbranded drugs (e.g., false statements about the online pharmacy's business in its web sites, contracts, and letters to brick and mortar pharmacies). Smith has not objected to the factual paragraphs in the PSR regarding those misrepresentations. See PSR ¶¶ 33, 38.

fraud against the government, § 2F1.1 rather than § 2N2.2 was the correct guideline section).

B. The Loss Amount Is More Than \$24 Million

Defendant argues that the \$24 million loss figure set forth in paragraph 101 of the PSR is over-inclusive because it includes all of Smith's sales of prescription drugs, not just those that were at issue in the counts of conviction for misbranded drugs. This argument is without merit because it ignores well-settled principles of relevant conduct. Because the loss amount for the misbranded drug count is over \$24 million, 22 levels are added to the base offense of 6 (6 + 22 = 28).

Under the guidelines, "specific offense characteristics, such as the calculation of fraud losses, 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)). "Relevant conduct" includes all "acts or omissions 'that were part of the same course of conduct or common scheme or plan' as [the defendant's] offense of conviction." Id. (citing U.S.S.G. § 1B1.3(a)(2)). "'Common scheme or plan' as used in § 1B1.3(a)(2) is construed broadly in determining relevant conduct for sentencing purposes." Id.

____ At trial, Dr. Mach testified that he did not issue a valid prescription for any of the prescription drugs that were sold by Smith's online pharmacy. All of the drugs sold were sold in

substantially the same way with the help of the same accomplices, including Dr. Mach and others. Id. (two or more offenses will constitute part of a common scheme or plan where they are "substantially connected to each other by at least one common factor," including "common accomplices, common purpose, or similar *modus operandi.*"); see United States v. Shields, 1993 WL 13348 (9th Cir. 1993) (court held that even conduct charged in dismissed counts can be counted as relevant conduct for establishing the loss in a steroid distribution scheme). During the testimony of Bernardette Hollis, the government introduced exhibits detailing the gross sales from all such prescription drugs, amounting to approximately \$24 million. The \$24 million figure was further supported by bank records introduced during testimony of Special Agent Chad Vetter. The correct loss calculation is \$24 million.

C. Enhancement for Mass-Marketing Through the Internet Applies

Defendant objects to the 2-level enhancement for committing the offense of introducing misbranded drugs into interstate commerce through mass-marketing pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(ii). His basic objection, that this enhancement is already taken into account in other aspects of the guidelines, is without merit. Thus, the offense level is increased to 30 (28 + 2 = 28).

For fraud offenses, "mass-marketing" is defined as:

a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit.

Application Note 4.(A) to U.S.S.G. § 2B1.1. In this case, because Smith sold his drugs not only through the Internet, but also via telemarketers who placed phone calls to prescription drug customers, this enhancement will apply.

To the extent Smith is arguing that this enhancement has already been taken into account in other aspects of the guidelines and thus would amount to double counting, his argument should be rejected. "Double counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." United States v. Kenney, 283 F.3d 934, 936 (8th Cir. 2002)(citations omitted). Moreover, the commentary to the guidelines, specifically, Application Note 4 to U.S.S.G. § 1B1.1, provides "that the Commission intended to include enhancements for every applicable aspect of criminal conduct, to be added together cumulatively, unless the Guidelines themselves direct otherwise." Id. at 938.

Because introduction of misbranded drugs can both be (and historically have been) accomplished in ways not involving the

Internet or other mass-marketing, there is no double counting. The 2-level enhancement should apply.⁷

D. Enhancement for Violation of a Prior Order or Injunction Applies

The Court held in its April 27, 2007, order in Case 05-mc-41(MJD) that the government proved beyond a reasonable doubt that Smith violated the preliminary injunction by making two \$1,000 withdrawals from Xpress Pharmacy Direct's U.S. Bank account. Accordingly, Smith should receive a 2-level enhancement for violating a prior order pursuant to U.S.S.G. § 2B1.1(b)(8)(C). His offense level is therefore increased to 32 (30 + 2 = 32).

Application Note 7(C) to U.S.S.G. § 2B1.1 states that this 2-level enhancement should apply:

if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the

⁷With respect to his controlled substances offenses, Smith raises a similar objection to an enhancement for distributing a controlled substance through mass-marketing by means of an interactive computer service pursuant to U.S.S.G. 2D1.1(b)(5). For the same reasons as set forth herein, that enhancement should also apply. See Application Note 22 to U.S.S.G. § 2D1.1(b)(5) (defining the phrase "mass-marketing by means of an interactive computer service" to mean "the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance.").

defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines

The defendant engaged in several instances of violating prior orders, any one of which is sufficient to support this enhancement. In addition to his violation of the preliminary injunction by withdrawing frozen funds (which the Court found had been proven beyond a reasonable doubt), the government has proven by a preponderance of the evidence that Smith also violated the injunction by fleeing to the Dominican Republic to start up a continuation of his online pharmacy.⁸

Moreover, Smith violated the Court's pretrial orders by smuggling a computer and PDA into the 180 Degrees halfway house and by setting up another web site business (which resulted in the Court's decision to revoke his pretrial release). PSR ¶¶ 10-11.

