

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HARRIET COMITE, M.D.	:	NO. 06-70

**MEMORANDUM**

**Baylson, J.**

**November 17, 2006**

**I. Introduction**

The Defendant is charged with eighty-two separate counts under 18 U.S.C. § 1347 of knowingly and willingly executing a scheme to defraud health care benefit programs, and obtaining money and property owned by the health care benefit programs through false and fraudulent pretenses by submitting false and fraudulent claims for reimbursement. (Indictment ¶13). Several pretrial motions are pending. The Court held oral argument on these motions on October 5 and November 6, 2006. The statute in relevant part states:

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.

18 U.S.C. § 1347.

**A. Summary of Indictment - Background**

Defendant Harriet Comite, M.D., was the owner and President of a dermatology and cosmetic spa practice in Reading, Pennsylvania until May 2000, and then afterwards in

Wyomissing, Pennsylvania. Defendant Comite's practice was open Monday through Fridays, although she seldom came into the office on Mondays. The Defendant employed a number of non-physician medical personnel including certified registered nurse practitioners, registered nurses, licensed practical nurses, and medical assistants in addition to a number of administrative staff including receptionists, filing clerks, billers, and office managers. (Indictment ¶¶ 1-4).

As part of her billing procedures, Defendant Comite used a pre-printed form called a "superbill" which is standard practice in the industry. The superbill contains a list of procedure codes, each corresponding to a specific procedure. The superbill reflected the medical procedure rendered to a given patient. Defendant's staff would input the superbill information into a billing software which then generated an insurance claim form. The physician would certify that all information contained on the form was correct. The form would then be submitted to the insurance company or health care benefit program, and Defendant Comite would be reimbursed an amount based on the procedure code. (Indictment ¶¶ 6-8).

**B. Indictment - Manner and Means**

The indictment alleges as "manner and means" that the scheme was based on three separate grounds as set forth in paragraphs 14 through 54 of the indictment.

**1. Upcoding**

"Upcoding" is a term used to describe the fraudulent practice of billing a health care benefit program for a procedure more costly than the one actually rendered by the physician. (Indictment ¶¶ 17 and 24). The indictment asserts that defendant regularly billed procedures known as shaves and scissor-snips as excisions, for which she received more compensation from health care benefit programs than that to which she was entitled. From approximately January

1997 to February 2004, defendant Comite billed health care benefit programs approximately \$1,153,441.78 for excisions, the vast majority of which were fraudulently upcoded. (Indictment ¶¶ 22-27).<sup>1</sup>

## **2. Out of Office Billings**

The rules of the health care benefit programs require “direct personal supervision” in the office setting, meaning the provider is in the immediate vicinity while a procedure is taking place, so that the provider can personally assist in the procedure or assume primary care of the patient if necessary. The indictment asserts that defendant Comite knew of these rules and was aware that they were not being met, but caused numerous false and fraudulent claims to be submitted to health care benefit programs representing that she was directly present during these procedures, when she in fact was out of the office. (Indictment ¶¶ 32-36).<sup>2</sup>

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<sup>1</sup> Defendant allegedly regularly removed “skin lesions,” or abnormal areas of skin from her patients, and forwarded those lesions to be analyzed by a pathology lab which would then report back to defendant. Defendant used three different methods in removing these lesions, a “shave,” a “scissor-snip” and an “excision.” A shave is when the doctor uses a scalpel, places it horizontally to the patient’s skin and then slices off the lesion. The scalpel does not penetrate into the fat layer below the skin. A scissor-snip is a very similar procedure using scissors rather than a scalpel, and also not penetrating into the fat layer below the patient’s skin. An excision however is performed with the scalpel at a perpendicular angle to the patient’s skin, and the dermatologist has to cut into the fat layer below the skin’s surface to remove the lesion. This is a much more time-consuming procedure, and involves a greater level of surgical skill than a shave or scissor-snip. Each of these procedures has a different code on the superbill for billing purposes, and dermatologists are taught the difference between these procedures. Insurance companies reimburse at different rates for each of the described procedures. (Indictment ¶¶ 18-22).

<sup>2</sup> Defendant Comite was out of the office on numerous occasions when despite her absence, licensed and unlicensed employees of her practice saw patients for wart treatments, keloid and cyst injections, acne visits and office visits. These services were billed under Defendant’s provider number as though Defendant Comite had rendered these services personally, or one of her employees had rendered the services under the defendant’s direct supervision. Defendant was reimbursed by health care benefit programs as if she been there to

### 3. False Identity Claims

The “false identity claims” refer to the Defendant submitting claims based on the false identity of multiple patients. The indictment asserts that Defendant Comite performed surgery on her cousin (known to the grand jury as Z.K.) who had recently lost his job and had no insurance. Defendant instructed one of her employees (M.P.) to submit the claim form to the health care benefit program under the name of K.P., M.P.’s husband. M.P. complied and submitted a claim for \$585 for the service provided to Z.K. As a result of Defendant’s fraud, Reading Hospital, which performed the analysis on the removed lesion, also submitted a claim to the same health care benefit program in the amount of \$384. (Indictment ¶¶ 38-41).

The indictment also alleges that Defendant Comite performed surgery on her ex-boyfriend (S.M.) and sent the removed lesion to Reading Hospital for analysis. Defendant did not accept S.M.’s insurance. Defendant again instructed M.P. to submit a false claim, this time under M.P.’s name. A claim for \$635 was submitted to the health care benefit program, and \$110 was submitted by Reading Hospital. The pathology report for S.M. indicated the lesion was cancerous and required Defendant Comite to perform another surgery. Defendant Comite again directed M.P. to submit the false claims. Although M.P. did not submit a claim to the health care benefit program, she did submit a requisition form to Reading Hospital which submitted a claim for \$507.50. A third surgery was then required and M.P. again submitted a requisition form to Reading Hospital which submitted a claim to the health care benefit program in the amount of \$101.50. (Indictment ¶¶ 42-54).

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directly supervise these procedures. Defendant was paid approximately \$35,582.62 by health care benefit programs for services rendered while she was out of the office. (Indictment ¶¶ 28-33; 37).

**C. Forfeiture Notice**

Additionally, the grand jury charges that as a result of the violations of 18 U.S.C. § 1347, Defendant shall forfeit to the United States any property that constitutes or is derived from gross proceeds traceable to the commission of such offenses, including, but not limited to, the sum of \$345,947.02. (Notice of Forfeiture ¶¶ 1-2).

**II. Defendant's Motion to Strike Portions of the Indictment as Time-Barred, And Containing Surplusage**

**A. Defendant's Contentions**

Defendant Comite contends that paragraphs 38 through 54 (false identity claims) of the government's indictment should be stricken on three grounds.

(1) Defendant argues that the false identity claims are not the subject of any specific count and are time barred by the statute of limitations because these events allegedly occurred in 1999, which is a full six and a half years before the filing of the indictment in February 2006. Because the fraud statute, 18 U.S.C. § 1347, under which the charges are brought, does not provide a specific statute of limitations provision, Defendant asserts that the general five-year statute of limitations under 18 U.S.C. § 1382(a) applies.

(2) Defendant argues that the time-barred allegations in the indictment are immaterial and prejudicial surplusage pursuant to Federal Rule of Criminal Procedure 7(d) which states, "upon the defendant's motion, the court may strike surplusage from the indictment or information." Defendant claims that these allegations are irrelevant to the actual counts in the indictment, and serve the sole purpose of unfairly prejudicing the jury against the defendant, and will not in any way assist the jury in determining whether Defendant practiced "upcoding" or

violated the “out of office billing” policy.

(3) Defendant argues that the evidence relating to the “false identity” claims should be precluded pursuant to Federal Rule of Evidence 403 because the probative value of such evidence is substantially outweighed by the dangers of unfair prejudice and confusion of the issues. Defendant asserts two reasons in support of this: (a) the evidence she is moving to preclude serves no legitimate purpose for the government because it does not bolster the upcoding and out of office billing counts in the indictment; and (b) the introduction of remote evidence will lead to unnecessary confusion and delay. Defendant contends that because these alleged occurrences happened over six years ago, introducing evidence relating to them defeats the entire purpose of the statute of limitations, and the Court should deem evidence of the “false identity” conduct inadmissible under Federal Rule of Evidence 404(b).

**B. Government’s Response**

The government first argues that Defendant fails to meet the requirements of Federal Rule of Criminal Procedure 7(d). It asserts that the purpose of Rule 7(d) is to protect the Defendant against prejudicial allegations that are neither relevant nor material to the charges made in the indictment. The government maintains this motion is rarely granted, and in a situation where the language pertains to matters which the government hopes to prove at trial, it cannot be considered surplusage no matter how prejudicial it might be.

Next, the government argues that allegations regarding the false identity claims are relevant. The government asserts that the “false identity” allegations serve to establish Defendant’s state of mind, intent and motives in carrying out the scheme, and therefore her motion should be denied. The government argues that Defendant’s limitations argument is

without merit because the indictment charges her with a scheme to defraud, which, like conspiracy, is a continuing offense, and the statute of limitations runs from the last date of the fraudulent conduct in furtherance of the scheme. Here, the government alleges a continuing fraud scheme from 1997 to 2004.

The government maintains that because the allegations are relevant to the scheme to defraud, the Court does not need to reach the question of whether the allegations are inflammatory and prejudicial.

**C. Discussion**

As the Court indicated in its Order dated October 5, 2006, the Court does not intend to allow evidence of the “false identity” claims to be introduced as part of the government’s case in chief. The false identity claims should be excluded for three separate reasons. First, they are highly prejudicial under Federal Rule of Evidence 404(b) because they tend to show the Defendant is guilty of bad acts that are not sufficiently related in content to the acts that constitute the charging counts of the indictment and would tend to prove propensity to commit crimes. Secondly, the false identity claims are limited in number and removed in time, having occurred several years prior to the beginning of the relevant five-year period for the statute of limitations. Third, the Court believes that the introduction of this evidence by the government in its case in chief would be collateral, and will unduly lengthen the trial, because the Court would have to allow Defendant to introduce her own evidence in defense of these false identity claims, perhaps showing extenuating reasons or testimony from other patients – all of which would be unrelated to the actual fraud claims made against the Defendant in the indictment.

However, this ruling only pertains to the government’s case in chief. If the Defendant, by

her own testimony at trial or by arguments or other evidence introduced at trial, “opens the door” so as to warrant introduction of the false identity evidence as part of the government’s case in rebuttal, the Court may admit the evidence as part of the government’s rebuttal case. The Court rejects the Motion to Strike these claims from the indictment as unnecessary because it is not the Court’s practice to give the indictment to the jury.

### **III. Defendant’s Motion for a Bill of Particulars**

Defendant moves the Court pursuant to Federal Rule of Criminal Procedure 7(f) to order the government to file a bill of particulars so that Defendant may properly prepare her defense and avoid prejudicial surprise or delay at trial.

#### **A. Defendant’s Contentions**

(1) Defendant argues that a bill of particulars is needed to understand the vague and imprecise allegation that she improperly billed a “shave” as an “excision.” Concerning this issue, Defendant needs to know (a) the wording of these standards; (b) the source of these standards; (c) the effective dates of these standards; and (d) how and when these standards were communicated to Defendant Comite. Defendant asserts that without this basic information, she is left to speculate as to the source of these standards and why she is charged with fraud.

(2) Defendant argues that the government failed to identify each of the claims that it alleges Defendant Comite fraudulently billed as an “excision.” Defendant believes the government has not provided her with enough information. The excision issue is the subject of 68 counts in the indictment, and the total amount allegedly billed in all of those counts was \$31,565. Yet, paragraph 27 of the indictment alleges that Defendant Comite billed health care benefit programs over \$1,153,441.78 for excisions, the majority of which were upcoded. The

government, however, allegedly fails to provide Defendant with any information about which claims are included within the allegation that the majority of the \$1,153,441.78 in bills for excisions were fraudulently upcoded.

(3) Defendant asserts that a bill of particulars is necessary to understand the vague claim that she fraudulently charged for services performed while she was physically out of the office but reachable by phone. In support of this, Defendant claims that the indictment accounts for \$1,290 in “out of office” billings, yet the indictment says that Defendant was paid \$35,582.62 by the insurance companies for out of office billings. (Indictment at ¶ 37). This inconsistency in the charges leaves Defendant with a lack of understanding as to the “out of office” billings for which she is charged.

(4) Defendant maintains that a bill of particulars is necessary for Defendant to understand the government’s vague notice of forfeiture. The notice of forfeiture required Defendant to forfeit all property that is derived from gross proceeds in the sum of \$345,947.02, yet the indictment does not give any basis for this figure. Defendant argues that in order to prepare a defense, a bill of particulars is needed indicating basic information enclosing the exact claims involved, the submission date of each claim, and the fraudulent nature of each claim.

**B. Government’s Response**

The government asserts that Defendant’s motion for a bill of particulars is without merit and should be denied.

(1) The government argues that the defendant misconstrues the purpose of the bill of particulars. The purpose of the bill of particulars is to inform the defendant of the charges brought against her, to allow the defendant to adequately prepare a defense, and to avoid surprise

during trial. The Third Circuit has stated that a bill of particulars should be issued only where the indictment fails to perform these functions, and consequently significantly impairs the defendant's ability to prepare his defense or leads to a likelihood of a prejudicial surprise at trial. United States v. Urban, 404 F.3d 754, 772 (3d Cir. 2005). The government argues that a bill of particulars will provide the defendant with the fruits of the government's investigation.

(2) The government maintains that, because the indictment adequately informs the Defendant of the charges, Defendant's request for a bill of particulars should be denied. The indictment lists 82 allegedly fraudulent medical claims, including the date of the claim, the patient for whom the claim was submitted, the health care benefit program which was defrauded, the claim number, the amount billed, and the manner in which the claim was allegedly false.

(3) The government argues that because the Defendant has had full access to open-file discovery, Defendant's request for a bill of particulars should be denied, because the information is readily available in another form.

### **C. Discussion**

Generally, a "bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused." United States v. Torres, 901 F.2d 205, 234 (2d Cir. 1990) (quoting United States v. Feola, 651 F. Supp. 1068 (S.D.N.Y. 1987)) (denying Defendant's motion for bill of particulars because indictment adequately informs defendant of charges pending against him). The purpose of a bill of particulars is to "inform the defendant of the nature of the charges brought against him, to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." United States v. Urban, 404

F.3d 754, 771 (3d Cir. 2005) (quoting United States v. Addonizio, 451 F.2d 49, 62-63 (3d Cir. 1971)). It is “[o]nly where an indictment fails to perform these functions, and thereby ‘significantly impairs the defendant’s ability to prepare his defense or is likely to lead to prejudicial surprise at trial [that] we will find that a bill of particulars should have been issued.’” Urban, at 771-72 (internal quotation omitted).

In Urban, the defendant challenged the sufficiency of the indictment and the District Court’s denial of a motion for a bill of particulars. The Court first stated that an indictment is sufficient if “when considered in its entirety, it adequately informs the defendant of the charges against her such that she may prepare a defense and invoke the double jeopardy clause when appropriate.” Urban, 404 F.3d at 771. The Court found the indictment sufficient because it tracked the language of the statute the defendant was accused of violating, and informed the defendant of the people who were victimized and the time period during which the fraudulent payments were made. Id.

The government has 1,500 slides which may be the subject matter of expert testimony by both parties even though only a small number of those slides are the basis of the 82 charging counts in the indictment. Given the huge volume of the government’s evidence, the Defendant has shown that she is entitled to more specificity in terms of the actual evidence that the government will introduce in its case in chief.

Therefore, after argument on October 5, 2006, the Court included in its Order of October 5, 2006, an instruction to the government to serve a statement on Defendant containing its offer of proof, in reasonable detail and witness by witness, of the evidence it intends to introduce as its case in chief by October 31, 2006. The Court further required the government to provide

Defendant with the final versions of the charts that it intends to use at trial to summarize the evidence, particularly the evidence supporting the allegations in paragraph 27 of the indictment, charging over \$1.1 million in upcoding fraud, paragraph 37 of the indictment, charging approximately \$35,000 in out-of-office billings, and the forfeiture notice, seeking over \$345,000 to be forfeited.

This pretrial statement should give the Defendant fair notice of the evidence which the government intends to introduce at trial. Otherwise, it would be unfair to require the Defendant to be prepared to defend against the more than thousand slides in the government's possession.

At the hearing on November 6, 2006, the Court reviewed the government's statement and summary charts with counsel. Defense counsel had submitted a seventeen-page letter to chambers, dated November 6, 2006, just prior to that hearing, which shall be docketed. The Court did not have the opportunity to fully review this letter by the time of the hearing.

The Court concludes that the government's submission is in accord with the Order of October 5, 2006. However, as government counsel recognized during the hearing, she still has a duty to provide additional details to the Defendant, particularly on a number of witnesses only designated by title or employer in the submission and on the content of several witnesses' anticipated testimony.

Also at the November 6, 2006 hearing, defense counsel asserted that the testimony of several of the witnesses who were identified is inadmissible, and that the summary charts are also inadmissible for various reasons. The Court refused to consider those admissibility issues. The purpose of the hearing was to address discovery issues and to consider Defendant's pretrial motions, specifically the motion for a bill of particulars. While the Court recognizes that the

charts submitted by the government present a great deal of data, it will not rule at this time on the admissibility at trial of the charts or the data underlying them. The Court expects the government to delineate, with supporting authority, the reasons why it should be allowed to show the jury data concerning hundreds, if not over a thousand, of Defendant's patients, when the indictment contains only 82 specific charges of illegal conduct. As noted in the accompanying Order, and as stated at the hearing, defense counsel will be given a full opportunity to object to the admissibility of testimony and exhibits, preferably prior to trial, or at the trial itself.<sup>3</sup>

Given the materials the government supplied in discovery prior to and on October 31, 2006, the Court finds that a bill of particulars is unnecessary. Defendant Comite will neither be prejudiced nor face unfair surprise at trial due to a denial of the motion for a bill of particulars because the indictment and the other information provided to the Defendant has supplied sufficient information to inform the Defendant of the nature of the charges pending against her.

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<sup>3</sup> Defense counsel also argued at the November 6 hearing, although this topic was not covered in Defense counsel's letter of the same date, that the regulations which the government claims Defendant violated are, inter alia, confusing and not followed by all insurance companies. As a result, Defense counsel argued that a sixty-day continuance of the trial would be necessary to allow defense counsel to fully investigate the status and effectiveness of these regulations, in order to be prepared to introduce evidence on this topic at trial. Given that defense counsel are known experts in healthcare fraud matters, and that sixty days exist from the date of the November 6 hearing until the date of the trial (albeit this includes the holiday season), the Court does not believe that any continuance should be necessary. It will be the government's burden to show the regulations that governed the Defendant's conduct and to prove that such conduct was, beyond a reasonable doubt, in violation of the law. At the next hearing scheduled for November 22, 2006, the Court will entertain argument about whether the government has provided defense counsel with sufficient information about the precise regulations the government asserts Defendant violated. In United States v. Singh, 390 F.3d 168 (2d Cir. 2004), the Second Circuit affirmed that conviction of a physician for false claims, based on the same regulations and similar codes to the ones the government relies on in this case. The court stated: "Singh's contention that the billing codes and rules were sufficiently ambiguous to preclude a finding of fraudulent intent on his part is belied by the evidence. There are in fact no ambiguities in the billing requirements." Id. at 187.

Moreover, the indictment is sufficient because the 82 specific counts in the indictment contain pertinent information as to the date of the claim, the patient to whom services were rendered, the health care benefit program, the claim number, the approximate amount that was billed, and a reason why the claim is false.

Similarly to the indictment in Urban, the government's indictment tracked the language of the statute with which Defendant is charged, and it provided the Defendant a detailed accounting of the counts against her in chart form. If the information that Defendant seeks is provided in the indictment or available in another form, then no bill of particulars is required. United States v. Kaplan, No. 02-883, 2003 WL 22880914, at \*12 (S.D.N.Y. Dec. 5, 2003) (quoting United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987)). If a defendant has full access to the information requested in a bill of particulars through pre-trial discovery, then the defendant's case for a motion for a bill of particulars is significantly weakened. Urban, 404 F.3d at 772.

In Bortnovsky, the Second Circuit held that the district court erred in failing to grant the bill of particulars because it was vital to the appellant's understanding of the charges pending. 820 F.2d at 575. Additionally, the court held the government did not fulfill its obligation to the defendant "merely by providing mountains of documents to defense counsel who were left unguided as to which documents would be proven falsified." Id. Unlike Bortnovsky, because of the data now supplied, Defendant Comite has been fully informed as to the insurance claims she submitted, which the government's proof will address. Therefore, Defendant's Comite's Motion for a Bill of Particulars will be denied.

#### **IV. Defendant's Motion to Dismiss Indictment for Failure to Allege Essential Elements**

Defendant moves this Court to dismiss the indictment for failure to allege essential elements of the offense charged under 18 U.S.C. § 1347. Defendant bases this motion on Rule 7(c)(1) and Rule 12(b)(3) of the Federal Rules of Criminal Procedure as well as Supreme Court precedent.

**A. Defendant's Contentions**

Defendant argues that Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an indictment be a “plain, concise and definite written statement of the essential facts constituting the offense charged.” This rule applies to each count in the indictment. Defendant alleges that the indictment is comprised of a series of overly broad, disjointed and unconnected allegations, and that it fails to incorporate specific introductory information that would be relevant to each count. Defendant further argues that 18 U.S.C. §1347, the only statute under which Defendant is charged, makes no reference to “commerce,” nor does it define “health care benefit program.” Defendant contends that: (1) not one of the 82 counts in the indictment alleges the essential element, and indeed the jurisdictional element, of affecting commerce; (2) not one of the 82 counts of the indictment alleges that the false statement must be material, and (3) not one of the 82 counts identifies what specific scheme to defraud underlies each of the 82 counts.

**B. Government's Response**

The government asserts that Defendant's Motion to Dismiss the Indictment is without merit and should be denied.

(1) The government argues that the indictment satisfies the legal standard. In determining whether the indictment is a clear and concise statement of the offenses charged, the Court reads the indictment as a whole, and interprets it in a common sense manner (citing United

States v. Markus, 721 F.2d 442, 443-44 (3d Cir. 1983)). An indictment will usually be sufficient if it states the offense by tracking the statutory language provided the statute fully states the elements of the offense. In paragraph 55 of the indictment, the government tracked the statutory language of 18 U.S.C. § 1347. The indictment also includes the date of each claim submitted, the claim number, the amount billed by the Defendant and the reason that the claim is alleged to be false. Therefore, the indictment adequately informs Defendant Comite of the charges against her and enables her to prepare a defense.

(2) The indictment alleges the essential elements of the offense. The government asserts that, even though the indictment does not expressly use the term “affecting commerce,” there is no jurisdictional issue under the health care fraud statute 18 U.S.C. § 1347 because it incorporates section 24(b) of the same title, which defines a health care benefit program as an entity affecting commerce. Additionally, the government contends that the Defendant’s argument that the indictment fails to allege a specific scheme to defraud is without merit. The indictment specifically defines “upcoding,” “out of office,” and “false identity.”

(3) The government argues that Congress did not exceed its power under the Commerce Clause when it passed the health care fraud statute, 18 U.S.C. § 1347. Under the Commerce Clause, Congress may regulate those activities which substantially affect interstate commerce. United States v. Morrison, 529 U.S. 598, 607 (2000). The government argues that there can be no question that, in enacting the health care fraud statute, Congress concluded that the activity substantially affected interstate commerce. Articulating the standard found in United States v. Lopez, 514 U.S. 549, 561 (1995), the government argues that the “substantial relation” requirement may be satisfied where: “(1) intrastate economic activity, when viewed in the

aggregate, substantially affects interstate commerce; or (2) the statute contains a jurisdictional element which would ensure, through case by case inquiry, that the prohibited act in question affects interstate commerce.” (Pls.’ Resp. to Def.’s Pretrial Mots. 15). To determine whether an activity substantially affects interstate commerce, the court should consider (i) whether the statute “by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”; (ii) whether the statute “contains an ‘express jurisdictional element which might limit its reach to a discrete set of [intrastate activities] that additionally have an explicit connection with or effect on interstate commerce.’” United States v. Spinello, 265 F.3d 150, 156 (3rd Cir. 2001) (quoting United States v. Lopez, 514 U.S. 549, 561-62 (1995)). The government contends that the statute in question passes constitutional muster because it regulates economic activity that substantially affects interstate commerce, and it incorporates an appropriate jurisdictional element.

**C. Discussion**

The Court will deny the Motion to Dismiss the Indictment for Failure to Allege Essential Elements. The government has provided a correct statement of the law, and the Defendant has failed to show any prejudice from the lack of the information which she contends is missing. As with the discussion above concerning a bill of particulars, the government has supplied a great deal of information in addition to what is already in the indictment. Furthermore, the Court will hear argument on November 22, 2006 or thereafter as to any specific matters concerning regulations to which Defendant believes she is entitled but has not yet received.

The Court has adopted these specific pretrial procedures because the complexity of this case and the mountain of evidence which the government has accumulated requires some

sharpening prior to trial. These procedures will also be of value in making sure that the admission of evidence before the jury flows smoothly and is in an understandable format.

**V. Defendant's Motion to Suppress Tangible Evidence (Doc. No. 35)**

Defendant Comite asserts that all the government's evidence should be suppressed based on four grounds: (1) The search warrant was unconstitutionally overbroad and lacked the particularity required by the Fourth Amendment; (2) the search warrant was far broader than the probable cause upon which it is based; (3) the search warrant was based on stale information; and (4) the good faith exception to the Fourth Amendment's exclusionary rule does not apply.

The search of Defendant Comite's office was conducted on February 10, 2004, the day after the search warrant was obtained. Defendant Comite was not present during the search, which lasted from 8:00 a.m. until 3:40 p.m. The agents conducting the search stripped her medical offices bare and took all of her patients' files, including those from the spa and cosmetic business,<sup>4</sup> financial paperwork, procedural manuals, and other documents. The agents were fully aware that they were seizing the files of cosmetic patients.

The Affidavit submitted in support of the search warrant provides general background information as to the investigation as well as Defendant Comite's practice and billing requirements. It outlines the four types of illegal conduct allegedly engaged in by Defendant Comite: (1) false statements to health insurance companies, (2) absentee billings, (3)

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<sup>4</sup> Defendant asserts the spa and cosmetic business is completely unrelated to the medical aspect of her practice: It operates under a different name and Defendant does not accept medical insurance for this aspect of her practice. The spa and cosmetic business it is not mentioned in the indictment, but it is discussed in Defendant's Motion to Suppress as supporting the overbreadth of the affidavit and warrant. At the oral argument on November 6, 2006, government counsel argued that the agents did not violate the warrant or any law by seizing the spa and cosmetic files, and that, in any event, they were returned shortly after the search.

prescription fraud,<sup>5</sup> and (4) upcoding.

The Affidavit defined the terms used in the warrant in paragraph 56. Defendant Comite argues that, without probable cause, the affiant sought to extend the search warrant to include the items listed in paragraph 60 of the Affidavit, which is a broad listing of types of records physicians would maintain. (Motion to Suppress ¶¶ 12-13 (citing Affidavit ¶¶ 56 and 60)). Defendant contends that these paragraphs state a clear intent to create a general warrant permitting the seizure of virtually every piece of paper and every computer record on the premises, even though a description of the office's computer system or even the kinds of materials stored on that system appears nowhere in the Affidavit.<sup>6</sup> Moreover, Defendant argues that the Affidavit does not distinguish between computers used in the business, or personal computers unrelated to the business. (Motion to Suppress ¶¶ 14-15).

**A. Defendant's Contentions**

**1. The Particularity Requirement**

Defendant Comite contends that the warrant must describe the items to be seized with particularity, Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). Moreover, Defendant Comite argues that the search warrant allowed the FBI and the other agents to seize all her documents regardless of whether they were related to the investigation. Additionally, Defendant argues that the warrant should have been limited to Dr. Comite's alleged criminal activity,

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<sup>5</sup> The Affidavit alleges that for nearly four years Defendant Comite wrote prescriptions for, and obtained 3,250 diet pills in the names of her employees, and then used them for herself. (Affidavit ¶¶ 35-38). There is no mention of this in the indictment.

<sup>6</sup> Paragraphs 57 and 58 of the Affidavit discuss the need for a broad search of computer-based data.

namely the “upcoding” and “out of office billings” allegations. Defendant asserts that courts have consistently held unconstitutional the wholesale seizure of business records when probable cause existed for only a portion of the a business’s files. Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 960 (3d Cir. 1984) (affirming injunction requiring return of law firm’s documents because virtually wholesale search and seizure of law firm’s records was improper when only a portion of the firm’s records were allegedly involved in criminal activity); see also United States v. Kow, 58 F.3d 423, 428 (9th Cir. 1995) (warrant authorizing general seizure of nearly every business record insufficiently particular because affidavit failed to acknowledge that government was unable to segregate legitimate from illegitimate documents).

Defendant finally asserts that the items to be seized as possible evidence of specific crimes were not described with particularity, and the warrant did not give any guidance to the executing officers as to what to seize and what not to seize. In the absence of such guidance, the officers seized nearly all the records in the office, the majority of which were completely unrelated to suspected criminal conduct.

## **2. The Search Warrant Lacked Probable Cause**

Defendant Comite argues that even if an item is particularly described as an item to be seized in a search warrant, the warrant must still demonstrate probable cause for its inclusion in the warrant. In order to determine whether the warrant was overbroad, Defendant asserts that the Court must compare the scope of the search and seizure authorized by the warrant with the ambit of probable cause established by the supporting affidavit. In re Impounded Case (Law Firm), 840 F.2d 196, 200 (3d Cir. 1988). Therefore, the warrant must be “no broader than the probable cause on which it is based.” United States v. Zimmerman, 277 F.3d 426, 432 (3d Cir. 2002).

Defendant argues that no probable cause is shown in the Affidavit for the items listed to be seized in the search warrant. These items include records for patients in no way related to the alleged criminal activity, personal documents (belonging to both Defendant and Defendant's patients) credit card statements, stock records, corporate materials, and tax related materials.

**3. The Information in the Search Warrant Was Stale**

Defendant argues that the information conveyed by the government's cooperating witnesses was stale because these witnesses had not had any contact with Defendant's business in the last three and a half to four years, and that the affiant deceptively failed to include that information in the Affidavit. Defendant relies on Zimmerman, and notes "the affidavit was bereft of 'facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.'" 277 F.3d at 435-36 (quoting Sgro v. United States, 287 U.S. 206, 210 (1932)).

**4. The Good Faith Exception Should Not Apply**

Defendant Comite argues that the Court should rule on Defendant's arguments because they present novel questions of law. Defendant further contends that the government's conduct was egregious, and that the good faith exception to the Fourth Amendment's exclusionary rule is not available to the government here. Defendant asserts that courts have previously identified four situations where an officer's reliance on a warrant would not be reasonable and thus would not trigger the good faith exception: (1) where a magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) where the magistrate abandoned his or her judicial role and failed to perform his or her neutral and detached function; (3) where the warrant was based on an affidavit without any indicia of probable cause as to render official belief in its

existence entirely unreasonable; and (4) where the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized. United States v. Hodge, 246 F.3d 301, 307 (3d Cir. 2001). Defendant contends that all four of the situations discussed in Hodge occurred here and, in light of all these defects, the officers and particularly the affiant could not have relied in good faith on this warrant. Therefore, the appropriate remedy is suppression of all evidence.

**B. Government's Response**

The government responds to Defendant's motion by arguing that (1) the evidence should not be suppressed because the agents relied on a validly issued search warrant in good faith; (2) the four narrow situations in which an officer's reliance on a warrant is not reasonable do not apply in this case; (3) the evidence should not be suppressed because the search warrant was not overly broad; and (4) the evidence recovered would be admissible under the inevitable discovery doctrine.

**1. Agents Relied on a Validly Issued Search Warrant in Good Faith**

The government contends that suppression of evidence under the good faith exception is "inappropriate when an officer executes a search in objectively reasonable reliance on a warrant's authority." Hodge, 246 F.3d at 307 (quoting United States v. Williams, 3 F.3d 69,74 (3d Cir. 1999)). Moreover, the test for whether the good faith exception applies is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate [judge's] authorization." Id. at 307 (internal quotations omitted). The government argues that the affidavit in support of the search warrant provided detailed information of criminal activity, and the magistrate judge who reviewed the search warrant and affidavit in support of the search warrant

found there was probable cause to conduct the search. The agent who conducted the search had reason to believe that every item covered by the warrant could legally be seized. The search team was instructed about the scope of the search and conducted the search with care as not to exceed the perceived scope of the warrant. Moreover, the government argues that the good faith exception applies and the evidence should not be suppressed because it was objectively reasonable for the case agent to believe that probable cause for the warrant was stated and for him and the other agents to rely in good faith on the warrant as issued by the magistrate. See United States v. Kepner, 843 F.2d 755, 764 (3d Cir. 1988) (reversing district court's suppression order when agent relied in good faith on valid search warrant).

**2. Affidavit Was Not Deliberately or Recklessly False**

The government asserts that Defendant Comite's argument that the special agent deliberately and deceptively failed to advise the magistrate judge of certain purportedly critical facts is without factual basis or legal merit. The Supreme Court has held the Fourth Amendment requires a hearing when the defendant makes "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement was necessary to the finding of probable cause." Franks v. Delaware, 438 U.S. 154, 155-56 (1978). Moreover, at the hearing the defendant must prove that "(1) the affiant knowingly, and deliberately, or with reckless disregard for the truth, made false statements or omissions that create[d] a falsehood in applying for a warrant; and (2) that such statements or omissions were material, or necessary, to the probable cause determination." United States v. Yusuf, 461 F.3d 374, 383 (3d Cir. 2006).

The government argues that Defendant Comite has failed to satisfy the standard for

obtaining a Franks hearing, because she has not made a “substantial showing” that the agent “knowingly, intentionally, or recklessly” excluded a fact from his affidavit and that the omitted fact “was necessary to the finding of probable cause.” The government asserts that the Defendant offered no factual support for her allegations other than repeating the required legal standard. The Defendant also failed to establish that the purported omissions, if included, would affect the finding of probable cause. Because of these reasons, the government contends that Defendant Comite’s motion should be denied.

**3. The Magistrate Judge Did Not Abandon His Judicial Role**

The government also argues that Comite’s argument that the magistrate judge and the special agent work in the same building, and that the magistrate judge abandoned his judicial role because of his “familiarity” with the special agent is frivolous. Moreover, the magistrate judge is not required to make any handwritten changes to the affidavit, and a lack of changes to the affidavit is not an indication that he did not carefully review it.

**4. Affidavit Was Supported by Probable Cause**

In order to prove the affidavit lacked probable cause, the defendant must show not just that the magistrate erred in issuing the search warrant, but that the “error was so obvious that a law enforcement officer, without legal training, should have realized, upon reading the warrant, that it was invalid and thus have declined to execute it.” United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars & Fifty-Seven Cents, 307 F.3d 137, 146 (3d Cir. 2002). The government argues that there was no error on the part of the magistrate judge, let alone an error that would invalidate the good faith of the executing officers.

The government asserts that the Affidavit in this case established probable cause for a

search warrant. It detailed a fraudulent scheme that had been investigated by agents over the course of several years. Additionally, the information provided by Petruska, Defendant Comite's former employee, established a sufficient nexus between the criminal activities alleged and Defendant's practice.

Moreover, the government contends that the information was not stale for a number of reasons. First, the relationship between defendant Comite and Petruska was of considerable duration, from at least 1993 to 2000. See Ninety-Two Thousand Four Hundred Twenty-Two Dollars, 307 F.3d at 148 (rejecting staleness argument in light of relationship of two years). Second, the warrant sought business and medical records, both of which are created for the purpose of preservation. See United States v. Singh, 390 F.3d 168, 182 (2d Cir. 2004) (denying motion to suppress based on staleness grounds because medical "records made and retained in the business office were of the type that would necessarily be kept over a period of years and would reasonably be found in the business office of any medical practice"). Third, the nature of the criminal activity was ongoing and long term in nature. Thus, the government argues the passage of time between the furnishing of the information by the government's cooperating witnesses and the execution of the search warrant was not significant under these circumstances.

**5. Search Warrant Was Not a General Warrant and Satisfied the Particularity Requirement**

The particularity requirement of the Fourth Amendment mandates that "warrants particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const. Amend. IV; see Yusuf, 461 F.3d at 393. The government notes that the Fourth Amendment does not prohibit a long list of items and documents to be searched as long as there

is probable cause for each item on the list and that each item is particularly described. Ninety-Two Thousand Four Hundred Twenty-Two Dollars, 307 F.3d at 149-50. The particularity requirement of the Fourth Amendment not only prevents general searches, but also assures the individual whose property is searched or seized that the executing officer has the lawful authority to conduct the search, a need to conduct the search, and limitations on his power to search. See United States v. Ritter, 416 F.3d 256, 265 (3d Cir. 2005). However, “no tenet of the Fourth Amendment prohibits a search merely because it cannot be performed with surgical precision.” United States v. Atwell, 289 F. Supp. 2d 629, 634 (W.D.Pa. 2003) (quoting United States v. Christine, 687 F.2d 749, 760 (3d Cir. 1982)). In order for a warrant to be invalidated as general, it must “vest the executing officers with unbridled discretion to conduct an exploratory rummaging through [defendant’s] papers in search of criminal evidence.” Christine, 687 F.2d at 753. The government argues there can be no question that the warrant in this case particularly described the place to be searched and the items to be seized. See Yusuf, 461 F.3d at 393.

The government contends that, because the facts do not show any of the four exceptions to the good faith rule apply to this case, the evidence seized in this case should not be suppressed.

#### **6. Evidence Admissible Under The Inevitable Discovery Doctrine**

The government argues alternatively, under the inevitable discovery doctrine, evidence obtained by unlawful means is nonetheless admissible if the prosecution can show it would have ultimately been discovered by the government by lawful means. The government appears to argue that even if there had not been a search warrant, a grand jury subpoena to Defendant Comite (see Ex. 2 to government’s brief) for these same records would have resulted in the records being produced to the grand jury, and they would have come into the government’s

possession in that fashion.

**C. Discussion**

**1. Good Faith Exceptions/Denial of Franks Hearing**

The Third Circuit has instructed district courts that, unless a motion to suppress evidence obtained pursuant to a warrant presents a Fourth Amendment argument that should be decided in order to instruct law enforcement officials or magistrate judges, it is appropriate for the reviewing court to turn immediately to a consideration of the officers' good faith in executing the warrant. Ninety-Two Thousand Four Hundred Twenty-Two Dollars, 307 F.3d at 145. The Second Circuit considers the "good faith" test as an alternative grounds to uphold a search. Singh, 390 F.3d at 183 (applying good faith exception to uphold admission of evidence where defendant asserted similar grounds of staleness, overbreadth, and lack of particularity).

First, the Court will specify the reasons why, in its October 5, 2006 Order, the Court denied Defendant's request for a Franks hearing as this bears on the good faith issue. The Singh decision notes that the Franks and good faith tests are similar. Singh, 390 F.3d at 183.

The Affidavit was not deliberately or recklessly false. Assuming, arguendo, the accuracy of the Defendant's contentions that the agent knew but did not advise the magistrate judge that some of the corroborating witnesses' knowledge about the Defendant's practices was several years old, and that the witnesses had not been in contact with the Defendant for several years, the Court would still not find this to be an omission of such magnitude as to warrant a Franks hearing. The Affidavit is replete with additional details building on and bringing current the information supplied by the cooperating witnesses. The Affidavit details the investigation of Defendant's medical practices, including an analysis of her travel records and other information

that supported the allegation in the Affidavit that she billed for her personal services while she was not only out of the office, but physically located in different states or countries on the same dates as the services were billed. The Affidavit further relates that the government secured the opinion of a practicing dermatologist at Reading Hospital on the upcoding issues, who looked at a large number of slides and concluded that the Defendant was charging for “incisions” when she in fact was doing the procedure known as a “shave” for which the reimbursement is less than an incision.<sup>7</sup>

The question of whether information known to the agent but omitted in the affidavit warrants a Franks hearing was recently considered in United States v. Yusuf, 461 F.3d 374 (3d Cir. 2006). This case summarized the well-known requisites for a Franks hearing. The defendant must prove by a preponderance of evidence that (i) the affiant knowingly and deliberately, or with reckless disregard for the truth, made false statements or omissions that created a falsehood in applying for a warrant; and (ii) such statements or omissions were material, or necessary to the probable cause determination. Yusuf, 461 F.3d at 383. In considering alleged omissions, a district court should add the missing information to the affidavit and then determine whether the corrected affidavit contains sufficient information. Yusuf, 461 F.3d at 388 n.12 (noting distinction between material omissions and misrepresentations). If the Court were to consider the additional information which Defendant now alleges was improperly omitted, i.e., that these confidential informants did not have recent experience with Defendant and their information was several years old, the Court would nonetheless uphold the warrant and

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<sup>7</sup> The Court notes an apparent error in paragraph 40 of the Affidavit, where the Affidavit states that the reimbursement rate for a shave is greater than an incision. This appears to be a mistake because the rest of the Affidavit asserts that greater reimbursement applies to incisions.

also uphold the good faith exception because the agent conducted additional investigation which corroborated the cooperating witnesses. See also Singh, 390 F.3d at 182 (rejecting a similar staleness attack on the affidavit in that case).

Because Defendant conducted a medical practice, which obviously required maintaining patient records for many years, there is a high likelihood that office practices which existed for prior years would have continued up until the time that the search warrant was executed. Defendant was continuing to practice in the same manner, as shown by the corroborating aspects of the agent's investigation. See Affidavit ¶ 60.

Defendant also makes much of the fact that Defendant's office had moved from the time that the cooperating witnesses were employed by Defendant, but the Court does not believe this factor is entitled to any significant weight because a physical move would not in any way necessitate a change in the conduct of the office practices of the Defendant or the maintenance of patient records.

In Yusuf, the Court noted the distinction between information received from an informant and information provided by law enforcement officials or other government agencies, where the latter's information is presumed more reliable. 461 F.3d. at 385. Although this Affidavit does not contain facts from other government agencies, it does contain corroboration from insurance companies (¶ 54) and from another physician (¶ 50). These are similarly reliable sources.

After considering all of the factors on which the good faith exception rests, the Court concludes that it applies in this case.

**2. The Court Concludes that the Particularity Requirement Was Satisfied, and that the Search Warrant Was Based on Probable Cause**

Considering the specific arguments made by Defendant, on November 10, 2006, Defendant submitted a supplemental memorandum (Doc. No. 85) contending that the Yusuf decision supported her arguments. The Court rejects Defendant's interpretation of this case. Yusuf provides authority to deny the Defendant's Motion.

Initially, concerning particularity, Defendant asserts that while Yusuf notes "the government is to be given more flexibility regarding the items to be searched" in complex financial investigations such as money laundering, Yusuf, 461 F.3d at 395, the same is not true for a fraudulent claim case against a physician. The Court rejects this distinction and finds that an investigation into a physician making false claims to an insurance company can be just as, if not even more, complex than other financial-based investigations into federal crimes. See United States v. Christine, 687 F.2d 749, 760 (3d Cir. 1982) ("flexibility is especially appropriate in cases involving complex schemes spanning many years"). It is obvious from both the pretrial papers and the arguments made at the hearings before this Court that the government went through painstaking detail to gather the evidence that led to the search and grand jury indictment in this case. This is also reflected in the evidence submitted to the Court at the hearings, including the summary charts referenced above. Proving beyond a reasonable doubt that a physician committed fraud is not an easy undertaking, and investigators with probable cause must have the flexibility noted in Yusuf to complete their task.

Defendant is correct that Attachment B to the search warrant, which lists the types of documents to be seized, is very broad and includes, without limitation, all patient records. Defendant asserts that the agents should have selected specific patient files since the investigation by the agents had given them reason to know the names of the patients for whom

Defendant made reimbursement requests when she was out of the office and for whom she upcoded the requests for reimbursement. Instead of making selective seizures of these records, the agents apparently took all of Defendant's files and computers. The government does not dispute this fact, and the photographs taken of the Defendant's office after the agents left corroborate Defendant's account.

While this may seem overly broad in the abstract, the nature of the investigation allowed the government to secure and review data on all of Defendant's patients. It was not required to limit its seizure to the specific patient records which a preliminary investigation had shown might show fraud. As in United States v. Christine, the warrant in this case does not "vest the executing officers with unbridled discretion to conduct an exploratory rummaging through appellees' papers in search of criminal evidence." 687 F.2d at 753. Instead, the warrant describes "in both specific and inclusive generic terms what is to be seized" as determined by the magistrate. Id. The Affidavit suggests Defendant had a pattern and practice of overcharging third-party payors on a regular basis. The extent of Defendant's practice, even the total universe of her patients, may be probative as to Defendant's intent or motive before a jury, even if there is no specific charge in the indictment with respect to every patient. Otherwise, the jury might not get a full picture of the Defendant's intent, an element the government must prove at trial. Because of this, a more precisely enumerated list of items was not feasible. Even though the government had evidence that certain patient records were likely to show fraud, it could not know precisely what other documents and information would assist it in proving Defendant's intent or motive. See United States v. Rankin, 442 F. Supp. 2d 225, 230 (E.D. Pa. 2006).

