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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. STANLEY GOLDBLUM, et al, Defendants.	No. BA109376 **DECLARATION OF EDWARD MURPHY; POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT [Penal Code § 995 and § 939.7]** [Assigned to Judge Ito] [Indictment filed May 20, 1996] Department 110 Trial

TO EACH PARTY AND ATTORNEY OF RECORD:

PLEASE TAKE NOTICE defendant Stanley Goldblum submits the attached declaration of Edward Murphy and memorandum of points and authorities in support of defendant's motion to dismiss the indictment.

Dated May 28, 2000, at Malibu, California.

LAW OFFICES OF EDWARD MURPHY

By_____
Edward Murphy
Attorney for Defendant

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DECLARATION OF EDWARD MURPHY

Declarant is the attorney for defendant Stanley Goldblum, and, based on court records and other sources, is informed and believes the following:

1. On or about September 15, 1995, and November 27, 1995, Barry Tarlow, Esq., attorney for defendant, delivered *Johnson*[1] material dated September 15, 1995, to the prosecution. A copy of defendant's September 15, 1995, *Johnson* material is marked Defense Exhibit A, attached hereto at Tab A and made a part hereof.

2. On or about September 15, 1995, Michael D. Chaney, Esq., attorney for codefendant Punturere, delivered *Johnson* material to the prosecution. A copy of the Punturere *Johnson* material is marked Defense Exhibit B, attached hereto at Tab B and made a part hereof.

3. On or about September 15, 19 and 21; October 2 and 26; November 3 and 15; December 4, 20 and 26, all in 1995; January 8, 11, 15, 22 and 26; April 22; and May 1 and 3, all in 1996, Richard A. Moss, Esq., attorney for codefendant Gardner, delivered *Johnson* material to the prosecution. A copy of the Gardner *Johnson* material is marked Defense Exhibit C, attached hereto at Tab C and made a part hereof.[2]

4. On or about April 18, 1996, Tarlow advised the prosecution previously submitted Johnson material as well as additional Johnson material be submitted to the grand jury. A copy of Tarlow's April 18, 1996, letter is marked Defense Exhibit D, attached hereto at Tab D and made a part hereof.

5. On or about May 6, 1996, the prosecution started calling witnesses to testify before the grand jury. One of the deputy district attorneys presenting evidence was Craig Karlan.

6. On or about May 9, 1996, while the grand jury was still in session, Karlan approached a defense investigator outside the grand jury room and told him he was

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1. *Johnson v. Superior Court* (1975) 15 Cal.3d 248.

2. Also, Tarlow's September 15, 1995, submission incorporates Moss's submissions to the extent they help establish defendant committed no crime. (Defense Exhibit A, page 4, footnote 4)

wasting his time asking the witnesses their names because he would find out "after the indictment comes down." A copy of Tarlow's May 14, 1996, letter reporting this incident is marked Defense Exhibit E, attached hereto at Tab E and made a part hereof.

7. On or about May 13, 1996, Tarlow delivered copies of additional *Johnson* material dated May 13, 1996, to the prosecution. A copy of defendant's May 13, 1996, *Johnson* material is marked Defense Exhibit F, attached hereto at Tab F and made a part hereof.

I declare the foregoing to be true and correct under penalty of perjury, except those matters based on information and belief, and as to those matters, I believe them to be true.

Dated May 28, 2000, at Malibu, California.

Respectfully submitted

_____

Edward Murphy

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

PriMedex Corporation and four medical corporations were wholly owned by codefendant Gardner. The Gardner medical corporations operated clinics that treated patients with workers' compensation claims. PriMedex Corporation handled collections and other administrative tasks; it did not control the professional activities of the medical corporations or the physicians they employed. From 1988 to 1993 defendant was a consultant to PriMedex Corporation.

As a consultant defendant had no control over medical protocols in the medical corporation clinics. Defendant had nothing to do with the establishment of doctors' bonuses. Defendant had nothing to do with trigger point injections. Defendant never ordered diagnostic blood tests and had no control over blood test orders. Defendant never ordered diagnostic imaging and had no control over imaging. Defendant had no control over patients' back care. Defendant had no control over disability ratings. Defendant had no control over changes in billing or billing rates. Defendant had no control over medical-legal reports.

Attorneys referred workers' compensation patients to the Gardner medical corporations. Defendant did not communicate or interact with the attorneys. Defendant did not set up or help set up or attend any seminars for the attorneys. Defendant gave no gifts or presents to attorneys, and had no control over gifts and presents to attorneys. Defendant had no control over referrals from attorneys.

Injury Hotline referred patients to the Gardner medical corporations. Defendant was not involved in or consulted about how Injury Hotline callers were referred to physicians, including specifically whether the patients were permitted to select a physician from the pool of doctors.

PriMedex Corporation also obtained patients for the Gardner medical corporations using its in-house advertising arm called Injury Central. Injury Central conducted lawful advertising.

In February 1992 a New York company called CCC Franchising Corporation purchased the assets of PriMedex Corporation and the medical corporations for $46,250,000. CCC Franchising Corporation changed its name to PriMedex Health Systems, Inc. And in January 1993 sold 7,589,018 shares of its common stock to the public for net proceeds of $30,279,174. The underwriter of the public offering was F. N. Wolf & Co., Inc.

Defendant was not an officer, director or shareholder of PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., PriMedex Corporation, or any of the medical corporations. Defendant signed no filings with the SEC, nor was he required to sign anything. He was not responsible for any statement or omission in the prospectus. He did not benefit from the public offering.

Six months later PriMedex Health Systems, Inc., decided to terminate the medical corporations' clinical operations. Defendant personally disapproved of and was vigorously opposed to the PriMedex Health Systems, Inc., decision to terminate the medical corporations' clinical operations. He had substantial financial motivation to keep the business operating because, as a result of the closures, he lost his job and significant compensation.

The argument by the prosecution defendant committed one or more crimes between 1988 and 1993 while he was a consultant to PriMedex Corporation is almost wholly based on defendant's prior convictions of securities fraud in 1974.

The defense makes four principal arguments, and several ancillary arguments, in support of its motion to dismiss the indictment filed July 24, 1996. The prosecution failed to prove defendant committed or conspired to commit securities fraud as *presently* charged. The prosecution prejudiced the grand jury, committed misconduct and deprived defendant of due process of law by eliciting inadmissible evidence defendant committed securities fraud *in the past.* The prosecution failed to prove defendant conspired to cheat and defraud a person of money by a means in itself criminal, obtain money by false pretenses or violate the Insurance Code. And aware of evidence—including the testimony of 60 named witnesses—reasonably tending to negate defendant's guilt, the prosecution failed to inform the grand jury of its nature and existence pursuant to *Johnson v. Superior Court* (1975) 15 Cal.3d 248.

Evidence and Argument

1. THE STATUTE OF LIMITATIONS BARS PROSECUTING DEFENDANT FOR CONSPIRING TO VIOLATE INSURANCE CODE §§ 556 AND 1871.1 AS ALLEGED IN COUNT 1 OF THE INDICTMENT.

A statutory bar to prosecution, such as expiration of the statute of limitations, is a proper basis for a motion to dismiss an indictment. *People v. McGee* (1977) 19 Cal.3d 948. In *People v. Zamora* (1976) 18 Cal.3d 538, the court stated:

> In order to hold a defendant over for trial the People bear the burden of producing evidence (either before the grand jury or at the preliminary hearing) which demonstrates that there is probable cause to believe that the prosecution is not barred by the statute of limitations. (*People v. Crosby, supra,* 58 Cal.2d 713, 725.)

As can be seen in *Zamora* the burden is on the prosecution to show the statute of limitations has *not* run; the burden is *not* on the defense to show the statute of limitations *has* run.

Legislative History of Insurance Code §§ 556 and 1871.1

In Count 1 defendant is charged with conspiring on and between December 8, 1987, and November 31, 1995, to commit the crime of insurance fraud, *inter alia,* in violation of Insurance Code § 556 and Insurance Code § 1871.1.

Insurance Code § 556 was enacted in 1935 and amended from time to time over the years that followed. It was repealed in 1989. Stats.1989, c. 1119, § 1. At the time it was repealed it provided a punishment of up to five years in state prison for anyone to, *inter alia,* "knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss, including payment of a loss under a contract of insurance." Stats.1989, c. 730, § 1. After December 31, 1989, Insurance Code § 556 was no longer the law. The last day defendant could have violated or conspired to violate Insurance Code § 556 was December 31, 1989.

Also in 1989 Insurance Code § 1871.1 was enacted, apparently operative January 1, 1990. Insurance Code § 1871.1 also provided a punishment of up to five years in state prison for anyone causing to be presented a fraudulent claim for the payment of a loss. Stats.1989, c. 1119, § 3.

Insurance Code § 1871.1 was repealed in 1992. Stats.1992, c. 675 (A.B.3067), § 4.[3] After December 31, 1992, Insurance Code § 1871.1 was no longer the law. The last day defendant could have violated or conspired to violate Insurance Code § 1871.1 was December 31, 1992.

Statute of Limitations Expired

In Count 1 the alleged objects of the alleged conspiracy were violations of Insurance Code § 556 and Insurance Code § 1871.1. Case law holds if the crime that was the object of the conspiracy was *committed,* the statute of limitations runs from the time of commission of the object of the conspiracy. In *Zamora* the court phrased this rule "upon successful attainment of the substantive offense which is the primary object of the conspiracy, the period of the statute of limitations for the conspiracy begins to run at the same time as for the substantive offense itself." 18 Cal.3d 538, 560. Otherwise the statute of limitations begins to run with the last overt act committed in furtherance of the conspiracy. *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392.

The statute of limitations for conspiracy is the time period within which a prosecution for a felony must be brought. Penal Code § 800; Penal Code § 801. The time period within which a prosecution for a felony must be brought depends on the proscribed punishment for the felony. Since 1984 the statute of limitations for felonies not punishable by eight years or more in the state prison is three years. Penal Code § 801

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3. Insurance Code § 1871.1 presently provides, "Insurers and their agents, while they are investigating suspected fraud claims, shall have access to all relevant public records that are required to be open for inspection under Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, and any regulations thereunder. This section restates existing law, and the Legislature does not intend to grant insurers or their agents access to public records other than to those public records available to them under existing law."

provides, "Except as provided in Sections 799 and 800, prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense." The punishment for a violation of Insurance Code §§ 556 and 1871.1 was up to five years in state prison. Therefore the statute of limitations for conspiracy to violate Insurance Code § 556 or § 1871.1 was three years.

But had the statute of limitations for conspiring to violate Insurance Code §§ 556 and 1871.1 run when defendant was indicted May 20, 1996?

As stated if the crime that was the object of the conspiracy was *committed,* the statute of limitations runs from the time of commission of the object of the conspiracy. Therefore the prosecution *must* argue a violation of Insurance Code § 1871.1 was *not* committed prior to its repeal December 31, 1992; otherwise the statute of limitations would have run no later than December 31, 1995. Since the indictment was not filed until May 20, 1996, a prosecution for conspiring to violate Insurance Code § 556 or § 1871.1 would be barred by the statute of limitations.

On the other hand, if the crime that was the object of the conspiracy was *not* committed, the statute of limitations begins to run with the last overt act committed in furtherance of the conspiracy. The prosecution will argue the last overt act committed in furtherance of the conspiracy to violate Insurance Code § 1871.1, if not § 556, was committed subsequent to May 20, 1993, therefore the statute of limitations has not run. But is this argument valid when the statute creating the crime that is the object of the conspiracy has been repealed?

The answer has to be no.

Suppose a statute made possession of marijuana a crime and the statute of limitations for prosecution three years. Defendant agrees with a co-conspirator to keep five pounds of marijuana at all times in the trunk of defendant's car. They put the first five pounds in the trunk. Then the legislature repeals the statute making possession of marijuana a crime, and for the next ten years defendant periodically replenishes the marijuana in his trunk.

After ten years can defendant be successfully prosecuted for conspiracy to possess marijuana? Can the prosecution successfully argue the last overt act in furtherance of the

ten-year-old conspiracy was committed, say, only a month before defendant was indicted, therefore the three-year statute of limitations had not run?

The answer obviously is no. The defense respectfully submits the commencement of the running of the statute of limitations cannot be delayed by committing an overt act subsequent to the repeal of the statute creating the crime that was the object of the conspiracy. The statute of limitations in the hypothetical could not start running after the legislature repealed the statute making possession of marijuana a crime.

Likewise, the statute of limitations in the case at bar could not start running after the legislature repealed Insurance Code § 1871.1. The very last day defendant could be prosecuted for a violation of Insurance Code § 1871.1 was December 31, 1995, and that would require the prosecution show an overt act on December 31, 1992, which the prosecution did not show. Therefore the statute of limitations bars prosecuting defendant for conspiring to violate Insurance Code § 1871.1 (or § 556).

Prosecution Failed to Show Four-year Statute Became Operative Before Three-year Statute Expired

The prosecution may argue the statute of limitations was four years, not three years. In 1995, Penal Code § 801.5 was amended in that former Insurance Code § 1871.1, Insurance Code § 1871.4 and Penal Code § 550 were changed to any offense "described" in Penal Code § 803(c). The 1995 amendment also changed the period from three years to four years. West's Ann.Cal.Penal Code §801.5 Historical and Statutory Notes. Penal Code § 803(c) "describes" "an offense punishable by imprisonment in the state prison, a material element of which is fraud," and "felony insurance fraud in violation of Section 548 or 550 of this code or former Section 1871.1, or Section 1871.4, of the Insurance Code."

This argument fails because even if you assume the prosecution established defendant did conspire to violate Insurance Code § 1871.1, the prosecution failed to establish that the three-year statute of limitations did not expire prior to January 1, 1996, when the four-year statute of limitations became operative. In other words, there was a

gap between expiration of the three-year statute and operation of the four-year statute. The prosecution failed to close the gap.

2. THE PROSECUTION FAILED TO PROVE DEFENDANT CONSPIRED TO VIOLATE INSURANCE CODE § 1871.4 AS ALLEGED IN COUNT 1 OF THE INDICTMENT

Insurance Code § 1871.4 was enacted in 1991, operative January 1, 1992. Prior to January 1, 1992, Insurance Code § 1871.4 did not exist. Therefore prior to January 1, 1992, it was impossible to conspire to violate Insurance Code § 1871.4. Defendant could only have conspired to violate Insurance Code § 1871.4 after January 1, 1992. To prove conspiracy to violate Insurance Code § 1871.4, as alleged, the prosecution had to prove by direct or circumstantial evidence on at least one occasion on or after January 1, 1992, at some location, with the requisite intentions, defendant actually agreed with some person to violate Insurance Code § 1871.4. Also the prosecution had to prove that on or after January 1, 1992, a co-conspirator committed an overt act in furtherance of the agreement.

On January 1, 1992, Insurance Code § 1871.4 provided:

> (a) It is unlawful to do any of the following:
> (1) Make or cause to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code.[4]
> (2) Present or cause to be presented any knowingly false or fraudulent written or oral material statement in support of, or in opposition to, any claim for compensation for the purpose of obtaining or denying any compensation, as defined in Section 3207 of the Labor Code.
> (3) Knowingly assist, abet, solicit, or conspire with any person who engages in an unlawful act under this section.

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4. December 8, 1987, Labor Code § 3207 provided:
"Compensation" means compensation under Division 4 and includes every benefit or payment conferred by Division 4 upon an injured employee, including vocational rehabilitation, or in the event of his death, upon his dependents, without regard to negligence.

(4) Make or cause to be made any knowingly false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from claiming benefits or pursuing a claim.

For the purposes of this subdivision, "statement" includes, but is not limited to, any notice, proof of injury, bill for services, payment for services, hospital or doctor records, X-ray, test results, medical-legal expense as defined in Section 4620 of the Labor Code, other evidence of loss, injury, or expense, or payment.[5]

Since July 30, 1985, through the present, Labor Code § 4620 has provided

For purposes of this article, a medical-legal expense means any costs and expenses incurred by or on behalf of any party, the administrative director, the board, or a referee for X-rays, laboratory fees, other diagnostic tests, medical

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5. The rest of Insurance Code § 1871.4 provided:

(b) Every person who violates subdivision (a) shall be punished by imprisonment in county jail for one year, or in the state prison, for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($50,000) or double the value of the fraud, whichever is greater, or by both imprisonment and fine.

(c) Any person who violates subdivision (a) and who has a prior felony conviction of that subdivision, of former Section 1871.1, or of Section 548 or 550 of the Penal Code, shall receive a two-year enhancement for each prior conviction in addition to the sentence provided in subdivision (b). The existence of any fact that would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

(d) This section shall not be construed to preclude the applicability of any other provision of criminal law that applies or may apply to any transaction.

reports, medical records, medical testimony, and, as needed, interpreter's fees, for the purpose of proving or disproving a contested claim.[6]

In 1992, operative January 1, 1993, the wording in Insurance Code § 1871.4(a)(3) was changed slightly. In 1993, effective July 16, 1993, Insurance Code § 1871.4 was amended to add a restitution provision, and in 1995 "of former Section 556" was inserted. Otherwise the version of Insurance Code § 1871.4 given above, operative January 1, 1992, was substantially the law through the alleged termination of the alleged conspiracy on November "31," 1995.

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6. The rest of Labor Code § 4620 provides:

(b) A contested claim exists when the employer knows or reasonably should know that the employee is claiming entitlement to any benefit arising out of a claimed industrial injury and one of the following conditions exists:

(1) The employer rejects liability for a claimed benefit.

(2) The employer fails to accept liability for benefits after the expiration of a reasonable period of time within which to decide if it will contest the claim.

(3) The employer fails to respond to a demand for payment of benefits after the expiration of any time period fixed by statute for the payment of indemnity.

(c) Costs of medical evaluations, diagnostic tests, and interpreters incidental to the production of a medical report do not constitute medical-legal expenses unless the medical report is capable of proving or disproving a disputed medical fact, the determination of which is essential to an adjudication of the employee's claim for benefits. In determining whether a report meets the requirements of this subdivision, a judge shall give full consideration to the substance as well as the form of the report, as required by applicable statutes and regulations.

The prosecution had the grand jury instructed to prove a violation of Insurance Code § 1871.4, it had to prove defendant had the specific intent to defraud.[7]

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7. In order to prove [violation of Insurance Code § 1871.4(a)], each of the following elements must be proved:

(1) That a person made or caused to be made any knowingly false or fraudulent material statement or material representations for the purpose of obtaining or denying any compensation as defined in section 3207 of the Labor Code; or,

(2) That a person presented or caused to be presented any knowingly false or fraudulent written or oral material statement in support of or in opposition to any claim for compensation as defined in section 3207 of the Labor Code; or,

(3) That a person knowingly assisted, abetted, solicited or conspired with any person who made or caused to be made or presented or caused to be presented any knowingly false or fraudulent written or oral material representation or statement for the purpose of obtaining or denying any compensation as defined in section 3207 of the Labor Code; and,

(4) Such person acted with the specific intent to defraud.

"Statement" includes, but is not limited to, any notice, proof of injury, bill for services, payment for services, hospital or doctor records, x-ray, test results or other expense or payment.

"Compensation," as defined in section 3207 of the Labor Code, means compensation under Division (4) of the Labor Code pertaining to workers' compensation and insurance and includes every benefit or payment conferred by Division (4) upon an injured employee in the course of treatment of medical or psychiatric conditions which are work-related and as to which a workers' compensation claim has been filed.

Benefits paid by a self-insured employer or by a third-party administrator in behalf of an employer are included in the definition of compensation under Division (4) of the Labor Code.

Medical-legal costs are defined in Section 4620 of the Labor Code to mean any costs and expenses incurred by or on behalf of any party for x-rays, laboratory fees, other diagnostic tests, medical reports, medical records, medical testimony and interpreters' fees for the purpose of proving or disapproving a contested claim.

No amount may be charged in excess of the direct charges for the physicians, professional services and the reasonable costs of laboratory examinations, diagnostic studies and other medical tests and reasonable costs of clerical expense necessary to producing the medical-legal report.

Direct charges for the physicians professional services shall include reasonable overhead expense.

(continued...)

As will be shown the prosecution failed to establish defendant conspired to violate Insurance Code § 1871.4. An indictment based on insufficient admissible evidence may be challenged by a motion to dismiss pursuant to Penal Code § 995. The test is whether the admissible competent evidence would lead "a man of ordinary caution or prudence to believe and conscientiously entertain a *strong* suspicion of the guilt of the accused." *Cook v Superior Court* (1970) 4 CA3d 822, 825 (emphasis added). If the prosecution fails to establish a strong suspicion of guilt, the court must set aside the indictment. Also see *Bompensiero v. Superior Court* (1955) 44 Cal.2d 178, 183.

Defendant Was a PriMedex Consultant

The prosecution had Charles Lutie Bennett identify People's Exhibit 16J as a prospectus dated December 11, 1992, publicly offering 10,000,000 shares of PriMedex Health Systems, Inc.[8] (RT 713-714) The prospectus stated defendant

> has been principally engaged as a consultant performing substantial operational functions for PriMedex's predecessor since 1988. Mr. Goldblum who was instrumental in the development and the implementation of PriMedex' management information systems is actively engaged in assisting management in monitoring compliance with the guidelines he helped to develop. Mr. Goldblum continues to assist management in updating various aspects of PriMedex' business including personnel policies, accounts receivable collection activities, the formatting and presentation of financial information and the identification and analysis of operating trends. Mr Goldblum is also assisting management in the development of an expansion strategy. From August, 1984 through October, 1987, Mr. Goldblum was principally engaged as president, chief executive and chief operating officer and a director of Century Medicorp, a publicly owned management company

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7. (...continued)
Medical-legal costs constitute compensation as that term is defined in section 3207 of the Labor Code. (RT 975-978)

8. Hereafter "the prospectus" refers to the December 11, 1992, PriMedex Health Systems, Inc./ F. N. Wolf & Co., Inc., prospectus (People's Exhibit 16J), unless otherwise indicated.

providing management services to Medical Clinics providing primary medical care in the Los Angeles area. (People's Exhibit 16J pages 58-59)

Defendant's primary responsibility as PriMedex Corporations' independent management consultant was to review and analyze data compiled by the management information system which he helped develop. The prospectus gave a detailed description of the components and functions of PriMedex Corporation's management information system:

> PriMedex's Management Information System provides management with a timely evaluation and appraisal of the health of the business itself. The System generates management reports, which provide management with daily cash flow analysis and summaries; daily patient flow and utilization reports; weekly clinic evaluation reports from the neurodiagnostic department reporting on utilization; and monthly reports of operations which give management a full overview of the entire financial operations for the month. The monthly reports include receivables analysis, collection rates and collection activities, status of personnel, and monthly profit and loss statements on a cash and accrual basis. The financial department also provides management with a monthly report analyzing and interpreting the above reports and highlighting variations from expected norms and from budget projections, By utilizing an intensive hands-on management information system, management believes that its ability to detect and correct problems in the business as they develop is enhanced, permitting management to minimize the risks of the business operations. (People's Exhibit 16J page 27)

Marc Skaggs worked at La Brea Medical Clinic as a collector from approximately 1986 to 1988. (RT 125) Skaggs normally collected from employers' insurance carriers (RT 137) but Skaggs did not know defendant (RT 124). Thomas Louis Mroch started working at La Brea Medical Clinic approximately at the beginning of May 1987. (RT 73) Mroch believed defendant "probably" joined "the business" in May or June 1987 (RT 76); after early 1989, Mroch testified, defendant got very involved in "the operation." (RT 77) Mroch worked for Gardner. (RT 72) Mroch "reported to" Gardner's father, Lloyd Goldberg. (RT 75, 150)

Leticia Guido was hired in August 1988. (RT 196) She testified defendant was a "consultant." (RT 202) "I did not quite understand what he was there for. He just comes to the office like a few hours a day. He doesn't really stay there." (RT 202) "He'd then,

like, kind of stay longer, like stay in the office every day, come in every day... I'm not good at dates." (RT 203) Mroch testified defendant "had his finger on the pulse of everything going on." (RT 77)

John Joseph Corrigan started working for PriMedex Corporation in March 1992. (RT 209) Until December 1992 Corrigan was an accounting employee. (RT 209) Asked what was his title, Corrigan responded, "Assistant, I think, to the controller." (RT 218) The deputy district attorney asked Corrigan:

Q. While you were the assistant controller, who was the controller?
A. Janette Lowrey.
Q. Do you know whether or not the same protocol was in effect at PriMedex Corporation whereby Janette—Janel would automatically report to Mr. Goldblum?
A. Yes.
Q. So she was not a controller who had—who headed up the billing and collections and signed the checks?
A. No. (RT 486)

In late December 1992 Corrigan became "accounting controller, accounting manager." (RT 209, 218) Defendant was his boss (RT 209, 218) through "November" 1993 when Corrigan believed defendant resigned. (RT 220) The deputy district attorney asked Corrigan:

Q. While you were assistant controller *or* assistant to the controller, who did you report to other than to the controller?
A. Janel Lowrey. (RT 218; emphasis added)

Lowrey reported to defendant. (RT 218) Corrigan testified he, defendant and Lowrey were in meetings. (RT 218) Lowrey and Corrigan gave defendant reports. (RT 218) The deputy district attorney asked Corrigan:

Q. Are you familiar with the procedure concerning doctor billings and how each patient procedure was then either written down or somehow translated and sent over to corporate headquarters?
A. Only on the cumulative. Accounting wasn't in charge of billing and collection.
Q. So if I showed you Super Bills and fee schedules, they would not be within your field of knowledge?

A. How it was derived? No. (RT 220)

Corrigan testified defendant made requests. Defendant had decision making authority. (RT 219) The deputy district attorney asked Corrigan:

Q. Do you know if he ever held himself out as the chief financial officer of the corporation?
A. No. (RT 219)

When recalled as a witness Corrigan testified "controller" at PriMedex through late 1993 did not have anything to do with billing or collections. The controller at PriMedex did not sign checks while defendant was there. Gardner or defendant signed the checks if they were available. Who was in charge of billing and collections changed over time. Collections were "ultimately" Gardner and defendant, but the manager would have been Norman Corrales, and then became Eric Salvalo and then Elias Munoz. Billing was "in two pieces." They had like a file audit department and a computer billing department. Computer billing was Frank Fraga[9] and Al Salazar. The deputy district attorney asked Corrigan:

Q. Do you know who those people reported to?
A. During the period [19]92 to [19]93?
Q. Yes.
A. It would have been to Mr. Goldblum.
Q. So Mr. Goldblum was in charge of billing, collections, any other departments?
A. M.I.S. maybe.
Q. Which is what?
A. Computer systems.

When Corrigan was the controller, he and defendant "would talk probably daily if he was there." Corrigan or the department would have provided a daily cash sheet, a daily accounts payable aging, and decide who got paid. Monthly Corrigan provided the manager the report he and defendant talked about. (RT 482-484)

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9. Fraga incorrectly spelled "Frogga" by court reporter.

Oliva testified defendant's "role" was "like a financial advisor." (RT 242) Oliva would usually have to go to defendant when he wanted to purchase equipment. (RT 665) "Since he was the financial advisor." (RT 665) Oliva had contact with defendant once a month. (RT 249) The purpose of the monthly meetings with defendant was "just to find out what was going on in the department." (RT 249) Defendant did not give orders during the meetings. (RT 249) Oliva testified defendant was concerned with financial issues at the meetings. (RT 664) Defendant would address questions to "everyone in the management team." The deputy district attorney asked Oliva:

> Q. What types of departments were involved in these meetings?
> A. Well, first of all, there was therapy, there was diagnostic, x-ray, the doctors, the historian department. That's about it. I can't recall any other ones. (RT 664)

Michael Allen Schaffer worked for PriMedex Corporation from the beginning of 1988 to April 1991. (RT 381) Elizabeth Directo hired Schaffer to head the computer department. (RT 382) They used Health Computer Systems 3000 Practice Management Software. (RT 384) In August 1991 Schaffer went to work for Health Computer Systems. (RT 396) The deputy district attorney asked Schaffer:

> Q. What was Mr. Goldblum's title while you were there?
> A. I honestly can't recall what his title was.
> Q. Do you know what his job was?
> A. I'm not real sure what his job was, to be real honest. He did oversee a lot of the operations, I know, that Elizabeth directed to him. He seemed to be second in command under Dr. Gardner. I didn't know for sure if he was a consultant or what his specific title was. (RT 405)

The deputy district attorney showed Corrigan an undated chart marked People's Exhibit 3A. (RT 210) People's Exhibit 3A shows Gardner as chief executive officer. (RT 210) Under Gardner's name, according to the undated chart, is defendant's name as "Chief Op. Off." (RT 210) District attorney investigator William Joseph Flores testified

People's Exhibit 3A "was obtained pursuant to a consent search."[10] (RT 923) Flores does not say when or where. The deputy district attorney offered no testimony authenticating or dating People's Exhibit 3A. The court does not know who drew it or when it was drawn. The deputy district attorney showed Schaffer People's Exhibit 3A. Schaffer testified he had never seen anything like People's Exhibit 3A. (RT 405) The deputy district attorney asked Corrigan if he recognized People's Exhibit 3A. (RT 210) Corrigan did not recognize the chart, although he recognized "the names and stuff." (RT 210) Referring to defendant's name on the undated chart, the deputy district attorney asked Corrigan:

> Q. Is that an accurate placement of him—his name in relationship to his control of the corporation?
> A. Yes. His *title* was *consultant,* I guess, but that's an accurate *placement.* (RT 210; emphasis added)

The deputy district attorney showed Jeffrey Olen Schneider People's Exhibit 3A and asked:

> Q. Do you recognize this document? It appears to be an organizational chart.
> A. That's what it appears to be.
> Q. Take a look at some of the names on here and their respective positions and tell me if it appears to be an accurate reflection of their places within the company?
> A. It appears to be accurate. (RT 571)

Apparently it was a grand juror who requested the deputy district attorney ask Schneider if Schneider asked for immunity for his testimony. Schneider replied, "No, I did not. But I'll take it." (RT 588) Jeffrey Olen Schneider testified he was a doctor of chiropractic. (RT 500)

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10. Flores testified in December 1992 there were so many clinics, a consent was signed by Gardner, Moss and deputy district attorney Richard Rosenthal. Defendant did not sign it. (RT 924, 949)

The deputy district attorney showed Philip Anan Sobol the undated chart marked People's Exhibit 3A. (RT 840) The chart shows Sobol as chief of medical staff, and Punturere as director of medical staff, bypassing defendant and reporting to Gardner. (People's Exhibit 3A) Sobol testified he never reported to defendant. (RT 840)

Mroch testified Gardner asked for particular types of reports. (RT 152) Defendant got Mroch's reports to Gardner and Gardner's father. (RT 151) Defendant never asked for specialized reports. (RT 153)

Oliva testified his monthly reports would go from Punturere to defendant. (RT 242) Mroch testified he also worked for defendant. (RT 72) Mroch testified defendant "was advised of all operations or ongoing procedures in the home office and the clinics. He was to be advised of everything that was happening." (RT 117)

Flores identified a number of memos written by defendant that were seized pursuant to the 1992 search warrants at the Gardner clinics. The memos dealt with copy machines problems (People's Exhibit 16H6); a pay raise (People's Exhibit 16H7) found in a folder entitled "Memo Madness"; equipment purchases (People's Exhibit 16H8); July 5, 1991, being a workday (People's Exhibit 16H9); leaving computer terminals at the end of the day (People's Exhibit 16H10); and cost of cellular phones (People's Exhibit 16H11). (RT 937-938) Mroch was shown People's Exhibit 13F, a memo from Punturere dated October 9, 1990 (RT 117), after Mroch was fired. At the bottom People's Exhibit 13F says:

> xc: Dr. Gardner
> Mr. Goldblum

Corrigan testified defendant had check signing authority and the authority to disburse funds. (RT 219)

Yolanda Adams worked for PriMedex Corporation as a bookkeeper from May 1989 to May 1994. (RT 277) The deputy district attorney asked Adams:

> Q. Did you ever report to Stanley Goldblum?
> A. Well, he was always there, but he wasn't like the main supervisor of my department. I had a lot of contact with him because he would sign the checks.

Q. Mr. Goldblum would sign the checks that you prepared?
A. Right, the payable checks.
Q. Did he do anything else?
A. He—well, I'm sure he did. *I don't really know everything that he did.* He was *like* over a lot of the departments. (RT 281; emphasis added)

Mintz identified a signature card for a PriMedex Corporation account with First Charter National Bank. (RT 602) The authorized signatures were Gardner, Goldberg, Mroch and defendant. (RT 602) Defendant is not identified as an officer.

Mintz identified a signature card for a "Crown Imaging Associates Grouping" account with First Charter National Bank; the authorized signatures were Gardner, Goldberg, Mroch and defendant. (RT 602-603)

The deputy district attorney showed Mintz a binder of checks designated People's Exhibit 5F16, not copied but, according to People's Exhibit 1, identified by the deputy district attorney in his opening statement as an exhibit list (RT 5), were available to the grand jury. Mintz "recognized" the checks as Gardner Medical Group payable to Gardner. (RT 605) The deputy district attorney showed Mintz 13 of the checks, announcing each check's number but not its date,[11] which purported to be payable to Gardner and signed by defendant. The deputy district attorney read the amounts of some of the 13 checks. The deputy district attorney said Check No. 3413 was for $900,000, Check No. 3414 for $350,000 and Check No. 9778 for $300,000. (RT 605-606) All the checks designated People's Exhibit 5F16 except one were deposited in Gardner's personal account. (RT 611)

The deputy district attorney showed Mintz more checks perhaps designated People's Exhibit 5F18.[12] (RT 607) Mintz testified the checks were drawn on First Charter National Bank, signed by defendant and payable to Gardner. Check No. 11445 drawn on the PriMedex Corporation account with First Charter National Bank was in the amount of $200,000. (RT 608) Check No. 1456 drawn on the Crown Imaging Associates account

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11. Apparently the grand jury wanted to know the dates but the deputy district attorney failed to comply with the request. See RT 612-614.

12. The deputy district attorney said, "Showing you what has been previously marked as 5F18, it appears that—strike that."

with First Charter National Bank was for $200,000. All the checks designated People's Exhibit 5F18, date not given, were deposited in Gardner's personal account. (RT 610)

Raymond J. Oliva worked for La Brea Medical later called PriMedex Corporation from August 1985 through August 1993 as director of physical therapy. (RT 240) Around 1988 defendant was no longer involved in hiring and firing decisions. (RT 251) Thereafter Oliva never sought approval to hire therapists from defendant. (RT 243) Oliva did not have to seek permission from defendant to fire someone. (RT 251) Gardner was his boss. (RT 241) Oliva reported to Punturere on a daily basis. (RT 241) Oliva reported to Gardner on a monthly basis. (RT 241)

Corrigan testified defendant had the authority to hire and fire people. (RT 219) Defendant signed the letter firing Mroch (RT 172) but Mroch responded in a letter to codefendant David Gardner. (RT 179) "I was dealing with David, not Mr. Goldblum," Mroch testified. (RT 179)

Schaffer testified when he decided to leave PriMedex, defendant said he was sorry to see Schaffer leave, wondered if it was based on monetary compensation and wanted to know if there was a way for Schaffer to stay there if he got a raise. Schaffer told defendant it was not about any monetary gain. The deputy district attorney asked Schaffer:

> Q. Did Mr. Goldblum have anything to do with your salary?
> A. Generally, it would be—to my knowledge, it was—Elizabeth was the one that approved our raises. If there was a question about it, then she would consult with Mr. Goldblum or Dr. Gardner, either one, so, in a sense, yes, I guess he would have had an effect on my salary.
> Q. Well, other than this conversation with Mr. Goldblum as you were about to leave the organization, did you have any contact with him concerning your pay?
> A. No, I did not. (RT 395-396)

Pursuant to *Johnson v. Superior Court, supra,* the defense made the prosecution aware of additional evidence showing or reasonably tending to show defendant was only a consultant to the Gardner corporations. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Judge Herman Feuerstein, a former judge on the Workers' Compensation Appeals Board and chief of PriMedex Corporation's legal department, would have testified he and his department were responsible for establishing and executing PriMedex Corporation's collections policies and activities. (Defense Exhibit A, page 24) Whenever any of the PriMedex Corporation's collections agents had a dispute or experienced unresolvable difficulties with an insurance carrier which was unwilling to pay or reach an agreeable settlement on the Gardner medical corporations' medical billings, Feuerstein and his department personnel took over the collections process. Feuerstein and his department personnel decided upon what litigation or settlement strategy to pursue to try to maximize PriMedex Corporation's lawful collections from the disputing insurance carriers. PriMedex Corporation's legal department personnel often attended and appeared on behalf of the company before the Workers' Compensation Appeals Board to litigate billings that were in dispute, and they acted on the company's behalf in settlement negotiations with the insurance carriers. Feuerstein and PriMedex Corporation legal department personnel made representations before the Workers' Compensation Appeals Board and to the insurance carriers during the course of settlement negotiations, including specifically representations regarding the legitimacy and value of the Gardner medical corporation's medical billings.

Feuerstein would have testified *defendant had no authority or input in the legal department's decisions regarding collections litigation or settlement negotiations strategy.* Defendant had no authority or input in any specific representations made by the legal department before the Workers' Compensation Appeals Board or during the course of settlement negotiations, specifically including representations regarding the legitimacy and value of the Gardner medical corporations' medical billings. Defendant never directed or suggested to Feuerstein or any legal department personnel as to what collections litigation or settlement strategy they should pursue, nor what representations they should make before the Worker's Compensation Appeals Board or to the insurance carriers during settlement negotiations regarding the legitimacy and value of the Gardner medical corporations' medical billings. (Defense Exhibit A, pages 24-25)

The defense made the prosecution aware of defendant's social security benefits application, dated December 8, 1993, consistent with the job description as stated in the prospectus:

> [I] advised management of financing, bank loans, opening of new offices and collection of receivables. I helped to interface with company's accountants and lawyers, I helped develop a management information system. (Defense Exhibit A, page 48-49)

The defense made the prosecution aware of witnesses who would have testified they formerly worked for the Gardner medical corporations and that Punturere's medical policy and protocol internal memoranda were indicated copied to defendant by virtue of a default setting in Punturere's computer which generated these memoranda. According to these witnesses, defendant did not specifically request to receive these documents nor did he necessarily even read them. Further, defendant, with no medical background, was unable to understand much less evaluate the propriety of the medical protocols described therein. (Defense Exhibit F, page 10) The defense requested the witnesses' testimony be presented to the grand jury.

Materials made available to defendant did not indicate any criminal activity went on at PriMedex. Directo, Eric Salvado and Jose Shuton, each of whom was a PriMedex Corporation Collections Department supervisor, would have testified during defendant's tenure as an independent management consultant to PriMedex Corporation, Directo, Salvado and/or Shuton prepared daily and weekly collections reports for defendant and others to review. The collections reports revealed which collections agent collected how much, from what insurance carrier, as of a particular date, as well as the ratio between the amount actually collected (or settled for) versus what amount was originally billed. This was critical information regarding PriMedex Corporation's collections rate and the performance of its individual collections agents. Directo, Salvado and/or Shuton compiled this data based on information supplied by each collections agent, which were cross-checked against the billing amounts indicated in the patient files and the settlement checks received by the accounting department from the insurance carriers. The collections report which defendant and others viewed was a computerized summary

printout, meaning it did not contain or refer to any of the specific underlying documentation, records, or raw data from which the report was generated. As is common in the business world for someone performing defendant's job he did not see the underlying documentation, records, or raw data from which the cash reports were generated. On those occasions when defendant wanted to confirm or verify certain figures he read in the collections reports, he simply called Directo, Salvado and/or Shuton for the answer. Absent wild deviations from prior collections reports or receiving patently contradictory information from other related departments, inaccuracies in the collections reports (assuming there were any) would not normally be apparent to defendant who only had access to the aggregate, summary data. Directo, Salvado and Shuton did not knowingly misrepresent the information they supplied to defendant in the collections reports, and any inadvertent errors were corrected immediately upon their discovery. Defendant never directed or asked Directo, Salvado or Shuton to alter or distort any of the data contained in or underlying the daily and weekly collections reports. Directo, Salvado and Shuton had access to the final materials made available to defendant and far more extensive underlying information. There was nothing in this information for which they could or did conclude, believe or suspect that any type of criminal activity went on at PriMedex. (Defense Exhibit A, pages 51-52)

Under *Johnson* the prosecution was obligated but failed to present the exculpatory evidence to the grand jury.

The evidence established defendant was a PriMedex Corporation consultant.

Defendant Was Compensated as a Consultant

Michael Overton Rhoades testified he recovered People's Exhibit 16L2 from defendant's house on June 22, 1994. (RT 850) Exhibit 16L2 is a memo from Lowrey to defendant dated August 22, 1992. Subject is "Your Account." It shows "total accrued earnings as of July 31, 1992, of, apparently, $297,678. It lists cash payments February through July. It lists checks issued to defendant in January and February 1992 totaling, apparently, $219,470.85. It lists 19 checks issued to Health System Financial

Corporation, February 25, 1992, through August 18, 1992, totaling, apparently, $643,360.54.

The deputy district attorney showed Flanagan checks marked People's Exhibit 16L3. (RT 918-919) People's Exhibit 16L3 is 19 checks dated February 25, 1992, to August 18, 1992, payable to Health Systems Financial Corporation, issued by PriMedex Corporation drawn on PriMedex Corporation's account at First Charter Bank, all paid. (RT 919) Flores indicated People's Exhibit 16L3 was obtained by "bank search warrants." (RT 939)

The deputy district attorney asked Mroch about defendant's compensation for his services. (RT 164) Mroch expressed his belief and guess. (RT 164)

"I believe Stanley started out with something like $2,000 a week, and shortly after moving to La Brea—from La Brea to Bristol Parkway—it went up to $6,000 and after that it jumped to ten, and we kept going from there, I guess." (RT 164) Mroch testified Gardner's salary went in the ledgers as a payroll record; *defendant's compensation was charged to his account as a consultant.* (RT 180)

The prospectus stated:

> Stanley Goldblum serves as a consultant to the Company primarily engaged in rendering management consulting services to PriMedex... PriMedex has agreed to pay Mr. Goldblum a consulting fee at an annual rate of $250,000 and additional compensation equal to a 2% share in PriMedex's annual pre-tax profits plus one-half of 1% of PriMedex's cash collection during the period that he renders such services. Mr. Goldblum was issued Warrants exercisable to purchase an aggregate 250,000 shares of PHS Common Stock at $8.00 per share during the rive-year period ending June 11, 1997 for his role as a finder in connection with PHS' acquisition of the RadNet business. (People's Exhibit 16J page 59)

The prosecution offered no evidence defendant received a salary as an employee. All the evidence establishes defendant was compensated as a consultant. Defendant provided significant and valuable services to PriMedex Corporation and the medical corporations in his capacity as an independent management consultant. His functions and authority were limited to providing administrative and financial management matters. The prosecution offered no evidence defendant had other functions or authority. For

example the prosecution offered no evidence defendant had authority to determine the Gardner medical corporations' clinical policies or practices. Nor did the prosecution offer evidence defendant had decision-making authority over significant corporate decisions such as shutting down the medical corporations' clinical operations. And the prosecution offered no evidence defendant later had control or decision-making authority over the parent of PriMedex Corporation, PriMedex Health Systems, Inc., including decisions relating to the timing, structure, or forms of the parent's public offerings.

The evidence established defendant was a PriMedex Corporation consultant and was compensated as such.

Gardner Owned the Companies

Corrigan identified People's Exhibit 4A showing five corporations "owned and/or operated" by Gardner. (RT 211) Gardner owned and operated Crown Imaging Associates Medical Group, Inc. (RT 214) Gardner owned and operated Gardner Neurological Orthopedic Medical Group, Inc. (RT 213) And Ortho-Neurosurgery Medical Group, Inc. was one of Gardner's corporations. (RT 214) Gardner Medical Group, Inc., treated industrial injuries (RT 212) and was one of Gardner's corporations. (RT 214) Gardner Medical Group, Inc., articles of incorporation were filed August 6, 1985. (People's Exhibit 4E)

PriMedex Corporation was incorporated June 9, 1989, in California. (People's Exhibit 16J, page F-75) Corrigan testified Gardner owned and operated PriMedex Corporation (RT 212) until 1992, "and then it became a publicly held company." (RT 214) PriMedex Corporation was engaged in providing management and financial services to the four medical corporations wholly owned by Gardner. (People's Exhibit 16J)

Defendant Owned No PriMedex Stock

The prospectus stated February 11, 1992, as of January 31, 1992, CCC Franchising Acquisition Corporation entered into an asset purchase agreement with PriMedex

Corporation to purchase substantially all of the assets of PriMedex Corporation. (People's Exhibit 16J) The prosecution offered People's Exhibit 16I—a 65-page agreement entitled "Asset Purchase Agreement," dated February 11, 1992, that comprehensibly details the transaction. The agreement provides that PriMedex Corporation and Gardner agree to sell the assets of PriMedex Corporation to CCC Franchising Acquisition Corporation.

Gardner signed the Asset Purchase Agreement individually as David G. Gardner and David G. Gardner as president of PriMedex Corporation. Defendant did not sign the agreement nor is defendant mentioned in the agreement. Gardner was specifically identified in the agreement as "the *sole* stockholder of PriMedex [Corporation] and each of its Companies." (People's Exhibit 16I page 5; emphasis added) The agreement stated that "*all*. . . issued and outstanding shares [of PriMedex Corporation] are owned of record and beneficially by Stockholder," where "Stockholder" is Gardner. (People's Exhibit 16I page 16; emphasis added) The agreement provided the entire purchase price—which consisted of $25 million cash, $5 million placed in escrow pending collection of existing receivables, and 2,000,000 shares of CCC Franchising stock—was payable to Gardner through PriMedex Corporation, his *wholly-owned* company. (People's Exhibit 16I pages 8-4; emphasis added) There was no indication or even suggestion defendant owned stock in PriMedex Corporation or defendant was to receive any portion of the purchase price.

The main text of the prospectus refers to Gardner as PriMedex Corporation's "sole stockholder." (People's Exhibit 16J, page 55) Incorporated within the prospectus is Combined Statement of Cash Flows Nine Months Ended September 30, 1991, prepared and certified by the accounting firm Grant Thornton as "fairly, in all material respects," representing PriMedex Corporation and Gardner Medical Group's combined financial position. (People's Exhibit 16J, page 52) The combined statement indicates that PriMedex Corporation made distributions "to sole shareholder." (People's Exhibit 16J, page 56)

Incorporated within the prospectus is Combined Statement of Cash Flows Year Ended December 31, 1991, prepared and certified by the accounting firm Grant Thornton as "fairly, in all material respects," representing PriMedex Corporation and Gardner

Medical Group's combined financial position. (People's Exhibit 16J, page 62) The combined statement indicates that PriMedex Corporation received contributions "by sole shareholder." (People's Exhibit 16J, page 66)

Although Gardner *clearly* owned 100 percent of the stock of PriMedex Corporation, the prosecution tried to show defendant owned five percent of the stock of PriMedex Corporation.

Frank Fratto testified he was a semi-retired employee of Imperial Bank. (RT 488) The deputy district attorney showed Fratto a document marked People's Exhibit 16A2, dated December 28, 1989, entitled "Imperial Bank Special Loan Minutes Report." (RT 490) Fratto testified People's Exhibit 16A2 was "an internal transaction prepared by the bank." (RT 490) On page 3 of People's Exhibit 16A2, under "% Owned," following defendant's name, it says "5," followed by "PriMedex Corporation." The deputy district attorney asked Fratto:

> Q. And that was based upon information provided to you by the lender, the person—
> A. By the borrowers, yes. (RT 491)

Page 1 of People's Exhibit 16A2 lists the borrowers—and guarantors. The borrowers are La Brea Medical Management Corporation, Gardner Medical Group, Inc., Crown Imaging Associates Medical Group, Inc. The guarantors are Gardner and his parents, Lloyd R. and Eudice Goldberg. Defendant's name is not listed as a borrower or guarantor. On page 10 of Exhibit 16A2 defendant is listed as a consultant. The loan was approved and funded. (RT 492)

Mintz testified he was senior vice president of First Charter National Bank when he was introduced to Gardner and defendant in March or April of 1990. (RT 592-593) A loan was negotiated that peeked at $2.5 million. (RT 594) Mintz identified signed and initialed documents dated June 19, 1990, (People's Exhibits 16B1 and 16B2) authorizing PriMedex Corporation to borrow money from First Charter National Bank. (RT 595-598) Mintz testified defendant initialed page 3 of People's Exhibit 16B2 which says defendant (along with Gardner) was a stockholder of PriMedex Corporation. Mintz testified he

thought defendant told him he (defendant) owned five percent of the stock. (RT 598) Gardner personally guaranteed the loan. (RT 612)

One other attachment to the prospectus is a report dated June 11, 1990, by Hollander, Gilbert & Co. (People's Exhibit 16J, page F-71) In a note to the combined 1988 and 1989 financial statements in the Hollander attachment is the statement PriMedex Corporation "is owned 95% by David Gardner. (People's Exhibit 16J, page F-75) Defendant's name is not mentioned.

Pursuant to *Johnson* the defense made the prosecution aware of evidence showing or reasonably tending to show defendant was not a shareholder of any of the Gardner corporations. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

The prosecution was informed it had possession of and/or access to the entirety of PriMedex Corporation's corporate books, minutes, and share certificate ledgers. (Defense Exhibit F page 49) Under *Johnson* the prosecution was obligated to produce the documents to the grand jury because they contained evidence in support of defendant's position that he was not an equity owner of PriMedex Corporation. The evidence tending to negate guilt of which the prosecution was specifically aware and failed to inform the grand jury was as follows:

Although the July 3, 1989, minutes of PriMedex Corporation's directors meeting show Gardner, attending as the sole director of the company, adopted a resolution to sell to defendant 525 shares, or five percent, of PriMedex Corporation's common stock, PriMedex Corporation's share certificate ledger shows that less than 30 days later, on July 31, 1989, a share certificate issued to defendant for 525 shares of PriMedex stock was rescinded with the word CANCELED written over it.

PriMedex Corporation's share certificate ledger also shows that on July 31, 1989, a share certificate issued to Gardner for 9975 shares of PriMedex Corporation stock (or the remaining 95 percent of its shares) was rescinded with the word CANCELED written over it.

Then, a PriMedex Corporation stock certificate, dated July 31, 1989, was issued to Gardner *for the entire 10,500 shares (100 percent) of the company's capital stock.* (Defense Exhibit F page 50)

There were no subsequent or additional corporate records or share certificates indicating that defendant or anyone other than Gardner owned or was issued any shares of PriMedex Corporation. (Defense Exhibit F page 50)

The defense also apprised the prosecution it had possession of and/or access to the entirety of PriMedex Corporation's corporate tax returns. (Defense Exhibit F page 50) Under *Johnson* the prosecution also was obligated to produce these documents to the grand jury because they contained evidence showing defendant was not an equity owner of PriMedex Corporation.

The official K-1 Schedule of Shareholder's Share of Income, Deductions, Credits, etc., filed along with PriMedex Corporation's 1990 state corporate tax return, stated at line A that Gardner's "percentage of stock ownership for income year" was "100.00000%."

The official K-1 Schedule of Shareholder's Share of Income, Deductions, Credits, etc., filed along with PriMedex Corporation's 1990 *federal* corporate tax return, stated at line A that Gardner's "percentage of stock ownership for income year" was "100.00000%."

