UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
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	:	
v.	:	No. 3:00cr133(EBB)
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RICHARD MARKOLL, ERNESTINE BINDER, a/k/a/ ERNESTINE BINDER MARKOLL, and BIO-MAGNETIC THERAPY SYSTEMS, INC. Defendants.	:	

Omnibus Ruling on Defendants' Motion to Strike and Motions to Dismiss

Defendants, Richard Markoll ["Markoll"], Ernestine Binder (a/k/a Ernestine Binder Markoll) ["Binder"], and Bio-Magnetic Therapy Systems, Inc. ["BMTS"], move, pursuant to Fed. R. Crim. P. 7(d), to strike certain "highly prejudicial surplusage" from the Superceding Indictment [doc. # 43]. Defendants also move, pursuant to Fed. R. Crim. P. 12(b), to dismiss counts 1 through 14 of the Superceding Indictment on the grounds that they 1) fail to state a crime [doc. # 46], and 2) are unconstitutionally vague [doc. # 44]. For the reasons set forth below, Defendants' motions are DENIED.

I. BACKGROUND

On October 25, 2000, a grand jury returned a fifteen-count Superceding Indictment [hereinafter the "Indictment"] against Markoll, Binder, and BMTS. The Indictment charged Defendants with fourteen counts of mail fraud [hereinafter the "Mail Fraud Counts"] in violation of 18 U.S.C. § 1341, and one count of

conspiracy to commit offenses against the United States in violation of 18 U.S.C. § 371. Specifically, Defendants are charged with fraudulently submitting claims to Medicare for reimbursement of services under inaccurate billing codes. The facts as alleged in the Indictment are summarized here.

Markoll invented a device called the Electro-Magnetic Induction Treatment System, Model 30/40 ("EMIT Device"), for which he obtained U.S. patents for various uses. Markoll held a medical doctor degree (M.D.), but was not licensed to practice medicine. The EMIT Device, by directing electric current through an air coil, created a pulsed electro-magnetic field for the purpose of treating arthritis. Although use of the EMIT Device involved placing the affected joint into the electro-magnetic field, it did not involve the use of electrodes directly contacting the skin, or the use of ultrasonic energy. Beginning in 1989, Defendants sought FDA approval for commercial applications of the EMIT Device, but never successfully secured approval.

At all relevant times, Markoll and Binder served on the Board of Directors and owned or controlled a majority of the shares of BMTS. Markoll and Binder also acted as officers of BMTS' subsidiary and predecessor corporations, Magnetic Therapy, Inc., and Magnetic Therapy, Scovill Street, Inc., respectively. In 1990 and 1991, through Magnetic Therapy, Scovill Street, Inc., Defendants began operating three clinics for the purpose of

conducting clinical trials of the EMIT Device under the research protocols of two hospitals' Institutional Review Boards. Defendants' clinics provided no services other than the ones set forth in the research protocols, and, significantly, neither possessed nor utilized either “ultrasound” or “electrical stimulation” devices. Various state-licensed physicians were employed by Defendants on a part-time basis to perform evaluations.

Part B of the Medicare Act [hereinafter “Medicare”] is a voluntary program that provides medical insurance benefits to aged or disabled persons. See 42 U.S.C. 1395j-95w.[1] Physicians seeking reimbursement from health insurance plans under Medicare were required to submit claims on a Health Insurance Claim Form [hereinafter “Claim Form”], and indicate each service or procedure administered using a five-digit code from the Physicians' Current Procedural Terminology Manual [hereinafter “CPT Code”]. The Government alleges that no CPT Code was specifically designated for treatment using the EMIT Device. Reimbursement claims for evaluation and management services also require, among other things, that 1) the services indicated by

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[1] Medicare is a federally funded program intended to provide insurance benefits for medically necessary services to elderly and disabled people. The United States Department of Health and Human Services, though the Health Care Financing Administration [“HCFA”], administered the Medicare program. HCFA contracted with private insurance companies, Medicare carriers, to administer the Medicare program.

the CPT Code be performed (at least in part) by the physician in whose name the claim is made, 2) the physician describe the exact service by using the appropriate CPT Code or by selecting the "unlisted procedure" code and providing a description of the service provided, and 3) the physician certify that the medical services for which reimbursement is claimed were actually performed, and were personally provided by, or under the direct supervision of, the physician making the claim. Furthermore, the government alleges, at all relevant times, reimbursement for medical devices not approved by the FDA were denied because they were considered "investigational" by health insurance programs, and, as such, not "reasonable" or "necessary" for diagnosis or treatment of illness or injury.

