Defendant and Washington. (Trial Tr. Vol. 16 (Testimony of Mamie Carroll) at 2599-2604; Gov't Ex. 963.) Ms. Carroll negotiated her pay rate with Defendant, and reported her hours each week to the payroll department at the FHG corporate office. (Trial Tr. Vol. 16 (Carroll) at 2604-05, 2611-12; Gov't Exs. 963, 964.) FHG paid Ms. Carroll as if she were an employee. (Trial Tr. Vol. 16 (Carroll) at 2604-05, 2611-12; Gov't Exs. 963, 964). Ms. Carroll received $10,566.76 from the nursing homes' account. (Trial Tr. Vol. 11 (Singh) at 1705-06; Gov't Ex. 963.) Washington signed the majority of the checks payable to Ms. Carroll. (Gov't Exs. 963, 964.)

491. Dorothy Askew was paid $13,306.08 through the nursing home payroll account for her work as a nanny for Defendant and Washington. (Trial Tr. Vol. 11 (Singh) at

1706-07; Gov't Ex. 1027.) Washington signed the majority of the checks payable to Ms. Askew. (Gov't Exs. 1027, 1028.) On a check for $165 dated February 11, 2005 and made payable to Ms. Askew, the memo section indicated that the check was for "Work/Sitting." (Trial Tr. Vol. 11 (Singh) at 1707; Gov't Exs. 1027-28.)

j. Automobiles

492. On August 4, 2004, Defendant signed an IRS Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, on which Defendant indicated that the only vehicle he owned was a 1980 Hyundai worth $500. (Trial Tr. Vol. 8 (Justice) at 1129-33; Gov't Ex. 1231_14.) On January 19, 2004, Defendant had purchased a Mercedes E-500 for $63,882, using nursing home funds. (Trial Tr. Vol. 11 (Singh) at 1699; Gov't Ex.

957.) On January 20, 2004, Defendant purchased a Mercedes S-430 for $76,586, using nursing home funds. (Trial Tr. Vol. 11 (Singh) at 1699; Gov't Ex. 957.) Mr. Justice testified that he recalled seeing Houser driving a Mercedes, rather than a 1980 Hyundai. (Trial Tr. Vol. 8 (Justice) at 1132.) On June 10, 2005, Defendant wrote a $35,468 check from his personal account to Global Imports, a luxury vehicle dealership. (Trial Tr. Vol. 11 (Singh) at 1700-01; Gov't Exs. 950j, 950k.) The memo line on that check states "BMW 48iS for Forum," but interviews with employees showed that there was no company car. (Trial Tr. Vol. 11 (Singh) at 1700-01; Gov't Exs. 950j, 950k.) Defendant also purchased a Jeep Liberty for his daughter and a car for Washington's father. (Trial Tr. Vol. 4 (Ingram) at 710.)

23. Taxes

493. "Payroll taxes" consist of Social Security, Medicare and federal withholding taxes that an employer takes out of an employee's paycheck. (Trial Tr. Vol. 8 (Justice) at 1106-07, (Testimony of Marilyn Igbalajobi) at 1208-10.) An employer is entrusted to withhold those taxes from his employees' paychecks and pay the taxes over to the IRS. (Trial Tr. Vol. 8 (Justice) at 1106-07, (Igbalajobi) at 1208-10.) An employer must pay over the payroll taxes in biweekly federal tax deposits ("FTDs"), and must report the payroll taxes in IRS Forms 941 that are to be filed quarterly. (Trial Tr. Vol. 8 (Justice) at 1106-07, (Igbalajobi) 1208-1210.) One or more individuals in the employer's management team is responsible for collecting and paying over the employee's payroll taxes, and those individuals are

personally liable for doing so. (Trial Tr. Vol. 8 (Justice) at 1196.) The employer also must pay its share of the employment taxes biweekly. (Id. at 1106-07, (Igbalajobi) 1208-1210.)

494. During the early 1990s, Defendant operated the Moran Lake and Mt. Berry nursing homes. (Trial Tr. Vol. 8 (Justice) 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. (Id.) Defendant did not pay over his employees' payroll taxes, and in 1993, the IRS seized the Mt. Berry home, and the State of Georgia revoked Defendant's license to operate the nursing homes. (Id.) The IRS imposed tax liens on the homes, which expired after ten years. (Id.) Odell Justice, a Revenue Officer in the

Rome office, handled the case. (Id.)

495. Between 1993 and July 2004, Defendant stopped by Mr. Justice's office occasionally and asked for a payout figure, or an updated figure of the taxes, penalties and interest that Defendant owed. (Trial Tr. Vol. 8 (Justice) at 1110-11, 1171-73.) Mr. Justice testified that he always gave Defendant a payout figure to encourage him to pay off the tax liens, but that Defendant never did paid off the liens. (Id.)

496. Acting through Forum Healthcare Group ("FHG"), Defendant and Washington assumed management of the two Rome nursing homes in May 2003. (Trial Tr. Vol. 8 (Sheppard) at 1080-1085,1091-92; Gov't Exs. 100, 101.) Ms. Burrell, the former FHG payroll administrator, prepared the paychecks for the biweekly payroll and the FTD coupon

for the payroll taxes. (Trial Tr. Vol. 1 (K. Edwards) at 114; Trial Tr. Vol. 4 (Ingram) at 715-16; Trial Tr. Vol. 8 (Burrell) at 1236-41; Gov't Ex. 107.) Ms. Burrell also wrote out federal tax deposit ("FTD") checks for Defendant to sign. (Trial Tr. Vol. 1 (K. Edwards) at 114; Trial Tr. Vol. 4 (Ingram) at 715-16; Trial Tr. Vol. 8 (Burrell) at 1236-41; Gov't Ex. 107.) Sometimes, Defendant signed the checks and mailed the FTDs, but sometimes he did not. (Trial Tr. Vol. 1 (K. Edwards) at 114; Trial Tr. Vol. 4 (Ingram) at 715-16; Trial Tr. Vol. 8 (Burrell) at 1236-41.) Ms. Burrell spoke with Defendant about the need to pay over the employees' payroll taxes after each payroll, and Defendant told her that he "would take care of it." (Trial Tr. Vol. 8 (Burrell) at 1239; Gov't Ex. 107.) Ms. Burrell testified that, when she received telephone calls from the IRS about payroll taxes, she

transferred the calls to Defendant. (Trial Tr. Vol. 8 (Burrell) at 1239.)

a. Tax Year 2004

497. In 2004, Medicare and Medicaid paid Defendant $4,962,599.55. (Gov't Exs. 254a & 255d.)

498. On June 30, 2004, Defendant bought land at 427 Chulio Road in Rome for $650,000, and he paid approximately $353,000 toward his purchase at the closing. (Trial Tr. Vol. 11 (Singh) at 1657-60; Gov't Exs. 1035, 1042, 1112, 1112a,1113, 1114.) Washington received a real estate commission of $24,824. (Trial Tr. Vol. 11 (Singh) at 1658; Gov't Ex. 1042.)

