GEORGE S. CARDONA
United States Attorney
WAYNE R. GROSS
Assistant United States Attorney
Chief, Southern Division
KENNETH B. JULIAN
Assistant United States Attorney
(Cal. State Bar # 149840)
411 W. Fourth Street
Santa Ana, California 92701
Telephone: (714) 338-3537
Facsimile: (714) 338-3708
kenneth.julian@usdoj.gov

Attorneys for Plaintiff
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. FREDERICK H. CORBIN, Defendant.	NO. SA CR 06-022-DOC GOVERNMENT'S OPPOSITION TO DEFENDANT FREDERICK H. CORBIN'S MOTION TO DISMISS INDICTMENT HEARING: JUNE 4, 2007 TIME: 1:30 P.M. COURTROOM: 9D

I.

INTRODUCTION

This is a conspiracy and false statement prosecution against defendant FREDERICK H. CORBIN ("defendant"), a plastic surgeon, brought pursuant to 18 U.S.C. §§ 371 and 1035. Defendant has moved to dismiss the indictment. In his motion (the "Motion" or "Mtn."), defendant contends that: (1) the conspiracy count is duplicitous (charges more than one crime in one count) and barred by the 5-year statute of limitations, and (2) that the conspiracy and false statement counts are defective for failure to allege that a health care benefit program paid defendant money in connection with these crimes. Motion. at 8-16.

As discussed below, the Motion lacks merit because the conspiracy count alleges a single crime, namely: a multi-object conspiracy, and because the last overt act occurred before the expiration of the 5-year statute of limitations. Moreover, the conspiracy and false statement counts are sufficient because they properly allege that defendant's criminal conduct occurred in a matter involving a "health care benefit program" (i.e., a breast implant study) and in connection with the delivery of health care items (silicone gel breast implants) and services (breast augmentation surgery) within the meaning of 18 U.S.C. §§ 24(b), 1035, and 1347. The Motion therefore should be denied.

II.

STATEMENT OF FACTS

As set forth in the indictment, the facts of this case are straightforward. Defendant was a plastic surgeon with a medical office in Orange County, California. Between approximately 1996 and October 2001, defendant unlawfully implanted silicone gel breast implants into women patients. Indictment, ¶¶ 1-14.

Defendant initially implanted unlawful French-made silicone gel breast implants. Defendant caused these implants to be illegally smuggled into the United States from Mexico. Later, defendant used his position as a physician-investigator on an FDA-authorized breast implant research study (the "Implant Study") to obtain silicone gel implants from Mentor Corporation ("Mentor"), a breast implant manufacturer and sponsor of the Implant Study. Defendant fraudulently qualified women for the Implant Study and concealed his illegal conduct by creating false medical records. Indictment, ¶¶ 4-15.

In February 2001, Mentor audited defendant's medical records to determine his compliance with requirements of the Implant Study, including defendant's duty to create, keep, and maintain medical records as a physician-investigator with the Implant Study. In connection with Mentor's February 2001 audit, defendant caused medical records to be destroyed and created false medical records to conceal his ongoing illegal conduct. Indictment, ¶¶ 15(j)-15(o).

III.

THE CONSPIRACY COUNT IS NOT DUPLICITOUS OR TIME-BARRED

In the Motion, defendant claims that the conspiracy count is duplicitous because it alleges multiple "schemes" in a single count, and that it was brought after the expiration of the five-year statute of limitations. Mtn. at 1-2. As discussed below, these claims lack merit.

A. The Conspiracy Is Not Duplicitous

An indictment is duplicitous where a single count joins two or more distinct offense. United States v. Martin, 4 F.3d 757, 759 (9th Cir. 1993)(conspiracy charge with more than one object not duplicitous). "[W]hen the defendant is making a pretrial objection under Rules 12(b)(2) and 8(a) to the form of the indictment as duplicitous," as with the present Motion, "the duplicity inquiry necessarily proceeds without reference to the evidence". United States v. Grace, 429 F.Supp.2d 1207, 1216 (D. Mont. 2002)(indictment charging conspiracy to release asbestos and to conceal the dangers not duplicitous)(emphasis added). Stated another way, "the court limits its review to a reading of the indictment itself to determine whether it may be read to charge a single violation."[1] United States v. King, 200 F.3d 1207, 1212 (9th Cir. 1999)(emphasis added); United States v. Morse, 785 F.2d 771, 774 (9th Cir. 1986) (court "look[s] to the

[1] Defendant *incorrectly* asks this court to determine duplicity with reference to a proffer of what he expects the evidence to be at trial (i.e., the "over all agreement/relevant factors" test) as set forth in United States v. Gordon, 844 F.2d 1397 (9th Cir. 1988)(post-trial, non-unanimous jury verdict on multi-object conspiracy count may have resulted from district court's denial of special verdict form). Mtn. at 3-9.

indictment itself to determine whether it may fairly be read to charge but one crime in each count").

