APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

PAUL WISEBERG and ROBERT KALABA,

Defendants.

13 Cr. 794 (AT)

ORDER

ANALISA TORRES, District Judge:

After a twelve-day jury trial, on October 22, 2015, a jury convicted Defendants Paul Wiseberg and Robert Kalaba of conspiracy to distribute or illegally dispense a controlled substance—or to possess with intent to do so—in violation of 21 U.S.C. § 841(a)(1) (2012); conspiracy to use an invalid Drug Enforcement Administration ("DEA") registration number in violation of 21 U.S.C. § 843(a)(2), to fraudulently acquire a controlled substance in violation of 21 U.S.C. § 843(a)(3), or to provide false information to the DEA in violation of 21 U.S.C. § 843(a)(4)(A); and conspiracy to launder money in violation of 18 U.S.C. § 1956(a)(1).

Defendants move for a post-verdict judgment of acquittal as to Counts One and Three[1] pursuant to Federal Rule of Criminal Procedure 29(c) or, in the alternative, for a new trial pursuant to Rule 33. Defendants' motions are DENIED.

MOTION FOR JUDGMENT OF ACQUITTAL

A. Legal Standard

Defendants seek a judgment of acquittal on the ground that the evidence introduced at trial was "insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). A successful Rule 29

[1] The Court refers to the three counts actually tried, rather than the numbers assigned in the original indictment. Both Defendants admitted guilt as to Count Two of the indictment at trial. *E.g.*, Tr. 88, 101.

motion requires a showing by a defendant that "no rational trier of fact, viewing the evidence in the light most favorable to the government, could have found him guilty beyond a reasonable doubt of the essential elements of the crimes charged. . . . [The defendant] bears a very heavy burden." *United States v. Desena*, 287 F.3d 170, 176-77 (2d Cir. 2002); *accord United States v. Irving*, 452 F.3d 110, 117 (2d Cir. 2006). The Court must "credit every inference that could have been drawn in the government's favor" and, "[w]here there are conflicts in the testimony, . . . must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *United States v. Ware*, 577 F.3d 442, 447 (2d Cir. 2009). This is true even where, as in this case, Government witnesses "had pled guilty to [narcotics crimes] and testified pursuant to cooperation agreements with the Government and even though their testimony [contained] inconsistencies." *United States v. Glenn*, 312 F.3d 58, 64 (2d Cir. 2002). Deference to the jury's determinations is "especially important" when dealing with conspiracy convictions, "because a conspiracy by its very nature is a secretive operation," requiring careful balancing of circumstantial evidence and witness credibility. *United States v. Morgan*, 385 F.3d 196, 204 (2d Cir. 2004) (quoting *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992)).

B. Count One: Narcotics Conspiracy

1. Elements

Each of Defendants' three convictions derive from conspiracy charges, for which the Government must prove beyond a reasonable doubt that (1) the conspiracy charged in the indictment existed and (2) each defendant knowingly and intentionally participated in that conspiracy. Tr. 1806-1807; *United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014). Here, Count One required proof that Defendants operated several pharmacies in furtherance of a conspiracy "to dispense the controlled substances, or cause them to be dispensed, other than for a legitimate medical purpose, other than in good faith, and not in the usual course of medical practice." Tr. 1813; *accord United States v. Quinones*, 635 F.3d 590, 594-95 (2d Cir. 2011).

2. Sufficiency of the Evidence

The evidence presented at trial, when viewed in the light most favorable to the government, easily supports a reasonable jury's finding that the Government proved the essential elements beyond a reasonable doubt.

Taking all reasonable inferences in favor of the Government, the evidence at trial showed that Defendants Wiseberg and Kalaba were the owner and manager, respectively, of Plainfield Pharmacy in Plainfield, New Jersey. *See, e.g.*, Def. Mot. 1, ECF No. 330. Defendants operated a mail-order prescription business out of Plainfield as well as two other pharmacies in Manhattan and in Union, New Jersey. Tr. 389-91. Defendants admit that the business plan for their pharmacies entailed filling prescriptions from pain management clinics in Florida for medications like oxycodone, *e.g.*, Tr. 89-92, 99-101, which are Schedule II controlled substances, 21 C.F.R. § 1308.12(b)(1) (2012), under the Controlled Substances Act, 21 U.S.C. § 812 (2012). Indeed, up to eighty-one percent of Plainfield's patients received such narcotics in a given month. Tr. 973.

From the beginning of the operation, there were signs that this plan was not medically legitimate and not in the usual course of medical practice. Patients were prohibited from calling or visiting Plainfield, Tr. 200, which would have frustrated the pharmacy's legal obligation to provide counseling to patients, Tr. 1096. Despite Defendants' professed policy preventing the shipment of narcotics to multiple patients at the same address, Tr. 501-02, the Government offered an example of five such patients living in the same apartment in Florida, Tr. 162-67, 1532-34, which the Government's pharmaceutical expert described as a "major problem," Tr.

1104. Other so-called red flags, as identified by the expert, included the pharmacy's policy against accepting payments via insurance or Medicaid, Tr. 199, 1110-11, 1311, and the great distances between the location of some patients, their prescribers, and the pharmacy, Tr. 193, 713, 1093-96.

Video evidence indicated that when one pharmacist raised concerns about the pharmacy's compliance with the law, Defendants simply opened up shop on a Saturday—without a licensed pharmacist present—and filled the prescriptions themselves. Tr. 235-41. On that particular day, Defendants substituted the medications' dosage and quantity—for example, by issuing 62 four-milligram tablets instead of 31 eight-milligram tablets—without consulting the prescribing doctors. Tr. 253-55. These acts, outside the presence of a pharmacist, provided strong evidence that Defendants' business was not conducted in the usual course of medical practice, Tr. 1098-1102, 1167, and that Defendants knew so.

Defendants protest that they "put[] measures in place to screen for patients who do not have a medical necessity." Def. Mot. 11-12. But, as noted above, few of these protocols were actually followed. Tr. 189-96. For example, the Government offered evidence of Kalaba instructing that prescriptions be filled despite noncompliance with the protocols, Tr. 384, and overriding limits on the frequency of prescriptions, Tr. 174. The pharmacy maintained a do-not-fill list of banned patients, but the Government offered evidence of narcotics prescriptions filled even for names on that list. Tr. 261. The law and professional practice require pharmacists to verify that a genuine doctor-patient relationship exists before filling a prescription, Tr. 1093-96, and indeed Defendants' protocols required employees to call doctors' offices, Tr. 308-11. But unlike at other pharmacies, Plainfield employees did not speak directly to the doctors to make this verification. Tr. 138, 747-48. Even if they had, merely calling to verify the existence of the prescription would have been insufficient: as the Government's expert explained, if a doctor is intentionally signing illegitimate prescriptions, "it's pretty obvious [he or she] is not going to say, 'You got me, don't fill it.'" Tr. 1097; *accord* Tr. 1206, 1211-12. Given this evidence, the jury "was free to find these measures to be nothing more than a façade simply designed to convey the appearance of legitimacy." *United States v. Green*, 818 F.3d 1258, 1277 (11th Cir. 2016). In particular, "[t]he jury could find that [Defendants'] verification procedure was little more than a rubber-stamp measure designed to ensure that an actual doctor had actually written a given prescription" and that in practice it "did nothing to ensure that the prescriptions [the pharmacy] filled were validly written for legitimate medical purposes." *Id.* In short, the evidence was overwhelming that Defendants' business plan was in reality a conspiracy to dole out prescription painkillers other than for a legitimate medical purpose, other than in good faith, and not in the usual course of medical practice.

The evidence was just as compelling that both Defendants knowingly and intentionally participated in this unlawful scheme. In addition to the video recording discussed above, audio recordings revealed, for example, Wiseberg's discussions with the owner of a Florida pain clinic who planned to "sell the crap out of Kentucky and Tennessee," Tr. 727, and Wiseberg's own plan to ship medications under the name of a fake video gaming company in order to evade detection by the "rats" at UPS, Tr. 184-85, 735. Regarding a package of several prescriptions for patients residing at the same address, Wiseberg admitted to an associate that this was "too coincidental," to which she responded in agreement that it did not "look good." Gov't Ex. 3-7. The prescriptions were filled nonetheless. *Id.* Although Wiseberg stated in one of these conversations that he did not "want to break any laws," Tr. 746, given the other evidence, the jury could have concluded that he meant he intended to comply with certain regulatory formalities so as to avoid scrutiny of the underlying unlawful scheme, *Green*, 818 F.3d at 1276.

As for Kalaba, he also expressed approval, even delight, at a set of six patients all receiving prescriptions at the same address. Gov't Ex. 2-6 ("They're all going to the same address! Six of 'em! I told Paul [Wiseberg] this. . . . That's, that's all that is bro! Nothing else. Greed. Greedy, greed, greed, greed, greed, greed."). Kalaba instructed his employees to conceal the pharmacy's records of Florida prescriptions from Medicaid inspectors. Tr. 214. He repeatedly lied to inspectors from both the DEA and pharmaceutical distributors about the nature of the business, denying that the pharmacy accepted mail orders or pain-clinic prescriptions, describing the patients as coming from a local HIV clinic, and misreporting the percentage of prescriptions written for controlled substances. Tr. 264-65, 475-86, 932-33, 946-47, 1259. Both Defendants concealed their occupations and the pharmacy income on their tax returns. Tr. 1330-36. These deceptions undercut the defense's argument that Kalaba was merely a manager who was unaware of any unlawful bigger picture: if that were the case, "he presumably would have had no reason to lie . . . . The jury could have inferred from this that [Kalaba] was aware of the conspiracy and lied to [inspectors] in order to conceal it." *United States v. Fuchs*, 467 F.3d 889, 909 (5th Cir. 2006); *accord United States v. Lockhart*, Cr. No. 12-9-ART-(4), 2013 WL 6669818, at *6 (E.D. Ky. Dec. 18, 2013) (finding such evidence sufficient to satisfy *mens rea*).

3. Defense Arguments

Defendants make a number of arguments in support of their Rule 29(c) motion that are more properly addressed to the weight of the evidence, rather than its sufficiency. But "Rule 29(c) does not provide the trial court with an opportunity to 'substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.'"

United States v. Guadagna, 183 F.3d 122, 129 (2d Cir. 1999) (alternation in original) (quoting *United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984)). For example, Defendants argue that the data entered by the pharmacy into the New Jersey Prescription Monitoring Program (PMP) database contradicted the testimony of two Government witnesses. Def. Mot. 6-9. But the jury was entitled to be skeptical of the pharmacy's self-reported data, *Green*, 818 F.3d at 1277, and the Government persuasively argued that, when compared to the pharmacy's daily logs, the PMP reporting was substantially incomplete, Tr. 1776. Defendants also repeatedly debate the credibility of Government witnesses. *E.g.*, Def. Reply 10, 13, ECF No. 341. These are precisely the kinds of questions of weight and credibility that the Court is prohibited from reviewing at this stage. Defendants "had [their] chance to make [these arguments] to the jury, and [they] did so. That the jury did not agree with [them] is not a reason to grant a new trial." *United States v. Gotti*, No. S8 02 Cr. 743, 2005 WL 1214321, at *2 (S.D.N.Y. May 19, 2005).

Defendants suggest that "it is worth highlighting that not a single doctor or patient was arrested in relation to the charges brought in this case." Def. Mot. 9. Defendants do not, however, explain how this is legally relevant to their present convictions. The Government was under no obligation to make such arrests, nor was the testimony of any doctors or patients required to meet the Government's burden of proof. Nevertheless, Mr. Kalaba's counsel raised this absence to the jury in summation, Tr. 1716, 1737, and the Court will not second-guess the weight the jury assigned to it.

Finally, Defendants argue that the Government proved neither the illegitimacy of the prescriptions filled by their pharmacy nor Defendants' knowledge of this. *E.g.*, Def. Mot. 5-6, 11-13. Given the overwhelming evidence recounted above, the Court disagrees. Moreover, the Government correctly notes that "the jury did not need to find that even a single prescription was illegitimate because the defendants were charged with, and have now been convicted of, *conspiring* to distribute controlled substances unlawfully." Gov't Opp. 16, ECF No. 335. "It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Salinas v. United States*, 522 U.S. 52, 65 (1997).

The Court finds that there was sufficient evidence of the existence of a conspiracy, as well as both Defendants' knowing and intentional participation, for a reasonable jury to find Defendants guilty beyond a reasonable doubt of Count One. Defendants' reliance on *United States v. Cassese*, 428 F.3d 92 (2d Cir. 2005), is misplaced. This is not a case where the evidence "gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence.'" *Cassese*, 428 F.3d at 103 (quoting *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002)). Rather, the evidence at trial clearly supported the convictions of both Defendants, and, accordingly, the Rule 29(c) motion is DENIED as to Count One.

C. Count Three: Money Laundering Conspiracy

As with Count One, Count Three required that the Government prove the existence of a conspiracy and Defendants' knowing and intentional participation in it. *See* Tr. 1833. The conspiracy charged here required proof that Defendants "agreed . . . to commit money laundering by engaging in financial transactions that involved the proceeds of illegal narcotics transactions with the intent" either (1) "to promote the carrying on of narcotics transactions" or (2) "to conceal the nature, location, source, ownership, and control of the proceeds." Tr. 1834; *accord* 18 U.S.C. § 1956(a)(1).

Defendants' motion does not make independent arguments as to Count Three. Rather, because Count Three depends upon the existence of the conspiracy in Count One, the defense seems to argue that the convictions will rise or fall together. Even on an independent inquiry, it is clear that there was sufficient evidence at trial to convict on Count Three. As discussed above, the jury found that Defendants entered into a conspiracy to violate narcotics laws, and the Government presented extensive testimony from a financial investigator describing the complex web of bank accounts, shell companies, and financial transactions that facilitated Defendants' operations. *See generally* Tr. 1299-1348. For example, Defendants paid out $655,470 in Plainfield Pharmacy proceeds to acquire more narcotics from pharmaceutical distributors. Tr. 1313-14. Defendants opened an account in the name of Sun Park Pharmacy funded by Plainfield proceeds and later changed the name to Sun Park Professional Systems. Tr. 1318. Testimony indicated that the Yonkers, New York, address of Sun Park was not a pharmacy but rather a post-office box. Tr. 1319. Both Defendants were signatories on the Sun Park account in addition to Kalaba's elderly mother, and Kalaba withdrew as much as $175,000 to cover personal expenses. Tr. 1318-20, 1337-39. Approximately $350,000 in Plainfield proceeds went to Wiseberg and related entities, including Direct Management Services, Inc., and Metrosource Inc. Tr. 1321-29.

The evidence is uncontradicted that Defendants used the proceeds to purchase the narcotics needed for additional sales, which is sufficient to satisfy the first object of the conspiracy. *See United States v. Valasquez*, 55 F. Supp. 3d 391, 396 (quoting *United States v. Warshak*, 631 F.3d 266, 317 (6th Cir. 2010)). Based on the transactions and shell companies described by the investigator's testimony, a reasonable jury could also have found beyond a reasonable doubt that Defendants conspired to use financial transactions to conceal the nature and ownership of the narcotics proceeds. *See, e.g.*, *United States v. Browning*, 40 F. App'x 873, 880 (6th Cir. 2002) (per curiam); *cf. United States v. Cessa*, 785 F.3d 165, 188 (5th Cir.) (describing, in the context of sentencing, the use of fictitious entities, shell companies, and multiple levels of transactions indicative of sophisticated laundering), *cert. denied*, 136 S. Ct. 522 (2015). Accordingly, Defendants' Rule 29(c) motion is DENIED as to Count Three.

MOTION FOR NEW TRIAL

A. Legal Standard

As an alternative to their motion for a judgment of acquittal, Defendants move for a new trial under Federal Rule of Criminal Procedure 33. "[T]he [C]ourt may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Rule 33 motions "are disfavored in this Circuit," so the standard is "strict." *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995). The Court's determination must be informed by "the totality of the case," and its "discretion should be exercised sparingly." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). The burden is on Defendants, who must convince the Court "that there is 'a real concern that an innocent person may have been convicted.'" *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (quoting *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001)). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *Ferguson*, 246 F.3d at 134.

