

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 07-10234-MLB
)	
STEPHEN J. SCHNEIDER,)	
and)	
LINDA K. SCHNEIDER, a/k/a)	
LINDA K. ATTERBURY,)	
d/b/a SCHNEIDER MEDICAL CLINIC,)	
)	
Defendants.)	
_____)	

**GOVERNMENT’S CONSOLIDATED RESPONSE IN OPPOSITION TO
DEFENDANTS’ JOINT MOTIONS TO DISMISS**

The United States of America, by and through Assistant United States Attorney Tanya J. Treadway, hereby submits its Consolidated Response in Opposition to Defendants’ Joint Motions to Dismiss (Doc. 98, 105). Because the defendants’ motions raise only factual issues to be resolved by the jury, the Court should deny their motions to dismiss the indictment on constitutional and sufficiency grounds.

INTRODUCTION

The defendants' motions to dismiss are repetitious of each other, of their motion for a bill of particulars, of their motion to strike surplusage, of their motion for abstention,¹ and are replete with irrelevant and extraneous information² and grandiose rhetoric lacking in substance. Also lacking is any citation to authority actually on point and supportive of the defendants' claims. Conversely, defendants do not cite and attempt to distinguish case law directly on point and contrary to their positions.

The government has had to tease out from this morass the thin threads of defendants' arguments in order to fashion a response. The government will not respond to every irrelevancy and errant allegation, but will instead respond to the defendants' three primary contentions: (1) that 21 U.S.C. § 841 and 18 U.S.C. § 1347 are unconstitutional on their face; (2) that these same statutes are unconstitutionally void for vagueness; and (3) that the indictment does not sufficiently plead violations of these two statutes.

DISCUSSION

I. The defendants' claim that the controlled substances act and the health care fraud statute are facially unconstitutional is without merit.

Facial challenges to statutes are proper in two circumstances: (1) when the statute threatens to chill constitutionally protected conduct, especially conduct protected

¹ The defendants' motions are also largely reminiscent of their Complaint in Pain Relief Network vs. State of Kansas, 08-1048-WEB, which has been dismissed.

² The government is perplexed by defendants' duplicate submission of Dr. Estivo's 100+-page deposition, which has no bearing on any issue in their motions to dismiss. Similarly, the lengthy diatribes about the KBHA, Mr. Wall, and the DEA are completely irrelevant and serve no purpose.

by the First Amendment; and (2) in a declaratory judgment action requesting pre-enforcement review of a statute as vague in all of its applications.³ Because the defendants have been charged, the second circumstance is inapplicable.⁴

The defendants assert that 21 U.S.C. § 841 and 18 U.S.C. § 1347 are facially unconstitutional because they chill **patients'** First Amendment rights and Fourteenth Amendment due process rights. But, the defendants utterly fail to offer any argument in support of their assertion, and also fail to indicate how they have standing to raise such a challenge on behalf of unidentified patients. Therefore, the government has no understanding of the basis of this facial challenge to the statutes. The government cannot intelligently respond except to state that the numerous reported cases involving the prosecution and conviction of physicians under both 21 U.S.C. 841(a)(1) and 18 U.S.C. § 1347 would indicate that defendants' facial challenge is frivolous and does not warrant the Court's consideration.

II. The statutes are not unconstitutionally vague as applied to the defendants.

The defendants broadly claim that both the controlled substances act and the health care fraud statute are void for vagueness as applied to them because the statutes fail to provide adequate notice of what conduct is prohibited and therefore allow for arbitrary enforcement. As the Tenth Circuit found in Gaudreau, the defendants' broad arguments are "foreclosed by decisions of the Supreme Court."⁵

³ See United States v. Gaudreau, 860 F.2d 357, 360-61 (10th Cir. 1989).

⁴ See id. at 361.

⁵ See id. at 362.

The Court has consistently held statutes sufficiently certain when they employ words or phrases with "a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ[.]"⁶

"The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."⁷ The due process requirement of a "fair warning," however, does not demand "an explicit or personalized warning," nor does it excuse "professed ignorance of the law", nor does it encourage "deliberate blindness to the obvious consequences of one's actions."⁸ Thus, when a defendant engages in patently unlawful conduct, the due process clause does not require that a "statute demarcate the limits of his offense with algebraic exactitude."⁹

In Village of Hoffman Estates v. The Flipside,¹⁰ the Supreme Court outlined several "factors for a court to consider in determining whether a statute is impermissibly vague, including whether the statute (1) involves only economic regulation, (2) provides only civil, rather than criminal, penalties, (3) contains a scienter requirement mitigating

⁶ Id. (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)).

⁷ Id. at 359 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)); see also, United States v. Agnew, 931 F.2d 1397, 1403 (10th Cir. 1991); accord, United States v. Daniel, 813 F.2d 661, 663 (5th Cir. 1987).

⁸ United States v. Arcadipane, 41 F.3d 1, 5 (1st Cir. 1994).

⁹ United States v. Abod, 770 F.2d 1293, 1297 (5th Cir. 1985).

¹⁰ 455 U.S. 489, 498-99 (1982).

vagueness, and (4) threatens any constitutionally protected rights.”¹¹ The controlled substances act and the health care fraud statute involve economic regulation, contain a scienter requirement, and threaten no constitutionally protected rights.

Under a reasonable construction of the controlled substances act and the health care fraud statute, the conduct alleged in the Indictment is prohibited. The Supreme Court has recognized that a scienter requirement assists in avoiding any vagueness problem.¹² When a statute includes specific intent as an element, it is rare that such a statute could be considered unconstitutionally vague.¹³

The requirement in both the drug distribution and health care fraud statutes that the government must establish a defendant’s specific intent not only provides the necessary “notice” but also provides “the necessary specificity for limited prosecutions.”¹⁴ As the Tenth Circuit explained: “Specific intent is an objectively verifiable requirement with a long history in American jurisprudence” which does not foster arbitrary enforcement.¹⁵ “One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.”¹⁶ Thus, unless the defendants can demonstrate the statutes are so vague as to not capture their alleged conduct, the

¹¹ United States v. Starks, 157 F.3d 833, 839 (11th Cir. 1998).

¹² Id.

¹³ See Screws v. United States, 325 U.S. 91, 102 (1945); see also, Ward v. Utah, 398 F.3d 1239, 1252 (10th Cir. 2005) (holding a state statute containing a specific intent requirement to provide fair notice).

¹⁴ United States v. Gray, 96 F.3d 769, 776 (5th Cir. 1996).

¹⁵ Ward, 398 F.3d at 1253.

¹⁶ Parker v. Levy, 417 U.S. 733, 756 (1974).

defendants' vagueness challenge must be rejected. The defendants' argument falls far short of such a demonstration.

In reviewing a vagueness challenge that does not implicate basic First Amendment freedoms, the Court must examine only the defendants' conduct to determine if, under a reasonable construction of the statute, such conduct is prohibited.¹⁷ The Supreme Court in Village of Hoffman Estates clearly stated the rationale for not permitting hypothetical and speculative vagueness challenges to laws that do not implicate basic First Amendment freedoms:

to sustain such a challenge, **the complainant must prove that the enactment is vague** "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather **in the sense that no standard of conduct is specified at all.**"¹⁸

Because neither the controlled substances act nor the health care fraud statute inhibits the exercise of constitutionally protected rights, the Court should apply the above-cited standard in determining whether the conduct in question is prohibited. The defendants have fallen far short of proving that the statutes are vague in the sense that they completely fail to specify a standard of conduct, especially considering that the defendants fail to cite a single case so holding. Consequently, neither statute raises concerns of either fair notice or adequate enforcement standards.

¹⁷ See Village of Hoffman Estates, 455 U.S. at 495.

¹⁸ 455 U.S. at 495 n.7 (citations omitted) (emphasis added).

A. 21 U.S.C. § 841

In support of their claim that 21 U.S.C. § 841 is void for vagueness, the defendants rely heavily on Gonzales v. Oregon,¹⁹ a case which has little, if any significance to the case at bar.²⁰ In Gonzales, the Supreme Court was deciding a narrow issue – whether the Controlled Substances Act (“CSA”) authorized the Attorney General, through an Interpretive Rule, to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicides permitted by an Oregon state statute.²¹ The Supreme Court held that the Interpretive Rule was not a valid exercise of the Attorney General’s authority under the CSA.²²

But, the Court did not hold that the CSA was deficient in any respect, and did not even implicitly overrule the long line of cases allowing a physician to be prosecuted for violating the CSA. Indeed, the Court explicitly stated:

The statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood.²³

* * *

Viewed in its context, the prescription requirement is better understood as a provision that ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a

¹⁹ 546 U.S. 243 (2006).

²⁰ See United States v. Prejean, 429 F. Supp. 2d 782, 801-06 (E. D. La. 2006).

²¹ See Gonzales, 546 U.S. at 248-49.

²² See id. at 258, 268, 274-75.

²³ Id. at 269-70.

corollary, the provision also bars doctors from peddling to patients who crave the drugs for those prohibited uses.²⁴

Therefore, Gonzales confirmed that the CSA itself defines the parameters of a prosecution of a physician. For example, the Court acknowledged that the CSA defines a “valid prescription” as one “issued for a legitimate medical purpose.”²⁵ The Court also acknowledged that physicians are considered to be acting as practitioners under the statute if they dispense controlled substances “in the course of professional practice.”²⁶ Justice Scalia, in his dissent, rightfully combined these two acknowledgments and echoed the holding of United States v. Moore:

Under our reasoning in Moore, writing prescriptions that are illegitimate under § 829 is certainly not “in the [usual] course of professional practice” under § 802(21) and thus not “authorized by this subchapter” under § 841(a). . . . A doctor who does this may thus be prosecuted under § 841(a), and so it follows that such conduct “violates the Controlled Substances Act[.]”²⁷

Gonzales did not transform the CSA into an unconstitutionally vague statute, and cannot be read to conclude that “enforcement can no longer proceed on a case-by-case basis.”²⁸ Indeed, “[a] close reading of Gonzales reveals no explicit changes to the

²⁴ Id. at 274 (citing United States v. Moore, 423 U.S. 122, 135, 143 (1975)).

²⁵ See id. at 257 (quoting 21 U.S.C. § 830(b)(3)(A)(ii)); see also id. at 277 (“It is beyond dispute, then, that a ‘prescription’ under § 829 must issue for a ‘legitimate medical purpose.’”) (Justice Scalia, dissenting).

²⁶ See id. (quoting 21 U.S.C. § 802(21)).

²⁷ See id. at 285.

²⁸ Doc. 98 at p. 14, n.2. The government is not really sure what the defendants mean by this statement. How can enforcement of the CSA proceed other than on a case-by-case basis?

CSA's section 841 standard. Instead, . . . the Supreme Court reaffirms . . . United States v. Moore . . . , which discusses the scope of CSA violations and the corresponding situations in which it will be violated."²⁹

Essentially, the defendants complain that what constitutes legitimate medical practice and a legitimate medical purpose must be "determined upon consideration of evidence and attending circumstances."³⁰ But, federal criminal statutes do not need to delineate the precise circumstances that constitute a violation, for to do so would be an impossible task.³¹ A statute "can be unambiguous without addressing every interpretive theory offered by a party," so long as "the statute encompasses the conduct at issue."³²

"The legislative history [of the CSA] indicates that Congress was concerned with the nature of the drug transaction, rather than with the status of the defendant."³³ Thus,

²⁹ Prejean, 429 F. Supp. 2d at 803.