Under the Mail Fraud Counts, the Government alleges that Defendants devised a plan to defraud four insurance providers, Medicare[2] and Civilian Health and Medical Program of the Uniformed Services ["CHAMPUS"] (both federal programs), and Blue Cross and Blue Shield of Connecticut ["Blue Cross"] and Metropolitan Insurance Company ["Metropolitan"] (both private companies). Specifically, the Government alleges that Defendants executed their scheme by fraudulently certifying on their Claim Forms that 1) EMIT Device treatments constituted reimbursable

[2] At all relevant times, Travelers Insurance Company was the Medicare carrier for Connecticut, and Empire Blue Cross and Blue Shield was the carrier for New York.

ultrasound treatments under CPT Code 97128, 2) EMIT Device treatments constituted reimbursable manual electrical stimulation under CPT Code 97118, and 3) unsupervised non-physician patient evaluations constituted reimbursable evaluations personally performed by the billing physician. Counts 1 through 14 each allege a mailing of a Medicare payment check induced by Defendants' scheme.

III. DISCUSSION

A. Motion to Strike Surplusage

Defendants move, pursuant to Fed. R. Crim. P. 7(d), to strike all references to CHAMPUS, to Blue Cross, to Metropolitan, and to ultrasound treatment under CPT Code 97128, from the Mail Fraud Counts as "highly prejudicial surplusage" since Defendants are not charged with any specific offenses as to those companies or as to that CPT Code and procedure. The Government opposes the motion, arguing that the references are relevant and necessary background material to expose the full scope of Defendants' scheme.

Rule 7(d) provides that "[t]he court on motion of the defendant may strike surplusage from the indictment or information." Fed. R. Crim. P. 7(d). A motion to strike surplusage is "only granted where the challenged allegations are 'not relevant to the crime charged and are inflammatory and prejudicial.'" United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990) (quoting United States v. Napolitano, 552 F. Supp.

465, 480 (S.D.N.Y. 1982)); see also United States v. Hernandez, 85 F.3d 1023, 1030 (2d Cir. 1996) (quoting Scarpa). "If evidence of the allegation is admissible and relevant to the charge, than regardless of how prejudicial the language is, it may not be stricken." Scarpa, 913 F.2d at 1013 (quoting United States v. DePalma, 461 F. Supp. 778, 797 (S.D.N.Y. 1978)); see also United States v. Langella, 776 F.2d 1078, 1081 (2d Cir. 1985). Further, under Fed. R. Evid. 404(b) "evidence of other crimes, wrongs, or acts" is admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In Scarpa, the Second Circuit upheld the district court's refusal to strike reference to a notorious organized crime family because the defendants' group in that case was allegedly a branch of the crime family. The Scarpa court noted that in RICO cases, "courts have refused to strike allegations of organized crime connections that 'serve to identify the enterprise' and the means by which its members and associates conduct various criminal activities.'" Scarpa, 913 F.2d at 1013 (quoting Napolitano, 552 F. Supp. at 480).

Similarly, in Hernandez, the Second Circuit affirmed the district court's refusal to strike references to the defendant's cocaine-related activity when the defendant was charged with a heroin conspiracy because it was relevant to the organizational structure, method of operation, and nature of relationships

between the defendants. See Hernandez, 85 F.3d at 1030; accord United States v. Montour, 944 F.2d 1019, 1026 (2d Cir. 1991) ("[A]s long as the overt acts alleged are relevant to the conspiracy charge, the trial judge's refusal to strike is not error.").

Here, the issue is whether references in the prefatory section of the Indictment concerning other insurance companies affected by Defendants' alleged mail fraud scheme, and other CPT Codes used by Defendants' to execute the scheme are relevant and admissible when the fourteen charged counts only involve mailings to and from Medicare under the CPT Code for "electrical stimulation," CPT Code 97118. Defendants argue that these additional allegations constitute highly prejudicial surplusage because they are not charged in the Indictment, and, therefore, would tend to confuse the jury, leading to speculation of guilt as to the charged accounts. The Government, however, urges that evidence of similar billings submitted to other insurance companies, and billings using another inaccurate CPT Code, would constitute direct evidence of the mail fraud scheme perpetrated in the fourteen charged counts, and, as such, should not be stricken.

Applying the standards set forth above, the Court finds the challenged references to be both relevant and admissible. Section 1341 of Title 18 of the Unites States Code prohibits the

devis[ing] or intending to devise any scheme or artifice to

> defraud, or for obtaining money . . . by means of false or fraudulent pretenses, representations, or promises . . . [and] for the purpose of executing such scheme . . . [the placing] in any post office . . . any matter or thing whatever to be sent or delivered by the Postal service.

18 U.S.C. § 1341. In other words, federal law is violated when the mails are used to effectuate a fraudulent scheme. Evidence of Defendants' submissions to other insurance companies, and submissions using the ultrasound CPT Code, therefore, are relevant as proof of a scheme in the charged counts. Just as the defendants' uncharged cocaine activity in Hernandez was found relevant to the charged heroin conspiracy as showing the defendants' organizational structure and method of operation, the additional alleged claim submissions here are relevant to Defendants' alleged method of submitting claims for reimbursement of EMIT Device treatment by using inaccurate codes. Furthermore, the challenged references would likely be admissible under Rule 404(b) as proof of motive, preparation, plan, and/or absence of mistake or accident. Accordingly, Defendants' motion to strike is denied.

B. Motions to Dismiss

Defendants next move, pursuant to Fed. R. Crim. P. 12(b), to dismiss the Mail Fraud Counts on the grounds that they 1) fail to state a crime, and 2) are unconstitutionally vague. In reviewing a motion to dismiss pursuant to Fed. R. Crim. P. 12(b), a court must accept all factual allegations in the indictment as true. See Costello v. United States, 350 U.S. 359, 363 (1956). "[W]here

a grand jury has determined that there is probable cause to believe that a fact constituting an element of a crime has occurred, and where this fact is alleged in an indictment, a defendant may not challenge this factual assertion short of a trial on the merits." United States v. Bicoastal Corp., 819 F. Supp. 156, 158 (N.D.N.Y. 1993); see also United States v. Martinez, No. S1 94cr219(RPP), 1995 WL 10849, at *2 (S.D.N.Y. Jan. 12, 1995).

1. Failure to State a Crime

Federal Rule of Criminal Procedure 7(c)(1) provides that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." An indictment "need do little more than track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998) (quoting United States v. Stavroulakis, 952 F.2d 686, 693 (2d Cir. 1992)). The Second Circuit has made clear that an indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge against him, and enables him to plead an acquittal or a conviction which bars future prosecution for that same offense. See United States v. Pirro, 212 F.3d 86, 91-92 (2d Cir. 2000) (quoting Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)).

Rule 12(b), governing criminal pretrial motions, provides

that “[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.” Fed. R. Crim. P. 12(b). In the Second Circuit, dismissal of an indictment is justified either “to eliminate prejudice to a defendant; or, to prevent prosecutorial impairment of the grand jury's independent role.” United States v. Hogan, 712 F.2d 757, 761 (2d Cir. 1993).