B. Prosecutorial Remarks

The first basis for Defendants' Rule 33 motion is a lengthy catalog of alleged trial misconduct by the Government. In particular, Defendants charge that the prosecutors made a number of factual misstatements and inflammatory remarks in their opening statement, summations, and other comments to the Court and the jury. Def. Mot. 14-30. But "[i]nappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction in an otherwise fair proceeding." *United States v. Young*, 470 U.S.

1, 11-12 (1985). A prosecutor's remarks must "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process," *United States v. Coriaty*, 300 F.3d 244, 255 (2d Cir. 2002) (alteration in original) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)), and must have exhibited "egregious misconduct," *id.* (quoting *Donnelly*, 416 U.S. at 647). Courts must view the challenged remarks "against the entire argument" and "examine 'the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct.'" *United States v. Gansman*, 657 F.3d 85, 96 (2d Cir. 2011) (quoting *United States v. Caracappa*, 614 F.3d 30, 41 (2d Cir. 2010)).

Defendants failed to raise contemporaneous objections to any of the prosecutorial statements they challenge. In such cases, the Court's review is especially strict: a new trial will be granted "only if the statements constituted flagrant abuse, which caused [Defendants] substantial prejudice." *United States v. Beridze*, 415 F. App'x 320, 327 (2d Cir. 2011) (summary order) (quotation marks and citations omitted); *accord Coriaty*, 300 F.3d at 255. This is so because "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 238 (1940).

First, Defendants take issue with the Government's remarks in summation concerning whether or not there had been a shortage of legitimate oxycodone in Florida. This shortage was the primary explanation argued by the defense at trial: Defendants claim to have opened opiate-focused pharmacies to cater to a legitimate medical need in the market. In closing, the Government criticized this argument, for example: "Where is the shortage? . . . What evidence of that have you heard? I would submit there is none." Tr. 1662. Although Defendants referred in their questioning to newspaper articles and speeches related to the shortage, *e.g.*, Tr. 599-600, 1037, and submitted many of those articles as exhibits to their motion, Def. Mot. Exs. D-I, none were admitted into evidence. The only admissible evidence offered was the vague and anecdotal testimony of two witnesses, *see* Tr. 1135-36, 1515-16, one of whom made clear that problems of undertreatment were "not prevalent," Tr. 1213. Moreover, Defendants quote the prosecution out of context: after questioning whether there was evidence to support the defense narrative, the Government acknowledged that one witness had mentioned "occasional[]" problems. Tr. 1662. Shortly thereafter, Defendants were given the opportunity to rebut the Government's argument. *See* Tr. 1718-19. Given the minimal and unspecific evidence offered as to the shortage, the Court finds no misconduct. The Government was entitled to argue—and the jury entitled to conclude—that Defendants presented no genuine evidence of a widespread shortage of medication affecting legitimate patients. *See United States v. Ferguson*, 676 F.3d 260, 284 (2d Cir. 2011).

Second, Defendants argue that the Government exaggerated the prevalence of patients residing outside of Florida—in other words, in a state different from their prescribing doctor. The Government argued, based on witness testimony, that "virtually all of th[e] oxycodone went to patients all over the country." Tr. 1625. Defendants contend that "the PMP data in this case completely contradicts this," Def. Mot. 19, and that "[f]or the jury to believe that virtually all patients were from out of state the PMP data . . . would have to be a complete fabrication," *id.* at 20. As discussed above, the Government's narcotics investigator gave the jury good reason to distrust the PMP data. For example, in the month the investigator used as an example, Defendants reported fewer than 30% of the Schedule II prescriptions they filled. *See* Tr. 1776. The jury may reasonably have surmised that Defendants excluded the most suspicious prescriptions, such as those from out of state. Accordingly, the Government was not bound by the PMP data and was entitled instead to point to other testimony establishing that patients resided all over the country. *See, e.g.*, Tr. 129, 657-58, 713.

Third, Defendants quibble with the Government's assertion that Defendants "made a killing, $2 million in just two years," Tr. 79, because that figure represents their revenue, not their net profit. But the Government was clear in questioning its financial investigator that this figure represented "the total amount of money orders or cash that was deposited into the Plainfield bank accounts," Tr. 1308, and the defense similarly walked the witness through the revenue, costs, and profit figures on cross-examination, Tr. 1348.

Finally, Defendants challenge the prosecution's allegedly inflammatory characterizations of their business and their patients. For example, the Government described Defendants as "drug dealers" and their patients as "drug addicts," Tr. 79, drawing analogies between the prescription narcotics sold by Defendants and street drugs like cocaine and heroin, *e.g.*, Tr. 80. But rather than object, Defendants themselves characterized the charged crimes in this way, contrasting such drug dealing with what they claimed was their legitimate business plan. *E.g.*, Tr. 97 ("But Count One, the count that alleges that [Kalaba] was a drug dealer, he is not guilty of."); Tr. 101 ("They're not guilty of being drug dealers."); Tr. 1675 ("[T]he plan was for them to . . . cut corners but not to cross the line to becoming drug dealers."). It was not misconduct for the prosecution to describe Defendants as dealing drugs, as "this is essentially what was proved" at trial. *United States v. Panza*, 750 F.2d 1141, 1153 (2d Cir. 1984); *see also United States v. Jackson*, 619 F. App'x 189, 194 (3d Cir. 2015) ("In a case where the Government has charged the defendant with drug distribution, the statements that the evidence will show that the defendant is a drug dealer do not cross the line . . . ."), *cert. denied*, 136 S. Ct. 992 (2016). Even if these characterizations "approached the boundary of propriety, they did not cross it, much less rise to the level of 'flagrant abuse'" required where Defendants failed to object at the time. *Beridze*, 415 F. App'x at 327. Defendants fair no better with their argument that the Government mischaracterized their businesses as "[p]harmacies where no questions were asked," Tr. 82, given that Defendants did, literally, ask some questions. A reasonable juror would have understood this comment to mean that Defendants willfully avoided asking key questions about the legitimacy of patients and their doctors. *See, e.g.*, *No Questions Asked*, *Cambridge Dictionary of American Idioms* (2003).