³⁰ United States v. Collier, 478 F.2d 268, 272 (5th Cir. 1973).

³¹ See id. (overruling similar "void for vagueness" challenge to CSA); see also, Prejean, 429 F. Supp. 2d at 801, 805 (overruling "void for vagueness" challenge to CSA and stating that the Gonzales Court "indicated that there was no uniform national standard for 'professional practice' or 'legitimate medical purpose' and that Congress did not intend to create one.").

³² Salinas v. United States, 522 U.S. 52, 60 (1997); see also, Moore, 423 U.S. at 145 (The canon in favor of strict construction of criminal statutes is not an inexorable command to override common sense and evident statutory purpose, nor does it demand that a statute be given the narrowest meaning; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.) (internal quotations and citation omitted).

³³ Moore, 423 U.S. at 134. See also, United States v. Fellman, 549 F.2d 181, 182 (10th Cir. 1977) ("The prohibitions and penalties of § 841 are plainly intended to reach any person who deals in controlled substances without authorization.").

the issue of whether a medical professional's conduct "exceeds the bounds of professional medical practice, rendering him criminally liable under § 841, is one for determination by a jury. . . . As such, this is an element of the offense which the Government must prove to the jury, and is not properly the subject of a motion to dismiss."³⁴

Similarly, a jury will need to determine the defendants' specific intent, which the defendants agree is an element the government must prove. Because the CSA requires proof of specific intent, the defendants' void-for-vagueness challenge simply cannot be sustained. For the same reason, their reliance on Colautti v. Franklin³⁵ is misplaced and results in a strained analysis. The Colautti court found a state abortion statute vague, at least in part, because of the absence of a scienter requirement.³⁶

The defendants' complaints about the CSA can all be categorized as factual disputes with the government's allegations, or arguments about what the government must prove at trial. While the defendants may challenge the government's evidence at trial, and while the elements of the offense will undoubtedly be the subject of arguments

³⁴ United States v. Valdivieso Rodriguez, 532 F. Supp. 2d 316, 322 (D. P. R. 2007) (overruling defendant's claim that the drug distribution charges against them should be dismissed because their conduct did not fall outside scope of professional practice and prescriptions were for a legitimate medical purpose); accord, Collier, 478 F.2d at 272; see also, Moore, 423 U.S. at 142 (evidence sufficient for jury to find conduct exceeded bounds of professional practice); United States v. Rosen, 582 F.2d 1032, 1035 (5th Cir. 1978) (what constitutes bona fide medical practice must be determined upon consideration of evidence and circumstances); United States v. Jobe, 487 F.2d 268, 269 (10th Cir. 1973) ("The issue of whether the prescriptions were given in the course of professional practice and for a legitimate purpose was settled by the jury verdict.").

³⁵ 439 U.S. 379 (1979).

³⁶ See id. at 390.

regarding how the jury should be instructed, such challenges and arguments simply do not support a “void-for-vagueness” challenge.

B. 18 U.S.C. § 1347

The defendants attempt to make the health care fraud statute vague by claiming that the Indictment incorporates into the statute the CPT codes, Kansas law, and health insurance regulations and policies. But, the indictment does not incorporate codes, state law, or insurance regulations and policies into the health care fraud statute, and the statute itself makes no such incorporation. Instead, the codes, regulations, and policies are merely the benchmark against which the jury will determine if the defendants’ claims were false and fraudulent.

The health care fraud statute makes criminal all fraudulent schemes against a health care benefit program. The indictment’s specificity about how the defendants committed their crimes cannot be used to transform the straightforward health care fraud statute into a constitutionally deficient and vague statute. The health care fraud statute, a general anti-fraud statute like its predecessor bank fraud, wire fraud, and mail fraud statutes, is not unconstitutionally vague. Indeed, no federal court has held the statute to be unconstitutionally vague, a fact notably missing from the defendants’ motion.

