

NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

BARBARA LANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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APPENDIX A**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

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Case No. 15-5997

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT****FILED**
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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
BARBARA LANG,	)	DISTRICT OF TENNESSEE
	)	
Defendant-Appellant.	)	OPINION

BEFORE: KEITH, ROGERS, and McKEAGUE, Circuit Judges.

McKEAGUE, Circuit Judge. This is a criminal appeal following a lengthy trial. A federal jury convicted Barbara Lang of running a “pill mill” in Tennessee and structuring cash deposits to avoid U.S. Treasury reporting requirements. She appeals on a host of evidentiary, constitutional, and sentencing issues. We **AFFIRM**.

I

After a twenty-six-day trial, a federal jury convicted Lang on twenty-one counts of federal drug and money-laundering charges. The district court imposed a 280-year sentence. Specifically, Lang was convicted under three separate statutes:

- Conspiring to distribute controlled substances (two counts), 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C), (b)(2);
- Maintaining drug-involved premises (five counts), 21 U.S.C. § 856(a)(1);
- Structuring cash deposits to evade reporting requirements (fourteen counts), 31 U.S.C. §§ 5313(a), 5324.

Case No. 15-5997, *United States v. Lang*

The jury acquitted Lang on one drug-involved-premises count and seven structuring counts. After the government rested, the court, on Lang's motion, entered a judgment of acquittal on a charge of obstructing the due administration of the Internal Revenue Code. 26 U.S.C. § 7212(a).

Lang and her daughter (Faith Blake) operated a pain clinic called Superior One ("Superior") in Tennessee. The clinic employed one medical director (a licensed doctor), several nurse practitioners, and other para-physician staff members. Neither Lang nor Blake was a medical professional; instead, their ostensible role was to manage the clinic's non-medical affairs. Lang, for example, led the clinic's Bible studies.

The U.S. Drug Enforcement Agency ("DEA") eventually suspected that Superior was a "pill mill," which is a clinic that dispenses drugs with no legitimate purpose. The evidence supporting this suspicion was substantial. At all hours of the day, the line to enter Superior was long, and patients frequently waited all day to get an appointment. Nearly all of the people who observed the clinic's patients—neighbors, city officials, other patients, and employees alike—were convinced that most of Superior's patients were drug addicts. For example, witnesses observed many patients with "track marks" on their arms and patients who were "strung out," "zombified," and "out of it." One witness testified that the scene reminded him of a drug house.

Through surveillance and investigation, the DEA confirmed its suspicion. It obtained wiretaps for Lang's cell phone, where agents recorded conversations between Lang and a well-known drug dealer, John Goss. In these conversations, Lang invited Goss to bring his buyers to her clinic, and Goss routinely asked Lang to let his clients skip the line. Lang was well-aware that Goss was an active drug dealer. An undercover agent (Mark Delaney) posed as a patient and was eventually able to obtain access to a provider at the clinic who gave him excessive pain medication without much examination and without viewing any medical records. Several other

Case No. 15-5997, *United States v. Lang*

employees of the clinic, concerned about the activity there, passed along information to the DEA. The DEA was also informed that, on at least one occasion, Blake ordered a doctor to prescribe pain medication to a patient even though the patient did not need it.

Blake, however, eventually started illegally obtaining pain medication for herself. This caused her attendance at the clinic to lapse, and Lang stepped in to fill the void, sometimes seeing patients on her own, even though she had no medical training. Lang eventually discovered that Blake was giving drugs to her twelve-year-old child—Lang's grandson. This fact sparked a fight between the two women that eventually led to the resignation of the medical director and the closure of Superior for good.

After Superior closed, the two women formed their own medical clinics. Lang's clinic was named Primary Care ("Primary"), and Blake's clinic was named Elite Care ("Elite"). Lang retained many of the patients who previously attended Superior, and some of the medical staff followed her there as well. Lang made some attempts to run Primary legally, but it still suffered from many of the same issues. For example, soon after Primary opened, Lang called Goss and suggested that he start bringing his customers to her clinic. Lang also ordered her physicians to issue prescriptions, even when the doctors did not think the prescriptions were warranted.

These issues led the DEA to continue investigating Lang and Primary. Eventually, the DEA raided Primary, Elite, and Lang's home. The evidence gathered during the government's investigation and surveillance was eventually used to indict Lang, Blake, and several other members of the clinics' staff on federal drug and money-laundering charges. During trial preparation, the government turned over a sample of the clinics' paper medical records to their expert witness, Dr. Kloth, who concluded that the overwhelming majority of the prescriptions issued to these patients lacked a legitimate medical purpose.

Case No. 15-5997, *United States v. Lang*

The government presented substantial evidence to the jury. To make its case, the government called several codefendants who had pled guilty under a cooperation agreement, its expert witnesses, the clinic's neighbors, several patients who had been addicted to the pain medication prescribed by the clinic, and the law enforcement agents involved in the investigation. Lang defended by insisting that the prescriptions were legitimate and that she had no knowledge of any illegality occurring at either clinic. The jury convicted her on twenty-one of the twenty-nine counts remaining at the close of the proofs.

At sentencing, the court found Lang's base offense level to be 38. After enhancement, her offense level was set at 43, carrying a recommended sentence of 3,360 months' imprisonment—an effective life sentence. Lang spoke for over an hour in a plea for mercy, asserting that she never meant to break the law and presenting many characters from the Bible and U.S. history as her life inspirations. The district judge, unimpressed, sentenced Lang according to the Guidelines. The court reasoned that the need for general deterrence and retributive punishment were compelling, considering the size of the conspiracy, the prescription drug epidemic, and Lang's refusal to acknowledge her own culpability.

This appeal followed. Additional facts are supplied in the analysis when necessary.

II

Lang appeals her conviction on six grounds: (A) the district court erroneously admitted evidence of her financial misdeeds through an IRS Agent; (B) the district court improperly admitted the testimony of the government's medical expert; (C) the district court improperly admitted evidence of an overdose death, news articles about investigations of other medical clinics, and a chronology found in her desk; (D) the district court improperly denied her Fourth Amendment motion to suppress; (E) the trial resulted in cumulative error; and (F) the

Case No. 15-5997, *United States v. Lang*

government presented insufficient evidence to sustain her drug convictions. She also argues that the district court imposed an unlawful sentence. None of these arguments have merit.

A

Lang's first argument revolves around an IRS Agent's testimony that the government offered in pursuit of an obstruction charge in the indictment (Count 91). *See* 26 U.S.C. § 7212(a) (obstructing the due administration of the Internal Revenue Code (IRC)). She contends that Count 91 was defective as charged, and should have been dismissed during pretrial motion hearings. The district court found before trial that the count was properly charged, but entered a judgment of acquittal after the government's case for lack of evidence.

Since Lang was not convicted on the obstruction count, she can only win if she can show some other prejudice from the court's refusal to dismiss the count before trial. Her appeal therefore focuses on the relevancy of the IRS Agent's testimony. This agent (Don Lemons) testified about Lang's financial misdeeds during the government's case-in-chief. Lang argues that the admission of this testimony requires us to grant her a new trial. Her theory involves two steps. First, Agent Lemons's testimony was unfairly prejudicial and was only relevant to the obstruction charge. Thus, it would have been excluded if the court had granted her motion to dismiss Count 91 before Agent Lemons testified. Second, the indictment on Count 91 was legally defective—and therefore should have been dismissed—because it did not allege knowledge of a discrete, official IRS action. Because Lang's arguments fail on the first issue, we do not reach the second.

Case No. 15-5997, *United States v. Lang*

1

The government responds to Lang's arguments by saying that Agent Lemons's testimony was relevant to other charges in the indictment, not just Count 91. The government is mostly correct. Even where it is wrong, any error was harmless.

Generally, we review evidentiary rulings on relevance and unfair prejudice for an abuse of discretion. *United States v. Jackson-Randolph*, 282 F.3d 369, 375 (6th Cir. 2002). We review unpreserved evidentiary objections for plain error. *United States v. Kelly*, 204 F.3d 652 (6th Cir. 2000); Fed. R. Evid. 103. If counsel raises objections in a motion *in limine* but the court defers its ruling or makes its decision "in any way qualified or conditional," then "the burden is on counsel to raise objection [at trial] to preserve error." *United States v. Poulsen*, 655 F.3d 492, 510 (6th Cir. 2011) (quoting *United States v. Brawner*, 173 F.3d 966, 970 (6th Cir. 1999)).

The bulk of Lang's pretrial motions focused on her objections to the indictment. However, at the end of Lang's supplemental brief and during oral argument on the motion, Lang's counsel protested that the testimony would be irrelevant and unfairly prejudicial—clear allusions to Rules 401 and 403 of the Federal Rules of Evidence. The court indicated it would file a written ruling on the motions. But nowhere in the court's memorandum and order did it consider whether the evidence would be relevant to other counts in the indictment if the court dismissed Count 91 at a later time.

Thus, Lang's counsel bore the burden of reminding the court at trial that she would object on relevance or undue prejudice grounds if Count 91 were dismissed. This is particularly true in a twenty-six-day jury trial where the district judge cannot possibly be expected to remember every nuance of the parties' arguments. Nowhere during Agent Lemons's testimony did Lang's

Case No. 15-5997, *United States v. Lang*

counsel object on these grounds and give the district court the opportunity to consider that objection. We therefore find this argument to be forfeited, and we apply plain-error review.

2

There was no plain error in admitting the agent's testimony. A district court commits plain error in admitting evidence only if: (1) it commits an error; (2) the error is obvious; (3) the error affects substantial rights; and (4) the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Demjanjuk*, 367 F.3d 623, 629 (6th Cir. 2004) (quoting *Johnson v. United States*, 520 U.S. 461, 466–67 (1997)).

Agent Lemons's testimony was mostly relevant. Under Rule 401, evidence is relevant "if it has any tendency to make a fact more or less probable than it would be without the evidence," and if "the fact is of consequence in determining the action." Fed. R. Evid. 401. This threshold is low, and evidence is relevant if it "advance[s] the ball" one inch. *Dortch v. Fowler*, 588 F.3d 396, 401 (6th Cir. 2009). Evidence of financial irregularities has long been admissible in white-collar crime and narcotics prosecutions to show the defendant's intent, knowledge, motive, or to explain the source of income. *Jackson-Randolph*, 282 F.3d at 377.

Here, Lang's relevance objections focus primarily on two subjects. First, she argues that her failure to file tax returns and underreporting of income was not relevant to any issue except Count 91. But Lang's main defense was (and is) that Primary was a legitimate business. The failure to file tax returns or the underreporting of income casts some doubt on that contention, which is all Rule 401 requires. See *Jackson-Randolph*, 282 F.3d at 377; *United States v. Martinez*, 430 F.3d 317, 335 (6th Cir. 2005) (holding testimony admissible to rebut defense characterization of the evidence).

Case No. 15-5997, *United States v. Lang*

Furthermore, this evidence was relevant to the structuring charges. Lang's failure to file tax returns for an entity also tends to prove that her motive in structuring the same entity's cash deposits was unlawful. *See, e.g., United States v. Abboud*, 438 F.3d 554, 581–82 (6th Cir. 2006). This is particularly true considering Agent Lemons's statement that the IRS often collaborates with other federal agencies (such as the U.S. Treasury and the DEA) while investigating crimes. In other words, financial irregularities or drug activity may alert the IRS to potential tax violations, and vice versa. A savvy criminal, eager to avoid detection by both the DEA and the IRS, might intentionally structure his or her financial matters to avoid triggering these bureaucratic "trip wires." There was no plain error in finding that this evidence was relevant.

Second, Lang objects to the testimony that she may have embezzled or "skimmed" cash from her employer before depositing it. However, this evidence was relevant to the structuring charges, because it had some tendency to show willfulness and dishonest intent in structuring the deposits. *See, e.g., Abboud*, 438 F.3d at 581–82 (paying employees under the table admissible to prove lack of mistake or accident in prosecution for willful violation of tax laws). It also would be admissible to show Lang's control over the funds and her opportunity to commit the structuring offenses. *See United States v. Jobson*, 102 F.3d 214, 221 (6th Cir. 1996) (holding gang membership admissible to show access to unlawful firearms or opportunity to commit the charged offense). Additionally, we have held that uncharged financial misconduct that is "inextricably intertwined" with the charged conduct may be admitted as "evidence of a single criminal episode." *United States v. Aldridge*, 455 F. App'x 589, 594 (6th Cir. 2012); *United States v. Tarwater*, 308 F.3d 494, 516–17 (6th Cir. 2002).

Here, Lang allegedly skimmed cash from the very deposits she was accused of structuring. This evidence was therefore relevant to explain the disparity between the clinics'

Case No. 15-5997, *United States v. Lang*

income and the amounts Lang deposited. This fact also has a tendency to show that Lang was, indeed, not running a lawful business—a fact which undermined Lang’s primary defense. A cash-only business is generally lawful, but the lack of electronic accounting mechanisms makes it necessary to keep accurate cash-flow records. An owner’s *deliberate* attempts to hide the amount of cash flowing into her business generates enough suspicion of illicit behavior to satisfy Rule 401. There was no plain error in finding that this testimony was relevant.¹

Alternatively, Lang contends this evidence was unfairly prejudicial under Rule 403. “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . .” Fed. R. Evid. 403. The district judge has broad discretion in ruling on unfair-prejudice objections, but the standard is even more deferential here because the trial court was not afforded the opportunity to consider the objection. *Demjanjuk*, 367 F.3d at 629. Even then, the cards are stacked in favor of admissibility—only when the risk of prejudice is both *unfair* and *substantially weightier* than any probative value does the court have discretion to exclude the evidence. Fed. R. Evid. 403.

Here, the evidence of Lang’s failure to file tax returns and skimming cash was certainly prejudicial. But the record does not show that this prejudice was *plainly unfair*, as contemplated by Rule 403 and as required by the plain-error standard. Perhaps it would be different if a financial crime was entirely collateral to the charged offenses. *See Old Chief v. United States*, 519 U.S. 172, 174 (1997). But both pieces of evidence have substantial probative force here, and any unfair prejudice that resulted from their admission is simply not enough to require reversal.

¹ Lang’s counsel contended at argument that the testimony was only evidence of general criminal intent, not the specific criminal intent required by the statutes. Although this distinction is critical in determining what the government must prove, *United States v. Odeh*, 815 F.3d 968 (6th Cir. 2016), it has far less importance in deciding issues of relevance. A fact need not carry the party’s entire case to be relevant. *Dortch*, 588 F.3d at 401. Proof of general criminal intent has some tendency to prove specific intent to commit the charged crime, although it cannot sustain a conviction by itself. On plain-error review, Lang has not shown that this evidence was so far outside the realm of relevance that there was a fundamental miscarriage of justice.

Case No. 15-5997, *United States v. Lang*

3

The last part of Agent Lemons's testimony, however, was relevant only to the obstruction count. But any error was harmless. Error in admitting testimony is harmless "unless it is more probable than not that the error materially affected the verdict." *United States v. Pritchett*, 749 F.3d 417, 432–33 (6th Cir. 2014) (quoting *United States v. Clay*, 667 F.3d 689, 700 (6th Cir. 2012)). Thus, admitting irrelevant or prejudicial testimony is harmless if other factors provide "fair assurance" that the conviction was not influenced by the error. *Id.*

Towards the end of his testimony, Agent Lemons testified about the impact Lang's actions had on the IRS. When asked whether he was able to reconstruct how much tax Superior and Lang owed to the IRS, the following exchange ensued:

[Agt. Lemons]: No. There wasn't enough records, enough documents of any kind, to determine how much was—how much was brought in, how much was paid out, expenses, how much was paid to the employees. We just had no way to determine those figures.

[AUSA]: And what effect did that have on your ability to collect taxes and to hold people responsible under federal law for the income taxes they owe?

[Agt. Lemons]: It really kind—it really shuts us down, because, like we had talked about at the very beginning, the whole system is voluntary, it depends on each one of us reporting—including the businesses, reporting how much they pay everybody, and then it's dependent upon us as taxpayers to file our own tax return and pay that. But if we don't have any records or any way to track that, especially from the employer's side, we just have no way to determine that.

Unlike his earlier testimony, this statement is relevant only to the obstruction charge. Indeed, it has little probative value other than to "dirty up" Lang in front of the jury. Fed. R. Evid. 403; 404(a). It is no secret that tax cheats are unpopular with taxpayers, a fact that has the potential to stir up the unfair prejudice spoken of by Rule 403.

Even if this testimony should have been excluded under Rule 403, its admission was harmless error. Lang has not shown us that "it is more probable than not that the error materially

Case No. 15-5997, *United States v. Lang*

affected the verdict.” *Pritchett*, 749 F.3d at 432–33. Perhaps the most telling fact on this point is that the jury was remarkably precise when it convicted Lang. Of the six drug-involved-premises counts, the jury only convicted her on five. Similarly, the jury convicted Lang on only fourteen of the twenty-one structuring counts. We have held in other contexts that acquittal on the relevant charges indicates a lack of unfair passion in deliberations. *See, e.g., United States v. Throneburg*, 921 F.2d 654, 658 (6th Cir. 1990); *United States v. Ferguson*, 385 F. App’x 518 (6th Cir. 2010). Here, a jury enraged by evidence of tax evasion would be inclined to convict on all counts to express its disapproval of the defendant’s greed. The fact that the jury decided the case with precision is strong evidence that the jurors set aside any irrational impulses and decided the case based on the evidence presented, as they were required to do. We therefore find no reversible error in admitting Agent Lemons’s testimony. Thus, we need not—and do not—express any opinion on whether Count 91 was constitutionally defective.

B

Next, Lang makes two arguments aimed at excluding the government’s expert witness, Dr. Kloth. First, she argues that the district court should have held a *Daubert* hearing on the reliability of Dr. Kloth’s methods, contending that he failed to review crucial evidence—specifically, Primary’s electronic medical records (“EMRs”). Second, she contends that the district court erred in refusing to strike Dr. Kloth’s testimony when confronted with the EMRs. Both objections are without merit.

Daubert requires that expert testimony be “not only relevant, but reliable.” *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589–90 (1993). To that end, the district court is required to act as a gatekeeper, drawing the line between junk science on one hand and legitimate methods on the other. *Id.* Because the district judge is in the best position to make reliability

Case No. 15-5997, *United States v. Lang*

determinations, we will only reverse for an abuse of discretion. *See Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 915–16, 919 (6th Cir. 2009). De novo review applies “only where the district court excludes expert testimony on the basis of an incomplete record, or after conducting nothing more than a perfunctory review.” *Id.* at 915. Forfeited evidentiary objections are reviewed for plain error. *United States v. Poulsen*, 655 F.3d 492, 510 n.6 (6th Cir. 2011).

1

Lang argues first that the district court denied her *Daubert* motion based on an incomplete record. But this argument was forfeited because Lang never asserted below that the record was incomplete. *See Vance v. Wade*, 546 F.3d 774, 781 (6th Cir. 2006). The district court received not one, but two sets of *Daubert* motions on Dr. Kloth's testimony. It also received Dr. Kloth's expert reports. Nowhere in Lang's pretrial briefing or motions did she mention the EMRs she claims were necessary to a full record. Instead, she made vague complaints about the chain of custody and scientific sampling. Indeed, the first time Lang mentioned EMRs was in her motion to strike, after Dr. Kloth testified and long after the appropriate time for a *Daubert* hearing had passed. At least in the context of a motion for a *Daubert* hearing, Lang forfeited her right to have the EMRs considered as part of the gatekeeping inquiry by failing to specify them in her motion.

Lang's second argument meets a similar fate. She contends that the court engaged in a “perfunctory review” of the record by not addressing her “objection related to the incomplete patient files.” But Lang never raised the EMR objection specifically in her motion, and so she can hardly complain that the court's review was perfunctory on this issue. The district court was not obligated to do Lang's work for her. Therefore, Lang has forfeited this argument as well.

Case No. 15-5997, *United States v. Lang*

Lang's counsel maintained at oral argument that he did actually identify this issue in his initial *Daubert* motion. The Court then read the relevant pages of the motion on the record for clarity. The crucial parts of the motion stated:

[T]here is nothing to suggest that the patient files at the time law enforcement first obtained them, were the same patient files used by [the clinics] at the time when they were prescribing prescriptions to their patients. These patient files appear to have been stored, moved, and kept by a variety of different individuals over several months. The files appear to have traveled over state lines and appear to have several custodians at certain times and no custodian at other times. The chain of custody of these files is certainly at issue and calls into question the credibility of the files themselves.

R. 246, Second Mot. for *Daubert* Hr'g, PID 1147–48. The quoted language asserts only two things: (1) that law enforcement might not have obtained the *correct* files; and (2) that the content of the files might be *inaccurate* because of their dubious chain of custody. But this is clearly *not* an objection that the files were incomplete because they lacked EMRs. Counsel does not preserve an objection simply by making a vague, global objection that evidence *might* be imperfect.² See Fed. R. Evid. 403(a)(1)(B) (“a party, on the record, [must] . . . state[] the specific ground” for an objection). Otherwise, every objection to a piece of evidence, no matter how obscure, would preserve *all* arguments on that evidence for appellate review. This, of course, would defeat the whole reason for having a contemporaneous-objection rule—to let the district court address the argument in the first instance. Lang's gatekeeping arguments are forfeited.

In light of Lang's forfeiture, plain-error review applies to both of her gatekeeping arguments. Expert testimony on whether prescriptions are medically appropriate has long been the norm in controlled-substance prosecutions. See *United States v. Word*, 806 F.2d 658, 662–64 (6th Cir. 1986); *United States v. Hughes*, 895 F.2d 1135, 1144–45 (6th Cir. 1990). We have

² Counsel expressed frustration during oral argument that he “does not know how to make it any clearer.” We are not so pessimistic about trial attorneys' ability to be precise. Simply saying, “Your honor, we have reason to believe that the clinics used electronic medical files not provided to the expert” would have sufficed to put the district judge on notice of the objection. The judge would, presumably, have then asked the government if this was true, and proceeded to resolve the issue—perhaps at a *Daubert* hearing.

Case No. 15-5997, *United States v. Lang*

acknowledged that—while not always necessary—it sometimes makes sense for the expert to provide an opinion on the files at issue in the case, rather than just stating generally appropriate practices. *Word*, 806 F.3d at 662–64. The district court found that Dr. Kloth reviewed the paper files of each patient on which he offered an opinion, and limited his testimony to those subjects. Absent a timely objection, there is no plain error in the district court’s apparent belief that the paper files would be sufficient for a doctor to render a minimally reliable opinion.

The cases *Lang* cites do not change the outcome here. In these cases, we could not identify *any* factual findings on reliability in the record. *Mike’s Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 407 (6th Cir. 2006) (concluding that the district court failed to “make any findings” on reliability); *United States v. Smithers*, 212 F.3d 306, 315 (6th Cir. 2000) (same); *Busch v. Dyno Nobel, Inc.*, 40 F. App’x 947, 961 (6th Cir. 2002) (reversing when the district court’s ruling was “a mere recitation of the standard to be applied”). Here, the district court found that Dr. Kloth reviewed the patients’ files and would give an opinion only on those patients. This is not plainly an abdication of the court’s gatekeeping function, and so we uphold the court’s decision not to hold a *Daubert* hearing.

2

Lang next argues that, in any event, the court abused its discretion in not striking Dr. Kloth’s testimony once the EMRs came to light. We disagree. The *Daubert* standard is liberal, and it does not require expert opinions to be bulletproof. *Daubert*, 509 U.S. at 596. Instead, “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” *Id.* Thus, as in all cases, a jury is free to disbelieve expert testimony that it finds to be flawed. *Id.*; see also *United States v. Conatser*, 514 F.3d 508, 518–19 (6th Cir.

Case No. 15-5997, *United States v. Lang*

2008). The district court is also free to take the issue from the jury if it finds that no reasonable juror would be able to credit the testimony. *Daubert*, 509 U.S. at 596. We review reliability findings for an abuse of discretion. *Ky. Speedway*, 588 F.3d at 919. An abuse of discretion only exists if this court is “left with a definite and firm conviction that [the district court] committed a clear error of judgment.” *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir. 2008) (quoting *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 781 (6th Cir. 2002)).

We first address some of the cases Lang cites in support of her insufficient-data claim. She correctly points out that “[a] district court is not required to admit expert testimony ‘that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.’” *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 254 (6th Cir. 2001) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). However, she overlooks the discretionary nature of this standard—what a district court *may* do and what it *must* do are two different things. For this reason, none of the Sixth Circuit cases that Lang cites in favor of reversal are helpful. In every case, we found no abuse of discretion. *Ask Chems., LP v. Computer Packages, Inc.*, 593 F. App’x 506, 510–11 (6th Cir. 2014); *Jack Henry & Assoc. v. BSC, Inc.*, 487 F. App’x 246, 257 (6th Cir. 2012); *Coffey v. Dowley Mfg., Inc.*, 89 F. App’x 927, 931–32 (6th Cir. 2003); *Kolesar v. United Agri Prods., Inc.*, 246 F. App’x 977, 981 (6th Cir. 2007).

Since *Daubert*, we have only ordered a district judge to exclude expert testimony twice. *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 667–68 (6th Cir. 2010); *Mike’s Train House*, 472 F.3d at 467. In both *Tamraz* and *Mike’s Train House*, however, the primary concern was with the expert’s methods, not the factual basis of his opinion. In *Mike’s Train House*, we found the expert’s testimony wanting because he conjured his methods from thin air and lacked the

Case No. 15-5997, *United States v. Lang*

basic technical knowledge that would render an opinion trustworthy. 472 F.3d at 407–08. In *Tamraz*, we reversed because the expert’s opinion “was at most a working hypothesis, not admissible scientific ‘knowledge.’” 620 F.3d at 670. Like a hunch, an untested and unvalidated hypothesis may be correct, but it cannot be *knowledge*, since it is not based on sufficient facts or data and is not the product of reliable methods. *Id.* While acknowledging that *Daubert* “does not require anything approaching absolute certainty,” we reasoned that “so long as there is a line, some forms of testimony may cross it, and that happened here. [The expert]’s opinion contains not just one speculation, but a string of them At some point, the train becomes too long to pull and the couplings too weak to hold the cars together.” *Id.* at 671–72.

Thus, the only times a district judge has abused its discretion by admitting an expert is when it turns a blind eye to methods that are quite obviously made up. To be sure, there could be other grounds on which a court would improperly admit an expert. But the lesson to be learned from *Tamraz* and *Mike’s Train House* is that unless the expert is clearly relying on “alternative facts” to support his or her opinion, we will trust the district court’s judgment. We alluded to this standard soon after *Daubert* was decided:

Expert testimony is not inadmissible simply because it contradicts eyewitness testimony. Expert testimony, however, is inadmissible when the facts upon which the expert bases his testimony contradict the [physical] evidence Because the factual underpinnings of the expert’s testimony are sound, his testimony is admissible. For plaintiffs to succeed on this issue, they would have had to present facts that plainly contradict the physical evidence

Greenwell v. Boatwright, 184 F.3d 492, 497–98 (6th Cir. 1999).

There is some merit to Lang’s argument that an expert cannot “cherry-pick” only favorable data. As Judge Agee recently pointed out in a Fourth Circuit concurrence, cherry-picking data is just as bad as omitting it or making it up altogether. *EEOC v. Freeman*, 778 F.3d 463, 468–71 (4th Cir. 2015) (Agee, J., concurring) (citing *EEOC v. Kaplan Higher Educ. Corp.*,

Case No. 15-5997, *United States v. Lang*

748 F.3d 749 (6th Cir. 2014)). Although Rule 702 does not require an expert to consider *all* the facts and data available, it does require the factual basis of his opinion to be *sufficient*. Fed. R. Evid. 702. Consequently, an expert may not be permitted to testify to the jury when his opinion rests only on facts that “plainly contradict” undisputed evidence. *Greenwell*, 184 F.3d at 498. Therefore, the question is whether, in light of the record as a whole, we are firmly convinced that the record plainly contradicts Dr. Kloth’s factual basis. *In re Scrap Metal Antitrust Litig.*, 527 F.3d at 528. We are not convinced.

Lang focuses on the two patients that were only seen at Primary—Rasso and Easterly—and so we limit our analysis to those patients.³ We start with Rasso. Dr. Kloth concluded that Rasso’s paper file contained “inadequate documentation” to justify certain prescriptions. Lang protests that the EMRs contradict this finding because they included records of a physical examination and rationales for the prescriptions. Although this is strictly true, Dr. Kloth relied on a host of other facts when coming to his conclusion, and Lang offers no argument to explain how these facts were contradicted by the EMRs. Lang cannot exclude an expert’s entire opinion by removing one brick from the wall. Evaluating the impact of this small discrepancy was properly placed in the hands of the jury.

Lang makes similar arguments about Easterly’s records. As with Rasso, Dr. Kloth lamented the lack of patient history and medical documentation in the paper file. Lang again argues that the EMRs answer this question by recording the results of a physical examination of the patient. Again, this is true, but beside the point. Dr. Kloth’s report relies on more than this one fact to support his conclusion, and Lang does not argue that the EMRs have an impact on any of those other facts. Based on these records, Lang has not shown that the district court

³ Lang does not develop her argument regarding the other eight patients covered by the EMRs. These patients were also seen at Superior (which used paper records and no EMRs), and so Dr. Kloth’s testimony about them is not subject to attack under this theory.

Case No. 15-5997, *United States v. Lang*

abused its discretion. Dr. Kloth may have been unaware of some relevant data, but he was aware of enough data for his opinion to be sufficient under *Daubert*. Lang was free to impeach Dr. Kloth, to introduce the EMRs as contrary evidence, and to argue the incompleteness to the jury. *Daubert*, 509 U.S. at 596. In other words, she makes arguments about the weight of the evidence, rather than its admissibility. The district court therefore did not abuse its discretion in denying the motion to strike.

C

Lang raises three more evidentiary arguments on appeal. She insists that the district court erred in: (1) excluding fourteen defense witnesses, (2) admitting various pieces of irrelevant or unfairly prejudicial evidence, and (3) failing to exclude inadmissible hearsay. We review evidentiary rulings for an abuse of discretion. *United States v. Adams*, 722 F.3d 788, 810 (6th Cir. 2013). Lang has not established any reversible error.

1

At the beginning of her case-in-chief, Lang attempted to call fourteen medical providers from Superior, Primary, and Elite. The government objected, protesting that it had not been given the required notice of expert testimony under Federal Rule of Criminal Procedure 16(b)(1)(C). The defense responded by contending that these individuals were lay witnesses who are not subject to the disclosure requirements. The court barred Lang from calling these witnesses, finding that they were experts and that Lang had not given the required notice.

This was not an abuse of discretion. A lay witness may not give an opinion “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701(c). Although a doctor may properly be called as a lay witness to testify about facts and treatment, she may *not* testify about the connection between the two without being qualified

Case No. 15-5997, *United States v. Lang*

as an expert—in other words, she may not explain why treatment was medically necessary or appropriate. See *United States v. Volkman*, 797 F.3d 377, 388–90 (6th Cir. 2015); *United States v. Kirk*, 584 F.2d 773, 785 (6th Cir. 1978).

Lang’s argument is perplexing in this regard. She argued below that these witnesses should be able to say “why a physician wrote a specific prescription on a specific day, [and] whether the doctor believed that the patient needed that prescription at the time.” On appeal, Lang mirrors this argument, contending that the testimony was “highly relevant to the jury’s consideration of whether prescriptions were legitimate,” and complains that they were necessary to rebut Dr. Kloth’s opinion that the prescriptions were illegitimate. But this is classic expert testimony. To opine on *why* a physician wrote a specific prescription and *why* the patient needed it takes specialized medical knowledge, and is therefore a medical judgment subject to Rule 702. See *Volkman*, 797 F.3d at 388–90. Lang’s citation of *United States v. Wells* is not to the contrary. 211 F.3d 988 (6th Cir. 2000). *Wells* predates the amendment to Rule 701 prohibiting expert testimony by lay witnesses; more importantly, however, the doctors in *Wells* testified about facts, not causes, rationales, or medical justifications. *Id.* at 998. The district court did not abuse its discretion in finding that these witnesses were undisclosed experts.

The district court also did not abuse its discretion in barring Lang from presenting the witnesses. The court found that Lang’s failure to disclose the witnesses was a tactical ambush, designed to circumvent Rule 702 and avoid revealing her witnesses to the other side. Considering Lang’s consciousness of the witnesses’ expert purpose, the timing of the ambush, Lang’s ample opportunity to disclose the witnesses, and the length of the trial, the district court did not abuse its discretion in barring Lang from presenting these witnesses.

Case No. 15-5997, *United States v. Lang*

Lang's constitutional argument requires only brief treatment. Obviously, neither Rule 16 nor the district court's use of it can violate Lang's right to call witnesses and present a complete defense. *United States v. Blackwell*, 459 F.3d 739, 752 (6th Cir. 2006). But Lang's argument is foreclosed by *Taylor v. Illinois*, where the Supreme Court held that exclusion is one of the many proper sanctions a judge may impose for willful discovery violations. 484 U.S. 400, 410–16 (1988). As *Taylor* reasoned, a defendant's constitutional right to call witnesses in his favor does not include the right to ambush the government with them. *Id.* (“[O]ne cannot invoke the Sixth Amendment as a justification for presenting what might be a half-truth.”) (quoting *United States v. Nobles*, 422 U.S. 225, 241 (1975)). The exclusion of the defense witnesses therefore did not violate the Constitution.

2

Next, Lang makes a mixture of relevance and unfair-prejudice objections. Under Rule 401, evidence is relevant “if it has any tendency to make a fact more or less probable than it would be without the evidence,” and if “the fact is of consequence in determining the action.” Fed. R. Evid. 401. This threshold is low, and evidence is relevant if it “advance[s] the ball” one inch. *Dortch v. Fowler*, 588 F.3d 396, 401 (6th Cir. 2009). Additionally, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice” Fed. R. Evid. 403. Both rules strongly favor admissibility—the only problematic evidence is that which evokes *unfair* prejudice that *substantially outweighs* any material, probative value provided. *Id.* As one court has aptly described the standard:

In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion. What is meant here is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one. In the pungent phrase of Judge

Case No. 15-5997, *United States v. Lang*

Sloan . . . the party “is entitled to hit as hard as he can above, but not below, the belt.”

People v. Vasher, 537 N.W.2d 168, 172 (Mich. 1995) (internal citations omitted).