The official K-1 Schedule of Shareholder's Share of Income, Deductions, Credits, etc., filed along with PriMedex Corporation's *1991* state corporate tax return, stated at line A that Gardner's "percentage of stock ownership for income year" was "100.00000%."

The official K-1 Schedule of Shareholder's Share of Income, Deductions, Credits, etc., filed along with PriMedex Corporation's 1991 *federal* corporate tax return, stated at line A that Gardner's "percentage of stock ownership for income year" was "100.00000%."

The official K- 1 Schedule of Shareholder's Share of Income, Deductions, Credits, Etc., filed along with PriMedex Corporation's 1992 state corporate tax return, stated at line A that Gardner's "percentage of stock ownership for income year" was "100.00000%."

The Form 8594 Acquisition Statement filed along with PriMedex Corporation's 1992 state corporate tax return stated, at line 6, "the sole shareholder of PriMedex Corporation [is] Dr. David Gardner."

The defense reminded the prosecution that the prosecution had possession of the memorandum of attorney Clifford Daniel Sweet of the law firm Heggeness & Sweet in San Diego, faxed September 15, 1992, to Los Angeles Deputy District Attorney Sheila Calahan. (Defense Exhibit F page 51) Sweet's memorandum details some of the points covered in his September 10, 1992, deposition of Gardner. Sweet enclosed along with the memorandum 25 pages of printout which he downloaded from the Dow Jones on-line News Wire Service. The wire service stores, among other things, information concerning the corporate background and history of various companies including CCC Franchising Corporation and PriMedex Corporation. Page 24 of the printout faxed to Calahan stated "100% of [PriMedex Corporation] capital stock is owned by Dr. David Gardner."

The defense requested the prosecution subpoena the original business records containing the information directly from Dow Jones if it believed Sweet's memorandum and printout inadmissible, although the defense waived any objection to the admissibility of the evidence by requesting the prosecution inform the grand jury of its nature and existence.

The defense requested the prosecution inform the grand jury Richard Suhl and Jack Baruch, both high-ranking officials of Coast Federal Bank, could each testify in support of the conclusion defendant was not an equity owner of PriMedex Corporation.

Either Suhl or Baruch would have testified that in 1991 or 1992, he engaged in negotiations with PriMedex Corporation on behalf of Coast Federal Bank for a $4 million loan to the company. As part of his consideration of the loan proposal, he and/or other Coast Federal Bank personnel acting under his direction conducted an extensive due diligence review of PriMedex Corporation's corporate background and history and its business operations. According to Suhl and Baruch, Coast Federal Bank's careful due diligence review did not uncover any evidence which supported any claim that defendant was an equity owner of PriMedex Corporation. Based on his knowledge about the company and his contacts and dealings with PriMedex Corporation and its personnel, he had no reason to believe defendant was an equity owner of PriMedex Corporation and in fact believed defendant was *not* an owner of the company. (Defense Exhibit F, page 52)

The prosecution neither called Suhl nor Baruch as witnesses, nor informed the grand jury of Suhl or Baruch.

The defense requested the prosecution inform the grand jury Stewart Kahn was an independent finance and leasing agent who previously worked with PriMedex Corporation. Kahn could provide testimony supporting the conclusion defendant was not an equity owner of PriMedex Corporation.

Kahn would have testified that between 1990 and 1993, he worked with PriMedex Corporation personnel and helped the company negotiate and liquidate its equipment leases. He also helped the company to obtain loans from various banking institutions. Kahn would have testified that through the course of his professional relationship with PriMedex Corporation, he had access to and carefully reviewed the company's corporate and financial records, and he also had substantial contacts with various individuals associated with PriMedex Corporation, including defendant. Kahn would have testified that, based on his knowledge of the company, his contacts with the company's personnel and defendant, and his own careful review of PriMedex Corporation's corporate and financial records, he had no reason to believe that defendant was an equity owner of PriMedex Corporation, and that in fact defendant was *not* an equity owner of PriMedex Corporation.

The prosecution neither called Kahn nor informed the grand jury of Kahn.

The accounting firm of Mortenson & Associates represented and advised CCC Franchising Corporation in its negotiations and acquisition of PriMedex Corporation, and it provided advice and input toward the preparation of the agreement. James Mortenson, the principal of Mortenson & Associates, would have testified his firm conducted extensive due diligence review of PriMedex Corporation's corporate and financial records, corporate history, and business operations in order to properly advise its client about the acquisition. He would have verified all factual representations made in the agreement were true, complete and accurate, including specifically representations about Gardner's sole ownership of PriMedex. Based on his extensive review of PriMedex Corporation's corporate and financial records, corporate history, and business operations, he had no reason to believe defendant was an equity owner of PriMedex Corporation.

The prosecution neither called Mortenson as a witness nor informed the grand jury of Mortenson.

The law firm of Tolins & Lowenfels, and specifically attorney Roger Tolins represented and advised PriMedex Health Systems, Inc., in connection with the company's December 11, 1992, public stock offering. They participated in the preparation of the prospectus. Tolins, the grand jury would have learned, is a highly experienced securities lawyer, and is qualified by background, education, and experience in securities law-related matters. Tolins would have testified he conducted an extensive due diligence review of PriMedex Corporation's corporate records, corporate history, and its business operations in order to properly advise his client about the securities offering. Prior and final drafts of the prospectus were submitted to the SEC for verification. Tolins would have verified factual representations made in the prospectus about Gardner's sole ownership of PriMedex Corporation were materially true. Based on his extensive review of PriMedex Corporation's corporate and financial records, corporate history, and its business operations, he had no reason to believe defendant owned an equity interest in PriMedex Corporation, and in fact believed defendant was not an owner of the company. (Defense Exhibit F, page 62)

The law firm of Robinson, St. John & Wayne, and specifically attorney Thomas Ruane represented and advised underwriter, F. N. Wolf & Co., Inc., in connection with the December 11, 1992, public stock offering of PriMedex Health Systems, Inc. (Defense Exhibit F, page 62) It also participated in the preparation of the prospectus. Ruane, who is qualified by background, education and experience as an expert in securities law-related matters, would have testified he and government professionals and experts analyzed and cross-checked the information disclosed in the prospectus regarding Gardner's sole ownership of PriMedex Corporation—for material accuracy and completeness. Ruane would have verified that factual representations made in the prospectus about Gardner's sole ownership of PriMedex Corporation were materially true, complete and accurate. Moreover, based on his extensive review of PriMedex Corporation's corporate and financial records, corporate history, and its business operations, Ruane had no independent reason to believe defendant owned an equity interest in PriMedex Corporation and in fact believed defendant was not an owner of the company. (Defense Exhibit F, page 62)

Attorney Gerald Connor would have testified that in late 1991 he represented Richard Jackson, President of Allegiant Physicians, Inc., in extensive negotiations with PriMedex Corporation in connection with a contemplated acquisition of PriMedex Corporation. (Defense Exhibit F, page 63) Prior to the end of 1991, Jackson nearly consummated the acquisition, but ultimately he could not come to terms with PriMedex Corporation to finalize the transaction. Thereafter CCC Franchising Corporation purchased the assets of PriMedex Corporation. Connor conducted extensive due diligence review of PriMedex Corporation's corporate and financial records, corporate history, and its business activities in order to advise Jackson about the proposed transaction. Based on his knowledge of the company and its personnel, and his thorough review of its corporate and financial records, corporate history, and business activities, Connor would have testified PriMedex Corporation was wholly-owned by Gardner. Connor would have testified he has no reason to believe defendant was an equity owner of PriMedex Corporation, and in fact he believed defendant did not own any interest in PriMedex. (Defense Exhibit F, page 64)

The prosecution did not call Tolins, Ruane or Connor. The prosecution did not inform the grand jury of the nature or their testimony or the existence of Tolins, Ruane or Connor. Under *Johnson* the prosecution was obligated but failed to present to the grand jury the evidence showing defendant was not an equity owner of PriMedex Corporation.

The prosecution failed to establish defendant was a shareholder in any of the Gardner corporations Even if the court infers defendant told somebody he owned five percent of PriMedex Corporation stock, that would not make defendant a five percent shareholder. Virtually all the documentation before the court indicates Gardner owned all the stock in PriMedex Corporation, except for four weeks in 1989. The evidence establishes defendant was not a shareholder of PriMedex Corporation.

Defendant Was Not an Officer of PriMedex

The prosecution offered testimony to support its claim that defendant was an officer of PriMedex Corporation. As will be seen defendant was never an officer of PriMedex Corporation.

Guido testified sometime in 1990-1991 defendant became "like" an officer (RT 202); she believed defendant's title changed to "chief officer." (RT 206)

Around October 20, 1989, defendant was in Imperial Bank negotiating a $1 million revolving line of credit secured by the accounts receivable. (RT 486) The deputy district attorney showed Fratto a letter to Fratto marked People's Exhibit 16A1, dated October 20, 1989, regarding financial statements, signed by defendant, "Operations." (RT 489) Flores testified People's Exhibits 16A1, 16A2, 16E1 where seized pursuant to a bank search warrant. (RT 937)

Schneider testified Gardner was his boss, owner of "Neurological Orthopedics Associates." (RT 501) People's Exhibit 4A lists Neurological Orthopedics Associates Medical Group as a dba of Gardner Medical Group, Inc. Schneider testified his supervisor, when he supervised the floor clinics, was Punturere. (RT 560) Initially Schneider testified he recognized defendant in his picture as "Vice-president of Orthopedics or PriMedex" (RT 501); but later Schneider said he misspoke. (RT 582-583) Schneider recognized defendant's signed name, no title, to People's Exhibit 16H3, a September 28, 1990, memo saying we are all saddened by the death of Lloyd Goldberg. (RT 582) Flores testified People's Exhibit 16H3 was seized pursuant to the December 1992 search warrant of 3711 South La Brea Boulevard. (RT 937) The memo says, "Dr. Gardner will continue to direct the affairs of the Company as Chief Executive Officer, as he had done since he founded the Company five years ago." (People's Exhibit 16H3)

Kenneth Michael Burpo, who did not report to defendant, testified he believed defendant was an "executive officer." (RT 616)

Mroch testified it seemed in the beginning of 1990 it was his responsibility to draw necessary funds from Imperial Bank. (RT 164) The deputy district attorney asked

Q. Did you get any directions from anyone at the corporations to appear or cooperate in this loan process?
A. Well, yes. Give them whatever information they wanted to have.
Q. Who told you to do that?
A. Well, I'm sure I got that from both Dr. Gardner and Mr. Goldblum. (RT 165)

Mroch was a signor on the Imperial Bank account. (RT 93) At one time the entire $1 million was in use by the borrowers. (RT 498) Eventually the loan was repaid.[13] (RT 494)

Fratto identified People's Exhibit 16E1 as an Imperial Bank signature card. (RT 494) People's Exhibit 16E1 stated account opened for PriMedex Corporation March 23, 1990. The deputy district attorney asked Fratto:

> Q. And can you tell from the signature card who the authorized signators are?
> A. There are three signatures there. One is marked president, and I can't read the signature. I can read vice-president, which is Stanley Goldblum. And the third one is the controller, vice-president controller Thomas Mroch. (RT 495)

Donna Marie Williams started working for PriMedex Corporation August 12, 1988, as a deposit clerk, and was laid off in May 1994. (RT 455-456) Williams testified defendant attended a meeting where Gardner offered full time schooling to employees that wanted to go to school. (RT 458-459) She attended another meeting in which defendant talked about how the company was sold. (RT 460) Clerk Williams testified she knew defendant's job title was "vice-president" because she had seen his name on a company letterhead "as stating so," defendant got faxes and letters indicating his title from Alan Goldberg who was the company attorney, and defendant "has a plaque in his office that says 'vice-president.'" (RT 462-463)

Of the thousands of pages of exhibits offered by the prosecution, the defense was unable to find a single letterhead that supports the clerk's testimony that defendant was shown as a vice president of any of Gardner's corporations.

The defense made the prosecution aware of evidence showing, or reasonably tending to show, defendant was not a vice president or other officer of PriMedex Corporation or any other Gardner company.

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13. Q. So they repaid the loan?
A. Yes. They repaid the loan, not on the spot, but we also allowed them to repay it as their cash flow permitted and they did that. (RT 494)

During the execution of search warrants at PriMedex Corporation headquarters on June 22, 1994, district attorney investigators interviewed Salvado. Salvado would have testified unequivocally defendant worked as a *consultant* to PriMedex Corporation—he was *not* an officer of the company—consistent with statements Salvado made to the prosecution during his June 22, 1994, interview wherein he specifically said defendant's role in PriMedex Corporation was as a consultant, for business advice.

Herschel Aron was a former Los Angeles County Sheriff's deputy and a retired 24-year veteran of the Los Angeles District Attorney's Bureau of Investigations. (Defense Exhibit A, page 6) Aron would have testified that in July 1994 he interviewed Salvado at the request of Moss, then counsel for PriMedex Corporation. According to Aron, Salvado told him defendant worked as a *consultant* to PriMedex Corporation—he was not an officer of the company.

During the execution of search warrants at PriMedex Corporation headquarters on June 22, 1994, district attorney investigators interviewed PriMedex Corporation's accounting supervisor Thelma Abuton. She would have testified defendant worked as a *consultant* to PriMedex Corporation, and that he was *not* an officer of the company. This is consistent with statements Abuton made to the prosecution during her June 22, 1994, interview, wherein when asked about defendant's role in PriMedex Corporation, she said he was a consultant—not an officer. Aron would have testified that in July 1994 he interviewed Abuton at the request of Moss. Aron would have testified Abuton told him defendant worked as a consultant to PriMedex Corporation, and was not an officer of the company. (Defense Exhibit F, page 66)

Directo was interviewed by FBI Special Agent Pamela Myers September 2, 1992. She was interviewed by Pete Mello of the National Insurance Crime Bureau and Riverside County Deputy district attorney Karen Kadyk December 17, 1991. Directo would have testified defendant worked as a *consultant* to PriMedex Corporation—he was *not* an officer of the company—consistent with statements Directo made to Myers during their September 2, 1992, interview, wherein she said defendant was employed as a consultant by Gardner at PriMedex Corporation. This is also consistent with statements Directo made to Mello and Kadyk wherein Directo said that Gardner hired defendant to work at PriMedex as a consultant. Significantly, when Mello specifically asked her

whether defendant was a vice president of the company, Directo corrected him, saying defendant was a consultant. (Defense Exhibit F, page 67)

The prosecution had in its possession a copy of PriMedex Corporation's 1990 state corporate tax return extension form dated December 31, 1990. The defense requested the grand jury be informed of this document because it supported defendant's position that he was not an officer of PriMedex Corporation. Defendant signed the extension form on PriMedex Corporation's behalf. The space labeled "Title" located next to the signature line was left blank.

The prosecution had in its possession a copy of PriMedex Corporation's 1991 state corporate tax return extension dated March 16, 1992. The defense requested the grand jury be informed of this document because defendant signed the extension form on PriMedex Corporation's behalf. In the space labeled "Title" located next to the signature line defendant is listed as a "Manager," not an officer of the company.

District attorney investigators interviewed PriMedex Corporation collections employee Norman Corrales on February 3, 1994. Corrales would have testified defendant worked as a consultant for the company, not an officer—consistent with statements Corrales made to the prosecution during the interview wherein he said, "Stanley Goldblum functioned as a consultant" for PriMedex Corporation.

Jackson would have testified in late 1991 he engaged in extensive negotiations with PriMedex Corporation in connection with his contemplated acquisition of the company. Jackson and his attorneys had extensive dealings and contacts with PriMedex Corporation company officials and personnel in negotiating the contemplated transaction. Based on his knowledge of the company and his thorough examination of its corporate and financial records, corporate history, and business activities, Jackson would have testified defendant worked as a *consultant* to PriMedex Corporation—defendant was *not* an officer of the company. (Defense Exhibit F, page 68)

The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Even though the court has testimony defendant held himself out as a "vice president," this does not transform him into an officer of PriMedex Corporation. A person becomes a corporate officer only if specific, legal protocols and requirements are

satisfied. In order for the grand jury to have interpreted the evidence properly, the defense requested it be instructed on relevant principles of corporate law and formalities. Pursuant to *Johnson* the defense was prepared to present the testimony of qualified legal experts to explain these legal principles to the grand jury. (Defense Exhibit F, page 68)

The witnesses would have testified all California corporations (including PriMedex Corporation) are required by law to elect or designate corporate officers in accordance with its corporate bylaws or as determined by its board of directors. Corporations Code § 312(a). Any meeting, proceeding or action taken by a corporation's board of directors must be accurately recorded and maintained in its corporate minutes. Corporations Code § 1500. Further, within 90 days of its articles of incorporation being filed with the Secretary of State, and annually thereafter, a corporation must submit a statement to the Secretary of State containing, among other information, the names and complete business or residence addresses of its corporate officers. Corporations Code § 1502(a).

Richard Cole was a tax partner at the accounting firm of Grant Thornton. Grant Thornton served as PriMedex Corporation's independent corporate accountant and auditor between 1990 and 1992. Cole would have testified in support of defendant's position that he was not an officer of PriMedex Corporation in that Cole was personally responsible for the PriMedex Corporation account and he supervised the preparation of PriMedex Corporation's tax returns. Cole was consulted on and provided information for Grant Thornton's preparation of certified financial audits of PriMedex Corporation. Through the course of providing professional services to PriMedex Corporation, Cole conducted extensive due diligence review of PriMedex Corporation's corporate, tax and financial records, corporate history, and business operations. Cole would have testified defendant was *never* elected, appointed, or otherwise designated as a corporate officer for PriMedex Corporation. Cole had no reason to believe defendant was an officer of PriMedex Corporation, and in fact, he believed defendant worked as a consultant for the company. (Defense Exhibit F, page 70)

The defense requested the prosecution inform the grand jury defendant could not have actually become an officer or director of a company unless numerous legally-mandated steps and procedures were followed. (Defense Exhibit A, page 61) These included filing papers and forms with the Secretary of State and the Department of

Corporations, nominations and votes executed by existing officers or directors at a properly called directors' meeting, receiving shareholder approval, filing annual reports with governmental agencies and disseminated to the public identifying defendant as an officer or director, among other procedures. The prosecution was obligated to produce the various corporate and public documents which would have shown none of the legally required steps and procedures had ever been undertaken to make defendant an officer or director of PriMedex Health Systems, Inc., PriMedex Corporation, or the medical corporations. The prosecution had already seized many of these documents from the companies, or they were accessible to the prosecution through governmental agencies or by other publicly available means. (Defense Exhibit A, page 61) The prosecution was obligated to inform the grand jury that, absent following the legally required steps and procedures, defendant could not have been made an officer or director of PriMedex Health Systems, Inc., PriMedex Corporation, or the medical corporations even if someone associated or not associated with the companies identified defendant as an officer of the companies, or believed that defendant was an officer of the companies; defendant called or identified himself to others as an officer of the companies; or defendant signed documents under the title of an officer of the companies. (Defense Exhibit A, pages 61-62) Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

The prosecution failed to establish defendant was an officer of PriMedex Corporation or any other Gardner company. Defendant in fact was never an officer or director of PriMedex Health Systems, Inc., PriMedex Corporation, or the medical corporations. Defendant was paid as a consultant, defendant's title was consultant, defendant *was* a consultant. It is immaterial that some employees thought he was an officer, or even that defendant held himself out as an officer.

Finally defendant also was not a *de facto* officer of PriMedex Corporation, should the prosecution try to make such an argument in opposition to this motion. A person is made a *de facto* corporate officer only if he was elected to an office for which he was ineligible, elected to an office through invalid or illegal procedures, or removed from office but allowed to remain pending litigation over the validity of the removal. See

Consumers Salt Co. v. Riggins (1929) 208 Cal. 537, 541; 1 Ballantine & Sterling, *California Corporations Laws* § 89.05 (4th ed. 1996)

The prosecution failed to prove defendant was an officer of *any* Gardner corporation.

PriMedex Did Not Control the Professional Activities of the Medical Corporations

The defense made the prosecution aware of the Management and Service Agreement entered into between CCC Franchising Acquisition Corporation, and the medical corporations on February 11, 1992, and requested the agreement be presented to the grand jury. (Defense Exhibit F page 4)

The Management and Service Agreement was signed by Andrew C. Alson, president of CCC Franchising Acquisition Corporation, and David G. Gardner, president of Gardner Medical Group, Inc. The agreement set forth the different roles and services to be provided by CCC Franchising Acquisition Corporation and the medical corporations. There is no indication in the agreement that CCC Franchising Acquisition Corporation (or anyone working for or consulted by the management company) in any way controlled the professional activities of the medical corporations or the physicians they employed. Indeed, as discussed below, all of the language is to the contrary. There is no mention in the agreement of any treatment protocols or of their development or application.

Relevant provisions in the agreement included the proviso CCC Franchising Acquisition Corporation had the sole and exclusive responsibility of managing the *non-medical* aspects of the medical corporations' practice. The *medical corporations* had the exclusive responsibility to provide and employ physicians and other professional personnel. All professional services "shall be provided under the direct supervision and control" of a physician provided by the medical corporations. The agreement warranted that all physicians be duly licensed; all physicians comply with all applicable laws; and all physicians perform work "at all times in strict accordance with currently approved methods and practices" in the field. The agreement was clear that neither CCC

Franchising Corporation nor anyone working for or consulted by CCC Franchising Acquisition Corporation was responsible for the evaluation and treatment services provided to patients by the medical corporations.

The agreement was evidence tending to establish defendant in no way controlled the professional activities of the Gardner medical corporations or the physicians they employed. Under *Johnson* the prosecution was obligated to present the agreement to the grand jury because it contained exculpatory evidence in support of defendant's position that neither he nor PriMedex Corporation controlled the professional activities of the Gardner medical corporations or the employed physicians.

The prosecution failed to establish defendant as a consultant to PriMedex Corporation in any way controlled the professional activities of the Gardner medical corporations or the physicians they employed.

Defendant Had No Control over Medical Protocols

In its opposition to this motion, based on its argument to the grand jury, the prosecution may contend defendant had some input or control over the medical practice or billing rates.

The prosecution offered no evidence defendant is a physician or has any medical background or training. The evidence shows defendant is not a physician nor has he any medical background or training. As will be seen the prosecution offered no evidence defendant had any control over the medical practice or billing rates.

Mroch testified there were monthly meetings attended by the doctors and chiropractors. (RT 167) They would go over the patient files on a case-by-case basis. (RT 168) Defendant was not invited to the monthly meetings. (RT 167)

Mroch testified at weekly meetings at which operating procedures in the clinics were discussed, either Gardner or Punturere—not defendant—would tell the doctors they were not ordering enough of a particular test. (RT 117, 174-175) Defendant attended (RT 117, 118) but Gardner conducted the meetings (RT 166).

Defendant assisted management in accounts receivable collection activities. Vanessa Hammonds testified she worked for PriMedex Corporation in different

capacities from June 1990 to February 1994. (RT 891) She was supervisor in charge of billing in 1991 until she was laid off in 1994. (RT 903) She was in charge of files audit as long as Corrigan was there, from 1992 forward. If Hammonds had a question about something that happened in the clinics, she would ask Punturere. The deputy district attorney asked Hammonds:

Q. Now, when you worked at PriMedex, who did you report to?
A. Stanley Goldblum.
Q. Did you ever report to Dr. Gardner?
A. No.
Q. How often would you report to Mr. Goldblum?
A. If there was a problem that would arise or if I needed to take a vacation or time off.
Q. When you say, "problem," you mean problem in terms of the billing?
A. In terms of the billings. If there was something I see that was wrong or incorrect, that I would notify him. (RT 899-900)
...
Q. Was there ever a weekly tally summation done of the billings?
A. Of what we were billing for the week?
Q. Yes.
A. Yes, I kept a tally.
Q. And who would you give that summation to?
A. I would give it to Vincent Punturere.
Q. You had dealings with Vincent Punturere, too?
A. Yes. A lot of dealings, yes.
Q. When would you talk to Vincent Punturere?
A. A lot. We always spoke a lot about what was going on at the clinic, or if I had questions regarding a chiropractor exam, because he was a chiropractor, with a lot of physical therapy and things with the bill.
Q. In terms of official business, how often would you have dealings with Mr. Punturere?
A. I would say 45 percent of the time I did.
Q. And the other 55 percent of the time you would deal with Mr. Goldblum?
A. Yes. (RT 900)

The prosecution established defendant *attended* weekly meetings at which operating procedures in the clinics were discussed. The prosecution offered no evidence defendant set the policy for operating procedures in the clinics, or offered input, or even spoke at the weekly meetings. The prosecution established defendant was consulted

regarding billing problems but offered no evidence defendant set the policy for billing rates.

Pursuant to *Johnson* the defense made the prosecution aware of evidence showing or reasonably tending to show defendant was never consulted about any medical decision made at any of the clinics. The defense requested the prosecution present the testimony of Randy Cockrell, a Gardner medical corporations Regional Managing Doctor. Cockrell would have specifically testified defendant was not consulted about any medical decision made at any of the Gardner medical corporations' clinics, because he had absolutely no medical qualification, knowledge, or background. (Defense Exhibit A, page 20) Other than isolated instances or for limited administrative purposes, defendant did not attend weekly or monthly doctors' meetings or any other informal medical discussion during which the Gardner medical corporations physicians conferred and exchanged ideas about proper clinical protocols for dealing with specific diagnostic and treatment issues. Defendant participated in only one monthly doctors' meeting when the physicians invited him to come and explain certain administrative and management reports that he had helped to produce as a fiscal management tool.

The prosecution failed to inform the grand jury of the nature or existence of the evidence.[14]

The prosecution failed to establish defendant had any control over medical protocols in the Gardner medical corporation clinics.

Defendant Had No Authority Regarding Super Bill Changes

Mroch testified he was responsible for making changes on Super Bills. (RT 155) Mroch testified he got directions from Gardner and Directo—not defendant. (RT 155)

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14. As will be shown *infra* the prosecution *only* informed the grand jury Cockrell would testify to the proposition defendant did not participate in or have authority in establishing, monitoring or implementing the Gardner medical corporation's clinical policies and practices. The prosecution did *not* inform the grand jury of the nature and existence of the remainder of the physician's testimony tending to negate guilt. The same is true for Drs. Anias, Groves, Kaufman, Capps, Fessenden, Pili, Samir, Mikhail, Billson, Angelich, Harkleroad and Hollier. (RT 960)

The deputy district attorney showed Hammonds a Super Bill marked People's Exhibit 14B2 and a Super Bill marked People's Exhibit 14B3. Flores testified People's Exhibit 14B2 was seized from the Grant Thornton Accounting firm in Los Angeles during the June 1994 search warrants. (RT 935) Flores testified he believed People's Exhibit 14B3 "was seized from a consent." (RT 935) People's Exhibit 14B2 had "the prices" on it; People's Exhibit 14B3 did not. (RT 892) Hammonds testified the Super Bills were revised every so often. (RT 893) "I believe the procedures codes were changed and some descriptions were added on to each Super Bill." (RT 893)

Pursuant to *Johnson* the defense made the prosecution aware of evidence showing, or reasonably tending to show, defendant had no authority or input over Super Bill changes. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

PriMedex Corporation's general manager Durwin Corrales would have testified defendant did not participate or have authority in setting or revising the billing rates for the Gardner medical corporations' medical services. This testimony was consistent with statements Durwin Corrales previously made during his January 28, 1994, interview with the prosecution. In that interview, Corrales indicated that all of PriMedex Corporation's billing information and rates were programmed into its billing department computers. He specifically stated that only four people had authority to set or revise the programmed billing rates. Corrales would have testified that defendant was not one of the individuals with authority to set or review PriMedex Corporation's billing rates. (Defense Exhibit G, page 29)

Brad Hale would have testified he was PriMedex Corporation's Manager of Data Services. Hale was responsible for programming the Patient Files Auditing Department's computers with the predetermined per unit costs for each coded procedure that was printed on the Super Bill. Hale received instructions from only Gardner and Sobol as to what per unit costs should be programmed in for each coded procedure printed on the Super Bill. (Defense Exhibit A, page 22) Gardner and Sobol would periodically instruct him to reprogram the computers to amend the per unit costs of specific procedures listed on the Super Bill. Defendant had no authority to determine the per unit costs of procedures listed on the Super Bill. Defendant never directed Hale to input or alter any

per unit costs in the computer. Hale and Oliver Castellanos, PriMedex Corporation's Assistant Manager of Data Services, knew the encrypted computer passwords that were needed to access and program or reprogram the billing computer's per unit cost levels. Defendant did not know the passwords nor did he ever ask for or otherwise try to decipher or obtain them. Defendant never tried to access the computers for any purpose relating to the Super Bill programming for medical cost pricing. Castellanos would have testified to the same thing as Hale. (Defense Exhibit A, page 22)

PriMedex Corporation Reports Department Supervisor Ron Banjovic would have testified defendant had no input or authority over PriMedex Corporation's medical billing rates, practices or policies. (Defense Exhibit A, page 23) Moreover Banjovic would have testified PriMedex Corporation did not bill for medical procedures which the Gardner medical corporations did not actually perform. PriMedex Corporation did not bill medical procedures at rates in excess of what was legally permitted. To Banjovic's knowledge, PriMedex Corporation often underbilled the insurance carriers either in terms of not billing for certain medical procedures performed, which it legally could have, and/or charging rates for procedures below that which were lawfully allowed. (Defense Exhibit A, page 23)

The defense made the prosecution aware of witnesses Norman Corrales, Directo, Salvado, Fred Rappaport, Abuton, Nancy Wims, Melissa Springer, Vincent Ambrose, Elaine McCramer, Rita Davis, Margarita Trejos, Rasalia Fuentes, Sonsuray Phillips and Terrence Walker who also would have testified defendant did not participate or have authority in establishing, monitoring, or implementing the Gardner medical corporations' clinical policies and practices. (Defense Exhibit F, pages 8 and 9) The witnesses would have testified defendant worked at, and his office was located in, PriMedex Corporation's Culver City headquarters, whereas the Gardner medical corporations' multiple clinics (approximately nine in number) were dispersed throughout Southern California at disparate locations such as Pomona, La Brea, and Long Beach. The witnesses' testimony would not have been cumulative because they were employed by PriMedex Corporation or the medical corporations during different time periods and they worked at geographically disparate locations. (Defense Exhibit F pages 5-10)

The defense requested the witnesses' testimony be presented to the grand jury. Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

The evidence established defendant did not set the policy for operating procedures in the clinics and had no control over medical practice or billing rates

Defendant Did Not Establish Doctors' Bonuses

Roger V. Bertoldi testified Gardner hired him the end of 1988 (RT 290) and was employed until near the end of 1990 (RT 299). When shown defendant's picture he thought his name might be Gold Something. (RT 289-290)

Bertoldi did brain wave testing. (RT 291) Bertoldi testified he was not aware of a bonus policy for doctors, meaning MDs as distinguished from chiropractors. (RT 297)

Sobol testified he thought he was employed by PriMedex Corporation "between 1991 and 1993." (RT 838) He negotiated his compensation with Gardner, not defendant. Sobol testified:

A. When I first joined PriMedex, basically I was a salaried employee. The company then went into a public entity and at that point they wanted to drop my salary down. So, essentially, I allowed them to do that, and then I received compensation, a percentage of collections of the surgeries that I did. That was a direct percentage, no bonus, it was a per surgery basically.
Q. A percentage of the bill?
A. Of the collection, yes.
Q. When did this arrangement begin, do you recall?
A. I think the company went public somewhere between six and eight months after I joined. I don't recall the exact dates. And then the contract was changed.
Q. Who did you deal with to renegotiate your compensation?
A. Dr. Gardner.
Q. Did you speak to anybody else about your compensation?
A. I think I dealt with Dr. Gardner directly.

Carolyn Druffel, a chiropractor, testified Gardner hired her in April 1986. (RT 310) and was employed until August or September 1993 (RT 311, 341). When shown defendant's picture she believed his name was "Goldberg." (RT 310)

Druffel testified they were paid a bonus "for procedures that we felt were necessary on patients." (RT 312) Druffel testified either Gardner or Punturere set up the bonus program, although she "really" did not have firsthand knowledge. (RT 313)

The deputy district attorney asked Druffel:

> Q. Let's focus on the bonus for diagnostic tests. What type of test would qualify for a bonus?
> A. From what I can recall, it was for MRI scans that we ordered, that we thought were appropriate for the patient. (RT 313)

Druffel testified "When we ordered diagnostics studies, we ordered them as we thought necessary. I didn't care whether the patient—I wasn't thinking in my mind, 'Oh, I'll order this and I will get a bonus for it.' I was only thinking of the patients and the welfare of the patients. It didn't occur to me whether I got a bonus or not." (RT 325)

The deputy district attorney showed Druffel a March 15, 1990, memo (People's Exhibit 7C13) from Punturere to all doctors, only copy to Gardner. (RT 319) The memo says there was a drop in the number of scans and the doctors should be paying more attention "to the scans as well as other items which can be beneficial to both the patient and the company." The deputy district attorney asked Druffel:

> Q. Would you get a memorandum such as this when the number of scans seemed to drop in someone's opinion?
> A. Yes, sometimes we would. May I add something though?
> Q. Yes.
> A. Myself, personally, and the other doctors, if we didn't think a scan was warranted for the patient, we did not order it. We didn't do anything that we did not think was necessary for the patient. (RT 319-320)

Referring to People's Exhibit 7C13, the deputy district attorney asked Druffel:

Q. The fourth paragraph down states, "Let's pay attention to the fine point of case management so that we can maximize each case in each clinic." Does that not mean that order more tests, get bigger bonuses?
A. What that means to me is that with each patient, they wanted you to pay attention to the procedures that would be beneficial for that patient and pay attention to them. Because we were so busy, we would forget to do things that would otherwise benefit the patient. (RT 341)

The deputy district attorney asked Druffel:

Q. Did you get a large number of memos?
A. We got a lot of memos, yes.
Q. Who would they be from normally?
A. They would be from many people. Mostly from Dr. Punturere, Dr. Gardner, sometimes the editors, sometimes I would distribute memos. (RT 314)

The deputy district attorney showed Schneider several memos to doctors in which a copy was to go to defendant (RT 565 et seq) and asked Schneider

Q. What was the purpose of this memo or any of these memos?
A. To inform the doctors. (RT 569)

The deputy district attorney asked Druffel:

Q. Was there at any point a dictation bonus?
A. No. But if we dictated any reports on the outside away from our regular office hours, we were paid for those addition to our regular salary check. (RT 312)

The deputy district attorney asked Schneider about trigger point injections.

A. The policy was to do as many as were indicated.
Q. You got bonuses for ordering trigger point injections, did you not, at some point?
A. I believe we did at that time, based on what you showed me last Thursday.
Q. Do you know why the doctors were given bonuses for ordering these procedures if they were medically needed, medically justified?
A. Obviously it was a money making, profit generating procedure. (RT 575)

Michael Allen Tebo testified he worked for "La Brea" for ten months in 1986 (RT 435). Tebo had a conversation with Punturere toward the end of his employment. The deputy district attorney asked Tebo:

> Q. And what was said?
> A. To increase the revenue of the company, we were encouraged to hold on and delay any release of patients. (RT 437)

This was before defendant became a consultant to PriMedex Corporation.

Although the prosecution failed to establish defendant had anything to do with the establishment of doctors' bonuses, including bonuses for trigger point injections, the defense made the prosecution aware of evidence showing or reasonably tending to show trigger point injections were a preferred and appropriate therapy. The prosecution failed to inform the grand jury of the nature or existence of the evidence. Reynolds McKay, Gardner medical corporations staff physician, would have testified the traditional way of treating patients suffering from localized muscular strain and pain was to apply direct manual pressure to the source area of the pain—known as the "trigger point." (Defense Exhibit A, page 20) However, according to McKay, this was well-known among the chiropractic community as an extremely uncomfortable and painful remedy. During the last several years, the chiropractic medical community had come to widely recognize that a highly effective but far less painful method of treatment for localized muscular strain and pain is to inject, by needle, pain-suppressing and anti- inflammatory agents directly into the trigger point. According to McKay the Gardner medical corporations physicians preferred trigger point injections over direct manual pressure precisely because of its superior therapeutic benefit. Under *Johnson* the prosecution was obligated but failed to present the exculpatory evidence to the grand jury.

Defendant had no input, authority or control over any clinical decisions to prescribe trigger point injections for patients. Defendant did not set the policy for operating procedures in the clinics. Defendant had no control over medical practice or billing rates. Defendant did not set establish, authorize or recommend doctors' bonuses.

No Industrial Medicine Standards Existed When Defendant Was a Consultant to PriMedex

Even though defendant did not set the policy for operating procedures in the clinics, the defense made the prosecution aware of evidence showing or reasonably tending to show no industrial medicine standards existed when defendant was a consultant to PriMedex Corporation in any case. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Steven Nagelberg was a board-certified orthopedic surgeon and president of the California Society of Industrial Medicine and Surgery. He also served as a panelist on the State of California Consensus Panel for treating guidelines for common and industrial back injury. (Defense Exhibit F, page 11) Nagelberg would have testified he was in charge of developing and promulgating state-wide medical treatment protocols in the field of industrial medicine, pursuant to legislative mandate under Labor Code § 139(e)(8). Nagelberg was qualified by education, experience, and training to explain to the grand jury S.B. 1005 was enacted by the California legislature and became effective on July 28, 1993, adding Labor Code § 139(e)(8). This section provided the Industrial Medical Council of the Department of Industrial Relations shall adopt by no later than July 1, 1994, comprehensive guidelines for the treatment of common industrial injuries. Specifically, the guidelines shall detail "standards of care" relating to "appropriate and inappropriate diagnostic techniques, treatment modalities, adjustive modalities, length of treatment, and appropriate specialty referrals."

Nagelberg's testimony would have indicated the prior to the time this statutory section became effective on July 28, 1993, there were no established, universal legal guidelines for medical care in industrial medicine. Prior to the enactment of Labor Code § 139(e)(8) there were no legislative efforts to develop or establish fixed medical treatment standards for industrial medicine in the state of California. The purpose of Labor Code § 139(e)(8) was to create and implement for the first time ever in California legally mandated standards of medical care in industrial medicine. Pursuant to Labor Code § 139(e)(8) the Industrial Medical Council sought to promulgate guidelines for

proper medical care. However, the scope of the guidelines was limited, and they were all adopted after the Gardner medical corporations ceased operations in 1993.

For example guidelines for the care of low back problems had yet to be adopted as late as May 1996; a public hearing to review the then most current proposal was scheduled for June 6, 1996. Guidelines for the care of neck problems were not drafted or adopted until approximately 1995. Guidelines for the care of neuromusculoskeletal disabilities were not drafted or adopted until approximately 1994. Guidelines for the care of post-traumatic stress disorder were not drafted or adopted until approximately 1996. Guidelines for the care of pulmonary disabilities were not drafted or adopted until approximately 1994. Guidelines for the care of cardiac disabilities were not drafted or adopted until approximately 1994. Guidelines for the care of occupational asthma were not drafted or adopted until approximately 1995. Guidelines for immunologic testing were not drafted or adopted until approximately 1994.

Defendant departed in late 1993.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury. The testimony of Nagelberg is exculpatory evidence tending to establish allegations the Gardner medical corporations physicians ordered unnecessary diagnostic tests, prescribed inappropriate treatment and set unwarranted disability ratings or terms necessarily presume the existence of a legally mandated standard of medical care against which the Gardner medical corporations' clinical policies and practices may be compared, and no such mandatory or universal benchmarks in fact existed during the time when the Gardner medical corporations were in operation, which ended in approximately the middle to the latter part of 1993.

Apart from failing to establish defendant set the policy for operating procedures in the clinics, the prosecution failed to establish industrial medicine standards existed when defendant was a consultant to PriMedex Corporation.

Defendant Had No Control over Diagnostic Blood Tests

As shown defendant was a consultant to PriMedex Corporation which did not control the activities of the Gardner medical corporations. Defendant had no control over medical protocols. This included diagnostic blood tests.

The deputy district attorney showed Schneider People's Exhibit 10A. (RT 566) People's Exhibit 10A is an August 16, 1989, memo from Punturere to all doctors saying Gardner would like them to order the standard blood workup on all new patients to establish a baseline and fully evaluate the patient's status. Defendant is not copied in on the memo. Schneider testified the memo was followed except for patients who refused to receive the blood work. (RT 577) The deputy district attorney asked Schneider as a doctor why was blood work ordered. Schneider testified, "To do a general screen on our patient population, to do a screen on any blood abnormalities." (RT 577)

William J. Ordas testified he had been employed as a California workers' compensation judge since October 1990. (RT 14) His responsibility was to resolve disputes between medical practitioners and employers over medical bills. Ordas testified on May 6, 1996, "Labor Code § 5307.1 involves the medical fee schedule that is used to determine the level of payment to physicians for their services for medical treatment and medical-legal testing." (RT 21) The deputy district attorney asked Ordas:

> Q. Was the official medical fee schedule revised every two years as mandated by the code?
> A. It was supposed to be but it was not. (RT 23)
> ...
> Q. What period of time did the official medical fee schedule—was it not properly revised?
> A. From July 1 of 1989 until January 1, 1994.
> Q. Once again, during that period of time, the fee schedule served what purpose?
> A. It was a very strong guideline for use by all of the parties and individuals in workers compensation.

Defendant departed in late 1993.

The deputy district attorney showed Schaffer preliminary People's Exhibit 21, a 578-page computer run, dated April 23, 1996, and asked Schaffer what it was. (RT 401) Schaffer testified:

A. This is a report that was generated regarding one specific transaction procedure, the code is 75, requesting it by a patient on file date which is the first date that patient's demographic information was entered into the computer system.

Procedure code 0075 was comprehensive blood work. For every patient that signed up in 1991, $942,638 was generated in charges for the procedure. (RT 402-403) For those patients $4,956,7072.83 still had not been collected as of April 23, 1996. (RT 403-404) Referring to People's Exhibit 21 (RT 421) the deputy district attorney asked Munoz:

Q. According to this run, for this procedure 0075?
A. Yes.
Q. The amount of that procedure was billed for $125. Is that correct?
A. That's what *this run* would show. (RT 425; emphasis added)
...
Q. My question is, that's what their records indicate, that they are were billing, $125; right?
A. To be very honest, no. These are not *their* records. These are something *we* created. I know what they charged $125 for, I know what we tried to collect at $125, I know that $125 is in here, so you could do a leap of logic, so to speak. But I cannot testify that these records, that sit before me, that I have talked about, will prove or demonstrate what was charged. I just need to be very careful. I'm trying to be very careful.
Q. I understand. I have nothing further of this witness. (RT 452)

Connie Louise Ripa testified she worked for Medical Science Institute Laboratories, Inc. (M.S.I.) (RT 876) Ripa identified People's Exhibit 45 to be the M.S.I. blood test billings to the Gardner corporations, except Crown Imaging from 1989 until 1993. (RT 877) The charge for a comprehensive panel was $19 when they first started then dropped to $15.50 in June 1991. (RT 879) There was a $22 rate too. (RT 879)

Poppy Jenny Tankenson testified Flores gave her records from M.S.I. (RT 676) She calculated the number of charges for $15.50, $19 and $22. (RT 676) Dennis Craig Greene testified he got information from Tankenson. (RT 680) Green prepared People's Exhibit 10B. (RT 680) People's Exhibit 10B is listed in People's Exhibit 1 as M.S.I. blood schedule (comprehensive panel).

The deputy district attorney showed Hammonds a fee schedule dated March 29, 1989, marked People's Exhibit 14B11. The deputy district attorney asked Hammonds:

Q. Is blood indicated? Oh, here. Do you recall how much was billed for blood?
A. A total of $135.
Q. Was that broken down into two different sums?
A. Yes. I think $10 was for the lab fees and 125 was for the actual work that was done by M.S.I.
Q. And that would be about seven items from the bottom, it says, "0075?"
A. Yes.
Q. Is that the procedure code for the blood?
A. Yes, I believe.
Q. Then it says the RVS code; correct?
A. Yes.
Q. Then it has comprehensive panel?
A. Yes.
Q. That was the description?
A. Yes.
Q. Then here whatever—this was 89, it was 55. Is that correct?
A. Yes.
Q. Then it went up to 125?
A. Yes; yes. (RT 899)

As stated defendant had no control over diagnostic blood tests. Nevertheless, pursuant to *Johnson,* the defense made the prosecution aware and requested the grand jury hear the testimony of Directo. Although she was not a physician, she would have testified that neither the medical corporations nor PriMedex Corporation ever required or encouraged physicians to order greater volumes of diagnostic blood tests. Directo was interviewed by law enforcement officials on numerous previous occasions, including specifically by the district attorney on November 29, 1995. Her testimony would have been consistent with her prior statements to the prosecution. Specifically she told the prosecution that she did not recall reading or hearing about anyone ordering doctors to order more tests. Further Directo did not recall PriMedex Corporation or the medical corporations paying doctors bonuses for ordering blood tests. (Defense Exhibit F, page 15)

The defense made the prosecution aware of Jerome Groopman. (Defense Exhibit F, page 12) He was a Boston hematologist and a faculty member of the Harvard Medical

School. He did not work for the Gardner medical corporations but he would have provided independent medical background information about the utility of blood tests as a diagnostic tool. This important information would have helped the grand jury to evaluate the medical corporations' policies and practices with respect to ordering diagnostic blood tests. Specifically, Groopman, who was a highly experienced physician, would have testified blood is the human body's most informative organ, and it can effectively reveal many aspects of a person's health or illness more readily than any organ in the body. Groopman often refers to blood as "the life of the flesh ... and that's true for medical diagnosis, too." Throughout the medical profession, doctors rely on blood tests as an early warning system to detect latent or hard to uncover illnesses or conditions. The annals of medical history are replete with documented studies as well as anecdotal accounts of how diagnostic blood tests have successfully detected serious medical problems prior to the onset of perceptible symptoms. Early detection and medical intervention enable the patient to avert potentially fatal complications which may result if the condition was discovered later. Groopman cited one particular example of a man who got a blood test prior to a routine cataract removal surgery. His test showed signs of anemia which led to discovery of an early colon cancer, and the patient had life-saving surgery. Starting in approximately March 1996 the U.S. Health Care Financing Administration began sharply limiting payments to Medicare providers for diagnostic blood tests. Payments were essentially restricted to situations in which the tests were ordered where the patient exhibited specific disease symptoms or had a verifiable family history of disease. According to Groopman, a large faction within the medical community, including himself, disagrees with the Administration's decision. Groopman would have cautioned the grand jury to critically evaluate any allegation which the prosecution or a witness may make against the medical corporations for purportedly ordering excessive diagnostic blood tests. Such an allegation presupposes some consensus within the medical-legal community regarding the "proper" prescription of diagnostic blood tests. But, as is clear from physicians' reactions to the recently imposed Medicare restrictions, no consensus on this issue exists.

The defense made the prosecution aware of Groopman and requested Groopman's testimony be presented to the grand jury. The prosecution failed to inform the grand jury of Groopman or his expected testimony.

The defense also made the prosecution aware of Samir Mikhail, an orthopedic surgeon who formerly worked for the Gardner medical corporations. He would have testified that the Gardner medical corporations' policies and practices on ordering diagnostic blood tests were medically justified. Mikhail treated numerous orthopedic cases during his tenure at the Gardner medical corporations wherein diagnostic blood tests enabled him to pinpoint the cause and extent of injury. For example, he recalled a case where a patient was found to have a high blood sugar count. This led to the discovery of diabetes as the root of the patient's physical symptoms—not work place injury—thus saving the workers' compensation insurance carrier substantial treatment costs. The prosecution did not inform the grand jury Mikhail would testify ordering diagnostic blood tests was medically justified.

The defense made the prosecution aware of Renaldo Pili, a chiropractor who formerly worked for the Gardner medical corporations. He was previously interviewed by the prosecution regarding, among other subjects, certain aspects of the Gardner medical corporations' clinical policies and practices. Consistent with statements he previously made in his interview with the prosecution, Pili would have testified ordering diagnostic blood tests was medically justified.

The defense made the prosecution aware of Norman Corlew, a chiropractor. Corlew would have testified defendant did not participate in or have authority in establishing, monitoring or implementing the Gardner medical corporations' clinical policies and practices.

The defense made the prosecution aware of Paul Ananias, a chiropractor. Ananias would have testified ordering diagnostic blood tests was medically justified.

The defense made the prosecution aware of Kathleen Fessenden, a chiropractor. Fessenden would have testified ordering diagnostic blood tests was medically justified.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

Defendant had no authority in establishing, monitoring or implementing the Gardner medical corporations' clinical policies and practices which included diagnostic blood tests. Defendant ordered no blood work. Defendant had no control over blood work orders. The prosecution failed to establish defendant as a consultant had control over laboratory blood tests charged by the Gardner corporations. And in any case the prosecution failed to show the Gardner corporations could not markup charges incurred by outside laboratories if that was their choice.

Defendant Believed Patients Suffered Real Injuries

Schneider identified People's Exhibit 30 as the Fraud Prevention Manual (RT 551); the deputy district attorney asked Schneider its purpose:

> A. Well, I think the purpose ultimately was to keep them from coming in in the first place. And if they did get in the door, it was to let people know and be aware of certain issues that might trigger them to suspect that something wasn't just right.
> Q. Do you know when this program was implemented?
> A. Well, the fraud manual is dated January of 1991. I began working there in January of 1987. And the same principals were applied prior to that. (RT 552)

Flores testified he believed People's Exhibit 14B3—a Super Bill that did not have "prices" on it— "was seized from a consent." (RT 89, 935) The deputy district attorney asked Flores if People's Exhibit 14B3 and other People's exhibits came from the "fraud files."

> A. Yes, they did.
> Q. What were the fraud files?

A. A series of files that weren't seized during the 1992 search warrants.[15] They were in a location that we didn't find, I don't know for what reason. However, attorney Richard Moss turned them over to us because they were suspected fraud files and they were kept in another location that we didn't seize.
Q. What were you informed concerning these fraud files? What did they tell you?
A. The fraud files still had the Super Bills attached. The Super Bill is this—the fraud files still had a Super Bill attached to them.
Q. The fraud files that was the term used by PriMedex. Is that correct?
A. That's correct.
Q. These were the files in which they removed because they were suspect patients. Is that correct?
A. That's my understanding, yes.
Q. So this was their way of attempting to weed out suspect patients or new patients?
A. That's my understanding.

