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CJB

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED IN OPEN COURT
MAY 22 2024
CHRISTOPHER EKMAN
CLERK

UNITED STATES OF AMERICA

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CRIM. NO. 24-76-KD

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USAO NO. 23R00197

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v.

*

VIOLATION:

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18 U.S.C. § 371

JAMES MATTHEW THORTON POTTER

*

a.k.a., "Bo Potter"

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FORFEITURE NOTICE

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FILED UNDER SEAL

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

Conspiracy to Violate the Anti-Kickback Statute
Title 18, United States Code, Section 371

1. From in or about January 2023 through in or about July 2023, in the Southern District of Alabama and elsewhere, the defendant,

JAMES MATTHEW THORTON POTTER,

knowingly and willfully combined, conspired, confederated, and agreed with Brian Cotugno and others to purchase, sell, and distribute, and to arrange for the purchase, sale, and distribution of Medicare beneficiary identification numbers, in violation of 42 U.S.C. §1320a-7b(b)(4).

OBJECTIVE OF THE CONSPIRACY

2. The objective of this conspiracy was to obtain money from Medicare through the purchase and sale of beneficiary identification numbers ("BINs") that were then used to bill Medicare for COVID-19 test kits.

BACKGROUND

The Medicare Program

3. Medicare is a federal program administered by the Centers for Medicare and Medicaid Services (“CMS”), an agency of the U.S. Department of Health and Human Services and is a “health care benefit program” as defined in 18 U.S.C. § 24(b).

4. Medicare is funded through individual payroll taxes, other taxes, and user fees. Medicare helps pay for certain medical services for people aged 65 and over and some other individuals with specific illnesses and/or disabilities. Individuals who receive benefits under Medicare are referred to as Medicare “beneficiaries.”

5. Each Medicare beneficiary is identified with a unique beneficiary identifier number known as a “BIN.” These BINs are used, among other ways, to submit claims to Medicare seeking reimbursement for covered benefits, items, and services. BINs are considered means of identification pursuant to 18 U.S.C. § 1028(d)(7).

6. Medical providers and suppliers must obtain a National Provider Identifier (“NPI”) number before enrolling in Medicare. Healthcare providers seeking to become Medicare providers must submit enrollment documentation to Medicare.

7. Every enrollment application submitted by, or on behalf of, a healthcare provider, includes an agreement by the healthcare provider to abide by Medicare’s rules and regulations. As a condition of payment, Medicare requires providers to certify all information on the claim to be true, correct, and complete.

8. Medicare does not reimburse providers for claims for testing, items, or services procured in violation of the Federal Anti-Kickback statute, including the provision set out in 42 U.S.C. §1320a-7b(b)(4), prohibiting the purchase, sale, and distribution of Medicare BINs.

Over the Counter (“OTC”) COVID-19 Test Kits

9. In April 2022, the federal government announced that Medicare beneficiaries could receive up to eight OTC COVID-19 test kits per calendar month, at no cost to the beneficiary, from participating Medicare providers during the duration of the COVID-19 public health emergency (“PHE”).

10. While these tests were available at no cost to the beneficiaries, they were not “free.” Rather, Medicare used federal tax dollars to reimburse enrolled healthcare providers for these tests at the tune of approximately \$94.00 per test.

11. During the period when these COVID-19 test kits were authorized for distribution, participating healthcare providers were encouraged by Medicare to use online ordering mechanisms, including direct-to-consumer shipping programs, to furnish these tests to requesting beneficiaries. Direct-to-consumer shipping programs included online and telephone ordering. To comply with the federal authorization for these tests, these direct-to-consumer shipping programs could only be operated by an eligible pharmacy or healthcare provider enrolled in the Medicare program.

12. The federal government ended the PHE on May 11, 2023. However, Medicare announced a one-year grace period for healthcare providers to bill for COVID-19 test kits shipped to requesting beneficiaries prior to May 11, 2023, but which had not been billed to Medicare before the end of the PHE.

13. To receive reimbursement from Medicare for these COVID-19 test kits, healthcare providers were directed to bill Medicare using Healthcare Common Procedure Coding System code K1034 (“code K1034”). CMS guidance to providers regarding billing code K1034 was to “only give patients the tests when they request them.” Thus, a provider could not send unrequested tests to beneficiaries and then bill Medicare for these tests.

