IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Crim. No. DKC-99-0452
	)	
DANIEL GERSHONI	)	
and	)	
FRANCISCO SANTINI,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS DANIEL GERSHONI'S AND FRANCISCO SANTINI'S
JOINT MOTION FOR A BILL OF PARTICULARS

Pursuant to Fed. R. Crim. P. 7(f), defendants Daniel Gershoni and Francisco Santini hereby move that the Government be required to supply them with a Bill of Particulars setting forth the information specified below. The requested particulars are necessary to inform the defense of the specific charges in the Superseding Indictment, to reduce the possibility of unfair surprise and undue prejudice at trial, and to avoid double jeopardy.

REQUESTED PARTICULARS

A. Requiring the Government to Specify the Specific Laws, Regulations, or Policy Directives the Defendants Are Alleged to Have Violated

1. Identify the specific Medicare statute or regulations upon which the government relies for the statement in Count I, ¶ 7 that "to be reimbursable, services performed, ordered and supervised by a licensed medical doctor must have been reasonable and necessary for the diagnosis of illness and injury."

2. Identify the specific source of law (i.e. statute, regulation, or otherwise) under Medicare Part B upon which the government relies for the allegations in Count I, ¶ 8 regarding the reimbursement of transtelephonic electro-cardiographic services.

3. With regard to Count I, ¶ 8, identify the source of law upon which the government relies to define the term "medically necessary," including the source of law, if any exists, that requires anything other than the receipt of the doctor's prescription and documentation for the service to qualify as "medically necessary."

4. Identify the source of law upon which the government relies for its allegations in Count I, ¶ 9, including the definition of "Cardiac event monitoring services" and the description of how those services are provided.

5. With regard to Count I, ¶ 10, identify the specific Medicare regulations that require service providers to submit the correct CPT code for the medical service charged to Medicare.

6. Identify the source of law that provides the government's interpretation of the CPT codes referred to in Count I, ¶ 11.

7. With regard to Count I, ¶ 19, identify the source of law that prohibits the use of cardiac event monitoring equipment to take measurements of multiple patients at scheduled or predetermined periods.

B. Requiring the Government to Identify Which Claims Submitted by the Defendants were False or Fraudulent and How Those Claims Were False or Fraudulent

8. With regard to Count I, ¶ 15(1), identify how the alleged conspirators' conduct would have impeded, impaired, obstructed, and defeated the lawful functions of the Department of Health and Human Services.

9. With regard to Count I, ¶ 16, identify the specific false and fraudulent claims (by patient name and date of service) that the government alleges were submitted to Medicare Part B for cardiac event monitoring services when the services represented in fact were not provided to the Medicare beneficiaries.

10. With regard to Count I, ¶ 17, identify the specific cardiac monitoring tests (by patient name and date of service) that the Government maintains were unnecessary or illegible, specifying which tests the Government maintains were unnecessary and which tests the Government maintains were illegible.

11. With regard to Count I, ¶ 17, define the term "otherwise unacceptable" with regards to the tests at issue, including the specific conduct to which that term refers, and identify (by patient name and date of service) what tests were "otherwise unacceptable," and how, why, or in what respect each of these tests were "otherwise unacceptable."

12. With regard to Count I, ¶ 18, identify (by patient name and date of service) the occasions on which the defendants are alleged to have "utilized cardiac event monitoring equipment which did not have the capability of providing the service billed."

13. With regard to Count I, ¶ 19, identify (by patient name and dates of service) the occasions on which the defendants "did improperly utilize the cardiac event monitoring equipment to take measurements of multiple patients at scheduled or predetermined periods rather than permitting each patient to keep his or her equipment as needed to record an event."

14. With regard to the overt acts set forth in Count I, ¶ 21, specify in which of the respects enumerated in the "Manner and Means" the claims submitted on behalf of the eleven named patients were false or fraudulent.

15. With regard to Count I, ¶ 21(overt act m), and Count VII, identify the patient or patients of Dr. Santini's whose cardiac data was transmitted on or about March 23, 1995, and specify in which of the respects enumerated in the "Manner and Means" any claim or claims submitted in regard to this patient or patients were false or fraudulent.

