

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,

Plaintiffs,

v.

HOLLAND-GLEN,

Defendant.

CIVIL ACTION
NO.:

07-2699

ORDER

AND NOW this day of upon consideration of the Verified Complaint filed by plaintiffs' United States of America and the Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"), as well as plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction with supporting memorandum of law, the Court finds as follows:

- A. Plaintiffs have demonstrated probable cause to believe that defendant is engaged in an ongoing health care fraud regarding Holland-Glen's nursing facility in Hatboro, Pennsylvania ("the Hatboro nursing facility").
- B. Plaintiffs have demonstrated probable cause to believe that defendant is engaged in an ongoing mail fraud/wire fraud scheme regarding the Hatboro nursing facility.
- C. Plaintiffs have demonstrated probable cause to believe that, at the Hatboro nursing facility, defendant is engaged in ongoing violations that are subject to United States Department of Health and Human Services civil monetary penalties.

D. Plaintiffs have demonstrated probable cause to believe that defendant has engaged in a pattern of failing to comply with DPW licensing requirements regarding the Hatboro nursing facility.

E. There is a reasonable probability that the plaintiffs will succeed on the merits of their underlying claims.

F. There is a probability of irreparable injury if the relief requested is not granted.

G. This restraining order is in the public interest.

H. The following provisions are necessary to serve the interests of justice and to prevent a continuing and substantial injury to members of the public.

It is therefore hereby ORDERED as follows:

1. The motion for a temporary restraining order is granted.
2. Defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them are enjoined from continuing the acts, practices, and omissions set forth above and from billing for the acts, practices, and omissions set forth above.
3. Defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them are enjoined from acting and/or from failing to act in a manner that violates generally accepted professional standards and from billing for any acts or omissions in violation of generally accepted professional standards.
4. Defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them are enjoined from acting and/or from failing to act in a manner that violates the Federal Nursing Home Reform Act and its regulations and from billing

for any acts or omissions in violation of the Federal Nursing Home Reform Act and its regulations.

5. Defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them are enjoined from acting and/or from failing to act in a manner that violates the licensing standards of DPW and from billing for any acts or omissions in violation of the licensing standards of DPW.

6. Defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them are enjoined from altering, destroying, hiding, and/or disposing of any record(s) relating to the subject matter of plaintiffs' Verified Complaint, including but not limited to any patient record(s), billing record(s), incident report(s), investigation report(s), staffing schedule(s), equipment and facility record(s), inspection record(s), plan(s) for correction, quality report(s), evacuation plan(s), calendar(s), letter(s), and complaint(s), whether in document, electronic, or other form.

7. Within thirty (30) days of the date of this Order, defendant shall substitute current management with a Court-approved temporary manager to run the Hatboro nursing facility to ensure the safety and well-being of the residents. The temporary manager shall be selected from the Commonwealth of Pennsylvania, Department of Health-maintained list of temporary managers for nursing facilities.

8. Defendant shall hire at least one monitor that the United States will select to ensure that the Hatboro nursing facility is in compliance with generally accepted medical practices and the Federal Nursing Home Reform Act and its regulations. The monitor(s) shall report to the court concerning the status of the Hatboro nursing facility and whether there is a continuing need for a temporary manager.

9. Defendant shall promptly provide notice of the contents of this Order to all Holland-Glen employees, officers, agents, board members, and persons acting on their behalf or in concert with them, as well as to all entities that pay for services that defendant provides at the Hatboro nursing facility.

10. A hearing on plaintiffs' motion for preliminary injunction shall be held on _____, 2007, at _____ .m., in Courtroom _____, United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

BY THE COURT:

Judge, United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO.
	:	
v.	:	
	:	
HOLLAND-GLEN,	:	
	:	
Defendant.	:	

**PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Pursuant to 18 U.S.C. § 1345; 42 U.S.C. § 1320a-7a(k); and 62 P.S. §§ 1052 and 1053, plaintiffs United States of America and the Commonwealth of Pennsylvania, Department of Public Welfare (“DPW”) hereby move the Court to issue a temporary restraining order and, after hearing, a preliminary injunction against defendant Holland-Glen. Plaintiffs’ motion is based upon, and they request the Court to find, probable cause to believe that defendant is violating 18 U.S.C. § 1347 (proscribing health care fraud); 18 U.S.C. § 1341 (proscribing mail fraud); 18 U.S.C. § 1343 (proscribing wire fraud); 18 U.S.C. § 1035 (proscribing false statements relating to health care matters); 42 U.S.C. § 1320a-7a(a) (describing civil monetary penalties that are a predicate to injunctive relief); and Pennsylvania licensing standards.

Because such relief is necessary to protect the vulnerable residents of defendant’s nursing facility in Hatboro, Pennsylvania (“the Hatboro nursing facility”) and the victims of defendant’s fraud, plaintiffs United States and DPW respectfully request the Court to enter an order or orders:

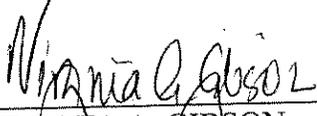
1. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from continuing the acts, practices, and omissions set forth in plaintiffs' Verified Complaint for Injunctive Relief and from billing for the acts, practices and omissions set forth in plaintiffs' Verified Complaint;
2. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from acting and/or from failing to act in a manner that violates generally accepted professional standards and from billing for any acts or omissions in violation of generally accepted professional standards;
3. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from acting and/or from failing to act in a manner that violates the Federal Nursing Home Reform Act and its regulations and from billing for any acts or omissions in violation of the Federal Nursing Home Reform Act and its regulations;
4. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from acting and/or from failing to act in a manner that violates the licensing standards of DPW and from billing for any acts or omissions in violation of the licensing standards of DPW;
5. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from altering, destroying, hiding, and/or disposing of any record(s) relating to the subject matter of plaintiffs' Verified Complaint for Injunctive Relief, including but not limited to any patient record(s), billing record(s), incident report(s), investigation report(s), staffing schedule(s), equipment and facility inspection record(s), plan(s) for correction, quality report(s), evacuation plan(s), calendar(s), letter(s), and complaint(s), whether in document, electronic, or other form;
6. Requiring defendant to substitute current management with a Court-approved temporary manager to run the Hatboro nursing facility to ensure the safety and well being of residents there;
7. Requiring defendant to hire a monitor(s) to ensure that the Hatboro nursing facility is in compliance with generally accepted medical practices and the Federal Nursing Home Reform Act and its regulations; and
8. Granting all just and proper further equitable relief.

The reasons for this motion are set forth in the accompanying Memorandum of

Law.

Respectfully,

PATRICK L. MEEHAN
United States Attorney

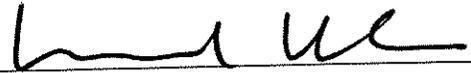


VIRGINIA A. GIBSON
Assistant United States Attorney
Chief, Civil Division



MARILYN S. MAY
Assistant United States Attorney

GERALD B. SULLIVAN
Assistant United States Attorney



HOWARD ULAN
Senior Assistant Counsel
Commonwealth of Pennsylvania
Department of Public Welfare

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO.
	:	
v.	:	
	:	
HOLLAND-GLEN,	:	
	:	
Defendant.	:	

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

PRELIMINARY STATEMENT

As set forth in the accompanying Verified Complaint, and as further described below, defendant Holland-Glen has knowingly defrauded plaintiff United States of America and plaintiff Commonwealth of Pennsylvania, Department of Public Welfare ("DPW"). Defendant has done so by: (i) providing to the medically fragile, vulnerable juvenile residents of Holland-Glen's Hatboro, Pennsylvania nursing facility ("the Hatboro nursing facility") services that are so deficient and below generally accepted professional standards of care as to be worthless; (ii) engaging in a scheme to defraud federal and state government by falsely representing that required care, services and environment would be provided to -- and, later, had been provided to -- residents of that facility; and (iii) nevertheless billing for such deficient care as if the billed-for services had been completely and properly provided. Notwithstanding DPW's continued citations and license non-renewals for the Hatboro nursing facility, defendant has persisted in this fraud.

By still participating in these fraudulent schemes, defendant Holland-Glen is violating not only Pennsylvania licensing standards but federal criminal statutes proscribing health care fraud (18 U.S.C. § 1347); false statements relating to health care matters (18 U.S.C. § 1035); mail fraud (18 U.S.C. § 1341); and wire fraud (18 U.S.C. § 1343). Defendant is further thereby engaging in conduct that will subject it to United States Department of Health and Human Services civil monetary penalties. To halt defendant's ongoing fraud, and to protect the vulnerable juvenile residents of the Hatboro nursing facility and the public whom defendant continues to victimize, plaintiffs United States and DPW invoke the Court's civil injunctive authority to enjoin: (i) under the Anti-Fraud Injunction Statute, 18 U.S.C. §1345, such mail, wire, and health care fraud; (ii) under 42 U.S.C. §1320a-7a(k), activity that may lead to a civil monetary penalty; and (iii) under 62 P.S. §§ 1052 and 1053, further violations of Pennsylvania licensing regulations.

STATEMENT OF FACTS

In support of their request for a temporary restraining order, plaintiffs United States and DPW rely upon, and incorporate herein by reference, the averred facts in their Verified Complaint for Injunctive Relief in this action. In support of their request for a preliminary injunction, plaintiffs rely upon, and incorporate herein by reference, their Verified Complaint and evidence that they will present to the Court at a hearing on this matter.

ARGUMENT

I. THE UNITED STATES IS ENTITLED TO RELIEF UNDER THE ANTI-FRAUD INJUNCTION STATUTE, 18 U.S.C. § 1345

The Anti-Fraud Injunction Statute ("Section 1345") authorizes the United States to commence a civil action in any federal court to enjoin persons who are criminally violating, or about to violate, the provisions of the Health Care Fraud, Mail Fraud, and/or Wire Fraud statutes, and/or statutes proscribing health care-related false statements. See 18 U.S.C. §1345(a).¹ Section 1345 provides that a district court "may . . . enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought." 18 U.S.C. § 1345(b). The government meets its Section 1345 burden by demonstrating probable cause to believe that the defendant is engaged in, or is about to engage in, health care, mail, and/or wire fraud and/or false statements relating to health care.

In this case, there is probable cause to believe that defendant Holland-Glen has engaged in and is continuing to engage in such fraud at the Hatboro nursing facility. Because through such conduct defendant continues to victimize not merely the public at large, the United States, and DPW but that facility's medically fragile juvenile residents, plaintiffs United States and DPW move for injunctive relief restraining defendant's illegal conduct.

¹ Congress enacted Section 1345 as part of the Comprehensive Crime Control Act of 1984. See Pub. L. No. 98-473, § 1205(a), 98 Stat. 1837, 2152 (1984). In doing so, Congress sought to stop fraud during pending criminal investigations by providing the government with a civil tool to protect innocent persons from being subjected to continuing fraudulent schemes. See S. Rep. 225, 98th Cong., 2d Sess. 401-02, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3539-40. The Health Insurance Portability and Accountability Act added health care offenses to the types of criminal conduct subject to civil injunctive relief. See Pub. L. No 104-191, 110 Stat. 1936 (1996).

A. **Section 1345 Relief Is Available Once The United States Has Established Probable Cause To Believe That Defendant Is Engaging in Health Care, Mail, And/Or Wire Fraud And/Or False Statements Relating to Health Care**

1. **A probable cause standard applies**

Under Section 1345, once the United States establishes probable cause to believe that defendant is engaged in a violation of one or more of the predicate criminal statutes, the Court must issue such preliminary injunctive relief as justice requires to protect the victims of the wrongs alleged in the government's Complaint. See, e.g., United States v. Weingold, 844 F. Supp. 1560, 1573 (D.N.J. 1994) (applying probable cause standard).² Probable cause is established by showing "facts and circumstances based upon reasonably trustworthy information, sufficient to justify a person of reasonable caution believing that an act has occurred or is about to occur." United States v. Cen-Card Agency/C.C.A.C., 872 F.2d 411 (Table), Slip Op. No. 88-5764 (3d Cir. Mar. 23, 1989), at 9 (a copy of this decision is attached to this memorandum as Exhibit "A"). Legislative history and logic provide the rationale for applying the "probable cause" standard to a Section 1345 proceeding. That standard long applied under the statute permitting the Postal Service to detain mail, by injunction, when there is evidence of mail fraud. See 39 U.S.C. § 3007 (requiring, until 1999 amendments, probable cause showing); see also United States Postal Service v. Beamish, 466 F.2d 804, 806 (3d Cir. 1972) (probable cause standard applied to injunctions sought under § 3007). In later enacting Section 1345 in 1984, Congress intended to enhance the government's ability to protect the public against frauds

² Accord, e.g., United States v. William Savran & Assocs., Inc., 755 F. Supp. 1165, 1177 (E.D.N.Y. 1991) (same); United States v. Davis, 1988 WL 168562, at *3 (S.D. Fla. Sept. 23, 1988) (same); see generally United States v. Payment Processing Center, LLC, 461 F. Supp. 2d 319, 323 (E.D. Pa. 2006) (noting, in context of different issue concerning property ownership, "in a § 1345 action[] the government must establish probable cause").

including mail fraud. See United States v. Belden, 714 F. Supp. 42, 44-45 (N.D.N.Y. 1987) (extensive discussion of legislative history supporting application of probable cause standard to Section 1345 injunctions). It would be incongruous to impose upon the government a tougher standard of proof under Section 1345 than under the pre-existing Section 3007 when Congress intended the former provision to augment the government's anti-fraud arsenal during the often lengthy time required to investigate and prosecute underlying charges. See Id. at 45.

