Ted W. Cassman
Email: cassman@achlaw.com
ARGUEDAS, CASSMAN & HEADLEY LLP
803 Hearst Avenue
Berkeley, CA 94710
Telephone: (510) 845-3000
Facsimile: (510) 845-3003

Counsel for Vilasini Ganesh

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. VILASINI GANESH, Defendant.	No. 16-211 LHK DEFENDANT GANESH'S MOTION FOR JUDGMENT OF ACQUITTAL AND/OR NEW TRIAL, FED. R. CRIM. PRO. RULES 29 AND 33

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I. INTRODUCTION

This case was charged and prosecuted as a broad-ranging conspiracy between Vilasni Ganesh, M.D., and her husband, Gregory Belcher, to commit health care fraud and money laundering. As for Dr. Ganesh, the defense proffered was not guilty by reason of insanity. The jury rejected both theories, acquitting Dr. Ganesh of the government's conspiracy and money laundering charges and Mr. Belcher of all but one false statement charge. One consequence is this: Dr. Ganesh stands convicted of ten discreet substantive charges that received relatively little attention from the government and virtually none from the defense throughout these proceedings. In fact, in his closing argument, defense counsel did not directly address those charges at all. Another consequence is that the adequacy of the evidence supporting those charges and the propriety of the relevant jury instructions must now be re-evaluated without the overlay of the conspiracy charges.

We assert that the jury's verdicts on the substantive charges must be vacated for numerous reasons. First, as to each of the charges, the Court erred by failing to give a unanimity instruction requiring that all of the jurors agree on the act that Dr. Ganesh committed and that constituted a fraud and/or a false claim. As to each count, the government asserted two or more alleged falsities as the basis for conviction. In the absence of an instruction requiring unanimity, there is an unacceptable risk that Dr. Ganesh was convicted of these counts without the jurors agreeing unanimously that she made a specific false representation in a claim.

Second, as to Counts Eleven and Twelve, the government constructively amended the charges. The indictment alleged that the claim Dr. Ganesh submitted in each of these counts was fraudulent because she used a different doctor's Tax Identification Number (TIN). However, at trial, the government presented evidence and argued to the jury that the claims were false because Dr. Ganesh identified a different doctor as the service provider. Because these are two factually distinct claims subject to different defenses, the government's new trial theory violated Dr. Ganesh's Sixth

Amendment right to a trial on the same charges found by the grand jury.

Third, we renew our objections to the admission of the so-called "source spreadsheets," produced by insurance companies in response to government subpoenas, as business records pursuant to Federal Rule of Evidence § 803(6). *See* Exhibits 15A-D, 38B-D, 39A-D, 40A-D, 41A-I, and 88A. While we are aware that the Court has now twice overruled this objection, we continue to assert that the source spreadsheets were erroneously admitted as business records and that their admission into evidence violated Dr. Ganesh's right to confrontation under *United States v. Crawford*, 541 U.S. 36 (2004). We further emphasize that the government's reliance on these exhibits permitted it to present its case of health care fraud and false statements on eight of the ten charges without ever presenting to the jury the specific claim (i.e. Form 1500) that Dr. Ganesh allegedly submitted. As to Counts Two, Three, Five, Six, Twelve, Thirteen, Fourteen and Fifteen, the evidence was therefore insufficient as a matter of law.

Fourth, as to Counts Six and Fifteen, the source spreadsheets introduced into evidence stated that the "billed amount" for the claims was zero dollars. On that record, there was a failure of proof that a claim was submitted as part of scheme "to obtain money or property" as alleged in Count Six or that a false statement was made "in connection with the delivery of or payment" as alleged in Count Fifteen. Accordingly, the evidence on these counts was insufficient.

II. FACTS AND PROCEDURAL POSTURE

After a jury trial, Dr. Ganesh was convicted of the five health care fraud offenses and the five false statement offenses. As to these charges, we summarize the allegations in the Superseding Indictment and the evidence presented at trial below:

A. Count Two – Health Care Fraud

1. The Indictment

Count Two charged that Dr. Ganesh submitted a false claim for payment to Anthem Blue Cross ("Anthem") for services provided to Surekha Soni on June 28, 2012.

Dkt. No. 52, p. 10.

2. The Testimony

The prosecutor showed Ms. Soni Exhibit 33-311 through 33-313, which was an Explanation of Benefits ("EOB") from Anthem, reflecting that Anthem had paid a claim for services rendered by "Kuhlman, Riley & Dewees, MD," on June 28, 2012. RT 11/7, pp. 239-240. Ms. Soni testified that Dr. Ganesh was her personal physician from 2011 to 2013, and that she never saw a doctor named Dewees. RT 11/7, pp. 236-237. Ms. Soni testified that the only doctor she saw at Dr. Ganesh's office was Dr. Ganesh. RT 11/7, p. 240:15-20.

The prosecutor next directed Ms. Soni to Exhibit 97, which consisted of copies from Dr. Ganesh's patient file for Ms. Soni. RT 11/7, p. 240:21-25. Ms. Soni testified that she did not see any records in her patient file reflecting an office visit with Dr. Ganesh on June 28, 2012. RT 11/7, p. 241:10-12.

The patient file in question has a Progress Note for June 18, 2012, reflecting that Ms. Soni was seen by Dr. Ganesh on June 18, 2012. Exhibit 97-5. Aetna's source spreadsheets do not reflect that a claim was submitted for services on June 18, 2012, raising the reasonable possibility that the date of June 28, 2012 was mistakenly entered for the claim, either by Dr. Ganesh' office or Aetna's staff when the claim was submitted a year later. *See* Exhibit 38b. These facts were never brought to the jury's attention.