The Court finds no evidence of prosecutorial misconduct in the remarks challenged by Defendants. To the extent that there were even "minor aberrations," they were "not cumulative evidence of a proceeding dominated by passion and prejudice, [and] reversal would not promote the ends of justice." *Socony-Vacuum*, 310 U.S. at 240. The Court repeatedly instructed the jury that the statements of attorneys were not evidence. Tr. 68-69, 1623, 1791-92. Moreover, Defendants' failure to object to even a single instance of the alleged misconduct is "an indication that the incident[s] did not affect the trial atmosphere in a manner disadvantageous to [Defendants]," *United States v. Walker*, 191 F.3d 326, 337 (2d Cir. 1999), but rather that Defendants later "pore[d] at leisure over the transcript, hunting for any plausible (or nearly plausible) claims," *Ferguson*, 676 F.3d at 283. Taken individually or cumulatively, the alleged misconduct does not even remotely approach the flagrant abuse and substantial prejudice required to justify a new trial in the absence of contemporaneous objections. Even without the challenged remarks, given the significant evidence of guilt, the Court "ha[s] no doubt that the verdict would have been the same," *Walker*, 191 F.3d at 337, and a new trial is not warranted.

C. Emmanuel Antonio

In their motion for a new trial, Defendants also seek to relitigate the admissibility of facts related to Wiseberg's prior conviction, which arose out of an illegitimate internet pharmacy scheme. Initially, the Court precluded the admission of any details beyond the mere fact of that conviction. *See* Order 4-6, ECF No. 239. But in their opening statements, Defendants asserted that they relied in good faith upon their employees, including a man named Emmanuel Antonio. *See* Tr. 90-91, 100. Antonio was involved in both the pharmacy business at issue in this case as well as the internet pharmacy conspiracy to which Wiseberg pleaded guilty in 2008. *See id.*; Tr. 1414. The Government argued that Defendants' good-faith reliance argument had opened the door to evidence of the prior conspiracy and Antonio's involvement. *See* Letter Mot. 1-4, ECF No. 263. The Court agreed, ruling that because "Mr. Wiseberg had knowledge that Mr. Antonio knowingly was involved in an illegal scheme having to do with drugs[,] . . . it could not be reasonable and in good faith that [Wiseberg] relied on Mr. Antonio in order to run a legitimate business. And so the prosecution has the right to rebut that." Tr. 468.

In the present motion, Defendants argue that the prosecution misled the Court regarding Antonio's involvement in the internet pharmacy conspiracy. Def. Mot. 22-24. Defendants assert that Wiseberg's reliance on Antonio was proper because the case against Antonio stemming from that conspiracy was dismissed after he asserted an advice-of-counsel defense. *See id.*; Def. Reply 34-35. Defense counsel did not raise this argument when the Court was making its evidentiary ruling at trial. *See* Tr. 468. Even with the benefit of this additional information, the Court's ruling would have been the same: Wiseberg pleaded guilty to knowingly participating in a pharmaceutical conspiracy with Antonio, *see* Tr. 1414-16, and his later reliance on Antonio to run a legitimate pharmacy business was not reasonable or in good faith.[2]

The Court is neither persuaded that it was misled by the prosecution nor that its evidentiary ruling was inappropriate. Furthermore, the Government used the evidence related to Antonio solely for the narrow purpose of rebutting Defendants' good-faith reliance argument. This was but a small brick in the wall of evidence supporting Defendants' convictions, and the Court finds no prejudice justifying a new trial.

D. *Brady* Violation

Defendants allege that their due-process rights were violated when the Government failed to provide them with the patient records from one of the Florida pain clinics whose patients patronized Defendants' pharmacies. *See* Def. Mot. 30-37. Defendants' argument is frivolous.

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[2] Bewilderingly, even in this motion defense counsel again fail to tell the whole story of Wiseberg and Antonio's prior convictions. After noting that Antonio and several other defendants successfully moved to have their cases dismissed or pleas vacated, the defense states, "Apparently, Mr. Wiseberg's attorney refused to file such a motion." Def. Mot. 24. Not so. As the Government helpfully points out, Wiseberg has twice unsuccessfully filed for relief from his 2008 conviction. *See* Gov't Opp. 23 n.10; Motion to Vacate Sentence and Set Aside Guilty Plea, *Wiseberg v. United States*, No. 09-60824, 2009 WL 2258259 (S.D. Fla. July 29, 2009), ECF No. 1; Unopposed Motion for Reconsideration, *id.*, ECF No. 9. This omission by defense counsel is precisely the kind of misdirection of which they accuse the prosecution, evincing a failure either of due diligence (in not locating their client's own past motions) or of candor (in leading the Court to believe they did not exist).

