IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

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| UNITED STATES OF AMERICA | § | |
| | § | |
| v. | § | No. 4:20-CR-358-1 |
| | § | JUDGE MAZZANT |
| NEERAJ JINDAL (1) | § | |
| | § | |

**UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT NEERAJ JINDAL'S MOTION FOR A BILL OF PARTICULARS**

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## I. INTRODUCTION

The Grand Jury charged Neeraj Jindal and John Rodgers with conspiring to fix prices paid to physical therapists ("PTs") and physical therapist assistants ("PTAs") (Count One) and with conspiring and endeavoring to obstruct a federal investigation into that conduct (Counts Two through Four) (Dkt. #21). The United States produced organized discovery in a text-searchable format. Jindal nonetheless moves for a bill of particulars as to Count One, requesting (1) information relating to the "implementation" of the price-fixing conspiracy, and (2) the identities of unindicted co-conspirators (Dkt. #53, at 2–3). Neither request is appropriate because the Grand Jury's allegations, together with the discovery the United States has produced, fully inform Jindal of the facts constituting the offenses and provide sufficient information to enable him to prepare his defense and avoid surprise at trial. Moreover, implementation of a price-fixing conspiracy is not an element of the charged offense because the price-fixing agreement itself is the crime. Thus, there is no basis to require the United States to provide the specific information Jindal requests regarding implementation (i.e., "alleged 'collusive noncompetitive rates'—amounts decreased, whose rates were changed, and the dates of the decreases" (Dkt. #53, at 3)). Jindal also fails to justify his request that the Court order the disclosure of names of unindicted co-conspirators seven months before the pretrial deadline for exchanging witness lists in this case. Accordingly, the United States asks the Court to deny Jindal's motion in its entirety.

## II. FACTUAL BACKGROUND

The Grand Jury indicted Jindal on December 9, 2020 (Dkt. #1), and returned the First Superseding Indictment ("Indictment") on April 14, 2021 (Dkt. #21). Count One of the Indictment charges Jindal and Rodgers with knowingly entering into and engaging in a conspiracy to suppress competition by agreeing to fix prices paid to home healthcare workers (Dkt. #21 ¶¶ 1–13). Count

Two charges Jindal and Rodgers with conspiring to obstruct and make false statements in a Federal Trade Commission ("FTC") investigation of their conduct (Dkt. #21 ¶¶ 14–20). Counts Three and Four charge Jindal and Rodgers, respectively, with endeavoring to obstruct the FTC investigation (Dkt. #21 ¶¶ 21–26).

On December 23, 2020, the United States produced to Jindal over 14,000 records in discovery. The United States made two additional productions, on May 17, 2021, and July 12, 2021, together consisting of over 600 additional records. The discovery is text-searchable, was produced in a format compatible with document review platforms, and each individual record is marked with a unique document identifier (commonly known as "Bates numbering" or "Bates stamping"). To further organize the discovery, the United States included an index with each production. And, in response to a written discovery request from Jindal in June 2021, the United States provided a "key" identifying the names of individuals and companies anonymized in the Indictment.

On August 5, 2021, the Court issued a revised pretrial order (Dkt. #52). Among other deadlines, the Court ordered the parties to provide "a list of witnesses, a list of exhibits anticipated to be introduced during trial, and a copy of each marked exhibit" by March 28, 2022 (Dkt. #52).

## III. LEGAL STANDARD

"Under Rule 7(f) of the Federal Rules of Criminal Procedure, a defendant may move the court to direct the government to provide a bill of particulars—a formal written statement providing details of the charges against the defendant." *United States v. Churchill*, No. 4:20-CR-00252(1), 2021 WL 862306, at *1 (E.D. Tex. Mar. 8, 2021). "A defendant possesses no right to a bill of particulars[.]" *United States v. Rodriguez*, No. 4:18-CR-00216(18), 2020 WL 4689193, at *4 (E.D. Tex. July 27, 2020), *report and recommendation adopted*, 2020 WL 4674141 (E.D. Tex.