Julie Haskins testified on behalf of Anthem. She testified that four "source spreadsheets" identified as Exhibits 38B, C, D, and 88A, were derived from data created and maintained by Aetna in the ordinary course of business. RT 11/21, pp. 83-84. She further testified that Anthem would not pay a claim if Anthem knew that the date that for services rendered on the Form 1500 was inaccurate, if the wrong doctor was identified on the Form 1500 as the renderer of services, and/or if the wrong CPT code was used on the Form 1500. RT 11/21, pp. 74-76. The prosecutors did not ask Ms. Haskins any questions, and she did not offer any opinions, about whether Anthem would pay a claim if the wrong TIN was used on the Form 1500.

The government did not present the jury with a Form 1500 for services rendered to Surekha Soni on June 28, 2012.

3. Closing Arguments

In his closing argument, the prosecutor directed the jury to Exhibit 33-313, the EOB form reflecting a payment by Anthem for services rendered to Surekha Soni on June 28, 2012. RT 12/12, p. 85. He also pointed to Exhibit 38b, line 6045, an Aetna source spreadsheet reflecting a claim for services rendered on June 28, 2012, and pointed out that the spreadsheet reflected that "It's claimed as Edward Dewees. Please make a note of that, that that's who is claimed as providing the care." RT 12/12, p 85:22-24. So the prosecutor argued that Dr. Ganesh had submitted a false claim because the source spreadsheet "indicates that Dr. Dewees was claimed as the doctor providing it" and because Ms. Soni testified that she her patient file did not contain a record of an office visit on June 28, 2012. RT 11/21, p. 86:2-9.

Defense counsel did not address Count Two in his closing argument.

B. Count Three – Health Care Fraud

1. The Indictment

This Count charged that Dr. Ganesh submitted a false claim for payment to Blue Shield for services provided to Michael Kelley on March 5, 2012. Dkt. No. 52, p. 10.

2. The Evidence

Michael Kelley testified that in the 2010 to 2015-time frame, Dr. Ganesh treated him for neuropathy, diabetes, weight loss and administered B-12 shots. RT 11/14, p. 6:15-24. Kelley was shown Exhibit 34-547, a Blue Shield EOB dated April 19, 2013 and Kelley noted that it reflected a payment to Kuhlman, Riley, Dewees MD Inc. for services rendered on March 5, 2012. RT 11/14, p. 27-28. Mr. Kelley was not asked and never stated whether he received services from Dr. Ganesh on March 5, 2012.

Alex Kondratenko testified on behalf of Blue Shield. He testified that four "source spreadsheets" identified as Exhibits 39A, B, C, and D, were derived from data created and maintained by Blue Shield in the ordinary course of business. RT 11/20, pp.

210:15-211:1, and RT 11/21, pp. 4:23-6:14. He further testified that Blue Shield would not pay a claim if Blue Shield knew that the date that for services rendered on the Form 1500 was inaccurate or if the wrong doctor was identified on the Form 1500 as the renderer of services. RT 11/21, p. 19:4-9; 23:18-24:1. Regarding the CPT codes 99215 and 9925, Mr. Kondratenko testified that typically visits were expected to last 45 minutes, but that Blue Shield might pay a claim for those codes for visits as short as 15 minutes, depending on the circumstances. RT 11/21, p. 21:7-24. The prosecutors did not ask Mr. Kondratenko any questions, and he did not offer any opinions, about whether Blue Shield would pay a claim if the wrong TIN was used on the Form 1500.

The government did not present the jury with a Form 1500 for services rendered to Michael Kelley on March 5, 2012.

3. Closing Arguments

In his closing argument, the government attorney directed the jury back to Exhibit 34-547, the EOB that Mr. Kelley had seen, and he described it as follows:

> Can we go, please, to 34-547? This is count three. And can we highlight the bottom half? There's the claim, 3-5-12, 99245, Michael Kelley. If we can go now to 39a, row 815, please. And there again, Dr. Dewees. This claim was submitted for March 5th, 2012 care, but *it claims Dr. Dewees is the one that provided it.* That claim is false.

RT 12/12, p. 86:10-16 (emphasis added). But the government mischaracterized the Exhibit 34-547: it was not a claim form, and it did not identify the physician who rendered the service. Similarly, Exhibit 39a, line 815, was not "a claim," but rather Blue Shield's source spreadsheet. The only claim of falsity that the government attorney argued with respect to this charge was the identification of Dr. Dewees as the provider of care.

Defense counsel did not directly address Count Three in his closing argument.

C. Count Four – Health Care Fraud

1. The Indictment

This Count charged that Dr. Ganesh submitted a false claim for payment to Cigna for services provided to Mastaneh Habibi on December 30, 2012. Dkt. No. 52, p.

10.

2. The Evidence

Ms. Habibi testified that she was Dr. Ganesh's patient and only saw her on weekends once or twice. RT 11/14, pp. 72-73. The government attorney directed Ms. Habibi to Exhibit 35-333, a Cigna EOB reflecting a payment of services provided by Dr. Ganesh on Saturday, December 30, 2012. RT 11/14, p. 85. Ms. Habibi testified that she did not think that she saw Ms. Ganesh on December 30, 2012. RT 11/14, p. 87:19-22. The evidence included a Form 1500 submitted to Cigna for services to Ms. Habibi on December 30, 2012. Exhibit 140.