Brian Cotugno and TeleMD, LLC

14. Brian Cotugno (“Cotugno”) owned TeleMD, LLC (“TeleMD”), which is located in the Northern District of Georgia.

15. Neither Cotugno nor TeleMD has ever been an enrolled Medicare provider. Thus, neither could bill Medicare for tests, items, or services, such as COVID-19 test kits.

16. During the period relevant to this Indictment, TeleMD had a bank account with Renasant Bank (hereinafter “the TeleMD bank account”). Cotugno was the only signatory on this account.

Lab-1 and Lab-2

17. **JAMES MATTHEW THORTON POTTER** (“**POTTER**”) co-owns two businesses in Alabama. Specifically, **POTTER** and “Individual-1” co-own “Lab-1” in Spanish Fort. **POTTER** and “Individual-2” co-own “Lab-2” in Birmingham.

18. During the period relevant to this Indictment, both Lab-1 and Lab-2 were registered Medicare providers. Thus, both labs had the ability to bill Medicare for COVID-19 test kits provided to requesting beneficiaries during the PHE.

19. Lab-1 and Lab-2 had bank accounts with Community Bank and Valley National Bank, respectively. For purposes of this Indictment, these accounts will be referred to as “Lab-1 bank account” and “Lab-2 bank account.” Reimbursement monies for claims submitted to Medicare by Lab-1 and Lab-2 was electronically deposited into their respective bank accounts. **POTTER**, Individual-1, and a third individual were the only signatories on the Lab-1 bank account. **POTTER** and Individual-2 were the only signatories on the Lab-2 bank account.

MANNER AND MEANS OF THE CONSPIRACY

20. In January 2023, **POTTER** agreed to purchase COVID-19 “lead packages” from Cotugno. Each “lead package” consisted of a beneficiary’s personal information, their BIN, and an audio recording supposedly of the beneficiary requesting COVID-19 test kits.

21. From February 2023 through May 2023, **POTTER** used Lab-1 and Lab-2 to bill Medicare for over 230,000 COVID-19 test kits supposedly ordered by the beneficiaries whose BINs **POTTER** purchased from Cotugno. During this same four-month period, Medicare reimbursed Lab-1 and Lab-2 nearly \$20,000,000.00 for these COVID-19 test kits. All of these proceeds were electronically deposited into the labs' respective bank account.

22. Neither Lab-1 nor Lab-2 provided COVID-19 test kits to any of the beneficiaries for whom they billed. Rather, **POTTER** and Individual-1 paid extra money to Cotugno in exchange for him to use a separate distributor. Thus, **POTTER**, Individual-1, and Individual-2 obtained nearly \$20,000,000.00 in Medicare reimbursements simply by billing Medicare using the BINs purchased from Cotugno as part of this scheme.

OVERT ACTS

23. Numerous overt acts were committed as part of this conspiracy. These overt acts include, but are not limited to, the following kickback payments wired from the Lab-1 and the Lab-2 bank accounts to the TeleMD bank account as payment for "lead packages":

Date	Amount	Wired From	Wired To
Feb. 02, 2023	\$120,000.00	Lab-1 account	TeleMD account
Feb. 17, 2023	\$120,000.00	Lab-1 account	TeleMD account
Feb. 28, 2023	\$120,000.00	Lab-1 account	TeleMD account
Mar. 03, 2023	\$60,000.00	Lab-2 account	TeleMD account
Mar. 10, 2023	\$240,000.00	Lab-1 account	TeleMD account
Mar. 16, 2023	\$160,000.00	Lab-2 account	TeleMD account
Mar. 17, 2023	\$170,000.00	Lab-1 account	TeleMD account
Mar. 24, 2023	\$60,000.00	Lab-1 account	TeleMD account
Mar. 27, 2023	\$70,000.00	Lab-1 account	TeleMD account
Mar. 31, 2023	\$35,000.00	Lab-1 account	TeleMD account
Apr. 06, 2023	\$500,000.00	Lab-1 account	TeleMD account
Apr. 07, 2023	\$300,000.00	Lab-1 account	TeleMD account
Apr. 11, 2023	\$300,000.00	Lab-1 account	TeleMD account
Apr. 12, 2023	\$100,000.00	Lab-2 account	TeleMD account
Apr. 14, 2023	\$400,000.00	Lab-1 account	TeleMD account
Apr. 14, 2023	\$200,000.00	Lab-2 account	TeleMD account
Apr. 20, 2023	\$500,000.00	Lab-1 account	TeleMD account
Apr. 20, 2023	\$300,000.00	Lab-2 account	TeleMD account
Apr. 24, 2023	\$300,000.00	Lab-1 account	TeleMD account