There is, of course, a heightened sensitivity to the seizure of individual medical records

because of privacy issues. It is conceivable that denying Defendant, a practicing physician who is presumed innocent, her patient records might prevent her from rendering care to a specific patient on a timely basis. Although these are valid concerns, they do not warrant granting a motion to suppress an otherwise valid search.<sup>8</sup> The Constitution prohibits illegal searches, not inconvenience, embarrassment or extra expense.<sup>9</sup>

In Yusuf, the court noted the possibility of redaction of a warrant if certain of the items designated to be seized did not satisfy the particularity requirement. However, in this case, the Court finds that the warrant satisfied the requirement of particularity because it was limited in three respects:

- (1) The warrant specified that agents were searching for evidence of specifically enumerated crimes.
- (2) The search was limited to a specific location, Dr. Comite's office.
- (3) The evidence sought was limited to records pertaining to Dr. Comite and her patients.

See Yusuf, 461 F.3d at 395.

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<sup>8</sup> Even if the Court agreed with Defendant, the only result would be to suppress the search as to the records of patients not the subject of allegedly fraudulent billing practice, see Ninety-Two Thousand Four Hundred Twenty-Two Dollars, 307 F.3d at 151, because the overbreadth was only to the items seized, not as to the warrant itself.

<sup>9</sup> The Defendant was required to pay over \$40,000 to make copies of the files that were seized and had to replace the computers that were seized. Government counsel asserts that it is standard procedure to maintain the originals of such files and that the government does not expend funds to make copies or reimburse the subject of a search, even if the person is then not under indictment, for the cost of duplication. This issue was addressed in U.S. v. Bein, 214 F.3d 408, 411-12 (3d Cir. 2000) where the court held that it did not have jurisdiction over a claim for damages for property the government allegedly destroyed during or after a search. It is not clear to the Court whether this rule would apply to a court imposing a requirement that the government pay for copies of business documents when a business such as a professional medical practice needs to continue operating with these records, i.e., patient charts, in order to function. Defense counsel can file a motion for the return of property, as provided for in Rule 41(e) of the Federal Rules of Criminal Procedure.

It should be noted that in Yusuf the Court also rejected a claim that the search was constitutionally overbroad. The Defendant's reliance on United States v. Leary, 846 F.2d 592 (10th Cir. 1988) is rejected for the same reason that it was rejected in Yusuf. Yusuf, 461 F.3d at 394-95.

At the oral argument on November 6, 2006, the Court raised some questions about the breadth of the seizure. The breadth of the warrant would not affect the validity of the search warrant itself, because the seizure of more records than was necessary does not in and of itself require suppression of the warrant when the search warrant satisfied the requirement of particularity. The Affidavit of Agent Quirk at paragraphs 57 and 58 details why the FBI desired to take possession of all of Defendant's computers, and the Court finds this seizure was proper.

The Court will distinguish the Klitzman case relied upon by Defendant. In that case, the court condemned the search and seizure of the records of an entire law firm where only one attorney in the firm was under investigation. Klitzman, Klitzman, & Gallagher v. Krut, 744 F.2d 955, 962 (3d Cir. 1984). The search also impinged on materials protected by the attorney-client privilege. Id. at 960. The Court finds that other cases relied on by the Defendant are distinguishable and that the specific facts set forth in Singh, where the search was upheld by the Second Circuit, and the general principles recently set by the Third Circuit in Yusuf, warrant denial of Defendant's Motion.

Lastly, the Court will reject Defendant's argument that the warrant was a general warrant, or that the Court should redact it. Blanket suppression is not called for if the items seized are broader than necessary as long as the warrant itself is proper. The Court has held that the warrant is proper, and thus need not consider or grant relief merely because the agents took into their

possession more records than Defendant asserts were necessary. The Court also agrees with the government that, even assuming the suppression motion were to be granted and the files returned to the Defendant, Defendant would have to submit exactly the same files in response to the grand jury subpoena. Since the files would come into the government's possession via the grand jury subpoena, the doctrine of inevitable discovery applies. See Nix v. Williams, 467 U.S. 431, 444 (1984); see also United States v. Herrold, 962 F.2d 1131, 1138-39 (3d Cir. 1992).

The Court also concludes that probable cause existed for the search and that, in light of the discussion above, the contents of the Affidavit established probable cause.

In determining whether a warrant should be issued, “[t]he task of the issuing magistrate is simply to make a practical, common-sense decision, whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.” New York v. P.J. Video, Inc., 475 U.S. 868, 876 (1986) (quoting Jones v. United States, 363 U.S. 257, 271 (1960)). Probable cause can often be inferred by “considering the type of crime, the nature of the items sought, the suspect’s opportunity for concealment, and normal inferences about where a criminal might hide” the fruits of his crime. United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001) (internal quotation omitted).

Considering the holding of Yusuf, the nature of the alleged violations of law and the nature of the investigation, which by definition requires detailed examination of voluminous patient charts, physician billing records and third-party payor data, the government has established sufficient probable cause and particularity, in addition to the facts warranting the good faith exception.

An appropriate Order follows.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
HARRIET COMITE, M.D.	:	NO. 06-70

**ORDER**

AND NOW, this 17th day of November, 2006, following oral argument on October 5, 2006 and November 6, 2006 on various pretrial motions, and in accordance with the foregoing Memorandum, and also the government having filed on October 31, 2006 its Trial Memorandum and Summary Exhibits 1-6, it is hereby ORDERED as follows:

1. Defendant's Motion for Bill of Particulars (Doc. No. 24) is DENIED.
2. Defendant's Motion to Strike Portions of the Indictment Pursuant to 18 U.S.C. § 3282 and Federal Rule of Criminal Procedure 7(d) and to Exclude Evidence Pursuant to the Federal Rules of Evidence 403 and 404(b) (Doc. No. 25) is GRANTED in part and DENIED in part. As ruled in the Order dated October 5, 2006, the government may not introduce evidence of the "false identity" claims as part of its case in chief, but the other relief requested by the Motion is DENIED.
3. Defendant's Motion to Dismiss Indictment for Failure to Allege Essential Elements (Doc. No. 26) is DENIED.
4. Defendant's Motion to Suppress Tangible Evidence (Doc. No. 35) is DENIED.
5. At the hearing on November 6, 2006, there was substantial discussion about the

admissibility of the summary charts 1-6, in whole or in part, and about other documents or testimony which the government intends to introduce in this case. The Court will hear argument on inadmissibility of Summary Charts 1-6, following argument on the Daubert issues on November 22, 2006.

6. The Court will require the government to serve a list of trial exhibits, not necessarily in the order in which they will be introduced at trial, no later than December 8, 2006.

7. Argument will be heard at the hearing on November 22, 2006, and/or at a future date to be discussed, preceded by an appropriate letter to chambers by defense counsel, attacking the admissibility of other trial exhibits or evidence which the Defendant claims should not be admitted.

8. Defendant's request at the hearing November 6, 2006 for a continuance of the trial for sixty days is DENIED.

BY THE COURT:

/s/ Michael M. Baylson  
Michael M. Baylson, U.S.D.J.