Tammy Sue Kahler testified on behalf of Cigna. She testified that four "source spreadsheets" identified as Exhibits 40A, B, C, and D were derived from data created and maintained by Cigna in the ordinary course of business. RT 11/21, pp. 175:2-176:5. She further testified that Cigna would not pay a claim if Cigna knew that the date for services rendered on the Form 1500 was inaccurate, if the wrong doctor was identified on the Form 1500 as the renderer of services, and/or if the wrong CPT code was used on the Form 1500. RT 11/21, pp. 181:24-187:17.

3. The Closing Arguments

The government attorney directed the jury to the Cigna source spreadsheet, Exhibit 40A, Row 5715. RT 12/12, p. 87:4-5. He noted that the exhibit reflected payment of a claim for services at CPT 99215 on Sunday, December 30, 2012. *Id.* The attorney concluded "[s]o that claim is false. No one was there that day. The use of that CPT code is inappropriate." RT 12/12, p. 87:16-17.

Defense counsel did not address Count Four in his closing argument.

D. Count Five – Health Care Fraud

1. The Indictment

This Count charged that Dr. Ganesh submitted a false claim for payment to United Health Care ("UHC") for services provided to Ann Dwan on February 17, 2014. Dkt. No. 52, p. 10.

2. The Evidence

Ann Dwan testified that she was out of the country from February 4, 2014 to February 27, 2014. RT 11/13, pp. 88-89. Ms. Dwan was shown Exhibit 36-101, an EOB reflecting a payment for services rendered to Ms. Dwan on February 17, 2014. RT 11/13, pp. 90-92.

Jacob Kearny testified on behalf of UHC. He testified that four "source spreadsheets" identified as Exhibits 41A through I were derived from data created and maintained by UHC in the ordinary course of business. RT 11/21, pp. 79:20-81:14. He further testified that UHC would not pay a claim if UHC knew that the date for services rendered on the Form 1500 was inaccurate, if the wrong doctor was identified on the Form 1500 as the renderer of services, and/or if the wrong CPT code was used on the Form 1500. RT 11/21, pp. 75:7-76:18.

The government did not present the jury with a Form 1500 for services rendered to Ms. Dwan on February 17, 2014.

3. The Closing Arguments

The government attorney directed the jury to Exhibit 36-101, the EOB for services provided on February 17, 2014, and reminded the jurors that Ms. Dwan testified she was not in the U.S. at that time. RT 12/12, p. 87:18-25. The attorney noted that the EOB was corroborated in the source spreadsheets at Exhibit 42g at row 3911. RT 12/12, p. 88:4. Thus, the attorney asserted that the claim for payment was false both because Ms. Dwan had not received services February 17 and because the claim had the wrong CPT code. RT 12/12, p. 88:1-4.

Defense counsel did not address Count Four in his closing argument.

E. Count Six – Health Care Fraud

1. The Indictment

This Count charged that Dr. Ganesh submitted a false claim for payment to Aetna for services provided to Ms. Kakkar on September 21, 2012. Dkt. No. 52, p. 10.

2. The Evidence

Ms. Kakkar testified that Dr. Ganesh treated Ms. Kakkar for weight loss and prescribed Phentermine, and Ms. Kakkar was initially pleased with her care and with the results. RT 11/13, p. 136:7-24. Referring to Exhibit 32-656 and 657, an Aetna EOB, Ms. Kakkar testified that it reflected payments for claims for services rendered to her on September 17, 19 and 21, 2012. RT 11/13, pp. 148:1-150:21. Ms. Kakkar testified that she did not remember seeing Dr. Ganesh seven times in September 2012. RT 11/13, p. 152:12-16. Ms. Kakkar was never asked whether she actually saw Dr. Ganesh on September 21, 2012, and she did not testify to the contrary.

Although it was not pointed out to the jury, Aetna's source spreadsheet reflects that *the billed amount for this claim was zero dollars*. Exhibit 15b, Row 3292, Column U. See also, Exhibit 122, Row 27. (The relevant excerpt of Trial Exhibit 15b is appended hereto as Exhibit A.) In addition, the defense is in possession of a Progress Note reflecting treatment of Ms. Kakkar on September 21, 2012. Exhibit B. This document was not shown to Ms. Kakkar and was not seen by the jury.

Kathy Richer testified on behalf of Aetna. She testified that four "source spreadsheets" identified as Exhibits 15A, B, C and D were derived from data created and maintained by Aetna in the ordinary course of business. RT 11/14, pp. 35:25-38:18. She further testified that Aetna would not pay a claim if Aetna knew that the date for services rendered on the Form 1500 was inaccurate, if the wrong doctor was identified on the Form 1500 as the renderer of services, and/or if the wrong CPT code was used on the Form 1500. RT 11/14, pp. 28:21-30:15.

The government did not present the jury with a Form 1500 for services rendered to Ms. Kakkar on September 21, 2012.

3. The Closing Arguments

The government attorney directed the jury's attention to Exhibit 32-657, the Aetna EOB reflecting a payment for services rendered on September 21, 2012 and three other dates between the 14th and 21st. RT 12/12, p. 88:5-7. The attorney noted

that Ms. Kakkar did not recall seeing Dr. Ganesh four times over the space of a week, as indicated on the EOB. RT 12/12, p. 89:6-8. He urged that the claim was false both because Ms. Kakkar did not remember the visits and because the CPT codes were wrong. RT 12/12, p. 89:6-12.

Defense counsel did not address Count Four in his closing argument.

F. Count Eleven – False Statement

1. The Indictment

Count Eleven charged that on December 23, 2013, Dr. Ganesh submitted a false claim for payment to Anthem services provided to Surekha Soni on December 31, 2012. The charge identified the allegedly false representations as "Impermissible usage of TIN [Taxpayer Identification Number] associated with another physician; alleged service not provided on 12/31/2012 for duration claimed." Dkt. No. 52, p. 11.