⁸Even though the Court decided the government did not prove criminal contempt beyond a reasonable doubt based solely on evidence introduced at the contempt hearing, the Court can still assess this enhancement because the government can prove the factors supporting the enhancement by a preponderance of the evidence based on evidence later introduced at trial. United States v. Woods, 270 F.3d 728, 730 (8th Cir. 2001) ("[E]ven acquitted conduct can be considered when determining a sentence under the Sentencing Guidelines, so long as that conduct has been proved . . . by a preponderance of the evidence.").

Finally, Smith violated various Court orders by arranging from Sherburne County Jail to establish yet another online pharmacy in the Philippines. PSR ¶ 12. Any one of these instances is sufficient to warrant the 2-level enhancement for violating a prior order.⁹

E. Enhancement for Relocating a Substantial Part of the Scheme to Another Jurisdiction Applies

Defendant Smith objects to the 2-level enhancement for relocating or participating in relocating a substantial part of a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory authorities pursuant to U.S.S.G. § 2B1.1(b)(9)(A). The enhancement under § 2B1.1(b)(9)(A) for relocating the scheme is applicable because Smith relocated a substantial part of his scheme to the Dominican Republic and Canada. His offense level is therefore increased to 34 (32 + 2 = 34).

Based on evidence introduced at trial as well as at the July 2005 contempt hearing, the government can meet its burden of showing by a preponderance that Smith relocated a substantial part of his scheme to the Dominican Republic and Canada. After Smith's Minnesota-based online pharmacy was shut-down, the defendant moved to the Dominican Republic for the purpose of setting up another

⁹It should be noted that the guidelines specify that this enhancement applies only to conduct "not addressed elsewhere in the guidelines" U.S.S.G. 2B1.1(b)(8)(C). Therefore, the government is not seeking an obstruction enhancement based on these same facts.

online pharmacy, using a database of customers he obtained from his Minnesota-based online pharmacy despite the Court's injunction. With the help of others, Smith set up a web site offering the same sorts of hydrocodone products. The web site was shut down by the government before actual sales could go through.¹⁰ According to recorded calls with Bruce Lieberman (introduced at trial), Smith located his online pharmacy in the Dominican Republic so that he could be outside the jurisdiction of U.S. authorities. Scott Poe's trial testimony also demonstrated that Smith's purpose in relocating to the Dominican Republic was to evade U.S. law enforcement.

Additionally, according to Scott Poe's trial testimony, in 2005, Smith, Poe and others began relocating the online pharmacy scheme to Canada in part to evade government authorities. Smith, Poe and others traveled to Canada, and hundreds of thousands of dollars were shipped there. The Canadian telemarketing operation had rented space, hired employees and was about to begin telemarketing calls when Smith's business was enjoined in May 2005.

F. Alternative Enhancement for Committing a Substantial Portion of the Scheme Outside the Country Applies

Even if the Court chooses not to apply the 2-level enhancement for relocation of the scheme outside the jurisdiction, the Court

¹⁰That there were no actual sales is irrelevant. The scheme itself was relocated when Smith moved to the Dominican Republic and set up a new web site.

should still apply a 2-level enhancement under other portions of U.S.S.G. § 2B1.1(b)(9). Namely, the evidence shows that a substantial part of the fraudulent scheme was committed from outside the United States pursuant to U.S.S.G. § 2B1.1(b)(9)(B).¹¹

A substantial part of the scheme was committed in the Dominican Republic and Canada, as well as the Philippines and France. In addition to Smith's relocation to the Dominican Republic in May 2005, Smith some months earlier had begun relocating or expanding into Canada. By May 2005, Smith had rented space, had hired employees and was about to begin telemarketing calls at his Canadian telemarketing center when Smith's business was enjoined.

Moreover, Smith enlisted the telemarketing services of Harry Creaghan, located in the Dominican Republic, from the outset of Smith's scheme until at least the time of the injunction. Throughout the scheme, he also enlisted his Phillipines associate to conduct customer service work to appease customers of his illegal online pharmacy and, later, to establish another online pharmacy located in the Phillipines. Additionally, for most of the duration of his online pharmacy, he employed offshore merchant

¹¹As indicated above, the Probation Officer did not address this alternative enhancement. Because the United States can prove its application by a preponderance, it respectfully requests that the Court include this alternative enhancement (along with all alternative enhancements) in its final sentencing decision.

account companies to process credit card orders (including Bardo in France). Finally, Smith's scheme began when he imported drugs directly from India.