16. Please identify that documents that will be introduced in evidence or referred to or relied upon by witnesses testifying during the Government's case in chief.

C. Requiring the Government to Provide Basic Information Relating to the Operation of the Alleged Conspiracy

17. Identify the names of all persons whom the government will claim at trial were co-conspirators in the conspiracy alleged to exist in Count I, ¶ 15.

18. With regard to Count I, ¶ 20, specify who paid and who received the kickbacks at issue; the form in which the alleged kickbacks were paid (e.g., cash, checks, goods, services, or other types of benefits or inducements); the period of time over which the kickbacks were paid; the number of occasions on which such kickbacks were paid; the dates or approximate dates when these kickbacks were paid; and identify the individual or individuals who were involved in carrying out these transactions.

Respectfully submitted,

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UNITED STATES OF AMERICA,	)	
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Plaintiff,	)	
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FRANCISCO SANTINI,	)	
	)	
Defendants.	)	
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DEFENDANTS DANIEL GERSHONI'S AND FRANCISCO SANTINI'S
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THEIR JOINT MOTION FOR A BILL OF PARTICULARS

Pursuant to Fed. R. Crim. P. 7(f), defendants Daniel Gershoni and Francisco Santini, by their undersigned counsel, state the following in support of their joint motion for a bill of particulars.

ARGUMENT

THE PARTICULARS REQUESTED BY THE DEFENSE IN THIS CASE ARE NECESSARY TO ADEQUATELY PREPARE A DEFENSE AND TO AVOID UNFAIR AND PREJUDICIAL SURPRISE AT TRIAL, AND COMPLYING WITH THESE REQUESTS WILL NOT IMPOSE AN UNREASONABLE BURDEN UPON THE PROSECUTION

A. The Legal Standards Governing Bill of Particulars

Fed. R. Crim. P. 7(f) provides that in appropriate cases, "the court may direct the filing of a bill of particulars." The primary function of a bill of particulars is to fairly apprise the defendant of the charges against him so that he may adequately prepare a defense and avoid

surprise at trial. *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996). The courts have established that Rule 7(f) should be interpreted broadly to ensure that defendants are given fair notice of the charges against them. *See United States v. Tucker*, 262 F. Supp. 305, 307 (S.D.N.Y. 1966); Advisory Committee Note to Fed. R. Crim. P. 7(f) (stating that the 1966 amendment to Rule 7(f), which eliminated the requirement of showing cause, was "designed to encourage a more liberal attitude by the courts towards bills of particulars"). Consistent with this approach, any doubt concerning whether a bill of particulars should be granted "must be resolved in favor of disclosure and the conflicting concerns [of the prosecutor and defendant] must yield to the paramount public interest in affording the accused a reasonable foundation for mounting a defense." *United States v. Manetti*, 323 F. Supp. 683, 696 (D. Del. 1971); *see also United States v. Thevis*, 474 F. Supp. 117, 124 (N.D. Ga. 1979), *aff'd on other grounds*, 665 F.2d 616 (5th Cir. 1982). When a bill of particulars would serve these purposes, the defendant is entitled to it "as of right," even though it requires "the furnishing of information which in other circumstances would not be required because [it would be] evidentiary in nature." *United States v. Gypsum Co.*, 37 F. Supp. 398, 403 (D.D.C. 1941). However, a bill of particulars is not intended to be used as a general discovery tool, and a court need not require a bill of particulars where the Indictment and the materials produced in discovery "are sufficient to allow a defendant to prepare a defense with reasonable diligence." *United States v. Murgas*, 967 F. Supp. 695, 701-01 (N.D.N.Y. 1997) (emphasis added).

B. The Prosecution Should be Required to Specify the Particular Statutes and Regulations That Provide the Basis for the Indictment's Allegations that the Defendants Violated Established Requirements of the Medicare Program (Requested Particulars 1-7)

This D.C. Court should require the Government to specify the sources of law upon which it bases the allegations in the Superseding Indictment. A fundamental purpose of an indictment is to inform the defendants of the law that they have allegedly violated. Indeed, Fed. R. Crim. P. 7(c) specifically requires that "[t]he indictment . . . shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated."