There is no doubt, and Defendants do not challenge, that the Indictment here meets these basic pleading requirements in that it provides sufficient factual detail to permit Defendants to prepare their defense and to bar future prosecutions for the same offense. Defendants instead argue that the Mail Fraud Counts must be dismissed because they fail to allege the violation of any law, and accordingly, operated to misinform the grand jury, thereby fatally infecting its charging function. Specifically, Defendants insist that the Government misstated significant legal standards governing how Medicare claims are submitted and processed. Contrary to the Government's assertions in the Indictment, Defendants' claim that 1) FDA approval was not necessary for Medicare reimbursement, 2) investigational treatments or services were not automatically precluded from Medicare reimbursement, 3) CPT Codes, as a matter of law, are not applied with absolute precision in that i) HCFA regulations required that only the most accurate code, not the exact code, be used, and ii) since they are undefined, the scope of the

ultrasound and electrical stimulation CPT Codes is uncertain, and 4) the billing physician's certification does not certify that all services were personally performed by the billing physician. The Government counters that these challenges to the Indictment reflect a misconstrual of the mail fraud scheme alleged in the Indictment, and/or constitute factual arguments not appropriately decided on a motion to dismiss.

a. FDA Approval and Investigational Devices

Defendants assert that the gravamen of the Mail Fraud Counts rests on the erroneous legal proposition that FDA approval of a service or treatment was required for Medicare reimbursement. The Government urges, however, that the mail fraud scheme, at its core, alleges that Defendants chose to bill for their EMIT Device treatments as either ultrasound or electrical stimulation treatments, which, according to the Government, they are not. Therefore, regardless of whether Medicare required FDA approval or permitted reimbursement for investigational devices, billing for EMIT Device treatments using CPT Codes for other devices would be fraudulent. As the Government points out, whether FDA approval was required and reimbursement for investigational devices was prohibited could speak to Defendants' motive for utilizing the alternative CPT Codes, but are not essential to the alleged fraudulent scheme. Therefore, the issue of whether, as a matter of law, FDA approval was required and reimbursement for investigational devices was prohibited between 1990 and 1994 is

not reached by the Court at this time.

Defendants' arguments, therefore, based on a recent Institute of Medicine Report, that Medicare Carriers were in fact reimbursing for services related to investigational devices is also inapposite since Defendants are not charged with simply billing for investigational devices. As discussed above, Defendants are charged with concealing the fact that their services were performed with an investigational device (the EMIT Device), by billing Medicare for ultrasound and electrical stimulation treatments that, the Government alleges, were not actually performed.

b. CPT Codes

Defendants next argue that the CPT Codes, as a matter of law, are not applied with the precision alleged in the Indictment, that they are undefined and allow flexibility, and therefore, that the Government's criminalization of Defendants' billing practices must fail. The Government urges, however, that these arguments again misconstrue the charged mail fraud scheme, and, anyway, are factual arguments not appropriately decided on a motion to dismiss. The Court agrees.

Much is made by Defendants of the fact that the Indictment alleges that physicians claiming reimbursement from Medicare must "describe the exact service or procedure provided using the CPT Code designated for that service or procedure," (Indictment at ¶ 21), when the CPT guidelines only call for using the CPT Code

"most accurately" identifying the procedure. Defendants, however, are not charged with mistakenly utilizing the ultrasound and electrical stimulation codes to bill for EMIT Device treatment. Rather, the Government alleges that Defendants intentionally utilized these alternative codes knowing that they did not properly describe the EMIT Device treatment.

As discussed above, in reviewing a motion to dismiss pursuant to Fed. R. Crim. P. 12(b), a court must accept all factual allegations in the Indictment as true. See Costello v. United States, 350 U.S. 359, 363 (1956); United States v. Bicoastal Corp., 819 F. Supp. 156, 158 (N.D.N.Y. 1993). Therefore, regardless of whether the CPT Codes apply an "exact" or "most accurate" standard, the Government's allegations that the EMIT Device does not constitute either an ultrasound or electrical stimulation service, and that Defendants knowingly and fraudulently billed for them anyway, must be accepted as true, and are sufficient to state a crime. "A deliberate misleading use of a particular code, would, of course, support a criminal fraud charge under various federal statutes. See, e.g., 18 U.S.C. §1341." Siddiqi v. United States, 98 F.3d 1427, 1428 (2d Cir. 1996). Furthermore, the issues of whether or not the EMIT Device constitutes some form of either ultrasound or electrical stimulation treatment sufficient to justify the use of such codes (likely requiring the assistance of experts), and whether Defendants intended to submit false claims using these codes, are

questions of fact to be determined at trial, and therefore, not appropriately determined in a pretrial motion. See Alfonso, 143 F.3d at 777 ("[T]he sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment."); United States v. Snead, 822 F. Supp. 885, 887 (D. Conn. 1993) ("Dismissal of an indictment is [only] proper when the determination can be made based solely upon issues of law.").

