UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	**CR. NO. 7:02CR00009**
Plaintiff,	)	
v.	)	**MEMORANDUM OPINION**
CECIL KNOX, III, et al.,	)	
	)	**By: Samuel G. Wilson**
Defendants.	)	**Chief United States District Judge**

This is a prosecution for alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq., for conducting and conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962 (c) and (d) and for various other related offenses including health-care fraud, mail fraud, obstruction of justice, the payment and receipt of unlawful kickbacks, the unlawful distribution of a host of controlled substances, and conspiracies to commit these offenses. The defendants are Dr. Cecil Byron Knox, III, a medical doctor licensed by the Commonwealth of Virginia; Southwest Virginia Physical Medical and Rehabilitation, PC, ("SVPMR"), the corporation through which Dr. Knox operated his medical practice; Beverly Gale Boone, a registered nurse employed by the corporation as a nurse and office manager; Tiffany D. Durham, an emergency medical technician employed by the corporation who allegedly operated a prescription refill telephone "hotline"; Willard Newbill James, a licensed professional counselor who allegedly received kickbacks on referrals from Dr. Knox; and Kathleen G. O'Gee, an unlicensed practitioner of "Cranio Sacral Therapy" who received referrals from Knox. The matter is before the court on Knox's and the corporation's motions to dismiss counts one and two of

the indictment–the RICO counts. Knox maintains that those counts are defective because they fail "to properly allege a distinction between the person and the enterprise"or a sufficient pattern of racketeering activity. The corporation maintains that those counts name it as both a defendant and the enterprise, which it contends is improper. The court finds that the RICO counts satisfy RICO's separateness requirements and properly allege a pattern of racketeering activity.

I.

Count one of the indictment alleges, in part:

> 2. That at various times material to this Indictment, CECIL BYRON KNOX, III, BEVERLY GALE BOONE, WILLARD NEWBILL JAMES, JR., KATHLEEN G. O'GEE, and SOUTHWEST VIRGINIA PHYSICAL MEDICINE AND REHABILITATION, PC., defendant, and others known and unknown to the Grand Jurors, were officers, employees, and associates of SOUTHWEST VIRGINIA PHYSICAL MEDICINE AND REHABILITATION, P.C., which was located in Roanoke, Virginia, in the Western Judicial District of Virginia.
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> 3. That SOUTHWEST VIRGINIA PHYSICAL MEDICINE AND REHABILITATION, P.C., its related off-site medical services, and the named defendants constituted an enterprise, that is, a loose association engaged in, and the activities of which affected, interstate commerce, as defined in Title 18, United States Code, Section 1961(4).
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> 4. That from in or about September 1997 until in or about February 2002, in the Western Judicial District of Virginia and elsewhere, CECIL BYRON KNOX, III, BEVERLY GALE BOONE, WILLARD NEWBILL JAMES, JR., and KATHLEEN G. O'GEE, and others known and unknown to the Grand Jury, being persons who were officers of, were employed by, or were otherwise associated with the SOUTHWEST VIRGINIA PHYSICAL MEDICINE AND REHABILITATION, P.C., which was engaged in, and the activities of which affected, interstate commerce, unlawfully and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity as set forth below.

According to count one, defendants committed nine racketeering acts "in furtherance of the enterprise." Racketeering acts one through five, allege that defendants used the mails in a scheme to

submit to Medicare, Medicaid and Trigon claims for non-covered therapies; racketeering acts six through eight allege that defendants used the mails in an "upcoding" scheme, a scheme "that overstated the nature, extent, duration, and complexity of the services provided;" and racketeering act nine alleges drug trafficking–dispensing a host of controlled substances beyond the scope of legitimate medical practice and not for a legitimate medical purpose.

II.

Knox and SVPMR argue that the court should dismiss counts one and two because those counts fail to meet the "distinctiveness" required for Rico liability under §§ 1961 (c) & (d). The court disagrees, albeit for reasons other than those advanced by the government.

Even a cursory comparison of paragraphs 3 and 4 of count one discloses differing descriptions of the enterprise. On the one hand, paragraph 3 describes "Southwest Virginia Physical Medicine and Rehabilitation, P.C., its related off-site medical services, and the named defendants" as the enterprise. On the other hand, paragraph 4–the charging clause

–charges that Knox, Boone, James, and O'Gee, who are described as "officers of", "employed by", or "otherwise associated with" Southwest Virginia Physical Medicine and Rehabilitation, P.C., "unlawfully and knowingly conducted and participated, directly and indirectly, in the conduct of the affairs of *that* enterprise through a pattern of racketeering activity...." Paragraph 4, therefore, unequivocally charges that the corporation is the enterprise. The government fails to acknowledge this discrepancy and steadfastly relies upon its description of the enterprise in paragraph 3. That reliance is misplaced but is not fatal. Although the two paragraphs cannot be harmonized, the charging clause is sound and takes precedence. See Stillman v. United States, 177 F.2d 607, 611 (9th Cir. 1949) (holding that charging

part of the indictment controls when the body of the indictment and the caption conflict).

A.

With that in mind, the court turns to the question of whether counts one and two satisfy RICO's "distinctiveness" requirements as applied to Knox, a question the court believes Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) answers. In King, the Supreme Court held that "to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." Id. at 161. See also Busby v. Crown Supply, Inc. 896 F.2d 833, 840 (4th Cir. 1990); U.S. v. Computer Scis. Corp. 689 F.2d 1181 (4th Cir. 1982). The court concluded, however, the plaintiff could bring a RICO action against King, the defendant, for conducting the affairs of his wholly-owned corporation, the alleged RICO enterprise, through a pattern of racketeering activity. King, 533 at 166. The court reasoned that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." Id. at 163. It could "find nothing in the statute that requires more 'separateness' than that." Id.

King clearly precludes Knox's argument. As in King, the indictment in the present case alleges that an individual, Knox, conducted the activities of SVPMR, his wholly-owned corporation, through a pattern of racketeering activity. That allegation was sufficient in King, and it is necessarily sufficient here. Therefore, the court denies Knox's motion to dismiss counts one and two because, contrary to Knox's argument, those counts satisfy RICO's "distinctness" requirement.

B.

SVPMR also argues that the court should dismiss counts one and two against it because the government has failed to satisfy the requirement of distinctness. Although the holding of King is not controlling because SVPMR is both a defendant and the enterprise, SVPMR may be criminally liable under RICO based on respondeat superior. Therefore, the court denies SVPMR's motion.

SVPMR's legal position is different from the position of the other defendants because the indictment names SVPMR as the enterprise. King held that criminal liability under RICO requires two distinct entities: a person and an enterprise. King, 533 U.S. at 161. SVPMR argues that because the indictment names SVPMR as the enterprise, the indictment cannot also name SVPMR as a defendant, even if the indictment names other defendants who do satisfy the requirement of distinctness. However, King explicitly did not decide whether ordinary principles of respondeat superior apply to corporations under RICO. Id. at 166 ("[This opinion] does not assert that ordinary respondeat superior principles make a corporation legally liable under RICO for the criminal acts of its employees; that is a matter of congressional intent not before us."). Consequently, the court looks elsewhere for guidance.

Although King did not decide the question of whether respondeat superior principles apply under RICO, the Fourth Circuit has implicitly decided the question. United States v. Najjar, 300 F.3d 466 (4th Cir. 2002). In Najjar, a jury found the defendants, Basem Najjar and Tri-City Auto Outlet, Inc., guilty of violating RICO by operating a car theft ring. Id. at 470-71. The indictment alleged that the enterprise was an association in fact between the two defendants and other unnamed persons. Id. at 484. Tri-City Auto Outlet, Inc. appealed its conviction, claiming that the government did not establish sufficient "distinctness." The Fourth Circuit disagreed, reasoning that "principles of corporate

liability apply in the RICO context." Id. The Fourth Circuit further reasoned that

> [a] certain degree of 'distinctiveness' is required for RICO liability; however, where a corporate employee acting within the scope of his authority . . . conducts the corporation's affairs in a RICO forbidden way, the only 'separateness' required is that the corporate owner/employee be a natural person and so legally distinct from the corporation itself. Thus, there were two distinct entities in this case sufficient for liability under 18 U.S.C. § 1962(c): (1) a person, Basem Najjar, and (2) a corporation, Tri-City Auto Outlet, Inc.

Id. (internal citations omitted).

Although Najjar does not expressly mention respondeat superior liability, the decision's unqualified pronouncement that "principles of corporate liability apply in the RICO context" necessarily implies an acceptance of traditional respondeat superior principles. See e.g. United States v. Automated Medical Laboratories, Inc., 770 F.2d 399 (4th Cir. 1985) (corporation criminally responsible for actions of employees acting within the scope of their authority or apparent authority and for the benefit of the corporation, even if such actions were against corporate policy or express instructions). Thus, in Najjar, the government could charge Tri-City Auto Outlet, Inc. under RICO because Najjar, acted within the scope of his employment with Tri-City . Although other courts have reached conflicting results on the issue of whether RICO incorporates traditional principles of respondeat superior,[1] this court believes the 4th Circuit finds them applicable.

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[1]Several district courts have held that 18 U.S.C. § 1962(c) includes respondeat superior liability, reasoning that normal agency principles apply unless Congress indicates that those principles do not apply. Tryco Trucking Co., v. Belk Stores Servs., Inc., 634 F.Supp. 1327, 1334 (W.D.N.C. 1986); Morley v. Cohen, 610 F.Supp. 798, 811 (D. Md. 1985); Bernstein v. IDT Corp. 582 F.Supp 1079, 1083-84 (D. Del. 1984). The First and Third Circuits both have rejected respondeat superior liability under § 1962(c), reasoning that the corporate employers were often the victims of the racketeering activity conducted by employees and that Congress did not intend to impose liability on these victims. Gasoline Sales, Inc. v. Aero Oil Co., 39 F.3d 70, (3rd Cir. 1994); Miranda v. Ponce

It follows that although the indictment describes SVPMR as the enterprise, based on respondeat superior it properly may be a defendant as well. Therefore, the court denies SVPMR's "separateness" challenge to the RICO counts of the indictment.

III.

Knox and SVPMR further argue that the court should dismiss counts one and two because these counts fail to allege a pattern of racketeering activity as required by 18 U.S.C. § 1962 (c). The court disagrees with their arguments.

To demonstrate "a pattern of racketeering activity" under 18 U.S.C. § 1962(c), the government must prove "relationship" and "continuity or a threat of continuity" among the predicate acts of racketeering. H.J. Inc. v. Northwestern Bell Tel. Co. 492 U.S. 229, 239 (1989); Anderson v. Found. for Advancement, 155 F.3d 500, 505 (4th Cir. 1998); Mylan Lab. Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1993). The predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." H.J. Inc. 492 U.S. at 240; Anderson 155 F.3d at 505-06. Furthermore, courts "are cautious about basing a RICO claim on predicate acts of mail and wire fraud because it will be the unusual fraud that does not enlist the mails and wires in its services at least twice." Al-Abood v. El-shamari, 217 F.3d 225, 238 (4th Cir. 2000). However, these concerns are not present here because the indictment does not allege a single fraud that just happens to use the mails more than once; rather, the indictment alleges several different frauds with each fraud requiring several

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Fed. Bank, 948 F.2d 41, 45 (1st Cir. 1991).

mailings. In this case, the defendants allegedly performed all of the predicate acts of mail fraud against similar victims in a similar way and for the same purpose–to defraud health care insurance carriers by charging them for medical procedures either not performed or not covered and allegedly distributed controlled substances as a means to obtain and maintain patients. Consequently, the predicate acts satisfy the requirement of relatedness.

The government must also show that the predicate acts satisfy the requirement of continuity to establish a pattern of racketeering activity pursuant to 18 U.S.C. § 1962(c) and (d). H.J. Inc. 492 U.S. at 240. "[C]ontinuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." Id. at 242. In the present case, the indictment alleges that the defendants regularly caused the corporate enterprise to defraud insurance carriers and to illegally distribute controlled substances. These allegations, if proven, will show that mail fraud and drug trafficking were part of SVPMR's regular way of doing business, thereby satisfying the requirement of continuity.

In sum, The indictment alleges that the defendants engaged in several similar frauds against similar victims for similar purposes, and that these crimes were part of the entity's regular way of doing business. These allegations show a relatedness and continuity among the predicate acts of racketeering sufficient to establish the element of "pattern of racketeering activity" RICO requires. Therefore, the court denies the defendants' motions to dismiss counts one and two for failure to allege a pattern of racketeering activity.

IV.

For the reasons stated above, the court denies the defendants' motion to dismiss counts one

and two of the indictment.

ENTER: This August 22, 2003.

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CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	**CR. NO. 7:02CR00009**
Plaintiff,	)	
v.	)	**ORDER**
CECIL KNOX, III, et al.,	)	
	)	**By: Samuel G. Wilson**
Defendants.	)	**Chief United States District Judge**

In accordance with the Memorandum Opinion entered this day it is **ORDERED** and **ADJUDGED** that the motions of Cecil Byron Knox, III, and Southwest Virginia Physical Medical and Rehabilitation, PC, to dismiss counts one and two of the indictment against them are **DENIED**.

ENTER: This August 22, 2003.

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CHIEF UNITED STATES DISTRICT JUDGE