Courts have frequently granted motions for bills of particulars that seek clarification of the specific legal provisions that defendants are alleged to have violated. Thus, in *United States v. Madeoy*, 652 F. Supp. 371 (D.D.C. 1987), a white-collar fraud case involving an alleged real estate scam against the Veterans' Administration, Judge Harold Greene required the Government to state the specific laws or regulations that the defendant had allegedly violated in response to a bill of particulars. Although the Government had filed a lengthy indictment in that case, it referred in passing to "more than 700 pages of the Code of Federal Regulations without specifying which regulations are at issue." *Id.* at 374. In granting the defense's motion that the Government be required to specify the particular regulations upon which it relied, Judge Greene stated, "There is no reason whatever why these laws and regulations should not be specified by way of a bill of particulars -- a specification which may well be vital to the defendants' abilities to answer these charges." *Id.*

In this case, the Government has alleged generally that the defendants violated "Medicare regulations" and has provided definitions of medical terms that purport to be official interpretations from some binding source of law. *See* Superseding Indictment, Count I, ¶s 7-11. Yet the Government has consistently failed to furnish "the official citation of the . . . rule, regulation, or other provision of law," as required both by basic principles of fair notice and by Rule 7(c). By failing to provide these citations, the Government both denies the defendants adequate notice of the charges against them and hinders their ability to prepare for trial. Moreover, since it seems likely that the Government has this information readily available to it, so the burden of complying with these requests should not be significant. Defendants' requests for Particulars 1-7 should therefore be granted.

C. The Prosecution Should be Required to Provide Reasonably Particularized Information Identifying the Patients and Dates of Service that Will be at Issue at Trial, and it Should be Required to How Each of these Claims were False or Fraudulent (Requested Particulars 9-16); the Government Should Also Be Required to Supply Basic Information Concerning the Allegations that Kickbacks were Paid (Requested Particular 18).

This case involves allegations that Cardio-Tel, Servicios Medicos, and Dr. Santini between them submitted hundreds, if not thousands, of false and fraudulent claims for reimbursement to their respective carriers over a four-year period. As we have noted in our Joint Motion to require the Government to provide its witness list and to designate the documents on which it intends to rely at trial, the defendants – one of whom has court-appointed counsel and the other of whom does not have unlimited resources – cannot fairly be expected to individually investigate and prepare to defend every single one of the hundreds or even thousands of claims

that are conceivably at issue. Moreover, it is particularly unfair and inappropriate to force the defendants to guess which of the half-dozen separate means alleged in the Indictment applies to any specific patient's case, since a review of the documents pertaining to each such claim will not necessarily disclose this.

In similar white-collar fraud cases, the courts have recognized that the Government may appropriately be required to particularize its charges by specifically identifying the allegedly falsified documents and claims. In *United States v. Bortnovsky*, 820 F.2d 572 (2d Cir. 1987), for example, the defendants were charged with defrauding the Federal Emergency Management Administration (FEMA) and a state insurance agency by submitting claims relating to staged burglaries. As the Second Circuit found when it reviewed the defendants' convictions, however, "Nowhere in the Indictment . . . does the Government specify the dates of the staged burglaries or enumerate which of the numerous documents were falsified." *Id.* at 574.[1] The Second Circuit found that as a result of the Government's failure to specify which of fifteen burglaries potentially at issue were staged, the defendants "were forced to explain the events surrounding eight actual burglaries and to confront numerous documents unrelated to the charges pending. In effect, the burden of proof impermissibly was shifted to appellants." *Id.* at 574-75. It accordingly reversed the defendants' convictions.

In this case, the Indictment identifies eleven patients whose cases will be at issue in the trial, but it utterly fails to specify how the claims submitted in each of those cases were false or fraudulent. One overt act (m) and one substantive charge (Count VII) do not even identify the patient who is at issue, and based on Dr. Santini's billing information, at least, there are several

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[1] In *Bortnovsky*, the "numerous" documents totaled 4,000 in number. *Id.*

possible candidates. Moreover, the Government has not indicated that it intends to confine its proof at trial to these eleven cases, leaving the defense forced to guess at which of hundreds of other claims may likewise be at issue at trial.

The Indictment's failure to provide the degree of detail necessary to allow the defendants to adequately prepare for trial is particularly egregious with regard to the Indictment's allegations of kickbacks (Count I, ¶s 15(5) and 20). The Indictment does not even clearly specify who paid and who received the kickbacks. Nor does it specify the form in which the kickbacks were paid, or who was involved in making the payments. There is, in short, no detail whatsoever from which defendants could begin to discern how they might prepare to defend against this claim. Accordingly, absent further specification such as that set forth in Requested Particular No. 18, defendants will be forced to try and prove, based upon an overall review of their financial affairs, they did *not* pay or receive kickbacks.

Other white-collar fraud cases have provided defendants with relief under Rule 7(f) similar to that requested here. In *United States v. Nachamie*, 91 F. Supp. 2d 565 (S.D.N.Y. 2000), for example, the court granted a bill of particulars in a Medicare fraud case requiring the government to identify the specific documents, patient files, and checks that were allegedly part of the conspiracy and, "for each such document, file, or check, specify . . . each item, statement, or entry on each such document, file or check which is alleged to be false or fraudulent . . . ." *Nachamie*, 91 F. Supp. 2d at 574-75. The court granted this request, even though the Government had provided the defendant with extensive discovery totaling approximately 200,000 pieces of paper and hundreds of boxes and files relating to 2,000 separate Medicare claims. *Id.* at 571. What the Government in *Nachamie* had not done, however, was to "inform[]

the defendants which of these claims were false and in what way they were false" -- which is likewise the problem here. In another striking similarity to this case, the district court in *Nachamie* found that "[w]hile the Indictment specifies five ways in which claims were falsified, no claims are identified by defendant, type of falsity, claim number, and date." *Id.* Based on these circumstances, the *Nachamie* court found that "The Government has not yet complied with its obligation to provide adequate notice to the defense." *Id.*

Similarly, in *United States v. Trie*, 21 F. Supp. 2d 7 (D.D.C. 1998), the defendant was charged with, *inter alia*, making false statements to the Federal Election Commission (FEC). The defense sought a bill of particulars requiring the Government to identify the particular statements alleged to be false, how the statements were false, and the specific contributions at issue. *Id.* at 21. Although the government had provided the defendant with open-file discovery, as well as forty-five pages of excerpted records supposedly containing all of the false statements, *id.* at 21 & n.12, the court found that the defendant would not be able to prepare adequately for trial without more specific information about the false statements. As Judge Friedman sharply explained, in terms that are likewise applicable here:

> The problem is that these 45 pages [provided by the Government] contain 175 names along with a variety of information about each person or entity listed. The government contends that with due diligence Mr. Trie can readily identify which of the 175 names and what part of the related information constitute the actual false statements. This argument fails.
>
> Not only does the government's position presume that the defendant knows what the government alleges that he did[,] and with whom he dealt[,] and therefore that he has all the information he needs, a premise inconsistent with the presumption of innocence, but it smacks of gamesmanship. *A defendant faced with false statements charges should not have to waste precious pre-trial preparation time guessing which statements he has to defend against or which contributors may be witnesses against him at trial when the government knows*

> *precisely the statements on which it intends to rely and can easily provide that information.*

Id. at 21 (emphasis added). Accordingly, the court ruled that "The government must provide information as to exactly what the false statements are, what about them is false, who made them, and how Mr. Trie caused them to be made." *Id.* at 21-22.

As *Bortnovsky*, *Nachamie* and *Trie* demonstrate, the production of numerous documents -- sometimes known as "burying the defendant in paper" -- is not an adequate alternative for particularized information about the allegedly false documents or claims. Other cases likewise concur with this analysis, finding that the sheer volume of documents made available for review as part of pre-trial discovery can sometimes be a factor that weighs in favor of granting defense requests for a bill of particulars. *See United States v. Davidoff*, 845 F.2d 1151, 1155 (mere production of 6,000 documents was inadequate to provide the defendants with appropriate notice of the uncharged crimes under RICO that the prosecution intended to prove at trial); *United States v. Bin Laden*, 92 F. Supp. 2d 225, 234 (S.D.N.Y. 2000) ("[i]t is no solution to rely solely on the quantity of information disclosed by the government; sometimes, the large volume of material is precisely what necessitates a bill of particulars"); *United States v. Upton*, 856 F. Supp. 727, 753 (E.D.N.Y. 1994) ("it would be unfair . . . to allow the government to introduce allegedly falsified maintenance records buried in thousands of documents already produced without prior notice to defendants of those documents upon which the government intends to rely").

In this case, the Government has provided the Defendant with access to sixty-six regular and oversized file boxes containing an estimated total of at least 150,000-200,000 pieces of paper, but it has not provided any significant degree of guidance in the Indictment or otherwise to

help the defendants understand the specific allegations they will be required to meet at trial. The documents the Government has made available to the defense literally relate to hundreds, if not thousands, of individual claims. The Indictment makes reference to only eleven individual patients, and even then it does not specify with regard to any of them what the nature of the "false or fraudulent" claim was in their specific case -- an omission that is particularly troubling in light of the roughly half-dozen different fraudulent practices that the defendants are alleged to have employed in the "Manner and Means."

Moreover, absent an expressed willingness on the Government's part to limit its proof at trial to the specific patients identified in the Indictment -- a concession that has not occurred to date and that is unlikely to occur -- the defense cannot restrict their preparation to that small group of patients. *Upton*, 856 F. Supp. at 747-48. In the case of Dr. Santini alone, the Government has obtained records relating to almost 380 of his patients, but the Government has provided no guidance whatsoever as to which of these besides those mentioned in the Indictment may be the subject of proof at trial. In the case of Mr. Gershoni, who is also faced with answering allegations relating to the patients of the Servicios Medicos Clinic in Cabo Rojo, the practical difficulties of preparing to meet the Government's sweeping and multi-pronged claims without some clarification as to which patients they apply to and how they apply to them are even more insuperable.

In contrast to the burdens placed on the defense by a general, non-specific Indictment and a roomful of documents relating to claims submitted by Dr. Santini and Cardio-Tel, the burden on the Government of complying with the requested particulars is quite moderate. For example, the Government presumably bases its allegation in Count I, ¶ 16 that some services were billed

for that were not actually provided on information it has received from co-operators or specific anomalies it has noted in its review of the records. In either case, it should impose no great burden to require the Government to transmit that information to the defense -- indeed, this could and should have been done in the Indictment itself. *Compare Upton*, 856 F. Supp. at 745-746 (in prosecution for falsifying aircraft maintenance records, the Indictment's overt acts detailed the dates particular records were falsified; the name of the employee who falsified them; the identification number of the aircraft for which the maintenance records were falsified; the specific document that was falsified; and the items of maintenance that were falsified).[2] Similarly, it should be quite easy for the Government to explain what services are at issue in Count I, ¶s 16 and 18. Likewise, the Government presumably supplied the Grand Jury with specific instances of the conduct alleged in ¶ 19 (that ECG monitoring devices were used to take measurements of multiple patients in a predetermined sequence), so it should once again be no great burden to provide the defense with that information. Finally, we also assume that the Government must have some specific evidence relating to particular payments or benefits that it presented to the Grand Jury in support of the two paragraphs in the Indictment accusing the defendants of giving and receiving kickbacks. Again, it should not be at all burdensome to require the Government to supply appropriate specifics concerning that evidence to the defense.

D. The Prosecution Should be Required to Identify Those Individuals Whom it Considers Co-Conspirators of the Defendants (Requested Particular 17).

[2] Despite this level of detail, the trial court still found that a bill of particulars was appropriate in *Upton*, primarily because the Government did not indicate it intended to limit its proof at trial to the specific transactions identified in the Indictment. *Id.* at 747-48, 753.

This court should also require the prosecution to disclose the names of any individuals that it will contend at trial were co-conspirators of the defendants. The case law establishes that if the identity of known co-conspirators does not appear in the Indictment or in some other particularized disclosure, then the prosecution may appropriately be required to provide them in response to a bill of particulars. Such motions are commonly granted not only in white-collar fraud cases, but even in cases involving violent crimes. *See, e.g., Bin Laden*, 92 F. Supp. 2d at 241-42 (granting motion for a bill of particulars requiring the government to identify all unindicted co-conspirators to whom it will refer at trial); *Nachamie*, 21 F. Supp. 2d at 572-73 (granting a bill of particulars requiring the government to disclose the names of any known unindicted co-conspirators); *United States v. Anderson*, 31 F. Supp. 2d 933, 938 (D. Kan. 1998) (granting a bill of particulars requiring the government to provide the names of the unindicted co-conspirators in a Medicare fraud case); *United States v. Murgas*, 967 F. Supp. 695, 702 (N.D.N.Y. 1997) (requiring the government to provide the identities of all alleged coconspirators); *United States v. Taylor*, 707 F. Supp. 696, 700 (S.D.N.Y. 1989) (granting a bill of particulars that required the government to provide the names of "all persons whom the government will claim at trial were co-conspirators"); *United States v. Feola*, 651 F. Supp. 1068, 1134 (S.D.N.Y. 1987).

In determining whether to grant a bill of particulars requesting the identity of unindicted coconspirators, the court in *Nachamie* considered the following six factors:

(1) the number of co-conspirators;
(2) the duration and breadth of the alleged conspiracy;
(3) whether the prosecution has provided adequate notice of the particulars through alternative means;
(4) the volume of pretrial disclosure;

(5) the potential danger to co-conspirators and the nature of the alleged criminal conduct; and
(6) the potential harm to the prosecution's investigation.

Nachamie, 91 F. Supp. 2d at 572. These factors strongly support the defendants' motion for disclosure of the identities of their alleged co-conspirators here.

First, the government has charged only two individual co-conspirators in this case, but the Indictment and the known facts here suggest that the number of other possible co-conspirators could be quite substantial. Cardio-Tel employed dozens of sales representatives, including a significant number in Puerto Rico. Hundreds of doctors prescribed its services.[3] It is particularly crucial for the defense to know which physicians the Government will maintain were co-conspirators at trial. In the first place, each doctor who prescribed Cardio-Tel's services is a potential witness for the defense, both with regard to their view of the efficacy of Cardio-Tel's ECG services and with regard to their understanding of HHS's and HCFA's billing requirements. To prepare an adequate defense, defense counsel must be in a position to determine which doctors they can call without encountering an assertion of their Fifth Amendment privilege. In addition, it may be that some of the unindicted co-conspirators have billing patterns that are far more suggestive of deliberate fraud than are those of Dr. Santini. If this is the case, it is obviously important that his counsel be in a position to establish this at trial, and that will necessarily require advance investigation.

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[3] By naming Servicios Medicos of Cabo Rojo as a co-conspirator, the Government has strongly suggested that it believes at least some physicians there acted as co-conspirators, but we do not know whether the Government believes that was true of all of the physicians who worked there, or only some of them.

In *Nachamie*, the court found that where a large number of co-conspirators may exist, this factor weighs in favor of disclosure. *Nachamie*, 91 F. Supp. 2d at 573; *see also Trie*, 21 F. Supp. 2d at 22 (emphasizing that the court must evaluate the total number of *alleged* co-conspirators, not simply the number of *indicted* co-conspirators, in deciding to grant the request for the identities of co-conspirators). Obviously, the larger the number of co-conspirators, the more investigation that will be necessary to prepare an adequate defense. It is critically important for the defense to identify the individuals the Government maintains are unindicted co-conspirators, because the Government's principal trial witnesses are often drawn from their ranks. Particularly in a case like this one, where Dr. Santini and Mr. Gershoni may never even have met many of the individuals that the Government will allege were their co-conspirators (the doctors of Servicios Medicos are the most obvious members of this category), it is particularly important that the defense receive sufficient advance notice of their identity to permit reasonable investigation of these individuals' character and their participation in the alleged wrongdoing. *Trie*, 21 F. Supp. 2d at 22 (granting request for identities of coconspirators in part because the defendant may not have met them or be able to identify them). In addition, of course, a defendant in a conspiracy case may be held liable for the acts of co-conspirators even if he was not fully informed of their actions. *Id.; see also United States v. Resko*, 3 F.3d 684, 696 (3d Cir. 1996). It is therefore critical for both defendants here to know the identities of their alleged co-conspirators so they can adequately investigate their conduct.

Second, in this case, as in *Nachamie* and *Trie*, the alleged conspiracy continued for a significant amount of time. In both *Nachamie* and *Trie*, the alleged conspiracies ran three years or more, *see Nachamie*, 91 F. Supp. 2d at 573; *Trie*, 21 F. Supp. at 22; here, the alleged

conspiracy is alleged to have covered four and a half years (Count I, ¶ 15). The larger the size of the alleged conspiracy and the longer the period of time it is alleged to have lasted, the greater is the likelihood that the defense will be surprised by the identity of some of the alleged co-conspirators at trial. *Nachamie*, 91 F. Supp. at 572.

The third and fourth factors address the amount and adequacy of information that the Government has previously supplied to the defense. For the reasons set forth previously, the Government has not provided adequate notice here to permit the defendants to identify all of their alleged co-conspirators without further specification from the Government.

Finally, the fifth and sixth factors set forth in *Nachamie* address the possibility that disclosure of the names of co-conspirators will either endanger the lives of these individuals or may hamper the Government's investigation. As previously noted, there is no reason to believe there is any risk of violence or witness intimidation here. Mr. Gershoni is forty-one years old and Dr. Santini is sixty-five, and neither have prior criminal records. The Government allowed both defendants to appear voluntarily for arraignment, and both were released without significant conditions. And, as the court noted in *Nachamie,* "this case charges Medicare fraud – not narcotics trafficking or murder." 91 F. Supp. 2d at 573. Even in *Bin Laden*, a case that did involve allegations of serious violent crimes, the court held that the government must make a good faith, particularized determination that disclosure would expose the co-conspirator or another person to "a significant risk of bodily harm" before it can argue against disclosure based on concerns about witness intimidation. *Bin Laden*, 92 F. Supp. at 241. Finally, this case involves a time period that is now almost wholly beyond the statute of limitations, and the fact of this Indictment and the somewhat similar Indictment in the case of *United States v. Roberto*

Rosich-Bachs, et al. are presumably well-known in Puerto Rico. Thus, there seems to be little risk that any ongoing Government investigations will be compromised by identification of the alleged co-conspirators in this matter.

In short, because all six factors support the disclosure of the identities of the co-conspirators, this Court should require the government to provide that information.

E. The Prosecution Should be Required to Specify How the Defendants' Conduct Impeded, Impaired, Obstructed, and Defeated the Lawful Functions of the Department of Health and Human Services (HHS) (Requested Particular 8).

In ¶ 15(1) of Count I, the Indictment charges that the defendants impeded, impaired, obstructed, and defeated the lawful functions of HHS and the Health Care Financing Administration (HCFA), but it fails to go on and provide the further critical detail of exactly how the defendants are alleged to have done this. It may well be that the Government simply means that the defendants did these things by concocting a scheme to defraud Medicare. If that is the case, then the Government can easily address this issue, either by writing the defendants with assurances to the effect or by providing a one-sentence response to this item as part of a bill of particulars. Without such clarification, however, defense counsel are left with the concern that the Government may plan to claim at trial that they "imped[ed], impair[ed], [and] obstruct[ed]" HHS and HCFA in some less obvious way that is revealed neither by the Indictment nor by the discovery provided to date.