2. The Evidence

The prosecutor showed Ms. Soni Exhibit 33-92, the actual Form 1500 for services provided on December 31, 2012, and inquired whether she "had a memory of seeing a Dr. Dewees in December of 2012?" RT 11/7, pp. 238-239. Ms. Soni responded "No, I don't remember. But I never met [a Dr. Dewees] in the doctor's office." RT 11/7, p. 239:2-3.

Ms. Soni's patient file included a record of an office visit with Dr. Ganesh on December 28, 2012. Exhibit 97-44. Aetna's source spreadsheets do not reflect that a claim was submitted for services on December 28, 2012, raising an inference that the date of December 31, 2012 was mistakenly entered for the claim by Dr. Ganesh's office when the claim was submitted almost a year later. *See* Exhibit 38b. These facts were never brought to the jury's attention.

3. The Closing Arguments

The government attorney directed the jury's attention to Anthem's source spreadsheet, Exhibit 38b, Rows 6800 through 6803, which he asserted described a claim for services on December 31, 2012. RT 12/12, p. 96:7-12. He then called up the

actual Form 1500, Exhibit 33-92, and asserted that the claim was false because Dr. Dewees was not the rendering physician and because the form used the wrong CPT codes. RT 12/12, pp. 96:22-97:4. At no point did the attorney argue that the claim was false because it included an inaccurate TIN.

Defense counsel did not address Count Eleven in his closing argument and did not point out that the charge was fraudulent use of another doctor's TIN.

G. Count Twelve – False Statement

1. The Indictment

Count Twelve charged that on August 10, 2013, Dr. Ganesh submitted a false claim to Blue Shield for services provided to Michael Kelley on June 2, 2012. The charge identified the allegedly false representations as "Impermissible usage of TIN [Taxpayer Identification Number] associated with another physician; alleged service not provided on 6/2/2012 for duration claimed." Dkt. No. 52, p. 11.

2. The Evidence

The government attorney never asked Mr. Kelley whether he was seen by Dr. Ganesh on June 2, 2012, and Mr. Kelly never testified whether or not he received services from her on that date.

The government did not present the jury with a Form 1500 for services rendered to Michael Kelley on June 2, 2012.

3. Closing Arguments

The government attorney directed the jury to Blue Shield's EOB, Exhibit 34-804, and to its source spreadsheet, Exhibit 39a, Row 1089. RT 12/12, p. 97:5-13. The attorney asserted that these two exhibits (which of course were derived from the same database), corroborated each other:

> It matches – again, the source spreadsheet matches the explanation of benefits, but this *confirms that what was claimed was Dr. Dewees saw Michael Kelley, and you know he didn't*. You know that Dr. Dewees was long gone by 2012. That claim is false. And it also uses inappropriately the 99245.

RT 12/12, p. 97:17-22 (emphasis added). At no point did the attorney argue that the

claim was false because it included an inaccurate TIN.

As with the earlier Count relating to Michael Kelley (Count Three), defense counsel did not directly address this charge in his closing argument. RT 12/12, p. 147:14-15. Nor did he point out that the actual charge was fraudulent use of another doctor's TIN.

H. Count Thirteen – False Statement

1. The Indictment

Count Thirteen charged that on March 29, 2013, Dr. Ganesh submitted a false claim to Cigna for services provided to Ms. Habibi on December 29, 2012. The charge identified the allegedly false representations as "Services not provided on three successive days (12/29/2012, 12/30/2012, and 12/31/2012) for the duration claimed." Dkt. No. 52, p. 12.

2. The Evidence

As noted previously, Ms. Habibi testified that she did not think that she saw Ms. Ganesh on December 30, 2012. RT 11/14, p. 87:19-22. She offered no testimony concerning whether she was treated by Dr. Ganesh on December 29, 2012 or December 31, 2012.

The government did not present the jury with a Form 1500 for services rendered to Ms. Habibi on December 29, 2012.

3. The Closing Arguments

The government attorney directed the jury to Exhibit 40a, Row 5712, the Cigna source spreadsheet, reflecting that services were provided to Ms. Habibi on December 29, 2012. RT 12/12, p. 98:8-12. Scrolling through the exhibit, the attorney noted that the spreadsheet reflected three claims for three consecutive days: Saturday, Sunday, and Monday, December 29, 30 and 31, 2012. RT 12/12, p. 98:12-99:7. The attorney urged that the claim was false because it used the wrong CPT code and because the 29th was a Saturday, when the office was closed. RT 12/12, p. 99:3-7.

Defense counsel did not address Count Thirteen in his closing argument.

I. Count Fourteen – False Statement

1. The Indictment

Count Fourteen charged that on May 12, 2014, Dr. Ganesh submitted a false claim to UHC for services provided to Ann Dwan on February 19, 2014. The charge identified the allegedly false representations as "Services not rendered on date indicated for the duration claimed" but did not specify the date in question. Dkt. No. 52, p. 12.

2. The Evidence

As noted above, Ms. Dwan testified that she was out of the country from February 4, 2014 to February 27, 2014. RT 11/13, pp. 88-89. Exhibit 36-101, the EOB from UHC, reflected payments for claims submitted for services rendered to Ms. Dwan on February 17, 19 and 21, 2014. RT 11/13, pp. 90-97.

The government did not present the jury with a Form 1500 for services rendered to Ann Dwan on February 19, 2014.

3. Closing Arguments

The government again directed the jury's attention to Exhibit 36-101, the EOB from UHC reflecting payments for services rendered to Ms. Dwan on February 17, 19 and 21, 2014. RT 12/12, p. 99:8-9. The attorney urged that the EOB was corroborated by UHC's source spreadsheet, Exhibit 42g, Row 3947. RT 12/12, p. 99:18-20. The attorney reminded the jury of Ms. Dwan's testimony that she was outside of the U.S. during those dates. RT 12/12, p. 99:13-17. Referring to the UHC source spreadsheet, Exhibit 42g, the attorney asserted that the claim for payment was false both because Ms. Dwan had not received services February 19th and because the claim had the wrong CPT code. RT 12/12, p. 99:13-20.

J. Count Fifteen – False Statement

1. The Indictment

Count Fifteen charged that on December 10, 2012, Dr. Ganesh submitted a false claim to Blue Shield for services provided to Sarini Kakkar on September 19, 2012. The

charge identified the allegedly false representations as "Services not rendered on date indicated for the duration claimed," but did not specify the date in question. Dkt. No. 52, p. 12.

2. The Evidence

Ms. Kakkar reviewed Exhibit 32-657, an Aetna EOB that showed a billing date of December 10, 2012 for services provided by Dr. Ganesh on December 14, 19 and 21, 2012. RT 11/13, p. 149:12-150:20. Ms. Kakkar testified that she did not remember seeing Dr. Ganesh that many times. RT 11/13, p. 152:12-16. Ms. Kakkar was never asked whether she actually saw Dr. Ganesh on any of the specific dates on the Aetna EOB.

Although it was not pointed out to the jury, Aetna's source spreadsheet reflects that *the billed amount for this claim was zero dollars*. Exhibit 15b, Row 3292, Column U; *see also* Exhibit 122, Row 26. In other words, Aetna's source spreadsheets show that there was no attempt to obtain money for services rendered to Ms. Kakkar by Dr. Ganesh on September 19, 2012.

The government did not present the jury with a Form 1500 for services rendered to Ms. Kakkar on September 19, 2012.

3. Closing Arguments

Referring to Exhibit 32-657, the Aetna source spreadsheet, the government attorney argued that the claim for September 19, 2012 was false because Aetna's records reflected claims for services for three other dates that same week, because Dr. Ganesh's billing as reflected on Aetna's records showed the same pattern of billing for a number of Dr. Ganesh's patients, and because Ms. Kakkar testified that she did not remember seeing Dr. Ganesh so often in one week. RT 12/12, p. 100:2-10. The attorney asserted that the claim was false both because the evidence showed Ms. Kakkar was not seen on that date and because the claim used the wrong CPT code. *Id*.

Defense counsel did not address Count Fifteen in his closing argument.

III. ARGUMENT

Twenty-twenty hindsight comes easily enough, of course. But Dr. Ganesh has retained new counsel, and it is indeed our task to reconsider and re-evaluate every aspect of the trial. We accept (as we must for the purposes of this motion) that the government presented extensive evidence of a scheme to bill fraudulently for services. However, the evidence at trial also established that Dr. Ganesh worked long hours in a busy office, that she provided good and appropriate care to hundreds of patients to whom she was devoted, often during lengthy appointments, and that her billing system was a mess in which her office frequently faxed Form 1500s to insurance companies that had been scratchily filled out by hand. *See, e.g.,* Exhibit 33-92. The question posed, then, was whether each specific charged offense was an example of the purported scheme to defraud or of a legitimate office visit, with mistaken entries either by Dr. Ganesh's staff or by the insurance companies.

With the focus during trial on evidence of conspiracy and the insanity defense, this question received scant attention from the parties. Now, Dr. Ganesh stands convicted of ten fraudulent and false statements offenses where (1) for eight of the charges, the offending statements themselves were never actually presented to the jury, (2) the government was free to pick and choose among numerous potential false statements up until it finished its rebuttal, (3) the jury was not required to unanimously agree which specific statement was false or fraudulent, (4) as to Counts Eleven and Twelve, the government constructively amended the indictment, and (5) as to Counts Six and Fifteen, the evidence presented to the jury showed in fact that there was no attempt to obtain a payment. Given the errors asserted herein, we submit that a judgment of acquittal or, in the alternative, new trial should be granted on all counts.

A. A Judgment of Acquittal Should be Entered Pursuant to Rule 29 For Insufficiency of the Evidence

Rule 29 mandates acquittal where evidence is insufficient to sustain a conviction. Evidence is insufficient to sustain a conviction if, viewing the evidence in the light most

favorable to the prosecution, a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *see also United States v. Nevils*, 598 F.3d 1158, 1164-1167 (9th Cir. 2010) (en banc); *United States v. Milwitt*, 475 F.3d 1150, 1152 (9th Cir. 2007). Where the government relies on circumstantial evidence, the inferences drawn therefrom must be reasonable and not speculative. *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002); *see also Van Liew v. United States*, 321 F.2d 674, 678 (5th Cir. 1963) (in acquitting on perjury charge, Fifth Circuit held that the "Government's proof must be by substantial evidence excluding to the satisfaction of the jury every other hypothesis than that the Defendant in testifying as he did purposefully misstated the fact knowing it to be false and untrue").

1. The Evidence Supporting Counts Two, Three, Five, Six, Twelve, Thirteen, Fourteen and Fifteen was Insufficient Because the Allegedly False or Fraudulent Statements Were Not Presented to the Jury

This Court has now twice overruled defendants' objections to introduction of the insurers' source spreadsheets as business records and despite the assertion of Dr. Ganesh's Sixth Amendment right to confrontation under *Crawford*, 541 U.S. 36. Dkt 149, p. 5; Dkt. No. 361, p. 19-21. Requesting the Court's indulgence, we renew those objections yet again and ask the Court to reconsider its rulings in the light of the unique state of evidence that has resulted here: for eight of the ten charges in the indictment, the government utterly failed to present to the jury the false or fraudulent statement that Dr. Ganesh allegedly made.

In the admittedly short time available, counsel has not found a single case involving a fraud or false statement charge in which the actual offending statement was not actually introduced into evidence either as a document, recording, transcript or by testimony of a witness who heard it. On the other hand, there are numerous reported cases where the availability of the actual statement proved dispositive.

In *United States v. Karaouni,* 379 F.3d 1139 (9th Cir. 2004), the defendant was charged with falsely claiming to be a U.S. citizen in violation of 18 U.S.C. § 911. At trial,

the evidence established that on a government form he had checked the box indicating that "I attest, under penalty of perjury, that I am . . . [a] citizen or national of the United States." *Id.* at 1140-1141. Given this ambiguity, the conviction could not stand: "Because Karaouni merely attested on the I-9 Form that he was a U.S. citizen *or* national, and a claim of U.S. nationality, even if false, does not violate § 911, we hold that his answer on the I-9 Form cannot constitute an offense under that statute." *Id.* at 1143.

In *United States v. Good*, 326 F.3d 589, 591-592 (4th Cir. 2003), the government appealed from an order dismissing an indictment alleging a false statement in violation of 18 U.S.C. § 1001, when the defendant answered "no" to a form inquiring whether she had ever been convicted of various offenses, including theft, dishonesty and misrepresentation. In fact, the defendant had suffered a conviction for embezzlement. Carefully examining the application and the defendant's response, the court of appeal determined that her answer was "literally true" and that the indictment was properly dismissed. *Id*. at 592.

In *United States v. Qing Chang Jiang,* 476 F.3d 1026 (9th Cir. 2007), after a court trial the defendant appealed his conviction under § 1001(a)(2) for making a false statement. The offending statement was allegedly made during an interview with an Export Enforcement Agent regarding the defendant's application that was neither recorded nor transcribed. The agent made notes of the interview a few days later. Evaluating the conviction, the Ninth Circuit emphasized the importance of context in every false statement case:

> When determining whether there is sufficient evidence to satisfy these elements, we "must begin with an appreciation of the context in which the statement was offered [, and] . . . we must look to the context of the defendant's statement to determine whether the defendant and his questioner joined issue on a matter of material fact to which the defendant knowingly uttered a false declaration." *United States v. Sainz*, 772 F.2d 559, 562 (9th Cir. 1985). We must also consider "extrinsic evidence relevant to [the defendant's] understanding of the questions posed."" *United States v. Culliton*, 328 F.3d 1074, 1079 (9th Cir. 2003) (per curiam).

Id. at 1029. After considering factors such as the ambiguities in the agent's question and notes, language issues, the agent's failure to examine relevant documents that the defendant possessed, the court of appeal held that "the government cannot sustain a materially false statement charge based merely on the government agent's interpretation of what the individual meant – there must be clear evidence of what was said and a full appreciation of the context in which the statement was made." *Id*. at 1030.

The point is this: in each of these cases, one can readily anticipate the government seeking to introduce a "business record" generated by the recipient of each defendant's statement inputting that statement into a database – "he said he was a citizen" (*Karaouni*), "she denied an embezzlement conviction" (*Good*), and "he said he returned all of the product" (*Qing Chang Jiang*). And in each instance, a serious injustice would have resulted because the courts and triers of fact had no opportunity to examine the allegedly offending statement itself.

Here, the evidence amply established that Dr. Ganesh was devoted to her patients, worked long hours, saw many patients on a daily basis and provided quality care. RT 11/14, pp. 15:15 – 16:8 (Kelley); RT 11/14, pp. 125:24-126:9 (Kelley); RT 11/6, p. 46:24 – 47:4 (Thomas); RT 11/13 pp. 223:11 – 227:12 (Bonte). The evidence further established that her office was dysfunctional and disorganized, especially the "billing system;" and that claims were filled out by hand and faxed to the insurers. RT 11/6, p. 29:11-24 and 46:12-24 (Thomas); RT 11/6, pp. 119:14 – 125:14 and 133:10 – 134:5 (Johnson). *See, e.g.,* Exhibit 33-92 (the Form 1500 for service rendered to Surekha Soni on December 31, 2012). Moreover, as to several charges, the patient's file showed that services were provided to the patient on a date near in time to the charged date and that no claim was submitted for that date. *See, e.g.,* discussion of Counts Two and Eleven, supra at pp. 3 and 9, and Exhibits 97-5 and 97-44. In this context, it was crucial that the trier of fact have an opportunity to examine each Form 1500 supporting each charge. Only then would there be "clear evidence of what was

said and a full appreciation of the context in which the statement was made." *Qing Chang Jiang*, 476 F.3d at 1030.

For these reasons, we submit that it was error to admit the source spreadsheets and that, as to those counts for which no Form 1500 was presented to the jury, the evidence was insufficient to sustain a conviction as a matter of law.

2. The Evidence Supporting Counts Six and Fifteen was Insufficient Because the Evidence Failed to Establish that a Claim for Payment was Submitted to the Insurer

As noted previously, the Aetna source spreadsheets that were introduced into evidence as Exhibit 38b reflect that the billed amount for the claim was zero dollars. Exhibit A. Although this fact was not pointed out to the jury, the Court must conclude that the evidence failed to establish an element of the offenses charged in Counts Six and Fifteen. There was no attempt "to obtain money or property" as required for a Health Care Fraud offense (§ 1347) and there was no false statement "in connection with the delivery of or payment for health care benefits . . ." as required for a False Statement Offense (§ 1035). *See* Court's Jury Instructions, Dkt. No. 278, pp. 32-34. Consequently, a judgment of acquittal must be entered on these counts.

