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OPINIONS AND ORDERS

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MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (APRIL 5, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 17-4268 (L)
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 18-4852
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4359
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4511
(2:11-cr-00511-BHH-1)

The judgment of this court, entered February 28, 2022, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ Patricia S. Connor, Clerk

AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (FEBRUARY 28, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 17-4268

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 18-4852

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4359

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4511

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Bruce H. Hendricks, District Judge.
(2:11-cr-00511-BHH-1)

Before: WILKINSON and AGEE, Circuit Judges, and
FLOYD, Senior Circuit Judge.

PER CURIAM:

After a bench trial before United States District Judge David C. Norton in 2015, Dr. Jian-Yun Dong

was convicted of conspiracy to commit offenses or to defraud the United States in violation of 18 U.S.C. § 371, theft of government property in violation of 18 U.S.C. § 641, and twenty-two counts of wire fraud in violation of 18 U.S.C. § 1343. Before sentencing, his case was transferred to United States District Judge Bruce H. Hendricks. Judge Hendricks sentenced Dr. Dong to seventy months' imprisonment and, relevant here, imposed a forfeiture money judgment in the amount of $3,211,599.38. For the reasons that follow, we affirm Dr. Dong's convictions, vacate his sentence insofar as the district court imposed the forfeiture money judgment based on a joint and several liability theory, and remand for further proceedings on that issue only.[1]

Like his corporate co-defendants, GenPhar, Inc. and Vaxima, Inc., Dr. Dong first argues that the operative Third Superseding Indictment failed to allege an offense because "using contract funds for purposes inconsistent with [the] terms and conditions of [a] grant" cannot be a crime. Opening Br. 13. We agree with the district court, however, that the various federal criminal statutes relating to fraud broadly apply to a plethora of fraud schemes, and properly encompass the conduct Dr. Dong was accused (and ultimately convicted) of here.[2]

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[1] Because we presume the parties' and the lower court's familiarity with the facts, we dispense with a full recitation of the case's procedural posture. *See* 4th Cir. Loc. R. 36(b). For a more complete factual and procedural background, we reference our related decision in *United States v. Maxima, et al.*, Nos. 17-4277 & 17-4278, slip op. at 3–9.

[2] Dr. Dong also purports to adopt arguments his corporate co-defendants raised in their appeals. We will assume *arguendo*

Dr. Dong next asserts, without citation to case law, that "[e]gregious procedural deficiencies in the investigation, prosecution, trial and sentencing" occurred such that his convictions and sentence must be reversed. Opening Br. 18. He first points to alleged deficiencies in the affidavit supporting Special Agent Leonard's application for a search warrant during the investigative phase of this case. Having reviewed Special Agent Leonard's affidavit, we agree with the district court that the affidavit and resulting search warrant complied with the Fourth Amendment. *See* J.A. 149–51. Second, Dr. Dong claims that Judge Norton erred in failing to recuse himself before entering his verdict in this case. For the reasons ably explained by Judge Hendricks, *see* Supp. J.A. 1830–31, we find no error in this regard, either.

Finally, Dr. Dong asserts that the forfeiture order included in his sentence is invalid under the Supreme Court's decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), which was issued just over a month after the district court entered it.[3]

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that he may do so, even though his appeal is not consolidated with those of his corporate co-defendants. In any event, after conducting a thorough review of the record and the legal arguments made in the *Maxima* briefing, we discern no meritorious ground for vacating or reversing any of Dr. Dong's convictions.

[3] We reject Dr. Dong's other two challenges to his forfeiture order. There was a valid statutory basis for it. *See* 18 U.S.C. § 981(a)(1)(C); 28 U.S.C. § 2461(c). And, as we previously held, the forfeiture order did not violate Dr. Dong's alleged right to obtain the appellate counsel of his choosing. *See United States v. Dong*, 814 F. App'x 778, 778–79 (4th Cir. 2020) (per curiam) (disposing of this argument).

In *Honeycutt*, the district court held a manager of a hardware store—who had no ownership interest in it—jointly and severally liable with the store's owner for a forfeiture money judgment under 21 U.S.C. § 853(a)(1) constituting the entirety of the proceeds of a drug-related conspiracy operated through the hardware store. That statute provides:

> Any person convicted of a violation of [21 U.S.C. §§ 801-971] punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law . . . any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation[.]

21 U.S.C. § 853(a)(1) (emphasis added).

The Supreme Court unanimously held that the forfeiture order was legally invalid, because § 853(a)(1) does not permit the imposition of one under a joint and several liability theory. 137 S. Ct. at 1632-33. Instead, the Court explained, the statute demanded proof that a defendant personally obtained the assets being forfeited. *Id.* at 1633. In so holding, the Court found the phrase "the person obtained" significant, as it indicated that the defendant himself had to "come into possession of" or "get or acquire" the property to be forfeited. *Id.* at 1632 (citations omitted). Put differently, "[n]either the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else. Yet joint and several liability would mean just that[.]" *Id.*

The Court explained that two other aspects of § 853(a) were also important. First, the statute limits forfeiture only to property "derived from" the offense, *i.e.*, that which "flow[ed] from . . . the crime itself." *Id.* That limitation, the Court explained, comports with the common law understanding that forfeiture focuses only on "tainted" property. *Id.* at 1634–35. Second, the adverbs "directly or indirectly" modify how one "obtains" property, reinforcing in the Court's eyes the requirement that the defendant must obtain the property to be forfeited. *Id.* at 1633.

The forfeiture order in the instant case was not entered pursuant to § 853(a). Rather, it was entered pursuant to 18 U.S.C. § 981(a)(1)(C), as incorporated by 28 U.S.C. § 2461(c). The order held Dr. Dong jointly and severally liable for the entirety of the proceeds of his and his corporate co-defendants' crimes of conviction. Dr. Dong argues the order is invalid because it does not comply with *Honeycutt*'s requirement of proof that he personally obtained these assets.

In the short time since *Honeycutt* was decided, a well-defined circuit split has arisen as to whether its rule extends to § 981(a)(1)(C) forfeiture orders. That split rests primarily on textual differences between § 981(a)(1)(C) and the forfeiture statute at issue in *Honeycutt*, 21 U.S.C. § 853(a)(1). Whereas § 853(a)(1) specifically refers to proceeds "the person obtained, directly or indirectly, as the result of" the crime of conviction, § 981(a)(1)(C) only requires that the proceeds to be forfeited "constitute[ ] or [be] derived from proceeds traceable to" the offense of conviction.[4]

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[4] Also of note, whereas 21 U.S.C. § 853(a) does not define the term "proceeds," 18 U.S.C. § 981(a)(2) does, and it varies based on

Largely because Congress did not include the phrase "the person obtained" in § 981(a)(1)(C), the Sixth and Eighth Circuits have declined to extend *Honeycutt* to forfeiture orders issued under that statute. *See United States v. Peithman*, 917 F.3d 635, 652 (8th Cir.), *cert. denied*, 140 S. Ct. 340 (2019); *United States v. Sexton*, 894 F.3d 787, 798-99 (6th Cir.), *cert. denied*, 139 S. Ct. 415 (2018). The Third and Ninth Circuits, however, have deemed this textual difference immaterial and instead held that *Honeycutt* bars the imposition of joint and several liability under a § 981 (a)(1)(C) forfeiture order. *See United States v. Thompson*, 990 F.3d 680, 689–91 (9th Cir.), *cert. denied*, 142 S. Ct. 616 (2021); *United States v. Gjeli*, 867 F.3d 418, 427-28 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 700 (2018).[5]

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context. In cases concerning "unlawful activities," for example, "proceeds" refers to "property of any kind obtained directly or indirectly[ ] as the result of the" crime of conviction. 18 U.S.C. § 981(a)(2)(A). And in cases concerning "lawful services that are . . . provided in an illegal manner," "proceeds" refers generally to "the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the . . . services." *Id.* § 981(a)(2)(B). Neither statute specifically defines the word "person."

[5] We did not, and had no occasion to, take a position on this circuit split in *United States v. Chittenden*, 896 F.3d 633 (4th Cir. 2018). *Chittenden* focused on 18 U.S.C. § 982(a)(2), the text of which "mirrors that of 21 U.S.C. § 853(a)(1)" and "limits forfeiture to 'property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of' the crime." 896 F.3d at 637 (quoting 18 U.S.C. § 982(a)(2)). Given the textual differences in § 981(a), as noted above, we could follow the Sixth and Eighth Circuits and hold that *Honeycutt* does not extend to § 981(a) without contradicting *Chittenden*. We are not now taking that

Other courts have found it unnecessary under the facts presented to decide the extent to which *Honeycutt* applies to forfeiture statutes other than § 853(a)(1). These cases have focused instead on whether the record showed that the defendant subject to a joint and several liability forfeiture order exhibited sufficient dominion and control over the proceeds at issue to satisfy *Honeycutt*'s rule. *See, e.g.*, *Saccoccia v. United States*, 955 F.3d 171, 175 (1st Cir. 2020) (assuming *Honeycutt* applied and affirming the forfeiture order at issue because the defendant "controlled the full proceeds as a result of the crime"); *United States v. Bane*, 948 F.3d 1290, 1297–98 (11th Cir. 2020) (assuming *Honeycutt* applied and affirming forfeiture award against the owner and operator of a company that committed healthcare fraud totaling over $5.8 million because of the fact that he owned the company and was "the mastermind behind the fraud"); *United States v. Jergensen*, 797 F. App'x 4, 8 (2d Cir. 2019) (assuming *Honeycutt* applied and affirming forfeiture order against two co-executives of a company because they approved transfers from the victim's bank account to the company's account, thus constituting acquisition of those funds in satisfaction of the *Honeycutt* rule); *see also United States v. Peters*, 732 F.3d 93, 103-04 (2d Cir. 2014) (holding, under 18 U.S.C. § 982(a)(2), that an individual "indirectly" obtains proceeds through a corporation when he "so extensively controls or dominates the corporation and its assets that money paid to the corporation was effectively under the control of the individual" (cleaned up)).

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position, however, and the foregoing is neither an implicit endorsement nor disapproval of such a holding.

Here, the district court's forfeiture money judgment against Dr. Dong is premised on joint and several liability. While we might affirm on dominion and control grounds, as in *Saccoccia*, *Bane*, and *Jergensen*, the district court made no factual findings that would enable us to do so. By way of example, both parties conceded during oral argument that the extent of Dr. Dong's ownership interest in GenPhar is unclear on the current record. Of course, the district court did not have the benefit of *Honeycutt* at the time the forfeiture order was entered and so never received the aid of argument by the parties on its application, if any, to this case. But given the lack of relevant factual findings and the overall paucity of adversarial briefing on this issue from both parties, we believe the more prudent course is to vacate the forfeiture order as to Dr. Dong and remand for the district court to reconsider it in light of *Honeycutt*.

Accordingly, for the foregoing reasons, we affirm Dr. Dong's convictions *in toto*, vacate the forfeiture order entered against him, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART,

VACATED IN PART,

AND REMANDED

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (FEBRUARY 28, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 17-4268 (L)
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 18-4852
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4359
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4511
(2:11-cr-00511-BHH-1)

In accordance with the decision of this court, the judgment of the district court is affirmed in part and vacated in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/Patricia S. Connor
Clerk

FORFEITURE ORDER OF THE UNITED STATES DISTRICT COURT OF SOUTH CAROLINA (APRIL 27, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v.

JIAN-YUN DONG, a/k/a JOHN DONG,
GENPHAR, INC., VAXIMA INC.,

No. 2:11-cr-00511-DCN

Before: Bruce Howe HENDRICKS,
United States District Judge

This matter is before the Court on two motions for Preliminary Orders of Forfeiture ("POFs"), (ECF Nos. 593; 793), filed by the United States of America ("the Government") in the instant criminal action, the Government's amended motion to hold the forfeiture of substitute assets in abeyance (ECF No. 656), and Defendant Jian-Yun Dong's motion to stay the forfeiture order pending appeal (ECF No. 811). In light of the evidentiary record, and for the reasons set forth below, the Court GRANTS IN PART the Government's first POF motion, (ECF No. 593), insofar as it pertains to the imposition of a forfeiture money judgment and the forfeiture of the GenPhar Property. The Court GRANTS

IN PART the second POF motion, (ECF No. 793), and restrains the SunTrust Accounts to potentially be forfeited as substitute assets at a later date. The Court further GRANTS the Government's amended motion to hold the forfeiture of substitute assets in abeyance, (ECF No. 656). Finally, the Court DENIES Dong's motion to stay the forfeiture order, (ECF No. 811).

I. Background

On April 16, 2013, a multi-count Third Superseding Indictment ("Third SSI") was filed charging Defendants Jian-Yun Dong, GenPhar, Inc., and Vaxima, Inc. ("Defendants") with, *inter alia*, Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371 (Count 1); Theft of Government Property, in violation of 18 U.S.C. § 641 (Count 7); and Wire Fraud, in violation of 18 U.S.C. § 1343 (Counts 13-34). (ECF No. 281.)

The Government's prosecution was based upon evidence that Defendants misappropriated federal grant funds earmarked for research, by diverting such funds into non-allowable expenditures primarily for construction of a research facility (the "GenPhar building") on the "GenPhar Property",[1] and for certain lobbying costs and other costs. A jury trial and subsequent bench trial resulted in guilty verdicts

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[1] The GenPhar Property is located at 1200 Innovation Way, Mount Pleasant, South Carolina. It is also referenced as "South Morgan Point Road" in the first restraining order (ECF 255 at 9) and Third SSI (ECF 281 at 29). However, because of the primary building's location on the property, the intersecting street, "Innovation Way", is now the designated street address for the property. *See* First Restraining Order (ECF No. 255 at 3, n.1); and Government's first POF Motion (ECF No. 593-7 at 4, n.4.)

against Defendants on all of the previously referenced charges. (ECF Nos. 489-90; 556-58.)

Pursuant to Fed. R. Crim. P. 32.2(a), the Third SSI contains a notice of forfeiture alleging that upon conviction, certain listed property, or equivalent substitute assets, would be subject to forfeiture to the United States. (ECF No. 281 at 28-37.) Pursuant to Rule 32.2(b)(1)(A), the forfeiture notice also includes a request for a forfeiture money judgment ("money judgment") against Defendants, representing proceeds of the offenses of conviction. Although the amount of the proposed money judgment in the Third SSI is $3,622,849.14, (ECF 281 at 29), the Government has since reduced that amount to $3,211,599.83. (ECF No. 593 at 3.)

In November 2012, pursuant to 21 U.S.C. § 853(e)(1)(A), Judge Houck issued an order (the "First Restraining Order") restraining various properties listed in the Third SSI. (ECF No. 255.) He ordered the restraint of, *inter alia*, all real property in which Defendants may have an interest, up to the value of $3,622,849.14 (including both directly forfeitable property (*i.e.*, "proceeds") and substitute assets). (*Id.* at 14-15.) Judge Houck also required that the property owners maintain the present condition of any real property subject to the order, and make timely mortgage and tax payments. (*Id.* at 15.) In issuing the restraining order, Judge Houck rejected Defendants' contentions that the GenPhar Property was worth more than $1,560,000. (*Id.* at 6.)

Relevant here, the Government has filed two motions for Preliminary Orders of Forfeiture, (ECF Nos. 593; 793), seeking the forfeiture of real and personal property in which Defendants currently or

formerly had an interest. The Government also seeks imposition of a money judgment against Defendants in the amount of $3,211,599.83, representing the gross proceeds of the offenses of conviction (and equaling the amount of loss as currently determined by United States Probation). The Government seeks to forfeit the GenPhar Property under 18 U.S.C. § 981(a)(1)(C), as directly forfeitable property constituting or derived from proceeds traceable to the counts of conviction (*i.e.*, as "proceeds"). In the alternative, the Government seeks forfeiture of the GenPhar Property under 21 U.S.C. § 853(p)(2), as a substitute asset.[2] (ECF 593 at 3-5.)

The Government maintains that it has met the statutory predicates for forfeiture of this property as a substitute asset. The Government argues, *inter alia*, that Defendants have engaged in prohibited acts or omissions under 21 U.S.C. § 853(p)(1) resulting in substantial liens on the GenPhar Property, rendering it effectively unavailable for purposes of forfeiture; and, that Defendants commingled grant funds and non-grant funds, then routed such commingled funds through multiple accounts, thereby making tracing of the grant funds into other specific property time-consuming, resource-intensive, inordinately expensive, and, ultimately, likely futile.

Because of uncertainties in the value of the GenPhar Property, the Government also moves to hold the forfeiture of the remaining property in abeyance, until

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[2] *See United States v. Smith*, 770 F.3d 628, 642 (7th Cir. 2014) (the government may argue that property is directly forfeitable or, in the alternative, that it is a substitute asset, and the court may enter an order forfeiting the property under both theories).

such time as the Government is in a position to know the amount of net forfeiture proceeds,[3] if any, realized from the forfeiture and sale of the property. (ECF No. 656). The Government points to the widely conflicting appraisals submitted in this case,[4] and the substantial liens currently associated with the property.[5] Based upon these factors, the Government argues that if the GenPhar Property is forfeited, there is substantial uncertainty as to how much, if anything, may ultimately be realized from its sale. The Government notes that if the net forfeiture proceeds were sufficient to satisfy the money judgment, there would be no need to forfeit other assets. The Government's related concern is that the remaining substitute property should continue to be restrained. The Government argues

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[3] The "net forfeiture proceeds" would generally be the amount of funds available to the United States from the sale of the GenPhar Property, after deducting the value of any ancillary claims which are determined to be superior to the United States' interest under 21 U.S.C. § 853(n)(6), and after deducting statutory costs of the United States Marshals Service under 21 U.S.C. § 881(e)(2)(A).

[4] The most recent appraisal submitted by the Government estimates that the fair market value ("FMV") of the GenPhar Property "as-is" is $1,200,000, and recommends that the research facility be torn down because of construction defects and other problems. The appraisal submitted by Defendants gives an "as-is" FMV of $9,000,000, with a higher hypothetical FMV upon completion of the research facility.

[5] The Government has submitted two mortgages against the GenPhar Property: a mortgage involving Rentec Management Systems as mortgagee, (the "Rentec mortgage") dated July 15, 2011, in the amount of $250,000, signed by the Chief Operating Officer of GenPhar (ECF No. 606-9); and the mortgage involving Mandra Applied Materials, Ltd., as mortgagee, (the "Mandra mortgage") dated December 20, 2013, in the amount of $4,647,917.90, signed by John Dong, (ECF No. 606-4).

that if such property were to be returned to defendants at this time, and the net forfeiture proceeds from the sale of the GenPhar Property were insufficient to satisfy the money judgment, the Government would be left without recourse to pursue forfeiture of the other property, because, having been returned to Defendants, such property would likely have been dissipated, or otherwise be unavailable.

Defendants oppose forfeiture,[6] and oppose holding the forfeiture of substitute assets in abeyance. (*See* ECF Nos. 608; 612; 811.) Defendants assert their innocence, contending that only non-grant funds were used to construct the research building on the GenPhar Property. Relatedly, Defendants urge that even if grant funds were used for this purpose, their actions were not criminal, but were, at most, in the nature of civil contractual disputes over the appropriate use of federal grant funds. Defendants also contend that the involvement of one of the case agents, former Special Agent Larry Leonard, with the Defense Criminal Investigative Service, was a violation of the Posse Comitatus Act, thereby justifying dismissal of the entire case and related forfeiture. (ECF No. 634 at 7.)

Regarding the abeyance issue, Defendants maintain that the value of the GenPhar Property is more than sufficient to satisfy the proposed FMJ, and that forfeiture of substitute assets is therefore unnecessary. Defendants therefore seek the return of the

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[6] Since the filing of the Government's first POF motion, the parties have filed multiple pleadings related to disputes over forfeiture and restraint of property. Although the Court has thoroughly considered all such pleadings and arguments, the Court will not review and summarize them all here.

other currently restrained substitute assets. (ECF Nos. 603; 614 at 2).

Relatedly, Defendants contend that the mortgages on the property could not prevail as ancillary claims under 21 U.S.C. § 853(n)(6).[7] Defendants further contend that the "Rentec" mortgage, (ECF No. 606-9), in the amount of $250,000, has been effectively extinguished by the Stipulation of Dismissal, (ECF No. 107), filed in the case of *SCBT, N.A. v. GenPhar Inc., et al.*, Civ. No. 2-11-2532-RMG. However, review of the filings in that case reveals that the only mortgage extinguished in that litigation was that of South Carolina Bank & Trust (ECF No. 1-1 at 18-27), not the Rentec mortgage.

Pursuant to Fed. R. Crim. P. 32.2(b)(1)(B), the Court held a hearing on the Government's POF motions on April 21, 2017. The hearing elicited the following testimony from the parties' witnesses:

Jonathan Vaughn, the Government's auditing expert, testified that the amount of grant funds misdirected into the construction of the GenPhar building was $2,903,537.83. He further testified that, because of Defendants' commingling of grant funds and non-grant funds, coupled with Defendants' routing of such commingled funds through multiple accounts, any effort to trace grant funds into other specific property of the defendants, for the purpose of determining whether such property constitutes proceeds of the

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[7] The Court observes that the opportunity to file such third-party claims is reserved for the process of ancillary proceedings, which have not yet begun. Accordingly, it would be inappropriate at this juncture for the Court to opine regarding whether, and by whom, ancillary petitions may be filed, or the likelihood of their success.

offenses, would be extremely time-consuming, resource-intensive, and, in the end, likely futile.