The defense made the prosecution aware of evidence showing or reasonably tending to show patients seen in the clinics suffered real injuries. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Thomas Bingamon, a Gardner medical corporations chiropractor, would have testified the Gardner medical corporations' supervising physicians and clinic managers never promoted, encouraged or acquiesced in any policy or practice of performing

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15. Flores testified that in December 1992 search warrants were executed at over 44 locations. (RT 924) Flores believed the locations included five PriMedex Corporation clinics and the PriMedex Corporation headquarters. (RT 924) Execution lasted three days, 24 hours a day. (RT 924) Six hundred boxes of evidence were seized from the Gardner locations. (RT 946) Checks were retrieved from PriMedex Corporation headquarters at 6167 Bristol Parkway, Culver City, and a warehouse facility at 3641 South La Brea Boulevard. (RT 926) Also checks were retrieved pursuant to "bank search warrants." (RT 926) The deputy district attorney showed Flores several documents including checks, memoranda, marked as People's exhibits which Flores recognized as items recovered. (RT 926-946) Jimmy Garcia testified he inventoried thousands of documents during the execution of a search warrant at "Neurological Orthopedic Associates," 815 West Washington Boulevard, Montebello, on December 1, 1992. (RT 861) Garcia turned over part of the evidence to Flores. (RT 861) Joel Adams testified he recovered numerous documents pursuant to a search warrant at 6167 Bristol Parkway, Culver City, December 3, 1992. (RT 882)

diagnostic or treatment procedures which were not medically necessary and justifiable, for the purpose of increasing medical billing volume or rates. (Defense Exhibit A, page 15) Bingamon would have testified in fact the supervising physicians and clinic managers specifically and consistently instructed the medical staff that only medically necessary and justifiable procedures were to be prescribed. Bingamon would have further testified defendant had no input, authority or control over what medical diagnostic or treatment procedures the Gardner medical corporations physicians prescribed for patients.

Jesus Martinez was Bingamon's patient sometime between approximately 1990 and 1993 when he visited the Gardner medical corporations for evaluation and treatment in connection with a purported work-related injury. (Defense Exhibit A, page 13) Unbeknownst to Bingamon and Gardner medical corporations personnel at the time, Martinez was not actually injured nor was he a workers' compensation applicant; he was sent in as an undercover agent by an insurance carrier which had wired him with a concealed tape recorder and instructed him to make certain pre-scripted statements.

Martinez surreptitiously tape-recorded his clinical visits to the medical corporations, which included sessions in which he was examined by Bingamon. On the tapes Martinez is heard making certain statements about the existence, nature and extent of his physical injuries which may be interpreted as suggesting that the cause of the injuries was not work-related or was ambiguous, or that the injuries were non-existent.

The defense requested the prosecution play for the grand jury numerous other secret tape recordings made by individuals posing as patients of the medical corporations that show defendant did not knowingly participate in any conduct involving Gardner medical corporations clinical personnel which can be construed as being unlawful or fraudulent. (Defense Exhibit A, page 12)

Randy Cockrell would have testified he was one of the Gardner medical corporations Regional Managing Doctors. He, along with Gardner, Punturere, Schneider and Sobol were the primary supervising physicians for the Gardner medical corporations. He, along with the other supervising physicians, regularly addressed and advised the medical staff on clinical procedures at weekly and monthly doctors' meetings as well as during informal medical discussions which took place regularly within the clinics. He,

along with the other supervising physicians, consistently counseled the medical staff the patient's health was the primary and singular concern of the Gardner medical corporations. They specifically emphasized that medical billing rates and volume were irrelevant to any medical decision. He, along with the other supervising physicians, regularly conducted seminars and distributed inter-clinic memoranda to educate the Gardner medical corporations physicians on the latest medical and scientific developments. Their objective was to train and maintain a highly skilled, professional medical staff which was prepared and singularly committed to providing high caliber medical services to its patients. If he or any of the other supervising physicians had known of any Gardner medical corporations clinical personnel who violated any of the principles and policies described above, they would have immediately put a stop to the misconduct and terminated the services of the offending individual. Cockrell would have testified defendant had no input, authority, or control over what medical diagnostic or treatment procedures the Gardner medical corporations physicians prescribed for patients, nor any influence over the medical corporations' clinical practices and policies.

Mikhail would have testified no one on the Gardner medical corporations' medical staff was authorized to prescribe any evaluative or treatment procedure other than what was medically essential and justifiable for the patient's diagnostic or treatment needs. All of the medical corporations medical staff took personal pride and responsibility in holding each other to the high ethical standards of the medical profession. Further, had he known of an instance of misconduct, he would have immediately reported the incident to a supervising physician and advocated severe reprimand or termination for the offending individual. Mikhail would have testified defendant had no input, authority, or control over what medical diagnostic or treatment procedures the medical corporations physicians prescribed for patients.

Mikhail would have further testified that in 1994, he sued the Gardner for damages relating to the monetary terms under which his services were terminated. Significantly, during his deposition in that lawsuit, he was asked, under oath, by counsel for the medical corporations, whether he knew or suspected of any fraudulent or unlawful conduct in the Gardner medical corporations' medical practice. To this question Mikhail answered that he could not think of a single instance where such misconduct occurred.

This despite the fact that, as an adversarial litigant, it would appear he would have had every motive and reason to be particularly critical of the Gardner medical corporations' operations.

Eugene Hubbard was a board-certified orthopedic surgeon. He was also a reserve with the Los Angeles County Sheriff s Office. He was also a staff doctor at the Gardner medical corporations. He would have testified had he known or believed that another Gardner medical corporation physician was prescribing medically unnecessary or unjustifiable evaluative or treatment procedures, he would have immediately reported the incident to a supervising physician and vigorously advocated severe reprimand or termination for the offending individual. (Defense Exhibit A, page 17) Hubbard would have testified defendant had no input, authority, or control over what medical diagnostic or treatment procedures the Gardner medical corporations physicians prescribed for patients.

Catherine Capps, a staff chiropractor at a Gardner medical corporation, would have testified no one on the staff was authorized to prescribe any evaluative or treatment procedure other than that which was medically essential and justifiable for the patient's diagnostic or treatment needs. Had she known or believed that another Gardner medical corporations physician was prescribing medically unnecessary or unjustifiable evaluative or treatment procedures, she would have immediately reported the incident to a supervising physician and vigorously advocated severe reprimand or termination for the offending individual. Capps would have testified defendant had no input, authority, or control over what medical diagnostic or treatment procedures the Gardner medical corporations physicians prescribed for patients.

Craig Angelich, managing doctor at the Gardner Panorama City clinic, would have testified no one on the staff was authorized to prescribe any evaluative or treatment procedure other than that which was medically essential and justifiable for the patient's diagnostic or treatment needs. Had he known or believed that another Gardner medical corporations physician was prescribing medically unnecessary or unjustifiable evaluative or treatment procedures, he would have immediately reported the incident to a supervising physician and vigorously advocated severe reprimand or termination for the offending individual. Angelich would have testified defendant had no input, authority, or

control over what medical diagnostic or treatment procedures the Gardner medical corporations physicians prescribed for patients.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

Defendant Had No Control over Patients' Back Care

The prosecution failed to establish defendant had any control over patients' back care. Schneider testified patient back care called "back school" consisted of a videotape, either in English or Spanish, and exercises demonstrated by the therapist or doctor. If a patient had questions about the information contained in the back school videotape, the questions could be answered by the therapist or the doctor. (RT 554-555) Flores testified People's Exhibit 9 described as "back school video tape" was seized pursuant to a consent search. (RT 933)

Jay Heller testified he worked for PriMedex Corporation at Panorama City clinic from April 1990 for about ten months as a physical therapy aid. (RT 535) Back School was a 30-minute video tape patients watched. (RT 535) The deputy district attorney asked Heller:

Q. What would the patients do after seeing the video?
A. They would leave. They would checkout.
Q. To your knowledge, was there ever any "question and answer" period with a chiropractor or medical doctor concerning back school?
A. No. (RT 535)

Heller did not know defendant. (RT 534)

Estella Ponce testified she worked for PriMedex Corporation at the Montebello Office from 1991 for about a year and a half as a physical therapy aid. (RT 539) The deputy district attorney asked Ponce:

Q. Was there ever any "question and answer" period concerning back school with a physician?
A. If they had any questions, they would ask the doctor.
Q. When would they ask the doctor?

A. On their follow-up visit. (RT 540)

There was no testimony Ponce knew defendant.

Ernest Monroy testified he worked for "La Brea Medical" at Montebello from late 1989 for almost a year in physical therapy. (RT 545-546) The deputy district attorney asked Monroy:

Q. Did you ever see a patient that was supposed to be watching the video?
A. Most of the times they were wandering around.
Q. What do you mean?
A. Looking the other way, they didn't pay attention to the tape.
...
Q. *On the day that the video was shown,* was there ever any "question and answer" session with the physician?
A. No, sir. (RT 546-547; emphasis added)

Monroy did not know defendant. (RT 545)

Alex Llames testified he was employed by PriMedex Corporation from August 1988 to 1993 when the office closed as a therapy aid. (RT 787) "Back school" was "a 25-minute video or show explaining low back body mechanics and injuries." (RT 787) When "back school" was given, it would be marked on the patient's Super Bill. (RT 788) Heller testified the Super Bill would indicate back school had been "shown." (RT 536) Thereafter the Super Bill would get turned in at night and sent to the insurance company. (RT 536)

The deputy district attorney directed Hammonds's attention to People's Exhibit 8. People's Exhibit 8 is five separated patient files—patients Bell, Hamilton, Mickaye, Jones and Galaviz. (RT 901) The deputy district attorney apparently showed Hammonds the file of the fifth patient, apparently Galaviz. (RT 901-902) The deputy district attorney asked Hammonds:

Q. Do you know if there is a back school bill? This one?
A. Right there, March 18.
Q. March 18, 1991. Next entry, back school; correct?
A. Yes.
Q. It has on there as a description, "instructions to patients on the care of the back, prevention of injury, home stretch exercises, lecture activities,

daily living, including questions and answers—" Excuse me, "questions and answers session with physician." parenthesis, "2 hours." Is that correct?
A. Yes.
Q. Was that the description always given for back school?
A. Yes.
Q. That was always the billing for back school?
A. Yes.
Q. $165?
A. Yes. (RT 903)
...
Q. Do you know what back school was?
A. No, I do not. (RT 904)

As stated the prosecution failed to establish defendant had any control over patients' back care. Nevertheless, to counter the grand jury from inferring an insurance carrier was billed for back care not provided the patient, the defense made the prosecution aware and requested the grand jury hear the testimony of therapy aide Mercedes Lara, Ananias, Jason Billson, Kris Harkleroad, Fessenden, Douglas Hollier, Matthew Grippi, and Pili. The witnesses would have testified all the patients for whom the back care video was played watched the entire tape, and the total time devoted to the patient's back care instructional program, including the videotape and in-person demonstrative sessions, equaled or exceeded two hours over the course of a patient's treatment and care at the Gardner medical corporations.

Wims would have testified she has personally observed physicians watching the back care video along with the patients. simultaneously talking to and instructing the patient about what was being shown on the back school videotape.

Directo would have testified that all indicated medical services which PriMedex Corporation billed to the insurance carriers were actually performed. This testimony was consistent with statements she made to Mello and deputy district attorney Kadyk during the December 17, 1991, interview. When asked whether all billed medical procedures were actually performed, Directo stated, "Oh, no, no, everything is done. Yeah, everybody came in everything was done ... Yes, everything is in the up and up, because that's the one thing that ... he [Dr. Gardner] didn't want to be caught with.... they had everybody sign." (Defense Exhibit F, page 30) When asked whether she believed

anything illegal was happening in PriMedex Corporation's billing department, Directo firmly answered no. She specifically denied any double-billing practices. Based on Directo's responses, at one point during the interview Mr, Mello remarked, "[W]hat we're finding out is that his business was on the up and ups ... [S]o we're not going to catch him [Gardner], the double billing, we're not gonna catch him with patients that, that don't sign in or bill . . . or billing for something that didn't [get done]." When asked whether billed X-rays were actually performed, Directo replied, "X-rays were done." (Defense Exhibit F, page 30)

An informant with the last name Avelar, whose full identity and location the prosecution could have readily obtained, was interviewed at least once by Department of Insurance Fraud Investigator Sue Welton on February 19, 1992. Avelar would have testified all medical services which PriMedex Corporation billed to insurance carriers were actually performed—consistent with Avelar's statements to Welton, wherein he/she admitted that there were "only rumors" within the workers' compensation industry that PriMedex Corporation submitted false claims or billings. Avelar further admitted he/she "did not have any proof or first hand information to provide" regarding purported false claims or billings submitted by PriMedex Corporation.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury. But apart from the exculpatory evidence, the prosecution did not establish that an insurance company was billed for back care instructions to a patient (the video) where the patient was not provided back care instructions. The evidence indicated the video was shown on one day and questions and answers session with a physician on a follow up visit, and the claim for it all was $165. The defense respectfully submits the prosecution did not establish that an insurance company was billed for two hours where the patient was not provided two hours.

But even if the court somehow inferred a Gardner corporation employee deliberately claimed for back care not provided a patient, the prosecution offered no evidence *defendant* claimed or was otherwise responsible for a claim for back care not provided a patient. The prosecution offered no evidence defendant knew how patient back care was provided. Defendant was a consultant to *PriMedex Corporation* which

had no control over the protocols of the Gardner medical corporations. Defendant had no control over patients' back care.

Defendant Had No Control over Disability Ratings

Burpo testified over 95 percent of the patients seen at "Neuro Ortho,"[16] based upon the reports that Burpo reviewed, were found to have some form of a permanent disability. (RT 638) The deputy district attorney asked Burpo:

> Q. If you were to increase a patient's disability rating, who benefits from that increase? Do the clinics benefit?
> A. No. (RT 646)

Although defendant had no control over disability ratings, pursuant to *Johnson* the defense made the prosecution aware of evidence showing or reasonably tending to show the disability ratings were based on the patient's medical condition. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Pili would have testified after a patient's disability term was initially set, the treating doctor repeatedly re-evaluated the disability period at each subsequent bi-weekly clinical visit. (Defense Exhibit F, page 26) On numerous occasions Pili and other Gardner medical corporation physicians reduced or increased a patient's initial disability term depending on the individual's recovery and progress in treatment. Pili would have stressed that one of the legitimate factors which Gardner physicians took into account in setting and re-setting disability terms was the individual patient's cooperation and motivation in treatment. For example a patient who was initially given a prolonged disability period may become psychologically resigned to the prospect he may have to remain inactive for some period of time. As a result, the patient may be less motivated to cooperate in therapy during the initial weeks. If the treating physician detects this attitude in a patient, he may try to motivate the patient to become more cooperative in therapy by

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16. It is unknown if witness meant Gardner Medical Group, Inc., dba Neurological Orthopedics Associates Medical Group, or Gardner Neurological Orthopedic Medical Group, Inc.

reducing the patient's disability term within reasonable medical limits. In his own medical practice Pili also routinely adjusted disability terms within medically reasonable limits in an attempt to encourage patients who lack proper motivation.

Ananias would have testified each patient's disability rating and period were set based upon his or her individual medical condition. The ratings and terms were regularly re-evaluated and adjusted as needed during subsequent clinical visits, depending on the progress of treatment. The Gardner medical corporations never promulgated or encouraged the adoption of a set formula for disability ratings or terms. Physicians had complete independence to make these decisions based on their own medical judgment. During Ananias' interview, district attorney investigators insinuated that the Gardner physicians issued "standard" disability ratings for all or most of their patients—either TID (temporarily totally disabled from performing normal job functions) or TPD (temporarily partially disabled from performing normal job functions). In response Ananias bluntly told the investigators that this was a ridiculous allegation. Disability rating decisions were made on a case-by-case basis based on legitimate medical considerations for the patient's recovery.

Corlew would have testified patients at the Gardner medical corporations were not given predetermined disability ratings and there was no set formula for disability periods. Rather, such decisions were all made based on a case-specific basis depending on each patient's particular medical condition and his prospects for recovery. As Corlew previously testified before a grand jury panel in November 1995, the disability ratings and periods were set according to what the doctor's diagnosis was and what his clinical skills would have indicated.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

Defendant had no input regarding or control over disability ratings.

Defendant Had No Control over Medical-legal Reports

Ordaz testified medical-legal reports are prepared by the physician under Labor Code sections, and regulations.

Q. Are there Labor Code sections and/or regulations that prescribe how medical-legal reports are to be prepared?
A. Yes. Labor Code sections 4620 through 4628 generally involve the process of medical-legal reports and the [Workers' Compensation Appeals Board] rule 10606, although it was 10978 for a couple years. (RT 20)

Ordaz testified the report "demonstrates the physician's medical-legal opinion concerning the issues in the workers' compensation case." (RT 20) The deputy district attorney asked Druffel:

Q. When reports were dictated, where did they go?
A. When they were dictated, we would put them in an envelope and they would go to the transcriber, transcription service, then they would be typed up at the service and brought back to our offices.
Q. At some point were they ever reviewed by someone known as an editor or revisionists?
A. Yes.
Q. Where in that process would that take place?
A. Usually after it came back from the transcriber.
Q. What was the function of the editor or revisionists?
A. The editor would look for corrections in the report, grammar, also making sure that everything that was in the chart was included in the report. (RT 334)

Schneider testified, "Ultimately, the person who would decide whether the changes would go in would be the medical doctor." (RT 562) Burpo testified the medical-legal reports that were prepared by the chiropractors would be signed by a medical doctor. (RT 632) The doctors reviewed reports before they would sign them and they would disapprove if the report was inappropriate. (RT 644) Judge Ordas testified, "There is nothing wrong with having a report reviewed by an editor and then having the doctor look at it again and sign it to make sure it actually expresses his or her opinion." (RT 52)

Burpo testified he worked for Gardner's corporations from August 2, 1989, until October 22, 1993. (RT 617) Burpo worked for Gardner (RT 615) and worked with Punturere (RT 617). Burpo did not report to defendant. (RT 616) The job of Burpo's department basically was to review the medical reports for compliance with the requirements of the Labor Code for accuracy in terms of what was in the chart record, to

review the final reports, workers' compensation reports, for compliance with the company policies on assigning permanent disability ratings. They really were not "editors," because they did not have much control over the work product. (RT 618) The deputy district attorney asked Burpo:

> Q. Did you have the authority to alter the work restrictions on a patient's medical-legal report without consulting with the examining physician?
> A. We had a five percent discretion within the parameters established in this report writing manual.
> Q. Who gave you this authority?
> A. I believe that was Dr. Gardner's determination. It might should been Dr. Punturere's determination. I can't say who made that decision. (RT 622)
> ...
> If the doctor had left out work restrictions or failed to address a diagnoses, say, that appeared in the initial report and the patient had complaints related to that, the report would be sent back to the doctors to address those issues. There were times when the reports were needed on an urgent basis, for like a hearing two days from the time when we received it where we might call the doctor and get the doctor's authority to put the language in. (RT 623)
> ...
> If it was evident, for instance, from the chart record that the patient, say, had a diagnosis of a cervical myofascia pain syndrome that appeared in the initial report, had complaints of neck pain that appeared in a supplemental report and you get to the final report that diagnosis is missing, however there is a discussion in the discussion area of the report for that diagnosis, there is a rating for that neck disability, we would add the diagnosis. And there were some times when I would, if there was a diagnosis that had been missed, I would add that. But I would always call the doctor or notify him, like, with a post-it or something like that. (RT 640-641)

Burpo testified they had the discretion to make a five percent alteration without telling the doctor but when he would do that, he would put a note on the report for the doctor to advise him of that change, and if the doctor did not feel it was appropriate, Burpo would hear about it. (RT 649)

Pursuant to *Johnson* the defense made the prosecution aware of evidence showing or reasonably tending to show all medical reports were generated based on the patient's medical chart which contained detailed notes made by the chiropractor and medical doctor during their separate and joint examinations of the patient, medical doctors signed

the reports and medical doctors did not sign medical reports for patients whom they did not examine; defendant was not consulted or advised about the manner in which the Reports Department organized and processed the medical-legal reports; and defendant did not make or direct any changes to be made in the medical-legal reports. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Ananias, Groves, Kaufman, Capps, Fessenden, Pili, Mikhail, Billson, Cockrell, Angelich, Harkleroad and Hollier would have described in their testimony the procedures for a new patient seen at any of the Gardner medical corporation clinics, and how a medical-legal report would be generated. (Defense Exhibit F, page 33)

The new patient was initially interviewed by a historian who took down the patient's subjective complaints and outlined the patient's medical history.

Next, a chiropractor conducted a detailed physical examination of the patient to verify and refine the patient's medical history and his or her current complaints. The patient's vital signs were taken and noted.

A medical doctor was summoned to see the patient. Depending on the preliminary findings of the chiropractor's preceding examination, either an orthopedist or neurologist would be consulted. The medical doctor conferred with the chiropractor to obtain a summary of the preliminary examination results and an initial diagnosis. The medical doctor then proceeded to conduct his own thorough examination of the patient, as the chiropractor simultaneously presented the patient's history and the evaluation results he (the chiropractor) previously obtained. Based on the findings of his own examination, the medical doctor verbally instructed the chiropractor to amend and further refine the patient's noted history. The medical doctor also personally reviewed and verified the chiropractor's examination results. This commonly involved the medical doctor personally replicating the chiropractor's prior evaluations and instructing the chiropractor to repeat certain examinations before him.

Based on further consultation between the medical doctor and chiropractor, the medical doctor made the determinative diagnosis. The medical doctor also formulated a treatment plan, ordered diagnostic tests, and determined the appropriate term of disability.

The medical doctor's prior approval was required and always obtained for all diagnostic tests, treatment plans, and disability ratings.

Based on the medical doctor's amendments, comments, and instructions, the chiropractor dictated or typed the medical-legal report.

The medical doctor received drafts of the medical-report. He substantively reviewed or edited all of his medical-legal reports, and sometimes requested numerous amendments and redrafts, before personally signing the final document.

Wims would have testified it was the policy and practice for the Gardner corporation medical doctors to personally examine each patient for whom they signed a medical-legal report. This testimony would have been consistent with her prior testimony before a grand jury panel in November 1995. Wims testified that the medical doctor normally would personally examine a patient right after the chiropractor had finished performing his examination. Wims testified if on occasion the medical doctor was not available to see patients after the chiropractor's exam, then the patients had to come back so the medical doctor would see them. Wims was asked whether the Gardner medical corporations issued any internal directives instructing medical doctors to personally examine patients. The prosecution insinuated such directives were issued in response to patient complaints that they had not been seen by a medical doctor. Wims denied any directives of this nature were issued and she rejected the implication of the question. (Defense Exhibit F, page 34)

Norman Corrales would have testified it was standard practice for the Gardner corporation medical doctors to personally examine each patient for whom they signed a medical-legal report. This testimony was consistent with statements Corrales previously made during his February 4, 1994, interview with the prosecution, wherein he said the patient was always seen by a medical doctor.

Gardner medical corporation assistant manager Martha Corrales would have testified it was standard practice for the Gardner corporation medical doctors to personally examine each patient for whom they signed a medical-legal report. She would further have testified the medical doctors—not the chiropractors—were the ones who had exclusive, ultimate authority to prescribe diagnostic tests and to set the course of treatment. This testimony was consistent with statements Corrales made during her

January 28, 1994, interview with the prosecution, wherein she said initial medical examinations were conducted by both the chiropractor and the medical doctor. Chiropractors never prescribed medicine, and tests were ordered only after a discussion between the chiropractor and the medical doctor.

Corlew would have testified in his opinion the Gardner corporation medical doctors spent sufficient time personally examining the patients to gain a proper understanding of the patient's particular medical condition. This testimony was consistent with Corlew's prior testimony before a grand jury panel in November 1995 wherein he firmly rejected the prosecution's allegation that the Gardner corporation chiropractors, not the medical doctors, did the majority of the work in patient examinations. Specifically, Corlew characterized the prosecution's allegation as an unfounded "biased opinion," because the time which each medical doctor must spend examining a patient in order to gain a sufficient understanding of the patient's condition depends on the complexities and peculiarities of each individual case.

Grippi, a chiropractor who worked for the Gardner medical corporations, would have testified all medical reports were generated based on the patient's medical chart, which contained detailed notes made by the chiropractor and medical doctor during their separate and joint examinations of the patient. (Defense Exhibit F, page 35) Patients were examined by both the chiropractor and medical doctor. The medical doctor was not always the one who physically performed the clerical task of dictating, typing, or generating the medical reports. The chiropractor generating the medical report was authorized to include only facts and information which were reviewed and authorized by the medical doctor and stated in the patient's medical chart. All information and data indicated in the medical report regarding diagnostic tests performed on each patient were based on the actual report of each diagnostic technician. The chiropractor generating the medical report had no authority to change any of the data contained in a diagnostic test report. All diagnostic and treatment recommendations authorized by the medical doctor were ultimately made and authorized by the medical doctor. Medical doctors did not sign medical reports for patients whom they did not examine.

Banjovic would have testified that on December 1, 1992, during the course of the prosecution's execution of its first series of search warrants at the Gardner corporation

clinics, he was interviewed by various law enforcement officers. Banjovic would have testified he was interviewed by Flores and/or Thomas Melbourne. Investigator Flores and/or Melbourne asked Banjovic if the medical corporations ever held any meetings where people discussed how to commit fraud. Banjovic responded with a flat *no,* saying instead that there were numerous meetings held in which employees were directed and taught how to detect and prevent fraud. However, according to Banjovic, he noticed that neither Flores nor Melbourne took any notes of these exculpatory statements he made.

Cockrell would have testified that in or about early 1992, he and Gardner, Punturere, and computer programmer Hale collaborated on designing a proprietary computer program for PriMedex Corporation, to be used for the generation of the medical corporations' medical-legal evaluation reports. He, Gardner, Punturere and Hale continued to refine the program throughout 1992 and the first half of 1993, in the effort to give the medical corporations' doctors greater flexibility in further individualizing the medical-legal reports for each patient. He, Gardner, Punturere and Hale were the only individuals who had access to the encrypted computer codes which were necessary to make changes in the report writing program. He, Gardner, Punturere and Hale were the only individuals authorized to make changes in the report writing program. Defendant was not consulted about any aspect of the computer report writing program, nor did defendant have any decision-making authority or input in these matters. Defendant was not specifically advised of the various features and contemplated modifications of the report writing program, nor did he have decision-making authority or input in these matters. (Defense Exhibit A, page 42-43)

Banjovic would have testified he and his department were exclusively responsible for organizing and processing the medical corporations' medical-reports, and submitting them to the employers and insurance carriers for workers' compensation billing claims purposes. He and his department received the medical-reports from the medical corporations physicians who generated the reports and then transferred them into the corresponding patient files. Defendant never approached him or anyone in his department to request copies of any medical-legal reports. Copies of the medical-legal reports were not distributed or routed to defendant. Defendant was not consulted or advised about the manner in which the Reports Department organized and processed the

medical-legal reports. Defendant did not make or direct any changes to be made in the medical- legal reports. (Defense Exhibit A, page 43)

The defense also made the prosecution aware of evidence showing, or reasonably tending to show, that even a medical report which does not satisfy the technical requirements of a medical-legal report under Labor Code § 4628 may be used to legally support a claim for payment under an alternative theory, i.e., as a physicians "treatment report." The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Attorney Rose Mitchell would have testified she was formerly on the legal staff of Bristol A. R., Inc., in which capacity she represented the Gardner medical corporations as lien claimants before the workers' compensation Appeals Board. In May 1996 she was outside counsel for Bristol A. R., Inc., defending it against a consolidated action filed by various insurance carriers to reclaim or stop payment on liens generated by the medical corporations for workers' compensation related medical services. One of the specific claims she was defending in the action involved the preparation of medical reports by the Gardner corporations. Besides her work on behalf of Bristol A. R., Inc., she had extensive professional experience and knowledge in the field of workers compensation law and regulation.

Mitchell would have testified a medical report which does not satisfy the technical requirements of a medical-legal report under Labor Code § 4628 may be used to legally support a claim for payment under an alternative theory, i.e., as a physicians "treatment report." The legal requirements for a treatment report, as set forth under 8 Cal. Code of Regs. § 9785 and § 10606 are different from and less stringent than the medical-legal report requirements under Labor Code §4628. Perhaps up to 90 percent of the substantial numbers of medical reports generated by the Gardner medical corporations, which Mitchell reviewed, may have qualified as treatment reports under 8 Cal. Code of Regs. § 9785 and § 10606. Therefore it is inappropriate for the prosecution to broadly allege or argue the Gardner medical reports do not legally support a claim for medical services provided solely because they purportedly do not qualify as medical-legal reports.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury. But apart from the exculpatory evidence, all the prosecution

established was that changes were sometimes made in a medical-legal report which was returned to the doctor to look at again to make sure it actually expressed his or her opinion, and then sign it—which the prosecution expert said was okay. The prosecution failed to establish anyone reported any medical procedure or other work that was not in fact provided. And the prosecution certainly offered no evidence *defendant* reported any medical procedure or other work that was not in fact provided. The prosecution offered no evidence defendant told anyone to not report a medical procedure or other work that was not in fact provided. The prosecution offered no evidence defendant knew anyone reported any medical procedure or other work that was not in fact provided. The prosecution offered no evidence defendant conspired with anyone for anyone to not report a medical procedure or other work that was not in fact provided.

Defendant had no control over medical-legal reports.

Defendant Had No Authority to Prevent the Use of Crown Imaging as a Separate Billing Entity

Gardner owned and operated Crown Imaging Associates Medical Group, Inc. (RT 214) Ellis Stern signed the articles of incorporation filed April 29, 1988. (People's Exhibit 4G) Melissa Springer signed the Statement by Domestic Stock Corporation March 4, 1991; Gardner signed it April 29, 1993. (People's Exhibit 4G)

Mroch testified Crown Imaging had no scanning equipment. (RT 87) Cynthia Anne Sarfati testified Crown Imaging "had MRIs and CAT scans in other places." (RT 255) Scans were done at the Gardner Pomona, Rancho Cucamonga and Riverside clinics which had their own equipment. (RT 257)

Mroch testified RadNet Management, Inc., would perform the imaging services and then bill Gardner. (RT 87) Roxsan Radiology performed imaging services. (RT 315) Gardner would rebill under the Crown Imaging letterhead. (RT 87) Sarfati worked for Gardner from mid-1988 to January 1992. (RT 254) Sarfati's supervisor was Directo. (RT 256) Sarfati testified:

A. They wanted Elizabeth Directo to put Crown Imaging on top of the letterhead, on the top of the CAT scans and things that had been done.
Q. Just the name on the billing?
A. Just the name.
...
Q. Did you ever have any conversations with Stanley Goldblum concerning Crown Imaging at the Bristol Park address that would reflect Crown Imaging was there?
A. Yes.
Q. How many conversations?
A. One.
Q. Do you recall when that was?
A. Maybe 1990.
Q. How did that come up?
A. The billers and I thought it would be very helpful for the couriers that come to copy medical records to be able to see where we were located and he said that was not a good idea. (RT 256, 271-272)

The deputy district attorney asked Mroch:

Q. RadNet would perform the imaging services and then bill Crown?
A. Then bill Dr. Gardner.
Q. What would Dr. Gardner do with those bills?
A. Rebill them under Crown Imaging letterhead.
Q. Would he change the bills?
A. Well, I believe we would put whatever our procedure code for the price was, otherwise it would make no sense for us to handle those bills unless we were putting a markup on the bill.
Q. Did you in fact mark up the bill?
A. Yes, we did.
Q. Do you know what the markups were?
A. No, I do not. (RT 87-88)

Mroch testified, "As the report came in from RadNet, or whatever service we used, it had to be a Crown Imaging letterhead for the billing. So it was just easier for a cut and paste to put a Crown Imaging letterhead on it." (RT 88)

The deputy district attorney showed Mroch an unsigned memo marked People's Exhibit 12A, dated March 6, 1989, saying all communication regarding CAT scans and MRIs are to be directed to Crown Imaging Associates and not Roxsan Radiology, Beverly Radiology or Pacific Medical Imaging. (RT 90) Defendant is not copied in on

the memo. Flores testified People's Exhibit 12A was seized from 3711 South La Brea Boulevard pursuant to a December 1992 search warrant. (RT 933) The deputy district attorney asked Mroch:

Q. Do you have any reason to explain why it would be imperative not to affiliate Crown Imaging with Neurologic-Orthopedic or Dr. Gardner?'
A. Trying to create the impression of an arm's length transaction; that there was no connection between Crown Imaging and Gardner Medical Group or any of the other entities under his control. (RT 90)

The deputy district attorney elicited Mroch's beliefs regarding the purpose of creating Crown Imaging. (RT 159-160)

Q. Were there ways of increasing your percentage of recovery on a particular case by changing a billing entity? (RT 159)
A. Yes, of course.
Q. And how would that work?
A. Well, let's say that we got an 87 percent overall collection rate on our cases.
Q. I'm talking just about workers' comp case.
A. That's correct, workers' comp cases. If we paid another billing entity, such as Crown Imaging, we are more than likely to get a 90, 95 or even 100 percent return on that particular invoice. So putting those all together, our overall percentage of recovery on that patient is much greater than the original 87 percent.
Q. Was that the purpose of creating Crown Imaging?
A. As far as I believe, yes. (RT 160)

Sarfati recognized a May 23, 1990, memo from Charles McCranie to "all office managers" telling when and when not to change the letterhead. (RT 263-264) The memo indicates Sarfati, Keshishian and defendant to receive a copy. (People's Exhibit 12C) Mroch testified defendant got copies of reports that listed particular procedures. (RT 183)

Sarfati testified to receive checks from the insurance companies, Crown Imaging used 11802 Washington Boulevard, Suite 605, Los Angeles, which was a post office box. (RT 259) Gardner or Directo would direct the couriers how to pick up the mail. (RT 259) When Sarfati got the mail it was never unopened. (RT 261) Gardner's secretary was Springer. (RT 262)

Q. When Dr. Gardner or Melissa Springer were finished with the mail, what would happen then?
A. They would give it to us.
Q. Who would deliver it to you?
A. Melissa.
Q. Personally?
A. Yes. (RT 262)

Schaffer testified, "Crown Imaging shared the same computer with us except they had a separate department that was responsible. They received their own Super Bills and posted those." (RT 389) Schaffer testified he gave Mroch the same reports he gave Gardner and defendant. (RT 407)

Pursuant to *Johnson* Directo would have testified she genuinely believed, as did other employees and associates of PriMedex Corporation whom she knew, it was entirely legal for Crown Imaging to bill insurance carriers for services it purchased. (Defense Exhibit F, page 29) This testimony would have been consistent with statements Directo made during her November 29, 1995, interview with the prosecution, wherein she said she "didn't feel that it was illegal for a company [PriMedex Corporation] to pay [Crown and Bristol] for services and then bill for them."

To counter the grand jury from possibly inferring from the Gardner billing practice an employee ordered an unjustified scan, the defense made the prosecution aware and requested the grand jury hear the testimony of Mikhail, Groves, and Corlew that policies and practices of the Gardner medical corporations ordering diagnostic X-rays, MRIs, and CAT scans were medically proper and justified, and were administered by qualified, competent and ethical professionals.

Mitchell Kaufman, a neurologist and a faculty member at the UCLA School of Medicine, and a supervising physician at the medical corporations, would have testified it was the clinical policy that CAT scans and MRIs were to be ordered for a patient only if a highly qualified physician determined that the procedure was medically necessary and justified. Kaufman would also have testified CAT scans and MRIs were recognized throughout the medical profession as the "gold standard" of diagnostic tools. They were particularly suited for accurately identifying the nature and causes of the types of injuries that are most commonly associated with work place accidents. Because of their

technological superiority, CAT scans and MRIs could help the doctor evaluate, with far greater precision than a conventional X-ray image, the true cause of soft-tissue and muscular-skeletal physical injuries. As a result, they enable the doctor to rule out work place accidents as the cause of injuries in instances where a plain X-ray could not and would not have. Kaufman would have given specific illustrations of numerous cases that the medical corporations handled in which a patient's claim of work place injury was discredited by the use of CAT scans or MRIs, thus saving the insurance carrier from incurring what would have otherwise been an unjustified liability. Finally Kaufman would have testified defendant had no input, authority or control over the clinical decisions regarding whether to prescribe CAT scans or MRIs for any particular patient.

Medical corporations area manager Wims would have testified that there was never any discussion among the clinical staff about increasing the number of diagnostic tests prescribed. This is consistent with her prior testimony before a grand jury panel in November 1995. There she was asked do you recall discussing issues such as the need to increase your statistics as far as certain tests are concerned—the blood tests, X-rays, MRIs? Without hesitation Wims replied, "No. No."

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

The prosecution offered no evidence defendant as a consultant (or any employee) made a claim for an MRI, CAT scan or scan of any kind that was not in fact medically proper and justified, and actually provided to the patient.

Crown Imaging Associates Medical Group, Inc., was a *separate entity,* a California corporation, articles filed April 29, 1988. (People's Exhibit 4G) When consulted about letting couriers, copiers and the like know that Crown Imaging was located at the same address as PriMedex Corporation, defendant did not think it was a good idea. It was *not* a good idea. If your intention is to create a separate company to increase the percentage of recovery from insurance carriers that are refusing to pay claims, then it *is* a good idea not only to keep the separate company separate on paper but also if possible geographically separate. Where did the carriers get off not paying 100 percent of the cost of MRI or CAT scans? The prosecution did not establish Gardner *over* billed for MRI or CAT scans. It should have been unnecessary for Gardner to form Crown Imaging Associates

Medical Group, Inc., in the first place. When Crown personnel pasted its name on another company's invoice, the invoice became a Crown Imaging Associates Medical Group, Inc., invoice.

Mroch testified "we" marked up the bills, apparently referring to himself and Gardner. Again the prosecution made no showing what that meant or that it somehow operated as a fraud on the insurance carriers. What were the markups? Mroch did not know what the markups were. The grand jury did not know what the markups were. Was the markup ten percent, or five percent, or one percent, or fifty percent? The grand jury had no way of knowing.

And finally, in any case, unless prevented by statute or government regulation, a company can markup bills all it wants. The prosecution made no showing that billing carriers that refused to pay claims under the name of a separate corporation was a violation of the law regardless of the amount of the bill.

Defendant had no authority to prevent the use of Crown Imaging as a separate billing entity, and the prosecution failed to show using Crown Imaging as a billing entity was anything other than a business strategy, not criminal offense.

Defendant Was Not Involved in Unlawful Activity

The defense made the prosecution aware of evidence showing or reasonably tending to show defendant was uninvolved in any unlawful activity. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Certified public accountants Jeffrey Gilbert, Cole, Richard Polep, and/or Mortenson from the reputable accounting firms of Hollander & Gilbert, Grant Thornton, and Mortenson & Associates would have testified that during the course of every year, using generally accepted standards for auditing, which are comprised of guidelines promulgated by the American Institute of Certified Public Accountants, their firms conducted independent audits of the financial statements and reports periodically issued by PriMedex Health Systems, Inc., and/or PriMedex Corporation, to assess, *inter alia,* the accounting principles or methods utilized by the companies' management; the significant financial and business estimates and assumptions adopted by the companies'

management; and the accuracy and completeness of the disclosures in the financial documents and reports.

The assessment was done by testing a representative sample of the purported evidence supporting the selected disclosures. For example, the auditors selectively contacted lenders to verify the amount of the companies' stated debt position, or they reviewed a sample of vendor invoices to ascertain the existence and volume of purported outstanding account receivables. To conduct the audits, teams of certified public accountants were dispatched from their firms to the offices of PriMedex Health Systems, Inc., and/or PriMedex Corporation, and to the medical corporations' clinics. The auditing process could last up to several weeks, during which time the auditing teams interviewed numerous employees and critically reviewed selected corporate records and financial documentation, among other things. At the end of the audits, if it concluded that all of the information disclosed in the companies' financial statements and reports were materially accurate and complete, and that the company was carrying on its business in a lawful manner, the accounting firm issued an opinion letter to certify the material accuracy and completeness of the companies' financial statements and reports.

Certified audit opinion letters were issued on each occasion for PriMedex Health Systems, Inc., and/or PriMedex Corporation. During the course of their audits of PriMedex Corporation and/or PriMedex Health Systems, Inc., the accounting firms did not discover any information which demonstrated that defendant knowingly participated in any fraudulent, illegal or improper conduct relative to the business operations of the companies. During the course of the audits, the accounting firms did not discover any information which demonstrated that defendant directed anyone else to engage in fraudulent, illegal or improper conduct relative to the business operations of the companies. During the course of the audits, the accounting firms did not discover that any company was engaged in any activity that was fraudulent, illegal or improper. Had the accounting firms discovered any such information, they would have alerted the management and/or board of directors of PriMedex Health Systems, Inc., or PriMedex Corporation. Had the accounting firms discovered any such information, they would not have issued a certified audit opinion letter. (Defense Exhibit A, pages 53-55)

During the execution of search warrants at the offices and clinics of PriMedex Corporation and the medical corporations December 1, 1992, and June 22, 1994, district attorney and other law enforcement personnel interviewed dozens of PriMedex Corporation and medical corporation personnel and employees. (Defense Exhibit A, page 9) Some of them were directed to fill out pre-printed questionnaires. Many of these interviews were taped. The interviewers also took notes of the interviews and made reports of their conversations.

The defense requested the prosecution to produce for the grand jury the questionnaires, tapes, notes and reports, in their entirety, as well as the testimony of the individuals who were interviewed, because they contain exculpatory evidence regarding defendant. None of the witnesses indicated defendant knowingly participated in, or asked anyone else to participate in, any fraudulent or illegal activity. Many of the individuals also stated they did not know of any fraudulent or unlawful act committed by anybody associated with any of the companies. Any reports, notes, and tapes of these witnesses, as well as the testimony of these individuals, are exculpatory information for defendant; therefore, the prosecution was requested to present those materials as well. (Defense Exhibit A page 9)

On June 22, 1994, during the execution of search warrants at PriMedex Corporation and medical corporation offices and clinics in Los Angeles, and at the offices of PriMedex Health Systems, Inc., in New Jersey, law enforcement personnel interviewed dozens of PriMedex Health Systems, Inc., PriMedex Corporation and medical corporation personnel. Many of these interviews were tape recorded, and law enforcement officials took notes and made reports about the substance of these interviews. Law enforcement officials also ordered many of these individuals to fill out pre-printed questionnaires. The defense requested the prosecution inform the grand jury of the interview tapes, notes and reports, the completed questionnaires, as well as the testimony of the witnesses who were interviewed, because they also contain exculpatory information about defendant. (Defense Exhibit A, page 72)

The defense requested the prosecution inform the grand jury of Jerry Treadway, Chief of the State Department of Insurance, Fraud Division Bureau, who would have testified that since 1979, the State Department of Insurance had maintained a Fraud

Bureau Database, which contained the names of over 2,000 individuals whom insurance carriers and the Department of Insurance had identified as having engaged in the filing of potentially fraudulent or suspicious insurance claims, including specifically workers' compensation claims. (Defense Exhibit A, page 10) The Fraud Bureau Database did not identify or contain facts which show defendant as someone who had engaged in the filing of potentially fraudulent or illegal workers' compensation claims.

The defense requested the prosecution access for the grand jury exculpatory information regarding defendant from something called the "Index System." (Defense Exhibit A, page 10) Prior to May 1996, for the previous ten years or more, a consortium of insurance carriers compiled and operated a database called the Index System. The Index System was a computerized clearinghouse which contained background and claims history information on thousands of individuals whom insurance carriers suspected of filing potentially fraudulent insurance claims, including specifically claims for workers' compensation benefits. Insurers who subscribed to the Index System for a fee could add to its list of names and information about suspicious individuals, and the subscribing insurers could also access the same information through a central computer database. The larger insurance carriers who subscribed to the Index System included State Farm Insurance, Mercury Insurance, and Twentieth Century Insurance. The grand jury wold have learned the Index System did not identify or contain facts which showed defendant as an individual who knowingly participated in the filing of potentially fraudulent or illegal workers' compensation claims. If the Index System made reference to potentially fraudulent or illegal workers' compensation claims involving specific individuals associated with PriMedex Corporation or the medical corporations, the details of the investigations conducted by law enforcement and/or insurance industry officials into those cases would have shown defendant did not know any of these individuals were engaged in fraudulent or illegal conduct; did not direct, encourage, or knowingly assist any of these individuals to engage in fraudulent or illegal conduct; and/or did not engage in any conversation with any of these individuals in which their fraudulent or illegal conduct was discussed.

Pursuant to *Johnson* Gary Hernandez, Chief of Enforcement for the State Department of Insurance, would have testified major insurance carriers operated

in-house special investigation units (SIUs) to monitor and gather intelligence, and to investigate potentially fraudulent insurance claims, including specifically suspicious claims for workers' compensation benefits. (Defense Exhibit A, page 11) SIUs also referred cases and claims which they believed fraudulent to law enforcement agencies, including the State Department of Insurance and various district attorneys offices (including the Los Angeles district attorney. One of the primary sources of the SIUs' intelligence was the informal exchange of information which occurred regularly among the SIUs of various insurance carriers throughout the industry. SIU agents also met regularly at seminars and trade meetings sponsored by the insurance industry or by local chapters of the California Fraud Investigators Association, where they exchanged intelligence about medical providers, claimants and other individuals whom they suspected engaged in insurance fraud, including specifically workers' compensation fraud. The grand jury would have learned the SIU agencies had no facts which showed defendant as having engaged in the filing of potentially fraudulent claims for workers' compensation benefits. If the SIU agencies had information concerning potentially fraudulent workers' compensation claims involving specific individuals associated with PriMedex Corporation or the medical corporations, the details of the investigations conducted by law enforcement and/or insurance industry officials into those cases would have shown defendant did not know any of these individuals were engaged in fraudulent or illegal conduct; did not direct, encourage, or knowingly assist any of these individuals to engage in fraudulent or illegal conduct; and/or did not engage in any conversation with any of these individuals in which their fraudulent or illegal conduct was discussed.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

The prosecution failed to establish defendant knew of unlawful activity.

Prosecution Failed to Prove Defendant Conspired to Violate Insurance Code § 1871.4

Conspiracy is an agreement between two or more persons to commit a crime accompanied by an overt act done in California by one or more of the parties in

furtherance of the conspiracy. Penal Code § 184; *People v. Van Eyk* (1961) 56 Cal.2d 471, 478, cert. denied, 369 U.S. 824 (1962); *People v. Buffum* (1953) 40 Cal.2d 709, 715. Not only must the prosecution prove defendant agreed, the prosecution must also prove defendant intended to agree. *People v. Horn* (1974) 12 Cal.3d 290, 296. The prosecution's obligation to prove defendant intended to agree is separate and distinct from the prosecution's obligation to prove defendant intended to commit the crime. The prosecution must prove an agreement and defendant intended to agree.

There are two ways to show the agreement: direct evidence and/or circumstantial evidence.

Although the agreement is usually shown by circumstantial evidence, it can be shown by direct evidence, typically by wiretaps or the testimony of a co-conspirator. But because conspiracy is usually shown by circumstantial evidence, prosecutors tend to breeze over *the fact* that needs to be proved circumstantially. The prosecution *must* prove—although the proof can be circumstantial—defendant in fact agreed to commit the alleged crime. With no agreement to commit the alleged crime, there is no conspiracy.

As stated, in the case at bar defendant could only have conspired to violate Insurance Code § 1871.4 after January 1, 1992. This means the prosecution had to prove at least circumstantially that on at least one occasion, on or after January 1, 1992, at some location, with the requisite intentions, defendant actually agreed with some person to violate Insurance Code § 1871.4. True the alleged agreement can be inferred. But whether the agreement is inferred from proved circumstances, or proved directly without the need for inference, the prosecution in every case must prove an agreement. For conspiracy there has to have been an agreement.

In the case at bar the prosecution offered no direct evidence defendant agreed with anybody to violate Insurance Code § 1871.4. There was no testimony from a co-conspirator there was an agreement. There was no testimony from a third party there was an agreement. There was no testimony from a law enforcement officer that he heard the agreement while conducting a wiretap. The prosecution is not expected to argue it offered direct evidence of an agreement in opposition to this motion. The prosecution

will argue—indeed *must* argue—the alleged agreement by defendant to violate Insurance Code § 1871.4 was proved by circumstantial evidence.

What was, then, the circumstantial evidence of an alleged agreement?

The only possible circumstantial evidence in the case at bar would be evidence defendant actually violated or aided and abetted a violation of Insurance Code § 1871.4. Of course defendant is not charged with actually violating Insurance Code § 1871.4. But if defendant actually violated Insurance Code § 1871.4, the court arguably could infer defendant *agreed* to violate Insurance Code § 1871.4. But if the prosecution failed to prove defendant at least aided and abetted a violation of Insurance Code § 1871.4, the court can not infer defendant agreed to violate Insurance Code § 1871.4. And if the court can not infer defendant agreed to violate Insurance Code § 1871.4, absent any direct evidence, the court cannot sustain a charge defendant conspired to violate Insurance Code § 1871.4.

To prove defendant actually violated Insurance Code § 1871.4, the prosecution is not expected to argue it established defendant *himself* presented a statement in support of a claim for workers' compensation. The prosecution will argue defendant aided and abetted another who presented a statement in support of a claim for workers' compensation.

To establish defendant aided and abetted a violation of Insurance Code § 1871.4, it is not enough for the prosecution to show defendant was merely present when another presented a statement in support of a claim for workers' compensation, and it is not enough for the prosecution to show defendant merely failed to take steps to prevent another from presenting a statement in support of a claim for workers' compensation. Neither presence at the scene of a crime, nor failure to take steps to prevent it, establishes aiding and abetting. *In re Michael T.* (1978) 84 Cal.App.3d 907.

Moreover it is not even enough for the prosecution even to show defendant assisted another present a statement in support of a claim for workers' compensation. To establish defendant was an aider and abetter, the prosecution had to show the perpetrator had the intent to defraud, and that intent to defraud was shared by defendant. *People v. Beeman* (1984) 35 Cal.3d 547, 560-561; also see CALJIC 3.01.

The defense respectfully submits this is where the prosecution proof fails. The prosecution did not establish defendant had or shared an intent to defraud.

The evidence showed PriMedex Corporation and the four medical corporations were wholly owned by Gardner. Defendant may have been a five percent shareholder of PriMedex Corporation very briefly in 1989, but his certificate was rescinded almost immediately after it was issued. Defendant was not a shareholder thereafter. At all relevant times, defendant was never a shareholder of PriMedex Health Systems, Inc., PriMedex Corporation, or the medical corporations. Defendant was never at any time an officer or director of PriMedex Health Systems, Inc., PriMedex Corporation, or the medical corporations. It is immaterial that some employees thought he was an officer, or even that he held himself out as an officer; that did not make defendant an officer. Defendant was a consultant; defendant's title was consultant; defendant was compensated as a consultant.

The evidence showed that as a consultant to PriMedex Corporation, defendant had no control over medical protocols in the Gardner medical corporation clinics. He did not control the professional activities of the medical corporations or the physicians they employed. He had nothing to do with the establishment of doctors' bonuses. He had nothing to do with trigger point injections. He never ordered diagnostic blood tests and had no control over blood test work orders. He never claimed, aided and abetted a claim or agreed to make a claim for blood tests. Just as presence is not enough to establish one to be an aider and abettor, evidence that defendant was in the company of or associated with Gardner or Punturere does not prove defendant was a member of any alleged conspiracy. See *People v. Hardeman* (1966) 244 Cal.App.2d 1, 37-38; *People v. Toledo-Corro* (1959) 174 Cal.App.2d 812, 820.

Moreover, the prosecution failed to establish blood work was billed but not done. The prosecution offered evidence the Gardner medical corporations had their blood work done by an outside laboratory for anywhere from $15.50 to $22, and billed the employers' insurance carriers anywhere from $125 to $135. But the prosecution did not establish that an insurance company was billed for a patient's blood work where the blood work was not done. Furthermore, absent a specific statute limiting the amount, a corporation could bill any amount it wanted for providing medical services. The official medical fee schedule mandated by the Labor Code for workers compensation claims was

not revised from July 1, 1989, until January 1, 1994, and used as a guideline only. No statute limited the amount, a corporation could claim and bill for providing medical services.

