IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No 19-CR-58-JED**
	)	
GREGORY SINCLAIR CONNOR,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE IN OPPOSITION
TO MOTION TO DISMISS FORFEITURE COUNT (Doc. 34)

The United States of America, by its counsel, submits this Opposition to Defendant Gregory Connor's Motion to Dismiss the Forfeiture Count in the Superseding Indictment. In support of its Opposition, the Government says the following.

I. INTRODUCTION

The Government has filed a Superseding Indictment charging Defendant Gregory Connor with forty-one counts of health care fraud, misbranding drugs, and aggravated identity theft. The Indictment also contains a Forfeiture Allegation advising Defendant that the Government will seek the forfeiture of the proceeds of his offenses if he is convicted of any of the charges alleged in the Indictment.

Defendant has filed a motion seeking the dismissal of the Forfeiture Allegation on the ground that it seeks the forfeiture of proceeds derived from conduct occurring outside of the statute of limitations, and for other reasons. Defendant's motion lacks merit, however, for several reasons.

First, criminal forfeiture is simply part of the defendant's sentence in a criminal case. It is not a substantive offense to which any statute of limitations applies. If the defendant is convicted of one or more criminal offenses that occurred within the applicable statute of limitations, the forfeiture of the proceeds of those offenses will follow. Thus, Defendant has no basis to assert that the forfeiture allegation itself is barred by any statute of limitations.

Moreover, to the extent that Defendant argues that the forfeiture of the property named in the Forfeiture Allegation exceeds the scope of what will be forfeitable upon his conviction, it is premature. The appropriate scope of the forfeiture order that the court will enter if Defendant is convicted will be determined at that time; it is not a matter cognizable in a pretrial motion to dismiss.

Finally, Defendant's various arguments regarding the proper scope of an order of forfeiture in a case of this nature are incorrect as a matter of forfeiture law. Accordingly, even if they were not prematurely raised, Defendant's challenges to the forfeiture notice should be rejected on the merits.

For all of these reasons, as more fully explained below, Defendant's Motion to Dismiss should be denied.

II. FACTS AND DEFENDANT'S ARGUMENTS

On June 6, 2019, the grand jury returned a Superseding Indictment ("the Indictment") charging Defendant with 36 counts of health care fraud in violation of 18 U.S.C. § 1347 (Counts 1 and 7-41); one count of misbranding drugs in violation of 21 U.S.C. §§ 331(c) and 333(a)(2); and four counts of aggravated identity theft in violation of

18 U.S.C. § 1028A. The Indictment also contains a Forfeiture Allegation putting Defendant on notice that if he is convicted of one or more of the offenses alleged in the Indictment, the proceeds of those offenses will be subject to forfeiture under the appropriate criminal forfeiture statute. Indictment at 17.

The Indictment alleges that beginning in 2009 and continuing to 2017 Defendant, a medical doctor who owned and operated the Neurological Center of Oklahoma, perpetrated a scheme to bill the Medicare program for treating patients with FDA-approved Botox, when in fact he had actually treated the patients "with illegal, foreign Botox, the cost of which was not reimbursable by Medicare." Indictment at 9-10.

On June 13, 2019, Defendant filed a Motion to Dismiss the Forfeiture Count,[1] primarily on statute of limitations grounds. He alleges that because the Indictment seeks the forfeiture of the proceeds of his entire scheme, including conduct that occurred outside of the five-year statute of limitations, it is barred by the statute of limitations. Motion at 2-3

Defendant also argues that the Forfeiture Allegation should be dismissed because it seeks to hold him jointly and severally liable for the forfeiture of proceeds that were obtained not by him personally, but by the Neurology Center of Oklahoma, Inc., which

[1] In the title of his motion, Defendant refers to the Forfeiture Allegation as a "count" of the Indictment. Elsewhere, he refers to the Forfeiture Allegation as "Count 7" of the Indictment. Motion at 1. Presumably, he does so because the Forfeiture Allegation appears on the page following Count 6. As explained in the text, however, a forfeiture allegation is merely a notice provision; it is not a substantive offense. Accordingly, Rule 32.2(a) of the Federal Rules of Criminal Procedure expressly provides that the forfeiture notice shall not be designated as a "count." Defendant's misunderstanding of this point may explain why he has mistakenly assumed that criminal forfeiture is subject to a statute of limitations separate and apart from the temporal limitations placed on the substantive offenses alleged elsewhere in the Indictment.

Defendant alleges is a separate entity, even though it was owned and operated by him. Holding him liable for the forfeiture in those circumstances, Defendant argues, would violate the Supreme Court's decision in *Honeycutt v. United States,* 137 S. Ct. 1626 (2017). Motion at 4-8.

Finally, Defendant argues that the Forfeiture Allegation should be dismissed because the amount alleged in the Indictment as the proceeds of the offense includes "expenses and overhead," such as "the office lease, employee salaries, insurance, etc.," and thus does not properly set forth "a sum of money that could be forfeited." Motion at 8.

III. ARGUMENT

A. Forfeiture is Part of the Defendant's Sentence; There is no Statute of Limitations for Forfeiture.

In criminal cases, a judgment of forfeiture is part of the defendant's sentence; it is not a substantive offense nor an element of the underlying crime. *Libretti v. United States*, 516 U.S. 29, 39 (1995) ("criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense"); *United States v. Christensen,* 828 F.3d 763 (9th Cir. 2015)("forfeiture is an aspect of the sentence, not an element of the underlying crime"; citing *Libretti*); *United States v. Valdez*, 726 F.3d 684, 699 (5th Cir. 2013) ("Criminal forfeiture is a part of sentencing imposed after conviction; it is not a substantive element of the offense"). The Tenth Circuit acknowledged this relationship between forfeiture and the criminal case in *Wittig* when it held that because forfeiture is part of sentencing, the Double Jeopardy Clause does not bar the Government from seeking to

forfeit, on retrial, assets that the jury in the first trial declined to forfeit. *United States v. Wittig*, 575 F.3d 1085, 1096-97 (10th Cir. 2009).

As the courts universally recognize, the forfeiture allegation in an indictment is merely a notice provision, required by Rule 32.2(a), to ensure that the defendant is aware that, in the event of his conviction in his criminal case, his property will be subject to forfeiture. Rule 32.2(a), F.R.Crim.P., and Advisory Committee Note. *See, e.g., United States v. Hampton,* 732 F.3d 687, 690 (6th Cir. 2013); *United States v. Chicago*, 2017 WL 2963475, *3-4 (S.D. Ala. Jul. 11, 2017) (explaining Rule 32.2(a) and Advisory Committee Note); Cassella, *Asset Forfeiture Law in the United States* (2d ed.), Juris:2013 at § 16-2. Indeed, Rule 32.2(a) twice refers to the forfeiture allegation as a "notice," and expressly provides that "The notice should not be designated as a count of the indictment or information." Rule 32.2(a). Thus, the inclusion of a forfeiture allegation in an indictment does not transform the forfeiture from part of the sentencing process to a substantive offense.

That forfeiture is part of the defendant's sentence and does not constitute a substantive offense has many consequences. Among other things, it means that the criminal trial must be bifurcated, with the Government required to establish the defendant's guilt in the case-in-chief, and the forfeiture relegated to a post-conviction hearing in which the court will order the forfeiture of the property in accordance with the applicable forfeiture statute and the procedures set forth in Rule 32.2(b) of the Federal Rules of

Criminal Procedure.[2] *See United States v. Liquidators of European Federal Credit Bank,* 630 F.3d 1139, 1144-46 (9th Cir. 2011) (explaining how criminal forfeiture procedure works under Rule 32.2 and Section 853).

It also means that the Government's burden of proof in the forfeiture hearing is preponderance of the evidence and that hearsay is admissible, *United States v. Smith,* 770 F.3d 628, 637 (7th Cir. 2014); it means that there is no separate venue requirement for the forfeiture, *see United States v. Haddix,* 2008 WL 151847, *2 (E.D. Ky. 2008) (denying motion to dismiss forfeiture notice for lack of proper venue); it means that the defendant has no Sixth Amendment right to have the jury determine what property is subject to forfeiture, *Libretti, supra; United States v. Elbeblawy,* 899 F.3d 925 (11th Cir. 2018) (following *Libretti*); and it means that the defendant has no right to have the grand jury determine what property is subject to forfeiture when it returns an indictment. *See United States v. Silvious,* 512 F.3d 364, 369-70 (7th Cir. 2008) (because forfeiture is part of the sentence and not a substantive charge, a change to the forfeiture notice is not a constructive amendment to the indictment); *United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002) (same).

Most importantly for present purposes, that forfeiture is part of the defendant's sentence means that there is no separate statute of limitations for criminal forfeiture.

[2] As explained below, the applicable forfeiture statute for a federal health care offense charged under 18 U.S.C. § 1347 is 18 U.S.C. § 982(a)(7). That statute provides as follows:

"The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, direct or indirectly, from gross proceeds traceable to the commission of the offense."

United States v. Harris, 2018 WL 6184878, *7 (D. Haw. Nov. 27, 2018). If the defendant is convicted of a criminal offense that falls with the statute of limitations *for that offense*, forfeiture will follow as part of his sentence. If he is *not* convicted – because his criminal conduct occurred outside of the statute of limitations for that offense or for any other reason – there will be no forfeiture order in connection with that offense.

In *Harris,* the defendant, a speech therapist, was convicted of multiple counts of wire fraud for falsely billing TRICARE, the health benefit program for military service members and their dependents, for services that were not rendered. At the conclusion of her trial, she objected to the entry of a forfeiture order on various grounds, one of which was that the forfeiture order should not include the proceeds of conduct occurring outside of the statute of limitations.

The court held, however, that "[f]orfeiture is not a substantive criminal offense, but it is part of sentencing," and that accordingly, "[t]here is no particular statute of limitations for forfeiture." 2018 WL 6184878, at *7. Thus, the court held that because the Government had proven that the defendant's scheme continued into the limitations period for wire fraud, she must forfeit the proceeds of the entire scheme. *Id.*

The same reasoning applies here: there is no separate statute of limitations for forfeiture, and accordingly there is no merit to Defendant's contention that the forfeiture notice in his indictment should be dismissed because it seeks the forfeiture of property derived from conduct occurring outside of the statute of limitations.

B. Challenges to the Scope of Forfeiture Following Conviction are Premature if Raised Pre-Trial

To the extent that Defendant moves to dismiss the Forfeiture Allegation on the ground that the forfeiture sought by the Government exceeds the scope of the what is authorized by statute, it is premature. What property will be subject to forfeiture if Defendant is convicted of a Federal health care fraud offense will be determined by the court if and when Defendant is convicted at trial or the court accepts a plea of guilty. Rule 32.2(b). He has no right to have the court determine prior to trial that the forfeiture the Government will seek following his conviction will exceed the scope of the forfeiture authorized by the applicable forfeiture statute, which in this case will be 18 U.S.C. § 982(a)(7).[3] *See United States v. Dote,* 150 F. Supp. 2d 935, 943 (N.D. Ill. 2001) (the amount of money subject to forfeiture is a matter for the Government to prove and the jury to determine at trial—not an issue the court can resolve on a motion to dismiss the forfeiture allegation in the indictment); *United States v. Mongol Nation,* 132 F. Supp.3d 1207 (C.D. Cal. 2015) (motion to strike forfeiture of trademarks from indictment on constitutional grounds, and because forfeiture would be impermissible under trademark law, is premature in the pre-trial stage); *United States v. Faux*, 2015 WL 1190105 (D. Conn. Mar. 16, 2015) (the forfeiture notice in the indictment is only a notice, and is not subject to a motion to dismiss for lack of evidence; forfeitability will be determined only if the defendant is

[3] The Forfeiture Allegation in the Indictment also alleges that Defendant's property will be subject to forfeiture under other forfeiture statutes if Defendant is convicted of the mislabeling and identity theft offenses alleged in Counts 2-6. Defendant's Motion, however, focuses on the forfeiture authority for the Federal health care offenses alleged in Counts 1 and 7-41. We accordingly confine our argument in opposition to the forfeiture of property under § 982(a)(7).

convicted); *United States v. Sudeen,* 2002 WL 1897095, *1 (E.D. La. 2002) (motion to dismiss forfeiture allegation on *ex post facto* grounds is premature; court will consider objection only after there is a conviction). *Cf. United States v. Hilliard,* 818 F. Supp. 309, 315 (D. Colo. 1993) (forfeiture count not subject to dismissal on ground that subject property is jointly owned by innocent spouse; that issue will be addressed in the ancillary proceeding if the spouse files a claim contesting the forfeiture).

Accordingly, it would be premature for the court to determine whether forfeiture under § 982(a)(7) extends to aspects of Defendant's scheme that occurred outside of the statute of limitations, or for that matter, whether the forfeiture in a Federal health care case is limited by the Supreme Court's decision in *Honeycutt*.[4]

C. The Forfeiture Statute for Health Care Fraud Authorizes Forfeiture of the Proceeds of the Entire Scheme.

Even if Defendant's motion challenging the scope of the forfeiture authorized for a Federal heath care offense were not premature, it should be denied on the merits. That is because forfeiture in a fraud case is based on the proceeds of the *entire scheme,* including proceeds derived from conduct that occurred outside of the statute of limitations.

As mentioned earlier, in addition to finding that there is no separate statute of limitations for forfeiture, the court in *Harris* held that as long as the defendant's conduct continued into the limitations period for wire fraud, the proceeds of her entire scheme to defraud the health care program for military families were subject to forfeiture, including

[4] *See* Section III.D, *infra.*

proceeds derived from conduct occurring outside of the statute of limitations for wire fraud. *Harris*, 2018 WL 6184878, at *7. Other courts have reached the same conclusion.

The leading appellate case on this issue is the Fifth Circuit's decision in *United States v. Reed,* 908 F.3d 102 (5th Cir. 2018), where the defendant, an elected District Attorney, and his son were convicted of wire fraud and other offenses in connection with the misuse of campaign funds and the personal use of public money over a period of 20 years. Ordered to forfeit $46,200 in proceeds of the offense, the defendant appealed on the ground that the forfeiture should have been limited to the proceeds he obtained within the five-year limitations period for wire fraud. But the panel held that a person convicted of wire fraud is liable to forfeit the proceeds of the entire scheme, even if the scheme began outside of the limitations period. 908 F.3d at 125-26.

Similarly, in *United States v. Sigillito*, 899 F. Supp.2d 850, 861-62 (E.D. Mo. 2012), the defendant was ordered to forfeit the proceeds of a fraudulent loan scheme. He argued that including the proceeds of the entire scheme would violate the statute of limitations for mail and wire fraud, but the court did not agree.

"It is a well-settled point of law that the government may seek the forfeiture of all proceeds involved in a scheme or conspiracy," the court said. 899 F. Supp.2d at 862 (collecting cases). Thus, the defendant was required to forfeit the proceeds of the entire scheme, even if some of the proceeds were based on conduct occurring outside of the 5-year statute of limitations. *Id., aff'd, United States v. Sigillito,* 759 F.3d 913 (8th Cir. 2014). *Cf. United States v. Lo,* 839 F.3d 777 (9th Cir. 2016) (forfeiture in a fraud case is not limited to the executions of the scheme on which defendant was convicted, but includes the

proceeds of the entire scheme, "including additional executions of the scheme that were not specifically charged or on which the defendant was acquitted"); *United States v. Venturella,* 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a mail fraud case "is not limited to the amount of the particular mailing but extends to the entire scheme;" defendant's guilty plea to one substantive count involving $477 rendered her liable for money judgment of $114,000); *United States v. Cox,* 851 F.3d 113 (1st Cir. 2017) (same; defendant convicted of mortgage fraud is liable to forfeit the proceeds of the entire scheme, including uncharged and acquitted conduct); *United States v. Jafari,* 85 F. Supp.3d 679 (W.D.N.Y. 2015) (provider convicted of health care fraud liable for the gross proceeds of the entire scheme, not merely the proceeds of the four counts of conviction), *aff'd* 663 Fed. Appx. 18 (2nd Cir. 2016)*; United States v. Dillon,* 2017 WL 4870910 (D. Idaho Oct. 27, 2017) (defendant who pled to 24 executions of health care fraud scheme must forfeit proceeds of entire scheme, not just proceeds of the 24 counts); *United States v. Ahmed,* 2017 WL 3149336, *15 (E.D.N.Y. Jul. 25, 2017) (defendant required to forfeit millions derived from false Medicare billings, not limited to the billings alleged in the indictment and proven at trial).

In this case, the indictment alleges that Defendant's health care fraud scheme began in 2009 and resulted in gross proceeds of $223,696.66. Indictment at 1, 17. Defendant argues that if he is convicted, the forfeiture amount would be limited to the proceeds derived within the limitations period for Federal health care fraud – that is, to proceeds of conduct occurring after August 11, 2014 – and for that reason the Forfeiture Allegation should be dismissed. Motion at 3. For the foregoing reasons, the premise of Defendant's

motion is incorrect. If Defendant is convicted of a scheme that began outside of the limitations period but continued within the limitations period, he will be subject to the forfeiture of the proceeds of the entire scheme.

Thus, even if Defendant's motion were not premature, it should be denied on the merits as contrary to well-established law.

D. The Supreme Court's Decision in *Honeycutt* does not Support the Motion to Dismiss.

In Section II of his Motion to Dismiss, Defendant argues that the Forfeiture Allegation is limited by the Supreme Court's decision in *Honeycutt v. United States,* which held that in cases arising under the Controlled Substances Act, a forfeiture order must be limited to the proceeds of the offense that the defendant personally obtained. Motion at 4. In arguing that *Honeycutt* likewise limits the scope of the forfeiture that may be imposed in a case involving a Federal health care offense, Defendant raises a direct challenge to the scope of the forfeiture order that this court may impose if and when Defendant is convicted of any of the offenses alleged in the Indictment.

For the reasons stated in Section III.B, *supra,* challenges to the scope of a potential forfeiture order are premature if made prior to the defendant's conviction for any offense giving rise to forfeiture, and thus may not be made in a pre-trial motion to dismiss the Forfeiture Allegation. For that reason alone, Defendant's challenge to the Forfeiture Allegation based on *Honeycutt* should be denied.

The motion also should be denied, however, because *Honeycutt* does not apply to forfeitures based on Federal health care offenses, and because even if it did, holding

Defendant liable for the forfeiture of criminal proceeds that he directed to a corporation that he owned and controlled would not constitute a forfeiture based on joint and several liability.

1. *Honeycutt* does not apply to forfeitures under Section 982(a)(7).

In *Honeycutt,* the Supreme Court held that a defendant convicted of a drug offense under the Controlled Substances Act may not be held jointly and severally liable for the forfeiture of the proceeds of the entire scheme, but may be ordered to forfeit only the proceeds that he personally obtained. *Honeycutt,* 137 S. Ct. at ___. The linchpin of the decision was the text of the applicable forfeiture statute: 21 U.S.C. § 853(a). Because that statute authorizes the forfeiture of "proceeds the person obtained" as a result of the offense, the Court said, any forfeiture order entered pursuant to Section 853(a) must be limited to proceeds that the defendant *personally obtained* and may not include proceeds obtained by a co-defendant or co-conspirator. *Id. See United States v. Sexton,* 894 F.3d 787 (6th Cir. 2018) (the holding in *Honeycutt* was based on the language of § 853(a), limiting forfeitures to the proceeds that the defendant personally obtained); *United States v. Peithman,* 917 F.3d 635 (8th Cir. 2019) (same; following *Sexton*).

It is an open question whether *Honeycutt* bars joint and several liability in cases where the applicable forfeiture statute *does not* limit forfeitures to the proceeds that the defendant personally obtained. As the Ninth Circuit recently held in *Chow, Honeycutt* may have abrogated prior case law holding that joint and several liability applies in all cases, but it did not hold that joint and several liability is never authorized; rather, courts must

examine each forfeiture statute to determine if joint and several liability is authorized. *United States v. Chow,* ___ Fed. Appx. ___, 2019 WL 2142183 (9th Cir. May 15, 2019).

Indeed, numerous courts have held that *Honeycutt does not* apply to cases based on forfeiture statutes that, unlike Section 853(a), are *not limited* to the proceeds that the defendant personally obtained. For example, in *Sexton* and *Peithman* the Sixth and Eighth Circuits, respectively, held that joint and several liability is not barred by *Honeycutt* in fraud cases where the forfeiture is authorized by 18 U.S.C. § 981(a)(1)(C), a statute that authorizes the forfeiture of any property "which constitutes or is derived from proceeds traceable to" mail or wire fraud, and contains no reference to property that the defendant personally obtained. *Sexton,* 894 F.3d at 798-99; *Peithman*, 917 F.3d at 652. *See also United States v. Shelton,* 336 F. Supp.3d 940 (W.D. Ark. 2018) (following *Sexton*); *United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (*Honeycutt* was limited to Section 853(a); it does not mention and does not apply to forfeitures under § 981(a)(1)(C) which is not limited by property obtained *by a particular person*); *United States v. Lasher,* 2018 WL 3979596 (S.D.N.Y. Aug. 20, 2018) (following *McIntosh*). *See also United States v. Anthony,* 747 Fed. Appx. 628 (9th Cir. 2019) (finding it unnecessary to decide if *Honeycutt* applies to § 981(a)(1)(C) because defendant who deposited all of the fraud proceeds in her bank account – presumably before distributing them to co-conspirators – had personally "obtained" the money).

Likewise, other courts have held – or at least questioned – whether *Honeycutt* applies to forfeitures under other statutes, such as the forfeiture statutes for RICO, 18 U.S.C. § 1963, or money laundering, 18 U.S.C. § 982(a)(1), that also lack any language

limiting the forfeiture to proceeds that the defendant personally obtained. *See United States v. Bikundi,* ___ F.3d ___, 2019 WL 2426147 (D.C. Cir. Jun. 11, 2019) (whether *Honeycutt* applies for forfeitures under the money laundering statute is an open question in the D.C. Circuit); *United States v. Chow,* ___ Fed. Appx. ___, 2019 WL 2142183 (9th Cir. May 15, 2019) (remanding for the district court to determine in the first instance if *Honeycutt* applies to RICO and money laundering); *United States v. Alquza,* 2017 WL 4451146 (W.D.N.C. Sept. 20, 2017) (questioning whether *Honeycutt* applies to forfeitures under § 982(a)(1), which authorizes the forfeiture of all property "involved in" a money laundering offense and is not limited to the proceeds obtained by the defendant), aff'd 722 Fed. Appx. 348 (4th Cir. 2018).

If the defendant in this case is convicted of a Federal health care offense in violation of 18 U.S.C. § 1347, the forfeiture of the proceeds of his offense will be governed by 18 U.S.C. § 982(a)(7). That statute authorizes the forfeiture of "property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." Like Section 981(a)(1)(C), and unlike Section 853(a) – the statute at issue in *Honeycutt* – it contains no language limiting the forfeiture the property that a given defendant personally obtained. Accordingly, applying the rationale of *Sexton* and *Peithman*, when the issue ultimately reaches the Tenth Circuit, it should hold that nothing in Section 982(a)(7) bars joint and several liability in Federal health care cases. Presently, however, the courts are split on this issue. *See United States v. Bikundi*, ___ F.3d ___, 2019 WL 2426147 (D.C. Cir. Jun. 11, 2019) (whether *Honeycutt* applies to forfeitures under § 982(a)(7) is an open question in the D.C. Circuit); *United States v. Roy,*

2018 WL 6696598 (N.D. Ill. Dec. 20, 2018) (denying § 2255 petition; because § 982(a)(7) is not limited to property the defendant personally "obtained," counsel was not ineffective for failing to contest a forfeiture order based on joint and several liability). *But see United States v. Sanjar,* 876 F.3d 725 (5th Cir. 2017) (*Honeycutt* applies to forfeiture of gross proceeds of health care fraud under § 982(a)(7)); *United States v. Elbeblawy,* 899 F.3d 925 (11th Cir. 2018) (same; following *Sanjar*).

2. Even if *Honeycutt* applies, holding Defendant liable for all proceeds of his scheme would not violate *Honeycutt.*

Even if *Honeycutt* applies to forfeitures in Federal health care offenses governed by Section 982(a)(7), it does not follow that holding Defendant liable for the forfeiture of the proceeds of his scheme would constitute joint and several liability.

Defendant argues that the proceeds of his scheme to defraud the Medicare program were obtained not by him, but by the Neurology Center of Oklahoma, Inc., the corporation that Defendant owned and controlled and that he used to operate the clinic from which the fraudulent Medicare charges emanated. Because the corporation is a separate entity, Defendant argues, he did not "personally obtain" any of the fraud proceeds, and thus cannot be liable for the forfeiture of those proceeds under *Honeycutt.* Motion at 5-8.

Stated simply, an individual defendant cannot escape liability for the forfeiture of the proceeds of his offense by directing the payment of those proceeds to a corporation that the individual owns and controls. *See United States v. Peters,* 257 F.R.D. 377, 384 (W.D.N.Y. 2009) (disregarding corporate form and ordering defendant to pay money judgment equal to the value of the property obtained by alter ego corporations in a bank

fraud case), aff'd on other grounds, 732 F.3d 93 (2nd Cir. 2013); *United States v. Segal*, 339 F. Supp. 2d 1039, 1050 n.14 (N.D. Ill. 2004) (property held in the name of defendant's corporation may be forfeited if defendant's conduct justifies piercing the corporate veil); *United States v. Masino*, 2019 WL 1045179, *5 (N.D. Fla. Mar. 5, 2019) (rejecting defendants' claim that proceeds obtained not by them but by corporation they owned and controlled is not forfeitable in a criminal case). At the very least, if the proceeds of his fraud scheme were paid to Defendant's corporation, Defendant should be held liable to forfeit those proceeds as property that he obtained "indirectly" – a theory of forfeiture expressly authorized by Section 982(a)(7). *See United States v. Peters,* 732 F.3d 93, 102 (2nd Cir. 2013) (because the statute makes defendant liable for property obtained "directly or indirectly," he is liable for proceeds obtained by a corporation that he dominates or controls, even if he did not obtain the money himself); *United States v. Contorinis*, 692 F.3d 136, 147-48 (2d Cir. 2012) (neither defendant nor those acting in concert have to obtain actual possession; it is enough if the proceeds come under their control); *United States v. Seabrook,* 661 Fed. Appx. 84 (2nd Cir. 2016) ("proceeds obtained indirectly" includes property that the defendant caused to be delivered to a third party; following *Contorinis*); *United States v. Emor*, 850 F. Supp. 2d 176, 217 (D.D.C. 2012) (proceeds become proceeds when they come under the defendant's control, even if has not yet received the benefit); *United States v. Huber*, 243 F. Supp. 2d 996, 1003-04 (D.N.D. 2003) (forfeiture verdict properly included proceeds that defendant did not receive personally because he directed them to a third party), aff'd, 404 F.3d 1047 (8th Cir. 2005); *United States v. Zai*, 932 F. Supp.2d 824, 829 (N.D. Ohio 2013) (proceeds of defendant's bank

fraud were forfeitable even though they were paid to corporation in which defendant had an interest); *United States v. Perry,* 2014 WL 7499372, *2 (E.D. Va. Dec. 22, 2014) (following *Peters*; it is not necessary to pierce the corporate veil to find defendant personally liable for fraud proceeds paid to his corporation where defendant owned and dominated the corporation and used its assets to pay his personal expenses; such benefits constituted proceeds defendant obtained at least indirectly).

Alternatively, even if the court were to determine, as Defendant suggests, that his corporation was an entirely separate entity, acting on its own and not subject to Defendant's control, it is indisputable that Defendant was the leader or moving force behind the fraud scheme, and that he and the corporation were related entities who acted in concert with each other in perpetrating the offense. In cases where *Honeycutt* indisputably applies to the forfeiture statute in question, the courts have nevertheless held that when related parties act in concert with each other, jointly obtaining the proceeds of their joint offense, and jointly determining how those proceeds will be distributed between them, it is not a violation of *Honeycutt* to hold the parties each liable for the forfeiture of the proceeds of the offense. That is because in such cases – unlike the situation in *Honeycutt* where one defendant realized all of the proceeds and the other realized none – the jointly acting parties each personally obtained the proceeds of the offense. *See United States v. McIntosh,* 2017 WL 3396429 (S.D.N.Y. Aug. 8, 2017) (notwithstanding *Honeycutt,* when defendants act in concert, jointly acquiring proceeds and dividing them among themselves by joint decision, they each remain liable to forfeit the total proceeds). *See also United States v. Hoffman,* 901 F.3d 523, 561 n.27 (5th Cir. 2018) (speculating that defendants may not have

raised a *Honeycutt* objection to the money judgment in their appeal because they were co-owners of the company that received the illegal proceeds, and thus all "acquired" the money); *United States v. Carlyle,* ___ Fed. Appx. ___, ___ n. 6, 2019 WL 2307959 (11th Cir. May 30, 2019) (questioning whether *Honeycutt* bars joint and several liability where spouses or business partners act jointly and jointly obtain the criminal proceeds, but not deciding the issue).

Similarly, courts have held that when the leader of a criminal organization is the person who decides how the proceeds of an offense will be distributed among the participants in the scheme, the leader remains liable under *Honeycutt,* for the forfeiture of all of the proceeds of the scheme, even though he did not personally *retain* all of the proceeds for himself. *See United States v. Leyva,* 916 F.3d 14 (D.C. Cir. 2019) (*Honeycutt* did not deal with the leader of an organization and it is "far from clear" that the leader should not be liable to forfeit the proceeds obtained by his organization; it was not plain error for the district court to so hold); *United States v. Potts,* ___ Fed. Appx. ___, 2019 WL 1458799 (3rd Cir. Apr. 2, 2019) (distinguishing *Honeycutt*; the leaders of a drug organization "obtain" whatever the organization obtains regardless of how they divide the money among themselves and their subordinates); *S.E.C. v. Metter,* 706 Fed. Appx. 699, 702 n.2 (2nd Cir. 2017) (*Honeycutt* is limited to cases involving "incidental figures" whose role in the offense does not justify joint and several liability and does not apply to a person with a controlling interest who determined how the proceeds of the offense were distributed); *United States v. Bangiyev*, 359 F. Supp.3d 435 (E.D. Va. 2019) (following *Metter* and *Ward* and limiting *Honeycutt* to cases involving incidental figures who did not

personally obtain the criminal proceeds; it does not apply to the leaders who obtained all of the money before distributing it among themselves); *United States v. Masino,* 2019 WL 1045179, *9 (N.D. Fla. Mar. 5, 2019) (*Honeycutt* does not bar holding leaders of illegal gambling operation jointly and severally liable where they acted in concert in running the operation and deciding how to distribute its proceeds); *United States v. Ward,* 2017 WL 4051753 (W.D. Mich. Aug. 24, 2017) (leader of a drug organization "obtains" the gross proceeds of the drug offense, even if some of the money is actually received by his employees; *Honeycutt* does not limit his liability to the money that comes into his own hands).

Because Defendant was the leader of the Medicare fraud scheme and/or acted in concert with his corporation, he will be liable to forfeit the proceeds of the entire scheme even if the corporation was a separate entity, and even if *Honeycutt* applies to forfeitures under Section 982(a)(7).

E. Section 982(a)(7) authorizes the forfeiture of "gross proceeds."

Finally, Defendant argues that the Forfeiture Allegation should be dismissed because the forfeiture sought by the Government includes the expenses his business incurred in committing the offense, including the office lease, the employees' salaries, and costs of insurance. Motion at 8. In Defendant's view, because these overhead expenses must be deducted from the amount subject to forfeiture, and thus are not attributable to Defendant, the Indictment fails to set forth "a sum of money that could be forfeited." *Id.*

Setting aside the question whether an incorrect assertion of the amount subject to forfeiture could ever be grounds for dismissing the Forfeiture Allegation from an

indictment (in short, it cannot), Defendant's argument fails for the simple reason that the applicable forfeiture statute, Section 982(a)(7), expressly authorizes the forfeiture of the "gross proceeds" of a Federal health care fraud offense. Thus, if he is convicted, Defendant will *not* be entitled to the deduction of any overhead expenses as the costs that he incurred in committing the offense. To the contrary, the gross proceeds will be subject to forfeiture, and for the reasons discussed in Section III.D, he will be personally liable to forfeit them. *See United States v. Saoud,* 595 Fed. Appx. 182 (4th Cir. 2014) (doctor who concealed his ownership of his medical practice to circumvent a bar on his participation in Medicare and Medicaid must forfeit all revenue from the practice without credit for services legitimately performed; every dollar constitutes the "gross proceeds" of the fraud under § 982(a)(7)); *United States v. Poulin,* 461 Fed. Appx. 272, 288 (4th Cir. 2012) (*per curiam*) (forfeiture of gross proceeds is explicit in health care fraud cases under § 982(a)(7); defendant must forfeit all funds received from Medicare, not just amount above what he could have received for services actually provided); *United States v. Louthian,* 2013 WL 594232, *4 (W.D. Va. Feb. 15, 2013) (because § 982(a)(7) authorizes forfeiture of gross proceeds, convicted health care provider is liable for money judgment equal to gross amount received from Medicare); *United States v. Soliman,* 2008 WL 4490623, *10 (W.D.N.Y. Sept. 30, 2008) (denying motion to strike the word "gross" from the phrase "gross proceeds" in the forfeiture allegation because the applicable forfeiture statute, § 982(a)(7), authorizes the forfeiture of gross proceeds).

IV. CONCLUSION

For all of these reasons, Defendant's Motion to Dismiss the Forfeiture Count should be denied.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, the foregoing document was electronically transmitted to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECT registrants:

Mark D. Lyons
Counsel for Defendant

/s/ Pam Kuch
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