Jeff Ball, Commercial Plans Examiner for the Town of Mt. Pleasant, testified for the Government, *inter alia*, that because the GenPhar building is the subject of multiple building code violations, some of which are serious, Mt. Pleasant has not issued a Certificate of Occupancy for the building, and will not do so unless the violations are corrected.

Michael Nelson, a Deputy U.S. Marshall specialized in locating potentially forfeitable property, testified for the Government that he made substantial efforts to locate property of the defendants beyond that already restrained, but was unable to find anything beyond a boat of questionable value.

Marshall Smith, Special Agent with the Criminal Investigation Division of the SCDOR, testified that SCDOR has levied $112,032.86 in tax liens against the GenPhar Property, based upon GenPhar's failure to file returns related to South Carolina's use tax and employer withholding tax.

Bradley Belcher, the appraiser for the Government, testified, *inter alia*, that the as-is FMV of the GenPhar property is $1,200,000; that such value does not take into account third-party liens; and, that the highest and best use of the property would be to raze the GenPhar building. He could not opine on how much the construction costs would be to remediate the building code violations.

Appraiser Gary Schwab testified for Defendants that, although he had previously appraised the property with an as-is FMV of $9,000,000, he was not aware at that time of the various building code violations, and

that Defendant Dong had advised him that the only costs for remediation would be for replacement of broken windows, and for repairs for cosmetic damages. He testified that his appraised value did not take into account the existing liens on the property. He also could not opine on how much the construction costs would be to remediate the building code violations.

During the hearing, GenPhar's counsel made the Court aware of an interested buyer in attendance who had made an offer of $1,700,000 to purchase the property.

II. Forfeiture Authorities and Legal Standards

A. Forfeiture

"A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek forfeiture of property as part of any sentence in accordance with the applicable statute." Fed. R. Crim. P. 32.2(a). "[T]he court must determine what property is subject to forfeiture under the applicable statute." Fed. R. Crim. P. 32.2(b)(1)(A). If the forfeiture is contested, the court must conduct a hearing on either party's request. Fed. R. Crim. P. 32.2(b)(1)(B).

"If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." Fed. R. Crim. P. 32.2(b)(1)(A). Generally, co-defendants are jointly and severally liable for a forfeiture money judgment. *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (all coconspirators are jointly and severally liable for the amount of the forfeiture regardless of

how much or how little they benefitted from the conspiracy).[8] "In a multi-defendant case, each of the defendants is jointly and severally liable for the forfeiture of the proceeds of the offense or the money otherwise involved in it." Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2nd Ed.), p. 700 (footnote omitted).

The amount of the money judgment ultimately imposed can differ from that listed in an indictment. *See United States v. Poulin,* 690 F. Supp. 415, at 422-23, 430 (E.D. Va. 2010) (although the indictment's forfeiture notice sought an FMJ of "at least $850,000", district court ordered FMJ exceeding $1.3 million) (collecting cases).

The court's forfeiture determinations are based on evidence already in the record, and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable. Fed. R. Crim. P. 32.2(b)(1)(B). Because criminal forfeiture proceedings are part of the sentencing phase, reliable hearsay is admissible. *United States v. Ali*, 619 F.3d 713, 720 (7th Cir. 2010); *United States v. Ivanchukov*, 405 F. Supp. 708, 709 n.1 (E.D. Va. 2005).

"A district court may order the forfeiture of (1) proceeds obtained as a result of the crime for which a defendant was convicted or (2) property used or intended to be used to commit or to facilitate the commission of the crime for which a defendant was convicted." *United States v. Herder,* 594 F.3d 352, 363-

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[8] The issue of joint and several liability under Section 853 is currently pending before the Supreme Court. *See Honeycutt v. United States*, Case. No. 16-142, filed August 1, 2016.

64 (4th Cir. 2010) (citing 21 U.S.C. § 853(a)).[9] The government has the burden of proof and must establish that the property is subject to forfeiture by a preponderance of the evidence. *Id.* at 364. Section 853 "is not limited to property that the defendant acquired individually but includes all property that the defendant derived indirectly from those who acted in concert with him in furthering the criminal enterprise." *United States v. McHan,* 101 F.3d 1027, 1043 (4th Cir. 1996).

Under Fed. R. Crim. P. 32.2(b)(1), the court is required to determine whether the government has "established the requisite nexus between the property and the offense." The Fourth Circuit utilizes the "substantial connection" standard under which "the government must establish that there was a substantial connection between the property to be forfeited and the offense." *Herder,* 594 F.3d at 364. The government must establish the requisite nexus by a preponderance of the evidence, because forfeiture constitutes an aspect of the sentence imposed, rather than a substantive element of an offense. *United States v. Neal,* 2003 WL 24307070, at *2 (E.D. Va. 2003) (citing *Libretti v. United States,* 516 U.S. 29, 39 (1995); *United States v. Tanner,* 61 F.3d 231, 235 (4th Cir. 1995)). The government "may rely on circumstantial evidence to meet this burden of proof." *United States v. Patel,* 949 F. Supp. 2d 642, 648 (W.D. Va. 2013) (citing *Herder,* 594 F.3d at 364).

Where forfeiture is applicable, it is mandatory. 28 U.S.C. § 2461(c) states: "If the defendant is convicted of the offense giving rise to the forfeiture, the court shall

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[9] 28 U.S.C. § 2461(c) incorporates the provisions of 21 U.S.C. § 853 into all criminal forfeiture proceedings.

order the forfeiture of property as part of the sentence in the criminal case. . . . " (emphasis added). "The word 'shall' does not convey discretion. It is not a leeway word, but a word of command." *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (interpreting Section 2461(c)). The order of forfeiture must be included in the criminal judgment. Fed. R. Crim. P. 32.2(b)(3).

Imposition of forfeiture is mandatory notwithstanding that restitution may also be required as part of a criminal sentence. *United States v. Bollin*, 264 F.3d 391 (4th Cir. 2001) (defendant ordered to pay $1.2 million forfeiture judgment and $783,000 in restitution); *United States v. O'Connor*, 321 F.Supp.2d 722, 729 (E.D. Va. 2004) (forfeiture and restitution serve different purposes; "forfeiture generally serves to remove from an offender the fruits and instrumentalities of his crime, and thereby provides a powerful disincentive to commit the crime in the first instance"; restitution serves primarily to compensate the victim).

Defendants may not use forfeiture proceedings to relitigate the legality of their conduct. *See United States v. Warshak*, 631 F.3d 266, 331 (6th Cir. 2010) (affirming district court's refusal to let defendant introduce evidence in forfeiture proceedings to show that his conduct was not illegal; in the forfeiture phase, the legality of the conduct "is no longer a live issue"); *see also* Fed. R. Crim. P. 32.2(b)(1)(B) (forfeiture determinations only take place after conviction).

18 U.S.C. § 981(a)(1)(C) provides, in pertinent part, for the civil forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity' (as defined in section

1956(c)(7) of this title), or a conspiracy to commit such an offense." Although 18 U.S.C. § 981(a) is an umbrella forfeiture statute that generally applies to civil forfeitures, its provisions are incorporated into criminal forfeitures by 28 U.S.C. § 2461(c), which states, in pertinent part:

> If a person is charged in a criminal case with a violation of an Act of Congress for which the civil or criminal forfeiture of property is authorized, the Government may include notice of forfeiture in the indictment or information pursuant to the Federal Rules of Criminal Procedure.

"Section 2461 thus acts as a 'bridge' or 'gap-filler' between civil and criminal forfeiture, authorizing criminal forfeiture when no criminal forfeiture provision applies to the crime charged against a particular defendant but civil forfeiture for that charged crime is nonetheless authorized." *Blackman*, 746 F.3d at 143 (certain internal quotation marks omitted).

As relates to the foregoing statutory provisions, all of the counts of conviction are either specified unlawful activities ("SUAs"), or a conspiracy related thereto. Count 7 (Theft of Government Property) charges a violation of 18 U.S.C. § 641, which is defined as an SUA by 18 U.S.C. § 1956(c)(7)(D). Counts 13 through 34 (Wire Fraud) charge violations of 18 U.S.C. § 1343, which is defined as an SUA by 18 U.S.C. § 1956(c)(7)(A) (incorporating 18 U.S.C. § 1961(1)(B)). Count 1 charges a conspiracy in violation of 18 U.S.C. § 371, the objects of which included the violations of 18 U.S.C. §§ 641 and 1343 contained at Counts 7 and 13-34. Accordingly, any property constituting or derived

from proceeds traceable to the counts of conviction in this case is subject to forfeiture.

B. Forfeiture of Substitute Assets

21 U.S.C. § 853(p) governs forfeiture of substitute assets. As with direct forfeiture of proceeds, the government must show its entitlement to substitute assets by a preponderance of the evidence. *United States v. Poulin,* 690 F. Supp. 415, 421-22 (E.D. Va. 2010). Section 853(p)(1)(A) states that "if any property described in subsection (a) of this section, as a result of any act or omission of the defendant—(A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with, a third party; (C) has been placed beyond the jurisdiction of the court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty . . . the court shall order the forfeiture of any other property of the defendant, up to the value" of the property subject to forfeiture. The language of § 853(p) is "not discretionary; the statute mandates forfeiture of substitute assets when the tainted property has been placed beyond the reach of a forfeiture." *United States v. Alamoudi,* 452 F.3d 310, 314 (4th Cir. 2006) (internal quotation marks omitted).

"Because criminal forfeiture is remedial in nature, section § 853 states that the forfeiture provisions its provisions 'shall be liberally construed' in order to effectuate this purpose." *Patel,* 949 F. Supp. 2d at 649 (citing 21 U.S.C. § 853(o)). Applying this provision, the Fourth Circuit held that the government's "due diligence" showing was satisfied through the submission of an affidavit of a case agent attesting that she had

looked for directly forfeitable property, but could not find any due to the acts or omissions of the defendant. *Alamoudi*, 452 F.3d at 315.[10] Moreover, a defendant's act in commingling tainted and untainted funds may also trigger section 853(p). *See United States v. Swenson,* 2014 WL 3748301, *9-10 (D. Idaho 2014) (if defendant has caused the directly forfeitable proceeds to be commingled, and an agent testifies that they cannot be traced and separated without significant effort and expense, the court may order the forfeiture of substitute assets).

Additionally, although a defendant must have a hand in the prohibited "act or omission" to trigger section 853(p)(1)(A), there is no requirement that a such act or omission involve obstructionist motives (such as, for example, the intent to conceal property from the government). *See United States v. Jameel,* 2014 WL 5317860, *2 (E.D. Va. 2014) (to the extent the Government must show property was "unavailable" to obtain a money judgment, it did so by showing property had so many liens on it the equity was zero); *United States v. Sokolow*, 1995 WL 113079, *1 (E.D. Pa. 1995) (where forfeitable property is diminished in value due to defendant's bad business investment, forfeiture of substitute assets is appropriate; investment is an "act" of the defendant), *aff'd*, 81 F.3d 397 (3d Cir. 1996); *United States v. Hovind*, 305 Fed. Appx. 615, 618-23 (11th Cir. 2008) (affirming forfeiture of substitute assets where defendants transferred

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[10] In this case, the Government has submitted more than one affidavit from Special Agent Leonard regarding his unsuccessful efforts to locate property of the defendants constituting directly forfeitable proceeds. *See* ECF Nos. 584-1 at 2-5; 597-3; 677-1.

forfeitable assets associated with their offenses to third parties and used them to pay business expenses).

The court may order the forfeiture of substitute assets to satisfy a money judgment, where the money judgment represents the value of the proceeds of the offense that cannot be directly forfeited for one of the reasons set forth in section 853(p)(1)(A). *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (once the Government has obtained a forfeiture money judgment, it may forfeit defendant's real property in partial satisfaction of that judgment); *United States v. Davis*, 177 F. Supp. 2d 470 (E.D. Va. 2001) (if property cannot be forfeited as directly traceable to the offense, it can be forfeited as a substitute asset and used to satisfy the money judgment).

The "relation-back doctrine" of federal forfeiture law, codified at 21 U.S.C. § 853(c), prevents criminal defendants from defeating forfeiture simply by transferring forfeitable property to third parties.[11] Under the relation-back doctrine, the United States' interest in such transferred property vests at the moment of the "act giving rise to forfeiture." § 853(c)

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[11] Section 853(c) states:

> Third party transfers. All right, title, and interest in [forfeitable property] vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a third party . . . shall be forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of such purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

"This 'relation-back' provision enables the government to reach forfeitable assets in the hands of third parties at the time of conviction; it thus prevents defendants from escaping the impact of forfeiture by transferring assets to third parties." *In re Bryson*, 406 F.3d 284, 291 (4th Cir. 2005) (certain internal quotation marks omitted).

In the Fourth Circuit, these relation-back provisions apply with equal force to substitute assets, vesting the government's interest in substitute property at the time of the offense:

> Given that the purpose of the relation-back provision in § 853(c) was to prevent defendants from escaping the impact of forfeiture by transferring assets to third parties, and the purpose of § 853(p) was similarly to address this very impediment to significant criminal forfeitures, the substitute property that is subject to forfeiture under § 853(p) must be read to include all property of the defendant at the time of the commission of the acts giving rise to the forfeiture.

United States v. McHan, 345 F.3d 262, 272 (4th Cir. 2003) (internal citations and punctuation omitted).[12]

If the conditions set forth in section 853(p)(1) have been met, section 853(p)(2) mandates forfeiture of any other property "of the defendant." Determining whether an asset is property "of the defendant" may

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12 The continuing viability of *McHan*, or at least certain aspects of that decision, are currently the subject of an appeal pending before the Fourth Circuit. *See United States v. William Todd Chamberlain*, Fourth Circuit Docket No. 16-4313. Regardless, at this time, *McHan* remains the controlling law in the Fourth Circuit.

require resort to state law defining ownership interests in property. "[B]ecause forfeiture proceedings implicate property rights which have traditionally been measured in terms of state law, and because section 853 contains no rule . . . , it is appropriate to refer to state law in a forfeiture proceeding." *United States v. Smith,* 966 F.2d 1045, 1054 n.10 (6th Cir. 1992) (certain quotation marks omitted). Once the ownership interests are defined under state law, however, the federal forfeiture statutes determine whether those property interests must be forfeited to the Government. *United States v. Lester*, 85 F.3d 1409, 1412 (9th Cir. 1996).

Although the provisions of 21 U.S.C. § 853 govern forfeiture of property, they also are designed to ensure the availability of potentially forfeitable property, in part through the issuance of restraining orders, seizure warrants, and other orders (§§ 853(e), (f), (g)). Moreover, Congress has instructed that "[t]he provisions of [Section 853] shall be liberally construed to effectuate its remedial purposes." § 853(o). Additionally, Fed. R. Crim. P. 32.2(e)(1)(B) vests the court with continuing jurisdiction over substitute assets.

Finally, although preponderance standard governs forfeiture determinations, the "probable cause" standard governs restraining orders. *See United States v. Monsanto*, 491 U.S. 600, 615-16 (1989) (the standard for issuing a restraining order is probable cause).

III. Discussion

A. Dong's Motion to Stay Forfeiture

Dong moves the Court to stay the forfeiture order pending appeal. (ECF No. 811.) Under Rule 32.2(d) of the Federal Rules of Criminal Procedure, "[i]f a

defendant appeals from a conviction or an order of forfeiture, the court may stay the order of forfeiture on terms appropriate to ensure that the property remains available pending appellate review." As evidenced by the text of Rule 32.2(d), a court is not required to stay an order of forfeiture. District courts have found that the following four factors should be considered in determining whether a stay pending an appeal of a forfeiture order should be granted: "(1) the likelihood of success on appeal; (2) whether the forfeited assets will depreciate over time; (3) the forfeited assets' intrinsic value to the defendant; and (4) the expense of maintaining the forfeited property." *United States v. Ngari*, 559 Fed. Appx. 259, 272 (5th Cir. 2014).

In his brief motion, Defendant makes no attempt to address any of the above factors in seeking a stay. Upon review, the Court finds that each of the factors weighs against a stay. Specifically, the Court finds that: (1) it is unlikely that Dong will succeed on appeal as the trial was fairly conducted and the verdict was fully supported by the evidence; (2) the GenPhar building, the largest asset for forfeiture, has already depreciated in value and the evidence indicates it will continue to do so; (3) there is no intrinsic value to the GenPhar building as construction was never completed and it has never been occupied as a residence or business office; and (4) maintaining the GenPhar building is a substantial expense and has already cost the U.S. Marshal's Service thousands of dollars. For these reasons, the Court finds no basis to stay the forfeiture pending appeal.

B. Defendant's Arguments Against Forfeiture

As previously noted, Defendants maintain that they either did not use grant funds for non-allowable purposes (*i.e.*, for purposes not authorized under grants), or that if they did, such use did not constitute a criminal offense, but was instead merely a good-faith dispute about the appropriate use of such funds. However, the multiple guilty verdicts on the counts of conviction refute Defendants' contentions, and their claims of innocence are no longer viable. As previously noted, Defendants may not use forfeiture proceedings to re-litigate the issue of guilt, which has already been established as a matter of law in this case. Accordingly, the Court rejects these arguments as they relate to forfeiture.

In addition, as a purported defense against forfeiture (or restraint of property), Defendants argue that Agent Leonard's status with DOD-OIG constitutes a violation of 18 U.S.C. § 1385, the "Posse Comitatus Act" ("PCA"). (ECF Nos. 701 at 4; 739 at 9 13). However, Judge Houck previously rejected Defendants' PCA argument multiple times. Defendants filed their first PCA motion to dismiss or suppress on March 30, 2014. (ECF No. 404.) The Court denied the PCA motion on September 11, 2014. (ECF No. 442.) Noting that the Fourth Circuit has never countenanced dismissal or suppression for an alleged PCA violation, Judge Houck determined that it was unnecessary to reach the issue of whether there was such a violation in this case. (ECF No. 442 at 18.)

Approximately one month later, Defendants renewed their motion (ECF 453), which was again denied. (ECF 455.) Defendant Dong also unsuccessfully raised the PCA issue in the campaign financing case.

United States v. Dong, Case No. 2:11-510, ECF 325, 357. On July 18, 2016, Defendant Dong again made the PCA argument in his motion seeking dismissal or a new trial. (ECF Nos. 634 at 7; 637 at 10.)

In light of the prior rulings on this precise matter, this Court concludes that it would not be appropriate to reconsider an issue that has already been decided multiple times against Defendants. Even if this Court were to revisit the issue, it concludes that there is no PCA violation here, and that even if there were, it would not justify foreclosing the remedial remedy of forfeiture.

The purpose of the PCA "is to uphold the American tradition of restricting military intrusions into civilian affairs, except where Congress has recognized a special need for military assistance in law enforcement." *United States v. Al–Talib*, 55 F.3d 923, 929 (4th Cir. 1995) (emphasis added; internal citation omitted). The PCA prohibits using "the Army or the Air Force" to execute the laws of the United States, and has since been construed, together with 10 U.S.C. § 375,[13] to

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[13] 18 U.S.C. § 1385 states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

10 U.S.C. § 375 states, in relevant part:

> The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity . . . under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other

extend to all active duty members of the armed forces. *See United States v. Khan,* 35 F.3d 426, 431 (9th Cir. 1994).

The DCIS is a component of the DOD-OIG, having been established by a 1982 amendment to the Inspector General Act of 1978 (IG Act), 5 U.S.C. app. 3. Significantly, the DOD Inspector General is prohibited by statute from being in the armed forces. *See* 5 U.S.C. Appx. § 8(a) ("No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.") This prohibition thereby avoids any suggestion that the DOD-IG's civilian activities could be deemed to conflict with the PCA's restrictions on military involvement.

The DCIS has explicit authority to investigate fraud involving the Department of Defense, such as the offenses involved in this case. Congress has authorized the DODIG to investigate "fraud, waste and abuse in the programs and operations of the Department." 5 U.S.C. app. §§ 8(c)(1), (2) and (4). Importantly, Congress has decreed that "[t]he provisions of [the PCA] shall not apply to audits and investigations conducted by, under the direction of, or at the request of the Inspector General of the Department of Defense to carry out the purposes of this Act." 5 U.S.C. app. § 8(g).

Based upon these provisions, the Court concludes that Agent Leonard's involvement in this investigation and prosecution did not constitute a violation of the PCA, and that even if such a violation were to be assumed, it would not provide any basis upon which

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similar activity unless participation in such activity by such member is otherwise authorized by law.

to foreclose restraint or forfeiture of property in this case.

C. Forfeiture Money Judgment

The Government's Sentencing Memorandum summarizes much of the salient trial testimony. (ECF No. 761.) Such testimony and guilty verdicts establish that Defendants misdirected federal grant funds earmarked and restricted for research, by using such funds for non-allowable purposes, including building construction and lobbying expenses.

The trial record establishes that Defendants were involved in research to combat various infectious diseases. Defendants applied for and received federal grants for this purpose. Defendants also received private funding from third parties ("non-grant funds"). Defendants decided to build the GenPhar building as a large research and manufacturing facility. After experiencing financial difficulties when the non-grant funds were becoming depleted, Defendants turned to grant funds to carry on with their construction plans. Defendants used at least $2,903,537.83 in grant funds for the construction of the GenPhar building. Defendants misdirected at least another $308,062 in grant funds for other non-grant purposes, including for lobbying expenses, legal fees, consultants, and advertising/ marketing costs. (ECF No. 761-14.)

The Court concludes that the grant funds so misdirected constitute gross proceeds of the offenses of conviction, subjecting Defendants to the imposition of a money judgment in the amount of $3,211,599.83. Property of Defendants, whether proceeds or substitute assets, may be forfeited to satisfy the money judgment.

