IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 1:19-cr-10043-STA**
	)	
JAY SHIRES, M.D.	)	
LORAN KARLOSKY, M.D.	)	
MARY ANN BOND	)	

MOTION TO EXCLUDE PRACTICE FUSION RECORDS AND SUMMARIES OF PRACTICE FUSION RECORDS BASED ON EVIDENTIARY AND DUE PROCESS RELIABILITY CONCERNS

Comes the defendant, LORAN KARLOSKY, M.D., through counsel and pursuant to the Due Process Clause of the Fifth Amendment, Fed. R. Evid. 401, Fed. R. Evid. 1006, *United States v. Bray*, 139 F.3d 1104 (6th Cir. 1998), the other authorities cited in the accompanying memorandum and their progeny, and respectfully moves this Court to exclude the electronic medical records seized from Practice Fusion in this case, as well as the government's summary evidence of the Practice Fusion records.

In further support, the following is submitted:

(1) The allegations in this case concern Downtown Medical Clinic, which used an electronic medical records company, Practice Fusion, to create and maintain its patient files.

(2) The government sought the clinic's Practice Fusion records, first through court orders in 2016 and 2017 and later using a trial subpoena in 2020. In response to the government's first request, Practice Fusion said it was "unable" to provide the records in the requested format. In response to the government's second request, Practice Fusion produced the records in a fashion that made them—according to the government—"difficult to navigate, synthesize and, sometimes, understand." As a result, the government undertook "extensive" efforts "to improve upon what

Practice Fusion provided." Along the way, the government identified "inconsistencies" that required "part" of the production to be "re-issued" and described the data as having been provided "without any readily apparent means of synchronizing each category." Eventually, the government sent Practice Fusion a trial subpoena to obtain the records again. And, after "holding Practice Fusion's feet to the fire," the government obtained "data exported in a format that looks like medical records," though they are not the same medical records that the provider at Downtown Medical Clinic would have seen. The government has "tr[ied] to make sense of all this" and is now "forced to present summary exhibits off of that data."

(3) One reason for the difficulties in getting records from Practice Fusion is that the company "doesn't keep archived copies of prior iterations of its software." Whereas the indictment in this case concerns conduct alleged to have occurred in 2014–16 that the government wishes to establish using Practice Fusion records, Practice Fusion "tinkers with the code in realtime" and now cannot "recrate the picture that the doctor was looking at" because the software "has been altered enough times" and they "don't keep great records of that." Therefore, the government has indicated it plans to introduce "an approximation of the patient record visually that the doctor was looking at."

(4) The government's relationship with Practice Fusion extends beyond this case. Last year, for example, Practice Fusion entered into a deferred prosecution agreement, resolving civil and criminal investigations concerning Practice Fusion's electronic health records, with the company agreeing to pay $145 million. Part of the allegations had included Practice Fusion's software "caus[ing] its users to submit false claims for federal incentive payments by misrepresenting the capabilities of its [electronic health record] software." Practice Fusion also agreed to cooperate with the government as part of the resolution.

(5) In this case, the defense does not have copies of the proposed summary exhibits yet, but the government has previously indicated that, "The government's Practice Fusion summaries will likely include (1) pivot tables and categorical excerpts/summaries of the data contained in the Practice Fusion Excel spreadsheets; and (2) compilations of data and scanned documents comprising the 'medical records' of Downtown Medical patients."

(6) Federal Rule of Evidence 1006 governs "Summaries to Prove Content" and provides that a party "may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court." Fed. R. Evid. 1006.

(7) As construed by the Sixth Circuit, Rule 1006 imposes five requirements (the so-called *Bray* factors) for the admission of a summary: (1) the underlying documents must be so voluminous that they cannot be conveniently examined in court, (2) the proponent of the summary must have made the documents available for examination or copying at a reasonable time and place, (3) the underlying documents must be admissible in evidence, (4) the summary must be accurate and nonprejudicial, and (5) the summary must be properly introduced through the testimony of a witness who supervised its preparation. *United States v. Modena,* 302 F.3d 626, 633 (6th Cir. 2002).

(8) Regarding the first *Bray* factor, any summary that is not based on voluminous records (*e.g.*, summaries designed merely to re-create approximations of patient records) does not meet the test for Rule 1006. Regarding the second *Bray* factor, the government has not yet made the summaries available or identified the specific underlying documents, though the lengthy and

complex jury trial is two months away. Recording the third *Bray* factor, the authenticity and accuracy problems evident from the history of the government's acquisition and repeated partial re-acquisitions in this case means there are serious reliability concerns that will impact the records' admissibility. Regarding the fourth *Bray* factor, summaries must be non-misleading and cannot be embellished with inferences, but the government admits that the re-created patient records are not what a practitioner would have seen and that Practice Fusion has produced records containing discrepancies. The fifth *Bray* factor cannot be evaluated without knowing who will introduce the records.

(9) Dr. Shires previously filed a "Motion to Exclude Practice Fusion Summary and Expert Testimony Regarding Practice Fusion Records," (Doc. 126), which this Court denied. (Doc. 173). That motion raised different issues than presented here. There, the Court identified the issues presented as "whether the government met its obligation to disclose the underlying data it intends to present in a summary exhibit as part of its case-in-chief and whether the government has made a timely disclosure of the witness through whom it will introduce the summary as a trial exhibit." (*Id.*, PageID 876–77). The Court concluded that the motion was moot because the government's October 2020 production of Practice Fusion materials addressed some of the defense's concerns, no supplemental relief was requested following the production, and the continued trial date meant there was additional time to review the materials. (*Id.*, PageID 878–79). Finally, the Court noted that the issues raised are "[g]enerally speaking," considered motions in limine, and so the Court "need not make a final determination" because "any concerns Defendant may have about the Practice Fusion evidence, a Rule 1006 summary of the evidence, or the admissibility of any possible testimony from Mr. Roose" can be addressed just prior to or during trial. (*Id.* 879–80).

(10) Here, in addition to raising additional challenges under Rule 1006, Dr. Karlosky challenges the government's use of summary evidence in this case to introduce Practice Fusion records on constitutional grounds.

(11) The Fifth Amendment provides that, "No person shall […] be deprived of life, liberty, or property, without due process of law…." "Due process does not permit a conviction based on no evidence, or on evidence so unreliable and untrustworthy that it may be said that the accused had been tried by a kangaroo court." *California v. Green*, 399 U.S. 149, 203 n.20 (1970) (internal citations omitted).

(12) The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right […]to be confronted with the witnesses against him…and to have the Assistance of Counsel for his defense." *See Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.").

(13) Based on the Fifth and Sixth Amendments, the Practice Fusion records and summaries based on such records should be excluded from the trial of this matter because the manner in which they were obtained by the government and the issues with their contents would allow any potential conviction in this case to rest on constitutionally unreliable evidence.

WHEREFORE, Dr. Karlosky moves to exclude the Practice Fusion records and summaries in this case. This motion is filed based on currently available information. After the government has produced the summaries, it may be appropriate to revise this motion. This motion is also filed based on undersigned counsel's efforts to comply with the Court's scheduling order. However, it remains counsel's position that it is unreasonable to expect adequate preparation for pretrial proceedings or the trial itself within the current schedule and that the constitutional protections

afforded persons accused, and the essential requirements of the defense function, cannot be met without additional time to prepare. *See* (Motion to Continue, Doc. 157) (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)); (Supplement to Motion to Continue, Doc. 174); (Second Supplement to Motion to Continue, Doc. 177).

Respectfully submitted this 17th day of August 2021, by:

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CERTIFICATE OF SERVICE

I certify that on August 17, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

/s/Stephen Ross Johnson
STEPHEN ROSS JOHNSON