

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA	:	Hon. Kevin McNulty
	:	
v.	:	Criminal No. 21-
	:	
BRIAN HERBSTMAN	:	18 U.S.C. § 371

**INFORMATION**

The defendant having waived in open court prosecution by Indictment, the Acting United States Attorney for the District of New Jersey charges:

1. Unless otherwise indicated, at all times relevant to this Information:

**The Defendant and His Coconspirators**

a. Defendant BRIAN HERBSTMAN (“defendant HERBSTMAN”) was a resident of New Jersey.

b. Coconspirator-1 (“CC-1”) and Coconspirator-2 (“CC-2”) were each residents of New Jersey who owned, operated, and/or had financial or controlling interests with others in numerous durable medical equipment (“DME”) supply companies located in New Jersey and elsewhere (collectively, the “CC-1/CC-2 DME Companies”). The CC-1/CC-2 DME Companies primarily supplied DME such as knee, ankle, back, wrist, and shoulder braces.

c. Defendant HERBSTMAN had a financial interest in one or more of the CC-1/CC-2 DME Companies.

d. CC-1, CC-2, defendant HERBSTMAN, and others used the CC-1/CC-2 DME Companies to fill “completed doctors’ orders” for DME (“DME

Orders”). DME Orders consisted of a doctor’s order or prescription for DME or other medical services for a particular patient along with the patient’s identifiers and insurance information. Within the context of the scheme, a DME Order amounted to a guarantee that the DME prescribed would be reimbursed by Medicare or another health care benefit program, regardless of medical necessity. The DME Orders were provided to the CC-1/CC-2 DME Companies by individuals and entities who expected and received kickbacks in return.

e. CC-1 and CC-2 also had relationships with entities that performed genetic cancer screening tests (“CGX Tests”). Genetic tests were laboratory tests designed to identify specific inherited mutations in a patient’s genes. These genetic variations affected a patient’s risk of developing certain diseases or how the patient responded to medications. CGX Tests were genetic tests related to a patient’s hereditary predisposition for cancer.

f. Defendant HERBSTMAN and others also had business relationships with call centers (the “HERBSTMAN Supply Companies”) through which defendant HERBSTMAN and others obtained patient referrals for CGX Tests. The patient referrals were meant to target beneficiaries of Medicare or another health care benefit program, with the goal of having CGX Tests for those patients reimbursed, regardless of medical necessity. The HERBSTMAN Supply

Companies provided patient referrals to CC-1, CC-2, and others, in exchange for kickbacks and bribes from the companies that performed the referred CGX Tests.

**Background on Government Health Care Benefit Programs**

g. Medicare was a federal program that provided free or below-cost health care benefits to certain individuals, primarily the elderly, blind, and disabled. Medicare was a “health care program” as defined in 18 U.S.C. § 24(b) and a “Federal health care program” as defined in 42 U.S.C. § 1320a-7b(f). The Medicare Part B program was a federally funded supplemental insurance program that provided Medicare insurance benefits for individuals aged 65 or older, and for certain individuals who were disabled. The Medicare Part B program paid for various medical services for beneficiaries, including DME and CGX Tests.

h. Medicare-authorized suppliers of healthcare services can only submit claims to Medicare for reasonable and medically necessary services. Medicare will not reimburse claims for services that it knows are procured through kickbacks or bribes. Such claims are deemed false and fraudulent because they violate Medicare laws, regulations, and program instructions, as well as violating federal criminal law. For example, where a DME order or CGX Test is procured through the payment of a kickback in violation of the Federal Anti-Kickback Statute, a claim to Medicare for reimbursement for that order is fraudulent. By implementing these restrictions, Medicare aims to preserve its

resources, which are largely funded by United States taxpayers, for those elderly and other qualifying beneficiaries who have a genuine need for medical services.

### **TRICARE**

i. TRICARE was a health care program of the United States Department of Defense (“DoD”) Military Health System that provides coverage for DoD beneficiaries worldwide, including active duty service members, National Guard and Reserve members, retirees, their families, and survivors. The Defense Health Agency, an agency of the DoD, is the military entity responsible for overseeing and administering the TRICARE program. TRICARE was a “health care benefit program,” as defined by Title 18, United States Code, § 24(b), and a “Federal health care program,” as defined by Title 42, United States Code, § 1320a-7b(f), that affects commerce.

### **CHAMPVA**

j. The Civilian Health and Medical Program of the Department of Veterans Affairs (“CHAMPVA”) was a federal health benefit program within the Department of Veterans Affairs (“VA”). CHAMPVA was a comprehensive health care program in which the VA shares the cost of covered health care services and supplies with eligible beneficiaries. The eligible categories for CHAMPVA beneficiaries were the spouses or children of veterans who had been rated permanently and totally disabled for a service-connected disability and the

surviving spouse or child of a veteran who died from a VA-rated service-connected disability.

k. In general, the CHAMPVA program covered most health care services and supplies that are medically and psychologically necessary. CHAMPVA was always the secondary payer to Medicare and reimbursed beneficiaries for costs that Medicare did not cover. Health care claims must have first been sent to Medicare for processing. Medicare electronically forwarded claims to CHAMPVA after Medicare had processed them. For Medicare supplemental plans, CHAMPVA processed the remaining portion of the claim after receiving Medicare's explanation of benefits.