Though many courts have adopted the probable cause standard for Section 1345 injunctions, some have not and have imposed instead the traditional civil injunctive standards.³ The distinction between the standards, however, is one without a material difference here. See e.g., United States v. Fang, 937 F. Supp. 1186, 1196-97 (D. Md. 1996) (stating that difference "may be more apparent than real"). As the Fang court noted, the traditional standard is "reasonable probability" of success on the merits, which means something less than actual proof by a preponderance because evidence sufficient to support an injunction may be less than that needed to obtain a trial verdict. Id. at 1197. Indeed, the "reasonable probability" standard "equates" to the "probable cause" standard, id., which applies under Section 1345 in this case.

³ See United States v. Sriram, 147 F. Supp. 2d 914, 938 (E.D. Ill. 2001) (requiring preponderance showing that predicate fraud offense has been or is being committed); see also United States v. Brown, 988 F.2d 658, 663-64 (6th Cir. 1993) (same); United States v. Quadro Corp., 916 F. Supp. 613, 617 (E.D. Tex. 1996) (same); United States v. Barnes, 912 F. Supp. 1187, 1194-95 (N.D. Iowa 1996) (same, but adding that such a showing can be that the offense is "about" to be committed). The Third Circuit has not weighed in on this question, declining in an unpublished opinion to address it because -- as in this case -- the government's evidence was sufficient to issue a Section 1345 injunction even under common law requirements. United States v. Cen-Card Agency/C.C.A.C., 872 F.2d 411 (Table), Slip Op. No. 88-5764 (3d Cir. Mar. 23, 1989), at 10 n. 4 (Exhibit "A" hereto).

2. **The United States need not show common law irreparable harm to obtain injunctive relief under Section 1345**

Courts have consistently held that irreparable harm need not be shown to obtain a Section 1345 injunction. See, e.g., United States v. Quadro Corp., 916 F. Supp. 613, 617 (E.D. Tex. 1996) (“Irreparable harm need not be demonstrated [under Section 1345] because so long as the statutory conditions are met, irreparable harm to the public is presumed.”).⁴ One district court so concluded by analogizing to other courts’ construction of statutes in which Congress, similarly to the language in Section 1345, specifically provided the government with an injunctive enforcement remedy: “In [such other statutes] . . . the courts have consistently held that irreparable harm need not be demonstrated, and that so long as the statutory conditions are met, irreparable harm to the public is presumed[.]” United States v. William Savran & Assocs., 755 F. Supp. 1165, 1179 (E.D.N.Y. 1991) (citing cases including Government of the Virgin Islands v. Virgin Islands Paving, Inc., 714 F.2d 283, 286 (3d Cir. 1983) (no need to show irreparable harm where purpose of statute is to protect public)).⁵

Although the United States contends that a showing of traditional irreparable

⁴ Accord, e.g., United States v. Sriram, 147 F. Supp. 2d 914, 937 (N.D. Ill. 2001) (same) (reasoning further that under Section 1345 government is relieved of all traditional injunctive relief elements other than showing of a likelihood of success on merits); United States v. Fang, 937 F. Supp. 1186, 1199-1200 (D. Md. 1996) (government is not required to establish irreparable harm, inadequacy of remedy at law, public interest, or balance of hardships, all of which are presumed once government has made its merits showing); United States v. Weingold, 844 F. Supp. 1560, 1573 (D.N.J. 1994) (“[p]roof of irreparable harm is not necessary for the [g]overnment to obtain a preliminary injunction”).

⁵ The Third Circuit thus recognizes that Congress can statutorily modify the common law elements for equitable injunctive relief. See also, e.g., National Resources Defense Council, Inc. v. Texaco Refinery & Marketing, Inc., 906 F.2d 934, 940-41 (3d Cir. 1990); ReMed Recovery Care Centers v. Township of Williston, 36 F. Supp. 2d 676, 687-88 (E.D. Pa. 1999) (holding irreparable injury presumed where Fair Housing Act has been violated); see generally United States Postal Service v. Beamish, 466 F.2d 804, 806 (3d Cir. 1972) (no need to show irreparable harm under 39 U.S.C. § 3007).

harm should not be required for the Court to order Section 1345 injunctive relief in this case, if the Court nevertheless requires that showing, such harm is easily established. Our Court of Appeals stated as much when affirming a finding of irreparable harm where the continued operation of certain defendants' consumer fraud posed harm to "the integrity of the postal system" as well as to the "large number of people" who could "irretrievably lose their money if immediate action was not taken by the district court." United States v. Cen-Card Agency/C.C.A.C., 872 F.2d 411 (Table), Slip Op. No. 88-5764 (3d Cir. Mar. 23, 1989), at 12-14 (also emphasizing that "the public interest in being protected from schemes to defraud is paramount") (Exhibit "A" hereto). Defendant Holland-Glen's ongoing fraud in this case, absent the requested injunctive relief, similarly threatens irreparable harm -- here, to the medically vulnerable residents of the Hatboro nursing facility.

B. The United States Has Demonstrated Probable Cause To Believe That Defendant Is Engaged In Health Care, Mail, and Wire Fraud Offenses

1. Probable cause that defendant is engaged in health care offenses

Section 1345 authorizes the court to enjoin continuing violations of federal health care offenses. 18 U.S.C. § 1345.⁶ Here, the United States has demonstrated probable cause to believe that defendant is committing such health care offenses as proscribed under 18 U.S.C. § 1347 ("Section 1347") and 18 U.S.C. § 1035 ("Section 1035"). As provided in pertinent part in

⁶ For purposes of Title 18, "Federal health care offense" is defined as: "(a) . . . a violation of, or a criminal conspiracy to violate -- (1) section . . . 1035 [or] 1347 . . . of this title; (2) section . . . 1341 [or] 1343 of this title, if the violation or conspiracy relates to a health care benefit program." 18 U.S.C. § 24(a). The term "health care benefit program" is defined as "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract." 18 U.S.C.A. § 24(b).

Section 1347, the Health Care Fraud statute:

Whoever knowingly and wilfully executes . . . a scheme or artifice --

- (1) to defraud any health care benefit program; or
- (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be [punished].

18 U.S.C. § 1347. Under Section 1035:

(a) Whoever, in any matter involving a health care benefit program, knowingly and wilfully --

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or

(2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of our payment for health care benefits, items, or services, shall be [punished].

18 U.S.C. § 1035(a).

Two recent criminal cases against nursing home defendants -- United States v. Bell, 2006 WL 952214 (W.D. Pa. Apr. 12, 2006), and United States v. Wachter, 2006 WL 2460790 (E.D. Mo. Aug. 23, 2006) -- support the United States' averments that defendant Holland-Glen's continuing conduct violates the health care proscriptions of Sections 1347 and 1035. In Bell, the court, on post-conviction motions, upheld a jury's findings that the defendants had violated Section 1347 by falsifying records to conceal substandard care. The court ruled that

the defendants' conduct rose to the level of criminal fraud because they: falsely represented that required care would be provided; failed to provide such care; concealed what did and did not occur by falsifying records of care; and billed the government as if services had been appropriately rendered. Bell, 2006 WL 952214, at * 2. (A copy of the Bell decision is attached hereto as Exhibit "B.") In Wachter, the court, in denying the defendants' motion to dismiss the indictment against them, ruled that allegations of billing for care that was so inadequate, deficient and substandard as to be worthless constituted potential violations of 18 U.S.C. § 1347 as well as of 18 U.S.C. § 1035 and 42 U.S.C. § 1320a-7b(a)(2) and (3). Wachter, 2006 WL 2460790, at *7-12. (A copy of the Wachter decision is attached hereto as Exhibit "C.")

In this action, the United States and DPW aver in their Verified Complaint that defendant Holland-Glen likewise falsely represented that required care would be provided at the Hatboro nursing facility but, in fact, rendered services there that were so inadequate as to be worthless and, further, falsified related care records, including patient medical records and billing records. These verified averments, coupled with defendant's knowing claims for payment from federal funds, demonstrate probable cause to believe that defendant has committed and is committing Section 1347 and Section 1035 predicate health care offenses that not merely warrant but necessitate the government-requested Section 1345 injunctive relief.

2. Probable cause that defendant is engaged in mail and wire fraud

Plaintiffs' Verified Complaint further establishes probable cause to believe that defendant Holland-Glen is engaged in violations of the Mail and Wire Fraud statutes, 18 U.S.C. §§ 1341 and 1343, respectively, for which Section 1345 dictates injunctive relief to stop the fraud while the United States' investigation continues. The elements of a mail or wire fraud violation

are: (1) a defendant's knowing and willful participation in a scheme or artifice to defraud; (2) with specific intent to defraud; and (3) the use of the mails or interstate wire communications in furtherance of the scheme. See, e.g., United States v. Hedaithy, 392 F. 3d 580, 590 (3d Cir. 2004) (quotation marks and citations omitted). The scienter requirement is satisfied by a showing of deliberate or intentional ignorance, or willful blindness. See, e.g., United States v. Wert-Ruiz, 228 F.3d 250, 255 (3d Cir. 2000); United States v. Stewart, 185 F.3d 112, 125-26 (3d Cir. 1999). In short, deliberate ignorance is not a safe harbor for a defendant's culpable conduct.

The schemer(s), as a part of the fraud and for there to be statutory violations, need not have contemplated use of the mails. See United States v. Pereira, 347 U.S. 1, 8 (1954). "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used" for purposes of the mail fraud statute. Id. at 8-9. "All that is required is that the defendant[] knowingly participated in a scheme to defraud and caused a mailing to be used in furtherance of the scheme." See United States v. Pharis, 298 F.3d 228, 234 (3d Cir. 2002). The elements of a "scheme to defraud" are identical under the mail and wire statutes. See United States v. Lemire, 720 F.2d 1327, 1334-35 n. 6 (D.C. Cir. 1983); see also United States v. Giovengo, 637 F.2d 941, 944 (3d Cir. 1980) (mail and wire fraud statutes are construed in pari materia).

In this case, the United States avers that defendant Holland-Glen is violating both the Mail Fraud and the Wire Fraud statutes. See Verified Complaint, passim. The United States specifically avers that defendant knew and knows that it: (1) failed and is failing to provide services at the Hatboro nursing facility; (2) acted and is acting contrary to doctors' orders

regarding residents there; and (3) provided and is providing services that were and are so substandard, inadequate, and deficient manner as to be worthless. Id. Defendant nevertheless continues, through the wires and/or mails, to submit to the government related bills and to receive related checks in payment as if the such services were fully and adequately provided. Id. In these circumstances, the United States has demonstrated probable cause to believe that the defendant Holland-Glen has engaged in and is engaging in predicate mail and wire fraud offenses that do not merely warrant but necessitate a Section 1345 injunction

II. THE UNITED STATES IS ENTITLED TO AN INJUNCTION UNDER 42 U.S.C. § 1320a-7a(k)

In 42 U.S.C. § 1320a-7a(k), Congress has empowered this Court to enjoin any person from engaging in activity that subjects the person to a United States Department of Health and Human Services (“HHS”)-imposed civil monetary penalty. The statute states that “whenever the [HHS] Secretary has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject to a civil monetary penalty under this section, the Secretary may bring an action in an appropriate district court of the United States . . . to enjoin such activity.” 42 U.S.C. § 1320a-7a(k). Civil monetary penalties apply in the many circumstances specified in 42 U.S.C. § 1320a-7a(a), including where a person: (i) submits a claim for services that the person knows or should know were not provided as claimed (42 U.S.C. § 1320a-7a(a)(1)(A)); (ii) submits a claim for services that the person knows or should know is false or fraudulent (42 U.S.C. § 1320a-7a(a)(1)(B)); or (iii) arranges or contracts with an individual whom the person knows or should know is excluded from participation in a federal health care program (42 U.S.C. § 1320a-7a(a)(6)). The United States, on behalf of the Secretary

of HHS, has brought this action to enjoin such civil monetary penalty-necessitating conduct by defendant Holland-Glen.

In United States v. Federal Record Service Corp., 1999 WL 335826 (S.D.N.Y. May 24, 1999), the court granted under 42 U.S.C. § 1320a-7a(k) and 18 U.S.C. § 1345 the United States' motion preliminarily to enjoin a direct mail solicitor's improper use of the words "Social Security." The court reasoned that Section 1320a-7a(k) relief is appropriate if the government makes a substantial showing of likelihood of success as to both a current violation and the risk of repetition. Id. at *13 (showing of irreparable harm not necessary). In arriving at that standard, the court analogized the provisions of Section 1320a-7a(k) to statutes authorizing injunctive relief for the Securities and Exchange Commission and the Federal Trade Commission. Courts have ordered relief under those provisions based upon a pattern of past violations because such a pattern is "highly suggestive of the likelihood of future violations." Id. at *13 & n. 30 (citing, e.g., SEC v. Management Dynamics, Inc., 515 F.2d 801, 808-09 (2d Cir. 1975)); see also Commodity Futures Trading Commission v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979) (construing Commodity Exchange Act injunctive provision and concluding that systematic rather than isolated wrongdoing a fortiori justifies injunctive relief).