B. Alternatively, Dr. Ganesh is Entitled under Rule 33 to a New Trial Both Because the Weight of the Evidence Does Not Support the Convictions and Because Her Convictions are Marred by Legal Error

Under Rule 33, upon consideration of a motion for a new trial, a district court possesses a power to scrutinize and set aside a jury verdict that is much broader than its power under Rule 29. *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000).[1] Unlike under Rule 29, a trial court deciding a Rule 33 motion is not "obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses." *Kellington*, 217 F.3d at 1097. If the court determines after weighing the evidence that "the evidence

[1] All the arguments made in the Rule 29 motion *supra* are hereby re-asserted under the more lenient legal standard applicable to a Rule 33 motion for new trial.

preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, and submit the issues for determination by another jury." *Id.* (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

1. By Abandoning the Allegation that Dr. Ganesh Falsely Used another Physician's TIN, the Government Constructively Amended the Indictment as to Counts Eleven and Twelve

The Fifth Amendment guarantees that defendants may be tried only for offenses set forth in an indictment (or presentment) by a grand jury. *Stirone v. United States*, 361 U.S. 212 (1960). A defendant may not be convicted on a factual theory of liability different than the one on which she was indicted, even if that uncharged theory is supported by the evidence. *See United States v. Shipsey*, 190 F.3d 1081, 1086-1087 (9th Cir. 1999). A "constructive amendment" occurs "when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984) (quoting *United States v. Cusmano,* 659 F.2d 714, 718 (6th Cir. 1981)); *see also Shipsey*, 190 F.3d at 1190.

As previously noted, Counts Eleven and Twelve charged that Dr. Ganesh fraudulently used a different physician's TIN (i.e. Box 25) on the Form 1500 to bill the insurance companies. (A blank copy of the Form 1500 was admitted as Exhibit 143. For the Court's convenience, another copy is appended hereto as Exhibit C.) The Form 1500 is promulgated by the National Uniform Claim Committee ("NUCC"). Together with the American Medical Association, the NUCC publishes an Instruction Manual for completing Form 1500. (Relevant excerpts from the 2013 version of the Manual are appended as Exhibit D.) The NUCC Manual includes instructions for completing Item No. 25 on Form 1500, and specifically directs billers to "[e]nter the 'Federal Tax ID Number' (employer ID number or SSN) of the Billing Provider identified in Item Number 33." Exhibit D. The Billing Provider need not be and often is not the same person as the rendering physician (i.e. Box 24j).

In its opening statement and examination of patient/witnesses, the government conflated the TIN on the Form (Box 25) with the identity of the service provider (Box 24j). RT 10/24, pp. 27:23-28:7; RT 11/14, pp. 27:14-28:20. In its examinations of the witnesses from the insurance companies, the government attorney never inquired whether the TIN was material to an insurer's payment of a claim, and the witnesses offered no such testimony. By contrast, the government elicited testimony supporting an inference that the date of service, length of service and identity of the rendering physician were material to insurers. RT 11/14, pp. 28-30 (Richer); RT 11/21, pp. 74-78 (Haskins); RT 11/21, pp. 19-21 (Kondratenko); RT 11/21, pp. 181-187 (Kahler). In its closing arguments, the government attorney omitted any reference to the TIN and called instead for the jury to convict Dr. Ganesh on these counts based on the assertion that the submitted claims falsely asserted that the patients were seen by Dr. Dewees, when in fact they were not. RT 12/12, pp. 96:23-97:22.

Importantly, prior to the submission of the case to the jury, defense counsel raised concerns regarding the possibility of a constructive amendment of the False Statement charges in Counts Eleven through Fifteen. Counsel observed that problems might arise from the conjunctive pleading and from the government's assertion that it should be allowed to argue other factual theories than those set forth in each specific count, but counsel expressly excluded the issue raise here – i.e. the TIN – from his argument. RT 12/8, pp. 292:24-303.21; *see also* Dkt. No. 264. The Court later entered an order permitting the government to argue its various theories of liability on the False Statement counts, as charged, but expressly precluded the government from arguing other allegations set forth in the conspiracy charge (but not alleged in the substantive counts) in support of conviction of on the substantive charges. Dkt. No. 285, p. 3. As noted above, the government's closing argument subtly sidestepped this order.

The government's shift from the theory of the indictment (i.e. that Dr. Ganesh fraudulently used a different doctor's TIN to bill) to the theory presented to the jury (i.e. that Dr. Ganesh falsely identified Dr. Dewees as the rendering physician) worked a

fundamentally prejudicial amendment of the charges in Counts Eleven and Twelve by permitting conviction based on conduct that was not alleged in the indictment. *See United States v. Ward*, 747 F.3d 1184, 1191-1193 (9th Cir. 2014) (constructive amendment where in aggravated identity theft case court's instructions allowed conviction for victims not identified in the charge); *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (constructive amendment where indictment alleged that defendant misrepresented "the fact that the servers had been upgraded, [but] the court's instructions allowed the jury to convict the defendant of wire fraud if it found that the defendant had misrepresented how the servers had been upgraded"). The convictions on these charges must therefore be vacated.

2. The Court Erred by Failing to give a Specific Unanimity Instruction Requiring the Jury to Agree which if any Statements were False or Fraudulent

The Sixth Amendment guarantees that in all federal criminal cases the defendant has a right to a unanimous jury verdict, including unanimity as to each element of the offense. *Richardson v. United* States, 526 U.S. 813, 817 (1999); *Andres* v. *United States*, 333 U.S. 740, 748 (1948); Fed. R. Crim. P. 31(a). Implementing this rule, the Ninth Circuit has held that in the ordinary case, a general unanimity instruction suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict. *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999); *United States v. Payseno,* 782 F.2d 832, 835 (9th Cir. 1986). A specific unanimity instruction is required only when it appears that "there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *United States v. Anguiano,* 873 F.2d 1314, 1319 (9th Cir. 1989) (quoting *United States v. Echeverry,* 719 F.2d 974, 974, *modifying United States v. Echeverry,* 698 F.2d 375 (9th Cir. 1983)).

Numerous cases demonstrate the circumstances under which a specific unanimity instruction is required because of potential jury confusion and/or the possibility that different jurors may vote to convict based on the defendant's different

acts. In *United States v. Jerome*, 942 F.2d 1348, 1329 (9th Cir. 1991), the defendant was charged with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. One element of that offense required that the prosecution prove that the defendant acted in concert with five or more other individuals in a management position. *Id*. at 1330. The Ninth Circuit found that the trial court erred by failing to give a specific unanimity instruction *sua sponte*:

> The jury in this case was presented with a variety of persons that the prosecution told them could count in making up the five persons necessary to trigger the statute. However, some of the people named by the prosecution could not have been organized by Jerome. In such a case the court must give the jurors a specific unanimity instruction – that is the jurors had to be instructed that they must unanimously agree as to the identity of each of the five people Jerome organized, managed or supervised.

Id. at 1331; *see also United States v. Delgado*, 4 F.3d 780, 784 (9th Cir. 1993) ("Under *Jerome*, then, the conviction of continuing criminal enterprise can stand only if Fernandez, Fajardo, and their customers could properly be counted."); *United States v. Fuchs*, 218 F.3d 957, 963 (9th 2000) (plain error not to give specific unanimity instruction where some jurors may have voted to convict based on overt acts "improperly included as part of the conspiracy because they were barred by the statute of limitations"); *United States v. Gilley*, 836 F.2d 1206, 1213 (9th Cir. 1988) (plain error where trial court failed to give specific unanimity instruction for alleged illegal gambling under 18 U.S.C. § 1955, where offense required as element that defendants participated in that enterprise with five or more other persons for a period of at least thirty days).

The case that is perhaps most directly on point comes from the Fifth Circuit. In *United States v. Holley*, 942 F.2d 916 (5th Cir. 1991), the defendant was convicted of two counts of perjury during a deposition. Each count of the indictment alleged several different statements from the same deposition to be perjurious. *Id*. at 927-29. On appeal the Fifth Circuit agreed with the defendant's contention that the district court committed error by failing to give a specific unanimity instruction:

> The most reasonable interpretation of the court's instruction quoted above

> is that each juror was *individually* required to find at least one statement in each count to have been knowingly false in order to find Holley guilty. The instruction does not, however, require that all of the jurors concur in the knowing falsity of at least one particular statement.

Id. at 929 (emphasis in original). Thus, the court of appeal reversed the conviction and ordered a new trial. *Id.*; *see also United States v. Acosta*, No. C 11-00182 CRB, 2012 U.S. Dist. LEXIS 10383 (N.D. Cal. Jan. 30, 2012) (court granted a motion for a new trial arising from a conviction for a false statement under 18 U.S.C. § 1001 in part because the absence of a specific unanimity instruction created a risk that some jurors may have voted to convict based on an uncharged statement)

Here, the charges in the indictment and the evidence presented at trial created a genuine possibility of jury confusion and a significant risk that some jurors might vote to convict based on different acts committed by Dr. Ganesh.[2] The issue is presented most starkly with regard to Counts Eleven and Twelve, which charged three distinct false statements: (1) impermissible use of another doctor's TIN, (2) service not provided on specified date and (3) and not for duration claimed. Dkt. No. 52, p. 11. As demonstrated above, the government did not attempt to prove the allegation of fraudulent use of a TIN and did not argue that issue to the jury. Instead the government argued as to these counts that Dr. Ganesh's guilt was established because the claim misrepresented Dr. Dewees as the rendering physician and because the claim used the wrong CPT codes. Hence, the lack of a specific unanimity instruction created an undue risk that one or more jurors voted to convict for an impermissible reason. *See, e.g., Fuchs*, 218 F.3d at 963.

The absence of a specific unanimity agreement infected the other eight charges

[2] During the trial, defense counsel orally raised the question whether a specific unanimity instruction was required for the money laundering counts for the jury's determination of who committed the alleged offense and who aided and abetted it. RT 12/8, pp. 284:19-287:23. Citing *United States v. Garcia*, 400 F.3d 816 (9th Cir. 2005), defense counsel later withdrew his request for such an instruction and the Court ruled that there would be no such instruction. Dkt. Nos. 259 and 283. The issue regarding a specific unanimity as to Counts Two through Six and Eleven through Fifteen was not raised during the trial.

as well. The evidence in the case raised an inference that claims for service were mistakenly submitted with an incorrect date; and assuming one or more jurors accepted that inference, they may well have voted to convict based upon the CPT code allegations only. Consequently, as in *Holley*, *Acosta* and the other cases cited above, there was an unacceptable risk that jurors voted for guilt based on different facts as to each of the fraud and false statement charges. Those convictions must be vacated.

IV. CONCLUSION

For all of the reasons set forth above, the motion for a judgment of acquittal or, in the alternative, for a new trial should be granted.

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Respectfully submitted,

/s/
Ted W. Cassman
ARGUEDAS, CASSMAN & HEADLEY, LLP
Counsel for Vilasini Ganesh, M.D.