Reversals on Rule 403 grounds are few and far between. Particularly when a district judge admits prejudicial evidence after performing the required balancing on the record, we have reversed for an abuse of discretion only once under the modern rules. *Adams*, 722 F.3d at 832. Here, Lang objects to three pieces of evidence: (1) questions about the overdose death of a patient, (2) a news article about a pain clinic in another city, and (3) a news article about Superior.

Lang attacks the overdose death first. In her defense, Lang called Patterson, a nurse at Primary. Patterson testified that her patients were “legitimate pain patients.” On cross-examination, the government sought to ask Patterson about whether she knew if any of her patients had died from an overdose, and specifically whether she had heard that James Treadway (one of her patients) had died from an oxycodone-fluoxetine overdose shortly after Patterson prescribed oxycodone to him. The government did not pursue this subject during its case-in-chief.⁴ The court admitted the evidence over Lang’s objections, reasoning that since Patterson adamantly refused to follow Lang’s direction, the questions would only prejudice the witness, not the defendant.

The district court was correct. Attacks on a witness’s credibility are always relevant. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974); *United States v. Moore*, 917 F.2d 215, 222 (6th Cir.

⁴ Lang complains that, before trial, the government promised not to “introduc[e] evidence that [Lang was] responsible for [Treadway’s] death,” and that the government violated this promise. We are not convinced. Even assuming this amounted to a binding promise, the government did not break that promise. The government simply used evidence of the death to test *Patterson’s* credibility. Nowhere did the government attempt to attribute the death to Lang. It is well-established that the government has wide latitude in attacking the credibility of a witness by exposing reasons why he or she ought not to be believed, and Lang cites no authority for the position that these questions amounted to reversible error. *See, e.g., United States v. Dexta*, 136 F. App’x 895, 906 (6th Cir. 2005); Fed. R. Evid. 611(b).

Case No. 15-5997, *United States v. Lang*

1990); Fed. R. Evid 611(b). Thus, good-faith questions about whether Patterson knew that her patient had died from an overdose soon after she prescribed a large dose of oxycodone to that patient were admissible to impeach Patterson's claim that her patients were legitimate. Furthermore, the district court did not abuse its discretion in refusing to exclude the questions under Rule 403. As the court noted, Patterson testified that she did not, and would not, have obeyed Lang even if Lang had attempted to direct her medical practice. The danger that the jury would exact vengeance on Lang was therefore minimal. We have affirmed the admission of similar lines of questioning because of the strong probative force of impeachment evidence. *See, e.g., United States v. Dexta*, 136 F. App'x 895, 906–07 (6th Cir. 2005). The district court did not abuse its discretion.

Lang also challenges the court's decision to admit two news articles that agents discovered in her desk at Primary. One of those articles discussed a federal indictment against a pill mill in another city ("the Crossville Article"); the other involved allegations of suspicious activities at Superior ("the Superior Article"). Of the thirty-three defendants indicted in the Crossville case, twelve were patients at either Superior or Primary. The Superior Article chronicled citizen complaints about suspicious activity occurring at Superior, including customer statements that Superior handed out medicines "that normal doctors just won't give you." This article was published just before Superior closed.

These articles are quite obviously relevant. Lang contended below—and contends on appeal—that she was ignorant of any illegality at her clinics, particularly at Superior. These articles tend to rebut Lang's defense, or make it "less probable," by showing that she may have known of illegal conduct at her clinics. Fed. R. Evid. 401. This clears the low bar set by Rule 401. *Dortch v. Fowler*, 588 F.3d 396, 401 (6th Cir. 2009).

Case No. 15-5997, *United States v. Lang*

Nor are the articles unfairly prejudicial. To be sure, it is unfavorable to have drug investigators find these materials in your desk at a suspected pill mill. But this is not the kind of prejudice of which Rule 403 speaks. The rule only contemplates “evidence which tends to suggest a decision on an improper basis” or which “hit[s] . . . below[] the belt.” *United States v. Talley*, 164 F.3d 989, 1000 (6th Cir. 1999) (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1995)); *Vasher*, 537 N.W.2d at 172. In contrast, these articles suggest a decision on a wholly proper basis—that Lang knew her clinic was a pill mill, but that she continued operating it anyway. It also does not resemble a strike below the belt. The district court therefore did not abuse its discretion in admitting the evidence.

3

Finally, Lang raises two hearsay objections. Her first argument—that the Superior Article was inadmissible hearsay—is meritless. A statement is not hearsay unless it is an out-of-court statement offered “to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c)(2). Out-of-court statements are frequently offered—and admitted—for other reasons, including to prove the listener’s reaction to a statement. *Moore v. City of Memphis*, 853 F.3d 866, 871 (6th Cir. 2017). That is exactly what the government did here. The article was offered to show that that Lang kept it in her desk, regardless of whether the accusations were true. Lang’s act of retaining the article has a strong tendency to show that she was aware of potential misdeeds at the clinic. See *United States v. Crosgrove*, 637 F.3d 646, 657–58 (6th Cir. 2011). The court did not abuse its discretion in admitting the article.

Second, Lang argues that the court should not have admitted an alleged co-conspirator statement under Rule 801(d)(2)(E). Specifically, Lang disputes the admission of a document, found in her desk, titled “Chronology of Business Activities for Barbara Lang.” In order to be

Case No. 15-5997, *United States v. Lang*

admissible as a co-conspirator statement, the government must show by a preponderance of the evidence that a conspiracy existed, that the defendant was part of that conspiracy, and that the offered statement was made by a co-conspirator in furtherance of the conspiracy. *United States v. Young*, 553 F.3d 1035, 1045 (6th Cir. 2009). We review factual findings on this subject for clear error. *Id.* Lang only takes issue with the last requirement—that the statements were made by a co-conspirator in furtherance of the conspiracy.

Lang has shown no clear error. The district court found that even though the precise author of the statement was unknown, the document was clearly prepared for Primary, Lang's alleged corporate alter ego. The court observed further that the context of the statement indicated that it must have been written by someone in the conspiracy. The chronology itself was an unapologetic defense of Superior's business model and of Primary's adoption of that model. The district court did not commit clear error in finding that *one of the conspirators* wrote the statement, even if it could not identify which one. *See United States v. Martinez*, 430 F.3d 317, 326 (6th Cir. 2005).

There is also no clear error in finding that the statement was made in furtherance of the conspiracy. A statement qualifies under Rule 801(d)(2)(E) "if it was intended to promote conspiratorial objectives; it need not actually further the conspiracy." *Martinez*, 430 F.3d at 327 (quoting *United States v. Carter*, 14 F.3d 1150, 1155 (6th Cir. 1994)). Here, the chronology is remarkably favorable to Lang, and the district court did not commit clear error by finding that its purpose was likely to further the conspiracy's objective—to continue making money.

For these reasons, Lang has not identified any error in the court's evidentiary rulings.

Case No. 15-5997, *United States v. Lang*

D

Lang's next objection relates to an allegedly illegal search of Superior by an undercover DEA agent. After being interviewed by Superior for a nurse-practitioner job, Deane Peterson contacted DEA agents and told them that the clinic "made him feel uneasy." He asked if the agents would like him to accept the job in order to feed them information, and the agents agreed. Peterson accepted the job and provided information, but eventually gave in to temptation and started prescribing illegally himself, despite strong rebukes by the DEA. Eventually, undercover agent Mark Delaney posed as a patient to observe Superior's activity. On one visit, the clinic admitted Delaney to see a provider, who happened to be Peterson. Peterson did not know the true identity of his "patient". Delaney's observations were then used to incriminate Lang.

Lang contends that Delaney's entry into the exam room violated the Fourth Amendment. Specifically, she contends that Peterson was a government agent, and therefore that his act of admitting Delaney into the exam room caused an unconstitutional search. The government responds by arguing that Peterson was only an *informant*, and therefore generally incapable of being a state actor under the Fourth Amendment. *See Hiser v. City of Bowling Green*, 42 F.3d 382, 383–84 (6th Cir. 1994). The district court agreed with the government and denied the motion. This was proper, but for reasons different than those given by the district court.

We review Fourth Amendment constitutional questions *de novo*. *United States v. Hardin*, 539 F.3d 404, 416 (6th Cir. 2008). The Fourth Amendment protects both businesses and private residences. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978). However, a defendant has no reasonable expectation of privacy in places of a commercial building where the public is invited to transact business. *Maryland v. Macon*, 472 U.S. 463, 469 (1985). On this point, we agree with the district court that the only colorable Fourth Amendment claim here relates to

Case No. 15-5997, *United States v. Lang*

Delaney's entry into Peterson's examination room, since the waiting room and lobby of a medical clinic are open to the public.

Lang argues that the search was illegal because Peterson was a government agent. Her arguments rest on the assumption that if a defendant's employee is secretly a government agent (as opposed to a mere informant), the employee's consent is constitutionally ineffective. However, none of our cases adopt this view or even ask the agent-informant question—because it's the wrong question to ask. Lang applies the government-agent test through a misunderstanding of the private-search doctrine. Ordinary burglars or nosy roommates cannot violate the Fourth Amendment, no matter how invasive they become. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971); *United States v. Bowers*, 594 F.3d 522, 525–26 (6th Cir. 2010). The private-search doctrine was imposed to prevent the police from covertly deputizing private citizens to break the law, thereby circumventing the state-action requirement and the Fourth Amendment's strictures. *Id.* Thus, when an ordinary citizen invades another's privacy at the government's request and for the government's benefit, he becomes a *government agent*, and the courts treat him as one. *United States v. Boumelhem*, 339 F.3d 414, 425 (6th Cir. 2003); *Hardin*, 539 F.3d at 418–19.

This was what happened in *Hardin*, the one case Lang cites in support of her position. *Hardin* involved police officers who suspected that the defendant was staying in his girlfriend's apartment. *Id.* at 407–08. In order to obtain probable cause for a search warrant, they constructed a ruse where the landlord would gain entry to the apartment by lying about a maintenance issue, and then confirm the defendant's presence for the officers. *Id.* We concluded that the landlord was an agent of the government when he performed the unlawful search. *Id.* at 418–19. We reached this conclusion by observing that (1) the government

Case No. 15-5997, *United States v. Lang*

instigated the ruse, (2) the government knew about the illegal search, and (3) the landlord's intent was aligned with the government's interests. *Id.*

Two important distinctions show that *Hardin* does not apply here. First, Peterson *did not conduct a search*. Indeed, Lang objects only to *Delaney's* allegedly illegal search of the exam room. But in every case where we have found a violation of the private-search doctrine, the private person at issue had always conducted a search on the government's behalf. *See, e.g., United States v. Lichtenberger*, 786 F.3d 478, 484–85 (6th Cir. 2015) (search of a boyfriend's computer); *United States v. Booker*, 728 F.3d 535, 545 (6th Cir. 2015) (doctor's intubation and physical examination of suspect); *Hardin*, 539 F.3d at 418–19. Second, Peterson violated no law or rule that would require private-search analysis anyway. Lang does not contest that Peterson had the authority to treat patients in the exam room. In contrast, the landlord in *Hardin* lied about his authority to enter—something that is beyond the power of the police and laypersons alike. *E.g., United States v. Shaw*, 707 F.3d 666, 669 (6th Cir. 2013) (holding that police may not “tell an occupant that they have a warrant to make an arrest at a given address when they do not”). The private-search doctrine is therefore inapplicable to this case.

Instead, this Fourth Amendment issue is governed by the Supreme Court's consent jurisprudence. The voluntary consent of a person authorized to give it removes the need for a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *United States v. Matlock*, 415 U.S. 164, 171 (1974). Police may also rely on a third party's apparent authority to give consent, so long as that reliance is reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990). Furthermore—in contrast to lies about authority—an undercover officer's misrepresentation of her *identity* does not invalidate consent. *United States v. Pollard*, 215 F.3d 643, 648 (6th Cir.

Case No. 15-5997, *United States v. Lang*

2000); *United States v. Baldwin*, 621 F.2d 251, 252–53 (6th Cir. 1980); *Shaw*, 707 F.3d at 669 (6th Cir. 2013).

Further, the Constitution is not an insurance policy against broken trust. “The Fourth Amendment . . . does not protect wrongdoers from misplaced confidence in their associates.” *Baldwin*, 621 F.2d at 252; *see also Hoffa v. United States*, 385 U.S. 293, 301 (1966) (“Partin [an informant] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. [Hoffa], in a word, was not relying on the security of the hotel room; he was relying in his misplaced confidence that Partin would not reveal his wrongdoing.”); *United States v. King*, 55 F.3d 1193, 1196 (6th Cir. 1995) (“It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information.”) (quoting *United States v. Jacobsen*, 466 U.S. 109, 117 (1984)). We have therefore rejected complaints that a defendant “never consented to the presence of a ‘police spy’ in his home.” *Baldwin*, 621 F.2d at 252. This is consistent with the Supreme Court’s view that that voluntariness does not always require full disclosure by the police. *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996); *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (“[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest . . .”).

Thus, the true question here is whether Peterson had actual or apparent authority to admit Delaney to the exam room. The parties do not dispute that he did. Lang’s only complaint is that he used that authority to let Delaney enter. But this is not different from a case where the defendant finds out, to his chagrin, that he has unwittingly invited an undercover officer into his home. *Baldwin*, 621 F.2d at 252. Although we have not specifically reached this holding with

Case No. 15-5997, *United States v. Lang*

regard to a police informant, the other three circuits to confront this issue have found no Fourth Amendment violation. See *United States v. Spotted Elk*, 548 F.3d 641 (8th Cir. 2008) (apparent authority); *United States v. Apperson*, 441 F.3d 1162, 1186–87 (10th Cir. 2006); *Wang v. United States*, 947 F.2d 1400, 1403 (9th Cir. 1991). Absent some lack of authority by his criminal comrades, a defendant may not make out a Fourth Amendment violation merely by crying, “*Et tu, Brute!*” The district court therefore properly denied Lang’s motion to suppress.

E

Lang makes a feeble attempt to assert cumulative error under *United States v. Adams*, 722 F.3d 788, 832 (6th Cir. 2013). Since the only possible error was the admission of Agent Lemons’s colloquy about prejudice to the IRS, there is no reason to address this question. There is no cumulative error.

F

Lang argues next that the evidence was insufficient to convict her of the conspiracy counts and the drug-involved-premises counts. Although the standard of review is de novo, we will only vacate a conviction on these grounds if, after viewing the evidence in the light most favorable to the prosecution, “[No] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Pritchett*, 749 F.3d 417, 430–31 (6th Cir. 2014) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Lang has not met that requirement here.

1

Lang first challenges her two drug-conspiracy convictions. See 21 U.S.C. § 846. To convict on a § 846 charge, the government must prove: “(1) an agreement to violate drug laws; (2) knowledge of and intent to join the conspiracy; and (3) participation in the conspiracy.”

Case No. 15-5997, *United States v. Lang*

United States v. Gunter, 551 F.3d 472, 482 (6th Cir. 2009). Lang contends that the evidence was insufficient to support a finding of (1) intent to join a drug conspiracy at Superior, and (2) an agreement to violate the drug laws at Primary. Her arguments are meritless.

Lang concedes that the evidence was sufficient to prove the existence of a conspiracy at Superior. But once a conspiracy is proven, “the prosecution need only produce slight evidence to implicate the defendant.” *United States v. Sturman*, 951 F.2d 1466, 1474 (6th Cir. 1991). Moreover, this slight evidence may be provided by circumstantial proof. *United States v. Sadler*, 750 F.3d 585, 593 (6th Cir. 2014). Although a conviction cannot stand when the evidence only establishes “a climate of activity that reeks of *something* foul,” the evidence is sufficient when it, so to speak, identifies the source of the odor. *See United States v. Morrison*, 220 F. App’x 389, 393 (6th Cir. 2007) (quoting *United States v. Wieschenberg*, 604 F.2d 326, 332 (5th Cir. 1979) (emphasis added)).

Lang argues that she was an innocent bystander who neither knew about nor intended to join the drug conspiracy at Superior. A reasonable jury could have found otherwise. Lang was at the clinic almost on a daily basis, and the jury heard an avalanche of testimony that Superior was handing out pills like candy at a carnival. *See, e.g.*, R. 682, Farinash Testimony, PID 8794 (“It was so blatant to me what was going on there”); *id.*, Williams Testimony, PID 8821–24 (describing Superior’s patients as “zombies”); *id.*, Dr. Miller Testimony, PID 8768 (“[E]verything there just made me feel very dirty, in a very dirty place. And it was not anything like I would expect in a doctor’s office. . . . I thought it was a pill mill.”); R. 683, Sampson Testimony, PID 8870–71 (“They didn’t look like your average customers. They looked more like they w[ere] drug users. . . . They had sores on their faces, and they had sores on their hands

Case No. 15-5997, *United States v. Lang*

and arms. . . . it didn't look right [I]t put me in the mind of a drug house."); R. 685, Delaney Testimony, PID 9263 (describing the patients as "strung out").

Additionally, the jury heard testimony that Lang knew drug dealers were bringing their buyers to Superior. When clinic staff asked one of the dealers (John Goss) "if [he was] the law," one of the patients laughed and said, "Probably anything but the law." Lang was present for this colloquy. Lang later wrote a note to herself that Goss had done a "[t]en-year federal stint" for drug crimes. Nevertheless, Lang maintained a close relationship with Goss, where Goss would call ahead and ask Lang to clear space for his buyers, and Lang would do so. When federal agents asked Lang if she knew Goss or had ever talked to him, Lang said she knew he was a dealer, but that she "didn't want to have anything to do with him," had never spoken to him, and would run him off her property if she found him. This was not true—Lang even had Goss's cell phone number, and DEA agents had recorded calls between the two of them.