A person of ordinary intelligence, given a reasonable construction of the health care fraud statute, would understand the conduct alleged in the Indictment was prohibited by the statute. Indeed, defendants do not argue that they did not understand what it means to devise and execute a scheme to defraud and therefore could not have intentionally violated the statute. Instead, the defendants challenge the government’s

evidence – that the government’s allegations and evidence will not prove that they submitted false claims, or that they did so knowingly and intentionally. Such a factual challenge, however, cannot serve as the basis for a successful vagueness challenge.

Defendants’ alleged conduct goes to the heart of the health care fraud statute, *i.e.*, devising and executing a scheme to defraud health care benefit programs, which scheme included submitting false and fraudulent claims. Such conduct has been illegal since the enactment of the mail fraud statute, and well before. Consequently, courts have consistently sustained similar fraud statutes against void-for-vagueness challenges.³⁷

The defendants attempt to create vagueness in the straightforward health care fraud statute by grafting onto it the CPT codes, state law, and the insurance industry’s policies and regulations. But such attempts at creating vagueness in a federal statute where there is none have met with rejection.

In United States v. Augustine Medical, Inc., the defendants were charged with conspiracy, health care fraud, and mail fraud.³⁸ The defendants claimed that the Medicare requirements created an unconstitutionally vague legal scheme.³⁹ This Court should reach the same conclusion as did the Minnesota District Court –

³⁷ See, *e.g.*, United States v. Daniels, 247 F.3d 598, 600 (5th Cir. 2001) (bankruptcy fraud statute); United States v. Feinberg, 535 F.2d 1004, 1010 (7th Cir. 1976) (mail fraud statute); United States v. Reliant Energy Services, Inc., 420 F. Supp. 2d 1043, 1061 (N.D. Cal. 2006) (commodity manipulation statute).

³⁸ 2004 WL 256772 *2 (D. Minn. Feb. 10, 2004).

³⁹ See *id.* at *4.

It is for the jury to determine whether Defendants . . . made false statements to effect such billing with the intent to profit financially. This is the conduct alleged in the Indictment and which is made criminal by fraud statutes.

Defendants' . . . arguments may prove to provide a valid defense before a jury, but at this stage "[t]he government is entitled to marshal and present evidence at trial, and to have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29." [United States v. Ferro, 252 F.3d [964,] 968 [(8th Cir. 2001)].

In its most basic terms, the Indictment claims that Defendants conspired to commit fraud and in fact defrauded the government under circumstances where they knew that their actions were illegal.

Dismissal under the void-for-vagueness doctrine is not warranted in this case. While Medicare regulations are admittedly complex, the statutes Defendants are charged with violating are relatively straightforward descriptions of fraud and conspiracy to commit fraud, and thus provide Defendants with sufficient notice as required by the Fifth Amendment. See 18 U.S.C. §§ 371, 1341, 1347. These statutes do not specify the myriad of fraud schemes one might devise. However, a statute "can be unambiguous without addressing every interpretive theory offered by a party," so long as "the statute encompasses the conduct at issue." Salinas v. United States, 522 U.S. 52, 60 (1997). Further, the requirement that a statute provide notice of proscribed behavior "cannot be used as a shield by one who is already bent on serious wrongdoing." United States v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998)(citations omitted).⁴⁰

Similarly, in United States v. Kirkham, the Fifth Circuit rejected a "vagueness as applied" challenge to the federal health care fraud statute.⁴¹ The Kirkham case, like the case at bar, involved submitting false claims to health care benefit programs, which

⁴⁰ Id. at *4-5.

