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Sano Medical Consultants, LLC & John Garbino

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1	United States of America v. John Garbino (Case no.SA16 – 324M)
2	CA Secretary of State: Statement of Information, 05/14/2015

AO 91 (Rev. 11/82)

CRIMINAL COMPLAINT

UNITED STATES DISTRICT COURT	CENTRAL DISTRICT OF CALIFORNIA
UNITED STATES OF AMERICA v. JOHN GARBINO	DOCKET NO. MAGISTRATE'S CASE NO. SA16-324M

CLERK, U.S. DISTRICT COURT
JUN 20 2016
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Complaint for violation of Title 42, United States Code, Section 1320a-7b(b)(1)(A): Illegal Remuneration Involving A Federal Health Care Program

NAME OF MAGISTRATE JUDGE	UNITED STATES MAGISTRATE JUDGE	LOCATION
HONORABLE KAREN E. SCOTT		Santa Ana, California

DATE OF OFFENSE	PLACE OF OFFENSE	ADDRESS OF ACCUSED (IF KNOWN)
In or about June, 2015	Orange County	

LODGED
2016 JUN 17 PM 1:23
CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
SANTA ANA

COMPLAINANT'S STATEMENT OF FACTS CONSTITUTING THE OFFENSE OR VIOLATION:

[42 U.S.C. § 1320a-7b(b)(1)(A)]

In or about June, 2015, in Orange County, within the Central District of California, defendant JOHN GARBINO, together with others known and unknown, knowingly and willfully, received remuneration, that is, approximately $926,563 in the form of two checks, one deposited on or about June 8, 2015, and the other deposited on or about June 24, 2015, into a bank account in the name of Sano Medical Consultants LLC, an account controlled by defendant JOHN GARBINO, in return for referring individuals to seek compounded medication prescriptions for which payment could be made in whole and in part under a Federal health care program, namely Tricare.

BASIS OF COMPLAINANT'S CHARGE AGAINST THE ACCUSED:

(See attached Affidavit which is incorporated herein by this reference as part of this Complaint)

MATERIAL WITNESSES IN RELATION TO THIS CHARGE: N/A

Being duly sworn, I declare that the foregoing is true and correct to the best of my knowledge.	SIGNATURE OF COMPLAINANT MONICA PANDIS /s/ OFFICIAL TITLE Special Agent – Federal Bureau of Investigation

Sworn to before me and subscribed in my presence,

SIGNATURE OF MAGISTRATE JUDGE[1]	DATE
/s/ KAREN E. SCOTT	June 20, 2016

[1] See Federal Rules of Criminal Procedure 3 and 54

AUSA: Mark Aveis, USAO CDCA, Major Frauds Section, (213) 894-4477

REC: BOND

AFFIDAVIT

I, MONICA PANDIS, being duly sworn, declare and state as follows:

I. AFFIANT'S BACKGROUND

1. I am a Special Agent ("SA") of the Federal Bureau of Investigation ("FBI"). I have been so employed since approximately June 2002. I am currently assigned to the white collar crime squad of the Orange County Resident Agency of the Los Angeles FBI Field Division, which investigates allegations of Public Corruption and Health Care Fraud. Over the past 14 years I have been assigned to investigate Health Care Fraud. As an FBI SA, I have investigated over 50 health care fraud and other white-collar cases including cases involving the payment of illegal kickbacks affecting federal health care programs. Before becoming an FBI SA, I was a medical social worker assigned to hospice and pediatric HIV patients. I have a Master's Degree in Social Work, a Bachelor's Degree in Behavioral Science and a Minor in Criminal Justice and Corrections.

II. PURPOSE OF AFFIDAVIT

2. This affidavit is made in support of a complaint and request for the issuance of an arrest warrant charging JOHN GARBINO with Illegal Remunerations for Health Care Referrals, in violation of 42 U.S.C. § 1320a-7b(b)(1)(A).

3. The facts set forth in this affidavit are based upon my personal observations, my training and experience, documents obtained from various sources including financial institutions, information obtained from various law enforcement personnel, and

from witnesses. This affidavit is intended to show only that there is probable cause to support the referenced complaint and request for issuance of an arrest warrant for GARBINO. It does not purport to set forth all of my knowledge of or investigation into this matter, nor is it intended to provide all of the information obtained in connection with the investigation. Also, unless specifically indicated otherwise, all conversations and statements described in this affidavit are related in substance and in part only, and are not *verbatim*.

III. SUMMARY OF PROBABLE CAUSE

4. Based upon the evidence stated herein, I have probable cause to believe that GARBINO received illegal remuneration in exchange for referring Tricare-reimbursable prescription medication to pharmacies. Furthermore, GARBINO fabricated documents to cover-up his offense conduct and encouraged another individual to make false statements to law enforcement in order to further conceal GARBINO's offense conduct.

IV. STATEMENT OF PROBABLE CAUSE

A. BACKGROUND

TRICARE[1]

5. "In 1994, Tricare replaced CHAMPUS as the health care program for active-duty military personnel, retirees, and their families. See http:// www.Tricare.mil/faqs/question . . . ,"

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[1] Statutory and case citations and legal analysis have been prepared by the Assistant U.S. Attorney with whom I am working on this investigation. I have relied upon those citations and that analysis in support of this affidavit.

U.S. ex rel. Nowak v. Medtronic, Inc., 806 F. Supp. 2d 310, 318, note 5 (D. Mass. 2011), as a "comprehensive managed health care program for the delivery and financing of health care services in the Military Health System," see 32 C.F.R. § 199.17(a). Tricare is applicable to all of the uniformed services. 32 C.F.R. § 199.17(a)(3). "[A]ll CHAMPUS-eligible beneficiaries who are not Medicare eligible on the basis of age are eligible to enroll in" a Tricare program. 32 C.F.R. § 199.17(c). Tricare is a "health care benefit program" as defined by 18 U.S.C. § 24(b), that affects commerce, see Taylor v. United States, 89 F.Supp.3d 766, n. 1 (E.D.N.C. 2014), and as that term is used in 18 U.S.C. § 1347. Tricare is administered by the Defense Health Agency ("DHA").

Compounded Medications

6. During the course of this investigation, I have learned from reviewing documents, witness interviews, and speaking with other investigators involved in the investigation, that:

a. In general, "compounding" is a practice in which a licensed pharmacist, a licensed physician, or, in the case of an outsourcing facility, a person under the supervision of a licensed pharmacist, combines, mixes, or alters ingredients of a drug or multiple drugs to create a drug tailored to the needs of an individual patient.

b. Compounded drugs are not FDA-approved, that is, the FDA does not verify the safety, potency, effectiveness, or manufacturing quality of compounded drugs. The California Board

of Pharmacy regulates the practice of compounding in the State of California.

c. Compounded drugs may be prescribed when an FDA-approved drug does not meet the health needs of a particular patient. For example, if a patient is allergic to a specific ingredient in an FDA-approved medication, such as a dye or a preservative, a compounded drug can be prepared excluding the substance that triggers the allergic reaction. Compounded drugs may also be prescribed when a patient cannot consume a medication by traditional means, such as an elderly patient or child who cannot swallow an FDA-approved pill and needs the drug in a liquid form that is not otherwise available.

d. The compounded medication prescriptions in this case were ostensibly prescribed for the treatment of pain, scarring, stretch marks, erectile dysfunction, or for "general wellness." The prescriptions were based on substantially similar 8 1/2" x 11" forms with check-the-box sections that described the chemical compounds for each of these conditions. Although it may be possible, I have reviewed hundreds of these forms, and discussed well over a thousand of these forms with other agents involved in this and related investigations, and I am not aware of any instances in which a prescribing physician altered the pre-formulated prescriptions to suit the individual needs of any patient.

Anti-Kickback Statute

7. The federal health care anti-kickback statute, at 42 U.S.C. § 1320a-7(b)(1)(A), ("AKS") prohibits the receipt of any

remuneration (including any kickback, bribe, or rebate) for referrals in connection with federal health care programs such as Tricare. To prove a violation of the AKS, the government must prove each of the following elements beyond a reasonable doubt:

(1) The defendant knowingly and willfully received remuneration, directly or indirectly, overtly or covertly;

(2) In return for the referral of an individual to a person for the furnishing or arranging for the furnishing of any item or service; and

(3) Payment was or would be made in whole or in part under a federal health care program.

See, e.g., United States v. Patel, 17 F.Supp.3d 823, 824 (N.D.Ill. 2014).

8. The government need not prove that a defendant had actual knowledge of the AKS or a specific intent to violate it. 42 U.S.C. § 1320a-7(b)(h); United States v. St. Junius, 739 F.3d 193, 210 (5th Cir. 2013) ("Section 1320a-7b(h) clarifies that the Government is not required to prove actual knowledge of the Anti-Kickback Statute or specific intent to violate it. Instead, the Government must prove that the defendant willfully committed an act that violated the Anti-Kickback Statute."). "The [AKS] is not a highly technical tax or financial regulation that poses a danger of ensnaring persons engaged in apparently innocent conduct. Rather, the giving or taking of kickbacks for medical referrals is hardly the sort of activity a person might expect to be legal." United States v. Vernon, 723 F.3d. 1234, 1259 (11th Cir. 2013), citing United States v. Starks, 157 F.3d

833, 838 (11th Cir. 1998). The AKS may be violated even where the referral payment has multiple purposes, so long as at least one purpose was to induce referrals (as opposed, for example, to compensate for advertising expense). United States v. McClatchey, 217 F.3d 823, 835 (10th Cir. 2000); United States v. Kats, 871 F.2d 105, 108 (9th Cir. 1989). Evidence that an individual engaged in illegal kickbacks may include that the kickback payor deliberately mischaracterized a kickback as a seemingly legitimate expense. See, e.g., United States v. Moran, 778 F.3d 942, 953 (11th Cir. 2015) (kickback payor "initiated the plan to have the patient recruiters [kickback payees] sign fraudulent ''case manager'' contracts" to create appearance of legitimacy for kickbacks).

Telemedicine

9. During the course of this investigation, I have learned from interviewing and reviewing reports of interviews of a pharmacist, pharmacy technicians, pharmacy owners and others that, although a prescription is typically delivered to a pharmacy by the patient for whom the prescription is written, or phoned-in or otherwise communicated directly by the prescribing physician's office to the pharmacy for fulfillment, an enormous number of compounded medications prescriptions -- in the thousands during a few-month relevant time period in early to mid-2015 -- were not delivered to pharmacies in that manner. Instead, they were generated through online "telemedicine" sites and then faxed to a pharmacy for fulfillment; the prescription was not sent to the patient who, in turn, delivered the pre-

scription to the pharmacy of his/her choice for fulfillment.[2] A telemedicine site is ostensibly designed to assist individuals in obtaining low-cost, easy access to health care for minor ailments. A patient is supposed to pay a small fee and complete an online questionnaire whereby the patient describes his/her symptoms and provides some health history. A doctor under contract with the telemedicine site operator then receives and reviews the questionnaire and, at least in theory, exercises independent judgment to determine a course of treatment that may, or may not, include prescription medication.

10. Through interviews of doctors under contract with telemedicine sites, and others, as well as discussions with others involved in this investigation, I have learned that telemedicine site operators accepted payment from third parties to advertise compounded prescription medications. More specifically, for a fee, telemedicine site operators sent to their contract doctors blank compounded medication prescription forms, or at times, such forms with "boxes checked" for the prescription of specific compounded medications, before the doctors had even reviewed a patient's questionnaire answers. The site operators encouraged their contract doctors to prescribe these medications. At least two telemedicine site contract doctors told investigators that they were not paid unless they prescribed these medications or that, with few exceptions that did not relate to

[2] In fact, I have learned that dozens, if not hundreds, of patients who received these prescriptions knew nothing about them until the prescriptions showed up on their doorsteps.

their view of medical necessity, they always prescribed these medications. One other telemedicine site contract doctor, Dr. N.C., whom I know agents interviewed and whose interview report I reviewed, told the agents that she was pressured by the site operator to prescribe these medications and, after refusing to do so, learned that the telemedicine site operator and fulfilling pharmacy had used her identity and medical credentials, without her permission, to fill dozens of prescriptions for these medications worth thousands of dollars in Tricare reimbursements. Dr. N.C. told the agents that the telemedicine site operator offered her $200,000 to remain silent and, if she refused, the site operator threatened to ruin her practice.

B. CRIMINAL INVESTIGATION

Tricare Beneficiary Complaints

11. Based upon my discussion with agents of the Defense Criminal Investigation Service ("DCIS"), I learned the following:

a. In 2015, DHA made a criminal referral to the DCIS based, in part, on complaints that DHA had received from Tricare beneficiaries. Among other things, beneficiaries had complained about prescriptions for compounded medications. For example, on or about April 14, 2015, Tricare beneficiary M.H. complained to DHA that M.H. had received an "Explanation of Benefits" form from Tricare stating that M.H. received a prescription for compounded medications for which the dispensing pharmacy had charged Tricare $59,362.33; that the beneficiary had never received the medication; that the beneficiary did not know the

prescribing physician; and that the beneficiary had received no phone calls about the medication. Tricare paid the dispensing pharmacy $46,981.59 on that claim.[3]

b. At least twenty Tricare beneficiaries made similar complaints to DHA around this same period of time.

Investigation of Trucare Pharmacy's Tricare Claims

12. I received and reviewed claims data from Tricare and DHA and learned the following:

a. Trucare Pharmacy ("Trucare") was at the relevant time located at 1875 California Avenue, Corona, California.

b. For the calendar year 2013, Trucare submitted approximately 48 claims to Tricare for reimbursement for filling compounded medication prescriptions, for a total amount of approximately $7,059, and on which Trucare was paid approximately $6,478. Trucare's Tricare claims for 2013 thus averaged approximately $147 per claim.

c. For the calendar year 2014, Trucare submitted approximately 16 claims to Tricare for reimbursement for filling compounded medication prescriptions, for a total amount of approximately $18,698, and on which Trucare was paid approximately $16,400. Trucare's Tricare claims for 2014 thus averaged approximately $1,025 per claim. Based upon my review of Tricare and DHA data, and my discussions with other agents involved in this investigation, who have reviewed the same data, I believe

[3] I reviewed Tricare claims data and noticed that it was not uncommon for Tricare to reimburse for less than the amount of a claim.

that the greater per-claim and per-reimbursement rates for 2014 were the result of a rash of claims for filling compounded medication prescriptions that had been specially formulated to achieve the highest possible reimbursement rates rather than the greatest medical efficacy.

d. For the calendar year 2015, Trucare submitted approximately 336 claims to Tricare for reimbursement for filling compounded medication prescriptions, for a total amount of approximately $7,267,290, and on which Trucare was paid approximately $5,933,564. Trucare's claims for 2015 thus averaged approximately $17,659 per claim. As stated above, I believe that the greater per-claim and per-reimbursement rates for 2015 were the result of a huge influx of claims for filling compounded medication prescriptions that had been specially formulated to achieve the highest possible reimbursement rates rather than the greatest medical efficacy. By early May 2015, Tricare changed its claims evaluation practices and stopped honoring claims for the bulk of these formulations.

Investigation of Haeoyou Pharmacy's Tricare Claims

13. I received and reviewed claims data from Tricare and DHA and learned the following:

a. Haeoyou Pharmacy ("Haeoyou") is located in Palmdale, California.

b. For calendar year 2013, Haeoyou submitted zero claims to Tricare for reimbursement for filling compounded medication prescriptions.

c. For calendar year 2014, Haeoyou submitted approximately 31 claims to Tricare for reimbursement for filling compounded medication prescriptions, and was paid approximately $62,278 on those claims.

d. For calendar year 2015, Haeoyou submitted approximately 2,798 claims to Tricare for reimbursement for filling compounded medication prescriptions, and was paid approximately $46,294,453 on those claims, for an average of approximately $16,546 per claim.

e. For calendar year 2015, Tricare paid Haeoyou approximately $4,366,638 based on compounded medication prescriptions that reflected Dr. N.C. as the prescribing physician.

Initial Interview of M.K.

14. On April 13, 2016, I interviewed M.K. who told me the following:

a. He is a part-owner of Trucare. He is a licensed pharmacist and was the pharmacist-in-charge at Trucare at all relevant times.

b. Trucare specializes in creating compounding creams among other drugs.

c. Between late 2014 and mid-2015, Tricare reimbursements paid to Trucare for filling compounded medication prescriptions accounted for 20% of Trucare's business.

d. It was illegal to pay outside marketers to refer prescriptions for which reimbursement was sought from Tricare or Medicare, and he (M.K.) knew that during the time in 2014-2015

when Trucare filled compounded medication prescriptions for which Trucare sought Tricare reimbursements.

e. M.K. had never heard of Clevis Management, Haoeyou, or J.C., among others.

f. M.K. had heard of "Sano" but he refused to discuss his involvement with Sano except to say that it was related to marketing.

g. After being advised that it was a crime to lie to federal agents, M.K. declined to change any of his answers.

Trucare's Referral Contracts with HP and Sano

15. I know that the government subpoenaed certain documents from Trucare and that, after M.K.'s initial interview, M.K. provided the government with documents relating to Trucare, Sano, and Haeoyou. I observed the following from these documents:

a. A "Manufacturing and Marketing Agreement" between Trucare and Haeoyou, signed by M.K. on behalf of Trucare, and by J.C. on behalf of Haoeyou, and made effective February 27, 2015.[4] The agreement provided that Haoeyou would refer compounded medication prescriptions to Trucare and, in exchange, Trucare would pay Haoeyou 65% of the amount that Trucare received as reimbursements on claims submitted for filling those prescriptions. The agreement also contained a clause, at section 3.4, identi-

[4] I know from my interview of J.C. that he controlled Clevis and, from that interview and from reviewing documents produced in this investigation, that Clevis did business as Haeoyou.

fied as "ANTI-REFERRAL LAWS," that stated in part that "[t]he parties acknowledges /sic/ that they may be subject to certain federal laws governing referral of patients . . . including . . . payments for referral or to induce the referral of patients . . . [under] the Medicare/Medicaid Fraud and Abuse Law . . . ." The agreement also stated, under section 8.1, entitled "NOTICES," that Haoeoyou's address was listed as 25971 Pala, Suite 120, Mission Viejo, California 92691.[5]

b. A "Consulting Services Agreement" between Trucare and Sano, signed by M.K. on behalf of Trucare and GARBINO on behalf of Sano, and "entered into as of March 1, 2015 . . . ." This agreement stated that Trucare would pay Sano 65% of "Net prescriptions billed and collected by [Trucare]."

Second Interview of M.K.

16. On April 13, 2016, I again interviewed M.K., this time pursuant to a proffer agreement between M.K. and the government that essentially granted to M.K. limited use immunity for his statements, subject to certain conditions. One of my goals of that proffer was to confront M.K. about what I believed were false statements that he had made to me, during his initial interview, regarding his knowledge of Haeoyou, J.C., and Sano. During that second interview, M.K. admitted that he had falsely

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[5] I know from reviewing documents obtained in this investigation, including correspondence from targets, and from visiting that location, that this addresswas, at the relevant time, the office of Trestles RX LLC and Trestles Pain Management Specialists (collectively "Trestles") and Sano Medical Consultants LLC ("Sano").

denied knowing Haeoyou and J.C. M.K. was also willing during this second interview to discuss Sano. Thus, during this second interview, M.K. stated:

Early Referral Business With GARBINO

a. M.K. knew GARBINO and GARBINO owned Sano. M.K. had known GARBINO since about 2013 or earlier, when M.K. had done business with GARBINO by paying GARBINO for the referral of workers' compensation medication prescriptions. GARBINO at that time had told M.K. that paying such referral fees was legal because GARBINO was doing the same business with other pharmacies. M.K. paid GARBINO by check and wrote "marketing services" in the memo section of the checks to GARBINO even though GARBINO did not do any actual marketing services for M.K., such as advertising, creating flyers, sending mailings or coupons, or any other traditional marketing services.

Overflow Prescriptions Referred By Trestles

b. In or about January 2015, M.K., on behalf of Trucare, was solicited to fill Tricare-reimbursable compounded medication prescriptions. M.K. understood that these prescriptions were "overflow" prescriptions (the "Overflow Prescriptions") that Trestles had referred to Haeoyou in exchange for a referral fee, but that Haoeyou lacked the ability to fill the prescriptions. M.K. believed that Trestles was controlled by GARBINO, D.F., and R.R. M.K. believed that R.R. was also Trestles' in-house counsel.

c. M.K., on behalf of Trucare, agreed to fill the Overflow Prescriptions. M.K. knew that it was illegal to pay

referral fees for Tricare-reimbursable prescriptions. The individual who initially solicited M.K. for Trucare to fill the Overflow Prescriptions, D.V., told M.K. that they could do a "work around."

GARBINO'S Visit to Trucare and Discussion About Red Flags Regarding the Overflow Prescriptions

d. GARBINO and Trestles purported co-owner D.F.[6] visited Trucare to ensure that Trucare. would correctly process the Overflow Prescriptions. M.K. told GARBINO and D.F. that Trucare personnel intended to call the patients to verify the Overflow Prescriptions. GARBINO and D.F. objected. M.K. also stated that he thought the Overflow Prescriptions looked suspicious because some of the prescription forms called for prescribing at least five different products. D.F. told M.K. to fill prescriptions for just three of the products on the forms and that should not make them appear so suspicious.

e. M.K. told GARBINO, D.F., and D.V. that the Overflow Prescriptions should be sent directly from doctors' offices and not from marketers. M.K. later learned instead that Trestles sent the prescriptions to the pharmacies.[7]

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[6] GARBINO and D.F. were accompanied by D.V., who had initially solicited M.K. to fill the Overflow Prescriptions.

[7] I know from interviewing other former Trestles distributors, including J.B. and L.M., and from reviewing Trestles documents obtained by a former Trestles employee, V.P., that Trestles' so-called marketers were known within Trestles as "distributors" and were assigned unique "e-fax" numbers. Prescriptions obtained in large part from telemedicine site activity were "e-faxed" to the pharmacy of Trestles' choice, both to enable Trestles to track the progress of fulfillment and claims re-

f. M.K. estimated that Trucare received approximately 200 Overflow Prescriptions over a period of about three weeks. Thereafter TP refused to process any more Overflow Prescriptions in part because M.K. learned about improprieties for hundreds of compounded medication prescriptions purportedly authorized by Dr. P.B., who was the subject of a national news report.[8] M.K. then suspected that *all* of the Overflow Prescriptions were bogus. GARBINO and D.F. nonetheless pushed M.K. to keep filling them and to not worry about what M.K. perceived as problems with telemedicine doctors' prescriptions, including those purportedly authorized by Dr. P.B.[9]

The Fraudulent Invoices

g. At some point around May or June 2015, GARBINO and Trestles' purported co-owner D.F. demanded that Trucare pay Trestles a referral fee for the Overflow Prescriptions. M.K. refused because his lawyer told him and, in turn, M.K. told GARBINO, that such payments would be illegal.

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imbursement for each prescription, and so that Trestles could chose the pharmacy that would pay the highest possible referral fee. For example, Haeoyou had agreed to pay Trestles 65% of final Tricare claims adjudications.

[8] I know that, on or about May 6, 2015, CBS aired a news report that stated, in part, that Dr. P.B. had authorized compounded medications prescriptions. http://www.cbsnews.com/news/doctors-complicit-costly-abuse-military-health-care-system/.

[9] I know from reviewing emails in or about late April-early May 2015, provided by a cooperating, former sales distributor of Trestles, that GARBINO, D.F., and Trestles purported co-owner R.R. were aware that Dr. P.B. was a telemedicine doctor and had denied authorizing numerous prescriptions that Trestles had referred to HY for fulfillment in exchange for a referral fee.

h. As a work-around, GARBINO proposed that Trucare could pay referral fees owed on the Overflow Prescriptions by calling those referral fees an "advance" on GARBINO's other business, Sano, for referring non-Tricare workers' compensation prescriptions to Trucare.

17. Based on M.K.'s interview statements, and on my review of bank records obtained and emails provided by M.K. during this investigation, I learned the following:

a. On or about June 10, 2015, B.K.[10] emailed M.K., with a "cc" to "garbs92629@gmail.com,"[11] a document entitled "invoice" dated June 10, 2015. The "invoice" stated that Trucare owed Sano 65% of the "billed amount" for "workers' compensation," totaling $997,608.

b. On or about June 24, 2015, B.K. emailed M.K., with a "cc" to "garbs92629@gmail.com," another "invoice," dated June 24, 2015. This "invoice" described a "sales amount" for "May - June 10" of "W/C" of approximately $1,458,685, against which Trucare owed Sano $926,563.

c. I calculated that $926,563 is approximately 64% of $1,458,685, or approximately $21,582 less than TP would purportedly owe pursuant to its 65% agreement with Sano, described

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[10] I believe, from Trestles and Sano emails and from internal Trestles documents obtained from former Trestles employees or distributors, that B.K. worked below GARBINO at Trestles and Sano.

[11] I believe that this email address belonged to GARBINO based on my review of several emails, including one dated April 6, 2015, from "John Garbino (garbs92629@gmail.com)" to D.V.

above. Based upon my knowledge of this case as described herein, and from speaking with other agents involved in this investigation, I have probable cause to believe that this calculation helps establish that the "invoices" were fraudulent because (1) GARBINO and others seeking to collect referral fees for the Tricare-reimbursable Overflow Prescriptions had made clear that they were owed 65% on adjudicated payments; there was no good reason for them, especially given their general desire to collect what they believed was debt, to give-up more than $21,000 of that claim, and (2) as shown more fully below, the claimed debt of $926,563 that GARBINO characterized as related to non-Tricare referrals was substantially the same as 65% of the final Tricare adjudications for the Overflow Prescriptions. Had the numbers been the same, it simply would have been even more suspicious.

d. Sano bank records show that Trucare paid Sano approximately $926,563 via two checks, on or about June 9, 2015 and on or about June 24, 2015. The same records show that the Sano bank account into which Trucare's payments were made was opened only a few days before Trucare's first payment, on or about June 3, 2015.

e. Sano bank records also show no other significant deposits after the opening of that account (June 3, 2015), and that approximately $685,000 of the credit to that account due to Trucare's checks was transferred fairly quickly to an account in the name of Trestles Pain Specialists LLC.

f. Sano bank records further show that GARBINO and Trestles' in-house counsel R.R. were the authorized signatories for the Sano bank account into which Trucare's checks were deposited. Trestles Pain Specialists, LLC bank records show that GARBINO was its authorized signatory. D.F., who had accompanied GARBINO to TP and who had made a demand for Trucare to pay referral fees for the Overflow Prescriptions, as stated above, was also identified as a "member."

18. I reviewed a certain spreadsheet provided by M.K. to DCIS Special Agent Timothy Nugent, who I know is co-investigating this case. SA Nugent who told me about the spreadsheet's origin from his discussions with M.K. From this evidence, I learned the following:

a. M.K. sent SA Nugent a spreadsheet in or about May 2016 that M.K. prepared to show details of the Tricare reimbursement payments related to the Overflow Prescriptions.

b. The spreadsheet showed "net commission" of $937,969.96, or 65% of and against the reimbursement payments, and after expenses, of $1,443,030.70. M.K. told SA Nugent that the "net commission" figure was based upon GARBINO's and others' demands for payment for referral fees for the Overflow Prescriptions.

19. I also reviewed an email from M.K., dated August 6, 2015, showing its sender as "[B.K.]@sanomedical.net," with a "cc" to an email address that I know, as mentioned above, was used by GARBINO. The email stated:

"Hello [M.K.], Attached is an [Explanation of Benefits] from a patient that was processed at [Tru care]. It shows Tricare paid $12,042.92 for two [com pounded] creams. We were paid our percentage on the total of $9,634.34 for this patient. The difference is $2,408.58. If you could please let us know about the difference of $2,408.58. Thanks,…"

20. I compared the patient and prescription information described in the above-referenced email with M.K.'s spreadsheet, as described above, and have probable cause to believe that, when read together and in light of the evidence stated herein, the spreadsheet accurately represented Tricare reimbursements paid to Trucare for the Overflow Prescriptions, and that the $926,563 payment from Trucare to Sano in June 2015 was compensation for Tricare-reimbursable Overflow Prescriptions and *not* for the referral of so-called workers' compensation prescriptions. Thus, I have probable cause to believe, based on the same evidence, that GARBINO prepared or caused others to prepare the purported "workers' compensation" invoices in order to knowingly conceal illegal referral fees paid or to be paid.

Covertly-Recorded Meeting Between GARBINO and M.K.

21. On April 25, 2016, M.K. participated in a covert, consensually-monitored (video-taped) meeting with GARBINO. I reviewed the recording and transcript of that meeting, and discussed that meeting with agents who monitored the statements made by M.K. and GARBINO and who told me that the recording and transcript accurately depict the substance of the statements

made during that meeting. In addition to what I believe were GARBINO's admissions that the so-called workers' compensation invoices were bogus, I also believe that GARBINO counseled M.K. to fabricate a story to conceal the truth about the invoices and advanced a sham and insincere "advice of counsel" defense. GARBINO stated that:

a. He owned Sano.

b. Trestles did Tricare business from December 2014 until April 2015.

c. Trestles sent Tricare business to Haeoyou. Haeoyou transferred that business to Trucare and Trucare filled that business.

d. "And while we feel like we're at like this giant circle of investigation that they're looking at, we're a very small pimple of everything that's going on."

e. M.K. had "specifically said" that Trucare would not pay referral fees on Tricare-reimbursable prescription referrals. M.K. was "adamant about not paying Sano on Tricare . . . prescriptions." "So, through [D.F.] and [R.R.]'s influence [Trucare] paid $926,000 to Sano Medical which was based on Tricare adjudicated business. But we categorized it as a Workers' Comp advance because we had enough business to do so and [Trucare]was not going to pay on Tricare."

f. [In response to M.K. stating that law enforcement will notice that the $926,563 payment from Trucare to Sano substantially equaled 65% of the Tricare reimbursements for the Overflow Prescriptions, GARBINO stated], "[b]ut Matt [M.K.'s

nickname]. Matt, the numbers being the same - you decided to pay that money to us as a Workers' Comp advance. Whether it was the exact number or not the fact that it's categorized as a Worker's Comp advance doesn't mean it's Tricare. That's what my attorneys told me today. When it becomes Tricare is when you chose once the money comes in to pay us again on it. I'm here telling you we're not seeking that money. I'm telling you right now that we're considering that business as a Worker's Comp payment. At my own financial hardship I'm saying that. . . "that's where my story comes from. . . When do you meet with your attorney?"

g. "I mean honestly when I met with my attorney he was like, . . . 'you're my guys now, They're not.' I'm like, '[D.F. and R.R. are] not.' 'What do I do?' He basically said straight out, 'Fuck those guys.' Its what he told me. So, I'm in it to protect myself. You're in it to protect yourself. And we need to protect each - we need to protect ourselves. . . [M]y attorneys have advised me that I've got [to] 100 percent separate from [D.F.] because he's being looked at as really the ring leader . . . ."

h. "[M]y argument has to coincide with your argument. And I'm not going to go tell my side of the story and have that be completely different from your side of the story . . . before I go in to speak with the prosecuting attorney, I will not go in there unless I've got my story 100 percent down, and that's my story that was my role in Trestles . . . It will be my story in working with you. I mean, there's not going to

be anything where you're going to walk in and speak with [the prosecutors] and your story of how this whole thing transpired is different than mine. . . [let's] explain our program to [our attorneys] that it's 100 percent the same. So, that they're not hearing a different story from you than they are from me."

i. "My fight is to legitimize how the payments were made."

j. "And the bottom line is that my company [where] my defense comes in at is we had our contracts vetted out by attorneys. We were doing everything based on the advice of our attorneys, whether it was [R.R.] or the healthcare attorneys, the pharmacies, whatever it was. We were working within what we thought were the confines of the law. And there was never a criminal intent of anything that we ever wanted or with anything that we tried to do. . . I mean, I had an attorney that was a partner in my company and was supposed to be watching over all the shit that we did. . . We even had an additional healthcare attorney that we hired outside of our own attorney that was supposed to be vetting stuff. The contracts that were signed by the pharmacies all had their healthcare attorneys. You had [your own attorney] that even modified our contract. He's one of the top healthcare attorneys in the country."

k. "Does [your attorney] have any pull with [the prosecutor, AUSA] Mark Aveis?"

l. "My argument has to coincide with your argument . . . . I'm not going to tell my side of the story and have that be completely different from your side of the story."

m. "I have to 100% separate myself from D.F. . . . . He's being looked at as the ringleader - his fight is different."

22. I reviewed an email dated May 18, 2016 from R.R. to Trucare's corporate lawyer[12] in which R.R. indicated that he would file a civil complaint against Trucare and M.K. "tomorrow if I do not hear from you and this gets resolved today." R.R. attached a draft complaint to that email. I reviewed the attached draft civil complaint and observed the following allegations:

a. Sano's principal place of business was in Orange County, California.

b. "On March 1, 2015 Sano and [Trucare] entered into [a] Consulting Services Agreement . . . [by which] . . . [Trucare] would pay Sano 65% of the payment [Trucare] receives on the sale of each Compound Pain Cream."

c. "The total sums [Trucare] has billed all payors through February 2016, including billing for TriCare Federal Program patient . . . is in excess of $26 million which if the total sum is collected would mean [Trucare] will owe Sano $16,900,000."

d. "[Trucare] has billed TriCare Federal Program patients through February 2016 $926,562.98 . . . ."

e. "[M.K.] has informed Sano that he and [Trucare] are being investigated by the U.S. Attorney's Office for [Tru-

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[12] Trucare is a fictitious business name of Egyptian, Inc.

care] TriCare billing and in or about March 2016, [M.K.] requested Sano to issue a false billing statement for the TriCare Billing and to state that it was billing for Compound Pain Cream for California Worker Compensation patients and not for TriCare billing. Sano advised [M.K.] that it would not participate in any form of subornation of perjury or make any false statement concerning the Compound Pain Cream or TriCare Billing."

23. I have probable cause to believe, based on the evidence described herein, that the allegations of the draft complaint provide additional evidence of GARBINO's criminal intent and knowledge. First, the complaint was drafted by R.R., a Trestles insider with close ties to GARBINO, on behalf of Sano which is wholly owned by GARBINO. The complaint may reasonably be read as if GARBINO is asserting facts on which he believes he is entitled to recovery. Next, despite what plainly appears to be GARBINO's effort to re-characterize, after-the-fact, the $926,563 payment as an advance against non-Tricare-reimbursable prescription referrals, the complaint plainly characterizes that payment as from Tricare referrals. Next, there is no evidence that M.K. requested any type of billing in March 2016. Next, a plain and fair interpretation of GARBINO's extemporaneous statements during the April 2016 consensually-monitored call, described above, leads to the reasonable conclusion that GARBINO suggested and prepared the fraudulent invoices, not M.K.

C. DEFENSES

Advice-of-Counsel

24. I have learned from other investigators involved in this investigation, and from the recording and transcript described above, that GARBINO has stated that he acted on the advice of counsel in seeking to collect and in collecting fees for Tricare-reimbursable prescriptions that his businesses had referred to pharmacies. For example, I interviewed former Trestles distributor J.B., and spoke to investigators who interviewed former Trestles distributor L.M., who told me that GARBINO frequently mentioned at Trestles' headquarters that they would have to "ask [A.]" or "ask [R.R.]," both attorneys, about how to take some action or another regarding Trestles. I also know that, in support of its civil case against Haeoyou that Trestles filed in or about May 2015, (discussed below), Trestles introduced a declaration of attorney A.D., that I have reviewed, who declared that he was an expert in healthcare law and, having reviewed a contract between Trestles and Haeoyou that called for referral payments, he believed that a provision in the contract that mentioned the AKS showed that the parties did not intend to violate that law. In that same declaration, A.D. also stated that the "employment" safe harbor exemption in the AKS, discussed below, might apply. Additionally, in connection with the same civil case of Trestles against Haeoyou, Trestles produced a memorandum purportedly dated April 6, 2015 that was purportedly prepared by Trestles co-owner and in-house counsel R.R. In that memorandum, that I reviewed, R.R. purportedly opined that the

AKS did not prohibit Trestles' right to fees for referring prescriptions because Tricare was "funded by private health insurance," notwithstanding that, in the same memorandum, R.R. stated that "Tricare is a federal Program for providing medical care to military personnel . . ." and that "a percentage payment arrangement which involved Medicare, which is funded by Federal taxpayers, . . . would be illegal."[13]

25. Based on my training and experience, and discussions with other investigators and prosecutors, I believe that, in order to prevail on an advice of counsel defense, a defendant must establish that, before taking any action, defendant, [1] while acting in good faith and [2] for the purpose of securing advice on the lawfulness of his possible future conduct, [3] sought and obtained the advice of an attorney [4] whom he considered to be competent, and [5] made a full and accurate report or disclosure to his attorney of all important and material facts of which he had knowledge or had the means of knowing, and [6] acted strictly in accordance with the advice his attorney gave following this full report or disclosure. See Devitt and Blackmar, Federal Jury Practice and Instructions, 19.08 (Action on Advice of Counsel Explained) (1992).

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[13] GARBINO may argue that he relied on R.R.'s advice, even if R.R.'s advice was wrong. However, in light of all of the evidence stated herein, I nonetheless believe there is probable cause to believe that GARBINO did not rely on R.R.'s advice; had he done so, GARBINO would not have needed to mis-characterize the approximately $926,000 payment for the Overflow Prescriptions as anything other than Tricare-reimbursable activity.

26. Based on my training and experience, discussions with other investigators and prosecutors, and my review of the evidence in this as described above, I have probable cause to believe that this defense is a sham, insincere, and not likely to succeed for several reasons. First, although witnesses, and perhaps GARBINO, allude to A.D. as having provided legal advice to Trestles during the offense conduct described herein, A.D. did not state that he had done so in his declaration described above. Given that witnesses stated that A.D. was Trestles' outside counsel at the relevant time, it would have made more sense for A.D. to have declared that he counseled Trestles at the relevant time that Trestles' conduct was legal; he did not so declare. Next, A.D.'s opinion in his declaration, that GARBINO and others may be exempt from AKS liability under the so-called "employment" safe-harbor exception, is meritless and indicates that GARBINO misled A.D. about the relationship between GARBINO, on the one hand, and Haeoyou and Trucare, on the other hand. As discussed below, I have probable cause to believe that the "employment" safe-harbor exemption cannot apply because GARBINO was not employed by either Haeoyou or Trucare. Next, R.R.'s purported opinion memorandum was dated more than three months after Trestles had already referred compounded medications prescriptions to Haeoyou and to Trucare. Thus, unless GARBINO were to testify that R.R. orally provided the same opinion prior to that time, it would likely be seen as concocted after-the-fact. Next, R.R. was a purported co-owner of Trestles. His bias and interest in an outcome favorable to GARBINO would be difficult

to overcome. Next, based on my training and experience, and review of the evidence in this case, including Tricare data and payments, R.R.'s opinion incorrectly stated that Tricare was a privately-funded program. A simple Internet search would have shown that Tricare was and is a federal health care program.

Anti-Kickback "Safe Harbors"

27. The AKS has several safe harbors as well as an implied safe harbor that results from either getting or to some extent relying on advisory opinions from the U.S. Department of Health and Human Services ("HHS"). 42 C.F.R. § 1001.952. The first safe harbor is a "referral service." A payment to a "referral service" may be exempt from AKS liability if it meets four requirements, set forth in 42 C.F.R. § 1001.952(f), including that payments must be based on the cost of operating the referral service, and not on the volume or value of any referrals to or business otherwise generated. I know from the evidence gathered in this and related investigations that dispensing pharmacies claimed thousands of dollars *per prescription* in seeking reimbursement from Tricare and, in turn, paid large amounts of those reimbursements to cappers that were tied to a percentage of the volume and value of referrals. Thus, I believe that there is probable cause to believe that GARBINO's activities did not meet the test for the "referral service" exemption described above because the payments to him appeared to be based on the volume and value of the business he generated by his referrals, and were not based on the actual or legitimate cost of operating a bona fide referral service.

28. I further believe that GARBINO cannot claim the employee exemption either, 42 C.F.R. § 1001.952(i), that exempts payments in a bona fide employment relationship. At least under Medicare AKS case law, "the safe-harbor provision relies on 26 U.S.C. § 3121(d)(2) for the definition that an employee is 'any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.'" United States v. Robinson, 505 F.App'x. 385, 387 (5th Cir. 2013). GARBINO operated his own referral service, namely Trestles and Sano, and was not employed by the pharmacies to whom he had referred, or intended to refer, prescriptions for fulfillment in exchange for a fee.

29. Finally, based on my discussions with others involved in this investigation, I have learned that GARBINO had not sought and was not identified as the subject of an HHS advisory opinion.

IV. CONCLUSION

30. For all of the reasons described above, I believe

there is probable cause to believe that JOHN GARBINO received illegal remuneration, in violation of Title 42, United States Code, Section 1320a-7b(b)(1)(A).

/s/

Monica Pandis, Special Agent
Federal Bureau of Investigation

Subscribed to and sworn before me
this 20 day of June, 2016.

/s/

HONORABLE
UNITED STATES MAGISTRATE JUDGE

KAREN E. SCOTT

State of California
Secretary of State

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STATEMENT OF INFORMATION 133
(Limited Liability Company)

Filing Fee $20.00. If this is an amendment, see instructions.

IMPORTANT — READ INSTRUCTIONS BEFORE COMPLETING THIS FORM

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1. LIMITED LIABILITY COMPANY NAME
Sano Medical Consultants, LLC

File Number and State or Place of Organization

2. SECRETARY OF STATE FILE NUMBER: 201512610367
3. STATE OR PLACE OF ORGANIZATION (If formed outside of California): CA

No Change Statement

4. **If there have been any changes to the information contained in the last Statement of Information filed with the California Secretary of State, or no Statement of Information has been previously filed, this form must be completed in its entirety.**

☐ If there has been no change in any of the information contained in the last Statement of Information filed with the California Secretary of State, check the box and proceed **to Item 15**.

Complete Addresses for the Following (Do not abbreviate the name of the city. Items 5 and 7 cannot be P.O. Boxes.)

	STREET ADDRESS	CITY	STATE	ZIP CODE
5. STREET ADDRESS OF PRINCIPAL OFFICE	25531 Goldenspring Drive	Dana Point	CA	92629
6. MAILING ADDRESS OF LLC, IF DIFFERENT THAN ITEM 5				
7. STREET ADDRESS OF CALIFORNIA OFFICE	25531 Goldenspring Drive	Dana Point	CA	92629

Name and Complete Address of the Chief Executive Officer, If Any

8. NAME	ADDRESS	CITY	STATE	ZIP CODE

Name and Complete Address of Any Manager or Managers, or if None Have Been Appointed or Elected, Provide the Name and Address of Each Member (Attach additional pages, if necessary.)

	NAME	ADDRESS	CITY	STATE	ZIP CODE
9.	John Edward Garbino	25531 Goldenspring Drive	Dana Point	CA	92629
10.					
11.					

Agent for Service of Process If the agent is an individual, the agent must reside in California and Item 13 must be completed with a California address, a P.O. Box is not acceptable. If the agent is a corporation, the agent must have on file with the California Secretary of State a certificate pursuant to California Corporations Code section 1505 and Item 13 must be left blank.

12. NAME OF AGENT FOR SERVICE OF PROCESS
Legalzoom.com, Inc. C2916734 19

13. STREET ADDRESS OF AGENT FOR SERVICE OF PROCESS IN CALIFORNIA, **IF AN INDIVIDUAL**	CITY	STATE	ZIP CODE
		CA	

Type of Business

14. DESCRIBE THE TYPE OF BUSINESS OF THE LIMITED LIABILITY COMPANY
Consulting - Marketing

15. THE INFORMATION CONTAINED HEREIN, INCLUDING ANY ATTACHMENTS, IS TRUE AND CORRECT.

DATE	TYPE OR PRINT NAME OF PERSON COMPLETING THE FORM	TITLE	SIGNATURE
05/11/2015	Cheyenne Moseley	Auth. Rep.	