This is only a sampling of the evidence against Lang on this issue. Contrary to Lang's contentions, the government did more than merely present evidence that Lang knew about general wrongdoing. A conspiracy conviction requires proof of knowledge and intent, but it does not require juries to ignore their common sense. *Thompson v. Parker*, 867 F.3d 641, 647–48 (6th Cir. 2017). Here, it was clear to even casual observers that Superior was a pill mill. Lang was a part owner of Superior and was present on a regular basis. The jury could reasonably find, therefore, that Lang must have actually "[seen] the handwriting on the wall," just as others did, and knew she was running a pill mill.

Lang's citation of *United States v. Morrison* does not help her case. In *Morrison*, we vacated several drug convictions because the government presented no evidence that the defendant knew hidden contraband was cocaine, as opposed to some other illegal item. 220 F.

Case No. 15-5997, *United States v. Lang*

App'x at 395. In reaching this conclusion, the panel stated that "conjecture and surmise regarding what a defendant may have intended or known is insufficient to support a conviction." *Id.* (quoting *United States v. Coppin*, 1 F. App'x 283, 291 (6th Cir. 2001)). While this statement is conceptually true, it obscures the distinction between impermissible speculation and legitimate inference. Juries cannot read minds, and yet the criminal law often requires them to make factual findings about a defendant's knowledge or intent. To a certain extent, these findings are *always* based on "conjecture and surmise," particularly in drug-conspiracy cases. *Id.*; *United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000); *United States v. Green*, 548 F.2d 1261, 1266 (6th Cir. 1977). Thus, while jurors may speculate about what a defendant knew, such speculation must be based in *fact*, not on thin air.

This was the problem with the conviction in *Morrison*. In that case, the cocaine was hidden in the gas tank of the car, the parties never discussed the nature of the contraband, and the defendant was simply an intermediary between the "runners" and the ultimate purchaser. 220 F. App'x at 395–97. Thus, the jury was presented with no facts from which they could infer that the defendant knew the cargo was cocaine, as opposed to some other contraband. *Id.* Lang's case is fundamentally different. She knew Superior was prescribing controlled substances. The crucial issue here is whether she knew the prescriptions were illegitimate, and as stated above, the jury was presented with an ample factual basis from which they could infer that Lang knew the prescriptions were illegal. The evidence was therefore sufficient to support a conviction for conspiring to distribute illegal controlled substances from Superior.

Lang also challenges her second conspiracy conviction by arguing that the jury could not have found that there was a drug conspiracy at Primary. She is wrong. The government need not prove a formal agreement in conspiracy cases; instead, it carries its burden by showing at

Case No. 15-5997, *United States v. Lang*

least “a tacit or material understanding among the parties.” *United States v. Warman*, 578 F.3d 320, 332 (6th Cir. 2009) (quoting *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990)). Such an agreement may be proven by circumstantial evidence, including by the defendant’s participation in a common plan. *Id.*

Unlike Superior, Lang concedes that she was the owner and operator of Primary. The jury heard testimony that soon after Primary opened, Lang called Goss—whom she knew to be a drug dealer—and asked him to bring his people to Primary. Lang also overruled her doctors’ refusal to prescribe the pills that her customers wanted. And Primary suffered from the same addict-riddled clientele as Superior. (*See, e.g.*, R. 689, Goldberg Testimony, PID 9975–76 (“The only thing different was the owner.”)). This evidence speaks for itself. A rational jury could have easily found that Lang was part of a drug conspiracy at Primary.

2

Next, Lang challenges her five convictions for maintaining a drug-involved premises. *See* 21 U.S.C. § 856(a)(1). To convict a defendant on these charges, the government must prove beyond a reasonable doubt that the defendant (1) knowingly (2) maintained any place, whether permanently or temporarily, (3) for the purpose of distributing a controlled substance. *United States v. Russell*, 595 F.3d 633, 644 (6th Cir. 2010). Lang disputes the maintaining element as to Superior, and the purpose element as to both Superior and Primary. Again, her arguments are without merit.

Lang argues first that she did not maintain Superior. But ownership or primary responsibility for a premises is not required by the word *maintained*. *See id.* Instead, the element is satisfied by “control, duration, acquisition of the site, renting or furnishing the site, repairing the site, supervising, protecting, supplying food to those at the site, [or maintaining]

Case No. 15-5997, *United States v. Lang*

continuity.” *Id.* (quoting *United States v. Clavis*, 956 F.2d 1079, 1091 (11th Cir. 1992)). Under this standard, a reasonable jury could have convicted Lang of maintaining Superior. Lang was identified at various times as an owner or manager of Superior. She obtained Superior’s business license and was active in paying its expenses. Although Blake was the manager, Lang worked at the clinic at least as much as Blake did. When Blake’s attendance started to slip, Lang became even more engaged in the management of Superior—up to and including “seeing patients.” This is more than enough to allow a rational jury to find that Lang helped maintain Superior.

Second, Lang contends that her purpose in maintaining the clinics was not to distribute drugs illegally. As shown above, however, the jury heard ample evidence to the contrary. Illegal distribution need not be a defendant’s sole or primary purpose, as long as the illegal purpose is significant. *Sadler*, 750 F.3d at 592–93. Although Lang contends that her only significant role in operating Superior was running Bible studies, the evidence recounted above tells a different story. Lang complains that Primary was operated differently than Superior, and that some of Primary’s employees sincerely believed that nothing illegal was happening there. This is beside the point. We will not reweigh the evidence or second-guess the jury’s decision to disbelieve a witness. *Pritchett*, 749 F.3d at 431. So long as the government presented enough proof to allow a reasonable jury to convict, we will affirm. As described above, that is the case here. The evidence was sufficient to support a finding that Lang’s purpose was to distribute drugs illegally. We therefore uphold all of Lang’s convictions.

III

Lang also raises several objections to her sentence. After a hearing, the district judge sentenced Lang to 3,360 months (280 years) in prison. The court arrived at this result by applying the Guidelines and by setting Lang’s twenty-one convictions to run consecutively.

Case No. 15-5997, *United States v. Lang*

Lang argues that this sentence was procedurally unreasonable because the court miscalculated the quantity of drugs attributable to her. She argues that the sentence is substantively unreasonable because it is far higher than any sentence imposed in similar circumstances and is inappropriately long. Notwithstanding the abstract absurdity of the sentence here, it's practical effect was not unreasonable.

A

Lang's first argument is that her sentence is procedurally unreasonable. The thrust of her claim is that the district court's factual findings on drug quantity were not supported by a preponderance of the evidence. We are not persuaded.

The quantity of drugs attributable to the defendant is used to calculate the appropriate base offense level under the Guidelines. *United States v. Tucker*, 90 F.3d 1135, 1144 (6th Cir. 1996); USSG § 2D1.1(c). Incorrectly calculating this number is a significant procedural error that requires resentencing. *United States v. Shields*, 664 F.3d 1040, 1043 (6th Cir. 2011). We review the district court's factual findings on drug quantity for clear error. *United States v. Walton*, 908 F.2d 1289, 1300–01 (6th Cir. 1990).

The district court found that Lang's base offense level was 38. To trigger a base offense level of 38 under the Guidelines for a drug crime, the court must find the defendant responsible for at least 13.4 kilograms⁵ of oxycodone. See USSG § 2D1.1(c), cmt. 8(A), (D). The district court found—and Lang does not appear to dispute—that her clinics prescribed around 50 kilograms of oxycodone. Lang simply protests that not all these prescriptions were illegal,

⁵ Oxycodone is not listed in § 2D1.1's *Drug Quantity Table*. In such cases, the Guidelines direct the court to use the *Drug Equivalency Tables* to convert the controlled substance at issue to an equivalent amount of marijuana. USSG § 2D1.1(c), cmt. 8(A). The quantity of marijuana should then be used to find the appropriate base offense level. *Id.* A person who possess 90,000 kilograms or more of marijuana is subject to the maximum base offense level of 38. *Id.* § 2D1.1(c). One kilogram of oxycodone is equal to 6,700 kilograms of marijuana. *Id.*, cmt. 8(D). Thus, to trigger the base offense level of 38 for an oxycodone-based crime, the defendant must be held responsible for: ~~XXXXXXXXXXXX~~ 13.4 ~~XXXXXXXXXXXX~~ *Id.*

Case No. 15-5997, *United States v. Lang*

and even less could be attributed to her. But the district court heard and credited testimony from the trial that at least half the prescriptions written by the clinics were illegal. Thus, even if Lang is correct that the court lacked a factual basis for finding that her clinics distributed 50 kilograms of illegal oxycodone, there *was* a basis for finding that 25 kilograms were illegal, more than enough to trigger level 38 under the Guidelines.

Lang also complains that even if this is correct, it is unfair to attribute all 25 kilograms to her. It is true that a court cannot automatically attribute all the drugs distributed by a conspiracy to all defendants. *Tucker*, 90 F.3d at 1144. Instead, a defendant must be sentenced based on “the drug quantities for which he is directly involved, and any quantity that is a reasonably foreseeable consequence of the conspiracy.” *United States v. Anderson*, 333 F. App’x 17, 25 (6th Cir. 2009). Although the district court’s findings on this issue are less specific than perhaps they should be, there is no serious question that at least 13.4 kilograms could be attributed to Lang. As the court noted later, Lang “exercise[d] a leadership position in th[e] conspiracy.” There is no clear error in finding a leader of a conspiracy responsible for around half the illegal drugs distributed by the conspiracy. Lang has therefore not shown any procedural unreasonableness that requires resentencing.

B

Lang next objects to her 3,360-month sentence. As her counsel noted at sentencing, a hypothetically immortal prisoner, fresh out of jail in 2015 on an identical sentence, would have been originally incarcerated in the year Paul Revere was born. In the abstract sense, Lang’s objection is understandable. Heaping several lifetimes of punishment on her serves no real purpose: She only has one life to give.

Case No. 15-5997, *United States v. Lang*

But the Guidelines do not deal in abstractions. Neither do the courts. At a certain point, large numbers become meaningless placeholders for one practical reality: Lang will spend the rest of her mortal life in jail. A 3,360 month sentence—like a 750-year or 10,000-year sentence—might be “uncommonly silly,” but it makes no practical difference. *Cf. Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir. 1988); *United States v. Betcher*, 534 F.3d 820, 827–28 (8th Cir. 2008) (“Betcher’s sentence—for practical purposes—is a life sentence, and that is how we view it. . . . The absurdity of a 750 year sentence, or even a 10,000 year sentence, should not detract from the gravity of Betcher’s crimes.”). Thus, the real question here is whether Lang can show that an effective life sentence is an abuse of discretion. She cannot.

Lang’s ultimate offense level was 48, well above the highest level contemplated by the Guidelines. USSG § 5A. At that level, the Guidelines recommendation is life imprisonment. USSG § 5A, cmt. 2. A sentence within the Guidelines range is presumptively reasonable, and the defendant bears the burden of rebutting that presumption. *United States v. Ruiz*, 777 F.3d 315, 323 (6th Cir. 2015). The district court found that Lang was one of the leaders of a “massive conspiracy” that injected “huge quantities” of illegal pills into the community. It also noted the serious epidemic of prescription drug abuse in the region and in the United States.

Additionally, Lang was the only defendant who refused to plead guilty and who required a trial to establish guilt. And even after she was convicted, Lang never clearly acknowledged her personal culpability. R. 711, Sent. Hr’g, PID 12972–74 (“I have tried my best to do the right thing. I always want to do the right thing, and I’ve always thought I was doing the right thing . . . I do not know all the ins and the outs of the laws, and have been surprised at all the laws that I’ve uncovered since all this has happened. It would be nice . . . if the public would

Case No. 15-5997, *United States v. Lang*

have known them.”); *id.* at 12980–81 (“I’ve started doing some studying on all this conspiracy thing. When I looked up in *Webster*, to conspire means ‘to plan together in secret to commit a wrongful act.’ Your Honor, I’ve never met anybody in secret, never discussed anything with anybody.”).

Lang also argues that a 3,360-month sentence is disproportionate to other sentences handed out for similar offenses across the country. See *United States v. Thompson*, 218 F. App’x 413, 416–17 (6th Cir. 2007); 18 U.S.C. § 3553(a)(6). The highest comparable sentence either party has identified was an 830-month sentence affirmed in *United States v. Kincaid*. 631 F. App’x 276, 279 (6th Cir. 2015). But the sentence in *Kincaid* was also an effective life sentence. *Id.* at 285. Thus, any numerical disparity aside, the *Kincaid* sentence is identical to Lang’s. A numerical disparity between sentences cannot be a basis for declaring a sentence unreasonable when the practical effect of the sentence is the same in both cases.

In light of the evidence heard by the court, an effective life sentence was not an abuse of discretion. The court acknowledged the need for the sentence to reflect the seriousness of the crime and to promote due respect for the law. 18 U.S.C. § 3553(a)(2). An effective life sentence is not an inappropriate response to a drug conspiracy of this size and a defendant who remains in deep denial of her personal culpability. The court therefore did not abuse its discretion in sentencing Lang.

IV

There is no reversible error in Lang’s convictions or in her sentence. We **AFFIRM** the judgment of the district court.

APPENDIX B

EDTN Judgment in a Criminal Case (Rev. 1/12)
Sheet 1

United States District Court

Eastern District of Tennessee

UNITED STATES OF AMERICA

v.

BARBARA LANG

A.K.A. BARBARA LANGFORD, AUNT
BEA

JUDGMENT IN A CRIMINAL CASE
(For Offenses committed on or after November 1, 1987)

Case Number: 1:12-cr-00104-002-CLC-CHS

Bryan Hoss, Janie Varnell

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s):
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☒ was found guilty on count(s) Superseding Indictment 1,3,4,5,8,9,10,71-78,81-85,86 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Violation Concluded	Count
See Pages 2-3			

The defendant is sentenced as provided in pages 4 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. 3553.

- ☒ The defendant has been found not guilty on count(s) 2,67-69,70,79,80,87-88,93.
- ☐ All remaining counts as to this defendant in this case are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

August 27, 2015

Date of Imposition of Judgment

/s/

Signature of Judicial Officer

Curtis L Collier, United States District Judge

Name & Title of Judicial Officer

September 8, 2015

Date

DEFENDANT: Barbara Lang
A.K.A. Barbara Langford, Aunt Bea
CASE NUMBER: 1:12-cr-00104-002-CLC-CHS

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Violation Concluded	Count
21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Conspiracy to Distribute & Dispense Controlled Substances	July 31, 2011	1
21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Conspiracy to Distribute & Dispense Controlled Substances	June 30, 2012	8
21 U.S.C. § 856(a)(1), 21 U.S.C. § 856(a)(1)	Maintaining a Drug Involved Business	July 30, 2011	5
21 U.S.C. § 856(a)(1), 21 U.S.C. § 856(a)(1)	Maintaining a Drug Involved Business	September 30, 2011	9
21 U.S.C. § 856(a)(1), 21 U.S.C. § 856(a)(1)	Maintaining a Drug Involved Business	June 30, 2012	10
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	September 12, 2011	71
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	September 13, 2011	72
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	September 28, 2011	74
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	September 28, 2011	73
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	September 30, 2011	75
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	September 30, 2011	76
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	October 7, 2011	77
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	October 14, 2011	81
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	October 7, 2011	78

DEFENDANT: Barbara Lang
A.K.A. Barbara Langford, Aunt Bea
CASE NUMBER: 1:12-cr-00104-002-CLC-CHS

31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	October 14, 2011	82
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	November 10, 2011	84
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	November 10, 2011	83
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	December 2, 2011	85
21 U.S.C. § 856(a)(1), 21 U.S.C. § 856(a)(1)	Maintaining a Drug Involved Business	April 30, 2011	3
31 U.S.C. § 5324(a)(3) and 31 U.S.C. § 5324(d)(2)	Structuring Financial Transactions to Evade Reporting Requirement	December 2, 2011	86
21 U.S.C. § 856(a)(1), 21 U.S.C. § 856(a)(1)	Maintaining a Drug Involved Business	May 31, 2011	4

DEFENDANT: Barbara Lang
A.K.A. Barbara Langford, Aunt Bea
CASE NUMBER: 1:12-cr-00104-002-CLC-CHS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **280 years**.

This term consists of 20 years on Counts 1,3,4,5,8,9, and 10; and 10 years on counts 71,72,73,74,75,76,77,78,81,82,83,84,85 and 86, all such terms to be served consecutively.

- ☒ The court makes the following recommendations to the Bureau of Prisons: That defendant be placed at FPC Alderson. If that is not possible; the BOP should place her at an appropriate facility.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
at __ a.m. p.m. on __
☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on .
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Barbara Lang
A.K.A. Barbara Langford, Aunt Bea
CASE NUMBER: 1:12-cr-00104-002-CLC-CHS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. For each of counts 1,3,4,5,8,9, 10,71,72,73,74,75,76,77,78,81,82,83,84,85 and 86, all such terms to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the Court or probation office;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his/her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the Court;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by his/her criminal record or personal history of characteristics and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Barbara Lang
A.K.A. Barbara Langford, Aunt Bea
CASE NUMBER: 1:12-cr-00104-002-CLC-CHS

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. 3013.

	Assessment	Fine	Restitution
Totals:	\$ 2,100	\$	\$

- ☐ The determination of restitution is deferred until __. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. 3664.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS:	\$__	\$__	

- ☐ If applicable, restitution amount ordered pursuant to plea agreement \$__
- ☐ The defendant shall pay interest on any fine or restitution of more than \$2500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:
- ☐ The interest requirement is waived for the ☐ fine and/or ☐ restitution.
- ☐ The interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

DEFENDANT: Barbara Lang
A.K.A. Barbara Langford, Aunt Bea
CASE NUMBER: 1:12-cr-00104-002-CLC-CHS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$2,100 due immediately, balance due
☐ not later than , or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F below); or
- C ☐ Payment in equal __ installments of \$__ over a period of __, to commence __ after the date of this judgment; or
- D ☐ Payment in equal __ installments of \$__ over a period of __, to commence __ after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within __ after release from imprisonment. The court will set the payment plan based on as assessment of the defendant's ability to pay at the time; or
- F ☒ Special instruction regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if the judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to U.S. District Court, 900 Georgia Avenue, Suite 309, Chattanooga, TN 37402. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names, and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States: A Final Order of Forfeiture will enter separately.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA

v.

BARBARA LANG,

Defendant.

*
*
*
*
*
*

DOCKET NO. 1:12-CR-104

JUDGE COLLIER/CARTER

Defendant's Pretrial Motion #14

MOTION FOR *DAUBERT* HEARING AS TO DR. KLOTH AND MOTION IN LIMINE
TO EXCLUDE CERTAIN PORTIONS OF DR. KLOTH'S REPORTS &
MEMORANDUM IN SUPPORT

COMES NOW, the Defendant, Barbara Lang, by and through her attorneys, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and Rule 104(a), 702 and 703 of the *Federal Rules of Evidence* and would show unto the Court as follows:

1. The Government has disclosed that it will call Dr. David Kloth as an expert in this case. The Government has provided counsel with two (2) expert reports from Dr. Kloth dated August 6, 2012 and November 16, 2012. *See* Dr. Kloth Report, 8/6/12 (16 pages), Exhibit A; *See* Dr. Kloth Report, 11/16/12 (23 pages), Exhibit B.

2. According to Dr. Kloth's August 6, 2012 report (1st report), he reviewed twelve (12) patient files who went to either the Superior One or Elite Pain clinic or both. He also reviewed a Search Warrant Affidavit of Rod Watters filed in the case as well as unknown "audio and videotapes of undercover visits at these respective clinics." Dr. Kloth reviewed these materials at the request of the Government in furtherance of their criminal prosecution of the Defendant. *See* Exhibit A, p. 1.

3. According to Dr. Kloth's November 16, 2012 report (2nd report) which he termed an "addendum" to his first report, Dr. Kloth received twelve (12) new patient files and additional medical records of six (6) patients who he previously reviewed in his August 6, 2012 report. *See* Exhibit B, p. 1. Again, he reviewed these new materials at the request of the Government in furtherance of their criminal prosecutions of the Defendant. *Id.*

4. Out of the twenty-four (24) patient files that Dr. Kloth examined, ten (10) were patient files from the Primary Care Clinic.

5. The Government hand selected the twenty-four (24) patient files of Superior, Elite and Primary and provided those specific files to Dr. Kloth. The Government never attempted any random sampling of the thousands of patients who attended the clinics.

6. Further, it is unclear whether the twenty-four (24) patient files were obtained by the Government from their search of the storage unit (which the Defendant has not moved to suppress), their search of Primary (which the Defendant has moved to suppress), the files obtained from Geoffrey Dean Peterson (which the Defendant has moved to suppress), the files obtained from Ralph Carroll (which the Defendant has moved to suppress), or the files obtained by Investigator Charles Whitson (which the Defendant has moved to suppress).

7. Dr. Kloth does not identify any written standards, recommendations, state or federal guidelines, medical journals, treatises, periodical or other medical authority of any kind that he uses to base his opinions and draw conclusions from.

8. The Defendant submits several objections to Dr. Kloth's report outlined below.

PROCEDURAL HISTORY

Because the Court has previously ruled on Dr. Kloth's testimony and *Daubert*, the Defendant submits a brief procedural history for the benefit of the parties.

On December 11, 2012, co-defendant Faith Blake filed a Motion in Limine to Exclude Testimony of David S. Kloth, or in the alternative a Request for a *Daubert* Hearing. *See* Doc. #59. The Government filed a Response in opposition. *See* Doc. #60. On December 20, 2012, Dr. Sherard filed a Motion to Exclude Testimony of Dr. Kloth. *See* Doc. 64. On the same date, December 20, 2012, the Defendant, Barbara Lang, filed a similar Motion in Limine adopting and joining Blake's Motion [Doc. # 59]. *See* Doc. #66.

On December 27, 2012, the Court entered a Memorandum and Opinion denying the Motion and *Daubert* hearing. *See* Doc. #68. The Court noted that the Defendants' "primary argument is Dr. Kloth is licensed in Connecticut, not Tennessee, and cannot effectively testify to the professional standards of Tennessee physicians." *Id.* at 2. The Court also noted that the Defendants were relying on Tennessee's requirement in civil actions "that expert medical testimony relate to local, rather than national, standards and any testifying expert witness be licensed in Tennessee or a contiguous state." *Id.* The Court noted that the Defendants also moved in the alternative to "exclude Dr. Kloth's testimony because he is unfamiliar with Tennessee medical standards." *Id.* at 3. The government argued that Dr. Kloth may testify to national standards. *Id.* The Court phrased the issue as "whether *Gonzales*, although not directly addressing the issue, suggests the government must establish a physician-defendant prosecuted under § 841(a) violated local standards, or whether the government may still establish a violation of a generally accepted national practice."

This Court concluded that “the government may offer Dr. Kloth to testify regarding national medical standards and practices. Because the Court concludes the government may offer Dr. Kloth’s testimony to discuss generally accepted medical standards in the United States, and Defendants offer no other basis for excluding his testimony, a *Daubert* hearing is unnecessary.” *Id.* at 6.

In addition, the Court noted in its Memorandum and Order that the Defendants also sought an Order to prevent Dr. Kloth from testifying to any of the Defendant’s states of mind. The Court ruled that because the Government expressed that it has no intent to elicit testimony “about the requisite intent of any of the defendants,” then the Defendants could have grounds to object pursuant to Rule 704 of the *Federal Rules of Evidence*. *Id.*

The Defendant, Lang, files this instant motion and asserts new grounds for a ruling in limine to exclude certain portions of Dr. Kloth’s testimony and requests a *Daubert* hearing.

The Defendant objects to the methods used by Dr. Kloth, the reliability of Dr. Kloth’s conclusions and specific comments made by Dr. Kloth contained in his first report as follows:

- The fact that the Government hand-selected twelve (12) patient files and provided those to Dr. Kloth. These were patient of Superior and Elite and not of Primary. There was no random sampling used to select which patient files were to be reviewed. *See* Dr. Kloth Report, 8/6/12, p. 1, Exhibit A.
- Any comment regarding any facts alleged in the search warrant of Rod Watters. This is hearsay, not within his personal knowledge, and the doctor does not have any knowledge, skill, experience or training with search warrants that would allow his comments regarding such. *Id.* at 1-2.
- “Patients should be able to find legitimate pain clinics in their area.” *Id.* at 2.

- “Armed security guards are not required at legitimate pain clinics, but have been associated with “pill mills” and the potential criminal elements that such “pill mills” attract.” *Id.*
- His comments on alleged “bribes” being paid to Superior employees whom he says are unethical, illegal and unacceptable. *Id.*
- Any comment from Delaney’s undercover visits. *Id.* at 2-3.
- The Government failed to advise Dr. Kloth that Geoffrey Dean Peterson who first prescribed Delaney Percocet and performed the very examinations that Dr. Kloth complained of was in fact a government informant himself.
- Any comment that the Affidavit for a search warrant of Rod Watters described a number of individuals who received large dosages of medications which they diverted to drug distribution rings. *Id.* at 2.
- Any comment about Larmore’s interview or about his rate of pay “above standards for this area of medicine.” *Id.* at 3.
- Any comment from Larmore’s interview, Sherard’s statement(s), or other statement by co-defendants. *Id.*
- “Urine drug testing is mandatory prior to the start of pain treatment in all patients who are going to receive chronic medications.” *Id.* at 5.
- Certain “opiod guideline(s)” that Dr. Kloth claimed to have reviewed. *Id.* at 6.
- Dr. Kloth had consistent generalized complaints of several items in the patient’s medical files including patient’s histories taken, patient examinations, unsigned patient forms, lack of counseling for certain prescriptions, lack of drug urine tests and other generalized complaints. The Defendant submits that a *Daubert* hearing

is necessary to determine any written standards, medical guidelines, authorities or written materials which substantiate any rules or regulations for medical professionals that was relied upon by Dr. Kloth.

- Prescription monitoring program check(s). The Defendant has not been provided with any standard, rule, regulation, law, protocol, or guideline regarding how often these prescription monitoring programs should be checked. The Defendant is seeking out any authored treatise, periodical, medical journal or other learned writing of any kind which substantiates the standards that Dr. Kloth is claiming existed at the time of the patients' treatment at Superior, Elite and Primary.
- "Her physical examination is non-existent, as with all of the patients who are seen at Superior One clinic."
- Any statements referencing legal conclusions such as certain conduct was "illegal" or "criminal" or any other phrase involving a legal conclusion.

11. The Defendant objects to the following in Dr. Kloth's second report:

- The fact that the Government hand-selected twelve (12) additional patient files and provided those to Dr. Kloth. There was no random sampling used to select which patient files were to be reviewed. *See* Dr. Kloth Report, 11/16/12, p. 1, Exhibit B.
- That a certain prescription drug dosage is indicative of "addiction and abuse" and that "the use of 30mg Oxycodone strongly suggests substance abuse." *Id.* at 2.
- The term "doctor shopping." *Id.* at 2.

- “My review would suggest that most of these relate to the various pain clinics under investigation.” The Defendant objects to Dr. Kloth testifying to any other pain clinic not involved in the present case. *Id.* at 2.
- “These dosages should be a red flag that this patient has a potential history of addiction.” *Id.* at 8.
- “While I cannot comment on depression, certainly the pathology found in her cervical and lumbar spine would not warrant Social Security Disability and an inability to work for the rest of her life.” *Id.* at 16.
- “The quality of urine drug screens performed at the Sherard Clinic are inadequate...” *Id.* at 17.

MEMORANDUM IN SUPPORT

In *United States v. Stapleton*, 2013 WK 3967951 (E.D. Ky July 31, 2013), the Defendant, Ray Stapleton, owned and operated a pain clinic where two physicians issued a high volume of prescription medications which the government alleged were medically baseless. The government sought to introduce the testimony of a pain specialist as an expert. The Defendant objected on several grounds including that the expert’s testimony would violate Rules 702 and 703 of the *Federal Rules of Evidence*, that the expert’s opinions address ultimate legal issues properly left for the jury, that the government failed to identify the specific data which the expert based his opinion, and that the government failed to provide the defendant with that data. In that case, the Defendant requested and the Court conducted a *Daubert* hearing.

I. Dr. Kloth's testimony cannot address ultimate issues such as state of mind and should not include legal conclusions.

"Testimony offering nothing more than a legal conclusion—i.e [.] , testimony that does little more than tell the jury what result to reach—is properly excludable under the Rules." *Woods v. Lecureux*, 110 F.3d 1215, 1220 (6th Cir. 1997).

The Defendant objects to any legal conclusions offered by Dr. Kloth. Dr. Koth, on multiple occasions in his reports, states that certain conduct was in fact "illegal," "unethical," "pill mill," "doctor shopping," and other legal conclusions. The Defendant submits that Dr. Kloth should be precluded from testifying as to any legal opinion.

II. Dr. Kloth's testimony and reports should not be admissible under Fed.R.Evid. 702.

Rule 702 of the *Federal Rules of Evidence* requires the Court to employ a "'gatekeeping role' in screening the reliability of expert testimony." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 668 (6th Cir. 2010) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Expert testimony satisfies Rule 702 only if it meets three (3) requirements:

- (1) the witness is qualified by "knowledge, skill, experience, training, or education";
- (2) the expert's testimony is relevant, meaning that "it 'will assist the trier of fact to understand the evidence or to determine a fact in issue'"; and
- (3) the testimony is reliable. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528–29 (6th Cir. 2008).

As the proponent of the expert testimony, the government must establish its admissibility by a preponderance of the evidence. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001) (citing *Daubert*, 509 U.S. at 592 n. 10); See *United States v. Thomas*, 223 F. App'x

447, 457 (6th Cir. 2007) (noting that even when an expert opinion is unopposed, it is error not to conduct *Daubert* analysis).

A. Dr. Kloth's qualifications.

The Government has provided defense counsel with Dr. Kloth's CV. And while it does appear that he has experience in the area of pain clinics, it also appears that Dr. Kloth's area of expertise is in performing procedures on patients who experience pain. For example, his CV shows his experience with certain epidural injections, disc surgeries, injection blocks and implanting certain devices to deal with pain. The clinics involved in this case were not procedure driven clinics. Should a patient request an epidural injection at Superior, Elite or Primary, the doctors and nurse practitioners would refer those patients to other health care providers. This issue arises in several places of Dr. Kloth's reports who opines that in certain situations, he would recommend that a certain procedure be performed rather than the course of treatment offered by the clinics in this case. That recommendation of a particular procedure, of course, and the subsequent criticism by Dr. Kloth could not happen at Superior, Elite or Primary. There are certain pain management clinics which do not offer the procedures that Dr. Kloth appears to be familiar with on a day to day basis and it appears from his qualifications that he has experience and qualifications with a different type of pain management clinic at issue in this case.

While this Court previously ruled that Dr. Kloth may testify to a national standard of care, one consideration that weighs against the finding that he is qualified is the fact that he has never practiced medicine in the State of Tennessee, has never seen a patient in the State of Tennessee, and has never been subjected to the written guidelines and protocols of pain management physicians in the State of Tennessee.

B. Relevancy of Dr. Kloth's testimony.

The Sixth Circuit has held that expert opinion evidence from a physician is generally permissible in controlled substances cases. *United States v. Kirk*, 584 F.2d 773, 785 (6th Cir. 1978). This specifically includes testimony "to establish the 'generally acceptable standards of medical practice for issuing prescriptions.'" *United States v. Hughes*, 895 F.2d 1135, 1144 (6th Cir. 1990) (quoting *Kirk*, 584 F.2d at 785) (internal quotations omitted)); see also *United States v. Word*, 806 F.2d 658, 663 (6th Cir. 1986).

C. The reliability of Dr. Kloth's testimony.

To satisfy Rule 702, Dr. Kloth's methods and his conclusions must be reliable. The Court should look at the *Daubert* factors to determine reliability. *Daubert*, 509 U.S. at 593-594. While the *Daubert* factors are not a definitive checklist, the Supreme Court has said:

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green 645. See also C. Hempel, *Philosophy of Natural Science* 49 (1966)

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, *The Fifth Branch: Science Advisors as Policymakers* 61-76 (1990), and in some instances well-grounded but innovative theories will not have been published, see Horrobin, *The Philosophical Basis of Peer Review and the Suppression of Innovation*, 263 *JAMA* 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, *Reliable Knowledge: An Exploration* 594-594 of the Grounds for Belief in Science 130-133 (1978); Relman & Angell, *How Good Is Peer Review?*, 321 *New Eng.J.Med.* 827 (1989). The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, e.g., *United States v. Smith*, 869 F.2d 348, 353–354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, see *United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979).

Finally, “general acceptance” can yet have a bearing on the inquiry. A “reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.” *United States v. Downing*, 753 F.2d, at 1238. See also 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and “a known technique which has been able to attract only minimal support within the community,” *Downing*, 753 F.2d, at 1238, may properly be viewed with skepticism.

The Sixth Circuit has also found another factor to be whether the expert's findings are derived from independent research or were prepared for the purpose of litigation. *Smelser v. Norfolk S. Railroad*, 105 F.3d 299, 303 (6th Cir. 1997).

Even if Dr. Kloth's “methods” were found to be reliable, the Court must also make sure that his conclusions “reasonably follow from his methods.” *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 671 (6th Cir. 2010) (rejecting an expert's conclusions as too speculative and attenuated). Dr. Kloth's opinions must be a product of a “reliable application of an otherwise acceptable method.” *United States v. Stapleton*, 2013 WK 3967951 (E.D. Ky July 31, 2013).

In the present case, one of the first steps in Dr. Kloth's “method” was to review the search warrant of Rod Watters and certain audio and video recordings of undercover officers in this case. Reviewing these types of criminal investigative files is not something that a physician generally does or relies upon when treating a patient.

Further, while it would certainly be an appropriate "method" for Dr. Kloth to review certain patient files to see what was recorded and a patient's course of treatment, the twenty-four (24) patient files that he reviewed were hand-selected by the government and represent a fraction (less than 1%) of the patients seen at the clinics. The risk is that this small sampling of patients, hand selected by the government, are unrepresentative of the clinics treatment of their patients and represent only extreme or unusual cases.