D. Value of the GenPhar Property

The dispute over the value of the GenPhar Property has continued for several years. Faced with similar assertions in 2012, Judge Houck rejected the higher value proffered by Defendants, finding at that time that the property was worth only $1,560,000 (not taking then-existing liens into account). (ECF 255 at 7.) Faced with similar "high value" arguments from defendants, this Court also declined to depart from that lower valuation in a subsequently issued restraining order. (ECF 658 at 4.) The GenPhar Property continues to deteriorate, and has substantial code violations related to serious construction defects. These factors support a lower value. Moreover, at this time, the "firm offer" tendered by one prospective purchaser is only $1,700,000—again supporting the lower value. Additionally, Defendants' acts and/or omissions have resulted in substantial additional debts related to the property in the form of mechanic's liens,[14] tax liens, and mortgage liens. Although Defendants may argue that the mortgage debts will not survive the process of ancillary hearings, the Court cannot divine the future of such proceedings, nor offer predictions regarding the success or failure of any ancillary petitions which have yet to be filed.

As previously noted, the valuation issue relates to whether the Court should continue to restraint Dong's other property[15] as substitute assets, and whether to hold forfeiture of such property in abeyance

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[14] The unpaid mechanic's liens in the record total $60,897.97. (ECF No. 606-8 at 3.)

[15] None of the remaining property currently under restraint is titled to GenPhar.

pending the resolution of the forfeiture and proposed sale of the GenPhar Property. If, after resolution of ancillary proceedings and issuance of a Final Order of Forfeiture, the sale takes place, and the net forfeiture amount realized therefrom is sufficient to satisfy the money judgment, then forfeiture of the other substitute assets will be rendered moot. If insufficient, then forfeiture of such substitute assets will become necessary—as will their continued restraint at this time.

Because of the uncertainty regarding the value of the property, the Court will not depart from the prior valuation as initially determined by Judge Houck. On the related issue of whether the remaining substitute assets may ultimately be subject to forfeiture in order to satisfy the money judgment, the Court is mindful of two guiding principles underlying section 853. First, courts should liberally construe the provisions of the statute in order to effectuate its remedial purposes. § 853(o). Second, courts may take any appropriate actions which preserve the availability of defendants' property for forfeiture. § 853(e)(1).

Applying those principles here, the Court concludes that it is appropriate, necessary, and remedial to continue the restraint of Defendant Dong's remaining substitute assets pending the resolution of ancillary proceedings related to the GenPhar Property, entry of a Final Order of Forfeiture related thereto, and, if applicable, government disposition of the GenPhar Property.[16] Accordingly, the Court grants the government's motion to hold the forfeiture of such other

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16 For these reasons, the Court denies Dong's "Motion for Reconsider Order Granting Government's Supplemental Motion

assets in abeyance (ECF 656), and continues the restraining orders currently in effect (ECF Nos. 255; 658; 681) until further order of this Court.[17]

E. Prohibited Acts or Omissions of the Defendants Under Section 853(p)(1)

The Court finds that Defendants have engaged in acts or omissions resulting in liens against the GenPhar Property. These include taking out two mortgages on the GenPhar Property (the Rentec and Mandra mortgages) totaling $4,897,917.90; failing to file tax documents, resulting in the SCDOR levying tax liens in the amount of $112,032.86; and, failing to pay workers, resulting in mechanic's liens totaling $60,897,97. The Court concludes that Defendants' actions in burdening the property with such liens and debts constitute prohibited "acts or omissions" on their part under section 853(p)(1), which have substantially diminished the value of the property under section 853(p)(1)(D).

The Court finds that Defendants failed to take reasonable steps to secure and maintain the property as ordered by the original restraining order, resulting in vandalism, theft, and deterioration. The Court further finds that these acts and omissions constitute

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for Forfeiture," (ECF No. 701), which seeks the release of those currently restrained substitute assets.

[17] The Court grants the Government's motion to strike as unnecessary the provision in the original restraining order (ECF No. 255 at 15) regarding the appointment of a receiver for GenPhar. (ECF No. 834.) As the Government notes, GenPhar is no longer a going concern. Therefore, managing GenPhar is no longer viable and the appointment of a receiver is not necessary. The remainder of the restraining order (ECF No. 255) is still in effect.

prohibited "acts or omissions" on defendants' part under section 853(p)(1), which have substantially diminished the value of the property under section 853(p)(1)(D).

The Court finds that Defendants' actions in disbursing grant funds in the amount of $308,062 for lobbying and other non-allowable expenses constituted acts or omissions by defendants under Section 853(p)(1), which have resulted in the transfer of directly forfeitable proceeds to third parties under section 853(p)(1)(B).

The Court finds that Defendants commingled grant funds and non-grant funds, which were then transferred through multiple accounts, such that Government efforts to trace the grant funds into other property (for the purpose of determining the existence of other directly forfeitable property) would be time-consuming, resource-intensive, prohibitively expensive, and, in all likelihood, futile. The Court concludes that Defendants' commingling and transfers of funds in this fashion constitute acts or omissions under section 853(p)(1). The Court further finds that, based upon such acts or omissions, the Government cannot, upon the exercise of due diligence, locate other directly forfeitable property of Defendants under section 853 (p)(1)(A); and that as a result of such acts or omissions, the grant funds were commingled with other property which could not be divided without difficulty under 853(p)(1)(E).

The Court finds that the inability of the government to locate other directly forfeitable property of Defendants was the result of one or more of the above-described acts or omissions of Defendants. Therefore, the Court concludes that the continued restraint of the substitute assets is warranted.

F. The GenPhar Property

1. Proceeds:

Based upon the record in this case, the Court finds that the GenPhar Property is titled in the name of defendant GenPhar, Inc. The Court further finds that the GenPhar Property constitutes proceeds of the grant fraud underling the convictions in this case, inasmuch as the defendants misdirected at least $2,903,537.83 in grant funds into the construction of the GenPhar building. As such, the GenPhar Property constitutes or is derived from proceeds of violations of the counts of conviction, all of which are either specified unlawful activities, or conspiracy related thereto. Accordingly, the GenPhar Property is forfeited pursuant to 18 U.S.C. § 981(a)(1)(C) (as incorporated into criminal forfeiture by 28 U.S.C. § 2461(c)).

2. Substitute Asset:

In the alternative, the GenPhar Property is forfeited as a substitute asset under 21 U.S.C. § 853(p)(2), based upon the above-described acts or omissions of Defendants.

IV. Order

For the foregoing reasons, the Court GRANTS IN PART the Government's first POF motion, (ECF No. 593), insofar as it pertains to the imposition of a forfeiture money judgment and the forfeiture of the GenPhar Property. The Court further GRANTS IN PART the second POF motion, (ECF No. 793), and restrains the SunTrust Accounts to potentially be forfeited as substitute assets at a later date. The Court also GRANTS the Government's amended motion to

hold the forfeiture of substitute asset in abeyance, (ECF No. 656), and GRANTS the Government's motion to strike a provision in the restraining order, ECF No. 255, (ECF No. 834). Finally, the Court DENIES Dong's motion to stay the forfeiture order pending appeal, (ECF No. 811), and DENIES Dong's "Motion for Reconsider Order Granting Government's Supplemental Motion for Forfeiture," (ECF No. 701).

Accordingly, it is hereby ORDERED that the below-described property, and all right, title, and interest of the defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC., and VAXIMA, INC., in and to such property, is hereby forfeited to the United States of America, for disposition in accordance with law, subject to the rights of third parties in such property under 21 U.S.C. § 853(n):

A. Cash Proceeds / Money Judgment:

A sum of money equal to all proceeds the defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC., and VAXIMA, INC., obtained directly or indirectly as the result of the offenses charged in the Third Superseding Indictment, or traceable to such property; that is, a minimum of $3,211,599.83 in United States currency, for which the defendants are jointly and severally liable, along with interest thereon at the rate provided for in 28 U.S.C. § 1961.

B. Real Property:

Pursuant to 18 U.S.C. 981(a)(1)(C) (as incorporated by 28 U.S.C. 2461(c)), and/or 21 U.S.C. 853(p)(2), the below-listed real property is forfeited, as is all right, title and interest of the defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC. and VAXIMA,

INC., in and to such property. Such real property is more fully described as follows:

S. Morgan Point Road
(also known as 1200 Innovation Way)
Mount Pleasant, South Carolina 29466
Sub-Division: Christ Church Parish
Government Asset Identification Number:
12-DEF-000001

All that certain piece, parcel or tract of land with any and all improvements thereon, situate, lying and being in Christ Church Parish, Town of Mount Pleasant, Charleston County, South Carolina and containing 2.595 Acres, and designated as Parcel B, and shown on that certain Plat prepared by Atlantic Coast Land Surveying entitled "Subdivision, Recommendation and Property Line Adjustment Plat Showing A New 6.000 Acre 'Parcel A' Prepared for University Medical Associates of the Medical University of South Carolina and Oakland Properties, LLC, Created from a 0.128 Acre Parcel With TMS #600-00-00-056, A 0.260 Acre Portion of a Parcel With TMS#600-00-00-055, A 0.749 Acre Portion of a Parcel with TMS #600-00 00-057 and A 4.863 Acre Portion of a Parcel with TMS # 600-00-00-047 and a New 2.595 Acre 'Parcel B' Created From the Remaining Parcel With TMS # 600-00-00-057 and A 0.804 Acre Portion of a Parcel with TMS # 600-00-00-047", dated April 29, 2008, last revised June 17, 2008, and recorded in Plat Book L08 at Page 0162 in the RMC Office for Charleston County, South Carolina.

BUTTING, BOUNDING, MEASURING AND CONTAINING as by reference to said plat will more fully appear.

Being the same property conveyed to the Mortgagor herein by deed of Oakland Properties, LLC., dated March 28, 2007 and recorded in Book S627, page 692 in the RMC Office for Charleston County. TMS #600-00-00-056

It is further ORDERED that forfeiture proceedings against the below-described property are to be held in abeyance until further order of this Court, and that such property is restrained under the same terms and conditions as the restraining orders previously issued against such property until further order of this Court:

C. Real Property:

1. 441 Lake Moultrie Drive
   Bonneau, South Carolina 29431
   Berkeley County, SC
   Government Asset Identification Number:
   12-DEF-000003

All that certain lot, piece or parcel of land, known and designated as Lot 2, Section IV, on a plat of Lake Moultrie Shores Subdivision, dated March 23, 1965, recorded in Plat Book 0, at page 176, Clerk of Courts Office for Berkeley County (a/k/a ROD Office for Berkeley County; said lot having such buttings and boundings, measurements and dimensions as are shown on said plat;

AND also the assumption of that lease from South Carolina Public Service Authority, dated April 20, 1979. Subject to those Restrictions outlined in the Deed from Lake Moultrie Shores, Inc. To Edwards A. Riley and Katherine Riley recorded in Book A295, at page 175,k and those Restrictive Covenants recorded in Book C113, at Page 108; Book C114, at Page 54; and Book C115, at Page 137.

Being same property conveyed to the Granters herein by deed of Edwards A. Riley, Jr. dated July 5, 3003 and recorded in Book 2819 Page 84 in the RMC Office for Berkeley County Tax Map Number: 057-01-04-004

2. 71 Delahow Street
   Daniel Island, South Carolina
   Government Asset Identification Number:
   15-DCI-000120

ALL that certain lot, piece, parcel of land and all improvements thereon, located on Daniel Island, situate, lying and being in the City of Charleston, Berkeley County, SC and known and Lot 29, Block C, Parcel B, as shown and designated on a plat by Thomas & Hutton Engineering Co., entitled "Final Subdivision Plat of Parcel B, Block C, Lots 17-29, Block D, Lot 5-8 & 27-31, Block E, Lots 4-6, Blocks F-H & Block I, Lots 1-5, Daniel Island Park, Owned by Daniel Island Associates, LLC" by Thomas & Hutton Engineering Co., dated April 25, 2000 and recorded in the ROD Office for Berkeley County in Plat Cabinet O at Page 284-A, said lots having such size,

shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

Being the same property conveyed to Neal P. Vhor and Caroline J. Vohr by deed of Kenneth C. Marcoon dated September 11, 2007 and recorded in the ROD Office for Berkeley County in Plat Cabinet 6856 at Page 290 on September 14, 2007.

Being the same property conveyed to Centigene, LLC by deed of Neal P. Vhor and Caroline J. Vohr dated June 13, 2014 and recorded in the ROD Office for Berkeley County in Plat Cabinet 1081 at Page 52 on June 20, 2014

SUBJECT to any and all restrictions, covenants, conditions, easements, rights of way and all other matters affecting subject property of record in the Office of the RMC for Berkeley County, South Carolina. TMS Number: 271-15-02-014

D. Bank Accounts / Investment Accounts:

1. All funds contained in the following Oppenheimer Funds retirement accounts:

Account Number	**Account Description**
00847 8477189413	RPSS TR Simple IRA, Registered to GenPhar, Inc., FBO Jian-Yun Dong (Government Asset ID No. 16-DCI-000010)

00836 8360552915	RPSS TR IRS, FBO Jian-Yun Dong (Government Asset ID No. 16-DCI-000011)
00836 8360432201	RPSS TR Simple IRA, Registered to GenPhar, Inc., FBO Jian-Yun Dong (Government Asset ID No. 16-DCI-000012)
00701 7016065196	RPSS TR Simple IRA, Registered to GenPhar, Inc., FBO Jian-Yun Dong (Government Asset ID No. 16-DCI-000013)
00591 5910221221	RPSS TR Simple IRA, Registered to GenPhar, Inc., FBO Jian-Yun Dong (Government Asset ID No. 16-DCI-000014)
00252 2521445444	RPSS TR IRA, FBO Jian-Yun Dong (Government Asset ID No. 16-DCI-000015)
00226 2261697003	RPSS TR Simple IRA, Registered to GenPhar, Inc., FBO Jian-Yun Dong (Government Asset ID No. 16-DCI-000016)

2. All funds contained in South Carolina Deferred Compensation Program 401(k) Account No. xxx-xx-0403, registered to Jiayun Dong (Government Asset ID No. 12-DEF-00006).

3. All funds contained in three TIAA CREF MUSC retirement accounts registered to Jiayun Dong (Government Asset ID No. 12-DEF-00007), further described as follows:

a. TIAA RC Traditional Account No. F001525-2;

b. CREF RC Account No. H001525-8; and,

c. TIAA GRA Traditional Account No. 3506411-2.

4. All funds contained in SunTrust Bank Account Number 1000193937819. In the names of Jian-Yun Dong and Ping Zhao (Government Asset Identification Number: 17-DCI-000019).

5. All funds contained in SunTrust Bank Account Number 1000193937827. In the names of Jian-Yun Dong and Ping Zhao (Government Asset Identification Number: 17-DCI-000020).

It is further **ORDERED**:

1. That upon entry of the criminal judgment, the POF becomes final as to Defendant, and shall be made a part of the sentence and included in the criminal judgment, pursuant to Rule 32.2(b)(4)(A.

2. That pursuant to Rule 32.2(e), the United States may at any time move to amend the POF to forfeit property in which defendants have an interest, whether directly forfeitable or substitute assets, and whether identified at this time or in the future, to satisfy the money judgment of $3,211,599.83.

3. That the United States may sell or otherwise dispose of any forfeited property, including substitute assets, in accordance with law as required to satisfy the money judgment.

4. That pursuant to 21 U.S.C. § 881(e)(2)(A), the proceeds from any sale of forfeited property in this case shall be used to pay all property expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs.

5. That upon the entry of the POF, the United States Attorney is authorized to conduct proper discovery in identifying, locating, or disposing of the described property, or other substitute assets, pursuant to Rule 32.2(b)(3); and to commence proceedings that comply with statutes governing third party rights, if applicable, pursuant to 21 U.S.C. § 853(n)(6).

6. That the POF shall serve as a Writ of Entry and Inspection, authorizing the United States Marshals Service ("USMS"), and any other Government or non-Government personnel assisting the USMS, to enter onto and into the premises of the above-described real property as necessary for purposes of conducting inspections, appraisals, and video recording the property, to record and document the condition, value, and maintenance of the property until the forfeiture proceedings are concluded.

7. That occupants of the real property forfeited herein shall be served with a copy of the POF and provided with notice of the forfeiture of the property.

8. That the Government is not required to publish notice regarding the forfeiture money judgment against the Defendants; however, the POF shall be recorded in the records of the County Clerk's Office in the County of the debtor's residence, place of business, and any and all other counties in which the debtor has either real or personal property, as a lien thereon.

9. That the United States shall publish notice of the POF and its intent to dispose of the personal property in such manner as the Attorney General may direct, pursuant to 21 U.S.C. § 853(n)(1); and that the United States shall send notice of the POF to any person, other than the Defendants, who reasonably appears to be a potential claimant with standing to contest the forfeiture, pursuant to Rule 32.2(b)(6).

10. That upon entry of the POF, the USMS or its designee is authorized to seize the above-described forfeited property as directed by the United States Attorney's Office, and to commence proceedings that comply with legal provisions governing third-party rights under 21 U.S.C. § 853(n) and Rule 32.2(c).

11. That any person, other than the Defendants, asserting a legal interest in the forfeited property may, within thirty days of the final publication of notice or receipt of notice, whichever is earlier, petition the Court for a hearing without a jury to adjudicate the validity of their alleged interest in the property, and for an amendment of the POF, pursuant to 21 U.S.C. § 853(n)(6) and Rule 32.2(c).

12. That pursuant to the requirements for ancillary petitions under 21 U.S.C. § 853(n)(3), any petition filed by a third party asserting an interest in the above-described forfeited property shall be signed by the petitioner under penalty of perjury, and shall set forth (1) the nature and extent of the petitioner's right, title, or interest in the particular property; (2) the time and circumstances of the petitioner's acquisition of the right, title, or interest in such property; (3) any additional facts supporting the petitioner's claim to an interest in such property; and (4) the relief sought.

13. That after the disposition of any motion filed under Rule 32.2(c)(1)(A) (providing for dismissal of ancillary petitions for lawful reasons), and before any ancillary hearing on the petition, discovery may be conducted in accordance with the Federal Rules of Civil Procedure, pursuant to Rule 32.2(c)(1)(B), upon a showing that such discovery is necessary or desirable to resolve factual issues.

14. That the United States shall have clear title to the property following the court's determination of all third-party interests, or, if no petitions are filed, following the expiration of the period provided in 21 U.S.C. § 853(n)(2) for the filing of third-party petitions.

15. That the Court shall retain jurisdiction to resolve disputes which may arise, and to enforce and amend the POF as necessary, pursuant to Rule 32.2(e).

16. That the Clerk of the United States District Court shall provide one (1) certified copy of this Order to the United States Attorney's Office.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

Greenville, South Carolina
April 25, 2017

ORDER ON POST-TRIAL RULE 29 MOTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (DECEMBER 8, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v.

JIAN-YUN DONG, a/k/a JOHN DONG,
GENPHAR, INC., VAXIMA INC.,

Defendants.

No. 2:11-cr-00511-DCN

Before: David C. NORTON,
United States District Judge.

This matter comes before the court on various post-trial motions filed by defendants Jian-Yun Dog, a/k/a John Dong ("Dong"), GenPhar, Inc. ("GenPhar"), and Vaxima, Inc. ("Vaxima") (collectively "defendants").

I. Background

On April 16, 2013, a federal grand jury returned a thirty-four count Third Superseding Indictment ("Indictment") charging Dong, GenPhar, and Vaxima with conspiracy to defraud the United States in violation of 18 U.S.C. § 371 by (1) presenting false,

fictitious, or fraudulent claims to an agency of the United States in violation of 18 U.S.C. § 287; (2) stealing or improperly converting government funds to their own use in violation of 18 U.S.C. §§ 641 & 2; (3) stealing or improperly converting money from programs receiving federal funds in violation of 18 U.S.C. § 666(a)(1)(A); (4) using interstate wire communications in furtherance of the scheme in violation of 18 U.S.C. § 1343; and (5) making material false statements to federal agencies in violation of 18 U.S.C. § 1001. Counts Two through Nine charged the defendants with eight counts of theft of government property in violation of 18 U.S.C. §§ 641 & 2, Counts Ten through Twelve charged three counts of theft from an organization receiving federal funds in violation of 18 U.S.C. §§ 666(a)(1)(A) & 2, and Counts Thirteen through Thirty-four charged twenty-two counts of wire fraud in violation of 18 U.S.C. §§ 1343 & 2.

Defendants entered a plea of not guilty on October 30, 2012. Counts Two through Six and Eight through Twelve were dismissed by government motion on November 4, 2014. ECF No. 471. The first jury trial began on November 5, 2014 before United States District Judge C. Weston Houck. The jury failed to render a verdict on all counts against Dong. On November 14, 2014, the jury returned a verdict of guilty on most counts against GenPhar and Vaxima; however, the jury was unable to render a verdict on Count One against GenPhar and Vaxima and Count Sixteen against Vaxima.

