

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

<hr/>		)
Mark B. Kabins,		)
		)
	Plaintiff,	)
		)
v.		) Case No.
		) 2:11-cv-01742-JCM-RJJ
		)
KATHLEEN SEBELIUS, in her Official		)
Capacity as the Secretary of the United States		)
Department of Health & Human Services,		)
		)
	Defendant.	)
<hr/>		)

**ORDER**

This matter involves the Plaintiff’s challenge to the Secretary of Health and Human Services’ (HHS) decision to exclude the Plaintiff, Mark Kabins, M.D., from continuing to participate as a physician or in any manner in various federal health care programs. This Court now vacates the Secretary’s exclusion action and directs the Secretary to take certain actions in furtherance of reinstating Dr. Kabins’ eligibility to participate in the relevant federal health care programs and to otherwise reverse the effects of the Secretary’s exclusion decision.

In support of its Order, this court adopts the following findings and conclusions:

PROCEDURAL

1. On November 23, 2009, Dr. Kabins pleaded guilty in the United States District Court for the District of Nevada to one count of misprision of felony in violation of 18 U.S.C. § 4. Rec. 303-309.
2. The guilty plea was entered pursuant to a plea agreement between Dr. Kabins and the United States, dated October 30, 2009. Rec. 777-788. The plea was in answer to criminal information filed November 23, 2009. Rec. 789-792.
3. During the plea colloquy, without objection from the government, the Court noted that “misprision [is] the failure to report an alleged crime committed by others.” Rec. 285 (emphasis added).

4. Both the Information and the Plea Agreement's factual statement indicate that the felony of others that Dr. Kabins did not report was "the crime of mail or wire fraud committed by [Howard] Awand and [Noel] Gage." Rec. 792, 786.
5. Noel Gage is an attorney who came to represent Ms. Simon with respect to possible legal claims against her medical providers. Rec. 790.
6. Both Noel Gage and Dr. Kabins had business relations with Howard Awand related to receiving work referrals, with Gage receiving referrals of possible personal injury clients and Dr. Kabins receiving potential patient referrals. Rec. 790-791.
7. As a result of the common relationship that Dr. Kabins and Noel Gage had with Howard Awand, Noel Gage had a potential legal conflict of interest in representing Ms. Simon with respect to whether to sue Dr. Kabins. Rec. 791.
8. In a "Letter of Complaint" that assisted Noel Gage in assessing a potential lawsuit on behalf of Ms. Simon, Dr. Kabins failed to reveal Gage's legal conflict of interest and that Gage and Awand were thereby engaged in mail and wire fraud. Rec. 791-792.
9. At the time of sentencing, Melodie Simon stated that she "did not sue . . . Dr. Kabins because I did not think [he was] responsible for what had happened to me. I believe that Doctor Kabins saved my life." Rec. 321.
10. An expert witness for the government, Dr. Alan Hamilton, has previously testified under oath (at the trial of Noel Gage) that Dr. Kabins did not cause harm to Melodie Simon. Rec. 384.
11. At Dr. Kabins' sentencing, the District Court modified the normal conditions of probation to ensure that Dr. Kabins would be able to continue practicing medicine. Rec. 800-801.
12. Judgment in Dr. Kabins' case was entered on January 22, 2010. Rec. 401-405.
13. Over the government's objection, the Court subsequently granted Dr. Kabins' motion to terminate early his probation, Rec. 264-265. In its Orders granting Dr. Kabins' request, the District Court emphasized Dr. Kabins' offense lacked any connection to health care violations and the minor role played by Dr. Kabins. Rec. 264, 268.
14. By letter dated January 31, 2011, the HHS Office of Inspector General (OIG) notified Dr. Kabins that he was excluded from Medicare, Medicaid, and all federal health care programs for five years. Rec. 775-776.
15. Dr. Kabins appealed this exclusion to an HHS Administrative Law Judge ("ALJ"). Rec. 29-30, 74-119.

16. The ALJ sustained the exclusion of Dr. Kabins. Rec. 1-10.
17. Dr. Kabins then appealed to the HHS Departmental Appeals Board (“DAB”). Rec. 165-208.
18. The DAB affirmed the exclusion. Rec. 11-23.
19. The DAB asserted it applied a “common sense” test to determine whether an offense was committed “in connection with” the delivery of a health care service. Rec. 18-20.
20. The DAB characterized Dr. Kabins’ argument by which Dr. Kabins noted that (a) the offense of Gage and Awand that he failed to report (mail and wire fraud designed to deprive the client of honest legal services) was no longer recognized as an offense in light of the Supreme Court’s decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), (b) Dr. Kabins’ own conviction could not thereby be described properly as a conviction meeting the exclusion statutes terms as an attack on the validity of the underlying conviction rather than a challenge to the nature of the conviction. Rec. 21.
21. Dr. Kabins filed a motion for reconsideration in which he argued that the record should be re-opened to consider the new decisions of the District Court where it terminated early Dr. Kabins’ probation. Rec. 250-268.
22. The Secretary “decline[d] to admit either order” of this District Court into the record. Rec. 26.
23. Dr. Kabins timely brought suit in this court, challenging the Secretary’s decision in a multi-count complaint.

## LEGAL

24. The statute and regulation under which Dr. Kabins was excluded are consistent and include four requirements to be satisfied for an exclusion to be warranted. The first two of those are not at issue (there must be a felony conviction and the felony must have occurred after August 21, 1996).
25. The second two are as follows: (a) the offense must have been a felony relating to “fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct” and (b) the offense of conviction must have occurred “in connection with the delivery of a health care item or service.”
26. Addressing the last element first, the felony offense at issue in the instant case, Dr. Kabins’ misprision of a felony, is not properly characterized by the Secretary as one that was “in connection with the delivery of a health care item or service.” The plea colloquy made clear that Dr. Kabins was, fundamentally and uncontrovertibly, admitting to the crime of not reporting the crime of two others, Messrs. Awand and Gage. Both that plea colloquy and the accompanying plea

factual statement further make clear that the crime Messrs. Awand and Gage committed involved their failure to provide honest services to their client through their failures in the delivery of legal, not medical, services.

27. While the phrase “in connection with the delivery of a health care item or service” may be broad, it cannot reasonably be stretched to embrace the conviction here. The phrase “in connection with the delivery of health care” is a term of limitation on the Secretary – it establishes Congress’ intent that only a particularized set of felonies should subject a medical provider to exclusion. It also speaks in terms of the “delivery of health care” not in terms of “health care previously delivered.” These limiting terms are not to be reasonably read to permit exclusion premised on what is a remote relatedness to some health care service delivery. Such a reading would be inconsistent with the statute’s fundamental purposes which include providing the Secretary with exclusion authority, but exclusion authority that is carefully limited.
28. While not concluding that any single one of the following factors are dispositive, the following points, among others, when taken together demonstrate that Dr. Kabins’ conviction for misprision of a felony was not a conviction for an offense that occurred in connection with the delivery of health care: (a) no element of the crime of misprision includes delivery of health care as a necessary requirement; (b) the crime that Dr. Kabins failed to report, and which formed the basis of his misprision offense, involved Messrs. Gage (an attorney) and Awand (a consultant) failing to provide proper legal services to their client and thus defrauding her of honest legal services; (c) that failure in the delivery of legal services occurred long after Dr. Kabins provided surgical services to that same person, Ms. Melodie Simon; (d) the crime Dr. Kabins failed to report thus could have had no conceivable bearing on the quality, type, or extent of medical services delivered to Ms. Simon, or even the manner in which Dr. Kabins billed for those services, or otherwise influenced “the delivery” of Dr. Kabins’ health care services no matter how broadly one may construe the term “delivery”; (e) there is no indication that Dr. Kabins improperly billed any federal health care program; and (f) there is no indication that the services he provided were deficient, indeed the Secretary had before her record evidence demonstrating that the government’s own expert has testified that the services were appropriate, as had the patient in question.<sup>1</sup>

---

<sup>1</sup> The Secretary has emphasized that she is owed complete deference in her statutory interpretation, and, in particular, deference to her judgment that the excluding official need only find some “common sense” connection between the offense and the delivery of health care. The Court is not persuaded that announcing that the statute requires nothing more than application of a “common sense” test does anything to further illuminate the factors that properly go into whether this conviction meets the statutory requirement to exclude a person from participation in all federal health care programs. Indeed, given that what “common sense” dictates can vary so significantly from person to person, a “common sense” test is either likely meaningless as a decisional tool or so susceptible to inconsistent application as to be arbitrary and capricious. Dr. Kabins’ submissions in this case suggest apparent inconsistencies in the Secretary’s application of this mandatory exclusion authority, a fact consistent with the latter possibility.

29. While not essential to the Court's decision, the Court also notes that giving such breadth to the mandatory exclusion statute increases considerably the risk of selective enforcement of the exclusion sanction, targeting those defendants where the prosecuting authority and investigating agency may feel the criminal penalty was insufficient or was prematurely terminated. In this case Dr. Kabins put forward many examples of convictions that appear to bear a much more direct connection to the delivery of health care than does his own conviction, and where, nonetheless, the convicted individual had not been excluded by the Secretary. This variable application of the exclusion sanction could be viewed as either arbitrary or, given the amorphous nature of the "common sense nexus" approach, lending itself to arbitrary and certainly selective enforcement. This Court does not believe Congress had such an approach in mind when it mandated exclusions for only certain convictions.
30. The misprision offense here, involving Dr. Kabins' failure to report the misconduct of others, is not itself an offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct." No element of misprision requires fraud, theft, embezzlement, breach of fiduciary responsibility or financial misconduct and no aspect of Dr. Kabins particular conduct in the offense involved the listed offenses.
31. The Secretary, through the DAB, improperly mischaracterized Dr. Kabins' Skilling-based argument. The statute of necessity requires each conviction relied upon to be characterized in order to determine whether it satisfies the statutory requirements. It was not responsive to Dr. Kabins' argument to simply declare that his argument that Skilling now precludes describing or characterizing his conviction as related to fraud (and the other listed crimes) was, instead, an argument challenging the fact of having been convicted. The two are not the same and the Secretary failed to respond to the argument Dr. Kabins did make. That argument thereby stands unrebutted by the DAB acting for the Secretary and serves as an alternative basis for this decision.
32. The Court hereby incorporates as well, all statements and reasons provided by the Court in announcing its initial decision orally from the bench. See Ex. 1, attached.