In part because the burden on the Government of complying is so minimal, the courts have commonly required that the government specify how a conspiracy has affected a federal agency's "lawful functions." *See United States v. Hsia*, 24 F. Supp. 2d 14, 32 (D.D.C. 1998);

United States v. Turkish, 458 F. Supp. 874, 884 (S.D.N.Y. 1978) ("Defendants are entitled to know what lawful government functions [of the Department of Treasury] they are alleged to have interfered with or obstructed"). In *Hsia*, the court required the Government to specify through a bill of particulars which lawful functions of the INS the defendant had impeded and how she had impeded those functions. 24 F. Supp. 2d at 32. Although the government had identified certain general INS functions in its indictment, the court found that the government had not specified how the alleged conspiracy was related to the INS functions. The Court noted that "The fact that a plausible connection may be inferred by a reader of the indictment does not provide sufficient protection against surprise at trial as to what connection the government will actually attempt to prove." *Id.* Because the Indictment was ambiguous, the *Hsia* court accordingly required the Government to explain how the conspiracy had impeded the general lawful function of the INS. Similar relief is appropriate here.

F. The Prosecution Should be Required to Clarify Ambiguous Charges or Allegations, Such as the Claim that the Defendants Improperly Billed for ECG Tests that Were "Unnecessary" (Requested Particular 10), "Otherwise Unacceptable" (Requested Particular 11), or the Assertion that the Defendants "Did Pay and/or Receive Illegal Kickbacks" (Requested Particular 18).

The Government "cannot be permitted to allege overt acts in such general terms as to require seemingly unlimited research and investigation by the Defendants in an attempt to answer those charges." *Bin Laden*, 92 F. Supp. 2d at 237; *Turkish*, 458 F. Supp. at 883. Rather, the Government must use terms that permit defense counsel to "reasonably focus their investigation." *Bin Laden*, 92 F. Supp. 2d at 238.

In *United States v. Turkish*, 458 F. Supp. 874 (S.D.N.Y. 1978), the court granted a bill of particulars requiring the government to clarify various ambiguities in its indictment. The court required the government to explain whether the "losses" referred to in one paragraph were tax-deductible; to identify the "other conditions of the Crude Oil Market" that the defendants had allegedly fixed; and to state whether any "other reasons" existed for the losses it referred to in the indictment. *Id.* at 882-83. The court reasoned that defendants must be "apprised *as specifically as possible* of the crime with which they are charged . . . ." *Id.* at 883 (emphasis added).

In the instances set forth in Requested Particulars 10, 11, and 18, the burden on the Government of clarifying these terms once again will be minimal. There is no proper and compelling reason the Government can give for not clarifying terms such as these. The only conceivable motive the Government might have for not clarifying these terms would be that it wants to preserve maximum flexibility to argue at trial that the evidence presented somehow matches the allegations of its Indictment in these areas. And that motive, of course, would be

improper. The Government obtained this Indictment from the Grand Jury based on particular theories and allegations, and it obviously knows what those are. Those specific theories and allegations must be the basis on which this case is presented and argued to the jury at trial. The Government accordingly should be required to clarify these ambiguous references in the Indictment.

CONCLUSION

For the reasons stated, defendants Daniel Gershoni and Francisco Santini's Joint Motion for a Bill of Particulars should be granted.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have, this ___ day of July, 2000, caused a copy of the foregoing Defendants' Joint Motion for a Bill of Particulars to be delivered by first-class mail, postage prepaid, to:

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Greenbelt, Maryland 20770

Counsel for the United States of America.

_____
Jefferson M. Gray, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Crim. No. DKC-99-0452
	)	
DANIEL GERSHONI)		
and	)	
FRANCISCO SANTINI,	)	
	)	
Defendants.	)	
_____	)	

ORDER

Upon consideration of Defendants Daniel Gershoni's and Francisco Santini's Joint Motion for a Bill of Particulars, the Government's Opposition thereto, and the record herein, it is this ____ day of _____, 2000, hereby

ORDERED that the defendants joint Motion is GRANTED; and it is further

ORDERED that the Government shall provide the defense with the requested Particulars as soon as possible, but in no event less than sixty days prior to the start of the trial in this matter.

_____
The Hon. Deborah K. Chasanow
U.S. District Court Judge

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