Aug. 12, 2020) (alteration in original) (quoting *United States v. Burgin*, 621 F.2d 1352, 1358 (5th Cir. 1980)). "The decision whether to grant a motion for a bill of particulars is within the discretion of the trial court," and the "court abuses its discretion in denying [the] motion . . . only when the denial results in actual surprise at trial and prejudice to a defendant's substantial rights." *Churchill*, 2021 WL 862306, at *1. A "trial court should only grant a bill of particulars when the information is necessary for the defendant to prepare for trial." *Rodriguez*, 2020 WL 4689193, at *4 (quoting *United States v. Little*, No. 11-189-01, 2012 WL 566805, at *1 (W.D. La. Feb. 19, 2012)).

## IV. ARGUMENT

### A. The Indictment and Discovery Provide Jindal with Sufficient Information to Enable Him to Prepare His Defense and Avoid Surprise.

When an indictment "(1) contains the elements of the offense charged; (2) fairly informs the defendant of the charges he must prepare to meet; and (3) enables a defendant to plead an acquittal or a conviction in bar to future prosecutions for the same offense," a bill of particulars is not necessary. *United States v. Moody*, 923 F.2d 341, 351 (5th Cir. 1991); *see also United States v. Beebe*, 792 F.2d 1363, 1366 (5th Cir. 1986) ("Because the indictment was sufficient, the district court did not abuse its discretion when it denied [the defendant's] request for a bill of particulars."). "A bill of particulars is only required where the indictment is so general it does not apprise the defendant of the specific acts of which they are accused." *Churchill*, 2021 WL 862306, at *1.

The Indictment plainly contains the elements for each offense charged against Jindal (Dkt. #21 ¶¶ 11, 13, 18, 20, 23). *See* Fed. R. Crim. P. 7(c)(1). Count One alleges, for example, that a conspiracy "to fix prices by lowering the pay rates to PTs and PTAs" existed "[f]rom in or around March 2017 to in or around August 2017," and that Jindal "knowingly entered into and engaged in [that] conspiracy" (Dkt. #21 ¶ 11). And it alleges that the business activities "that are the subject of the conspiracy . . . were within the flow of, and substantially affected, interstate trade and

commerce" (Dkt. #21 ¶ 13). The Indictment further describes means and methods by which Jindal committed the offenses alleged (Dkt. #21 ¶¶ 12, 20). It specifies, for example, that "Jindal, Rodgers, and co-conspirators, among other things, provided and received non-public rates paid to PTs and PTAs; communicated about rate decreases; discussed and agreed to decrease rates paid to PTs and PTAs; implemented rate decreases in accordance with the agreement reached; and paid PTs and PTAs at collusive and noncompetitive rates" (Dkt. #21 ¶ 12). Jindal is "fairly apprised of the Government's theories and the particulars upon which each charge [is] based" on the face of the Indictment alone. *Hickman v. United States*, 406 F.2d 414, 415 (5th Cir. 1969). "He [is] entitled to no more." *Id.*

Furthermore, when the United States provides a defendant with the information "in some other form," such as discovery, "no bill of particulars is required." *United States v. Marrero*, 904 F.2d 251, 258 (5th Cir. 1990); *see also United States v. Kirkham*, 129 F. App'x 61, 72 (5th Cir. 2005) (unpublished) (noting the United States' "voluminous discovery . . . obviated the need for a bill of particulars"); *United States v. Vasquez*, 867 F.2d 872, 874 (5th Cir. 1989) ("It is well established that if the government has provided the information called for in some other satisfactory form, then no bill of particulars is required."); *United States v. Campbell*, 710 F. Supp. 641, 642 (N.D. Tex. 1989) (denying motion for bill of particulars because pretrial order and government's discovery policy meant there would be "very little if anything in the motion that the defendant ha[d] not or w[ould] not obtain through legitimate disclosure devices").

