TIMOTHY A. SCOTT
California Bar No. 215074
MARCUS S. BOURASSA
California Bar No. 316125
SINGLETON SCHREIBER MCKENZIE & SCOTT, LLP
1350 Columbia St, Suite 600
San Diego, CA 92101
Email: tscott@ssmsjustice.com
mbourassa@ssmsjustice.com

Attorneys for Stephen Silverman

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HON. RICHARD SEEBORG

United States of America, Plaintiff, vs. Stephen Silverman, Defendant.	Case No.: 3:18-cr-00533-RS Date: June 22, 2021 Time: 2:30 p.m. **MR. SILVERMAN'S NOTICE OF MOTIONS AND MOTIONS TO: (1) DISMISS FOR IMPROPER VENUE (2) TRANSFER TO THE CENTRAL DISTRICT OF CALIFORNIA**

/ /

/ /

/ /

I. INTRODUCTION

For years, the Government alleges that the defendants in this case committed at least three separate conspiracy offenses. The defendants all lived in the Los Angeles area. They worked there. They met there. They allegedly shipped illicit drugs from there. They were arrested there. The only connection to Northern California is that *FBI agents* opened a bank account in San Mateo and persuaded a cooperator to have money wired there. Ultimately, this case presents two issues flowing from the Government's effort to manufacture venue in the Northern District:

> **Issue One:** Should the indictment be dismissed where none of the conspirators reached an illicit agreement in the Northern District or performed any acts in the Northern District?
>
> **Issue Two:** If the case is not dismissed, should the case be transferred under Fed. R. Crim. P. 21 to the district where the defendants reside, the witnesses reside, and the relevant events occurred?

The answer to both issues is yes. This case should be dismissed. Failing that, it should be transferred. Mr. Silverman brings this motion accordingly.

/ /

/ /

/ /

/ /

/ /

/ /

/ /

/ /

/ /

II. BACKGROUND[1]

The Indictment charges Mr. Silverman and three others with three conspiracies: Count 1, conspiracy to commit wire fraud; Count 2, conspiracy to commit money laundering; and Count 3 conspiracy to engage in unlawful wholesale distribution of drugs. None of the alleged criminal acts underlying these three conspiracies were committed in the Northern District of California.

A. The Acts and Witnesses Underlying This Case Were in the Central District of California.

As an initial matter, the members of the alleged conspiracies were residents of the Los Angeles area at all times relevant to the Indictment. Declaration of Counsel (hereinafter "Decl.")[2], ¶ 5. Mr. Silverman's law office is in the Los Angeles area. *Id.* ¶ 6. Additionally, the primary sources of prescription drugs were residents of the Los Angeles area. *Id.* ¶ 7.

When the alleged conspirators have met, it has been in the Central District of California. *Id.* ¶ 8. When they met with suppliers, it was in the Central District. *Id.* ¶ 9. When they met with alleged money launderers, it was in the Central District as well. *Id.* ¶ 10. When they purportedly fabricated drug pedigrees from legitimate wholesale drug distributors, those drug distributors were in the Central District as well. *Id.* ¶ 11. There does not appear to be evidence that co-conspirators agreed to commit any of the objectives of the alleged conspiracies while any of them were present in the Northern District of California. *Id.* ¶ 29(b).

---

[1] The instant background is predicated upon records disclosed in discovery to counsel. Although counsel relies upon those records to assess venue, Mr. Silverman does not intend to concede or waive any argument at trial that the Government's records or the testimony of cooperators is accurate.

[2] Although the voluminous records disclosed in discovery are not, themselves, attached to the instant motion, counsel has submitted a declaration predicated upon his review of discovery.

Furthermore, the drugs at issue appear to have originated in the Central District. One supplier provided diverted prescription drugs until 2015. *Id.* ¶ 13. That supplier worked at a pharmacy in Glendale, California (in the Central District). *Id.* Thereafter, the overwhelming majority of the diverted drugs originated with Mr. Papyan and two contacts of his in the Central District. *Id.* ¶ 14. There does not appear to be evidence of deliveries of drugs to or from the Northern District of California. *Id.* ¶ 29(c). On the contrary, the scheme appears to have depended upon street suppliers in the Los Angeles area. *Id.* ¶ *12.*

The diverted drugs were also prepared and shipped from various locations in the Los Angeles area. *Id.* ¶ 15. Ordinarily, Mr. Kojoyan and Mr. Papyan would inspect the drugs, record lot numbers, prepare them for shipment, and send them from various locations in the Los Angeles area. *Id.* ¶ 16. At times, Mr. Ovasapyan assisted in those efforts. *Id.* At least one member of the group claims to have prepared drugs for shipment from Mr. Silverman's office in the Los Angeles area. *Id.* ¶ 17. In contrast to these acts in the Central District, counsel cannot identify any discovery suggesting that illicit drugs were prepared in, purchased from, shipped to, or received by anyone while they were in the Northern District. *Id.* ¶ 29(b).

Finally, the Government's theory appears to be that the conspirators created the illusion of a legitimate drug pedigree by creating bank accounts and listing addresses in such a way as to imitate Aarogya Medsurg, LLC. *Id.* ¶ 11. Aarogya Medsurg, LLC, was a legitimate licensed drug wholesaler. It operated in the Central District. *Id.*

The foregoing efforts, although not explained in depth, span the entire period of the alleged conspiracy and encompass myriad meetings, communications, and actions that the Government might frame as overt acts in the furtherance of the alleged conspiracies. Counsel cannot discern evidence of any such meetings, communications, or actions in the Northern District of California. *Id.* ¶ 28.