Here, there is reason to believe that defendant Holland-Glen: submitted false or fraudulent claims for services at the Hatboro nursing facility that it knew or should have known were not provided; has engaged in systemic wrongdoing; and has a long pattern of previous violations. Additionally, this defendant contracted with a respiratory therapist whom it knew or should have known was excluded from participating in federal health care programs. Because defendant Holland-Glen continues to operate the Hatboro nursing facility and continues to

submit claims for deficient services, there is reason to believe that such violations will be repeated. For these reasons, defendant Holland-Glen should be enjoined under Section 1320a-7a(k) from continuing to commit such acts that subject it to civil monetary penalties.

III. DPW IS ENTITLED TO AN INJUNCTION BECAUSE DEFENDANT VIOLATED DPW REGULATIONS

Plaintiffs, in their Verified Complaint, aver Holland-Glen's long history of -- and continuing -- violations at the Hatboro nursing facility of DPW's licensing regulations. Some of those violations led DPW temporarily to revoke the facility's license in 2005. Based upon these violations, DPW is entitled to injunctive relief against defendant Holland-Glen.⁷

The General Assembly for the Commonwealth of Pennsylvania, in the Commonwealth's Public Welfare Code, has authorized such injunctive relief as follows:

[DPW] may maintain an action in the name of the Commonwealth for an injunction or other process restraining or prohibiting any person from establishing, conducting or operating any private institution during any period after a license to engage in such activity has been refused, has not been renewed or has been revoked by the department.

62 P.S. § 1052 (interpolation added). The General Assembly has further provided:

Whenever any person, regardless of whether such person is a licensee, has violated the laws of this Commonwealth pertaining to the licensing of a private institution or the rules and regulations adopted pursuant to such laws by [DPW], [DPW] . . . may maintain an action in the name of the Commonwealth for an injunction or other process restraining or prohibiting such person from engaging in such activity.

62 P.S. § 1053 (interpolations added). The General Assembly has enacted this injunctive remedy

⁷ The Court has supplemental jurisdiction over DPW's claim for injunctive relief because it is "so related to [the United States' claims for injunctive relief] . . . [that are] within [the Court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

to allow agencies like DPW, in their discretion, to permit a facility to fix its regulatory violations and continue to operate. This helps avoid the substantial hardship that might befall residents such as those at the Hatboro nursing facility, where based on regulatory violations to date DPW could otherwise revoke the facility's license and close the facility down. The Pennsylvania Commonwealth Court has consistently held that a single violation of applicable licensing statutes or regulations -- far less than Holland-Glen's voluminous violations -- suffices to warrant license denial or revocation.⁸

Because at this time the interests of the residents of the Hatboro nursing facility would be best served by entry of an injunction as described below rather than by the closing of the facility, DPW respectfully requests the Court to enter the accompanying proposed order.

IV. THE REQUESTED PRELIMINARY RELIEF IS AMPLY JUSTIFIED ON THE FACTS OF PLAINTIFFS' COMPLAINT

The temporary and preliminary injunctive relief that plaintiffs United States and DPW seek is warranted to prevent a continuing and substantial injury to the victims, past and future, of defendant Holland-Glen's fraud. Based upon the facts alleged in their Verified Complaint, plaintiffs respectfully request the Court to issue a temporary restraining order and preliminary injunction order:

1. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from continuing the acts, practices, and omissions set forth in plaintiffs' Verified Complaint for Injunctive Relief and from billing for the acts, practices and omissions set

⁸ See, e.g., 1st Steps Intern'l Adoptions, Inc. v. DPW, 880 A.2d 24, 39 (Pa. Commw. 2005); Arcurio v. DPW, 557 A.2d 1171, 1174 (Pa. Commw. 1989); Colonial Manor Personal Care Boarding Home v. DPW, 551 A.2d 347, 353 (Pa. Commw. 1988); Pine Haven Residential Care Home v. DPW, 512 A.2d 59, 61 (Pa. Commw. 1986); cf. Colonial Gardens Nursing Home, Inc. v. Department of Health, 382 A.2d 1273, 1275 (Pa. Commw. 1978).

forth in plaintiffs' Verified Complaint;

2. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from acting and/or from failing to act in a manner that violates generally accepted professional standards and from billing for any acts or omissions in violation of generally accepted professional standards;
3. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from acting and/or from failing to act in a manner that violates the Federal Nursing Home Reform Act and its regulations and from billing for any acts or omissions in violation of the Federal Nursing Home Reform Act and its regulations;
4. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from acting and/or from failing to act in a manner that violates the licensing standards of DPW and from billing for any acts or omissions in violation of the licensing standards of DPW;
5. Enjoining defendant, its agents, subordinates, successors in office, and all those acting in concert or participation with them from altering, destroying, hiding, and/or disposing of any record(s) relating to the subject matter of plaintiffs' Verified Complaint for Injunctive Relief, including but not limited to any patient record(s), billing record(s), incident report(s), investigation report(s), staffing schedule(s), calendar(s), equipment and facility inspection record(s), plan(s) for correction, quality report(s), evacuation plan(s), letter(s), and complaint(s), whether in document, electronic, or other form;
6. Requiring defendant, within 30 days, to substitute current management with a Court-approved temporary manager (selected from the Pennsylvania Department of Health-maintained list of temporary managers for nursing facilities) to run the Hatboro nursing facility to ensure the safety and well-being of residents there;
7. Requiring defendant to hire a monitor(s) to ensure that the Hatboro nursing facility is in compliance with generally accepted medical practices and the Federal Nursing Home Reform Act and its regulations; and
8. Granting such other and further equitable relief as the Court may deem just and proper.

This requested relief is fully justified by the averred facts and, because of the public interests involved, is reasonably required in the interests of justice. Courts have recognized that the Anti-Fraud Injunction statute authorizes broad relief commensurate with the need to protect the public from fraudulent schemes.⁹ Moreover, the relief that plaintiffs seek here is well within the general equitable powers of the Court to craft a remedy that attends to and protects the interests of justice. See Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (discussing comprehensive equitable jurisdiction in district court, and noting that where public interest is involved, the district court's powers "assume an even broader and more flexible character than when only a private controversy is at stake").¹⁰ Regarding plaintiffs' request that the Court appoint a temporary manager for the Hatboro nursing facility, both Pennsylvania and federal law provide for the appointment of temporary managers for nursing facilities to bring

⁹ See, e.g., United States v. Cen-Card Agency, 872 F.2d 411 (Table), Slip Op. No. 88-5764 (3d Cir. Mar. 23, 1989), at 5, 18 (affirming preliminary injunction detaining and returning mail, prohibiting defendant from acts of fraud, freezing assets received from scheme, requiring defendant to notify customers of right to refund, and directing production of documents) (a copy of this decision is attached to this memorandum as Exhibit "A"); United States v. White, 1991 WL 190098, at *1-2 (D.D.C. Sept. 12, 1991) (entering temporary restraining order -- ex parte under § 1345 -- detaining mail, stopping further receipt of consumer funds, freezing assets, preserving records, requiring production of lists, and directing extensive document production); United States v. William Savran & Associates, Inc., 755 F. Supp. 1165, 1182, 1184-85 (E.D.N.Y. 1991) (stating that "Section 1345 has been held to vest the federal courts with power to decree broad remedial preliminary relief" and issuing preliminary injunction halting defendants' business, detaining mail, preserving records, and freezing assets.); United States v. Cen-Card Agency/C.C.A.C., 724 F. Supp. 313, 318 (D.N.J. 1989) (endorsing broad remedial injunction under Section 1345, beyond "the four corners of the statute," to remedy all mail fraud-caused harms).

¹⁰ See also Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 326 (1999) (noting Supreme Court precedent holding that courts of equity will "go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved") (quotation marks omitted) (quoting United States v. First National City Bank, 379 U.S. 378, 383 (1965)).

such facilities into compliance or to oversee the facilities' closure. See 42 U.S.C. 1395i-3(h)(2)(B)(iii); 42 C.F.R. 488.415; 35 P.S. § 448.814(b).¹¹ The Commonwealth of Pennsylvania, Department of Health maintains a list of persons/entities eligible to serve as temporary managers of nursing facilities.

In sum, the United States and DPW seek relief to protect medically fragile children and young adults at the Hatboro nursing facility -- the most vulnerable members of society -- from defendant Holland-Glen's ongoing illegal conduct that poses a continuing threat to the well-being of such residents. Under these circumstances, plaintiffs request the Court to exercise such broad and flexible equitable relief as will provide justice to these persons who are unable to protect themselves.

CONCLUSION

For the reasons set forth above and averred in their Verified Complaint, plaintiffs United States of America and Commonwealth of Pennsylvania, Department of Public Welfare respectfully request that the Court grant their motion for a temporary restraining order and a preliminary injunction order.

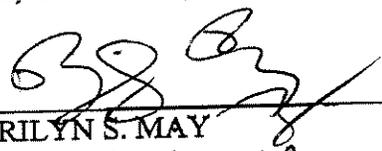
¹¹ The only reported case in which a temporary manager was appointed was one in which the parties apparently reached agreement following the filing of the request for injunction. See United States v. Northern Health Facilities, 25 F. Supp. 2d 690, 698 (D. Md. 1998) (nursing home). The appointment of a temporary manager, however, is akin to the court's inherent equitable power to appoint a receiver.

Respectfully submitted,

PATRICK L. MEEHAN
United States Attorney



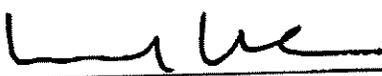
VIRGINIA A. GIBSON
Assistant United States Attorney
Chief, Civil Division



MARILYN S. MAY
Assistant United States Attorney



GERALD B. SULLIVAN
Assistant United States Attorney



HOWARD ULAN
Senior Assistant Counsel
Commonwealth of Pennsylvania
Department of Public Welfare

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-5764

UNITED STATES OF AMERICA
& UNITED STATES POSTAL SERVICE

v.

CEN-CARD AGENCY/C.C.A.C.
A New Jersey Corporation,
SANTO RIGATOSO a/k/a BOB HARRIS, an individual
and DIANA RIGATOSO, an individual

Cen-Card Agency/C.C.A.C., Inc.
Santo Rigatuso a/k/a Bob Harris
and Diana Rigatuso

Appellants

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 88-3919
(Honorable H. Lee Sarokin)

Submitted Under Third Circuit Rule 12(6)
March 17, 1989

Before: MANSMANN, GREENBERG and SCIRICA, Circuit Judges

(Filed MAR 23 1989)

MEMORANDUM OPINION

SCIRICA, Circuit Judge.

Defendants Cen-Card Agency/C.C.A.C., Santo Rigatuso,
the owner of Cen-Card Agency, and Diana Rigatuso, the director of



Cen-Card Agency (collectively "Cen-Card"), appeal from an order of the district court granting a preliminary injunction. The injunction prohibited Cen-Card from making false representations concerning the issuance of any credit card, restrained Cen-Card from transferring any monies received from their credit card business, required that Cen-Card notify purchasers of the credit card that they were entitled to a refund, and ordered that any mail sent to Cen-Card as a result of their credit card business would be returned to its sender. For the reasons stated, we will affirm the order of the district court.

I.

In July 1988, Cen-Card solicited approximately seven million persons, purporting to offer credit cards with an initial charge limit of \$2,850, without any credit investigation. The mailed solicitations stated in pertinent part:

YOUR CHARGE LIMIT HAS BEEN APPROVED FOR \$2850. YOUR CARDS WILL BE PROCESSED WITHIN 48 HOURS OF RECEIPT OF THE FORM BELOW BY CEN-CARD AGENCY C.C.A.C..

WE CAN HANDLE THOUSANDS OF TRANSACTIONS PER YEAR WITH VISA, MASTER CARD, CEN-GOLD CARD, CHARGE CARD U.S.A., ETC.

YOUR OPENING COMBINED CHARGE LIMIT IS \$2850. AND THIS WILL INCREASE TO \$5000 AS YOU ESTABLISH A GOOD PAYING HISTORY. FOR YOUR CEN-GOLD CARD, CHARGE CARD U.S.A., ETC., PLEASE SIGN THE FORM BELOW AND RETURN WITH \$39.95 1 YR PROCESSING FEE OR \$49.95 LIFE TIME.

YOUR CARDS ARE READY FOR ISSUE BY COMPUTER AND WILL BE SENT TO YOU WITHIN 5 DAYS OR LESS. PERSONAL CHECKS ALLOW APPROX. 21 DAYS. MONEY ORDERS, CASH AND BANK CHECKS ARE HANDLED AS CASH, AND SHIPPED OUT IMMED.

YOUR CARDS WILL BE HELD FOR PAYMENT A MAXIMUM OF TEN DAYS ONLY.

FOR MORE INFORMATION CALL 1-900-909-3000
\$2.00 TOLL CHARGE 1ST MINUTE 35 CENTS EACH ADDL MINUTE.

* * * * *

C.C.A.C. GUARS THAT YOU WILL RECEIVE A MIN OF 2 CARDS ABOVE TO START THAT WILL BE GOOD IN CATALOGS AND BROCHURES AND FUTURE CONDITIONAL CASH WITHDRAWALS UP TO \$1250 INTEREST FREE BASED ON PURCHASES AND A MIN CHARGE LIMIT OF \$2850 WITH A CHANCE AT OTHER MAJOR CARDS REGARDLESS OF YOUR PAST CREDIT HISTORY.