G. Alternative Enhancement For Sophisticated Means Applies

In the further alternative, aside from the foreign countries in which Smith operated portions of his scheme, the Court could apply a 2-level enhancement for sophisticated means pursuant to U.S.S.G. § 2B1.1(b) (9) (C).

Application Note 8.(B) to U.S.S.G. § 2B1.1 provides:

[f]or purposes of subsection (b) (9) (C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

This application note describes almost exactly what happened in this case. In addition to relocating the scheme in Dominican Republic and Canada, as described above, Smith also established a shell company, Rxorderfill.com, Inc. and bank accounts in that entity's name in order to disguise his involvement with the online pharmacy funds that flowed through those accounts. See PSR ¶ 42. Prior to his establishment of Rxorderfill.com, Inc., Smith relied

on offshore bank accounts and merchant account companies, such as Bardo in France.

H. Enhancement for Risk of Death or Serious Bodily Injury Applies

Defendant Smith objects to a 2-level enhancement under U.S.S.G. § 2B1.1(b) (12) (A) for the conscious or reckless disregard of death or serious bodily injury, along with objections to factual paragraphs regarding deaths associated with his online pharmacy. His objections are without merit. The government is prepared to present evidence at the evidentiary hearing regarding the deaths that are described in paragraphs 65-67 of the PSR. But even if there were no actual deaths, the defendant's sentence should still be enhanced for his conscious or reckless disregard of death or serious bodily injury. His offense level is therefore increased to 36 (34 + 2 = 36).

In the context of this enhancement, the Eighth Circuit defines "reckless" to mean "the defendant disregarded 'a risk of harm of which he is aware.'" United States v. McCord, Inc., 143 F.3d 1095, 1098 (8th Cir. 1998) (citations omitted). Thus, to apply the enhancement under U.S.S.G. § 2B1.1(b) (12) (A), the government must prove that the defendant's criminal conduct "created a risk of serious bodily injury," and that the "defendant was in fact aware of and consciously or recklessly disregarded that risk." Id. "Serious bodily injury" is defined by the guidelines to involve

"extreme physical pain or the impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." Application Note 1.(L) to U.S.S.G. § 1B1.1. There is no requirement that the persons at risk for serious bodily injury be victims of the offense. United States v. Hoffman, 9 F.3d 49, 50 (8th Cir. 1993).¹²

As the trial evidence made clear, the defendant was well aware that a large number of his purchasers were drug addicts, and yet he continued his online pharmacy scheme. In instant messages, he chatted about the "f-ing addicts" and joked about how addicts would be willing to pay high prices to get their fix. In addition, Smith received various other indications that his customers were addicts, such as observing promotional postcards with mailing labels that demonstrated customers made multiple purchases using only slight alterations on their names and addresses.

It is a matter of common knowledge that addicts can suffer severe health problems and can overdose or become suicidal as a

¹²The government's primary position is that the victims of Smith's offenses were the government agencies. However, the Court could conclude that some or all of the drug purchasers were victims (those who may have been defrauded into believing they were buying legitimate prescription drugs with valid prescriptions). In that event, the defendant could potentially face several other enhancements, including enhancements for over 250 victims, see U.S.S.G. § 2B1.1(b)(2), or for a large number of vulnerable victims (namely, those who are addicts), see U.S.S.G. § 3A1.1(b).

result of their addiction. Indeed, at trial, one of Smith's best customers testified that he was hospitalized not once but twice due to overdosing on prescription medication he ordered from Smith's online pharmacy (which he preferred because of how easy it was to get orders through).

Moreover, in 2005, one of the pharmacies for Xpress Pharmacy Direct, Fallbrook Pharmacy, was sued in a wrongful death action, and information about the lawsuit was passed on to Smith. The person who died (an addict) had placed orders with various online pharmacies and had received an order from Xpress Pharmacy Direct, although apparently after he had already died. Although Smith and his online pharmacy operation was therefore not responsible for that particular death, this lawsuit placed Smith on notice of the potential for a death resulting from orders placed by addicts with online pharmacies. He nonetheless did nothing to change his online pharmacy operation.

In addition, Smith's own web pages warned of the dangers of addiction, side effects, and overdose from the prescription drugs he distributed. His Internet customers were asked to click that they had read disclaimer forms acknowledging these risks. See United States v. Nomar, 95 Fed. Appx. 28, 29 (4th Cir. 2004), vacated on other grounds, 543 U.S. 1101 (2005) (where defendant posed as a physician and prescribed Schedule III and IV drugs via an Internet pharmacy, court found enhancement for conscious or

reckless risk of serious bodily injury applied; even though there was no evidence any specific customer had been injured, the court found the defendant "was fully aware of the serious risk associated with prescribing medications in the manner described by the Government, as demonstrated by the disclaimer posted on [defendant's] website.").