In the present case, count one of the indictment alleges that defendant participated in a single conspiracy with three objects:

(1) to commit honest services health care fraud and health care fraud in violation of Title 18, United States Code, Sections 1346 and 1347 (e.g., to deprive Mentor/FDA of the right to defendant's honest services as physician-investigator with Implant Study);

(2) to cause the introduction of an adulterated device in interstate commerce in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2)(e.g., smuggle and implant unapproved and unauthorized silicone gel implants); and

(3) to receive in interstate commerce, and deliver for pay or profit, a device that was adulterated in violation of Title 21, United States Code, Sections 331(c) and 333(a)(2)(e.g., implant for money unapproved and unauthorized silicone gel implants).

The conspiracy count is not duplicitous merely "because it charges a conspiracy to commit more than one offense." United States v. Bauer, 84 F.3d 1549, 1560 (9th Cir. 1995); United States v. Begay, 42 F.3d 486, 501 ("An indictment charging conspiracy to commit more than one offense is not duplicitous"). This is because "[t]he conspiracy is the crime, and that is one [crime], however diverse its objects." Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99 (1942)(conspiracy to violate

various internal revenue statutes constituted single offense); Begay, 42 F.3d at 501 (conspiracy to commit assault, kidnaping, and burglary not duplicitous); United States v. Diaz Rosendo, 357 F.2d 124, 130 (conspiracy to smuggle marijuana into the United States and to conceal and transport marijuana not duplicitous).

In fact, "[u]nder existing law, the government must charge a single conspiracy which contemplates the violation of two different statutes in the same count; otherwise the indictment would be multiplicitous." United States v. Licciardi, 30 F.3d 1127, 1131 (9th Cir. 1994)(conspiracy to defraud the United States and to commit mail fraud not duplicitous). Hence, charging this matter as four separate conspiracies, as defendant advocates, would have been improper. Id.

Defendant contends that his concealment of facts from Mentor and the FDA, and the falsification and destruction of medical records in connection with the Implant Study audit, was a separate "cover-up" conspiracy. Mtn. at 11-12. This contention lacks merit because the indictment specifically alleges in the means section:

> "Defendant and his co-conspirators falsified and destroyed patient's medical records in connection with the Mentor [Implant] Study and otherwise concealed his unlawful conduct from Mentor and the FDA."

Indictment, ¶ 14(e).

Thus, defendant's fraudulent acts and concealment, in February 2001, with respect to the Mentor Implant Study audit were part and parcel of the conspiracy to defraud Mentor and the FDA of their right to defendant's honest services as a physician-

investigator under the Implant Study. United States v. Finlay, 55 F.3d 1410, 1415-16 (9th Cir. 1995)(conspiracy, as charged, embraced both illegal shipments, and later false documentation to cover them up); Grace, 429 F.Supp.2d at 1224-25 (indictment can "fairly be read" to charge a single conspiracy offense to violate Clean Air Act, defraud the government, and avoid liability through concealment). This is especially so here because defendant's acts of concealment occurred with respect to a Mentor audit, not a law enforcement or grand jury investigation, which might have triggered a separate cover-up conspiracy. See, e.g., Gordon, 844 F.2d at 1400 (conspiracy indictment charged two conspiracies one to defraud the government, and another to obstruct a grand jury investigation). Defendant's duplicity claims therefore are without merit.

1. A Special Verdict Form Will Cure Any Purported Duplicity Problems

Even if defendant could establish a duplicity problem, a special verdict would remedy any such problem: "instructing the jury that all members are required to agree as to which of the distinct charges the defendant has actually committed." Grace, 429 F.Supp. at 1219; United States v. Robinson, 651 F.2d 1188, 1194 (6th Cir. 1981)("a duplicitous ... indictment is remediable by the court's instruction to the jury particularizing the distinct offense charged in each count in the indictment"). Thus, dismissal of count one is not warranted.

B. The Conspiracy Charge Is Not Time-Barred

In the Motion, defendant claims that the conspiracy count is time-barred because, under defendant's interpretation of what he

believes the government's evidence might be at trial, the 'four schemes' took place before February 8, 2007. Mtn. at 14-15. This argument is without merit.