App. at 57a. Some of the solicitation letters contained a slight variation in the language used. App. at 31a, 32a and 56a. If a prospective buyer called the telephone number provided, they received the following pre-recorded message:

Hello. Thank you so much for calling. Americans use charge cards for everything; gasoline purchases, food, trips, cash advances and the list goes on. Usually you fill out a time consuming application then keep your fingers crossed and wait for the final decision. Even people with good credit get turned down. Now there's a brand new way to acquire credit without any credit investigation whatsoever. That's right, no lengthy applications to fill out, no waiting to see if you're approved, no waiting to use your cards, and absolutely no one is turned down. We act like an insurance company. We gamble but still pay. If you don't, we will. But based on national computer statistics we'll give you a second chance regardless of your past credit. Our cards are good on purchases within our catalogs and brochures which contain thousands of items. All offered at savings of up to 90% off. In addition, your cards are also good on future cash withdrawals. Cash withdrawals can amount to as much as \$1200 and we can also assist you in acquiring a VISA or MASTERCARD. A pre-approval form is included with your package. Simply send in the small service fee now and your cards, catalogs and everything else will be on their way. It's that simple. You'll not only receive major savings but you'll get instant credit as well. You'll even be able to use us as a credit reference to establish or re-establish your credit. And once you're a member it will entitle you to future additional benefits and many new items. For additional information be sure to call this number tomorrow. That's 1-900-909-3000. Thank you and have a wonderful new and prosperous day.

App. at 50a.

Cen-Card received and processed approximately 28,000 responses and orders to their solicitation. The responses and orders were sent to an address in Parsippany, New Jersey. The mail was retrieved by Cen-Card's New Jersey data processing contractor and forwarded to Cen-Card at a post office box in Maryland.

Customers of the Cen-Card solicitation lodged complaints with various consumer agencies, stating that they expected to receive a Visa or Mastercard. They instead received either a cardboard card entitling them to purchase from an enclosed catalog of costume jewelry and reconditioned appliances and electronic merchandise, or they never heard from Cen-Card after they submitted their fee. App. at 111a to 115a.

On August 16, 1988, the Postal Service served a "Notice of Withholding Mail" on Cen-Card. App. at 29a. The notice advised Cen-Card that their mail would be withheld because the postal inspector had reason to believe that "(1) you are using fictitious, false, or assumed name, title, or address in violating Title 18, U.S. Code, Section 1341 (Mail Fraud), and (2) that letters sent in the mail are addressed to places not the residence or regular business address of the person for whom they are intended to enable that person to escape identification." App. at 29a. As a result of this notice, an "Interim Mail Detention Agreement" was negotiated between the Postal Service

and Cen-Card. App. at 172a. The Postal Service and Cen-Card did not, however, reach any final agreement.

By means of summons and verified complaint, the Postal Service obtained a temporary restraining order which allowed for detention of Cen-Card's mail and prohibited Cen-Card from soliciting, by mail or phone, any credit card business. App. at 18a. An order to show cause was also entered, requiring that Cen-Card show cause why their credit card solicitation business should not be restrained. App. at 16a.

On September 23, 1988, the district court held a hearing on the Postal Service's application for a preliminary injunction. App. at 189a. The court entered an order which stated that since Cen-Card engaged in acts which violated 18 U.S.C. § 1341 (1984), mail fraud, and 18 U.S.C. § 1343 (1984), wire fraud, all mail sent to Cen-Card would receive a stamp, stating that it was being returned by order of the court because the material contained false or fraudulent representations. App. at 230a. The court granted the preliminary injunction, stating that until a final determination was entered in the action, Cen-Card would be: (1) prohibited from making false or fraudulent representations concerning the issuance of any credit card, (2) prohibited from accepting, disposing, or transferring any monies received from their credit card scheme, and (3) ordered to notify all Cen-Card customers of their right to a refund. App. at 231a. Cen-Card was also required to produce materials relating to their credit card business. App. at 232a.

Cen-Card filed a timely notice of appeal to the imposition of the preliminary injunction. App. at 1a. Cen-Card contends that the district court incorrectly determined that the practices of Cen-Card were false and misleading, and improperly granted the preliminary injunction. Cen-Card also claims that the fraud injunction statute, 18 U.S.C. § 1345 (West Supp. 1988), is unconstitutional due to vagueness. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (West Supp. 1988). Our scope of review is limited: the district court's grant of the preliminary injunction will be reversed only if the court abused its discretion, committed an obvious error in applying the law, or made a serious mistake in considering the proof. Loretangeli v. Critelli, 853 F.2d 186, 193 (3d Cir. 1988).

II.

In order to obtain a preliminary injunction, the moving party must generally show (1) a reasonable probability of eventual success in the litigation, and (2) that they will be irreparably injured if the relief is not granted. Delaware River Port Auth. v. Transamerican Trailer Transp., Inc., 501 F.2d 917, 919-20 (3d Cir. 1974). Moreover, while the burden rests upon the moving party to make these requisite showings, the district court "should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." Id.; see also Loretangeli, 853 F.2d at 193.

A.

We first consider whether the Postal Service has shown a reasonable probability of success on the merits. The district court found that the Postal Service established a likelihood of success on the merits because the Postal Service presented uncontroverted evidence of Cen-Card's solicitation. The court stated that the solicitation contained no information indicating that the credit cards were only good on purchases from Cen-Card's catalogs. App. at 227a. The court also stated that average consumers believed that recognized and established credit cards were being offered. App. at 228a. Our consideration of this issue requires a review of the factual background of the case and the legal theory upon which the Postal Service relies. Delaware River, 501 F.2d at 920.

The complaint requested injunctive relief under 39 U.S.C. § 3007 and 18 U.S.C. § 1345. App. at 6a. The district court's order appears to have granted the preliminary injunction under the latter statute. App. at 230a. However, we will examine the propriety of the preliminary injunction under each statute.

Under 39 U.S.C. § 3007,¹ the Postal Service need not

1. 39 U.S.C. § 3007, titled "Detention of mail for temporary periods" states in part:

(a) In preparation for or during the pendency of proceedings under sections 3005 and 3006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postal and upon a showing of probable cause to believe either
(continued...)

show a likelihood of success on the merits, but rather, has the burden of establishing probable cause for the detention of mail. 39 U.S.C. § 3007(a).² We find that the Postal Service did establish probable cause with the submission of an affidavit of Postal Inspector Robert R. Blackburn. App. at 19a. The affidavit contains a complete factual background explaining Cen-Card's solicitation practices, as well as prior administrative action taken against Santo Rigatuso and C.C.A.C. App. at 25a. Exhibits to the affidavit show copies of the solicitation letters, a transcript of the phone message, copies of the catalogs offered by Cen-Card, copies of consumer complaints, and documentation of the prior administrative action. App. at 28a to 128a.

1. (...continued)

section is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incoming mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom

Section 3005, referred to above, allows the Postal Service to take action against persons who obtain money through the mail by means of false representations. Section 3006, also referred to, allowing the Postal Service to take action when a person obtains money through the mail for obscene materials, is inapplicable to this case.

2. To obtain the issuance of an injunction under 39 U.S.C. § 3007, the government need only meet the probable cause showing of 39 U.S.C. § 3005. The common law standards for the imposition of a preliminary injunction, a likelihood of success on the merits and a showing of irreparable harm, do not apply to injunctions under § 3007. United States v. Beamish, 466 F.2d 804, 806 (3d Cir. 1972).

The affidavit and exhibits established probable cause for a preliminary injunction under 39 U.S.C. § 3007(a). See United States Postal Service v. Beamish, 466 F.2d 804, 806 (3d Cir. 1972) (postal service's burden of demonstrating probable cause was met by affidavit of service's expert developing ultimate conclusion, uncontradicted by defendant, that advertising claims extolling defendant's products were grossly false and irrational); cf. United States Postal Service v. Stimpson, 515 F. Supp. 1149, 1150 (N.D. Fla. 1981) (to establish probable cause, the postal service must show facts and circumstances based upon reasonably trustworthy information, sufficient to justify a person of reasonable caution believing that an act has occurred or is about to occur). In Stimpson, the Postal Service failed to establish probable cause of false representation with copies of the defendant's advertisement and brochure, because these alone were insufficient to show that the defendant's system did not deliver the promised reward. Id. at 1151.

By contrast, the Postal Service here presented evidence of Cen-Card's solicitation, which appeared to indicate that upon payment the recipient would receive a Visa, Mastercard, or other nationally recognized credit card. The Postal Service also showed that the recipient received no such card, but rather a card allowing the customer to only purchase items on credit from Cen-Card's catalogs. We hold that this established probable

cause for the district court to enter a preliminary injunction under § 3007(a).

As stated, the complaint alternatively requested injunctive relief under 18 U.S.C. § 1345³. Section 1345 allows the district court to enter an injunction against any party committing a violation under chapter 63 of title 18. The complaint alleged that Cen-Card's activities violated 18 U.S.C. § 1341, prohibiting mail fraud, and 18 U.S.C. § 1343, prohibiting wire fraud. We look to whether the Postal Service established a likelihood of success on these provisions as well.⁴

The essential elements of mail fraud under § 1341 are the existence of a scheme to defraud, use of the mails in furtherance of the fraudulent scheme, and culpable participation

3. 18 U.S.C. § 1345 states in pertinent part:

Whenever it shall appear that any person is engaged or about to engage in any act which constitutes or will constitute a violation of this chapter, the Attorney General may initiate a civil proceeding in a district court of the United States to enjoin such violation. The court . . . may, at any time before final determination, enter such a restraining order or prohibition, or take other such action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought . . .

4. It has been suggested that since the legislative history of 18 U.S.C. § 1345 indicates that Congress intended to broaden the remedy available in 39 U.S.C. § 3007, if the stringent common law injunction requirements are not applicable to § 3007, Congress certainly did not intend them to apply to § 1345. United States v. Belden, No. 86-CV-659 (N.D.N.Y. Nov. 23, 1987) (available on Westlaw, 1987 WL 20386). We decline to address whether the Postal Service may obtain a preliminary injunction pursuant to § 1345 under a lesser standard, because they have met the common law requirements for the issuance of a preliminary injunction in this case.

by the defendant. United States v. Pearlstein, 576 F.2d 531, 534 (3d Cir. 1978). To support a conviction for mail fraud, the government's evidence must show that the defendant agreed to participate in a scheme to defraud and that he caused mails to be used in furtherance of the scheme. United States v. Sturm, 671 F.2d 749, 751 (3d Cir.) (citing United States v. Pereira, 347 U.S. 1 (1954)), cert. denied, 459 U.S. 842 (1982). The elements of wire fraud under § 1343 are the existence of a scheme to defraud, and the use of interstate communications in furtherance of the scheme. United States v. Gordon, 780 F.2d 1165, 1171 (5th Cir. 1986). The element of a "scheme to defraud" is identical under both statutes. United States v. Lemire, 720 F.2d 1327, 1334-35 n.6 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); see also United States v. Giovenco, 637 F.2d 941, 944 (3d Cir. 1980), cert. denied, 450 U.S. 1032 (1981) (mail and wire fraud statutes are in pari materia, and cases construing the mail fraud statute are applicable to the wire fraud statute).

The government alleged the elements necessary to establish mail and wire fraud. The government alleged that Cen-Card had devised their scheme to obtain money by means of false and fraudulent pretenses, that they knowingly caused their advertisements to be delivered by the mail, and that they transmitted sounds in interstate commerce by means of the telephone. See, e.g., Gordon, 780 F.2d at 1171-72. The facts of this case, along with these allegations, are sufficient to permit the government to seek an injunction under § 1345. These facts

and allegations, if proven, also show a reasonable likelihood of success on the merits. We therefore hold that the complaint and affidavit by postal inspector Blackburn establish a reasonable likelihood of success on the merits sufficient to grant a preliminary injunction under either basis proposed by the Postal Service.

B.

We next consider the possibility of irreparable harm to the Postal Service and other persons, as well as consideration of the public interest. Delaware River, 501 F.2d at 923; Loretangeli, 853 F.2d at 193.⁵ The district court found that consumers who had already sent in their money to Cen-Card would be irreparably harmed unless Cen-Card was prohibited from transferring any monies received from their scheme and Cen-Card notified the consumers of their right to a refund. App. at 228a. We agree with this assessment.

The continued operation of Cen-Card, until a determination on the merits by the district court, would harm the integrity of the postal system. Cf. United States v. Rendini, 738 F.2d 530, 533 (1st Cir. 1984) (the mail fraud statute was enacted by Congress to protect the integrity of the mails by making it a crime to use them to implement fraudulent schemes of

5. Again, the common law requirement of irreparable harm does not apply where an injunction is sought under 39 U.S.C. § 3007. Beamish, 466 F.2d at 806. See supra note 2. We will, however, apply this common law requirement for an injunction to the Postal Service's request for an injunction under 18 U.S.C. § 1345. But see supra note 4.

any kind). More importantly, the Cen-Card operation would cause irreparable harm to those who had been solicited by the company. Given the fact that 28,000 people responded to Cen-Card's offer, a large number of people could irretrievably lose their money if immediate action was not taken by the district court. While the loss of income alone does not constitute irreparable harm, Morton v. Beyer, 822 F.2d 364, 372 (3d Cir. 1987), the preliminary injunction did not require that Cen-Card return the money, but only that it not transfer any monies received from their credit card operation. App. at 231a. This would ensure that if the district court made a final determination adverse to Cen-Card, purchasers of the card would have the opportunity to recover their credit card fee. Moreover, since Cen-Card had solicited seven million people with its credit card offer, the potential for injury to an even larger number of people was substantial. We conclude that irreparable harm to customers of Cen-Card was established, and that freezing Cen-Card's assets as well as advising Cen-Card customers that they had a right to a refund was warranted under the facts of this case.

Finally, the interest of the public supports the issuance of the preliminary injunction. The legislative history of 18 U.S.C. § 1345 indicates that Congress was concerned about the possibility that innocent people would continue to be victimized by fraudulent schemes during the often lengthy period of time required to investigate such schemes and bring charges against the perpetrators. See S. Rep. No. 225, 98th Cong., 2d

Sess. 401-02, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3539-40 (hereinafter "Senate Report"). The Judiciary Committee sought to expand on the remedy afforded in 39 U.S.C. § 3007, because § 3007 did not restrict future mailings or schemes that did not directly involve the United States mails. Senate Report at 402. The Judiciary Committee sought broader equitable relief so that even after indictment or conviction, the perpetrators of fraudulent schemes could not continue to victimize the public. Id.

Thus, it is clear that § 1345 seeks to prevent the continued perpetration of schemes to defraud the general public. Indeed, it has been suggested that the existence of a scheme is irreparable harm per se. United States v. Belden, No. 86-CV-659 (N.D.N.Y. Nov. 23, 1987) (available on Westlaw, 1987 WL 20386) ("Indeed, it is probable that Congress considered the continued existence of a scheme to defraud as irreparable harm per se, since it is likely that the victims of such a scheme would not be able to recover money lost as a result of it.") (citing Government of the Virgin Islands v. Virgin Islands Paving Inc., 714 F.2d 283, 286 (3d Cir. 1983) ("when a statute contains, either explicitly or implicitly, a finding that violations will harm the public, the courts may grant preliminary equitable relief on a showing of a statutory violation without requiring any additional showing of irreparable harm"); Securities & Exchange Comm'n v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975) (same)).

On the basis of this legislative history, we find that the public interest in being protected from schemes to defraud is paramount, and in this case, supports the issuance of the preliminary injunction. The Postal Service having established a likelihood of success on the merits, irreparable injury, harm to other interested parties, and the public interest, it was not an abuse of discretion for the district court to grant the preliminary injunction.

III.

Cen-Card also appeals on the basis that 18 U.S.C. § 1345 is void for vagueness. We find this contention without merit.

We understand Cen-Card's argument to be that § 1345, the fraud injunction statute, is so vague that it violates standards of due process. There are two criteria for evaluating a vagueness challenge under the due process clause. Trade Waste Management Ass'n, Inc. v. Hughey, 780 F.2d 221, 235 (3d Cir. 1985). First, the statute "must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" Id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). "Second, 'if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.'" Id. (quoting Grayned, 408 U.S. at 108).

Cen-Card maintains that ordinary individuals are required to guess at the meaning of the statute when it says

"[w]henver it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a violation of this chapter . . ." Appellant's Brief at 38 (emphasis in original). Cen-Card states that they are unable to tell where the line is drawn between competitive salesmanship and punishable fraud. Id. at 39. Vagueness challenges to statutes not threatening first amendment interests are examined in light of the facts of the case at hand; the statute may be judged on an as-applied basis. Maynard v. Cartwright, 108 S.Ct. 1853, 1858 (1988).

The challenged provision cannot be read in a vacuum. Section 1345 does not create a substantive offense, but only provides a civil injunctive remedy for actions which may be a violation under chapter 63 of title 18. Possible substantive offenses relevant to this case are mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343. Several courts have held §§ 1341 and 1343 constitutional in the face of vagueness challenges. Durland v. United States, 161 U.S. 306, 313-14 (1896) (interpreting a predecessor statute); United States v. Conner, 752 F.2d 566, 574 (11th Cir.), cert denied, 474 U.S. 821 (1985); United States v. Bohonus, 628 F.2d 1167, 1174 (9th Cir.), cert. denied, 447 U.S. 928 (1980). Thus, if §§ 1341 and 1343 gave Cen-Card enough notice to know that their actions constituted a violation of those provisions, they had enough notice to know that their actions could be enjoined in a civil proceeding under § 1345.

Furthermore, given the facts of this case, we find that Cen-Card had reason to believe that their actions might subject them to the remedies under § 1345. The past administrative actions against Cen-Card, as well as the "Notice of Withholding Mail" sent to Cen-Card, gave them ample warning that their solicitation went beyond mere competitive salesmanship and could be construed as fraud.

Cen-Card also claims that the statute provides for arbitrary and discriminatory enforcement. They argue that the district court "is vested with an unbridled and 'standardless' power to arrive at an 'appearance finding,' and then seek to justify same on the facts thereafter presented for support." Appellant's Brief at 40. We reject this argument. In evaluating the Postal Service's request for a preliminary injunction, the district court applied the common law standards for the issuance of a preliminary injunction. We have held that under these standards, the issuance of the preliminary injunction was appropriate. Moreover, the preliminary injunction is just that, preliminary. The district specifically stated that the injunction was in effect until a final determination could be made on the allegations of the Postal Service. Thus, the district court does not, as alleged, seek to justify its result on facts thereafter presented. We find that the constitutional challenge to § 1345 is without merit.

IV.

Because we find that the district court did not abuse its discretion in granting the preliminary injunction, and we reject Cen-Card's challenge to the constitutionality of 18 U.S.C. § 1345, we will affirm the issuance of the preliminary injunction by the district court.

TO THE CLERK:

Please file the foregoing opinion.



Circuit Judge

DATED:

Westlaw.

Not Reported in F.Supp.2d

Page 1

Not Reported in F.Supp.2d, 2006 WL 952214 (W.D.Pa.)
 (Cite as: Not Reported in F.Supp.2d)

H

U.S. v. Bell
 W.D.Pa., 2006.
 Only the Westlaw citation is currently available.
 United States District Court, W.D. Pennsylvania.
 UNITED STATES of America

v.
 Martha BELL and Atrium I Nursing and
 Rehabilitation Center.
 No. 02:04cr0212.

April 12, 2006.

Thomas R. Ceraso, New Kensington, PA,
 Alexander H. Lindsay, Jr., Lindsay, Jackson &
 Martin, Butler, PA, for Defendants.
 Leo M. Dillon, United States Attorney's Office,
 Pittsburgh, PA, for Plaintiff.

**MEMORANDUM OPINION AND ORDER OF
 COURT**

McVERRY, J.

*1 Before the Court for disposition are the following:

MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR PRESERVATION OF ISSUE FOR APPELLATE REVIEW filed by Martha Bell (*Document No. 110*);

MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR PRESERVATION OF ISSUE FOR APPELLATE REVIEW filed by Atrium I Nursing and Rehabilitation Center (*Document No. 112*); and

THE GOVERNMENT'S RESPONSE TO MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR PRESERVATION OF ISSUE FOR APPELLATE REVIEW (*Document No. 113*).

After careful consideration of the motions and the relevant case law, the Court will deny the Motions for Reconsideration.

Background

An eleven-count indictment was filed on August 24, 2004 against defendants Martha Bell and Atrium I Nursing and Rehabilitation Center. Both defendants were charged with one count of Health Care Fraud (Count I), in violation of Title 18, United States Code, Sections 1347 and 2, and ten counts of False Statements Relating to Health Care Matters (Counts 2 through 11), in violation of Title 18, United States Code, Section 1035(a)(2).

A jury trial commenced on July 19, 2005. At the close of the government's case in chief, each Defendant presented a motion pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure for judgment of acquittal. After hearing extensive arguments of counsel, the Court denied the respective motions.

On August 24, 2005, the jury rendered a unanimous verdict as to each defendant. Defendant Bell was found guilty on Counts 1, 2, 3, 4, 5, 6, 8, 10 and 11 and Defendant Atrium I was found guilty on all eleven count of the indictment.

On August 26, 2004, Defendants filed Motions for Judgment of Acquittal, which were denied by the Court on November 18, 2005.

Defendants have filed the instant Motions in which they request, pursuant to the recent United States Supreme Court decision in *Gonzales v. Oregon*, 546 U.S. 243, 126 Sup.Ct. 904, No. 04-623 (filed January 17, 2006), that this Court enter an Order acquitting Defendants of their convictions of the count brought under 18 U.S.C. § 1347 and grant a new trial on all other counts or, in the alternative, grant a new trial as to both statutes and that these issues be considered preserved and not waived for purposes of appellate review.

Standard of Review

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.



Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 952214 (W.D.Pa.)
(Cite as: Not Reported in F.Supp.2d)

A motion for reconsideration may be filed in a criminal case. *United States v. Fiorelli*, 337 F.3d 282, 286 (3d Cir.2003). However, such a motion may only be granted if "the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [rendered its decision]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir.1999). Defendants argue that the United States Supreme Court's recent pronouncement in *Gonzales* requires this Court to acquit Defendants on the count of conviction under 18 U.S.C. § 1347 ^{FN1} and to grant a new trial as to all other counts of conviction.

FN1. Section 1347 provides as follows:

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice-

- (1) to defraud any health care benefit program; or
- (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

Discussion

*2 Distilled to its essence, Defendants argue that the government prosecuted the alleged 18 U.S.C. § 1347 violations "under a standard of care enunciated at 42 C.F.R. 483.15 and 483.25," both of which are "

vague and ambiguous" and, therefore, under *Gonzales* Defendants are entitled to acquittal.

The Court finds, however, that *Gonzales* is not controlling to the Court's determination in this matter for a number of reasons. First, the *Gonzales* decision only addressed the deference which should be given to an interpretative rule of the United States Attorney General. Importantly, the case *sub judice* was based not on an Executive official's interpretative rule, but rather was based upon 18 U.S.C. § 1347, a federal statute.

Next, it is important to note that while the government relied upon certain regulations set forth in 42 C.F.R. 483, *et seq.*, the government's case was not merely a "failure to meet required standards of care" case. Rather, Defendants were charged and found guilty of § 1347 (health care fraud) based upon a scheme to falsify records which Martha Bell utilized in an attempt to conceal from state and federal regulatory agencies the substandard care which was being provided to residents at Atrium.

Last, the government has consistently maintained, in the indictment and throughout the presentation of the case at trial, that defendants engaged in health care fraud by (a) falsely representing that the required care would be provided to nursing home residents; (b) failing to provide such care; and (c) concealing what occurred by falsification of records pertaining to the residents' care. The Court finds and rules that these actions went well beyond the mere failure to provide care, and elevated the wrongdoing in this case to the level of criminal fraud.

For all these reasons, the Defendants' motions will be denied.

ORDER OF COURT

AND NOW, this 12th day of April, 2006, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that Defendants' Motions For Reconsideration Or In The Alternative For Preservation Of Issue For Appellate Review are

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 952214 (W.D.Pa.)
(Cite as: Not Reported in F.Supp.2d)

DENIED.

W.D.Pa.,2006.

U.S. v. Bell

Not Reported in F.Supp.2d, 2006 WL 952214
(W.D.Pa.)

END OF DOCUMENT

Westlaw.

Page 1

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

C

U.S. v. Wachter
E.D.Mo., 2006.Only the Westlaw citation is currently available.
United States District Court, E.D. Missouri, Eastern
Division.

UNITED STATES of America, Plaintiff,

v.

Robert D. WACHTER, American Healthcare
Management, Claywest House Healthcare, Oak
Forest North, and Lutheran Healthcare, Defendants.
No. 4:05CR667SNL.

Aug. 23, 2006.

J. Richard Kiefer, Bingham and McHale, LLP,
Indianapolis, IN, Patrick M. Flachs, Husch and
Eppenberger, LLC, St. Louis, MO, Harvey M.
Tettlebaum, Husch and Eppenberger, LLC,
Jefferson City, MO, for Defendants.
Dorothy L. McMurtry, Howard J. Marcus, Office of
U.S. Attorney, St. Louis, MO, for Plaintiff.**ORDER**

STEPHEN N. LIMBAUGH, District Judge.

*1 This matter is before the Court on the United States Magistrate Judge's Order and Recommendation (# 101), filed July 14, 2006. On or about August 1, 2006 defendant Wachter filed his objections to the Magistrate Judge's report (# 102). On or about August 1, 2006 the "organizational defendants" filed their objections to the Magistrate Judge's report (# 103). On or about August 9, 2006 the Government filed its response to the Magistrate Judge's report (# 109).

Contrary to defendant Wachter's assertions, Magistrate Judge Noce's thorough report does not "ignore[s] the fatal flaws in the Indictment in the case"; nor does it fail to address the Government's "own inconsistencies in how it argues its 'worthless services theory'; and nor does the Magistrate Judge fail to protect the "fundamental Constitutional rights

of Wachter." In fact, the report goes to great length to address all material concerns raised.

Finally, defendant Wachter reargues his contention that both the Magistrate Judge and the Government "misquote" a relevant section of 42 U.S.C. § 1320c-5. Defendant Wachter states:

"Judge Noce cites paragraph 32 of the Indictment and states:

'The Indictment alleges that the providers are prohibited from submitting claims that are 'of a quality which fails to meet professionally recognized standards of health care.'" (Judge Noce's Recommendation, p. 13). Wachter has pointed out in his Memorandum of Law that the Government misquoted the statute, that it has nothing to do with the submission of claims and that the quoted language 'providers are prohibited from submitting . . .' is nowhere to be found in the statute quoted. (Wachter's Memorandum of Law in Support of Motion to Dismiss, pp. 9-10)(Doc.48-2). Surprisingly, Judge Noce does not say the Government misquoted the statute; nor does he explain his adoption of the Government's erroneous quotation. Nor does he address Wachter's argument relating to the misquote and the Government's reliance on the faulty premise that federal law prohibits the submission of claims that are for care that fails to meet regulatory standards. That premise is at the crux of the Government's Indictment, yet the Recommendation fails to address the fact that the only statute the Government cites in support of that premise is misquoted."

Defendant Wachter's Objections (# 102), pgs. 1-2.

Although Defendant Wachter does not cite the statute he refers to in his Objections, the Court has reviewed his Memorandum of Law and the instant report, and presumes that he is referring to 42 U.S.C. § 1320c-5. This statute reads, in pertinent part:

§ 1320c-5. Obligations of health care practitioners and providers of health care

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.



Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

services; sanctions and penalties; hearings and review

(a) Assurances regarding services and items ordered or provided by practitioner or provider
It shall be the obligation of any health care provider and any other person (including a hospital or other health care facility, organization, or agency) who provides health care services for which payment may be made (in whole or in part) under this chapter, to assure, to the extent of his authority that services or items ordered or provided by such practitioner or person to beneficiaries and recipients under this chapter-

*2 (2) will be of a quality which meets professionally recognized standards of health care;

The Court finds that the report does properly cite to the instant statute and that the remainder of defendant Wachter's argument is meritless.

As for the objections to the report raised by the "organizational defendants", the Court has reviewed same and finds them to be meritless.

After receiving and carefully reviewing all objections to the United States Magistrate Judge's Report and Recommendation,

IT IS HEREBY ORDERED that United States Magistrate Judge David D. Noce's Order and Recommendation (# 101), filed July 14, 2006, is **SUSTAINED**, **ADOPTED** and **INCORPORATED** herein. Upon review of the Magistrate Judge's Report and Recommendation, the parties' pleadings, and the evidentiary hearing transcript, as well as relevant caselaw, the Court concurs with the Magistrate Judge's findings and recommendation.

IT IS FURTHER ORDERED that defendant Wachter's motion to dismiss the indictment (# 48)^{FN1} be and is **DENIED**.

FN1. Defendant Wachter filed the motion; however, the remaining defendants joined in the motion (# 62, # 70).

IT IS FINALLY ORDERED that defendant Wachter's motion to sever (# 46)^{FN2} be and is **DENIED**.

FN2. Defendant Wachter filed the motion; however, the remaining defendants joined in the motion (# 62).

DAVID D. NOCE, Magistrate Judge.

ORDER AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held June 19, 2006.

On November 17, 2005, the instant six-count federal grand jury indictment was filed against defendants Robert D. Wachter and four organizations. Count 1 of the indictment alleges that all defendants conspired to make false statements in connection with payments for health care, in violation of 18 U.S.C. § 1035; to defraud a health care benefit program, in violation of 18 U.S.C. § 1347; to make false statements regarding health care benefits, in violation of 42 U.S.C. § 1320a-7b(a)(2); and to conceal or fail to disclose events affecting the right to health care benefits, in violation of 42 U.S.C. § 1320a-7b(a)(3). In Counts II through VI, all five defendants are charged with making false statements and records regarding health care benefits for five specific persons, in violation of 18 U.S.C. §§ 2 and 1035.

I. Pretrial disclosure of evidence.

Defendant Robert D. Wachter (Wachter) has moved to strike surplusage (Doc. 45), and to compel compliance with a court order (Docs. 66 and 80).

Defendants American Healthcare Management, Inc. (AHM), Claywest House Healthcare, LLC, Oak Forest North, LLC, and Lutheran Health Care, LLC (organizational defendants) have moved for leave to file additional motions (Doc. 52), to compel

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

compliance with court order (Doc. 69), to quash government's subpoena (Doc. 72), and to strike (Doc. 81).^{FN1}

FN1. Defendants AHM, Claywest, Oak Forest North, and Lutheran Health moved to join defendant Wachter's motion to strike surplusage. (Doc. 62.) Defendant Wachter moved to join the motions of AHM, Claywest, Oak Forest North, and Lutheran Health to quash and to strike. (Doc. 74, 88.) The court sustained these motions. (Docs.70, 75, 93.)

A. Motions to strike

Defendants moved to strike surplusage from the indictment. (Doc. 45.) Defendants also moved to strike pages 13 through 15 of the government's response and Attachment 1 of that response because that material is immaterial, inflammatory, and prejudicial. (Doc. 81.)

I. Strike from indictment

*3 Federal Rule of Criminal Procedure 7(d) provides "[u]pon the defendant's motion, the court may strike surplusage from the indictment or information." Fed.R.Crim.P. 7(d). "A motion to strike surplusage from an indictment ... should be granted only where it is clear that the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter." *United States v. Michel-Galaviz*, 415 F.3d 946, 948 (8th Cir.2005). Federal Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

Defendants argue that paragraphs 53, 56, 61b, 61c, 71, 81, 86, 99, 110, and 119 should be stricken because the information contained in them is not relevant to the charges and contains merely prejudicial or inflammatory matter. They also argue that any information about residents R.M., C.B.,

D.M., or L.A. should be stricken because those individuals are not listed in the counts as specific persons about which false statements were made.

The indictment alleges in Count I that defendants conspired to make false statements to defraud a health care benefit program. Counts II through VI allege that the defendants did make false statements regarding healthcare benefits. Therefore, any facts that tend to establish a false or fraudulent claim, false statement, or action taken in furtherance of the conspiracy is relevant and should not be stricken.

Paragraph 53 of the indictment should not be stricken. It details the story of Resident R.M, who eloped, or left without permission, from Claywest on May 24, 1998. R.M. walked 0.8 miles, crossed a six-lane intersection and was found at a grocery store. Paragraph 53 alleges that only 14 nurses were on staff for the 141 residents, and that on May 30, 1998, Claywest was cited with deficiencies, including insufficient staffing, and was cited again on June 12, 1998. Claywest was also cited by the state authorities with serious problems with ants and mice on June 12, 1998.

Paragraph 53 alleges facts that are relevant to the insufficient staffing that led to the inadequate care on which the Medicare and Medicaid claims are allegedly based. It alleges that few staff members were working the day a resident eloped, that no one knew where the resident was, and that shortly thereafter, the facility was cited for staff shortages, among other citations that would, taken together, support the government's theory that the services were worthless. That these services were allegedly worthless supports the element that defendants provided false statements about the quality of care.

Paragraph 56 alleges: "On or about June 30, 1998, the State sought to revoke Claywest's license. Defendants Wachter, Claywest, and AHM opposed the revocation and Claywest was permitted to operate pursuant to a stay order under specific conditions." (Doc. 2 at 17 .) These allegations are relevant to both the relative seriousness of the alleged substandard care given to the patients at Claywest, as well as the knowledge of Wachter about the care given to the patients at Claywest, and

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

are relevant to whether defendants made false statements about the care given.

*4 Paragraphs 61b and 61c allege:

b. Between 1997 and 1999, Resident M.W. suffered numerous injuries including a hand fracture and skin tears and bruises on her legs, arms, and hands.

c. In or about February 1999, Resident M.W. suffered from a dislocated shoulder and pressure sores on her heels.

(Doc. 2 at 18.) These paragraphs are relevant. Each alleges facts that, if true, are relevant to the standard of care being provided to residents at the facilities, Claywest in particular. Taken in context with the rest of paragraph 61, which details allegations about how these sores were not treated, and how this resident was ultimately removed from the facility, this paragraph alleges facts relevant to whether this resident's care was worthless, and whether defendants provided false statements about this service.

Paragraph 71 alleges: "On or about April 13, 1999, Defendant Wachter in an e-mail declared himself the 'dictator' of the company. He told his facility administrators to send a card, instead of more expensive flowers, when a resident died. He stated that the resident's family would appreciate the card more." (Doc. 2 at 20.) This paragraph should not be stricken, because it is relevant to Wachter's role in the companies, and his management over the actions of the facilities.

Paragraph 81 alleges that Resident C.B. was changed to a pureed diet because he had trouble swallowing. On June 17, 1999, he allegedly aspirated at approximately 1:00 p.m., and an x-ray was ordered, but the records did not indicate whether the x-ray or other intervention was ever performed. C.B. died while his wife was feeding him at 6:00 p.m. on June 17. The indictment alleges that no registered nurse was on duty from 12:00 a.m. to 6:00 a.m., or from 5:00 p.m. until 11:00 p.m., and that there was no plan of care to prevent aspiration, to stop feedings by mouth, or to monitor the resident. (Doc. 2 at 23.) This paragraph is relevant to the charges that the care provided was so inadequate as to be considered worthless, and

whether defendants' statements or representations about this care were false.

Paragraph 86 of the indictment contains allegations about V.B., who resided at Claywest in July 1999. Her hip had been surgically pinned and was unstable, but she was neither terminally ill nor demented. On July 29, 1999, a nurse, after performing a pulse oximetry reading, indicated that V.B. should be transported to the hospital for an acute myocardial infarction. V.B. was hospitalized on July 29, 1999, and died on August 23, 1999.

Paragraph 86 is relevant to the charges. Defendants argue there is no way of telling by reading the indictment how this patient died. While this may be true, the government need not expressly state with clarity all of its evidence in the indictment. See Fed.R.Crim.P. 7(c)(1) (indictment to contain the "essential" elements of the offense alleged). This paragraph is another factual allegation of resident health problems at the facilities, which is relevant to the quality of the services provided.

*5 Paragraph 99 alleges, in relevant part, that Charles B. Kaiser, defendant AHM's president and in-house counsel, "stated that asking the government to pay for substandard care was Medicare fraud" and that "Mr. Wachter and Mr. Kaiser are going to jail." (Doc. 2 at 27-28.) This is relevant to Wachter's knowledge of his alleged subsequent wrongdoing and conspiracy, and his knowledge that the care given was substandard and allegedly worthless.

Paragraph 110 alleges details about Resident L.A., who had a pressure sore at the Stage I level, was bed or chair bound, had an incontinent bladder and bowel, and had a history of dehydration and poor nutrition. The indictment alleges that in the afternoon on April 17, 2001, L.A. lay on a regular mattress and in his urine, and was not provided a pressure-relieving mattress nor promptly cleansed after urinating. Later in the evening of April 17, L.A. lay in bed soaked with urine. His wound care order stated that both heels were to be wrapped with cling gauze after Lanaseptic ointment was applied every shift, or three times a day. On April 18, 2001, a staff member noted that the dressings were the

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

same as applied the day before, and the resident had multiple pressure sores at the Stage II level. Treatment records indicated that facility staff failed to treat the pressure sores 19 times between April 7 through April 18, 2001. This paragraph is relevant to the standard of care that patients, particularly L.A., were receiving, and should not be stricken.

Paragraph 119 alleges:

119. During times relevant to this indictment, Defendant AHM and the nursing facilities managed by AHM entered into a number of settlements of civil lawsuits brought by relatives of residents of AHM-managed facilities. The civil lawsuits alleged that residents had died or suffered serious injury as the result of the inadequate care provided by the facilities.

(Doc. 2 at 42.)

The information contained in paragraph 119 is relevant to defendants' knowledge about the alleged "worthless" care provided by defendants. That they had civil suits brought against them and settled them is relevant to whether or not the defendants were aware, at the least, of complaints about the standard of care. Defendants argue that it should be stricken because Federal Rule of Evidence 408 prohibits admitting evidence of offers to compromise. However, "[t]he indictment is not evidence of any kind against the defendant." *United States v. Figueroa*, 900 F.2d 1211, 1218 (8th Cir.1990). It should not be stricken.

Defendants argue that any information about residents R.M., C.B., D.M., and L.A. should be stricken. They are residents described in the introductory portion of the indictment who are not alleged in the overt acts of Count 1 or included in false statements Counts 2-6. With regard to the Count 1 conspiracy, the government can offer evidence of other overt acts not alleged in the indictment. *E.g.*, Fed.R.Evid. 404(b). "Where the indictment fairly specifies the offense charged and notifies the defendant of the particulars, the defendant has knowledge that other overt acts underlying the conspiracy might be pleaded at trial." *United States v. Lewis*, 759 F.2d 1316, 1344 (8th Cir.1985); *see also United States v. Coleman*, 349

F.3d 1077, 1088 (8th Cir.2003), *cert. denied*, 541 U.S. 1055, 1080 (2004). The government is not limited to offering evidence about only those residents specifically listed in the counts. The defendants, furthermore, have been put on notice by the grand jury of the information the government has regarding the other residents and which may be offered at trial.

ii. Strike responsive brief

*6 Defendants have also moved to strike pages 13 through 15 of the government's response (Doc. 78), arguing that the material in those pages and Attachment 1 concerns a patient who is not mentioned in the indictment and is only discussed to inflame the court against defendants. (Doc. 81.) The government argues that it has provided the defendants with all the names of the residents about whom it intends to offer evidence at trial, including that resident, and that there is no legal basis for striking this information.

The court concludes that there is no basis for striking those pages and attachments from the government's brief. There is no reason a jury would see these pages. The motion should be denied.

B. Motion to quash

Defendants AHM, Claywest, Oak Forest, and Lutheran Healthcare have moved to quash the government's May 9, 2006 subpoena issued to Cathedral Rock of St. Charles. (Doc. 72.) They also seek a protective order barring the government from any future administrative subpoenas.

On May 9, 2006, Dorothy L. McMurtry, Assistant United States Attorney who is the signatory on the six-count indictment, signed and issued a subpoena duces tecum to the Custodian of Records of the Cathedral Rock of St. Charles, Missouri, d/b/a Blanchette Place Care Center. The subpoena commanded the production of certain documents at the office of the United States Attorney in St. Louis on May 22, 2006. The face of the subpoena stated that the materials sought

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

are necessary in the performance of the responsibility of the U.S. Department of Justice to investigate federal health care offenses, defined in 18 U.S.C. § 24(a) to mean violation of, or conspiracies to violate: 18 U.S.C. §§ 669, 1035, 1347, or 1518; and 18 U.S.C. §§ 287, 371, 666, 1001, 1027, 1341, 1343, or 1954 if the violation or conspiracy relates to a health care benefit program (defined in 18 U.S.C. § 24(b).

(Doc. 72 Ex. A.)

Defendant Wachter argues that the subpoena should be quashed, because it was issued unlawfully. Defendants incorporate by reference the arguments of defendant Wachter in his motion to quash dated February 27, 2006 (Doc. 23), which this court denied (Doc. 37). In summary, Wachter had previously argued that it is unlawful for the government to use the administrative subpoena to continue its investigation of the crimes charged in the pending indictment. By doing this, defendant Wachter argues, the government is avoiding the requirements of Federal Rule of Criminal Procedure 17 and the requirement of the Right to Privacy Act, 12 U.S.C. § 3405, that the subpoena state with reasonable specificity the nature of the law enforcement inquiry. (Doc. 23.)

"Generally, absent violation of the Constitution or other provision of law, and where authorized by law, the government may use an administrative subpoena, issued to third parties, to continue investigating pending charges. *United States v. Phibbs*, 999 F.2d 1053 (6th Cir.1993); *United States v. Harrington*, 761 F.2d 1482 (11th Cir.1985); *United States v. Daniels*, 2000 WL 764951 (D.Kan.2000)." (Doc. 37 at 3.) To be reasonable under the Fourth Amendment, an investigative subpoena

*7 must be (1) authorized for a legitimate governmental purpose; (2) limited in scope to reasonably relate to and further its purpose; (3) sufficiently specific so that a lack of specificity does not render compliance unreasonably burdensome; and (4) not overly broad for the purposes of the inquiry as to be oppressive....

In re Subpoena Duces Tecum, 228 F.3d 341, 349

(4th Cir.2000).

Here, there is no indication that there is any violation of the Constitution or other provision of law, and defendant Wachter does not argue otherwise. It is limited in scope, is for a legitimate purpose, and specific. For the same reasons this court denied Wachter's previous motion to quash, it denies this motion to quash.^{FN2} No defendant has presented any new argument why this third party administrative subpoena differs from the other so that it should be quashed.

FN2. For a thorough discussion of the previous motion and this issue, see Doc. 37.

The motion will be denied.

C. Motion to compel compliance with a court order and to file additional motions

Defendants' motion to compel compliance with a court order (Docs.69, 80) is denied. The court order required that the government file its motion for pretrial determination of admissibility of evidence by May 1, 2006, which the government did not do. Counsel for the government stated at the hearing that it did not have any arguably suppressible evidence to offer at trial, and counsel for the defendants stated that they did not plan to file a motion to suppress. Therefore, this motion is denied. Defendants' motions for leave to file additional motions will be sustained in that any such additional motion shall be accompanied by a showing of good cause why any such additional motion was not filed within the deadlines set by the court.

II. Motion to dismiss

Defendants move to dismiss the indictment (Doc. 48),^{FN3} arguing generally that the indictment alleges no crime, because it is not illegal to submit payments for services rendered even if there are shortage of staff or quality of care issues.

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

FN3. Defendant Wachter filed the motion (Doc. 48), in which the remaining defendants joined. (Docs.62, 70.)

This motion to dismiss challenges the indictment as legally insufficient on its face. To be legally sufficient on its face, the indictment must contain all the essential elements of each offense charged, it must fairly inform each defendant of the charges against which he and it must defend, and it must allege sufficient information to allow each defendant to plead a conviction or an acquittal as a bar to a future prosecution. U.S. Const. amends. V and VI; Fed.R.Crim.P. 7(c); *Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. White*, 241 F.3d 1015, 1021 (8th Cir.2001). "An indictment should not be read in a hyper technical fashion and should be 'deemed sufficient unless no reasonable construction can be said to charge the offense.'" *United States v. O'Hagan*, 139 F.3d 641, 651 (8th Cir.1998) (quoting *United States v. Morris*, 18 F.3d 562, 568 (8th Cir.1994)).

Initially, the court must determine the essential elements of each offense charged. The indictment alleges six counts. Count 1 alleges that defendants Wachter, American Healthcare Management, Claywest House Healthcare, Oak Forest North, and Lutheran Healthcare violated 18 U.S.C. §§ 371^{FN4} and 2 by conspiring to violate 18 U.S.C. § 1035,^{FN5} 18 U.S.C. § 1347,^{FN6} 42 U.S.C. § 1320a-7b(a)(2),^{FN7} and 42 U.S.C. § 1320a-7b (a)(3)^{FN8}. Counts 2 through 6 of the indictment allege the making of false statements relating to health care matters in violation of 18 U.S.C. § 1035.

FN4. Section 371 provides in relevant part:
If two or more persons conspire either to commit any offense against the United States ... and one or more of such persons do any act to effect the object of the conspiracy, each shall be [punished].
18 U.S.C. § 371.

FN5. Section 1035 provides in relevant part:
(a) Whoever, in any matter involving a health care benefit program, knowingly

and willfully-

(2) ... makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, shall be [punished].

See 18 U.S.C. § 1035(a)(1).

FN6. Section 1347 provides in relevant part:

Whoever knowingly and willfully executes ... a scheme or artifice-

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or

payment for health care benefits, items, or services, shall be [punished].

See 18 U.S.C. § 1347.

FN7. Section 1320a-7b(a)(2) and (a)(3) provides in relevant part:

Whoever-

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to such benefit or payment,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized,

shall (i) in the case of such a statement,

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

representation, concealment, failure or conversion by any person in connection with the furnishing (by that person) of items or services for which payment is or may be made under the program, be guilty of a felony and upon conviction [punished]

....
See 42 U.S.C. § 1320a-7b(a)(2), (a)(3).

FN8. See footnote 7.

*8 The essential elements of the Count 1 § 371 conspiracy crime are alleged in that count. They are that defendants (1) agreed with another (2) to commit crimes against the United States, and (3) at least one overt act was committed in furtherance of the agreement. See 18 U.S.C. § 371; *United States v. Falcone*, 311 U.S. 205, 210 (1940); *United States v. Sdoulam*, 398 F.3d 981, 991 (8th Cir.2005). The indictment identifies the federal criminal laws that are the subjects of the conspiracy. *Tramp v. United States*, 978 F.2d 1055, 1055 (8th Cir.1992). The indictment also describes the nature and purpose of the conspiracy, and its manner and means. Count 1 also alleges 16 overt acts in furtherance of the conspiracy.

All the essential elements of the § 1035 false statements crimes are alleged in each of Counts 2 through 6. They are that defendants (1) in a matter involving a health care benefit program, (2) knowingly and willfully, (3) made or used any materially false writing or document entry, (4) knowing the writing or document contained a materially false, fictitious, or fraudulent statement or entry, (5) in connection with the delivery of or payment for health care benefits, items, or services. See 18 U.S.C. § 1035(a)(2). Section 1035 incorporates the definition of "health care benefit program" found in 18 U.S.C. § 24(b).^{FN9} Each count alleges, regarding a different resident, regarding different dates of service, and regarding different dates the statements were submitted, that defendants

FN9. Section 24(b) defines "health care benefit program" as
any public or private plan or contract,

affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.
18 U.S.C. § 24(b).

stated and represented that the facilities had provided services to the residents named below when the Defendants knew, at the time the claim was submitted, that the services were so inadequate, deficient, and substandard as to constitute worthless services.
(Doc. 2 at 54.)

Defendants argue that the indictment is flawed, because it does not allege any facts that indicate that the alleged misrepresentations were material to the decision of Medicaid and Medicare to pay the claims.

An accepted definition of "material" or "materiality" is as follows:

A fact is "material" if it has a natural tendency to influence, or is capable of influencing the decision of the institution. Whether a fact is material does not depend on whether a course of action [] intended to deceive others actually succeeded.

Eighth Circuit Manual of Model Jury Instructions (Criminal) § 6.18 .1006A at 255 (Thomson West 2003). *Neder v. United States*, 527 U.S. 1, 16 (1999); *United States v. Adler*, 623 F.2d 1287, 1292 n. 7 (8th Cir.1980). The Eighth Circuit in *Adler* stated: we think that a statement is material if it has a tendency to induce the government to act, and that this requirement is certainly satisfied by a statement that is adequate to induce the agency to make a decision whether or not to pay. What makes a statement material is that it is required to put the claimant in a position to receive government benefits, whether rightfully or wrongfully.

*9 623 F.2d at 1291. Statutes involving fraudulent acts have been interpreted as including an element of materiality, regardless of whether or not the statutes specifically included that element. *United*

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

States v. Pizano, 421 F.3d 707, 722 (8th Cir.2005),
cert. denied, 126 S.Ct. 1409 (2006); *United States*
v. Cooper, 283 F.Supp.2d 1215, 1232 (D.Kan.2003)

Defendants argue that while the indictment contains allegations of false statements, there are no facts these false statements actually affected the decision of Medicaid or Medicare to pay the claims. The indictment alleges what provider claims for reimbursement should contain, e.g., the identity of the respective patient, the provider's identification number, a description of the service provided, the medical necessity for the service, and a certification that the information provided by the provider is accurate and complete. (Doc. 2 ¶ 17.) The indictment alleges that the providers are prohibited from submitting claims that are "of a quality which fails to meet professionally recognized standards of health care." (*Id.* at ¶ 32.) The indictment alleges that the defendants entered into eight plans of corrections regarding adequacy of staffing. (*Id.* at ¶ 46, 51, 57, 83, 95, 96, 97, and 102.) The indictment alleges that the defendants submitted 13 claims for reimbursement, (*id.* at 153d) and five statements that services were provided when the subject services were worthless. (*Id.* at ¶ 155.) The indictment alleges that the defendants' representations induced the government through the Medicaid and Medicare programs to pay defendants' claims for reimbursement for services.

Even if compliance with the regulations and statutes governing the facilities are conditions of participation in the Medicare and Medicaid programs and not express conditions of payment, payment of claims is a benefit of participation not available to those that fail to maintain the standards and are not allowed to participate. See 42 U.S.C. §§ 1395f, 1395cc; see also *Beverly Health & Rehabilitation Services, Inc. v. Thompson*, 223 F.Supp.2d 73, 79 (D.C.Cir.2002) (substandard facilities can be excluded from program). To be reimbursed by Medicare or Medicaid, the defendants were required to become a "provider" in the program and enter into a provider agreement. 42 U.S.C. § 395cc. If excluded from the program for substandard facilities, the facilities would not be entitled to receive reimbursement from Medicare

and Medicaid. See *Beverly Health*, 223 F.Supp.2d at 79. The indictment alleges that the provider agreement entered into by defendants, signed by Wachter, provided that they would abide by all federal health care regulations. (Doc. 2 at 10-11.)

Further, the indictment alleges more than mere minor deviations from the regulations. This is not, as defendants argue, a criminalization of only minor staff shortages and deviations from accepted standards of care. Such an argument should await the presentation of evidence at trial. The indictment alleges facts indicating that patients died or eloped from their facilities; the indictment alleges many factual circumstances of neglect and abuse allegedly caused by staff shortages that were mandated by defendants pursuant to a 40 percent formula for staffing.^{FN10}

FN10. The indictment alleges that defendant Wachter demanded that staffing payroll not exceed 40 percent of the Medicaid per diem. (Doc. 2 at 17-18.)

*10 To comply with the definition of and requirement of materiality, it is unnecessary for the indictment to allege, or the government to prove, although the government's evidence might prove, that the government programs actually relied on the defendants' false representations. *Pizano*, 421 F.3d at 722. The indictment sufficiently alleges facts that, if true, would satisfy the materiality requirement, that the representations were relevant to the decisions to pay the defendants' claims for reimbursement.

The indictment alleges that defendants controlled what information was told to the federal and state agencies concerning patient care. The indictment alleges that defendant Wachter discouraged employees from reporting suspected abuse. Employees allegedly were encouraged not to take pictures of pressure sores, and were educated on what to say and not say to state surveyors. The indictment alleges that Wachter gave false statements about the 40 percent payroll policy while testifying in a civil suit, and there are many factual examples in the indictment of instances where,

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

despite being cited for insufficient staffing and promising to increase staffing, defendants failed to do so. The alleged facts that Wachter gave false statements about the 40 percent staffing policy, and directed staff to lie about the conditions at the facilities, indicate that his actions were to defraud the Medicaid and Medicare programs. These alleged attempts to conceal the conditions of the facilities support the materiality element, i.e., that defendant Wachter knew that, if the state and federal agencies were aware of the conditions, they might not pay the claims.

Defendants argue that the indictment should be dismissed because the government is estopped from bringing criminal charges, because, through its regulations and payment of the claims, it misled them into believing their actions were legal.

Entrapment by estoppel is an affirmative defense and "can be used by a defendant who reasonably relied on a statement by the government which misled him into believing that his conduct was legal." *United States v. Patient Transfer Service, Inc.*, 413 F.3d 734, 742 (8th Cir.2005). To present a defense of entrapment by estoppel, the defendants have the burden of proving that they were misled by the statements of the government official, and that the reliance on the government official's statements was reasonable. *United States v. Benning*, 248 F.3d 772, 775 (8th Cir.2001); *United States v. Austin*, 915 F.2d 363, 365-66 (8th Cir.1990). "[A] government official must be guilty of affirmative misconduct in order for a defendant to put forth a viable defense of entrapment by estoppel." *Benning*, 248 F.3d at 775.

Even if this argument is appropriate in an analysis of whether the indictment is legally sufficient on its face, defendants have not shown that the indictment's allegations establish any affirmative action by the government that would satisfy the defense of estoppel by entrapment. They argue that the relevant statutes do not criminalize submitting claims for compensation for providing substandard care. But "an incomplete explanation of law cannot support an estoppel-by-entrapment defense." *United States v. Ray*, 411 F.3d 900, 904 (8th Cir.) (no affirmative representation when statute did not say

that a person who had been convicted of a misdemeanor could possess a firearm), *cert. denied*, 126 S.Ct. 469 (2005). Like *Ray*, there is no affirmative representation alleged in the indictment that defendants' conduct was legal; defendants only argue no one ever told them it was illegal. Even if true, this may not be "affirmative misconduct" sufficient to establish the affirmative defense of entrapment by estoppel. *Id.*

*11 Defendants' third argument is that the indictment contains no facts that the services rendered were "worthless," as the indictment generally alleges, and that applying this doctrine to the statutes would render them void for vagueness.

Defendants argue that the term "worthless service" is vague, and renders the statutes void when applied to them. They argue that defining "worthless" services would prove difficult and gives no person notice as to what constitutes criminal behavior. "The Fifth Amendment guarantees every citizen the right to due process. Stemming from this guarantee is the concept that vague statutes are void." *United States v. Washam*, 312 F.3d 926, 929 (8th Cir.2002). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

Courts that have applied the "worthless services" doctrine in civil cases have defined "worthless services" as services "so deficient that for all practical purposes it is the equivalent of no performance at all." *Mikes v. Straus*, 274 F.3d 687, 702 (2nd Cir.2001). This doctrine has been recognized as a basis for relief under the civil False Claims Act. *Id.*; *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048 1053 (9th Cir.2001); *United States v. Covenant Care, Inc.*, 279 F.Supp.2d 1212, 1216 (E.D.Cal.2002); *United States v. NHC Health Care Corp.*, 163 F.Supp.2d

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

1051, 1056 (W.D.Mo.2001). In the civil context, courts have held that "a worthless services claim asserts that the knowing request of federal reimbursement for a procedure with *no medical value* violates the [False Claims] Act irrespective of any certification." *Mikes*, 274 F.3d at 702 (emphasis added). Defendants do not assert, and the court cannot find, any cases where this theory was applied to criminal charges. FN11

FN11. In *United States v. Dose*, 2005 WL 106493 (N.D.Iowa Jan. 12, 2005), the court considered a nine-count indictment alleging various acts of health care fraud, making false statements, and obstructing a federal audit. The factual basis for the charges in *Dose* were that the defendants received Medicare and Medicaid funds. During one survey of the facility in May 1999, it was cited for not providing its residents with adequate supervision and assistance. After this survey, a resident fell out of his wheelchair. *Id.* at *2. In June 1999, the Iowa Department of Inspections requested a list of all residents who had fallen since May 1999. The resident who had fallen was left off the list, and the defendants allegedly concealed the accident.

Dose was not a case where generally worthless services were being alleged. However, false statements about the conditions of the facility, even if only the fall of one resident, were the basis for the charges. See also *United States v. Hinman*, 2005 WL 958395 (N.D.Iowa Apr. 22, 2005); *United States v. Dose*, 2005 WL 1806414 (N.D.Iowa July 28, 2005).

Applying the "worthless services" doctrine to the criminal statutes the indictment alleges defendants conspired to violate does not render them void for vagueness. "Worthless" is defined as "[t]otally lacking worth; of no use or value." *Black's Law Dictionary*, (8th ed.2004). Value means "[t]he significance, desirability, or utility of something." *Id.* These are common terms whose definition is readily known to ordinary men. Worthless services

could include services that were so deficient that they were of no utility to the resident, or were totally undesirable.

Here, "men of common intelligence" could reasonably understand when their conduct could result in worthless services, or services completely lacking value. "Objections to vagueness ... rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *United States v. Strauss*, 999 F.2d 692, 698 (2d. Cir.1993) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct [with] which a defendant is charged." *United States v. Chandler*, 66 F.3d 1460, 1471 (8th Cir.1995). Here, the indictment alleges that defendants concealed and misrepresented the conditions and care provided. In light of these alleged facts, defendants were on notice that their conduct was at risk for criminal liability.

*12 Defendants argue that it would be difficult for nursing home facilities to distinguish between merely bad services and worthless services. But, "statutes and regulations ... are not impermissibly vague simply because it may be difficult to determine whether marginal cases fall within their scope." *United States v. Sun and Sand Imports, Ltd.*, 725 F.2d 184, 187 (2nd Cir.1984).

Further, the fact that the government alleges facts satisfying the scienter requirement, knowledge, mitigates any vagueness that might be present. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). The indictment alleges that the defendants knew the services were worthless but, nonetheless, submitted claims to Medicaid and Medicare. The indictment alleges many instances where defendant Wachter, who allegedly oversaw the other organizational defendants, attended meetings where the staff shortages and other substandard care issues were discussed. One care facility nearly lost its license due to quality of care issues. The indictment alleges Wachter repeatedly told staff not to report abuse or neglect and to guard what they said to state surveyors. Knowledge of care can be inferred from

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

these facts. Therefore, the statutes defendants allegedly violated are not rendered void for vagueness when applied in this case.

For the above reasons, this indictment is legally sufficient on its face and should not be dismissed.

III. Bill of Particulars

Defendant Wachter has moved for a bill of particulars, and the other defendants have joined the motion. (Docs.60, 62.) Specifically, defendants argue that they are entitled to a bill of particulars which identifies each statement, representation, promise, pretense, document, and writings that are allegedly false, and any alleged worthless services, and the name of any residents not already named in the indictment that the government intends to offer at trial. They also seek a bill of particulars which identifies the names of any coconspirators not named in the indictment, which private settlements in civil lawsuits the government intends to introduce, and evidence of any meetings attended by Wachter the government intends to introduce at trial.

"A bill of particulars serves to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment is too vague and indefinite." *United States v. Hernandez*, 299 F.3d 984, 989-90 (8th Cir.2002). It is not a discovery tool, and should not be used to obtain detailed disclosure of the government's evidence. *United States v. Wessels*, 12 F.3d 746, 750 (8th Cir.1993). The court has discretion to order the government to provide additional details when the indictment fails to sufficiently inform the defendant of the charges against him so as to hinder his ability to prepare a defense. *United States v. Garrett*, 797 F.2d 656, 665 (8th Cir.1986).

*13 As stated above, the indictment is legally sufficient on its face and provides the defendants with the constitutionally required notice of the

charges against them. To require the government further to identify the specific false representations, to name all residents, civil lawsuits, and any meetings about which the government intends to introduce at trial, would be using the bill of particulars improperly as a discovery tool. Further, counsel for the government stated at the hearing that it has provided defendants with the names of all the residents about whom it intends to offer evidence, and will continue to supplement this information with newly discovered evidence.

This motion will be denied.

IV. Motion to sever

Defendant Wachter has moved to sever himself from the other defendants for a separate trial (Doc. 46). The other defendants joined this motion. (Doc. 62.)

Federal Rule of Criminal Procedure 14 "allows the trial court to order severance even if joinder was proper under Rule 8(b)." FN12 *United States v. Wadena*, 152 F.3d 831, 850 (8th Cir.1998). "When a defendant moves for a severance, a district court must first determine whether joinder is proper under Federal Rule of Civil Procedure 8." *United States v. Darden*, 70 F.3d 1507, 1526 (8th Cir.1995). Here, joinder of the defendants is proper under Rule 8(b). All defendants are charged in each of the counts. Thus, the facts and charges alleged against each defendant are factually interrelated with those alleged against all the other defendants. *See id.* at 1526-27 ("indictment in this case sufficiently alleged that the joined defendants and counts were factually interrelated").

FN12. Federal Rule of Criminal Procedure 8(b) provides:

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

in one or more counts together or separately. All defendants need not be charged in each count.

Fed.R.Crim.P. 8(b).

Federal Rule of Criminal Procedure 14(a) provides:

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

Fed.R.Crim.P. 14(a).

Whether or not to sever is within the discretion of the trial judge. *Wadena*, 152 F.3d at 850. "In a ruling on a motion for severance, a court must weigh the inconvenience and expense of separate trials against the prejudice resulting from a joint trial of codefendants." *United States v. Pherigo*, 327 F.3d 690, 693 (8th Cir.2003). Severance is only required when the evidence is such that a jury could not be expected to compartmentalize it as it relates to the separate defendants. *Id.* at 693. The prejudice against a defendant must be "severe or compelling." *Id.* The court must consider the complexity of the case, if one or more of the defendants was acquitted, and the availability of adequate instructions. *Id.*

It is not an abuse of discretion to deny a severance motion when not every joined defendant has participated in every offense charged, [*United States v. Delpit*, 94 F.3d [1134,] 1143-44 [(8th Cir.1996)], when evidence which is admissible only against some defendants may be damaging to others, *id.*, or when there is varying strength in the evidence against each defendant.

United States v. Lee, 374 F.3d 637, 646 (8th Cir.2004), *cert. denied*, 125 S.Ct. 2962 (2005). There is a strong presumption against severing properly joined defendants, especially in a conspiracy case. *United States v. Noe*, 411 F.3d 878, 886 (8th Cir.2005).

*14 Wachter argues that severance is necessary because certain evidence would be admissible

against the other defendants and not him. This alone does not justify severance. *See Lee*, 374 F.3d at 646. Further, all the defendants are charged with conspiracy. "In general, persons charged in a conspiracy or jointly indicted on similar evidence from the same or related events should be tried together." *United States v. Ruiz*, 446 F.3d 762, 772 (8th Cir.2006). The trial judge can assess the nature of the evidence actually introduced at trial, the efficacy of cautionary jury instructions to avoid undue prejudice to any defendant, and all the circumstances of the trial. Therefore, defendant's motion to sever is denied, but without prejudice to being refiled at trial upon a sufficient showing of prejudice from the joinder.

Whereupon,

IT IS HEREBY ORDERED that the motions of defendant Wachter to strike surplusage (Doc. 45), for a bill of particulars (Doc. 60), and to compel compliance with court order (Docs. 66 and 80) are denied.

IT IS FURTHER ORDERED that the motions of corporate defendants for leave to file additional motions (Doc. 52), to compel compliance with court order (Doc. 69), to quash government's subpoena (Doc. 72), and to strike (Doc. 81) are denied.

IT IS FURTHER ORDERED that the third motion of defendants American Healthcare Management, Claywest House Healthcare, Oak Forest north, and Lutheran Healthcare motion to join pleadings filed by Wachter (Doc. 95) is sustained.

IT IS HEREBY RECOMMENDED that the motion of defendant Wachter to dismiss the indictment (Doc. 48) be denied

IT IS FURTHER RECOMMENDED that the motion of defendant Wachter to sever defendant Wachter from the other defendants (Doc. 46) be denied.

The parties are advised they have until August 1, 2006,^{FN13} to file written objections to this Order and Recommendation. The failure to file objections

Not Reported in F.Supp.2d

Not Reported in F.Supp.2d, 2006 WL 2460790 (E.D.Mo.)
(Cite as: Not Reported in F.Supp.2d)

may result in a waiver of the right to appeal issues
of fact.

FN13. This is 10 days from July 14, 2006.
See 28 U.S.C. § 636(b); Fed.R.Crim.P.
45(a)(2).

E.D.Mo., 2006.

U.S. v. Wachter

Not Reported in F.Supp.2d, 2006 WL 2460790
(E.D.Mo.)

END OF DOCUMENT