Finally, the government is aware of at least three instances where individuals who ordered drugs from Smith's online pharmacy died. The government will be prepared to introduce the following evidence at the evidentiary hearing for the purpose of further demonstrating the very real risk of death or serious bodily injury:

1. K.O.

K.O. committed suicide on March 3, 2005. After his death, his family uncovered several bottles of prescription drugs, mostly hydrocodone products, at his home. When the family looked at K.O.'s computer they discovered that he was ordering these drugs from several different on-line pharmacies.¹³ After his death, the family continued to receive calls from at least some of these pharmacies, soliciting K.O. for refills. The family also recovered

¹³Smith was well aware that there were other illegal online pharmacies operating and that customers were readily able to order from multiple web sites at the same time. In early 2005, he arranged to hack in and steal a competitor online pharmacy operator's customer database. After Smith did so and began marketing to the competitor's customers, Smith's sales rose dramatically.

a credit card statement that showed that K.O. had ordered from Xpress Pharmacy Direct in the approximate two-week period prior to K.O.'s death. During the DEA investigation of Smith's online pharmacy operation, it was discovered that K.O. had ordered at least once from Smith's company, in approximately February 2005. The family believes that K.O. became addicted to these drugs and as a result fell into financial difficulties and eventually lost his job. These circumstances, combined with the effects of the addiction itself on K.O.'s mental state, are what likely led to his suicide.

2. C.M.

C.M. died in September 2006. During the DEA investigation of Smith's pharmacy operation it was discovered that C.M. had ordered at least seven times from Smith's online pharmacy in a three month period between late March 2005 and mid May 2005. C.M. was ordering mostly hydrocodone products from Smith's pharmacy and was apparently also ordering from other online pharmacies. During an interview of C.M. by the DEA in July 2006, she indicated that she ordered from Smith's online pharmacy because it was so easy to do so. In October 2006, the DEA spoke to C.M.'s husband, who indicated that his wife died from medical complications associated with the volume of controlled substances that she was taking over a long period of time, including the time during which she had obtained hydrocodone from Smith's online pharmacy.

3. J.P.

J.P. died on Christmas Day of 2006. During the DEA investigation of Smith's pharmacy operation, the government discovered that J.P. had ordered drugs from Smith's pharmacy at least twelve times in a five month period between late November 2004 and early April 2005. J.P. was ordering mostly hydrocodone products from Smith's pharmacy and was apparently ordering from other online pharmacies. In July 2006, during a conversation with J.P.'s father, the DEA learned that J.P. had become addicted to the controlled substances and was placed in a drug rehabilitation program twice. J.P.'s father indicated that his son's life had been ruined by the drugs and that his son suffered medical problems associated with the use of these types of drugs. The DEA contacted the Stearns County Sheriff's Department after learning of J.P.'s death. The DEA was informed that J.P.'s death would be ruled as an accidental overdose of prescription medications.¹⁴

¹⁴There could well have been other deaths associated with Smith's online pharmacy, in light of the thousands and thousands of customers, many of whom were clearly addicted based on their excessive orders. Given Smith's many efforts to mask the identity and ownership structure of his online pharmacy, family members would not necessarily know Smith was involved, and even if they did know, they might not necessarily reach out to law enforcement to report the connection between Smith's online pharmacy and their family member's death.

I. Alternative Enhancement for Possession of Firearm In Connection With Offense Applies

Defendant Smith objects to the alternative 2-level enhancement for possessing a firearm in connection with the misbranded drug offenses pursuant to § 2B1.1(b)(12)(B). On the day of the search warrants in May 2005, Smith was stopped in his Cadillac Limousine and observed wearing a holster. A Glock pistol was found on the floor of the Cadillac limousine and another Glock pistol was found in his personal office at the Burnsville facility. Both are locations that were connected to Smith's prescription drug selling activities. Namely, prescription drugs bearing Mach's name were found in the Cadillac, the same vehicle as the firearm. Prescription drugs and cash were also located at sometime during the scheme in Smith's office.

For the misbranded drug counts, the enhancement language is fairly broad. The enhancement will apply if the offense involved "possession of a dangerous weapon (including a firearm) in connection with the offense." U.S.S.G. § 2B1.1(b)(12)(B). The phrase "in connection with" has been defined to mean "possessed in a manner that permits an inference that it facilitated or potentially facilitated-i.e., had some potential emboldening role in-a defendant's felonious conduct." United States v. Riley, 335 F.3d 919, 930 (9th Cir. 2003); Cf. United States v. Harper, 466 F.3d 634, (8th Cir. 2006) (Eighth Circuit defines similar "in

connection with" phrase under U.S.S.G. § 2K2.2(b)(5) to mean "the firearm had a 'purpose or effect with respect to' the other felony offense because its presence facilitated or had the potential to facilitate the offense, as opposed to being the result of mere accident or coincidence.").

Trial evidence demonstrated that Smith kept returned drugs and large amount of cash (delivered by Brinks) in and near his office. Many young telemarketers, including some hired from 180 Degrees halfway house, worked in areas near to his office. Smith told at least one witness that he carried a gun because of how much cash he had around. Therefore, "it is certainly reasonable to infer that [Smith] carried the firearm to prevent a 'rip-off'" of the drugs or cash. United States v. McClain, 252 F.3d 1279, 1288 (11th Cir. 2001). For these reasons, the firearm enhancement under U.S.S.G. § 2B1.1(b)(12)(B) should apply even without additional facts regarding Smith's possession and use of tasers (which the government also reserves the right to prove at the evidentiary hearing).¹⁵

¹⁵With respect to his controlled substances offenses, Smith also objects to an enhancement for possessing a firearm pursuant to U.S.S.G. § 2D1.1(b)(1). For the same reasons as set forth herein, that enhancement should also apply. See Application Note 3 to § 2D1.1 (provides that the weapon enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."). Moreover, "[a] connection between a firearm and drug-related activities may be shown by proof that the firearm was located in the same place as the drugs or drug-related activity." United

J. Enhancement for Obstruction of Justice

Smith objects to the 2-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1, along with various factual paragraphs relating to this enhancement. These objections are without merit, and the obstruction of justice enhancement is appropriate because, as will be discussed below, Smith engaged in at least seven different categories of significant obstructive behavior. Thus, his offense level is increased to 38 (36 + 2 = 38).

1. Plot to Kill Witness

First, at the evidentiary hearing, the government will prove by a preponderance of the evidence that Smith engaged in "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness . . . directly or indirectly, or attempting to do so," as described in Application Note 4 to U.S.S.G. § 3C1.1.

Namely, the United States will introduce an actual recorded call and transcript from March 4, 2006, in which Smith discusses his plans to kill a witness. It will also introduce surrounding

States v. Davis, 471 F.3d 938, 949 (8th Cir. 2006). The enhancement applies "if the firearm is present during 'relevant conduct,' as defined by [the guidelines], not merely during the offense of conviction." United States v. Savage, 414 F.3d 964, 966 (8th Cir. 2005). To meet its burden, the United States "need only prove a temporal and spatial nexus among the weapon, defendant, and drug-trafficking activity. The government need not prove the defendant had actual possession of the weapon; constructive possession will do." United States v. Delapaz, 168 Fed. Appx. 126, 128 (8th Cir. 2006).

calls and transcripts and a call log of all calls made by Smith in March 2006 to the fake attorney number. Based on the surrounding circumstances of the March 4 call, namely, the defendant's elaborate efforts to hide the call from the authorities, the content of the call and the defendant's tone, it is clear that he discussed sending a threatening email to a witness and soliciting help in arranging to kill the witness. See PSR ¶ 19 ("I'm more looking for the, uh, missing persons kind of thing, not, uh, not, you know what I mean, not, uh, something laying around to be stared at and . . . talked about."). There are other surrounding facts that prove the defendant's intent was to obstruct justice through violent acts involving the witness. See PSR ¶¶ 21-22, 55-56.

In cases that, like this one, involve at least the discussion of threats or plans to harm a witness, courts have readily found that the obstruction enhancement applies.¹⁶ For example, in United States v. Adipietro, 983 F.2d 1468, 1479 (8th Cir. 1993), the district court ordered the 2-level enhancement after finding that

¹⁶Although the facts supporting this conduct are also the subject of the separate charges brought against Smith in Criminal No. 06-97, the government does not have to prove the elements of those charges for the enhancement to apply. Moreover, if the Court were to base the obstruction enhancement on the death plot, there is no double jeopardy issue with the second case. See, e.g., United States v. Bellrichard, 62 F.3d 1046, 1052 (8th Cir. 1995) (citing Witte v. United States, 515 U.S. 389(1995), as "reject[ing] the claim that double jeopardy principles bar a later prosecution or punishment for criminal activity where that activity has been considered at sentencing for a separate crime.").

the defendant had attempted to procure the bodily injury of a co-defendant who had pled guilty and who was planning to testify against the defendant at trial. The evidence came largely from recorded jail calls in which the defendant told a third party about his plans to have the co-defendant harmed. Id. The court based its obstruction finding on the content of the jail calls, the defendant's tone of voice, and the roundabout way he spoke. Id. at 1480. The court rejected an argument (similar to one Smith is making here) that the language on the tapes was innocuous. Id.; see also United States v. Hawkins, 51 Fed. Appx. 192, 193 (8th Cir. 2002) (district court properly found the obstruction enhancement applied despite defendant's claims that his statements were ambiguous, he was just blowing off steam, or that he never intended for the alleged threats to reach the potential witness); United States v. Capps, 952 F.2d 1026, 1028 (8th Cir. 1991) (obstruction of justice enhancement properly applied in a case where threat was not communicated directly to the witness; the party to whom the threat was communicated was a co-conspirator who could be intimidated into obstructing the government's investigation).

2. Fake Attorney Number

Even apart from Smith's plot to kill a witness, the obstruction enhancement can be based on Smith's use of two fake attorney phone numbers to make calls to an associate in the Philippines, among others. Smith went to such efforts to avoid

having his calls recorded so that he could thwart the government's investigation into his new online pharmacy and other illegal activities.

3. Destruction of Returned Drugs

Evidence at trial showed that Smith arranged with associates to dispose of returned prescription drugs after he learned of the government's investigation. See PSR ¶ 41. This conduct falls within Application Note 4(d) to U.S.S.G. § 3C1.1, which prohibits "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding"

4. New Online Pharmacy in Dominican Republic

Evidence during the July 2005 contempt hearing showed that after Smith's company was shut down by the Court's preliminary injunction, he fled to the Dominican Republic in order to evade U.S. authorities and to start up what the evidence proved at least by a preponderance was a continuation of his online pharmacy. As Scott Poe testified at trial (evidence which was not available to the Court at the contempt hearing), Smith had fled the country because he knew U.S. authorities were going to be looking for him, and he planned to continue his online pharmacy in a manner that was not significantly different from the business that was then under investigation by the government. That is, he planned to sell

controlled substances and prescription drugs to U.S. customers without any sort of meaningful review by a physician.

5. Hiding of Cash and Luxury Vehicles

As may be shown at the evidentiary hearing, both before and after the Court entered its preliminary injunction freezing the proceeds from Smith's Burnsville-based online pharmacy, Smith hid large sums of cash and other assets derived from online pharmacy proceeds. He then clandestinely provided cash and other assets to associates and family members. PSR ¶ 13. Namely, beginning in or about March 2005, after learning that he and his business operation were under investigation by the federal government, Smith housed cash in various safes in various locations, and some of it was brought to Canada. Some of the luxury vehicles that Smith bought with illegal online pharmacy proceeds were brought to various storage locations in Minnesota (in names other than Smith's), and some were brought to Canada.

As with the destruction of returned drugs, Smith's conduct with regard to assets falls within Application Note 4(d) to U.S.S.G. § 3C1.1, which prohibits "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding" In addition, comparable violations of court orders involving restrained assets are specifically identified in the comments to U.S.S.G. § 3C1.1 as examples of obstructive conduct.

Application Note 4(j) (obstruction of justice includes "failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p) . . . ").

6. Use of Multiple Aliases and Web Addresses

During the time he ran his Burnsville-based online pharmacy and after it was shutdown by the preliminary injunction, Smith employed multiple web site addresses, multiple business names (including Discount Pharmacy Direct, Xpress Healthcare Ltd., and Rxorderfill.com, Inc.). He also employed various aliases, such as "Robert Jonson," "Robert Johnson," "Chris Jonson," "Bruce Jonson," and "Tony Spitalie," among others. The purpose for employing these different web site addresses, multiple business names, and aliases was at least in part to conceal and disguise from third parties, including law enforcement and others, his ownership and control of the prescription drug operation. Indeed, as Scott Poe testified at trial, at one point, Smith masked the very products he was selling by having his merchant bank account identify the products sold as bicycle parts.

The obstruction enhancement can be based on use of aliases. See United States v. Blackman, 904 F.2d 1250, 1259 (8th Cir. 1990). At trial, Special Agent George Kyrilis testified that his investigation was initially thwarted because he did not realize Robert Johnson and Chris Smith were the same person.