1. CHAMPVA was a “health care benefit program,” as defined by Title 18 United States Code § 24(b), and a “Federal health care program,” as defined by Title 42 United States Code § 1320a-7b(f), that affects commerce.

### **The Conspiracy**

2. From in or around March 2018 through in or about September 2019, in the District of New Jersey, and elsewhere, the defendant,

#### **BRIAN HERBSTMAN,**

did knowingly and intentionally conspire and agree with others to commit certain offenses against the United States, that is, to:

a. knowingly and willfully execute, and attempt to execute, a scheme and artifice to defraud a health care benefit program and to obtain, by means of false and fraudulent pretenses, representations, and promises, any of the money owned by, and under the custody and control of, a health care benefit program,

as defined by Title 18, United States Code, Section 24(b), in connection with the delivery of or payment for health care benefits, items and services, contrary to Title 18, United States Code, Section 1347; and

b. knowingly and willfully solicit and receive remuneration, directly and indirectly, overtly and covertly, in cash and in kind, that is, kickbacks and bribes, from any person in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under Federal health care programs, namely Medicare, TRICARE, and CHAMPVA, contrary to Title 42, United States Code, Section 1320a-7b(b)(1)(A).

#### **Goals of the Conspiracy**

3. One goal of the conspiracy was for defendant HERBSTMAN and his coconspirators to unlawfully enrich themselves by paying kickbacks and bribes to others in return for procuring DME Orders that defendant HERBSTMAN and his co-conspirators could themselves submit for reimbursement to Medicare, TRICARE, CHAMPVA, and other health care benefit programs.

4. It was a further goal of the conspiracy for defendant HERBSTMAN and his coconspirators to unlawfully enrich themselves by soliciting and receiving kickbacks and bribes in exchange for their role in procuring DME Orders and referrals for CGX Tests that were ultimately reimbursed by Medicare, TRICARE, CHAMPVA, and other health care benefit programs.

### **Manner and Means of the Conspiracy**

5. The manner and means by which defendant HERBSTMAN and others sought to accomplish the goals of the conspiracy included, among other things, the following:

a. In order to obtain DME Orders that would result in a guaranteed reimbursement for the CC-1/CC-2 DME Companies from Medicare and other health care programs, defendant HERBSTMAN conspired to enter into kickback agreements with other individuals to supply defendant HERBSTMAN and his coconspirators with those orders (collectively, "Suppliers").

b. To generate DME Orders, Suppliers identified qualified beneficiaries located in New Jersey and elsewhere through the use of marketing call centers under their control or with whom they had relationships. Once beneficiaries were identified by the marketers, the Suppliers utilized the services of telemedicine companies to secure corresponding prescriptions for DME. Once prepared, the Suppliers transmitted the completed DME Orders to the CC-1/CC-2 DME Companies for processing. The CC-1/CC-2 DME Companies paid the Suppliers kickbacks ranging from approximately \$160 to \$385 in exchange for each DME Order.

c. The CC-1/CC-2 DME Companies then arranged for the prescribed DME, such as orthotic braces, to be shipped to the individual beneficiaries pursuant to the DME Orders. Finally, the CC-1/CC-2 DME Companies electronically submitted or caused the electronic submission of claims to Medicare, TRICARE, CHAMPVA, and other federal and private health

care benefit programs from New Jersey and elsewhere for payment for each qualifying DME Order.

d. Defendant HERBSTMAN and others also entered into kickback agreements with companies that performed CGX Tests. Under the agreements, the HERBSTMAN Supply Companies and others were paid kickbacks for each patient referral for a CGX Tests that was subsequently billed to Medicare and other health care benefit programs.

#### **Overt Acts**

6. In furtherance of the conspiracy, and in order to effect the goals thereof, defendant HERBSTMAN committed or caused the commission of the following overt acts in the District of New Jersey and elsewhere:

a. On or about May 22, 2018, defendant HERBSTMAN received a kickback payment from one of the Suppliers of \$8,190 based on the Supplier's providing approximately 819 DME Orders to the CC-1/CC-2 DME Companies.

b. On or about May 25, 2018, defendant HERBSTMAN wired approximately \$40,000 to one of the CC-1/CC-2 DME Companies to be used to pay kickbacks to Suppliers for DME Orders.

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

**FORFEITURE ALLEGATION**

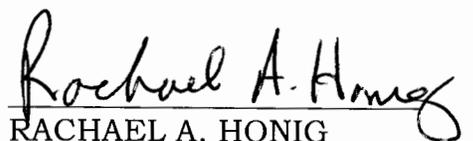
1. Upon conviction of the conspiracy offense alleged in the Information, defendant HERBSTMAN shall forfeit to the United States, pursuant to 18 U.S.C. § 982(a)(7), all property, real or personal, that constitutes or is derived, directly and indirectly, from gross proceeds traceable to the commission of the offense (as defined in 18 U.S.C. § 24) alleged in this Information, and all property traceable to such property.

**SUBSTITUTE ASSETS PROVISION**

2. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

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

the United States shall be entitled to forfeiture of substitute property, pursuant to 21 U.S.C. § 853(p), as incorporated by 18 U.S.C. § 982(b).

  
RACHAEL A. HONIG  
Acting United States Attorney

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**BRIAN HERBSTMAN**

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**INFORMATION FOR**

**18 U.S.C. § 371**

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**RACHAEL A. HONIG**

*ACTING UNITED STATES ATTORNEY*

*NEWARK, NEW JERSEY*

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