The indictment was filed on February 8, 2001. The indictment alleges that the conspiracy ended in or about October 2001, and alleges specific overt acts on or about February 14 and 26, 2001. Indictment, ¶¶ 13, 15(l) through 15(o). Thus, on the face of the indictment, the conspiracy charge is not time-barred. Finlay, 55 F.3d at 1415 (because last overt act occurred before five year limitations period, conspiracy charge is not time-barred.

Moreover, there can be no doubt that defendant's overt acts of fraud, and concealment in connection with the Mentor's Implant Study audit "were part of the main conspiracy" to commit honest services health care fraud. Finlay, 55 F.3d at 1415. The Finlay case is directly on point.

In Finlay, the court found that the subject "conspiracy, as charged, embraced both illegal shipments, and the [later occurring] illegal documentation and false documentation" to hide the illegal shipments. Id. at 1415. In the present case, the charged conspiracy squarely embraces defendant's destruction of medical records, falsification of medical records, and concealment of his illegal activity during Mentor's audit of defendant's compliance with the Implant Study. Id.

As such, because the conspiracy, including defendant's false submissions to Mentor in connection with the Implant Study audit, continued through at least February 14 and 26, 2001, the conspiracy count is not time-barred. Id. at 1415-16; Flintkote

v. United States, 7 F.3d 870, 873 (9th Cir. 1993)(continuing conspiracy not time-barred because five-year statutory period did not commence until last overt act). Moreover, "[a]s long as some part of the conspiracy continued into the five-year period preceding the indictment, the statute of limitations [does] not insulate [defendant] from criminal liability for actions taken more than 5 years prior to the time of indictment." Id. This aspect of the Motion therefore also is without merit.

IV.

THE INDICTMENT IS NOT DEFECTIVE FOR FAILURE TO ALLEGE PAYMENT FROM A HEALTH CARE BENEFIT PROGRAM

In the Motion, defendant contends that the conspiracy and the false statement counts are defective because defendant's crimes did not involve payment from a health care benefit program. Mtn. at 15-16. These claims must fail because the Implant Study is a health care benefit program within the meaning of 18 U.S.C. § 24(b) ("Section 24(b)") and no "payment" from the program itself is required under the statute.

Section 24(b) defines the term "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). The health care fraud statutes are interpreted broadly because Congress intended "to include within its scope a wide range of conduct so that all forms of health care fraud would be proscribed ...." United States v. Lucien, 347 F.3d 45, 51 (2nd

Cir. 2003); United States v. Whited, 311 F.3d 259, 264 (3rd Cir. 2002)("plain language of [heath care fraud] statute ... shows [an intended] extensive attack on frauds against the health care industry").

Thus, in Lucien, the court held that New York's No-Fault Auto Insurance Plan was a "health care benefit program" within the meaning of Section 24(b) because "quite simply," under the statute, it is a "public or private plan or contract ... under which any medical benefit, item, or service is provided to any individual". Lucien, 347 F.3d at 52. In finding a "health care benefit program," the court relied simply upon the fact that defendants received a "medical benefit" as a result of the vehicle owners no fault insurance "contracts." Id. There was no requirement, as the defense contends, that defendant receive "payment" from the plan. Id.; see also 18 U.S.C. § 24(b).

The same is true in the present case. The Implant Study is a "health care benefit program" because it constitutes a plan and contract (among FDA, Mentor, and physician-investigators), affecting commerce (national in scope), under which a medical item (silicone gel breast implants) and medical service (breast augmentation surgery) are "provided to ... individual" patients. 18 U.S.C. § 24(b); Lucien, 347 F.3d at 52. Nothing more is required under the statute.[2] Id.

[2] Even if it were, the patients' payments to defendant for the implants and surgery would be payments "made under the plan or contract" since the implants and surgery would be illegal outside the Implant Study. 18 U.S.C. § 24(b).

Thus, defendant's false statements and concealment from Mentor in connection with the Implant Study audit were "in [a] matter involving a health care benefit program" within the meaning of 18 U.S.C. § 1035 (false statements). Likewise, defendant's false statements and concealment in furtherance of the charged conspiracy were made to defraud a "health care benefit program," namely the Implant Study sponsored by Mentor and authorized by the FDA, of the right to defendant's honest services as a physician-investigator within the meaning of 18 U.S.C. §§ 1347 (health care fraud) and 1346 (honest services). The Motion therefore is without merit.

V.

CONCLUSION

In light of the forgoing, the government requests that the Motion be denied.

GEORGE S. CARDONA
United States Attorney

WAYNE R. GROSS
Assistant United States Attorney
Chief, Southern Division

May 21, 2007
DATE

Kenneth B. Julian
KENNETH B. JULIAN
Assistant United States Attorney