

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

RAGHUVVEER NAYAK

No. 12 CR 447

Judge Robert W. Gettleman

PLEA AGREEMENT

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, GARY S. SHAPIRO, and defendant RAGHUVVEER NAYAK, and his attorney, THOMAS K. MCQUEEN, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure and is governed in part by Rule 11(a)(2), as more fully set forth below. The parties to this Agreement have agreed upon the following:

Charges in This Case

2. The superseding information in this case charges defendant with mail fraud, in violation of Title 18, United States Code, Section 1341, and obstructing and impeding the due administration of the tax laws, in violation of Title 26, United States Code, Section 7212(a).

3. Defendant has read the charges against him contained in the superseding information, and those charges have been fully explained to him by his attorney.

4. Defendant fully understands the nature and elements of the crimes with which he has been charged.

Charges to Which Defendant Is Pleading Guilty

5. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the following counts of the superseding information: Count One, which charges defendant with mail fraud, in violation of Title 18, United States Code, Section 1341; and Count Two, which charges

defendant with obstructing and impeding the due administration of the tax laws, in violation of Title 26, United States Code, Section 7212(a).

Factual Basis

6. Defendant will plead guilty because he is in fact guilty of the charges contained in Counts One and Two of the superseding information. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt:

a. With respect to Count One of the superseding information:

Beginning no later than in or about 2002, and continuing until not earlier than in or about 2010, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant RAGHUVVEER NAYAK, together with others, knowingly and with the intent to defraud, devised and participated in a scheme to defraud and to deprive patients of their right to the honest services of their physicians through improper cash payments as bribes and kickbacks, and on or about November 13, 2007, for purpose of executing the scheme and attempting to do so, knowingly caused to be placed in an authorized depository for mail, to be sent and delivered by the Postal Service, an envelope containing a check from Blue Cross and addressed to Patient CL, in violation of Title 18, United States Code, Sections 1341 and 1346.

More specifically, in about 1998, defendant opened Rogers Park One-Day Surgery Center (“Rogers Park”). He opened Lakeshore Surgery Center (“Lakeshore”) about seven years later. Both facilities are privately-owned one-day surgery centers, where surgeons performed outpatient surgeries not requiring an overnight stay, ranging from urological to podiatric to orthopedic procedures. Defendant’s profits depended upon doctors bringing patients for surgery to defendant’s outpatient facilities, rather than to a traditional hospital, or to one of the many other surgery centers in the Chicagoland area.

As part of the scheme, defendant paid, or offered to pay, physicians money in exchange for the physicians referring patients to or conducting surgeries at Rogers Park and Lakeshore, rather than at a hospital or competitor surgery center. More specifically, defendant paid some physicians cash in exchange for patients they brought or referred to Rogers Park and Lakeshore, in amounts that reflected the volume of surgeries they conducted at the surgery centers or the number of patients they referred there.

Defendant made cash payments to physicians in exchange for referrals to his surgery centers, intending that the money would influence the physicians' medical motives and further intending that the physicians would not disclose the cash payments to their patients. Defendant acknowledges that physicians owe a fiduciary duty of honest services to their patients for decisions made relating to the medical care of those patients, which duty encompasses an obligation to make referral decisions based solely on the best interests of their patients, rather than influenced by the physician's financial interests, as well as the obligation to disclose material information to the patient, such as money received in exchange for or to influence the doctor's decision of where to conduct a surgery. Defendant further acknowledges that the cash payments were material to physicians accepting the cash in exchange for patient referrals and to the patients of those physicians who underwent surgeries at Rogers Park and Lakeshore. By paying physicians cash in exchange for referral of patients to defendant's surgical facilities, defendant intended to and did deprive medical patients of the intangible right to the honest services of their physician. Defendant did not intend to cause the medical patients any physical or monetary harm by his cash payments to their physicians.

