

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL INDICTMENT  
 :  
 : NO. 4:10-CR-012-HLM-WEJ  
 GEORGE D. HOUSER :

**UNITED STATES' PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW, VOL. III**

Comes now the United States, by and through Sally Quillian Yates, United States Attorney for the Northern District of Georgia, and Glenn D. Baker and William G. Traynor, Assistant United States Attorneys, and hereby submits its proposed findings of fact and conclusions of law. Due to its length, the Government has split its submission and is filing it in three volumes.

### **VIII. RESIDENT TRUST FUND**

Nursing home providers must protect their residents' personal funds by depositing them in a separate, interest-bearing account commonly referred to as a Resident Trust Fund. 42 C.F.R. § 483.10(c); Mauldin Tr. at 192-93; Stanley Tr. at 21-22; Knowles Tr. at 341; Free Tr. at 407. Nursing home providers must have a separate accounting system for the RTF that "precludes any commingling of resident funds with facility funds or with the funds of any person other than another resident." 42 C.F.R. § 483.10(c)(4)(i). Resident funds include the \$30 per month that Social Security provided residents for personal spending money during the conspiracy period (that amount has since been increased to \$50 per month). Stanley Tr. at 21-22; Ingram Tr. at 724; Primus Tr. at 733-35; Greenway Tr. at 804; Davis Tr. at 2587, 2596-97.

A nursing home provider steals RTF funds when he takes money out of the account for any purpose other than for a resident's needs. Goldsmith Tr. at 2881-82. Taking money taken out of the RTF for operating purposes, such as payroll, is stealing the residents' money. Goldsmith Tr. at 2881-82; *see also* Stanley Tr. at 74; Landers Tr. at 1730-31, 1741-42.

Houser used the RTF to pay FHG payroll. Stanley Tr. at 74; *see also* Exs. 282 (\$33,532 transferred from RTF to FHG payroll account); 299 (checks drawn

on RTF payable to FHG payroll).

Houser directed Rosa Free to use the RTF to pay the Wildwood's Georgia Power bill. Free Tr. at 407.

Houser told his business manager, Heidi Ingram, that the money in the RTF was his. Ingram Tr. at 708.

A nursing home administrator and the business manager should be the only two people with access to the RTF. Knowles Tr. at 341. Throughout the conspiracy period, however, Houser had access to the RTF and spent the money in the account. Stanley Tr. at 21-30, 74-75; Knowles Tr. at 341, 367-68; Free Tr. at 407, 418-19; Glymph Tr. at 457-58; Greenway Tr. at 803-04, 849, 855-56, 862, 957, 987-88; Landers Tr. at 1728-30; Chandler Tr. at 2309, 2311-12, 2318-19; Exs. 298, 451, 452, 453, 459, 465, 518, 809, 811. Houser would occasionally comply with the regulations and remove himself from the RTF – only to give himself access to the fund and spend its contents again. Knowles Tr. at 341; Greenway Tr. at 804, 849, 855-56, 988. When Lois Greenway reminded Houser that he was not supposed to have access to the RTF after he had been removed from the account, he told her, “Well, I’m on it now.” Greenway Tr. at 849.

Several times a month, every month, Houser would withdraw large amounts of money from the RTF. Ingram Tr. at 707. Later, he would make deposits into

the RTF, but Ingram was never able to balance the account. Ingram Tr. at 707-08, 724.<sup>1</sup> Similarly, Angie Chandler was never able to balance the RTF at Mt. Berry. Chandler Tr. at 2311-12. Houser never hired an independent accounting firm to account for the RTF. Chandler Tr. at 2318-19.

State surveyors cited the homes repeatedly during Houser's management for misappropriating RTF funds and failing to establish an accounting system to protect the residents. The Moran Lake surveys that found RTF misappropriations during the conspiracy period include Exhibits 275 (June 23, 2004, failure to manage RTF according to accepted accounting principles); 276 (January 1, 2005, multiple withdrawals by Houser from RTF totaling \$41,725 and \$30,522 not for residents or their needs)<sup>2</sup>; 282 (August 16, 2005, \$33,532 transferred to FHG payroll account, \$11,931 check drawn by corporate staff for unknown reasons, \$1,885 check to Forum Management Services for unknown reason; and no accounting system to prevent commingling); 286 (February 5, 2007, a resident's VA benefit checks were improperly deposited into the corporate operating account, \$16,000 transferred from RTF for unknown reason, and failure to have an

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<sup>1</sup>Sometimes Houser did not deposit money in the RTF until after state surveys had discovered his unauthorized withdrawals. Stanley Tr. at 56; Landers Tr. at 1729-30.

<sup>2</sup>All dollar figures in survey summaries are rounded.

accounting system to prevent commingling and protect residents' funds); and 292 (May 23, 2007, failure to ensure that money taken from the RTF was used for residents, failure to deposit residents' funds in an interest-bearing account, failure to purchase a surety bond to cover the RTF, and failure to have an accounting system to prevent commingling and protect residents' funds).

The Mt. Berry surveys finding RTF misappropriations during the conspiracy period include Exhibits 296 (January 12, 2005, withdrawals from RTF of \$11,287, \$4,272, \$7,201, and \$19,000 not for residents or their needs, and failure to have an accounting system to prevent commingling and protect residents' funds); 299 (August 17, 2005, several checks drawn on RTF not for residents, including checks of \$20,735, \$25,112, \$14,683 and \$17,327 payable to "cash," and checks of \$6,880, \$4,036, \$6,110, and \$1,059 payable to FHG payroll, failure to prevent commingling, and failure to purchase a surety bond as required to cover RTF); 304 (March 19, 2007, failure to prohibit misappropriation of residents' RTF funds); 306 (May 23, 2007, failure to protect residents' funds); and 309 (June 14, 2007, failure to protect residents' funds).

The Wildwood surveys finding RTF misappropriations during the conspiracy period include Exhibits 310 (January 27, 2005, withdrawals made for unknown purposes of \$4,422, \$9,101, \$9,101, \$9,101, \$32,000, \$28,500, \$25,729,

\$54,870 and \$10,000); 314 (August 24, 2005, failure to credit interest to residents' account and failure to manage RTF according to accepted accounting principles); and 320 (February 15, 2007, unauthorized withdrawals from RTF not for residents).

Houser fired Stanley soon after she reported his unauthorized withdrawals from the RTF. Stanley Tr. at 21-32; Free Tr. at 418-19; Hannay Tr. at 1432-33; Exs. 451, 452, 453, 459. Thereafter, Rosa Free did not report Houser's improper use of RTF funds for fear of losing her job. Free Tr. at 418-19.

Administrators repeatedly notified Houser about problems with the RTF. In a letter faxed June 27, 2006, Grant told Houser that the RTF at Wildwood was "still on hold with Bank of America." She added:

**George, this resident trust issue is critical, if we can't get this money today, we will have to contact ORS. Wildwood has not had access to cash since last Thursday.**

Ex. 831.7 (emphasis in original).

Similarly, in a letter faxed February 21, 2007, Knowles told Houser that state surveyors had cited Moran Lake for the commingling of RTF funds and operating funds, and they had once again demanded that no one have access to the fund except Knowles and the FHG business manager. Ex. 487.

Because the money in the RTF belongs to the residents, FHG should have transferred the residents' RTF funds to their new homes when the state closed the FHG homes. Davis Tr. at 2585-87, 2595-97. When twenty-one residents were transferred from Moran Lake to Cedar Springs Healthcare in June 2007, however, FHG kept their RTF funds. Davis at 2585-87, 2595-97. Two months later, state surveyors cited Wildwood in August 2007 for failing to transfer a resident's RTF funds after he transferred to another home. Chal Tr. at 2671-72.

Houser's depletion of the RTF caused residents or residents' family members to unknowingly write worthless checks, incur bad check penalties, and lose the use of their money. Stanley Tr. at 21-27; Primus Tr. at 736-37.

The theft and misappropriation of the RTF has a powerfully negative impact on residents. Greenway Tr. at 957; Fuqua Tr. at 2182-83; Lee Tr. at 2283. Like anyone else, nursing home residents "worry about their money." Greenway Tr. at 957. Residents use their RTF money to buy snacks and personal items, or to have their hair cut. Stanley Tr. at 21; Ingram Tr. at 724; Landers Tr. at 1730-31; Lee Tr. at 2283. For many residents, buying a snack or having their hair styled is the highlight of their day. Fuqua Tr. at 2182-83; Davis Tr. at 2509.

But there were many times when Houser depleted the fund and residents were denied access to their money to buy a snack. Landers Tr. at 1741-42; Fuqua

Tr. at 2182-83; Lee Tr. at 2283. Residents would start gathering at the “bank” window after breakfast, and some would become very upset when employees told them “there was no money in the bank” or “the bank was closed.” Landers Tr. at 1741-42; Fuqua Tr. at 2182-83; Lee Tr. at 2283. Moran Lake LPN Stephanie Lee summarized the situation:

[The residents] were upset. They didn’t understand why. I mean, it’s their money, why don’t they have it. And then they’re used to being able to get a snack or an extra drink and, you know, they weren’t able to. So very upset and then some of them became very agitated.

Lee Tr. at 2283.

The unavailability of RTF money had “a huge impact” on the residents. Fuqua Tr. at 2182-83. Once a Moran Lake resident was so upset by his inability to access his RTF money that he threw a chair across a room filled with residents, though luckily, the chair did not hit anyone. Fuqua Tr. at 2831.

## **IX. DIVERSION OF FUNDS**

### **Medicare and Medicaid Always Paid What Was Billed**

During the course of the conspiracy, Medicare and Medicaid paid a combined total of \$32,914,304.66 for the claims submitted by the three nursing homes. Exs. 254a, 255d. Forum did not have any problems getting paid by Medicare and Medicaid. Ingram Tr. at 705-06, 721; Chisolm Tr. at 260-61, 268;

Edwards Tr. at 127. To the extent Houser had any problems getting paid by Medicare and Medicaid, it was because Forum had trouble keeping up on the billing, so a lot of back-billing had to be done. Chisolm Tr. at 260-61. In this regard, there were times that Houser did not pay the vendor for the software that was used to bill Medicare and Medicaid, which delayed billing. Ingram Tr. at 705-06. Additionally, the power was frequently shut off at the corporate office for hours at a time because Houser was not paying the power bill, and they could not use the internet or bill Medicaid and Medicare when that happened. Chisolm Tr. at 263, 270; McFadin Tr. at 1717; Ex. 1500.

#### **Houser's Intentional Obfuscation**

Odell Justice's research revealed that Houser was associated with approximately 40 different entities. Justice Tr. at 1138-39. Justice asked Houser why he had created so many entities with similar names. Justice Tr. at 1151. Houser explained that he created those companies to confuse and hide assets from people who might want to sue him. Justice Tr. at 1151.

Similar to creating numerous entities to prevent people from suing him, Houser controlled at least 62 bank accounts, including a number of personal accounts in his or Rhonda's name, and he was constantly "moving" the nursing home funds from and to these accounts during the course of the conspiracy.

Singh, Tr. at 1654-55; Ex. 950.1; Edwards Tr. at 105-06. Houser believed the nursing home money belonged to him, and that he could do whatever he wanted with it. Ingram Tr. at 712-13.

**Intentional Failure to Account for Expenses and Profit**

Karon Goldsmith acknowledged how important it is for a nursing home to have an accounting system in place, and to have an accountant who can create financial statements that trace the purposes for which nursing home funds are used. Goldsmith Tr. at 2992. Goldsmith agreed that if accurate financial statements are not created, the owner could improperly spend the nursing home's funds on anything the owner wants without worrying about having to account for expenses and profits. *Id.*

During Odell Justice's meetings with the Housers, Houser did not provide Justice with financial statements prepared by his accountants even though Houser indicated to Justice that the accountants were working on them. Justice Tr. at 1126, 1145, 1181-82; Ex. 1231\_13. Rhonda, on the other hand, indicated to Justice that financial statements had not been prepared for the corporation, and that she and Houser maintained and had access to the books and records of the corporation. Justice Tr. at 1144-45; Ex. 1231\_4. According to Rhonda, Houser had the responsibility of dealing with the outside accountants, while Houser

claimed that the both of them did. Exs. 1231\_4, 1231\_13. Houser did provide Justice with a personal financial statement indicating that Houser's total net worth was more than \$20 million. Justice Tr. at 1174, 1178; Ex. 182.