c. Physician Certification

Lastly, Defendants claim that the Government misstated the certification on the back of the Claim Form when it alleged in the Indictment that "it was further part of the scheme and artifice to defraud that the defendants submitted . . . claims to Medicare-Part B for evaluations that were certified as being personally performed, in whole or in part, by the billing physician, when such evaluations were not so performed." (Indictment ¶ 62.) The signature portion of the Claim Form requires the billing physician to certify that the billed services were "personally furnished by me or were furnished incident to my professional service by my employee under my immediate personal supervision." (Defs.' Mem. in Supp. of Mot. to Dismiss for Failure to State a Crime [hereinafter "Defs.' Crime Mem."], Attach. 2 at 4.) Defendants, therefore, claim that the Government's omission of the language allowing for billing of services provided by the physician's employee "fatally infects the criminal allegations in counts 1-14." (Defs.' Crime Mem. at

14.) The Court disagrees.

Semantics aside, the certification represents that the billing physician either personally performed or personally supervised the services being billed. Therefore, the Government's qualification in the Indictment that Defendants certified that the services were personally performed “in whole or in part,” covers this discrepancy. The Court finds, therefore, that the Government's omission of the supervisory portion is not a clear misstatement and does not fatally infect the mail fraud counts. The bottom line in the certification is some degree of personal participation by the billing physician.

The Government alleges that Defendants hired two doctors part-time and obtained provider numbers in the names of those two doctors to enable themselves to bill for services under those two doctors' provider numbers. By billing under these provider numbers, Defendants represented that these physicians personally performed or personally supervised the treatments. The Indictment alleges that as part-time employees, these physicians neither personally performed nor personally supervised many of the billed services. As such, these allegations would constitute further evidence of defendants overall fraudulent scheme. Whether in fact the billing physicians actually supervised or performed the services billed is a question of fact for the jury.

In sum, Defendants' motion to dismiss the Mail Fraud Counts on the ground that the Government failed to state a crime is

denied.

2. Unconstitutionally Vague

Defendants' third and final motion seeks dismissal of the Mail Fraud Counts on the ground that, as applied, the statute is unconstitutionally vague. The Government contends that the relevant regulations are clear and that Defendants fail to demonstrate how their conduct was based on any ambiguity or lack of guidance in the law.

The Supreme Court has held that the void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); see also United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000) ("Due process requires that a criminal statute give fair warning of the conduct that it makes a crime." (quoting Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964))). "The touchstone inquiry is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." United States v. Velastegui, 199 F.3d 590, 593 (2d Cir. 1999). In criminal prosecutions, the rule of lenity requires that "ambiguities in the statute be resolved in the defendant's favor." United States v. Plaza Health Laboratories, Inc., 3 F.3d 643, 649 (2d Cir.

1993). "Because the meaning of language is inherently contextual," however, the Supreme Court has "declined to deem a statute 'ambiguous' for purposes of lenity merely because it was possible to articulate a construction more narrow than that urged by the Government." Moskal v. United States, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990). Rather, it is a "doctrine of last resort." Dauray, 215 F.3d at 264. Finally, it is well established that vagueness challenges other than in the First Amendment context "must be examined in light of the facts of the case, on an as-applied basis." United States v. Whittaker, 999 F.2d 38, 42 (2d Cir. 1993); see also United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1997).

Here, Defendants do not argue that the mail fraud statute itself is unconstitutionally vague. Rather, Defendants argue that, as applied to this case, the mail fraud charges incorporate provisions from the Medicare program which lack the precision of the criminal code. Specifically, Defendants claim that the Medicare statutes', regulations', and program instructions' lack of standards on proper billing procedures, and lack of guidance on interpreting CPT Codes, preclude the imposition of criminal liability for misusing those terms. The Government, however, again urges that this is not a case about unintentional coding errors on Medicare claim submissions. Rather, as reiterated above, Defendants are charged with intentionally falsifying

claims by using inaccurate codes to bill for treatment with an investigational device not yet approved by the FDA, because they knew that treatment with the EMIT Device was not reimbursable. Moreover, the Government urges that the relevant CPT Codes are neither uncertain nor complex, and that no industry standard would sanction the use of these codes for the EMIT Device.

In support of their argument, Defendants rely on Siddiqi v. United States, 98 F.3d 1427 (2d Cir. 1996), for the general proposition that all CPT Codes are inherently ambiguous, do not provide clear guidance on what services are reimbursable, and, therefore, cannot serve as a basis for criminal liability. The Court finds this interpretation to be over broad. In Siddiqi, uncontradicted expert and lay testimony indicated that there was widespread confusion concerning a specific chemotherapy code, and that the defendant's conduct was standard practice among physicians. See id. at 1430, 1439. The Second Circuit criticized the Government's inability to cite any authority indicating that the defendant's conduct was excludable as a compensable service under the disputed code. See id. at 1436-39. This holding, however, cannot be generalized for the proposition that all charges based on mail fraud violations arising from submission of fraudulent CPT Codes are necessarily ambiguous.

Here, while it is true that the Government has not pointed to a specific rule excluding the EMIT Device as a billable form of ultrasound or electrical stimulation treatment, Defendants

have yet to claim that the EMIT Device in fact constitutes either of those services. Instead, Defendants make the general assertion that all CPT Codes are vague and uncertain. While the Court is mindful that it must not permit the Government to "ambush" a defendant with ambiguities in Medicare regulations, the Court also notes that "Medicare and Medicaid fraud constitute a great drain on a limited source of social funding. Those who perpetrate such fraud deserve relentless prosecution and severe punishment, and . . . should not be . . . allow[ed] . . . to hide behind the ambiguities of bureaucratic regulations." United States v. Siddiqi, 959 F.2d 1167, 1174 (2d Cir. 1992) (citations omitted).

Applying the standards set forth above, the Court finds that the Mail Fraud Counts, as applied in this case, are not unconstitutionally vague. The mail fraud statute requires the Government to show that Defendants devised a scheme to defraud it of money, and used the mail to execute such scheme. The relevant Medicare regulations tell physicians that 1) they are only permitted to bill for "reasonable and necessary services," (Program Compliance Guidelines of Inspector General at 10-11, Defs.' Vagueness Memo., Attach. 2); 2) that they must utilize the CPT Code most accurately identifying the service or procedure performed, (Physicians Current Procedural Terminology at xi, Defs.' Failure Memo., Attach. 7); 3) that "unlisted" codes were available for use when billing for procedure or services not

listed in the CPT manual, (Id. at xiv), and 4) that they were on notice that "they may be subject to criminal, civil, and administrative penalties for signing a certification when they know that the information is false or for signing a certification with reckless disregard as to the truth of the information." (Program Compliance Guidelines of Inspector General at 25, Defs.' Vagueness Memo., Attach. 2.) In the Court's view, these combined regulations gave fair warning of the conduct that they made a crime. As applied, this collective statute does not appear vague when the charge is devising and executing a scheme to defraud Medicare by intentionally billing Medicare for reimbursement under CPT Codes Defendants knew to be improper. To succeed, of course, the Government will have to prove both fraudulent intent and the inaccuracy of the CPT Codes as applied to the EMIT Device. As discussed above, however, these are issues of fact reserved for trial; not ambiguities in the law to be decided on a motion to dismiss. Accordingly, Defendants' motion to dismiss the Mail Fraud Counts on the ground of vagueness is denied.

IV. CONCLUSION

In sum, and for the reasons set forth above, Defendants' Motion to Strike [doc. # 43], Defendants' Motion to Dismiss Counts 1 through 14 of the Superceding Indictment for Failure to State a Crime [doc. #46], and Defendants' Motion to Dismiss Counts 1 through 14 of the Superceding Indictment as Unconstitutionally Vague [doc. #44], are DENIED.

So ordered.

Ellen Bree Burns,
Senior District Judge

Dated at New Haven, Connecticut, this ___ day of January, 2001.