B. The Only Apparent Connection to the Northern District Is A Bank Account Created By the FBI.

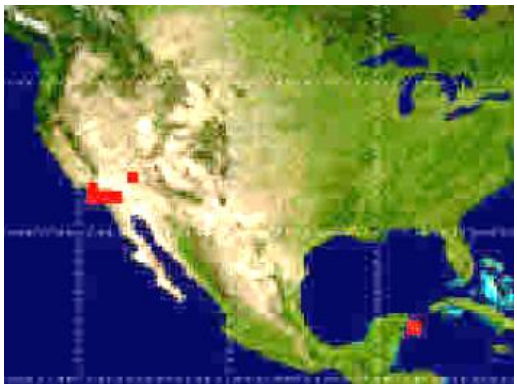
Mr. Kojoyan, in coordination with Mr. Ovasapyan, appears to have been primarily responsible for laundering any proceeds from their illicit drug operation. *Id.* ¶ 18. In fall 2017, the FBI had recruited someone working with Mr. Kojoyan as a confidential informant (CI). *Id.* ¶ 19. In September 2017, Mr. Kojoyan asked that CI to open a new bank account in the name "Brothers Wholesale". *Id.* ¶ 20. The CI told the FBI about his communication with Kojoyan. *Id.* ¶ 21. Thereafter, the FBI opened a bank account under the name Brothers Wholesale. *Id.*

The FBI gave Brothers Wholesale a fictitious address in San Mateo. *Id.* ¶ 22. The FBI's case agent averred in a warrant application that the FBI established the account "in San Mateo," however discovery disclosed thus far does not provide further detail. *Id.* ¶ 23. It is unknown if the FBI worked through a brick-and-mortar bank branch in the Northern District or if, in the FBI's view, the fictitious business address in San Mateo sufficed to establish the account's putative geographic location. *Id.*

Bank statements reflect multiple wire transfers into the Brothers Wholesale account controlled by the FBI. *Id.* ¶ 24. Those bank statements provide a bank address in the Central District of California. *Id.*

Although the FBI provided the Brothers Wholesale account information to their CI, the CI did not meet with Mr. Kojoyan in the Northern District of California. *Id.* ¶ 25. For example, in March 2018, the FBI surveilled the CI in the Los Angeles area when he provided cash from the Brothers Wholesale account to Mr. Kojoyan. *Id.*

When the FBI later arrested Mr. Kojoyan in the Los Angeles area, they seized his cell phone. *Id.* ¶ *26.* A forensic download revealed hundreds of location data points stored on the phone between September 10, 2015 and May 1, 2018. *Id.* Those coordinates suggest Mr. Kojoyan never traveled to the Northern District in relation to money laundering. On the contrary, as the automatically generated map confirms – with exceptions in Las Vegas, Nevada, and Cancun, Mexico – all of the coordinates were recorded in the Los Angeles area where he lived. *Id.*



Counsel has not identified any records in discovery suggesting someone withdrew funds or deposited funds into the Brothers Wholesale account while in the Northern District. *Id.* ¶ 29(d).

III. THE INDICTMENT MUST BE DISMISSED FOR LACK OF VENUE IN THE NORTHERN DISTRICT OF CALIFORNIA

The Sixth Amendment to the U.S. Constitution provides that a defendant has the right to "an impartial jury of the State and district wherein the crime shall have been committed." Congress codified that rule by similarly providing that "[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed." Fed. R. Crim. P. 18. Thus, a "grand jury should return an indictment only in a district where venue lies. Otherwise, the resulting indictment can be dismissed." *United States v. Cessa*, 856 F.3d 370, 372 (5th Cir. 2017) (citing *United States v. Cabrales*, 524 U.S. 1, 10 (1998)).

Venue may only be had "where the criminal act is done." *United States v. Anderson*, 328 U.S. 699, 705 (1946). In the case of continuing offenses, Congress has said that an offense may be prosecuted "in any district in which such offense

was begun, continued, or completed." 18 U.S.C. § 3237(a). To determine where an offense was committed, the Court must (1) identify the conduct "constituting the offense," then identify (2) the location where those criminal acts were undertaken. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999). This "essential conduct element" test focuses on "conduct the defendant himself must engage in as part of the offense." *United States v. Bowens*, 224 F.3d 302, 310 (4th Cir. 2000).

"When a defendant is charged in more than one count, venue must be proper with respect to each count." *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994) (quoting *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188 (2nd Cir.), *cert. denied*, 493 U.S. 933 (1989). Furthermore, there may be no joinder of offenses committed in different districts. *United States v. Palomba*, 31 F.3d 1456, 1461 (9th Cir. 1994). Accordingly, venue over each count must be assessed separately. In this case, venue is wanting for each count.

A. Count One must be dismissed because the alleged illicit agreement was not formed in the Northern District of California.

The only basis for venue over Count One would be if the conspirators were in the Northern District when they reached an illicit agreement or traveled through there in the furtherance of the conspiracy. Since there is no basis for such a finding, venue is improper.