⁴¹ 129 Fed. Appx. 61, 71 (5th Cir. 2005).

claims were false in numerous respects.⁴² The Kirkham indictment set forth the scheme in detail, and listed particular transactions in execution of the scheme.⁴³ In answer to the defendant's vagueness challenge, the Fifth Circuit concluded "neither the statute nor the indictment left defendants guessing at what conduct the government alleged was fraudulent, whom they defrauded, or how."⁴⁴ The Court should reach the same conclusion in this case.

Finally, in United States v. Franklin-EI, this Court refused an almost identical challenge to the health care fraud statute.⁴⁵ Judge Brown found that the health care fraud statute was not void for vagueness, finding as follows:

The court finds that the statute, which requires a showing that the defendants acted with intent to defraud, provides fair notice that the conduct alleged in the Indictment was prohibited. The court further finds that the requirement of specific intent under Section 1347 eliminates any claim that the statute encourages arbitrary or discriminatory enforcement. . . . Accordingly, the court finds that the motion to dismiss the Indictment for vagueness should be denied.⁴⁶

In the present case, it was each defendant's responsibility "to insure that [his/her] actions [did] not fall outside the legal limits."⁴⁷ The defendants' failure to do so was not

⁴² See id. at 65.

⁴³ See id.

⁴⁴ See id. at 71.

⁴⁵ See Case No. 06-40011-MLB at Doc. 79.

⁴⁶ See id. at pp. 8-9. Because defense counsel Lawrence Williamson was appointed to represent Johnnie Franklin-EI on appeal, he should have been aware of this prior ruling. However, it is not mentioned in the defendants' motions.

⁴⁷ United States v. Powell, 423 U.S. 87, 92 (1975).

the result of a vague statute, but of greed. The health care fraud statute, like its predecessors, is not void for vagueness and clearly applies to the conduct with which defendants are charged – devising and executing a scheme to defraud various health care benefit programs. Accordingly, the defendants' vagueness challenge must fail.

III. The Indictment is more than sufficient.

The Federal Rules of Criminal Procedure provide that the indictment shall be a “plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). The indictment in this case goes far beyond statutory requirements, providing not only notice of the substantive criminal charges, but also background, context, and evidentiary detail.

The principles for determining the sufficiency of an indictment are well settled. The test for sufficiency is not whether the indictment could be more definite and certain.⁴⁸ An indictment is sufficient if it contains the elements of the offense and appraises the defendant of what he must be prepared to meet, and if it shows the defendant to what extent he may plead double jeopardy.⁴⁹ Moreover, an indictment need not state the details of evidence upon which the case will rest.⁵⁰

In the Tenth Circuit, it is usually enough for the indictment to track the statute when the statute adequately expresses all of the offense elements.⁵¹ An indictment is

⁴⁸ See United States v. Salazar, 720 F.2d 1482, 1487 (10th Cir.1983).

⁴⁹ See United States v. Radetsky, 535 F.2d 556, 562 (10th Cir.1976).

⁵⁰ See id. at 565.

⁵¹ See United States v. Dunn, 841 F.2d 1026, 1029 (10th Cir.1988).

held only to minimal constitutional standards.⁵² The sufficiency of an indictment is judged "by practical rather than technical considerations."⁵³

As this Court has previously noted:

[i]n ruling on a motion to dismiss the Indictment, the court treats the allegations as true and construes all facts in a light most favorable to the government. The court views the Indictment as a whole, with an emphasis on common sense, rather than technicalities. **A motion to dismiss an indictment will not be entertained if the dispute centers on factual questions, as such questions are within the province of the jury.**⁵⁴

A. The defendants raise factual and evidentiary disputes which cannot sustain a motion to dismiss for insufficiency.

Dismissing an indictment for insufficiency cannot be based upon arguments related to the insufficiency of the evidence to prove the charges in the indictment.⁵⁵ All of defendants arguments about "actus reus," "mens reas," and "medical judgments" do not go to the sufficiency of the allegations, but instead go to the evidence and proof at trial. As such, the defendants can make these arguments to the jury, but cannot use

⁵² See United States v. Edmonson, 962 F.2d 1535, 1541 (10th Cir.1992).