7. **Misrepresentations During Proffer Session**¹⁷

On January 31, 2006, the government met with the defendant and his counsel for a proffer interview. The defendant was told that he needed to be truthful. The defendant proceeded to tell the government, among other things, that he had been making unauthorized and unrecorded calls from jail to a woman named "Baby" who lived in the Philippines and who was helping him do some research on Internet pharmacies so he could turn that information over to the government. This information was false and was intended to, and did, significantly obstruct the government's investigation into Smith's activities, including the unauthorized telephone calls that he was making to his Philippines associate to discuss setting up a new online pharmacy and to discuss to plans to threaten and kill a witness against him. See Application Note 4(g) (providing that obstruction enhancement can be based on "providing materially false statement to a law enforcement officer that

¹⁷The proffer letter sent to the defendant's counsel on December 12, 2005, provided, "if the government should ever conclude that Mr. Smith has knowingly withheld material information from the government or has otherwise not been completely truthful and candid at the proffer session or sessions and/or Grand Jury appearances, the government may use his statements against him for any purpose, after first notifying you of its intention to do so." The government has provided that notification.

significantly obstructed or impeded the official investigation or prosecution of the instant offense . . . ").¹⁸

IV. GUIDELINE ISSUE NOT IN DISPUTE

The defendant does not object to the Probation Officer's conclusion that he was an organizer or leader of a criminal activity that involved five or more participants. Therefore, his guidelines are subject to a 4-level enhancement pursuant to U.S.S.G. § 3B1.1(a). The resulting offense level is a 42 (38 + 4 = 42).

V. SUMMARY OF GUIDELINE ISSUES

The guideline issues for Group 2, the misbranded drug counts, can be summarized as follows:

Guideline Enhancement	Increase in Level
Base offense	6
Loss amount greater than \$20 million but not more than \$50 million	+ 22

¹⁸In the March 4, 2006, recorded phone call between Smith and his Phillipines associate, Smith acknowledged that he lied during his proffer with the government. As he stated to her, "'cause the Feds wanted me to give your, give them your information. I said what, said what are you talking about, who you talking to, not me ... I'm not giving you sh-t, I don't know anything. That was part of the reason the deal fell apart is 'cause there were certain areas they wanted to know about and I wasn't going to talk about it....").

Guideline Enhancement	Increase in Level
Offense committed through mass-marketing (Internet)	+ 2
Violation of prior orders	+ 2
Relocation of scheme to another jurisdiction to evade authorities (or alternatively, substantial part of offense was committed outside the U.S., or alternatively, otherwise involved sophisticated means)	+ 2
Conscious or reckless disregard of risk of death or serious bodily injury (or alternatively, dangerous weapon was possessed in connection with offense)	+ 2
Organizer or leader of criminal activity involving five or more participants	+ 4
Obstruction of justice	+ 2
Total Adjusted offense level:	42

The sentencing guideline range for an offense level of 42 is 360 months to life imprisonment.

VI. DEFENDANT'S OBJECTION TO CONCLUSION THAT HE HAS NOT DEMONSTRATED AN INABILITY TO PAY A FINE

Defendant objects to paragraph 167 and its conclusion that he has not demonstrated an ability to pay a fine. Because he refused to provide Probation with his financial information (see PSR ¶ 162) and because there is nothing to indicate he does not now and will not in the future have an ability to pay a fine, this paragraph should remain as written.

The defendant bears the burden of proving that he cannot pay a fine. United States v. Berndt, 86 F.3d 803, 808 (8th Cir. 1996).

"[A] fine is the rule-and it is the defendant's burden to demonstrate that his case is the exception." United States v. Yeje-Cabrera, 430 F.3d 1, 19 (1st Cir. 2005). Indeed, "[t]he existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under this section." Application Note 6 to U.S.S.G. § 5E1.2. Courts should consider not just the defendant's present financial situation, but how much a defendant can pay toward a fine while incarcerated and after leaving prison. U.S.S.G. § 5E.12(d); Yeje-Cabrera, 430 F.3d at 19. If the defendant can establish that he cannot pay a fine within the guideline range, courts can still order a fine outside that range. U.S.S.G. § 5E1.2(f). Because there has been no showing by the defendant that he cannot pay a fine, his objections to paragraph 167 are without merit.¹⁹

¹⁹ The United States has learned from Smith's counsel that Smith may also be moving the Court to appoint counsel for him for all further proceedings, namely, on appeal, based on his inability to pay. The defendant may also contend that his new attorney's fees should be paid out of receivership funds. The United States will oppose any such motion. First, the defendant's lawyers' fees cannot be paid out of the receivership monies because the government is entitled to forfeiture of those funds as illegal proceeds. The Supreme Court has held that criminal defendants are not entitled to use illegal proceeds for their criminal defense. United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989). Second, this Court should deny Smith's request for the same reasons as it should deny his request to be exempted from a fine: He cannot meet his burden of showing an ability to pay. In particular, "the court may . . . refuse to appoint counsel if it finds that the defendant's portrayal of financial ability lacks credibility," United States v. Barcelon, 833 F.2d

VII. GROUND FOR UPWARD DEPARTURE OR VARIANCE

In response to the PSR, the government reserved the right to move for an upward departure and/or upward variance from the guideline range. The guidelines may not sufficiently reflect the full nature of the defendant's conduct, such as (1) the defendant's plans to kill not one but two human beings, a witness against him and his wife; (2) the numerous instances of obstruction of justice, only one instance of which is necessary for the enhancement; (3) the numerous instances of the defendant's violations of prior court orders, only one instance of which is necessary for the enhancement; (4) the substantial risk to members of the public (even if they are not technically victims) created by defendant's illegal online pharmacy; and (5) the defendant's corruption of a large number of other individuals (including his co-defendants, telemarketers, and numerous other co-conspirators) whom he lured into criminal behavior. Moreover, the defendant's criminal history score may "not adequately reflect the seriousness of the

894, 897 (10th Cir. 1987); see United States v. Lefkowitz, 125 F.3d 608, 621 (8th Cir. 1997), the defendant's request is based only on "conclusory protestations of poverty," United States v. Martinez-Torres, 556 F. Supp. 1275, 1280 (S.D.N.Y. 1983), the defendant concealed or secreted funds, United States v. Robinson, 543 F.2d 951, 964 (2d Cir. 1976), and the defendant has funds available to him from sources such as family, friends, trusts, etc., Martinez-Torres, 556 F. Supp. at 1279.

defendant's past criminal conduct or the likelihood that the defendant will commit other crimes." U.S.S.G. § 4A1.3.²⁰

As discussed below, the government is not moving for an upward departure or variance because of its view that the guideline range, as set forth in the PSR, is sufficient, and a sentence within that range would be reasonable in light of 18 U.S.C. § 3553(a).

VIII. MOTION TO DISMISS DRUG DISTRIBUTION CONSPIRACY COUNT

Because conspiracy to distribute controlled substances is a lesser included offense of operating a continuing criminal enterprise ("CCE"), double jeopardy precludes the entry of both convictions. See United States v. Jones, 101 F.3d 1263, 1268 (8th Cir. 1996) (citing, inter alia, Rutledge v. United States, 517 U.S. 292 (1996)). Thus, at sentencing, the government will move the Court to vacate Smith's conviction for conspiracy to distribute controlled substances (Count 1). In the event that the CCE conviction (Count 9) is for whatever reason reversed on grounds that only affect that offense, the Court may later reinstate the conspiracy conviction. Rutledge, 517 U.S. at 306.

²⁰The defendant has zero criminal history points and is in Criminal History Category I.

IX. CONCLUSION AND SENTENCING RECOMMENDATION

The United States contends that a sentence at the bottom of the sentencing guideline range as found by the Probation Officer, 360 months, is more than a reasonable sentence. It takes into consideration the many extreme aspects of defendant's conduct in this case, including his chilling plans to kill not one but two people, the multiple instances of his other obstructive conduct over a long period of time, his demonstrated willingness to violate any rule or law placed in front of him no matter the consequences, the extremely large volume of illegal drugs that he wantonly distributed, and his callous disregard for the harm he was causing to a substantial number of vulnerable, addicted people.

If anything, the 360 month to life guideline range is conservative. Many of the guideline enhancements that make up this range are readily proven under a number of different alternative factual scenarios. Indeed, the defendant is quite close to being within a guideline range that begins at life imprisonment. Namely, the Court could conceivably apply one or more additional enhancements (such as an enhancements for more than 250 victims or for numerous vulnerable victims). Even one additional enhancement would bring the defendant to an offense level of 43, the highest possible level and a level where the resulting guideline range would be life imprisonment. While the United States is not seeking any additional enhancements and does not contend that the

appropriate guideline range starts at life, these facts do demonstrate that a 360 month sentence is reasonable.

Even if the defendant had not been convicted of the misbranded drug counts, a 360 month sentence would still be reasonable. For his conviction on the CCE count, Smith is already at an offense level of 40 (based on a base offense level of 38 plus a single two-level enhancement for obstruction of justice). His plans to kill two people could alone justify an upward departure or variance of two offense levels. Alternatively, the defendant's criminal history, which did not adequately take into account his long history of illegal behavior, could readily support an upward departure or upward variance. With an upward departure or variance of only two criminal history levels or two offense levels, the defendant's guideline range would be 360 months to life.

In sum, a sentence of 360 months is a fair sentence. It takes into consideration the many extreme aspects of Smith's behavior described at length herein and during the trial of this matter. Thus, it reflects the seriousness of all of the defendant's offenses, promotes respect for the law, provides just punishment for the offenses, and affords adequate deterrence to criminal conduct. Although this is a defendant who has never shown a willingness to let incarceration affect his criminal plans, this sentence will protect the public from further crimes of this

defendant, at least to the extent feasible and at least for the duration of the defendant's incarceration.

Dated: July 19, 2007

Respectfully submitted,

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