To date, the United States has produced 14,659 records to Jindal. The discovery includes, for example, spreadsheets from Jindal's own company showing PT and PTA rates during the time period charged in the Indictment—and even showing decreased rates in red-colored text. The United States has made early disclosures of interview reports, including interviews of PTs and

PTAs who contracted with Company A. And in response to a written request, the United States provided a "key" identifying the names of individuals and companies referred to in the Indictment. Given the detailed Indictment, extensive discovery, and additional information the United States has provided, Jindal has "sufficient information to enable him to prepare his defense and avoid surprise." *Moody*, 923 F.2d at 351.

### B. Jindal Improperly Seeks Early Identification of the United States' Evidence and Witnesses.

Jindal asks the Court to order the United States to (1) provide specific information relating to the implementation of the price-fixing conspiracy (the "amounts decreased, whose rates were changed, and the dates of the decreases") and (2) identify all unindicted co-conspirators (Dkt. #53 at 2–3). But "[a] defendant is not entitled to a bill of particulars to obtain the theory of the government's case, nor may it be 'used for the purpose of obtaining a detailed disclosure of the government's evidence in advance of trial.'" *Churchill*, 2021 WL 862306, at *1 (quoting *United States v. Hajecate*, 683 F.2d 894, 898 (5th Cir. 1982); *Downing v. United States*, 348 F.2d 594, 599 (5th Cir. 1965)); *accord Burgin*, 621 F.2d at 1359; *United States v. Kilrain*, 566 F.2d 979, 985 (5th Cir. 1978). Jindal's motion fails because it serves only an improper purpose—having the United States identify specific evidence before trial.

#### 1. Implementation is not an element of a price-fixing offense.

A bill of particulars is appropriate to supplement an indictment when the "indictment fails to set forth specific facts in support of requisite elements of the charged offense, and the information is essential to the defense." *United States v. Williams*, 679 F.2d 504, 510 (5th Cir. 1982) (quoting *United States v. Crippen*, 579 F.2d 340, 341 (5th Cir. 1978)). A bill of particulars is inappropriate where, as here, a defendant seeks information inessential to any element of the charged offense. *See, e.g.*, *United States v. Sherriff*, 546 F.2d 604, 606 (5th Cir. 1977) (affirming

denial of defendant's request for bill of particulars specifying "[t]he exact location, including the street address, of the alleged illegal sale, receipt, transportation, and concealment of automobiles charged in all counts of the indictment" in prosecution for interstate motor vehicle theft (alteration in original)); *United States v. Faulkner*, No. 3:09-CR-249-D(02), 2011 WL 2880919, at *2 (N.D. Tex. July 15, 2011) (denying motion for bill of particulars when "the identity of the alleged victims [was] not an essential element of conspiracy to commit wire or mail fraud"); *United States v. Carrillo-Morones*, 564 F. Supp. 2d 703, 706 (W.D. Tex. 2008) (denying motion for bill of particulars when the question of "whether [the d]efendant's possession [was] actual or constructive and joint or sole [was] irrelevant to a conspiracy offense, as [was] information regarding the seizure of any drugs").

In a price-fixing case, the United States must prove three elements: (1) conspirators "knowingly formed, joined or participated in a combination or conspiracy to fix, raise, maintain or stabilize" prices; (2) the defendant "knowingly formed, joined or participated in [that] combination or conspiracy"; and (3) the activities subject to the conspiracy either "occurred in the flow of interstate commerce" or "substantially affected interstate commerce." *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 681, 679 (5th Cir. 1981). Implementation of the agreement is not an element of 15 U.S.C. § 1: "no overt act, *no actual implementation of the agreement is necessary* to constitute an offense." *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) (emphasis added). The agreement itself is the crime. *See, e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) ("[I]t is . . . well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring. It is the 'contract, combination . . . or conspiracy, in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or

successful on the other." (quoting 15 U.S.C. § 1) (citing *Nash v. United States*, 229 U.S. 373, 378 (1913))); *Flom*, 558 F.2d at 1183 (finding "no merit in appellants' argument that the indictment was insufficient because it failed to enunciate with specificity the contracts allocated" because "[t]he heart of a Section One violation is the agreement to restrain").