At any rate, nothing in the tangled procedural web of Wiseberg's habeas petition would lead the Court to change its ruling or order a new trial. Although Wiseberg may now claim he was entitled to an advice-of-counsel defense, this Court defers to Judge Zloch's reasoned opinion upholding that conviction. *See Wiseberg*, 2009 WL 2258259, at *3 ("The jury would have been free to accept or reject any Defendant's advice of counsel argument. For this reason, [Wiseberg] cannot now argue 'me, too' in claiming that he is actually innocent . . . ."). As for Antonio, as Judge Zloch points out, his case was dismissed by the Government based on its assessment of the evidence; neither Antonio's nor Wiseberg's advice-of-counsel defense was ever proven or adjudicated in court. *Id.*

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the government." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). As is evident from *Brady*'s holding, "[a]s a threshold matter, [Defendants] must show that the Government actually suppressed evidence." *United States v. Esposito*, 834 F.2d 272, 275 (2d Cir. 1987). Here, upon acquiring the patient files, the Government e-mailed defense counsel, described the files, and offered to "make [them] available." Gov't Opp. Ex. A.[3] At trial, the Government reiterated its willingness to produce the files. Tr. 1784.

This was plainly not suppression. *See Esposito*, 834 F.2d at 275 ("[E]vidence is not suppressed and *Brady* is not applicable where the defendant either knew or should have known the essential facts permitting him to take advantage of the evidence in question."). The Government's manifest willingness to share the patient files aside, Defendants failed to object at any point before the present motion, including when a Government witness referenced the seizure of the files as part of the investigation. *See* Tr. 848. Defense counsel assert that it was not until that witness's testimony that they "became aware of the need for the patient files for the impeachment" of the witness, Def. Reply 42, but even then they did not request a continuance to review the files. This is not the stuff of a valid *Brady* claim. *See United States v. Kimoto*, 588 F.3d 464, 486-87 (7th Cir. 2009) (noting that any prejudice was the result of the defendant's own failure to follow up on properly disclosed evidence or to seek a continuance).

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[3] The Court observes that although defense counsel meticulously chronicled their requests for *Brady* material in Defendants' motion, *see* Def. Mot. 31 & Exs. T-Y, they did not even mention the Government's e-mail offering up the patient files. As with Wiseberg's habeas motions, *see supra* note 2, defense counsel has once again leveled a serious charge of prosecutorial misconduct, while failing to disclose a critical part of the story. Whether counsel neglected to read the Government's e-mail or elected not to bring it to the Court's attention, this is a distressing pattern.

Confronted with the Government's e-mail, Defendants change course on reply, arguing that the Government "cannot hide *Brady* material as an exculpatory needle in a haystack of discovery materials, which is precisely what happened in this case." Def. Reply 42. There is no foundation for such a statement. No constitutional rights were violated by the prosecution's alerting the defense to the patient files "very close in time to when defense counsel received the [18 U.S.C. §] 3500 material, which . . . consisted of thousands upon thousands of documents." *Id.* There was no haystack: the Government sent a one-page e-mail describing the particular nature of the documents and offering to hand them over. *See* Gov't Opp. Ex. A. This was not a case where an exculpatory document was buried in a file with thousands of others so as to render the disclosure meaningless. *See, e.g., United States v. Gil*, 297 F.3d 93, 106 (2d Cir. 2002). Even the case Defendants cite for this argument concluded that there was no *Brady* violation despite a disclosure far more tenuous than the one challenged here, involving files buried within hundreds of millions of pages. *See United States v. Skilling*, 554 F.3d 529, 576-77 (5th Cir. 2009), *aff'd in part and vacated in part on other grounds*, 561 U.S. 358 (2010); *see also United States v. Ohle*, No. S3 08 Cr. 1109, 2011 WL 651849, at *3 (S.D.N.Y. Feb. 7, 2011) ("[*Skilling*] is far more nuanced tha[n] defendants suggest."). The Court concludes that there has been no showing of the suppression of evidence and no *Brady* violation in this case.

CONCLUSION

The Court finds that there was sufficient evidence for a reasonable jury to convict each Defendant on each of the counts charged. Taking into account the totality of the case, the Court additionally finds no single instance—nor any cumulative effect—of prosecutorial misconduct or manifest injustice. Accordingly, Defendants' motions for a judgment of acquittal and for a new trial are DENIED. The Clerk of Court is directed to terminate the motion at ECF No. 330.

Defendants' sentencing will be held on **January 9, 2017**, at **2:30 p.m.** Defendants shall file their sentencing submissions by **December 26, 2016**. The Government shall file its sentencing submission by **January 2, 2017**.

SO ORDERED.

Dated: September 20, 2016
New York, New York

ANALISA TORRES
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 14th day of March, two thousand eighteen.

PRESENT:
ROBERT A. KATZMANN,
Chief Judge,
DENNY CHIN,
Circuit Judge,
ALISON J. NATHAN,*
District Judge.

UNITED STATES OF AMERICA,

Appellee,

v. No. 17-331

PAUL WISEBERG, GERALD WISEBERG, STEPHANIE TOMASINI, LANA WISEBERG, EMMANUEL ANTONIO, DANIEL PODELL, HOWARD HISRCH, LAWRENCE ZASLOW,

Defendants,

ROBERT KALABA,

Defendant-Appellant.

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* Judge Alison J. Nathan, of the United States District Court for the Southern District of New York, sitting by designation.