The evidence showed defendant had no control over patients' back care. The prosecution established a video was shown on one day and questions and answers session with the physician on a follow up visit, and the claim for it all was $165. The prosecution did not establish that an insurance company was billed for back care instructions to a patient (the video) where the patient was not provided the back care instructions. The prosecution did not establish that an insurance company was billed for a questions and answers session with a physician where the patient was not provided the physician. The prosecution did not establish that an insurance company was billed for two hours where the patient was not provided two hours. And even if the court found a medical corporation employee claimed for back care not received by a patient, the prosecution offered no evidence *defendant* claimed or aided and abetted a claim for back care not received by a patient. The prosecution offered no evidence defendant knew how patient back care was provided.

Defendant had no control over medical-legal reports. Reports at the medical corporations were dictated. There was never a "dictation bonus," but if employees dictated any reports outside regular office hours, they were paid for that in addition to their regular salary checks. The reports would then be put in an envelope and go to the transcription service where they would be typed. Then the reports would be brought back to their offices. Usually after the report came back from the transcriber, it was reviewed by an editor. The editor would look for corrections in grammar and make sure everything that was in the chart was included in the report. Ultimately the person who would decide whether the changes would go in the report would be the medical doctor. Medical-legal reports prepared by the chiropractors would be signed by a medical doctor. The doctors reviewed reports before they would sign them, and they would disapprove if the report was inappropriate. There is nothing wrong with having a report reviewed by an editor and then having the doctor look at it again and sign it to make sure it actually expresses his or her opinion. Defendant had no control over medical-legal reports. Defendant had no control over operating procedure policies in the Gardner clinics. He had no control

over billing rates. Defendant in no way controlled the professional activities of the Gardner medical corporations or the physicians they employed.

The prosecution offered testimony by Mroch there were ways of increasing the percentage of recovery on a particular case by changing a billing entity. The insurance carriers were more than likely to pay 90, 95 or even 100 percent of the invoice if the work was done by a different entity. That was the purpose Gardner created Crown Imaging Associates Medical Group Inc. This was not a crime. It might be now because the workers' compensation laws are drastically different now. But at the time it was not a crime. At the time no industrial medicine standards existed.

Moreover defendant had no control over forming Crown Imaging. Defendant never ordered any imaging. Defendant nor anyone else made a claim for MRIs, CAT scans or scans of any kind that were not in fact provided.

Even if defendant did something that furthered the alleged conspiracy—which he did not—proof of the act is insufficient in itself to prove defendant was a member of the alleged conspiracy. Evidence of the commission of an act which furthered the purpose of the alleged conspiracy is not, in itself, sufficient to prove that the person committing the act was a member of such a conspiracy. See CALJIC 6.18.

The prosecution never proved the where or when of the charge of conspiring to violate Insurance Code § 1871.4. Even if only by circumstantial evidence, the prosecution still has to establish the where and when of a charge.

Defendant resigned in November 1993. *When* on or after December 8, 1987, did defendant specifically *intend to agree* to violate Insurance Code § 1871.4? When can the court infer this happened? When did defendant *intend to violate* Insurance Code § 1871.4? When can the court infer this happened? When did defendant *agree to violate* Insurance Code § 1871.4? When can the court infer this happened? When was the alleged overt act committed? Was defendant already a conspirator? If the alleged overt act was committed before defendant became a conspirator, it does not count as the overt act needed to establish defendant is guilty of conspiracy. See CALJIC 6.10 and Use Note.

Where on or after December 8, 1987, did defendant specifically intend to agree to violate Insurance Code § 1871.4? Where can the court infer this happened? Where did

defendant intend to violate Insurance Code § 1871.4? Where did defendant agree to violate Insurance Code § 1871.4? Where was the alleged overt act committed?

The prosecution never answered these questions—at least not sufficiently to establish circumstantially defendant conspired to violate Insurance Code § 1871.4—and the uncomplicated reason is defendant did *not* conspire to violate Insurance Code § 1871.4.

In its response the prosecution will argue that to circumstantially establish defendant was an aider and abettor it was under no duty to offer a mass of evidence he shared the perpetrator's criminal intent; just a small amount to permit the inference. A close look at the case law shows this is not true. As will be seen, the courts have held evidence establishing *more* complicity than defendant's in the case at bar *insufficient* to permit an inference of aiding and abetting.

In *People v. Sully* (1991) 53 Cal.3d 1195, the issue was whether the evidence supported an inference that Tina Livingston was an aider and abettor (and therefore an accomplice) in the murder of Kathryn Barrett. It is necessary to recite the facts somewhat in detail.

Defendant Sully, an ex-police officer, met Livingston when she was a partner in an escort service. Gloria Fravel worked as a prostitute for Livingston and owed Livingston $500. Livingston transported Fravel to Sully's warehouse, ostensibly to obtain some camping equipment. There Sully gagged and handcuffed Fravel and suspended her from the ceiling, assuring Livingston Fravel would repay Livingston the amount she owed. After having sex with Fravel, Sully fashioned a hangman's noose from a piece of rope and sodomized her. Fravel's gag fell off and she began screaming. Livingston attempted unsuccessfully to replace the gag and to silence Fravel by tightening the hangman's noose around her neck. Sully put his foot against the back of her neck, and jerked hard on the hangman's noose. After several tugs, Fravel's body went limp and her bodily fluids spilled out. With the assistance of Livingston, Sully encased Fravel's body in plastic and moved it into a car. Sully drove away to dispose of the body and Livingston cleaned up the warehouse.

Shortly after the murder of Fravel, Sully told Livingston he wanted to take a completely new girl (i.e., one that had not previously had professional sex) and kill her before anyone else "had" her. Livingston called Sully and told him about Brenda

Oakden, age 19, a roommate of a receptionist at Livingston's escort service. At Sully's request, a nervous Oakden was escorted to the warehouse where Sully killed her.

On another occasion Sully gave Livingston a satchel containing the clothing and personal items of Barbara Searcy, and told Livingston that he badly wanted to recover a recording on Searcy's answering machine. Livingston was to go to Searcy's apartment, recover the recording, and steal the rest of her property. Livingston attempted the theft in the company of another man but was frightened away. When she returned to the warehouse empty-handed, Sully showed her Searcy's body, wrapped in opaque plastic sheeting, explaining he had killed her. They loaded her body into Sully's pickup truck. While attempting to drag the body beyond recognition behind the truck, Sully and Livingston unexpectedly encountered a witness and sped away, leaving the body.

So Livingston knew Sully was a murderer. In the murder of Kathryn Barrett, where the issue was whether Livingston aided and abetted Sully, deceased had offered to sell Sully six ounces of cocaine. Sully's friend, Francis, suggested that they steal the cocaine, and Sully agreed. At Sully's request, *Livingston drove deceased to Sully's warehouse,* then went to a local bar to wait. Two hours later Sully called Livingston and told her she need not pick up deceased. Livingston returned to the warehouse *and observed Francis stabbing deceased in the chest.* When Livingston started to leave, Sully followed and intercepted her, telling her deceased would not be recognized even if someone found her body. Still alive, deceased continued to moan. Disgusted with Francis's inability to kill deceased, Sully returned to their location in the warehouse. Francis later emerged alone, looking ill, and told Livingston that Sully had hit deceased in the mouth with a sledgehammer, stating he could still hear her bones cracking. Deceased's body was found nude, wrapped in plastic sheeting, on a street in South San Francisco.

The California Supreme Court held it was *not* error *not* to instruct the jury *could* find Livingston an accomplice (aider and abettor) of the murder of Barrett. The evidence did *not* support an inference that Tina Livingston was an aider and abettor:

> An accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." [Citations.] In order to be an accomplice, the witness must be chargeable with the crime as a principal ([Penal Code] § 31) and not merely as an

> accessory after the fact ([Penal Code] §§ 32, 33). [Citations.] An aider and abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator *and shares the perpetrator's criminal purpose.* It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose. [Citations.]
>
> Accomplice status is a question of fact for the jury unless the evidence permits only a single inference ... The evidence does not support an inference of accomplice liability on Livingston's part. [53 Cal.3d 1195, 1227; emphasis added.]

In *Sully,* at the perpetrator's request, the alleged aider and abettor drives the victim to the perpetrators. In *Sully* the alleged aider and abettor then waits. In *Sully* the alleged aider and abettor observes the victim being knifed to death. We respectfully submit if the evidence in *Sully* did not support an inference that Tina Livingston aided and abetted the murder, *a fortiori* the evidence presented to the grand jury in the case at bar does not support an inference that defendant aided and abetted a violation of Insurance Code § 1871.4. See also *Pinell v. Superior Court* (1965) 232 Cal.App.2d 284.

The defense respectfully submits, under the cases cited, the prosecution did not establish defendant was an aider and abetter. As stated, the prosecution offered no evidence defendant himself presented a statement in support of a claim for workers' compensation. Therefore the prosecution failed to establish defendant actually violated or aided and abetted a violation of Insurance Code § 1871.4. But, as stated, since the prosecution offered no direct evidence, such as wiretaps, that defendant agreed to violate Insurance Code § 1871.4, the *only* way the prosecution could establish defendant agreed to violate Insurance Code § 1871.4 was to show he violated or aided and abetted a violation of Insurance Code § 1871.4. Since the prosecution failed to establish defendant violated or aided and abetted a violation of Insurance Code § 1871.4, the prosecution failed to establish defendant agreed to violate Insurance Code § 1871.4. But to prove defendant conspired to violate Insurance Code § 1871.4, the prosecution had to prove at least circumstantially that defendant agreed to violate Insurance Code § 1871.4. The prosecution failed to prove defendant agreed to violate Insurance Code § 1871.4, therefore the prosecution failed to establish defendant conspired to violate Insurance Code § 1871.4.

3. THE PROSECUTION FAILED TO PROVE DEFENDANT CONSPIRED TO COMMIT INSURANCE FRAUD AS ALLEGED IN COUNT 1 OF THE INDICTMENT.

In Count 1 defendant is charged with conspiring on and between December 8, 1987, and November 31, 1995, to commit the crime of insurance fraud in violation of Insurance Code §§ 556, 1871.1 and 1871.4. As shown the statute of limitations bars prosecution of defendant for violations of Insurance Code §§ 556 and 1871.1, and the prosecution failed to prove defendant conspired to violate Insurance Code § 1871.4. But as will be seen, apart from the statute of limitations issue, the prosecution *also* failed to prove defendant conspired to violate Insurance Code §§ 556 and 1871.1. So the prosecution argument that it is not barred by the statute of limitations from prosecuting defendant for conspiracy to violate Insurance Code §§ 556 and 1871.1 is irrelevant. The prosecution failed to establish defendant conspired to violate Insurance Code §556, § 1871.1 *or* § 1871.4. The prosecution failed to establish defendant conspired to violate *any* section of Insurance Code.

The prosecution had the grand jury instructed Insurance Code §§ 556 and 1871.1 proscribed knowingly with specific intent to defraud causing to be presented a false claim for the payment of a loss under a contract of insurance.[17] As stated Insurance Code

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17. Insofar as "Insurance Code § 556/1871.1(a)" is applicable, the prosecution had the grand jury instructed:

> Every person who, with specific intent to defraud, knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss, including payment of a loss under a contract of insurance, is in violation of Section 556/1871.1(a) of the Insurance Code, a crime. In order to prove such crime, each of the following elements must be proved:
>
> (1) That a person knowingly presented any false or fraudulent claim for the payment of a loss, including payment of a loss under a contract of insurance; or;
>
> (2) That a person knowingly prepared, made or signed a writing with the specific intent to present, use or allow to be presented or used in support of any false or fraudulent claim for the payment of a loss under a contract of insurance; or,
>
> (3) That a person knowingly assisted, abetted, solicited or conspired with another who knowingly presented any false or fraudulent claim for the payment of a loss, including payment of a loss under a contract of insurance, or another who knowingly prepared, made or subscribed any writing with intent to present or use it or to allow it to be presented in support of any claim; and,

(continued...)

§ 556 was the law through December 31, 1989. Insurance Code § 1871.1 was the law January 1, 1990, through December 31, 1992. Insurance Code § 1871.4 has been the law since January 1, 1992.

This all means it was important for the prosecution to establish dates. The prosecution had to prove that through December 31, 1991, the object of the alleged conspiracy was presenting a fraudulent claim for the payment of a loss; the prosecution had to prove that during 1992 the object of the alleged conspiracy was presenting a fraudulent *either* claim for the payment of a loss *or* statement in support of a claim for workers' compensation; or the prosecution had to prove that on or after January 1, 1993, the object of the alleged conspiracy was presenting a fraudulent statement in support of a claim for workers' compensation.

The prosecution offered no *direct* evidence defendant agreed with anybody to violate any section of Insurance Code; thus the prosecution *must* argue the alleged agreement by defendant to commit insurance fraud was proved by circumstantial evidence. The only possible circumstantial evidence in the case at bar would be evidence defendant actually committed, or aided and abetted the commission of, insurance fraud. Therefore if the prosecution failed to prove defendant at least aided and abetted the commission of insurance fraud, the court can not infer defendant agreed to commit insurance fraud. And if the court can not infer defendant agreed to commit insurance fraud, the court cannot sustain a charge defendant conspired to commit insurance fraud.

The prosecution is not expected to argue it established defendant himself presented a claim for the payment of a loss or statement in support of a claim for workers' compensation. The prosecution will argue defendant aided and abetted another who presented a claim for the payment of a loss or statement in support of a claim for workers' compensation. But to establish defendant was an aider and abetter, the prosecution had to show the other who presented a claim or statement had the intent to defraud, and that intent to defraud was shared by defendant. The defense respectfully submits the prosecution did not establish defendant had the intent to defraud.

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17. (...continued)
(4) Such person acted with the specific intent to defraud. (RT 974)

The evidence showed defendant was a consultant to PriMedex Corporation. As a consultant to PriMedex Corporation he had no control over medical protocols in the Gardner corporation clinics. He did not control the professional activities of the medical corporations or the physicians they employed. He had nothing to do with the establishment of doctors' bonuses. He had nothing to do with trigger point injections. He never ordered diagnostic blood tests and had no control over blood test work orders, and there is no evidence blood work was billed but not done. Defendant had no control over patients' back care. There is no evidence an insurance company was billed for back care instructions to a patient where the patient was not provided the back care instructions. Defendant had no control over disability ratings. He had no control over Super Bill changes. He had no control over medical-legal reports. He never ordered imaging and had no control over imaging. He had no control over forming Crown Imaging Associates Medical Group, Inc., as a separate billing entity. There is no evidence defendant or anyone made a claim for MRIs, CAT scans or scans of any kind that were not in fact provided.

To prove he was an aider and abettor the prosecution had to establish defendant shared a perpetrator's criminal intent. As shown, the courts have held evidence establishing far more involvement than defendant's in the case at bar insufficient to permit an inference of aiding and abetting.

Even by circumstantial evidence the prosecution never proved the where or when of the charge that defendant conspired to violate the Insurance Code. The prosecution failed to prove defendant committed insurance fraud as an aider and abettor, and offered no evidence defendant himself presented a claim for the payment of a loss or statement in support of a claim for workers' compensation. Therefore the prosecution failed to establish defendant actually committed, or aided and abetted the commission of, any kind of insurance fraud. But since the prosecution offered no direct evidence that defendant agreed to commit insurance fraud, the only way the prosecution could establish defendant agreed to commit insurance fraud was to show he committed or aided and abetted the commission of insurance fraud. Since the prosecution failed to establish defendant committed or aided and abetted the commission of insurance fraud, the prosecution failed to establish defendant agreed to commit insurance fraud. But to prove defendant conspired to commit insurance fraud, the prosecution had to prove at least circumstantially that defendant agreed to commit insurance fraud.

The prosecution failed to prove defendant agreed to commit insurance fraud, therefore the prosecution failed to establish defendant conspired to commit insurance fraud—*any kind* of insurance fraud. The prosecution failed to establish defendant conspired to violate Insurance Code §556, § 1871.1 *or* § 1871.4.

4. THE PROSECUTION FAILED TO PROVE DEFENDANT CONSPIRED TO DEFRAUD A PERSON OF MONEY BY A MEANS IN ITSELF CRIMINAL OR FALSE PRETENSES IN VIOLATION OF PENAL CODE § 182(A)(4) AS ALLEGED IN COUNT 1 OF THE INDICTMENT.

Defendant is also charged in Count 1 with violating Penal Code § 182(a)(4) which makes it a crime:

> If two or more persons conspire [t]o cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.[18]

The grand jury was instructed to indict defendant for a violation of Penal Code § 182(a)(4) it had to find he had the specific intent to defraud.[19]

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18. The statute provides, "When they conspire to do an act described in paragraph (4), they shall be punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year, or by a fine not exceeding ten thousand dollars ($10,000), or both."

19. The prosecution had the grand jury instructed:

> Every person who conspires with another person or persons, obtains money or property by false pretenses or by false promises with fraudulent intent not to perform such promises is in violation of section 182(a)(4) of the Penal Code, a crime.
>
> In order to prove the crime of obtaining money or property by false pretenses, each of the following elements must be proved:
>
> (1) A person made or caused to be made to another person, by word or conduct, either a promise without intent to perform it or a false pretense or representation of an existing or past fact known to such person to be false or made recklessly and without information which would justify a reasonable belief in its truth;
>
> (2) Such person made the pretense, representation or promise with specific intent to defraud;

(continued...)

To establish a violation of Penal Code § 182(a)(4) the prosecution had to prove defendant on or after December 8, 1987, specifically intended to agree and did agree to defraud a person of money by a means in itself criminal or obtain money by false pretenses. As shown the alleged agreement can be inferred, but whether inferred from proved circumstances, or proved directly without the need for inference, the prosecution had to prove an agreement. Since the prosecution offered no direct evidence defendant specifically intended to and did agree to defraud a person of money by a means in itself criminal or false pretenses, the prosecution must argue it proved it by circumstantial evidence. This, the defense respectfully submits, the prosecution did not do.

Proving a person defrauded another of money by a means in itself criminal or obtained money by false pretenses, and therefore circumstantially conspired to do the same, requires more evidence than proving a person fraudulently presented a claim for the payment of a loss or statement in support of a claim for workers' compensation.

While presentment of a claim or statement may show a violation of the Insurance Code, presentment of a claim does not establish a violation of Penal Code § 182(a)(4). A *claim* is not a false pretense or representation of a past known false fact as long as the claimant did what it or he claims it or he did. A claim—or bill or invoice—is not a fact; a claim is a claim. Absent a specific statute limiting the amount, a corporation or individual can *claim* whatever it or he wants.

In the case at bar no statute limited the amount the medical corporations could claim. The official medical fee schedule mandated by the Labor Code for workers compensation claims was not revised from July 1, 1989, until January 1, 1994, and only used as a guideline. As long as the medical corporations did what they said they did, the claim was not a false pretense or a representation of a past known false fact. And under Penal Code § 182(a)(4) it is immaterial on whom the claim is made. The corporation might make the claim directly to the patient, to the employer who is responsible by operation of law, or to the employer's carrier responsible by contract

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19. (...continued)

(3) The pretense, representation or promise was believed and relied upon by the other person and was material in inducing him or her to part with his or her money or property even though the false pretense, representation or promise was not the sole cause; and,

(4) The theft was accomplished in that the other person parted with his or her money or property intending to transfer ownership thereof. (RT 978-979)

with the employer. And under Penal Code § 182(a)(4) it is immaterial whether the recipient of the services or other entity would pay the claim, and it is immaterial whether an administrative or *any* judge would side with the entity that refused to pay the claim. Under Penal Code § 182(a)(4) a person is not cheated and defrauded simply by receiving a claim.

As shown the prosecution failed to establish defendant fraudulently presented a claim for the payment of a loss or statement in support of a claim for workers' compensation. As a consultant to PriMedex Corporation he had no control over medical protocols in the clinics, doctors' bonuses, trigger point injections, diagnostic blood tests, patients' back care, disability ratings, Super Bill changes, medical-legal reports or claims for imaging. That defendant was in the company of Gardner or Punturere does not prove defendant was a member of the alleged conspiracy; that defendant did something that furthered the alleged conspiracy is insufficient in itself to prove defendant was a member of the alleged conspiracy. A failure of proof that defendant fraudulently presented a claim for the payment of a loss or statement in support of a claim for workers' compensation *a fortiori* constitutes a failure of proof that defendant defrauded another of money by a means in itself criminal or obtained money by false pretenses.

Even by circumstantial evidence the prosecution never proved the where or when of the charge that defendant violated Penal Code § 182(a)(4). When on or after December 8, 1987, and presumably before defendant resigned in November 1993, did he specifically *intend to agree* to defraud a person of money by a means in itself criminal or false pretenses? When can the court infer this happened? When did defendant *intend to defraud* a person of money by a means in itself criminal or false pretenses? When did defendant *agree to defraud* a person of money by a means in itself criminal or false pretenses? When was the alleged overt act committed? Was defendant already a conspirator? If the alleged overt act was committed before defendant became a conspirator, it does not count as the overt act needed to establish defendant is guilty of conspiracy. Where on or after December 8, 1987, did defendant specifically intend to agree to defraud a person of money by a means in itself criminal or false pretenses? Where can the court infer this happened? Where did defendant intend to defraud a person of money by a means in itself criminal or by false pretenses? Where did defendant agree

to defraud a person of money by a means in itself criminal or false pretenses? Where was the alleged overt act committed?

The prosecution failed to prove defendant defrauded a person of money by a means in itself criminal or obtain money by false pretenses himself or as an aider and abettor. Since the prosecution failed to establish defendant defrauded or aided and abetted defrauding a person of money by a means in itself criminal or false pretenses, the prosecution failed to enable an inference that defendant *agreed* to defraud a person of money by a means in itself criminal or false pretenses. But to prove defendant *conspired* to defraud a person of money by a means in itself criminal or false pretenses, the prosecution had to prove at least circumstantially that defendant agreed to defraud a person of money by a means in itself criminal or false pretenses. The prosecution failed to prove defendant agreed to defraud a person of money by a means in itself criminal or false pretenses, therefore the prosecution failed to establish defendant conspired to defraud a person of money by a means in itself criminal or by false pretenses: the prosecution failed to prove defendant conspired to violate Penal Code § 182(a)(4).

5. THE PROSECUTION FAILED TO PROVE DEFENDANT COMMITTED SECURITIES FRAUD IN VIOLATION OF CORPORATIONS CODE § 25541 AS ALLEGED IN COUNT 2 OF THE INDICTMENT.

In Count 2 defendant is charged with violating Corporations Code § 25541 between December 8, 1987, and January 21, 1993. December 8, 1987, Corporations Code § 25541 was a wobbler providing a $10,000 file, county jail or state prison for

> any person who willfully employs, directly or indirectly, any device, scheme, or artifice to defraud in connection with the offer, purchase, or sale of any security or willfully engages, directly or indirectly, in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the offer, purchase, or sale of any security.

Corporations Code § 25541 was amended in 1988 and again 1993 to increase the penalty; Corporations Code § 25541 is no longer a wobbler.[20] The grand jury was instructed to indict defendant for a violation of Corporations Code § 25541 it had to find defendant had the specific intent to defraud.[21]

As will be seen the prosecution did not establish defendant offered or sold a security with the specific intent to defraud. Also it will be seen the prosecution did not establish defendant willfully engaged directly or indirectly in an act, practice or course of business which operated as a fraud or deceit upon a person in connection with the offer or sale of a security with the specific intent to defraud.

The defense can foresee what the prosecution will argue to support its claim that defendant committed securities fraud based on questions asked witnesses, opening statements and closing arguments before the grand jury, and subsequent comments by counsel in and out of court.

The defense expects the prosecution will argue it established defendant engaged in an act or practice which operated as a fraud in connection with the offer of a security

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20. The authorized state prison sentence is now two, three, or five years, and the maximum fine is $10,000,000.

21. Any person who willfully employed, directly or indirectly, any device, scheme or artifice to defraud in connection with the offer, purchase or sale of any security, or willfully engages, directly or indirectly, in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the offer, purchase or sale of any security, is guilty of violation of Corporations Code Section 25541. In order to indict a target for the crime of securities fraud, you must find the following:
(1) That the target offered, purchased or sold a security;
(2) That the target willfully employed, directly or indirectly, a device, scheme or artifice to defraud in connection with the offer, purchase or sale or willfully engaged directly or indirectly in an act, practice or course of business which operated as a fraud or deceit upon any person; and
(3) The target had specific intent to defraud.
The word "security" includes the stock of a corporation. An intent to defraud is an intent to deceive another person for the purpose of gaining some material advantage over that person or to induce that person to part with property or to alter that person's position to his or her injury or risk and to accomplish that by some false statement, false representations of fact, wrongful concealment or suppression of proof or by any other artifice or act designed to deceive. (RT 984)

mainly by showing defendant 1) between December 8, 1987, and January 21, 1993, conspired to violate Insurance Code §556, Insurance Code § 1871.1, Insurance Code § 1871.4, or defraud a person of money by a means in itself criminal or by false pretenses in violation of Penal Code § 182(a)(4), and the conspiracy operated as securities fraud; and 2) is criminally responsible for false statements and material omissions in the prospectus—in particular the *statement* at no time did PriMedex Corporation pay any person to make an illegal referral of patients, and the *omission* defendant received $1,500,000 in finder fees in connection with the purchase by CCC Franchising Corporation of the assets of PriMedex Corporation.

The defense has shown the prosecution failed to establish defendant conspired to violate Insurance Code §556, Insurance Code § 1871.1, Insurance Code § 1871.4, or defraud a person of money by a means in itself criminal or by false pretenses in violation of Penal Code § 182(a)(4). Now the defense will show the prosecution arguments that defendant is criminally responsible for false statements and material omissions in the prospectus are also void of merit.

Defendant Had No Control over Referrals from Attorneys

The prospectus stated it was the position of PriMedex Health Systems, Inc., management that at no time did either PriMedex Corporation or the medical corporations

pay any person or entity to make an illegal referral of patients in violation of California law.[22]

Sandra Joy Richlin testified she worked for PriMedex Corporation from August 1987 to July 1993. (RT 345) Gardner was her boss. (RT 345) The deputy district attorney asked Richlin:

> Q. What did you want the attorneys to do?
> A. To send their patients to our facility for treatment. (RT 346)
> ...
> Q For a certain number of patients that were referred to the clinic, the people in your department would get a $50 bonus; correct?
> A. Correct.
> Q. Per patient?
> A. Correct.
> Q. Then if they were able to get a larger volume of patients over a certain number in a particular month, did they get more than $50?
> A. Yes.
> Q. How did that work?
> A. I don't recall, it's been so long. It was—for that it was probably 65 or 70. There was an elevated dollar amount per number of referrals.
> Q. So for the first—I'm using this as a hypothetical since you don't appear to recall the exact numbers—but let's say for the first 100 patients that they brought into the clinic that month they would get $50 per patients, and then for the next 100 patients they get $75 per patient?
> A. Correct.
> Q. Were you, too, similarly compensated with a base salary then a graduated bonus structure per patient?
> A. Yes.

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22. It is the position of management that at no time did either PriMedex [Corporation] or the medical corporations pay any person or entity to make an illegal referral of patients in violation of California law. Payments to Medical Media were for advertising services previously provided by Medical Media.
...
The management and counsel of Medical Media had previously assured PriMedex [Corporation] and the medical corporations that Medical Media's operations were conducted in accordance with California law and further advised that Medical Media's attorneys had received a letter from Staff Counsel to the State of California, Department of Consumer Affairs in January, 1991, which confirmed that Medical Media's indicated method of operation is not violative of the "anti-referral" prohibitions of California law. (People's Exhibit 16J, pages 13, 41)

Q. Who authorized these bonus payments? Did that come from you or somebody else?
A. No. Dr. David Gardner. (RT 348)

Gardner approved an $8,305 check received by Richlin. (RT 352) Defendant did *not* have authority to raise or lower Richlin's salary. (RT 362)

Schaffer testified:

A. There were attorney payment reports and there were attorney new cases reports. That gave us a breakdown by attorney of how many new cases they had referred to us during that time period.
Q. And who would get copies of these reports?
A. Myself, I kept a copy, Elizabeth Directo, Dr. Gardner and Mr. Goldblum as well as the finance department.
Q. Who is your supervisor throughout your years there?
A. Elizabeth Directo. (RT 386)
...
Q. What types of concerns did Dr. Gardner have concerning the attorney reports?
A. Not that there were any concerns necessarily other than wanting to verify that we had received payment from attorneys either on the workers' comp or personal injury cases that had been negotiated by the collectors that worked there, based on promises that were made, promises to pay.
Q. Were those questions to you from Dr. Gardner concerning cases in general or attorneys in general or what?
A. It was nonspecific, it was more generalized. (RT 388)
...
Q. Did you ever have any conversations with Mr. Goldblum concerning the information in these [attorney] reports?
A. Basically the same types of conversations that I had with Dr. Gardner.
Q. How frequently would you have these discussions?
A. Generally each month when I delivered the reports Mr. Goldblum, he would want to verify everything was entered and I had checked with any open batches. It was not every month that they questioned the reports, and it was more so Mr. Goldblum that would ask me about them. Particularly about the Crown Imaging, which is a separate clinic number, to make sure—they did all of their own data entering, so he wanted to make sure I would check on his work, also.
Q. Did you?
A. Yes.
Q. Was their work accurate as far as you could tell?
A. Yes, it was. (RT 388-389)

Shelly Bowman testified she recovered Attorney Blue Books for 1988 (People's Exhibit 5C1) and 1991 (People's Exhibit 5C2) pursuant to a search warrant of 3641 South La Brea Boulevard and 3711 South La Brea Boulevard in December 1992. (RT 908-909, 945)

People's Exhibit 5C1 consists of four computer runs dated January 31, 1988; February 29, 1988; November 30, 1988; and December 31, 1988. The title of all the runs is "Attorney Financial Summary." The records appear to be sorted alphabetically by "Attorney," then by "Name," which may be patient name. The column on the far right is "Balance" and appears to contain dollar amounts. Shown People's Exhibit 5C1 Mroch testified, "This is just a summary of the patient and the dollar amounts billed. (RT 182)

People's Exhibit 5C2 consists of monthly computer runs for July 1991 through December 1991, and February 1992 through October 1992. The title of all the runs is "Attorney Payments Summary." The records appear to be sorted alphabetically by "Attorney," then by "Name," which may be patient name. The column on the far right is "Payments" and appears to contain dollar amounts.

Mroch was shown People's Exhibit 5C1. He recognized it to be "an attorney financial summary." (RT 78) People's Exhibit 5C1 shows "what dollar revenue was generated by a particular attorney on a particular case." (RT 78) Mroch testified at page 153 People's Exhibit 5C1 showed a balance owed Robert Hildago of $835,316.54.[23] (RT 183)

Neither Mroch nor any other witness testified about People's Exhibit 5C2.

When asked to whom those reports would be *distributed,* Mroch replied Gardner. (RT 79) Later in his testimony Mroch testified Gardner and defendant got *copies* of the Attorney Blue Book. (RT 182) The deputy district attorney asked Mroch:

> Q. When either of those individuals got the Blue Book, would there be questions directed to you concerning the information from that record?
> A. Yes. There were concerns about the number of procedures of—that a particular thing wasn't high enough or the patient's account was correct or this attorney wasn't correct or something of that nature.

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23. Robert Hidalgo is listed an the attorney on page 153 of December 31, 1988, run. The balance showed for Hidalgo (on page 159) is $85,316.54—not $835,316.54.

Q. Who would ask you those questions?
A. Generally those came from Dr. Gardner.
Q. Would Mr. Goldblum ever ask you those questions?
A. Yes, I'm sure he has, but as I indicated, most of the time it was Dr. Gardner. (RT 182)

The defense made the prosecution aware of evidence showing or reasonably tending to show defendant had no control over referrals from attorneys. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Carol Stimson, a key assistant in PriMedex Corporation's Public Relations and Sales Department, would have testified one of her department's functions was to serve as PriMedex Corporation's marketing representative and liaison to attorneys who represented injured workers making claims for workers' compensation benefits, called "applicants' attorneys." It was her department's objective to provide the applicants' attorneys with accurate and truthful information concerning the quality and costs of the medical corporations' evaluation and treatment services, as well as to help keep them abreast of important medical and scientific developments in the field of industrial and occupational medicine. In turn, the applicants' attorneys were a valuable source of information and feedback for the medical corporations on evolving legal doctrines and government regulations in the workers' compensation field. She along with Sobol and other PriMedex Corporation personnel were responsible for organizing and publicizing periodic industrial medicine seminars which were sponsored by PriMedex Corporation. She helped arrange for guest speakers which frequently included physicians, attorneys, insurance industry representatives and government regulators to address the attendees about medical and legal developments and other topics of interest in the workers' compensation field. Invitees to the seminars included physicians and attorneys who represented the insurance industry as well as those who represented injured applicants. The purpose of these seminars was to facilitate intellectual exchange and dialogue, and to foster greater understanding and cooperation, among otherwise often contentious parties. Defendant did not attend any of the seminars nor have any input or play any role in setting up the seminars or contacting the invitees.

On occasion, some of the applicants' attorneys who had been contacted by the PriMedex Corporation's Public Relations and Sales department or who had attended the

seminars it sponsored referred patients to the medical corporation. Defendant did not authorize Stimson or any of her department's employees to pay, or offer to pay, any compensation, gift or other consideration to attorneys or anyone else in exchange for referring a patient to the medical corporations. (Defense Exhibit A, page 39-40)

Stimson would have further testified other than media advertising through Injury Hotline and later Injury Central, the only meaningful source of patient referrals to the medical corporations were the applicants' attorneys. All attorney-referred patients were screened and processed initially by PriMedex Corporation Public Relations and Sales Department personnel. Only PriMedex Corporation Public Relations and Sales Department personnel were authorized to communicate directly and establish professional liaisons with the applicants' attorneys. Defendant did not communicate or interact with applicants' attorneys. Defendant did not control nor did he have decision-making authority over the operations and the internal policies and procedures of the Public Relations and Sales Department. Specifically, executive decisions on the financial budget of the Public Relations and Sales Department were made by PriMedex Corporation management personnel. Defendant did not have a decision-making role in these matters. (Defense Exhibit A, page 41)

Attorney Michael Tichon was an independent expert in the field of health care law. He had conducted extensive research into state and federal anti-medical referral laws. He was qualified by education, background and experience to testify that the anti-medical-referral laws do not prohibit medical providers or their management companies (such as the medical corporations and PriMedex Corporation) from employing marketing representatives (such as Injury Hotline) to disseminate informational data about the quality and costs of their medical services. Tichon would have testified such activity falls within the scope of constitutionally protected commercial speech. Tichon's testimony would have dealt with commercial speech, or speech made for the purpose of facilitating income-generating business activities. It is protected under the free speech clause of the First Amendment. *Central Hudson Gas & Elec. Corporation v. Public Serv. Comms'n,* 447 U.S. 657 (1980); *State Bd. of Pharmacy v. Virginia Citizens Consumers Counsel, Inc.,* 425 U.S. 748 (1976).

Tichon would have pointed out the First Amendment also protects in-person marketing (such as Injury Central) as a form of commercial speech. Thus, a flat prohibition of in-person marketing is not permitted absent a showing that the conduct in question is inherently prone to abuse. *Project 80's Inc. v. City of Pocatelo,* 942 F.2d 635, 638 (9th Cir. 1991); *Cf. National Funeral Servs. v. Rockefeller,* 870 F.2d 136, 142 (4th Cir. 1989).

According to Tichon, PriMedex Corporation's employment of marketing representatives to disseminate information regarding the quality and costs of the medical corporations' medical services did not violate any governing anti-medical referral laws, including Business and Professions Code § 650 which makes it illegal for a licensed medical practitioner to offer consideration as compensation or inducement for "referring" a patient to any person. As construed by the California Attorney General, the term "referring" used in Business and Professions Code § 650 means "the process whereby a third party independent entity who initially has contact with a person in need of health care first selects a professional to render the same and then in turn places the prospective patient in contact with that professional for the receipt of treatment." 65 Ops. Atty. Gen 252, 254 (April 23, 1982). Business and Professions Code § 650 was enacted purportedly to "ensure that referrals would not be induced by considerations other than the best interest of the patient"—i.e., "tainted" by the receipt of a fee. *Id*. According to Tichon, for reasons including those discussed below, PriMedex Corporation's employment of marketing representatives to disseminate information about the quality and costs of the medical corporations' medical services did not violate Business and Professions Code § 650 even under the Attorney General's interpretation of the law. PriMedex Corporation's marketing representatives were the exclusive agents of the medical corporations, not a "third party independent entity." (*Compare* 77 Ops. Atty. Gen. 143 (June 30, 1994) stating Business and Professions Code § 650 prohibits operation of podiatry referral service for profit which directs patients to subscribing doctors). By strictly providing attorneys with information about the quality and cost of the services of the medical corporations, PriMedex Corporation's marketing representative did not "refer" patients because the representative was not in a position to decide for prospective patients whether they would ultimately seek the services of the

medical corporations. PriMedex Corporation's marketing representatives provided the attorneys strictly with information regarding the quality and costs of the services of the medical corporations. This enabled the attorneys to make a better informed decision about whether to refer patients to the medical corporations based on considerations of quality medical care and reasonable cost. A referral decision based on these legitimate factors was not "tainted" by the lawyer's expectation for payment.

Tichon would have testified that under then recently enacted Penal Code § 549, it was illegal for any person to "solicit, accept, or refer" any business to or from another with knowledge that the person for or from whom the referral was made intended to file a fraudulent claim for insurance benefits in violation of Penal Code § 550 or Insurance Code § 1871.4. The attorney would have testified that by making it a crime to solicit business where there might be fraud in the underlying insurance claim, and not banning in-person solicitation outright, the legislature strongly indicated that solicitation *is* lawful so long as the underlying insurance claims are not fraudulent.

Tichon would also have testified Business and Professions Code § 17500.1 prohibits any trade association, professional organization, or state agency from enacting any rule to ban advertising by any professional where the advertising does not violate Business and Professions Code § 17500 or any other provision of California law. Section 17500 prohibits false or misleading professional advertising. According to Tichon, the strong implication of Business and Professions Code § 17500.1 is that advertising by medical providers, if truthful, is generally legal. Therefore PriMedex Corporation's employment of marketing representatives to advertise the quality and costs of the medical corporations' medical services was lawful so long as no false or misleading statements were made. (Defense Exhibit F, page 39)

Tichon had conducted extensive legal research on the applicable California and federal anti-medical referral laws. (Defense Exhibit A, page 40) He had advised major California medical providers regarding the applicability and meaning of anti-medical referral laws. He had concluded based on his legal knowledge and experience a medical provider's employment of marketing representatives to disseminate truthful information about the quality and costs of the physician's services did not in and of itself constitute an unlawful medical referral under governing California law because the marketing

representatives are merely providing information about, not referring patients to, particular physicians. This is true even if the marketing representatives' efforts or contacts resulted in a patient being referred or coming to the medical corporations for examination or treatment. The valuable information disseminated by marketing representatives about the quality and costs of a physician's services empowers the potential patient to make an intelligent choice of which doctor he will see, and to this extent, the marketing representatives are engaged in free speech activity that is protected under the California and United States Constitutions. (Defense Exhibit A, page 40-41)

Finally, Durwin Corrales would have testified and provided evidence to corroborate defendant's position that defendant had no reason to believe PriMedex Corporation compiled statistical data for the purpose of paying attorneys for patient referrals, consistent with Corrales's November 1995 testimony before a grand jury panel as well as with statements he made during his January 24, 1994, district attorney interview. Corrales previously testified he was responsible for compiling the patient statistical reports. He consistently maintained the numbers were kept just to keep track of the patients, to see where the payments on medical liens were coming from. Corrales further explained that the reports did not contain billing or collection information regarding the profitability of each patient's case. Corrales would have testified and elaborated upon the underlying facts of his prior testimony when asked specific relevant questions. Corrales testified that he would give the statistical reports to Gardner or Punturere so that Gardner or Punturere could know what attorneys were sending cases to them. Significantly, Corrales never suggested defendant ordered, received, or reviewed the reports. Upon repeated questioning as to why PriMedex Corporation kept track of the patient referral sources, Corrales responded, "You would have to ask Dr. Gardner that question." Significantly, Corrales never attributed defendant as having such knowledge. Corrales stated during his January 24, 1994, district attorney interview that Punturere was the person in charge of talking with the attorneys and keeping track of the patients being treated. Corrales never suggested that defendant had direct dealings with attorneys nor that he ordered the patient referral sources to be tracked.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

The prosecution failed to establish defendant had control over referrals from attorneys.

Defendant Believed Patients Were Lawfully Referred

Besides the testimony of Durwin Corrales, the defense made the prosecution aware of evidence showing or reasonably tending to show PriMedex Corporation conducted internal investigations that would indicate to defendant the clinics were not engaging in unlawful practices. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Aron would have testified during his tenure with the district attorney's office he served as the supervising investigator for the Major Fraud, Insurance Fraud, Consumer Fraud, and Welfare Fraud Divisions. Since 1991 he had been working as a licensed private investigator and an anti-fraud and security consultant to PriMedex Corporation. (Defense Exhibit A, page 6)

Aron would have testified the medical corporations maintained a separate set of files for rejected workers' compensation cases. These were cases which the medical corporations refused to accept or terminated due to suspicions about potential fraudulent or unlawful conduct. The medical corporations began compiling these rejected case files prior to December 1, 1992, the date on which the prosecution executed its first series of search warrants, and prior to which no one at PriMedex Corporation or the medical corporations had any reason to believe that their conduct was potentially under investigation by the prosecution. Each rejected case file contained a detailed write-up by the managing doctor who documented the circumstances which led to the case rejection or termination. There were up to approximately 200 or more cases in the rejected case files. PriMedex Corporation repeatedly invited the prosecution to access and review the rejected files. However it refused to take possession of the material so it could be made available to the grand jury to help it gain an accurate and complete understanding of an important aspect of the case.

An example of a potentially unlawful and fraudulent case detected and rooted out by medical corporations personnel as documented in the rejected case files was on

October 22, 1992 Former PriMedex Corporation employee Ben Oropeza, acting completely on his own and without any authorization from PriMedex Corporation, offered to refer a personal injury case to attorney Bruce Stuart in return for a fee payable to Oropeza. Upon receiving notice of Oropeza's conduct that day, PriMedex Corporation employees Maria Sabio and Laurie Weinstock immediately conducted a joint investigation and verified the incident with Stuart's office. Oropeza was terminated the same day.

Another example was on April 9, 1993, a man named Mark Vinci, who represented himself as an office administrator working for attorney Jack Silver, visited one of the clinics and offered to refer and transport patients to that clinic. In response to detailed questions posed by clinical personnel, Vinci revealed that in addition to his employment with Silver, he worked independently for various physicians who paid him on a per patient basis for referrals. Upon further questioning, it became clear Vinci was proposing that the clinic pay him money in return for referrals. Clinical personnel immediately informed Vinci that the medical corporations did not and will not pay for patient referrals and terminated their conversation. Four days later, a follow-up investigation was conducted by calling attorney Silver's office, which confirmed that Vinci had not been authorized by Silver to make any patient referrals.

None of the documented cases contained in the rejected case files involved or implicated defendant in any potentially suspicious, unlawful or fraudulent conduct.

Aron conducted periodic undercover operations to test the effectiveness of the fraud detection procedures which were in place at the clinics. Aron would have testified PriMedex Corporation authorized him to conduct these undercover tests before December 1, 1992, the date on which the prosecution executed its first series of PriMedex-related search warrants. Aron was assisted by two retired law enforcement officers—retired Supervising District Attorney Investigator Hal Braveman, and retired Los Angeles County Sheriff's Office Sgt. Leroy Patrick, both of whom were also experienced criminal investigators. The uniformly positive results of these surreptitious tests were documented in Aron's July 31, 1995, investigative report, which was turned over to the prosecution. (Defense Exhibit A, page 7)

Aron would have testified about the cases documented in his July 31, 1995, report. On February 18, 1993, Patrick called Injury Central to seek assistance with his purported work-related injury claim. The next day, an Injury Central field counselor visited Patrick at his home. During this meeting, Patrick asked the field counselor for a business card so that he could refer other patients to Injury Central. The field counselor immediately responded that he had no cards, that Patrick could not refer any patients, and all inquiries should be made directly to the Injury Central 800 number.

On March 15, 1993, Braveman met with the office manager of the medical corporations Pomona clinic to discuss his purported work-related back injury. During this meeting the office manager asked Braveman if he was presently experiencing any back pain, to which Braveman stated *no.* Immediately, the office manager informed Braveman that it would do him no good to see a doctor if he had no pain and then instructed him to call for an appointment only if and when pain returned.

On April 7, 1993, and April 15, 1993, Braveman returned to the Pomona clinic claiming his back pain had resumed. However, when interviewed by the clinical historian and later examined by one of the attending physicians, Braveman told them that he was in fact pain-free. Aron subsequently retrieved Braveman's patient charts from the Pomona clinic which revealed that both the attending physician's and the historian's examination charts accurately reported that the patient was asymptomatic and that no treatment was needed.

Aron would have testified that on June 23, 1993, he turned over Braveman and Patrick's original "medical files" to Melbourne who was then the lead investigator in this case for the district attorney's office.

Aron would have further testified that on July 7, 1993, he conducted a covert surveillance of the Montebello clinic to observe and time the patients who entered and exited the clinic during a randomly selected one-hour span. Aron later checked his observations against the clinic's patient logs and medical files to determine whether the number of patients he saw matched the number of those who signed in, and whether these patients were inside the clinic for a period of time that was consistent with the type of evaluation or treatment procedure indicated on the medical charts as having been administered. According to Aron, all records and time periods were consistent with the

conclusion that the clinic accurately recorded and administered bona-fide evaluative and treatment procedures.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

The prosecution failed to establish defendant had any reason not to believe patients were lawfully referred.

Defendant Was Uninvolved in Any Kickbacks Paid Attorneys

As stated the prosecution offered testimony from Mroch that the purpose of creating Crown Imaging was to increase the percentage of recovery from the insurance carriers because the carriers apparently refused to pay 100 percent of the claims. But, according to Mroch, if the billing entity was not affiliated with PriMedex Corporation, if the billing entity was a third party, instead of paying, say, an average of 87 percent of the claim, the carriers would be likely to pay 90 to even 100 percent of the claim. The implication of Mroch's testimony, although he did not say it, seemed to be if the billing entity was affiliated with Gardner, a Crown Imaging letterhead would be pasted on it.

As shown, so long as the services were provided the patient, the fact that a different billing entity presented the bill to the carrier did not establish defendant conspired to violate Insurance Code §556, Insurance Code § 1871.1, Insurance Code § 1871.4, or defraud a person of money by a means in itself criminal or by false pretenses in violation of Penal Code § 182(a)(4). If the carriers would have paid claims as they were required, pasting different letterheads would have been unnecessary.

Mroch also testified at some point the Crown Imaging business was deleted from the attorney run. (RT 83) Mroch wasn't sure whether Gardner or defendant suggested it. (RT 88) "But I was informed by Mr. Goldblum we needed to make that change to the computer programs to get that desired result."

The deputy district attorney asked Mroch:

Q. What was the effect of the deleting the Crown Imaging bills from the attorneys' run as far as the lawyers were concerned?
A. It would show less revenue generated by that particular attorney.

Q. What significance would that have for Dr. Gardner or Stanley Goldblum?
A. If there were any fee paid back to the attorney, it would be based on the volume of business that he sent us. If the reports would show a reduced dollar volume, then any arrangements would be reduced by deleting the Crown Imaging procedures.
Q. What was the rational for doing this?
A. Well, Crown Imaging bills were something that were generated internally that PriMedex generated and the attorneys had nothing to do with, an ancillary service. The rationale, he sent us a patient and he got reimbursed on whatever basis, based on the dollar volume of normal procedures. We felt anything that we generated ourselves, why should they share in. (RT 89)

Mroch and defendant worked with Health Computer Systems to make the change. Defendant discussed what changes they needed to work with. At that time Mroch was working with the Health Computer Systems. Subsequently, defendant got involved with that also. (RT 84) In September or October 1990 Mroch was fired for embezzling money from the Gardner companies. (RT 76, 171) Fratto identified an Imperial Bank Crown Imaging Associates Medical Group, Inc., signature card with defendant as an authorized signature. (RT 496-497) No title was given beside defendant's name.

The defense made the prosecution aware of evidence showing or reasonably tending to show all claimed diagnostic imaging was performed and justified. Directo would have testified Gardner (alone) decided to form Crown Imaging as a separate billing entity consistent with her statements made during her November 29, 1995, district attorney interview. Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury. But apart from the *Johnson* evidence the prosecution failed to establish defendant was involved in any kickbacks paid attorneys.

The prosecution elicited testimony from Mroch suggesting he had personal knowledge that Gardner had some kind of arrangement to pay a fee back to an attorney based on the volume of business the attorney sent but for some reason Crown Imaging bills for X-rays, MRIs, and CAT scans should not be counted. But the prosecution did not show how Mroch could have known this. At trial the defense respectfully submits the court would have sustained an objection to this testimony until the prosecution established a foundation. How did Mroch know there was an arrangement to pay

kickbacks to lawyers? How did Mroch know what the alleged arrangement was? Considering the establishing X-rays, MRIs, and CAT scans were performed and justified, why should the diagnostic imaging bill *not* be counted in an alleged arrangement to pay a fee back to an attorney based on the total volume of business Gardner sent? The prosecution established no foundation for Mroch's testimony. Did Mroch *see* Gardner hand a cash kickback to a lawyer? Did Gardner *admit* to Mroch he paid the lawyers kickbacks. Did Mroch *himself* pay the lawyers kickbacks?

Over defense objection the defense respectfully submits the court would have required a showing of some personal knowledge or other proper foundation for Mroch's testimony. And *if* Mroch would have been questioned about what he knew of any arrangement to pay attorneys kickbacks, there is no evidence indicating he would have testified *defendant* paid any kickbacks to attorneys. At best the prosecution would have had Mroch testify defendant worked with Health Computer Systems and would implement requested changes. In fact the argument could be made that if defendant suggested the Crown Imaging business be deleted from the attorney run (Mroch was not sure who made the suggestion), if anything this would show an effort by a consultant, if not stop, to at least reduce payments to sleazebag attorneys. The evidence would negate an intent to defraud insurance carriers or stockholders.

Penal Code § 939.6(b) provides "the grand jury shall not receive any evidence except that which would be admissible over objection at the trial of a criminal action." Without some foundational testimony the grand jury should not have received Mroch's testimony implying he had knowledge of some kind of arrangement to pay kickbacks to attorneys because the testimony would have been inadmissible over objection at trial.

Nevertheless, the prosecution may argue, Mroch had testified defendant got copies of the Attorney Blue Book and asked questions, and the Attorney Blue Book showed attorney payments, so this at least shows defendant had knowledge of kickbacks. This argument is incorrect.

It is true Mroch testified defendant got copies of the Attorney Blue Book, and he was sure defendant must have asked questions about patients' accounts (although generally the questions came from Gardner). Defendant was a consultant to PriMedex Corporation and as such he was consulted on the implementation of management

information systems including the formatting and presentation of financial information and the identification and analysis of operating trends.

But Mroch was fired for embezzlement in October 1990. Therefore, of the two marked, the only Attorney Blue Book Mroch identified and could testify about was People's Exhibit 5C1 consisting of 1988 computer runs that showed the patient and the dollar amounts *billed.* Mroch did not and could not identify People's Exhibit 5C2 consisting of 1991 and 1992 computer runs apparently showing *attorney payments* because Mroch was gone in 1991 and 1992. This is why the prosecution did not ask Mroch to identify People's Exhibit 5C2. There was no testimony defendant ever received a copy of or asked questions about the Blue Book showing attorney payments.

The prosecution failed to establish defendant was involved in any attorney kickbacks.

Defendant Had Nothing to do with Deleted Patient Files

It seemed like files would be deleted almost on a daily basis while Skaggs worked at La Brea Medical Clinic as a collector from approximately 1986 to 1988. (RT 125, 132) The deputy district attorney asked Schaffer:

Q. Were there any problems concerning the ability or inability to delete records from the computer?
A. There was an ability to delete records while I was employed there, yes.
Q. What types of records?
A. Any of the transactions entered in the patient's account whether it's charges, payments or write-offs.
Q. Who would have that ability to delete those records?
A. I had that ability, several of the employees within that department, Elizabeth [Directo] and Dr. Gardner. (RT 397-398)

Mroch testified from time to time there were certain patients' files deleted from the computer. (RT 81) When asked if he discussed this with anyone, Mroch replied Gardner. The prosecution offered no evidence deleted files were discussed with defendant. (RT 81)

Q. What did [Gardner] say about that?
A. Well, in effect, it's his business, he could run it the way that he saw fit to do. (RT 82)

Skaggs, the collector, who did not know defendant, testified he was paid for what he brought in. (RT 126) When he noticed patients' files deleted from the computer, he talked to Gardner about it "because, you know, the agreement for incentive program was based on [Gardner] coming to me and saying, 'if you collect this amount, then we will give you this amount as an incentive.'" The deputy district attorney asked Skaggs:

Q. What did he tell you?
A. He told me not to worry about the computer. "You will get paid for what you are collecting on."

Skaggs testified he did, in fact, get paid for what he collected on. (RT 129) Skaggs testified the physical file as well as the record in the computer would be gone. (RT 131)

Defendant had nothing whatsoever to do with deleted patient files.

Defendant Had No Control over Gardner's Mail or Checks

All mail was opened by Gardner. (RT 93) Guido testified she remembered defendant was already there. (RT 201) From 1990 until 1995 Guido was an accounts receivable clerk. (RT 197) She worked at 6167 Bristol Parkway. (RT 200) Guido testified when she got the checks (RT 198) the envelope was sliced open apparently like someone peeked to see what was in there. (RT 199) Gardner wanted to see the checks first. (RT 201) Guido would show the checks to Gardner. (RT 201) Mroch testified the checks from insurance companies would come to him via Gardner. (RT 158) Defendant would ask Guido how much money came in for the day "until they sold it to the public, and then he doesn't asked me anymore." (RT 204) From "like" 1990 until 1992 Guido would advise Gardner and defendant on a daily basis the amount of money received. (RT 201) PriMedex Corporation operations were substantially dependent on Gardner. (People's Exhibit 16J)

Michael Edward Stein who owned a check-cashing store in 1988 through 1990 (RT 140) cashed checks for Gardner (RT 141-146). Yolanda Adams testified Gardner "would call me and say, 'Yolanda, make a check for $9,800,' or Melissa, his secretary, he would tell her if he couldn't get a hold of me. You know, she would come back and say, "make a check." (RT 284) Stan A. Hersh testified he owned Fast Cash Check Cashing, and he cashed checks for Gardner (RT 650-659)

Mroch testified funds requested by Gardner inhibited cash flow. (RT 161)

There was no evidence defendant had control over Gardner's mail or checks.

Defendant Had No Knowledge of Bristol Advertising

Bristol Advertising, Inc., was incorporated August 7, 1988. (People's Exhibit 4J) Mroch testified Bristol Advertising opened a checking account so Gardner would have checks available at his disposal that would not disrupt the business operation of the management company. (RT 97) Mroch testified it was his "understanding" that those checks "were to be used to give to the attorneys. We would classify that as an advertising expenditure." (RT 98)

The prosecution offered no evidence defendant signed any checks drawn on the Bristol Advertising account or that defendant was a signatory on the account. The prosecution failed to establish that defendant even knew of the account and its purpose.

Defendant Was Not Knowingly Involved with Payments to Larry Parker

Mroch testified Larry Parker was an attorney that sent the medical corporations personal injury cases. (RT 103) Mroch was shown 17 checks marked People's Exhibit 6C2 apparently drawn on PriMedex Corporation accounts with Imperial Bank and First Charter Bank. (RT 105) Mroch said he saw defendant's signature on three checks payable to Asher Gould Advertising. Two checks apparently were dated February 4, 1991, and February 14, 1991, after Mroch was fired in September 1990. Mroch said he

saw defendant's signature on Check 4661. There is no Check 4661 with defendant's signature.[24] (RT 105)

Peter Nicholson identified People's Exhibit 6B as cash receipts for Asher Gould Advertising client Parker from 1988 through 1993. (RT 190) The entries in People's Exhibit 6B total $7,604,811.39 starting February 3, 1988, and ending December 3, 1993. Nicholson testified the checks in People's Exhibit 6C2 are in the list of cash receipts for Asher Gould Advertising client Parker. (RT 192-193)

Pursuant to *Johnson* the defense made the prosecution aware of evidence showing or reasonably tending to show defendant had no control over payments to Parker. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

The prosecution had served a search warrant on Asher Gould. The defense requested the prosecution call individuals presently or formerly associated with Asher Gould who had business dealings with PriMedex Corporation. These witnesses would have testified defendant was not involved in any arrangements or conversation which resulted in the payment of any money to Asher Gould on behalf of or for the benefit of any lawyer including Larry Parker. (Defense Exhibit F, page 48) The witnesses would have testified they did not have any conversations with defendant concerning committing or furthering any allegedly criminal act. The witnesses would have testified they did not have any agreements with defendant to commit or further any allegedly criminal act. Defendant was not involved in any allegedly criminal conduct which the witness committed or furthered, if in fact any criminal act took place. Defendant had no knowledge of any allegedly criminal activity which the witness committed or furthered, if in fact any criminal act took place. If defendant may have signed documents or checks relating to Asher Gould, defendant did not participate in nor did he have knowledge of any allegedly criminal act, if in fact any such criminal act was committed.

Directo would have given testimony that corroborated defendant's position that he reasonably believed PriMedex Corporation did not pay any third-parties (including attorneys) consideration or kickbacks in return for their referral of patients to the medical

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24. There is a June 1, 1990, check, # 4664, drawn on PriMedex Corporation's account at Imperial Bank for $15,000 payable to Parker signed by defendant.

corporations. This testimony would have been consistent with statements Directo previously made to Mello and deputy district attorney Kadyk during the December 17, 1991, interview. After being repeatedly asked whether Gardner paid attorneys kickbacks in return for patient referrals, Directo said "I would think, but I don't know. . . That's the thing I don't know." Pressed further as to any potential kickback arrangements between Gardner and attorneys for patient referrals, Directo stated, "I could not prove that. . . that is one thing I cannot prove." Directo told Mello and Kadyk that Gardner held a number of closed door meetings with attorneys who referred patients to the medical corporations. These meetings were held either at Gardner's office or at the attorneys' offices. When asked whether "it was just Doctor Gardner" who met with the attorneys, Directo's response was affirmative. Throughout the entire interview (the transcript is 46 pages) Directo never suggests that defendant had any contacts or meetings with attorneys.

Durwin Corrales would have given testimony that corroborated defendant's position that he reasonably believed PriMedex Corporation did not pay consideration to any third-parties (including attorneys) in return for their referral of patients to the medical corporations. This testimony was consistent with statements Corrales made during his January 28, 1994, interview with the prosecution wherein he said he never saw or heard directly of any kickbacks to the attorneys.

Norman Corrales would have given testimony that corroborated defendant's position that he reasonably believed PriMedex Corporation did not pay consideration to any third parties (including attorneys) in return for their referral of patients to the medical corporations. This testimony would have been consistent with statements Corrales made during his February 1994 interview with the prosecution wherein he said he does not know if attorneys received any kickbacks.

On January 6, 1996, and on other occasions, the prosecution interviewed Springer, Gardner's personal secretary at PriMedex Corporation. Springer would have provided exculpatory testimony to corroborate defendant's position that he reasonably believed PriMedex Corporation did not pay consideration to any third-parties (including attorneys) in return for their referral of patients to the medical corporations. This testimony was consistent with statements Springer made during her interview wherein she said she had

only heard from talk around the office but she had no personal knowledge that Gardner bought patients from attorneys or others.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury. Aware of the evidence, the prosecution did call one witness from Asher Gould, Nicholson, who did not testify defendant was involved with or had knowledge of any criminal activity.

The prosecution offered no evidence defendant signed any checks payable to Parker. The prosecution offered no evidence defendant knew checks he signed payable to Asher Gould Advertising were for Parker.

Defendant Had No Control over Seasonal Gifts and Presents to Attorneys

The deputy district attorney showed Richlin a request for Laker playoff tickets for attorneys marked People's Exhibit 5D1 and asked:

Q. Who approved this document?
A. David Gardner.
Q. How do you know that?
A. Because he okayed everything, he authorized it.
Q. Was that policy?
A. Yes. (RT 349)

Gardner approved theater tickets for attorneys. (RT 353) The deputy district attorney showed Richlin several more check requests dated through July 1992 all approved by Gardner. (RT 356)

Although the prosecution failed to show defendant had any knowledge of or control over gifts and presents to attorneys, the defense nevertheless made the prosecution aware of evidence showing or reasonably tending to show gifts to attorneys were not improper. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Tichon would have testified the anti-medical referral laws, including Business and Professions Code § 650, do not prohibit medical providers from giving seasonal gifts to attorneys as a token of goodwill and appreciation. Specifically, according to Tichon, based on his understanding and analysis of relevant legislative history, Business and

Professions Code § 650 was not intended to prohibit the exchange of holiday gifts between medical practitioners and others. Tichon would have pointed out the Comment to ABA Model Rules of Professional Conduct, Rule 1.8, provides that a lawyer may accept a gift from a client such as a present given at a holiday or as a token of appreciation. Analogously, judges serving the Workers' Compensation Appeals Board were allowed to accept holiday gifts from members of the bar. See Code of Judicial Conduct, Canon 5. It was not until September 1993 when Labor Code § 123.6 was amended that the law was changed to impose stricter restrictions on the receipt of gifts and honoraria by Workers' Compensation Appeals Board judges. Under the new rules gifts to judges must be less than five dollars in value.

Under *Johnson* the prosecution was obligated but failed to present this evidence to the grand jury.

Defendant gave no gifts or presents to attorneys, and had no control over gifts and presents to attorneys.

Defendant Had No Control over Referrals from Injury Hotline

The defense made the prosecution aware of evidence showing or reasonably tending to show defendant was not involved in or consulted about how Injury Hotline callers were referred to physicians including whether the patients were permitted to select a physician from the entire pool. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Linda Wakelin, owner of Medical Media dba Injury Hotline, would have testified PriMedex Corporation began using Medical Media's services before 1988, before the time defendant became a consultant to PriMedex Corporation. After defendant became a consultant he was not involved in or consulted about the production or design of the contents of commercials and advertisements produced or aired by Medical Media. Defendant was not involved in or consulted about Medical Media's practices and policies on how Injury Hotline callers were referred to physicians including specifically whether the patients were permitted to select a physician from the entire pool of doctors who subscribed to Medical Media's services. (Defense Exhibit A, page 25)

Janis Spire, manager of Medical Media, would have testified to the same thing as Wakelin. (Defense Exhibit A, page 25)

The defense requested the prosecution introduce a copy of an open letter written by Gardner within a week or ten days after the prosecution executed its first series of search warrants at the clinics and offices on December 1, 1992, in connection with its investigation into Medical Media. This letter was distributed to all PriMedex Corporation employees and associates including defendant. It stated that, in addition to the Bureau of Consumer Affairs opinion, PriMedex Corporation had obtained legal opinions from two law firms assuring it that the indicated method of operation by Injury Hotline presented no violation of anti-referral laws. (Defense Exhibit A, page 27)

Donald Marks, an experienced, respected and highly competent Los Angeles criminal defense lawyer, would have testified that during 1991 or 1992, when defendant was a consultant to PriMedex Corporation, Marks informed PriMedex Corporation representatives that Medical Media had communicated with the Bureau of Consumer Affairs office about the legality of Medical Media. During these communications, Marks sent various documents, including the types of agreements Medical Media had with its professional clients, such as PriMedex Corporation, to the representatives of the Bureau of Consumer Affairs. The Bureau analyzed the information submitted by Medical Media and, in a written opinion, concluded that its practices did not violate the anti-referral provisions of Business and Professions Code § 650. Marks would have testified that in 1992 he furnished a representative of PriMedex Corporation with a copy of the Bureau of Consumer Affairs opinion at PriMedex Corporation's request.

The prosecution had already been furnished with a copy of the Bureau's opinion. The opinion, dated January 23, 1991, was written by Gregory Gorges, staff counsel at the California Bureau of Consumer Affairs. Gorges would have testified he wrote Medical Media that its operations did not violate Business and Professions Code § 650 so long as patients who called Medical Media for a physician referral were given the entire list of Medical Media's subscribing physicians from which they could select the doctor they desired to see. (Defense Exhibit A, page 28)

Spire would have testified every single patient who contacted Medical Media for a medical referral was provided with the entire list of Medical Media's subscribing

physicians, and that the patients independently selected their physician from this comprehensive list without any suggestion or pressure from Medical Media personnel. Spire would have further testified every patient who ultimately selected a physician from one of the Gardner medical corporations was given the same opportunity to view the entire list of Medical Media's subscribing physicians prior to making their selection. (Defense Exhibit A, page 28-29)

An experienced and high-ranking representative of the Los Angeles district attorney's office had publicly stated that the operation of a medical hotline referral service, such as Injury Hotline and Injury Central, was not in and of itself violative of the anti-medical referral provisions of Business & Professions Code § 650. Edward Feldman, who was the assistant head deputy in charge of the Workers' Compensation Fraud Division, and the immediate supervisor of assistant district attorney Rosenthal and deputy district attorney Karlan, made these statements in a 1992 interview with the *California Workers' Compensation Enquirer,* a professional trade magazine in the workers' compensation field. (Defense Exhibit A, page 38) In this interview Feldman was asked about the legality of on-air advertising and hotline referral services for workers' compensation medical providers to which he responded: "No, that in itself doesn't constitute fraud, at least certainly not under the existing provisions of the [Business and Professions] Code... The advertising *per se,* under existing law, probably is protected and probably is not criminally actionable."

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

Defendant had no control over referrals from Injury Hotline.

Defendant Believed Injury Central Conducted Lawful Advertising

The prospectus stated it would be "improper" to characterize the management agreement entered into between PriMedex Corporation and the medical corporations as creating a business relationship which violated the anti-medical referral laws. (People's Exhibit 16J, page 40) The management agreement provided, among other things, that PriMedex Corporation would operate and fund Injury Central and other marketing

services on the medical corporation's behalf, and in return for these and other administrative non-medical services the medical corporations would pay PriMedex Corporation a management fee based upon a predetermined formula.

The prospectus explained PriMedex Corporation, through its operation and funding of Injury Central, did not violate proscriptions against medical referrals because it acted "as the agent for the [medical corporations] in the advertising and marketing programs and not as an independent party referring patients to the medical corporations." (People's Exhibit 16J, page 40) The prospectus further stated

> even if [PriMedex Corporation] were deemed to be referring patients to the [medical corporations], [PriMedex Corporation] does not believe that any portion of its management fee is being paid for such referrals, but rather constitutes reasonable compensation for the services provided by [PriMedex Corporation] to the [medical corporations] pursuant to the [management agreement]. (People's Exhibit 16J, page 40)

The prospectus also stated:

> The statements of law included in this Prospectus under the caption "Business—Government Regulation—PriMedex and RadNet," insofar as they relate to the laws and applicable regulations of the State of California and of the United States, other than statements predicated on or expressing the Company's belief as to compliance with applicable United States and California law, are included herein in reliance on the authority of Weissburg and Aronson, Inc., as experts in health care law. (People's Exhibit 16J, page 65)

The defense made the prosecution aware of evidence showing or reasonably tending to show Injury Central conducted lawful advertising. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Robert Sevell, an attorney specializing in health care law and regulation from the prominent Los Angeles law firm of Weissburg & Aronson, an expert in health care regulatory law who advised PriMedex Corporation on related matters, would have testified that in February or March 1992 PriMedex Corporation filed for a fictitious business name statement doing business as Injury Central. (Defense Exhibit A, page 35) Sevell would have testified that the formation of Injury Central as a dba of PriMedex

Corporation violated no law or regulation including specifically the provisions of Business & Professions Code § 650 which prohibit certain medical referrals.

After AB2329 was enacted in 1993 (now Labor Code § 5432), Injury Central advertising videotapes were reviewed to maintain compliance with the fraud admonition requirements, i.e. print type, dark background, and time duration on the television screen. The statute regulates all advertisements which solicit persons to file workers' compensation claims or to consult or engage a medical provider or clinic. It does not render such advertisements illegal. The grand jury was requested to have been made aware of the existence of this law and its date of enactment. This information and the legal review process of the advertisements are discussed in Moss's exculpatory evidence submission to the grand jury (Defense Exhibit C)

Sevell and John Hartigan, a partner at the nationally prominent law firm of Morgan, Lewis & Bockius, would each have testified that during 1991 and early 1992 he personally drafted and reviewed the February 11, 1992, Management and Service Agreement. Sevell represented PriMedex Corporation, and Hartigan represented CCC Franchising Corporation, later to become PriMedex Health Systems, Inc.

The agreement provided, among other things, that CCC Franchising Corporation shall operate all advertising, marketing and promotional activities conducted on behalf of the medical corporations, and that such services shall be conducted at the expense of CCC Franchising Corporation. Sevell advised PriMedex Corporation that the agreement, including specifically its provisions regarding the operation and funding of advertising, marketing and promotional activities (which included Injury Central) on behalf of the medical corporations, violated no laws or regulation, including specifically the anti-medical referral provisions of Business & Professions Code § 650.

The agreement, including its provisions regarding the operation and funding of Injury Central and other marketing services on behalf of the medical corporations was similar to and was based on language contained in standard management agreements which were commonly and lawfully entered into between lay "management service organizations" (commonly referred to within the

health care industry as "MSOs") and professional medical groups throughout the entire health care industry involving both workers' compensation and non-workers' compensation medical providers. The management agreement was similar to and based on language contained in standard MSO management agreements, and the legality of these MSO agreements was widely recognized by courts and legal experts throughout the health care industry prior to February, 1992; during the period of time in and around February, 1992; and in May 1996 when Sevell and/or Hartigan would have testified before the grand jury. (Defense Exhibit A, page 37)

Weinstock would have testified that for the duration of Injury Central's operation between March 1992 and September 1993, she and other personnel from the Marketing Department hired and worked with independent producers to produce commercials and advertisements for Injury Central. Defendant did not contribute or give input to the contents or production of commercials and advertisements for Injury Central. She and other personnel from the Marketing Department communicated and conducted negotiations with television and radio stations to place Injury Central commercials and advertisements on the air. Defendant did not participate in these negotiations or discussions. She and other PriMedex Corporation personnel established, modified and enforced policies and guidelines governing the manner in which Injury Central operators and field counselors interviewed and screened patients. Defendant had no involvement in the manner in which Injury Central personnel interviewed or screened potential patients. (Defense Exhibit A, page 35)

Under *Johnson* the prosecution was obligated but failed to present this evidence to the grand jury.

The evidence establishes defendant had no reason to believe the advertising conducted by Injury Central was anything but lawful.

Defendant Was Uninvolved with Referrals to Attorneys

Obviously many patients who would respond to the advertisements of Injury Hotline and Injury Central would not have attorneys. The deputy district attorney showed Schneider People's Exhibit 5E2. People's Exhibit 5E2 is an April 1, 1991, memorandum

from Schneider stating per Richlin they will be directing good cases from Injury Hotline to certain attorneys. Copies of People's Exhibit 5E2 are indicated to Gardner, Punturere, Sobol, Richlin, Durwin Corrales and defendant. The deputy district attorney asked Schneider how he got the names of the attorneys listed in People's Exhibit 5E2:

> A. I don't recall specifically whether it was Dr. Gardner or Dr. Punturere that gave me those names or whether it was Sandy Richlin who give me those names. Actually, it says, "per Sandy Richlin," so it must have been from her. (RT 585)

The deputy district attorney showed Garcia People's Exhibit 5E5, a March 20, 1992, memo from Punturere saying schedule patients referred by Injury Central with listed attorneys. Copies of People's Exhibit 5E5 are indicated to Gardner, Sobol, Richlin, Durwin Corrales and defendant. Garcia testified he marked People's Exhibit 5E5 as coming from 815 West Washington Boulevard (RT 862) apparently Neurological Orthopedic Associates Medical Group in Montebello.

The prosecution only established defendant, who as shown was a consultant, was indicated to received copies of memoranda listing attorneys. There was no evidence defendant was involved with the referral of patients to attorneys, ever referred a patient to an attorney or had any control over the referral of patients to attorneys.

Defendant's Fees Were Lawfully Earned and Disclosed.

The deputy district attorney asked Mroch:

> Q. Was there a figure that you analyzed to come up with a ballpark estimate of what percentage of a bill was typically collected on a workers' compensation case?
> A. Approximately 87, 67, it varied. But on an overall average, I don't know, I think 87 maybe, 85. I'm not really sure of that. (RT 159)
> ...
> Q. But for financial planning purposes you needed to know that type of information—or Dr. Gardner and Mr. Goldblum needed to know that information, didn't they?

A. Yes. We used that on some cash flow projections for subsequent years and we had to have some kind of basis to know what kind of money we would have coming in. (RT 159)

Corrigan testified two clinics—Long Beach and Santa Ana—were added in 1992. (RT 215) The deputy district attorney asked Corrigan when "the corporation" started having cash problems. (RT 220)

A. When Injury Central's advertising expenses got very high and, in addition, when they opened up the two new clinics.
Q. So it would be at the end of [19]92?
A. Yes.
Q. PriMedex started having cash flow problems?
A. Yes. I'm sure when the first loan was but it would have been late 1992 or mid [19]92 from the parent. (RT 221)

Corrigan testified the collection cycle for billing was two to four years. (RT 232) In May 1996 they were still collecting for patients that were pre-1989. (RT 233)

The deputy district attorney asked Mroch why the transition from the cash basis to the accrual basis was needed.

A. Well, it showed some net worth of the company. On a cash basis we didn't have any cash basis. The company wasn't worth anything. On an accrual basis all those receivables that were on the books that were equity in the company and would show a terrific net worth.
Q. And who in the company wanted to show a terrific net worth?
A. Dr. Gardner and Mr. Goldblum. (RT 169)

Mroch testified he knew that because that was the whole basis for the discussion. "Putting together a package to sell the company or to take it public." (RT 169)

Mroch testified he was "kind of aware of" two or three attempts to sell "the company." (RT 162) Mroch sometimes put projections together. (RT 162) The deputy district attorney asked Mroch:

Q. Who were you dealing with at the corporation while you were doing this?
A. For the most part, Dr. Gardner. Later on, of course, Mr. Goldblum. (RT 162)

As stated the prosecution introduced the 65-page Asset Purchase Agreement marked People's Exhibit 16I. The prosecution established the purchaser of the assets, CCC Franchising Acquisition Corporation, represented and warranted to Gardner and PriMedex Corporation

> all negotiations relative to this Agreement have been carried on by it directly *without the intervention of any person who may be entitled to any brokerage or finder's fee or other commission* in respect to this Agreement or the consummation of the transactions contemplated hereby, and Purchaser holds harmless [Gardner and PriMedex Corporation] against any and all claims, losses, liabilities and expenses which may be asserted against or incurred by it as a result purchaser's dealings, arrangements or agreements with any such person. (People's Exhibit 16I page 60; emphasis added)

The prosecution established the owner and seller of the assets, Gardner and PriMedex Corporation, represented and warranted to CCC Franchising Acquisition Corporation

> all negotiations relative to this Agreement have been carried on by it directly *without the intervention of any person who may be entitled to any brokerage or finder's fee or other commission* in respect to this Agreement or the consummation of the transactions contemplated hereby, and [Gardner and PriMedex Corporation], jointly and severally hold harmless Purchaser against any and all claims, losses, liabilities and expenses which may be asserted against or incurred by it as a result purchaser's dealings, arrangements or agreements with any such person. (People's Exhibit 16I page 59; emphasis added)

The prospectus stated a bank loan obtained to fund the cash portion of the purchase of PriMedex Corporation assets was collateralized with approximately $33,000,000 principal amount of United States Government treasury bills pledged under a guaranty by Hartley Bush Financial Corporation wholly owned by the principal shareholder of CCC

Franchising Corporation,[25] Robert E. Brennan. (People's Exhibit 16J, page 9) The prospectus stated that on October 16, 1992, Brennan owned 46 percent of CCC Franchising Corporation stock. (People's Exhibit 16J, page 61)

The deputy district attorney marked as People's Exhibit 34 what is described in People's Exhibit 1 as the articles of incorporation for Due Process Stables, Inc. Exhibit 34 is dated January 10, 1980 and is signed by Martin D. Pollack, the incorporator. Brennan is a director.

Rhoades testified he recovered People's Exhibit 16L4 from defendant's house on June 22, 1994. (RT 850) Exhibit 16L4 is a copy of a $1 million check dated January 6, 1992, payable to defendant, drawn on the Due Process Stables, Inc., account with First Fidelity Bank, N.A., New Jersey. (RT 853)

The deputy district attorney showed Donna Ruth Dunbar, employee of Smith Barney, People's Exhibit 16L4. Dunbar testified it was a check deposited to defendant's Smith Barney account. (RT 529-530) Dunbar recognized People's Exhibit 16L5 as a statement of defendant's Smith Barney account. (RT 530) It showed a deposit of $1 million January 8, 1992. (RT 530) Rhoades testified he recovered People's Exhibit 16L5 from defendant's house on June 22, 1994. (RT 851)

Rhoades testified he recovered People's Exhibit 16L1 from defendant's house on June 22, 1994. (RT 850) Exhibit 16L1 is two handwritten pages including headings that say "FINDER'S FEE SCHEDULE," "92 iNCOME Proj," and "Cash FLOW Jul/25/92—12/30/92." The earliest legible date on People's Exhibit 16L1 is January 31, 1992. It says, "Bal. on 1/31/92 $1,000,000." Bruce Roth Greenwood testified he was a forensic document examiner and took a sample of defendant's handwriting. (RT 819, 820) He testified in his opinion defendant wrote People's Exhibit 16L1. (RT 819-820)

Rhoades testified he recovered People's Exhibit 16L7 from defendant's house on June 22, 1994. (RT 851) At the top of People's Exhibit 16L7 is "Stan Goldblum

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25. For convenience the prospectus refers to CCC Franchising Corporation as PriMedex Health Systems, Inc. CCC Franchising Corporation changed its name November 17, 1992. See *infra.*

Schedule of Fees/Forms 1090 1992." The earliest date on Exhibit 16L7 is January 5, 1992, showing $1,000,000 followed by the comment "Due Process Stables."

Rhoades testified he recovered People's Exhibit 16L6 from defendant's house on June 22, 1994. (RT 851) Exhibit 16L6 is a $500,000 check, number 10, dated April 30, 1992, payable to defendant, drawn on the Dreyfus Worldwide Dollar Money Market Fund, Inc., account with the Bank of New York, White Plains, New York. The check also reads ALAN NOVICH TTEE DTD 3/15/89 FBO ALLISON PACE & KIMBERLY PACE. People's Exhibit 16L6 also includes a May 1, 1992, statement on defendant's letterhead to Alan Novich, Trustee, for services rendered $500,000.

David Ballou testified he was vice president of Dreyfus Service Corporation. (RT 825) The deputy district attorney showed Ballou apparently one page of People's Exhibit 16L6, two pages.

Q. What is that?
A. It is a check drawn against a Dreyfus account.
Q. Whose account?
A. Allen Novich, trustee, dated 3/15/89, to the benefit of Allison Pace and Kimberly Pace.
Q. What type of funds is this check drawn on?
A. It's drawn off a money market fund called a Dryefus Worldwide Dollar Money Market Fund.
Q. What is the account number on that check?
A. Account number is 762-300430691.
Q. Does this check appear to be a money market fund check on a Dreyfus account?
A. Yes, it does. (RT 826)
...
Q. On the back of the check, can you interpret whether or not that check was negotiated?
A. Yes. There are markings on there indicating that it has been paid out. (RT 834)

Ballou identified a Dreyfus Service Corporation monthly statement. (RT 835) Ballou testified:

A. There is an entry on the statement indicating Check No. 10, which matches up on this check number for a $500,000 check written against the account.

Q. Who would that check be credited to?
A. It would be credited to Stanley Goldblum.
Q. The payee on the check?
A. Payee on the check.
Q. Amount of the check?
A. Amount of the check is $500,000. (RT 835)

Bennett testified Allen Novich knows Randolph K. Pace who has affiliations with Brennan owner of First Jersey Corporation. (RT 706) Novich has represented companies Brennan has taken public. (RT 706) Bennett testified:

A. Mr. Pace is an investment banker. He's been in the business for 30 years. He has a relationship with Mr. Novich whom you have asked me about. He's generally known to have relationships with Mr. Brennan which is another name that's been mentioned here today.
Q. You say he's "generally known." What do you mean by that?
A. Well, in the investment banking business, as I guess I described earlier, if a company goes to F. N. Wolf and chooses F. N. Wolf as an underwriter, then they go to other firms, other colleagues to help them distribute these securities. So, for instance, Mr. Brennan for a number of years owned First Jersey Securities, so it would not be unusual for F. N. Wolf, First Jersey Security or Randy Pace to be involved with each other in underwriting or be involved in the investment banking business in distributing securities together. (RT 729)

The latest date is May 5, 1992, showing $500,000 followed by the comment "Allison & Kimberly Pace Trust" on People's Exhibit 16L7 from defendant's house on June 22, 1994. At the top of People's Exhibit 16L7 is "Stan Goldblum Schedule of Fees/Forms 1090 1992."

The defense made the prosecution aware of evidence showing or reasonably tending to show defendant's fees were lawfully earned and disclosed. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

Sam Williams, the lead State Franchise Tax Board investigator in this case, would have testified he conducted extensive investigations into defendant's finances and taxes for time periods relevant to his association with PriMedex Health Systems, Inc., PriMedex Corporation and the medical corporations. These periods include tax years 1989, 1990, 1991, 1992 and 1993. During the course of these investigations, Williams

accessed and reviewed defendant's federal and state tax returns for the tax years 1989, 1990, 1991, 1992 and 1993, as well as the corporate financial and tax records of PriMedex Health Systems, Inc., PriMedex Corporation and the medical corporations for those years. Based on his thorough analysis, Williams would have testified defendant properly reported as taxable income on his federal and state tax returns all compensation, fees, bonuses and other payments which he received as a result of his association with PriMedex Corporation and the medical corporations during the tax years of 1989, 1990, 1991, 1992 and 1993. Based on his thorough analysis, Williams would have testified that he found no credible evidence establishing defendant knowingly participated in any conduct that can be shown to be criminal tax evasion for the tax years of 1989, 1990, 1991, 1992 and 1993. (Defense Exhibit A, page 74)

Under *Johnson* the prosecution was obligated but failed to present this evidence to the grand jury.

The prosecution offered no evidence defendant's fees were anything but lawfully earned and disclosed.

The Sale of PriMedex Assets Was Lawful.

CCC Franchising Corporation was a New York corporation incorporated October 21, 1985, to provide security guard and related services. Thereafter it acquired interests in Viromedics, Inc., Digital Products Corporation and ImmunoTherapeutics, Inc. (People's Exhibit 16J)

January 24, 1992, CCC Franchising Corporation organized a wholly-owned subsidiary, CCC Franchising *Acquisition* Corporation. (People's Exhibits 4D and 16J)

February 11, 1992, as of January 31, 1992, CCC Franchising Acquisition Corporation entered into an asset purchase agreement with PriMedex Corporation to purchase substantially all of PriMedex's assets for a purchase price of approximately $46,250,000 consisting of $30,000,000 cash and 2,000,000 shares of CCC Franchising Corporation common stock that closed on NASDAQ February 10, 1992, at 8⅛ (i.e., $16,250,000). (People's Exhibit 16J; RT 863-864)

The purchased assets included medical and computer equipment, furniture, fixtures and improvements, cash and deposits. (People's Exhibit 16J) Also, as of January 31, 1992, tangible PriMedex Corporation assets included approximately $42,000,000 in accounts receivable. (People's Exhibit 16J, page F-2)

PriMedex Corporation agreed to assign its leasehold rights to the real properties from which the business was being conducted, as well as certain equipment leasehold rights, to CCC Franchising Acquisition Corporation. Liabilities assumed by CCC Franchising Acquisition Corporation included payables and accrued expenses, liabilities under capital leases and amounts owed to PriMedex Corporation's "sole stockholder" and the medical Corporations. (People's Exhibit 16J)

People's Exhibit 16I comprehensibly details the transaction. The agreement provided that PriMedex Corporation and Gardner agree to sell the assets of PriMedex Corporation to CCC Franchising Acquisition Corporation. Gardner was specifically identified as "the sole stockholder of PriMedex [Corporation] and each of its Companies." (People's Exhibit 16I page 5) The agreement stated that "all. . . issued and outstanding shares [of PriMedex Corporation] are owned of record and beneficially by Stockholder," where "Stockholder" was identified solely as Gardner. (People's Exhibit 16I page 16) The agreement provided the entire purchase price—which consisted of $25 million cash, $5 million placed in escrow pending collection of existing receivables, and 2,000,000 shares of CCC Franchising stock—was payable to Gardner through PriMedex Corporation, his wholly-owned company. (People's Exhibit 16I pages 8-4) There was no indication or suggestion in the agreement that defendant owned stock in PriMedex Corporation or defendant was to receive any portion of the purchase price.

In connection with the sale of PriMedex Corporation, Michael Daniel Weiner testified, "I was counsel for the purpose of the transaction." (RT 682) Weiner recognized People's Exhibit 16I as memorializing the PriMedex Corporation acquisition. (RT 683) The documents comprising People's Exhibit 16I would be accurate and reliable up to the point of acquisition. (RT 686) Weiner testify the general terms of the purchase agreement were approximately $30 million in cash and roughly $2 million shares of the purchaser's common stock. (RT 683) Michael Gillum testified he seized People's Exhibit 16I from Gardner's home June 22, 1994. (RT 865) Greenwood testified the "yellow sticky" on the

inside front cover of People's Exhibit 16I that says "Congratulations again, Stan," was written by defendant. (RT 821-822)

Corrigan testified PriMedex Corporation was sold to "CCC Franchising, Aquasist Corporation" in February 1992. (RT 216) Corrigan testified he was aware of that fact from documents; he did not participate in the closing. (RT 216) It was already closed when he came. (RT 216) The deputy district attorney asked Corrigan:

Q. What is, if you know, CCC Franchising Corporation? What is it affiliated with?
A. Well, it became PriMedex Health Systems Inc.
Q. Is PriMedex a public corporation or private?
A. Public corporation, traded on NASDAQ.
Q. How do you know that?
A. I just do. Because it is.
Q. PriMedex became a subsidiary of a publicly traded corporation?
A. Yes.
Q. Did your responsibilities as an accountant and for documentation, did you have to prepare paperwork for that?
A. Really we transferred our records to the parent who would do that.
Q. You would, say, "records to the parent?"
A. No.
Q. I would give that to Mr. Goldblum and I believe he would. (RT 217)

The prosecution offered no evidence the sale of PriMedex Corporation assets was anything but lawful.

Defendant's Fee for RadNet Was Lawful

The deputy district attorney asked Corrigan:

Q. Are you familiar with the fact PriMedex was purchased by a publicly traded corporation?
A. Yes.
Q. Was RadNet ever purchased by anybody?
A. Purchased by the same company in April of [19]92. (RT 486)

The prospectus stated that in June 1992, as of April 30, 1992, CCC Franchising Acquisition Corporation entered into a purchase agreement with RadNet Management,

Inc., and related companies to acquire substantially all of RadNet's assets for a purchase price of approximately $66,000,000. PriMedex Health Systems, Inc., paid $500,000 as a finder's fee to F. N. Wolf & Co., Inc., in connection with the acquisition. (People's Exhibit 16J)

Also in connection with the purchase of RadNet, defendant received an option to purchase, after June 12, 1992, from CCC Franchising Corporation, 250,000 shares of CCC Franchising Corporation common stock. (RT 685) Weiner identified People's Exhibit 16L9 and People's Exhibit 16L8. (RT 685) People's Exhibit 16L9 is an option to purchase 250,000 shares of common stock of CCC Franchising Corporation. Bennett testified reviewing the prospectus the NASD saw defendant receiving a warrant to purchase 250,000 shares of "CCC Franchising" stock at $8 per share. (RT 701) Bennett testified:

A. Our staff was told that Mr. Goldblum had, along with F. N. Wolf, introduced RadNet to CCC Franchising, and he had performed certain services germane in introducing management and gathering certain information so that CCC Franchising could make a decision as to whether to acquire RadNet.
Q. Did your department inquire as to the compensation paid to Mr. Goldblum for the services?
A. The warrants to acquire 250,000 shares at $8 was disclosed in the registration statement, and we did ask about that compensation. (RT 704)

People's Exhibit 16L8 shows defendant acknowledged receipt of the option "in full satisfaction of any and all finder's fees due to [defendant] in connection with those certain acquisition transactions." Rhoades testified he recovered People's Exhibit 16L9 and People's Exhibit 16L8 from defendant's house on June 22, 1994. (RT 851, 852) Greenwood testified in his opinion defendant signed People's Exhibit 16L8. (RT 821)

The deputy district attorney asked Corrigan:

Q. Does RadNet perform the same types of services for these imaging services that PriMedex performed for the Gardner medical clinics?
A. Pretty much, yes. (RT 485-486)

Corrigan testified RadNet Management currently (May 9, 1996) managed 19 imaging centers in Southern California. (RT 477) Corrigan testified RadNet previously was a subsidiary of "PriMedex." (RT 477) The deputy district attorney did not clarify whether "PriMedex" was PriMedex Corporation or PriMedex Health Systems, Inc.

The prosecution offered no evidence the option received by defendant in connection with the purchase of RadNet Management, Inc., was anything but lawful. However the prosecution never established whether defendant ever exercised the option or profited therefrom.

Defendant Was Not Responsible for the Public Offering

The prosecution is expected to argue in opposition to this motion defendant was somehow criminally responsible for the subsequent PriMedex Health Systems, Inc., public offering even though defendant was not an officer, director or shareholder of PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., PriMedex Corporation, RadNet Management, Inc., or any of the medical corporations.

Bennett testified he worked in the corporate financing department of the National Association of Securities Dealers. (RT 689) He was familiar with an offering by PriMedex Health Systems, Inc. (RT 696) In September 1992, F. N. Wolf & Co., Inc., "as the underwriter of a public offering of the shares of CCC Franchising, applied to the corporate financing department for an opinion that the proposed underwriting terms and arrangements would be acceptable." (RT 696-697)

The registration statement of CCC Franchising Corporation was filed with the NASD September 14, 1992. (RT 698) Initially the NASD issued its opinion the underwriting compensation in connection with the proposed offering was excessive. (RT 698) F. N. Wolf & Co., Inc., amended their registration statement and filed an amended registration statement with the NASD. (RT 699-700)

November 17, 1992, the stockholders of CCC Franchising Corporation adopted an amendment to the company's certificate of incorporation changing the company's name from CCC Franchising Corporation to PriMedex Health Systems, Inc. November 20,

1992, the amendment was filed with the New York Department of State. (People's Exhibit 16J)

Hahn testified he was a broker for L.C. Waygardt which participated in a "new issue" offering called PriMedex Health Systems, Inc. (RT 953) He attended a due diligence meeting for brokers at the PriMedex offering at the Philadelphia Airport Marriott on December 10, 1992. (RT 954) Defendant gave a presentation. (RT 956)

Q. Do you recall what Stanley Goldblum said?
A. Stanley Goldblum was more general in that he discussed how this was the most fantastic stock offering he's been associated with in his numerous years in the investment business.
Q. Do you know what the purpose of this public offering was?
A. We were told it was to raise capital to retire loans that had been initiated in the acquisition and development of new business for PriMedex. (RT 957)

The prospectus stated:

> PriMedex has agreed to pay Mr. Goldblum a consulting fee at an annual rate of $250,000 and additional compensation equal to a 2% share in PriMedex's annual pre-tax profits plus one-half of 1% of PriMedex's cash collection during the period that he renders such services. Mr. Goldblum was issued Warrants exercisable to purchase an aggregate 250,000 shares of PHS Common Stock at $8.00 per share during the five-year period ending June 11, 1997 for his role as a finder in connection with PHS's acquisition of the RadNet business. (People's Exhibit 16J pages 58-59)

The prospectus stated Brennan due to his ownership of controlling shares in PriMedex Health Systems, Inc., is the individual who "will effectively be able to elect all of the Company's directors and control its affairs." (People's Exhibit 16J page 12) Thirty million dollars of the stock offering proceeds were to be applied toward repaying Brennan for indebtedness incurred in connection with CCC Franchising Corporation's February 1992 acquisition of PriMedex Corporation assets, and the remainder were to be applied toward working capital. (People's Exhibit 16J pages 4, 13-14).

David Walter Warren testified he purchased 1,000 shares of PriMedex Health Systems, Inc. (RT 780, 783) He couldn't give an exact date. Somewhere around the end of 1991 or early 1992 or possibly the end of 1992. (RT 782) Prior to purchasing the

shares, the broker sent Warren the prospectus. (RT 780) Warren believed the broker mentioned the name "Brenner." (RT 782) Warren read through the prospectus. (RT 782) Warren believed he paid $4.50 per share. (RT 782) On May 14, 1996, the shares were worth approximately 20 percent of what Warren paid for them. (RT 784-784)

The NASD approved the amended registration statement of F. N. Wolf & Co., Inc. (RT 700) Bennett identified the March 15, 1993, PriMedex Health Systems, Inc., and Affiliates Securities and Exchange Commission Form 10-Q marked People's Exhibit 33. (RT 720-721) The Form 10-Q stated the company as of January 21, 1993, completed the sale of 7,589,018 shares of common stock in a public offering for net proceeds of $30,279,174. (People's Exhibit 33, Note 6 on page 8)

The defense made the prosecution aware of evidence showing or reasonably tending to show defendant was not responsible in any manner for the PriMedex Health Systems, Inc., public offering. The prosecution failed to inform the grand jury of the nature or existence of the evidence.

In order for the grand jury to properly assess the exculpatory value of the evidence, the defense was prepared to present the testimony of securities law experts who would have explained to the grand jurors these governing securities law principles. (Defense Exhibit F, page 70)

The witnesses would have testified in order for a person to qualify as an *offeror* or *seller* of a security under the California securities laws, he must have personally made direct statements about the security to potential investors or directed agents or others to make such statements to potential investors. Defendant generally discussing how this was the most fantastic stock offering he's been associated with in his numerous years in the investment business was not a direction by defendant to agents and others to make statements about the security to potential investors.

Andrew Alson, Roger Bodman, Ronald Riccio and Roger Barnett, all officers and/or directors of PriMedex Health Systems, Inc., would have testified about the processes and mechanisms involved in the company's public securities offerings. (Defense Exhibit F, page 71) Specifically, their testimony would have detailed what roles and responsibilities particular individuals associated with the company had with respect to the selling and preparation of its securities offerings. Their testimony would have specifically

established that defendant did not participate in any conduct which would qualify him as an *offeror* or *seller* of a PriMedex Health Systems, Inc., security. (Defense Exhibit F, page 71)

Tolins would also have testified the regulations promulgated by the SEC governed the conduct of most public companies including PriMedex Health Systems, Inc. (Defense Exhibit F, page 71) Under SEC rules, PriMedex Health Systems, Inc., was required to periodically file public financial and informational reports with the SEC. These reports included the Form 10-K annual report and its subsequent amendments, Form 10-KA-1 and Form 10-KA-2; the Form 10-Q quarterly report; the Form S-3 registration statement for public offerings; and the Form 8-K report of significant corporate transactions or developments, as well as its subsequent amendment, the Form 8-K-A. SEC rules also required PriMedex Health Systems, Inc., to disseminate prospectuses about the company to potential investors in connection with its public securities offerings. The prospectuses would incorporate the company's periodic financial and informational reports which were on file with the SEC. PriMedex Health Systems, Inc., periodically supplemented its public financial and informational reports with specific information furnished by various individuals associated with the company. Under SEC rules, these individuals were required to periodically submit or file information about their relationship with the company. For example, any officer or director of PriMedex Health Systems, or any holder of ten percent or more stock in the company, was required to file a Form 3, which had to be supplemented by filing a Form 4 if a change in stock ownership occurred. The company also periodically had to furnish its officers, directors, and principal stockholders with O&D questionnaires to elicit and update information regarding, among other things, any financial transactions which may have taken place between those individuals and the company.

Tolins would have testified since the time of formation of PriMedex Health Systems, Inc., in 1992, the company had filed with the SEC dozens of mandated periodic financial and informational reports, and their requisite supplements, including the prospectus. PriMedex Health Systems, Inc., also periodically updated its SEC filings with information furnished by the company's officers, directors, and principal stockholders. *Defendant never prepared or signed any PriMedex Health Systems, Inc., SEC financial*

or informational report. Defendant never participated or had authority in preparing such reports. Defendant never had authority over their contents of such reports.

Tolins would have testified PriMedex Health Systems, Inc., never furnished defendant with an O&D questionnaire, and defendant never filled one out for the company. All of PriMedex Health Systems, Inc., SEC-related documents, reports, and questionnaires were public records and could be obtained through the SEC or the company itself.

Frank Irizarry was formerly counsel for the U.S. Securities and Exchange Commission. He was also counsel for Alliance Capital, one of the largest money management firms in the world, and for Prudential Mutual Funds. Irizarry, a securities law expert qualified by experience, background, and training, would have testified PriMedex Health Systems, Inc., filed numerous multi-page SEC forms containing extensive and detailed information about the company's business activities. Irizarry would have explained the nature, content, and required methods of preparation of these voluminous filings. PriMedex Health Systems, Inc., SEC filings, reports, documents, and their corresponding supplements, which were prepared by the company since its formation in 1992, could have been obtained from the SEC. The company's O&D questionnaires, which contained information used to update and supplement the company's SEC filings, could also have been obtained from the SEC. Analysis and review of these documents would have demonstrated *defendant never signed any of these PriMedex Health Systems, Inc., SEC filings, reports, or documents* which contained detailed information relative to the company's business and the issuance of its securities. All of these documents were available from the SEC and would have been presented to the grand jury and explained by Irizarry. Analysis and review of these documents would have demonstrated defendant was not asked and nor did he furnish any information for these SEC filings or for the company's O&D questionnaires. The detailed information contained in these hundreds of pages of SEC and corporate documents would have shown defendant did not sign or supply information for any other PriMedex Health Systems, Inc., SEC filing, report or O&D questionnaires.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury.

The prosecution failed to establish defendant was responsible for the PriMedex Health Systems, Inc./F. N. Wolf & Co., Inc., public offering.

Defendant Did Not Benefit from the Public Offering

The prosecution offered no evidence defendant benefited from the PriMedex Health Systems, Inc., December 11, 1992, stock offering. Nevertheless pursuant to *Johnson* the defense reminded the prosecution of exculpatory information regarding defendant disclosed during a meeting between defendant's attorneys, Rosenthal and Karlan on April 20, 1995. (Defense Exhibit A, page 74) At this meeting, the prosecutors asked the defense what if any compensation, consideration or financial benefit defendant received as a result of the stock offering. Defendant's attorneys responded that other than the normal, predetermined and disclosed consultant fees which he was paid for his work as an independent management consultant on behalf of PriMedex Corporation, defendant received *no* financial consideration or benefit from the stock offering. Defendant would have received his consultant fees whether the stock offering happened or did not happen. Defendant's attorneys stated that defendant received no portion of the proceeds of the stock offering was verifiable by corporate, financial and tax records accessible to the prosecution.

Under *Johnson* the prosecution was obligated but failed to present the exculpatory evidence to the grand jury.

July 1993 Insurance Industry Legislation Curtailed Clinical Operations

Apart from the fact defendant had no say in closing the clinics, as will be seen, and indeed stood to lose money as a result of the closures, the defense made the prosecution aware of evidence showing or reasonably tending to show a critical factor in closing the clinics was the last minute passing of an insurance-industry legislation that curtailed PriMedex Health Systems, Inc., clinical operations. This evidence contradicts the prosecution contention PriMedex Health Systems, Inc., had no reason to continue operations once it filled its coffers from the public offering.

The defense requested the prosecution inform the grand jury of the information available in the public domain showing that prior to July 15, 1993, PriMedex Health Systems, Inc., had no clear or verifiable indication that the California legislature would be able to pass revisions in the workers' compensation statutes *before* the legislature recessed for the summer beginning July 17, 1993. Nor could it be reasonably foreseen which specific provisions of the package would be enacted if it passed on time. (Defense Exhibit A, page 72)

The prosecution had copies of a press release issued by PriMedex Health Systems, Inc., on July 29, 1993. The press release stated that "recent changes in the California workers' compensation system," specifically "including the enactment by the California State Legislature on July [16,] 1993 of new legislation making significant changes to the system," were the "principal reason" for the decision to terminate the medical corporations' clinical operations. The press release did not indicate there was a pre-existing decision or plan to shut down the clinical operations of the medical corporations.

Tolins, who advised and assisted PriMedex Health Systems, Inc., in writing the July 29, 1993, press release, would have testified according to the release, the passage of these legislative reforms was apparently what ultimately precipitated the parent company's decision to shut down the medical corporations' clinical operations. The facts show that there were strong indications prior to July 15, 1993, that the reform package would *not* be timely enacted before the legislative recess. (Defense Exhibit A, pages 66, 72)

Although on May 17, 1993, California Governor Pete Wilson met with state legislative leaders and predicted that a comprehensive workers' compensation reform bill package would be enacted and sent to the Governor for his signature by the end of the month, reported in the *Los Angeles Times* May 17, 1993, as of June 14, 1993, the joint legislative committee still had not ironed out a final version of the workers' compensation reform bills for consideration by both houses of the legislature. (Defense Exhibit A, page 73) Assembly Speaker Willie Brown publicly conceded that the original goal of passing a workers' compensation reform package before the end of May 1993 was unrealistic, and that it then appeared the legislation would not be enacted at least

until after the legislature completed its work on finalizing a state budget. This was reported in the *Sacramento Bee* June 14, 1993. The prospect of these events occurring prior to the legislative recess on July 17, 1993, seemed bleak, especially given the fact that a year earlier, in 1992, it took the legislature until September to finally adopt a state budget. On June 28, 1993, the legislature enacted a state budget. But since the legislative recess was only three weeks away, it seemed highly unlikely that the legislature would be able to pass a comprehensive workers' compensation reform package in time. This was reported in the *Los Angeles Times* June 28, 1993.

On July 12, 1993, a joint legislative committee's efforts to issue a final report on the workers' compensation reform bills stalled. This was because State Insurance Commissioner John Garamendi unexpectedly lobbied legislators not to abolish the guaranteed minimum premium rates for insurers as part of the reform package. This move fractured tenuous alliances which had been forged among various key lawmakers and resulted in a 24-hour work stoppage on the workers' compensation reform package. This further jeopardized the chances that the reform legislation would pass prior to July 17, 1993. This was reported in the *California Applicants' Attorneys Association News* July 12, 1993. Assembly Speaker Willie Brown publicly predicted that due to the 24-hour legislative work stoppage caused by Insurance Commissioner Garamendi's unexpected foray into the debate, passage of the workers' compensation reform package "will not happen this week," before the legislative recess. This was reported in the *Sacramento Bee* July 14, 1993. (Defense Exhibit A, page 73)

Then a few minutes after midnight on July 15, 1993, the joint legislative committee unanimously approved a final version of the workers' compensation reform package, after Assembly Speaker Brown deftly severed the contentious minimum premium issue from the reform package. This was reported in the *Sacramento Bee* July 16, 1993. (Defense Exhibit A, pages 72-73)

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury. This evidence showed there was hope well into July that legislation curtailing PriMedex Health Systems, Inc., operations would not pass.

Defendant Opposed Closing the Clinics

The deputy district attorney asked Corrigan:

Q. So between what period of time did the clinics begin closing down?
A. Late July to October of 1993.
Q. So by October of 1993 the four Gardner medical corporations were no longer treating new patients or taking new patients?
A. That's true. (RT 229)

Munoz testified he became employed by PriMedex Corporation in the fall of 1993. (RT 411) When shown defendant's picture, Munoz had no idea who he was. (RT 411)

Corrigan believed defendant resigned in November 1993. (RT 220)

Munoz testified he was chief executive officer (in May 1996) of Bristol A. R., Inc. (RT 412) Bristol A. R., Inc. purchased $50 million in accounts receivable from PriMedex Health Systems, Inc., (RT 412) August 1, 1995 (RT 415). Defendant had no interest in Bristol A. R., Inc. (RT 453) The deputy district attorney asked Munoz:

Q. How much did you pay for the $50 million accounts receivable?
A. Approximately nine-and-a-half million.[26]
Q. When you negotiate a bill, how do you go about that?
A. Well, first you have got to see why the insurance company doesn't want to pay. *It's a standard litany of why they don't pay.*
Q. I'm not asking that question. (RT 417; emphasis added)

Pursuant to *Johnson* the defense made the prosecution aware of evidence showing or reasonably tending to show defendant had no control over the closing of PriMedex Health Systems, Inc., clinics.

Anne Marie Foglio, the clinic manager at the Pomona clinic, was one of the PriMedex Corporation employees assigned to help consolidate the first two-and-a-half of the eight clinics. (Defense Exhibit A, page 62) These consolidations occurred in late June 1993. They were intended to be temporary and were completely unrelated to the subsequent complete and permanent clinical operations shut-down ordered by the parent company, PriMedex Health Systems, Inc., in New Jersey. Foglio would have testified

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26. Corrigan testified the accounts receivable were sold to Bristol A. R., Inc. in July 1995 for $9,448,000. (RT 233)

that during the latter part of June 1993, she assisted in the consolidation of the first two-and-a-half of the total eight medical corporations medical clinics. (Defense Exhibit A, page 62) The Pomona clinic was to be closed because its lease had run out, and all the equipment and furnishings from that clinic were moved to the nearby clinic in Ontario. One-half of the clinical operations at the Riverside clinic was to be temporarily suspended. All patients who would have otherwise received evaluative and medical treatment services at the Riverside clinic were to be temporarily transferred to the nearby Ontario clinic. Patients scheduled to receive physical therapy at the Riverside clinic would remain there and were unaffected by the consolidation. Foglio believed, as did other PriMedex Corporation and medical corporations personnel whom she knew, that the decision to partially consolidate the Riverside clinic was made based on the fact that PriMedex Corporation had also decided at about the same time to temporarily suspend advertising on Spanish radio and television. Nearly 90 percent of the patients who came to the Riverside clinic for diagnostic and treatment services were Spanish-only speakers.

The Santa Ana clinic was a mere "turnkey" closure. All of the clinic's equipment and furnishings were retained there and simply locked up in the building. The clinic could thus be reopened and made fully operational again in little or no time. Foglio believed, as did other PriMedex Corporation and medical corporations personnel whom she knew, that the Santa Ana clinic was slated for full reopening during August or September 1993.

During late-June 1993, she believed, as did the other PriMedex Corporation and medical corporations personnel whom she knew, that none of the remaining five-and-a-half medical corporations clinics—Ontario, Long Beach, La Brea, Montebello, Panorama City and one-half Riverside—would be permanently shut down. (Defense Exhibit A, pages 62-63)

Gary Morris, PriMedex Corporation's Director of Personnel, would have testified that as of June 28, 1993, and later until mid-July 1993 he believed, as did other PriMedex Corporation and medical corporations personnel whom he knew, that based on everything he had heard and read, the partial clinical consolidations were merely temporary, and they fully expected that by August or September 1993 the clinical operations would resume at full scale. Specifically, Morris would have testified that on or before June 28, 1993, he consulted with Punturere and engaged in detailed conversations

with him to finalize a list of clinical staff reassignments and lay-offs which was to be implemented as part of the initial two-and-a-half-clinic consolidations. In constructing this list, Punturere took pains to retain the most highly skilled and professional personnel so that there would be quality individuals available to staff the remaining clinics. (Defense Exhibit A, page 65)

Weinstock would have testified that as of June 29, 1993, and later until mid-July, 1993, she, along with the other PriMedex Corporation and medical corporations personnel whom she knew, firmly believed that, based on everything she had heard and read, the partial clinical consolidations were merely temporary. They fully expected that by August or September 1993 the clinical operations would resume at full scale. Specifically, Weinstock would have testified that on June 5, 1993, and June 29, 1993, she helped submit revised cuts of an Injury Central television commercial for review and approval. At that time Weinstock believed, as did all of the other PriMedex Corporation and medical corporations personnel whom she knew, that the new commercials would air sometime in July 1993 for the purpose of attracting more patients to visit the clinics in the future. (Defense Exhibit A, page 64)

Stimson would have testified that as of June 15, 1993, and later until mid-July 1993, she, along with other PriMedex Corporation and medical corporations personnel whom she knew, firmly believed that, based on everything she had heard and read, the partial clinical consolidations were merely temporary and fully expected that by August or September 1993 the clinical operations would resume at full scale. Specifically, Stimson would have testified that on June 15, 1993, the Public Relations and Sales department hired Pat Braband for a full-time position as service support representative. At that time, Stimson believed, as did all of the other PriMedex Corporation and medical corporations personnel whom she knew, that based on everything she had heard and all of the documentation she had reviewed Braband would greatly assist and add to her department's ability to service and process patients who were referred to the medical corporations by applicants' attorneys in the future. (Defense Exhibit A, page 64)

Alson, president and chief executive officer of PriMedex Health Systems, Inc., would have testified when PriMedex Health Systems, Inc., made a determination during July 1993 it was going to shut down the clinical operations of the medical corporations, it

did *not* consult defendant prior to making this determination. PriMedex Health Systems, Inc., did *not* advise defendant of this determination prior to when it was made. Defendant had *no* input and was *not* a factor in the PriMedex Health Systems, Inc., determination to shut down the clinical operations of the medical corporations. (Defense Exhibit A, pages 55-56)

Barnett, chief financial officer and a director of PriMedex Health Systems, Inc., would have testified and corroborated the testimony of Alson. (Defense Exhibit A, page 56)

Bodman, formerly a director of PriMedex Health Systems, Inc., would have testified and corroborated the testimony of Alson. (Defense Exhibit A, pages 56-57)

Riccio, formerly a director of PriMedex Health Systems, would have testified and corroborated the testimony of Alson. (Defense Exhibit A, page 57)

Kahn would have testified and corroborated the testimony of Alson. (Defense Exhibit A, page 58)

Tolins would have testified that July 26, 1993, he was present at a PriMedex Health Systems, Inc., telephonic board meeting. At the meeting, the board of directors voted and decided to shut down the clinical operations of the medical corporations. Defendant was present but was not asked to give his input and he gave none. Defendant did not participate in the board meeting. Inasmuch as defendant was not an officer, director or controlling shareholder of PriMedex Health Systems, Inc., or PriMedex Corporation, he had no voting power at the board meeting. Defendant did not advocate or recommend closing the clinics at the meeting. (Defense Exhibit A, pages 58-59)

Alson, Barnett and Bodman would have testified and corroborated the testimony of Tolins. (Defense Exhibit A, page 59-61)

Morris would have testified it was obvious that the closure of the clinical operations would necessarily result in the termination of defendant's services at PriMedex Corporation. (Defense Exhibit A, page 67) Morris would have testified *defendant lost up to a total of approximately $3,300,000 or more in compensation and stock options as a result of the termination of the clinical operations.* The final consulting agreement which defendant had with PriMedex Corporation was effective from March 31, 1993 through October 31, 1996. PriMedex Corporation agreed to pay him an annual consulting fee

consisting of $250,000 and a two percent share in PriMedex Corporation's annual pre-tax profits, plus one-half of one percent of PriMedex Corporation's cash collections. For the year 1992, the year prior to the termination of defendant's services with PriMedex Corporation, he was paid in consulting fees a total of roughly $1 million. Extrapolating, defendant expected to be paid a total of roughly up to $4 million in consulting fees from 1993 through October 31, 1996. Compared to the fact that he had received only roughly $880,000 in total consulting fees in 1993 prior to his termination in November, 1993, and he was given a $200,000 severance payment, defendant's net loss in terms of consulting fees as a result of the clinic closures was indeed in the neighborhood of $3 million.

Morris would have testified defendant's financial losses as a result of the clinic closures were compounded by the fact that in June 1992 defendant received 250,000 shares of PriMedex Health Systems, Inc., common stock options, at $8.00 per share, for his role in the PriMedex Health Systems, Inc., acquisition of RadNet that month. In November 1993 PriMedex Health Systems, Inc., modified defendant's stock options to 125,000 shares at $3.50 per share. He had not exercised the options through September 15, 1995. Based on information Morris could have reviewed and verified, the value of the shares were at approximately $3.60 per share as of July 1, 1993. But, as of July 30, 1993, the shares fell to approximately $2.50 per share. As of September 14, 1995, the value of the shares were approximately 7 cents per share. Therefore, defendant sustained up to approximately $370,000 in economic losses from his stock options as a result of the clinic closures. (Defense Exhibit A, pages 67-68)

District attorney investigator John Grogan interviewed Kahn and the interview was tape recorded. Kahn would have testified that in late-July and early-August 1993 Kahn had numerous conversations with defendant in which *defendant expressed his extreme disapproval and disappointment over the parent company's determination to terminate the clinical operations.* (Defense Exhibit A, page 68) The determination to shut down the clinical operations was made by the parent company in New Jersey, not defendant. Defendant was *personally strongly opposed* to the determination to shut down the clinical operations. Defendant was deeply concerned about this decision due to factors other than that he was going to lose his job and suffer a large personal financial loss.

Specifically, defendant was most disturbed by the fact that other employees and associates of PriMedex Corporation and the medical corporations would become unemployed due to the clinic closures. Defendant repeatedly stated he felt it was a great shame that all the medical and administrative skill, know-how and technology which these people had developed would be wasted as a result of the clinical operations shutdown. Defendant repeatedly vented his frustration at the fact that he had no control over the determination to shut down the clinics, and that there seemed nothing he could do to salvage the situation. Defendant was so troubled by this prospect that he worked with and advised Kahn on producing a proposal for a health care finance company called Summit Capital. Under the proposal, Summit Capital would absorb and utilize most of PriMedex Corporation's then-existing employees, infrastructure and proprietary technologies and redeploy them into a full service finance and consulting company for health care providers. Defendant contributed to the Summit Capital proposal purely out of his intense compassion and loyalty to the hundreds of PriMedex Corporation personnel who were to be laid off as a result of the clinic closures. Defendant expected to reap no personal financial benefits from the Summit Capital venture. He gave Kahn valuable free advice and did not intend to stay with the company if it was formed. Had defendant the authority to approve the Summit Capital proposal, he would have.

But the authority for such a decision at that time was vested in Robert Caruso, PriMedex Health Systems, Inc., vice-president and chief financial officer. Caruso summarily rejected the Summit Capital proposal in October 1993. During the time when the medical corporations' clinics were in the process of being shut down in the fall of 1993, Caruso was the authoritative person overseeing, monitoring, and making operational management decisions for PriMedex Health Systems, Inc., PriMedex Corporation and the medical corporations. (Defense Exhibit A, pages 68-69)

Defendant was strongly opposed to closing the clinics.

Prosecution Failed to Prove Defendant Offered a Security

The prosecution had the grand jury instructed it could indict defendant if it found, *inter alia,* defendant offered, purchased or sold a security. The prospectus offered a

maximum of 10,000,000 shares of PriMedex Health Systems, Inc., common stock. The December 11, 1992, offering is the only evidence the prosecution introduced to the grand jury of securities being offered. So to establish defendant offered or sold a security on or before January 21, 1993, the prosecution had to establish at least one of the shares of common stock was offered by Stanley Goldblum. This the prosecution did not do. The prosecution failed to show defendant offered or sold a security.

Prosecution Failed to Prove Defendant Made Statements in the Prospectus

The prosecution failed to prove defendant made a single statement—true or untrue—in the prospectus. The prosecution failed to prove defendant authorized any statement in the prospectus. The prosecution failed to show defendant was responsible for any statement in the prospectus. The responsibility for statements in the prospectus rested with the officers and directors of PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., and affiliated entities. The responsibility for statements in the prospectus rested with persons who signed filings with the SEC. Defendant signed no filings with the SEC, nor was he required to sign anything. Defendant was not a director or officer of PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., PriMedex Corporation, the medical corporations or any company connected to the offering. The prosecution failed to prove defendant made or authorized any of the statements in the prospectus.

Prosecution Failed to Prove Defendant Was Responsible for Omissions in the Prospectus

As shown defendant was not responsible for the PriMedex Health Systems, Inc./ F. N. Wolf & Co., Inc., public offering. Defendant was not responsible for any statement or omission in the prospectus. The responsibility for making disclosures in the prospectus rested with PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., and any other entity or person who signed filings with the SEC. The defense was prepared to present the testimony of securities law experts who would have explained these principles of securities law to the grand jurors but the prosecution refused to call the experts.

Defendant was only a consultant. The prosecution offered no testimony—expert or lay—that defendant as a consultant was responsible for any statement or omission in the prospectus. Defendant was not a director or officer of PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., PriMedex Corporation, the medical corporations or any company connected to the offering. No law, no federal or state regulation, of which the defense is aware, makes a *consultant* liable for omissions made in a company's prospectus. Even if defendant *wished* additional information be included in the prospectus, he would have had no authority to compel its inclusion. Defendant signed no filings with the SEC, nor was he required or empowered to sign anything. What is the prosecution contending? That defendant somehow could have hauled into court, say, officials of F. N. Wolf & Co., Inc., and *forced* them to include something in the prospectus that defendant *wanted there?* The contention is preposterous. Defendant was not responsible for any omission—as well as any statement—in the prospectus.

Prosecution Failed to Prove Defendant Calling the Offering "Fantastic" Operated as a Fraud

The prosecution will argue defendant generally discussing in a room full of brokers at the Philadelphia Airport Marriott on December 10, 1992, how this was the most fantastic stock offering he's been associated with in his numerous years in the investment business, established defendant willfully engaged in an act which operated as a fraud upon a person in connection with the offer or sale of a security with the specific intent to defraud. This argument has no merit. All defendant said about the offering was it was "fantastic." The dictionary defines *fantastic* as something "based on fantasy; not real." The prosecution offered no evidence defendant described the offering in any manner whatsoever except "fantastic." The defense respectfully submits testimony defendant said the offering was fantastic does not establish an act which operated as a fraud perhaps a year or more later on Warren or any other purchaser of PriMedex Health Systems, Inc., stock.

Prosecution Failed to Prove Defendant Had the Specific Intent to Defraud

As stated the defense the prosecution will argue it established defendant engaged in an act or practice which operated as a fraud in connection with the offer of a security by showing defendant was criminally responsible for the statement at no time did PriMedex Corporation pay any person to make an illegal referral of patients. As shown this contention is not supported by the evidence. Apart from the fact the evidence established defendant was not responsible for statements in the prospectus, the evidence established defendant had no control over referrals from attorneys, did not communicate or interact with the attorneys, did not set up or attend any seminars for the attorneys, did not ever refer a patient to an attorney, and did not give gifts or presents to attorneys or have control over gifts and presents to attorneys. Defendant did not know checks he signed payable to Asher Gould Advertising were for Parker. Defendant had no control over payments to Parker. Defendant was not involved in or consulted about how Injury Hotline callers were referred, and the evidence established Injury Central conducted lawful advertising.

The prosecution failed to prove defendant had the specific intent to defraud. The prosecution failed to prove defendant violated Corporations Code § 25541 as alleged in Count 2 of the indictment. Therefore the defense respectfully submits the court dismiss Count 2.

6. THE PROSECUTION FAILED TO PROVE DEFENDANT CONSPIRED TO COMMIT SECURITIES FRAUD AS ALLEGED IN COUNT 1 OF THE INDICTMENT.

In Count 1 defendant is charged with *conspiring* on and between December 8, 1987, and November 31, 1995, to commit the crime of securities fraud in violation of Corporations Code § 25541.

In trying to prove the charge defendant conspired to commit securities fraud the prosecution faced a hurtle similar to the one it faced in trying to prove the charge defendant conspired to commit insurance fraud. To prove defendant conspired to commit securities fraud the prosecution had to prove at least circumstantially that on at least one occasion, on or after December 8, 1987, at some location, with the requisite intentions,

defendant actually agreed with some person to violate Corporations Code § 25541. Whether the agreement is inferred from proved circumstances, or proved directly without the need for inference, the prosecution had to prove an agreement. As stated for conspiracy there has to be an agreement.

Again as with insurance fraud the prosecution offered no direct evidence of an agreement. Therefore the prosecution must argue the alleged agreement by defendant to violate Corporations Code § 25541 was proved by circumstantial evidence. But the only possible circumstantial evidence would be evidence defendant *actually* violated or aided and abetted or attempted a violation of Corporations Code § 25541. From this the court arguably could infer defendant *agreed* to violate Corporations Code § 25541. If the prosecution can offer no direct evidence of an agreement, and can not establish defendant actually at least attempted to violated the law, the prosecution can not prove a conspiracy.

But as shown the prosecution failed to prove defendant violated or aided and abetted or attempted a violation of Corporations Code § 25541 because the prosecution never proved defendant had the specific intent to defraud. He had no control over referrals from attorneys, did not communicate or interact with them, did not set up or attend seminars for them, had no control over the referral of patients to them, had no control over gifts and presents to them. The prosecution did not establish he knew the checks he signed payable to Asher Gould Advertising were for personal-injury attorney Parker, nor that defendant had control over payments to Parker. He was not consulted about how Injury Hotline callers were referred to physicians, and the in-house advertising arm of PriMedex Corporation, Injury Central, conducted lawful advertising, or at least defendant had reason to so believe. Since the prosecution failed to establish defendant violated or aided and abetted or attempted a violation of Corporations Code § 25541, the defense respectfully submits the court can not infer defendant agreed to violate Corporations Code § 25541. And if the court can not infer defendant agreed to violate Corporations Code § 25541, the court cannot sustain a charge defendant conspired to violate Corporations Code § 25541.

The prosecution failed to present sufficient evidence to the grand jury to establish defendant conspired to commit the crime of securities fraud.

As shown the prosecution also failed to present sufficient evidence to the grand jury to establish defendant conspired to violate Insurance Code § 556, § 1871.1 or § 1871.4, or cheat and defraud a person of money by a means in itself criminal or obtain money by false pretenses, therefore the defense respectfully submits the court should dismiss Count 1.

7. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY INTRODUCING STATEMENTS IN A NEWSPAPER AND A PROSPECTUS ABOUT DEFENDANT'S PRIOR SECURITIES FRAUD CONVICTIONS.

As will be seen, pursuant to Evidence Code § 352 and Penal Code § 939.6, statements in a newspaper and in the prospectus of defendant's prior convictions, and testimony about the statements, would have been inadmissible over objection at trial because of their minimal probative value balanced against the substantial danger of undue prejudice, the substantial danger of confusing the issues, and the substantial danger of misleading the jury. As will be seen, if the prosecution wished to introduce admissible portions of the prospectus, the statements of defendant's prior convictions should have been redacted.

The prospectus stated:

> Mr. Goldblum was convicted in 1974 of various criminal violations of federal and state securities laws based on fraud arising out of his conduct as president and chief executive officer of Equity Funding Corporation of America. Mr. Goldblum was sentenced to an eight-year prison term commencing May 22, 1975, and was fined $20,000. He was released on parole March 14, 1979, after serving approximately four years of the sentence and his probation ended in May 1983. (People's Exhibit 16J, pages 58-59)

The prosecution introduced the unredacted prospectus containing these statements, and elicited testimony about the statements.

Bennett testified the review by the NASD of the prospectus showed defendant had received a warrant to purchase 250,000 shares of CCC Franchising Corporation stock at $8 per share in connection with the purchase of RadNet Management, Inc. The evidence showed April 30, 1992, CCC Franchising Acquisition Corporation acquired RadNet's

assets for a purchase price of approximately $66,000,000. That defendant received an option to purchase, after June 12, 1992, shares of CCC Franchising Corporation common stock arguably could be relevant on the issue of defendant's intent. But from the grant of the warrant months before the December 11, 1992, PriMedex Health Systems, Inc./F. N. Wolf & Co., Inc., public offering, the prosecution maneuvered Bennett into telling the grand jury how *defendant was not eligible to be employed in the broker industry in this country as a result of his several prior criminal convictions for securities fraud.* The tactic selected by the deputy district attorney to accomplish his objective was use of the *why* question.

> Q. *Why* did that transaction cause the NASD to investigate it further? (RT 701; emphasis added)

What difference does it make *why* the NASD investigated defendant's stock option further? How do *the reasons why the NASD investigated further* tend to prove defendant is guilty of conspiracy to commit securities fraud?

Bennett answered:

> A. Mr. Goldblum is a statutorily disqualified individual, and we have a special sensitivity to payments being received by those types of individuals.
> Q. What does *that* mean, "statutorily disqualified?"
> A. Mr. Goldblum, *as a result of the conviction of several federal statutes,* is not eligible to be employed in the broker industry in this country. (RT 702; emphasis added)
> ...
> Q. *Would you explain,* please, the statutory qualification that applies to Stanley Goldblum?
> A. Well, Mr. Goldblum in the '70's, I believe—if you don't mind, it would help if I could open up this prospectus.
> Q. If it will refresh your memory.
> A. This is exactly what we would do if we were looking at this from the prospective of the examination of an underwriting compensation. What you find on page 357 [sic] is a disclosure as to the management directors executive officers key employees and consultants. On page 358 [sic] Mr. Goldblum is disclosed as having been *convicted in 1974 of various criminal violations of federal and state securities laws based on fraud* arising out of his conduct as president and chief executive officer of

Equity Funding Corporation. The fact that he was convicted of these types of activities means that he is no longer eligible to be employed in the securities business. So the term that we refer to these people is as "Statutorily disqualified individuals."

Q You have used a term "employed in the securities business."

A. That's correct.

Q. What does that mean?

A. Well, a public policy decision was made in 1934 that certain individuals who had been convicted of certain types of activity would not be eligible to interact with the investing public and the purchase or sale of securities because it's deemed to be too great a risk to the public to be dealing with *these types of people.* (RT 725; emphasis added)

What does that mean? Would you explain? The prosecution bled the issue dry.

Now the prosecution will argue Bennet was only reciting what was in the prospectus and the prospectus was admissible because the statements therein are relevant on the issue of whether defendant committed or conspired to commit securities fraud.

As will be seen whether a statement in the prospectus was admissible depends on the statement and the reason for its admissibility.

The Statements Were Inadmissible as Nonhearsay

Any statement in a prospectus obviously is a statement "made other than by a witness while testifying," and therefore is hearsay if "offered to prove the truth of the matter stated." Evidence Code § 1200. The prosecution can show the relevance of some statements made in the prospectus not because they were true, but simply because they were made.

For example the prospectus stated a minimum of 5,000,000 shares of common stock was being offered by PriMedex Health Systems, Inc. This statement could be relevant on the issue of whether defendant committed securities fraud to show an offer of a security was made. The issue is not whether an offer is "true"; the issue is whether an offer was made.

The prospectus stated it was the position of management that at no time did either PriMedex Corporation or the medical corporations pay any person or entity to make an illegal referral of patients in violation of California law. (People's Exhibit 16J page 13).

This statement could be relevant to show the offer operated as a fraud. The prosecution would not be claiming the statement is true. To the contrary the prosecution would claim the statement was *untrue.* The prosecution would not offer the statement to prove the truth of the matter stated. The prosecution would offer the statement to prove it was made. As stated the prosecution is expected to do just that in connection with its argument that defendant was involved in paying kickbacks to attorneys.

Without conceding any particular prosecution argument, the defense agrees that evidence of some statements made in the prospectus is admissible to show the statements were made. The relevance of the statements is not the truth of the matter stated, but rather the fact that the statements were made. Therefore the statements raise no hearsay problems because the statements are not offered to prove the truth of the matter stated; they are offered to show they were made.

The issue is whether the prosecution can show *every* statement in the prospectus was made. Are some statements in the prospectus inadmissible under Evidence Code § 352, and therefore should *not* have been received by the grand jury?

The answer of course is yes. Evidence Code § 352(b) provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *People v. Harris* (1989) 47 Cal.3d 1047, 1081, 1090 n.22.

The fact the statement *was made* that in 1974 defendant suffered multiple prior federal and state securities fraud convictions for which he received an eight-year prison term was utterly unneeded by the prosecution to prove defendant between 1987 and 1993 committed or conspired to commit securities fraud. The fact the statement *was made* has no probative value. So if and when the prosecution argues it only offered the statement to prove it was made, and not to prove the truth of the matter stated, i.e., defendant *has* prior securities fraud convictions, the statement is clearly irrelevant and clearly inadmissible under Evidence Code § 352. Because the evidence of the making of the statement has no probative value, the evidence is unduly prejudicial. That defendant indeed went to prison for securities fraud in 1975 is clearly not admissible simply

because it is in the prospectus, simply because it was made. The evidence can only be relevant if it is true.

The Statements Were Inadmissible as Hearsay

The prosecution will not *only* argue the statements of defendant's prior convictions of security fraud are admissible simply because they are in the prospectus. The prosecution will also argue the statements in the prospectus are exceptions to the rule against hearsay and therefore are admissible to prove the truth of the matter stated. Offered to prove the truth of the matter stated, the prosecution will argue, the statements are relevant not to show defendant's disposition to commit securities fraud but a fact such as plan or scheme
under Evidence Code § 1101(b). That the prosecution will make this argument is evidenced by it having had the grand jury instructed evidence defendant committed other crimes was received for the purpose of showing the crimes charged are part of a "large continuing plan, scheme or the existence of a conspiracy."[27]

But to offer the statements to prove the truth of the matter stated, the prosecution must qualify the statements under some exception to the hearsay rule. The three expected arguments are each flawed.

The Statements Were Inadmissible as Statements of a Co-conspirator

The prosecution will argue the statements in the prospectus were statements of a conspirator. Evidence of a statement made by a defendant's alleged co-conspirator is not made inadmissible by the hearsay rule if the statement is offered in evidence after (or before) the admission of independent evidence sufficient to establish the existence of a

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27. The prosecution had the grand jury instructed:

> Evidence was also introduced that the targets may have committed other crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it extends to show that the crimes charged are part of a large continuing plan, scheme or the existence of a conspiracy. (RT 987)

conspiracy. *People v. Morales* (1989) 48 Cal.3d 527, 551-552, cert. denied, 493 U.S. 984 (1989); *People v. Leach* (1975) 15 Cal. 3d 419, 423-424, cert. denied, 424 U.S. 926 (1976); Evidence Code § 1223.

The co-conspirator argument raises two questions. Who made the statements in the prospectus, i.e., who was the declarant? And did the prosecution establish at some point by independent evidence the declarant was a conspirator?

Black's Law Dictionary defines a prospectus as a document published by a company, or by persons acting as its agents, setting forth the nature and objects of an issue of securities. On the face of the prospectus in the case at bar the publisher appears to be F. N. Wolf & Co., Inc., on behalf of PriMedex Health Systems, Inc. (People's Exhibit 16J)

Pursuant to *Johnson* the defense requested, but the prosecution declined, to call Tolins, the attorney who advised PriMedex Health Systems, Inc., regarding the prospectus, and Ruane, the attorney who advised F. N. Wolf & Co., Inc., regarding the prospectus. Either would have testified as to how he obtained the information underlying the factual representations made in the prospectus. Between the two attorneys, the court can infer that they probably were the authors of the prospectus, that they *made* the statements in the prospectus. As the apparent actual declarants, Tolins and Ruane could have given the name of any additional person who participated in the preparation of the prospectus.

If the prosecution is claiming the statements in the prospectus were the statements of co-conspirators, the prosecution could have established who made the statements by calling Tolins and/or Ruane as requested by the defense. The court then could have addressed the question of whether the prosecution established by independent evidence the declarants or any of them were conspirators. Although the prosecution did not establish Tolins or Ruane were co-conspirators, it could have tried to establish co-conspirators authorized Tolins or Ruane to make the statements. Gardner and Punturere are *mentioned* in the prospectus but the prosecution offered no evidence either Gardner or Punturere said anything in the prospectus. Brennan is mentioned in the prospectus. But the prosecution offered no evidence Brennan said anything in the prospectus, and the prosecution did not establish by independent evidence that Brennan was a co-conspirator.

The prosecution declined to call Tolins or Ruane. The prosecution declined to call anyone who participated in the preparation of the prospectus. The prosecution did not establish by independent evidence statements in the prospectus were made by co-conspirators. Therefore the statements in the prospectus of defendant's prior convictions for securities fraud were not admissible as the statements of co-conspirators to prove the truth of the matter stated.

The Statements Were Inadmissible as Admissions

Although there is no evidence defendant made the statements in the prospectus, the prosecution may argue the statements are admissible as "authorized admissions." Statements made by a person authorized by a defendant to make statements for him concerning the subject matter of the statements are not made inadmissible by the hearsay rule. However, such evidence must be preceded (or followed) by evidence sufficient to sustain a finding of authority. Evidence Code § 1222.

As shown the prosecution failed to prove defendant authorized any statement in the prospectus. The prosecution offered no evidence defendant even knew Tolins or Ruane. Even if the court assumes defendant may have known Tolins or Ruane, the prosecution offered no evidence defendant authorized Tolins or Ruane to make any statements. As shown defendant had no control over the preparation of the prospectus. The prosecution offered no evidence defendant authorized anyone to make a statement in the prospectus.

The Statements Were Inadmissible as Business Records

Finally, it its quest for an exception to the rule against hearsay, the prosecution probably will argue the statements in the prospectus were business records. A document *made in the regular course of business* can be admissible as an exception to the rule against hearsay and used to prove the truth of matters stated therein if the document was made at or near the time of the event *and* its proponent calls a witness and the witness establishes its identity and the mode of its preparation. Evidence Code § 1271.

The prosecution failed to lay a sufficient foundation for the prospectus as a business record in three regards.

First, the prospectus was not made at or near the time of defendant's convictions. The prospectus states defendant was convicted in 1974; sentenced in 1975, and released on parole in 1979. The prospectus is dated December 11, 1992. The prospectus was made 13 to 18 years after the events. In *Reisman v. Los Angeles City School Dist.* (1954) 123 Cal.App.2d 493, the court held a document made two years and two months after the event was not "at or near the time of event."

Second, the prosecution did not call a witness and have the witness establish the mode of preparation of the prospectus. The prosecution had Bennett *identify* the prospectus as being filed with the NASD December 21, 1992. (RT 714) But identity is only a portion of the required foundation. The prosecution needed to establish its mode of preparation. Although the prosecution knew from defendant's *Johnson* proffer about Tolins, Ruane and perhaps others who apparently prepared the prospectus and were apparently familiar with its mode of preparation, the prosecution declined to call the witnesses and introduced no evidence of its mode of preparation.

Third, the prosecution did not establish the prospectus was made in the regular course of business. This is understandable. It is doubtful the prosecution *could* have established the prospectus was made in the regular course of business. Public offerings of a company's common stock are not everyday occurrences such as the preparation of sales receipts or hospital records. Sales receipts and hospital records are made in the regular course of business; a prospectus is not made in the regular course of business.

The statements made in the prospectus were not admissible as business records for any one of the three reasons stated.

The hearsay statements in the prospectus of defendant's prior convictions for securities fraud do not qualify as co-conspirator statements, authorized admissions or business records. The statements do not qualify under any exception to the rule against hearsay. Therefore the statements are inadmissible to prove the truth of the matter stated, and therefore not usable to show a fact other than defendant's disposition such as plan or scheme to commit securities fraud under Evidence Code § 1101(b).

The Statements Did Not Establish Plan, Scheme or Intent

But even if we *assume* for the purpose of argument that the statements *do* qualify as some exception to the hearsay rule, the prosecution still failed to show the statements were admissible under Evidence Code § 1101(b) because, as will be shown, the fact defendant went to prison for securities fraud in 1975 under California case law only shows defendant's disposition to commit securities fraud.

In California evidence of a person's character or a trait of his character, such as evidence of his prior convictions of securities fraud, is generally inadmissible when offered to prove his conduct on a specified occasion, such as the truth of present charges of securities fraud. Evidence Code § 1101(a); *People v. Ewoldt* (1994) 7 Cal.4th 380, 390-393. On the other hand, the general rule does not prohibit the admission of evidence that defendant committed a crime when relevant to prove some fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. Evidence Code § 1101(b). But evidence of prior crimes should be closely scrutinized by the court and will be received in evidence only when its connection with the crime charged is clearly perceived. If its connection with the crime charged is not clearly perceived *the doubt should be resolved in favor of defendant.* In *People v. Allums* (1975) 47 Cal.App.3d 654, 660-661, overruled on other grounds by *People v. Wheeler* (1978) 22 Cal.3d 258, 286-287, n. 35., the court stated:

> Evidence of other crimes admitted for a limited purpose under Evidence Code section 1101, subdivision (b), is not barred by section 1025. (*People v. Washington* (1969) 71 Cal.2d 1061 [80 Cal.Rptr. 567, 458 P.2d 479]; *People v. Peete* (1946) 28 Cal.2d 306, 314-320 [169 P.2d 924]; *People v. Leyva* (1960) 187 Cal.App.2d 249, 254 [9 Cal.Rptr. 469].) [3] And, as stated in *People v. Enos* (1973) 34 Cal.App.3d 25, 34 [109 Cal.Rptr. 876]: "Where the proffered evidence is that of other crimes it 'should be scrutinized with great care, however, in light of its inherently prejudicial effect, and should be received only when its connection with the crime charged is clearly perceived.' (*People v. Durham, supra,* 70 Cal.2d 171, 86-187.) If its connection with the crime charged is not clearly perceived, the doubt should be resolved in favor of the accused. (*People v. Kelley, supra,* 66 Cal.2d 232, 39; *People v. Albertson,* 23 Cal.2d 550, 577 [145 P.2d 7].) This principle is consonant with that stated in Evidence Code section 352 that the court in its discretion may exclude evidence if its probative value is substantially outweighed by its prejudicial effect. (See *People v. Archerd,* 3

> Cal.3d 615, 638 [91 Cal.Rptr. 397, 477 P.2d 421]; *People v. Durham, supra,* at p. 186; *People v. Schader, supra,* 71 Cal.2d 761, 772.) [47 Cal.App.3d 654, 660]

As stated the prosecution will argue the evidence of defendant's past securities fraud convictions shows the present securities fraud charges were part of a plan or scheme. In opposition to this motion the prosecution will probably argue the prior convictions also show intent.

Evidence of uncharged crimes is admissible to show intent, or the offense occurred as charged consistent with a common design or plan, when the prosecution shows the modus operandi of the uncharged and charged offenses are sufficiently similar. When the prosecution fails to make such a showing, the evidence is inadmissible.

In *People v. Harvey* (1984) 163 Cal.App.3d 90, 100-103, the court held evidence defendant Harvey previously robbed Bradley was inadmissible to show defendant was in the process of committing the present 32nd Street robbery when he killed one of his victims.

> In the present case, the People argue that evidence of the Bradley robbery was relevant to the issues of the identity of the 32d Street gunman and, once his identity was established, Harvey's intent to rob Brady prior to shooting him. [163 Cal.App. 3d 90, 100]
> ...
> Turning to the facts of this case, the People identify the following similarities between the Bradley robbery and the 32d Street shooting: (1) the crimes occurred in the same area of the city (same street, eight blocks apart); (2) a firearm was used; (3) the firearm was discharged into the ground at some point during the crimes; (4) the victims were young white males in a predominantly black neighborhood; and (5) the perpetrator fled on foot from the scene of the crime. They argue that these five "shared marks" give rise to an inference that the man who robbed Paul Bradley was the same man who shot Gerald Pierro and Robert Brady. [163 Cal.App. 3d 90, 101]

The court rejected the prosecution argument the Bradley robbery was admissible under Evidence Code § 1101(b) to show identity. But the court *also* rejected the prosecution argument the Bradley robbery was admissible under Evidence Code § 1101(b) to show *intent.*

> Where evidence of defendant's intent in a prior criminal episode is introduced to prove that he harbored a similar intent in the currently charged crime, the desired inference is only as strong as the crimes are similar. (*People v. Thompson, supra,* 27 Cal.3d at pp. 319-320, fn. 23; *People v. Guerrero, supra,* 16 Cal.3d at pp. 728-729.) We have already indicated that the circumstances of the two crimes are far from sufficiently similar to allow an inference that the same person committed both. We likewise conclude it was error to admit the evidence of the Bradley robbery to prove Harvey's intent to rob. [163 Cal.App. 3d 90, 105]

In the case at bar *the prosecution offered no evidence of a plan or modus operandi in defendant's 1970s crimes.* What were the marks common to defendant's 1970s crimes and his alleged 1990s crimes? "Where the prosecution seeks to fix responsibility for a particular crime on defendant by showing a consistent modus operandi, there must be common marks which, considered singly or in combination, support the strong inference that the current crime bears his signature." *People v. Alcala* (1984) 36 Cal.3d 604, 632. In the case at bar the prosecution proved defendant was convicted in the 1970s and went to prison. Period. The prosecution introduced defendant's prior securities fraud convictions for no reason other than to show his propensity to commit or conspire to commit the class of crimes known as securities fraud. And it worked. The grand jury indicted defendant for securities fraud.

In *Alcala* the California Supreme Court held the prosecution argument for inadmissibility under Evidence Code § 1101(b) fails when the inference it seeks is to establish defendant's propensity to commit crimes of a particular class. The court stated:

> The rule excluding evidence of criminal propensity is nearly three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647.) Such evidence "is [deemed] objectionable, not because it has no appreciable probative value, but because *it has too much."* (Italics added.) Inevitably, it tempts "the tribunal ... to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." (Id., at p. 646; quoted in *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6 [80 Cal.Rptr. 1, 457 P.2d 841].)
>
> California's codification of the common law rule (Evid. Code, § 1101, subd. (a)) is absolute where it applies. However probative to common sense, evidence must be excluded under section 1101, subdivision (a), if the inference it directly seeks to establish is solely one of propensity to commit crimes in

> general, or of a particular class. (*People v. Thompson* (1980) 27 Cal.3d 303, 317 [165 Cal.Rptr. 289, 611 P.2d 883].) fn. 15. [36 Cal.3d 604, 631]

If there ever was a case where defendant's propensity to commit crimes of a particular class *proved too much,* it is the case at bar. Mr. Goldblum committed securities fraud in the early 1970s and *he's up to his old tricks again.* It is difficult to imagine the grand jury not thinking along those lines. If the prosecution is honest it will admit that is exactly how it wanted the grand jury to think. Be that as it may, when the prosecution cannot show marks common to defendant's prior crimes and the present allegations it cannot bootstrap the introduction of the evidence by arguing plan or scheme. Nor can it bootstrap the introduction of the evidence by arguing intent. In *Alcala* the deceased was Robin:

> [T]he prosecutor's theory of "intent" was but a euphemism for proving the identity of Robin's killer by establishing defendant's general disposition to commit similar crimes. Of course, any effort to use prior crimes for that purpose is expressly forbidden by Evidence Code section 1101. (*Thompson, supra,* at pp. 320-321; see also *People v. Guerrero* (1976) 16 Cal.3d 719, 728 [129 Cal.Rptr. 166, 548 P.2d 366].)
>
> For similar reasons, the evidence could not be bootstrapped in on the theory that it showed defendant's "plan or scheme." Mere use of those words adds nothing to a case for the admission of prior offenses. The proffered evidence must still be analyzed to determine whether it proves something material, disputed, and beyond bare disposition. (*Thompson, supra,* 27 Cal.3d at pp. 315-318.) [36 Cal.3d 604, 634]

Admission of evidence of other crimes cannot be justified merely by asserting an admissible purpose, which is what the prosecution is doing in the case at bar when it claims plan, scheme or intent. In *People v. Valentine* (1989) 207 Cal.App.3d 697, 704, the court held the trial court erred in permitting prosecution to introduce evidence that defendant used drugs intravenously to prove that defendant cultivated or possessed marijuana for sale. The court stated:

> The Supreme Court in *People v. Thompson* (1980) 27 Cal.3d 303 [165 Cal.Rptr. 289, 611 P.2d 883], held, in ascertaining whether evidence of other crimes has a tendency to prove the material fact, the court must first determine whether or not

> the uncharged offense serves logically, naturally, and by reasonable inference to establish that fact. In addition, "'admission of other crimes evidence cannot be justified merely by asserting an admissible purpose'" in the abstract. The key question is "whether the particular evidence of defendant's other offenses here offered is logically relevant to prove the defendant's intent in this case.'" (Id. at p. 319, italics added.) Lastly, since "'substantial prejudicial effect [is] inherent in [other crimes] evidence,' uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded." [207 Cal.App.3d 697, 703]

Also see *People v. Felix* (1993) 14 Cal.App.4th 997, 1006-1008; and *People v. Cardenas* (1982) 31 Cal.3d 897, 906-907. The case law in California is substantial. The prosecution offered no evidence of defendant's intent or purpose in committing the prior crimes other than defendant committed the prior crimes. Therefore even assuming the statements of defendant's prior convictions qualify as some exception to the hearsay rule—which they do not—the prosecution still failed to establish the statements showed plan, scheme or intent, and therefore the statements were admissible under Evidence Code § 1101(b).

The Statements Did Not Establish the Existence of a Conspiracy

The prosecution had the grand jury instructed the evidence defendant committed other crimes may be considered to show "the existence of a conspiracy." (RT 987) The defense was unable to find any authority for this novel proposition of law. But assuming for the purpose of argument Evidence Code § 1101(b) authorizes evidence of prior convictions to prove "the existence of a conspiracy," the prosecution made no showing how the fact defendant was convicted of securities fraud in 1974 and went to prison in 1975 somehow shows the existence of a conspiracy to commit securities fraud between December 8, 1987, and November "31," 1995. There is no evidence that defendant knew Gardner in the 1970s. There is no evidence that defendant knew Punturere in the 1970s. There is no evidence that defendant knew anyone mentioned to the grand jury in the 1970s. There is no evidence *how* defendant committed securities fraud in 1970s. The prosecution failed to show that defendant was convicted of securities fraud in 1974 established the present charge of a conspiracy to commit securities fraud. As stated, that

defendant was convicted of securities fraud in 1974 only established defendant's disposition to commit securities fraud: the prosecution hoped if it could show defendant presently *committed* securities fraud, the court could infer defendant presently *conspired* to commit securities fraud. But under the many cases cited, this the prosecution was not permitted to do.

In the case at bar the prosecution made no showing the fact defendant was convicted of securities fraud in 1974 and went to prison in 1975 somehow shows a conspiracy to commit securities fraud between December 8, 1987, and January 21, 1993.

The Statements Confused the Issues

The statements in the prospectus defendant went to prison in 1975 for securities fraud convictions, 22 years before the grand jury heard about it in 1996, were not only inadmissible under Evidence Code § 1101(b) and therefore unduly prejudicial, the evidence also confused the issues and was misleading to the grand jury. The real issues for the grand jury were 1) did defendant conspire to commit insurance or other fraud, and if so did the conspiracy operate as securities fraud; 2) did defendant make false statements in the prospectus; 3) was defendant criminally responsible for material omissions in the prospectus; and 4) did defendant offer or sell a security with the specific intent to defraud. That defendant was convicted of securities fraud in the early 1970s was a wrench the prosecution threw at the grand jurors. Once heard the court can be sure no grand juror forgot that evidence when he or she voted to indict defendant. The defense respectfully submits planting that evidence in the minds of the grand jurors confused the issues and misled them. Under Evidence Code § 352 the court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of confusion of issues or misleading of the jury as well as undue prejudice. The defense respectfully submits injecting defendant's prior convictions into an already complex case confused the issues and misled the grand jury.

Truth of the Statements Was Improperly Assumed in a Hypothetical Question

The statements in the prospectus of defendant's prior convictions of security fraud being inadmissible under Evidence Code § 1101(b) and Evidence Code § 352, the prosecution was not permitted under the law to get defendant's prior convictions in through the backdoor by assuming their truth in a hypothetical question.

The prosecution had Warren testify he read through the prospectus and purchased 1,000 shares of PriMedex Health Systems, Inc., somewhere near the end of 1991 or early 1992 or possibly the end of 1992. The deputy district attorney asked Warren:

> Q. Would you have wanted to know when deciding whether to invest in this company, that a person listed in the prospectus, Stanley Goldblum, that that person listed as a consultant in the prospectus was in fact the controller of the corporation? And when I add to the hypothetical that *Mr. Goldblum had suffered a conviction, a felony conviction for securities violations,* would that be information that you would want to know when deciding whether to invest in this company?
> A. Yes. I think it's information that I would like to know, yes. (RT 784)

When asking a hypothetical question the prosecution must be able to establish what is hypothecated. "Every hypothesis contained in the question should have some evidence to sustain it." *Rosenberg v. Goldstein* (1966) 247 Cal.App.2d 25, 30-31. As shown the prosecution introduced inadmissible evidence defendant suffered a prior felony conviction for securities violations. Therefore the question was improper, and the question and answer should be struck.

That the Statements Were Inadequately Described Was a Deliberate Pretext

The prosecution also tried to circumvent Evidence Code § 352 by attempting to introduce evidence of defendant's 1974 convictions for securities fraud on the pretext they were not adequately described in the prospectus.

First the deputy district attorney had Long read to the grand jury how the prospectus stated defendant was convicted in 1974 of various criminal violations of federal and state securities laws based on fraud arising out of his conduct as president and chief executive

officer of Equity Funding Corporation of America, and was sentenced to an eight-year prison term. Then the deputy district attorney asked Long:

> Q. Does that adequately describe the scope of Mr. Goldblum's directional activity in Equity Funding? It doesn't mention Equity Funding, does it?
> A. Yes, it does. It doesn't go on to discuss, as I did, this was one of the major frauds in the United States. And, therefore, I would think additional disclosures would be appropriate here as to the nature and extent of his involvement. (RT 763-764)

The prosecution will argue Long was qualified as a securities law expert and therefore the prosecution was entitled to elicit his opinion—right or wrong—the statement of defendant's criminal convictions in the prospectus was inadequate. The prosecution will argue if Long was in error, the defense can take that up at trial.

This argument fails for several reasons.

First it should be noted that Long never really testified the disclosure was inadequate. He only testified he thought "additional disclosures would be appropriate." Saying additional disclosures would be appropriate is not the same as saying what *was* disclosed was inadequate. Long never testified what *was* disclosed was inadequate.

If Long did not answer the question, we are only left with Long reading statements in the prospectus about defendant's past criminal violations of federal and state securities laws already shown to be inadmissible under Evidence Code § 1101(b) and § 352.

Second, the reason Long never directly answered the question asked by the deputy district attorney may have been Reg. S-K § 229.401. Reg. S-K, promulgated under the Securities Act of 1933, deals with what must be disclosed in a prospectus for an offering of securities requiring registration under federal securities law. Item 401(c) under Reg. § 229.401 under Reg. S-K requires the directors and officers of the company be identified

and their background disclosed as well as "significant employees."[28] Item 401(f)(2) states:

> *Involvement in certain legal proceedings.* Describe any of the following events that occurred *during the past five years* and that are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the registrant ...
> Such person was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) (emphasis added)

The prospectus described criminal proceedings where the person was convicted *not* during the past five years but *over 17 years ago.* Long testified he was a law professor at the University of Oklahoma with an expertise in federal and state securities law. (RT 735) The court can infer Long was keenly aware of Item 401(f)(2). It is also probable the deputy district attorney discussed Professor Long's expert testimony with him before he testified. Lawyers rarely call expert witnesses without discussing their testimony first. In discussing whether the prospectus adequately described defendant's criminal convictions it is very probable Long pointed out Item 401(f)(2) requires only criminal convictions that occurred during the past five years.

But that really did not matter to the prosecution. The prosecution was not seriously arguing the description of defendant's criminal background as detailed in the prospectus operated as a fraud on the purchaser of PriMedex Health Systems, Inc., stock. The prosecution wanted to use the bogus "issue" of whether the description was adequate as a pretext for allowing Long *to read the description to the grand jury.*

Long obliged. But even Professor Long could not bring himself to testifying, "*No.* The description is inadequate." Instead he starts his answer with, "It doesn't go on to discuss ..." Then Long astonishingly never mentions Item 401(f)(2).

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28. Item 401(c) provides:
> Identification of certain significant employees. Where the registrant employs persons such as production managers, sales managers, or research scientists who are not executive officers but who make or are expected to make significant contributions to the business of the registrant, such persons shall be identified and their background disclosed to the same extent as in the case of executive officers.

There is a strong suspicion the prosecution used Long not to establish the description was inadequate, but to inform the grand jury of defendant's 1974 criminal convictions for securities fraud.

Third, as shown the prosecution failed to show defendant was criminally responsible for material omissions in the prospectus. Defendant had no way to force PriMedex Health Systems, Inc., or F. N. Wolf & Co., Inc., to include something in the prospectus defendant wanted there. Before the prosecution could ask Long as an expert if the description in the prospectus of defendant's prior convictions was adequate, the prosecution had to first ask Long as an expert whether in his opinion defendant was legally responsible for the adequacy of the description of his prior convictions. Therefore the question asked Long was objectional on the ground of insufficient foundation, and the defense respectfully submits the court would have sustained the objection on that ground at trial.

But what makes the question and answer especially egregious is the inescapable conclusion the prosecution *purposely* did not establish a foundation for the question because the prosecution knew it *could not* establish a foundation. Here is the question the prosecution never first asked Long:

> Q. In your opinion was defendant criminally responsible for any statement made in the prospectus if he was not a director or officer of PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., PriMedex Corporation, the medical corporations or any company connected to the offering?

The only answer to the question is *no.*

Fourth, there is another reason why the question and answer was objectional on the ground of insufficient foundation. The prosecution never established *where* Long got the additional details of defendant's criminal involvement in Equity Funding that made it so horrendous that stating defendant was president and chief executive officer of Equity Funding Corporation of America, and was sentenced to an eight-year prison term, was a legally inadequate disclosure, assuming that is what Long meant. Did Long read about the additional details? Was Long told about the additional details? By whom? By a deputy district attorney before Long testified? The rule that an expert may rely on hearsay

is *not* absolute. It is within the court's discretion to exclude the hearsay basis of an expert's opinion. *People v. Nicolaus* (1991) 54 Cal. 3d 551, 582-583, cert. denied, 505 U.S. 1224 (1992). And misleading a grand jury about the nature of hearsay testimony is prosecutorial misconduct. *United States v. Breslin,* 916 F.Supp. 438 (E.D.PA 1996) At trial the defense would have requested a showing of what additional disclosures Long had in mind, and how he acquired knowledge of them before he gave his answer, and the defense respectfully submits the court would have granted the defense request.

Fifth, even if defendant was somehow responsible for the disclosure—which he was not—and the disclosure should have been more detailed, how probative of—how important to—the prosecution charges of securities fraud would disclosures *in addition* to what was stated in the prospectus have been? Answer: very, very minimal. The question and answer were objectional under Evidence Code § 352. Any probative value of additional disclosures would clearly be outweighed balanced against the very substantial danger of undue prejudice.

Sixth, the prosecution could not bootstrap into evidence the statement of defendant's criminal convictions in the prospectus by introducing the statement of defendant's criminal convictions in the prospectus. The prosecution had the grand jury instructed:

> Evidence has been introduced for the purpose of showing that the target Stanley Goldblum committed a crime other than that for which he is alleged in the proposed indictment.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show that a material misrepresentation or omission occurred with respect to the evidence relating to the stock offering prospectus of PriMedex. (RT 987)

Long testified he thought additional disclosures would be appropriate here as to the nature and extent of defendant's involvement with Equity Funding because the statement in the stock offering prospectus of PriMedex does not go on to discuss that Equity Funding was one of the major frauds in the United States. In referring to the evidence introduced for the purpose of showing defendant committed a crime other than the

present charges, the instruction has to refer to the testimony about defendant's criminal convictions apart from the statement of his criminal convictions in the prospectus; otherwise the instruction would mean the grand jury could consider the statement of defendant's criminal convictions in the prospectus to show a material misrepresentation or omission occurred with respect to the statement of defendant's criminal convictions in the prospectus. The defense respectfully submits the prosecution could not bootstrap into evidence the statement of defendant's criminal convictions in the prospectus by introducing the statement of defendant's criminal convictions in the prospectus.

Moreover, the instruction defendant's uncharged crimes may be considered only for the limited purpose of showing a material misrepresentation or omission in the prospectus is rendered utterly nonsensical by the instruction defendant's uncharged crimes may be considered for the purpose of showing plan, scheme or conspiracy.[29]

The prosecution may argue the court simply *disregard* Long's *reason* for testifying the statement of defendant's criminal convictions in the prospectus was inadequate. The argument goes Long was qualified as a securities law expert and therefore he was entitled to give his opinion the statement of defendant's criminal convictions in the prospectus was inadequate. The witness did not have to give a reason. If his reason should not have been elicited, just disregard it.

The problem with this argument is that it is unrealistic to disregard the effect the statement had on the grand jury. *Equity Funding was one of the major frauds in the United States.* Just disregard it.

Right.

In desperation the prosecution may argue if *defendant* was not responsible for omissions in the prospectus, *Gardner* was; therefore the prosecution had a perfect right to elicit Long's testimony why defendant's convictions were not adequately described to show *Gardner* committed securities fraud, and it is unfortunate the grand jury learned about defendant's uncharged crimes in the process. The grand jury could not consider defendant's uncharged crimes against defendant, goes the argument, only against Gardner.

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29. See footnote 27.

This argument is specious for at least two reasons. First, if Evidence Code § 352(b) precluded the introduction of defendant's prior convictions, as it did, then the prosecution was precluded from introducing them period, and even a clear instruction defendant's uncharged crimes may be considered only for the limited purpose of showing a material misrepresentation or omission in the prospectus would not remedy the problem. Second, as shown,[30] the prosecution had the grand jury instructed it *could* consider defendant's uncharged crimes against defendant to show plan, scheme or a conspiracy.

The defense invites the court's attention to a final note.

Here was the ultimate irony. The defense respectfully submits there was a decent chance based on the evidence the grand jury would have declined the prosecution request to indict defendant for securities fraud had it not learned of his multiple prior convictions for securities fraud in a prospectus only trying to go the extra mile by disclosing prior convictions it was not required to do.

The Statements in a Newspaper Were Inadmissible

As seen the prosecution sought to establish that PriMedex Corporation was paid money by insurance carriers as a result of submitting fraudulent claims. To prove defendant conspired to defraud the insurance carriers, the prosecution tried to prove defendant controlled to one degree or another PriMedex Corporation. To prove defendant controlled PriMedex Corporation, the prosecution offered evidence defendant signed the signature card as a vice president when PriMedex Corporation opened a checking account with Imperial Bank.

That defendant signed a corporation signature card as a vice president could be relevant on the issue of how much control if any defendant had in the company. But the prosecution did not stop there and its real reason for not stopping there will be obvious in a moment.

The prosecution then offered evidence Imperial Bank loaned money to PriMedex Corporation. Now the prosecution is not claiming PriMedex Corporation or anyone

30. See footnote 27.

cheated or defrauded Imperial Bank. So there immediately is a question why it is relevant that Imperial Bank loaned money to PriMedex Corporation. The prosecution then offered evidence Imperial Bank recalled the loan. Again there is a question why that is relevant since the prosecution is not claiming PriMedex Corporation cheated or defrauded Imperial Bank. But here lies the reason why the prosecution did not stop with the evidence defendant signed the signature card as a vice president. The deputy district attorney embarked on the following line of questioning of Fratto, a semi-retired employee of Imperial Bank:

> Q. Now, that loan was recalled prematurely. Is that correct?
> A. The loan was—yes. We asked the borrowers to repay the loan prior to maturity because of some adverse publicity that appeared.
> Q. It was brought to your attention that there was some publicity published where?
> A. In the *Los Angeles Times.*
> Q. And in that article in the *Los Angeles Times,* did it describe—well, *what did it describe in terms of Stanley Goldblum?*
> A. The article centered on past *illegal deceptive* transactions that had made—that were *extremely* newsworthy over the last 10 to 15 years. And they included pictures of the principals that the article was referring to. Stanley Goldblum's picture appeared in there. And the indications were that he was involved in what was known as the Equity Funding *scandal,* which was a registered New York stock exchange company that had serious internal incorrect, inaccurate and *fraudulent* bookkeeping records and entries.
> Q. Did that article indicate the amount of loss as a result of the Equity situation?
> A. The article certainly did indicate it. That's where they got the eight or ten people. I think the article was based around the largest—the most prominent or most—largest amount of exposure down to the least amount of that group. However, I don't recall what that total amount was. (RT 493)

Well, gee, gosh, what was the publicity? The defense respectfully submits that the *Los Angeles Times* ran an article detailing defendant's allegedly illegal, deceptive and fraudulent past was irrelevant; that Imperial Bank recalled a loan made to PriMedex Corporation was probably irrelevant; and that Imperial Bank even make a loan to PriMedex Corporation is of questionable relevancy. The reason the prosecution offered testimony Imperial Bank *made* a loan to PriMedex Corporation was so it could offer

testimony Imperial Bank *recalled* the loan. And the reason the prosecution offered testimony Imperial Bank recalled the loan was so it could offer testimony *why* Imperial Bank recalled the loan. And the reason it offered testimony why Imperial Bank recalled the loan was so it could offer testimony about a newspaper article detailing *defendant's illegal, deceptive and fraudulent past.* And the reason it offered testimony detailing defendant's illegal, deceptive and fraudulent past was to paint a picture of defendant as a bad person. Nothing could be more patently obvious. Evidence of the *Los Angeles Times* article would be clearly inadmissible over objection at trial.

The Testimony about the Heinousness of Defendant's Crimes Was Inadmissible

The prosecution did not rest with the testimony it elicited from Fratto and Bennett. Joseph Cagney Long testified:

> A. We all know *Mr. Milken.* And it might be something to say Mr. Milken is kind of—or higher in the corner of this country but it turned out Milken is running this company. And *Mr. Milken and Goldblum did put in about the same both in terms of the heinousness of the crimes—of this particular crime.* (RT 765; emphasis added)

Here the prosecution has a witness comparing defendant to Michael Milken. Here the prosecution has a witness describing the heinousness of defendant's crimes. Long's testimony would be inadmissible over objection at trial.

The prosecution very clearly was out to paint a picture of defendant as a bad person. Nothing could be more patently obvious.

The Admission of the Statements Deprived Defendant of Due Process

The defense respectfully submits the evidence of defendant's illegal, deceptive and fraudulent past; his prior felony convictions for securities fraud; the comparing him to Michael Milken, the describing the heinousness of his crimes; his being sentenced to eight years in prison—all was inadmissible as nonhearsay or hearsay under Evidence Code § 352 and § 1101(b), and all contributed to a substantial deprivation of due process

of law compelling the court under the cases cited to dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant. The courts have found a deprivation of due process on less inadmissible evidence than was introduced in the case at bar.

In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, defendant was charged with the murder of his mother who died on January 28, 1984, after her throat was slit. The medical examiner testified that the cuts could have been made by almost any kind of knife. Defendant's camouflage pants, soaked with blood of his mother's type on the right leg, were found in the room in which he had been sleeping while staying at his parents' house that January.

The trial court admitted evidence defendant had possessed a "Gerber" knife that was confiscated by a police officer in September 1983. Defendant took the stand and on cross examination the prosecutor questioned him about his "fascination" with knives, and about whether he enjoyed looking at, talking about and possessing knives. There was also testimony that the defendant was proud of his "knife collection," that on occasion he strapped a knife to his body while wearing camouflage pants, and that he used a knife to scratch the words "Death is His" on the door to his closet in his dormitory room. The trial court admitted color photographs of the scratches in the door.

In closing argument, the prosecution described its case as concentrating on three things, one of which was "any knives the defendant may have owned." The prosecutor reiterated the importance of the connection defendant had to any knives that could have been used to murder his mother.

The defendant was convicted and on appeal argued his constitutional right to a fundamentally fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment was violated. The prosecution argued the knife evidence was admissible to dispute the defendant's claim he was "knife-free" at the time of the murder. The prosecution argued the evidence tended to show that he was lying.

The California Court of Appeal rejected the defense argument and the defendant sought a writ of habeas corpus in the United States District Court for the Central District of California. The district court granted the writ and the People appealed. The United States Court of Appeals for the Ninth Circuit *affirmed granting the writ,* holding

defendant's constitutional right to a fundamentally fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment was violated. Unlike the California Court of Appeal, the Ninth Circuit held the evidence regarding the Gerber knife was *irrelevant* to any element of the prosecution's case, including opportunity, and was *irrelevant* to any argument that defendant was "knife-free." Similarly, evidence that defendant at times in the past wore a knife when wearing camouflage and that he scratched the words "Death is His" on the door to his dormitory room closet was also *irrelevant*. And evidence of the defendant's fascination with knives, including discussion of his collection, sharpening activities, and window shopping for knives was *irrelevant*. Although the court stated it was "hard to imagine" any inference at all to be drawn from the fact that the defendant scratched "Death is His" on his closet door, except that perhaps he had committed a murder with a knife, it held nevertheless the defendant's constitutional right to a fundamentally fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment was *violated*. The evidence of the carving was "not probative of any element of the offense with which McKinney was charged, or even of the State's definition of 'opportunity.' There are no rational inferences, permissible under the historical rule against character evidence, raised by the evidence."

> In this situation, McKinney's trial was impermissibly tainted by irrelevant evidence such that it is more than reasonably likely that the jury did not follow its instructions to weigh all the evidence carefully, but instead skipped careful analysis of the logical inferences raised by the circumstantial evidence and convicted McKinney on the basis of his suspicious character and previous acts, in violation of our community's standards of fair play.
>
> Because of the nature of the case against McKinney, the likelihood that the jury based its decision on impermissible inferences rendered McKinney's trial fundamentally unfair. We are unable to conclude beyond a reasonable doubt that the pervasive use of inadmissible knife evidence throughout the trial did not contribute to the jury's conviction of McKinney. See *Yates v. Evatt,* 114 L. Ed. 2d 432, 111 S. Ct. 1884, 1892-93 (1991); *Chapman v. California,* 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). His was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are. Because his trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair, McKinney is entitled to the conditional writ of habeas corpus that the district court awarded him.

In *McKinney* defendant was charged with slitting his mother's throat with a knife, and all the prosecution did was introduce evidence that in the past defendant carried a knife. In the case at bar we have defendant charged with securities fraud and the prosecution introducing evidence that in the past defendant was convicted of securities fraud. The defense respectfully submits if Mr. McKinney was deprived of due process of law so was Mr. Goldblum.

In opposition to this motion the prosecution will argue, as a last resort, the court should simply disregard the evidence. The prosecution will argue under Penal Code § 939.6(b) "the fact that evidence that would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury." The prosecution is unlikely to mention the statute is subject to an important caveat.

The important caveat is this. When the extent of inadmissible evidence is such that it is unreasonable to expect that the grand jury could limit its consideration to the admissible evidence, defendant is denied due process and the indictment must be dismissed notwithstanding the statute. In *People v. Backus* (1979) 23 Cal.3d 360, the California Supreme Court held that

> when the extent of incompetent and irrelevant evidence before the grand jury is such that, under the instructions and advice given by the prosecutor, it is unreasonable to expect that the grand jury could limit its consideration to the admissible, relevant evidence (see *People v. Aranda* (1965) 63 Cal.2d 518, 528-529 [47 Cal.Rptr. 353, 407 P.2d 265]), the defendants have been denied due process and the indictment must be dismissed notwithstanding Penal Code section 939.6. [23 Cal.3d 360, 392]

It is unreasonable to expect the grand jury could have limited its consideration to the admissible evidence when the prosecution offers evidence defendant had suffered prior felony convictions for securities fraud when defendant is presently charged with securities fraud. The defense respectfully submits under *McKinney* and *Backus* the improper introduction of evidence defendant suffered prior felony convictions for

securities fraud denied defendant of due process of law, and the indictment should be dismissed.

8. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS IN REPEATEDLY HAVING A WITNESS TELL THE GRAND JURY DEFENDANT WAS A "STATUTORILY DISQUALIFIED PERSON."

The prosecution did not let up in showing the grand jury Mr. Goldblum was a bad person. The deputy district attorney asked Bennett:

> Q. Let me ask you another hypothetical. What if I were to tell you that Mr. Goldblum received over $3880,000 [sic], or approximately $380,000 in finder's fees from—directly from PriMedex Corporation over a period of several months beginning February '92 through October, November of '92; and that these payments were made in checks in the amount of 50 or $55,000 on a monthly basis; would the N.A.S.D. corporate finance department wish to be apprised of that information?
> A. Yes.
> Q. Why?
> A. Well, once again, we are dealing with a hypothetical that you have presented. But, as I have indicated before, *Mr. Goldblum is a statutorily disqualified person.* Therefore, we have a particular interest in assuring the nature of the compensation that he receives, and either accounting in his underwriting compensation or determining that it is not. So we want to know all transactional compensation that somebody could be deemed to be under—an underwriter person could receive so we can make that determination for the interest of the buying public. (RT 717; emphasis added)

Whether defendant was eligible to be employed in the broker industry in this country was not and is not an issue in this case. The prosecution elicited this testimony for the same reason it elicited testimony detailing his illegal, deceptive and fraudulent past and prior felony convictions for securities fraud. And lest a grand juror did not get it, the deputy district attorney asked Bennett another hypothetical question:

> Q. If I were to tell you hypothetically, I want you to assume this as a hypothetical, that *$1 million was paid to Mr. Goldblum as a finder's fee in January of 1992 in connection with the PriMedex deal,* would N.A.S.D. be interested in this information?

A. Yes, we would.
Q. And why?
A. Well, once again, as I mentioned, Mr. Goldblum is a *statutorily disqualified person.* So any payments received by *such a person* are the types of transactions which we want to investigate closely. So the fact that hypothetically he received a million dollars would be of interest to my department. (RT 705)

Tell us again, Mr. Bennett. Why?

The deputy district attorney asked Bennett:

Q. If I were to tell you hypothetically that Mr. Goldblum received $500,000 on April 30, 1992 from a trust account, Allen Novich trustee for Allison Pace and Kimberly Pace, would this be information that your department would want to have been made aware of?
A. If that $500,000 had a connection to this transaction, we would want to know about it, yes.
Q. Would your department have investigated this payment to see if, in fact, it was connected to this offering or to this acquisition?
A. Yes, we would have.
Q. Was your department aware of any cash payments to Stanley Goldblum classified as finder's fees?
A. No.
Q. Now, if, in fact, the $500,000 payment that I have asked you hypothetically about was made to Mr. Goldblum on April 30, 1992, how would the N.A.S.D. have treated this payment?
A. Well, the fact that it was received by Goldblum on April 30 of '92, once again it falls within the 6-month presumptive period. *And since Mr. Goldblum is a person that we take a special interest in because of his statutory disqualification,* we would have wanted to have thoroughly investigated any payment made to the individual that could be connected to the C.C.C. Franchising PriMedex underwriting to determine whether or not it was underwriting compensation. (RT 707; emphasis added)

In repeatedly having Bennett tell the grand jury defendant was a "statutorily disqualified person," the defense respectfully submits the prosecution further deprived defendant of due process of law. But there was more.

9. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY ASKING BENNETT HYPOTHETICAL QUESTIONS AND ELICITING PREJUDICIAL ANSWERS THAT ASSUMED FACTS NEVER PROVED.

As shown defendant was clearly not responsible for any omissions in the prospectus. But as shown the prosecution assumed defendant was responsible for omissions in the prospectus to elicit testimony by Bennett defendant was a "statutorily disqualified" person. As will be seen, the prosecution assumed additional facts not proved to elicit additional testimony by Bennett defendant was a "statutorily disqualified person."

Prosecution Failed to Connect Defendant's $1,000,000 Fee to PriMedex

The prosecution established Brennan was a director of Due Process Stables, Inc., back in January 1980. Twelve years later Due Process Stables paid defendant $1,000,000. At some unknown time defendant wrote *Finder's Fee Schedule* at the top of a sheet of paper, then filled the paper with dates and numbers that included the statement *Balance on January 31, 1992: $1,000,000.* At the bottom of a second page defendant filled with writing he wrote *Additional Fee Brennan (Option) (1993) $500,000.* Based on the foregoing, the prosecution asked Bennett to assume $1,000,000 was paid to defendant in January 1992 as a finder's fee "in connection with the PriMedex deal."

The defense respectfully submits the evidence does *not* establish the $1,000,000 was paid to defendant by Brennan or anyone else as a finder's fee in connection with CCC Franchising Acquisition Corporation purchasing substantially all of the assets of PriMedex Corporation February 11, 1992, as of January 31, 1992, or any other "PriMedex deal."

As stated the prosecution introduced the 65-page agreement. The prosecution established the purchaser of the assets, CCC Franchising Acquisition Corporation, represented and warranted to Gardner and PriMedex Corporation all negotiations relative to purchase of the assets of PriMedex Corporation by CCC Franchising Acquisition Corporation were carried on by it directly without the intervention of any person entitled to any finder's fee. The prosecution also established the owner and seller of the assets, Gardner and PriMedex Corporation, represented and warranted to CCC Franchising Acquisition Corporation all negotiations were carried on by them directly without the intervention of any person entitled to any finder's fee. Brennan was not mentioned in the agreement. Defendant of course was not mentioned in the agreement.

Although the prosecution offered no evidence whatsoever as to *why,* presumably it will argue the statement by CCC Franchising Acquisition Corporation was untrue. The prosecution will argue it established Brennan owned 46 percent of PriMedex Health Systems, Inc., stock and loaned CCC Franchising Acquisition Corporation $33,000,000 to purchase the PriMedex Corporation assets; therefore Brennan was connected to PriMedex Health Systems, Inc.; therefore the court can infer the fee paid to defendant was "in connection with the PriMedex deal."

The defense respectfully submits even if the court finds Brennan was a creditor and shareholder of CCC Franchising Acquisition Corporation, and it was Brennan and not another entity that paid defendant the $1,000,000, it does not necessarily follow that the fee was paid to defendant by Brennan for "finding" PriMedex Corporation. The prosecution offered no evidence what defendant found. If any finder's fee was paid in connection with the sale of PriMedex Corporation's assets, it probably would be the other way around. Normally *sellers* pay finder's fees, not purchasers. CCC Franchising Acquisition Corporation was the *purchaser.* The prosecution request the court infer the *purchaser* paid a finder's fee is not warranted by the evidence.

The prosecution *did* establish that at the time CCC Franchising Acquisition Corporation purchased the assets defendant was a consultant to PriMedex Corporation. Based on the evidence the court could infer defendant was consulted by PriMedex Corporation in the transaction. That the transaction was accomplished explains why defendant apparently scribbled congratulations to himself on a Post-it. But just because defendant may have been consulted by PriMedex Corporation does not establish the $1,000,000 was paid to defendant as a finder's fee.

Moreover, the defense respectfully submits statements in the prospectus and testimony by witnesses about statements in the prospectus linking Brennan to PriMedex Health Systems, Inc., upon objection by the defense were inadmissible hearsay. The statements and testimony were offered to prove Brennan *was* linked to PriMedex Corporation; therefore the evidence was offered to prove the truth of the matter stated and only admissible as an exception to the rule against hearsay. Evidence Code § 1200. But as shown the prosecution failed to qualify statements in the prospectus as co-conspirator statements, authorized admissions, business records or other exception.

Unless the objection is waived by the defense the statements in the prospectus offered to prove the truth of the matter asserted are inadmissible hearsay. The prosecution failed to qualify the statements under any exception to the rule against hearsay. Therefore the statements are inadmissible to prove the truth of the matter stated. Therefore the prosecution cannot rely on the prospectus to link Brennan to PriMedex Health Systems, Inc.

The defense respectfully submits the prosecution failed to establish defendant's $1,000,000 fee was in connection with the purchase of PriMedex Corporation's assets or any other PriMedex deal. Therefore it was improper for the prosecution to assume it proved $1,000,000 was paid to defendant in connection with any PriMedex deal. The improper question was used to elicit prejudicial testimony defendant was a statutorily disqualified person, and it is unreasonable to assume the grand jury could have disregarded the testimony, all of which further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

Prosecution Failed to Connect Defendant's $500,000 Fee to PriMedex

As will be seen the prosecution elicited testimony regarding defendant's $500,000 fee that further deprived defendant of due process of law.

The prosecution established the Dreyfus Worldwide Dollar Money Market Fund, Inc., paid defendant $500,000 April 30, 1992. The names Alan Novich, Allison Pace and Kimberly Pace are also printed on the check. May 1, 1992, defendant sent a statement to Alan Novich for services rendered, $500,000. Novich had represented companies Brennan had taken public. Novich knew Pace. Pace had affiliations with Brennan and it would not be unusual for Pace to be involved with F. N. Wolf & Co., Inc., in underwriting or distributing securities. The deputy district attorney asked Bennett would the NASD have investigated the $500,000 payment to defendant to see if, in fact, it was connected to the acquisition of PriMedex Corporation assets or the subsequent PriMedex Health Systems, Inc., public offering. Bennett answered yes because of defendant's statutory disqualification.

The defense respectfully submits the evidence did not establish the $500,000 fee paid to defendant by Dreyfus Worldwide Dollar Money Market Fund, Inc., was connected to the acquisition of PriMedex Corporation assets or the subsequent PriMedex Health Systems, Inc., public offering. Therefore it was improper for the prosecution to assume it proved the $500,000 was paid to defendant in connection with the acquisition of PriMedex Corporation assets or the subsequent PriMedex Health Systems, Inc., public offering.

The improper questioning was used to elicit more prejudicial testimony defendant was a statutorily disqualified person, and it is unreasonable to assume the grand jury could have disregarded that testimony, all of which further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

10. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS IN ALLOWING A JUDGE OPINE THE GARDNER CORPORATIONS VIOLATED THE LAW.

Mroch testified Gardner corporations marked up third-party bills and submitted them to insurance carriers. The insurance carriers paid the Gardner corporations millions of dollars. The prosecution takes the position that marking up third-party bills constitutes insurance fraud; that defendant conspired with people in the Gardner corporations; therefore defendant is guilty of conspiracy to commit insurance fraud.

The deputy district attorney elicited the following testimony from Ordas after Ordas testified he was a judge:

> A. If the provider has had other services done by an outside party, there is usually no reason for the provider to get paid extra compensation done by an outside entity. And the outside entity is entitled to be paid for what it charged and then the immediate provider shouldn't get anything different. (RT 28; emphasis added)

Ordas's testimony the Gardner corporations should not have gotten the money paid by the insurance carriers is another way of saying the Gardner corporations violated the law—committed fraud—when they marked up the bills. That the Gardner corporations

(and therefore defendant) violated the law is not a proper subject for expert testimony. An expert's opinion testimony is limited to an opinion that is related to a subject that is sufficiently beyond common experience so that the opinion will assist the trier of fact. Evidence Code § 801(a). Whether defendant committed the crime charged is not a proper subject for expert testimony, does not assist the trier of fact, and is not beyond common experience. *People v. Torres* (1995) 33 Cal.App.4th 37; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40; *People v. Smith* (1989) 214 Cal.App.3d 904, 915-916, cert. denied, 507 U.S. 1020 (1993) Ordas's testimony that the Gardner corporations should not have gotten the money paid by the insurance carriers was inadmissible opinion and improperly elicited by the prosecution.

The next question is, for purposes of this motion, should the court simply strike the inadmissible testimony or was it unreasonable to expect that the grand jury could limit its consideration to the admissible evidence? The defense respectfully submits just striking the testimony does not cure the error. Here was a California *judge* improperly telling the grand jury the Gardner corporations and therefore defendant violated the law. The defense respectfully submits this was very prejudicial and under *People v. Backus, supra,* further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant. But this was not the only improper testimony the prosecution elicited from Ordas.

The deputy district attorney showed Ordas the August 16, 1989, memo from Punturere to all doctors saying Gardner would like them to order the standard blood workup on all new patients to establish a baseline and fully evaluate the patient's status. Ordas read the memo and testified, "I *think* that's *inappropriate.* There is no need for every patient that walks in the door for a work injury to have a full blood count workup done." (RT 36; emphasis added) "You have to blend basic knowledge of medicine into legal parameters even though the judge is not trained as a physician." (RT 37) Under further questioning by the deputy district attorney, Judge Ordas called the memo's reference to a baseline "wiggle language." (RT 38)

The defense respectfully submits this also was inadmissible expert opinion. A person is qualified to testify as an expert only if he has special knowledge, skill, experience,

training, or education sufficient to qualify him as an expert on the subject to which his or her testimony relates. Evidence Code § 720(a). The prosecution established Ordas was a judge, not a physician. The prosecution did not qualify Ordas to testify about his thoughts regarding the appropriateness of the need for every patient that has an injury to have a full blood count workup. The prosecution did not qualify Ordas to testify about baselines. As shown Dr. Groopman would have cautioned the grand jury to critically evaluate any such allegation from a *medical doctor*. Such testimony from a layman was inadmissible and improperly elicited by the prosecution. But there was more.

The deputy district attorney asked Ordas the following hypothetical question:

> Q. If it were proven that a particular medical provider paid an independent unaffiliated third party laboratory $15.50 for a comprehensive blood panel analysis, and then turned around and submitted a lien in the amount of $125 for the blood panel analysis and ten extra dollars for a lab handling fee, how much would *you* award the medical provider for this lien?
> A. *I* would offer them the charge for the blood work, if the blood work was appropriately done, at the level the lab did it only.
> Q. At the $15.50 level?
> A. That's right, the $15.50. And I would look at the handling charge with a jaundiced eye if they really had a handling fee at all.
> Q. So you may or may not allow the handling fee?
> A. I may or may not allow that. But I certainly wouldn't allow $110 profit off doing this blood work just for having an outside lab do it and then billing it under their lien. (RT 30-31; emphasis added)

Ordas indicated he reviewed "probably" hundreds of "orthopedic" liens "relating to the medical provider in question." Ordas testified, "No one ever presented me specifically with any evidence at court that PriMedex were paying less for the blood work than they were billing for." (RT 40-41)

Although the prosecution arguably established the hypothecated "facts," the question was improper and prejudicial because Ordas's testimony that he as a judge certainly would not allow a Gardner corporation profit off having an outside lab do blood work is once again another way of saying the Gardner corporations violated the law—committed fraud—when they marked up the bills. As stated, that the Gardner corporations and therefore defendant violated the law is not a proper subject for expert testimony. Therefore the testimony was also inadmissible and improperly elicited by the

prosecution, and under *People v. Backus, supra,* further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

An interesting footnote to this argument is the defense had informed the prosecution it knew the prosecution may present the testimony of Ordas deliberately selected to support the prosecution theory that all or some of Gardner corporations policies and practices—including those specifically discussed in Defense Exhibits A and F—were unlawful. (Defense Exhibit F, page 49) The defense made the district attorney aware under *Johnson* the *defense* was prepared to present the testimony of independent legal experts in the field of workers' compensation law and practice who, based on their professional experience, training and background, would explain to the grand jury that many of the laws and regulations which govern workers' compensation are highly complex, are subject to differing interpretations, and that knowledgeable people can arrive at polar opposite conclusions about the scope and meaning of the laws and regulations. The independent experts who the defense was prepared to present would have testified that based on their independent analysis, PriMedex Corporation and the medical corporations policies and practices including those specifically discussed in Defense Exhibits A and F were lawful under the applicable laws and regulations. The defense respectfully submits the district attorney's failure to inform the grand jury of the nature and existence of the evidence further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

11. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS IN ALLOWING A JUDGE TO MATERIALLY MISLEAD THE GRAND JURY REGARDING THE APPLICABILITY OF BUSINESS AND PROFESSIONS CODE § 655.5

Besides eliciting improper opinion testimony, the prosecution elicited misleading testimony from Ordas. The deputy district attorney elicited the following testimony from Ordas:

Q. Are you familiar with Business and Professions Code § 655.5?
A. Yes, I am.
Q. Are you familiar with generally what it requires?
A. Yes. It requires that there be a specific itemized bill for the services of doing blood work, where they do blood testing *and they are only supposed to bill for the services they actually provide.*
Q. And they are required to disclose—does the section also require that the provider disclose exactly how much it is taking for the services if performed by an outside entity?
A. Yes, it does. (RT 29; emphasis added)

The clear import of Ordas's testimony was that a Gardner corporation could only bill insurance carriers for blood work it actually provided the patient; it could not charge additional charges for outside laboratory services. This testimony materially misled the grand jury.

Through August 26, 1993, Business and Professions Code § 655.5 required doctors to apprise patients of outside laboratory charges. West's Ann.Cal.Penal Code §655.5 Historical and Statutory Notes. In 1993 Business and Professions Code § 655.5 was amended to provide, "It is also unlawful for any person licensed under this division or under any initiative act referred to in this division to charge *additional charges* for any clinical laboratory service that is not actually rendered by the licensee to the patient and itemized in the charge, bill, or other solicitation of payment." Business and Professions Code § 655.5(c); emphasis added.

This means prior to August 26, 1993, it was *only* unlawful for doctors not to tell their patients of outside laboratory charges. *After* August 26, 1993, Business and Professions Code § 655.5 could be read to make it unlawful for doctors to charge additional charges for outside laboratory services not itemized in a solicitation of payment from a workers' compensation carrier.

There was a key change in Business and Professions Code § 655.5 August 26, 1993. If the prosecution was using Judge Ordas to instruct the grand jury on the law, then it should have elicited this important change. The prosecution should have had Ordas explain to the grand jury that the Gardner corporations were supposed to bill only for the services they actually provided *after August 26, 1993* particularly since the prosecution never clearly established a Gardner corporation failed to apprise a patient of outside

laboratory blood services, nor after August 26, 1993, charged an additional charge for laboratory blood services that were not actually rendered by the corporation to the patient and itemized in the charge, bill, or other solicitation of payment for the laboratory blood services.

Ordas's testimony that a Gardner corporation could not charge additional charges for outside laboratory services materially misled the grand jury. The grand jury had to assume from Ordas's testimony there was a violation of the law every time a Gardner corporation charged an additional charge for outside laboratory blood services. The grand jury had to assume every time a Gardner corporation billed and was paid by an insurance carrier for the blood services, the corporation committed insurance fraud, and therefore defendant is guilty of conspiring to commit insurance fraud.

Upon objection misleading testimony is inadmissible. Evidence Code § 352(b). Also a question that is vague as to time is objectionable and the answer is inadmissible. The deputy district attorney asked Ordas, "Are you familiar with generally what [Business and Professions Code § 655.5] requires?" Required *when?* Before or after August 26, 1993? Virtually all the evidence in this case deals with what happened *before* August 26, 1993.

At trial counsel would have also objected to the question on the ground it was vague, and the defense respectfully submits the court would have sustained the objection and probably asked the deputy district attorney to rephrase the question. The deputy district attorney would then have asked, "Are you familiar with generally what Business and Professions Code § 655.5 required *through August 26, 1993?"* Ordas would have answered the Gardner corporations were only required to apprise patients of outside laboratory charges. This is quite a different answer from the one Ordas gave suggesting the Gardner corporations could only bill insurance carriers for blood work they actually provided.

Again the court is confronted with the question of whether simply striking the inadmissible testimony cures the error. The defense again respectfully submits simply striking the testimony does not cure the error. Again here was the prosecution having no less than a California judge improperly suggesting to the grand jury insurance fraud was committed anytime a Gardner corporation was paid by an insurance carrier for the

outside marked-up blood services. This was not the law before August 26, 1993, and the prosecution never sufficiently established a Gardner corporation was paid by an insurance carrier for outside blood services rendered after August 26, 1993. The testimony was so materially misleading it prejudiced the grand jury, it was unreasonable to expect that the grand jury could limit its consideration to the admissible evidence, and under *People v. Backus, supra,* defendant was further denied due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

12. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS IN ALLOWING A JUDGE TO MATERIALLY MISLEAD THE GRAND JURY REGARDING THE APPLICABILITY OF LABOR CODE § 4628 GOVERNING MEDICAL-LEGAL REPORTS.

The prosecution elicited yet more misleading testimony from Ordas.

The deputy district attorney had Ordas testify "ghost writing" was "inappropriate." (RT 50) In response to questions by the deputy district attorney, Ordas testified, "We have an entire set of statutes in 4628 prohibits ghost writing because of this problem. If we have an extended abuse of this problem, it renders the system meaningless." (RT 50-51)

Labor Code § 4628 enacted in 1989 was applicable only to injuries occurring on or after January 1, 1990. West's Ann.Cal.Labor Code §4628 Historical and Statutory Notes. For injuries occurring on or after January 1, 1990, Labor Code § 4628 provides, with some exceptions, no person other than the physician who signs the medical-legal report shall participate in the nonclerical preparation of the report. Failure to comply with Labor Code § 4628 "shall eliminate any liability for payment of any medical-legal expense incurred in connection with the report." Labor Code § 4628(e)

The testimony the prosecution elicited from Ordas never referred to the fact that the "entire set of statutes" *only* applied to the preparation of *medical-legal* reports, and then *only* to injuries occurring on or after January 1, 1990, and then *only* to *nonclerical* preparation of medical-legal reports.

The grand jury could have inferred from Ordas's testimony that the Gardner corporations violated the law and committed fraud when employees other than the signing physician participated in *any* kind of preparation of *any* kind of reports regarding *any* injury occurring at *any* time. This is not what the "entire set of statutes" proscribed.

Labor Code § 4628 only applies to medical legal reports. It does *not* apply to *treatment* reports or *supplemental* reports. See 8 Cal.Code.Reg., Reg. 9785. As stated, of significance, is most reports *also* constitute "treatment" expenses, are admissible under Labor Code § 4600 and are compensable pursuant to Labor Code § 4603.4. Some medical-legal reports are also compensable as *consultant's* reports pursuant to Labor Code § 4601. Labor Code § 4601 provided that at any time in any serious case (i.e., any injury requiring more than basic first aid), the injured employee was entitled to the services, including treatment, of a consulting physician or chiropractor of his or her choice at the expense of the employer. Ordas never discussed this third theory of recovery. In some cases, the medical services were compensable under all three theories of recovery.

In cases where the reports and other services are compensable Labor Code § 4628, the medical-legal theory of recovery and at least one of the other two theories of recovery (treatment or consultant), the lien claimant has the right to elect recovery for expenses incurred in connection with the report under the other theory of recovery (Labor Code § 4603.2 or Labor Code § 4601), thereby rendering Ordas's implications of violations of Labor Code § 4628 irrelevant, although this was hardly the implication the prosecution left with the grand jury. The prosecution did not have Ordas explain to the grand jury that lien claimants and employees are entitled to plead alternative and/or inconsistent theories of recovery and that medical services may be compensable under one, two or three theories of recovery.

So, again, Ordas's testimony was misleading. First we have the prosecution have a California judge mislead the grand jury into believing insurance fraud was committed anytime a Gardner corporation was paid by an insurance carrier for outside marked-up blood services. Now we have the prosecution having the same judge mislead the grand jury into believing insurance fraud was committed whenever employees other than the signing physician participated in any preparation of any report regarding any injury. The

defense respectfully submits the latter was materially misleading so that in combination with the former prejudiced the grand jury, it was unreasonable to expect that the grand jury could limit its consideration to the admissible evidence, and under *People v. Backus, supra,* defendant was further denied due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

13. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY HAVING THE GRAND JURY INSTRUCTED IT COULD PROVE A VIOLATION OF INSURANCE CODE § 1871.4 BY SHOWING MEDICAL-LEGAL COSTS WERE CHARGED IN EXCESS OF THE DIRECT COSTS OF LABORATORY TESTS, WITHOUT PROVING THE INJURY OCCURRED AFTER JANUARY 1, 1990.

The grand jury was instructed in essence that to establish a violation of Insurance Code § 1871.4 the prosecution had to prove that a person caused to be made any knowingly false or fraudulent material statement or material representations for the purpose of obtaining any compensation, and medical-legal costs constitute compensation. Medical-legal costs are expenses incurred by or on behalf of any party for medical reports for the purpose of proving a contested claim. No amount may be charged *in excess of the direct charges for the physicians, professional services and the reasonable costs of laboratory examinations, diagnostic studies and other medical tests and reasonable costs of clerical expense necessary to producing the medical-legal report.* Direct charges for the physicians professional services shall include reasonable overhead expense. (RT 977-978)

Labor Code § 4628(d) indeed *presently* provides, "No amount may be charged in excess of the direct charges for the physician's professional services and the reasonable costs of laboratory examinations, diagnostic studies, and other medical tests, and reasonable costs of clerical expense necessary to producing the report. Direct charges for the physician's professional services shall include reasonable overhead expense." But as shown Labor Code § 4628(d) applies *only* to injuries that occurred on or after January 1, 1990.

In opposition to this motion the prosecution presumably will argue it offered evidence showing a violation of Labor Code § 4628(d). But based on the instruction, the grand jury would have assumed Labor Code § 4628(d) applied to *any* injury regardless of whether it occurred before or after January 1, 1990. The grand jury should have been instructed no amount may be charged in excess of the direct charges for the physicians, professional services and the reasonable costs of laboratory examinations, diagnostic studies and other medical tests and reasonable costs of clerical expense necessary to producing the medical-legal report *only for injuries that occurred on or after January 1, 1990.* The instruction the prosecution had the grand jury given was erroneous.

In *People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App.4th 403, the court stated:

> Our Supreme Court has recognized that the grand jury's ability to consider the evidence impartially and independently in order to determine whether there is probable cause to indict may be prejudiced by the manner in which the prosecutor conducts the grand jury proceedings, including advice, instructions and argument. (*People v. Backus* (1979) 23 Cal.3d 360, 393; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1022, fn. 1.) In light of this recognition by the Supreme Court, it follows that a defendant may review these communications between the prosecutor and the grand jury in order to prepare a motion to set aside an indictment on grounds of lack of probable cause under section 995... In sum, California law provides that a defendant has a due process right not to be indicted in the absence of a determination of probable cause by a grand jury acting independently and impartially in its protective role. (*Greenberg, supra,* 19 Cal.2d 320; *Parks v. Superior Court, supra,* 38 Cal.2d at p. 611; Cal. Const., art I, §14; *Johnson v. Superior Court, supra,* 15 Cal.3d at p. 253; *Backus, supra,* 23 Cal.3d at p. 393; *Cummiskey, supra,* 3 Cal.4th at p. 1022, fn. 1.) An indicted defendant is entitled to enforce this right through means of a challenge under section 995 to the probable cause determination underlying the indictment, based on the nature and extent of the evidence and the manner in which the proceedings were conducted by the district attorney. (*Backus, supra,* 23 Cal.3d at p. 393; *Cummiskey, supra,* 3 Cal.4th at p. 1022, fn. 1.) In reviewing the merits of such a challenge, courts have routinely considered relevant nontestimonial portions of the record of the grand jury proceedings. [78 Cal.App.4th 403, 425]

Defendant is entitled to enforce his right to due process through a challenge under Penal Code § 995 to the indictment based on the manner in which the proceedings were conducted by the prosecution *including instructions given the grand jury on the law.* The

defense respectfully submits the erroneous instruction further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

14. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY REPEATEDLY ASKING A JUDGE HYPOTHETICAL QUESTIONS, AND ELICITING PREJUDICIAL ANSWERS, THAT ASSUMED FACTS NEVER PROVED.

In addition to eliciting misleading testimony from Ordas, the prosecution asked him hypothetical questions that assumed facts that were never proved. As stated, when asking a hypothetical question, the prosecution must be able to establish what is hypothecated.

The prosecution never established Gardner corporation employees had the authority to raise or lower a patient's disability rating by 35 percent without the approval of the examining physician. Nevertheless the deputy district attorney asked Ordas the following hypothetical question:

> Q. If it were proven that a medical provider employed reporters that had the authority to raise or lower a patient's disability rating by 35 percent without the prior approval of the examining physician, how would this information affect your ruling on the medical provider's medical-legal liens?
> A. It's totally inappropriate and goes against the entire method—or the way that the system was set up. We are relying upon the credibility and honesty of the physicians in doing the examination and writing the reports. If we don't have that kind of honesty, the report is inadmissible as evidence. And we can't trust those people to do what they are supposed to do. (RT 45)

The defense respectfully submits at trial the court would have struck Ordas's answer for assuming facts not proved. But Ordas's answer loaded with derogatory implications stood.

The deputy district attorney showed Ordas People's Exhibit 13C9. People's Exhibit 13C9 is a memo dated July 19, 1989, noting errors and recommending changes in Druffel's report. The deputy district attorney asked Ordas the following hypothetical question:

Q. If it can be proven that the changes recommended in that 13C9 memorandum did, in fact, take place, how would that information affect your ruling on the medical-legal liens?

A. The report is inadmissible under Labor Code section 4628 and it is not payable. So nothing about that examination or report is payable if in fact these changes were made. So it doesn't reflect the actual opinions of the physician.

The prosecution never established that the recommended changes took place. The defense respectfully submits at trial the court would have struck Ordas's answer for assuming facts not proved.

The prosecution never established virtually all physical therapy billings contained the official medical fee schedule RVS code modifier .22 appended to the end of the corresponding RVS code. Nevertheless the deputy district attorney asked Ordas the following hypothetical question:

Q. If it were proven that virtually all physical therapy billings by a particular medical provider contained the ["official medical fee schedule"] RVS code modifier .22 appended to the end of the corresponding RVS code, how would this affect your opinion? (RT 60-61)

The defense respectfully submits at trial the court would have struck the question for assuming facts not proved.

The prosecution never established the medical corporations tacked "substantial" markups on imaging provided by outside companies. Nevertheless the deputy district attorney asked Ordas the following hypothetical question:

Q. If it were proven that liens for magnetic imaging, commonly known as MRIs, and CAT scans or computerized axial tomography were provided by a Medical Provider a, we will call him a, but in fact were performed by an independent unaffiliated Medical Provider B, at a *substantially* lower rate in the amount than the amount of the liens provided by Medical Provider a, how would this affect *your* award on the scan liens by Provider a?

A. Just as the blood work, the amount that the provider who actually provided the services that were paid for is the amount that *should* be paid as compensation for doing the service and not any markup between what

the actual provider did and the company that's billing it. (RT 45; emphasis added)

The defense respectfully submits at trial the court would have struck the question and answer for assuming facts not proved.

The deputy district attorney asked Ordas the following hypothetical question:

> Q. If it were proven that back school in actuality consisted of the showing of an approximately 26-minute videotape to the patient by an *unlicensed* therapy aide and that there was *no* question and answer session with a physician, how would this information affect your ruling on these liens?
> A. I think that's a *direct misrepresentation of the facts for the purpose of obtaining money.* That's totally inappropriate. If you prove those facts, that would go a long way towards proving fraud. I have had arguments with other judges about approving this kind of thing and it confirms my worse suspicion that *the services billed for weren't really done...* That's just straight misrepresentation. (RT 57-58; emphasis added)

The defense respectfully submits the prosecution never established that there was no question and answer session with a physician. The defense respectfully submits at trial the court would have struck the question for assuming facts not proved.

Repeatedly asking a witness hypothetical questions that assume facts never proved further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

15. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY IMPROPERLY ASKING A JUDGE TO ASSIST THE GRAND JURY IN ITS ROLE AS TRIER OF FACT.

Later, apparently in an attempt to correct the error in assuming there was never a question and answer session with a physician, the deputy district attorney asked Ordas what if the question and answer session with a physician occurred at a subsequent visit. (RT 59) Ordas testified it would *still* be misrepresentation because the bill indicates the question and answer session took place at the time of seeing the videotape. (RT 59-60)

As shown an expert's opinion testimony is limited to an opinion that is related to a subject that is sufficiently beyond common experience so that the opinion will assist the trier of fact. Evidence Code § 801(a). The defense respectfully submits whether the bill indicated the question and answer session took place at the time of seeing the videotape is not testimony so beyond common experience that Ordas's opinion was needed to assist the trier of fact. The defense respectfully submits at trial the court would have struck Ordas's answer as improper subject matter of expert opinion. Again, this represents the prosecution using a judge to influence the grand jury in executing its statutory fact-finding duties

It should be noted the deputy district attorney in his question specified the patient was shown the videotape by an *unlicensed* therapy aide. To counter the grand jury from possibly inferring the medical corporations physical therapy personnel administered physical therapy treatments to patients not in full compliance with governing laws and regulations, pursuant to *Johnson* Mitchell would have explained to the grand jury the laws and regulations which govern the provision of physical therapy treatments. (Defense Exhibit F, page 19) She would have testified Title 16 Chiropractic Code § 312 provided "unlicensed individuals" could administer physical therapy treatments "as an adjunct to chiropractic adjustment," provided the physical therapy treatment was conducted under the "adequate supervision" of a licensed chiropractor. Title 16 Chiropractic Code § 312 defined adequate supervision as the chiropractor shall be present in the same chiropractic facility with the unlicensed individual at least 50 percent of any work week, and he shall be readily available to the unlicensed individual at all other times for advice, assistance and instruction. Before the unlicensed individual begins to administer physical therapy treatment, the chiropractor must have initially examined the patient and prepared a written therapy program for the patient. At least once every 30 days, the chiropractor shall reevaluate the patient's treatment program as well as the unlicensed individual's performance in administering therapy to the patient. And at the termination of the patient's physical therapy treatment program, the chiropractor shall perform and record his evaluation of the patient and the patient's response to treatment. Mitchell would have testified the allegation or suggestion that an unlicensed individual who administers physical therapy must do so only under the "direct supervision" of a licensed therapist or

physician is a misstatement of the law. The requirement of direct supervision by a licensed therapist or physician applies specifically to occupational therapy assistants only, not unlicensed individuals performing physical therapy. See *Hand Rehabilitation Center v. WCAB* (1995) 34 Cal.App.4th 1204. Occupational therapy assistants are not governed by Title 16 Chiropractic Code § 312, but rather by wholly different statutes and regulations.

Under *Johnson* the prosecution was obligated but failed to present this exculpatory evidence to the grand jury. The defense respectfully submits the district attorney's failure to inform the grand jury of the nature and existence of the evidence adds to the prejudice of the hypothetical question that improperly assumed there was never a question and answer session with a physician which further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

16. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY HAVING A JUDGE TESTIFY DEFENDANT IS GUILTY.

The prosecution will argue to the extent the prosecution failed to prove assumed facts, or elicited improper subject matter of expert opinion, the court should simply disregard the deputy district attorney's questions and Ordas's answers; dismissing the indictment is a far too drastic sanction even if the court considers the cumulative effect of the improper questions.

That argument is toppled by what happened next. After the deputy district attorney asked Ordas all of the improper hypothetical questions *supra,* he asked Ordas this final hypothetical question, and elicited this answer from the judge:

> Q. If all of these facts were proven before you about the same medical provider, and you were sitting as a judge ruling on the liens of this medical provider, how would this information affect your rulings?
> A. The totality of this information would result in my finding that there was no basis for these medical charges and they would be disallowed. I would then have to indicate that I thought *there was fraudulent activity occurring and I would have to report it to the district attorney's office ... because the*

> *totality of this situation, when it's put altogether, is horrific*. (RT 65; emphasis added)

Again, the defense wishes to stress the rule of law that whether defendant committed the crimes charged is *not* a proper subject for expert testimony. *People v. Torres, supra; People v. Sergill, supra; People v. Smith, supra.* Again, Ordas is telling the grand jury what he would disallow. He previously improperly testified he would not allow a Gardner corporation profit off having an outside laboratory do blood work; now he is improperly testifying there was no basis for any of the Gardner medical corporation charges. But here Ordas goes further. It is not just a question of him disallowing the charges. According to the case claimed by the prosecution, Ordas says the Gardner corporations are guilty of fraud. Essentially we have the prosecution having a judge tell a grand jury defendant is guilty.

Is it any wonder defendant was indicted?

17. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS IN ALLOWING WITNESSES ARGUE THE PROSECUTION CASE TO THE GRAND JURY.

The prosecution pulled a tactic similar to having a judge testify defendant is guilty by calling an attorney specializing in workers' compensation *defense.* (RT 806) Christine Ann Wogee testified she handled a case in which Neurologic Orthopedics Associates Medical Group was a provider (RT 807). The deputy district attorney had her identify a August 23, 1990, letter she wrote on behalf of her clients, Azusa United School District and presumably its insurance carrier or agent, Gates, McDonald and Company. (People's Exhibit 14A) In the letter Wogee argues Neurologic Orthopedics Associates Medical Group charged excessive amounts. (RT 809) She argued Neurologic Orthopedics Associates Medical Group listed "questionable" treatment and seemed to "greatly inflate" their billing, and that she detected "duplicate charges." (People's Exhibit 14A)

Witnesses called before a grand jury are supposed to present evidence of facts, not present arguments. The defense respectfully submits Wogee would not be allowed to argue her client's defense at the suit of Neurologic Orthopedics Associates Medical Group's patient at trial, and the court would sustain counsel's objections to the

prosecution offer to introduce Wogee's arguments. The district attorney makes the arguments to the grand jury after the evidence is submitted. The defense respectfully submits it was highly improper and prejudicial for the prosecution to introduce Wogee's arguments why a Gardner corporation listed duplicate charges, questionable treatment, and charged excessive amounts.

Wogee was not the only witness the prosecution called to argue its case. The prosecution used Long to argue its case too. Long testified the seller of a security is obligated to provide all material information. (RT 738) He testified "material" means *"merely* something that [buyer] would take into consideration in making his investment decision." (RT 740; emphasis added) He testified he "thought" that would be the standard in California. (RT 741) After examining People's Exhibit 16J, the PriMedex Health Systems, Inc., prospectus, he testified, "I *feel* like there are a number of misrepresentations and omissions." (RT 741; emphasis added) Long referred to the section in the prospectus relating to the criminal investigation. Long testified:

> A. It essentially indicates here that the Los Angeles district attorney's office in conjunction with the FBI have issued certain warrants and is investigating them for what would amount to possibly criminal practices. Then the next statement I think is really an important statement, although I will come back to the earlier statement in just a second. It says: "Management, PriMedex and medical corporation, are fully cooperating with the search process. It is the position of management that at no time did either PriMedex or the medical corporation pay any person or entity to make an illegal referral of patients in violation of California law." *That I think is downplaying the significance of this investigation.* (RT 754; emphasis added)

The deputy district attorney asked Long:

> Q. Let's assume that the individual at PriMedex with the title of controller, by his own definition, does not have the usual duties and responsibility of a controller; that is he must report to Mr. Goldblum, that he and the controller in name cannot generate checks, he's not the signator on certain company bank accounts, but rather Mr. Goldblum is, does that indicate to you the mere status of a consultant as described in the prospectus?
> A. Absolutely not. Again, this is just more indication that, if you will, Mr. Goldblum is up to his ears in the operation of PriMedex and as such *is an*

> *officer* and the law recognizes what we call the doctrine of a de facto officer. (RT 760-761; emphasis added)

The deputy district attorney had Long go on and testify defendant appeared to be "the chief executive officer" of PriMedex Corporation. (RT 762-763) And later the deputy district attorney had Long testify, "He is a major player in this company. *He is, in fact, an officer of this company."* (RT 770)

The defense respectfully submits lawyer witness Long's testimony that he thought that in California "material" would mean merely something the buyer would take into consideration in making his investment decision; that he felt like there are a number of misrepresentations and omissions in the PriMedex Health Systems, Inc., prospectus; that he thought the disclosure that the Los Angeles district attorney's office and FBI were investigating PriMedex Health Systems, Inc., for what would amount to possibly criminal practices was downplaying the investigation; that defendant *was* in fact an officer of PriMedex Corporation; and that he thought additional disclosures would be appropriate as to the nature and extent of defendant's involvement in Equity Funding—all constituted prosecution arguments inadmissible over objection at trial and therefore improperly received by the grand jury under Penal Code § 939.6 much like attorney witness Wogee's prosecution arguments were improperly received by the grand jury under Penal Code § 939.6.

Again, we submit the remedy is not for the court to just strike the evidence. The grand jury heard it and read it. As shown *People v. Superior Court (Mouchaourab), supra,* holds an indicted defendant is entitled to enforce his right to due process through means of a challenge under Penal Code § 995 to the probable cause determination underlying the indictment based on "the manner in which the proceedings were conducted by the district attorney." The defense respectfully submits by allowing lawyers Long and Wogee to argue the prosecution case to the grand jury from the witness stand, the grand jury was prejudiced and defendant was further deprived of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

18. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS IN ELICITING AND/OR NOT STRIKING INADMISSIBLE PREJUDICIAL OPINION TESTIMONY BY WITNESSES KUHN AND SHAW THAT THE GARDNER BILLINGS WERE IMPROPER.

The prosecution called Kermit Kuhn who testified he had worked for the State Compensation Insurance Fund for 17 years and was presently "claims manager of the Cerritos office." (RT 792) It is unknown whether Kuhn was an attorney or even graduated from law school. With no further foundation, the deputy district attorney elicited legal opinions from Kuhn regarding paying for patient referrals (RT 794), laboratory fees (RT 794-795), diagnostic imaging (RT 797-798), report editing (RT 798), patient back care (RT 798-799), and reports (RT 799) At trial counsel would have objected to Kuhn's opinions on the basis of insufficient foundation, and the defense respectfully submits the court would have sustained the objections.

Kevin Le Lroi Shaw testified he was Pacific Rim Assurance Company "claims director." (RT 828) It was Shaw's job to decide whether to pay a lien (RT 831). It is unknown whether Shaw was an attorney or graduated from law school. Shaw was "advised" there were $1.4 million in outstanding liens against Pacific Rim Assurance Company held by the Gardner medical corporations. (RT 830) The deputy district attorney asked Shaw:

> Q. Do you have an opinion as to why the liens are not being paid?
> A. Yes.
> Q. What is your opinion?
> A. That the reports were ghost written; that we have been billed for charges for services that were never performed; that we were billed for charges in excess of a reasonable charge; that the reports were signed by doctors who never performed the services; that they had blanket charges ordering certain services across the board for all patients that were seen regardless and not stating in their account the individual facts of the case. We have information, and I saw evidence that they were paying attorneys' fees to send patients over and that's about it. (RT 831)

At trial counsel would have objected to Shaw's opinions on the basis of insufficient foundation, and the defense respectfully submits the court would have sustained the objections.

Eliciting and/or not striking the inadmissible prejudicial opinion testimony of Kuhn and Shaw further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

19. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY IMPLYING TO THE GRAND JURY DEFENDANT'S ATTORNEYS TOLD HIM NOT TO TALK ABOUT PATIENT REFERRALS FROM OUTSIDE ATTORNEYS.

Richlin testified she recalled having a conversation with defendant in his office about her salary, she believed in 1993. (RT 359) The deputy district attorney asked:

Q. What was the reason given for your salary being cut?
A. Downsizing the company and lack of funds, I guess. I don't know.
Q. Was the whole sales department salary being cut or just yours?
A. The entire. (RT 365)

The prosecution obtained a tape of the conversation, had a transcript made, and supplied the tape and transcript to the defense. The deputy district attorney showed the transcript to Richlin and asked her to use it to refresh her memory but never marked or introduced the transcript in evidence.[31] Later another deputy district attorney questioned Richlin about the conversation. From the record it appears she no longer had the transcript in front of her.

Q. At some time did he cut you off, mentioning some words to the effect about, "don't talk about that topic"?
A. Yes.

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31. Q. Would it refresh your recollection if you were to read a transcription of this?
A. Possibly.
Q. For the record I'm referring to a printed—
The foreperson: can you speak up, please, counsel.
Mr. Karlan: for the record, I'm referring to a printed transcription of a tape recorded conversation. Miss Richlin, has your memory been refreshed?
A. Yes. (RT 362)

Q. Can you please tell us precisely what you recall he said?
A. I don't recall exactly. I was just there defending myself.
Q. And what did he say when he interrupted you?
A. What did he say?
Q. Yes.
A. I don't recall exactly.
Q. Did he tell you to stop referring to referrals, he was told not to mention that on the advice of legal counsel. Do you recall that?
A. I sort of recall that.
Q. Well, do you recall if he said that or not? He interrupted you and—
A. He interrupted me on several occasions.
Q. —and told you to be quiet?
A. Yes.
Q. And said, "we won't talk about that topic"; correct?
A. Correct.
Q. "Because my attorneys told me not to discuss this issue"?
A. Correct.
Mr. Botello: I have nothing further. (RT 370)

The transcript, which is a faithful transcription of the tape, shows the following was said:

Richlin: What I'm going to say is, uhm, my salary has been compensated *** based on ***
Defendant: I—I—It's not really supposed to be that way and we really don't want to even talk about that. Because the attorneys do not, uh, anymore allow us to have any kinds of arrangements, uh, in the entire company that are related to patient referrals in any way whatsoever. (August 1994 Los Angeles District Attorney's Office Transcript, page 4; emphasis added)

Defendant never told Richlin to *stop referring to referrals;* he said we really don't want to talk about them. Defendant never told Richlin *to be quiet.* Defendant never told Richlin *his* attorneys *told him not to discuss the issue;* defendant referred to *the* attorneys, and he said they *no longer allowed the company to have arrangements related to patient referrals.*

The prosecution made it sound like defendant had been exercising his *Miranda* rights. The prosecution made it sound like defendant "was taking the Fifth." Only guilty people do that. Here was the golden opportunity for the prosecution to imply defendant was taking the Fifth because of course *Miranda* was entirely inapplicable. And the

prosecution gave the grand jury the clear impression that defendant's taking the Fifth was all right there in black and white, right in the transcript. Only the truth of the matter is it was not. There is nothing in the transcript or on the tape or in any of the discovery that indicates defendant was told by his or anyone else's attorneys not to discuss attorney referrals. The defense respectfully submits the prosecution wanted to give the grand jury the wrong impression defendant was instructed by his attorneys to exercise his right to remain silent if anyone questioned him or embarked on a discussion relating to the issue of whether he was in on illegal kickbacks to attorneys. The defense respectfully submits the prosecution misled the grand jury in this regard which further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

20. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY HAVING THE GRAND JURY INSTRUCTED A VIOLATION OF PENAL CODE § 182(A)(4) COULD BE PROVED BY SHOWING DEFENDANT MADE A REPRESENTATION NOT KNOWN BY DEFENDANT TO BE FALSE

As shown it was crucial for the prosecution to prove the commission or attempted commission of the crime that was the object of the alleged conspiracy since the prosecution offered no direct evidence of a conspiracy. In Count 1 defendant is charged with violating Penal Code § 182(a)(4). Penal Code § 182(a)(4) makes it a crime to conspire to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises. The prosecution had the grand jury instructed it proved obtaining money or property by false pretenses by proving, *inter alia,* a person made a false representation of an existing or past fact *recklessly and without*

information which would justify a reasonable belief in its truth.[32] This allowed the grand jury to indict defendant for Penal Code § 182(a)(4) by merely finding he represented an existing or past fact recklessly and without information which would justify a reasonable belief in its truth even if the fact was not known by defendant to be false. If this were true the prosecution would not have to prove a specific intent to defraud, which the prosecution confusingly had the grand jury instructed it was required to do. An intent to defraud is an element of the crime. The defense respectfully submits by not requiring a finding of every element of the crime that was the object of the alleged conspiracy, the instruction made it easier to find the commission of the object crime, thus enabling the grand jury to indict defendant for the charged offense. Instructing a petit jury to convict without finding every element of the offense violates federal due process, and the error is not harmless. *Keating v. Hood,* filed September 16, 1999, 1999 Daily Journal D.A.R. 9718. The defense respectfully submits the instruction was erroneous because it did not correctly state the law, and as shown defendant is entitled to enforce his right to due process through a challenge under Penal Code § 995 to the indictment based on the instructions given the grand jury on the law. *People v. Superior Court (Mouchaourab), supra.* The defense respectfully submits having the grand jury instructed the prosecution proved obtaining money or property by false pretenses by proving defendant made a false representation of an existing or past fact recklessly and without information which would justify a reasonable belief in its truth further deprived defendant of due process on

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32. In order to prove the crime of obtaining money or property by false pretenses, each of the following elements must be proved:
(1) A person made or caused to be made to another person, by word or conduct, either a promise without intent to perform it or a false pretense or representation of an existing or past fact known to such person to be false or made recklessly and without information which would justify a reasonable belief in its truth;
(2) Such person made the pretense, representation or promise with specific intent to defraud;
(3) The pretense, representation or promise was believed and relied upon by the other person and was material in inducing him or her to part with his or her money or property even though the false pretense, representation or promise was not the sole cause; and,
(4) The theft was accomplished in that the other person parted with his or her money or property intending to transfer ownership thereof.

which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

21. THE PROSECUTION DEPRIVED DEFENDANT OF DUE PROCESS BY FAILING TO HAVE THE GRAND JURY INSTRUCTED ON THE LAW OF CIRCUMSTANTIAL EVIDENCE.

The defense requested the prosecution instruct the grand jury if circumstantial evidence is susceptible to two reasonable interpretations, one of which pointing to defendant's guilt and the other to his innocence, the law requires adoption of the interpretation pointing to defendant's innocence, and rejection of the interpretation pointing to his guilt. (Defense Exhibit A, page 79; see CAIJIC 2.01) The prosecution declined to inform the grand jury of the law of circumstantial evidence.

As shown the circumstantial evidence offered by the prosecution in the case at bar was wanting, particularly in the claim of the prosecution that defendant specifically intended to defraud people while he was a well-paid consultant to PriMedex Corporation. The defense respectfully submits the grand jury should have been made aware when circumstantial evidence is susceptible to two reasonable interpretations, one of which pointing to defendant's guilt and the other to his innocence, the law *requires* adoption of the interpretation pointing to defendant's innocence, and *rejection* of the interpretation pointing to his guilt. As stated under *People v. Superior Court (Mouchaourab), supra,* and other cases cited, defendant is entitled to enforce his right to due process based on the instructions given the grand jury on the law. The defense respectfully submits the failure by the prosecution to have the grand jury instructed on the law of circumstantial evidence further deprived defendant of due process on which basis the court could and should dismiss the indictment independent of the failure of the prosecution to prove the charges against defendant.

22. THE STATUTE OF LIMITATIONS BARS PROSECUTING DEFENDANT FOR CONSPIRACY AS ALLEGED IN COUNT 1 OF THE INDICTMENT.

Defendant is charged in Count 1 with conspiring to violate Insurance Code § 556, Insurance Code § 1871.1, Insurance Code § 1871.4, and Corporations Code § 25541;

and conspiring to cheat and defraud a person of money by a means in itself criminal, or to obtain money by false pretenses, in violation of Penal Code § 182(a)(4). As shown the statute of limitations is a bar to prosecution for conspiracy to violate Insurance Code § 556 and conspiracy to violate Insurance Code § 1871.1. The defense respectfully submits the statute of limitations is likewise a bar to prosecution for conspiracy to violate Insurance Code § 1871.4, conspiracy to violate Corporations Code § 25541 and conspiring to cheat and defraud a person of money by a means in itself criminal, or to obtain money by false pretenses, in violation of Penal Code § 182(a)(4).

Prosecuting Defendant for Conspiring to Violate Insurance Code § 1871.4 Barred

As stated the burden is on the prosecution to show the statute of limitations has *not* run; the burden is not on the defense to show it has run. *People v. Zamora, supra.* If the crime that was the object of the conspiracy was committed, the statute of limitations runs from the time of commission of the object of the conspiracy. *People v. Zamora, supra.* Otherwise the statute of limitations begins to run with the last overt act committed in furtherance of the conspiracy. *Parnell v. Superior Court, supra.* The time period of the statute of limitations for conspiracy is the time period within which a prosecution for a felony must be brought. Penal Code § 800, § 801. The statute of limitations for felonies not punishable by eight years or more in the state prison is three years. Penal Code § 801. The punishment for conspiracy to commit insurance fraud in violation of Insurance Code § 1871.4 is the same as the punishment for violating Insurance Code § 1871.4. The punishment for violating Insurance Code § 1871.4 is up to five years in state prison. Insurance Code § 1871.4(b). Therefore the punishment for the crime of conspiracy to

violate Insurance Code § 1871.4 is also five years in state prison. Therefore the statute of limitations of conspiracy to violate Insurance Code § 1871.4 is three years.[33]

The indictment was filed May 20, 1996. Three years earlier was May 20, 1993. This means the prosecution has the burden of establishing, first, the crime that was the object of the conspiracy—a violation Insurance Code § 1871.4—was not committed on or before May 20, 1993. If the violation of Insurance Code § 1871.4 was committed on or before May 20, 1993, the indictment was not brought within three years of the commission of the object of the conspiracy, and therefore prosecution for conspiracy to violate Insurance Code § 1871.4 is barred by the statute of limitations.

Second, assuming the prosecution can establish the violation of Insurance Code § 1871.4 was not committed on or before May 20, 1993, the prosecution still has the burden of establishing the last overt act in furtherance of the alleged conspiracy to violate Insurance Code § 1871.4 was committed after May 20, 1993. If the last overt act in furtherance of the alleged conspiracy to violate Insurance Code § 1871.4 was committed on or before May 20, 1993, the indictment was not brought within three years of the commission of the last overt act in furtherance of the alleged conspiracy, and therefore prosecution for conspiracy to violate Insurance Code § 1871.4 is barred by the statute of limitations.

The important point here is it is not enough for the prosecution to establish an overt act *was done* by an alleged conspirator subsequent to May 20, 1993. The prosecution must *also* establish the overt act was done *in furtherance of the object of the conspiracy.* Not every act—overt, covert or otherwise—done by every alleged co-conspirator subsequent to the formation of the alleged conspiracy is an act in furtherance of the

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33. The prosecution *may* argue that although the punishment for violating Insurance Code § 1871.4 is five years in state prison, the Penal Code § 12022.6(d) enhancement adds four years; therefore the punishment for violating Insurance Code § 1871.4 *as alleged* is nine years in state prison; therefore under Penal Code § 800 the statute of limitations is six years. The fallacy is Penal Code § 800 increases the statute of limitations to six years when *the offense* is punishable by imprisonment in the state prison for eight years or more, not when the offense *plus the alleged enhancement* is punishable by imprisonment in the state prison for eight years or more. If the prosecution raises this argument in its opposition to this motion, the defense will elaborate on its position in its reply.

object of the alleged conspiracy. For example an act in furtherance of *concealment* of the object offense is not in furtherance of the conspiracy unless a separate conspiracy to conceal the object offense exists. In *People v. Zamora, supra,* concealment of arson by the overt act of reporting the hospitalized arsonist had fallen into a barbecue pit during a party was not an overt act in furtherance of the object of the conspiracy so as to bring the conspiracy within statute of limitations. *People v. Zamora, supra,* 18 Cal. 3d 538, 548 n.7, 551-555, 560. Moreover, by just showing defendant committed an overt *unlawful* act does not automatically establish an overt act in furtherance of the alleged conspiracy. In *People v. Northum* (1940) 41 Cal.App.2d 284, 287-289, 106 P.2d 433, in alleged retaliation against public officials, a large number of Jehovah's Witnesses appeared in town and went from door to door. The prosecution charged defendant with conspiracy to disturb the peace. The court held mere lawful presence, albeit en masse, in exercise of First Amendment rights was found not to be an overt act in furtherance of such a conspiracy.

The defense respectfully submits the prosecution failed to show an alleged conspirator committed an overt act in furtherance of the alleged conspiracy to violate Insurance Code § 1871.4 subsequent to May 20, 1993. Therefore the statute of limitations is a bar to prosecuting defendant for conspiring to violate Insurance Code § 1871.4.

Finally the prosecution will argue that in 1995 Penal Code §§ 801.5, referring to Penal Code § 803(c)(6), operative January 1, 1996, created a four-year statute of limitations for violations of Insurance Code § 1871.4. The prosecution will argue that when the indictment was filed May 20, 1996, the statute of limitations for a violation of Insurance Code § 1871.4 was four years; Insurance Code § 1871.4(a)(3) proscribes *conspiring* in making a fraudulent statement to obtain workers' compensation; Penal Code §§ 801.5, referring to Penal Code § 803(c)(6), should operate retroactively; therefore on May 20, 1996, the prosecution was not barred from prosecuting any conspiracy to violate Insurance Code § 1871.4 so long as any overt act in furtherance of the alleged conspiracy was committed after May 20, 1992.

The defense respectfully submits this argument is wrong for two reasons. First, in defendant's demurrer dated October 29, 1999, denied November 15, 1999, defendant

argued, and still argues, Penal Code § 801.5 should *not* operate retroactively because the legislature did not declare it operated retroactively, and under Penal Code § 3 no provision on the California Penal Code is retroactive unless expressly declared.

Second, even using a four-year statute of limitations the defense respectfully submits the prosecution failed to show an alleged conspirator committed an overt act *in furtherance of the alleged conspiracy to violate Insurance Code § 1871.4* even subsequent to May 20, 1992.

Therefore the defense respectfully submits the statute of limitations bars prosecuting defendant for conspiring to violate Insurance Code § 1871.4.

Prosecuting Defendant for Conspiracy to Commit Securities Fraud Barred

The defense respectfully submits for the same reasons the statute of limitations bars prosecuting defendant for conspiring to violate Insurance Code § 1871.4, the statute of limitations bars prosecuting defendant for conspiring to violate Corporations Code § 25541. The punishment for violating Corporations Code § 25541 is up to five years in state prison; therefore the punishment for the crime of conspiracy to violate Corporations Code § 25541 is also five years in state prison, and the statute of limitations of conspiracy to violate Corporations Code § 25541 is three years.

The indictment was filed May 20, 1996. Three years earlier was May 20, 1993. This means the prosecution has the burden of establishing, first, the crime that was the object of the conspiracy—a violation of Corporations Code § 25541—was not committed on or before May 20, 1993. If the violation of Corporations Code § 25541 was committed on or before May 20, 1993, the indictment was not brought within three years of the commission of the object of the conspiracy, and therefore prosecution for conspiracy to violate Corporations Code § 25541 is barred by the statute of limitations. The defense respectfully submits the evidence shows any violation of Corporations Code § 25541 *was* committed before May 20, 1993, therefore the indictment was not brought within three years of the commission of the object of the conspiracy, and therefore prosecution for conspiracy to violate Corporations Code § 25541 is barred by the statute of limitations.

Second, assuming the prosecution can establish the violation of Corporations Code § 25541 was not committed on or before May 20, 1993, the prosecution still has the burden of establishing the last overt act in furtherance of the alleged conspiracy to violate Corporations Code § 25541 was committed after May 20, 1993. If the last overt act in furtherance of the alleged conspiracy to violate Corporations Code § 25541 was committed on or before May 20, 1993, the indictment was not brought within three years of the commission of the last overt act in furtherance of the alleged conspiracy, and therefore prosecution for conspiracy to violate Corporations Code § 25541 is barred by the statute of limitations.

The defense respectfully submits the prosecution failed to show an alleged conspirator committed an overt act *in furtherance of the alleged conspiracy to violate Corporations Code § 25541* subsequent to May 20, 1993. Therefore the statute of limitations is a bar to prosecuting defendant for conspiring to violate Corporations Code § 25541.

Prosecuting Defendant for Conspiring to Cheat and Defraud a Person of Money by a Means in Itself Criminal, or to Obtain Money by False Pretenses, Barred

The defense respectfully submits for the same reasons the statute of limitations bars prosecuting defendant for conspiring to violate Insurance Code § 1871.4 and Corporations Code § 25541, the statute of limitations bars prosecuting defendant for a violation of Penal Code § 182(a)(4). The defense respectfully submits the prosecution failed to show an alleged conspirator committed an overt act *in furtherance of the alleged conspiracy to cheat and defraud a person of money by a means in itself criminal or obtain money by false pretenses* subsequent to May 20, 1993. Therefore the statute of limitations is a bar to prosecuting defendant for a violation Penal Code § 182(a)(4).

Statute of Limitations Bars Prosecuting Defendant for Conspiracy

As shown the statute of limitations is a bar to prosecution for conspiracy to violate Insurance Code § 556. The statute of limitations is also a bar to prosecution for

conspiracy to violate Insurance Code § 1871.1. The statute of limitations is also a bar to prosecution for conspiracy to violate Insurance Code § 1871.4. The statute of limitations is also a bar to prosecution for conspiracy to violate Corporations Code § 25541. The statute of limitations is also a bar to prosecution for conspiring to cheat and defraud a person of money by a means in itself criminal or obtain money by false pretenses in violation of Penal Code § 182(a)(4). Therefore the statute of limitations is a bar to prosecution for conspiracy as alleged in Count 1. Therefore the defense respectfully submits the court dismiss Count 1 on the ground prosecution is barred by the statute of limitations.

23. THE STATUTE OF LIMITATIONS BARS PROSECUTING DEFENDANT FOR SECURITIES FRAUD AS ALLEGED IN COUNT 2 OF THE INDICTMENT.

The defense respectfully submits the court should dismiss Count 2 as the statute of limitations bars prosecution of defendant for a violation of Corporations Code § 25541 and again incorporates the arguments made in defendant's demurrer dated October 29, 1999, denied November 15, 1999, that Penal Code § 801.5 should not operate retroactively because the legislature did not declare it operated retroactively, and under Penal Code § 3 no provision on the California Penal Code is retroactive unless expressly declared. The defense respectfully submits the prosecution failed to show defendant violated Corporations Code § 25541 subsequent to May 20, 1993. Therefore the statute of limitations is a bar to prosecuting defendant for violating Corporations Code § 25541.

Secondly, even using a four-year statute of limitations the defense respectfully submits the prosecution failed to show defendant violated Corporations Code § 25541 subsequent to May 20, 1992.

Therefore the defense respectfully submits the court dismiss Count 2 on the ground prosecution is barred by the statute of limitations.

24. THE PROSECUTION FAILED TO PROVE DEFENDANT TOOK PROPERTY OF A VALUE EXCEEDING $2,500,000 AS ALLEGED IN COUNTS 1 AND 2 OF THE INDICTMENT.

Shaw testified Pacific Rim Assurance Company paid "the Gardner medical group and various other medical enterprises owned by Dr. David Gardner" $1,321,753.44 through May 15, 1996. (RT 830) James Louis Meridith testified the total paid "Dr. Gardner organizations" by the "State Compensation Insurance Fund" January 1, 1988, through April 29, 1996, was $24,857,136.57. (RT 804)

Penal Code § 12022.6 provides:

> (a) When any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction, the court shall impose an additional term as follows ...
>
> (4) If the loss exceeds two million five hundred thousand dollars ($2,500,000), the court, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which the defendant has been convicted, shall impose an additional term of four years.
>
> (b) In any accusatory pleading involving multiple charges of taking, damage, or destruction, the additional terms provided in this section may be imposed if the aggregate losses to the victims from all felonies exceed the amounts specified in this section and arise from a common scheme or plan. All pleadings under this section shall remain subject to the rules of joinder and severance stated in Section 954...
>
> (d) This section applies to, but is not limited to, property taken, damaged, or destroyed in violation of Section 502 or subdivision (b) of Section 502.7. This section shall also apply to applicable prosecutions for a violation of Section 350, 653h, 653s, or 653w.

The defense respectfully submits the prosecution failed to prove defendant, with intent, took, damaged, or destroyed any property in the commission or attempted commission of any felony. Therefore the prosecution failed to prove defendant took property of a value exceeding $2,500,000.

25. AWARE OF EVIDENCE REASONABLY TENDING TO NEGATE DEFENDANT'S GUILT, THE PROSECUTION FAILED TO INFORM THE GRAND JURY OF ITS NATURE AND EXISTENCE.

Penal Code § 939.7 provides:

> The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

In *Johnson v. Superior Court, supra,* the court stated:

> However, the adversary system does not extend to grand jury proceedings. As has been explained, if the district attorney does not bring exculpatory evidence to the attention of the grand jury, the jury is unlikely to learn of it. We hold, therefore, that when a district attorney seeking an indictment is aware of evidence reasonably *tending* to negate guilt, he is obligated under [Penal Code §] 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its power under the statute to order the evidence produced. [Emphasis added] [34]

The prosecution's duty to present exculpatory evidence to the grand jury is also mandated by applicable ethical rules which govern the conduct of all prosecutors and attorneys licensed to practice law in California. For example the ABA Standards Relating to Administration of Criminal Justice: The Prosecution Function, Standard 3-3.6(b), provides, "No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense." In addition, California Rule of Professional Conduct 5-220 states, "a member [of the State Bar] shall not suppress any evidence that the member. . . has a legal obligation to reveal or produce." Further, California Rule of Professional Conduct 5-110 provides, "a member in government

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34. Defendant was indicted May 20, 1996. Penal Code § 939.71, enacted in 1997, provides:

> (a) If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7. If a failure to comply with the provisions of this section results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence.
>
> (b) It is the intent of the Legislature by enacting this section to codify the holding in *Johnson v. Superior Court,* 15 Cal. 3d 248, and to affirm the duties of the grand jury pursuant to Section 939.7.

service shall not institute charges when [he] knows or should know that the charges are not supported by probable cause."

Penal Code § 939.2 and §939.7 give the grand jury legal authority to direct either the prosecution or a judge of the superior court to issue subpoenas to obtain and produce any exculpatory evidence it has reason to believe exists.[35] Its authority extends to witnesses and evidence located outside the State of California which may be produced voluntarily or by subpoena pursuant to Penal Code § 1334 et seq., also called the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases. Under this statute, the grand jury may compel witnesses to appear and evidence to be produced from every state in the United States.

The defense expressly made the district attorney aware of the exculpatory evidence on September 15, 1995, November 25, 1995, and May 13, 1996.

But the district attorney had already set the stage for the question of whether the grand jury should hear defendant's side of the story. After eliciting from Fratto inadmissible, highly prejudicial hearsay testimony about defendant's allegedly illegal, deceptive and fraudulent past as reported in the newspaper, the deputy district attorney had asked:

> Q. Based on that article, what did you do in relationship to this loan?
> A. We had a meeting as quickly as possible with Mr. Goldblum and he indicated that—*he gave us his side of the story.* We did other research, including there is a book in the public library all about the Equity Funding case, and we read that thoroughly, and we were convinced that *we no longer wanted to do business with this firm. So we asked them to find another bank.* (RT 493-494)

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35. Penal Code § 939.2 provides:
A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the district attorney, his investigator or, upon request of the grand jury, by any judge of the superior court, for witnesses in the state, in support of the prosecution, for those witnesses whose testimony, in his opinion is material in an investigation before the grand jury, and for such other witnesses as the grand jury, upon an investigation pending before them, may direct.

Fratto testified on May 9, 1996. That same day Karlan approached a defense investigator outside the grand jury room and told the investigator he was wasting his time asking the witnesses their names because he would find out "after the indictment comes down."

The prosecution was not interested in the grand jury hearing defendant's side of the story.

May 20, 1996, after the prosecution called its last witness, the deputy district attorney stated to the grand jury:

> The attorney for target Stanley Goldblum has offered to have *physicians* testify to the proposition that Stanley Goldblum did not participate in or have authority in establishing, monitoring or implementing the medical corporation's clinical policies and practices...The grand jury should retire and decide whether or not they want to hear further evidence of a potentially exculpatory nature from any of these witnesses. (RT 960; emphasis added)

The deputy district attorney named Drs. Ananias, Groves, Kaufman, Capps, Fessenden, Pili, Mikhail, Billson, Cockrell, Angelich, Harkleroad and Hollier. But deputy district attorney only informed the grand jury they would testify to the proposition defendant did not participate in or have authority in establishing, monitoring or implementing the medical corporation's clinical policies and practices. The prosecution did *not* inform the grand jury of the nature and existence of the remainder of each physician's testimony tending to negate guilt.

But the deputy district attorney failed to mention entirely the following witnesses the defense requested give testimony:

Mr. Gary Morris	Dr. Mitchell Kaufman	Mr. Jack Baruch
Ms. Anne Marie Foglio	Rose Mitchell, Esq.	Ms. Elizabeth Directo
Mr. Andrew Alson	Informant Avelar	Mr. Eric Salvado
Mr. Roger Bodman	Ms. Mercedes Lara	Mr. Jose Shuton
Mr. Ronald Riccio	Dr. Matthew Grippi	Mr. Norman Corrales
Mr. Roger Barnett	Dr. Norman Corlew	Mr. Durwin Corrales
Mr. Sam Williams	Dr. Eugene Hubbard	Ms. Martha Corrales
Ms. Laurie Weinstock	Dr. Reynolds McKay	Mr. Brad Hale
John Hartigan, Esq.	Dr. Steven Nagelberg	Mr. Ron Banjovic
Robert Sevell, Esq.	Judge Herman Feuerstein,	Mr. Fred Rappaport
Donald Marks, Esq.	Clifford Daniel Sweet, Esq.	Ms. Nancy Wims
Ms. Janis Spire	Mr. Richard Cole	Ms. Melissa Springer
Ms. Linda Wakelin	Mr. Richard Jackson	Mr. Vincent Ambrose
Michael Tichon, Esq.	Ms. Thelma Abuton	Ms. Elaine McCramer
Ms. Carol Stimson	Roger Tolins, Esq.	Ms. Rita Davis
Mr. Gary Hernandez	Thomas Ruane, Esq.	Ms. Margarita Trejos
Mr. Jerry Treadway	Gerald Connor, Esq.	Ms. Rasalia Fuentes
Mr. Richard Polep	Mr. Herschel Aron	Ms. Sonsuray Phillips
Mr. Jeffrey Gilbert	Mr. James Mortenson	Mr. Terrence Walker
Mr. Richard Suhl	Mr. Stewart Kahn	Dr. Thomas Bingamon

Also the prosecution failed to mention entirely tape recordings, computer data and multitudinous exculpatory documents the defense requested the prosecution to produce, such as the PriMedex Corporation minutes showing on July 31, 1989, a share certificate issued to defendant for 525 shares of PriMedex stock was rescinded with the word CANCELED written over it. Of the stockpile of exculpatory evidence detailed in Defense Exhibits A and F made available to the prosecution, it selected only 13 of the physicians—a small fraction—for disclosure to the grand jury, and even for those witnesses, as shown, the prosecution failed to fully disclose what their testimony would have been.

The following dialogue between the foreperson and the deputy district attorney ensued:

> The Foreperson: Are those witnesses available if the grand jury should choose to hear them? Do you have any idea of where or what their status might be?
> Mr. Botello: *I have no idea* what the status of all of them are. I just assume the majority of them live in the area. *We* have had no contact with them.

The Foreperson: All right. (RT 960; emphasis added) [36]

The grand jury retired with the legal advisor, deputy district attorney Stephen C. Licker. The grand jury emerged: it's verdict was short and sweet:

> The Foreperson: Let the record show for the record the grand jury has chosen not to hear the exculpatory witnesses.

The defense respectfully submits that if the prosecution would have fully disclosed the nature and existence of the exculpatory evidence, the grand jury would not have chosen not to hear it.

But then why should the grand jury listen to defendant's side of the story in the form of *Johnson* evidence? Imperial Bank gave him a chance and apparently were more convinced than ever defendant is a fraud.

In *Bradley v. Lacy* (1997) 53 Cal.App.4th 883, the court stated:

> "Under the ancient English system ... the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." (*Hale v. Henkel* (1906) 201 U.S. 43, 59 [50 L.Ed. 652, 659, 26 S.Ct. 370], quoted in *Hoffman v. United States* (1951) 341 U.S. 479, 485 [95 L.Ed. 1118, 1123, 71 S.Ct. 814].) [¶] The Fifth Amendment guarantee that a civilian may not be held to answer in a federal prosecution for a capital or otherwise infamous crime "unless on a presentment or indictment of a Grand Jury" presupposes a grand jury "'acting independently of either prosecuting attorney or judge," whose mission is to clear the innocent, no less than to bring to trial those who may be guilty. (*United States v. Dionisio* (1973) 410 U.S. 1, 16-17 [35 L.Ed.2d 67, 81, 93 S.Ct. 764]; citation omitted.) [¶] The grand jury's 'historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor' (*United States v. Dionisio, supra,* at p. 17 [35 L.Ed.2d at p. 81]) is as well-established in California as it is in the federal system.... [8] 'a grand jury should never forget that it sits as the great inquest between the State and the citizen, to make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded accusation, whether from the government, from partisan passion, or private malice.' (*In re Tyler* (1884) 64 Cal. 434, 437 [1 P.

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36. Apparently the deputy district attorney didn't skip a beat. Deputy district attorney Al Botello then said, "I would like to at this time give a closing statement," and proceeded to give a closing statement.

884].)" (*Johnson v. Superior Court* (1975) 15 Cal.3d 248, 253-254 [124 Cal.Rptr. 32, 539 P.2d 792].)

...

It is apparent from the foregoing description of the grand jury's powers with respect to public offenses that it is not the mere handmaid of the district attorney. Although the district attorney may present evidence of public offenses to the grand jury, and may advise the grand jury concerning such matters, the grand jury has the authority and the means independent of the district attorney to investigate and indict for any public offense triable within the county.

The defense made the prosecution aware of evidence showing or reasonably tending to show defendant was not guilty of conspiracy and securities fraud. The prosecution failed to inform the grand jury of the nature or existence of the evidence. Under *Johnson* the prosecution was obligated but failed to present the exculpatory evidence to the grand jury. The evidence reasonably tended to negate guilt of the crimes charged. The prosecution was aware of the evidence. The prosecution withheld the evidence from the grand jury. "The rule of *Johnson* voids an indictment where a prosecutor has withheld from the grand jury evidence reasonably tending to negate guilt of the crimes charged." *Page v. Superior Court* (1979) 90 Cal.App.3d 959, 969. The defense respectfully submits the prosecution's failure to inform the grand jury of the nature and existence of the evidence requires the court pursuant to *Johnson* to grant this motion and void the indictment independent of the failure of the prosecution to prove the charges against defendant.

Conclusion

It really does not matter what theory—nonhearsay or hearsay exception—the prosecution claims it used to get defendant's prior convictions for securities fraud before the grand jury. Evidence Code § 352 precluded the grand jury from knowing about them. The prosecution could have saved a lot of time raising the issue by just introducing certified records of defendant's convictions and then just arguing it introduced defendant's convictions to show he committed securities fraud in the past, showing defendant committed securities fraud in the past is admissible to show his intent to commit securities fraud now, and the evidence of the convictions is admissible as official

record exceptions to the hearsay rule. Instead the prosecution beat around the bush. It introduced statements in a newspaper and a prospectus about defendant's prior securities fraud convictions. It improperly assumed the truth of the statements in hypothetical questions. It elicited testimony about the statements using seemingly innocent questions. *Why did the NASD investigate further? What does that mean? Would you explain? What was the publicity?* It introduced testimony about the statements on the pretext they were not adequately described in the prospectus.

But the result was the same. The grand jury was effectively informed *this was not the first time defendant committed securities fraud. He's in the same class with Michael Milken.*

The statements were inadmissible. The statements were inadmissible as nonhearsay because the fact the statements were made was irrelevant. The statements were inadmissible as statements of a co-conspirator because a co-conspirator did not make or authorize the statements. The statements were inadmissible as authorized admissions because defendant gave no one authority to make the statements. The statements were inadmissible as business records because no one established the mode of preparation of the prospectus, it was not made in the regular course of business and was not made at or near the time of defendant's convictions.

Moreover even if the statements qualified as an exception to the hearsay rule, they were inadmissible to show a plan or scheme because the prosecution offered no evidence of the plan or scheme defendant used to commit the prior crimes. The statements were inadmissible to show intent or purpose because the prosecution offered no evidence of defendant's intent or purpose in committing the prior crimes other than defendant committed the prior crimes. The statements were inadmissible to show "the existence of a conspiracy" because when defendant committed the prior crimes he did not even know anyone mentioned in the indictment or evidence.

Planting defendant's prior convictions for securities fraud in the minds of the grand jurors confused the issues, misled them, caused undue prejudice and deprived defendant of due process of law. Hence the court can have no confidence the grand jury indicted defendant because there was enough evidence to establish he was guilty of securities fraud or conspiracy.

One method of analyzing the evidence for sufficiency is to assume defendant is *not* Stanley Goldblum convicted of securities fraud in the past. Instead suppose defendant's name is John Smith. Then assume *all* facts *most* favorable to the prosecution. You get the following scenario.

Gardner is paying kickbacks to attorneys for sending his clinics patients. He retains John Smith as a consultant. Far from being a convicted felon, Smith is a financial wizard *and his background is spotless.*

Smith immediately goes to work assisting Gardner in the development of an expansion strategy. In dealing with banks Smith, to get the job done, falsely signs his name as vice president. In dealing with banks he falsely represents himself as a five percent shareholder. But the loans are paid in full and the banks are defrauded not a nickel.

As a consultant Smith gets copies of the reports showing how many new patients each attorney sends, and what revenue was generated by each attorney on each case. Smith asks questions about the reports.

Because carriers are likely to pay a higher percentage of the claim if CAT scans are done by an outside entity, CAT scans done in the Gardner clinics are rebilled under the name Crown Imaging. Smith suggests Crown Imaging be deleted from the attorney run. This would show less revenue generated by the attorney. If the attorney received kickbacks based on the volume of business sent, he or she would receive a reduced kickback.

Larry Parker is an attorney that sends Gardner's companies personal injury cases. Parker is a client of Asher Gould Advertising. Smith signs two of seventeen PriMedex Corporation checks payable to Asher Gould Advertising for Parker.

Over the next five years, although Smith receives substantial fees, Gardner's companies grow to the extent that they are worth millions of dollars. Gardner now wants to sell out. Smith will conduct the search for a buyer and receive a brokerage commission for his efforts.

Eventually Smith finds a company in New York. CCC Franchising Corporation is controlled by Robert Brennan who loans CCC Franchising Corporation $33,000,000 to buy Gardner's companies for $46,250,000. Smith receives a commission of $1,500,000

for finding CCC Franchising Corporation. After the sale, Gardner is a director of CCC Franchising Corporation, and president and CEO of its wholly-owned subsidiary, PriMedex Corporation. Smith writes a note "Congratulations again, John," and stays on as a PriMedex Corporation consultant.

Several months later, to repay Brennan's loan, CCC Franchising Corporation, which has now changed its name to PriMedex Health Systems, Inc., offers to the public up to 10,000,000 shares of common stock at $4.50 per share. At a due diligence meeting for stock brokers Smith tells the stock brokers it is the most fantastic stock offering he's been associated with in his numerous years in the investment business.

PriMedex Health Systems, Inc., sells 7,589,018 shares for net proceeds of $30,279,174, and Brennan recoups most of his loan. Six months later PriMedex Health Systems, Inc., starts closing its clinics. Smith resigns as a consultant. Two years later PriMedex Health Systems, Inc., sells its accounts receivable to Bristol A. R., Inc. for $9,500,000. The following year PriMedex Health Systems, Inc., stock is trading at 90 cents a share.

Again the defense wants to emphasize that the foregoing "facts" are based on many bold assumptions that the defense hotly disputes. But *assuming* the prosecution did establish these facts—which it did not—where is basis for indicting John Smith for securities fraud or conspiracy? Because he signed his name as vice president dealing with noncomplaining banks? Because he suggested Crown Imaging be deleted from the attorney run to reduce kickbacks? Because he signed two PriMedex Corporation checks payable to Asher Gould Advertising for Larry Parker? Because he received a commission of $1,500,000 for finding CCC Franchising Corporation. Because he told some stock brokers PriMedex Health Systems, Inc., is the most fantastic stock offering he's been associated with in his numerous years in the investment business?

The defense respectfully submits, based on the above "facts," which represent the prosecution case at its best, no reasonable trier of fact would strongly suspect John Smith was actually guilty of the crimes of securities fraud or conspiracy. No reasonable trier of fact would indict John Smith for the crimes of securities fraud or conspiracy.

But the defendant in this case is not John Smith. The defendant is Stanley Goldblum. Once the defendant is the infamous Stanley Goldblum everything changes. Why

infamous? Because that is how the prosecution had its witnesses describe Mr. Goldblum. And not just infamous in the general sense; infamous as a *securities fraud criminal.*

The defense respectfully submits that by introducing Mr. Goldblum's prior convictions for securities fraud the prosecution erred to the great prejudice of Mr. Goldblum. The defense respectfully submits the grand jury would not have indicted squeaky clean Mr. Smith even though Smith did what Goldblum did as a consultant to PriMedex Corporation.

But even apart from the prejudice, the prosecution failed to prove Mr. Goldblum conspired to violate Insurance Code § 556, § 1871.1 or § 1871.4 in any case. The medical corporations were solely owned by Gardner. Mr. Goldblum was a consultant, and then only to PriMedex. Mr. Goldblum was compensated as a consultant. Mr. Goldblum was not an employee. Mr. Goldblum was not a stockholder. Mr. Goldblum was not an officer. PriMedex Corporation did not control the professional activities of the medical corporations. Mr. Goldblum had nothing to do with deleted patient files. Mr. Goldblum had no control over medical protocols. Mr. Goldblum had no control over patients' back care. Mr. Goldblum had no control over diagnostic blood tests; and industrial medicine standards were nonexistent in any case. Mr. Goldblum had no authority to prevent the use of Crown Imaging as a separate billing entity; and use of Crown Imaging was not a violation of the law in any case. Mr. Goldblum had no control over medical-legal reports. Mr. Goldblum had no authority regarding Super Bills. Mr. Goldblum did not establish doctors' bonuses. Mr. Goldblum had no control over permanent disability ratings. Mr. Goldblum had no control over Gardner's mail or checks. Mr. Goldblum had no reason to disbelieve patients suffered real injuries. Mr. Goldblum did not violate Insurance Code § 556, § 1871.1 or § 1871.4. Mr. Goldblum did not conspire to violate Insurance Code § 556, § 1871.1 or § 1871.4. Mr. Goldblum was not involved in unlawful activity.

For all of the same reasons, apart from the prejudice, the prosecution failed to prove Mr. Goldblum conspired to defraud a person of money by a means in itself criminal or false pretenses. And for the additional reason this contention requires more proof than needed to prove a violation of the Insurance Code because a claim *per se* is not a false pretense or representation of a past known false fact.

Barring the evidence of Mr. Goldblum's prior convictions for securities fraud, the prosecution failed to prove he committed securities fraud. The prosecution failed to show Mr. Goldblum had the specific intent to defraud. If Gardner was paying kickbacks to attorneys for sending his clinics patients, the prosecution offered no evidence Mr. Goldblum had any control over the practice although it offered some evidence he possibly tried to curtail the practice—and that evidence was unreliable and inadmissible because the prosecution never established a proper foundation. If Gardner used the Bristol Advertising checking account to pay attorneys, Mr. Goldblum had no knowledge of it. Mr. Goldblum had no control over seasonal gifts and presents to attorneys. Mr. Goldblum signed two or three checks payable to Asher Gould Advertising but had no knowledge they were for personal injury attorney Larry Parker. Mr. Goldblum had no control over referrals from Injury Hotline. Mr. Goldblum had good reason to believe Injury Central conducted lawful advertising. Mr. Goldblum had good reason to believe Gardner patients were lawfully referred. Mr. Goldblum never referred a patient to an attorney.

Mr. Goldblum's fees were lawfully earned and disclosed. The sale of PriMedex Corporation assets was lawful. Mr. Goldblum's fee for the sale of RadNet was lawful. Mr. Goldblum was not responsible for the public offering because Mr. Goldblum was not an officer, director or shareholder of PriMedex Health Systems, Inc., F. N. Wolf & Co., Inc., PriMedex Corporation, RadNet Management, Inc., or any of the medical corporations. Mr. Goldblum signed no filings with the SEC, nor was Mr. Goldblum required to sign anything. Mr. Goldblum was not responsible for any statement or omission in the prospectus. Mr. Goldblum did not benefit from the public offering. He would have received his consultant fees whether the stock offering happened or not. Mr. Goldblum never offered a security and he had no intent to defraud. Mr. Goldblum had no control over closing clinics. His net loss in consulting fees and stock options as a result of the clinic closures was in the neighborhood of $3,370,000. As the prosecution failed to prove Mr. Goldblum committed securities fraud, the prosecution failed to prove Mr. Goldblum conspired to commit securities fraud.

But apart from failing to prove the charges, and prejudicing the grand jury by introducing Mr. Goldblum's prior securities fraud convictions, the prosecution

committed other errors and acts of misconduct. The prosecution repeatedly had witnesses tell the grand jury Mr. Goldblum was a "statutorily disqualified person." Besides improperly assuming the truth of Mr. Goldblum's prior convictions for securities fraud in hypothetical questions, it asked other hypothetical questions that assumed facts never proved. The prosecution elicited prejudicial answers that assumed facts never proved. The prosecution improperly implied Mr. Goldblum's attorneys told him not to talk about patient referrals from outside attorneys. The prosecution improperly allowed witnesses argue the prosecution case. The prosecution elicited inadmissible opinion that the Gardner billings were improper. The prosecution allowed Judge William J. Ordas to materially mislead the grand jury by testifying a Gardner corporation could not charge insurance carriers additional charges for outside laboratory services. The prosecution allowed Ordas to materially mislead the grand jury by testifying a Gardner corporation committed fraud when employees other than the signing physician participated in any kind of preparation of any kind of reports regarding any injury occurring at any time. The prosecution improperly asked Ordas to assist the grand jury in its role as trier of fact. The prosecution improperly allowed Ordas to opine the Gardner corporations violated the law. The prosecution improperly had Judge Ordas testify Mr. Goldblum is guilty.

The prosecution left gaps in proof that prevented the grand jury from making the inferences it wished made. It never sufficiently connected Mr. Goldblum's $1,000,000 fee and $500,000 to the sale of the PriMedex Corporation assets.

The prosecution improperly had the grand jury instructed it could prove a violation of Insurance Code § 1871.4 by showing medical-legal costs were charged in excess of the direct costs of laboratory tests, without proving the injury occurred after January 1, 1990. The prosecution improperly had the grand jury instructed a violation of Penal Code § 182(a)(4) could be proved by showing Mr. Goldblum made a representation not known by him to be false. And the prosecution improperly failed to have the grand jury instructed on the law of circumstantial evidence.

Apart from the question of whether the prosecution failed to prove Mr. Goldblum conspired to violate Insurance Code § 556, § 1871.1 or § 1871.4 is the question of whether prosecution of Mr. Goldblum is barred by the statute of limitations. The statute of limitations bars prosecuting him for conspiring to violate Insurance Code § 556 then §

1871.1 because the last day he could have been so charged was December 31, 1995, almost five months before he was indicted. The statute of limitations bars prosecuting Mr. Goldblum for conspiring to violate Corporations Code § 25541 because the prosecution failed to show an alleged conspirator committed an overt act in furtherance of the alleged conspiracy to violate Corporations Code § 25541 subsequent to May 20, 1993. The statute of limitations bars prosecuting Mr. Goldblum for a violation of Penal Code § 182(a)(4) because the prosecution failed to show an alleged conspirator committed an overt act in furtherance of the alleged conspiracy to cheat and defraud a person of money by a means in itself criminal or obtain money by false pretenses subsequent to May 20, 1993. The statute of limitations bars prosecuting Mr. Goldblum for a violation of Corporations Code § 25541 because the prosecution failed to show he violated Corporations Code § 25541 subsequent to May 20, 1992.

Finally the prosecution failed to inform the grand jury of the nature and existence of tape recordings, computer data, documents and the testimony of 60 witnesses reasonably tending to negate the claim of Mr. Goldblum's guilt.

For any and all of the above reasons the defense respectfully submits pursuant to Penal Code § 995 and/or Penal Code § 939.7 the court dismiss the indictment.

Dated May 28, 2000, at Malibu, California.

LAW OFFICES OF EDWARD MURPHY

By_____
Edward Murphy
Attorney for Defendant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, state of California. I am over the age of 18 and not a party to the within action. My business address is:

Law Offices of Edward Murphy
20700 Pacific Coast Highway, Suite 6
Malibu, CA 90265

On_____ I served the foregoing document described as DECLARATION OF EDWARD MURPHY; POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS INDICTMENT addressed as listed below on the other parties to this action by:

- ☐ United States mail
- ☐ Hand delivery
- ☐ Fax

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed this_____at Malibu, California.

_____

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