To be sure, the Grand Jury alleged not only that Jindal entered into a criminal agreement, but also that he acted on the agreement by lowering PT and PTA rates (Dkt. #21 ¶¶ 11–12). But even if the United States may choose to buttress its proof of Jindal's criminal agreement with corroborative evidence of overt acts, "a defendant is not entitled to use a bill of particulars to discover all overt acts that might be proved at trial." *Rodriguez*, 2020 WL 4689193, at *4 (collecting cases); *accord United States v. Perez*, 489 F.2d 51, 70 (5th Cir. 1973). Indeed, "the Fifth Circuit applies a lower standard of particularity for Indictments in conspiracy cases." *Churchill*, 2021 WL 862306, at *2. As in *Rodriguez*, where the United States was "not required to allege or prove at trial any specific overt acts by [the d]efendant" and "the important element of [the] conspiracy charge [was] the agreement," "a bill of particulars containing the requested 'overt acts' is not necessary and should be denied" in this case. 2020 WL 4689193, at *5.

**2. Documentation of PT and PTA rate decreases is already produced in discovery.**

Defendants may not use a bill of particulars as a vehicle to "identify the documents and records upon which each count of the indictment was founded." *United States v. Bearden*, 423 F.2d 805, 809 (5th Cir. 1970); *see also Hickman*, 406 F.2d at 415 ("Here, the record discloses that [the defendant] was fairly apprised of the Government's theories and the particulars upon which each charge was based. He was entitled to no more."). The United States "is under no obligation to organize and identify relevant information already produced to [the defendant]." *Churchill*, 2021 WL 862306, at *2.

The United States has provided Jindal with organized and detailed discovery. Each production is accompanied by an index that serves as a table of contents for the production: each entry in the index corresponds to a set of documents identified by a Bates range and contains a description of the records therein. The discovery includes the transcript of Jindal's FTC investigational hearing and corresponding exhibits, including (1) a Company A spreadsheet documenting contract pay rates in each 2017 pay period; and (2) Jindal's emails to PTs and PTAs informing them of rate cuts. *Cf. Marrero*, 904 F.2d at 258 (holding district court did not err in denying a defendant's motion for a bill of particulars as to a billing disparity where the defendant's "own records show[ed] the disparity" and "notes, which were made available to [the defendant] during discovery, similarly identif[ied] the disparity"). The discovery also includes reports of interviews of PTs and PTAs who contracted with Company A, some of whose rates Jindal reduced in 2017. The United States is not obligated to assist Jindal in his review of highly organized and easily searchable discovery. *See Churchill*, 2021 WL 862306, at *2; *see also Rodriguez*, 2020 WL 4689193, at *4 ("[A] bill of particulars 'is not designed to compel the government to detailed exposition of its evidence . . . .'" (quoting *Burgin*, 621 F.2d at 1359)).

**3. Jindal's request for early identification of all unindicted co-conspirators is overbroad and unjustified.**

Courts will grant motions for a bill of particulars to obtain pretrial disclosure of the names of unindicted co-conspirators only if two conditions are met. First, the disclosure must be limited to those "coconspirators the Government plans to call as witnesses at trial." *United States v. Hughes*, 817 F.2d 268, 272 (5th Cir. 1987). Second, the defendant must "articulate why the names are necessary to help him prepare any defense, including any alibi defense, or any specific prejudice he will suffer if his request is denied and/or if he does not receive the names at this time." *Rodriguez*, 2020 WL 4689193, at *6. Jindal fails to satisfy either condition.

Jindal does not limit his request to trial witnesses, but rather seeks identification of "*all* co-conspirators, whether individuals or entities" (Dkt. #53, at 4 (emphasis added)). In making this request, Jindal cites *United States v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir. 1979), for the proposition that "[a] bill of particulars is the proper procedure for identifying the names of co-conspirators involved in crimes charged" (Dkt. #53, at 8). But *Barrentine* itself specifies that this procedure is proper only "for discovering the names of unindicted coconspirators *who the government plans to use as witnesses*." 591 F.2d at 1077 (emphasis added); *accord Hughes*, 817 F.2d at 272. Jindal also claims that failing to grant his request will necessarily result in prejudicial surprise, and he points to *United States v. Thevis*, 474 F. Supp. 117, 125 (N.D. Ga. 1979), and *United States v. Rogers*, 617 F. Supp. 1024, 1029 (D. Colo. 1985) (Dkt. #53, at 8, 9). But again, Jindal's claim is inconsistent with Fifth Circuit law. In *Hughes*, the Fifth Circuit rejected *Rogers* and the identical argument from *Thevis* that "failure to disclose the names of coconspirators who will be called as government witnesses constitutes per se prejudicial surprise to a defendant." 817 F.2d at 272.[1]

Even if Jindal's request were limited to trial witnesses, it would still fail because he "does not explain why the [I]ndictment, which follows the language of the statute, is insufficient to give him notice of the offense charged without identifying unindicted coconspirators. Nor does he explain why the names of unindicted coconspirators are necessary to help him prepare for trial." *Faulkner*, 2011 WL 2880919, at *3. Jindal "does not assert any specific prejudice that he will suffer if his motion is denied. He merely restates the legal test for whether the court should grant

[1] While Jindal cites the Fifth Circuit as affirming the *Thevis* district court's ruling regarding disclosure of unindicted co-conspirators (Dkt. #53, at 8), that ruling was neither appealed to nor addressed by the Fifth Circuit. *See United States v. Thevis*, 665 F.2d 616, 621 (5th Cir. 1982) (summarizing the issues appealed and addressed).

a bill of particulars: that the information he requests is necessary to prepare his defense." *Id.* The United States provided Jindal with the names of all individuals and companies anonymized in the Indictment, and the discovery contains reports of interviews conducted in connection with this case. Furthermore, the pretrial order specifies that on March 28, 2022, the parties shall exchange witness lists (Dkt. #52).[2] "[A] bill of particulars regarding the identity of co-conspirators is largely obviated by the provision of a witness list before trial." *United States v. Mathis*, No. 4:19-CR-265-2, 2020 WL 7409089, at *6 (E.D. Tex. Nov. 3, 2020), *report and recommendation adopted*, 2020 WL 7396541 (E.D. Tex. Dec. 17, 2020). And it is improper to use a bill of particulars as a vehicle to obtain early disclosure of the United States' trial witnesses. *See United States v. Pena*, 542 F.2d 292, 294 (5th Cir. 1976); *Mathis*, 2020 WL 7409089, at *6.

In sum, Jindal "has not shown that a bill of particulars disclosing the names of unindicted coconspirators is necessary, or that he will be prejudiced if the government does not disclose the names of unindicted coconspirators." *Faulkner*, 2011 WL 2880919, at *3.

## V. CONCLUSION

The Indictment and discovery produced in this case provide sufficient information to put Jindal "on notice of his criminal acts and to avoid surprises at trial." *Churchill*, 2021 WL 862306, at *3. The United States therefore requests that the Court deny Jindal's motion for a bill of particulars in its entirety.

[2] In *Hughes*, the Fifth Circuit found no prejudicial surprise where defendants at trial received "one or more days' notice" of unindicted co-conspirators being called by the United States. 817 F.2d at 272. Here, the witness list deadline ensures that Jindal will have at least a full week's notice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2021, I electronically served a true and correct copy of this document on Defendants' counsel of record by means of the Court's CM-ECF system.

*/s/ Matthew W. Lunder*
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