In furtherance of the scheme, and in exchange for patient referrals, defendant made cash payments to Doctor A, a podiatrist, starting in approximately 2002 and continuing until

approximately 2009. Defendant paid Doctor A approximately \$200-300 in cash per surgery he conducted at Rogers Park or Lakeshore, in addition to the professional fees Doctor A billed separately to his patients' insurance companies. Defendant intended that the cash payments would influence Doctor A's decision of where to conduct surgery and that Doctor A would not disclose the cash payments to his patients. Defendant gave Doctor A the cash when they were alone, including at Doctor A's office. Defendant acknowledges that Doctor A did not disclose the cash payments to his patients. In total, Doctor A conducted approximately 142 surgeries at Rogers Park between 2004 and 2009, for which defendant paid Doctor A cash.

b. With respect to Count Two of the superseding information:

Beginning not later than in about 2004, and continuing through at least approximately 2011, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant corruptly obstructed and impeded and endeavored to obstruct and impede the due administration of Title 26, United States Code, by impeding and impairing the IRS in carrying out its lawful function of assessing and collecting income taxes, penalties, and interest for the United States, in violation of Title 26, United States Code, Section 7212(a).

More specifically, defendant paid physicians money in exchange for referrals of patients the physicians had made or would make to Rogers Park and Lakeshore. Among other means, defendant paid these physicians in cash, in an attempt to actively conceal the payments, knowing that the natural consequence would be a lack of documentation of the cash payments in Rogers Park's and Lakeshore's business records if the Internal Revenue Service were to audit or question the transactions. Defendant did not disclose the cash payments to his bookkeeper and outside tax preparer, and defendant did not file or cause to be filed with the Internal Revenue Service, or issue or cause to be issued, Forms 1099 for physicians to whom he paid cash in

exchange for patient referrals for tax years 2002 through 2010, knowing that a foreseeable consequence of his actions was that the federal income tax returns filed by the physicians to whom he made cash payments would be false as to material matters. Defendant also instructed Doctor A to not deposit the cash defendant gave him in his bank account, and to not report those cash payments on his federal tax returns, intending that Doctor A would file federal tax returns that would be false as to material matters.

7. The position of the government at sentencing will be that the following conduct, which defendant disputes, was part of defendant's corrupt endeavor to obstruct and impede and endeavor to obstruct and impede the due administration of Title 26, United States Code:

In approximately 2002, defendant devised and executed a scheme to obtain cash, including for the purpose of making cash payments to physicians in exchange for patient referrals, by giving Individual A over \$2 million in checks drawn on defendant's medical facilities from about 2002 through December 2008. In exchange, at defendant's direction, Individual A gave defendant cash in an amount equal to approximately 70% of the value of the checks that defendant gave Individual A. As part of this scheme, defendant hid the true purpose of the checks that he provided to Individual A by, among other things, indicating to defendant's tax preparer that the checks to Individual A were for advertising, and should be treated as advertising expenses on the tax returns that defendant signed and caused to be filed for himself and for defendant's facilities. Defendant subsequently filed and caused to be filed tax returns for himself and for defendant's facilities that falsely indicated that the money that defendant gave to Individual A in checks was advertising expenses incurred by defendant's facilities. As defendant knew, Individual A did not perform advertising services in exchange for the checks that defendant gave to Individual A.

Maximum Statutory Penalties

8. Defendant understands that the charges to which he is pleading guilty carry the following statutory penalties:

a. Count One carries a maximum sentence of 20 years' imprisonment. Count One also carries a maximum fine of \$250,000, or twice the gross gain or gross loss resulting from that offense, whichever is greater. Defendant further understands that with respect to Count One the judge also may impose a term of supervised release of not more than three years.

b. Count Two carries a maximum sentence of 3 years' imprisonment. Count Two also carries a maximum fine of \$250,000, or twice the gross gain or gross loss resulting from that offense, whichever is greater. Defendant further understands that with respect to Count Two, the judge also may impose a term of supervised release of not more than one year.

c. In accord with Title 18, United States Code, Section 3013, defendant will be assessed \$100 on each count to which he has pled guilty, in addition to any other penalty imposed.

d. Therefore, under the counts to which defendant is pleading guilty, the total maximum sentence is 23 years' imprisonment. In addition, defendant is subject to a total maximum fine of \$500,000, a period of supervised release, and special assessments totaling \$200.

Sentencing Guidelines Calculations

9. Defendant understands that in imposing sentence the Court will be guided by the United States Sentencing Guidelines. Defendant understands that the Sentencing Guidelines are

advisory, not mandatory, but that the Court must consider the Guidelines in determining a reasonable sentence.

10. For purposes of calculating the Sentencing Guidelines, the parties agree on the following points, except as specified below:

a. **Applicable Guidelines.** The Sentencing Guidelines to be considered in this case are those in effect at the time of sentencing. The following statements regarding the calculation of the Sentencing Guidelines are based on the Guidelines Manual currently in effect, namely the November 2012 Guidelines Manual.

b. **Offense Level Calculations.**

Count One:

i. The government's position is that the base offense level for Count One is 8, pursuant to Guideline § 2B4.1(a). It is the defendant's position that the sentencing guideline applicable to Count One is Guideline § 2B1.1.

ii. It is the government's position that, pursuant to Guideline § 2B4.1(b)(1) and the table in § 2B1.1(b)(1)(H), the base offense level for Count One is increased by at least 14 levels because the value of the bribes or the improper benefit to be conferred exceeded at least \$400,000. Defendant reserves the right to argue that the value of the bribes or the improper benefit conferred was less than \$400,000, and that there was no pecuniary loss from the offense.

iii. Accordingly, it is the government's position that the adjusted offense level for Count One is at least 22.

Count Two:

iv. If the Court agrees with the government that the conduct set forth in Paragraph 7 was part of defendant's corrupt endeavor to obstruct and impede the administration of the internal revenue laws, it is the government's position that the offense level for Count Two is 20, pursuant to §§ 2T1.1(a)(1) and 2T4.1(H), because the tax loss attributable to the conduct described in Paragraph 7 is \$705,857,¹ which is more than \$400,000, but less than \$1,000,000. Defendant reserves the right to argue that the offense level for Count Two is 6.

Combined Offense Level:

v. Pursuant to Guideline § 3D1.2, Count One and Count Two each constitute a separate Group for purposes of determining the combined offense level.

vi. It is the government's position that, pursuant to Guideline § 3D1.4(c), Count One counts as one Unit and Count Two counts as one additional Unit because it is two level less serious than the Group with the highest offense level. Therefore, it is the government's position that the combined offense level for Counts One and Two is at least 24.

vii. If the Court determines at the time of sentencing that defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct within the meaning of Guideline § 3E1.1(a), including by furnishing the United States Attorney's Office and the Probation Office with all requested financial information relevant to his ability to satisfy any fine that may be imposed in this case, a two-level reduction in the offense level will be appropriate. The government reserves the right to take whatever

¹ The government reserves the right to argue at sentencing that defendant is also responsible for tax loss stemming from the conduct described in Paragraph 6 of the Plea Agreement.

position it deems appropriate at the time of sentencing with respect to whether defendant has accepted responsibility within the meaning of Guideline § 3E1.1(a).

viii. If the Court determines that defendant has fully accepted responsibility within the meaning of Guideline § 3E1.1(a), and that the offense level is 16 or higher prior to the application of any reduction for acceptance of responsibility pursuant to § 3E1.1(a), the government will move for an additional one-level reduction in the offense level pursuant to Guideline § 3E1.1(b) because defendant has timely notified the government of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

c. **Criminal History Category.** With regard to determining defendant's criminal history points and criminal history category, based on the facts now known to the government, defendant's criminal history points equal zero and defendant's criminal history category is I.

d. Defendant and his attorney and the government acknowledge that the above guidelines calculations are preliminary in nature, and are non-binding predictions upon which neither party is entitled to rely. Defendant understands that further review of the facts or applicable legal principles may lead the government to conclude that different or additional guidelines provisions apply in this case. Defendant understands that the Probation Office will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final guideline calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations, and defendant shall not have a right to withdraw his plea on the basis of the Court's rejection of these calculations.

11. Both parties expressly acknowledge that this Agreement is not governed by Fed. R. Crim. P. 11(c)(1)(B), and that errors in applying or interpreting any of the sentencing guidelines may be corrected by either party prior to sentencing. The parties may correct these errors either by stipulation or by a statement to the Probation Office or the Court, setting forth the disagreement regarding the applicable provisions of the guidelines. The validity of this Agreement will not be affected by such corrections, and defendant shall not have a right to withdraw his plea, nor the government the right to vacate this Agreement, on the basis of such corrections.

Agreements Relating to Sentencing

12. Each party is free to recommend whatever sentence it deems appropriate.

13. It is understood by the parties that the sentencing judge is neither a party to nor bound by this Agreement and may impose a sentence up to the maximum penalties as set forth above. Defendant further acknowledges that if the Court does not accept the sentencing recommendation of the parties, defendant will have no right to withdraw his guilty plea.

14. Defendant agrees to pay the special assessment of \$200 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

15. After sentence has been imposed on the counts to which defendant pleads guilty as agreed herein, the government will move to dismiss the indictment as to defendant.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

16. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 12 CR 447.

17. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

18. Defendant understands that nothing in this Agreement shall limit the Internal Revenue Service in its collection of any taxes, interest or penalties from defendant and his spouse or defendant's partnership or corporations. Defendant understands that the amount of tax as calculated by the IRS may exceed the amount of tax due as calculated for the criminal case.

Conditional Plea of Guilty

19. The government agrees that defendant's plea of guilty is entered pursuant to Fed. R. Crim. P. 11(a)(2). Pursuant to that Rule, the parties agree that defendant, with the consent of the Court, may enter a conditional plea of guilty, reserving his right to appeal the Court's Order of September __, 2013, denying defendant's motion to dismiss the 18 U.S.C. § 1341 counts of the indictment and Count One of the superseding information. Only in the event of a reversal of that decision will defendant be permitted to withdraw his plea. The

government does not consent to an appeal on any other pretrial issue, and defendant reserves the right to appeal only the identified pretrial ruling and any issues relating to sentencing. Defendant acknowledges that in the event of a reversal of the Court's order denying the motion to dismiss the indictment and superseding information, the government may reinstate and prosecute any charges against defendant, including but not limited to the charges to which he is pleading guilty under this Agreement and the charges in the original Indictment. Defendant understands that the Court decides whether or not to approve the entry of this conditional plea under Fed. R. Crim. P. 11(a)(2). If the Court refuses to accept the conditional term of this Agreement, this Agreement shall be null and void.

Waiver of Rights

20. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

a. **Right to be charged by indictment.** Defendant understands that he has a right to have the charges prosecuted by an indictment returned by a concurrence of twelve or more members of a grand jury consisting of not less than sixteen and not more than twenty-three members. By signing this Agreement, defendant knowingly waives his right to be prosecuted by indictment and to assert at trial or on appeal any defects or errors arising from the information, the information process, or the fact that he has been prosecuted by way of information.

b. **Trial rights.** Defendant has the right to persist in a plea of not guilty to the charges against him, and if he does, he would have the right to a public and speedy trial.

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge sitting without a jury,

defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

ii. If the trial is a jury trial, the jury would be composed of twelve citizens from the district, selected at random. Defendant and his attorney would participate in choosing the jury by requesting that the Court remove prospective jurors for cause where actual bias or other disqualification is shown, or by removing prospective jurors without cause by exercising peremptory challenges.

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of proving defendant guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing all the evidence, it was persuaded of his guilt beyond a reasonable doubt and that it was to consider each count of the superseding information separately. The jury would have to agree unanimously as to each count before it could return a verdict of guilty or not guilty as to that count.

iv. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count separately, whether or not the judge was persuaded that the government had established defendant's guilt beyond a reasonable doubt.

v. At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant. Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them.

vi. At a trial, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require

their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

vii. At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

c. **Appellate rights.** Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial, and may only appeal the validity of this plea of guilty, the Court's order of September __, 2013, referenced above, and the sentence imposed. Defendant understands that any appeal must be filed within 14 calendar days of the entry of the judgment of conviction.

21. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraphs, with the exception of the appellate rights specifically preserved above. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights

Presentence Investigation Report/Post-Sentence Supervision

22. Defendant understands that the United States Attorney's Office in its submission to the Probation Office as part of the Pre-Sentence Report and at sentencing shall fully apprise the District Court and the Probation Office of the nature, scope, and extent of defendant's conduct regarding the charges against him, and related matters. The government will make known all matters in aggravation and mitigation relevant to sentencing.

23. Defendant agrees to truthfully and completely execute a Financial Statement (with supporting documentation) prior to sentencing, to be provided to and shared among the Court,

the Probation Office, and the United States Attorney's Office regarding all details of his financial circumstances, including his recent income tax returns as specified by the probation officer. Defendant understands that providing false or incomplete information, or refusing to provide this information, may be used as a basis for denial of a reduction for acceptance of responsibility pursuant to Guideline § 3E1.1 and enhancement of his sentence for obstruction of justice under Guideline § 3C1.1, and may be prosecuted as a violation of Title 18, United States Code, Section 1001 or as a contempt of the Court.

24. For the purpose of monitoring defendant's compliance with his obligations to pay a fine during any term of supervised release or probation to which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions, correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of supervised release or probation to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

25. Defendant agrees to cooperate with the United States Attorney's Office in collecting any unpaid fine for which defendant is liable, including providing financial statements and supporting records as requested by the United States Attorney's Office.

26. Regarding matters relating to the Internal Revenue Service, defendant agrees as follows (nothing in this paragraph, however, precludes defendant and his spouse or defendant's

partnerships or corporations from asserting any legal or factual defense to taxes, interest, and penalties that may be assessed by the IRS):

a. Defendant agrees to cooperate with the Internal Revenue Service in any tax examination or audit of defendant and his spouse and defendant's partnerships or corporations which directly or indirectly relates to or arises out of the course of conduct that defendant has acknowledged in this Agreement, by transmitting to the IRS original records or copies thereof, and any additional books and records that the IRS may request.

b. Defendant will not object to a motion brought by the United States Attorney's Office for the entry of an order authorizing disclosure of documents, testimony and related investigative materials which may constitute grand jury material, preliminary to or in connection with any judicial proceeding, pursuant to Fed. R. Crim. P. 6(e)(3)(E)(i). In addition, defendant will not object to the government's solicitation of consent from third parties who provided records or other materials to the grand jury pursuant to grand jury subpoenas, to turn those materials over to the Civil Division of the United States Attorney's Office, or an appropriate federal or state agency (including but not limited to the Internal Revenue Service), for use in civil or administrative proceedings or investigations, rather than returning them to the third parties for later summons or subpoena in connection with a civil or administrative proceeding involving, or investigation of, defendant and his spouse or defendant's partnerships or corporations. Nothing in this paragraph or the preceding paragraph precludes defendant and his spouse or defendant's partnerships or corporations from asserting any legal or factual defense to taxes, interest, and penalties that may be assessed by the IRS.

Conclusion

27. Defendant understands that this Agreement will be filed with the Court, will become a matter of public record, and may be disclosed to any person.

28. Defendant understands that his compliance with each part of this Agreement extends throughout the period of his sentence, and failure to abide by any term of the Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government, at its option, may move to vacate the Agreement, rendering it null and void, and thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

29. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

30. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

31. Defendant acknowledges that he has read this Agreement and carefully reviewed each provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

AGREED THIS DATE: _____

GARY S. SHAPIRO
United States Attorney

RAGHUVVEER NAYAK
Defendant

CARRIE E. HAMILTON
Assistant U.S. Attorney

THOMAS K. MCQUEEN
Attorney for Defendant