For the reasons set out above, it is hereby **ORDERED AND DIRECTED** that:

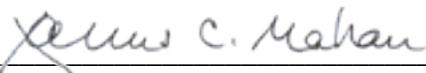
1. The Plaintiff's motion for summary judgment is **GRANTED** on all counts of his complaint challenging the Secretary's decision to exclude Mark B. Kabins, M.D., from all federal health care programs under 42 U.S.C. § 1320a-7(a);
2. The Secretary's cross motion for summary judgment is **DENIED**;

3. The Secretary's exclusion of Dr. Kabins is hereby **REVERSED** and that action **VACATED**;

4. The Secretary is **DIRECTED** forthwith, and in any event no later than **TEN CALENDAR DAYS** after this ORDER, to take all steps necessary to make this ORDER effective and to reverse the effects of the Secretary's exclusion of Dr. Kabins, including but not limited to:

- a. making appropriate notifications that Dr. Kabins' exclusion was reversed and vacated and that he was reinstated retroactive back to the effective date of the exclusion (February 20, 2011) in accordance with 42 C.F.R. §§ 1001.3003 and 1001.3005(c), including but not limited to notifications to any agency or party known to rely upon, or to have previously been given notice by the Secretary of, the exclusion;
- b. removing Dr. Kabins from those lists, including the Office of Inspector General's List of Excluded Individuals and Entities, through which the Secretary identifies excluded persons, and
- c. such other steps as reasonably are necessary to render the exclusion null and void.

**SO ORDERED** September 28, 2012.

  
\_\_\_\_\_  
JAMES C. MAHAN  
UNITED STATES DISTRICT JUDGE

Submitted by:

/s. David Z. Chesnoff

David Z. Chesnoff

Ex. 1

Kabins v. Sebelius

2:11-CV- 1742- JCM-RJJ

Transcript of September 25,  
2012 Hearing

Ex. 1

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

MARK B. KABINS,  
Plaintiff,

vs.

NO. 2:11-CV-1742-JCM-RJJ

KATHLEEN SEBELIUS,  
Defendant.

MOTION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, SEPTEMBER 25, 2012

10:00 A.M.

APPEARANCES:

For the Plaintiff: DAVID CHESNOFF, ESQ.  
RICHARD SCHONFELD, ESQ.  
SARALIENE DURRETT, ESQ.

For the Defendant: ROGER WENTHE, ESQ.  
JILL WRIGHT, ESQ.

Reported by: Joy Garner, CCR 275  
Official Federal Court Reporter

1           **LAS VEGAS, NEVADA, TUESDAY, SEPTEMBER 25, 2012**

2                                   **10:00 A.M.**

3                                   **\*     \*     \***

4                                   **P R O C E E D I N G S**

5  
6                   THE CLERK:   Mark Kabins versus Kathleen  
7 Sebelius, 2:11-CV-1742-JCM-RJJ.   This is the time  
8 set for a motion hearing.

9                                   Counsel, please note your  
10 appearances.

11                   THE COURT:   Mr. Chesnoff.

12                   MR. CHESNOFF:   Good morning, your  
13 Honor, David Chesnoff appearing with my client,  
14 Dr. Kabins, along with Richard Schonfeld and  
15 Saraliene Durrett of my office.

16                   THE COURT:   All right, thank you.

17                   MR. WENTHE:   Your Honor, Roger Wenthe  
18 on behalf of the United States, and with me is  
19 Jill Wright who is an attorney with the  
20 Department of Health and Human Services Office  
21 and counsel for the Inspector General.

22                   THE COURT:   All right, thank you.

23                                   All right, I've reviewed this  
24 with my brain trust.   Let me tell you what I'm  
25 inclined to do and then I'll give everyone a

1 chance to argue as you see fit. We've all heard  
2 the saying, hard cases make bad law, and this is  
3 a hard case. At various times over the last  
4 twenty-four hours, I've been I'm going to rule  
5 this way, and then I'll look at the case, look at  
6 this again, the facts here, I'm going to rule the  
7 other way. So I've gone back and forth on this  
8 with my brain trust. This is an interesting  
9 case, but it's certainly not clear-cut in my  
10 mind.

11                   You pronounce your last name  
12 Kay-bins (phonetic), right, Doctor?

13                   THE PLAINTIFF: Correct.

14                   THE COURT: I didn't want to  
15 mispronounce your name. There's nothing more  
16 irritating than have somebody mispronounce your  
17 name continually. First of all, Dr. Kabins had  
18 been convicted of a crime, you know, and so let's  
19 put that on the table and that's a terrible thing  
20 and you can say whatever you want to about that,  
21 but put that on the shelf. That's just a given.  
22 He's been excluded here by the Secretary Sebelius  
23 under the exclusion statute.

24                   It seems to me the purpose of  
25 the exclusion statute is to protect the

1 government from people who have cheated the  
2 government program, and you see if you look at  
3 the -- I've had the brain trust look at some of  
4 the people who have been excluded, and if  
5 somebody committed an actual fraud or  
6 embezzlement or some sort of thing like that,  
7 cheating a government program, it's a --

8           And let me have a fictional Dr.  
9 Mahan who sets up his practice and, you know,  
10 rips off Medicare and embezzles or overcharges,  
11 or whatever, and so he pleads guilty to some  
12 crime and serves a couple of years in jail, and  
13 then he's out again. And so Dr. Mahan's uncle is  
14 the Chairman of the State Medical Board, or  
15 whatever, so he gets re-licensed and he says,  
16 okay, Secretary Sebelius, you have to deal with  
17 me again.

18           Do we really? Do we really have  
19 to? It's almost like fool me once, shame on you;  
20 fool me twice, shame on me. The government still  
21 has to deal with this guy? And that's what the  
22 statute I think is designed to prevent that if  
23 somebody -- you're just an embezzler, or cheater,  
24 or whatever, and the government can exclude, but  
25 that's the way the statute is.

1                   Let me give you another example  
2 again with Dr. Mahan. He sells his house, and he  
3 sells the house and commits a fraud in selling  
4 the house, misrepresents something. Can he be  
5 excluded under the statute? No, because the  
6 statute is drawn so that it's got to be in  
7 connection with health care services. I'll get  
8 into that in just a minute more, but so Dr. Mahan  
9 commits a fraud selling his house. That doesn't  
10 give the grounds to the Secretary to exclude him.

11                   Now, here Dr. Kabins was  
12 convicted of misprision and failure to report a  
13 felony. If you look at the -- the -- well, first  
14 of all, look at the statute, the exclusion  
15 statute and the regulations that the Secretary  
16 has promulgated, the statute didn't say is a  
17 little bit unwieldy which is so unusual to think  
18 that the congress people would draft an unwieldy  
19 statute, but if you look at the regulations, I  
20 think they pretty clearly follow the statute.

21                   We've got four requirements and  
22 so everybody understands I'm speaking now from 42  
23 CFR, Section 1001.101(c). Four requirements:  
24 The individual must have been convicted of a  
25 felony, and that's true of Dr. Kabins here; the

1 felonious conduct must have occurred after August  
2 21, 1996, that's true here. So we're really  
3 focusing on the third and fourth elements. The  
4 felony offense must have been related to fraud,  
5 theft, embezzlement, breach of fiduciary  
6 responsibility, or other financial misconduct,  
7 and the felony offense -- number four, the felony  
8 offense must have been in connection with the  
9 delivery of a health care item or service.

10 And if you look at what happened  
11 here, at Dr. Kabins's conduct here, the  
12 misprision was committed in connection with legal  
13 services, not medical services. This occurred  
14 well after the medical services were rendered and  
15 all indications are that there's no complaint  
16 about the medical services. And I say that  
17 somewhat advisedly because after the fact, you  
18 know, people's memories is better -- and I  
19 shouldn't say is better -- may have been altered  
20 by subsequent events.

21 For example, if Dr. Kabins, and  
22 I don't know this, but if he settled on the side  
23 with Ms. Simon, and I don't know whether that  
24 happened or not, but suddenly she says, oh, that  
25 terrible Dr. Kabins. And then, oh, yes, he was

1 wonderful and, yes, all his services were  
2 wonderful and blah, blah, blah.

3 I mean so put that aside. I  
4 mean I understand the credibility of witnesses is  
5 questionable in something like this, but it  
6 appears that the medical services were fine.  
7 There's no question about the quality of the  
8 medical services. So the misprision occurred  
9 with legal services, not medical services.

10 Now, the -- you can go with the  
11 regulations rather than the statute, but it just  
12 is clearer. The felony offense must have been  
13 related to fraud, theft, embezzlement, breach of  
14 fiduciary responsibility, or financial  
15 misconduct. This was, like I say, it was legal  
16 services. I don't know that -- however you want  
17 to characterize it, fraud, and certainly fraud, I  
18 don't know, maybe. No theft, embezzlement,  
19 breach of fiduciary responsibility, it may be, or  
20 other financial misconduct. So number three is a  
21 maybe.

22 Number four, the felony offense  
23 must have been in connection with the delivery of  
24 a health care item or service, and here it's just  
25 not. I mean there's a medical service underlying

1 everything, of course, because he's a doctor and  
2 that's what we're dealing with, but I just don't  
3 see that the exclusion statute applies here. I'm  
4 concerned a little bit, too, about selective  
5 prosecution.

6                   If we had a case where every  
7 doctor who's convicted of a felony is subject to  
8 exclusion, then, you know, here we go. I'm  
9 sorry, Doctor, but that's the way it works, or  
10 whatever, you deal with that and you have  
11 different arguments I'm sure, but I'm concerned,  
12 too, about selective prosecution that a  
13 bureaucrat somewhere decides here's what we're  
14 going to do, we're going to do this, we're going  
15 to do that. We're going to prosecute this  
16 doctor, not that doctor, and that's always  
17 troubling to the Court if there's no uniformity  
18 with the decision to prosecute.

19                   Let's see, that's the memo in  
20 support of your motion for summary judgment, the  
21 plaintiff, and then at page 20 you list some  
22 doctors that plead guilty to -- here's one the  
23 misprision, the various felonies, and they were  
24 not -- they were not excluded. And what's the  
25 rational basis for excluding Dr. Kabins? I just

1 don't see it anywhere. So honestly this is a  
2 close question in my mind. I've gone back and  
3 forth on it, but I just -- I come back to I think  
4 it's the misprision was in connection with  
5 rendering of legal services or providing legal  
6 services and not the medical services.

7                   There was no question -- I  
8 haven't seen any question at all about the  
9 medical services. They apparently were  
10 appropriate and certainly Ms. Simon is not  
11 complaining about that, although that doesn't  
12 carry the day. As I've said, you know, it's a  
13 matter of credibility and we can say, well, I  
14 don't believe her, but I had the brain trust  
15 quickly try to identify doctors who had been  
16 excluded and they had been doctors who, like I  
17 said at the very beginning, like our fictional  
18 Dr. Mahan who committed overcharging or  
19 embezzlement or theft of some sort from the  
20 Medicare program, but it seems to me that Dr.  
21 Kabins's conduct here, his conviction here, was  
22 not related to fraud or other misconduct in  
23 connection with revision of a medical service.  
24 So what I'm inclined to do is to grant summary  
25 judgment to the plaintiff.

1                   Now, I'll give you -- do you  
2 want to talk me out of that, Mr. Chesnoff?

3                   MR. CHESNOFF: I was just going to say,  
4 your Honor, I don't want to talk -- we worked  
5 very hard, my colleagues, on the pleadings and  
6 obviously you've studied them along with your  
7 staff, so I don't want to talk myself out. I  
8 think the only thing that I would add is this,  
9 your Honor. I think that one of the things that  
10 really pushes it to our direction is that this  
11 court through Judge Quackenbush, who I consider  
12 one of the finest jurists I've ever appeared in  
13 front of in all my years, has specifically said  
14 on several occasions pointedly that what Dr.  
15 Kabins was convicted of had nothing to do with a  
16 health care violation, and he was the finder of  
17 fact as to the plea and as to the companion  
18 cases.

19                   And why that's so important,  
20 your Honor, is he went out of his way to say that  
21 he wanted Dr. Kabins to continue to provide  
22 medical services to the people of the state of  
23 Nevada and to allow an uncontrolled federal  
24 bureaucrat to basically disregard the clear  
25 statutory elemental requirements and you, as a

1 sitting federal judge, and me who practices an  
2 area of the law where the elements are crucial,  
3 then unless those elements are met, your decision  
4 is righteous and clear and it is completely  
5 consistent with what Dr. Kabins pled to.

6 And as you said, the legislative  
7 intent here was not to punish a doctor who  
8 committed an -- did an operation well before the  
9 honest service fraud occurred and involved legal,  
10 not medical and, therefore, this kind of knee  
11 jerk reaction that Dr. Kabins received and  
12 basically kicking sand in the face of Judge  
13 Quackenbush who pointedly, pointedly, wanted Dr.  
14 Kabins to do what he does which is to serve  
15 people.

16 The effect of what the Secretary  
17 did here doesn't just mean that Dr. Kabins  
18 doesn't get paid from Medicare and Medicaid. It  
19 has a real affect on his entire practice,  
20 including his right to practice in certain  
21 hospitals. So the Court would be following the  
22 direction of two branches of government, the  
23 legislative in enacting the law, and your brother  
24 judge in his interpretation of what this  
25 conviction meant.

1                   So with that said, your Honor, I  
2 don't believe under any standard proffered by the  
3 Secretary they meet the elemental requirement to  
4 have banned him, and I ask that you put your  
5 imprimatur on what you've indicated is your  
6 intention, your Honor.

7                   THE COURT: All right.

8                   MR. CHESNOFF: Thank you.

9                   THE COURT: And I'll just say if Judge  
10 Quackenbush had found to the contrary, he didn't  
11 look at this as closely as I did. I mean I'm  
12 glad that we agree with each other, but I looked  
13 at it independently and closely.

14                   Mr. Wenthe, I'll be glad to hear  
15 anything you have to say, sir.

16                   MR. WENTHE: Thank you, your Honor.

17                   THE COURT: Yes, sir.

18                   MR. WENTHE: I think that what's  
19 necessary here is to return to the first  
20 principle of why this statute exists. Congress  
21 enacted this exclusion statute because Congress  
22 can decide who the federal government will do  
23 business with and who it will not do business  
24 with, and this provision that we're dealing with  
25 today was added in 1996 because the existing

1 provisions were considered not broad enough to  
2 cover the types of people who the government does  
3 not want to do business with.

4           Before 1996, it already had a  
5 provision separate from this one that says  
6 anybody who defrauds the Medicare program or  
7 overcharges the Medicare program will be  
8 excluded, must be excluded. This provision was  
9 added because that wasn't broad enough so that  
10 what you maybe have had your brain trust look at  
11 is cases under that previously existing, and  
12 still existing, provision.

13           This provision was added so that  
14 anyone who commits any kind of -- and not just  
15 fraud -- but, as you said --

16           THE COURT: -- theft, or embezzlement,  
17 or other financial misconduct, or breach of  
18 fiduciary duty.

19           MR. WENTHE: There we go -- and breach  
20 of fiduciary duty.

21           THE COURT: Yeah.

22           MR. WENTHE: That's a very broad range  
23 of things, and we have to ask ourselves how can  
24 those things occur in connection with the  
25 delivery of a health care item or service because

1 that's the other thing you have to have. And I  
2 think if you're going to read this statute to say  
3 the health care item or service has to come after  
4 the fraud, or embezzlement, or theft, or  
5 whatever, which is what I think you're saying.

6 THE COURT: But, no, no, no, it's got  
7 to come in connection with that. The way I read  
8 the statute, Mr. Wenthe, is the fraud, or theft,  
9 or embezzlement has to come in connection with  
10 the provision of a medical service.

11 MR. WENTHE: In connection with --

12 THE COURT: Here it occurred well after  
13 the provision of the medical service.

14 MR. WENTHE: And Congress was  
15 deliberately broad by using the words "in  
16 connection with." What you were saying is that  
17 you're --

18 THE COURT: And I agree. I mean that's  
19 very broad language and we look at the statute  
20 "in connection with" as very broad, but it's got  
21 to be in connection with the provision of the  
22 medical service. This occurred -- here it  
23 occurred well after, did it not, well after the  
24 medical service was provided?

25 MR. WENTHE: But, see, when you're

1 saying well after, then you're saying in  
2 connection with only means before the medical  
3 service is provided.

4 THE COURT: No, no, to me it means  
5 contemporaneously generally, and I can't say -- I  
6 mean it's possible that it would arise -- some  
7 fraud would arise later. I mean, for example,  
8 with billing. For example, let's say that --  
9 we'll go back to Dr. Mahan. Dr. Mahan performs a  
10 service and then he doesn't bill for it for three  
11 months, but there's some -- some -- he  
12 overcharges, he triple bills or something three  
13 months later, is that -- but it's in connection  
14 with the provision of the medical service. So I  
15 mean the temporal aspect of the time aspect of it  
16 is not necessarily controlling.

17 There's got to be a connection  
18 with the provision of the medical service not  
19 something related to a medical service because  
20 that way everything a doctor did would be open to  
21 question. For example, Dr. Mahan selling his  
22 house and committing a fraud there, you know,  
23 overcharging somebody or hiding a defect on a  
24 house or something of that nature. You agree, do  
25 you not, that Dr. Mahan selling his house and

1 committing a fraud the Secretary can't be  
2 excluded --

3 MR. WENTHE: Because there's no medical  
4 service anywhere in that scenario, your Honor.

5 THE COURT: That's right. He's a  
6 doctor, but there's no medical service there.

7 MR. WENTHE: Now, the very question we  
8 are discussing right now is one that the Court is  
9 foreclosed from getting into. The Court cannot  
10 substitute its judgment for that of the agency on  
11 this question. This is a question of statutory  
12 interpretation, and your Honor wants to construe  
13 "in connection with" to mean very closely related  
14 in time.

15 THE COURT: No, no, that's not  
16 necessarily true, Mr. Wenthe.

17 MR. WENTHE: That's just what you said  
18 to me, your Honor, and the agency has said --

19 THE COURT: Well, wait, wait, wait,  
20 don't mischaracterize what I'm saying or doing.  
21 I didn't say that it had to be very closely  
22 related in time, did I?

23 MR. WENTHE: Yes, you did, but go ahead  
24 and tell me what -- what you --

25 THE COURT: No, I did not. I most

1 certainly did not and don't mischaracterize what  
2 I say.

3 MR. WENTHE: Tell me what you think the  
4 statute means, your Honor.

5 THE COURT: Well, I've told you that  
6 already, Mr. Wenthe, and I'm not going to have  
7 you mischaracterize what I said. We said that it  
8 could be three months later, didn't I? Were you  
9 listening? Don't smirk at me. Don't smirk at  
10 me, Mr. Wenthe.

11 MR. WENTHE: I'm smiling at you, your  
12 Honor.

13 THE COURT: What? What? Don't smirk  
14 at me. You're going to be in trouble, sir.  
15 We're in recess.

16 (Recess taken from  
17 10:20 a.m. to 10:25 a.m.)

18 THE COURT: We are back in session.  
19 Thank you. You may be seated.

20 All right, resume your argument,  
21 Mr. Wenthe.

22 MR. WENTHE: I apologize to the Court.  
23 I meant no disrespect.

24 THE COURT: Well, it certainly appeared  
25 disrespectful. Contentious, that's the way it

1 appeared, Mr. Wenthe. Smirk away all you want.  
2 Now go ahead and let me hear the rest of your  
3 argument and smirk all you want.

4 MR. WENTHE: I mean no disrespect to  
5 the Court.

6 THE COURT: Yes, you do. You most  
7 certainly do. You were smirking at me. You  
8 mischaracterized what I said. That's fine.  
9 Continue your argument.

10 MR. WENTHE: The agency has construed  
11 the words "in connection with" over the course of  
12 many years and they have applied that  
13 construction over and over and over, and they are  
14 permitted by Congress and by case law to do so.  
15 Their construction of those words "in connection  
16 with" means a common sense connection. They  
17 found in this case that the health care service  
18 provided by Dr. Kabins which was a service  
19 performed on Melodie Simon for which he admitted  
20 in his plea agreement that he could be held to  
21 have committed malpractice by a viable lawsuit by  
22 her. He admitted that.

23 THE COURT: Well, he disagrees. He  
24 disagrees with what you're saying, but that's  
25 fine. Go ahead. It's your argument.

1           MR. WENTHE: It is my argument, and it  
2 is his admission and your Honor will find his  
3 admissions in his plea agreement which begins at  
4 page 777 of the record and in particular the  
5 facts admitted under oath by him which begin at  
6 784 of the record and in Subparagraph (d) of  
7 those facts appears this statement: Accordingly,  
8 Dr. Kabins believed that Ms. Simon could bring a  
9 viable lawsuit against him arising out of  
10 provision of a health care item or service to  
11 her. And he escaped being sued for malpractice  
12 by covering up the fraud committed by Howard  
13 Awand and Noel Gage to which he also pled that he  
14 acknowledged that those men had committed the  
15 crime of fraud and that he concealed it.

16           So there is in the agency's view  
17 a common sense connection between his provision  
18 of that health care service for which he could  
19 have been sued for malpractice and his  
20 concealment and his conviction for concealment of  
21 the fact of fraud that got him out of being sued  
22 for malpractice for that health care item for  
23 service.

24           The agency decided in its --  
25 both its administrative law judge decided and its

1 DAB, Department Appeals Board, that construing  
2 its statute as it had for many, many years "in  
3 connection with" was satisfied in this case. The  
4 Court wishes to adopt a different interpretation  
5 of the words "in connection with" than what the  
6 agency has adopted. The Court is not permitted  
7 to do so by the doctrine of Chevron deference.

8           When the agency has an ambiguous  
9 statute to apply, the agency is afforded the  
10 discretion to choose within that range of  
11 reasonable constructions of that statute which  
12 one it will apply and it has done so. The Court  
13 apparently is saying that the construction by the  
14 agency here is completely outside that reasonable  
15 range of reasonable interpretations of the words  
16 "in connection with."

17           That seems highly unlikely since  
18 we have cited to you the Supreme Court's case of  
19 Morales in which the Supreme Court construed the  
20 words "in connection with" and relating to the  
21 statute and gave them the exact same meaning that  
22 the agency gives them and has given those words  
23 for many years. And so if the Court disagrees  
24 with the Supreme Court's Morales decision and  
25 wishes to overrule it --

1                   THE COURT:   Okay, cut it again, cut the  
2   crap, cut the contentious attitude, all right?  
3   I'm not going to overrule the Supreme Court. Do  
4   you really think I'm going to overrule the  
5   Supreme Court, Mr. Wenthe? I can't hear you.

6                   MR. WENTHE:   Of course not, of course  
7   not, of course not.

8                   THE COURT:   What are you arguing --  
9   nothing -- your whole attitude today has been  
10  nothing but contentious.

11                  MR. WENTHE:   That's incorrect, your  
12  Honor.

13                  THE COURT:   No, that's not incorrect,  
14  sir. Nothing but contentious. You mean I'm  
15  going to overrule the Supreme Court. Don't be  
16  stupid.

17                  MR. WENTHE:   And that's the point.

18                  THE COURT:   Try to make an argument  
19  that's coherent and not -- you sound like a  
20  little kid on the playground. I've indicated I  
21  might not rule in your favor and so you give a  
22  boo-hoo-hoo and try to -- yeah, go ahead and  
23  smirk some more. That's funny. Go ahead, go  
24  ahead, let me hear some more of your argument.

25                  MR. WENTHE:   I think that I've stated

1 it as clearly as I can. The agency --

2 THE COURT: But you say your contempt  
3 very clearly. That's what you did. Go ahead.

4 MR. WENTHE: The agency has decided  
5 what these words mean.

6 THE COURT: So I can't question the  
7 agency. I have to just bow down to the agency  
8 and rubber stamp it. That's Mr. Wenthe's  
9 position. Anything else? That's what you just  
10 told me. I'm bound by that. I can't question  
11 that at all. Now what's your next argument?

12 MR. WENTHE: I think, your Honor, that  
13 if anyone reads the record here, they will never  
14 see the words bow down coming out of my mouth.  
15 They came only out of yours. Now, the other  
16 point that has to be dealt with here that  
17 apparently has already -- well, it was not  
18 addressed by anybody yet today -- and that's  
19 relating to, this conviction has to be relating  
20 to fraud. I don't see how that could be  
21 questioned here. The conviction was for  
22 concealment of a fraud.

23 So the only argument really that  
24 Dr. Kabins has to oppose that is to say that we  
25 have to read the statute so that fraud only

1 involves financial misconduct fraud and,  
2 therefore, because this is not a financial  
3 misconduct case, this is not a conviction  
4 relating to fraud. I don't see that. I think  
5 that -- and particularly not when we have the  
6 Friedman versus Sebelius case which was just  
7 decided by the DC Circuit Court of Appeals this  
8 year, and we offered that to you in our  
9 supplemental authorities.

10 It went through a very lengthy  
11 discussion of the purpose, history, and text of  
12 the statute and said, no, Congress did not mean  
13 to restrict this statute to just financial  
14 misconduct fraud. It's any kind of fraud. And  
15 so it would be improper to read the statute that  
16 way as Dr. Kabins wants to and so we think that  
17 part of it is satisfied. And really that's the  
18 only two issues that there are here having the in  
19 connection with health care item or service and  
20 had to be relating to fraud.

21 Those were the two contested  
22 issues before the agency, and they are the only  
23 two issues here and for the reasons we've stated  
24 we feel they are both satisfied very amply here  
25 when the statute is read in accordance with

1 Chevron deference which applies to agency  
2 interpretations of their own statutes when they  
3 are ambiguous. So if the Court has no other  
4 questions, that's all I have.

5 THE COURT: All right. Thank you.

6 Ma'am, did you have anything or  
7 any argument you wanted to make?

8 MR. WENTHE: Are you asking counsel?

9 MS. WRIGHT: No, sir, I don't.

10 THE COURT: No?

11 All right, I'll give you a  
12 chance to reply.

13 MR. CHESNOFF: Just briefly, your  
14 Honor. In review of our pleadings, we were able  
15 to distinguish the argument that they made about  
16 Morales. Morales doesn't apply. As far as  
17 Chevron goes, your Honor, the Supreme Court has  
18 said you are allowed to decide whether it's  
19 reasonable, and that's what I believe the Court  
20 was attempting to do.

21 I would also point out as the  
22 Court did when the Secretary stands up and says  
23 that they've been applying this uniformly  
24 regularly, one only has to look at the list of  
25 doctors who we put in our pleadings who actually

1 were engaged in conduct involving medical  
2 services. Dr. Kabins has performed this surgery  
3 long before and that's why the temporal argument  
4 is so important, and he would have performed the  
5 surgery regardless of any scheme -- excuse me,  
6 I'm a little excited myself actually -- any  
7 scheme that Gage and the other gentleman engaged  
8 in. He did the surgery.

9                   It had nothing to do with their  
10 scheme to commit item or service fraud which is  
11 not a medical fraud and the statute also talks  
12 about, and especially the Ninth Circuit, your  
13 Honor, in the context of the fraud having a  
14 financial component. So for all the reasons that  
15 we've stated in our brief and the arguments today  
16 and the fact that the Secretary has relied on law  
17 that's not appropriate, including the supplements  
18 they filed, the Fourth Circuit case and the DC  
19 Circuit case, those cases involve people who  
20 actually engaged in the actual fraud themselves.

21                   And we're aware one of the  
22 elements that the Court has been focusing on was  
23 consciously met by the people involved. In our  
24 case if you analyze the elements the Court  
25 correctly stated that one and two exist, three is

1     questionable.  And, of course, we've argued it  
2     doesn't apply or hasn't been met, but most  
3     importantly element number four has never been  
4     established as a basis for the really draconian  
5     and isolated punishment that Dr. Kabins has  
6     suffered totally inconsistent with the  
7     Secretary's decisions in other doctors' cases.

8                     Thank you.

9                     THE COURT:  All right.  Thank you.

10                    As I said at the beginning, it's  
11     a close case.  Did you want to add something, Mr.  
12     Wenthe?  Go ahead.

13                    MR. WENTHE:  You know, I didn't get a  
14     chance to talk about the other doctors.  Would  
15     your Honor permit me?

16                    THE COURT:  Of course.

17                    MR. WENTHE:  Because your Honor did  
18     raise that in your opening remarks and I wanted  
19     to --

20                    MR. CHESNOFF:  Actually the Secretary's  
21     lawyer raised it by saying that they do this  
22     fairly in all cases.

23                    THE COURT:  Go ahead.

24                    MR. WENTHE:  Fair enough, but this  
25     whole question of other doctors who are getting

1 excluded, I do want to address that. We did  
2 address that in our briefs obviously, but I think  
3 your Honor is looking at that as though there's  
4 some unfairness going on. The statute is  
5 mandatory. The statute is mandatory. When we  
6 find a doctor, and the doctor comes to our  
7 attention and a hearing is held and all these  
8 statutory elements are satisfied, that doctor  
9 must be excluded. The agency has no discretion  
10 not to exclude him.

11 Now, the fact that other people  
12 may be out there who haven't been caught yet, we  
13 don't have an explanation for that. The record  
14 does not give us an explanation because the  
15 agency excluded all of that evidence as being  
16 irrelevant. If your Honor feels that that issue  
17 needs some more exploration by the agency that  
18 they should take that into account that that is  
19 relevant to their decision, then the thing to do  
20 is to remand this to the agency for further  
21 factual findings because they didn't make any  
22 findings of fact on this.

23 They excluded it all as being  
24 irrelevant, and I think they were right to  
25 exclude it as irrelevant, but if you disagree

1 with that and feel that they should consider it,  
2 it really is a matter for the agency to consider  
3 on remand. So I just wanted to make that one --

4 THE COURT: All right. Thank you.

5 As I said at the outset, this is  
6 to me a close question. It's a very close  
7 question, but I think on balance the plaintiff is  
8 entitled to summary judgment. So, if you would,  
9 Mr. Chesnoff, prepare an appropriate order.

10 MR. CHESNOFF: Yes, sir, your Honor.

11 THE COURT: Do it forthwith and let's  
12 file it, and then you all can appeal my decision.

13 MR. CHESNOFF: I know I won't be  
14 filing, your Honor.

15 THE COURT: Well, I know the government  
16 will be, so that's fine. That's why God created  
17 San Francisco.

18 MR. CHESNOFF: Have a nice afternoon,  
19 your Honor.

20 THE COURT: Yes, sir. Thank you. You,  
21 too.

22

23 (Whereupon, the proceedings concluded.)

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter.

Date: August 26, 2012

/s/ Joy Garner  
JOY GARNER, CCR 275  
U.S. Court Reporter