Houser's personal financial statement said that his only source of income was the money he received from operating the three Forum nursing homes. Justice Tr. at 1178; Ex. 182. Justice's investigation confirmed that, while Houser was associated with forty corporate entities, the nursing homes were his only source of income: "[The entities] were all somehow related to the nursing homes and the nursing homes' stream of cash." Justice Tr. at 1184-85.

Houser was not entitled to take money out of Forum as "profit" before he accounted for the nursing homes' expenses. Singh Tr. at 1655. The cost of running a business must first be deducted from revenues in order to determine if there is any profit to take. *Id.* FBI Agent Singh explained that "[p]rofit is a residual. It's what remains after expenses." *Id.* Justice noted that Houser did not deny to Justice that he was commingling funds of his personal and business assets. *Id.* Justice said it was obvious that this was Houser's way to hide his assets. *Id.* at 1205.

Houser was consistently advised by his employees and multiple accountants throughout the course of the conspiracy how important it was for him to take a

salary and to have profit and expenses properly accounted for. Ingram Tr. at 712-713; Burrell Tr. at 1233-34; Edwards Tr. at 95-97. Justice testified that “when you are a corporation, you are required to take a salary.” Justice Tr. 1204. Payroll Manager Laverne Burrell described a meeting with the accountants in Atlanta in 2004 that she attended during which Houser was specifically told that he was not to take any money out of the nursing homes as profit until the nursing homes’ expenses were paid. Burrell Tr. at 1233-34. Houser, however, refused to take a salary, proclaiming that the nursing home funds belonged to him: “It’s all my money. I can do whatever I want to with it.” Ingram Tr. at 712-13.

Houser operated the company as if all the money was his, consistently using nursing home funds to pay for personal expenses without properly accounting for it. Ingram Tr. at 712; Edwards Tr. at 95-97. There was no accounting system in place to track bills or accounts payable. Dawson Tr. at 1514. Houser and Rhonda used debit cards paid for by Forum for extravagant personal charges, including trips to California, Martha’s Vineyard and the Hamptons, as well as restaurants, toys, furniture, purses, perfumes, and chocolates. Ingram Tr. at 709-11; Edwards Tr. at 96-7. Houser did not provide any invoices or receipts for these personal purchases. Edwards Tr. at 97.

It was extremely difficult for Edwards to balance the books. *Id.* at 104. In

order to do so, Edwards categorized the personal purchases as “loans to the shareholder.” *Id.* at 97. When Edwards asked Rhonda about grocery store purchases coming through the corporate account, Rhonda told her to use the loan to shareholder category for those purchases. *Id.* at 102. Edwards assigned any personal purchases that had no supporting documentation to that category. *Id.* at 97. Houser, however, never signed any loan documentation or paperwork. *Id.*

### **Houser “Moving” Money**

Of the approximate \$33 million in Medicare and Medicaid money that was paid to Houser, he spent or transferred a little more than \$8 million, or nearly 25% of the funds for his personal use. Singh, Tr. at 1708-1709. In a meeting with Justice on June 29, 2005, Houser admitted that he had spent money on real estate and other items that should have been used for the nursing homes. Justice Tr. at 1183-84, 1198; Ex. 1231\_1. Houser also admitted when he testified in the Terhune trial that he “moved” the nursing home money from account to account. Houser Prior Testimony, Tr. at 2722. He claimed at the trial that he did not have personal funds or a personal account and just used the company. *Id.* Defense counsel also conceded during trial that Houser was paying for his personal expenses out of the nursing home. Justice Tr. at 1201.

Early on, administrators at the nursing homes could see the Medicare and

Medicaid money that was deposited into their homes' operating accounts being transferred out immediately to other accounts. Stanley Tr. at 20-21; Free Tr. at 398. When Houser was asked about the transfers, he would say that he needed the money for something else. Free Tr. at 399. Sometimes he would leave enough money in the accounts to pay the bills and sometimes not. Edwards Tr. at 106. On June 27, 2005, Dr. Hannay wrote a complaint letter to the state, saying that Houser was "siphoning profits" from the homes by writing himself checks and leaving the facility with inadequate funds for payroll. Hannay Tr. at 1431; Ex. 1234.

During the course of the conspiracy, \$2,282,439 was deposited or transferred directly into Houser's personal banking accounts, and \$467,949 was deposited or transferred directly into Rhonda's personal banking accounts, mostly from a Forum source. Singh Tr. at 1678-88; Exs. 950a, 950b, 950c, 950d. During the course of the conspiracy, \$1,745,620 was deposited or transferred into The Guild's operating account, mostly from a Forum source. Singh Tr. at 1688-95; 950e, 950g. This amount includes three Medicaid checks, one for each nursing home, dated October 5, 2005, totaling \$192,520.30, that were payable to Mt. Berry (in the amount of \$48,497.79), Wildwood (in the amount of \$97,071.55), and Moran Lake (in the amount of \$46,950.96), and were deposited directly into The Guild's account the next day on October 6, 2005. Singh Tr. at 1692-93; Exs.

950e, 950g. Three more Medicaid checks, one for each nursing home, dated October 12, 2005, totaling \$27,487.02, that were payable to Mt. Berry (in the amount of 2,192.14), Wildwood (in the amount of \$15,396.68), and Moran Lake (in the amount of \$9,998.20), were deposited directly into The Guild's account on October 13, 2005. Singh Tr. at 1693-94; Exs. 950e, 950g.

### **The Guild**

The Guild was a construction company owned and managed by Houser. Stanley Tr. at 20; Ingram Tr. at 705, 722; J. Chisolm 520; Burrell Tr. at 1235; Ex. 1231\_14. The Guild never had any revenue. Ingram Tr. at 716. Money was transferred into the Guild from the nursing homes' accounts. Ingram Tr. at 716, 726; Exs. 950e, 950g. Houser showed Suzanne Stanley some of the plans for his construction projects to be done through the Guild, and told her that the money that the administrators were making him at the nursing homes was going to be used for "the ventures he had with The Guild." Stanley Tr. at 21.

A number of employees were working for the Guild but were paid through the nursing homes' payroll. Ingram Tr. at 716, 725; Burrell Tr. at 1247-48. The Guild employees would report how many hours they worked to Burrell. Burrell Tr. at 1247. Burrell then keyed that information into Forum's system, which would calculate how much the Guild employees were supposed to be paid and

what taxes needed to be deducted. *Id.* at 1247-48. Houser told Burrell that she could use Forum's system to calculate the wages owed, but that she should delete the information afterwards so it would not be saved in the Forum payroll system. *Id.* at 1248.

Mt. Berry maintenance man Jerry Chisolm spent most of his time working for The Guild, doing general agricultural cleanup or cutting grass at the properties that Houser had purchased. J. Chisolm Tr at 520-22. Some of Chisolm's time was also spent working as Houser's personal mechanic or fixing things at the "mansion" that Houser had purchased for ex-wife Pamela Houser. *Id.* at 521-24. Chisolm estimated that he spent 80% of his time on those things rather than doing maintenance work at Mt. Berry, which is what he was being paid for. *Id.* at 521-22. He was rarely at the nursing home unless a survey had just happened and they needed him. *Id.* at 522. Nonetheless, Chisolm was paid the entire time by Forum. *Id.* at 522.

Moran Lake maintenance man Jamie Young occasionally did work for The Guild with Chisolm during his normal working hours, but he also was paid only by Forum. Young Tr. at 2556-57, 2572-73. Young's work for The Guild took him away from the work he should have been doing at the nursing home. *Id.* at 2573. Like Jerry Chisolm, Young also did some work at Pamela Houser's house.

*Id.* at 2557-58. He did not receive a separate paycheck for that work. *Id.* at 2558. Joseph Pearson, another nursing home maintenance employee, worked alongside Chisolm for The Guild. *Id.* Pearson spent a lot of time cutting grass at Houser's properties. *Id.*

Burrell recalled two or three other individuals working for The Guild who were surveying and clearing property. Burrell Tr. at 1235-36. Houser instructed Burrell to pay them through Forum as well. *Id.* Margaret Hilliard and Dorothy worked upstairs at the corporate office for The Guild, and were also paid through Forum. Ingram Tr. at 716, 725. Heidi Ingram testified that there had been "quite a few ladies" that had worked for The Guild, but were paid with Forum funds. Ingram Tr. at 725.

### **Houser's Property Purchases**

#### **1. The Marriott Hotel Development**

In February 2005, Houser expressed his interest in building and owning a Marriott hotel and sent a presentation to Norman Jenkins, a Senior Vice President of Marriott International, that proposed a 154-acre mixed-use development in Rome, Georgia, on property that Houser had already purchased and was about to purchase. Jenkins Tr. at 1010-13; Ex. 1066. The proposed development would include a Marriott Courtyard hotel, residential housing, retail establishments, and

office space. *Id.*

Houser signed the letter to Jenkins as President and chief executive of Forum Group Corporation. Jenkins Tr. at 1013; Ex. 1066. Houser's proposal listed Rhonda as Vice-President and Director of Human Resources and Marketing at the Forum Group. Ex. 1066. The letter did not mention Rhonda's position, role, or experience in the nursing homes, stating instead that she was a licensed real estate broker and executive, who had developed, constructed and sold residential and commercial properties in the Rome and Atlanta markets for the past twelve years. *Id.* Houser never told Jenkins whether Rhonda had any role at the nursing homes. Jenkins Tr. at 1012.

On May 17, 2005, Houser sent Jenkins an e-mail updating him on his land development in Rome, which he called ROMA. Jenkins Tr. at 1014-18; Ex. 1067. In his email, Houser stated that the new Marriott hotel would cost between seven and eight million dollars. Jenkins Tr. at 1015; Ex. 1067. Under Houser's proposal, Marriott was not going to have to lay out any cash. Jenkins Tr. at 1016. Jenkins was thrilled when Houser indicated that he was going to capitalize the venture himself, including a \$2.5 million contribution from refinancings and cash-flow and another \$1.5 to \$2 million to reduce the debt. Jenkins Tr. at 1015-16; Ex. 1067. Houser attached a Cash Flow Analysis for the three nursing homes for

the preceding four months. Jenkins Tr. at 1019-20; Ex. 1068. The analysis reflected that the nursing homes had a positive cash flow of \$1,300,486.08 for January-April 2005. Jenkins Tr. at 1020; Ex. 1068.

Houser's email further stated that he also had an interesting prospect for a hotel in Brunswick, Georgia, and was investigating the possibility of acquiring the \$9.2 million site for that potential hotel, as well as a third potential site in Atlanta at the Atlanta University Center. Jenkins Tr. at 1018; Ex. 1067.

On July 12, 2005, Houser sent another letter to Jenkins indicating that Forum Group would capitalize with \$4.9 million, or 50% equity, a new lodging company that would build the Marriott hotel at the development he called "Waterplace in Roma." Jenkins Tr. at 1020-1022; Ex. 1069. Houser projected the total cost of the hotel as \$9.8 million, and indicated that he would contribute four acres of property. Jenkins Tr. at 1021; Ex. 1069. Jenkins recalled that, soon after Houser's letter, he received inquiries from law enforcement officials about Houser. Jenkins Tr. at 1023. Marriott never entered into a contract with Houser. *Id.* at 1022, 1025.

## **2. Houser's Real Estate Purchases**

During the course of the conspiracy, from June 30, 2004, through July 12, 2005, Houser purchased a substantial amount of property in six separate

transactions with a total cost of \$4,232,609. Ex. 1112a. The Government executed a federal search warrant on November 17th, 2005, at the Forum Healthcare corporate office located at 940 Spider Webb Drive in Rome, Georgia. Rotti Tr. at 2542. Houser did not purchase any property with Forum funds after the search warrant was executed. Ex. 1112a. During the Terhune trial, Houser testified that he bought the property at the beginning because he was “stupid” and “euphoric.” Houser Prior Testimony Tr. at 2724.

**a) 427 Chulio Road**

On June 30, 2004, Houser purchased property at 427 Chulio Road, Rome, Georgia for \$650,000. Singh Tr. at 1657; Exs. 1112a, Ex. 1035. The borrower listed on the settlement statement was The Guild, Houser’s construction and development company. *Id.* Houser signed as the Buyer and president of The Guild. Singh Tr. at 1657; Ex. 1035. The Guild paid \$353,000 at closing towards the purchase with a cashier’s check from SunTrust drawn on The Guild account. Singh Tr. at 1657; Exs. 1035, 1113. Rhonda was the Re/Max broker representing The Guild in the transaction and she received a commission of \$24,824. Singh Tr. at 1658; Ex. 1042. A number of checks, signed by Houser or Rhonda, dated from October 2004 through May 2005, were drawn on the Forum Healthcare group or Forum Group Management Services accounts to pay for the balance of the

property transaction and any interest that was owed to the seller. Singh Tr. at 1658-1660; Exs. 1112a, 1114-1123.

**b) 110 Cross Roads Court (Pamela Houser Residence)**

On July 29, 2004, Houser purchased a house for his ex-wife, Pamela Houser, in the Atlanta, Georgia metropolitan area for approximately \$1.4 million. Singh Tr. at 1660-65; Exs. 1112a, 1046. To pay for the transaction, Houser borrowed \$700,000 from Roswell Holdings and he contributed approximately \$741,000. Singh Tr. at 1661-65; Exs. 1112a, 1046, 1125-28. Rhonda was the Re/Max designated agent representing Houser, and she received a commission of \$39,660. Singh Tr. at 1664; Ex. 1048.

Six weeks earlier, on June 15, 2004, Houser had transferred \$1.4 million from the Forum Healthcare Group bank account to a personal account in his name. Singh Tr. at 1662-62; Exs. 1030-32. Houser testified in the Terhune trial that his withdrawal of funds from the nursing homes' account to pay for Pamela's residence was a "big mistake," claiming that it "occurred in the euphoria of finally starting to be paid by Medicaid," and adding that, at the time, he "was like a kid in a candy store." Houser Tr. at 2721-23.

**c) Highway 411**

On December 21, 2004, Houser purchased property at Highway 411 in

Rome, Georgia for \$1,040,000. Singh Tr. at 1665-1668; Exs. 1112a, 1051. The borrower listed on the settlement statement was Roma Development Company, L.L.C. ("Roma Development"), another company owned by Houser, who signed as the Buyer. Singh Tr. at 1665; Ex. 1051. Houser borrowed \$766,604 from Roswell Holdings and \$25,000 from his ex-wife Jacque Houser to partially fund the purchase. Singh Tr. at 1667-68; Exs. 1112a, 1129-1134. Rhonda was the Re/Max broker and she received a commission of \$31,200. Singh Tr. at 1666; Exs. 1051, 1054.

**d) 553/555 Chulio Road**

On November 30, 2004, Houser purchased property at 553 and 555 Chulio Road in Rome, Georgia for \$150,920. Singh Tr. at 1668-70; Exs. 1112a, 1147. The borrower was Houser's company, Roma Development Company, which funded the entire purchase. Singh Tr. at 1669; Ex. 1147. Rhonda was the Re/Max broker, and she received a commission of \$1,372. Singh Tr. at 1669; Ex. 1063.5.

**e) 209 Tuckawana Drive**

On February 7, 2005, Houser purchased property at 209 Tuckawana Drive, Rome, Georgia for \$500,000. Singh Tr. at 1670-74; Exs. 1112a, 1056. The borrower was Roma Development. Singh Tr. at 1671; Ex. 1056. Houser signed as the buyer. *Id.* Houser borrowed \$205,063 from Roswell Holdings and \$50,000

from his ex-wife Jacque Houser, to partially fund the purchase. Singh Tr. at 1672-74; Exs. 1112a, 1136, 1139. Rhonda was the Re/Max broker and she received a commission of \$6,000. Singh Tr. at 1672; Ex. 1058.

**f) 147 Tuckawana Drive**

On July 12, 2005, Houser purchased property at 147 Tuckawana Drive, Rome, Georgia for \$360,000. Singh Tr. at 1674-78; Exs. 1112a, 1060. The borrower listed on the settlement statement was again Houser's company, Roma Development Company. Singh Tr. at 1674; Ex. 1060. Houser signed as the buyer. Singh Tr. at 1674; Ex. 1060.

Houser borrowed \$280,400.40 from Roswell Holdings to partially fund the purchase. Singh Tr. at 1675; Exs. 1112a, 1141. Houser also used two Medicaid checks totaling \$71,617.10 as earnest money for this purchase by signing them over directly to the sellers, Paul and Donna Hibbets, who deposited them. Hibbets Tr. at 768-69, 771-73; Singh Tr. at 1675-76; Exs. 1142, 1062a. One of the Medicaid checks, in the amount of \$34,309.54, was payable to the Forum Group at Moran Lake. Ex. 1142. The other Medicaid check, in the amount of \$37,307.56, was payable to Forum Group at Mt. Berry. *Id.* Donna Hibbets testified that she was concerned about receiving these checks because it did not appear that they were intended for her and her husband. Hibbets Tr. at 772. Rhonda was the

Re/Max broker and she received a commission of \$8,635. Singh Tr. at 1675; Ex. 1063.

### **3. Roswell Holdings**

Roswell Holdings (“Roswell”) is a “hard-money” lender, meaning that it lends money to individuals who are not able get conventional loans through a bank because of their lower credit rating, and it therefore uses the actual property as collateral for the loan rather than relying on creditworthiness. Alpern Tr. at 1628-29. The interest rate that Roswell charges is higher than the banks’ since the loans Roswell enters into are higher risk. *Id.* at 1629.

During the course of the conspiracy, Houser entered into several loan transactions with Roswell to help partially finance his real estate purchases. Alpern Tr. at 1629; Ex. 1147a. Houser borrowed a total amount of \$2,509,000 during this period from Roswell. Alpern Tr. at 1631; Ex. 1147a. During the course of the conspiracy, Houser made numerous payments on the Roswell loans totaling \$1,055,826, mostly drawn from the various Forum Healthcare entities or Houser’s personal accounts, all of which represented interest payments and fees on the loans, except for payoffs Houser made for the Chulio Road property. Alpern Tr. at 1634-41; Ex. 1164a. Houser still owes Roswell approximately \$6 million, \$4 million of which relates to a loan made in 2008 after the nursing homes closed.

Alpern Tr. at 1643, 1650-51.

**Rhonda Houser's "Salary"**

Rhonda Houser instructed Burrell to pay her money through the nursing homes' payroll account. Burrell Tr. at 1229-30. Federal payroll taxes were not withheld from Rhonda's checks. *Id.* at 1230. Rhonda told Burrell that she would pay her own taxes. *Id.* Houser was aware that Rhonda was being paid through the payroll. *Id.* Even though Rhonda was supposedly being paid a salary, she was infrequently in the office, and was not acting as the president of the company, which was her title. Ingram Tr. at 714; W. Chisolm Tr. at 261; Edwards Tr. at 95. From 2004-2007, a total of \$467,949 was deposited into Rhonda's personal account. Singh Tr. at 1687; Ex. 950c. Most of the money came from the Forum corporate account and the three nursing homes' operating accounts. Ex. 950c. More than \$88,000 of the deposits into Rhonda's account were from cash transfers. Ex. 950c.

**Pamela Houser's "Salary"**

Pamela Houser was not an employee of the nursing homes, yet she was paid every two weeks out of the nursing homes' payroll account. Houser Prior Testimony, Tr. at 2722; Stanley at 21, 39; Burrell Tr. at 1231-32. Houser admitted in his civil deposition that Pamela was not an employee and that the payments to

Pamela were for alimony. Houser Prior Testimony, Tr. at 2722. Rhonda signed most of the payroll checks to Pamela. Exs. 960, 961. On one of the nursing home checks payable to Pamela dated November 15th, 2004, in the amount of \$3,552.15, Rhonda wrote in the memo portion of the check that the payment was for "Payroll for week ending October 11th, 2004." Singh Tr. at 1704; Ex. 961.

Pamela was paid \$71,490.85 from the nursing home account as of October 2005. Singh Tr. at 1703-05; Ex. 960. Pamela continued to receive payroll checks well past October 2005. Singh Tr. at 1705; Burrell Tr. at 1231-32. In late 2006, Richard Rose, Houser's accountant, told Houser that Pamela could not be on the payroll. *Id.* Houser "just stuck his hands in his pockets and walked out the door." *Id.* Laverne Burrell sent a W-2 form to Pamela Houser the first year they were paying Pamela since she was receiving payroll checks. *Id.* at 1232. Houser found out about it and told Burrell that she was not supposed to send Pamela a W-2, and that Pamela should not have payroll taxes taken out of her payroll checks. *Id.*

**Nannies Mamie Carroll and Dorothy Askew**

Mamie Carroll and Dorothy Askew, drew Forum paychecks for their work as the Housers' nannies. Burrell, Tr. at 1234-35. Carroll worked as the Housers' nanny from December 2004 to approximately May 2005. Carroll, Tr. at 2599-2604; Ex. 963. Carroll negotiated her pay rate with Houser, and reported her

hours each week to the payroll department at the corporate office. Carroll, Tr. at 2604-05, 2611-12; Exs. 963, 964. She was paid as if she were an employee. *Id.* Carroll received \$10,566.76 from the nursing home's account. Singh Tr. at 1705-06; Ex. 963. Rhonda signed the majority of the checks payable to Carroll. Exs. 963, 964.

Nanny Dorothy Askew was paid \$13,306.08 through the nursing home payroll account. Singh Tr. at 1706-07; Ex. 1027. Rhonda signed the majority of the checks payable to Askew. Exs. 1027, 1028. On one of the checks signed by Rhonda dated February 11th, 2005, in the amount of \$165, the memo section indicated that it was for "Work/Sitting." Singh Tr. at 1707; Exs. 1027-28.

### **Automobiles**

On August 4, 2004, Houser signed IRS Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, on which he had indicated that the only vehicle he owned was a 1980 Hyundai worth \$500. Justice Tr. at 1129-33; Ex. 1231\_14. However, on January 19, 2004, Houser had purchased a Mercedes E-500 for \$63,882 using nursing home funds. Singh Tr. at 1699; Ex. 957. The next day, on January 20, 2004, Houser purchased a Mercedes S-430 for \$76,586 using nursing home funds. Singh Tr. at 1699; Ex. 957. Odell Justice recalled seeing Houser driving a Mercedes, not a 1980 Hyundai. Justice

Tr. at 1132. Those were not the only vehicles Houser purchased with nursing home funds. On June 10, 2005 Houser wrote a \$35,468 check from his personal account to Global imports, a luxury vehicle dealership. Although the memo says "BMW 48iS for Forum," interviews with employees showed that there was no company car. Singh Tr. at 1700-01; Exs. 950j, 950k. Houser also purchased a Jeep Liberty for a daughter and a car for Rhonda's father. Ingram Tr. at 710.

### **X. THE TAX CASE**

"Payroll taxes" are Social Security, Medicare and federal withholding taxes that are taken out of an employee's paycheck. Justice Tr. at 1106-07, 1208-1210; Igbalajobi Tr. at 1208-10. An employer is entrusted to withhold those taxes from his employees' paychecks and pay them over to the Internal Revenue Service. Justice Tr. at 1106-07, 1208-1210. An employer is supposed to pay over the taxes in biweekly federal tax deposits ("FTDs"), and to report them in IRS Forms 941 that are to be filed quarterly. Justice Tr. at 1106-07, 1208-1210. One or more people in the employer's management team is responsible for collecting and paying over the employee's payroll taxes, and they are personally liable for doing so. Justice Tr. at 1196.

The employer is also supposed to pay his share of the employment taxes biweekly. Justice Tr. at 1106-07, 1208-1210.

Houser operated the Moran Lake and Mt. Berry nursing homes in the early 1990s. Justice Tr. at 1107-10. During those years, the Moran Lake home was called, at different times, Brentwood or Three Rivers Healthcare, and the Mt. Berry home was called Wesley Rome. Justice Tr. at 1107-10. Houser did not pay over his employees' payroll taxes, and in 1993, the IRS seized the Mt. Berry home, and the State of Georgia revoked Houser's license to operate the homes. Justice Tr. at 1107-10. The IRS imposed tax liens on the homes, which expired after ten years. Justice Tr. at 1107-10. Odell Justice was the Revenue Officer in the Rome office who handled the case. Justice Tr. at 1107-10.

Between 1993 and July 2004, Houser stopped by Justice's office occasionally and asked for a payout figure, meaning an updated figure of the taxes, penalties and interest he owed. Justice Tr. at 1110-11 & 1171-73. Justice always gave Houser a payout figure to encourage him to pay off the tax liens, but Houser never did. Justice Tr. at 1110-11 & 1171-73.

Acting through Forum Healthcare Group ("FHG"), Houser and Rhonda assumed management of the two Rome homes in May 2003. Sheppard Tr. at 1080-1085, 1091-92; Exs. 100, 101. At FHG, Payroll Administrator Laverne Burrell prepared the paychecks for the biweekly payroll and the FTD coupon for the payroll taxes. Edwards Tr. at 114; Ingram Tr. at 715-16; Burrell Tr. at 1236-

41; Ex. 107. She also wrote out FTD checks for Houser to sign. Edwards Tr. at 114; Ingram Tr. at 715-16; Burrell Tr. at 1236-41; Ex. 107. Sometimes he signed the checks and mailed the FTDs, and sometimes he did not. Edwards Tr. at 114; Ingram Tr. at 715-16; Burrell Tr. at 1236-41. Burrell talked with Houser about the need to pay over the employees' payroll taxes after each payroll, and he told her that he "would take care of it." Burrell Tr. at 1236-41; Ex. 107. When she received telephone calls from the IRS about payroll taxes, she transferred the calls to Houser. Burrell Tr. at 1239.

#### **TAX YEAR 2004**

Medicare and Medicaid paid Houser \$4,962,599.55 in 2004. Exs. 254a & 255d.

On June 30, 2004, Houser bought land at 427 Chulio Road in Rome for \$650,000, and he paid approximately \$353,000 toward his purchase at the closing. Singh Tr. at 1657-60; Exs. 1035, 1042, 1112, 1112a, 1113, 1114. Rhonda, a real estate agent, received a commission of \$24,824. Singh Tr. at 1658; Ex. 1042.

On July 29, 2004, Houser bought a house for his ex-wife Pamela Houser. Singh Tr. at 1660-65; Exs. 1030, 1031, 1048. The house was located at 110 Cross Roads Court, Atlanta, the sale price was \$1,349,000, and Houser paid \$716,000 toward his purchase at the closing. Singh Tr. at 1660-65. Rhonda received a

commission of \$39,660. Singh Tr. at 1662-64; Ex. 1048.

Also in July 2004, the IRS opened an investigation of FHG's failure to pay over employees' payroll taxes in 2003, and the case was transferred to Justice on July 31, 2004. Justice Tr. at 1111-13; Ex. 1231\_1.

On August 2, 2004, Justice searched several databases and learned that FHG did not made any federal tax deposits ("FTDs") of its employees' payroll taxes in the last quarter of 2003. Justice Tr. at 1114-16. Based on the Form 941s that FHG had filed, it should have made FTDs totaling \$105,498.03 in that period. Justice Tr. at 1114-16. Justice learned that Rhonda was FHG's registered agent. Justice Tr. at 1111-14. Justice sent FHG a Notice of Intent to Levy, meaning that the IRS intended to recover the payroll taxes by garnishing Houser's and Rhonda's bank accounts, possibly seizing property, and other possible means of collection. Justice Tr. at 1111-16.

Justice searched the Georgia Secretary of State's records and found that Houser was the registered agent or a corporate officer for forty corporate entities, including:

Forum Group Management Services, Inc.

Forum Buildings LLC

FHG at Moran Lake Nursing & Rehabilitation Center, LLC

FHG @ Mt Berry Nursing & Rehabilitation Center, LLC

FHG at Wildwood Park Nursing & Rehabilitation Center, LLC

The Guild, Inc.

First Convalescent Center, LLC

First Convalescent Co., LLC

The Nepenthe Co.

The Second Nepenthe Co.

The Third Nepenthe Co.

The Fourth Nepenthe Co.,and

The Fifth Nepenthe Co.

Justice Tr. at 1138-1139; Ex. 1231\_17.

Justice also reviewed IRS records and found that one of Houser's companies, The Guild, Inc., never made any FTDs. Justice Tr. at 1137-38; Ex. 1231\_16.

On August 4, 2004, Justice visited the FHG office on Spider Webb Drive in Rome and met Houser and Rhonda. Justice Tr. at 1117-20. Justice verified that Houser and Rhonda were the people at FHG who were personally responsible for collecting and paying over the employees' payroll taxes. Justice Tr. at 1117-20, 1135-37; Exs. 1128, 1231\_13, 1231\_15. Justice explained the tax collection

process and their appeal rights to them. Justice Tr. at 1117-20. He discussed the fact that Houser had not made any FTDs for the entire year of 2004, and he demanded payment of FHG's payroll taxes. Justice Tr. at 1117-20. Houser said that earlier that day he had made FTDs for the second quarter of 2004. Justice Tr. at 1119.

Justice interviewed Houser during this visit and took notes of Houser's answers on IRS report forms, which Houser reviewed for accuracy and signed. Justice Tr. at 1120-37; Exs. 1128, 1231\_13, 1231\_15. Houser said he was the general counsel of FHG and he was assuming control of the business. Justice Tr. at 1120-25. Houser acknowledged his involvement with Wesley Rome and Three Rivers, and his previous payroll tax problems when he operated those nursing homes. Justice Tr. at 1120-25. He said that Rhonda was president of FHG and she owned 100 percent of the corporation. Justice Tr. at 1120-25. Houser said he authorized payroll checks, prepared the Forms 941, and authorized the payment of FHG's taxes. Justice Tr. at 1120-25. Houser said that he had hired the accounting firm of Read, Martin & Slickman to work on FHG's financial accounting, but Justice never received anything from that firm in 2004 or 2005. Justice Tr. at 1126-27.

Under penalty of perjury, Houser said that he had no investments, no cash

on hand, no accounts receivable, and no income. Justice Tr. at 1130-33; Ex. 1231\_14. Later in the same interview, Houser said that he had accounts receivable of \$400,000 per week from Social Security, Medicare and Medicaid payments made to FHG nursing homes. Justice Tr. at 1135-35; Ex. 1231\_15. Justice did not ask Houser to explain his contradictory claims to having (1) no accounts receivable and (2) accounts receivable in the amount of \$400,000 per week. Justice Tr. at 1136. Houser also said that he drove a 1980 Hyundai sedan, though Justice had seen him driving a Mercedes-Benz. Justice Tr. at 1128-1134; Ex. 1231\_14.<sup>3</sup>

Justice returned to the FHG offices on August 9, 2004. Justice Tr. at 1140-48. He interviewed Rhonda and discussed FHG's payroll tax situation with her and Houser. Justice Tr. at 1140-42. Justice gave them the deadline of September 15, 2004 to pay FHG's past due payroll taxes. Justice Tr. at 1141. In her interview, Rhonda said that she managed all the duties of the nursing homes, discussed payroll taxes with Houser, and they reviewed the payroll tax returns and payments together. Justice Tr. at 1142-48; Exs. 1231\_3 & 1231\_4. Rhonda said

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<sup>3</sup>Justice explained that when he interviews someone, he writes down whatever they say and lets them review and correct his form, and later he tries to verify what they told him. Justice Tr. at 1124-25.

the accounting firm Read, Martin & Slickman and Gregory Jones, an accountant from Marietta, were FHG's outside accountants, but Justice never received anything from the firm or Jones in 2004 and 2005. Justice Tr. at 1145; Ex. 1231\_4.

Houser and Rhonda did not pay FHG's past due payroll taxes by the deadline of September 15. Justice Tr. at 1148.

Houser visited Justice's office on October 20, 2004. Justice Tr. at 1148-52. Justice gave Houser notices that in addition to owing payroll taxes for the fourth quarter of 2003, he also owed them for the first and second quarters of 2004. Justice Tr. at 1149. Houser said he had hired the Paul A. Jones & Co. accounting to assist him in filing his personal and business taxes. Justice Tr. at 1149. Houser said he was going to apply for relief from the failure-to-file penalties ("an abatement"), and Justice advised him to request one in writing. Justice Tr. at 1149-50.

Houser said that he had reorganized the corporate structure of the nursing homes under FHG, and as of June 30, 2004, he was operating them under his Medicare and Medicaid provider number. Justice Tr. at 1150. Houser said he was in the process of obtaining a loan and he would use the proceeds to pay his past due payroll taxes. Justice Tr. at 1150. Justice decided not to file tax liens on the

homes to give Houser time to obtain the loan. Justice Tr. at 1151-52.

Justice asked Houser why he had so many companies with such similar names. Justice Tr. at 1151. Houser explained that wrongful death lawsuits were a problem in the nursing home industry, and he used so many similarly named entities to hide his assets from people who might try to sue him. Justice Tr. at 1151.

Despite his assurances to Justice that he was going to pay his taxes, Houser instead continued to buy real estate. On November 30, 2004, Houser bought the property at 553 and 555 Chulio Road in Rome for \$150,920. Singh Tr. at 1668-70; Exs. 1063.5, 1063.6, 1112a, 1145, 1146, 1147, 1147a. Rhonda received a commission of \$1,372. Singh Tr. at 1669; Ex. 1063.5.

On December 21, 2004, Houser bought several acres of land on Highway 411 in Rome. Singh Tr. at 1665-68; Exs. 1051, 1054, 1112a, 1130, 1131, 1132, 1133. The purchase price was \$1,040,000, and Houser funded the purchase in part by borrowing \$766,604 from Roswell Holding and \$25,000 from his first wife, Jacque Houser. Singh Tr. at 1667-68; Exs. 1051, 1052, 1112a, 1129-34. Rhonda received a commission of \$31,200. Singh Tr. at 1665-71; Ex.1054.

By January 2005, despite his representations to Justice about obtaining a loan to pay his past due payroll taxes, Houser still had not paid his taxes for the

last quarter of 2003. Justice Tr. at 1152. That amount was \$105,498.03 – about a tenth of the amount he spent on December 21, 2004, to buy the land on Chulio Road. Justice Tr. at 1114-16; Singh Tr. at 1665-71.

On January 10, 2005, Justice sent FHG a final notice demanding payment of the payroll taxes for the first quarter of 2004, which the IRS calculated to be \$872,165. Justice Tr. at 1152-53. Rhonda gave Justice ten checks that were drawn on the FHG operating account. Justice Tr. at 1153-1158; Ex. 1231\_30. Rhonda signed all ten checks, which were written payable to the IRS. Ex. 1231\_30. Three checks were written in the amount of \$100,000; one check was written in the amount of \$74,000, and six checks were written in the amount of \$50,000. Ex. 1231\_30. Rhonda told Justice that she would call him and tell him when he could deposit the checks. Justice Tr. at 1154-55. Pursuant to her instructions, Justice deposited one check for \$50,000 on January 11, 2005, and it cleared the bank. Justice Tr. at 1155-56.

He was instructed to deposit another \$50,000 check on January 24, 2005, and it cleared the bank. Justice Tr. at 1157-59.

He was instructed to deposit a third \$50,000 check on February 2, 2005, but it was returned for insufficient funds. Justice Tr. at 1158-59.

He was instructed to deposit a fourth \$50,000 check on February 7, 2005,

which was also returned for insufficient funds. Justice Tr. at 1159-60.

After the two checks bounced, Justice did not attempt to deposit any more of the checks. Justice Tr. at 1160.

Also on February 7, 2005, Houser bought property at 209 Tuckawana Drive in Rome. Singh Tr. at 1670-74; Exs. 1056, 1058, 1112a, 1135, 1136, 1137. The sales price was \$500,000, and Houser funded the purchase in part by borrowing \$205,063 from Roswell Holdings and \$50,000 from Jacque Houser. Singh Tr. at 1670-74; Exs. 1056, 1058, 1112a, 1135, 1136, 1137. Rhonda received a commission of \$6,000. Singh Tr. at 1672; Ex. 1058.

On February 16, 2005, Justice sent Houser and Rhonda a letter notifying them that the IRS was going to impose payroll tax recovery penalties (also called “trust fund recovery penalties”) against them for the taxes due from the fourth quarter of 2003. Justice Tr. at 1161-62.

In late February 2005, Justice received twenty checks, all drawn on the FHG payroll account and signed by Rhonda. Ex. 1231\_6. The checks were made payable to SunTrust Bank, and notations in the memo line indicated that they were meant to be FTDs for the fourth quarter of 2004. Justice Tr. at 1162-68; Ex. 1231\_6. The checks were written in amounts ranging from \$1,673.65 to \$19,631.43. Ex. 1231\_6.

Justice deposited all twenty checks; ten cleared and ten bounced. Justice Tr. at 1165-68. The ten worthless checks were written in amounts that totaled approximately \$157,000. Justice Tr. at 1167.

On March 2, 2005, Justice referred Houser, Rhonda, and FHG to the IRS for criminal investigation of an abusive tax avoidance scheme. Justice Tr. at 1158. Justice is a civil enforcement officer and is not involved in criminal investigations. Justice Tr. at 1168-69. He did not attempt to seize the FHG homes as he had in 1993 because the law had changed and, consequently, the IRS would not seize them because Houser had such little equity in them. Justice Tr. at 1194, 1203-04.

Once the case was referred for criminal investigation, Justice was instructed not to initiate further contact with Houser. Justice Tr. at 1170-71, 1181.

During his attempt to collect Houser's payroll taxes, Houser gave Justice a personal financial statement that he signed on February 23, 2005. Justice Tr. at 1174-80; Ex. 182. Houser's statement claimed that he had a personal net worth of \$20 million. Justice Tr. at 1178; Ex. 182. Houser listed several properties as his assets, though they were titled in nominees' names. Justice Tr. at 1175; Ex. 182. Houser listed \$18 million in real estate assets, though he did not explain to Justice how they were his personal assets when they were titled in others' names. Justice Tr. at 1176. For example, Houser listed the house he bought for Pamela Houser in

Atlanta under the name of “First Convalescent Center, LLC.” Justice Tr. at 1176; Ex. 182.

Houser’s personal financial statement said that his only source of income was the money he received from operating the three FHG nursing homes. Justice Tr. at 1178; Ex. 182. This statement was consistent with the findings of Justice’s finding that while Houser was associated with forty corporate entities, the nursing homes were his only source of income. Justice Tr. at 1184-85. Houser did not draw a salary or dividends from FHG; instead, he used the corporate accounts to pay his personal expenses. Justice Tr. at 1200-01,1204-05.

#### **TAX YEAR 2005**

Medicare and Medicaid paid FHG a total of \$11,099,068.36 in 2005. Exs. 254a & 255d.

Houser visited Justice on May 16, 2005. Justice Tr. at 1171-74. He asked Justice for a tax payoff calculation as of May 20, 2005. Justice Tr. at 1171-74. He told Justice that he was developing a Marriott hotel in Rome, and the Marriott required him to be free from any liens. Justice Tr. at 1171-72. Justice calculated Houser’s payoff was \$571,198.59. Justice Tr. at 1172; Ex. 1231\_19.

Houser visited Justice again on June 29, 2005. Justice Tr. at 1180-84. He admitted that he had not made any FTDs for the second quarter of 2005. Justice

Tr. at 1180-82. Houser blamed his failure to pay over his employees' payroll taxes on an insufficient cash flow stemming from what he claimed was a ban on Medicare and Medicaid admissions at his nursing homes. Justice Tr. at 1180-81. Houser said he had hired a new chief financial officer, a CPA named Charles Fletcher. Justice Tr. at 1181-82. Justice never received any work product or had any contact with Fletcher. Justice Tr. at 1181-82. Houser said he had hired a new billing clerk who would help him obtain even more money from Medicare and Medicaid. Justice Tr. at 1182.

Justice asked Houser about the bad checks he had received earlier in the year in purported payments of Houser's payroll taxes. Justice Tr. at 1182-83. Houser again blamed a ban on admissions for his financial difficulties. Justice Tr. at 1183. Justice asked Houser about his property purchases, and Houser said he should have reserved some of that money for operating the nursing homes. Justice Tr. at 1183-84. Houser assured Justice that he was soon to acquire \$8 million, and he would get caught up with his tax deficiencies when that money came in. Houser Tr. at 1184.

About two weeks after this meeting, on July 12, 2005, Houser bought the property at 147 Tuckawana Drive in Rome. Singh Tr. at 1674-78; Hibbets Tr. at 765-73; Exs.1060, 1062, 1062a, 1062b, 1063, 1112a, 1141, 1142, 1143. The sales

price was \$360,000, and Houser funded the purchase in part by borrowing \$280,400.40 from Roswell Holdings. Singh Tr. at 1674-78; Exs. 1060, 1112a, 1141. Houser also used two Medicaid checks to fund the purchase, for a total of \$71,617.10. Hibbets Tr. at 768-69, Singh Tr. at 1674-78; Exs. 1142, 1062a. One check was payable to Moran Lake in the amount of \$34,309.54, and the other was payable to Mt. Berry in the amount of \$37,30.56. Hibbets Tr. at 765-73; Singh Tr. at 1674-78; Exs. 1060, 1062, 1062a, 1062b. Houser also gave the sellers a check in the amount of \$10,000 from the Forum Group Management Services. Singh Tr. at 1674-78; Hibbets Tr. at 765-73; Exs. 1060, 1062, 1062a, 1062b. Donna Hibbets, the seller, was wary of taking the Medicaid checks because “that money looked like that it was not, you know, not intended to give to us.” Hibbets Tr. at 772. She took the checks only upon the assurances of her lawyer. Hibbets Tr. at 772.

IRS criminal investigators executed a search warrant on the FHG offices at 940 Spider Webb Drive on November 17, 2005. Rotti Tr. at 2542. Justice did not participate in the search. Justice Tr. at 2505.

### **PAYROLL TAXES OWED, COUNTS 2-9**

Marilyn Igbalajobi, an employment tax specialist with the IRS, calculated Houser’s personal liability for employees’ payroll taxes for eight quarters, which

are listed in Counts 2-9. Igbalajobi Tr. at 1210. Houser filed Forms 941s in these eight quarters, but when Igbalajobi reviewed the records, Houser had not made any FTDs in any of the quarters. Igbalajobi Tr. at 1211-12.

Count 2: using the numbers that Houser had supplied in the Forms 941, Igbalajobi calculated that for the first quarter of 2004, Houser was personally liable for \$214,935 for payroll taxes that had not been paid over to the IRS. Igbalajobi Tr. at 1210-15; Ex. 1069a. Igbalajobi found that FHG had overpaid employees' payroll taxes in other quarters, and she credited those overpayments to reduce Houser's liability for that quarter. Igbalajobi Tr. at 1212-14.

Counts 3, 4, 5, 6, 7, 8, and 9: When Igbalajobi did her analysis, she found that the Forum entities that operated Moran Lake, Mt. Berry and Wildwood did not make any FTDs for the fourth quarter of 2004 or the second quarter of 2005. Igbalajobi Tr. at 1214; Ex. 1069a. She found that the total unpaid taxes listed in Counts 3-9 was \$806,305. Igbalajobi Tr. at 1213-15; Ex. 1069a.

### **PERSONAL INCOME TAXES, COUNTS 10-11**

Federal law required individuals to file personal income tax returns (Forms 1040) if they (1) had more than \$7,950 in gross income in 2004 and (2) filed as individuals. Igbalajobi Tr. at 1216.

The law required married people to file a personal return if they had more

than \$15,900 in gross income in 2004. Justice Tr. at 2506.

The law required individuals to file personal returns in 2005 if they had more than \$8,200 in gross income. Igbalajobi Tr. at 1216.

Gross income includes wages, payments of money, property, goods, and services. Igbalajobi Tr. at 1216.

In 2004, Houser purchased property priced in excess of \$1.7 million in 2004, and he purchased two Mercedes-Benz automobiles that he and Rhonda drove for their personal use. Singh Tr. at 1655-1671; Exs. 950j, 950k, 1112a.

In 2005, Houser purchased property on Tuckawana Drive for \$860,000. Singh Tr. 1672-78; Hibbets Tr. at 765-73; Exs. 1060, 1062, 1062a, 1062b; 1112a. He also bought a BMW vehicle for \$35,468, and spent \$34,975 to send his son to school. Exs. 950j, 950k.

On April 9, 2008 – six days short of being three years late – Houser filed a Form 1040 for the year 2004. Justice Tr. at 2505-06, Ex. 1084. Houser filed as a married person filing a joint return with his spouse. Justice Tr. at 2506; Ex. 1084. The return listed his wife as Pamela Houser, but she did not sign the return. Justice Tr. at 2506; Ex. 1084.

There is no evidence in the record that George and Pamela Houser were married in 2004.

Houser never filed a personal income tax return for 2005. Justice Tr. at 2506-07; Ex. 1086c.

### **Payments**

IRS criminal investigators executed a search warrant on the FHG offices at 940 Spider Webb Drive on November 17, 2005, giving Houser notice of the criminal investigation. Rotti Tr. at 2542.

A year later, in late November 2006, one of Houser's attorneys made payroll tax payments for the quarters that were later charged in Counts 3, 5 and 9. Justice Tr. at 2507-13; Ex. 1069.1.

Six months later, Houser's attorney made payroll tax payments for the quarter that was later charged in Count 4. Justice Tr. at 2507-13; Ex. 1069.1.

The four payments did not pay the Forum entities' entire tax liability for those quarters. Justice Tr. at 2510-12; Ex. 1069.1. The four payments covered only the employees' portion of the payroll taxes due for those quarters. Justice Tr. at 2510-12; Ex. 1069.1. In letters accompanying the payments, Houser's attorney stated that the partial payments were being made to try to eliminate Houser's personal liability for the payroll taxes that had not been paid over to the IRS. Justice Tr. at 2510.

Neither Houser nor his tax attorney ever made any payments regarding

Counts 2, 6, 7, and 8. Justice Tr. at 2512-13.

## **XI. CONCLUSIONS OF LAW**

The Second Superseding Indictment contains eleven counts. It charges George and Rhonda Houser with a conspiracy (18 U.S.C. §1349) to commit health care fraud in violation of 18 U.S.C. § 1347 (Count One). The Indictment also charges George Houser with eight counts of failure to account for and pay over payroll taxes (26 U.S.C. § 7202) and two counts alleging failure to file individual income tax returns (26 U.S.C. § 7203).

### **Count One: Conspiracy to Commit Health Care Fraud**

To obtain a conviction for conspiracy to commit health care fraud under 18 U.S.C. § 1349, the Government must prove the existence of an agreement to achieve an unlawful objective, in this case to commit health care fraud in violation of 18 U.S.C. § 1347, and the defendant's knowing participation in that agreement. *United States v. Soto*, 399 Fed. Appx. 498, 500 (11th Cir. 2010). Under 18 U.S.C. § 1347, the Government must prove that the defendant (1) knowingly and willfully executed, or attempted to execute, a scheme or artifice to (2) defraud a health care program or to obtain by false or fraudulent pretenses any money or property under the custody or control of a health care benefit program, (3) in connection with the delivery of or payment for health care benefits, items, or services. 18 U.S.C. §

1347; *United States v. Puffenberger*, 358 Fed. Appx. 140, 142 (11th Cir. 2009).

Medicare and the State of Georgia Department of Community Health, Division of Medical Assistance (“Georgia Medicaid”) are health care benefit programs, as defined in Title 18, United States Code, Section 24(b) (*i.e.*, public plans affecting interstate commerce), under which medical benefits, items and services are provided to individuals. (Doc. 134 at 2-3).

### **Judgment**

The United States has proved beyond a reasonable doubt that defendant George D. Houser conspired with his wife, Rhonda Houser, to defraud the Medicare and Georgia Medicaid programs and to obtain by means of material false and fraudulent pretenses, representations and promises, money and property owned by, and under the custody and control of, the Medicare program and Georgia Medicaid, in connection with the delivery of and payment for health care benefits and services, in violation of Title 18, United States Code, Sections 1347, 1349.

The United States has proved beyond a reasonable doubt that the three Forum nursing facilities, Mt. Berry, Moran Lake and Wildwood, under the direction of Houser, submitted or caused to be submitted, during the course of the conspiracy, false or fraudulent claims to the Medicare and Georgia Medicaid

programs for services that were worthless in that they were not provided or rendered, were deficient, inadequate, substandard, and did not promote the maintenance or enhancement of the quality of life of the residents of the Nursing Facilities, and were of a quality that failed to meet professionally recognized standards of health care.<sup>4</sup>

The United States has proved beyond a reasonable doubt that during the course of the conspiracy, Houser fraudulently caused claims to be paid by Medicare and Georgia Medicaid for care and services that were either not rendered or were so inadequate or deficient as to constitute worthless services.

A worthless services claim stands for the unexceptional proposition that an entity may not bill the Government for products or services that are not rendered, or are so deficient that they have no value to the United States. Worthless services are services that are of a quality that fail to meet professionally recognized standards of health care, and are so inadequate, deficient, and substandard, or so

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<sup>4</sup> The Government, of course, does not have to prove that false claims for worthless services were submitted to Medicare and Medicaid during the entire period of the conspiracy for Houser to be guilty of a conspiracy to commit health care fraud. The Government has proven beyond a reasonable doubt that Houser submitted claims for worthless services “during the course of the conspiracy,” as charged in the second superseding indictment, which is sufficient. The Court recognizes that, for sentencing purposes, it must make a reasonable estimate of the loss. U.S.S.G. § 2B 1.1 app. n. 3(C).

completely lacking in value or of no utility to the resident, that a reasonable person would understand that any services provided were worthless. *See United States v. Wachter*, 4:05CR667SNL, 2006 WL 2460790 (E.D. Mo. Aug. 23, 2006).

During the course of the conspiracy, the evidence showed a long-term pattern and practice of conditions at the facilities that were so poor— *i.e.*, food shortages bordering on starvation, leaking roofs, virtually no nursing or housekeeping supplies, poor sanitary conditions, major staff shortages, safety concerns, etc.— that, in essence, any services Houser actually rendered were of no value. Given the severe nature of the multiple deficiencies at the facilities, the Court finds that a reasonable person would understand that Houser provided worthless services.

The United States has proved beyond a reasonable doubt that Houser had actual knowledge and received notice of the dire conditions at the nursing homes on an almost daily basis from the administrators at all three facilities throughout the period of the indictment. Houser knew that the nursing facilities were providing inadequate care during the course of the conspiracy, and that claims for reimbursement were being submitted, and were paid, for services that were so inadequate or deficient as to constitute worthless services.

The United States has proved beyond a reasonable doubt that, during the

course of the conspiracy, the nursing facilities perpetrated a fraud on the United States by making materially false representations in the submission of claims to Medicare and Georgia Medicaid.

Houser intentionally and successfully concealed, covered-up, and misrepresented the conditions and care provided in the nursing homes, thereby corrupting the State and Federal survey process.

The agreements that the Housers entered into with the Government in order to participate in the Medicare and Medicaid programs explicitly conditioned payment on Houser's compliance with all applicable laws and regulations. Houser was required to provide complete care for the residents. The residents suffered direct harm as a result of the poor conditions and worthless services that were provided at the nursing homes. Houser paid the facilities' employees and vendors untimely, if at all, and the residents received greatly reduced, if any, services in return.

Houser's contention that he is not guilty because the nursing homes may have provided some care or some portion of the bundle of services paid by Medicare and Medicaid is without merit. Even though the services were paid per diem, reasonable persons would know that supplying limited, or no, basic services would fail to comport with the very essence of the provider and benefit

agreements, and that seeking reimbursement for such deficient services would constitute fraud. *See Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (“[E]ven if the outermost boundaries of [a statute are] imprecise, any such uncertainty has little relevance ... where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions.”). There is a point at which a facility’s skilled nursing services fall so far below the standard of care that they have no value. Each of the nursing homes in this case reached such a point during the course of the conspiracy. Despite knowing this, Houser did nothing to correct the situation and continued to bill the Government for those services. The Court finds that the supposed “care” Houser provided to residents during the relevant time period was so deficient that the bundle of services had no medical value.

#### **Houser’s Knowledge and Intent**

Houser had actual knowledge of the lack of care at the facilities through an almost daily barrage of telephone calls, e-mails and faxes from the administrators at all three nursing homes during the entire period of the conspiracy, yet Houser affirmatively chose to ignore these alerts. Houser’s instructions to payroll manager Laverne Burrell that she should delete from the Forum payroll system any record of The Guild employees being paid with Forum funds, demonstrates Houser’s knowledge that he should not have been diverting nursing home funds to

pay for his property ventures when those funds were desperately needed to provide care at the nursing homes. *See* Burrell Tr. at 1247-48.

Intent to defraud may be inferred from the totality of the circumstances and need not be proven by direct evidence. *Puffenberger*, 358 Fed. Appx. at 142. In particular, intent “can be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits.” *United States v. Davis*, 490 F.3d 541, 549 (6th Cir. 2007) (affirming health care fraud convictions). The Government’s evidence provided substantial detail of all of the inferences of intent set forth in *Davis*.

Houser contends that he reasonably relied on the survey system and that his reliance negates any specific intent to defraud the Medicare and Medicaid programs. The Court disagrees. Houser’s correspondence with an executive from Marriott shows his intent was to develop a Marriott hotel in Rome, and then possibly in Brunswick and at the Atlanta University Center, and that he was willing to spend millions to do so. Houser was well aware that ongoing jeopardy conditions existed at the nursing homes during this time. Rather than make a good faith effort to remedy the glaring issues impacting the residents’ health and welfare, he chose instead to divert significant nursing home funds for his real estate development ventures and for other personal expenses, and intentionally

attempted to cover up and conceal the nursing home issues and his diversion of funds from the surveyors. Houser now seeks to hide behind the survey system he corrupted, to no avail.

### **Witness Credibility**

Because this was a bench trial, the Court is not only the gatekeeper but also the factfinder. *United States v. Brown*, 415 F.3d 1257, 1269-70 (11th Cir. 2005). “The credibility of a witness is in the province of the factfinder.” *United States v. Dumonde*, 190 Fed. Appx. 788, 791 (11th Cir. 2006); *United States v. Copeland*, 20 F.3d 412, 413 (11th Cir.1994). “Credibility determinations are among the most subtle a fact-finder is called upon to make” because “they involve complex assessments of demeanor, bias, motive, consistency, probability, memory, and a host of other factors.” *Starr Intern. Co., Inc. v. American Intern. Group, Inc.*, 648 F. Supp.2d 546, 550 (S.D.N.Y. 2009). The trier of fact has the unique prerogative to assess the credibility of fact witnesses as well as the weight to be given expert testimony.

#### **1. Administrators’ Communications with Houser**

Some of the most helpful and credible evidence in this case is the multitude

of faxes and emails sent by a number of administrators<sup>5</sup> to the Housers during the conspiracy, and the administrators' testimony about these documents and their telephone communications with the defendant. These documents, which were not provided to the surveyors, reveal that the nursing homes were in immediate jeopardy during the course of the conspiracy and, along with witness testimony, demonstrate that Houser was deliberately ignoring the urgent concerns expressed by the administrators who he had hired to manage the facilities. This evidence shows that Houser knowingly and willfully allowed the appalling conditions to persist while he continued to submit claims for reimbursement. *Cf. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) (defendants did not knowingly submit claims for worthless services where evidence showed that defendants addressed all complaints and attempted to rectify problems).

## **2. Employees and Family Members**

The documentary evidence also confirms much of the testimony by employees and family members about the terrible conditions in the homes. Houser has suggested these witnesses may have embellished how inadequate conditions were, but the Court does not find the testimony of employees and family members

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<sup>5</sup> This includes Suzanne Stanley and Lois Greenway at Mt. Berry, Kim Knowles at Moran Lake, and Rhondia Grant and Barbara Chal at Wildwood.

was exaggerated in the least. The employees and family members testified in great detail and with remarkable candor about the conditions. The administrators' contemporaneous emails and faxes, various complaints, and the testimony of Dr. Hannay and Kathy Gaulin, corroborate this testimony. These witnesses were remarkably willing to explain how inadequate the level of care was at the facilities and the Court finds them credible.

**3. Keith Hannay, M.D. and Ombudsman Kathy Gaulin**

The Court finds the testimony of Dr. Hannay, who was the attending physician at the Mt. Berry and Moran Lake nursing homes on a weekly basis during the course of the conspiracy, and Ombudsman Kathy Gaulin, who was at the Wildwood nursing home on a weekly basis during the course of the conspiracy, to be especially credible and valuable. Both are intelligent and disinterested witnesses whose top priority was the residents' health and welfare. Defense expert Goldsmith conceded, as she must, that Dr. Hannay would know better than her what impact any type of problem at the nursing home could have on the patient. Goldsmith Tr. at 2859. Dr. Hannay's and Ombudsman Gaulin's testimony about the appalling conditions and quality of care at the nursing homes was significantly corroborated by the numerous complaints they each filed during the course of the conspiracy and the testimony of numerous other witnesses. Dr.

Hannay and Ms. Gaulin aptly described the chaos, lack of care and corruption of the survey process all due to Houser's actions or inactions.

#### **4. Defense Expert Witnesses**

Two expert witnesses testified during the defense's case-in-chief: Karon Goldsmith, an expert in nursing home administration, and Kim Collins, M.D., a medical examiner at the Fulton County Medical Examiner's Office. The Court does not find either of these witnesses' testimony to be persuasive.

##### **Karon Goldsmith**

The Court finds defense expert Karon Goldsmith to be a credible witness in some limited respects. She provided some general information about nursing home administration, the survey process and the role of surveyors. However, Goldsmith's expert testimony about the quality of care provided at the facilities must be significantly discounted and given lesser weight than the testimony of other witnesses in this case.

Goldsmith's credibility problems begin with her refusal to respond directly to the Court's inquiry whether resident care was affected at all by the appalling conditions in the nursing homes. Her evasive response that she relied on the surveys and did not see evidence that any resident suffered as a result of the care provided at the nursing homes, is hard to reconcile with the overwhelming witness

testimony and documentary evidence in this case about the ongoing deficient conditions that existed in the homes. The Court finds Goldsmith's emphasis and heavy reliance on the surveys is misplaced, especially given how the survey process was corrupted by Houser.<sup>6</sup> Goldsmith's testimony that the leaking roofs "did not necessarily" impact resident care and that it was not a "substandard care issue" was unconvincing, especially after she acknowledged that moving a patient from room-to-room due to the leaking roofs could have an extremely adverse impact on that patient's welfare, comparing it to moving "cattle from feedlot to feedlot." Goldsmith Tr. at 2836, 2857.

When Goldsmith was asked during cross-examination about defense exhibit 29, a chart summarizing the surveys that defense counsel had previously asked her questions about, she appeared uninformed and could not answer any questions about specific data reflected on the chart that showed the high level of deficiencies at Mt. Berry, Moran Lake, and Wildwood during the relevant years as compared with other nursing homes in Georgia (*e.g.*, Moran Lake had 145 percent more deficiencies than the average nursing home in 2006 and 385 percent more deficiencies than the average nursing home in 2007). *Id.* at 2853-56. Goldsmith

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<sup>6</sup> Goldsmith testified that she had been in Court for almost the entire trial and had heard a majority of the testimony. Goldsmith Tr. at 2821.

also was not credible when she attempted to minimize the significance of the large percentage of substantiated complaints at the three nursing homes during the relevant years that appeared on the chart (*e.g.*, for Moran Lake 58 percent of the complaint surveys were substantiated; for Wildwood 56 percent were substantiated; for Mt. Berry 74 percent of the complaints were substantiated). *Id.* at 2851-53.

In addition to the logical flaws, inconsistencies and apparent bias in Goldsmith's testimony, the Court also takes into account Goldsmith's demeanor in the courtroom and other linguistic and logical twists on display during her lengthy testimony to dismiss those portions of it that relate directly to resident care in the facilities during the course of the conspiracy.

Kim Collins, M.D.

Dr. Kim Collins testified that there was no evidence that former Moran Lake resident Morris Ellison was malnourished or suffered from muscle wasting. Collins Tr. at 2767. Dr. Collins further testified that Mr. Ellison weighed 148 pounds two months before he died. *Id.* When shown an autopsy photograph of Mr. Ellison and asked by the Court to comment about his weight, Dr. Collins refused, stating that she did not want to guess. Collins Tr. at 2768.

The Government presented expert medical testimony from Dr. Brian Frist,

chief medical examiner in Cobb County. Dr. Frist performed an autopsy on Mr. Ellison's body on April 18th, 2007. Frist Tr. at 2230. Dr. Frist's testimony conflicted with Dr. Collins' testimony in several significant ways. Dr. Frist testified that, at the time of the autopsy, Mr. Ellison weighed roughly 100 pounds and showed muscle wasting and dehydration. Frist Tr. at 2233. With respect to the question of hydration and malnourishment, Dr. Frist testified about all of the signs of muscle wasting and dehydration that were apparent during the autopsy and in the photographs. Frist Tr. at 2234-35. Dr. Frist testified that, "[i]n this particular case, I believe that the pictures speak for themselves. It's clear that Mr. Ellison suffered from malnutrition and malnourishment and dehydration." Frist Tr. at 2247. Dr. Frist vividly compared Mr. Ellison's appearance to that of a concentration camp victim, meaning his bony structures were prominent. Frist Tr. at 2234. Dr. Frist concluded that Mr. Ellison was "far beyond what a normal elderly person should appear to be. He was 82 years old, and he shouldn't look like a concentration camp victim." Frist Tr. at 2235.

Dr. Collins was critical of Dr. Frist's failure to weigh and perform a number of other tests on Mr. Ellison in making his assessment. Collins Tr. at 2760-63. Dr. Frist countered that those tests are rarely performed in routine cases such as Mr. Ellison's. Frist Tr. at 2247. The Court does not believe that the tests

described by Dr. Collins would have changed its determination whether Mr. Ellison was malnourished and suffered from muscle wasting and dehydration at the time of his death. Based on Dr. Frist's testimony and the autopsy photographs of Mr. Ellison introduced into evidence, the Court readily agrees with Dr. Frist that Mr. Ellison was malnourished and dehydrated, and that he suffered from muscle wasting when he died.

### **5. Testimony about Worthless Services**

The Court does not find testimony by former employees about whether the services they provided were worthless<sup>7</sup> to be persuasive, relevant or helpful. Asking an employee-witness in this case to opine on whether he or she provided worthless services called for a conclusion by the employee-witness as to an ultimate issue of fact and therefore invaded the exclusive province of the fact-finder, who is the sole determiner of guilt. *See Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir.1990) ("A witness . . . may not testify to the legal implications of conduct; the [district] court must be the jury's only source of law."); *United States v. Perkins*, 470 F.3d 150, 158 (4th Cir. 2006) ("[C]onclusory testimony that a company engaged in 'discrimination,' that a landlord was

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<sup>7</sup> The Court notes that Angie Chandler, Mt. Berry administrator from April 2007 until the home closed on July 15, 2007, testified that she believed worthless services were, in fact, provided at Mt. Berry. Chandler Tr. at 2306-07, 2334.

‘negligent,’ or that an investment house engaged in a ‘fraudulent and manipulative scheme’ involves the use of terms with considerable legal baggage; such testimony nearly always invades the province of the jury.”); *Lynch v. Graham*, 2011 WL 5154143 at \*5 (W.D.N.Y. Oct. 28, 2011) (“As a general principle of common-law evidence, lay witnesses must testify only to the facts and not to their opinions and conclusions drawn from the facts. It is left to the jury to draw the appropriate inferences arising from the facts[.]”) (citation omitted).

The term “worthless services” in the context of the charges in this case, (*i.e.*, conspiracy to commit healthcare fraud) has a specific meaning. The testimony of an employee-witness on whether or not he or she provided worthless services is of extremely limited evidentiary value because the employee-witness did not hear all of the evidence, observe any other witness, or receive accurate instructions as to the term’s legal meaning in this case. The Court finds that the employees’ credibility on this one question therefore has to be viewed with some skepticism. Further, each of these witnesses, many of whom are licensed and still working in the long-term care industry, have motivations borne out of self-interest to minimize the impact their actions or lack of actions had on the residents’ care. A certain bias in an individual answering a question about the services they provided under such unique circumstances is to be expected, and must be carefully

considered by the Court. *See Starr Intern. Co., Inc. v. American Intern. Group, Inc.*, 648 F. Supp.2d 546, 550 (S.D.N.Y. 2009) (“Self-interest . . . creates such a powerful incentive to shade the truth that it is unusual for an interested witness to be totally candid.”).

The Court recognizes and takes into account that very few individuals would be willing to admit to providing worthless services under any circumstances. This reluctance is heightened in a case where the witness may know that the concept of “worthless services” may be related to the actual charges in the case. The Court is therefore hesitant to place any significant weight on such testimony, given the natural instinct of any witness to deny that anything they did was worthless, especially under circumstances where they may believe that, if they admit to providing worthless services, their nursing or administrator’s license may somehow be on the line or where they may be under the misconception that they might somehow be implicating themselves in some way.

As the factfinder in this case, it is the Court’s job to ascertain whether the defendant caused false claims to be submitted to Medicare and Medicaid based on all of the evidence presented in the case. The employee-witnesses’ knowledge in this case was limited solely to what they experienced and observed during the course of the conspiracy, not all of the evidence tendered in this case that the

Court has seen and heard. The Court held a bench trial lasting more than four weeks, examined numerous exhibits, and heard over eighty witnesses. Having heard all of the testimony from numerous witnesses, including the attending physician, the ombudsman, family members, former employees, and surveyors, as well as a significant amount of documentary evidence, the Court, playing the role of factfinder who has the opportunity to observe all the witnesses as they testify, is in a much better position than any one witness to determine whether worthless services were provided. *See United States v. Anderskow*, 88 F.3d 245, 251 (3d Cir. 1996) (“We do not understand how a witness’ subjective belief that a defendant ‘must have known’ is helpful to a factfinder that has before it the very circumstantial evidence upon which the subjective opinion is based.”); *Lee v. Small*, No. C 10–4034–MWB, 2011 WL 5866246 at \*24 (N.D. Iowa, Nov. 22, 2011) (expert or lay witness testimony that a person acted “dangerously,” “reasonably,” or “unreasonably” is unhelpful to the jury and inadmissible as it is “tantamount to telling the jury what result to reach.”). Whatever minimal value such testimony may have is substantially outweighed by the overwhelming evidence of worthless services proved by the Government’s evidence in this case.

### **Vagueness**

Section 1347 unquestionably applies to instances where, as here, a provider

submits claims for services that were not performed. *See United States v. Soto*, 399 F. App'x 498, 500-01 (11th Cir. 2010) (per curiam) (upholding health care fraud conspiracy conviction where defendant billed Medicare for equipment and services never provided to patients). Houser, however, has argued throughout this case that section 1347 is unconstitutionally vague as applied to his claims for reimbursement. The claim is without merit.

The Supreme Court has instructed that to satisfy due process concerns and avoid vagueness, a penal statute must both (1) “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited,” and (2) do so “in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also United States v. Di Pietro*, 615 F.3d 1369, 1371 (11th Cir. 2010). Additionally, the Court has recognized the second prong of the void-for-vagueness doctrine as more important because it prevents “a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)); *see also United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002). Where a statute falls below these standards, a criminal defendant may challenge it as unconstitutionally vague on its face or as applied to his own individual facts and

circumstances. *Di Pietro*, 615 F.3d at 1371.

“[The Supreme] Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.” *Colautti v. Franklin*, 439 U.S. 379 (1979). At the time of Houser’s offense, the health care fraud statute, 18 U.S.C. § 1347, provided that:

Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both.

The statute’s strict scienter requirement provides further protections for Houser. To convict Houser of healthcare fraud under section 1347, the Government had to prove not only that Houser submitted claims for worthless services, but also that he knew that the services were worthless, and nevertheless submitted claims to Medicare and Medicaid with the specific intent to defraud. *United States v. Medina*, 485 F.3d 1291, 1298 (11th Cir. 2007) (“we cannot hold that this conduct alone is sufficient to establish health care fraud without someone

making a knowing false or fraudulent representation to Medicare.”). The knowledge requirement adds an element of culpability and mitigates any vagueness concerns. *See Screws v. United States*, 325 U.S. 91, 103 (1945) (“[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from a lack of warning or knowledge that the act which he does is a violation of law.”). In other words, “a specific intent requirement . . . eliminate[s] the objection that the statute punishes the accused for an offense of which he was unaware.” *United States v. Franklin-El*, 554 F. 3d 903, 911 (10th Cir. 2009).

In *Wachter*, 2006 WL 2460790, a nursing home worthless services case similar to this one, the court held that the worthless services doctrine was sufficient, in the criminal context, to withstand a motion to dismiss on the grounds that the theory would render a criminal statute void for vagueness. The court noted that the defendants’ contention that it was difficult for nursing homes to distinguish between “merely bad services and worthless services,” did not make the statute vague: “[S]tatutes and regulations . . . are not impermissibly vague simply because it may be difficult to determine whether marginal cases fall within their scope.” *Id.* at \*12 (quoting *United States v. Sun and Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984)). The court further explained that:

‘[M]en of common intelligence’ could reasonably understand when their conduct could result in worthless services, or services completely lacking value. Objections to vagueness . . . rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.

*Id.* at \*11 (citation omitted). The court reasoned that any difficulty in distinguishing between merely bad nursing care services and those that were worthless was mitigated by section 1347's scienter requirement. *Id.* at \*11-12. The court found that, because the defendants concealed and misrepresented the conditions and care provided, they were on notice that their conduct was at risk for criminal liability. *Id.* at \*12.

Now, having the benefit of the evidence at trial, the Court finds that Houser intentionally and successfully concealed, covered-up, and misrepresented the conditions and care provided in the nursing homes, thereby corrupting the survey process. There was substantial evidence in this case showing that Houser effectively created an atmosphere of fear at the nursing homes. Employees, residents, and family members all were afraid to report what was truly happening at the nursing homes. Any assurances of anonymity that the employees and residents may have received was supplanted by the very real fear employees had that they would be fired if they reported Houser and the residents' fear of

retaliation if they reported the terrible conditions at the home. The overwhelming evidence shows that employees, residents and family members were not convinced the system would protect or support them if they reported the poor conditions and egregious quality of care. Records were falsified, employees withheld information, and numerous issues were covered up at Houser's direction. As a result, the surveyors could not fully and effectively do their job and were sometimes unable to substantiate serious complaints.

By requiring that the Government prove that the defendant's conduct was knowing and willful, the health care fraud statute avoids criminalizing innocent errors caused by a mistaken interpretation of the manual. It does not confer an impermissible degree of discretion on law enforcement authorities. Houser's intentional attempts to conceal the conditions of the facilities and corrupt the survey process demonstrates his knowledge of possible criminal liability and worthless services at the facilities. The Court therefore finds that the standard for a worthless services violation under section 1347 is sufficiently definite to provide Houser with actual notice of the prohibited conduct.

**Houser is not Charged with Violating Civil Rules or Regulations**

Houser argues that the Government is using civil statutes and regulations as the governing standard to prove a criminal violation. The Court disagrees. This is

not a regulatory compliance case, and Houser was not charged with failing to follow certain Medicare rules and regulations or with failing to pass the surveys. Houser is charged with submitting false claims to Medicare and Medicaid for services he did not provide. This is a straightforward health care fraud case where the services provided to the residents fell so far below accepted standards of care that they were de facto worthless, causing very real harm to both the patients and to the Government when Houser billed it for those services.

The Eleventh Circuit rejected an argument similar to Houser's in *United States v. Isley*, 369 Fed. Appx. 80, 89 (11th Cir. 2010). At trial, the defendant requested the district court to instruct the jury that the Medicare coding regulations that formed the basis of the health care fraud charges were only "interpretive rules" and therefore lacked the force and effect of law. *Id.* at 90. The appellate court held that the district court properly exercised its discretion in rejecting the defendant's jury instruction, stating that the defendant was not indicted for violating an interpretative Medicare rule, but for defrauding the Medicare program in violation of 18 U.S.C. 1347. *Id.* The court noted that submitting falsely coded claims to Medicare is made criminal by the Medicare fraud statutes, not Medicare's rules and regulations, which "are relevant only because they inform the jury on the question of whether the claims to Medicare were false." *Id.*

In *Franklin-El*, 554 F.3d at 911 (10th Cir. 2009), the defendant asserted that the health care fraud statute was unconstitutionally vague as applied because only by looking to several different Medicaid regulations and “a provider manual, a provider agreement, and various program policies and bulletins” could it be determined what precisely the health care fraud statute prohibited. The Tenth Circuit rejected this argument, reasoning that the health care fraud statute is not defined through other regulations, but is simply a fraud statute like the mail and wire fraud statutes:

Although the health care fraud statute does not (and could not) specify the innumerable fraud schemes one may devise, a person of ordinary intelligence would understand Defendant's conduct to be the very conduct contemplated by 18 U.S.C. § 1347. . . The complexity of Medicaid regulations does nothing to alter the straightforward nature of the health care fraud statute or the straightforward allegations of fraud lodged against Defendant.

*Id.* at 910-11. *See also United States v. Weiss*, 914 F.2d 1514, 1521-23 (2d Cir. 1990) (defendants were not convicted of “failing to . . . provide information” covered by the Medicare Manual, but for knowingly providing false information to Medicare); *United States v. Larm*, 824 F.2d 780, 784 (9th Cir. 1987) (the Medicaid billing codes are relevant only because they inform us on the question of whether the defendants submitted false claims).

This reasoning applies persuasively to Houser's case, as he was not charged with violating a civil regulation or some rule relating to the surveys. The Court concludes that Houser may be criminally prosecuted for health care fraud whether or not such conduct additionally violates administrative policies or civil regulations. Houser knew that submitting claims for services provided in the nursing homes would cause Medicare and Medicaid to act under the misapprehension that those services were being provided to the residents. Typically, the surveys would serve as one of a number of measuring sticks when determining just how egregious Houser's care was. While the surveys provide some guidance to the Court as to the level of care the facilities provided, Houser's intentional corruption of the process makes the surveys less helpful than the witness testimony and documentary evidence regarding the level of care provided.

**Entrapment by Estoppel**

The record lacks support for an entrapment-by-estoppel defense. The fact that surveys were conducted or that surveyors were monitoring the facilities from time-to-time does not entitle Houser to the defense. This would be so even if Houser had not corrupted the survey process. To hold otherwise, would preclude virtually all criminal cases involving program fraud against any Government

agency.<sup>8</sup>

The entrapment by estoppel defense “provides a narrow exception to the general rule that ignorance of the law is no defense.” *United States v. Funches*, 135 F.3d 1405, 1407 (11th Cir. 1998). The defense is “rarely available.” *United States v. Rector*, 111 F.3d 503, 506 (7th Cir. 1997). See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 422, (1990) (noting that the Supreme Court has “reversed every finding of estoppel [against the government] that [it has] reviewed.”); *United States v. Morrison*, 596 F. Supp.2d 661, 717 (E.D.N.Y.

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<sup>8</sup> For similar reasons, the Court also rejects Houser's suggestion throughout this case that simply by paying claims the Government has somehow endorsed Houser's fraudulent conduct. Defense expert Goldsmith testified that a nursing home would not be allowed to operate if the services it provided were worthless. This testimony has no bearing on the defendant's guilt in this case. Whether or not a nursing home was allowed to continue operating is irrelevant to the issue of whether a provider was submitting false claims to Medicare and Medicaid for reimbursement. Under Houser's theory, a provider may continue to submit fraudulent claims so long as it has not been terminated from the Medicare program or denied payment for regulatory non-compliance. This case demonstrates why reliance on the survey system in this way is illogical and unreasonable. The fact that, prior to paying Houser, the Government may not have detected the entirety of Houser's fraud through its state survey regulatory process, a process that clearly is not designed to investigate criminal health care fraud cases, has no bearing at all on whether Houser knowingly submitted false claims. In a similar fashion, the fact that, prior to the IRS paying a tax refund based on a phony tax return, an IRS Revenue Agent failed to detect fraud during several civil audits of the taxpayer's tax records, does not mean the taxpayer did not willfully commit tax fraud or that the taxpayer can continue submitting tax returns that the taxpayer knows to be fraudulent.

2009) (“Judicial decisions indicate great caution should be exercised when it comes to the application of the defense.”).

In this circuit, the defense of entrapment by estoppel maintains two elements. First, a defendant must actually rely on a federal official’s misstatement of the law. *Funches*, 135 F.3d at 1407. Second, “such reliance must be objectively reasonable—given the identity of the official, the point of law represented, and the substance of the misrepresentation.” *Id.* This defense is not available unless a defendant can show that she relied upon an official government communication before acting in a manner proscribed by law. *United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1998).

Houser’s alleged reliance on the survey process does not support the defense in this case. No evidence has been presented that shows Houser was affirmatively misled by the surveyors or any other government officials or that any supposed reliance on the Government’s alleged conduct was reasonable. The fact that the surveyors did not affirmatively declare the services provided to be worthless does not constitute an affirmative representation from the Government that the claims submitted by the nursing homes for reimbursement were not false. To find otherwise, would have the effect of shielding defendants who engaged in intentional and purposeful fraud against the United States simply because the

Government did not inform them in advance their claims were false prior to prosecution. The Court declines to adopt a rule that would have such an anomalous result.

Houser has not pointed to a single statement or communication to him personally upon which he relied to make his decisions concerning the services he provided at the nursing homes. The surveys did not affirmatively communicate to Houser that adequate services were being provided at the nursing homes. There is no evidence of any such communication. *See Isley*, 369 Fed. Appx. at 89 (approvals of falsely coded claims submitted to Medicare by a durable medical equipment supply company did not qualify as affirmative statements by government authorities upon which defendant could rely); *United States v. Eaton*, 179 F.3d 1328, 1332 (11th Cir.1999) (“For a statement to trigger an entrapment-by-estoppel defense, it must be made directly to the defendant, not to others.”); *United States v. Johnson*, 139 F.3d 1359, 1365 (11th Cir. 1998) (rejecting defendant’s theory that his authority was “conveyed through winks and nods” rather than the Government actually telling him his actions were legal).

The evidence at trial established that the defendant was notified on a daily basis about the dire conditions at each of the homes by the administrators who he had hired to manage the nursing homes. Under such circumstances, to rely solely

on surveys that found each nursing home out of substantial compliance throughout the course of the conspiracy was not objectively reasonable, especially given the defendant's demonstrated corruption of the survey process and his attempt to conceal the conditions of the facilities. *See Isley*, 369 Fed. Appx. at 89 (defendant's reliance on Medicare's payment of falsely coded claims was not objectively reasonable when the evidence established that there was no confusion in the industry about the correct way to code the claims); *Eaton*, 179 F.3d at 1332-33 (11th Cir. 1999) (conduct of the Customs officers did not "give rise to the objectively reasonable reliance necessary for an entrapment by estoppel defense" because Eaton was well aware of the regulations against smuggling certain snakes).

**Counts 2 Through 9: Failure to Account for and Pay Over Payroll Taxes (26 U.S.C. § 7202)**

Counts 2 through 9 of the Indictment charge that in three fiscal quarters in 2004 and 2005, in the Northern District of Georgia, defendant George Houser deducted and collected payroll taxes from employees of different Forum Healthcare Group entities, but failed to account for and pay over those taxes to the Internal Revenue Service. For each count, the Defendant can be found guilty of this offense only if all the following are proved beyond a reasonable doubt:

(1) The defendant was a person required to collect, truthfully account for, or pay over withheld federal income and FICA taxes for the entities listed in each count;

(2) The defendant failed to collect or truthfully account for and pay over federal income and FICA taxes that he was required to withhold from the wages of employees for the calendar quarters listed in each count; and

(3) The defendant acted willfully.

Based on the evidence admitted at trial, the Court makes the following conclusions:

(1) Houser was a person required to collect, truthfully account for, or pay over to the Internal Revenue Service employees' federal income and FICA taxes for the Forum entities listed in Counts 2-9. Edwards Tr. at 114; Ingram Tr. at 715-16; Burrell Tr. at 1236-41; Justice Tr. at 1117-25, 1135-37, 1140-52; Exs. 107, 1128, 1231\_3, 1231\_4, 1231\_13, 1231\_15.

(2) Houser failed to collect or truthfully account for and pay over federal income and FICA taxes that he was required to withhold from the wages of employees for the calendar quarters listed in Counts 2-9. Justice Tr. at 1114-20, 1148, 1152-53, 1161-67, 1180-84, 2507-13; Igbalajobi Tr. at 1211-14; Exs. 1069a, 1069.1.

(3) Houser acted willfully in failing to collect or truthfully account for and pay over federal income and FICA taxes that were withheld from the wages of employees for the calendar quarters listed in Counts 2-9. Edwards Tr. at 114; Ingram Tr. at 715-16; Burrell Tr. at 1236-41 (Burrell prepared checks for federal tax deposits of employees' payroll taxes ("FTDs") but Houser would not make the deposits); Justice Tr. at 1107-10, 1120-25; Ex. 1231\_13 at 2 (Houser lost control of the two Rome nursing homes in 1993 after he failed to pay over his employee's payroll taxes); Justice Tr. 1138-39, 1151; Exs. 1231\_17 (Houser used multiple, similarly worded names of corporate entities to shield his assets); Singh Tr. at 1657-78 & Ex. 1112a (property purchases interspersed with meeting with IRS Revenue Officer Odell Justice about failure to pay over employees' payroll taxes); Justice Tr. at 1148-52, Singh Tr. at 1165-70; Ex. 1112a (On October 20, 2004, Houser persuaded Justice to hold off filing a lien because Houser said he was in the process of obtaining a loan to pay his taxes, which he never did. In November and December 2004, Houser paid more than \$1.2 million for property on Chulio Road and Highway 411); Justice Tr. at 1152-68; Singh Tr. at 1670-74; Exs. 1231\_6, 1231\_30, 1112a (when Justice demanded payroll tax payments in January and February 2005, Houser and Washington gave him bad checks written in amounts over \$250,000 while on February 7, 2005, Houser bought a property on

Tuckawana Drive for \$500,000 and paid nearly \$300,000 at the closing); Justice Tr. 1171-74; Singh Tr. at 1674-78; Exs. 1231\_19 (Houser obtained a tax payout estimate from Justice on May 17, 2005, but instead of paying his taxes, he purchased the property at 147 Tuckawana Drive for \$360,000).

*United States v. Gilbert*, 266 F.3d 1180, 1185 (9th Cir. 2001) (defendant was properly convicted for failing to perform one of the duties that Section 7202 requires); *United States v. Thayer*, 201 F.3d 214, 219-221 (3d Cir. 1999), *cert. denied*, 530 U.S. 1244 (2000) (same); *United States v. Evangelista*, 122 F.3d 112, 120-22 (2d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998) (same); *United States v. Vespe*, 868 F.2d 1328, 1332-34 (3d Cir. 1989) (holding that “responsibility” for paying over income and FICA taxes “is a matter of status, duty, and authority,” not job title and, therefore, the defendant was properly convicted upon proof that he exercised "significant" but not exclusive control over the company's finances); *Gephart v. United States*, 818 F.2d 469, 473-74 (6th Cir. 1987) (factors in determining the defendant was a “responsible person” include: (1) the duties of the officer as outlined by the corporate by-laws; (2) the ability of the individual to sign checks of the corporation; (3) the identity of the officers, directors, and shareholders of the corporation; (4) the identity of the individuals who hired and fired employees; and (5) the identity of the individual(s) who were in charge of the

financial affairs of the corporation).

Houser learned he was the subject of an IRS criminal investigation on November 17, 2005, when IRS agents executed a search warrant at the FHG offices – Houser’s office – at 940 Spider Webb Drive in Rome. Rotti Tr. at 2542. Payments Houser’s attorney made more than a year later for the quarters charged in Counts 3, 4, 5, and 9, were ineffective, after-the-fact attempts to reduce his criminal liability.

Accordingly, Houser is guilty of the offenses charged in Counts 2-9.

**Counts 10 and 11: Failure to File Individual Income Taxes (26 U.S.C. § 7203)**

Counts 10 and 11 charge Houser with failing to file personal federal income taxes for the calendar years 2004 and 2005. Houser can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant was required by law or regulation to file an income-tax return for the taxable year charged;
- (2) the Defendant failed to file a return when required by law; and
- (3) At the time the Defendant failed to file the return, he knew he was required by law to file a return.

Based on the evidence admitted at trial, the Court makes the following conclusions:

(1) Houser was required by law or regulation to file an income-tax return for 2004 and 2005 as charged in Counts 10 and 11. Singh Tr. at 1655-1671; Exs. 950j, 950k, 1112a (Houser's gross income exceeded \$15,900 in 2004); Singh Tr. 1672-78; Hibbets Tr. at 765-73; Exs. 1060, 1062, 1062a, 1062b; 1112a (Houser's gross income exceeded \$8,200 in 2005).

(2) Houser failed to file income-tax returns for 2004 and 2005 when required by law. Justice Tr. at 2505-06; Exs. 1084 (Houser filed a return for 2004 in April 2008); Justice Tr. at 2506-07; Ex. 1086c (Houser never filed a return for 2005).

(3) At the time Houser failed to file returns in 2004 and 2005, he knew he was required by law to file returns. Justice Tr. at 1149 (Houser had hired an accountant to help with his personal and business taxes), 1172 (IRS had previously imposed penalties on Houser related to his personal returns as well as his payroll tax problems); Exs. 1086 (IRS transcript shows Houser filed Forms 1040 in years prior to 2004); 1086a (on April 15, 2004, Houser filed for an extension of time to file his 2004 individual return).

Filing a Form 1040 for 2004 in April 2008, after he had learned he was the subject of an IRS criminal investigation, was an ineffective, after-the-fact attempt to avoid criminal liability for his previous failure to file.

Accordingly, Houser is guilty of the offenses charged in Counts 10 and 11.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing UNITED STATES' TRIAL BRIEF was formatted using Times New Roman 14 point, in accordance with Local Rule 5.1C, and was electronically filed this day with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following counsel of record:

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This 19th day of March, 2012.

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