Additionally, the "method" employed by Dr. Kloth involves examining the patient files of undercover agent Mark Delaney (who's patient name was Mark Runion). The Government obviously informed Dr. Kloth that Mark Runion was an undercover officer (as indicated in his 1st Report), but failed to mention that the nurse practitioner who prescribed Runion/Delaney his first and subsequent prescription for Percocet was in fact a government informant himself, Geoffrey Dean Peterson. This cannot be said to be generally accepted "method" in any community, much less the medical community. Therefore, the "method" employed in this case is to hand-select only those patients with whom the government knows may have criminal histories and then present those to Dr. Kloth for his review, while also presenting part of the facts of the investigation (i.e. that Runion is an undercover officer, but failing to advise that Geoffrey Dean Peterson, the prescribing medical professional was also a government informant).

Additionally, regarding the patient medical files provided to Dr. Kloth, there is nothing to suggest that the patient files at the time law enforcement first obtained them, were the same patient files used by Superior, Elite or Primary at the time when they were prescribing prescriptions to their patients. These patient files appear to have been stored, moved, and kept by a variety of different individuals over several months. The files appear to have traveled over state lines and appear to have several custodians at certain times and no custodian at other times.

The chain of custody of these files is certainly at issue and calls into question that credibility of files themselves.

As an additional basis to find that Dr. Kloth's "method" is not reliable, Dr. Kloth fails to cite one guideline, statute, law, protocol or written plan of any kind that pain management physicians are required to rely upon and follow while treating patients. For example, in *Stapleton*, the Government expert in that case at least cited to the Kentucky Board of Medical Licensure guidelines when reaching his conclusions that the Defendant violated certain standards. In this case, Kloth cites to no guideline, state or federal, or any written medical journal, periodical or other publication of any kind, state or federal, that would at the bare minimum establish some written standard for pain management physicians to follow. Dr. Kloth's opinions appear to be based solely on his "opinion" and not on any written publication or guideline which has been subjected to peer review, publication and error rates.

Lastly, Dr. Kloth did not develop his opinions in an impartial manner. Rather, he developed his reports for the purpose of this criminal litigation. This is also a factor according to the Sixth Circuit that weighs against his reliability.

This Court should conduct a *Daubert* hearing and find that Dr. Kloth's testimony is not admissible pursuant to Rule 702 of the *Federal Rules of Evidence*.

II. Dr. Kloth's testimony and reports should not be admissible under Fed.R.Evid. 703.

Rule 703 provides that facts and data relied upon by an expert need not be admissible if they are of the type that "experts in the particular field would reasonably rely on ... in forming an opinion." See Fed.R.Evid. 703.

In the present case, the first thing that appears in Dr. Kloth's first report is a long assessment and review of the Affidavit of Rod Watters. Dr. Kloth provides opinions along the

way in reviewing the Affidavit, but typical pain management physicians and typical medical doctors would not reasonably rely on a Detective's Affidavit or audio or video recordings of a government informant before forming an opinion. It appears from Dr. Kloth's report that he relied heavily of Watters' Affidavit and made generalized and sweeping conclusions about each of the clinics even though he reviewed twenty-four (24) patient files out of nearly 4,000 total patients.

WHEREFORE PREMISES CONSIDERED, the Defendant requests:

1. That this Court conduct a *Daubert* hearing as to Dr. Kloth;
2. That this Court exclude Dr. Kloth's report or in the alternative, portions of his report;
3. Any further and general relief to which the Defendant would be entitled in the premises.

Respectfully Submitted,

DAVIS & HOSS, P.C.

s/Bryan H. Hoss

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access the filing through the Court's electronic filing system.

This the 31st day of July, 2014.

s/Bryan H. Hoss

APPENDIX D

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT
OF TENNESSEE AT CHATTANOOGA

UNITED STATES,

v.

BARBARA LANG

Defendant.

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1:12-CR-104

COLLIER/CARTER

**MOTION TO STRIKE EXPERT TESTIMONY OF DR. KLOTH AND DISMISS COUNT
EIGHT & MEMORANDUM IN SUPPORT**

COMES NOW, the Defendant, Barbara Lang, by and through undersigned counsel, pursuant to Rule 702 of the *Federal Rules of Evidence*, and respectfully requests this Honorable Court to strike the expert testimony of Dr. David Kloth specifically pertaining to medical expert opinions that were formed in reliance on any patient record from Primary Care and Pain Clinic, P.C.

1. On July 31, 2014, the Defendant timely filed two (2) pretrial motions. *See* Motion to Depose Government's Expert Witness, Dr. David Kloth. Document #246; Motion for a *Daubert* Hearing as to Dr. Kloth and Motion in Limine to Exclude Certain Portions of Dr. Kloth's Reports and Memorandum in Support. Document #246.

2. In the Motion for a *Daubert* hearing, Defendant objected to the methodology Dr. David Kloth used in forming his opinions. Document #246, page 6. Specifically, the Defendant noted: "... regarding the patient medical files provided to Dr. Kloth, there is nothing to suggest that the patient files at the time law enforcement first obtained them, were the same patient files

used by Superior, Elite, or Primary at the time when they were prescribing prescriptions to their patients.” *Id.* at page 12.

3. On November 19, 2014, Dr. Kloth testified before this Honorable Court during the course of this trial. He provided opinions on eleven (11) patients files from Primary Care and Pain Clinic, P.C. He testified that he never personally examined these patients. He testified that he based his opinions solely on the medical records provided and the CSMD information for each patient. Those exhibits were admitted into evidence as follows:

- a. Christopher Wright, Primary Care Patient File, Government’s Exhibit 322-B; Christopher Wright CSMD, Government’s Exhibit 256.
- b. Tony Rasso, Primary Care Patient File, Government’s Exhibit 317-C; Tony Rasso CSMD, Government’s Exhibit 232.
- c. Kevin Price, Primary Care Patient File, Government’s Exhibit 316-B; Kevin Price CSMD, Government’s Exhibit 231.
- d. Christopher Carroll, Primary Care Patient File, Government’s Exhibit 303-B; Christopher Carroll CSMD, Government’s Exhibit 170.
- e. Katrina Carroll, Primary Care Patient File, Government’s Exhibit 304-B; Katrina Carroll CSMD, Government’s Exhibit 171.
- f. Andrea Anderson, Primary Care Patient File, Government’s Exhibit 301-B; Andrea Anderson CSMD, Government’s Exhibit 152.
- g. Amanda Keyes, Primary Care Patient File, Government’s Exhibit 312-B; Amanda Keyes CSMD, Government’s Exhibit 208-A.
- h. Samuel Newcome, Primary Care Patient File, Government’s Exhibit 313-B; Samuel Newcome CSMD, Government’s Exhibit 223.
- i. Kathleen Parsons, Primary Care Patient File, Government’s Exhibit 315-B; Kathleen Parsons CSMD, Government’s Exhibit 226.
- j. Richard Goldberg, Primary Care Patient File, Government’s Exhibit 309-A; Richard Goldberg CSMD, Government’s Exhibit 197.
- k. Ezra Easterly, Primary Care Patient File, Government’s Exhibit 306; Ezra Easterly CSMD, Government’s Exhibit 183.

5. Dr. Kloth opined that the “paper” medical records he reviewed did not support a warrant the medications that were prescribed. He also criticized the lack of diagnosis, lack of physical examination, and the lack of note taking by medical providers at Primary Care and Pain Clinic, P.C.

6. Upon cross examination, counsel for the defense asked if there existed additional electronic or online medical records that had not been provided to Dr. Kloth, whether his opinions would be reliable. Dr. Kloth agreed that the jury would not be able to rely upon his opinions if there existed additional electronic or online medical records he did not review.

7. The Government in this case called Agent Jamie Hixson, who stated that he became aware of the electronic medical records at Primary Care and Pain Clinic, P.C. in June 2012 upon interviewing employees of the clinic. It is unclear why law enforcement never obtained the electronic medical records despite their actual knowledge that they existed.

8. Further, in grand jury transcripts from late June/July 2012, the prosecution in this case became not only aware that online medical records existed, but that the specific nurse practitioners would input their personal notes in the electronic side of the patient’s medical file.¹

9. The Defendant elicited testimony from two (2) employees at MD-Online, Inc. during its case-in-chief. Tom Wilson testified that Primary Care and Pain Clinic, P.C. began utilizing his company’s services in September 2011. He also testified that in November 2011, Primary Care and Pain Clinic, P.C. began imputing a significant amount of data into their electronic medical records. This data includes patient histories, pain levels complained of by the patient, the patient’s current problems, the patient’s diagnosis, physical examinations performed by the health providers, personal notes of the providers, notations about whether or not the

¹ See Exhibit 1, Grand Jury Testimony of Tracy Eaton, p. 12-13, dated June 26, 2012.

CSMD was checked before writing a prescription and other observations by the nurse practitioners. The paper files consisted of simply a triage form and the actual paper prescriptions. In one case, Ezra Easterly, Dr. Kloth testified that he was only seen on one occasion because there was only one “paper” file, when in fact, according to the electronic online EMR record, Easterly had been seen twice.

10. Once the online EMR records were admitted as Defendant’s Exhibit #53 in this case, the Court has heard several specific references to the notes, observations, and decisions by the nurse practitioners that are derived from those online records. No reasonable person could compare them to the “paper” chart and say that Dr. Kloth had a complete medical file.

11. Defendant’s exhibit #53 consists of the electronic medical records received from MD-Online subject to Defendant’s subpoena. The Defendant’s subpoena requested twenty-eight (28) patient files. MD-Online found twenty-six (26) out of twenty-eight (28) patients who had EMR records. The earliest of these records is early November, 2011. Many of these 26 patients visited Primary multiple times which these EMR records document.

12. These records complete the “paper” records reviewed by Dr. Kloth. It is clear on the face of these records that they contain additional information not included in the “paper” file. Testimony from Nurse Practitioner Lauren Patterson and Dr. Phillip Dugan clearly showed to the jury the differences in the electronic medical records and the paper medical record. Specifically, without the electronic medical record, it cannot be known whether the medical providers conducted physical examinations, checked the CSMD for that patient, received a detailed medical history, or even gave the patient a diagnosis. Without the electronic medical record, perhaps the most important part of a provider’s decision to write a prescription, the patient encounter with the nurse practitioner cannot be known.

13. While actual knowledge is not necessary to grant this motion, the government had actual knowledge and chose not to obtain these records. Further, the government gave partial medical records to their expert who has now tainted the jury with unreliable expert testimony. The Defendant is charged in Count Eight (8) of the Indictment with conspiracy to distribute and dispense controlled substances outside the scope of professional practice and not for a legitimate medical purpose. This count alone carries up to a twenty (20) year sentence if she is convicted. This court cannot allow Dr. Kloth's tainted methodology to poison the jury's decision. The only relief that can be warranted is to strike all of Dr. Kloth's testimony relating to the patient records he reviewed from Primary Care and Pain Clinic, P.C. and to dismiss Count Eight (8) of the Indictment. The Defendant has suffered actual prejudice by allowing Dr. Kloth to give expert opinion testimony on a partial set of medical records.

14. Given Kloth's testimony that these additional medical records would affect his reliability, the Government cannot now argue to this Court, contrary to their own expert's testimony, that the "paper" records and the online records are somehow similar, do not add anything or somehow contain the same information. Frankly, they are not the experts, Dr. Kloth was and already admitted on the stand that his opinions would be unreliable if there were additional online records that he did not review. Further, there is nothing to suggest that any doctor can give an opinion on another prescribing professional's medical decisions after only reviewing half the medical file. Therefore, the "method" employed here is fatally flawed.

MEMORANDUM OF LAW

The Sixth Circuit has held that expert opinion testimony from a physician is generally permissible in controlled substances cases. *United States v. Kirk*, 584 F.2d 773, 785 (6th Cir. 1978). This specifically includes testimony "to establish the 'generally acceptable standards of

medical practice for issuing prescriptions.”” *United States v. Hughes*, 895 F.2d 1135, 1144 (6th Cir. 1990).

Pursuant to Rule 702 of the *Federal Rules of Evidence*, a witness who is qualified by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a. the scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b. the testimony is based on sufficient facts or data;
- c. the testimony is the product of reliable principles and methods; and
- d. the expert has reliably applied the principles and methods to the facts of the case.

See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999).

Rule 702(b) and (c) come into play in this case and the *Daubert/Kumho* reliability tests also comes into play. Did Dr. Kloth have sufficient Primary Care medical records to warrant his opinion?

This issue comes up more in the civil context than the criminal. In *Erlanger v. Commissioner of Social Security*, 2013 WL 1182214 (W.D. Mich. March 21, 2013), an Administrative Law Judge relied upon the opinions of expert witnesses to determine whether a party had injuries that warranted disability benefits. The expert in that case based their opinions on incomplete medical records and the Court held that the expert’s testimony was unreliable. The Court held that there were various remedies including striking the testimony, overturning the judgments, and remanding the case back to the Administrative Law Judge. Even the United States Supreme Court in the civil contexts has discussed options available to trial courts if expert testimony is found to be unreliable which include granting directing verdicts and even motions

for summary judgment. *Daubert*, 509 U.S., at 596, 113 S.Ct., at 2798; *See* Fed.R.Civ.P. 50(a); Fed.R.Civ.P. 56.

By his own admission, it would be impossible for Dr. Kloth to provide the jury with a reliable opinion based on the existence of online medical records he has not reviewed. Controlled substances are not, on their face, illegal. Prescribing controlled substances rises to the level of illegality when it is done outside the scope of professional practice and not for a legitimate medical purpose. Important factors doctors rely upon to make decisions about whether to prescribe medication include: patient history, diagnosis, physical examination, checking the CSMD, etc. Without reviewing a doctor's full medical record, there is no way to know whether the providers at Primary Care and Pain Clinic, P.C. prescribed within the confines of the law. Thus, Dr. Kloth's testimony was not based on sufficient facts or data. Dr. Kloth based his opinions almost entirely on the content in the paper file and the CSMD. Without the entire medical record, his opinions are incomplete and unreliable. Without a reliable opinion on that precise subject, the jury cannot render a knowledgeable verdict on this Count.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests:

1. That this Court strike the testimony of Dr. David Kloth;
2. That this Court dismiss Count Eight of the Second Superseding Indictment; and
3. Any further and general relief to which the Defendant would be entitled.

Respectfully Submitted,

DAVIS & HOSS, P.C.

s/ Bryan H. Hoss

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

This the 16th day of January, 2015.

/s Bryan Hoss

BRYAN HOSS

BEFORE THE FEDERAL GRAND JURY
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

TESTIMONY OF TRACY EATON

June 26, 2012

APPEARANCES:

FOR THE U.S. GOVERNMENT:

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1 A. No, there wasn't.

2 Q. Was that unusual?

3 A. Yes.

4 Q. Now, ma'am, in terms of the medical records,
5 how were they kept?

6 A. Well, we had paper charts which had all of
7 their basic information, had their MRIs in it. Anytime
8 when they got a prescription wrote, we made photocopies
9 of it, put that in their charts. And then in the
10 computer we had an electronic medical record system, and
11 we put all of their vital signs. When the nurse
12 practitioners got done, they put all of their
13 information in, like what they done to them, the
14 prescriptions that they wrote them. Nothing was ever
15 copied or, you know, scanned and put in it, it was just
16 what they typed in their selves.

17 Q. So there were actually two separate files, one
18 a paper copy, one a electronic file, for each patient?

19 A. Yes.

20 Q. And the paper file would have things like the
21 stuff they had filled out and maybe some medical records
22 that they brought in?

23 A. Yes.

24 Q. And then the electronic file would have what
25 you did in terms of what their blood pressure looked

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1 like or their pulse or their temperature?

2 A. Yes.

3 Q. And the nurse practitioner or the doctor that
4 saw them, if they made any notes in their file, that
5 would be electronic?

6 A. Yes, they would put that in.

7 Q. Now, on the electronic side of things, could
8 anybody go in there and delete information or change
9 information that had been entered by somebody?

10 A. Yes, they could.

11 Q. Do you know who had access or had the ability
12 to do that?

13 A. Well, the nurse practitioners could do that.

14 The only thing that we could do, as far as MAs, is we
15 could go in and edit their blood pressures, you know.

16 Q. So the stuff that you worked on, you could
17 change?

18 A. Yes.

19 Q. But the stuff the nurse practitioner worked on,
20 you couldn't change?

21 A. No, we were not allowed to do that.

22 Q. Weren't allowed to or weren't able to?

23 A. No, we wasn't able, I'm sorry, wasn't able to
24 do that.

25 Q. And, ma'am, in terms of the employees there,

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APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	*	
	*	
v.	*	DOCKET NO. 1:12-CR-104
	*	
BARBARA LANG,	*	COLLIER/CARTER
	*	
Defendant.	*	

**DEFENDANT'S OFFER OF PROOF RE. THE COURT'S RULING EXCLUDING
PHYSICIAN & NURSE PRACTITIONER TESTIMONY**

COMES NOW, the Defendant, Barbara Lang, by and through her attorney of record, pursuant to Rule 103 of the *Federal Rules of Evidence* and would show unto the Court as follows:

1. On Thursday, January 8, 2015, the Defense called Dr. Clary Foote as their first witness in the defense of Barbara Lang. After several background questions establishing Dr. Foote as a licensed doctor in the State of Tennessee, Counsel asked him about the treatment that he provided to a patient named Damaris Abston and about a specific prescriptions that he had written to Abston on July 21, 2011. The Government objected. The prescription appeared in a Government exhibit that had been introduced before the jury. *See* Govt. Exhibit 150.

2. On Friday, January 9, 2015, the parties argued the issue before this Court. At the time, the Defendant put on the record certain evidence that it wished to present in regards to approximately fourteen (14) physician and nurse practitioners. The Court requested briefs.

3. On Monday, January 12, 2015, after submitting briefs, the Court excluded the testimony.

4. The Defendant during its case in chief filed a written motion seeking to submit on the record an offer of proof pursuant to Rule 103 of the *Federal Rules of Evidence*. The Court allowed a written submission and deemed that such written submission would be filed as if presented during the Defense case-in-chief.

5. On Friday, January 16, 2015, the Defendant rested its case “subject to offer of proof” above. The Court ruled on the record that the Defendant’s offer of proof is deemed filed before the Defendant closed its case for the purposes of appellate review.

6. The Defendant seeks to introduce the lay testimony of the following treating medical professionals. At any point, if Counsel asked any question that entered into “expert” testimony pursuant to Rule 702 of the *Federal Rules of Evidence*, counsel for the government could contemporaneously object. Lastly, all CSMD listed below were prepared by the government in anticipation of this trial and admitted as exhibits in this trial. The Government had actual knowledge of each and every one of the treating medical professionals and their specific prescriptions well before this trial ever began. This should hardly be deemed a surprise.

The Defendant submits the following:

A. WEDNESDAY, JANUARY 7, 2015

The Defendant subpoenaed three (3) witnesses who appeared in the Federal Courthouse on Wednesday, January 7, 2015 to give testimony. Those three (3) witnesses were Dr. Maria Stubbs, Alicia Horst APN¹, and Tiffany Steelman, APN.

1. Dr. Maria Stubbs.

¹ APN is an advanced practice nurse that is a nurse practitioner. APN have prescription writing abilities for schedule II thru V controlled substances in the State of Tennessee.

Dr. Maria Stubbs would have testified that she is a licensed doctor in the State of Tennessee. She would testify that she saw two (2) patients, Kathleen Parsons and Kevin Woody.² She would testify that she was served with a subpoena duces tecum and that she brought those patient files with her. She would testify that the Defense never reviewed those files, but that those files were with her in order to refresh her memory as to treatment of those two patients in case she needed them.

She would testify that she practices medicine at the Stubbs Medical Center, 189 Lantana Road, Crossville, Tennessee. She would testify that there were recent closings of pain clinics in and around the Crossville area.

She would testify that she saw Kathleen Parsons as a patient. She would testify that she observed her and examined her. She would testify that based on those observations that she wrote prescriptions to Kathleen Parsons.³ Defense counsel would show her government exhibit 226, Kathleen Parson's CSMD, which had been introduced in this trial. Dr. Stubbs would testify that she wrote 1 mg tablets of alprazolam (Xanax) for Kathleen Parsons beginning July 26, 2011. She would testify that she also wrote prescriptions on August 26, 2011, September 26, 2011, October 26, 2011, November 23, 2011, December 27, 2011, January 25, 2012, February 27, 2012, March 26, 2012, April 27, 2012, and May 25, 2012 to Ms. Parsons.⁴ Each of these prescribed Alprazolam in 1mg dosages. Parsons filled each of these prescriptions. With the exception of the last prescription, all were for 90 pills. The last prescription was for 60 pills. She would testify that according to the CSMD at the time, that the Defendant was also receiving prescriptions for

² Both Kathleen Parsons and Kevin Woody were patients reviewed by Dr. Kloth.

³ Kathleen Parsons was a patient of both Superior One and Primary Care.

⁴ Each of these prescriptions was during the time period of both the Superior One and Primary care conspiracy.

Oxycodone, Opana, Endocet, and Carisoprodol (soma).⁵ Dr. Stubbs would testify that her prescriptions were written during the time period in which Charles Larmore saw Kathleen Parsons.⁶ She would also testify that it appears from reviewing the CSMD that Kathleen Parsons was receiving Xanax from Charles Larmore but that stopped in June 2011 and that she took over Parsons' care at that point from the mental health side of Parsons' treatment.⁷ She could also testify as to whether or not Larmore communicated with her his findings of Parsons and whether she had knowledge of Larmore's previous treatment. It appears from the CSMD that Larmore and all other prescribers at the four (4) clinics involved in this case stopped writing Xanax for Parsons at the same time that Dr. Stubbs started writing Xanax.

In addition, Dr. Stubbs would testify that she saw Kevin Woody as a patient. She would testify that she observed him and examined him. She would testify that based on those observations that she wrote prescriptions to Kevin Woody.⁸ Defense counsel would show her government exhibit 255, Kevin Woody's CSMD, which had been introduced in this trial. Dr. Stubbs would testify that she wrote a prescription for hydrocodone for Kevin Woody at May 11, 2011. Woody filled this prescription. The prescription was for 30 tablets. She would testify that according to the CSMD at the time, that Woody was also receiving prescriptions for Oxycodone, Opana, and Xanax.⁹ Dr. Stubbs would testify that her prescriptions were written during the time

⁵ Dr. Kloth was highly critical of this fact, i.e. a patient receiving both Xanax and Oxycodone simultaneously. Although it would be inappropriate for this witness to comment on that issue, that is certain an issue in this case and the fact that this physician did that, cuts against Dr. Kloth's opinion and credibility.

⁶ Superior One prescriptions begin December 2010 and continue thru June 2011. This would indicate that she was a patient of Superior One. Further, NP's Lauren Patterson and Rory O'More and Larmore see her again at Primary from December 2011 thru April 2012.

⁷ Dr. Kloth was extremely critical as to why didn't Sherard and Larmore have outside mental health physicians prescribe Xanax. This is clearly a case in which that occurred.

⁸ Kevin Woody was only a patient of Superior One.

⁹ Dr. Kloth was highly critical of this fact, i.e. a patient receiving both Xanax and Oxycodone simultaneously. Although it would be inappropriate for this witness to comment on that issue, that

period in which Woody was seen by Charles Larmore¹⁰ Dr. Stubbs prescription for Hydrocodone was written to Woody approximately 50 days after Larmore's last prescription.

2. Alicia Horst, APN

Alicia Horst APN would have testified that she is a licensed nurse practitioner in the State of Tennessee. She would testify that she saw Kathleen Parsons as a patient.¹¹ She would testify that she was served with a subpoena duces tecum and that she brought with her the patient files. She would testify that the Defense never reviewed those files, but that those files were with her in order to refresh her memory as to treatment of those two patients in case she needed them.

She would testify that she practices as a nurse practitioner in and around middle Tennessee. She would testify that there were recent closings of pain clinics in and around the middle Tennessee area that affected all physicians and nurse practitioners.

She would testify that she saw Kathleen Parsons as a patient. She would testify that she observed her and examined her. She would testify that based on those observations that she wrote prescriptions to Kathleen Parsons.¹² Defense counsel would show her government exhibit 226, Kathleen Parson's CSMD, which had been introduced in this trial. Mrs. Horst would testify that she wrote two (2) prescriptions to her. They were on January 26, 2011 and April 27, 2011 and both prescriptions were for Oxycodone 30mg tablets (90 pills) and Xanax 1 mg tablets (90 pills).¹³

is certain an issue in this case and the fact that this physician did that, cuts against Dr. Kloth's opinion and credibility.

¹⁰ Superior One prescriptions begin December 2010 and continue thru March 23, 2011. This would indicate that he was a patient of Superior One.

¹¹ Kathleen Parsons was a patient reviewed by Dr. Kloth.

¹² Kathleen Parsons was a patient of both Superior One and Primary Care.

¹³ Dr. Kloth was highly critical of writing both Oxycodone and Xanax at the same time claiming that there was no medical reason or justification for both. He was also critical of writing oxycodone 30mg tablets in general.

Parsons filled each of these prescriptions.¹⁴ She would testify that Charles Larmore saw Parsons right before her prescription, in between her two (2) prescriptions and immediately after her prescriptions.¹⁵

3. Tiffany Steelman, APN

Tiffany Steelman, APN, would have testified that she is a licensed nurse practitioner in the State of Tennessee. She would testify that she saw Kathleen Parsons as a patient.¹⁶ She would testify that she was served with a subpoena duces tecum and that she brought with her the patient files. She would testify that the Defense never reviewed those files, but that those files were with her in order to refresh her memory as to treatment of those two patients in case she needed them.

She would testify that she practices as a nurse practitioner at 1246 Knoxville Highway, Wartburg, Tennessee. She would testify that there were recent closings of pain clinics in and around the middle Tennessee area.

She would testify that she saw Kathleen Parsons as a patient. She would testify that she observed her and examined her. She would testify that based on those observations that she wrote prescriptions to Kathleen Parsons.¹⁷ Defense counsel would show her government exhibit 226, Kathleen Parson's CSMD, which had been introduced in this trial. Mrs. Steelman would testify that she wrote two prescriptions to her. They were on February 28, 2011 and March 28, 2011 and both prescriptions were for Oxycodone 30mg tablets (90 pills) and Xanax 1 mg tablets (90 pills).¹⁸

¹⁴ Each of these prescriptions was during the time period of both the Superior One and Primary care conspiracy.

¹⁵ Larmore saw Parsons on January 18, 2011, February 3, 2011, February 16, 2011 and June of 2011.

¹⁶ Kathleen Parsons was a patient reviewed by Dr. Kloth.

¹⁷ Kathleen Parsons was a patient of both Superior One and Primary Care.

¹⁸ Dr. Kloth was highly critical of writing both Oxycodone and Xanax at the same time claiming that there was no medical reason or justification for both.

Parsons filled each of these prescriptions.¹⁹ She would testify that Charles Larmore saw Parsons right before her prescription, in between her two prescriptions and immediately after her prescriptions.²⁰

B. THURSDAY, JANUARY 8, 2015

The Defendant subpoenaed six (6) witnesses who appeared in the Federal Courthouse on Thursday, January 8, 2015 to give testimony. Those six (6) witnesses were Dr. Timothy Gowder, Dr. Gary Moore, Dr. Phillip Bannor, Dr. Douglas Carpenter, Dr. Clary Foote and Rebecca Norfleet, APN.

1. Dr. Timothy Gowder.

Dr. Timothy Gowder would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw three (3) patients, John Goss, Amy Carroll and Tony Raaso.²¹ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of those patients in case he needed them.

He would testify that he practices medicine at his own office located at 1008 Executive Drive, Hixson, Tennessee. He is a partner with Dr. Gary Moore. He would testify that there were recent closings of medical clinics in and around southeast and middle Tennessee in 2011/2012. He would further testify to the difficulty in pharmacies filling prescriptions during that same time

¹⁹ Each of these prescriptions was during the time period of both the Superior One and Primary care conspiracy.

²⁰ Larmore saw Parsons on January 18, 2011, February 3, 2011, February 16, 2011 and June of 2011.

²¹ Dr. Kloth reviewed the files of John Goss and Tony Raaso. Amy Shilling Carroll was a witness on the government's to-be-called list. She did not eventually testify but her CSMD was admitted. There was testimony that she was pregnant when she was seen as a patient at Primary by government witness Sam Newcome.

period as manufacturers drastically cut the amounts of pills sold to wholesalers. He would testify that it affected all physicians across the board.

He would testify that he saw John Goss as a patient. He would testify that he observed him and examined him. He would testify that based on those observations that he wrote prescriptions to John Goss.²² Defense counsel would show him government exhibit 199, John Goss' CSMD, which had been introduced in this trial. Dr. Gowder would testify that he wrote prescriptions for John Goss on September 6, 2011, November 4, 2011, January 27, 2012, March 23, 2012, April 17, 2012, May 16, 2012, and June 12, 2012.²³ Those prescriptions were for Oxycodone 30mg tablets and Xanax 2mg tablets. Dr. Gowder initially started Goss on 180 tablets of Oxy 30's and 90 tablets of Xanax 2mg tablets.²⁴ He increased the Oxycodone 30's to 210 tablets. He also began prescribing to Goss Ambien (zolpidem tartrate) and Carisoprodol (soma) at different times. He would testify that his partner, Dr. Gary Moore, independently examined John Goss and prescribed him similar medication. Further, showing Dr. Gowder the CSMD, he would testify that the amounts that he prescribed Goss for the medical conditions complained were actually greater than the amount that Charles Larmore prescribed.

In addition, Dr. Gowder would testify that he saw Tony Rasso as a patient. He would testify that he observed him and examined him. He would testify that based on those observations that

²² John Goss was a patient of Superior One. He testified in this case and claimed that he never suffered from any physical condition and was not in pain. He did testify that he brought patients to Primary care and testified to the level of treatment at Primary Care. He described the differences between the two clinics. He was personally familiar with both.

²³ Each of these prescriptions was during the time period of both the Superior One and Primary care conspiracy.

²⁴ Dr. Kloth was highly critical of this fact, i.e. a patient receiving both Xanax and Oxycodone simultaneously. Although it would be inappropriate for this witness to comment on that issue, that is certainly an issue in this case and the fact that this physician did that, cuts against Dr. Kloth's opinion and credibility.

he wrote prescriptions to Tony Rasso.²⁵ Defense counsel would show him government exhibit 232, Tony Rasso's CSMD, which had been introduced in this trial. Dr. Gowder would testify that he wrote prescriptions for oxycodone 30mg tablets and alprazolam (Xanax) 1mg tablets for Tony Rasso on August 23, 2011, September 20, 2011 and October 18, 2011. He would testify that based upon the CSMD that Rasso filled these prescriptions. The Oxycodone prescriptions were for 150 tablets each time. The Xanax prescriptions were for 60 tablets the first two prescriptions and 90 tablets the last prescription.²⁶ Each of these prescriptions was written during the time period of the Primary Care conspiracy.

In addition, Dr. Gowder would testify that he saw Amy Carroll as a patient. He would testify that He observed him and examined him. He would testify that based on those observations that he wrote prescriptions to Amy Carroll.²⁷ Defense counsel would show him government exhibit 238, Amy Carroll's CSMD, which had been introduced in this trial. Dr. Gowder would testify that he wrote her prescriptions for Oxycodone 30mg tablets and Alprazolam (Xanax) 1mg tablets for Amy Carroll on August 24, 2011, September 21, 2011 and October 19, 2011. He would testify that based upon the CSMD that Carroll filled these prescriptions. The Oxycodone prescriptions were for 90 tablets the first time and then 120 tablets the next two times. The Xanax prescriptions were for 60 tablets each time.²⁸ Each of these prescriptions was written during the time period of the Primary Care conspiracy.

²⁵ Tony Rasso was a patient of Superior One and the Sherard Clinic in early summer 2012.

²⁶ Dr. Kloth was highly critical of this fact, i.e. a patient receiving both Xanax and Oxycodone simultaneously. Although it would be inappropriate for this witness to comment on that issue, that is certain an issue in this case and the fact that this physician wrote those prescriptions cuts against Dr. Kloth's opinion and credibility.

²⁷ Amy Carroll was a patient of Superior One, Elite Care and Primary.

²⁸ Dr. Kloth was highly critical of this fact, i.e. a patient receiving both Xanax and Oxycodone simultaneously. Although it would be inappropriate for this witness to comment on that issue, that is certain an issue in this case and the fact that this physician did that, cuts against Dr. Kloth's opinion and credibility.

2. Dr. Gary Moore.

Dr. Gary Moore would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw one (1) patient, John Goss.²⁹ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of those patients in case he needed them.

He would testify that he practices medicine at his own office located at 1008 Executive Drive, Hixson, Tennessee. He is a partner with Dr. Timothy Gowder.

He would testify that he saw John Goss as a patient. He would testify that he observed him and examined him. He would testify that based on those observations that he wrote prescriptions to John Goss.³⁰ Defense counsel would show him government exhibit 199, John Goss' CSMD, which had been introduced in this trial. Dr. Moore would testify that he wrote prescriptions for John Goss on February 24, 2012.³¹ The prescription was for Oxycodone 30mg, Xanax 2mg tablets and Ambien (Zolpidem Tartrate).³² He would testify that his partner, Dr. Timothy Gowder, independently examined John Goss and prescribed him similar medication. Further, showing Dr. Moore the CSMD of Goss, he would testify that the amounts that he prescribed Goss for the medical conditions complained were actually greater than the amount that Charles Larmore prescribed.

²⁹ Dr. Kloth reviewed the files of John Goss.

³⁰ John Goss was a patient of Superior One. He testified in this case and claimed that he never suffered from any physical condition and was not in pain. He did testify that he brought patients to Primary care and testified to the level of treatment at Primary Care. He described the differences between the two clinics. He was personally familiar with both.

³¹ This prescription was during the time period of the Primary care conspiracy.

³² Dr. Kloth was highly critical of this fact, i.e. a patient receiving Oxycodone 30mg tablets and receiving both Xanax and Oxycodone simultaneously. Although it would be inappropriate for this witness to comment on that issue, that is certainly an issue in this case and the fact that this physician did that, cuts against Dr. Kloth's opinion and credibility.

3. Dr. Phillip Bannor

Dr. Phillip Bannor would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw one (1) patient, Angelique Gilmour.³³ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of those patients in case he needed them.

He would testify that he practices medicine at his own office located at 6106 Shallowford Road, Chattanooga, Tennessee.

He would testify that he saw Angelique Gilmour as a patient. He would testify that he observed her and examined her. He would testify that based on those observations that he wrote prescriptions to Angel Gilmore.³⁴ Defense counsel would show him government exhibit 196, Angel Gilmore's CSMD, which had been introduced in this trial. Dr. Bannor would testify that he wrote prescriptions for Gilmore on July 15, 2011, December 16, 2011, January 27, 2012, February 24, 2012 and March 5, 2012.³⁵ The prescriptions were for Oxycontin 30's, Hydrocodone, Opana, and Morphine in various dosages.³⁶

4. Dr. Douglas Carpenter

³³ Dr. Kloth reviewed the files of Angelique Gilmour. "Angel" Gilmore was also an employee of Superior One. John Goss testified that he met Angel Gilmore at a Waffle House and gave her money to help him get his individuals into the clinic to be seen. He further testified that he gave Angel Gilmore Oxycodone pills to give to Faith. Dr. Kloth was highly critical of Superior One and Larmore prescribing pills to their own employees. This added scrutiny makes Dr. Bannor's testimony and treatment of her even more relevant.

³⁴ Angel Gilmore was a patient of Superior One and Elite. Shakeema Branch was also the individual who Faith Blake used to rent the Uncle Bob's storage facility where law enforcement executed a subpoena. She was an employee of Elite. Dr. Kloth reviewed her file and gave opinions as to her care, treatment and condition. He further added additional scrutiny and criticism because she was an employee of Elite.

³⁵ The first prescription was written approximately one week after Superior One closed, but all others were written during the Primary Care conspiracy.

³⁶ Dr. Kloth was highly critical of Oxycodone 30 mg tablets.

Dr. Douglas Carpenter would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw one (1) patient, Amy Carroll.³⁷ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of those patients in case he needed them.

He would testify that he practices medicine at his own office located at Crossville Medical Group, 1000 Lantana Road, Crossville, Tennessee. He would testify that there had been recent closings of pain clinics in and around Crossville, Tennessee.

Dr. Carpenter would testify that he observed her and examined her. He would testify that based on those observations that he wrote prescriptions to Amy Carroll.³⁸ Defense counsel would show him government exhibit 238, Amy Carroll's CSMD, which had been introduced in this trial. Dr. Carpenter would testify that he wrote her a prescription for Oxycodone 30mg tablets on December 6, 2011.³⁹ He would testify that based upon the CSMD that Carroll filled that prescription.⁴⁰

5. Dr. Clary Foote

³⁷ She is also referenced in this case as Amy Carroll Shillings or Amy Shillings Carroll. She is Samuel Newcome's girlfriend. The government elicited testimony that it was somehow improper for Primary Care to treat her because she was pregnant. The government further elicited testimony that it would be obvious to anyone that she was pregnant. Counsel submits that Newcome testified that she had the baby in or around May/June 2012.

³⁸ Amy Carroll was a patient of Superior One, Elite Care and Primary.

³⁹ Dr. Kloth was highly critical of Oxycodone prescriptions in 30mg dosages. Although it would be inappropriate for this witness to comment on that issue, that is certainly an issue in this case and the fact that this physician prescribed that medication, cuts against Dr. Kloth's opinion and credibility.

⁴⁰ This prescription was written during the time period of the Primary Care conspiracy. Charles Larmore had written her prescriptions while at Superior One before this prescription and he wrote her prescriptions at Primary One after this prescription.

Dr. Clary Foote would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw one (1) patient, Damaris Abston.⁴¹ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of her in case he needed them.

He would testify that he practices medicine at his own office located at 190 North Roane Street, Harriman, Tennessee. He would testify that there had been recent closings of pain clinics in and around the east Tennessee area.

Dr. Foote would testify that he observed her and examined her. He would testify that based on those observations that he wrote prescriptions to Damaris Abston. Defense counsel would show him government exhibit 150, Damaris Abston's CSMD, which had been introduced in this trial. Dr. Foote would testify that he wrote her an initial prescription for methadone and Alprazolam (Xanax) 1mg on July 21, 2011 and August 15, 2011. After those dates, he wrote her prescriptions for Alprazolam (Xanax) only on September 13, 2011, October 11, 2011, November 9, 2011, December 7, 2011, January 6, 2012, March 15, 2012 and April 27, 2012. He would testify that he initially prescribed 1mg tablets and 90 pills but reduced it to .5mg and 120 pills as time progressed. Dr. Foote would testify that at the time, Damaris Abston was also being prescribed oxycodone.⁴² He would testify that based upon the CSMD that Abston filled that prescription.⁴³ Dr. Foote would

⁴¹ Damaris Abston was a patient at both Superior One and Primary Care.

⁴² Dr. Kloth was highly critical of why didn't Larmore seek and obtain outside physicians to monitor the Xanax and mental health prescriptions. According to the CSMD, Larmore initially prescribed Xanax for Abston, but when Dr. Foote started writing Xanax, Larmore stopped. It appears from this document that this was not simply a coincidence. Further, Dr. Kloth was highly critical of a patient receiving and taking both Xanax and Oxycodone. This evidence would cut against Dr. Kloth's credibility.

⁴³ This prescription was written during the time period of the Primary Care conspiracy. Charles Larmore had written her prescriptions while at Superior One before this prescription and he wrote her prescriptions at Primary One after this prescription.

testify that based upon the review of the CSMD that Charles Larmore had previously prescribed Xanax. Dr. Foote would testify that he took over the mental health side of Abston's care. Upon belief, Dr. Foote would also testify that he knew of Abston's other prescriptions for Oxycodone as well.

6. Rebecca Norfleet, APN

Rebecca Norfleet, APN would have testified that she is a licensed nurse practitioner in the State of Tennessee. She would testify that she saw Ben Chester as a patient.⁴⁴ She would testify that she was served with a subpoena duces tecum and that she brought with her the patient files. She would testify that the Defense never reviewed those files, but that those files were with her in order to refresh her memory as to treatment of those two patients in case she needed them.

She would testify that she practices as a nurse practitioner at 211 Woodland Street, Manchester, Tennessee. She would testify to whether there were recent closings of pain clinics in and around the middle Tennessee area.

She would testify that she saw Ben Chester as a patient. She would testify that she observed him and examined him. She would testify that based on those observations that she wrote prescriptions to Ben Chester. Defense counsel would show her a CSMD provided to the Defense in discovery.⁴⁵ Mrs. Norfleet would testify that she wrote one prescriptions to her dated June 18,

⁴⁴ Ben Chester was a patient reviewed by Dr. Kloth.

⁴⁵ The discovery CSMD's provided to the Defense was different than the CSMD's introduced at trial by a few months. The Government did introduce a Ben Chester CSMD at trial, but it did not contain Rebecca Norfleet's June 18, 2012 prescriptions. This prescription is still written during the time period of the Primary conspiracy and was written after a May 18, 2012 prescription by Dr. Sherard. It appears that Ben Chester was a patient of the Sherard Clinic and Elite Clinic. It does not appear that Chester ever was a patient of Primary. He may have been a patient of Superior One, but that it also unclear.

2012. She wrote oxycodone 15's, morphine and Alprazolam (Xanax).⁴⁶ Chester filled these prescriptions.⁴⁷

C. FRIDAY, JANUARY 9, 2015

The Defendant subpoenaed three (3) witnesses who appeared in the Federal Courthouse on Friday, January 9, 2015 to give testimony. Those three (3) witnesses were Dr. Timothy Bell, Linda Cole, APN, and Dr. Troy Gilson.

1. Dr. Timothy Bell.

Dr. Tim Bell would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw one (1) patient, Tim Wright.⁴⁸ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of those patients in case he needed them.

He would testify that he practices medicine at his own office located at 814 North Kentucky Street, Kingston, Tennessee. He is familiar with Linda Cole, APN, and previously worked with her as a nurse practitioner. He would testify that there were recent closings of medical clinics in and around southeast and middle Tennessee in 2011/2012. He would further testify to the difficulty in pharmacies filling prescriptions during that same time period as manufacturers drastically cut the amounts of pills sold to wholesalers. He would testify that it affected all physicians across the board.

He would testify that he saw Tim Wright as a patient. He would testify that he observed him and examined him. He would testify that based on those observations that he wrote

⁴⁶ Dr. Kloth was highly critical of writing both Oxycodone and Xanax at the same time claiming that there was no medical reason or justification for both.

⁴⁷ This prescription was written during the time period of the Primary care conspiracy.

⁴⁸ Dr. Kloth reviewed the files of Tim Wright.

prescriptions to Tim Wright.⁴⁹ Defense counsel would show him government exhibit 257, Tim Wright's CSMD, which had been introduced in this trial. Dr. Bell would testify that he wrote prescriptions for Tim Wright on November 17, 2011, February 15, 2012, March 14, 2012, April 12, 2012, May 11, 2012, and June 12, 2012.⁵⁰ The prescriptions were for Oxycodone 30mg and Morphine.⁵¹ He would testify that his nurse practitioner, Linda Cole, APN, at the time independently examined Tim Wright and prescribed him similar medication. Further, showing Dr. Bell the CSMD of Wright, he would testify that the amounts that he prescribed Wright for the medical conditions complained were times actually greater than the amount that Charles Larmore prescribed.

2. Linda Cole, APN.

Linda Cole, APN, would have testified that she is a licensed nurse practitioner in the State of Tennessee. She would testify that she saw one (1) patient, Tim Wright.⁵² She would testify that she was served with a subpoena duces tecum and that she brought those patient files to Court. She would testify that the Defense never reviewed those files, but that those files were with her in order to refresh her memory as to treatment of those patients in case she needed them.

She would testify that she practices as a nurse practitioner at her office located at 515 Rockbridge, Coalfield, Tennessee. She is familiar with Dr. Tim Bell and they previously worked together. She would testify that there were recent closings of medical clinics in and around southeast and middle Tennessee in 2011/2012. She would further testify to the difficulty in pharmacies filling prescriptions during that same time period as manufacturers drastically cut the

⁴⁹ Tim Wright was a patient of Superior One.

⁵⁰ These prescriptions were during the time period of the Primary Care conspiracy.

⁵¹ Dr. Kloth was highly critical of patients receiving prescriptions for Oxycodone 30mg tablets.

⁵² Dr. Kloth reviewed the files of Tim Wright.

amounts of pills sold to wholesalers. She would testify that it affected all physicians across the board.

She would testify that she saw Tim Wright as a patient. She would testify that she observed him and examined him. She would testify that based on those observations that she wrote prescriptions to Tim Wright.⁵³ Defense counsel would show her government exhibit 257, Tim Wright's CSMD, which had been introduced in this trial. Linda Cole, APN would testify that she wrote prescriptions for Tim Wright on August 18, 2011, September 19, 2011, October 18, 2011, and December 16, 2011.⁵⁴ The prescriptions were for Oxycodone 30mg and Morphine.⁵⁵ She would testify that her doctor, Dr. Tim Bell, at the time independently examined Tim Wright and prescribed him similar medication. Further, showing Linda Cole the CSMD of Wright, she would testify that the amounts that she prescribed Wright for the medical conditions complained were times actually greater than the amount that Charles Larmore prescribed.

3. Dr. Troy Gilson

Dr. Troy Gilson would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw one (1) patient, Shakeema Branch.⁵⁶ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of those patients in case he needed them.

He would testify that he practices medicine at his own office located at 940 South Ocoee Street, Cleveland, Tennessee. He is familiar with Dr. Willis Marshall who also saw Shakeema Branch and wrote her prescriptions. He would testify that he took over the care of Shakeema

⁵³ Tim Wright was a patient of Superior One.

⁵⁴ These prescriptions were during the time period of the Primary Care conspiracy.

⁵⁵ Dr. Kloth was highly critical of patients receiving prescriptions for Oxycodone 30mg tablets.

⁵⁶ Dr. Kloth reviewed the files of Shakeema Branch.

Branch from Dr. Marshall who is retired. He would testify that there were certain entries into the CSMD of Shakeema Branch in which his records indicated she was seen by nurse practitioners operating under his supervision at his clinic.

He would testify that he saw Shakeema Branch⁵⁷ as a patient. He would testify that he observed her and examined her. He would testify that based on those observations that he wrote prescriptions to Shakeema Branch.⁵⁸ Defense counsel would show him government exhibit 164, Shakeema Branch's CSMD, which had been introduced in this trial. Dr. Gilson would testify that he and/or his nurse practitioners wrote monthly prescriptions for Shakeema Branch in August 2011 thru April 2012 for a total of nine (9) prescriptions.⁵⁹ The prescriptions were for Alprazolam (Xanax).⁶⁰ Further, showing Dr. Gilson the CSMD of Branch, he would testify that when they began prescribing Xanax to Branch, that Larmore and Sherard stopped writing that prescription. This evidence reflects that at least Larmore and Sherard knew that a 3rd party physician who had experience in the mental health field was prescribing Xanax Branch.

D. MONDAY, JANUARY 12, 2015

Because of the Court's ruling on Friday, January 9, 2015, no other physicians or nurse practitioners appeared. Besides the twelve (12) listed above, counsel had issued and served subpoenas on two (2) other medical professionals who were to be called as witnesses during the week of January 12, 2015. They were Dr. Neal Frauwirth and Dr. Frances Barnett.

⁵⁷ Shakeema Branch was also the individual who rented the Uncle Bob's storage unit for Faith Blake that stored the Superior One medical files entered as evidence in this case.

⁵⁸ Shakeema Branch was a patient of Superior One, Elite Care and the Sherard Clinic.

⁵⁹ These prescriptions were during the time period of the Primary Care conspiracy.

⁶⁰ Dr. Kloth was highly critical of patients receiving prescriptions for Xanax while also receiving prescriptions for Oxycodone 30mg tablets. Further, Dr. Kloth opined that outside physicians with experience in mental health should be the individuals who write prescriptions for Xanax. This is precisely what occurred in this case. The medical providers obtained outside 3rd party prescribers to write a prescription for Xanax.

1. Dr. Neal Frauwirth

Dr. Neal Frauwirth would have testified that he is a licensed doctor in the State of Tennessee. He would testify that he saw one (1) patient, Tim Wright.⁶¹ He would testify that he was served with a subpoena duces tecum and that he brought those patient files to Court. He would testify that the Defense never reviewed those files, but that those files were with him in order to refresh his memory as to treatment of those patients in case he needed them.

He would testify that he practices medicine at his own office located at the Center for Pain Management, 65 Mousecreek Road NW, Cleveland, Tennessee.

He would testify that he saw Tim Wright as a patient. He would testify that he observed him and examined him. He would testify that based on those observations that he wrote a prescription to Tim Wright.⁶² Defense counsel would show him government exhibit 257, Tim Wright's CSMD, which had been introduced in this trial. Dr. Frauwirth would testify that he wrote prescriptions for Tim Wright on July 22, 2011.⁶³ The prescriptions were for Oxycodone 30mg and Morphine.⁶⁴ Further, showing Dr. Frauwirth the CSMD of Wright, he would testify that the amounts that he prescribed Wright for the medical conditions complained were times actually greater than the amount that Charles Larmore prescribed.

2. Dr. Frances Barnett

Dr. Frances Barnett would have testified that she is a licensed doctor in the State of Tennessee. She would testify that she saw one (1) patient, Misty Garcia.⁶⁵ She would testify that she was served with a subpoena duces tecum and that she brought those patient files to Court. She

⁶¹ Dr. Kloth reviewed the files of Tim Wright.

⁶² Tim Wright was a patient of Superior One.

⁶³ These prescriptions were during the last month of the Superior One conspiracy.

⁶⁴ Dr. Kloth was highly critical of patients receiving prescriptions for Oxycodone 30mg tablets.

⁶⁵ Dr. Kloth reviewed the files of Misty Garcia.

would testify that the Defense never reviewed those files, but that those files were with her in order to refresh her memory as to treatment of those patients in case she needed them.

She would testify that she practices medicine at her own office Medical Center Plaza, 980 Highway 28, Jasper, Tennessee. She would testify that there were recent closings of medical clinics in and around southeast and middle Tennessee in 2011/2012.

She would testify that he saw Misty Garcia as a patient. She would testify that she observed her and examined her. She would testify that based on those observations that she wrote prescriptions to Misty Garcia.⁶⁶ Defense counsel would show her government exhibit 191, Misty Garcia's CSMD, which had been introduced in this trial. Dr. Barnett would testify that she wrote prescriptions for Misty Garcia on March 7, 2011.⁶⁷ The prescriptions were for Oxycodone 30mg and Alprazolam (Xanax).⁶⁸ They were for 60 tablets of Oxycodone 30mg and for 45 tablets of Xanax, 2mg.

The Defendant would submit that this testimony of each of these fourteen (14) prescribing professionals constitutes lay testimony. The Defendant has a constitutional right to present a defense and to challenge the government evidence in this case. These are fact witnesses to the government's exhibit that they admitted. The Government had actual knowledge of these prescribing professionals, the dates of their interactions with these patients and their actual prescriptions because they appeared on the very exhibits that the government introduced. The Defendant specifically objects on constitutional grounds in that it is denying her fundamental right to present a defense and to a fair trial.

⁶⁶ Misty Garcia was a patient of Superior One, Elite Pain Care and in 2012, a patient with Dean Peterson, a government informant who opened his own clinic in or around early 2012.

⁶⁷ These prescriptions were during the time period of the Primary Care conspiracy.

⁶⁸ Dr. Kloth was highly critical of patients receiving prescriptions for Oxycodone 30mg tablets and he was highly critical of patients receiving prescriptions for both Oxycodone 30mg tablets and Xanax at the same time.

Respectfully submitted,

s/Bryan H. Hoss

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

This the 20th day of January, 2015.

s/Bryan H. Hoss