Apr. 24, 2023	\$100,000.00	Lab-2 account	TeleMD account
Apr. 27, 2023	\$300,000.00	Lab-1 account	TeleMD account
May 02, 2023	\$300,000.00	Lab-1 account	TeleMD account
May 04, 2023	\$275,000.00	Lab-1 account	TeleMD account
May 04, 2023	\$375,000.00	Lab-2 account	TeleMD account
May 08, 2023	\$400,000.00	Lab-1 account	TeleMD account
May 11, 2023	\$300,000.00	Lab-2 account	TeleMD account
May 12, 2023	\$500,000.00	Lab-1 account	TeleMD account
May 15, 2023	\$400,000.00	Lab-1 account	TeleMD account
May 18, 2023	\$500,000.00	Lab-1 account	TeleMD account
May 22, 2023	\$500,000.00	Lab-1 account	TeleMD account
May 22, 2023	\$500,000.00	Lab-2 account	TeleMD account

24. All in violation of Title 18, United States Code, Section 371.

FORFEITURE NOTICE

25. The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Sections 981(a)(1)(C), 982(a)(2) and 982(a)(7) and Title 28, United States Code, Section 2461(c).

26. Upon conviction of the offense in violation of Title 18, United States Code, Section 371 as set out in Count One of this Indictment, the defendant,

JAMES MATTHEW THORTON POTTER,

shall forfeit to the United States any property real or personal that constitutes or is derived directly or indirectly from gross proceeds traceable to the commission of the offense or any proceeds obtained directly or indirectly as the result of such offense and any property used or intended to be used in any manner or part to commit or to facilitate the commission of the offense. The property to be forfeited includes, but is not limited to the following:

- a. U.S. Currency in the amount of no more than \$7,411,504.52 electronically deposited by Medicare into the Lab-1 bank account associated with the COVID-19 test kits. This amount does not include proceeds paid to Cotugno from the Lab-1 bank account. However, this figure does include the following proceeds already seized by the United States:

- i. U.S. Currency in the amount of no more than \$5,524,745.33 already seized from a Morgan Stanley account ending in x7097 held in the name of Lab-1 with authorized signer, Individual-1.
 - ii. U.S. Currency in the amount of no more than \$789,936.10 already seized from a Community Bank account ending in x8834 held in the name of Lab-1 with authorized signers, **JAMES MATTHEW THORTON POTTER**, Individual-1, and a third person.
- b. U.S. Currency in the amount of no more than \$3,158,354.34 electronically deposited by Medicare into the Lab-2 bank account associated with the COVID-19 test kits. This amount does not include proceeds paid to Cotugno from the Lab-2 bank account.
 - c. A 2020 Mercedes-Benz GT63C4 bearing the VIN WDD7X8KB0LA013732.

27. If any of the property described above, as a result of any action or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or disposed of with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be subdivided without difficulty,

the United States shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p).

28. All pursuant to Title 21, United States Code, Section 853 and Title 28, United States Code, Section 2461(c).

A TRUE BILL

FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

SEAN P. COSTELLO
UNITED STATES ATTORNEY

By:



CHRISTOPHER J. BODNAR
Assistant United States Attorney



SEAN P. COSTELLO
United States Attorney

MAY 2024

PENALTY PAGE



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CASE STYLE: UNITED STATES v. JAMES MATTHEW THORTON
POTTER

DEFENDANT: JAMES MATTHEW THORTON POTTER (COUNT 1)

USAO NUMBER: 23R00197

AUSA: Christopher J. Bodnar

CODE VIOLATION:

COUNT ONE: 18 U.S.C. § 371 (Conspiracy to Violate the Anti-Kickback Statute)

PENALTY:

COUNT ONE: 5 yrs/\$250,000/3 yrs SRT/\$100 SA

FORFEITURE NOTICE: