

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,)	
)	
Petitioner,)	
)	
v.)	Misc. No. 2:14-mc-50155
)	Honorable George Careem Steeh
ARIA O. SABIT,)	Magistrate R. Steven Whalen
)	
Respondent.)	
)	
)	
)	

UNITED STATES’ REPLY

This is a subpoena enforcement action. In the six months since Dr. Sabit was served with Civil Investigative Demand (CID) 13-338, he has refused to produce *any* responsive documents with the exception of his *curriculum vitae*.

There is no dispute here about the law. The Government is authorized to issue Civil Investigative Demands when it investigates violations of the False Claims Act. *See* 31 U.S.C. § 3733(a)(1). In this case, the Government argues – and Dr. Sabit concedes – that the “reasonable particularity” standard controls. *See* Doc. # 4 (Sabit Br.) at 8. Thus, the parties agree that the Fifth Amendment does not justify Dr. Sabit’s refusal to produce documents which the Government can describe with reasonable

particularity. *See United States v. Ponds*, 454 F.3d 313, 320 (D.C. Cir. 2006); *In re Grand Jury Subpoena Dated April 18, 2003*, 383 F.3d 905, 910 (9th Cir. 2004); *United States v. Teeple*, 286 F.3d 1047, 1051 (8th Cir. 2002).

After Dr. Sabit asserted his rights under the Fifth Amendment on November 18, 2013, the Government agreed to narrow CID 13-338. As such, the Government seeks to enforce the CID only as to (1) communications between Dr. Sabit and Reliance, (2) medical records in Dr. Sabit's possession for patients he treated with Reliance implants, and (3) communications between Dr. Sabit and the California Medical Board. Dr. Sabit argues first that these narrower requests are still too broad, and second that – having issued the broader subpoena – “it is too late now” for the Government to narrow its requests in response to his Fifth Amendment objections. Sabit Br. at 12. Both of these arguments are without merit. The CID should be enforced.

DISCUSSION

“[A] person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not ‘compelled’ within the meaning of the privilege.” *United States v. Hubbell*, 530 U.S. 27, 35-36 (2000). Only where

a subpoena for documents is “designed to elicit information about the existence or source of potentially incriminating evidence,” and “the act of production itself may ... communicate information” is the respondent entitled to claim protection under the Fifth Amendment. *Id.* at 42, 43. The parties agree on these “basic principles,” and disagree only concerning how these principles apply in this case. *See Sabit Br.* at 6.

A. Communications with Reliance

The Government’s request for emails Dr. Sabit sent to or received from Reliance owners is narrowly tailored to its False Claims Act (FCA) investigation. The Government has identified the email account from which Dr. Sabit sent and received these emails, and it has shown that responsive emails exist.¹ Again, the Government’s burden is to describe the documents it seeks with *reasonable* particularity. There is no basis in law for Dr. Sabit’s suggestion that in order to demand production of emails, the Government must already have them. *See Sabit Br.* at 10 (stating that Dr. Sabit cannot be required “to go through all his emails and find those containing communications with Reliance.”).

¹ Reliance itself admits that it has deleted many – if not most – of the emails responsive to this request. *See Ex.A* (Brett Berry CID deposition excerpts).

Dr. Sabit's principal argument – here and elsewhere – is that the CID, as written, is “staggeringly broad,” Sabit Br. at 9, and that the Government should be prevented from “revis[ing] its subpoena ‘on the fly,’” *id.* at 10, by seeking enforcement of only a subset of the requests contained in the CID. First, CID 13-338 is *not* “staggeringly broad.” The CID is narrowly tailored to develop evidence relevant to the Government's FCA investigation. *See* Doc. No. 1-1 (Kuntz Decl) ¶ 3. The Government has served these same document requests both on Reliance itself, and several of its former physician-investors. No one except for Dr. Sabit has refused to produce documents on the basis of the alleged over-breadth of the request.

Dr. Sabit's argument that the Government is attempting to “revise its subpoena on the fly” is also without merit. The CID requests five specified categories of documents concerning Reliance. CID 13-338(C)(3)(a)-(e). In this action, the Government seeks enforcement only of specification (C)(3)(e) – the request for communications with Reliance, including present and former Reliance investors. This is not “revising” the original subpoena: the broader request encompasses the narrower. In seeking to enforce only the narrower request, the Government has quite properly attempted to accommodate Dr. Sabit's objections.

B. Medical Records of Patients on Whom Dr. Sabit Used Reliance Implants

The Government's request for medical records of patients Dr. Sabit treated using Reliance devices is also proper. As set forth in the Government's initial enforcement application, medical records maintained by hospitals are almost always incomplete. If an independent physician evaluates a patient in his office, and subsequently performs a surgery on this patient, then the hospital will maintain records relating to the surgery, but not records relating to the initial evaluation. Since *both* sets of records are often necessary to determine whether the surgery was medically necessary – and since the Government has evidence that Dr. Sabit's economic relationship with Reliance may have caused him to perform unnecessary surgeries using Reliance devices, *see, e.g.* Kuntz Decl. ¶¶11-12 – the Government's efforts to obtain all of the relevant medical records is plainly legitimate.

Dr. Sabit's argument that the "act of production" doctrine applies because the CID requires him "to determine which of his patients were treated with Reliance products," Sabit Br. at 11, is also unavailing. The Government can provide a list of the patients that Dr. Sabit treated using Reliance implants. Since this list contains protected health information, the

Government will provide the list either to Dr. Sabit directly or to this Court *in camera*.²

Dr. Sabit has waived his Fifth Amendment objection with respect to medical records at any rate. The Government took Dr. Sabit's deposition on January 30, 2014. In that deposition, Dr. Sabit refused to answer questions about Reliance, but testified fully concerning his surgical cases and their outcomes, including surgeries in which he used Reliance implants.³ Dr. Sabit was represented by counsel during the deposition. Thus, even if the act of producing medical records were testimonial – which it plainly is not – the subpoena should still be enforced.

C. Communications with the California Medical Board

There appears to be no dispute that Dr. Sabit's recorded statements to third parties, including the California Medical Board, are discoverable. *See*

² Dr. Sabit argues that medical records in his possession should be withheld because he speculates that these records may contain his “note[s] that he received a kickback each time he used a Reliance product.” Sabit Br. at 11. However, Dr. Sabit gives no indication that he has identified any such documents. At a minimum, Dr. Sabit should be required to provide responsive documents to the Court *in camera* so that the Court may determine on a document-by-document basis whether the “act of production” doctrine applies.

³ *See* Ex.C (Sabit CID Deposition Excerpts) at p.66. The attached excerpts from Dr. Sabit's deposition include his attempts to justify his infection rate at Community Memorial Hospital. In these excerpts from Dr. Sabit's deposition, he claims that an infection rate as high as 30% is acceptable for complicated spine surgery.

Sabit Br. at 12 (“Dr. Sabit already offered to provide those documents ...”). In spite of this, it has been more than six months since Dr. Sabit was served with the CID and he has not produced a single document responsive to this request. The Government respectfully requests that the Court order him to do so now.

D. Dr. Sabit’s Allegations of Government Misconduct

Dr. Sabit’s suggestion that the Government’s petition for enforcement fails to meet Rule 11’s requirements is wholly without basis. At the outset, we disagree with Dr. Sabit’s insistence that any reputational harm that he has suffered is attributable to the Government’s investigation, as opposed to the nature of the conduct that is being investigated. The Government is authorized to investigate violations of the False Claims Act. In this case, the Government has learned that Dr. Sabit had an undisclosed financial relationship with a spinal implant distributor during a period that the Medical Board of California has accused him of gross negligence, repeated negligent acts, and dishonest and corrupt acts. *See* Kuntz Decl., Ex. E (California Medical Board Accusation). The Government has also learned that Dr. Sabit maintained this undisclosed financial relationship well after the time that he left California. Dr. Sabit has admitted that he treated Medicare beneficiaries throughout this period, and billed Medicare for his

services. *See* Ex. C (Sabit CID Deposition Excerpts) pp.9-10. In spite of this, Dr. Sabit has repeatedly refused to produce any documents responsive to the Government's lawful requests. Thus, the Government's application to compel production was proper.

The Government's characterization of the factual record to this Court has been accurate in all respects. In particular, there is factual support that Dr. Sabit's surgeries resulted in at least one patient death. The evidence for the Government's statement includes – but is not limited to – the sworn statement of Dr. Samuel D. Small, who was the Chief of Staff at Community Memorial Hospital of San Buenaventura, where Dr. Sabit practiced.⁴ Dr. Small states:

Toward the later part of 2010, I and other members of the CMH Medical Staff were made aware of serious concerns regarding surgical cases handled by Dr. Sabit. Specifically, these concerns involved whether Dr. Sabit performed appropriate procedures, technically performed procedures within the standard of practice ... [and] responded appropriately to changes in a patient's condition ... One of Dr. Sabit's surgeries resulted in complications that ultimately required further, and allegedly urgent, interventional treatment of this patient at

⁴ Dr. Small's declaration was publicly filed in California Superior Court. *See Sabit v. Abou-Samra, et al*, No. 56-2012-00427968-CU-BT-VTA. The Government has other evidence that supports its characterization of the outcomes of Dr. Sabit's surgeries. Because much of the Government's evidence is not publicly available and is subject to one or more privilege, the Government is prepared to share additional evidence with the Court *in camera* if the Court so requests.

UCLA Medical Center. *Another surgery resulted in the death of the patient.*

Attached as Ex.B (emphasis added).

Dr. Sabit's other allegations of Government misconduct are also without basis. First, Government counsel have not disseminated information gathered in the investigation to the press. Second, the Government's witness interviews, including its interviews of officials at the hospitals where Dr. Sabit works, were authorized by law and proper. Third, the Government has not violated the Fifth Amendment rights of any witnesses in its investigation of Reliance – an entity that Dr. Sabit's attorney does not represent.⁵ Finally, the Government has accurately characterized Dr. Sabit's state court deposition testimony.⁶

⁵ On February 18, 2014, an FBI agent attempted to interview Mark Zidek, a Reliance owner whom the agent did not know to be represented by counsel. When Mr. Zidek informed the agent that he wished to speak to Reliance's attorney before agreeing to be interviewed, the agent immediately terminated the interview. Subsequently, the undersigned contacted Reliance's attorney and informed him that this contact was inadvertent.

⁶ Dr. Sabit's claim to have "testified, quite truthfully, that he did not get paid by Reliance," Sabit Br. at 3, is contradicted by his own prior deposition testimony. Dr. Sabit's deposition testimony in the state court malpractice cases was that he was never paid any compensation by a medical device manufacturer, and that his decision to use one particular device company rather than another did not make any difference to him financially. *See* Kuntz Decl. J (Sabit Malpractice Deposition Testimony Excerpts). When the Government re-asked Dr. Sabit these same questions – questions he now claims to have answered truthfully – Dr. Sabit invoked his

CONCLUSION

CID 13-338 is authorized by law, and the act of producing the three categories of documents the Government seeks would not be testimonial in nature. The CID should be enforced.

Respectfully submitted,

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right under Fifth Amendment and refused to answer. *See* Ex.C (Sabit CID Deposition Testimony Excerpts) at pp. 11-13.

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2014, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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I further certify that I have mailed by U.S. mail the paper to the following non-ECF participants: n/a

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