On June 9, 2015, defendants filed a joint motion for a bench trial with waiver of right to a jury trial. On June 17, 2015, the court conducted a hearing on defendants' motions during which the court instructed

defendants regarding their rights to a jury trial and their desire to waive that right. This court conducted a bench trial on June 22, 23, 24, and 25, 2015. On August 4, 2015, this court issued a verdict, finding Dong guilty of all counts, GenPhar guilty as to Count One, and Vaxima guilty as to Count One and Count Sixteen.[1]

On August 18, 2015, Dong filed a *pro se* motion for a new trial. That same day, Dong, Vaxima, and GenPhar filed a motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), or alternatively, for a new trial pursuant to Rule 33.[2] On August 19, 2015, Dong filed a second *pro se* motion for a new trial. Dong filed a second *pro se* motion for a judgment of acquittal or motion for a new trial on August 31, 2015, and an amended motion for a judgment of acquittal or motion for a new trial on September 2, 2015. The government responded to defendants'

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[1] The parties did not request findings of fact and conclusions of law but rather requested that the court issue its verdict solely by way of a verdict form, as would a jury. *See* Fed. R. Crim. P. 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.") (emphasis added). The court did, however, issue an order intended solely to provide informal insight into the court's thought process. The evidence cited within the order was not the sole evidence on which the court relied in issuing its verdict. Rather, the court engaged in an extensive analysis of the entirety of the evidence presented in reaching its decision but chose to note only a portion of the evidence in support of each count against the defendants. ECF Nos. 556, 557, & 558, Ex. 1.

[2] Dong's attorney also filed a motion to be relieved as counsel. ECF No. 563.

motions on September 3, 2015. On September 30, 2015, Dong filed a *pro se* motion for new trial based on newly discovered evidence and a reply to his prior motions. On September 30, 2015, October 18, 2015, and November 15, 2015, GenPhar and Vaxima filed motions to join in Dong's various *pro se* motions "in so far as they do not conflict with the interests of these two defendants."[3]

II. Standard

A. Rule 29(c)

Rule 29(c) provides that a court, on the motion of a defendant after a verdict of guilty, may "set aside the verdict and enter judgment of acquittal." Fed. R. Crim. P. 29(c). In considering a motion for judgment of acquittal, the court must decide "whether the evidence, viewed in the light most favorable to the prosecution, is such that the finder of fact might find the defendant guilty beyond a reasonable doubt." *United States v. Wooten,* 503 F.2d 65, 66 (4th Cir. 1974). In short, in a challenge to the sufficiency of the evidence, "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States,* 315 U.S. 60, 80 (1942). In determining the issue of substantial evidence, the court neither weighs the evidence nor considers the credibility of witnesses.

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[3] Because defendants GenPhar and Vaxima joined in Dong's *pro se* motions to the extent that the arguments within do not conflict with their interests, the court will address Dong's arguments as they apply to all defendants generally. The court will refer to such arguments as "defendants'" arguments, even when made solely by Dong in his *pro se* motions.

United States v. Arrington, 719 F.2d 701 (4th Cir. 1983).

B. Rule 33

Federal Rule of Criminal Procedure 33(a) permits a court, upon motion by a defendant, to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. The Fourth Circuit has recognized that "[a] new trial is a drastic remedy intended for the rare case. *United States v. Chin,* 1999 WL 333137, at *1 (4th Cir. May 26, 1999). Indeed, the Fourth Circuit has "held that a district court should exercise its discretion to grant a new trial 'sparingly' and that the district court should grant a new trial based on the weight of the evidence 'only when the evidence weighs heavily against the verdict.'" *United States v. Wilson,* 118 F.3d 228, 237 (4th Cir. 1997) (quoting *United States v. Arrington,* 757 F.2d 1484, 1486 (4th Cir. 1985)). In ruling on a motion for a new trial, "[t]he district court should examine all the evidence introduced at trial and—unlike when ruling on a motion for acquittal—the court may evaluate for itself the credibility of witnesses." *Chin,* 1999 WL 333137, at *1 (citing *Arrington,* 757 F.2d at 1485). The court may draw inferences unfavorable to the government from the evidence. *United States v. Campbell,* 977 F.2d 854, 860 (4th Cir. 1992).

When considering a Rule 33 motion, a district court is owed "great deference" because it effectively sits as a "thirteenth juror." *United States v. Wolff,* 1989 WL 152513, at *8 (4th Cir. Dec.12, 1989). "A trial judge's superior vantage point is nowhere more certain than in assessing the overall dynamics of a

trial, including . . . the overall 'weight' of the evidence." *Id.* at *9. However, the court should not carelessly substitute its judgment for that of the jury. "A district court 'judge is not a thirteenth juror who may set aside a verdict merely because he would have reached a different result.'" *United States v. Rivera Rangel,* 396 F.3d 476, 486 (1st Cir. 2005) (quoting *United States v. Rothrock,* 806 F.2d 318, 322 (1st Cir. 1986)). Only "[w]hen the evidence weighs so heavily against the verdict that it would be unjust to enter judgment" should the court grant a motion for a new trial. *Arrington,* 757 F.2d at 1485.

III. Discussion

In the numerous post-trial motions, defendants make various arguments, many of which simply request that the court re-weigh the evidence against them. To the extent that defendants argue that there is insufficient evidence to support the verdicts, the court directs defendants to its August 4, 2015 order in which the court extensively outlined the applicable law and overwhelming corresponding evidence as it relates to each count in the Indictment. Clearly, as the court found in issuing the verdicts, there is substantial evidence to establish defendants' guilt on all charges before the court. However, beyond defendants' arguments pertaining to the sufficiency of the evidence, the court will specifically address defendants' arguments below.

A. Newly Discovered Evidence

Defendants argue that they are entitled to an acquittal and/or a new trial based on newly discovered evidence. A defendant must demonstrate the following

to receive a new trial based on newly discovered evidence: (1) the evidence is, in fact, newly discovered; (2) the defendant used due diligence to uncover the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence would probably result in an acquittal at a new trial. *United States v. Lofton,* 233 F.3d 313, 318 (4th Cir. 2000). The defendant must meet all five factors in order to receive a new trial. *United States v. Chavis,* 880 F.2d 788, 793 (4th Cir. 1989).

Defendants cannot satisfy the aforementioned factors because the evidence is not newly discovered. In support of the motion for a new trial based on newly discovered evidence, Dong states the following: "New evidence arise [sic] during the trial but not followed up by the defense attorney that include the GMP facility is described in the proposal as testified by the Dr. Repik the Program Officer of NIH [sic], and Emails from Dr. Pratt confirmed that the Army requested the fund for experimental monkeys remained to be at GenPhar [sic] for additional work." ECF No. 572 at 1 (emphasis added). Dong further contends that "[n]ew evidence and testimony showed that Deputy Director for Grant Management, Dr. Norwood had been interviewed repeatedly and the last contact was right before trial." *Id.* at 2 (emphasis added). Copious grant documents and emails were produced prior to trial, and there is no evidence that any pertinent documents were withheld. Further, Dr. Repik and Dr. Pratt testified during the trial regarding the emails and grant documents.

It is clear that the "new evidence" cited in support of defendants' post-trial motions was revealed during the trial, evidenced by Dong's own statements. See

ECF no. 572 at 1–2. Therefore, defendants are not entitled to a new trial based on newly discovered evidence. To the extent that defendants argue that their attorneys failed to sufficiently address the newly discovered evidence during trial or subpoena Dr. Norwood to testify in light of recent communications, these arguments will be analyzed within the ineffective assistance of counsel claim below.

B. Ineffective Assistance of Counsel

Defendants also contend that they are entitled to an acquittal and/or new trial based on ineffective assistance of counsel. A defendant may request a new trial pursuant to Rule 33(b)(2) based on ineffective assistance of counsel. *See United States v. Russell,* 221 F.3d 615, 619 (4th Cir. 2000); *see also United States v. Smith,* 62 F.3d 641, 648 (4th Cir. 1995). When reviewing a motion for a new trial based on ineffective assistance of counsel, courts apply the familiar standard outlined in *Strickland. See Russell,* 221 F.3d at 620 (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). To that end, a defendant must satisfy the two-prong test outlined in *Strickland*: a defendant must first show that that his counsel's performance "fell below an objective standard of reasonableness," and second, a defendant must also show that he was "prejudiced" by his counsel's errors; that is, the defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

To satisfy the deficient performance prong of *Strickland,* the convicted defendant must overcome the "'strong presumption' that counsel's strategy and

tactics fall 'within the wide range of reasonable professional assistance.'" *Burch v. Corcoran,* 273 F.3d 577, 588 (4th Cir. 2001) (quoting *Strickland,* 466 U.S. at 689). The prejudice component requires a convicted defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In analyzing ineffective assistance of counsel claims, it is not necessary to determine whether counsel performed deficiently if the claim is readily dismissed for lack of prejudice. *Id.* at 697. "A reasonable probability is a probability sufficient to undermine confidence in the outcome.' It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter,* 131 S. Ct. 770, 787-88 (2011) (quoting *Strickland*, 466 U.S. at 687, 693-94).

i. Conflict of Interest

Dong's ineffective assistance of counsel arguments are principally based on his claim that trial counsel was acting under an actual conflict of interest.[4] "For a claim concerning a conflict of interest, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his

[4] During the trial, Rose Mary Parham represented Dong, but did not represent GenPhar or Vaxima. G. Wells Dickson, Jr. represented GenPhar and Vaxima, and there are no allegations of ineffective assistance of counsel or conflict of interest pertaining to his representation within the various post-trial motions.

lawyer's performance.'" *United States v. Okun,* 2015 WL 6471172, at *8 (E.D. Va. Oct. 26, 2015) (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 348 (1980)). "When a petitioner premises his ineffective assistance claim on the existence of a conflict of interest, the claim is subjected to the specific standard spelled out in" *Sullivan* instead of that articulated in *Strickland. United States v. Nicholson,* 475 F.3d 241, 249 (4th Cir. 2007). The petitioner must demonstrate "(1) that his lawyer was under 'an actual conflict of interest' and (2) that this conflict 'adversely affected his lawyer's performance.'" *Id.* (quoting *Sullivan,* 446 U.S. at 348). "If the petitioner can show an actual conflict, and that it adversely affected his lawyer's performance, prejudice is presumed and there is no need to demonstrate a reasonable probability that, but for the lawyer's conflict of interest, the trial or sentencing outcome would have been different." *Id.* "[A]n adverse effect is not presumed from the existence of an actual conflict of interest." *Id.* "That said, [courts] assess each of the two prongs of the *Sullivan* test in turn, that is, (1) whether Dong's attorney had an actual conflict of interest, and (2) whether that conflict adversely affected her performance during the trial." *Id.*

To establish an actual conflict of interest, Dong "must show that [his] interests diverged with respect to a material factual or legal issue or to a course of action." *Id.* (quoting *Gilbert v. Moore,* 134 F.3d 642, 652 (4th Cir. 1998) (en banc)). Dong contends that trial counsel acted under an actual conflict of interest and collaborated with the government because she is married to a member of the United States Attorney's Office. However, the fact that defense counsel's husband works for the United States Attorney's Office is not an

actual conflict of interest. Under American Bar Association ("ABA") Model Rule of Professional Conduct 1.7, "[a] concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Comment 11 to Rule 1.7 states:

> When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.

Model Rules of Prof'l Conduct r. 1.7 cmt 11 (emphasis added). Although Dong's attorney would have an actual conflict if her husband were opposing counsel, that conflict is not imputed to other lawyers with whom her husband is associated. Further, beyond

empty allegations that trial counsel colluded with the prosecution in an effort to better her husband's career, there is absolutely no evidence or indication to the court of a significant risk that Ms. Parham's representation of Dong was materially limited by her alleged personal interest. Thus, defendants cannot establish that defense counsel had an actual conflict of interest as required under the *Sullivan* factors.

ii. Other Allegations of Ineffective Assistance

It appears that Dong also argues that trial counsel's performance was deficient in numerous ways, including that: (1) defense counsel refused to file a motion to review certain documents before trial; (2) defense counsel failed to call defense witnesses or sufficiently examine the witnesses; (3) defense counsel refused to meaningfully cross examine witnesses to disclose alleged perjuries; (4) defense counsel failed to object to admission of certain evidence; and (5) defense counsel refused to subpoena Dr. Norwood to testify. The court finds that Dong's counsel's performance did not fall below an objective standard of reasonableness, especially in light of the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. Rather, Dong's attorney vigorously represented him during the trial notwithstanding his continued insistence on directing the entirety of his defense.

Even assuming that trial counsel's alleged "failures" amount to deficient performance under the first prong of the *Strickland* test, Dong does not attempt to demonstrate that defendants were prejudiced by the alleged errors, *i.e.*, that but for the alleged errors, the

court would not have found defendants guilty. In light of the overwhelming evidence presented by the government, there is no indication that the court would have acquitted defendants had Dong's attorney objected to certain evidence, more adequately cross examined witnesses, subpoenaed Dr. Norwood to testify, etc. Further, the court allowed Dong—after counsel's cross-examination of the witnesses—to write down questions he desired counsel to ask the witnesses and patiently continued to allow Dong to ask questions via his attorney until he was satisfied.

Because defendants have failed to establish that trial counsel's performance fell below an objective standard of reasonableness, prejudice, or an actual conflict of interest, the court holds that they are not entitled to a new trial based on ineffective assistance of counsel.

IV. Conclusion

For the reasons set forth above, defendants' motion for a new trial pursuant to Federal Rule of Criminal Procedure 33 and motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c) are DENIED.

AND IT IS SO ORDERED.

/s/ David C. Norton
United States District Judge

December 8, 2015
Charleston, South Carolina

VERDICT FORM FOR
JIAN-YUN DONG, A/K/A JOHN DONG
(AUGUST 4, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v.

JIAN-YUN DONG, a/k/a JOHN DONG,
GENPHAR, INC., VAXIMA INC.,

No. 2:11-cr-00511-DCN

Before: David C. NORTON,
United States District Judge

1. Dong is Guilty as charged beyond a reasonable doubt as to Count 1 of the Third Superseding Indictment.
2. Dong is Guilty as charged beyond a reasonable doubt as to Count 7 of the Third Superseding Indictment.
3. Dong is Guilty as charged beyond a reasonable doubt as to Count 13 of the Third Superseding Indictment.
4. Dong is Guilty as charged beyond a reasonable doubt as to Count 14 of the Third Superseding Indictment.

5. Dong is Guilty as charged beyond a reasonable doubt as to Count 15 of the Third Superseding Indictment.

6. Dong is Guilty as charged beyond a reasonable doubt as to Count 16 of the Third Superseding Indictment.

7. Dong is Guilty as charged beyond a reasonable doubt as to Count 17 of the Third Superseding Indictment.

8. Dong is Guilty as charged beyond a reasonable doubt as to Count 18 of the Third Superseding Indictment.

9. Dong is Guilty as charged beyond a reasonable doubt as to Count 19 of the Third Superseding Indictment.

10. Dong is Guilty as charged beyond a reasonable doubt as to Count 20 of the Third Superseding Indictment.

11. Dong is Guilty as charged beyond a reasonable doubt as to Count 21 of the Third Superseding Indictment.

12. Dong is Guilty as charged beyond a reasonable doubt as to Count 22 of the Third Superseding Indictment.

13. Dong is Guilty as charged beyond a reasonable doubt as to Count 23 of the Third Superseding Indictment.

14. Dong is Guilty as charged beyond a reasonable doubt as to Count 24 of the Third Superseding Indictment.

15. Dong is Guilty as charged beyond a reasonable doubt as to Count 25 of the Third Superseding Indictment.

16. Dong is Guilty as charged beyond a reasonable doubt as to Count 26 of the Third Superseding Indictment.

17. Dong is Guilty as charged beyond a reasonable doubt as to Count 27 of the Third Superseding Indictment.

18. Dong is Guilty as charged beyond a reasonable doubt as to Count 28 of the Third Superseding Indictment.

19. Dong is Guilty as charged beyond a reasonable doubt as to Count 29 of the Third Superseding Indictment.

20. Dong is Guilty as charged beyond a reasonable doubt as to Count 30 of the Third Superseding Indictment.

21. Dong is Guilty as charged beyond a reasonable doubt as to Count 31 of the Third Superseding Indictment.

22. Dong is Guilty as charged beyond a reasonable doubt as to Count 32 of the Third Superseding Indictment.

23. Dong is Guilty as charged beyond a reasonable doubt as to Count 33 of the Third Superseding Indictment.

24. Dong is Guilty as charged beyond a reasonable doubt as to Count 34 of the Third Superseding Indictment.

AND IT IS SO ORDERED.

/s/ David C. Norton
United States District Judge

August 4, 2015
Charleston, South Carolina

ORDER ACCOMPANYING THE VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA (AUGUST 4, 2015)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v.

JIAN-YUN DONG, a/k/a JOHN DONG,
GENPHAR, INC., VAXIMA INC.,

Defendants.

No. 2:11-cr-00511-DCN

This matter comes before the court following a bench trial held on June 22, 23, 24, and 25, 2015. The parties did not request findings of facts and conclusions of law but instead requested that the court issue its verdict solely by way of a verdict form, as would a jury. Nevertheless, during the course of its deliberation, the court found it helpful to outline the law and evidence as it pertains to the counts charged in the indictment. The court believes that this information may similarly be beneficial to the parties. However, the following statements are not intended to be nor should they be construed as findings of facts and conclusions of law. To the contrary, the following statements are intended

solely to provide informal insight into the court's thought process. The evidence cited is not the sole evidence on which the court relied in issuing its verdict. Rather, the court engaged in an extensive analysis of the entirety of the evidence presented in reaching its decision but chose to note only a portion of the evidence in support of each count against the defendants.

THIRD SUPERSEDING INDICTMENT[1]

COUNT ONE: Conspiracy

Count One charges that John Dong, Vaxima, and GenPhar conspired to defraud the federal government and conspired to commit a variety of offenses in violation of 18 U.S.C. § 371.

Objects of the Conspiracy

(1) To defraud the United States and its agencies by obtaining monies and property through false and fraudulent statements, representations, and promises

(2) To commit the following offenses: (1) to make claims to the United States for payment in the form of requests for federal grant funds, then knowing each claim to be false, fictitious, and fraudulent in violation of 18 U.S.C. § 287; (2) to knowingly and willfully embezzle, steal, purloin, and convert to their own use funds belonging to USAMRAA, NIH, NMRC, in violation of 18 U.S.C. § 641; (3) to use and cause the use of

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[1] The legal statements outlining the elements of each count below were taken from *Pattern Jury Instructions for Federal Criminal Cases*, United States District Court, District of South Carolina (2014), as well as from the court's own research of Fourth Circuit case law. As stated above, these legal statements are not to be construed as conclusions of law.

interstate wire communications in furtherance of a scheme to defraud the U.S. and to obtain money and property by means of false and fraudulent pretenses in violation of 18 U.S.C. § 1343; (4) to make material false statements to federal agencies in violation of 18 U.S.C. § 1001

(3) To obtain federal grant monies by means of materially false and fraudulent pretenses, representations, promises, and material omissions.

APPLICABLE LAW

Title 18, United States Code, Section 371 makes it a crime to conspire with someone else to commit an offense made illegal by federal law or to defraud the United States. *United States v. Ellis*, 121 F.3d 908, 913 (4th Cir. 1997).

> To establish a conspiracy under § 371, the Government must prove "(1) an agreement between two or more people to commit a crime, and (2) an overt act in furtherance of the conspiracy." *Ellis*, 121 F.3d at 922. "The existence of a tacit or mutual understanding between conspirators is sufficient evidence of a conspiratorial agreement." *Id.* (internal quotation marks omitted). Proof of the agreement may be established by circumstantial evidence. *United States v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996). It is no defense to a conspiracy charge that one's role in the conspiracy is minor. *See United States v. Laughman*, 618 F.2d 1067, 1076 (4th Cir. 1980) ("Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the

> conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy." (internal quotation marks omitted)).

United States v. Cone, 714 F.3d 197, 213 (4th Cir. 2013).

To prove conspiracy to commit an offense against the United States, the government must prove: (1) that two or more persons agreed to do something which federal law prohibits, *i.e.*, to violate 18 U.S.C. § 287; 18 U.S.C. § 641; 18 U.S.C. § 1343; or 18 U.S.C. § 1001; (2) that the defendants knew of the conspiracy and willfully joined the conspiracy; and (3) that at some time during the existence of the conspiracy or agreement and within the limitations period, one of the members of the conspiracy knowingly performed one of the overt acts charged in the indictment in order to accomplish the object or purpose of the agreement. *See United States v. Singh*, 518 F.3d 236, 252 (4th Cir. 2008).

To prove a conspiracy to defraud the United States, the government must prove (1) that two or more persons agreed to defraud the United States; (2) that at some time during the existence of the conspiracy or agreement and within the limitations period, one of the members of the conspiracy knowingly performed one of the overt acts charged in the indictment in order to accomplish the object or purpose of the agreement; and (3) that the defendants had the intent to agree to defraud the United States. *United States v. Winfield*, 997 F.2d 1076, 1082 (4th Cir. 1993) (citing *United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986)).

Under § 371, a conspiracy to defraud includes "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of government." *United States v. Berger*, 22 F. Supp. 2d 145, 150 (S.D.N.Y. 1998) (citing *Dennis v. United States*, 384 U.S. 855, 861 (1966)). "Such a conspiracy 'need not involve the violation of a separate statute,' so long as the government proves that 'deceitful or dishonest means [were] employed to obstruct governmental functions.'" *Id.* (quoting *United States v. Rosengarten*, 857 F.2d 76, 78 (2d Cir. 1988); *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996)).

"In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 n.20 (1978); *see also Kingrea*, 573 F.3d at 191 (4th Cir. 2009) (recognizing that conspiracy indictments must allege all elements of the offense that defendant is accused of conspiring to commit) (internal citations omitted); *United States v. Atkinson*, 966 F.2d 1270, 1275 (9th Cir. 1992) (outlining the elements of a conspiracy, including "the requisite intent to commit the underlying substantive offense").