499. On July 29, 2004, Defendant bought a house for his ex-wife Pamela Houser. (Trial Tr. Vol. 11 (Singh) at 1660-65; Gov't Exs. 1030, 1031, 1048.) The house was

located at 110 Cross Roads Court, Atlanta, the sale price was $1,349,000, and Defendant paid $716,000 toward the purchase at the closing. (Trial Tr. Vol. 11 (Singh) at 1660-65.) Washington received a real estate commission of $39,660. (Id. at 1662-64; Gov't Ex. 1048.)

500. In July 2004, the IRS opened an investigation of FHG's failure to pay over employees' payroll taxes in 2003, and, on July 31, 2004, the case was transferred to Mr. Justice. (Trial Tr. Vol. 8 (Justice) at 1111-13; Gov't Ex. 1231_1.)

501. On August 2, 2004, Mr. Justice searched several databases and learned that FHG did not make any FTDs of its employees' payroll taxes in the last quarter of 2003. (Trial Tr. Vol. 8 (Justice) at 1114-16.) Mr. Justice testified that, based on the Form 941s that FHG had filed, FHG

should have made FTDs totaling $105,498.03 during that period. (Id.) Mr. Justice learned that Washington was FHG's registered agent. (Id. at 1111-14.) Mr. Justice sent FHG a Notice of Intent to Levy, meaning that the IRS intended to recover the payroll taxes by garnishing Defendant's and Washington's bank accounts, by possibly seizing property, and by using other possible means of collection. (Id. at 1111-16.)

502. Mr. Justice searched the Georgia Secretary of State's records and found that Defendant was the registered agent or a corporate officer for forty corporate entities, including: (1) Forum Group Management Services, Inc.; (2) Forum Buildings LLC; (3) FHG at Moran Lake Nursing & Rehabilitation Center, LLC; (4) FHG at Mt Berry Nursing & Rehabilitation Center, LLC; (5) FHG at Wildwood

Park Nursing & Rehabilitation Center, LLC; (6) The Guild, Inc.; (7) First Convalescent Center, LLC; (8) First Convalescent Co., LLC; (9) The Nepenthe Co.; (10) The Second Nepenthe Co.; (11) The Third Nepenthe Co.; (12) The Fourth Nepenthe Co.; and (15) The Fifth Nepenthe Co. (Trial Tr. Vol. 8 (Justice) at 1138-1139; Gov't Ex. 1231_17.) Mr. Justice also reviewed IRS records and found that one of Defendant's companies, The Guild, Inc., never made any FTDs. (Trial Tr. Vol. 8 (Justice) at 1137-38; Gov't Ex. 1231_16.)

503. On August 4, 2004, Mr. Justice visited the FHG office on Spider Webb Drive in Rome and met with Defendant and Washington. (Trial Tr. Vol. 8 (Justice) at 1117-20.) During that meeting, Mr. Justice verified that Defendant and Washington were the people at FHG who

were personally responsible for collecting and paying over the employees' payroll taxes. (Id. at 1117-20, 1135-37; Gov't Exs. 1128, 1231_13, 1231_15.) Mr. Justice explained the tax collection process and appeal rights to Defendant and Washington. (Trial Tr. Vol. 8 (Justice) at 1117-20.) Mr. Justice discussed the fact that FHG had made no FTDs for the entire year of 2004, and demanded payment of FHG's payroll taxes. (Id.) Defendant stated that he had made FTDs for the second quarter of 2004 earlier that same day (Id. at 1119.)

504. Mr. Justice interviewed Defendant's during this visit and took notes of Defendant's answers on IRS report forms, which Defendant reviewed for accuracy and signed. (Trial Tr. Vol. 8 (Justice) at 1120-37; Gov't Exs. 1128, 1231_13, 1231_15.) Defendant stated that he was the

general counsel of FHG and that he was assuming control of the business. (Trial Tr. Vol. 8 (Justice) at 1120-25.) Defendant acknowledged his involvement with Wesley Rome and Three Rivers, as well as his previous payroll tax problems when he operated those nursing homes. (Id.) Defendant stated that Washington was the president of FHG, and that she owned 100 percent of the corporation. (Id.) Defendant stated that he authorized payroll checks, prepared Form 941s, and authorized the payment of FHG's taxes. (Id.) Additionally, although Defendant stated that he had hired the accounting firm of Reed, Martin & Slickman to work on FHG's financial accounting, Mr. Justice never received anything from that firm in either 2004 or 2005. (Id. at 1126-27.)

505. Under penalty of perjury, Defendant stated that

he had no investments, no cash on hand, no accounts receivable, and no income. (Trial Tr. Vol. 8 (Justice) at 1130-33; Gov't Ex. 1231_14.) Later during that same interview, Defendant stated that he had accounts receivable of $400,000 per week from Social Security, Medicare, and Medicaid payments made to FHG nursing homes. (Trial Tr. Vol. 8 (Justice) at 1135-36; Gov't Ex. 1231_15.) Mr. Justice did not ask Defendant to explain the contradictions between his statement that he had no accounts receivable and his statement that he had $400,000 per week in accounts receivable. (Trial Tr. Vol. 8 (Justice) at 1136.) Defendant also stated that he drove a 1980 Hyundai sedan; however, Mr. Justice saw Defendant driving a Mercedes-Benz. (Trial Tr. Vol. 8 (Justice) at 1128-1134; Gov't Ex. 1231_14.) According to Mr. Justice, when he interviews someone, he

writes down whatever the individual says and lets the individual review and correct his form, and he later attempts to verify what the individual told him. (Trial Tr. Vol. 8 (Justice) at 1136.)

506. On August 9, 2004, Mr. Justice returned to the FHG offices. (Trial Tr. Vol. 8 (Justice) at 1140-48.) Mr. Justice interviewed Washington and discussed FHG's payroll tax situation with Washington and Defendant. (Id. at 1140-42.) Mr. Justice gave Defendant and Washington a September 15, 2004 deadline to pay FHG's past due payroll taxes. (Id. at 1141.) During Washington's interview, she stated that she managed all the duties of the nursing homes, that she discussed payroll taxes with Defendant, and that she and Defendant reviewed the payroll tax returns and payments together. (Trial Tr. Vol. 8 (Justice) at 1142-

48; Gov't Exs. 1231_3 & 1231_4.) Although Washington stated that the accounting firm of Reed, Martin & Slickman and Gregory Jones, an accountant from Marietta, were FHG's outside accountants, Mr. Justice never received anything from those accountants in 2004 and 2005. (Trial Tr. Vol. 8 (Justice) at 1145; Gov't Ex. 1231_4.)

507. Defendant and Washington did not pay FHG's past due payroll taxes by the September 15, 2004 deadline. (Trial Tr. Vol. 8 (Justice) at 1148.)

508. On October 20, 2004, Defendant visited Mr. Justice's office. (Trial Tr. Vol. 8 (Justice) at 1148-52.) During that visit, Mr. Justice gave Defendant notices stating that, that in addition to owing payroll taxes for the fourth quarter of 2003, Defendant also owed payroll taxes for the first and second quarters of 2004. (Id. at 1149.) Defendant

stated that he had hired the Paul A. Jones & Co. accounting firm to assist Defendant in filing his personal and business taxes. (Id.) Defendant further stated that he planned to apply for relief from the failure-to-file penalties, or for "an abatement," and Mr. Justice advised Defendant to request an abatement in writing. (Id. at 1149-50.)

509. Defendant also stated that he had reorganized the corporate structure of the nursing homes under FHG, and that, as of June 30, 2004, Defendant was operating the nursing homes under Defendant's Medicare and Medicaid provider number. (Trial Tr. Vol. 8 (Justice) at 1150.) Defendant stated that he was in the process of obtaining a loan and that he would use the proceeds of the loan to pay his past due payroll taxes. (Id.) Mr. Justice decided not to file tax liens on the nursing homes to give Defendant time

to obtain the loan. (Id. at 1151-52.)

510. Mr. Justice asked Defendant why Defendant had so many companies with such similar names. (Trial Tr. Vol. 8 (Justice) at 1151.) Defendant explained that wrongful death lawsuits were a problem in the nursing home industry, and stated that he used so many similarly named entities to hide his assets from people who might try to sue him. (Id.)

511. On November 30, 2004, Defendant bought the property at 553 and 555 Chulio Road in Rome for $150,920. (Trial Tr. Vol. 11 (Singh) at 1668-70; Gov't Exs. 1063.5, 1063.6, 1112a, 1145, 1146, 1147, 1147a.) Washington received a real estate commission of $1,372. (Trial Tr. Vol. 11 (Singh) at 1669; Gov't Ex. 1063.5.)

512. On December 21, 2004, Defendant bought several acres of land on Highway 411 in Rome. (Trial Tr.

Vol. 11 (Singh) at 1665-68; Gov't Exs. 1051, 1054, 1112a, 1130, 1131, 1132, 1133.) The purchase price for that property was $1,040,000, and Defendant funded the purchase in part by borrowing $766,604 from Roswell Holding and $25,000 from his ex-wife, Jacque Houser. (Trial Tr. Vol. 11 (Singh) at 1667-68; Gov't Exs. 1051, 1052, 1112a, 1129-34.) Washington received a real estate commission of $31,200. (Trial Tr. Vol. 11 (Singh) at 1665-71; Gov't Ex.1054.)

513. By January 2005, Defendant still had not paid his payroll taxes for the last quarter of 2003. (Trial Tr. Vol. 8 (Justice) at 1152.) The payroll taxes for that period were $105,498.03, or approximately ten percent of the amount that Defendant spent on December 21, 2004, to buy the land on Chulio Road. (Id. at 1114-16; Trial Tr. Vol. 11

(Singh) at 1665-71.)

514. On January 10, 2005, Mr. 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. (Trial Tr. Vol. 8 (Justice) at 1152-53.) Washington gave Mr. Justice ten checks drawn on the FHG operating account. (Id. at 1153-1158; Gov't Ex. 1231_30.) Washington signed all ten checks, which were made payable to the IRS. (Gov't Ex. 1231_30.) Washington wrote three checks in the amount of $100,000, one check in the amount of $74,000, and six checks in the amount of $50,000. (Id.) Washington told Mr. Justice that she would call him and tell him when he could deposit the checks. (Trial Tr. Vol. 8 (Justice) at 1154-55.) Following Washington's instructions, Mr. Justice deposited one check

for $50,000 on January 11, 2005, and the check cleared the bank. (Id. at 1155-56.) Mr. Justice was instructed to deposit another $50,000 check on January 24, 2005, and that check cleared the bank. (Id. at 1157-59.) Mr. Justice was instructed to deposit a third $50,000 check on February 2, 2005; however, that check was returned for insufficient funds. (Id. at 1158-59.) Mr. Justice was instructed to deposit a fourth $50,000 check on February 7, 2005, which also was returned for insufficient funds. (Id. at 1159-60.) After the two checks bounced, Mr. Justice did not attempt to deposit any more of the checks. (Id. at 1160.)

515. On February 7, 2005, Defendant bought property located at 209 Tuckawana Drive in Rome. (Trial Tr. Vol. 11 (Singh) at 1670-74; Gov't Exs. 1056, 1058, 1112a, 1135, 1136, 1137.) The sales price for that property was

$500,000, and Defendant funded the purchase in part by borrowing $205,063 from Roswell Holdings and $50,000 from Jacque Houser. (Trial Tr. Vol. 11 (Singh) at 1670-74; Gov't Exs. 1056, 1058, 1112a, 1135, 1136, 1137.) Washington received a real estate commission of $6,000. (Trial Tr. Vol. 11 (Singh) at 1672; Gov't Ex. 1058.)

516. On February 16, 2005, Mr. Justice sent Defendant and Washington a letter stating that the IRS would impose payroll tax recovery penalties, or trust fund recovery penalties, against Defendant and Washington for the taxes due from the fourth quarter of 2003. (Trial Tr. Vol. 8 (Justice) at 1161-62.)

517. In late February 2005, Mr. Justice received twenty checks, all drawn on the FHG payroll account and signed by Washington. (Gov't Ex. 1231_6.) The checks were made

payable to SunTrust Bank, and notations in the memo line indicated that the checks were intended to be FTDs for the fourth quarter of 2004. (Trial Tr. Vol. 8 (Justice) at 1162-68; Gov't Ex. 1231_6.) The checks were written in amounts ranging from $1,673.65 to $19,631.43. (Gov't Ex. 1231_6.) Mr. Justice deposited all twenty checks, and ten of the checks cleared while the other ten checks bounced. (Trial Tr. Vol. 8 (Justice) at 1165-68.) The ten checks that bounced were written in amounts that totaled approximately $157,000. (Id. at 1167.)

518. On March 2, 2005, Mr. Justice referred Defendant, Washington, and FHG to the IRS for criminal investigation of an abusive tax avoidance scheme. (Trial Tr. Vol. 8 (Justice) at 1168.) Mr. Justice is a civil enforcement officer and is not involved in criminal investigations. (Id. at 1168-

69.) Mr. Justice did not attempt to seize the FHG homes as he had in 1993 because the law had changed and the IRS would not seize the nursing homes because Defendant had such little equity in the nursing homes. (Id. at 1194, 1203-04.) After Justice referred the case for criminal investigation, he received instructions not to initiate further contact with Defendant. (Id. at 1170-71, 1181.)

519. During Mr. Justice's attempt to collect the payroll taxes, Defendant gave Mr. Justice a personal financial statement that Defendant signed on February 23, 2005. (Trial Tr. Vol. 8 (Justice) at 1174-80; Gov't Ex. 182.) The personal financial statement claimed that Defendant had a personal net worth of $20 million. (Trial Tr. Vol. 8 (Justice) at 1178; Gov't Ex. 182.) Defendant listed several properties as his assets, although the properties were titled in

nominees' names. (Trial Tr. Vol. 8 (Justice) at 1175; Gov't Ex. 182.) Defendant listed $18 million in real estate assets, but he did not explain to Mr. Justice how those assets were Defendant's personal assets when the assets were titled in others' names. (Trial Tr. Vol. 8 (Justice) at 1176.) Defendant listed the house he bought for Pamela Houser in Atlanta under the name of "First Convalescent Center, LLC." (Id.; Gov't 182.) The personal financial statement provided that Defendant's only source of income was the money he received from operating the three FHG nursing homes. (Trial Tr. Vol. 8 (Justice) at 1178; Gov't Ex. 182.) According to Mr. Justice, that statement was consistent with Mr. Justice's finding that, although Defendant was associated with forty corporate entities, the nursing homes were Defendant's only source of income. (Trial Tr. Vol. 8

(Justice) at 1184-85.) Defendant did not draw a salary or dividends from FHG; rather, he used the corporate accounts to pay his personal expenses. (Id. at 1200-01,1204-05)

b. Tax Year 2005

520. In 2005, Medicare and Medicaid paid FHG a total of $11,099,068.36. (Gov't Exs. 254a & 255d.)

521. On May 16, 2005, Defendant visited Mr. Justice. (Trial Tr. Vol. 8 (Justice) at 1171-74.) Defendant asked Mr. Justice for a tax payoff calculation as of May 20, 2005. (Id.) Defendant told Mr. Justice that Defendant was developing a Marriott hotel in Rome, and that Marriott required Defendant to be free from any liens. (Id. at 1171-72.) Mr. Justice calculated Defendant's payoff as $571,198.59. (Id. at 1172; Gov't Ex. 1231_19.)

522. On June 29, 2005, Defendant again visited Mr.

Justice. (Trial Tr. Vol. 8 (Justice) at 1180-84.) During that visit, Defendant admitted that he had made no FTDs for the second quarter of 2005. (Id. at 1180-82.) Defendant blamed his failure to pay over his employees' payroll taxes on insufficient cash flow stemming from what Defendant stated was a ban on Medicare and Medicaid admissions at his nursing homes. (Id. at 1180-81.) Defendant further stated that he had hired a new chief financial officer, a certified public accountant named Charles Fletcher. (Id. at 1181-82.) Mr. Justice never received any work product from, and never had any contact with, Mr. Fletcher. (Id.) Defendant also stated that he had hired a new billing clerk who would help Defendant obtain even more money from Medicare and Medicaid. (Id. at 1182.)

523. Mr. Justice asked Defendant about the bad

checks that Mr. Justice had received earlier in the year for payments of FHG's payroll taxes. (Trial Tr. Vol. 8 (Justice) at 1182-83.) Defendant blamed his financial difficulties on a ban on admissions. (Id. at 1183.) Mr. Justice asked Defendant about his property purchases, and Defendant stated that he should have reserved some of that money for operating the nursing homes. (Id. at 1183-84.) Defendant stated that he would soon acquire $8 million, and that he would get caught up with his tax deficiencies when that money arrived. (Id. at 1184.)

524. On July 12, 2005, approximately two weeks later, Defendant bought the property at 147 Tuckawana Drive in Rome. (Trial Tr. Vol. 11 (Singh) at 1674-78; Trial Tr. Vol. 5 (Hibbets) at 765-73; Gov't Exs.1060, 1062, 1062a, 1062b, 1063, 1112a, 1141, 1142, 1143.) The sales price for the

property was $360,000, and Defendant funded the purchase, in part, by borrowing $280,400.40 from Roswell Holdings. (Trial Tr. Vol. 11 (Singh) at 1674-78; Gov't Exs. 1060, 1112a, 1141.) Defendant also used two Medicaid checks totaling $71,617.10 to fund the purchase. (Trial Tr. Vol. 5 (Hibbets) at 768-69; Trial Tr. Vol. 11 (Singh) at 1674-78; Gov't Exs. 1142, 1062a.) One check was made payable to Moran Lake in the amount of $34,309.54, while the other check was made payable to Mt. Berry in the amount of $37,30.56. (Trial Tr. Vol. 5 (Hibbets) at 765-73; Trial Tr. Vol. 11 (Singh) at 1674-78; Gov't Exs. 1060, 1062, 1062a, 1062b.) Defendant also gave the sellers a check in the amount of $10,000 from the Forum Group Management Services. (Trial Tr. Vol. 11 (Singh) at 1674-78; Trial Tr. Vol. 5 (Hibbets) at 765-73; Gov't Exs. 1060, 1062, 1062a,

1062b.) As previously noted, Donna Hibbets, the seller, was wary of taking the Medicaid checks, and she took the checks only after receiving assurances from her lawyer. (Trial Tr. Vol. 5 (Hibbets) at 772.)

525. On November 17, 2005, IRS criminal investigators executed a search warrant on the FHG offices at 940 Spider Webb Drive. (Trial Tr. Vol. 16 (Rotti) at 2542.) Mr. Justice did not participate in the search. (Trial Tr. Vol. 15 (Justice) at 2505.)

c. Calculations of Payroll Taxes Owed

526. Marilyn Igbalajobi, an employment tax specialist with the IRS, calculated Defendant's personal liability for employees' payroll taxes for the eight quarters listed in Counts 2 through 9 of the second superseding indictment. (Trial Tr. Vol. 8 (Igbalajobi) at 1210.) According to Ms.

Igbalajobi, although Defendant filed Forms 941s in those quarters, Ms. Igbalajobi's review of the records, indicated that Defendant made no FTDs in any of those quarters. (Id. at 1211-12.)

527. For count two, using the numbers that Defendant supplied in the Forms 941, Ms. Igbalajobi calculated that for the first quarter of 2004, Defendant was personally liable for $214,935 for payroll taxes that were not paid over to the IRS. (Trial Tr. Vol. 8 (Igbalajobi) at 1210-15; Gov't Ex. 1069a.) Ms. Igbalajobi found that FHG had overpaid employees' payroll taxes in other quarters, and she credited those overpayments to reduce Defendant's liability for the first quarter of 2004. (Trial Tr. Vol. 8 (Igbalajobi) at 1212-14.)

528. For counts three, four, five, six, seven, eight, and

nine, when Ms. Igbalajobi performed her analysis, she found that the Forum entities that operated Moran Lake, Mt. Berry and Wildwood made no FTDs for the fourth quarter of 2004 and the second quarter of 2005. (Trial Tr. Vol. 8 (Igbalajobi) at 1214; Gov't Ex. 1069a.) Ms. Igbalajobi found that the total unpaid taxes listed in Counts 3 through 9 was $806,305. (Trial Tr. Vol. 8 (Igbalajobi) at 1213-15; Gov't Ex. 1069a.)

d. Personal Income Taxes

529. Federal law required individuals to file personal income tax returns, using Form 1040 if the individuals had more than $7,950 in gross income in 2004 and filed as individuals. (Trial Tr. Vol. 8 (Igbalajobi) at 1216.) For 2004, the law required married people to file a personal return if they had more than $15,900 in gross income. (Trial Tr. Vol.

15 (Justice) at 2506.)

530. For 2005, the law required individuals to file personal returns in 2005 if the individuals had more than $8,200 in gross income. (Trial Tr. Vol. 8 (Igbalajobi) at 1216.)

531. Gross income includes wages, payments of money, property, goods, and services. (Trial Tr. Vol. 8 (Igbalajobi) at 1216.)

532. In 2004, Defendant purchased property priced more than $1.7 million, as well as two Mercedes-Benz automobiles that he and Washington drove for their personal use. (Trial Tr. Vol. 11 (Singh) at 1655-1671; Gov't Exs. 950j, 950k, 1112a.)

533. In 2005, Defendant purchased property on Tuckawana Drive for $860,000. (Trial Tr. Vol. 11 (Singh) at

1672-78; Trial Tr. Vol. 5 (Hibbets) at 765-73; Gov't Exs. 1060, 1062, 1062a, 1062b; 1112a.) Defendant also bought a BMW vehicle for $35,468, and spent $34,975 to send his child to school. (Gov't Exs. 950j, 950k.)

534. On April 9, 2008, six days short of being three years late, Defendant filed a Form 1040 for the year 2004. (Trial Tr. Vol. 15 (Justice) at 2505-06; Gov't Ex. 1084.) Defendant filed as a married person filing a joint return with his spouse. (Trial Tr. Vol. 15 (Justice) at 2506; Gov't Ex. 1084.) The tax return listed Defendant's wife as Pamela Houser; however, Pamela Houser did not sign the return. (Trial Tr. Vol. 15 (Justice) at 2506; Gov't Ex. 1084.) No evidence in the record indicates that Defendant and Pamela Houser were married in 2004.

535. Defendant never filed a personal income tax

return for 2005. (Trial Tr. Vol. 15 (Justice) at 2506-07; Gov't Ex. 1086c.)

e. Payments

536. On November 17, 2005, IRS criminal investigators executed a search warrant on the FHG offices at 940 Spider Webb Drive. (Trial Tr. Vol. 16 (Rotti) at 2542.) A year later, in late November 2006, one of Defendant's attorneys made payroll tax payments for the quarters that the Government charged in Counts 3, 5 and 9 of the second superseding indictment. (Trial Tr. Vol. 15 (Justice) at 2507-13; Gov't Ex. 1069.1.)

537. Six months later, Defendant's attorney made payroll tax payments for the quarter that the Government later charged in Count 4 of the second superseding indictment. (Trial Tr. Vol. 15 (Justice) at 2507-13; Gov't Ex.

1069.1.)

538. The four payments did not pay FHG's entire tax liability for those quarters. (Trial Tr. Vol. 15 (Justice) at 2510-12; Gov't Ex. 1069.1.) Instead, the four payments covered only the employees' portion of the payroll taxes due for those quarters. (Trial Tr. Vol. 15 (Justice) at 2510-12; Gov't Ex. 1069.1.) In letters accompanying the payments, Defendant's attorney stated that the partial payments were being made to attempt to eliminate Defendant's personal liability for the payroll taxes that had not been paid over to the IRS. (Trial Tr. Vol. 15 (Justice) at 2510.)

539. Neither Defendant nor his attorney ever made any payments with respect to the quarters charged in Counts 2, 6, 7, and 8 of the second superseding indictment. (Trial Tr. Vol. 15 (Justice) at 2512-13.)

II. Conclusions of Law

A. Witness Credibility

1. In 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 F. App'x 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 Defendant

2. The Court finds credible the numerous faxes and emails sent by a number of administrators, including Ms. Stanley and Ms. Greenway at Mt. Berry, Ms. Knowles at Moran Lake, and Ms. Grant and Ms. Chal at Wildwood, to Defendant and Washington during the time period relevant to this action. The Court also finds credible the administrators' testimony about these documents and their telephone communications with Defendant. The Court agrees with the Government that those communications and testimony demonstrate that Defendant deliberately ignored the urgent concerns expressed by the

administrators who were managing the nursing homes. The Court further finds that this evidence supports a determination that Defendant knowingly and willfully allowed the substandard conditions to persist while he continued to submit claims for reimbursement.

2. Employees and Family Members

3. The Court also finds credible the testimony given by employees and family members concerning conditions in the nursing homes. Specifically, the employees and family members testified in great detail and with remarkable candor about the conditions at the facilities. Additionally, the contemporaneous emails and faxes from the administrators and the testimony of Dr. Hannay and Kathy Gaulin, corroborate the testimony of the employee and family member witnesses.

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

4. The Court finds credible the testimony of Dr. Hannay and Ms. Gaulin. During the time period relevant to this action, Dr. Hannay served as the medical director for Moran Lake and Mt. Berry, and, even after Dr. Hannay no longer served in that position, he continued to see residents in those facilities and was present in the nursing homes on a weekly basis. During the time period relevant to this action, Ms. Gaulin was the ombudsman at Wildwood and was also present on a weekly basis. Further, the contemporaneous complaints of those witnesses, as well as the testimony of other witnesses, corroborates Dr. Hannay and Ms. Gaulin's testimony.

4. Expert Witnesses

5. Defendant presented testimony from two expert witnesses: Karen Goldsmith, an expert in nursing home administration; and Kim Collins, M.D., a medical examiner at the Fulton County Medical Examiner's Office. For the following reasons, the Court finds certain portions of both witnesses' testimony unpersuasive.

a. Ms. Goldsmith

6. The Court concludes that certain portions of Ms. Goldsmith's testimony are credible. For example, Ms. Goldsmith provided some general information about nursing home administration, the survey process, and the role of surveyors. The Court, however, finds that Ms. Goldsmith's expert testimony about the quality of care provided at the nursing homes simply is not credible in light of the other

evidence presented in this case. In particular, the Court finds that Ms. Goldsmith improperly relied heavily on the surveys of the facilities, given the evidence that the survey process was corrupt. Ms. Goldsmith was present for the majority of the trial, and she heard most of the testimony. In light of those circumstances, Ms. Goldsmith's testimony that the leaking roofs at the facilities "did not necessarily" impact resident care and did not constitute a "substandard care issue" is unpersuasive, especially after Ms. Goldsmith 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." (Trial Tr. Vol. 17 (Goldsmith) at 2836, 2857.)

7. The Court also finds that Ms. Goldsmith failed to

respond adequately to questions on cross-examination concerning Defendant's Exhibit 29, a chart summarizing the surveys. In particular, Ms. Goldsmith could not answer any questions about specific data reflected on the chart, including data indicating that the three nursing homes had high levels of deficiencies, as compared with other nursing homes in Georgia. (Trial Tr. Vol. 17 (Goldsmith) at 2853-56.)

b. Dr. Collins

8. Dr. Collins testified that there was no evidence that former Moran Lake resident Morris Ellison was malnourished or suffered from muscle wasting. (Trial Tr. Vol. 17 (Collins) at 2767.) Dr. Collins also 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 Mr. Ellison's weight. (Id. at 2768.) Given Dr. Frist's contrary, credible testimony, and given the Court's own review of the autopsy photographs of Mr. Ellison, the Court finds that Dr. Collins' testimony concerning the lack of evidence that Mr. Ellison was malnourished or suffered from muscle wasting simply is not credible. Further, although Dr. Collins was critical of Dr. Frist's failure to weigh Mr. Ellison and to perform a number of other tests in making his assessment, the Court finds that those tests would not change the Court's determination that Mr. Ellison was indeed malnourished and suffered from muscle wasting and dehydration at the time of his death. (Trial Tr. Vol. 17 (Collins) at 2760-63.)

5. Worthless Services

9. Many former employees testified that they did not believe that the services they provided were worthless. The Court, however, does not find that testimony to be persuasive, relevant, or helpful, as the determination of whether services were worthless is a matter solely for the Court to determine in its role as the ultimate finder of fact. 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 '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, No. 10–CV–0589(MAT), 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). "Worthless services," as charged in the indictment, has a specific meaning. The testimony of a former employee as to whether he or she provided worthless services has only limited value because the former employee 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 also notes that each of those witnesses,

many of whom are licensed and still working in the long-term care industry, had a motivation to minimize the impact that the witness' actions or lack of actions had on the residents' overall care. The Court acknowledges that very few individuals would be willing to admit to providing worthless services under any circumstances, and consequently hesitates to give significant weight to such testimony. The Court has heard all of the testimony from numerous witnesses and received an overwhelming volume of documentary evidence. As such, the Court is in a much better position than any one witness to determine whether Defendant provided worthless services. 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) (stating that expert or lay witness testimony that person acted "dangerously," "reasonably," or "unreasonably" is unhelpful to jury and inadmissible as it is "tantamount to telling the jury what result to reach"). Similarly, testimony from the former employee witnesses stating that they did the best they could with what they had does not foreclose a finding that Defendant provided worthless services. In any event, as discussed below, whatever value such testimony may have is substantially outweighed by the evidence of worthless services that the Government presented.

B. The Offenses Charged in the Indictment

10. As previously noted, the second superseding indictment contains eleven counts. Count one of the second superseding indictment charges Defendant and Washington with a conspiracy (18 U.S.C. §1349) to commit health care fraud, in violation of 18 U.S.C. § 1347. Counts two through nine of the second superseding indictment charge Defendant with eight counts of failure to account for and pay over payroll taxes, in violation of 26 U.S.C. § 7202, and counts ten and eleven charge Defendant with failing to file individual income tax returns, in violation of 26 U.S.C. § 7203. The Court first addresses count one, and then discusses the tax charges.

1. Count One

11. 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 Defendant's knowing participation in that agreement. United States v. Soto, 399 F. App'x 498, 500 (11th Cir. 2010). Under 18 U.S.C. § 1347, the Government must prove that 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 F. App'x 140, 142 (11th Cir. 2009).

12. Medicare and the State of Georgia Department of Community Health, Division of Medical Assistance ("Georgia Medicaid") are health care benefit programs, as defined in 18 U.S.C. § 24(b)--that is, public plans affecting interstate commerce--under which medical benefits, items and services are provided to individuals. (Docket Entry No. 134 at 2-3).

13. For the following reasons, the Court finds that the Government has proved beyond a reasonable doubt that Defendant conspired with his wife, Washington, 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 18 U.S.C. §§ 1347 and 1349.

14. Specifically, the Government has proved beyond a reasonable doubt that the three Forum nursing facilities, Mt. Berry, Moran Lake, and Wildwood, under the direction of Defendant, 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. The Court notes that the Government need not prove that Defendant actually

submitted false claims for worthless services to Medicare and Medicaid during the entire conspiracy period for Defendant to be guilty of conspiring to commit health care fraud. Here, the Government has proven beyond a reasonable doubt that Defendant submitted claims for worthless services "during the course of the conspiracy," as charged in the second superseding indictment, which is sufficient.

15. The Government has proved beyond a reasonable doubt that, during the course of the conspiracy, Defendant 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.

16. 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 that are so deficient that they have no value to the resident, or are totally undesirable. Worthless services are services that are so inadequate, deficient, and substandard, or so 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).

17. During the course of the conspiracy, the evidence shows a long-term pattern and practice of conditions at Defendant's nursing homes that were so poor, including food shortages bordering on starvation, leaking roofs, virtually no nursing or housekeeping supplies, poor sanitary

conditions, major staff shortages, and safety concerns, that, in essence, any services that Defendant actually provided were of no value to the residents. Given the severe nature of the multiple deficiencies at Defendant's nursing homes, the Court finds that a reasonable person would understand that Defendant provided worthless services.

18. The Government has proved beyond a reasonable doubt that Defendant had actual knowledge of, 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 relevant period. The Court finds that, throughout the conspiracy period, Defendant knew that the nursing homes were providing inadequate care, and that claims for reimbursement were being submitted, and were paid, for services that were so inadequate or deficient as to

constitute worthless services.

19. The Government consequently has proved beyond a reasonable doubt that, during the course of the conspiracy, the nursing homes perpetrated a fraud on the United States by making materially false representations in the submission of claims to Medicare and Georgia Medicaid. Further, Defendant 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.

20. The agreements that Defendant and Washington entered into with the Government to participate in the Medicare and Georgia Medicaid programs explicitly conditioned payment on Defendant's compliance with all applicable laws and regulations. Defendant was required to

provide complete care for the nursing home residents. The residents suffered direct harm as a result of the poor conditions and worthless services that Defendant provided at the nursing homes. Defendant paid the nursing homes' employees and vendors untimely, if at all, and the residents received greatly reduced, if any, services in return.

21. Defendant'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 Georgia Medicaid is without merit. Even though the services were paid per diem, reasonable persons would know that supplying limited, or no, basic services fails to comport with the very essence of the provider and benefit agreements, and that seeking reimbursement for such deficient services constitutes 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, Defendant did nothing to correct the situation and continued to bill the Government for those services. The Court finds that the supposed "care" Defendant provided to residents during the relevant time period was so deficient that the bundle of services had no medical value.

a. Defendant's Knowledge and Intent

22. Defendant had actual knowledge of the lack of care at the nursing homes through an almost daily barrage of telephone calls, emails, and faxes from the administrators at all three nursing homes during the entire period of the conspiracy, yet Defendant affirmatively chose to ignore these alerts. Defendant'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 Defendant's knowledge that he should not have diverted nursing home funds to pay for his property ventures when those funds were desperately needed to provide care at the nursing homes. (See Trial Tr. Vol. 8 (Burrell) at 1247-48.)

23. Intent to defraud may be inferred from the totality

of the circumstances and need not be proven by direct evidence. Puffenberger, 358 F. App'x 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 provides substantial detail of all of the inferences of intent set forth in Davis.

24. Defendant 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. Defendant's correspondence with an executive from Marriott shows that 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 of dollars to do so. Defendant 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, the evidence shows that Defendant chose instead to divert significant nursing home funds for his real estate development ventures and for other personal expenses, and that Defendant intentionally attempted to cover up and conceal from the surveyors the nursing homes' issues and his diversion of funds. Defendant now seeks to hide behind the survey system he corrupted, to no avail.

b. Vagueness

25. Section 1347 unquestionably applies to instances where 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). Defendant, however, has argued throughout this case that section 1347 is unconstitutionally vague as applied to his claims for reimbursement. For the following reasons, this contention fails.

26. 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); United

States v. Di Pietro, 615 F.3d 1369, 1371 (11th Cir. 2010). 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 the individual facts and circumstances. Di Pietro, 615 F.3d at 1371.

27. "[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 Defendant'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.

28. The statute's strict scienter requirement provides further protections for Defendant. To convict Defendant of healthcare fraud under section 1347, the Government had to prove not only that Defendant submitted claims for

worthless services, but also that he knew that the services were worthless, and that he 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) ("[W]e 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).

29. In Wachter, a criminal 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 difficultly 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.

30. Now, having the benefit of the evidence at trial, the

Court finds that, like the defendants in Wachter, Defendant intentionally and successfully concealed, covered-up, and misrepresented the conditions and care provided in the nursing homes. There was substantial evidence in this case showing that Defendant 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 that, if they reported Defendant, the employees would be fired and the residents would be retaliated against. The overwhelming evidence shows that employees, residents, and family members were not convinced that 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 Defendant's direction. As a result, the surveyors could not fully and effectively do their job and were sometimes unable to substantiate serious complaints.

31. 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. Defendant's intentional attempts to conceal the conditions of the nursing homes and corrupt the survey process demonstrate 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 Defendant with actual notice of the prohibited conduct.

c. The Government Did Not Charge Defendant With Violating Civil Rules or Regulations

32. Defendant argues that the Government is attempting to use civil statutes and regulations as the governing standard to prove a criminal violation. The Court disagrees. This is not a regulatory compliance case, and Defendant was not charged with failing to follow certain Medicare rules and regulations or with failing to pass the surveys. Defendant is charged with submitting false claims to Medicare and Georgia 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 Defendant billed the Government for those services.

33. The United States Court of Appeals for the Eleventh Circuit rejected an argument similar to Defendant's in United States v. Isley, 369 F. App'x 80, 89 (11th Cir. 2010). At trial, the defendant in Isley 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 by 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.

34. 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 United States Court of Appeals for 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) (holding that defendants were not convicted of "failing to . . . provide information" covered by Medicare Manual, but for knowingly providing false information to Medicare); United States v. Larm, 824 F.2d 780, 784 (9th Cir. 1987) (finding that Medicaid billing codes

are relevant only because they inform us on question of whether defendants submitted false claims).

35. The above reasoning applies persuasively to this case, as Defendant was not charged with violating a civil regulation or some rule relating to the surveys. The Court concludes that Defendant may be criminally prosecuted for health care fraud whether or not such conduct additionally violates administrative policies or civil regulations. Defendant knew that submitting claims for services provided in the nursing homes would cause Medicare and Georgia 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 whether the services provided by Defendant were deficient. Additionally, although the

surveys provide some guidance to the Court as to the level of care the nursing homes provided, Defendant's intentional corruption of the survey process makes the surveys less helpful than the witness testimony and documentary evidence regarding the level of care provided.

d. Entrapment by Estoppel

36. Further, the record does not support Defendant's entrapment by estoppel defense. The fact that surveys were conducted or that surveyors were monitoring the nursing homes from time to time does not entitle Defendant to an entrapment by estoppel defense. This would be so even if Defendant had not corrupted the survey process. To hold otherwise would preclude virtually all criminal cases involving program fraud against any Government agency.[3]

[3]For similar reasons, the Court also rejects Defendant's

37. 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

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suggestion throughout this case that, simply by paying claims, the Government has somehow endorsed Defendant fraudulent conduct. Defense expert Ms. 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 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 Georgia Medicaid for reimbursement. Under Defendant'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 Defendant, the Government may not have detected the entirety of Defendant'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 Defendant 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.

available." United States v. Rector, 111 F.3d 503, 506 (7th Cir. 1997); see also Office of Personnel Management v. Richmond, 496 U.S. 414, 422, (1990) (noting that 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. 2009) ("Judicial decisions indicate great caution should be exercised when it comes to the application of the defense.").

38. In this circuit, the defense of entrapment by estoppel contains 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 he 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).

39. Defendant's alleged reliance on the survey process does not support the entrapment by estoppel defense in this case. No evidence in the record shows Defendant 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 or that the services were not worthless. 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 that their claims were false prior to prosecution. The Court declines to adopt a rule that would have such an anomalous result.

40. Defendant 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 Defendant that adequate services were being provided at the nursing homes. There is simply no evidence of any such communication. See Isley, 369 F. App'x at 89 (finding that approvals of falsely coded claims submitted to Medicare by 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."); Johnson, 139 F.3d at 1365 (rejecting defendant's theory that his authority was "conveyed through winks and nods" rather than Government actually telling him his actions were legal).

41. The evidence at trial established that Defendant was notified on a daily basis about the dire conditions at each of the homes by the administrators whom he had hired to manage the nursing homes. Under such circumstances, reliance on surveys that found each nursing home out of substantial compliance throughout the course of the

conspiracy was not objectively reasonable, especially given Defendant's demonstrated corruption of the survey process and his attempt to conceal the conditions of the nursing homes from the surveyors. See Isley, 369 F. App'x at 89 (holding that defendant's reliance on Medicare's payment of falsely coded claims was not objectively reasonable when evidence established that there was no confusion in industry about correct way to code the claims); Eaton, 179 F.3d at 1332-33 (finding that conduct of Customs officers did not "give rise to the objectively reasonable reliance necessary for an entrapment by estoppel defense" because Eaton was well aware of regulations against smuggling certain snakes). The Court consequently finds that the evidence does not support Defendant's entrapment by estoppel defense.

e. Summary

42. In sum, the Court finds that the Government has proven beyond a reasonable doubt that Defendant is guilty of the offense charged in count one of the second superseding indictment. The Court further finds that none of Defendant's defenses to that charge apply. Consequently, the Court finds that Defendant is guilty of the offense charged in count one of the second superseding indictment.

2. Counts Two Through Nine

43. Counts two through nine of the second superseding indictment charge that in three fiscal quarters in 2004 and 2005, in the Northern District of Georgia, Defendant deducted and collected payroll taxes from employees of different FHG entities, but failed to account for

and pay over those taxes to the IRS, in violation of 26 U.S.C. § 7202. A defendant may be found guilty of failing to pay over payroll taxes, in violation of § 7202, only if the Government proves beyond a reasonable doubt that: (1) 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) 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) Defendant acted willfully.

44. Based on the evidence presented and admitted at trial, the Court finds that:

45. Defendant was a person required to collect, truthfully account for, or pay over to the IRS employees'

federal income and FICA taxes for the FHG entities listed in counts two through nine of the second superseding indictment. (Trial Tr. Vol. 1 (Edwards) at 114; Trial Tr. Vol. 4 (Ingram) at 715-16; Trial Tr. Vol. 8 (Justice) at 1117-25, 1135-37, 1140-52, (Burrell) 1236-41; Gov't Exs. 107, 1128, 1231_3, 1231_4, 1231_13, 1231_15.)

46. 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 counts two through nine of the indictment. (Trial Tr. Vol. 8 (Justice) at 1114-20, 1148, 1152-53, 1161-67, 1180-84, (Igbalajobi) 1211-14; Trial Tr. Vol. 15 (Justice) at 2507-13; Gov't Exs. 1069a, 1069.1.)

47. Defendant 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 two through nine of the second superseding indictment. (Trial Tr. Vol. 1 (Edwards) at 114; Trial Tr. Vol. 4 (Ingram) at 715-16.) Specifically, Ms. Burrell testified that, although she prepared checks for FTDs, Defendant would not make the FTDs. (Trial Tr. Vol. 8 (Burrell) at 1236-41.) Mr. Justice also testified that Defendant lost control of the two Rome nursing homes in 1993 after Defendant failed to pay over his employees' payroll taxes. (Trial Tr. Vol. 8 (Justice) at 1107-10, 1120-25; Gov't Ex. 1231_13 at 2.) Mr. Justice also found that Defendant used multiple, similarly-worded names for corporate entities, and testified that Defendant stated he did so to shield his assets. (Trial Tr. Vol. 8 (Justice) at 1138-39, 1151; Gov't Exs. 1231_17). Agent Singh also

testified concerning Defendant's property purchases that occurred during the same time period that Defendant was meeting with Mr. Justice about Defendant's failure to pay over payroll taxes. (Trial Tr. Vol. 11 (Singh) at 1657-78; Gov't Ex. 1112a). Likewise, on October 20, 2004, Defendant persuaded Mr. Justice to refrain from filing a tax lien based on Defendant's statements that he was in the process of obtaining a loan to pay his taxes, but Defendant never paid his taxes. (Trial Tr. Vol. 8 (Justice) at 1148-52.) In November and December 2004, however, Defendant paid more than $1.2 million for property on Chulio Road and Highway 411. (Trial Tr. Vol. 11 (Singh) at1165-70; Gov't Ex. 1112a.) Further, when Mr. Justice demanded payroll tax payments in January and February 2005, Defendant and Washington gave Mr. Justice bad checks written in amounts

totaling over $250,000. (Trial Tr. Vol. 8 (Justice) at 1152-68; Gov't Exs. 1231_6, 1231_30.) On February 7, 2005, however, Defendant bought property on Tuckawana Drive for $500,000 and paid nearly $300,000 at the closing. (Trial Tr. Vol. 11 (Singh) at 1670-74; Gov't Ex. 1112a.) Likewise, although Defendant obtained a tax payout estimate from Mr. Justice on May 17, 2005, he bought property located at 147 Tuckawana Drive instead of paying the taxes. (Trial Tr. Vol. 8 (Justice) at 1171-74; Trial Tr. Vol. 11 (Singh) at 1674-78; Gov't Ex. 1231_19.) See United States v. Gilbert, 266 F.3d 1180, 1185 (9th Cir. 2001) (finding defendant was properly convicted for failing to perform one of duties that Section 7202 requires); United States v. Thayer, 201 F.3d 214, 219-221 (3d Cir. 1999) (same); United States v. Evangelista, 122 F.3d 112, 120-22 (2d Cir. 1997) (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, 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) (stating that factors in determining that defendant was "responsible person" include: (1) duties of officer as outlined by corporate by-laws; (2) ability of individual to sign checks of corporation; (3) identity of officers, directors, and shareholders of corporation; (4) identity of individuals who hired and fired employees; and (5) identity of individual(s) who were in charge of financial affairs of corporation).

48. On November 17, 2005, when IRS agents

executed a search warrant at the FHG offices, Defendant learned that he was the subject of an IRS criminal investigation. (Trial Tr. Vol. 16 (Rotti) at 2542.) The Court finds that the payments that Defendant's attorney made more than a year later for the quarters charged in counts three, four, five, and nine of the second superseding indictment were ineffective, after the fact attempts to reduce Defendant's criminal liability.

49. For the reasons discussed above, the Court finds that the Government has proven, beyond a reasonable doubt, all of the elements of the offenses charged in counts two through nine of the second superseding indictment. The Court therefore finds Defendant guilty of the offenses charged in counts two through nine of the second superseding indictment.

3. Counts Ten and Eleven

50. Counts ten and eleven of the second superseding indictment charge Defendant with failing to file personal federal income taxes for the calendar years 2004 and 2005, in violation of 26 U.S.C. § 7203. The Court can find Defendant guilty of that offense only if the Government proves all of the following beyond a reasonable doubt: (1) Defendant was required by law or regulation to file an income tax return for the tax year charged; (2) Defendant failed to file a return when required by law; and (3) at the time Defendant failed to file the return, he knew he was required by law to file a return.

51. The Court finds that, based on the evidence admitted at trial:

52. Defendant was required by law or regulation to file

a personal income tax return for 2004 and 2005 as charged in Counts 10 and 11. Specifically, Agent Singh's testimony and the accompanying exhibits established that Defendant's gross income exceeded $15,900 in 2004. (Trial Tr. Vol. 11 (Singh) at 1655-1671; Gov't Exs. 950j, 950k, 1112a). Likewise, Agent Singh's testimony and other evidence in the record demonstrated that Defendant's gross income exceeded $8,200 in 2005. (Trial Tr. Vol. 11 (Singh) at 1672-78; Trial Tr. Vol. 5 (Hibbets) at 765-73; Gov't Exs. 1060, 1062, 1062a, 1062b, 1112a.)

53. The Court further finds that Defendant failed to file personal income tax returns for 2004 and 2005 when required by law. Specifically, Mr. Justice testified that Defendant filed a personal tax return for 2004 in April 2008. (Trial Tr. Vol. 15 (Justice) at 2505-06; Gov't Ex. 1084.) Mr.

Justice further testified that Defendant never filed a personal tax return for tax year 2005. (Trial Tr. Vol. 8 (Justice) at 2506-07; Gov't Ex. 1086c.)

54. At the time Defendant failed to file personal tax returns in 2004 and 2005, Defendant knew that he was required by law to file personal income tax returns. Mr. Justice testified that Defendant stated that he had hired an accountant to help with his personal and business taxes. (Trial Tr. Vol. 8 (Justice) at 1149.) Mr. Justice also testified that the IRS previously had imposed penalties on Defendant related to Defendant's personal income tax returns and his payroll tax problems. (Id. at 1172.) Moreover, Defendant filed personal tax returns in years prior to 2004, which demonstrates that Defendant certainly was familiar with the requirement to file a personal income tax return. (Gov't Ex.

1086.) Further, the Government presented evidence indicating that Defendant filed a request for an extension of time to file his 2004 personal income tax return, which certainly indicates that Defendant was aware of the requirement to file a personal income tax return. (Gov't Ex. 1086a.) The Court further finds that Defendant's action of filing a personal income tax return for 2004 in April 2008, after Defendant learned that he was the subject of an IRS criminal investigation, was an ineffective, after the fact attempt by Defendant to avoid criminal liability for his previous failure to file a personal income tax return.

55. For the reasons discussed above, the Court finds that the Government has proven beyond a reasonable doubt all of the elements of the offenses charged in counts ten and eleven of the second superseding indictment. The

Court consequently finds Defendant guilty of the offenses charged in counts ten and eleven of the second superseding indictment.

III. Conclusion

ACCORDINGLY, the Court **FINDS** that: (1) Defendant is **GUILTY** of the charge contained in count one of the second superseding indictment, which alleges that Defendant conspired to commit healthcare fraud, in violation of 18 U.S.C. § 1347 and § 1349; (2) Defendant is **GUILTY** of the charges contained in counts two through nine of the second superseding indictment, which charge Defendant with failing to account for and pay over payroll taxes collected from employees, in violation of 26 U.S.C. § 7202; and (3) Defendant is **GUILTY** of the charges contained in counts ten and eleven of the second superseding

indictment, which charge Defendant with failing to file personal income tax returns for 2004 and 2005, in violation of 26 U.S.C. § 7203. The Court **DIRECTS** the Clerk to schedule a sentencing date for Defendant.

IT IS SO ORDERED, this the 2nd day of April, 2012.

UNITED STATES DISTRICT JUDGE