

1 GEORGE S. CARDONA  
 United States Attorney  
 2 WAYNE R. GROSS  
 Assistant United States Attorney  
 3 Chief, Southern Division  
 KENNETH B. JULIAN  
 4 Assistant United States Attorney  
 (Cal. State Bar # 149840)  
 5 411 W. Fourth Street  
 Santa Ana, California 92701  
 6 Telephone: (714) 338-3537  
 Facsimile: (714) 338-3708  
 7 kenneth.julian@usdoj.gov

8 Attorneys for Plaintiff  
 UNITED STATES OF AMERICA

9 UNITED STATES DISTRICT COURT

10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA, ) NO. SA CR 06-022-DOC  
 12 )  
 Plaintiff, ) GOVERNMENT'S OPPOSITION TO  
 13 ) DEFENDANT FREDERICK H. CORBIN'S  
 v. ) MOTION TO DISMISS INDICTMENT  
 14 )  
 FREDERICK H. CORBIN, ) HEARING: JUNE 4, 2007  
 15 ) TIME: 1:30 P.M.  
 ) COURTROOM: 9D  
 16 Defendant. )  
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I.

**INTRODUCTION**

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

13 As discussed below, the Motion lacks merit because the  
14 conspiracy count alleges a single crime, namely: a multi-object  
15 conspiracy, and because the last overt act occurred before the  
16 expiration of the 5-year statute of limitations. Moreover, the  
17 conspiracy and false statement counts are sufficient because they  
18 properly allege that defendant's criminal conduct occurred in a  
19 matter involving a "health care benefit program" (i.e., a breast  
20 implant study) and in connection with the delivery of health care  
21 items (silicone gel breast implants) and services (breast  
22 augmentation surgery) within the meaning of 18 U.S.C. §§ 24(b),  
23 1035, and 1347. The Motion therefore should be denied.

1 II.

2 STATEMENT OF FACTS

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

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

18 In February 2001, Mentor audited defendant's medical records  
19 to determine his compliance with requirements of the Implant  
20 Study, including defendant's duty to create, keep, and maintain  
21 medical records as a physician-investigator with the Implant  
22 Study. In connection with Mentor's February 2001 audit,  
23 defendant caused medical records to be destroyed and created  
24 false medical records to conceal his ongoing illegal conduct.  
25 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."<sup>1</sup> 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

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<sup>1</sup> 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.

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

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

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

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

16 (3) to receive in interstate commerce, and deliver for pay  
17 or profit, a device that was adulterated in violation  
18 of Title 21, United States Code, Sections 331(c) and  
19 333(a) (2) (e.g., implant for money unapproved and  
20 unauthorized silicone gel implants).

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

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

6 In fact, "[u]nder existing law, the government must charge a  
7 single conspiracy which contemplates the violation of two  
8 different statutes in the same count; otherwise the indictment  
9 would be multiplicitous." United States v. Licciardi, 30 F.3d  
10 1127, 1131 (9th Cir. 1994) (conspiracy to defraud the United  
11 States and to commit mail fraud not duplicitous). Hence,  
12 charging this matter as four separate conspiracies, as defendant  
13 advocates, would have been improper. Id.

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

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

24 Indictment, ¶ 14(e).

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

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

15  
16 **1. A Special Verdict Form Will Cure Any Purported  
Duplicity Problems**

17 Even if defendant could establish a duplicity problem, a  
18 special verdict would remedy any such problem: "instructing the  
19 jury that all members are required to agree as to which of the  
20 distinct charges the defendant has actually committed." Grace,  
21 429 F.Supp. at 1219; United States v. Robinson, 651 F.2d 1188,  
22 1194 (6th Cir. 1981) ("a duplicitous ... indictment is remediable  
23 by the court's instruction to the jury particularizing the  
24 distinct offense charged in each count in the indictment").  
25 Thus, dismissal of count one is not warranted.

26 **B. The Conspiracy Charge Is Not Time-Barred**

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

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

4 The indictment was filed on February 8, 2001. The  
5 indictment alleges that the conspiracy ended in or about October  
6 2001, and alleges specific overt acts on or about February 14 and  
7 26, 2001. Indictment, ¶¶ 13, 15(1) through 15(o). Thus, on the  
8 face of the indictment, the conspiracy charge is not time-barred.  
9 Finlay, 55 F.3d at 1415 (because last overt act occurred before  
10 five year limitations period, conspiracy charge is not time-  
11 barred.

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

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

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

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

9 **IV.**

10 **THE INDICTMENT IS NOT DEFECTIVE FOR FAILURE**

11 **TO ALLEGE PAYMENT FROM A HEALTH CARE BENEFIT PROGRAM**

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

19 Section 24(b) defines the term "health care benefit program"  
20 as "any public or private plan or contract, affecting commerce,  
21 under which any medical benefit, item, or service is provided to  
22 any individual, and includes any individual or entity who is  
23 providing a medical benefit, item, or service for which payment  
24 may be made under the plan or contract." 18 U.S.C. § 24(b). The  
25 health care fraud statutes are interpreted broadly because  
26 Congress intended "to include within its scope a wide range of  
27 conduct so that all forms of health care fraud would be  
28 proscribed ...." United States v. Lucien, 347 F.3d 45, 51 (2nd

1 Cir. 2003); United States v. Whited, 311 F.3d 259, 264 (3rd Cir.  
2 2002) ("plain language of [health care fraud] statute ... shows [an  
3 intended] extensive attack on frauds against the health care  
4 industry").

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

16 The same is true in the present case. The Implant Study is  
17 a "health care benefit program" because it constitutes a plan and  
18 contract (among FDA, Mentor, and physician-investigators),  
19 affecting commerce (national in scope), under which a medical  
20 item (silicone gel breast implants) and medical service (breast  
21 augmentation surgery) are "provided to ... individual" patients.  
22 18 U.S.C. § 24(b); Lucien, 347 F.3d at 52. Nothing more is  
23 required under the statute.<sup>2</sup> Id.

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

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

12 **V.**

13 **CONCLUSION**

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

17 GEORGE S. CARDONA  
 18 United States Attorney

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

21 May 21, 2007

*Kenneth B. Julian*

22 DATE \_\_\_\_\_

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 23 KENNETH B. JULIAN  
 Assistant United States Attorney