"[I]t is undoubtedly true that a corporation is liable for the criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation." *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 63 (4th Cir. 1993). "The intracorporate conspiracy doctrine recognizes that a corporation cannot conspire with its agents because the agents' acts are the corporation's own." *Painter's Mill Grille,*

LLC v. Brown, 716 F.3d 342, 352 (4th Cir. 2013). However, "in the criminal context[,] a corporation may be convicted of conspiring with its officers." *United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir. 1983).

> The difficulty in accepting the theory of intracorporate conspiracy is conceptual. Under elementary agency principles, a corporation is personified through the acts of its agents. Thus, the acts of its agents become the acts of the corporation as a single entity. The conceptual difficulty is easily overcome, however, by acknowledging the underlying purpose for the creation of this fiction—to expand corporate responsibility. By personifying a corporation, the entity was forced to answer for its negligent acts and to shoulder financial responsibility for them. The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identify [sic] of the other. We decline to expand the fiction only to limit corporate responsibility in the context of the criminal conspiracy now before us.

Id. (quoting *United States v. Hartley*, 678 F.2d 961, 970-73 (11th Cir. 1982)).[2]

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[2] The Fourth Circuit has not explicitly addressed whether the intracorporate conspiracy doctrine should apply in the criminal context when there is more than one human actor. However, every circuit to address the issue has expressly rejected the application of the intracorporate conspiracy doctrine under these circumstances. *See, e.g.*, *United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974, 978-79 (9th Cir. 1994) (declining "to extend the intracorporate conspiracy doctrine to criminal activity"); *United*

Section 371 does not require a greater mens rea than does the substantive offense that is the object of the conspiracy. "[W]here a substantive offense embodies only a requirement of mens rea as to each of its elements, [§ 371] requires no more." *United States v. Feola*, 420 U.S. 671, 692 (1975). The two prongs of § 371—to commit an offense and to defraud—"are not mutually exclusive." *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091 (4th Cir. 1993).

Criminal Corporate Responsibility

A corporation may be held criminally responsible for criminal conduct committed by its employee or agent if the employee or agent was acting within the scope of his authority, or apparent authority, and for

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States v. Ames Sintering Co., 927 F.2d 232, 236 (6th Cir. 1990) (noting that the court has held a number of times that a corporation may be convicted for conspiring with its officers and employees); *United States v. Hugh Chalmers Chevrolet-Toyota, Inc.*, 800 F.2d 737, 738 (8th Cir. 1986); *United States v. Peters*, 732 F.2d 1004, 1007-08 (1st Cir. 1984); *United States v. Hartley*, 678 F.2d 961, 970-72 (11th Cir. 1982), abrogated on other grounds by *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1270-71 (11th Cir. 2000); *United States v. Pryba*, 674 F. Supp. 1504, 1511 (E.D. Va. 1987). In the Third Superseding Indictment, the government alleges that Dong conspired with "Person A," Dr. Wang, also an officer of the corporation. ECF No. 281, at 5-23. The government contends that the Third Superseding Indictment "clearly and sufficiently alleges that GenPhar entered into an agreement with, at the very least, Dong, Wang, and Vaxima, to engage in a scheme to fraudulently procure the award of grant funds as well as misuse those funds once awarded." ECF No. 312. Notably, Judge Houck refused to dismiss the indictment, holding that this well-established exception to the intracorporate conspiracy doctrine in the criminal context applied. ECF No. 357. Therefore, in outlining the law, the court applies the exception to the intracorporate conspiracy doctrine recognized in the criminal context.

the benefit of the corporation, even if such conduct was against corporate policy or express instructions. For GenPhar and Vaxima to be guilty, the government must prove each of the following beyond a reasonable doubt: (1) that the crime charged, here, conspiracy and wire fraud, was committed by an employee or agent of the corporation; (2) that, in committing the crime charged, the employee or agent was acting within the scope of his employment and within his apparent authority; and (3) that, in committing the crime charged, the employee or agent was acting on behalf of or for the benefit of the corporation.

"To be acting within the scope of his employment, an agent must be performing acts of the kind which he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation." *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985). An agent may act for his own benefit while also acting for the benefit of the corporation. The fact that the act was unlawful and contrary to corporate policy does not absolve the corporation of legal responsibility for the act. It is not necessary for the government to prove that the action of the agent or employee actually benefitted the corporation. *Id.* The fact finder must determine whether the agent or employee acted with the intent to benefit the corporation. If, however, the fact finder determines that the act of the employee or agent was contrary to the interests of the corporation, or that the act was undertaken solely to advance the interests of the employee or agent, then the corporation is not responsible, because the employee or agent would be acting outside the scope of his employment.

Responsible Corporate Officer

The defendant is liable for the corporation's violations if he is a responsible corporate officer. To be a responsible corporate officer, the government must prove that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or to promptly correct, the violation alleged, and that he failed to do so. The government does not have to prove that the defendant brought about the alleged violation through some wrongful action. The question is not whether the defendant had a particular title but whether he bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the violation alleged. *See United States v. Ming Hong*, 242 F.3d 528, 531 (4th Cir. 2001) ("The gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof; rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA.").

LAW APPLICABLE TO UNDERLYING SUBSTANTIVE OFFENSES OF THE CONSPIRACY[3]

18 U.S.C. § 287

Title 18, United States Code, Section 287 makes it a crime to present a false claim for money to an

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[3] The court will outline the law of the objects of the conspiracy that are not also the basis of substantive charges in the Third Superseding Indictment beyond the conspiracy charge. Those

agency of the United States. In order for the defendant to be found guilty, the government must prove each of the following beyond a reasonable doubt: (1) that the defendant made or presented a false, fictitious, or fraudulent claim to an agency of the United States; (2) that the defendant knew at the time that the claim was false, fictitious, or fraudulent;[4] and (3) that the claim was material.

Although the statute makes no reference to materiality, courts have interpreted the statute to require materiality as an element of the offense, in the same manner as § 1001, as outlined below. *United States v. Snider*, 502 F.2d 645, 652 n.12 (4th Cir. 1974) ("Implicit within the utilization of the materiality standard under § 287 and § 1001 is the notion that the criminal intent necessary under the statute includes not only an intention to make the statement but also an intention to deceive or mislead the person or agency to whom it is proffered.").[5]

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objects of the conspiracy that are also substantive offenses charged in the indictment are fully outlined in the relevant portion below.

[4] *United States v. Ewing*, 957 F.2d 115, 119 (4th Cir. 1992) ("[P]resenting false claims to an agency of the United States, a violation of 18 U.S.C. § 287, consists of two elements: 1) making or presenting a claim to any agency of the United States 2) knowing such claim to be false, fictitious, or fraudulent.").

[5] In *United States v. Greenberg*, No. 87-5089, 1988 WL 21229, at *4 n.2 (4th Cir. Mar. 8, 1988), the court indicated that "[w]e do not here decide whether materiality is an element of § 287 and note that some courts have recently concluded that it is not." The Second, Fifth, Sixth, Ninth and Tenth Circuits have all concluded materiality is not an element. However, in *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), the court reversed the conviction of a Quaker tax protester for violating 26 U.S.C. § 7205. In dicta, the court stated that materiality has been required as an element of

The word "claim" relates solely to the payment or approval of a claim for money or property to which a right is asserted against the government, based upon the government's own liability to the claimant. *United States v. Duncan*, 816 F.2d 153, 155 (4th Cir. 1987) (citing *United States v. Cohn*, 270 U.S. 339, 345-46 (1926)). A statement (or claim) is material if it has a natural tendency to influence, or is capable of influencing, the decision of the body to which it was addressed. It is irrelevant whether the false statement (or claim) actually influenced or affected the decision-making process. The capacity to influence must be measured at the point in time that the statement or claim was made. *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998). It is no defense to a prosecution under this section that the government received its money's worth. *See United States v. Blecker*, 657 F.2d 629, 634 (4th Cir. 1981) (recognizing that § 287 does not require a showing of specific intent to defraud the government and stating that "evidence that the government got its money's worth was no defense to" proof that a claim submitted to the government is either false, fictitious, or fraudulent).

18 U.S.C. § 1001

Title 18 U.S.C. § 1001 prohibits the making or using of any false, fictitious, or fraudulent statements

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§ 287 in the same manner as under § 1001 and cited *Johnson v. United States*, 410 F.2d 38, 46 (8th Cir. 1969), where the Eighth Circuit approved an instruction that included materiality. *Snider*, 502 F.2d at 652 n.12; *but see United States v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008) (materiality as an element under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*). Thus, in dicta, the Fourth Circuit interpreted § 287 to include a materiality element.

within the province of any government department or agency. "To establish a violation of § 1001, it must be proved that (1) the defendant made a false statement to a governmental agency or concealed a fact from it or used a false document knowing it to be false, (2) the defendant acted 'knowingly and willfully,' and (3) the false statement or concealed fact was material to a matter within the jurisdiction of the agency." *Arch Trading Co.*, 987 F.2d at 1095.

Courts have interpreted "false" as signifying more than a mere untruth. To establish that a statement was false, the government must negate any reasonable interpretation that would make the defendant's statement factually correct. *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978). Courts have therefore developed materiality as an element of the offense under § 1001. *United States v. Snider*, 502 F.2d 645, 652 (4th Cir. 1974). The test for materiality is "whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." *Id.* (quoting *Weinstock v. United States*, 231 F.2d 699, 701-02 (D.C. Cir. 1956)). "[T]here is no requirement that the false statement [actually] influence or effect the decision making process of a department of the United States government." *Arch Trading Co.*, 987 F.2d at 1095. Thus, although the false statement need not deceive someone in actuality, it must be deceptive, calculated to induce agency reliance or action. *Id.* (internal citations omitted).

EVIDENCE OF CONSPIRACY[6]

A. Conspiracy to Defraud the United States and Its Agents by Obtaining Monies and Property Through False and Fraudulent Statements, Representations, and Promises

1) Agreement to defraud the government

There is sufficient evidence to establish an agreement between Dong, Wang, GenPhar, and Vaxima to defraud the United States.

- Dong testified that he established Vaxima as a subsidiary of GenPhar. Wang testified that Vaxima was established to provide services to GenPhar. Wang also testified that Vaxima employees were paid by GenPhar.
- Employees of GenPhar worked for Vaxima previously, including Elaine Van Voris and John Johnston.
- Ex. 3 & Ex. 4 – NIH Grant Application and YR 1 Progress Report-Jan W. submitted the grant applications and progress reports, after Dong reviewed them as the principal investigator, with time misrepresentations.

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[6] The court addressed the evidence and law as it pertains to all objects of the conspiracy as charged and found that there was sufficient evidence to prove conspiracy beyond a reasonable doubt. In this outline, however, the court only addressed the law and evidence at is pertains to three objects of the conspiracy, since it was not necessary for the government to prove that Dong, GenPhar, and Vaxima conspired to commit every object of the conspiracy.

- According to Van Voris's testimony and Wang's testimony, Wang handled all of the finances and paid the construction costs out of the same account where the grant money was directly wired.
- Ex. 83 & Ex. 84 – Holman and Sakalian time-sheets; Holman testimony-Wang directed the employees to input inaccurate time sheets and the time was misrepresented in the progress reports to correspond with the internal time sheets.
- Sakalian testified that Dong confronted him about filling out the time sheets and said that the way he filled them out according to outside training was improper and told him to fill them out in the manner in which Wang directed.
- Ex. 58, pg 49 – Army Modification 4 signed by Dong on March 11, 2004 – $685,000.00 for GMP Vaccine Production – Dong testified that GenPhar never accomplished GMP Vaccine Production because it was not a GMP facility
- Ex. 58, pg 49 – Army Mod. 4 Budget signed by Dong on 3/11/2004 – $412,400.00 for rabbit toxicity study. Performed by Bridge in 2004; BUT Ex. 3 NIH Grant Proposal in 2006 – money in budget for toxicology and distribution study never performed again but reported as part of NIH Marburg final report (Ex. 8)
- Ex. 3, pg 8 – NIH Grant Proposal Budget 2006 – Molecular Medicine was supposed to get $480,000.00 for GMP vaccination production, but Dong testified that it never occurred.

- Ex. 3, pg 8 – NIH Grant Proposal Budget – MUSC was supposed to receive $348,536.00 for toxicology/biodistribution studies and GeneLogic was supposed to receive $373,000 .00 for standby toxicology studies – Wang testified that she performed the work in house for between $10,000–$15,000 to save money. Dong testified that he knew Wang performed the studies to save money
- Ex. 8 – Final Progress report for NIH grant – 2009 – Bridge study, performed in 2004 pursuant to Army Modification 4, was submitted as part of the final results for the toxicology and biodistribution studies and the GeneLogic Toxicology Studies under NIH Grant – The testimony and evidence shows that Wang performed the work in house for less money and GenPhar did not report the results of the non-GMP studies. Instead, GenPhar reported a study paid for by the Army 5 years prior as part of the final results from the NIH grant for which they received additional funds.
- Ex. 65 – 3/8/07 – Email chain between Dong and Dr. Pratt regarding NIH funding for monkey testing. Dr. Pratt asked about the specifics so he could plan for USAMRIID's obligations under the NIH grant. Dong notified him that there would be some funding in years 3 and 4. Pratt testified that USAMRIID never received any money for monkey testing.
- Ex. 3, pg 8 – NIH Grant Application 9/11/06- $606,900.00 allocated for USAMRIDD monkey testing

- Dr. Pratt testimony – He compared the monkey study results in the NIH and USAMRIID progress reports and concluded that they are the same study reported to both agencies a year and a half apart
- Ex. 67 – Army Progress Report for 9/02-5/07 – GenPhar represented that the biodistribution and toxicology study will be complete in 3 months
- Ex. 4 – NIH YR 1 Progress Report – June 25, 2007 – GenPhar reports the Bridge study performed pursuant to Army grant as part of the results – Dr. Repik testimony; she confronts GenPhar and Dong about the results of the study being for Marburg and Ebola when the funding is for Marburg only. GenPhar then drops the results from the progress report
- Ex. 50 – 5/15/09 – Final Bridge Report for biodistribution and toxicology study – actual studies were performed pursuant to Army grant – reported in Ex. 8 2011 Final Progress Report for NIH Marburg Grant
- Dong testified that he knew Wang performed the testing in-house to save money
- Larry Leonard testified about Dong's interviews regarding the "money earned" concept used to pay for building; in interviews with Agent Leonard, Dong expressed his familiarity with federal grants and his knowledge of government grant rules and regulations

- Wang and Van Voris testimony – All funds commingled, paid construction costs out of the account
- Exs. 41–47 – Various GenPhar shareholder letters establish Dong's familiarity with his financial situation and his knowledge of the grant limitations and restrictions
- Exs. 30-32 – Federal Cash Transaction Report ("CTRs") submitted and signed by Dong requested funding for NIH Grant – includes a certification that "I certify to the best of my knowledge and belief that this report is true in all respects and that all disbursements have been made for the purpose and conditions of the grant or agreement."

2) Overt act committed in furtherance of the conspiracy to defraud

- Ex. 4 – NIH Marburg Grant YR1 progress report – Based on the testimony from Wang and various GenPhar employees, the progress reports misrepresented the time spent researching on the grant. Dong was the principal investigator on the grant and Jan. W., an employee of GenPhar, submitted the progress report. Further, GenPhar was required to hire QA/QC personnel under the terms of the grant. Jan W. sent an email stating that the QA/QC responsibilities were divided among other employees; however, the government presented testimony that the QA/QC responsibilities were never completed and GenPhar never hired QA/QC personnel.

- Ex. 35 – Federal Cash Transaction Report for period between 7/1/08–9/30/08 to NIH. GenPhar submitted a request for payment for $955,085.51.
- Ex. 38 – NIH Summary of Payments for the period outlined in Ex. 35. On August 19, 2008, GenPhar requested payment of $233,900.00 to the U.S. Department of Health and Human Services, Program Support Center, Financial Management Service, Division Payment Management for reimbursement for the purchase of a wave bioreactor.
- Jan Van Voris testified that Wang directed her to "drawdown" the funds for the bioreactor before they would expire. Jan Van Voris submitted the request on behalf of GenPhar at Wang's direction.
- Testimony presented during trial established that the large wave bioreactor was never purchased and that GenPhar purchased the original smaller model prior to receiving the NIH grant award.

3) Intent to agree to defraud

- Van Voris testimony – Wang directed her to make all the payment requests from grants
- Wang testimony – Wang handled all finances, knew about not paying for monkey testing, performed in-house testing to save money, directed employees to incorrectly input time sheets, and paid construction costs directly out of the grant funds

- Ex. 90 – Email from Zucker to other board members – GenPhar's knowledge of limitations in the grants
- Ex. 46 – GenPhar Shareholder letter – Dong states that misuse of government funds is a crime punishable by imprisonment and that none of the funds can be used to repay any loans – spent all investor money by March 2004
- Ex. 41 – GenPhar Shareholder letter – Dong states that GenPhar paid off the loan but has no investment funds to support operations that are not currently approved by the DOD – company remains funded by Army and Navy – spending of government funds is restricted with clear statements of work and federal laws
- Ex. 44 – GenPhar Shareholder letter – Dong states that GenPhar wants to have a manufacturing facility
- Ex. 42 – GenPhar Investor letter – government funds cannot be used to support a new building but only to upgrade or expand existing building – government contracts and grants have strict restrictions on indirect expenses
- Ex. 91 – Email with Janine Danko – knowledge of grant restrictions
- Ex. 92 – Email response to Danko – more knowledge about the grants
- Ex. 43 – GenPhar shareholder letter – 7/6/09 – Dong makes various representations, including that GenPhar continues to operate with

government funding with significant limitations that are insufficient, that the building is currently funded with GenPhar's internally generated funds earned from performing various contracts, and that GenPhar's intention is that these funds will be refinanced by a mortgage and again become available for future operation

- Dr. Repik testimony – When she visited the GenPhar site, she asked Dong how the building was funded and he told her investor funds, even though he knew there was no investor money left, evidenced by his representations in the shareholder letters. His assertions to Dr. Repik are contrary to the shareholder letters regarding the remaining investor funds, evidencing his intent to defraud.

B. Conspiracy to Commit Wire Fraud

1) Two or more persons agreed to do something which federal law prohibits, that is here to violate 18 U.S.C. § 1343

- Wang and Van Voris testified that Wang directed all the drawdowns from the grant funds
- Exs. 30–37 – CTRs signed by Dong and other GenPhar employees requesting payment of grant funds. Include a certification that "to the best of my knowledge and belief . . . this report is true in all respects and that all disbursements have been made for the purpose and conditions of the grant or agreement."

- Ex. 38 – Summary of all payments made to GenPhar pursuant to the NIH Grant
- Exs. 41–47 – various GenPhar Shareholder Letters – Dong knew the restrictions on the grant funds and knew that the only operating money was from grant funds
- Wang testified that all of the money was commingled into a single account from which all construction costs were paid and knew that there was no more investor money
- Ex. 48 – Checks paid for lobbying costs and construction expenses from GenPhar, some of which are signed by Dong after the date that Dong says the company has been "operating in black" (Ex. 45)

2) Dong, GenPhar, and Vaxima knew of the conspiracy and willfully joined the conspiracy, and

- Ex. 46 – GenPhar Shareholder letter – misuse of government funds is a crime punishable by imprisonment and that none of the funds can be used to repay any loans – spend all investor money by March 2004
- Ex. 41 – GenPhar Shareholder letter – paid off the loan but has no investment funds to support operations that are not currently approved by the DOD – company remains funded by Army and Navy – spending of gov't funds is restricted with clear statements of work and federal laws

- Ex. 44 – GenPhar Shareholder letter – want to have a manufacturing facility
- Ex. 42 – GenPhar Investor letter-government funds cannot be used to support a new building but only to upgrade or expand existing building – government contracts and grants have strict restrictions on indirect expenses
- Ex. 91 – Email with Janine Danko – knowledge of grant restrictions
- Ex. 92 – Email response to Danko – more knowledge about the grants
- Ex. 43 – GenPhar Shareholder letter – 7/6/09 – Dong makes various representations, including that GenPhar continues to operate with government funding with significant limitations that are insufficient, that the building is currently funded with GenPhar's internally generated funds earned from performing various contracts, and that GenPhar's intention is that these funds will be refinanced by a mortgage and again become available for future operation
- Van Voris testimony – Wang directed her to make all the payment requests from grants
- Wang testimony – Wang handled all finances; knew about not paying for monkey testing; in-house testing to save money; Wang directed employees to incorrectly input time sheets; paid construction costs directly out of the grant funds
- Larry Leonard testimony – Dong explained the "money earned" concept and that he used

the money left over to pay for the building. Dong also stated that he was very knowledgeable as to federal grants and the restrictions and limitations with NIH grants

- Dong signed checks paid for construction and lobbying costs and was fully aware of the financial situation and the lack of operating funds

3) At some time during the existence of the conspiracy, one of the members of the conspiracy knowingly performed one of the overt acts charged in the indictment to accomplish the purpose of the agreement

- Ex. 3, pg 6 – NIH Grant Application – states that GenPhar has a wave bioreactor and requests $233,900 in equipment funding to purchase new large wave bioreactor
- Ex. 4 – NIH Grant YR 1 Progress Report – GenPhar still has not purchased larger wave bioreactor and requests permission to purchase smaller model
- Ex. 35 – Federal Cash Transaction Report for period between 7/1/08– 9/30/08 to NIH. GenPhar submitted a request for payment for $955,085.51.
- Ex. 38 – NIH Summary of Payments for the period outlined in Ex. 35. On August 19, 2008, GenPhar requested payment of $233,900.00 from the U.S. Department of Health and Human Services, Program Support Center,

Financial Management Service, Division Payment Management for reimbursement for the purchase of a wave bioreactor.

- VanVoris testimony – Wang directed her to draw down the money for the bioreactor so they would not lose it
- Wang testimony – told VanVoris to draw down the money so they would not lose it
- CTRs wiring money to GenPhar
- Ex. 48 – checks payable to lobbying firm and for construction costs signed by Dong and other GenPhar employees
- Exs. 30-32 – CTRs signed by Dong, certifying that the report is true in all respects and that the disbursements have been made for the purpose and conditions of the grant or agreement
- Ex. 93 summary of payments for grants – based on Ex. 61, 74, 38

C. Conspiracy to Make False, Fictitious and Fraudulent Requests to Federal Agency

1) Two or more persons agreed to do something which federal law prohibits, that is here to violate 18 U.S.C. § 287

- Holman and John Johnston testimony, as well as Wang's testimony-Wang directed employees to falsify time sheets
- Ex. 4 – NIH Grant YR 1 Progress Report – time was reported to correspond with internal time sheets, which inaccurately represented

the amount of time spent by the employees on the grants

- Sakalian testimony – Dong told Sakalian employee to enter his time "correctly" or it would get him in trouble. By correctly, Dong was referring to the method Wang told the employees to use, which, although it matched the grant requirements, was actually an inaccurate representation of the time spent on grant research.
- Ex. 3 – NIH Grant-Dong was the principal investigator on the NIH grant and testified that he read all submissions; would have seen that the time submitted was inaccurate
- Ex. 58, pg 49 – Army Modification 4 signed by Dong on March 11, 2004 – $685,000.00 for GMP Vaccine Production – Dong testified that GenPhar never accomplished GMP Vaccine Production because it was not a GMP facility
- Ex. 58, pg 49 – Army Modification 4 Budget signed by Dong on 3/11/2004-$412,400.00 for rabbit toxicity study. Performed by Bridge in 2004; but Ex. 3 NIH Grant Proposal in 2006 – money in budget for toxicology and distribution study never performed again but reported as part of NIH Marburg final report
- Ex. 3, pg 8 – NIH Grant Proposal Budget 2006-Molecular Medicine is supposed to get $480,000.00 for GMP vaccination production, but Dong testified that it never occurred.
- Ex. 3, pg 8 – NIH Grant Proposal Budget – MUSC supposed to receive $348,536.00 for

toxicology/biodistribution studies and GeneLogic supposed to receive $373,000.00 for standby toxicology studies – Wang testified that she performed the work in house for between $10,000 $15,000 to save money. Dong testified that he knew Wang performed the studies to save money

- Ex. 8 – Final Progress report for NIH grant – 2009 – Bridge study, performed in 2004 pursuant to Army Modification 4, submitted as part of the final results for the toxicology and biodistribution studies and the GeneLogic Toxicology Studies under NIH Grant – The testimony and evidence shows that Wang performed the work in-house for less money and GenPhar did not report the results of the non-GMP studies, but instead reported a study paid for by the Army 5 years prior as part of the final results from the NIH grant for which they received additional funds, *i.e.*, double payment.
- Wang and Dong testimony – tests were performed in-house for much less. Other entities were supposed to be paid to perform the testing. GenPhar received money for the testing, even though it was performed in-house.
- Wang testimony – told Dong that USAMRIID was never paid for monkey testing
- As more fully outlined above, Dong knew that the Bridge toxicology and biodistribution study results were represented to multiple agencies and also paid for by multiple agencies

2) Dong, GenPhar, and Vaxima knew of the conspiracy and willfully joined the conspiracy, and

- Jan W. testified that Dong reviewed all of the grant applications and progress reports and was fully aware of the representations made
- Dong was the principal investigator on the grants

3) At some time during the existence of the conspiracy, one of the members knowingly performed one of the overt acts charged in order to accomplish the purpose of the agreement

- Ex. 4 – NIH Marburg Grant YR 1 Progress Report – inaccurate time misrepresentations
- Ex. 5 – Revised time allocations are also inaccurate. Includes email from Jan W. "correcting" the prior inaccurate time allocations. The revised time allocations still include the inaccurate time allocations as testified by Jan W. and Holman, who both testified that the key personnel reports were inaccurate. Jan W. copied Dong on the email explaining the budget differences for the key personnel reports.
- Holman testimony – he was inaccurately representing his lab work. Did not spend his time researching on the grants as represented but rather spent his time on other projects or submitting grant proposals.

- Ex. 58, pg 49 – Army Mod. 4 Budget signed by Dong – includes the funding for GMP vaccine production and toxicity study in rabbits that was to be performed by outside entities but was performed by Wang in-house. Wang testified that Dong told her any money they saved with her in-house testing would belong to GenPhar

COUNT SEVEN: Theft of Government Property

The government charges that Dong did willfully and knowingly embezzle, steal, purloin, and convert to his own use over $1,000.00 belonging to the United States by submitting Federal Cash Transaction Reports ("CTR") to the DPM for NIH grants that falsely certified that all disbursements were made for the purposes and conditions of the grant in order to receive federal grant monies in violation of 18 U.S.C. §§ 641 and 2. Specifically, Count 7 alleges that Dong, GenPhar, and Vaxima submitted a CTR on October 8, 2008.

Counts 2-6 and 8-9 alleged further instances of theft of government property. However, those counts were dismissed by government motion on November 4, 2014, ECF No. 471. GenPhar and Vaxima were both found guilty of Count Seven after the previous trial.

APPLICABLE LAW

Title 18, United States Code, Section 641 makes it a crime to steal property, or possess stolen property, belonging to the United States. For the defendant to be found guilty, the government must prove each of the following elements beyond a reasonable doubt: (1) that the defendant embezzled, stole, purloined, or knowingly converted to his own use or the use of

another any record, voucher, money, or thing of value; (2) that the record, voucher, money, or thing of value belonged to the United States and was valued in excess of $1,000.00; and (3) that the defendant did so willfully.

Embezzle means the deliberate taking or retaining of the property of another with the intent to deprive the owner of its use or benefit by a person who has lawfully come into the possession of the property. *See United States v. Smith*, 373 F.3d 561, 564-65 (4th Cir. 2004). Steal means to take away from a person in lawful possession without right with the intention to keep wrongfully. *Morissette v. United States*, 342 U.S. 246, 271 (1952). Conversion is the act of control or dominion over the property of another that seriously interferes with the rights of the owner. The act of control or dominion must be without authorization from the owner. The government must prove both that the defendant knew the property belonged to another and that the taking was not authorized. *See United States v. Stockton*, 788 F.2d 210, 216 (4th Cir. 1986). Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. *Morissette*, 342 U.S. at 271-72. The government does not have to prove ownership, but the government must prove that the United States had

some interest in the property. *United States v. Mack*, No. 89-5520, 1990 WL 26880, at *2 (4th Cir. Feb. 26, 1990) (citing *United States v. Benefield*, 721 F.2d 128, 129 (4th Cir. 1983)). "The Fourth Circuit takes a broad view of what constitutes a 'thing of value of the United States.'" *United States v. Gill*, 193 F.3d 802, 804 (4th Cir. 1999).

It is not enough for the government to prove that the conveyance was without authority. The government must also prove that the defendant either knew that he was conveying the record, voucher, money, or thing of value without authority or that he acted with reckless disregard as to whether he had authority. It is a defense to a charge of conveyance without authority that the defendant either had actual authority or that he believed he had authority and that this belief was reasonable under all of the circumstances.

A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids—that is, with the bad purpose to disobey or to disregard the law. The person need not be aware of the specific law or rule that his conduct may be violating, but he must act with the intent to do something that the law forbids.

"The government can prove the knowledge element of a crime by showing that the defendant either had actual knowledge or was willfully blind to facts he should have known." *United States v. Logan*, 593 F. App'x 179, 184-85 (4th Cir. 2014) (citing *United States v. Abbas*, 74 F.3d 506, 513 (4th Cir. 1996)). "A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance." *Id.*

Willful blindness has two requirements: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *United States v. Jinwright*, 683 F.3d 471, 480 (4th Cir. 2012) (quoting *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011)).

EVIDENCE OF THEFT OF GOVERNMENT PROPERTY

1) **Dr. Dong embezzled, stole, purloined, or knowingly converted to his own use or the use of another any record, voucher, money, or thing of value**

- Ex. 3 – NIH Application – state that they recently purchased a wave bioreactor and have been very pleased with the results
- Ex. 3 – NIH Marburg Application – requested $233,900.00 in equipment costs for a wave bioreactor
- Ex. 4 – YR 1 Progress Report for NIH – notified NIH that the money was not spent to purchase wave bioreactor in YR 1 but planned to spend it in YR 2
- Testimony from various GenPhar employees – wave bioreactor was never purchased
- Ex. 38 – Details of NIH drawdowns from government records: 8/19/08-$233,900.00 requested by Van Vorris
- Van Vorris testimony – Dr. Wang told her to drawdown the money or it would be lost

- Ex. 35 – Federal CTR – $955,085.51 wired to GenPhar, included $233,900.00 for the wave bioreactor. Although this specific CTR is not signed by Dong, previous CTRs were signed by Dong, and all CTRs include a certification that the disbursements are made in accordance with the grant or agreement
- John Johnston testimony – testified that he remembered GenPhar having a wave bioreactor when he starting working there, but that to the best of his knowledge, GenPhar did not get a new wave bioreactor during his time working there
- Dong testimony – Dong testified that GenPhar only has, and has only ever had, one wave bioreactor. When asked about NIH application in which GenPhar stated that it recently purchased a table top wave bioreactor model, he essentially testified that GenPhar paid for the wave bioreactor with their own money and were being reimbursed.

2) The record, voucher, money, or thing of value belonged to the United States and was valued in excess of $1,000.00; and

- GenPhar received $233,900.00 from NIH to purchase a wave bioreactor. NIH is a federal agency.

3) Dr. Dong did so willfully

- Dr. Dong testimony – Dr. Dong knew that GenPhar had not purchased a new wave bioreactor after the NIH grant application;

during Dr. Dong's testimony, the government presented the original NIH Marburg Grant Application in which GenPhar represented that it had recently purchased a wave bioreactor and was pleased with the results. The government also showed him pictures of the lab and the original wave bioreactor

- Ex. 41 – Shareholder letter – 11/18/2005 – reports the costs to GenLogic and Molecular Medicine – $270,000 and $170,000
- Ex. 90 – Email from Zucker to other board members – GenPhar's knowledge of limitations in the grants
- Ex. 46 – GenPhar Shareholder letter – Dong stated that misuse of government funds is a crime punishable by imprisonment and that none of the funds can be used to repay any loans – spent all investor money by March 2004
- Ex. 41 – Shareholder letter – Dong states that Genphar paid off the loan but has no investment funds to support operations that are not currently approved by the DOD – company remains funded by Army and Navy – spending of government funds is restricted with clear statements of work and federal laws
- Ex. 44 – Shareholder letter – want to have a manufacturing facility
- Ex. 42 – GenPhar Investor letter-government funds cannot be used to support a new building but only to upgrade or expand existing

building – government contracts and grants have strict restrictions on indirect expenses

- Ex. 91 – Email with Janine Danko – knowledge of grant restrictions
- Ex. 92 – Email response to Danko – more knowledge about the grants
- Ex. 43 – GenPhar Shareholder letter – 7/6/09 – GenPhar continues to operate with government funding – significant limitations that are insufficient-the building is currently funded with our internally generated funds earned from performing various contracts – our intention is that these funds will be refinanced by a mortgage and again become available for future operation
- Dong testified that he wanted to have a GMP facility to manufacture vaccines
- Ex. 4, pg 8 – NIH YR 1 Progress Report – the "authorized organizational representative agrees to comply" with the applicable policies

COUNTS THIRTEEN through THIRTY FOUR: Wire Fraud

The government alleges that Dong, for the purposes of executing the scheme to defraud described above, knowingly transmitted and caused to be transmitted federal grant monies in interstate commerce by means of wire communications from DPM locations in Rockville, Maryland, to Mt. Pleasant, South Carolina in violation of 18 U.S.C. §§ 1343 and 2. GenPhar and Vaxima were found guilty of Counts 13 through 34,

except that the jury was hung as to Count 16 against Vaxima.

(1)	Count 13: 3/7/2007	$ 37,320.88
(2)	Count 14: 3/27/2007	$ 42,764.37
(3)	Count 15: 4/16/2007	$ 45,678.18
(4)	Count 16: 6/5/2007	$269,349.53
(5)	Count 17: 8/13/2007	$ 49,623.66
(6)	Count 18: 9/24/2007	$299,925.27
(7)	Count 19: 12/14/2007	$232,381.43
(8)	Count 20: 4/1/2008	$138,519.06
(9)	Count 21: 7/2/2008	$ 58,329.01
(10)	Count 22: 7/24/2008	$214,472.00
(11)	Count 23: 8/19/2008	$233,900.00
(12)	Count 24: 9/9/2008	$228.184.00
(13)	Count 25: 9/15/2008	$220,200.50
(14)	Count 26: 10/31/2008	$ 83,000.00
(15)	Count 27: 11/7/2008	$156,852.26
(16)	Count 28: 11/20/2008	$117,000.00
(17)	Count 29: 4/1/2009	$250,000.00
(18)	Count 30: 5/6/2009	$211,773.29
(19)	Count 31: 5/19/2009	$106,852.00
(20)	Count 32: 5/29/2009	$100,000.00
(21)	Count 33: 6/12/2009	$100,000.00
(22)	Count 34: 7/2/2009	$125,000.00

APPLICABLE LAW

Title 18, United States Code, Section 1343 makes it a crime to use interstate wire communications to execute a scheme to defraud. For Dong to be found guilty of Counts 13-34—and for Vaxima to be found guilty of Count 16—the government must prove each of the following beyond a reasonable doubt: (1) that the defendant devised or intended to devise a scheme to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises that were material; and (2) that, for the purpose of executing the scheme, the defendant transmitted or caused to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce any writings, signs, signals, pictures, or sounds.

In the Fourth Circuit, wire fraud under 18 U.S.C. § 1343 requires "two essential elements: (1) the existence of a scheme to defraud and (2) the use of . . . wire communication in furtherance of the scheme." *United States v. Armstrong*, 494 F. App'x 297, 299 (4th Cir. 2012) (quoting *United States v. Curry*, 461 F.3d 452, 457 (4th Cir. 2006)). "[T]he element 'to defraud' has 'the common understanding of wronging one in his property rights by dishonest methods or schemes and usually signify[ing] the deprivation of something of value by trick, deceit, chicane, or overreaching.'" *United States v. Wynn*, 684 F.3d 473, 477-78 (4th Cir. 2012) (quoting *Carpenter v. United States*, 484 U.S. 19, 27 (1987)). To establish a scheme to defraud, "the government must prove that the defendant[ ] acted with the specific intent to defraud." *Id.* (quoting *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001) (emphasis added)). "[T]o convict a person of defrauding another,

more must be shown than simply an intent to lie to the victim or to make a false statement to him." *Id.* at 478.

The words "scheme and artifice" include any plan or course of action intended to deceive others to obtain by either false or fraudulent pretenses, representations, or promises, either money or property from persons who are so deceived. A statement or representation is false or fraudulent if known to be untrue or made with reckless indifference as to the truth or falsity and made or caused to be made with the intent to deceive or defraud. *See United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir. 1983). A scheme to defraud requires that the government prove that the defendant acted with the specific intent to deceive or cheat for the purpose of getting financial gain for one's self or causing financial loss to another. Thus, the government must prove that the defendant intended to deceive someone through the scheme. *See United States v. Brandon*, 298 F.3d 307, 311 (4th Cir. 2002).

Fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent another person from acquiring material information. *United States v. Colton*, 231 F.3d 890, 898-99 (4th Cir. 2000) ("[Concealment] is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. [Nondisclosure] is characterized by mere silence. Although silence as to a material fact (nondisclosure), without an independent disclosure duty, usually does not give rise to an action for fraud, suppression of the truth with the intent to deceive (concealment) does."). Thus, a scheme to defraud can be shown by deceptive acts or contrivances

intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter. *Id.* at 901. The government can prove a scheme to defraud by evidence of active concealment of material information. *Id.* at 907.

There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension. A scheme to defraud may occur even absent a false statement or false representation, and may be based on fraudulent omissions. A scheme to defraud includes the knowing concealment of facts and information done with the intent to defraud. To act with an "intent to defraud" means to act with a specific intent to deceive or cheat, ordinarily, for the purpose of either causing some financial loss to another or bringing about some financial gain. It is not necessary, however, to prove that anyone was, in fact, defrauded, as long as it is established that the defendant acted with the intent to defraud or mislead. *See United States v. Ellis*, 326 F.3d 550, 556 (4th Cir. 2003). A "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value.

"[A] defendant must specifically intend to lie or cheat or misrepresent with the design of depriving the victim of something of value." *United States v. Harris*, 576 F. App'x 265, 272 (4th Cir. 2014) (internal quotation marks omitted). "A defendant's specific intent to defraud may be inferred from the totality of the circumstances." *Id.* (citing *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001)). A scheme to defraud

does not necessarily require affirmative misrepresentations; proof of such a scheme "can be shown by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or avert further inquiry into a material matter." *United States v. Okun*, 2009 WL 414012, at *3-4 (E.D. Va. Feb. 18, 2009) (citing *United States v. Colton*, 231 F.3d 890, 901 (4th Cir. 2000)). In essence, what is important to the determination is whether the defendant "fraudulently produc[ed] a false impression upon the mind of the other party; and if the result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." *Id.*

Criminal Corporate Responsibility

A corporation may be held criminally responsible for criminal conduct committed by its employee or agent if the employee or agent was acting within the scope of his authority, or apparent authority, and for the benefit of the corporation, even if such conduct was against corporate policy or express instructions. For GenPhar and Vaxima to be found guilty, the government must prove each of the following beyond a reasonable doubt: (1) that the crime charged, here, conspiracy and wire fraud, was committed by an employee or agent of the corporation; (2) that, in committing the crime charged, the employee or agent was acting within the scope of his employment and within his apparent authority; and (3) that, in committing the crime charged, the employee or agent was acting on behalf of or for the benefit of the corporation.

"To be acting within the scope of his employment, an agent must be performing acts of the kind which he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation." *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985). An agent may act for his own benefit while also acting for the benefit of the corporation. The fact that the act was unlawful and contrary to corporate policy does not absolve the corporation of legal responsibility for the act. It is not necessary for the government to prove that the action of the agent or employee actually benefitted the corporation. *Id.* The fact-finder must determine whether the agent or employee acted with the intent to benefit the corporation. If, however, the fact-finder determines that the act of the employee or agent was contrary to the interests of the corporation, or that the act was undertaken solely to advance the interests of the employee or agent, then the corporation is not responsible, because the employee or agent would be acting outside the scope of his employment.

EVIDENCE OF WIRE FRAUD

(1) Devised or intended to devise a scheme to defraud

- Exhibit 3, pg 5 – 9/11/06 NIH Marburg Grant Application time sheet projections
- Ex. 4, pg 9 – YR 1 Progress Report for NIH Grant – 6/25/07 misrepresentations about the time spent by GenPhar employees
- Ex. 5 – Revised YR 1 Progress Report – Jan. W and Holman testified that the time was

misrepresented. The revised report submitted by Jan W. after further inquiry by NIH officials into the inconsistency of the time allocations reported.

- Ex. 26 – Jan W. internal time sheets –Wang told employees to input inaccurate time sheet information
- Ex. 83 – David Holman timesheets and testimony – inaccurate time sheets
- Ex. 84 – Michael Sakalian time sheets – inaccurate time sheets
- Ex. 6, pg 13 – YR 2 Progress Report for NIH Grant 6/30/08 – report time to match internal time sheets – goes to the intent and the scheme to defraud
- Ex. 73, pg 4 – YR 1 Navy Invoice 9/14/05 – David Holman reported that he was working 100% of the time on Dengue, but also reported that he was spending time researching on the NIH Marburg grant. Holman and Jan W. were still in school during half the time reported in the Grant Progress Report (Ex. 4)
- Ex. 4, pg 3 – YR 1 Progress Report for NIH Grant – GenPhar requests to use money to purchase wave bioreactor in year 2 rather than year 1 – but testimony shows GenPhar never purchased new wave bioreactor. Also shows knowledge of the necessity of requesting approval for making changes to proposed use of funds in original application. Also shows that GenPhar and its employees, including

Dong, were aware of the proper way to request alterations to the use of funding

- Ex. 3, pg 31 – NIH Grant Application – 09/11/06 – GenPhar states that it recently purchased the table-top bioreactor and has had good success but also requested new wave bioreactor. Although GenPhar received funding for the new wave bioreactor, it never actually purchased it.
- Ex. 57, pg. 49 – Army Modification 4 budget March 11, 2004 – Pre-IND studies – During his testimony, Dong admitted that GenPhar never reached GMP vaccine production because they were not a GMP facility; however, GenPhar received money for reaching GMP vaccine production – $685,000.00. Money was also allocated for toxicity study in rabbits ($412,000) – Bridge Lab studies reported to multiple agencies. Wang performed the studies in-house.
- Ex. 59 – Army Mod. 4 revised budget – May 26, 2004 – revised version of Ex. 57 – Army Mod. 4 – includes funding for the monkey study and Pre-IND
- Ex. 3, pg 8 – NIH Grant Application – 9/11/06 – Rather than pay other entities to perform the work, Wang performed all of the work in-house, including the research to be performed by GeneLogic, MUSC, and USAMRIID. GenPhar then submitted the Bridge report study as part of its final report to NIH, even though the Army funded the study and it was performed prior to the NIH grant award

- Ex. 65 – Email chain between Dr. Pratt and Dong – Dr. Pratt finds out about USAMRIID budget in NIH grant – Pratt let Dong have $300,000
- Ex. 3, pg 8 – NIH Grant Application-report paying USAMRIID for monkey study that Dr. Pratt states he never performed or received payment
- Ex. 4 – NIH Grant YR 1 Progress Report – funding for monkey study also included
- Ex. 67 – Army Progress Report 9/02 to 5/07 – GenPhar represents that the biodistribution and toxicology study will be complete in three months – really performed in house by Wang
- Ex. 50, pg. 7 – Bridge Final Report – submitted with Ex. 4 NIH Progress report – June 25, 2007 – Bridge, formerly GeneLogic, concluded rabbit study – Dr. Repik reports to GenPhar the problem with reporting a study for Ebola and Marburg and that it is not permitted under the NIH grant and asks for a specific breakdown of how the NIH funds were allocated towards Marburg testing. GenPhar revised and omitted the study entirely.
- Ex. 41 – Shareholder Letter – 11/18/2005 – reports the costs to GenLogic and Molecular Medicine-$270,000 and $170,000
- Ex. 90 – Email from Zucker to other board members – GenPhar's knowledge of limitations in the grants
- Ex. 46 – GenPhar Shareholder letter – misuse of government funds is a crime punishable

by imprisonment and that none of the funds can be used to repay any loans – spend all investor money by March 2004

- Ex. 41 – GenPhar Shareholder letter – paid off the loan but has no investment funds to support operations that are not currently approved by the DOD – company remains funded by Army and Navy – spending of government funds is restricted with clear statements of work and federal laws
- Ex. 44 – GenPhar Shareholder letter – want to have a manufacturing facility
- Ex. 42 – GenPhar Investment Letter – government funds cannot be used to support a new building but only to upgrade or expand existing building – government contracts and grants have strict restrictions on indirect expenses
- Ex. 91 – Email with Janine Danko – knowledge of grant restrictions
- Ex. 92 – Email response to Danko – more knowledge about the grants
- Ex. 43 – GenPhar Shareholder letter – 7/6/09 – Dong made various representations, including that GenPhar continues to operate with government funding that has significant limitations that are insufficient, that the building is currently funded with our internally generated funds earned from performing various contracts, and that GenPhar's intention is that these funds will be refinanced by a

mortgage and again become available for future operation

- Dr. Repik testimony – Repik testified that when she visited the GenPhar facility, she asked Dong how the building was funded and he said investor money. His statements were contrary to those made in shareholder letters. Shows his intent to devise a scheme to defraud because if he told Dr. Repik the truth about using left over grant funds for the building, the government would have been aware. Also shows his knowledge of the illegality of his conduct.

(2) Used wire communications in furtherance of the scheme

- Ex. 35 – CTRs requesting wiring money to GenPhar
- Ex. 48 – checks signed by Dong
- Ex. 30-33 – CTRs signed by Dong
- Ex. 93 – summary of payments for grants – based on Ex. 61, 74, 38

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING (MARCH 28, 2022)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 17-4268 (L)
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 18-4852
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4359
(2:11-cr-00511-BHH-1)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIAN-YUN DONG, a/k/a John Dong,

Defendant-Appellant.

No. 19-4511
(2:11-cr-00511-BHH-1)

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee, and Senior Judge Floyd.

For the Court

/s/ Patricia S. Connor
Clerk

THIRD SUPERSEDING INDICTMENT
(APRIL 16, 2013)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v.

JIAN-YUN DONG, a/k/a JOHN DONG,
GENPHAR, INC., VAXIMA INC.,

Criminal No. 2:11-CR-000511

18 U.S.C. § 287; 18 U.S.C. § 371; 18 U.S.C. § 641;
18 U.S.C. § 666(a)(1)(A); 18 U.S.C. § 1343;
18 U.S.C. § 981(a)(1)(C); 18 U.S.C. § 982(a)(1)
18 U.S.C. § 1001; 28 U.S.C. § 2461(c)

COUNT ONE

THE GRAND JURY CHARGES:

INTRODUCTION

That at all times relevant to this Third Superseding Indictment:

1. Defendant GENPHAR, INC. is a Delaware Corporation with its principal place of business in Mt. Pleasant, South Carolina. Defendant GENPHAR, INC. conducts business in the State of South Carolina by and

through its officers, employees, agents and representatives. The primary office of Defendant GENPHAR, INC. was located at 600 Seacoast Parkway, Mt. Pleasant, South Carolina. During the time period of the conspiracy alleged herein, Defendant GENPHAR, INC. decided to construct a new facility (hereinafter referred to as "the new facility") located at S. Morgan Point Road, Mt. Pleasant, South Carolina. As detailed herein, grant funds were illegally diverted by the Defendants and their co-conspirators to pay construction costs associated with the new facility.

2. Defendant GENPHAR, INC. held itself out as being engaged in the business of conducting scientific research for the purpose of developing vaccines for diseases such as Dengue fever, Ebola virus, Marburg virus, Chikingunya virus and HIV.

3. Beginning in or about August 2004, Defendant JIAN-YUN DONG, a/k/a John Dong, was the President, Chief Executive Officer, a major shareholder, and a member of the Board of Directors of Defendant GENPHAR, INC. Defendant JIANYUN DONG, a/k/a John Dong, was also a Professor at the Medical University of South Carolina (MUSC) and also submitted federal grant applications through MUSC.

4. Person A was the Vice President of Research and Development, a major shareholder, and a member of the Board of Directors of Defendant GENPHAR, INC.

5. Defendant VAXIMA, INC. is a South Carolina corporation with its principal place of business in Mt. Pleasant, South Carolina, and doing business in the State of South Carolina, by and through its officers, employees, agents and representatives. Defendant

JIAN-YUN DONG, a/k/a John Dong, is the 100% owner of Defendant VAXIMA, INC. Defendant VAXIMA, INC.'s primary place of business is located at 600 Seacoast Parkway, Mt. Pleasant, South Carolina.

6. Defendant GENPHAR, INC. was a recipient of multiple federal grants from various federal agencies, including the United States Army Medical Research Acquisition Activity (USAMRAA); the National Institutes of Health (NIH); and the Naval Medical Research Center (NMRC). For example:

a. On or about September 15, 2002, Defendant JIAN-YUN DONG, a/k/a John Dong, and Defendant GENPHAR, INC., were awarded a grant, number DAMD17-02-2-0035, by the United States Army Medical Research Acquisition Activity (USAMRAA). The supplies/services to be provided by Defendant GENPHAR, INC. were described as, Migrated Co-operative Agreement, PI: Jian-Yun Dong, M.D. Ph.D., titled: "A Versatile and Rapidly Deployable Vaccine Vehicle for Infectious Disease Agents: a Complex rAD-Vector Vaccine for MBGV." The period of performance was September 15, 2002, through October 14, 2005, with a total value of $614,000.00. The agreement was subsequently modified and extended through May 31, 2007. The Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC., and Person A, caused Defendant GENPHAR, INC. to receive approximately $6,330,000 in grant monies over the period of this grant.

b. On or about May 25, 2005, Defendant JIAN-YUN DONG, a/k/a John Dong and Defendant GENPHAR, INC., entered into a Cooperative Agreement (grant), agreement number 1435-04-05-CA-43128, with the U.S. Department of the Interior, Gov. Works

for the Multivalent Dengue Vaccine Development Program. As awarded, the stated project period was from May 25, 2005, through December 31, closed on April 1, 2008. The Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC., and Person A, caused Defendant GENPHAR, INC. to receive approximately $2,194,757.00 in grant monies over the period of this grant.

c. On or about October 12, 2005, Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC. and Person A, submitted the Marburg Grant Application to the NIH. The application proposed research in the Preclinical Evaluation of a Trivalent Marburg Vaccine. The application was revised by Defendant GENPHAR, INC. on or about September 11, 2006. As awarded, the stated project period was from September 30, 2006 to August 31, 2010. The Defendant JIAN-YUN DONG, a/k/a John Dong, and Person A caused Defendant GENPHAR, INC. to receive approximately $4,238,466.00 in grant monies over the project period for this grant.

d. On or about August 6, 2007, Defendants JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC., and Person A, submitted a revised Chikingunya Small Business Innovation Research Grant to the NIH. The application proposed research in the Development of a Safe and Effective Chikingunya Virus Vaccine. As awarded, the stated project period was from July 15, 2008 to June 30, 2010. The Defendant JIAN-YUN DONG, a/k/a John Dong, and Person A caused Defendant GENPHAR, INC. to receive approximately $433,738.00 in grant monies over the project period for this grant.

THE CONSPIRACY

Beginning in or about August 2004 and continuing until in or about April of 2011, in the District of South Carolina and elsewhere, Defendants JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC., VAXIMA, INC., Person A, and persons known and unknown to the grand jury, knowingly and willfully did combine, conspire, confederate, and agree:

(1) to defraud the United States and its agencies by obtaining monies and property through false and fraudulent statements, representations and promises; and

(2) to commit the following offenses against the United States:

a. To knowingly make and present, and caused to be made and presented, to the United States Army Medical Research Acquisition Activity (USAMRAA); the National Institutes of Health (NIH), Rockville, Maryland; and the Naval Medical Research Center (NMRC) administered through the Department of the Interior (DOI), Minerals Management Service/ GovWorks, claims to the United States for payment, in the form of requests for federal grant funds, then knowing each such claim to be false, fictitious, and fraudulent, in violation of Title 18, United States Code, Section 287;

b. To knowingly and willfully embezzle, steal, purloin and convert to their own use funds belonging to the United States Army Medical Research Acquisition Activity (USAMRAA); the National Institutes of Health (NIH),

Rockville, Maryland; and the Naval Medical Research Center (NMRC) administered through the Department of the Interior (DOI), Minerals Management Service/GovWorks, agencies of the United States, of a value exceeding $1,000.00, in violation of Title 18, United States Code, Section 641;

c. To knowingly convert property worth at least five thousand dollars ($5,000.00) from Defendant GENPHAR, INC., an entity which received benefits in excess of ten thousand dollars ($10,000.00) under numerous federal programs in a calendar year, in violation of Title 18, United States Code, Section 666;

d. To use and cause the use of interstate wire communications in furtherance and execution of a scheme to defraud the United States and to obtain money and property by means of false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section 1343; and

e. To make material false statements to federal agencies, in violation of Title 18, United States Code, Section 1001.

3. It was a goal of the conspiracy that the Defendants would obtain federal grant monies by means of materially false and fraudulent pretenses, representations, promises, and material omissions.

MANNER AND MEANS OF THE CONSPIRACY

It was part of the conspiracy that the Defendants did and caused to be done the following:

1. Beginning in or about August 2004, and continuing until in or about April of 2011, Defendant JIAN-YUN DONG, a/k/a John Dong, and Person A operated, managed, and controlled Defendant GENPHAR, INC.

2. Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC., and Person A submitted and caused the submission of grant applications, grant progress submissions, and cash transaction reports containing false representations to obtain and receive federal grant monies. Defendant JIAN-YUN DONG, a/k/a John Dong, and Defendant GENPHAR, INC. directed their employees to include false, incorrect and misleading information in federal grant proposals in order to maximize the flow of grant funds to Defendant GENPHAR, INC and to financially benefit Defendant JIAN-YUN DONG, a/k/a John Dong.

3. After receiving federal grant monies for specific purposes, subsequent grant progress reports were submitted and caused to be submitted to the United States by Defendants JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC., and Person A in which false certifications were made that grant monies were being used and were going to be used for specific allowable purposes.

4. As detailed herein, federal grant monies were allocated for specific purposes; however, the Defendants frequently failed to use the funds as specified and awarded. The Defendants converted and pocketed funds that were not used as specified or awarded and also used said funds for improper purposes. Examples of the Defendant's failure to use federal grant funds as specified are detailed below:

a. On the NIH-Marburg grant application and award, salary and benefits for a quality control/ quality assurance personnel was listed for approximately $90,000.00. The position was funded by NIH, but Defendants JIAN-YUN DONG, a/k/a John Dong and GENPHAR, INC. never hired quality control/quality assurance personnel.

b. On the NIH-Marburg revised grant application and award, and on the Progress Report dated June 26, 2007, a 200L Wave Bio-Reactor was to be purchased for $140,000 and a large-scale FPLC machine was to be purchased for $93,900. GENPHAR, INC. then sought permission to substitute a smaller Wave Bioreactor at a cost of $80,000 and use the remaining funds for a FPLC machine at a cost of $93,000 and an AKTA CrossFlow machine at a cost of $60,000. NIH funded the purchase of the Wave Bioreactor, but it was not purchased by Defendants JIAN-YUN DONG, a/k/a John Dong and GENPHAR, INC.

c. On the NIH-Marburg grant application and award, funding was listed for a safety study at an outside facility, conducted over two years for approximately $105,509.00 and $384,536.00. The study was instead conducted at Defendant GENPHAR'S animal facility by Defendant VAXIMA, INC.

d. On the NIH-Marburg grant application and award, funding for the production of a clinical grade vaccine by a specified outside contractor was listed for approximately

$480,000.00. NI H funded the total amount of the production; however another company was used by Defendant GENPHAR, INC. and between approximately $50,000.00 and $75,000.00 was paid for this project.

e. On the NIH-Marburg grant application and award, funding for vaccine testing was listed at approximately $93,000.00. NIH funded this work and the testing was never performed.

f. On the NIH-Marburg revised grant application and award, funding for employees JW and DH was listed at a 60% level of effort for the first year of the project. Each employee had an annual salary of $50,000. Sixty percent of their annual salary plus $7,500 in fringe benefits, or $37,500, was listed as a total dollar amount requested from NIH for each employee. NIH funded the total dollar amount requested for employees JW and DH. Employees JW and DH were instructed by Defendant GENPHAR, INC. to charge time on their time sheets to the grant although they did not work on the grant at the hours reported or perform near the reported level of effort on the grant.

g. On the NIH-Marburg annual Progress Reports, employees JW and DH, among other employees, were listed on the Senior/Key Personnel Report page. On the Senior/Key Personnel Report page, all key personnel who worked on the NIH-Marburg grant during the grant's current budget period were to be listed, along with the actual calendar months devoted to the project. On the first annual

Progress Report, Defendant GENPHAR, INC reported to NIH that employees JW and DH each spent 7.2 calendar months working on the grant. On the second annual Progress report, Defendant GENPHAR, INC reported to NIH that employees JW and DH spent 5.4 and 7.2 months working on the grant, respectively. Employees JW and DH were instructed by Defendant GENPHAR, INC. to charge time on their time sheets to the grant although they did not work the hours they reported on the grant, or perform work on the grants at an amount near the reported calendar months that were supposed to be devoted to the project.

h. On the NIH-Marburg grant Progress Report submitted June 25, 2007, consortium costs were listed for approximately $606,900.00 for non-human primate testing at the U.S. Army Medical Research Institute of Infectious Diseases (USAMRIID). The testing was funded by NIH and USAMRIID was never paid.

5. In addition to its failure to use the funds as specified in the grant application and awards, the Defendants used grant funds for non-allowable purposes. For example:

a. Defendant VAXIMA, INC. was used by Defendants JIAN-YUN DONG, a/k/a John Dong, and GENPHAR, INC. to assist in the diversion of federal grant monies for unauthorized and fraudulent purposes.

b. Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC., and Person A paid for construction costs with federal grant monies, even though by the terms of the grants awarded to Defendant GENPHAR, INC., the Defendants knew such costs were unallowable.

c. Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC and Person A paid for lobbying expenses with federal grant monies even though by the terms of the grants awarded to Defendant GENPHAR, INC., Defendants knew such costs were unallowable.

d. Defendant JIAN-YUN DONG, a/k/a John Dong, and Person A paid for travel and personal expenses with federal grant monies even though by the terms of the grants awarded to Defendant GENPHAR, INC., Defendants knew such costs were unallowable.

e. Defendant GENPHAR, INC, acting through Defendant JIAN-YUN DONG, a/k/a John Dong and Person A directed employees to falsify timesheets and make materially false representations on timesheets to support requests for federal grant monies.

6. Defendant JIAN-YUN DONG, a/k/a John Dong as aided and abetted by Defendant VAXIMA, INC. attempted to hide and conceal Defendant DONG's ownership interests in Defendant VAXIMA, INC. from MUSC and the NIH.

7. Defendant JIAN-YUN DONG, a/k/a John Dong, as aided and abetted by Person A, attempted to increase

the amount of federal grant money that flowed to them individually, by various means, including attempting to artificially increase Person A's salary while hiding the actual amount of federal grant money received by Defendant JIAN-YUN DONG a/k/a John Dong from MUSC.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the District of South Carolina and elsewhere:

1. On or about January 25, 2005, the Defendant VAXIMA, INC. entered into a lease agreement with Defendant GENPHAR, INC. Pursuant to the lease agreement, VAXIMA, INC. agreed to pay $5,600.00 per month in rent to Defendant GENPHAR, INC.

2. On or about October 12, 2005, Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC. and Person A, submitted the Marburg Grant Application to the NIH. A revised application was sent from Defendant GENPHAR, INC. to NIH on September 11, 2006.

3. On or about August 19, 2008, the Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC., and Person A, submitted a Request for Payment for reimbursement on the purchase of a 200L Wave Bioreactor when, as detailed above, no such equipment had been purchased.

4. On or about December 17, 2008, Defendant JIAN-YUN DONG, a/k/a John Dong, as aided and abetted by Defendant VAXIMA, INC. submitted a MUSC proposal data sheet in support of an application

for a NIH grant, said proposal sheet falsely concealing DONG's ownership interest in VAXIMA, INC.

5. On or about August 6, 2007, Defendants JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC. and Person A, submitted the Chikingunya Small Business Innovation Research Grant application to the NIH.

6. Beginning in or about October 2005, through in or about 2009, the Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC. and Person A, submitted Progress Reports to the NIH. The following Progress Reports were submitted on or about the dates as set forth below:

	Budget Period Covered	Date Progress Report Submitted
3a	9/1/2007 through 8/31/2008	6/25/2007
3b	9/1/2008 through 8/31/2009	6/30/2008
3c	9/1/2009 through 8/31/2010	6/29/2009

7. On or about the dates set forth below, Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC. and Person A, submitted and caused the submission of Requests for Payments to the U.S. Department of Health and Human Services, Program Support Center, Financial Management Service, Division of Payment Management (DPM) for NIH grants which requested drawdowns of federal grant monies to Defendant GENPHAR, INC.; resulting in payments to Defendant GENPHAR, INC.:

	Date of Drawdown	Amount of Requested Drawdown
7a	3/7/2007	$37,320.88

7b	3/27/2007	$42,764.37
7c	4/16/2007	$45,678.18
7d	6/5/2007	$269,349.53
7e	8/13/2007	$49,623.66
7f	9/24/2007	$299,925.27
7g	12/14/2007	$232,381.43
7h	4/1/2008	$138,519.06
7i	7/2/2008	$58,329.01
7j	7/24/2008	$214,472.00
7k	8/19/2008	$233,900.00
71	9/9/2008	$228,184.00
7m	9/15/2008	$220,200.50
7n	10/31/2008	$83,000.00
7o	11/7/2008	$156,852.26
7p	11/20/2008	$117,000.00
7q	4/1/2009	$250,000.00
7r	5/6/2009	$211,773.29
7s	5/19/2009	$106,852.00
7t	5/29/2009	$100,000.00
7u	6/12/2009	$100,000.00
7v	7/2/2009	$125,000.00
7w	10/19/2009	$52,000.00
7x	11/2/2009	$150,000.00
7y	11/19/2009	$100,000.00

7z	12/1/2009	$200,000.00
7aa	2/2/2010	$185,000.00
7bb	2/22/2010	$230,000.00
7cc	3/23/2010	$150,000.00
7dd	4/13/2010	$134,078.56
7ee	4/21/2010	$75,000.00
7ff	6/29/2010	$75,000.00

8. Corresponding to a number of the drawdowns referenced above, Defendants JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC. and Person A made or caused to be made payments to various entities for non-allowable expenses under the grant programs as set forth below:

8a. On or about March 2, 2007, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8b. On or about March 14, 2007, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8c. On or about March 30, 2007, $5,500.00 was paid by and at the direction of the Defendants for soil testing of the new facility;

8d. On or about April 17, 2007, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8e. On or about May 9, 2007, $47,220.00 was paid by and at the direction of the Defendants for plans for the new facility;

8f. On or about May 23, 2007, $9,129.50 was paid by and at the direction of the Defendants for engineering plans for the new facility;

8g. On May 30, 2007, $109,498.80 was paid by and at the direction of the Defendants for construction;

8h. On or about June 28, 2007, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8i. On or about July 12, 2007, $3,500.00 was paid by and at the direction of the Defendant for lobbying fees;

8j. On or about August 3, 2007, $2,667.68 was paid by and at the direction of the Defendants for professional services and water design related to the new facility;

8k. On or about September 5, 2007, $24,177.00 was paid by and at the direction of the Defendants for water fees and permits related to the new building;

8l. On or about September 5, 2007, $237,907.00 was paid by and at the direction of the Defendants for site work on the new facility;

8m. On or about September 18, 2007, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8n. On or about November 27, 2007, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8o. On or about December 6, 2007, $69,681.00 was paid by and at the direction of the

Defendants for the "first invoice construction billing" for the new facility;

8p. On or about January 11, 2008, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8q. On or about January 24, 2008, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8r. On or about April 2, 2008, $737,805.95 was paid by and at the direction of the Defendants for construction of the new facility;

8s. On or about May 9, 2008, $587,805.34 was paid by and at the direction of the Defendants as a second payment related to construction of the new facility;

8t. On or about May 9, 2008, $12,000.00 was paid by and at the direction of the Defendants for construction work completed on the new facility;

8u. On June 17, 2008, $260,421.94 was paid by and at the direction of the Defendants for construction on the new facility;

8v. On or about July 1, 2008, $30,671.00 was paid by and at the direction of the Defendants for mechanical contractors working on the new facility;

8w. On or about July 19, 2008, $8,750.00 was paid by and at the direction of the Defendants for construction on the new facility;

8x. On or about August 8, 2008, $30,000.00 was paid by and at the direction of the Defendants

for the framing and construction of exterior walls at the new facility;

8y. On or about August 15, 2008, $3,500.00 was paid by and at the direction of the Defendants for lobbying fees;

8z. On or about August 25, 2008, $126,000.00 was paid by and at the direction of the Defendants for ventilation and air conditioning for the new facility;

8aa. On September 2, 2008, $25,000.00 was paid by and at the direction of the Defendants for lobbying fees;

8bb. On September 4, 2008, $5,000.00 was paid by and at the direction of the Defendants for lobbying fees;

8cc. On September 4, 2008, $171,114.50 was paid by and at the direction of the Defendants for electrical work;

8dd. On or about September 11, 2008, $48,293.92 was paid by and at the direction of the Defendants for construction work on the new facility;

8ee. On or about September 25, 2008, $12,951.90 was paid by and at the direction of the Defendants for materials/rental equipment for new facility;

8ff. On October 17, 2008, $150,000.00 was paid by and at the direction of the Defendants for glass installation;

8gg. On November 5, 2008, $102,157.49 was paid by and at the direction of the Defendants for construction costs;

8hh. On or about November 25, 2008, $40,000.00 was paid by and at the direction of the Defendants for air conditioning work at the new facility;

8ii. On or about November 14, 2008, $60,000.00 was paid by and at the direction of the Defendants for electrical work on the new facility;

8jj. On or about November 19, 2008, $40,000.00 was paid by and at the direction of the Defendants for purchase and installation of heat pump units at the new facility;

8kk. On or about February 27, 2009, $7,100.00 was paid by and at the direction of the Defendants for construction costs for the new facility;

811. On or about March 24, 2009, $10,000.00 was paid by and at the direction of the Defendants for construction services on the new facility;

8mm. On or about March 31, 2009, $9,848.92 was paid by and at the direction of the Defendants for supplies at the new facility;

8nn. On or about March 31, 2009, $6,000.00 was paid by and at the direction of the Defendants for work performed at the new facility;

8oo. On or about April 2, 2009, $8,325.70 was paid by and at the direction of the Defendants as a deposit on a construction contract on the new facility;

8pp. On or about April 16, 2009, $11,09176 was paid by arid at the direction of the Defendants for fees charged to vendors and Lowe's for the new facility;

8qq. On or about April 27, 2009, $13,871.94 was paid by and at the direction of the Defendants for vendor payments for the new facility;

8rr. On or about May 13, 2009, $7,500.00 was paid by and at the direction of the Defendants as a deposit for roof work at the new facility;

8ss. On or about May 13, 2009, $10,000.00 was paid by and at the direction of the Defendants as a partial payment on a contract related to the new facility;

8tt. On or about May 26, 2009, $9,664.61 was paid by and at the direction of the Defendants related to costs of the new facility;

8uu. On or about June 12, 2009, $9,373.13 was paid by and at the direction of the Defendants for a construction invoice on the new facility;

8vv. On or about June 12, 2009, $4,342.18 was paid by and at the direction of the Defendants for a construction invoice related to the new facility;

8ww. On or about June 12, 2009, $4,000.00 was paid by and at the direction of the Defendants for a subcontractor at the new facility;

8xx. On or about June 26, 2009, $2,000.00 was paid by and at the direction of the Defendants for wood framing at the new facility; and

8yy. On or about June 26, 2009, $2,000.00 was paid by and at the direction of the Defendants for sheet rock at the new facility.

9. On or about the dates set forth below, the Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC. and Person A, submitted and caused the submission of Federal Cash Transaction Reports ("CTR") known as "SF 272s" to the DPM for NIH grants which purportedly reconciled the disbursements of federal grant monies made to Defendant GENPHAR, INC. Defendant JIAN-YUN DONG, a/k/a John Dong, Defendant GENPHAR, INC. and Person A caused false certifications to be made on these CTRs, falsely certifying that all disbursements were made for the purposes and conditions of the grant. The following CTRs submitted on the dates as set forth below contained a false certification and resulted in continued payments being made to Defendant GENPHAR, INC.:

	Time Period Covered	Amount	Date(s) CTR Submitted
9a	1/1/2007 to 3/31/2007	$80,085.25	6/1/2007
9b	4/1/2007 to 6/30/2007	$315,027.71	7/6/2007
9c	7/1/2007 to 9/30/2007	$349,548.93	10/10/2007
9d	10/1/07 to 12/31/2007	$232,381.43	2/5/2008
9e	04/01/08 to 06/30/2008	$138,519.06	7/8/2008
9f	7/1/2008 to 9/30/2008	$955,085.51	10/8/2008
9g	10/1/2008 to 12/31/2008	$356,852.26	1/22/2009
9h	7/1/2009 to 9/30/2009	$125,000.00	10/14/2009

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO-NINE
THEFT OF GOVERNMENT PROPERTY

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Count One of this Third Superseding Indictment.

2. Between in or about August 2004, and in or about April 2011, in the District of South Carolina, the Defendants JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC. and VAXIMA, INC., as principals, aiders and abettors and as co-participants in jointly-undertaken criminal activity knowingly and willfully did embezzle, steal, purloin and convert to their own use over $1,000.00 belonging to the United States, by submitting Federal Cash Transaction Reports ("CTR") known as "SF 272s" to the DPM for NIH grants which falsely certified that all disbursements were made for the purposes and conditions of the grant in order to receive federal grant monies as set forth below:

Count	Time Period Covered	Amount	Date(s) CTR Submitted
2	01/01/2007 to 3/31/2007	$80,085.25	06/01/2007
3	4/1/2007 to 6/30/2007	$315,027.71	07/06/2007
4	7/1/2007 to 9/30/2007	$349,548.93	10/10/2007

5	10/1/07 to 12/31/2007	$232,381.43	02/05/2008
6	04/01/08 to 06/30/2008	$138,519.06	07/08/2008
7	7/1/2008 to 9/30/2008	$955,085.51	10/08/2008
8	10/1/2008 to 12/31/2008	$356,852.26	01/22/2009
9	7/1/2009 to 9/30/2009	$125,000.00	10/14/2009

In violation of Title 18, United States Code, Sections 641 and 2.

COUNT TEN
THEFT FROM ORGANIZATION RECEIVING FEDERAL FUNDS

THE GRAND JURY FURTHER CHARGES:

1. The charges contained in Counts One through Nine of this Third Superseding Indictment are hereby realleged and incorporated as if fully set forth herein.

2. That from on or about January 1, 2007, until on or about December 31, 2007, in the District of South Carolina, the Defendant JIAN-YUN DONG, a/k/a John Dong, an agent of GENPHAR, INC., said entity receiving in the above one-year period benefits in excess of ten thousand dollars ($10,000.00) under numerous federal programs from the United States Army Medical Research Acquisition Activity (USAMRAA); the National Institutes of Health (NIH); and the Naval Medical Research Center (NMRC); as a principal, aider and abettor and as a co-participant in

jointly-undertaken criminal activity, embezzled, stole, obtained by fraud and without authority, knowingly converted to the use of a person not the rightful owner, property worth at least five thousand dollars ($5,000.00) which was owned by, under the care, custody, and control of GENPHAR, INC.;

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

COUNT ELEVEN
THEFT FROM ORGANIZATION
RECEIVING FEDERAL FUNDS

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference all of the allegations contained in Counts One through Ten of this Third Superseding Indictment.

2. That from on or about January 1, 2008, until on or about December 31, 2008, in the District of South Carolina, the Defendants JIAN-YUN DONG, a/k/a John Dong, an agent of GENPHAR, INC., said entity receiving in the above one-year period, benefits in excess of ten thousand dollars ($10,000.00) under numerous federal programs from the United States Army Medical Research Acquisition Activity (USAMRAA); the National Institutes of Health (NIH); and the Naval Medical Research Center (NMRC); as a principal, aider and abettor and as a co-participant in jointly-undertaken criminal activity embezzled, stole, obtained by fraud and without authority, knowingly converted to the use of a person not the rightful owner, property worth at least five thousand dollars ($5,000.00) which was owned by, under the care, custody, and control of GENPHAR, INC.;

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

COUNT TWELVE
THEFT FROM ORGANIZATION
RECEIVING FEDERAL FUNDS

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference all of the allegations contained Counts One through Eleven of this Third Superseding Indictment.

2. That from on or about January 1, 2009, until on or about December 31, 2009, in the District of South Carolina, the Defendant JIAN-YUN DONG, a/k/a John Dong, being an agent of GENPHAR, INC., said entity receiving in the above one-year period, benefits in excess of ten thousand dollars ($10,000.00) under numerous federal programs from the United States Army Medical Research Acquisition Activity (USAMRAA); the National Institutes of Health (NIH); and the Naval Medical Research Center (NMRC), as a principal, aider and abettor and as a co-participant in jointly-undertaken criminal activity embezzled, stole, obtained by fraud and without authority, knowingly converted to the use of a person not the rightful owner, property worth at least five thousand dollars ($5,000.00) which was owned by, under the care, custody, and control of GENPHAR, INC.;

In violation of Title 18, United States Code, Sections 666(a)(1)(A) and 2.

COUNTS THIRTEEN-THIRTY FOUR
WIRE FRAUD

THE GRAND JURY FURTHER CHARGES:

1. The Grand Jury realleges and incorporates by reference the allegations contained in Count One of this Third Superseding Indictment.

2. On or about the dates as set forth below, in the District of South Carolina and elsewhere, Defendants JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC., and VAXIMA, INC, as principals, ciders and abettors and as co-participants, for the purpose of executing the above described scheme to defraud, knowingly transmitted and caused to be transmitted federal grant monies in interstate commerce by means of wire communications from DPM located in Rockville, Maryland, to Mt. Pleasant, South Carolina, as set forth below:

Count	Date of Drawdown	Amount Transmitted
13	03/07/2007	$37,320.88
14	03/27/2007	$42,764.37
15	04/16/2007	$45,678.18
16	06/05/2007	$269,349.53
17	8/13/2007	$49,623.66
18	9/24/2007	$299,925.27
19	12/14/2007	$232,381.43
20	4/1/2008	$138,519.06
21	7/2/2008	$58,329.01
22	7/24/2008	$214,472.00

23	8/19/2008	$233,900.00
24	9/9/2008	$228,184.00
25	9/15/2008	$220,200.50
26	10/31/2008	$83,000.00
27	11/7/2008	$156,852.26
28	11/20/2008	$117,000.00
29	4/1/2009	$250,000.00
30	5/6/2009	$211,773.29
31	5/19/2009	$106,852.00
32	5/29/2009	$100,000.00
33	6/12/2009	$100,000.00
34	7/2/2009	$125,000.00

In violation of Title 18, United States Code, Sections 1343 and 2.

FORFEITURE

1. Specified Unlawful Activities:

Upon conviction for one or more violations of Title 18, United States Code, Sections 371 (Conspiracy), 641 (Theft of Government Property), 666 (Theft From an Organization Receiving Federal Funds); and 1343 (Wire Fraud), as charged in this Indictment, the Defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC., and VAXIMA, INC., shall forfeit to the United States any property, real or personal, which constitutes or is derived from any proceeds the Defendants obtained, directly or indirectly, as the

result of such violations and any property traceable to such property.

2. Property:

Pursuant to 18 U.S.C. §§ 981(a)(1)(C), 982(a)(1), and 28 U.S.C. § 2461(c), the property which is subject to forfeiture upon conviction of the Defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR INC., and VAXIMA, INC., for the violations charged in this Third Superseding Indictment includes, but is not limited to, the following:

(A) Cash Proceeds / Personal Money Judgment:

A sum of money equal to all proceeds the Defendants obtained directly or indirectly as the result of the offenses charged in this Superseding Indictment, or traceable to such property, that is, a minimum of $3,622,849.14 in United States currency, for which the Defendants are jointly and severally liable;

(B) Real Property:

All right, title and interest of the Defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC and VAXIMA, INC., in and to certain real property, together with all improvements thereon, and with all rights and easements appertaining, being more fully described as follows:

1. S. Morgan Point Road

Mount Pleasant, SC 29466

Sub-Division: Christ Church Parish

All that certain piece, parcel or tract of land with any and all improvements thereon,

situate, lying and being in Christ Church Parish, Town of Mount Pleasant, Charleston County, South Carolina and containing 2.595 Acres, and designated as Parcel B, and shown on that certain Plat prepared by Atlantic Coast Land Surveying entitled "Subdivision, Recommendation and Property Line Adjustment Plat Showing A New 6.000 Acre "Parcel A" Prepared for University Medical Associates of the Medical University of South Carolina and Oakland Properties, LLC, Created from a 0.128 Acre Parcel With TMS #600-00-00-056, A 0.260 Acre Portion of a Parcel With TMS#600-00-00-055, A 0.749 Acre Portion of a Parcel with TMS #60000-00-057 and A 4.863 Acre Portion of a Parcel with TMS # 600-00-00-047 and a New 2.595 Acre "Parcel B" Created From the Remaining Parcel With TMS # 600-0000-057 and A 0.804 Acre Portion of a Parcel with TMS # 600-00-00-047" dated April 29, 2008, last revised June 17, 2008, and recorded in Plat Book L08 at Page 0162 in the RMC Office for Charleston County, South Carolina.

BUTTING, BOUNDING, MEASURING AND CONTAINING as by reference to said plat will more fully appear. Being the same property conveyed to the Mortgagor herein by deed of Oakland Properties, LLC., dated March 28, 2007 and recorded in Book S627, page 692 in the RMC Office for Charleston County.

TMS #600-00-00-056

(C) Bank Accounts/ Investment Accounts:

All right, title and interest of the Defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR, INC and VAXIMA, INC., in and to the following accounts:

1. Oppenheimer Funds (OIBBX)
   RPSS Tr Simple IRA
   Acct: xxxxx xxxxxx8137
   Registered to: Genphar Inc FBO Jiayun Dong

2. Nationwide Retirement Plans
   Optional Retirement Programs for
   EES 030-00261
   Collegiate Capital Management Plan
   # 030-00261
   Acct: xxx-xx-0403
   Registered to: Jian-Yun Dong

3. South Carolina Deferred Compensation Program State of SC Salary Deferral 401(k) Plan & Trust
   Plan: 98965-01
   Acct: xxx-xx-0403
   Registered to: Jianyun Dong

4. TIAA CREF
   Medical University of SC Optional
   Retirement Program
   Registered to: Jianyun Dong
   Acct #s: TIAA F001525-2;
   TIAA 3506411-2; CREF H001525-8

5. Tidelands Bank
   Mt. Pleasant, SC 29465
   Savings Acct: xxxxx0335
   Registered to: Danher Wang & Jian Yun Dong

6. Tidelands Bank
   Joint Checking Account
   Acct: DDAxxxx01779
   Registered to: Danher Wang, John Dong

7. Tidelands Bank
   Acct: DDAxxxxx03882
   Registered to: John Dong

3. Substitute Assets:

If any of the property described above as being subject to forfeiture to the United States, as a result of any act or omission of the Defendants,

(1) Cannot be located upon the exercise of due diligence;

(2) Has been transferred or sold to, or deposited with a third party;

(3) Has been placed beyond the jurisdiction of the Court;

(4) Has been substantially diminished in value; or

(5) Has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Sections 982(b)(1), [incorporating Title 21, United States Code, Section 853(p)], to seek forfeiture of any other property of the said Defendants up to the value of the above forfeitable property, including but not limited to the following property:

A. Real Property:

All right, title and interest of the Defendants, JIAN-YUN DONG, a/k/a John Dong, GENPHAR,

INC., and VAXIMA, INC., in and to certain real property, together with all improvements thereon, and with all rights and easements appertaining, being more fully described as follows:

(1) 4201 Victory Pointe Lane
Mount Pleasant, SC 29466
Lot 4201, Tract 12

All that piece, parcel or lot of land, lying and being in the Town of Mt. Pleasant, Charleston County, South Carolina, together with any improvements thereon, and being shown and designated as Lot 4201, 16,434 sq.ft. Victory Pointe Drive on a plat prepared by SouthStar Surveying entitled, "A FINAL SUBDIVISION PLAT OF THE BLUFF' AT CHARLESTON NATIONAL TRACT 12 CHARLESTON NATIONAL COUNTRY CLUB TOWN OF MOUNT PLEASANT, CHARLESTON, SOUTH CAROLINA" dated November 15, 1995, revised July 16, 1996, recorded in Plat Book EB at age 379 in the R.M.C. Office for Charleston County, South Carolina. Said lot having such size, shape and dimensions, buttings and boundings as will by reference to the said plat more fully appear.

Said property is conveyed subject to the following:

A. Easement to Southern Bell Telephone & Telegraph Company, dated March 22, 1984, recorded October 22, 1985 in Book B-149 at page 340 in the RMC Office for Charleston County, South Carolina.

B. Easement to South Carolina Power Company dated March 4, 1937, recorded in Book V-39, page 57 in the RMC Office for Charleston County, South Carolina.

C. Easement to South Carolina Power Company dated August 20, 1937, recorded in Book F-37, page 726 in the RMC Office for Charleston County, South Carolina.

D. Easement dated November 3, 1989 from Charleston National Country Club, a SC Partnership to South Carolina Electric and Gas Company in Book X-189 at page 404 in the RMC Office for Charleston County, South Carolina.

E. Agreement between Bulls Bay Rural Community Water District, Oyster Bay Utilities, Inc. and Lifetime Homes of South Carolina, Inc. dated July 31, 1086 and recorded April 21, 1987 in Book F-164 at page 637 in the RMC Office for Charleston County, South Carolina.

F. Subject to the authority of the S.C. Coastal Council in "Critical Areas" as defined in Code of Law of South Carolina, 1976, as amended, Section 48-39-10, et. seq. and rules and regulations promulgated to said Act.

G. Jurisdiction of the U.S. Corps of Engineers with respect to any portion of the property which may constitute wetlands or marshlands or navigable waters.

H. Declarations of Covenants, Conditions, and Restrictions for Charleston National Set forth by East Cooper Golf Co, Inc. Applying to Tracts D & E and Lots 33-39 dated November 13, 1992 and recorded November 23, 1992 in Book R-220 at page 629 in the RMC Office of Charleston County, South Carolina as made applicable to this lot by agreement entitled "Subjection of Lots to Declaration of Covenants, Conditions and Restrictions of Charleston National Properties, LLC." dated September 29,1995 in Book L 260 at page 581 in the RMC Office for Charleston County, South Carolina.

I. By-Laws Charleston National dated January 14, 1993 and recorded on January 21, 1993 in Book W-222 at page 34 in the RMC Office of Charleston County, South Carolina as made applicable to this lot by agreement entitled "Subjection of Lots to Declaration of Covenants, Conditions and Restrictions of Charleston National Properties, LLC." dated September 29, 1995, recorded September 29, 1995 in Book L 260 at page 581 in the RMC Office for Charleston County, South Carolina.

J. Declarations of Covenants, Conditions, and Restrictions Victory Point, Waterfront Lots, dated October 3, 1995, recorded October 11, 1995, in Book X 260 at page 349 in the RMC Office for Charleston County, South Carolina.

K. Declarations of Covenants, Conditions, and Restrictions Victory Point dated September 29, 1995, recorded September 29, 1995 in Book L 260 at page 544 in the RMC Office for Charleston County, South Carolina.

Being the same property conveyed to the Grantor herein by Deed of Theodore M. Solso and Denise L. Solso on August 21, 2000 and recorded in the in the RMC Office for Charleston County, South Carolina at Book M353 page 543 on August 22, 2000.

Lot: 4201, Tax Parcel Number: 599-08-00-017

(2) 441 Lake Moultrie Drive
Bonneau, SC 294691
Berkley County, SC

All that certain lot, piece or parcel of land, known and designated as Lot 2, Section IV, on a plat of Lake Moultrie Shores Subdivision, dated March 23, 1965, recorded in Plat Book 0, at page 176, Clerk of Courts Office for Berkeley County (a/k/a ROD Office for Berkeley County; said lot having such buttings and boundings, measurements and dimensions as are shown on said plat; AND also the assumption of that lease from South Carolina Public Service Authority, dated April 20, 1979.

Subject to those Restrictions outlined in the Deed from Lake Moultrie Shores, Inc. To Edwards A. Riley and Katherine Riley recorded in Book A295, at page 175, k and

those Restrictive Covenants recorded in Book C113, at Page 108; Book C114, at Page 54; and Book C115, at Page 137.

Being same property conveyed to the Granters herein by deed of Edwards A. Riley, Jr. dated July 5, 3003 and recorded in Book 2819 Page 84 in the RMC Office for Berkeley County

Tax Map Number: 057-01-04-004

(3) 40 acres located in St. Clair, Alabama
Titled in the name of Deanne Y. Dong
TMS: 24-04-18-0-001-001.001,
24-04-19-0-006-004.000

Pursuant to Title 18, United States Code, Sections 981(a)(1)(C), 982(a)(1) and Title 28, United States Code, Section 2461(c).

A TRUE BILL

/s/ [redacted]
Foreperson

/s/ William N. Nettles (MCM)
United States Attorney