

UM

FILED

FEB 12 2016

2-12-16
Judge Thomas M. Durkin
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

SETH GILLMAN

No. 14 CR 33-1

Judge Thomas M. Durkin

PLEA AGREEMENT

1. This Plea Agreement between the United States Attorney for the Northern District of Illinois, ZACHARY T. FARDON, and defendant SETH GILLMAN, and his attorney, EDWARD GENSON, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure and is governed in part by Rule 11(c)(1)(A), as more fully set forth below. The parties to this Agreement have agreed upon the following:

Charges in This Case

2. The indictment in this case charges defendant with health care fraud, in violation of Title 18, United States Code, Section 1347 (Counts 1 through 16) and conspiracy to obstruct a federal audit, in violation of Title 18, United States Code, Sections 1516 and 371 (Count 18).

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

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

✓

Charge to Which Defendant Is Pleading Guilty

5. By this Plea Agreement, defendant agrees to enter a voluntary plea of guilty to the following count of the indictment: Count Five, which charges defendant with health care fraud, in violation of Title 18, United States Code, Section 1347. In addition, as further provided below, defendant agrees to the entry of a forfeiture judgment.

Factual Basis

6. Defendant will plead guilty because he is in fact guilty of the charge contained in Count Five of the indictment. In pleading guilty, defendant admits the following facts and that those facts establish his guilt beyond a reasonable doubt, and establish a basis for forfeiture of the property described elsewhere in this Plea Agreement:

Beginning no later than August 2008 and continuing through January 2012, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant SETH GILLMAN did participate in a scheme to defraud a health care benefit program, as defined by Title 18, United States Code, Section 24(b), namely Medicare and Medicaid, and to obtain, by means of materially false and fraudulent pretenses, representations, and promises, money under the custody and control of that program in connection with the delivery of and payment for health care benefits and services.

GILLMAN and others participated in a scheme to cause Passages Hospice, LLC to submit false claims to Medicare and Medicaid for medically unnecessary

hospice care, namely, hospice care for patients who were not terminally ill and hospice care that did not qualify for general inpatient services, also known as GIP. GILLMAN submitted and caused to be submitted claims to Palmetto and the Illinois Department of Healthcare and Family Services for GIP when such services were not medically necessary and were not provided.

More specifically, GILLMAN knew that Passages regularly billed Medicare and Medicaid for GIP even though he knew that Passages used improper criteria that did not comply with Medicare and Medicaid requirements. He knew that many services were billed as GIP even though such services were not medically necessary. He also knew it was unlawful to falsely bill Medicare and Medicaid.

GILLMAN and co-defendant Gwen Hilsabeck designed and implemented a system at Passages in which bonuses were paid to nursing directors and certified-nursing directors based on the number of patients that were placed on GIP care each day. GILLMAN knew that these bonuses were not compensation for the additional nursing services that nursing directors and CNA directors provided a patient who was placed on GIP care and that the bonuses were designed to be an incentive to nursing directors and CNA directors to put patients on GIP care when in reality the patients did not need the extra nursing services that Passages employees provided when a patient was placed on GIP care.

On May 25, 2009, GILLMAN wrote an email to Hilsabeck asking who had informed co-defendant Carmen Velez about the GIP bonus that Velez began to receive once she became the nursing director for the region covering Chicago and its

suburbs. Hilsabeck wrote in her reply, "Come on, u know that if it wasn't for the bonus u wouldn't have any of these people on – so it is not like u r out anything – besides, half these people shouldn't be on most of the time anyways." GILLMAN replied, "Why do you write this?" GILLMAN acknowledges that he knew that many of the patients who were placed on GIP care should not have been.

GILLMAN made decisions at times to put patients on GIP so that Passages could make more money, even when he had no knowledge about the condition of the patient and even though he was not a physician or nurse. For example, in a June 2, 2009 email, GILLMAN wrote that Passages would cover the room-and-board rate for a patient, Patient IK, and wrote that someone should "look up" "whether the woman is inpatient" and "see to it that she [the patient] is out on" GIP if the patient was not already on. GILLMAN also wrote, "Let's GIP her." In writing his email, GILLMAN understood that he was directing others to put Patient IK on GIP without regard to whether Patient IK actually needed GIP.

In August 2009, GILLMAN learned that TrustSolutions, which performed audits on behalf of Medicare, had requested patient files. GILLMAN knew that Hilsabeck and Julie Parker, who was Passages' compliance officer at the time, were directing the alteration of the requested patient files before the files were provided to TrustSolutions. In particular, GILLMAN knew that some of the files did not contain signed orders from physicians regarding GIP and did not contain nursing notes consistent with patients actually receiving GIP as had been billed. GILLMAN

agreed with Hilsabeck and others that Passages employees should alter the files to make it falsely appear that the care was appropriately billed.

When the alterations were completed in September 2009, GILLMAN signed letters attesting to the accuracy of the patient files and that the services had been properly billed. GILLMAN knew that his statements in such letters were not true because the files had been altered and because some of the services had not been properly billed.

GILLMAN knew that Passages nurses continued to place patients on GIP improperly even after he received two reports regarding the inappropriate use of GIP in August 2010.

First, on August 16, 2010, GILLMAN received by email a report that was prepared by Individual LW, who was a Passages nurse who had legal training and who worked with Passages' compliance officer. In the report, Individual LW discussed three examples of Passages' billing of GIP services and concluded that one patient "clearly does not meet GIP criteria" and that two other patients (including Patient E) "probably were enrolled for an excessive length of GIP duration." One of the examples cited for Patient E was a period from May 6 to May 8, 2010 during which Patient E was placed on GIP for the use of over-the-counter body lotion, which Individual LW had written in the report "clearly does not constitute a change to GIP services." GILLMAN did not do anything to correct the billing for any of these patients and knew that no one else did. GILLMAN acknowledges that on or about July 21, 2011, Passages Hospice submitted to Palmetto, a Medicare

contractor, a false claim, specifically, that services provided to Patient E beginning on May 6, 2010 through May 8, 2010 qualified for reimbursement at the general inpatient level of hospice care.

Second, on or about August 27, 2010, GILLMAN received a copy of a report prepared by Passages' compliance officer at the time, Individual RJ. In the report, Individual RJ concluded that Passages "appears to be overusing the GIP level of care for patients" and recommended that Passages "lower levels of GIP."

As a result of the scheme, defendant GILLMAN and others caused losses to Medicare and Medicaid.

Maximum Statutory Penalties

7. Defendant understands that the charge to which he is pleading guilty carries the following statutory penalties:

a. A maximum sentence of 10 years' imprisonment. This offense also carries a maximum fine of \$250,000, or twice the gross gain or gross loss resulting from that offense, whichever is greater. Defendant further understands that the judge also may impose a term of supervised release of not more than three years.

b. Defendant further understands that the Court must order restitution to the victims of the offense in an amount determined by the Court.

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

Sentencing Guidelines Calculations

8. Defendant understands that in imposing sentence the Court will be guided by the United States Sentencing Guidelines. Defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in determining a reasonable sentence.

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

a. **Applicable Guidelines.** The Sentencing Guidelines to be considered in this case are those in effect at the time of sentencing. The following statements regarding the calculation of the Sentencing Guidelines are based on the Guidelines Manual currently in effect, namely the November 2015 Guidelines Manual.

b. **Offense Level Calculations.**

i. The base offense level is 6, pursuant to Guideline § 2B1.1(a)(2).

ii. The government's position is that the offense level is increased by 20 levels, pursuant to Guideline § 2B1.1(b)(1)(K), because the loss to Medicare was at least \$9.5 million but less than \$25 million. Defendant reserves the right to argue that the loss amount was less than \$9.5 million. Each party is free to present evidence or argument on this issue.

iii. The government's position is that the offense level is increased by an additional 3 levels, pursuant to Guideline § 2B1.1(b)(7), as the loss

to Medicare was more than \$7,000,000. Defendant reserves the right to argue that Guideline § 2B1.1(b)(7) does not apply. Each party is free to present evidence or argument on this issue.

iv. The government's position is that the offense level is increased by 4 levels, pursuant to Guideline § 3B1.1(a) because the defendant was an organizer or leader of a criminal activity that involved five or more participants and was otherwise extensive. Defendant's position is that Guideline § 3B1.1(a) does not apply. Each party is free to present evidence or argument on this issue.

v. The government's position is that the offense level is increased by two levels pursuant to Guideline § 3B1.3 because defendant abused a position of public or private trust in a manner that significantly facilitated the commission or concealment of the offense. Defendant's position is that Guideline § 3B1.3 does not apply. Each party is free to present evidence or argument on this issue.

vi. The government's position is that the offense level is increased by 2 levels pursuant to Guideline § 3C1.1 because the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administrative of justice with respect to the investigation of the offense of conviction by causing the alteration of patient files requested by TrustSolutions, and because such conduct related to the offense of conviction. Defendant's position is that Guideline § 3C1.1(a) does not apply. Each party is free to present evidence or argue on this issue.

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

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

d. **Anticipated Advisory Sentencing Guidelines Range.** Therefore, based on the facts now known to the government, and assuming the defendant has accepted responsibility within the meaning of Guideline § 3E1.1(a), the anticipated offense level is 35 which, when combined with the anticipated criminal history category of I, and pursuant to Guideline § 5G1.1(a), results in an anticipated advisory sentencing guidelines range of 120 months' imprisonment, in addition to any supervised release, fine, and restitution the Court may impose.

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

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

Agreements Relating to Sentencing

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

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

13. Regarding restitution, defendant acknowledges that pursuant to Title 18, United States Code, Section 3663A, the Court must order defendant, together with any jointly liable co-defendants, to make full restitution to Medicare and Medicaid in an amount to be determined by the Court at sentencing, which amount shall reflect credit for any funds repaid prior to sentencing.

14. Restitution shall be due immediately, and paid pursuant to a schedule to be set by the Court at sentencing. Defendant acknowledges that pursuant to Title 18, United States Code, Section 3664(k), he is required to notify the Court and the United States Attorney's Office of any material change in economic circumstances that might affect his ability to pay restitution.

15. Defendant agrees to pay the special assessment of \$100 at the time of sentencing with a cashier's check or money order payable to the Clerk of the U.S. District Court.

16. Defendant agrees that the United States may enforce collection of any fine or restitution imposed in this case pursuant to Title 18, United States Code, Sections 3572, 3613, and 3664(m), notwithstanding any payment schedule set by the Court.

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

Forfeiture

18. Defendant understands that by pleading guilty, he will subject to forfeiture to the United States all right, title, and interest that he has in any property derived from proceeds obtained, directly or indirectly, as a result of the offense.

19. Defendant agrees to the entry of a personal money judgment in an amount to be determined by the Court, which represents the total amount of proceeds traceable to the offense. Defendant consents to the immediate entry of a preliminary order of forfeiture setting forth the amount of the personal money judgment he will be ordered to pay.

20. Defendant admits that because the directly forfeitable property is no longer available for forfeiture as described in Title 21, United States Code, Section 853(p)(1), the United States is entitled to seek forfeiture of any other property of defendant, up to the value of the personal money judgment, as substitute assets pursuant to Title 21, United States Code, Section 853(p)(2).

21. Defendant understands that forfeiture shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon defendant in addition to the forfeiture judgment. In this case, however, the United States Attorney's Office will recommend to the Attorney General that any net proceeds derived from any forfeited assets be remitted or restored to eligible victims of the offense pursuant to Title 18, United States Code, Section 981(e), Title 28, Code of Federal Regulations, Part 9, and other applicable law.

22. Defendant agrees to waive all constitutional, statutory, and equitable challenges in any manner, including but not limited to direct appeal or a motion brought under Title 28, United States Code, Section 2255, to any forfeiture carried out in accordance with this agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. The waiver in this paragraph does not apply to a claim of involuntariness or ineffective assistance of counsel.

Acknowledgments and Waivers Regarding Plea of Guilty

Nature of Agreement

23. This Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 14 CR 33-1.

24. This Agreement concerns criminal liability only. Except as expressly set forth in this Agreement, nothing herein shall constitute a limitation, waiver, or release by the United States or any of its agencies of any administrative or judicial

civil claim, demand, or cause of action it may have against defendant or any other person or entity. The obligations of this Agreement are limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state, or local prosecuting, administrative, or regulatory authorities, except as expressly set forth in this Agreement.

Waiver of Rights

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

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

i. The trial could be either a jury trial or a trial by the judge sitting without a jury. However, in order that the trial be conducted by the judge sitting without a jury, defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

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

iii. If the trial is a jury trial, the jury would be instructed that defendant is presumed innocent, that the government has the burden of

proving defendant guilty beyond a reasonable doubt, and that the jury could not convict him unless, after hearing all the evidence, it was persuaded of his guilt beyond a reasonable doubt and that it was to consider each count of the indictment separately. The jury would have to agree unanimously as to each count before it could return a verdict of guilty or not guilty as to that count.

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

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

vi. At a trial, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court. A defendant is not required to present any evidence.

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

b. **Waiver of appellate and collateral rights.** Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial. Defendant is aware that Title 28, United States Code, Section 1291, and Title 18, United States Code, Section 3742, afford a defendant the right to appeal his conviction and the sentence imposed. Acknowledging this, defendant knowingly waives the right to appeal his conviction, any pre-trial rulings by the Court, and any part of the sentence (or the manner in which that sentence was determined), including any term of imprisonment and fine within the maximums provided by law, and including any order of restitution or forfeiture, in exchange for the concessions made by the United States in this Agreement. In addition, defendant also waives his right to challenge his conviction and sentence, and the manner in which the sentence was determined, in any collateral attack or future challenge, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness or ineffective assistance of counsel, nor does it prohibit defendant from seeking a reduction of sentence based directly on a change in the law that is applicable to defendant and that, prior to the filing of defendant's request for relief, has been expressly made retroactive by an Act of Congress, the Supreme Court, or the United States Sentencing Commission.

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

Presentence Investigation Report/Post-Sentence Supervision

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

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

29. For the purpose of monitoring defendant's compliance with his obligations to pay a fine and restitution during any term of supervised release or probation to which defendant is sentenced, defendant further consents to the disclosure by the IRS to the Probation Office and the United States Attorney's Office of defendant's individual income tax returns (together with extensions,

correspondence, and other tax information) filed subsequent to defendant's sentencing, to and including the final year of any period of supervised release or probation to which defendant is sentenced. Defendant also agrees that a certified copy of this Agreement shall be sufficient evidence of defendant's request to the IRS to disclose the returns and return information, as provided for in Title 26, United States Code, Section 6103(b).

Other Terms

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

31. Defendant understands that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Conclusion

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

33. Defendant understands that his compliance with each part of this Agreement extends throughout the period of his sentence, and failure to abide by any term of the Agreement is a violation of the Agreement. Defendant further understands that in the event he violates this Agreement, the government, at its option, may move to vacate the Agreement, rendering it null and void, and

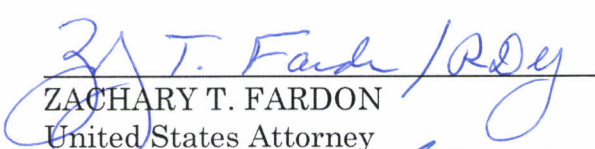
thereafter prosecute defendant not subject to any of the limits set forth in this Agreement, or may move to resentence defendant or require defendant's specific performance of this Agreement. Defendant understands and agrees that in the event that the Court permits defendant to withdraw from this Agreement, or defendant breaches any of its terms and the government elects to void the Agreement and prosecute defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

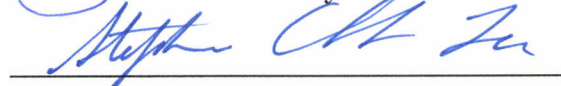
34. Should the judge refuse to accept defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound to it.

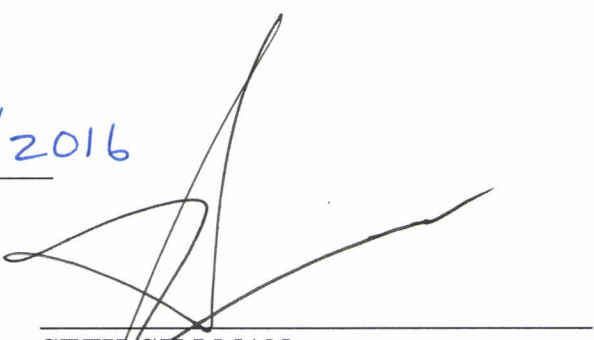
35. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

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

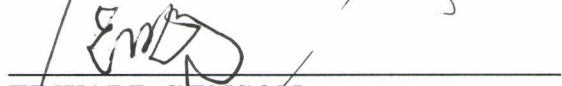
AGREED THIS DATE: 2/12/2016


ZACHARY T. FARDON
United States Attorney


STEPHEN CHAHN LEE
Assistant U.S. Attorney



SETH GILLMAN
Defendant



EDWARD GENSON
Attorney for Defendant