1. Venue over Count One only exists where the alleged illicit agreement existed.

Count One of the Indictment charges a conspiracy in violation of 18 U.S.C. § 1349 to commit wire fraud in violation of 18 U.S.C. § 1343. A conspiracy to commit wire fraud does not require proof of an overt act. *See Cox v. United States*, No. 8:16-CV-01222-CJC (KES), 2019 U.S. Dist. LEXIS 11100, at *37 (C.D. Cal. Jan. 22, 2019) (Collecting cases and noting that "[a]lthough the Ninth Circuit has not yet decided whether conviction under § 1349 requires proof of an overt act, most

Circuits have held it does not"). Thus, the only conduct constituting the offense is "an agreement between two or more persons to commit at least one crime." Ninth Circuit Model Criminal Jury Instruction 8.20 (December 2020).

Here, insofar as any illicit agreement was formed, it was formed in the Central District of California rather than the Northern District. There is no evidence the alleged conspirators were in the Northern District of California at any point while forming the illicit agreement charged in Count One. They lived and worked in the Los Angeles area in the Central District of California. Thus, the conduct "constituting the offense," *Rodriguez-Moreno,* 526 U.S. at 279, did not take place in the Northern District of California and the indictment must be dismissed.

2. The FBI's bank account does not alter the analysis.

Because the only connection between this case and the Northern District is the FBI's creation of a bank account with a fictitious address in the Northern District of California, Mr. Silverman anticipates the Government will attempt to extend the geographic extent of the conspiracy by virtue of transfers into that account. As an initial matter, the evidence does not indicate that any conspirator connected to that account while in the Northern District. Decl. ¶ 29(d)-(e). Nor are acts by the CI and FBI treated as overt acts of the conspiracy. *See United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984) (one cannot conspire with a government agent because there is no meeting of the minds).

3. No statute extends venue beyond the minimum conduct essential to the offense.

Since the essential conduct test does not permit venue in the Northern District, Mr. Silverman anticipates the Government will argue that title 18, U.S. Code section 3237 somehow alters the analysis. It does not. Section 3237 permits prosecution in any district where an offense was "begun, continued, or completed." As applied here, it would only extend venue to any district where the illicit agreement began,

continued, or was completed rather than into districts putatively affected by the illicit agreement or overt acts relating to the conspiracy.

Where Congress seeks to define the proper venue for a continuing offense, the Court must construe those provisions with the Constitutional mandate in mind by assessing "whether the criminal acts in question bear 'substantial contacts' with any given venue." *United States v. Saavedra*, 223 F.3d 85, 92-93 (2d Cir. 2000). "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed." *United States v. Johnson*, 323 U.S. 273, 276 (1944). Thus, venue provisions of the code must be narrowly construed in the direction of "constitutional policy." *Id.* Furthermore, "Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." *Travis v. United States*, 364 U.S. 631, 634 (1961) (*quoting Johnson*, 323 U.S. at 275). These canons of interpretation militate against any reading of section 3237 to extend venue to the Northern District because no defendant has committed criminal acts bearing "substantial contacts" there, *Saavedra*, 223 F.3d at 93, and it is not where the crime was "committed," U.S. Const. amend. VI.

Nor does section 3237 alter the essential conduct criminalized by 18 U.S.C. § 1349 – which is the mere formation of an illicit agreement. *See Whitfield v. United States*, 543 U.S. 209, 218 (2005) (noting that even a statute *expressly* extending venue to overt acts in furtherance of money laundering conspiracy *did not* alter the essential elements of a money laundering conspiracy charge). Thus, wherein the only essential conduct at issue is an illicit agreement in violation of section 1349, section 3237 merely stands for the uncontroversial principle that venue could be had anywhere the conspirators were geographically during and in furtherance of their agreement. There is no evidence they were in the Northern District.

Furthermore, if Congress intended to extend venue beyond the essential agreement element of a conspiracy charge, it knew how to do so explicitly. For example, Congress has provided that:

> A prosecution for an attempt or conspiracy [to money launder . . .] may be brought . . . *in any other district where an act in furtherance of the attempt or conspiracy took place*.

18 U.S.C. § 1956(i)(2) (emphasis added). Not only does section 1956(i)(2) demonstrate Congress's ability to draft statutes intended to extend venue beyond the essential agreement sufficient for certain conspiracies, it would be superfluous if section 3237 accomplished the same extension in all conspiracy cases. Thus, section 3237 could not have been intended to extend the venue of all conspiracies beyond the conduct essential to the charge. *See Bilski v. Kappos*, 561 U.S. 593, 609 (2010) (no statute should be interpreted so as to render another superfluous). Insofar as section 3237 might be read to do so, it would be unconstitutional. *United States v. Brennan*, 183 F.3d 139, 148 (2d Cir. 1999).[3]

Ultimately, permitting section 3237 to extend venue to the Northern District of California would be reversible error because all such statutes regarding venue must be narrowly construed. For example, one provision of section 3237 provides that "any offense *involving the use of the mails*," may be prosecuted "in any district from, through, or into which such . . . mail matter . . . moves." 18 U.S.C. § 3237(a) (emphasis added). In *United States v. Brennan*, the Second Circuit held that mail fraud did not involve "use of the mails" because "the crime is committed by the particular acts of depositing or receiving mail, or causing it to be delivered rather than by the more general and ongoing act of 'using the mails.'" 183 F.3d 139, 147

[3] Although the essential conduct underlying a charge for violation of section 1349 does not encompass overt acts, even if it did there would be no overt act here in the Northern District. *See* Section III.C, *infra*.

(2d Cir. 1999). At bottom, the Second Circuit held, "[p]assage of § 3237(a) . . . could not and did not alter the constitutional and policy concerns underlying the Court's restrained view of venue; and it did not affect the general validity of the *Johnson* rule of construction," that venue statutes be interpreted to protect against encroachment upon Sixth Amendment rights. *Id.* Thus, in *Brennan*, the Second Circuit reversed a conviction for mail fraud and ordered the indictment dismissed. *Id.* at 151. Here, the Court must similarly resist any invitation to construe section 3237 as extending venue beyond the precise conduct criminalized in section 1349.

Since the illicit agreement alleged in Count One was not made in the Northern District of California, Count One must be dismissed for lack of venue.

B. Count Two must be dismissed because there is no evidence of a conspiracy to money launder in the Northern District of California.

Neither the essential conduct test nor the statute governing venue in money laundering cases permits venue in the Northern District.

1. As with Count One, venue over Count Two only exists where the illicit agreement existed.

Count Two of the indictment alleges an illicit agreement to launder the proceeds of an illicit business. As with Count One, such an offense does not require proof of any overt acts. The only conduct essential to prove a conspiracy to launder money is an illicit agreement to launder money. *Whitfield*, 543 U.S. at 211. Since no illicit agreement was reached in the Northern District of California, venue is improper in the Northern District of California.

The analysis need not be any more complicated than that. The locus of the crime is the illicit agreement and that agreement was not reached in the Northern District of California. However, Mr. Silverman anticipates the Government will urge

a reading of 18 U.S.C. § 1956(i) that would extend venue to the Northern District because of some action taken by the FBI there. The Court must resist that invitation.

2. Section 1956(i) does not extend venue to the Northern District.

Section 1956(i) provides that a prosecution for an offense under section 1956 may be brought in any of three types of venues:

> [1] any district in which the financial or monetary transaction is conducted; or . . .
> [2] any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted. . . . [or]
> [3] [in the case of conspiracy] in the district where venue would lie for the completed offense under [1 and 2, above], or in any district where an act in furtherance of the attempt or conspiracy took place.

18 U.S.C. § 1956(i)(1)-(2). For purposes of venue, the statute adopts a specific meaning of the verb "conduct" to mean "initiating, concluding, or participating in initiating, or concluding a transaction," 18 U.S.C. § 1956(c)(2). 18 U.S.C. § 1956(i)(3). None of the foregoing provisions mean venue in this case may lie in the Northern District of California.

First, the Northern District of California is not the district in which a "financial or monetary transaction [was] conducted" by any alleged conspirator. Mr. Kojoyan, the conspirator who apparently caused the transfer of funds to the Brothers Wholesale account, did so from the Central District of California. He did not initiate the transaction from the Northern District, nor did he conclude it or participate in the concluding of any transaction in the Northern District. Decl. ¶ 29(e). It is not clear to the defense that any person participated in a financial transaction while in the Norther District, but, if anyone did, it appears to have been a CI or the FBI. Neither a CI, nor an agent for the FBI is a member of the alleged conspiracy. *See Escobar*

de Bright, 742 F.2d at 1199 (agents of government are not coconspirators). Thus, no conspirator conducted a financial transaction in the Northern District.

Second, the underlying unlawful activity which generated illicit revenue did not occur in the Northern District. The drug suppliers to the conspiracy were in the Los Angeles area, shipments were sent from the Los Angeles area, and the shipments were sent to districts other than the Northern District. Even if there were evidence of drugs diverted from the Northern District of California, there is no evidence any alleged coconspirator "participated in the transfer of the proceeds" of that unlawful activity from the Northern District. Decl. ¶ 29(f). Accordingly, the underlying unlawful activity does not extend venue to the Northern District.

Since there is no venue under the first two provisions of section 1956(i), the sole remaining basis for venue would be an overt act in the furtherance of the conspiracy. Here, none of the overt acts occurred in the Northern District.

Section 1956(i)(2) does not extend venue to districts merely indirectly affected by overt acts. "[T]he locus delicti of the charged offense must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999). In the context of conspiracy, the locus delecti is the agreement and the acts themselves – not the *effects* of conspirators' acts. *See Hyde & Schneider v. United States*, 225 U.S. 347, 357 (1912) (an overt act "does not give the offense criminal quality or extent," but merely marks the end of an opportunity to withdraw and evade criminal liability). For that reason, Courts have never concerned themselves with the specific effects of any overt act, provided they are undertaken to further the conspiracy. *See United States v. Thompson*, 493 F.2d 305, 310 (9th Cir. 1974) ("the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent such may be), and is not at all dependent upon the ultimate success or failure of the planned scheme").

Since none of the alleged coconspirators performed any acts in the Northern District, the extension of venue to overt acts does not change the analysis. There is no venue over the Money Laundering conspiracy in the Northern District.

3. If section 1956(i) extends venue here, it runs afoul of the Sixth Amendment.

As noted above, there is a powerful canon of interpretation construing venue statutes narrowly to avoid violating the Sixth Amendment. *See e.g.*, *Brennan*, 183 F.3d 139 (discussed above). Insofar as the Court finds that section 1956(i) expands venue to cover Count Two, the Court must determine whether it thereby runs afoul of the Sixth Amendment. Since overt acts are not essential conduct required to prove a money laundering conspiracy, the offense is not "committed" where overt acts occur and section 1956(i)'s extension of venue runs afoul of the Sixth Amendment.

Although the question was not presented there, *Whitfield v. United States*, strongly suggests that section 1956(i) extends venue beyond that which would be constitutionally permissible. In *Whitfield*, the defendants were convicted of a money laundering conspiracy. 543 U.S. at 211. The question on appeal was whether an overt act was required to prove a money laundering conspiracy. *Id.* In support of their position, the defendants argued that section 1956(i) expressly refers to overt acts in the furtherance of a money laundering conspiracy because Congress intended it to confirm the prevailing view that an overt act was required. *Id.* at 217. Rejecting this argument, the Supreme Court noted that section 1956(i) "supplement[s]" . . . "the default venue rule" requiring the government " 'prosecute an offense in a district where the offense was committed.' " *Id.* at 218 (quoting Fed. R. Crim. P. 18). Thus, the Court expressly observed that the universe of locations where overt acts occur is broader than where the offense of conspiracy to commit money laundering "was committed." The default rule would have venue lie where the "unlawful agreement was reached." *Id.* (citing *Hyde v. Shine*, 199 U.S. 62 (1905)).

Rejecting defendants' argument about the necessary proof of a money laundering conspiracy, the Court was not called upon to evaluate the Constitutionality of section 1956(i). However, the requirement that a crime be prosecuted where the crime was "committed" derives from the Sixth Amendment. *See* U.S. Const. amend. VI. (jury must be from district where offense was "committed"). By acknowledging that section 1956(i)(2) extends venue beyond the default rules focused on where a crime is committed, the Court implicitly observed that 1956(i) expands venue beyond the dictate of the Sixth Amendment. In doing so, the Supreme Court was correct. In fact, section 1956(i)'s discussion of overt acts is superfluous unless it extends venue beyond where the offense was committed because Federal Rule of Criminal Procedure 18 already enshrines that basic venue principle.

Ultimately, here, the Court need not pass upon the constitutionality of section 1956(i) because the facts of this case to not permit venue, even under the statute's broader provisions. Whoever joined in the illicit agreement to launder money, they did not do so in the Northern District. Insofar as section 1956(i) could extend venue beyond the essential elements of the offense, it does not expand venue to a district merely because money was wired into an account created by the FBI while working in the Northern District. Because none of the defendants conspired to launder money while in the Northern District, Count Two must be dismissed.

C. Count Three must be dismissed because none of the overt acts were committed in the Northern District.

Count Three charges a conspiracy to engage in the unlawful wholesale distribution of drugs in violation of 18 U.S.C. § 371. Count Three requires both an illicit agreement and overt acts in the furtherance of that agreement. *See* 18 U.S.C. § 371. Where the statute expressly requires overt acts, venue extends to the geographic areas wherein those acts were committed. *Hyde v. Shine*, 199 U.S. 62

(1905). However, there is no evidence of any overt acts committed in the Northern District of California.

The Indictment alleges two overt acts putatively "committed in the Northern District of California." Dkt. 51 at 7. Both acts are financial transfers into a bank account "domiciled in San Mateo, California." *Id.* Because of the amounts alleged, it is clear these allegations refer to the Brothers Wholesale account. The Indictment does not allege who initiated those transfers or the basis for its allegation that they were "domiciled" in San Mateo. Nor does discovery produced thus far explain the precise facts surrounding these transfers or the creation of the account "domiciled" in San Mateo. However, whatever the surrounding facts, the creation or management of the Brothers Wholesale account by the FBI working in the Northern District does not confer venue there.

First, assuming there is evidence that Kojoyan initiated the wire transfers by contacting the bank associated with the Mainspring Distribution account, that initiation does not, standing alone, confer venue to the Northern District. As set forth above, *supra-Section III*.B.2, the focus for venue purposes is upon the conduct of the defendant which is essential to the crime. The overt act was completed once undertaken, without regard to its effects. *See Hyde & Schneider*, 225 U.S. at 357 (an overt act "does not give the offense criminal quality or extent"). Thus, even if the wire transfers had been refused by the first bank, the alleged offense would have been completed regardless of whether the overt acts had any effect. To extend venue to a district where the conspirators never took any overt action would require extending it beyond that conduct essential to the offense.

Additionally, it is not at all clear that the transfer of funds in the Brothers Wholesale account was in the furtherance of the conspiracy alleged in Count Three. The objectives of the conspiracy alleged in Count Three were to (1) engage in unlicensed wholesale distribution of prescription drugs, (2) engage in the wholesale distribution of prescription drugs without appropriate transaction histories, and (3)

to impede the Food and Drug Administration's efforts to ensure drugs are safe and effective. However, the transfer of funds to the Brothers Wholesale account appears to have been, at most, a means of extracting illicit gains for the participants in the conspiracy. In other words, there is no evidence the funds transferred were intended to go towards the illicit distribution of drugs alleged to be the object of Count Three.

Finally, although the FBI created a fictitious address for Brothers Wholesale in San Mateo and may have opened the account through a bank branch in San Mateo[4], that does not mean that electronic transfers into the bank account bear any "substantial contacts," *United States v. Saavedra*, 223 F.3d 85, 92-93 (2d Cir. 2000), with the Northern District of California. Although the Government alleges the Brothers Wholesale account was "domiciled" in San Mateo, the actual relationship between the wire transfers and geography is more complicated.

The bank at issue, City National Bank, is a nationwide chain of banks founded in the Los Angeles area.[5] The bank statements for the Brothers Wholesale account specifically provide that the bank hosting the account is located in Los Angeles. The bank transfers appear to have been conducted electronically and without any person physically handling cash or walking into a bank with a check. The defense cannot identify any discovery identifying where the national bank servers managing the flow of electronic information existed. Decl. ¶ 29(g). Nor can the defense identify any movement of funds initiated in or flowing through the Northern District of California. *Id.* ¶ 29(d)-(e).

Insofar as the FBI may have viewed the account balance or initiated withdraws while on devices in the Northern District, those data transmissions to the bank's data servers from computers in the Northern District are *not* a necessary consequence of

---

[4] As previously indicated, the discovery does not explain where officers were when they created the account or how they created it.

[5] *See* City National Bank, *Our Story*, available at https://www.cnb.com/about-us/history.html (visited May 11, 2021).

the bank processing a monetary transfer *into* the Brothers Wholesale account. Nor are the actions of law enforcement part of the conspiracy. *United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984). Plainly, it would be absurd to confer venue anywhere the FBI traveled to withdraw funds from the Brothers Wholesale account they created and controlled. *See Travis v. United States*, 364 U.S. 631, 634 (1961) (the law should not "give the Government the choice of 'a tribunal favorable' to it").

The core constitutional task in evaluating venue is to (1) identify the conduct "constituting the offense," then identify (2) the location where those criminal acts were taken. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999). As it relates to Count Three, the conduct constituting the offense is an agreement to illicitly distribute drugs and overt acts in the furtherance of that objective. Neither the agreement, nor the overt acts occurred in the Northern District of California. Therefore, Count Three must be dismissed.

D. The Indictment should be dismissed in its entirety.

"The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *United States v. Cores*, 356 U.S. 405, 407 (1958). Here, Mr. Silverman is charged in the Northern District solely because that is where the FBI agents investigating him worked at the time. However, the FBI's connections to the Northern District do not extend venue there. The Indictment must be dismissed for lack of venue.

IV. THIS CASE SHOULD BE TRANSFERRED TO THE CENTRAL DISTRICT OF CALIFORNIA IF IT IS NOT DISMISSED.

Rule 21 provides for transfer upon defendant's motion "for the convenience of the parties, any victim, and the witnesses, and in the interests of justice." Fed. R. Crim. P. 21(b). Here, even if the Northern District is a proper venue, it will be

because of financial transactions whose only connection to Mr. Silverman and Mr. Papyan is tenuous at best. The Central District of California is a more natural home to the trial of this matter. It is where the defendants live, where the overwhelming majority of the witnesses live, and where the overwhelming majority of events occurred.

Appropriate factors in deciding whether to transfer a case are: (1) location of the defendants; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business if the case is not transferred; (6) expenses to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket conditions in each district; and (10) any other special circumstance that might bear upon the desirability of transfer. *Platt v. 3M*, 376 U.S. 240, 244 (1964). These factors weigh heavily in favor of transfer to the Central District of California in lieu of the Northern District.

A. The location of records and disruption of business are neutral factors.

The advent of digital discovery and computers renders the location of documents far less important than in the past. Additionally, insofar as there is no corporate defendant and the defendants' work will be interrupted by trial in any location, the location of records and disruption of business are neutral considerations.

B. The parties' expenses weigh slightly in favor of transfer.

Both sides will bear expenses from travel in either instance. However, the parties' costs weigh slightly in favor of transfer. As the greater number of witnesses are in the Central District, their travel to San Francisco will add expense. Additionally, the combined expense of travel and accommodations for defendants, counsel, and families will add expense to trial in the Northern District.

C. The location of counsel is neutral or weighs slightly in favor of transfer.

The assigned prosecutor is in the Northern District. Meanwhile, two attorneys for Mr. Silverman and counsel for Mr. Papyan are in southern California.

If either other defendant were to testify, their counsel will attend trial as well. Counsel for Mr. Ovasapyan is in the Northern District whereas Mr. Kojoyan's counsel is in the Central District.

Thus, there are two attorneys in northern California and four in Southern California. This factor weighs slightly in favor of transfer.

D. The courts' dockets militate in favor of transfer.

The courts' relative docket conditions militate in favor of transfer. The judges of the Northern District of California are managing, on average, far more pending cases than their counterparts in the Central District. *Compare* Ninth Circuit, *U.S. District Court Caseloads and Statistics*, Central District (indicating 525 pending cases per judge in 2019) *with* Northern District (indicating 854 pending cases per judge in 2019), *available at* www.ca9.uscourts.gov (visited May 11, 2021).

E. The defendants' locations and accessibility of the Court weigh heavily in favor of transfer.

Both the location of the defendants and the relative accessibility of the place of trial weigh heavily in favor of transfer. As an initial matter, all of the defendants reside in the Central District. Proceedings in the Northern District of California will necessitate that Mr. Silverman and Mr. Papyan travel to the Northern District and remain there.

Another important consideration is defendants' access to their support networks and the support networks' access to trial. *See United States v. Aronoff*, 463 F. Supp. 454, 460 (S.D.N.Y. 1978) (noting defendants' separation from friends as an important consideration). The inconvenience and stress of relocating during trial will be shared by defendants with their loved ones – who will either (1) lose their direct access to Mr. Silverman and Mr. Papyan during one of the most important and stressful events of their lives or (2) suffer the hardship and inconvenience of

traveling and staying in another city with them. Undoubtedly, members of both defendants' families would hope to attend and show support for their loved ones. In Mr. Silverman's case, his wife would likely attend the trial. The Government does not have analogous countervailing concerns. Thus, these factors weigh heavily in favor of transfer to the Central District.

F. The location of the witnesses weighs very heavily in favor of transfer.

The overwhelming majority of witnesses reside in the Central District.

At this time, since the Government has not identified its intended witnesses, the defense is ill-positioned to offer a full account of each prospective witness. However, since all but only a few of the events underlying the charges occurred in the Central District or in other states, it is expected that the witnesses necessary to recount those events do not reside in the Northern District and will overwhelmingly reside in the Central District. For example:

- The conspirators allegedly signed leases for various locations in the Los Angeles area from which they could prepare diverted drug shipments. The landlords or other witnesses to authenticate those records or confirm the use of any leased space reside in the Central District.
- At least one conspirator claims that they used Mr. Silverman's law office to prepare shipments. Employees who worked in Mr. Silverman's office and employees from neighboring offices are likely to testify to the veracity of those allegations and/or whether the illicit acts would have been obvious to Mr. Silverman.
- Employees of the law firm may also prove necessary to discuss Mr. Silverman's financial transactions and whether they were fees for legal work.
- In warrant affidavits the Government has claimed that more than 95% of fraudulent drug pedigrees were attempts to imitate a legitimate, licensed wholesale drug distributor called "Aarogya Medsurg, LLC." That distributor and

the witnesses who can confirm or deny the Government's claim are based out of Rancho Cucamonga in the Central District of California.

- Insofar as other defendants have pled guilty and are expected to testify against Mr. Silverman and Mr. Papyan, their residence in the Central District is an important consideration as well. Both Mr. Kojoyan and Mr. Ovasapyan reside in the Central District and the Government has indicated to the defense that it anticipates testimony from cooperating witnesses.

Against the weight of all the witnesses set forth above, counsel can only identify one or two government witnesses in the Northern District of California. Specifically, the FBI agents who investigated the case will likely testify. Additionally, the inconvenience of travel for them is less concerning than for lay witnesses because these agents have already repeatedly traveled to the Central District, wherein they have repeatedly surveilled the alleged coconspirators, executed warrants, and carried out much of the investigation.

Ultimately, the inconvenience of travel to the Northern District for potentially dozens of witnesses in the Central District substantially outweighs the inconvenience to the one or two FBI agents who have already been traveling to the Central District for this case. *See United States v. Daewoo Indus. Co.*, 591 F. Supp. 157, 164 (D. Or. 1984) ("Relocating one customs agent is more reasonable than relocating several defendants, witnesses, and translators to a community where they will have no family, friends or relevant community to relate to during a protracted trial").

G. None of the underlying events occurred in the Northern District, but they overwhelmingly occurred in the Central District.

None of the pertinent events took place in the Northern District and many took place in the Central District. Thus, it makes sense for trial to occur in the Central District. Proximity to the events will facilitate access for third-parties interested in

observing the proceedings and it will enable both sides to conduct any necessary investigation of issues arising during trial.

H. Defendants' lack of contacts with the Northern District weigh in favor of transfer.

Finally, insofar as any special factor bears upon the decision, defendants' de minimis contacts with the Northern District militate in favor of transfer. The founders were concerned about venue because of the "unfairness and hardship involved when an accused is prosecuted in a remote place." *United States v. Cores*, 356 U.S. 405, 407 (1958). Even if venue were proper in the Northern District, it would not alter the undisputed reality of this case – which involves defendants in the Central District, engaged in alleged crimes in the Central District, with witnesses in the Central District, families in the Central District, putative victims in the Central District, and only an FBI agent in the Northern District.

For the foregoing reasons, the Court should dismiss the Indictment. If the matter is not dismissed, it should be transferred to the Central District of California.

Respectfully Submitted,

Dated: May 11, 2021

/s/ Marcus Bourassa

MARCUS S. BOURASSA
SINGLETON SCHREIBER MCKENZIE & SCOTT LLP
Attorneys for Stephen Silverman

TIMOTHY A. SCOTT
California Bar No. 215074
MARCUS S. BOURASSA
California Bar No. 316125
SINGLETON SCHREIBER MCKENZIE & SCOTT, LLP
1350 Columbia St, Suite 600
San Diego, CA 92101
Email: tscott@ssmsjustice.com
mbourassa@ssmsjustice.com

Attorneys for Stephen Silverman

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HON. RICHARD SEEBORG

United States of America, Plaintiff, vs. Stephen Silverman, Defendant.	Case No.: 3:18-cr-00533-RS **DECLARATION OF COUNSEL IN SUPPORT OF MR. SILVERMAN'S MOTIONS TO:** **(1) DISMISS FOR IMPROPER VENUE** **(2) TRANSFER TO THE CENTRAL DISTRICT OF CALIFORNIA**

I, Marcus Bourassa, declare the following under penalty of perjury:

1. I am counsel for Mr. Silverman.
2. On May 7, 2021, our firm received additional discovery in this matter. It has not yet been converted by staff to an accessible server and I was unable to review it in advance of this filing.

3. The following description of the evidence produced in discovery is based upon my review of discovery disclosed in this case before May 7, 2021. I offer this declaration only to summarize certain pertinent information contained therein and relevant to the instant motion. If called upon to testify, I could testify to having reviewed discovery produced in this matter providing an evidentiary basis for the information that follows.
4. Records and information obtained by the Government and produced in discovery indicates the following:
5. The named members of the alleged conspiracies were residents of the Los Angeles area during the investigation.
6. Mr. Silverman's law office is in the Los Angeles area.
7. The primary sources of diverted prescription drugs were residents of the Los Angeles area.
8. When the alleged conspirators have met, it has been in the Central District of California.
9. When they met with suppliers, it was in the Central District of California.
10. When they met with money launderers it was in the Central District of California.
11. Aarogya Medsurg, LLC, was a licensed wholesale drug distributor in Rancho Cucamonga, California. Based upon the use of Aarogya Medsurg, LLC's address in the Central District and the use of fictitious names similar to Aarogya Medsurg, the FBI reached a conclusion that at least 95% of fictitious drug pedigrees created under Mr. Ovasapyan's direction were intended to appear as if they originated from Aarogya Medsurg, LLC, when in fact they did not.
12. The drugs at issue were provided by street dealers in the Central District.
13. One drug supplier until 2015 worked at a pharmacy in Glendale, California.

14. Thereafter, the overwhelming majority of the diverted drugs originated with Mr. Papyan and two contacts of his in the Central District.
15. The diverted drugs were prepared and shipped from various locations in the Los Angeles area.
16. Mr. Kojoyan and Mr. Papyan would inspect the drugs, record lot numbers, prepare them for shipment, and send them from various locations in the Los Angeles area. Mr. Ovasapyan also assisted in those efforts.
17. At least one member of the group claims to have prepared drugs for shipment from Mr. Silverman's office in the Los Angeles area.
18. Mr. Kojoyan, in coordination with Mr. Ovasapyan, was involved in laundering proceeds from the operation.
19. In fall 2017, the FBI recruited a confidential informant (CI) working on the money laundering effort. After being recruited, the CI took instruction from the FBI and disclosed information about his communications to the FBI.
20. In September 2017, Mr. Kojoyan asked that CI to open a new bank account in the name "Brothers Wholesale."
21. The CI told the FBI about his communication with Kojoyan and the FBI opened a bank account with City National Bank under the name Brothers Wholesale.
22. The FBI gave Brothers Wholesale a fictitious address in San Mateo.
23. The FBI's case agent averred in a warrant application that the FBI established the account "in San Mateo," however discovery disclosed thus far does not provide further detail on where or how the account was opened. Counsel cannot discern if the FBI worked through a brick-and-mortar bank branch in the Northern District or if, in the FBI's view, the fictitious business address in San Mateo sufficed to establish the account's putative location.
24. Bank statements reflect multiple wire transfers into the Brothers Wholesale account controlled by the FBI. The bank statements appear to indicate money

was wired into the account. Those bank statements provide a bank address in the Central District of California. Counsel has not identified any discovery explaining the precise facts surrounding the transfers into the Brothers Wholesale account.

25. Although the FBI provided the Brothers Wholesale account information to their CI, the CI did not meet with Mr. Kojoyan in the Northern District of California. For example, in March 2018, the FBI surveilled the CI in the Los Angeles area when he provided cash from the Brothers Wholesale account to Mr. Kojoyan.

26. When the FBI later arrested Mr. Kojoyan in the Los Angeles area, they seized his cell phone. A forensic download revealed hundreds of location data points stored on the phone between September 10, 2015 and May 1, 2018. Those coordinates were automatically converted onto a map image which was produced in discovery. I cropped the image and increased the brightness for accessibility. I have not otherwise altered the map, a true and correct copy of which is provided here:

27. The alleged conspirators signed leases for various office spaces or apartments in the Los Angeles area from which they could prepare diverted drug shipments.

28. The meetings, communications, and actions by alleged conspirators overwhelmingly occurred in the Central District, although they sometimes involved actions or communications with people in the states of Washington,

Illinois, and Pennsylvania. Counsel cannot discern from discovery any such meetings, communications, or actions taken by the named conspirators in the Northern District of California.

29. In reviewing discovery, I have yet to identify evidence of the following:

a. co-conspirators reaching an agreement to commit an illicit act while any of them were present in the Northern District;

b. illicit drugs prepared in, shipped to, or received by anyone while they were in the Northern District;

c. deliveries of drugs to or from the Northern District of California in relation to the conspiracy;

d. any withdrawal or other interaction with the Brothers Wholesale bank account while that person was in the Northern District;

e. a coconspirator initiating or concluded any banking transactions while in Northern District;

f. a coconspirator obtained proceeds from drug distribution in the Northern District and transferring it to the Central District;

g. where the national bank servers managing the flow of electronic information existed.

30. None of the following is predicated upon privileged communications and, by submitting this declaration Mr. Silverman does not intend to waive privilege.

Dated: May 11, 2021

MARCUS S. BOURASSA
SINGLETON SCHREIBER
MCKENZIE & SCOTT LLP
Attorneys for Stephen Silverman