⁵³ Dunn, 841 F.2d at 1029.

⁵⁴ United States v. Burger, 773 F. Supp. 1430, 1433-34 (D. Kan.1991) (citations omitted) (emphasis added).

⁵⁵ United States v. DeLaurentis, 230 F.3d 659, 660-61 (3d Cir. 2000).

them as reasons to dismiss the Indictment on sufficiency grounds.⁵⁶ Similarly, the defendants' arguments about whether the government must prove (and whether the jury must be instructed regarding) subjective versus objective intent, has nothing to do with the sufficiency of the Indictment.⁵⁷

B. The failure to use the words “material” or “materiality” in the health care fraud counts does not render the Indictment insufficient.

The health care fraud statute, like its predecessor statutes (mail, wire, and bank fraud) does not contain the words “material” or “materiality.” Instead, materiality is implied as an element of a fraud offense because of the well-understood meaning of “fraud” as a legal term.⁵⁸ “As commonly understood among both lawyers and laypersons, ‘fraud’ refers to conduct or speech intended to mislead the putative victim into parting with money or property.”⁵⁹ Therefore, the materiality of the misleading conduct is at the heart of the word “fraud.”⁶⁰

⁵⁶ Despite the defendants' current factual arguments with the government's allegations and evidence, the case law reveals that allegations very similar to those in the pending Indictment, if proved, are sufficient to prove a defendant guilty of both drug distribution and health care fraud. See, e.g., generally, United States v. Merrill, 513 F.3d 1293 (11th Cir. 2008); United States v. Bek, 493 F.3d 790 (7th Cir. 2007); United States v. Rosen, 582 F.2d 1032, 1035-36 (5th Cir. 1978) (analyzing cases).

⁵⁷ The government does not agree that proof of subjective intent is required, given the express rejection of that argument in United States v. Celio, 230 F.3d Appx. 818, 825 (10th Cir. 2007); see also, Merrill, 513 F.3d at 1305-06 (rejecting subjective intent instruction). But, that argument should be left for another day.

⁵⁸ See United States v. Klein, 476 F.3d 111, 113 (2d Cir. 2007).

⁵⁹ Id. (citing United States v. Resendiz-Ponce, 127 S. Ct. 782, 784 (2007)).

⁶⁰ See id. at 114.

Accordingly, although the indictment does not contain the magic words “material” or “materiality,” the indictment is not fatally insufficient for failing to allege materiality in haec verba.⁶¹ This is especially true when the facts alleged in the indictment warrant the inference of materiality.⁶² The indictment repeatedly references the defendants’ submission of false and fraudulent claims, which clearly encompasses the notion of materiality.⁶³ Therefore, the Indictment is sufficient.⁶⁴

C. Counts 6 and 10-12, which concern the illegal prescriptions of Actiq, are not insufficient.

The defendants repeatedly misconstrue the Indictment by claiming that it alleges illegal drug distribution and health care fraud arising from the off-label prescription of Actiq, a powerful form of Fentanyl, an opiate. The fact that the defendants’ prescriptions were off-label is important information, as the experts will explain at trial, but it is not the basis of these charges. Neither the illegal drug distribution count (Count 6), nor the health care fraud counts (Counts 10-12) claim that the defendants’ crime consists of off-label prescribing. Instead, the crime alleged in Count 6 is the illegal distribution and dispensing of Actiq not for a legitimate medical purpose and beyond the bounds of professional medical practice.⁶⁵ Counts 10-12 allege that the defendants

⁶¹ See United States v. Scott, 2007 WL 274004 *1 (5th Cir. 2001) (quoting United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975)).

⁶² See United States v. McAuliffe, 490 F.3d 526, 531-32 (6th Cir. 2007); accord, United States v. Ladum, 141 F.3d 1328, 1334 (9th Cir. 1998).

⁶³ See United States v. Stewart, 151 F. Supp. 2d 572, 584 (E.D. Pa. 2001).

⁶⁴ Alternatively, this omission can easily be corrected by a Superseding Indictment.

⁶⁵ See Doc. 2 at ¶ 87.

committed health care fraud by causing health care benefit programs to pay for these illegal prescriptions.⁶⁶ The gravamen of these four counts is the illegal distribution, which gives rise to both the drug distribution and health care fraud violations, with the health care fraud violations being premised on the fact that illegal prescriptions are not medically necessary. As the Seventh Circuit stated in dismissing a sufficiency challenge that illegal prescriptions did not support health care fraud charges, the doctor “was aware that he prescribed unnecessary medication and that the health care benefit programs would ultimately pay some (or all) of the costs of those medically unnecessary drugs.”⁶⁷

D. Count 5

The defendants claim that Count 5 fails to give them adequate notice of what they must meet at trial, yet also admit that the allegations reflect the standard required to convict defendants under the CSA. Thus, the defendants admit that this Count is sufficient. What they apparently want is evidentiary detail, not required by Rule 7(c), and found in the discovery materials that have long been available to them.

E. Counts 7-9, 13-17

Counts 7, 8 and 9 are the “health care fraud resulting in death” charges that are companion charges to Counts 2, 3, and 4, the “illegal drug distribution resulting in death” charges related to the same former patients – Patricia, Eric, and Robin. Again, to make their argument that these Counts are insufficiently pled, the defendants must

⁶⁶ See id. at ¶ 119.

⁶⁷ Bek, 493 F.3d at 801.

disingenuously misconstrue the health care fraud charges. The health care fraud charges are based on an overall scheme, fully described in the Indictment. That scheme included, among other things, billing for services not provided (e.g., illegitimate and therefore worthless medical services, as well as undocumented or insufficiently documented services); billing for medically unnecessary services (e.g., illegal prescriptions); and upcoding services (e.g., billing for services at higher reimbursing codes, though lesser services provided, or billing for services of a physician when a physician's assistant rendered the services). Such allegations sufficiently plead a health care fraud violation.

Counts 13-17 are based on the review performed by five health care benefit programs, namely, a review of the claims submitted as compared to the defendants' documentation. These counts specify not only what is wrong with the claims, but also quantify the problems, which is more than is necessary for a sufficiently pled health care fraud charge.

Although the defendants claim that the health care fraud charges cannot be based on upcoding or inadequate documentation, health care fraud can, indeed, be based on such actions.⁶⁸ Upcoding services or providers is a common form of health

⁶⁸ See, e.g., United States v. Igbokwe, 518 F.3d 550 (8th Cir. 2008) (health care fraud case involving upcoding); United States v. Janati, 237 Fed. Appx. 843 (4th Cir. 2007) (same); United States v. Singh, 390 F.3d 168 (2d Cir. 2004) (same); United States v. Mitrione, 357 F.3d 712 (7th Cir. 2004) (same); United States v. DBB, Inc., 180 F.3d 1277 (11th Cir. 1999) (same); United States v. Cooper, 2006 WL 288704 (D. Kan. 2006) (same); Bek, 493 F.3d at 799 (exceedingly poor record-keeping as basis for both drug distribution and health care fraud charges); United States v. Franklin-EI, 06-40011-MLB (insufficient documentation alleged and proved as basis for health care fraud).

care fraud, as it results in the provider receiving more money from the health care benefit programs than he is entitled to receive. Similarly, submitting claims without sufficient documentation to evidence that the services were provided is a common form of health care fraud, because the claim is one for services not rendered.

CONCLUSION

The Court should deny defendants' motions to dismiss. The controlled substances act and the health care fraud statute are not unconstitutional on their face and are not void for vagueness. Furthermore, the Indictment is more than sufficient under Rule 7(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following individuals:

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