For Defendant-Appellant: Jane Fisher-Byrialsen and Kaitlin F. Nares, Fisher & Byrialsen, PLLC, New York, NY.

For Appellee: Shawn G. Crowley, Edward B. Diskant, Daniel B. Tehrani, and Shane T. Stansbury, Assistant United States Attorneys, *for* Geoffrey Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Torres, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant Robert Kalaba appeals from a judgment of the Southern District of New York (Torres, *J.*), entered January 24, 2017, convicting Kalaba, following a jury trial, of four counts related to the illegal distribution of prescription narcotics and sentencing him to principally 84-months' imprisonment. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

On October 22, 2015, a jury convicted Kalaba and co-defendant Paul Wiseberg of conspiracy to distribute or illegally dispense—or possess with intent to do so—a controlled substance, in violation of 21 U.S.C. §§ 841(b), 846 (the "Narcotics Count"); conspiracy to use an invalid Drug Enforcement Administration ("DEA") number, in violation of 21 U.S.C. §§ 843(a), 846; and conspiracy to commit money laundering, in violation of 21 U.S.C. § 1956(h) (the "Money Laundering Count").[1] Kalaba and Wiseberg (collectively "defendants") were the

[1] Kalaba was also charged with conspiracy to distribute, and possess with intent to distribute, promethazine with codeine, in violation of 21 U.S.C. §§ 841(a), 846. He pleaded guilty to this charge and it is not at issue here.

manager and owner, respectively, of the Plainfield Pharmacy ("Plainfield") and two other pharmacies, one in Manhattan and one in Union City, New Jersey. The government presented evidence that the defendants' pharmacies primarily distributed mail-order prescription narcotics to patients from pain clinics in Florida while ignoring indicia that the patients lacked a legitimate medical need for the drugs and concealed the proceeds of their business using a series of shell corporations. Kalaba moved for a post-verdict judgment of acquittal as to the Narcotics Count and the Money Laundering Count, pursuant to Federal Rule of Criminal Procedure 29(c) or, in the alternative, for a new trial pursuant to Rule 33. The motions were denied. On appeal, Kalaba argues that the district court erred in denying the motions because there was insufficient evidence to convict him of either the Narcotics Count or the Money Laundering Count.

"A defendant challenging the sufficiency of the evidence bears a heavy burden." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). The court reviews such a challenge *de novo*, *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004), but the evidence is viewed in the light most favorable to the government and a jury verdict will be upheld if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis omitted). A court applies the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from others." *United States v. Riggi*, 541 F.3d 94, 108 (2d Cir. 2008). In addition, "'the jury's verdict may be based entirely on circumstantial evidence,'" *United States v. Santos*, 541 F.3d 63, 70 (2d Cir. 2008) (quoting *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995)), and the government is not obligated to "disprove every possible hypothesis of innocence," *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir. 1998) (internal quotation marks omitted), because "the task of choosing among competing, permissible inferences is for the [jury], not the reviewing court," *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

I. Narcotics Count

With respect to the Narcotics Count, Kalaba raises two arguments: first, that the government failed to show that he distributed prescription painkillers unlawfully because the law contains a "good faith" exception for medical practitioners and the pharmacies that work with them; and second, that there is insufficient evidence that he knew about the conspiracy and agreed to join. As Kalaba's argument suggests, the Narcotics Count has two elements: (1) the conspiracy charged in the indictment—to distribute or illegally dispense a controlled substance—existed, and (2) each defendant knowingly and intentionally joined the conspiracy. *United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014). Pursuant to the good faith exception, for the government to have established unlawful distribution of a controlled substance "the jury must have found that [Kalaba] knew or reasonably should have known that the doctors and pharmacists were distributing controlled substances outside the usual course of professional practice and without a legitimate medical purpose—or, in other words, that these professionals acted in bad faith." *United States v. Quinones*, 635 F.3d 590, 595 (2d Cir. 2011) (internal quotation marks omitted); *see also id.* at 594 ("A lay defendant likewise may be convicted of unlawful distribution of a controlled substance where the defendant relies upon a doctor's prescription that he knows or reasonably should have known was invalid.").

The evidence presented at trial easily satisfied these elements. When Wiseberg purchased Plainfield in 2011, it was distributing fewer than 5,000 oxycodone dosage units a month; by 2013 that number had increased to 40,000 dosage units. At times, up to 81 percent of Plainfield's customers were receiving narcotics and 95 percent of those customers received their prescription via mail. According to the government, this was no accident. Wiseberg previously owned a Florida pharmacy that was shut down by the DEA and had relationships with pain clinics in Florida. At trial, Joel Shumack, the owner of one of those clinics testified that his clinic was a "pill mill"— most of his customers did not need the medication they were prescribed and, as a result, local CVS and Walgreen pharmacies refused to fill prescriptions issued by his clinic. App. at 553, 560. When Wiseberg opened Plainfield, Shumack's clients began filling their prescriptions there. Kalaba was aware of this arrangement because Shumack called Kalaba to complain when his clients' prescriptions were not being filled expeditiously.

Wiretap communications provided further evidence that Kalaba was aware of and participated in the scheme to distribute narcotics to customers with no legitimate medical need. In one recorded call, Kalaba remarked to a friend that Plainfield was filling prescriptions for six people at the same address: "Hoffman has one fucking crew! They're all going to the same address! Six of em!" Add. 6. When the caller observed "that's bad bro . . . " and advised Kalaba not to fill the orders, Kalaba said Wiseberg did not want to send the customers their money back and instructed Kalaba to fill the prescriptions. *Id.* Kalaba summarized Wiseberg's motives: "Greedy, greed, greed, greed, greed, greed." *Id.* at 7. The government also presented video footage, recorded by a cooperator, showing Kalaba and Wiseberg filling prescriptions in the pharmacy on a day when it was closed. A new pharmacist at Plainfield had become concerned about the pharmacy's practices and refused to fill the narcotics prescriptions. Kalaba and Wiseberg, neither of whom were certified pharmacists, responded by surreptitiously filling 20 narcotics prescriptions without consulting a pharmacist or a prescribing physician. The government argues that this alone is sufficient to show that Kalaba was acting in bad faith.

But there is more: Plainfield's written procedures instructed customers, "Do not call or visit the pharmacy or you will not be filled," and advised "Obtain a money order (no checks, credit cards, debit cards, cash, Medicaid or any other insurance)." Add. 2. The government's pharmaceutical expert testified that these policies raised significant red flags because many states require pharmacists to provide drug counseling to patients—which they cannot do if patients cannot contact them—and pharmacies ordinarily have a very high percentage of insurance payments. The defendants also tried to conceal Plainfield's activities by using a fake return address on mail-order prescriptions, failing to disclose any income from Plainfield on their tax returns, and lying to a DEA agent who paid a visit to Plainfield in September 2012. Kalaba told the agent that the pharmacy's customers were mostly diabetes, blood pressure, and HIV patients and that 85 percent of his billings came from insurance.

In response, Kalaba points to evidence that Plainfield employees called to verify prescriptions with doctor's offices, and kept extensive records, including fulfillment agreements with clients from pain clinics, incident reports regarding customers who failed to comply with Plainfield's policies, and letters of necessity for each controlled substance prescription. However, the government introduced evidence that pain clinics illegally distributing prescription narcotics commonly "papered their files" to create the appearance of legitimacy, and the pharmaceutical expert testified that verifying a prescription does not relieve a pharmacist of his or her responsibility to ensure that the prescription serves a legitimate medical purpose. Similarly, Kalaba's emphasis on testimony that Santa Marina Pharmacy (also owned by defendants) used practices on par with Duane Reade does not negate the evidence of abuse at Plainfield. Moreover, to the extent that the testimony cited by Kalaba contradicts evidence presented by the government, the task of choosing among competing evidence falls to the jury, not this Court. *McDermott*, 245 F.3d at 137.

In sum, viewed in the light most favorable to the government, the evidence shows that Kalaba knew that Plainfield's business model was predicated on filling mail-order prescriptions for "pill mills," filled prescriptions against the objections of a licensed pharmacist, and did so in the face of ample indicia that customers lacked legitimate medical need. Accordingly, we find that there is sufficient evidence to sustain Kalaba's conviction on the Narcotics Count.

II. Money Laundering

Turning to the Money Laundering Count, Kalaba argues that the government failed to establish both that a conspiracy to launder money existed and that he agreed to join said conspiracy. The two elements of a money laundering conspiracy are the existence of a conspiracy and that the defendant knowingly participated in it. *United States v. Garcia*, 587 F.3d 509, 515 (2d Cir. 2009). Here, the two objects of the conspiracy charged by the government were "engaging in financial transactions that involved the proceeds of illegal narcotics transactions" with the intent either (a) "to *promote* the carrying on of narcotics transactions" or (b) "to *conceal* the nature, location, source, ownership, and control of the proceeds." App. at 1558 (emphases added). The evidence is sufficient to sustain Kalaba's conviction with regard to both objects.

According to testimony from an Internal Revenue Services' criminal investigator who reviewed Plainfield's bank accounts, from November 2011 to October 2013 $2 million dollars were deposited into Plainfield's accounts. Kalaba and Wiseberg were both signatories on these accounts. During that period, Plainfield spent approximately $655,000 in purchasing pharmaceuticals from distributors, and several of these payments were traced directly to purchases of controlled substances. Plainfield also made payments directly to Sun Park

Pharmacy (“Sun Park”), a corporation registered in the name of Dila Kalaba, the defendant’s mother. Sun Park, in turn, made payments to Kalaba. Plainfield also transferred approximately $350,000 to various entities controlled by Wiseberg, including two different shell companies—Direct Management Services, Inc. and Metrosource, Inc. There was no evidence that any of these corporate entities provided any goods or services to Plainfield.

The use of Plainfield proceeds to purchase prescription narcotics is sufficient to demonstrate promotional laundering which involves the “receipt and deposit of laundered funds . . . made with the intent to promote the specified underlying unlawful activity.” *United States v. Thom*, 317 F.3d 107, 133 (2d Cir. 2003). Here, narcotics distribution was the unlawful activity and the proceeds were used to purchase additional narcotics in furtherance of the illegal scheme. *Id.* at 133–34.

The evidence also demonstrates a conspiracy to conceal: as explained above, there is evidence that the money Plainfield made payable to Sun Park represented the proceeds of an illegal narcotics distribution conspiracy and that Kalaba knew this. In addition, because the evidence indicated that Sun Park is a shell company that did nothing to warrant the receipt of payments from Plainfield, a jury could conclude that the payments from Plainfield to Sun Park, which were then transferred to Kalaba, were “designed in whole or in part to conceal or disguise the nature, source, location, ownership, or control of those proceeds.” *United States v. Henry*, 325 F.3d 93, 103 (2d Cir. 2003).

We have considered all of Kalaba’s arguments and have found in them no basis for reversal. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe