

Approved: Edward Imperatore
EDWARD A. IMPERATORE
Assistant United States Attorney

Before: HONORABLE DEBRA FREEMAN
United States Magistrate Judge
Southern District of New York

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UNITED STATES OF AMERICA : AMENDED COMPLAINT
- v. - : Violations of
MICHAEL COSTANZA, : 18 U.S.C. §§ 1341, 1349
Defendant. : COUNTY OF OFFENSE:
NEW YORK

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SOUTHERN DISTRICT OF NEW YORK, ss.:

ADAM M. SUITS, being duly sworn, deposes and says that he is a Special Agent with the Office of the Inspector General, Office of Investigations, United States Railroad Retirement Board, and charges as follows:

COUNT ONE

(Mail Fraud and Health Care Fraud Conspiracy)

1. From at least in or about 2003, up to and including in or about 2012, in the Southern District of New York and elsewhere, MICHAEL COSTANZA, the defendant, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with others to commit mail fraud and health care fraud in violation of Sections 1341 and 1347 of Title 18, United States Code, to wit, COSTANZA defrauded the RRB by submitting a false claim for disability benefits to which he was not entitled.

2. It was a part and an object of the conspiracy that MICHAEL COSTANZA, the defendant, and others known and unknown, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, for the purpose of executing such scheme and artifice and

attempting so to do, would and did place in a post office and authorized depository for mail matter, a matter and thing to be sent and delivered by the Postal Service, and would and did take and receive there from, such matter and thing, and would and did cause to be delivered by mail according to the direction thereon, and at the place at which it is directed to be delivered by the person to whom it is addressed, a matter and thing, in violation of Title 18, United States Code, Section 1341.

3. It was further a part and an object of the conspiracy that MICHAEL COSTANZA, the defendant, and others known and unknown, willfully and knowingly would and did execute and attempt to execute a scheme and artifice to defraud health care benefit programs and obtain, by means of false and fraudulent pretenses, representations, and promises, money and property owned by, and under the custody and control of, health care benefit programs, in connection with the delivery of and payment for health care benefits, items and services, in violation of Title 18, United States Code, Section 1347.

OVERT ACTS

4. In furtherance of the conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about March 21, 2003, May 9, 2003, August 12, 2003, and December 1, 2003, MICHAEL COSTANZA, the defendant, met with Dr. Peter J. Ajemian, an indicted co-conspirator.

b. On or about March 19, 2008, Peter J. Ajemian caused a workers' compensation claim form and supporting medical diagnosis to be mailed on COSTANZA's behalf to the Fire Districts of New York Mutual Insurance Company in the Southern District of New York.

(Title 18, United States Code, Section 1349.)

COUNT TWO (Mail Fraud)

5. From at least in or about 2003 until at least in or about 2011, MICHAEL COSTANZA, the defendant, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, for

the purpose of executing such scheme and artifice and attempting so to do, would and did place in a post office and authorized depository for mail matter, a matter and thing to be sent and delivered by the Postal Service, and would and did take and receive there from, such matter and thing, and would and did cause to be delivered by mail according to the direction thereon, and at the place at which it is directed to be delivered by the person to whom it is addressed, a matter and thing, in violation of Title 18, United States Code, Section 1341, to wit, COSTANZA defrauded the RRB by submitting a false claim for disability benefits to which he was not entitled.

(Title 18, United States Code, Section 1341.)

The bases for my knowledge and for the foregoing charges are, in part, as follows:

6. I am a Special Agent with the Office of the Inspector General, Office of Investigations, United States Railroad Retirement Board ("RRB-OIG"). I have been a Special Agent with RRB-OIG since in or about October 2010, and, since that time, I have personally been involved in an investigation into disability fraud at the Long Island Railroad ("LIRR"), as set forth below. Previously, beginning in or about 1997, I was a Special Agent at the Federal Bureau of Investigation, in a variety of capacities, including as associate division counsel, and, prior to that, I was a prosecutor with the Judge Advocate General for the United States Navy. From in or about 1994 to 1996, I also worked as a senior casualty claims adjuster/fraud investigator for a private insurance carrier. I am familiar with the facts and circumstances set forth below from my personal participation in the investigation, my examination of reports and records, and my conversations with other law enforcement officers and witnesses. This affidavit is based upon my investigation, my conversations with witnesses and other law enforcement agents, and my examination of reports, records, and consensual recordings. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

BACKGROUND ON RAILROAD RETIREMENT BENEFITS AND
OVERVIEW OF THE PREMEDITATED DISABILITY FRAUD

7. The RRB is an independent federal agency that

administers comprehensive retirement and benefit programs, including disability benefits, for the nation's railroad workers and their families. The LIRR, founded in 1834, is one of the busiest commuter railroads in North America, carrying over 250,000 customers each week day.

8. Retiring LIRR employees are eligible to receive benefits both from the LIRR and the RRB. First, retiring LIRR workers hired before 1988 may draw a pension from the LIRR if they retire at or after the age of 50 and if they have been employed for at least 20 years as of the time of retirement. An LIRR pension is based, in part, on the average number of hours worked in the five years prior to retirement. Second, retiring LIRR workers may draw an additional pension from the RRB as of the time they reach age 65.¹ If, however, an LIRR worker retires and is disabled, that LIRR worker can receive a *disability* pension from the RRB, even if he or she retires before age 65. Thus, a non-disabled LIRR retiree is only eligible to receive pension benefits from both the LIRR and the RRB if, among other things, that LIRR retiree is age 65 or older. By contrast, an LIRR worker who retires and is disabled is eligible to receive benefits from both the LIRR and the RRB as early as age 50 - pension benefits from the LIRR and disability benefits from the RRB.

9. To qualify for disability benefits, retiring railroad workers must file with the RRB an Application for Determination of Employee's Disability, known as a Form AA-1d (hereinafter referred to as a "Disability Application"). In their Disability Application, petitioning workers must describe in detail, under penalty of perjury, their disability and the limitations resulting therefrom, and state when they could no longer work because of their disability. At times, annuitants receiving disability payments are directed to file a Continuing Disability Update Report, known as a Form G-254 or G-254A (hereinafter referred to as a "Disability Recertification"), in which annuitants must certify, under penalty of perjury, their continuing inability to work.

10. MICHAEL COSTANZA, the defendant, and others known and unknown, engaged in a multi-year, systemic fraud to obtain RRB disability benefits. As part of this fraud, LIRR workers who were ready to retire -- and who were older than 50 but younger than 65 years old -- falsely claimed to be disabled, including to be

¹ Certain LIRR workers - namely those with 30 years or more of service - are eligible to receive an RRB pension as of age 60.

occupationally disabled, i.e., unable to perform their railroad occupation, in order to receive benefits both from the LIRR and the RRB. Specifically, LIRR employees, who were eligible to retire as early as age 50 with an LIRR pension, routinely sought to supplement their LIRR pension by fraudulently procuring a separate RRB disability annuity which, when combined with their LIRR pension, resulted in a total income level that often approximated, and in some cases exceeded, their pre-retirement working income. This fraud was perpetrated with the knowing and intentional involvement of hundreds of LIRR retirees; "facilitators" who served as liaisons between retiring workers and participating doctors; and doctors themselves, who falsely declared retiring LIRR workers to be occupationally disabled. Typically, these disability doctors claimed that their LIRR patients suffered from various musculoskeletal impairments, which can involve claims of soft tissue injury that are more difficult to confirm by objective medical criteria than are other impairments, and are often diagnosed clinically, based upon pain as subjectively reported by the patient.

11. As a result of this pervasive fraud, hundreds of LIRR retirees received RRB disability benefits that they were not entitled to receive, and participating doctors received millions of dollars from patients and insurance companies. The foreseeable loss to the RRB disability funds -- if the scheme had not been uncovered and fraudulent claims had been paid out in full -- would have exceeded approximately \$1 billion. A complaint filed on October 26, 2011 in the U.S. District Court for the Southern District of New York against certain participants in this fraud is attached hereto and is incorporated by reference herein. The defendants named in that complaint have been separately indicted in S1 11 Cr. 1091 (VM).

THE DEFENDANT

12. MICHAEL COSTANZA, the defendant, is a former LIRR transportation manager who retired on or about December 1, 2003, at the age of 50 years and five months, after approximately 26 years of employment. According to a "vocational report" that COSTANZA submitted to the RRB, his duties and responsibilities as a transportation manager included preparing operating reports and supervising train and station operators. On January 22, 2004, COSTANZA applied for and was awarded an RRB occupational disability annuity. In his Disability Application, he claimed that he became "disabled" on November 22, 2003, approximately one week before he retired.

13. In his last year with LIRR (2003), MICHAEL COSTANZA, the defendant, earned \$87,385. In 2011, he received approximately \$37,520 in LIRR pension payments and approximately \$39,425 from his RRB disability payments, for a total of \$76,945 in payments. He continues to receive RRB disability payments through the present.

OVERVIEW OF CONSTANZA'S FRAUD

14. Based on the evidence set forth below, there is probable cause to believe that MICHAEL COSTANZA, the defendant, deliberately defrauded the RRB by falsely claiming to be disabled. COSTANZA visited Peter J. Ajemian, an indicted co-conspirator who, in only nine months, diagnosed COSTANZA with a disability in order to allow him to claim he was "disabled" as of his last day or work. COSTANZA paid Ajemian \$800 for a disability narrative three months before the examination in which Ajemian reached the conclusion that COSTANZA was disabled.

15. Notwithstanding his claims to the RRB, COSTANZA served as an active firefighter at the North Merrick Fire Department at least until March 19, 2008, long after he retired from LIRR with a "disability." In fact, only one year before he purportedly became disabled, Ajemian submitted a form to the North Merrick Fire Department certifying that COSTANZA was fit for active duty as a firefighter and that he could perform, among other duties, hoisting ladders, carrying victims up and down stairs, and directing a full force stream of water from a fire hose. Five years after he purportedly became disabled, COSTANZA fought fires and even returned to Ajemian for an injury he sustained while responding to a fire. COSTANZA currently serves as commissioner of the North Merrick Fire Department and has served as chairman of the Nassau County Fire Commission.

COSTANZA'S PURPORTED DISABILITY

16. I am aware that MICHAEL COSTANZA, the defendant, had been contemplating early retirement for approximately 18 months prior to his actual retirement. I base this conclusion on the following facts:

a. On or about July 30, 2002, COSTANZA submitted an Application for Pension Estimate in which he anticipated that his "planned retirement date" would be September 1, 2003.

b. On or about June 10, 2003, COSTANZA submitted

an Application for Pension Estimate in which he anticipated that his "planned retirement date" would be "Sept. or Oct. 2003."

17. I have reviewed a Disability Application, dated January 22, 2004, in which MICHAEL COSTANZA, the defendant, stated the following, among other things, knowing that he could be prosecuted for false statements:

a. COSTANZA listed the medical condition causing him to file for disability as "herniated discs," "lumbar spine degenerative changes," "bilateral carpal tunnel syndrome," "right shoulder impingement syndrome" with tendonitis, "right knee status post arthroscopy with early medial compartment arthrosis," and "left ankle tarsal tunnel syndrome."

b. COSTANZA stated that this condition began to affect his ability to work on March 1, 2003, and that he could no longer work because of this condition on November 22, 2003, one week before he retired.

c. In response to a question asking COSTANZA to describe how his condition prevented him from working, COSTANZA stated:

"The severe neck, back, carpal tunnel, and right knee pain I suffer, together with my right shoulder and left ankle problems, have made it impossible for me to perform my duties as a Railroad Transportation Manager. I cannot sit for long periods while I do my office work or view station TV monitors. When I assist and supervise in the operation of my territory, I can no longer physically work on moving trains and locomotives, walk up and down track embankments, walk on track beds through yards and tunnels, crouch to hang air hoses and jumpers, lift and carry couplers and knuckles, open and close heavy interior and exterior train doors, etc. Other duties such as cranking on hand brakes, coupling and uncoupling equipment, throwing and aligning hand thrown track switches, dual controlled switches or derails, is impossible for me to accomplish."

d. In response to a question about his daily

activities, COSTANZA stated:

"The neck, back, right knee, right shoulder, and left ankle problems I suffer, have altered the way I live. After breakfast, . . . I then take a short walk for some type of exercise, but return home quickly because of my neck and back pain. I love to do gardening, but can no longer do this work and have hired a lawn service. I pass much of my time reading novels, using my computer, or watching television, getting up to stretch every ten minutes or so to alleviate [sic] my pain and numbness. Occasionally, I go to a neighborhood movie."

e. COSTANZA stated that the following daily activities were "Hard" for him to do: sitting, standing, walking, eating, bathing, dressing, "other bodily needs," "indoor chores (meal preparation, laundry, cleaning, etc.)," outdoor chores, driving a motor vehicle, using public transportation, reading English, and writing English.

f. COSTANZA reported that he suffered from "stabbing neck, knee, ankle, and back pain when walking"; that he had difficulty "entering and exiting [a] shower," "putting [his] neck into shirts and sweaters," "bending to tie shoes," "reaching into kitchen cabinets," "turning [his] neck while driving," "climbing station steps"; that he was unable to "lift heavy trash cans and laundry baskets" and "climb ladders to paint"; and that he experienced "numbness" from "viewing computer screens" and writing "over long periods."

g. COSTANZA stated that his doctor, Peter J. Ajemian, an indicted co-conspirator, had restricted his daily activities beginning in November 2003. Asked to describe the restriction that Ajemian had imposed, COSTANZA responded: "I am physically unable to perform my duties as a railroad transportation manager due to my disabilities."

18. In support of his Disability Application, MICHAEL COSTANZA, the defendant, submitted to the RRB a "Vocational Report," which describes his position at LIRR as follows:

"The transportation manager position requires that I have the ability to perform a great deal

of work at a desk in the Jamaica Station Office or out in the field. When working from the desk I handled numerous telephones and computer work as I went about preparing daily, weekly, and monthly crew, tunnel, terminal tower and yard operating reports or viewed TV monitors supervising train and station operators. The work required that I be able to sit at the desk for basically 20% of my . . . shift. The other 80% of my shift would be spent moving between my office and the various other offices and railroad control towers, yard locations, tunnels, trains and tracks in order to oversee operations and to perform the field inspections I was responsible for."

19. In his progress notes, Ajemian catalogued COSTANZA's purportedly deteriorating condition, culminating in a narrative dated October 30, 2007, in which Ajemian concluded that COSTANZA was occupationally disabled. In that narrative, Ajemian reported the following:

a. COSTANZA reported with "multiple complaints of pain involving his neck, left and right shoulder, his lower back and at times his right knee."

b. COSTANZA stated that "during the course of time he developed areas of stiffness in his lower back which come and go. At times he has headaches which cause migraines and stiffness in his neck and episodes of 'numbness and tingling' to both upper extremities. He reports weakness to his right hand and leg."

c. In addition, COSTANZA "had left and right shoulder pain, has difficulty reaching overhead, climbing up and down ladders in the past. The patient had a Workers Compensation injury of 8/17/99 that was essentially related to his right knee" and received a "surgical arthroscopy on August 9, 2001."

d. COSTANZA further "report[ed] episodes of discomfort involving his lower back with numbness to both feet, sometimes weakness ascending and descending stairs and prolonged standing seems to bother him as well."

e. During an examination on August 12, 2003, following magnetic resonance imaging tests of COSTANZA's back and

ENG nerve conduction studies of his extremities, Ajemian recommended that COSTANZA "continue working as he possibly could." Ajemian nevertheless made COSTANZA "aware that he has significant problems and his abilities to continue working in his current capacities as he is accustomed to may not be anticipated or expected to be warranted for the next several years' time."

f. On December 1, 2003, COSTANZA saw Ajemian for the last time before he retired. Ajemian reported that COSTANZA was "frustrated and realizing that he cannot continue working in his current capacities with multiple problems, their persistence and lack of response to conventional over the counter anti-inflammatories and his inability to take stronger pain medication to give him relief of symptoms has made him decide he wants to pursue retirement as recommended by" Ajemian. On the basis of his examination on that date, Ajemian recommended COSTANZA "for medical disability retirement" and noted that "future surgeries and/or interventional treatments are recommended."

20. Ajemian's billing records for MICHAEL COSTANZA, the defendant, reflect that on September 4, 2003, COSTANZA paid Ajemian \$800 to complete a narrative diagnosing a disability and other "disability forms" on his behalf. That is, COSTANZA paid for the disability narrative three months before the examination in which Ajemian reported reaching the conclusion that he was disabled.

COSTANZA'S DISABILITY CLAIM WAS FRAUDULENT

21. Through my investigation, I have learned that MICHAEL COSTANZA, the defendant, was not physically restricted in the ways in which he and his doctor, co-conspirator Peter J. Ajemian, represented to the RRB. Specifically, among other things:

a. There are no notes from any of Ajemian's examinations of COSTANZA stating that COSTANZA was restricted in his ability to work because of his purported disabilities. Only once COSTANZA was ready to retire did Ajemian first indicate that COSTANZA's condition affected his ability to work.

b. Although Ajemian prescribed physical therapy on May 9, 2003 and August 12, 2003, COSTANZA attended physical therapy only once before his retirement, on June 9, 2003. On that day, COSTANZA stated on a physical therapy patient questionnaire that he was not "limited in the kind of work or other activities" that he performed at LIRR because of his condition.

c. Despite claiming long-simmering disabilities, COSTANZA received upon his retirement \$21,350 from the RRB as a buyout for unused sick days.

d. On or about August 11, 2004, the RRB retained an independent physician to examine COSTANZA. The physician observed that COSTANZA could lift objects weighing up to 10 pounds, stand for at least six hours in an eight-hour workday, and sit for at least six hours in an eight-hour workday, and concluded that "medical improvement [was] possible." The physician also found that Ajemian's December 2003 diagnosis "is not fully supported by the objective ME [medical evidence]."

e. In 2002, one year before his retirement, COSTANZA fought fires. In fact, on May 16, 2000 and July 31, 2002, Ajemian submitted to the North Merrick Fire Department a certification clearing COSTANZA to return to active duty as a firefighter following right knee arthroscopic surgery. The certification stated that COSTANZA was fit to perform the following:

"Driving an emergency vehicle;
Carrying an aided up and down stairs;
Extricating occupants of smashed vehicles;
Caring for a patient or multiple patients under stressful conditions who may be severely injured or dying from injuries that may be gruesome to view;
Administration of drugs or other treatments that are within the EMS Protocol;
Wearing an air pack and heavy protective clothing;
Hoisting ladders;
Pulling hose from a fire truck to a hydrant or scene;
Directing a full force stream of water at a fire."

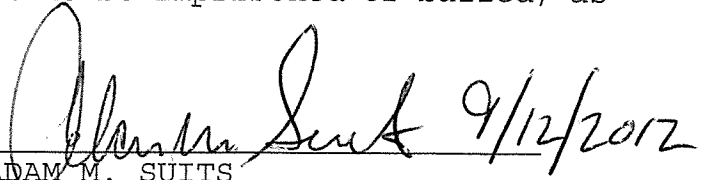
f. In 2008, five years after he retired with a "disability," COSTANZA fought fires and even returned to Ajemian for an injury he sustained while responding to a fire. In fact, on a patient questionnaire that he submitted to Ajemian, COSTANZA stated that, on March 19, 2008, he was injured as follows: "Responded to CO² incident. When I attempted to go back into cab of fire truck, used my left leg first to lift up. At that time I heard a pop (crack)

come from my left knee." COSTANZA listed the place of his injury as "fire truck Park Ave. North Merrick." In connection with this injury, Ajemian caused a workers' compensation claim form and supporting medical diagnosis to be mailed on COSTANZA's behalf to the Fire Districts of New York Mutual Insurance Company in the Southern District of New York.

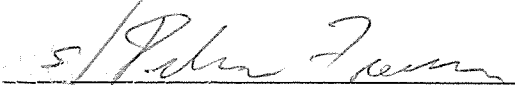
g. Thus, notwithstanding his claim on his Disability Application that he had difficulty standing, walking, bathing, dressing, performing both indoor and outdoor chores, driving a motor vehicle, "bending to tie shoes," and "reaching into kitchen cabinets," COSTANZA was able to meet the demanding physical requirements of being an active firefighter after he retired from LIRR.

h. Based upon my review of fire department records, I have learned that COSTANZA currently serves as commissioner of the North Merrick Fire Department, for which he receives an annual salary of approximately \$2,182, and also has served as chairman of the Nassau County Fire Commission. Under New York State law, COSTANZA's duties as commissioner include, among other things, "organiz[ing], operat[ing], maintain[ing] and equip[ping] fire companies," maintaining property, hiring employees, and entering into contracts on behalf of the fire department. COSTANZA was also required to complete a training course on "legal, fiduciary, financial, procurement, and ethical responsibilities."

WHEREFORE, deponent asks that a warrant be issued for the arrest of MICHAEL COSTANZA and that he be imprisoned or bailed, as the case may be.


ADAM M. SUITS
Special Agent
Office of the Inspector General,
U.S. Railroad Retirement Board

Sworn to before me this
12th day of September 2012


THE HONORABLE DEBRA FREEMAN
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK