UNITED STATES DISTRICT COURT
NOTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA v. VENKATESWARA R. KUCHIPUDI	Case No. 13 CR 312-3 The Honorable Matthew F. Kennelly

GOVERNMENT'S SENTENCING MEMORANDUM

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Venkateswara R. Kuchipudi did not simply commoditize the well-being of vulnerable patients under his control; he did so with an almost unconscionable indifference to their care. For the hundreds of nursing home patients he sent to Sacred Heart, Kuchipudi was not the hard-working, committed physician depicted in his sentencing memorandum. Rather, he was, for so many of those patients, a passing apparition. Kuchipudi sent patients to Sacred Heart in order to profit from the free medical staff hired to work for him. But Kuchipudi did not just take financial advantage of that kickback relationship; he outsourced responsibility for his patients' care at a time when they needed him most. His sentence should reflect this callous greed.

I. SENTENCING GUIDELINES

A. The Value of the Bribes Kuchipudi Received Far Exceeded $550,000.

The offense level for Kuchipudi's crime is eight, plus the number of offense levels that correspond to "the value of the bribe or the improper benefit conferred" from the loss table found in Guideline § 2B1.1. U.S.S.G. §§ 2B4.1(a) & (b)(1). As set forth in the *Government's Version of the Offense*, the value of the bribe Kuchipudi received is subject to two different methods of calculation: (1) the cost to employ the labor that was provided to him—at least $412,502; or (2) the billings he collected from work performed by that staff—an amount that far exceeded Guideline § 2B1.1(H)'s $550,000 threshold. Gov't Ver. at 29-30.[1] Consistent with the purpose

[1] Citations to record docket entries, including *Defendant Venkateswara Kuchipudi's Sentencing Memorandum* (R. 1114), are referenced by an "R." notation, followed by the relevant document number. Citations to the trial transcript are referenced by a "K.Tr." notation, followed by the transcript page(s) cited. References to the transcript from the administrators' trial, *United States v. Novak, et al.*, are referenced by a "N.Tr." notation, followed by the page(s) cited. Government exhibits and recording transcripts are identified by "G.E." and "G.E. Tr." notations, respectively. References to the Probation Officer's *Presentence Investigation Report* or the *Government's Version of the Offense*, which is attached thereto, are referenced as "PSR" and "Gov't Ver.", followed by the page or paragraph number referenced. Finally, the exhibits attached to this memorandum are referenced by an "Ex." Notation.

of Guideline § 2B4.1(b)(1), the Court should apply the latter calculation in sentencing Kuchipudi.[2]

The purpose of Guideline § 2B4.1(b)(1) is to ensure that, in sentencing a defendant convicted of bribery, a court accounts for the financial impact of the defendant's crime. In *United States v. Montani*, 204 F.3d 761, 771 (7th Cir. 2000), the Seventh Circuit was asked to decide whether the cost of a bribe should be deducted from the value of the improper benefit conferred by that bribe in calculating a defendant's offense level under Guideline § 2B4.1(b)(1). The court answered that question by looking at the "purpose of § 2B4.1(b)(1)," which it described as "trigger[ing] an enhancement to a bribery conviction based on the size of the crime." *Montani*, 204 F.3d at 771; *see id.* (Section § 2B4.1(b)(1) "allows for situations where small bribes may cause great harm or large bribes unexpectedly may result in small improper benefits."). The *Montani* court identified the "size of the crime" as the economic benefit derived from the unlawful arrangement. *Id.*

1. Kuchipudi's Billing Receipts Reflect the Magnitude of His Crime.

The economic benefit Kuchipudi derived from his unlawful kickback scheme with Sacred Heart was the ability to bill for the free medical practitioners' labor provided to him. Relying on the language used in the indictment, Kuchipudi nevertheless argues that the Court should ignore the actual value he received for his patient referrals and, instead, limit his Guidelines calculation

[2] As Kuchipudi correctly points out, the Probation Officer's *Presentence Investigation Report* incorrectly combines the value of the cost of the labor Kuchipudi received with the value derived from that labor. *See* R. 1114 at 23; PSR ¶ 49. The government agrees that the aggregation of those amounts constitutes impermissible "double counting." R. 1114 at 23. Rather, the value of the bribe Kuchipudi received is the greater of those two figures. As set forth in the *Government's Version of the Offense*, the Medicare and Medicaid claim reimbursement payments Kuchipudi received for the services performed by Sacred Heart's staff clearly exceeded their employment costs. Gov't Ver. at 29. As explained *infra*, the Court should use those proceeds to calculate Kuchipudi's sentence.

to the total amount paid to the employees hired to work for him. *See* R.1114 at 24. Kuchipudi's argument ignores the economic reality of his arrangement with Sacred Heart and the policy and purpose of Guideline § 2B4.1(b)(1).

Sacred Heart did not simply assign staff to aid Kuchipudi in his practice; it provided him the ability to bill for their labor. *See, e.g.*, K.Tr. 2987-88 (Stamboliu was told to record his time treating Kuchipudi's patients, but not to bill insurers for their care); 3921-32 (Sacred Heart did not collect revenue from its mid-level practitioners' work). Thus, while the indictment alleges that Kuchipudi solicited and received free medical staff labor in return for his referral of patients to Sacred Heart, his ability to bill for those practitioners' work was, as the Court previously held, "part of the benefit." R. 566 at 4-6 ("In other words, the fact [that] . . . Kuchipudi was able to bill and make money for the work of these Sacred Heart employees is admissible to show his reason, or at least a reason, for entering into the scheme."). Insurance proceeds were, from Kuchipudi's perspective, the kickback—*i.e.*, the reason he joined the conspiracy. To use the Court's metaphor, Kuchipudi's ability to bill for Sacred Heart's labor was, at a minimum, "frosting" on the kickback cake. R. 566 at 6-7. Accounting for that "frosting" comports with Guideline § 2B4.1(b)(1)'s purpose and intent: "to measure the true magnitude of the crime for which the defendant was convicted." *Montani*, 204 F.3d at 772; *see* Guideline § 2B4.1(b)(1) cmt. background (providing that the base offense level "is to be enhanced based upon the *value of the unlawful payment*.").

In his sentencing memorandum, Kuchipudi attempts to limit the benefit of the scheme in time and scope. In particular, his argument, if accepted, would require the Court to ignore the true duration of the scheme and of the benefit he received (*i.e.*, all the free labor for which he billed). Kuchipudi obtained free labor from Sacred Heart that exceeded the specific instances

identified in the indictment. In addition to Joanna Szwajnos, Myrline Jeudy, Jean Rush and Dr. Horia Stamboliu, Kuchipudi billed for services provided by physician assistants Doug Willaman and Ursula Baldoceda and the emergency room physicians who examined and cared for his weekend and late night patient referrals. K.Tr. 643; G.E. Tr. 26-a; G.E. Tr. 26-c. In addition, Kuchipudi received benefits that preceded the December 2010 "start date" he asks the Court to adopt for its Guidelines calculations. From April 2010 through December 2010, both Szwajnos and Willaman spent a significant portion (albeit not all) of their time working for Kuchipudi. K.Tr. 780 (Willaman often spent "several hours" rounding on Kuchipudi's patients). They cared for his patients during the week and were on call to cover his weekend referrals. K.Tr. 668-9, 784-5, 1562. This pre-December 2010 labor is encompassed within the charged conspiracy and should be considered for purposes of sentencing. *See* R. 231.[3] While determining the hours Willaman and Szwajnos dedicated to Kuchipudi's patients before December 2010 may be difficult to estimate, the value Kuchipudi derived from their labor—the Medicare and Medicaid billings he received—is not. Kuchipudi received payment for approximately 805 separate claims for services provided to patients at Sacred Heart from April 8, 2010 to November 30, 2010—services that were primarily performed by Sacred Heart staff.

In addition to the services provided by Stamboliu and Sacred Heart's mid-level practitioners, the hospital allowed Kuchipudi to bill insurers for the patient evaluations performed by Sacred Heart's ER physicians. Kuchipudi billed close to 1,200 initial history and physical patient evaluations at Sacred Heart. *See* G.E. 2596b. Many of those examinations were

[3] Even if the charged conspiracy did not cover these services, which it clearly does, their value would need to be included in calculating Kuchipudi's guidelines as relevant conduct. *See* U.S.S.G. § 1B1.3(a) (loss calculation can include amounts involving similar actors, victims, *modus operandi*, time, and purpose so as to constitute a common plan or scheme); *United States v. Watts*, 535 F.3d 650, 658-59 (7th Cir. 2008).

performed at Kuchipudi's insistence by Sacred Heart's ER physicians. *See* Ex. A; VRKMDREC001284-85; G.E. Tr. 26-c (demanding that the hospital's ER physicians evaluate his referrals). The government's calculation of Kuchipudi's billing proceeds as set forth in its *Version of the Offense* appropriately incorporates these benefits.

As set forth in the its *Version of the Offense*, the government estimates that Kuchipudi obtained well over $750,000 in billing revenue from the free labor provided to him in return for his Sacred Heart patient referrals. *See* Gov't Ver. at 22-27. That figure is comprised of the following components, the calculation of which is explained in its *Version of the Offense*:

Source of Revenue	**Estimated Value of Kickback Claims Reimbursements** [4]
Professional services rendered at Sacred Heart	$542,998
Jean Rush's services rendered in nursing homes	$5,261
Szwajnos' subsidized nursing home services	$222,460
Total:	**$770,719**

Based on that calculation, the Court should increase Kuchipudi's offense level by the fourteen levels anticipated by Guideline § 2B4.1(b)(1) and § 2B1.1(b)(1)(H).

2. The Government Correctly Calculated the Cost of the Mid-Level Practitioner Labor Provided to Kuchipudi.

Kuchipudi argues that the Court should quantify the value of the bribe he received by calculating the cost of the free labor assigned to work for him. The government calculated that cost in its *Version of the Offense.* Excluding the free labor of Doug Willaman and Joanna Szwajnos before December 2010 and the ER physicians who cared for his patients at night,

[4] This figure does not include the additional estimated revenue Kuchipudi received from Szwajnos' subsidized work in his clinic, which the government will present to the Court at the time of sentencing.

Sacred Heart spent at least $412,500 employing staff to work exclusively for Kuchipudi. *See* Gov't Ver., Ex. C.[5] In an effort to minimize the financial magnitude of his crime, Kuchipudi's sentencing memorandum tries to diminish the cost of the free labor he received. In particular, despite their uniform testimony to the contrary, Kuchipudi engages in mathematical machinations to suggest that Joanna Szwajnos, Myrline Jeudy and Jean Rush lied when they testified that they spent the overwhelming majority of their time at Sacred Heart caring for his patients. R. 1114 at 28, 30. Kuchipudi's assault on their credibility lacks merit.

The mid-level practitioners uniformly testified that they spent the vast majority of their time at Sacred Heart working for Kuchipudi. Their testimony was individually and collectively consistent, and is corroborated by the testimony of numerous additional witnesses. Szwajnos, Jeudy and Rush testified in both the administrators' trial and in Kuchipudi's trial that, once assigned to work for Kuchipudi, they spent at least 90% of their time treating his patients.[6]

The practitioners' testimony was corroborated by their titular supervisors, Sacred Heart's directors of nursing. Michael Castro testified that Szwajnos and Jeudy were assigned to work solely for Kuchipudi. K.Tr. 1207, 1381-82. He acknowledged that Kuchipudi acted as the

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[5] In his sentencing memorandum, Kuchipudi questions why the government's analysis of the value of the bribe provided to him is greater than that presented in the defendant-administrators' sentencing. R. 1114 at 20. The basis for the government's calculations is set forth with precision in its *Version of the Offense*. Gov't Ver., Ex. A. Those calculations are greater than those presented in the administrator-defendants' sentencing because: (1) they are based on pre-tax rather than post-tax payments provided to the Kuchipudi-assigned employees; (2) they include the value of Dr. Horia Stamboliu's 2012 and 2013 weekend services; and (3) they account for Sacred Heart's subsidization of Joanna Szwajnos' work for Kuchipudi outside of the hospital. *Id.* at Ex. A & Ex. D.

[6] Szwajnos testified that she spent 90% to 95% of her time at Sacred Heart treating Kuchipudi's patients. K.Tr. 1783; N.Tr. 3213. Jeudy estimated she spent at least 90% to 95% of her time working for Kuchipudi. K.Tr. 2777; N.Tr. 3415. Rush testified that she spent at least 90% of her time treating his patients. K.Tr. 2716; N.Tr. 3720; *see also* K.Tr. 2768 (Jeudy confirmed that during the period she shadowed Rush, Rush did not care for other physicians' patients); N.Tr. 3408 (same).

practitioners' *de facto* boss, overseeing their work and setting their schedule. *See* K.Tr. 1209, 1211. Castro also testified that, despite already having two practitioners assigned to his patients, Kuchipudi requested additional practitioner support. K.Tr. 1235-37. That testimony was consistent with a June 19, 2012 recording in which Castro told Noemi Velgara that Kuchipudi had requested an additional PA to care for his patients. G.E. Tr. 9-a. Castro's testimony was corroborated by both his predecessor and successor. Debra Savage, who preceded Castro as Sacred Heart's director of nursing, testified that Sacred Heart had, in fact, hired Szwajnos for the purpose of assigning her to Kuchipudi. K.Tr. 628-30, 749. James Bailey, who succeeded Castro, told investigating agents that Szwajnos and Jeudy worked exclusively for Kuchipudi. *See* Ex. B at 1.

The practitioners' testimony was further corroborated by Sacred Heart physicians and nurses who cared for Kuchipudi's patients. Dr. Mohammed Asgar testified that Szwajnos and Jeudy appeared to care exclusively for Kuchipudi's patients. K.Tr. 2399 ("My understanding is there were two – one nurse practitioner, one physician assistant [who] used to see Dr. Kuchipudi's patients most of the time."); *id.* At 2400 (Question: "These – this nurse practitioner and PA that used to see Dr. Kuchipudi's patients, to your knowledge, did they see or work with other doctors' patients at Sacred Heart?" Asgar: "No."). Dr. Pedro De Los Trinos similarly testified that he did not recall Szwajnos or Jeudy treating other physicians' patients. N.Tr. 3993-94. Dr. Vijay Pallekonda referred to "Joanna and Myrline" as "his [Kuchipudi's] nurse practitioners" and testified that he never observed them working with another physician. N.Tr. 4778; *see also id.* 4806-07 (Pallekonda asked but never received assistance from Kuchipudi's practitioners). Sacred Heart ICU nurse Cynthia Carmona similarly referred to Szwajnos and Jeudy as "Kuchipudi's PA" and "Kuchipudi's nurse practitioner." N.Tr. 3940-41;

see also K.Tr. 2878-79 (stating that she did not ever recall ever observing Szwajnos and Jeudy treating "other patients in the ICU besides Dr. Kuchipudi's."). ER nurse Tiffany Posey similarly referred to Szwajnos and Jeudy as Kuchipudi's nurse practitioner and physician assistant. K.Tr. 2274. Dr. Stamboliu, who cared for Kuchipudi's patients on the weekend, confirmed that once assigned to Kuchipudi, the mid-level practitioners worked almost exclusively for Kuchipudi. K.TR. 3008-09. In his trial testimony, Dr. Stamboliu referred to Szwajnos and Jeudy as "Kuchipudi's service." K.Tr. 3085-86. Kuchipudi himself referred to the practitioners as "my girls" in a February 28, 2012 recording. G.E. Tr. 26-f. Thus, despite Kuchipudi's claim to the contrary, there is overwhelming evidence to support the testimony of Szwajnos, Rush and Jeudy, that they spent between 90% and 95% of their time at Sacred Heart caring for Kuchipudi's patients.[7]

Despite this uncontroverted testimony, Kuchipudi argues that the mid-level practitioners assigned to work for him could not have been as dedicated as they claimed because, he argues, he did not have the patient census to keep them busy. Kuchipudi's argument suffers from numerous, overlapping flaws.

To start, Kuchipudi's analysis is predicated on a purported summary of hundreds of pages of daily census sheets. *See* G.E. 2520. According to Kuchipudi, those documents reflect that from December 2, 2010 through April 13, 2013, Kuchipudi cared for a total of 5,332 patients.

[7] In his motion, Kuchipudi states that the Court should discount, if not ignore, Jean Rush's testimony that she cared for his patients because Rush testified that she did not work with Szwajnos, did not know what work Szwajnos performed, and that she [Rush] was responsible for seeing Kuchipudi's patients. R. 1114 at 30-31. Szwajnos and Rush did not work closely together. That, however, does not prove that Rush did not treat Kuchipudi's patients. As noted above, there is overwhelming evidence to corroborate Rush's testimony, including the notes that she authored that are contained throughout Kuchipudi's Sacred Heart patient's charts. A sample of some of those notes bearing Rush's signature and Kuchipudi's countersignature, are attached hereto as Ex. A.

R. 1114 at 28-29. The government has not audited Kuchipudi's summary of those exhibits, but notes that an analysis of the claims data spreadsheet produced by his biller shows that Kuchipudi billed 5,851 weekday claims during the same period. G.E. 2596a. Based on the types of codes billed, it appears that the vast majority of those claims reflect separate, individual patient services. *Id.* Kuchipudi's sentencing summary therefore appears to account for *only* 91% of the total number of patients seen.

Kuchipudi's analysis is also predicated on the false assumption that his assigned mid-level practitioners spent only 15 to 20 minutes treating each of his patients. In advancing this argument, Kuchipudi ignores the breadth of the mid-level practitioners' work, and instead focuses solely on what he characterizes as their "primary service" of conducting rounds. R. 1114 at 29. That characterization of their job unfairly and inaccurately diminishes the work they performed for his patients.

As each practitioner testified, the care they provided Kuchipudi's patients involved significantly more work than a physical examination of his patients. When the practitioners got to Sacred Heart, their first task was to identify Kuchipudi's patients. Szwajnos, Jeudy and Rush would then take the requisite time to review the individual patients' labs and diagnostic test results. This process, which is unaccounted for in Kuchipudi's analysis, could take a significant amount of time. *See* K.Tr. 2770 (Jeudy: "It can take a while. I don't know. Hours."). After reviewing this patient data, the practitioners would go room-to-room, floor-to-floor examining each Kuchipudi patient. *See, e.g.*, K.Tr. 1691 (Szwajnos). The time it took to physically examine patients was determined by the number of patients, their acuity, and their length of stay in the hospital. *See* K.Tr. 1692-93 (Question: "Other than the number of patients, were there any other factors that might affect the length of time that this took you?" Szwajnos: "How ill they

were. If they were sicker, they required more time. . . . And also if they were – say five new patients came in overnight, that would take me longer than if no new patients came in overnight. Because if none came in overnight, I would already know the existing patients."); K.Tr. 2772 (Jeudy: "Well, you know, a new patient, you spent more time with them."); *id.* (Question: "What factors affected the amount of time that it would take you [to examine patients]?" Jeudy: "Well, you know, it depends how sick is the patient."). All of the practitioners testified that their examination of Kuchipudi's patients could take hours. *See, e.g.*, K.Tr. 2772 (Jeudy: "Several hours.") K.Tr. 780 (Willaman: "[u]sually several hours"); N.Tr. 3563 (same); K.Tr. 2720 (Rush estimated she spent an average of 30 minutes with each patient). Following the physical assessment of patients, the practitioners had to record their examinations and analyses in the patient's charts, which again took a significant amount of time. K.Tr. 2772 (Jeudy: "In the medical unit, it takes, you know, several hours to write the notes on everybody."); 781 (Willaman: "After I was finished rounding on all the patients that I had, I would start documenting my findings and my progress notes."); *see also* K.Tr. 1691 (Szwajnos); 2720 (Rush). At times, the practitioners also had to consult with the various specialists assigned to assess and care for Kuchipudi patients. K.Tr. 960-61 (Willaman). Finally, the practitioners would shadow Kuchipudi as he darted from patient-to-patient. Kuchipudi's suggestion that the value of the services performed by the mid-level practitioners assigned to work for him was limited to their physical examination of patients and watching him round does not comport with the evidence.

The fallacy of Kuchipudi's analysis becomes clear when one looks at Kuchipudi's claims data. According to Kuchipudi's calculus, he was the beneficiary of "a grand total of 2,396 hours" of Sacred Heart practitioner time. Kuchipudi billed a limited array of specific CPT codes

at Sacred Heart. As the Court is aware, many of those codes note an estimated time it takes to perform the services. The following chart identifies codes Kuchipudi billed, their description, the number of individual instances in which he billed those services, the estimated length of time required to complete that care, and the corresponding total number of minutes of work allegedly performed:

CPT Code	Code Description	Number of Instances Kuchipudi Billed CPT Code at Sacred Heart	Estimated Time to Render Care to an *Individual Patient*	Total Time Billed (Minutes)
99222	Initial Hospital Care Moderate Complexity	417	50 min.	20,850
99223	Initial Hospital Care High Complexity	555	70 min.	38,850
99232	Subsequent Hospital Care Moderate Complexity	2629	25 min.	65,725
99233	Subsequent Hospital Care High Complexity	3532	35 min.	123,620
99238	Hospital Discharge Day Management	914	30 min. or less	27,420
99291	Critical Care Evaluation & Management, First Hour	260	30 to 74 min.[8]	7,800
			TOTAL:	**284,265 min. (or) 4,737.75 hrs.**

[8] Kuchipudi also billed the following codes for which the CPT code manual does not include estimated times. If one were to assume that each service occupied just 20 minutes, the numbers would be calculated as follows:

CPT Code	Code Description	Number of Codes	Estimated Time	Total Time When Service is Estimated to be 20 Min.
99217	Observation Care, Discharge	208	none listed	4,160
99220	Initial Hospital Observation High Complexity	224	none listed	4,480
99236	Observation Hospital Care High Severity	17	none listed	340
			TOTAL:	**8,980 min. (or) 149.67 hrs.**

While the above analysis includes services Kuchipudi billed at Sacred Heart beginning in April 2010 (and not December 2, 2010), services performed by Sacred Heart's ER staff, and patient care provided on weekends, it reflects Kuchipudi's gross underappreciation of the labor Sacred Heart provided him. An aggregation of the CPT Code Manual's estimated time required to perform each of these patient care services demonstrates how Kuchipudi's sentencing analysis undervalues the free labor he received for his patient referrals.

Finally, Kuchipudi's argument fundamentally fails to acknowledge the reason Sacred Heart employed the mid-level practitioners at all. Once Kuchipudi joined the Sacred Heart staff, the hospital's "PA program" quickly became the "Kuchipudi program." The hospital hired Szwajnos in anticipation of Kuchipudi's business, and by December 2010, assigned her to work exclusively for him. K.Tr. 629. It assigned Rush to work for Kuchipudi full time a mere 2 months after she was hired in the fall of 2010. K.Tr. 2695. When Jeudy replaced Rush, she too was told that Kuchipudi's patients were her only assignment. K.Tr. 2768.

Once assigned to Kuchipudi, these professionals were not under-utilized, as Kuchipudi claims.[9] That is not to say that every day was equally busy. Perhaps there were some slow days in which Kuchipudi's census could not keep the staff assigned to work for him fully engaged. Szwajnos, Jeudy and Rush were nevertheless there *exclusively* for him. Kuchipudi's suggestion that their employment should now be viewed as that of third-party, independent contractors, who billed hourly for their work, disingenuously ignores both his relationship with Sacred Heart, and the hospital's relationship with the staff hired to work exclusively for him. Szwajnos, Rush, Jeudy and Willaman were not independent contractors paid by the hour. They were employees

[9] Kuchipudi actually wanted additional staff hired and assigned to work for him. G.E Tr. 9-a.

who were paid salaries and received benefits to work for Kuchipudi. Kuchipudi's wholesale reclassification of their utilization and value should be rejected.

3. The Court's Bribe Calculation Should Include Szwajnos' Travel Reimbursement.

Kuchipudi argues the Court should discount the $10,569 that Sacred Heart paid Joanna Szwajnos to travel to treat his patients in his office or their nursing home residences. Other than noting that the jury did not convict him of the two counts associated with those payments, Kuchipudi offers no reason to discount this indirect benefit.

It is well-accepted that in calculating "loss amount" under the Guidelines, a court should determine not only the loss associated with the conduct of conviction, but any relevant criminal conduct, regardless of whether that conduct was charged. *See United States v. Frith*, 461 F.3d 914, 917 (7th Cir. 2006) ("Loss amount for purposes of the guidelines must be calculated on the basis of the conduct of conviction and relevant conduct; relevant conduct must be criminal or unlawful conduct, though it need not have been charged."); *United States v. Swanson*, 483 F.3d 509, 514 (7th Cir. 2007) ("[R]elevant conduct not charged in the indictment is always fair game at sentencing."). "Conduct underlying an acquitted charge may be included as long as that conduct is proved by a preponderance of the evidence." *Frith*, 461 F.3d at 917 (citing *United States v. Watts*, 519 U.S. 148, 157 (1997)).

The government established by a preponderance of the evidence that the travel reimbursement payments paid by Sacred Heart to Szwajnos served as an indirect benefit to Kuchipudi. The spreadsheets that Szwajnos provided the hospital as support for those payments clearly show that Szwajnos was reimbursed for the costs of traveling to treat Kuchipudi's non-hospitalized patients. G.E. 6402, 6448. Kuchipudi alone billed insurers for the services she provided patients in those locations. G.E. 6445, 2572. Sacred Heart obtained no direct value

from her work at Kuchipudi's office or in his nursing homes. Rather, Sacred Heart paid these Szwajnos' expenses *for* Kuchipudi. It is also uncontroverted that Kuchipudi was aware that Sacred Heart was reimbursing Szwajnos for these expenses. K.Tr. 1643-45. Kuchipudi should therefore be held accountable for this component of the bribe.

4. The Court's Bribe Calculation Should Account for Sacred Heart's Subsidization of Szwajnos' Work Outside the Hospital.

From January 1, 2011 through April 15, 2013, Sacred Heart paid Szwajnos approximately 72% of her salary. *See* Gov't Ver., Ex. C. Szwajnos, however, spent only 40% of her time working at Sacred Heart. K.Tr. 1601. At trial, Szwajnos was asked about the amount of time she spent working for Kuchipudi and the amount he paid her – $2,000 a month.

Question: Prior to your testimony today, did you sit down and determine how much, given the sixty percent of your time outside of the hospital and a $24,000 annual salary, how much that salary would have been if effectively annualized for a full-time job at a hundred percent?

Szwajnos: You mean the $24,000?

Question: Yes.

Szwajnos: It would be about $40,000 a year.

Question: Would you have ever accepted a position working as a physician assistant at $40,000 a year?

Szwajnos: No.

Question: Why not?

Szwajnos: I went through a lot of schooling, and the standard pay is not $40,000 a year for a PA. I was making, you know, 75, $80 an hour working for Dr. May on weekends. I wasn't going to take a job at $40,000 a year.

K.Tr. 1786-77. Kuchipudi argues that the Court should ignore the value of Szwajnos' labor outside of the hospital, because, he claims, he paid Szwajnos "a fair market rate." R. 1114 at 27. He further claims that the preponderance of the evidence does not support a finding that he

understood that Sacred Heart was subsidizing Szwajnos' salary.[10] That claim of ignorance is belied by his experience. Kuchipudi had hired and paid less experienced physician assistants significantly more that the amount he was paying for Szwajnos' work. *See, e.g.*, K.Tr. 1997-99 (Kuchipudi initially paid Zidlicky $72,000 a year). Capable of rudimentary math, Kuchipudi understood that Sacred Heart was heavily subsidizing Szwajnos' work for him outside of Sacred Heart.

B. Kuchipudi Victimized Vulnerable Patients.

Kuchipudi took advantage of an unquestionably vulnerable patient population. The patients who became the instruments of Kuchipudi's crimes were elderly and physically and/or mentally impaired nursing home–bound patients. *See, e.g.*, K.Tr. 856-57, 2190. Many of these patients were reliant on Kuchipudi's guidance and care. As the government has demonstrated in its *Submission Regarding the Patient-Victims of Defendant's Offense*, R. 1107, and its *Reply to Defendant Kuchipudi's Response to the Government's Submission Regarding the Vulnerable Victim Enhancement* , R. 1128, Kuchipudi knowingly subjected the patients that he sent to Sacred Heart to increased risks of harm, and, in some cases, actual harm. For the reasons identified in the government's *Submission* and *Reply*, Kuchipudi should receive the four-level enhancement for victimizing a multitude of vulnerable victims pursuant to Guideline § 3A1.1(b). R. 1107, 1128.

[10] In particular, Kuchipudi argues that the evidence did not show that he "knew or understood that [Szwajnos'] work outside the hospital amounted to a kickback within the meaning of the AKS." R. 1114 a 27. The government, of course, proved beyond a reasonable doubt that Kuchipudi understood that Sacred Heart could not legally provide him with free labor in return for his patient referrals. K.Tr. 4977-78. As set forth above, it was undoubtedly clear to Kuchipudi that the hospital was subsidizing the cost of Szwajnos' clinic and nursing home services.

C. Kuchipudi Abused a Position of Trust.

Kuchipudi next challenges the probation officer's application of Guideline § 3B1.3's enhancement for abuse of a position of trust. R. 1114 at 32-34. This Court has imposed the abuse of trust enhancement to the other physician kickback recipients in this case. Consistent with its prior analysis, the Court should apply the enhancement in sentencing Kuchipudi.

Guideline § 3B1.3 provides that if a defendant "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense" his offense level should be increased by 2 levels. Guideline § 3B1.3. While the Guideline does not define what constitutes a "position of public or private trust," its commentary describes the term as one "characterized by professional or managerial discretion (*i.e.,* substantial discretionary judgment that is ordinarily given considerable deference)," further stating that "[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature." Guideline § 3B1.3 cmt. background.

The Seventh Circuit has held that "[m]edical service providers occupy [such] positions of trust with respect to private or public insurers (such as Medicare) within the meaning of Guideline § 3B1.3." *United States v. Hoogenboom,* 209 F.3d 665, 671 (7th Cir. 2000); *United States v. Vivit,* 214 F.3d 908, 924 (7th Cir. 2000). In *Hoogenboom,* the court held that the enhancement applied to physicians who use their profession to violate the law, stating:

> Medical providers ... enjoy significant discretion and consequently a lack of supervision in determining the type and quality of services that are necessary and appropriate for their patients. This forces Medicare to depend, to a significant extent, on a presumption of honesty when dealing with statements received from medical professionals.

Hoogenboom, 209 F.3d at 671; *United States v. Tiojanco,* 286 F.3d 1019, 1020 (7th Cir. 2002) ("Doctors . . . enjoy significant discretion in deciding what course of action is appropriate for

their patients and clients; patients and clients (and their insurers) are forced to rely on these professional judgments."). Other circuits have reached this same conclusion. *See, e.g., United States v. Ntshona*, 156 F.3d 318 (2d Cir. 1998) ("We adopt the view of the other circuits presented with this issue and hold that a *doctor* convicted of using her position to commit Medicare fraud is involved in a fiduciary relationship with her patients and the government and hence is subject to an enhancement under § 3B1.3") (emphasis in original); *United States v. McCollister*, 96 Fed. Appx. 974, 976 (6th Cir. 2004) ("A practicing physician enjoys perhaps the highest level of discretion afforded any professional.").

In opposing application of the "abuse of trust" enhancement, Kuchipudi argues that because so many doctors participate in the Medicare program, violations of statutes that defraud that program cannot, without more, support the enhancement. *See* R. 114 at 34. In other words, Kuchipudi argues that violations of the Anti-Kickback Statute are insufficient by themselves to implicate Guideline § 3B1.3. In support, Kuchipudi cites a single district court case, *United States v. Anderson*, 85 F. Supp. 2d 1084 (D. Kan. 1999).[11] To start, that case stands in stark contrast to the decisions of the Second, Third, Fourth, Sixth and Eleventh Circuits, which have held the enhancement appropriate for physicians found guilty of violating the Anti-Kickback Statute. *See United States v. Babaria*, 775 F.3d 593, 596-97 (3d Cir. 2014) (Physician who supervised payment of kickbacks for radiology patient referrals occupied a position of trust to

[11] In introducing *Anderson*, Kuchipudi writes that "*[c]ourts* . . . have held the abuse of trust enhancement is inapplicable to AKS violations." R. 1444 at 33 (emphasis added). Kuchipudi, however, fails to cite any additional case in which a court explicitly rejected application of the abuse of trust enhancement in sentencing a physician found guilty of violating the Anti-Kickback Statute, and the government is unaware of such a case.

Medicare and Medicaid for purposes of Guideline § 3B1.3);[12] *United States v. Adam*, 70 F.3d 776, 782 (4th Cir. 1995) (paying/receiving kickbacks for referral of federally insured patients qualifies as abuse of position of trust even where the services performed are otherwise medically necessary and appropriate); *United States v. Fata*, --- Fed. Appx. ---, Case No. 15-1935, 2016 WL 3000349, *3 (6th Cir. May 25, 2016) (applying enhancement because "[t]he discretion, the lack of supervision and the deference granted to Fata by virtue of his being a physician . . . place[d] him in the position to commit his offenses." Those offenses included conspiring to pay and receive kickbacks); *United States v. Liss*, 265 F.3d 1220, 1229-30 (11th Cir. 2001) (holding that a physician abuses a position of trust when he receives kickbacks even "where the referrals were medically necessary and physician does not falsify patients records or submit fraudulent claims to Medicare"). Moreover, despite Kuchipudi's suggestion to the contrary, no court has adopted the *Anderson* district court's critique of *Adam* or its broader analysis. Indeed, the Eleventh Circuit explicitly adopted the *Adam* court's analysis in *Liss*. *See Liss*, 265 F.3d at 1229-30 ("Suffice it to say that we agree with the Fourth Circuit's analysis in *Adam* and adopt its analysis and holding."). The Third Circuit similarly adopted the *Adam* court's reasoning, while acknowledging and rejecting the *Anderson* court's contrary holding. *Babaria* 775 F.3d at 598. The Second Circuit similarly cited to the *Adam* decision in *Ntshona*, 156 F.3d at 321, a case cited favorably by the Seventh Circuit in *Hoogenboom* for the proposition that physicians occupy positions of trust with respect to insurers like Medicare.

The application of the enhancement is similarly appropriate in this case. There is no question that Kuchipudi's role as a physician responsible for geriatric nursing home patients'

[12] The *Babaria* court found application of the abuse of trust enhancement appropriate despite the lack of evidence that Dr. Babaria falsified patient records, billed for medically unnecessary procedures, or otherwise compromised patient care. *Babaria*, 775 F.3d at 595.

care made the scheme difficult to detect. His patients' inability to make decisions concerning their own medical care gave Kuchipudi nearly limitless discretion in determining where those patients would receive care, and, from Medicare's vantage point, his patient referrals to Sacred Heart appeared ordinary on their face because Kuchipudi and Sacred Heart went to such great lengths to conceal Kuchipudi's illegal remuneration. There is also no question that the Medicare system relied on Kuchipudi's presumed knowledge and integrity as a medical provider. N.Tr. 1101 (Because the government doesn't see providers upon enrollment, "we have certain attestation statements within the enrollment process to basically ensure that our providers are honest and truthful in their claim submissions."); K.Tr. 1410 ("[W]e put a lot of trust and faith in our doctors for knowing the rules and regulations and knowing the policies in which they have to bill claims."). In light of these facts, the Court should adopt the PSR's finding, and add two offense levels based on Kuchipudi's abuse of a position of trust. PSR, ¶ 54.

II. A SENTENCE WITHIN THE GUIDELINES RANGE IS SUFFICIENT BUT NOT GREATER THAN NECESSARY TO ACCOMPLISH THE GOALS OF SENTENCING.

A. Nature and Circumstances of the Offense

The Court knows this case. It knows the participants. It knows their scheme. It therefore comprehends Kuchipudi's central role in a kickback conspiracy that dehumanized some of society's most exposed individuals. Kuchipudi's conduct in this case does not represent the "finest qualities" among us, or "the better angels of our nature," as Kuchipudi characterizes himself in his *Sentencing Memorandum*. R. 1114 at 1. Kuchipudi monetized an extremely vulnerable patient population by directing them to a hospital he consistently criticized as substandard for the sole reason that he benefitted financially. Kuchipudi did not simply solicit and receive payments for patient referrals—he placed those patients on the market, selling them to the hospital that would pay. K.Tr. 4376-77 (Kuchipudi told Loretto's CEO his hospital was

"losing business" by not giving him free practitioner labor). Because many of those patients were ill-equipped to make decisions regarding their medical care, underprivileged, elderly and mentally disabled nursing home–bound patients experiencing varying degrees of medical distress and anxiety were sent by ambulance, often great distances, to Sacred Heart. Relying on a fraudulent code that served to justify their transports—"direct admit to Room 200A"—ambulances bypassed other, better suited, hospitals, including facilities at which Kuchipudi had privileges, in order to reach Sacred Heart. Patients were sent on these unnecessary journeys at all times of the day and night, only to arrive at an emergency room that was often ill-equipped to meet their actual needs. There was nothing "kind" or "decent" in that conduct. *See* R. 1114 at 38.

Kuchipudi's sentencing presentation lacks any true acknowledgment, let alone contrition, for his crime. Instead, Kuchipudi continues to describe his association with Sacred Heart as nothing more than a mutually beneficial arrangement designed to aid an over-worked physician. R. 1114 at 15. While Kuchipudi acknowledges that his association with Sacred Heart crossed a legal threshold, he suggests that he never intended to violate the law. He further maintains that irrespective of the technical legality of his conduct, he never abandoned his commitment to his patients whom, he claims, benefitted from his criminal acts. *Id.* at 15-19 (claiming that the scheme allowed Kuchipudi to care for more patients and that the assistance of mid-level practitioners augmented and improved overall patient care: "[T]he patients benefited as well."). This characterization of his conduct amounts to an astonishing white-washing of his actions and repudiation of the jury's verdict.

In addressing his actions, Kuchipudi's sentencing memorandum completely ignores the scienter elements of the jury's verdict. Kuchipudi was not convicted of a strict liability crime. The jury found that Kuchipudi knowingly and *willfully* conspired to violate the Anti-Kickback

Statute–*i.e.*, that he "act[ed] voluntarily and purposely, with the specific intent to do something [he knew] the law forbids." K.Tr. 4981. Kuchipudi knew "what he was doing was illegal." His decisions were *not* made in good faith. *Id.* at 4981-82. Kuchipudi's assertion that he never abandoned his patients' interests simply cannot be reconciled with that verdict. More fundamentally, Kuchipudi's justification does not explain why he did not pay for his own staff or why he effectively outsourced the entirety of his patients' care to that staff.

B. Other Benefits Kuchipudi Obtained From Novak and Sacred Heart

Although not charged, Kuchipudi extracted other benefits from Ed Novak and Sacred Heart. Kuchipudi sought and obtained below-market malpractice insurance from Novak's company, the Bentley Insurance Group. Although Bentley had previously denied him coverage, Kuchipudi applied for malpractice coverage from Bentley in December 2009 as Sacred Heart began to recruit him. In a December 7, 2009 email, one of Bentley's underwriters (Individual NS), noted that Bentley had previously denied Kuchipudi coverage due to the frequency of claims alleged against him and again recommended refusing Kuchipudi coverage. Ex. G. Another Bentley employee (Individual JA) noted the frequency of those claims in a subsequent email to Novak, stating: "Dr. Kuchipudi [sic] claim frequency is very high and that alone can be costly to BIG [i.e., Bentley Insurance Group]." *Id.* JA agreed with the underwriter's recommendation: "Ed[,] we should consider declining him [Kuchipudi] because of his frequency." *Id.* Yet, in a December 9, 2009 email back to NS, JA wrote: "I just spoke to Ed, both of us know Dr. Kuchipudi and Ed is very familiar with his practice. Dr. Kuchipudi is paying about $43K[.] Ed suggested going in at about $41K." *Id.* Bentley offered Kuchipudi coverage at $39,000. Although Kuchipudi apparently incurred new claims after obtaining coverage from Bentley, including suits filed against him in 2010, 2011, and 2012, Bentley not only continued to provide

Kuchipudi coverage, but did so at reduced rates.[13] Ex. H. In December 2012, another Bentley employee wrote an email to Kuchipudi's insurance placement agent stating that, in light of those claims, Bentley would need to raise Kuchipudi's premium to $42,200. Ex. H. According to Kuchipudi's broker (and confirmed by her contemporaneous email), when she conveyed Bentley's concerns to Kuchipudi, he "went over [the Bentley employee's] head" and contacted Novak directly. Bentley subsequently provided Kuchipudi coverage at a reduced rate of $31,500, when he suggested he could obtain coverage from another provider at $33,350. Ex. H.

Kuchipudi extracted other benefits from Sacred Heart. In his early interviews with law enforcement, Tony Puorro informed investigating agents that Kuchipudi had begun requesting that Sacred Heart pay him for meals at Gibsons Bar and Steakhouse. According to Puorro, Kuchipudi would buy himself gift cards to the restaurant and then bring Sacred Heart the receipts. In a March 5, 2013 recording, Kuchipudi confirmed that he wanted $1,000 in Gibsons' gift certificates. *See* 1D151, Sess. 6. Puorro raised the gift certificate issue again in a March 11, 2013 meeting. Kuchipudi confirmed that he was waiting to be reimbursed for "$800 to $900" in Gibsons' gift certificate receipts. *See* 1D153, Sess. 6. In a March 15, 2013 meeting, Puorro provided Kuchipudi a new batch of gift certificates, and told him that, going forward, Sacred Heart would provide Kuchipudi with $200 in Gibson's gift certificates every month. "Thank you for all your business . . . . I spoke with Mr. Novak. He would like to give you, like, ongoing, so you don't have to give me the receipts, $200 every month. So, come back next month and it will be $200 every month . . . . But thank you for the admissions." *See* 1D153, Sess. 23.

[13] Before Bentley, Kuchipudi had experienced difficulty obtaining reasonably priced malpractice coverage. Kuchipudi's longstanding insurance agent stated that, in the years immediately preceding the date in which he obtained coverage with Bentley, Kuchipudi was twice dropped by carriers due to the frequency of claims alleged against him.

C. History and Characteristics of the Defendant

1. Kuchipudi's Refusal to Accept Responsibility for his Conduct or its Effect on Victims

The eloquent prose of his counsel's sentencing submission cannot mask the self-centered entitlement and greed that characterized Kuchipudi's association with Sacred Heart. Kuchipudi's lengthy sentencing memorandum lacks any meaningful acknowledgment of his criminal conduct, let alone contrition for his actions. Rather, despite a mountain of evidence and the jury's resounding verdict, Kuchipudi remains unapologetic. He continues to steadfastly ignore the adverse effect his conduct may have had on patients' care, insisting that, despite overwhelming evidence to the contrary, his actions somehow reflect his prioritization of his patients' interest. Ignoring the impact his actions had on patients, Kuchipudi characterizes himself as the victim, focusing solely on the ways in which he has suffered from his prosecution. *See* R. 1114 at 21-22.

2. A Commitment to Wealth Over Care

Kuchipudi built a successful medical practice. Over time, he employed numerous physicians, nurse practitioners, physician assistants and medical assistants. Kuchipudi clearly gained the trust of a patient population who regularly came to his office for care, and at the same time, he established a significant nursing home practice. By 2010, Kuchipudi had access to patients in over 30 nursing homes.

In his sentencing memorandum, Kuchipudi presents himself as a hard-working physician, committed to his patients. The letters submitted to the Court by Kuchipudi's family and friends reference a physician with an extraordinary, life-long passion for medicine and an exemplary work ethic—a doctor who always seemed willing to "sacrifice[] his life for his patients." R. 1114, Ex. B; *see id.* at Ex. C ("His devotion to patient care was always his number one

priority. . . . [H]e put patient care above anything else."); Ex. H. ("There was never a time where he was 'off' work."). His advocates laud his consistent willingness to work long hours for his patients. *See, e.g.*, R. 1114, Exs. C, E-H. This characterization of Kuchipudi, however, cannot be reconciled with the evidence in this case. That Kuchipudi—if he did exist—is not the man who sent his patients to Sacred Heart. Rather, Kuchipudi's sentencing presentation sets forth, at best, a dichotomy of personality: (1) the Brookpark Medical Center Kuchipudi who cared for those patients who came to his office and, when necessary, were hospitalized at respected west suburban hospitals; and (2) the Sacred Heart Kuchipudi who passed off responsibility for the care of indigent, nursing home-bound patients by directing them to a substandard hospital for his own profit.

Kuchipudi obtained privileges at Sacred Heart in April 2010. *See* G.E. 3417. He began referring patients to the hospital almost immediately. *See* G.E. 2596a. His patients arrived at Sacred Heart day and night, weekend and weekday. Kuchipudi, however, refused to work weekends, and to start, his weekend referrals were required to wait without a medical examination or physician care because Kuchipudi did not want to forgo the opportunity to bill for their treatment. Debra Savage, Sacred Heart's director of nursing, believed Kuchipudi's patients required more expeditious care. She implemented procedures to make sure that Kuchipudi's undiagnosed patients received some assessment. K.Tr. 668-69. She set up a "Kuchipudi on-call" assignment for the hospital's physician assistants and required new referrals to be "eye-balled" in the ER upon arrival. *Id.* To address Kuchipudi's billing demands, the hospital would later hire Dr. Stamboliu to cover Kuchipudi's patients on weekends and allow Kuchipudi to bill for the ER physicians' patient examinations. Kuchipudi also refused to take patient calls from Sacred Heart at night. *See* G.E. Tr. 26-j. Again, the hospital was forced to

cover, so Sacred Heart once again hired Stamboliu "to answer phone calls from Sacred Heart when Dr. Kuchipudi didn't answer or when he was not available from 7:00 [p.m.] to 7:00 [a.m.]" K.Tr. 2991; G.E. Tr. 26-j (Kuchipudi explaining that he needed to "relax at night.").

Kuchipudi was similarly cavalier with his patients' care during the day. The practitioners hired by Sacred Heart to work for Kuchipudi spent hours caring for his patients. When Kuchipudi made it to the hospital, he would round on those same patients in a cursory fashion. K.Tr. 1694-95 (Szwajnos), K.Tr. 2720-21 (Rush), 2770-79 (Jeudy), 780, 911 (Willaman). Myrline Jeudy testified Kuchipudi spent "minutes" moving "in and out" of the patients' rooms, taking only 10 to 15 minutes to cover all of his patients. K.Tr. 2775-76. Doug Willaman explained Kuchipudi would "[t]ypically," spend "a minute-ish" with each patient. K.Tr. 780, 911. Jean Rush similarly testified that Kuchipudi would spend only 15 to 20 minutes rounding on the patients. K.Tr. 2721; *see also* K.Tr. 1692, 1695 (Szwajnos testified Kuchipudi took between 20 minutes and an hour to see his patients). Cynthia Carmona testified that she never saw Kuchipudi physically examine a patient in the ICU. K.Tr. 2881. A cursory review of Kuchipudi patient charts further belies Kuchipudi's continued claim that he consistently and meaningfully participated in his patients' care. So many of those charts contain only the detailed notes of the mid-level practitioners assigned to work for Kuchipudi, supplemented only by his comment-less signature.

To buttress his claim of commitment to his profession, Kuchipudi's sentencing memorandum is accompanied by the letters of a number of former patients who laud Kuchipudi's interest to their treatment and care. *See, e.g.* R. 1114 at Ex. F. None of those patients, however, appear to have been residents in the feeder nursing homes Kuchipudi used to generate business for Sacred Heart, and none were ever sent there for care. *See* R. 1114;

G.E. 2596A. There are no letters from those nursing home patients or their family members. Rather, the Court has the trial evidence of Kuchipudi's inattentiveness, if not indifference to those patients' care. Willaman testified that he would provide Kuchipudi updates on his patients' care through voicemails, which often went unreturned. K.Tr. 910; *see also* K.Tr. 1555-56. According to Jeudy, Kuchipudi often did not even know who his patients were or why they were hospitalized.

> Question: In your experience rounding with Dr. Kuchipudi, was he familiar with the patients that he had referred to Sacred Heart Hospital?
>
> Jeudy: No.
>
> Question: What do you mean by that?
>
> Jeudy: Well, when I make rounds with him, he, like, has no clue, and I used to get pissed off at that because he has no clue on whom he is sending and, you know, what they are there for.
>
> Question: Would you have to tell him who the patients were and why they were there?
>
> Jeudy: Yes.

N.Tr. 3427.

Kuchipudi's claimed commitment to care is further undermined by how he historically used physician assistants to care for his nursing home residents. Before Sacred Heart provided him Szwajnos' assistance, Kuchipudi had employed physician assistants Joyce Pretzer and Sarah Zidlicky. Kuchipudi hired Pretzer, his first PA, in the spring of 2006. Zidlicky took over for Pretzer in early 2008. Kuchipudi hired both Pretzer and Zidlicky directly from their physician assistant programs. V.R. Kuchipudi M.D.S.C. was their first healthcare job. *See* Ex. C; Ex. D. Nevertheless, Kuchipudi provided both women virtually no training before sending them into the nursing homes *alone* to treat his patients. Pretzer told investigating agents that Kuchipudi accompanied her to the nursing homes for the first one or two weeks where she performed

patient examinations alone, after which she was completely on her own. *See* Ex. C at 2. Zidlicky was trained by Pretzer, who she shadowed for a couple of weeks. *See* Ex. D at 1. Kuchipudi provided neither practitioner any true on-site supervision. Rather, Kuchipudi would show up at the nursing homes after they had examined his patients simply to sign the notes they had authored. *See* Ex. C at 3 (Pretzer told investigating agents that she rarely saw Kuchipudi at the nursing homes. When he was there, it was to counter-sign her notes without examining patients); *see also* Ex. D at 3 (Zidlicky could not recall instances in which Kuchipudi amended her notes; he only occasionally ordered additional lab work). Zidlicky described her employment with Kuchipudi as "trial by fire," stating that "a supervisory physician should be more supervisory." Ex. D at 3, 6.

3. Instances of Kuchipudi's Dishonesty

Although the Anti-Kickback Statute does not have deceit as one of its elements, violations of the law invariably incorporate questions of honesty.[14] That was clearly the case here. Kuchipudi knew the rules. He chose to violate them. More importantly, he violated them in a fashion that consistently required active, intentional misrepresentations. Kuchipudi submitted claims for services he did not provide. He consistently billed Medicare and Medicaid for services rendered by the physician assistants, nurse practitioners and doctors hired by Sacred Heart to work for him. To conceal the unlawful benefit he received, Kuchipudi falsely claimed that he had personally provided the services those professionals had rendered. At trial, Kuchipudi argued that he personally checked the mid-level practitioners' work, rounding on each patient they treated. As explained above, the practitioners' testimony laid bare the falsity of that

[14] The Patient Protection and Affordable Care Act contains a provision which expanded the False Claims Act to include a claim for services predicated on violations of the Anti-Kickback Statute. 42 U.S.C. § 1320(a)-7b(g). Accordingly, violations of the Anti-Kickback Statute constitute false claims.

claim. Moreover, that argument does not explain the approximately 2,320 CPT claims that Kuchipudi billed insurers for services rendered to his patients on the weekends. *See* G.E. 2596c. That work was performed *solely* by Dr. Stamboliu and the physician assistants who were on call to care for his patients. K.Tr. 668-69. Had Kuchipudi employed the practitioners who performed those services—*e.g.*, if he had paid Dr. Stamboliu for his work—Kuchipudi could have billed their services to his practice under the practitioners' actual NPI number. He did not do that. Instead, he took credit for services rendered by others, in order to conceal his criminal conduct.[15] Similarly, Kuchipudi billed insurers for the nearly 1,200 initial history and physical patient examinations he never performed. *See* G.E. 2596b. Many of those examinations were performed by Sacred Heart's ER physicians. Simply put, there was a heightened dishonesty in Kuchipudi's particular violations of the Anti-Kickback Statute.

Examples of Kuchipudi's dishonesty are not limited to his offense of conviction. As detailed above, as part of its investigation, the government acquired information regarding Kuchipudi's acquisition of medical malpractice insurance for himself and his staff. As part of that process, Kuchipudi made a number of false representations. Kuchipudi claimed that his medical practice was limited to office work, specifically stating that he did not treat patients in hospitals or nursing homes. *See* Ex. E, ¶¶ 1-2, 7. He further falsely indicated that he was a solo practitioner and not part of a group practice. *See id.* at ¶¶ 10, 14a-c. Kuchipudi also falsely denied serving as a medical director within a hospital or other facility. *See id.* at ¶ 11. Kuchipudi's practice also submitted a malpractice insurance application on behalf of Naghma Sayyed that contained similar inaccuracies. That application falsely reflected that Sayyed was an

[15] As the Court is aware from the parties' pre-trial briefings, Kuchipudi also obtained an inflated rate of reimbursement for services rendered by mid-level practitioners by claiming he had rendered the services.

independent contractor (and not an employee), who had only an office practice. Ex. F, ¶¶ 1-2, 10. In particular, the application falsely stated that Sayyed did not practice in nursing homes. *See id.* at ¶ 7. According to Sayyed, who had never saw the application before it was presented to her by the government, the signature of her name on the application was forged.

D. The Need For a Sentence to Provide Just Punishment

For Kuchipudi, the illegality of his kickback arrangement with Sacred Heart was never in question. Kuchipudi has, at various times throughout this litigation, argued that his patients-for-staffing arrangement with Sacred Heart was protected by one of the Anti-Kickback Statute's safe harbors. *See, e.g.*, R. 1065. Tellingly, Kuchipudi has *never* argued he relied in good faith on the safe harbor's protection. *See id.* This is because Kuchipudi knew his arrangement with Sacred Heart was unlawful. He was specifically advised that this staffing-for-patients arrangement with Sacred Heart violated the Anti-Kickback Statute and that the safe harbors provided no protection. In particular, Kuchipudi was advised by two separate legal memos that he could not bill for services rendered by advanced practitioners employed by a hospital to which he referred patients.[16] Moreover, Kuchipudi simply knew better. He had employed physician assistants and nurse practitioners for years. He knew what they did and knew what they cost. Kuchipudi wanted to avoid those costs so he traded his nursing home patients for the right to bill for Sacred

[16] Loretto Hospital's CEO provided Kuchipudi a memorandum written by its outside counsel, Hogan Marren, Ltd, which specifically stated that the hospital could not employ advanced practitioners to perform patient examinations while allowing the referring physician to bill for those services, concluding that "if a hospital provides the services of a [non-physician practitioner] to the physician without charge, both the hospital and physician may have violated the Anti-Kickback Statute." G.E. 2901; *see also* K.Tr. 4355. Kuchipudi also had a copy of a legal memorandum written by Sacred Heart's outside counsel, Joan Lebow, which stated: "[w]hen [physician assistants and advanced practice nurses] are working at the Hospital, the Hospital alone may bill for the Provider's [sic] services." G.E. 9602 (emphasis in original); K.Tr. 3288-89.

Heart's free labor. He did so with the full knowledge that he was subordinating his patients' care to his own financial gain. Kuchipudi's conduct necessitates a punishment of incarceration.

A Guideline sentence is also appropriate for the specific reason that this is not the typical Anti-Kickback Statute case. It is about more than precluding economic distortions in the medical marketplace. Kuchipudi did not simply profit from his ability to direct from whom his patients obtained care; he knowingly jeopardized the quality of that care in his effort to profit from that control. The imposition of a Guideline sentence of incarceration is required to account for Kuchipudi's abuse of his patient-victims' trust.

E. The Need for Deterrence[17]

The Anti-Kickback Statute reflects Congressional intent to punish individuals who abandon their fiduciary obligations to patients and Medicare in return for their own pecuniary gain. *See United States v. Kruse*, 101 F. Supp. 2d 410, 413 (E.D. Va. 2000) (stating that the Anti–Kickback Statute's "legislative history also suggests a deterrent, and thus punitive, purpose"); H.R. Rep. No. 95–393, pt. 2, at 44, reprinted in 1977 U.S.C.C.A.N. 3039, 3040, 3047, 3050 (stating that the Anti–Kickback Statute was enacted to "strengthen the capability of the Government to detect, prosecute, and punish fraudulent activities under the Medicare and Medicaid programs"). Sacred Heart is not the first hospital in the Northern District of Illinois to pay kickbacks, and Kuchipudi is not the only physician who has sought to profit from his ability to direct from whom his patients receive care. Providers' continued violation of the Anti-Kickback Statute demonstrates the ongoing need for sentencing enforcement to act as a deterrent to future violations.

[17] The government acknowledges that specific deterrence is of diminished import in this case. Kuchipudi is sixty-nine years of age. His medical license has recently lapsed and likely cannot now be renewed. He has also been suspended from participating in the Medicare and Medicaid benefit programs.

Medical professionals of every kind must know that patient need should be the only factor influencing decisions concerning patient care. Patients are not commodities to be bartered or monetized. A meaningful sentence of imprisonment reinforces the message that real penalties exist for trading patients for cash or benefits in kind. *See United States v. Hayes*, 762 F.3d 1300, 1308 (11th Cir. 2014) ("[G]eneral deterrence is an important factor in white-collar cases, where the motivation is greed."). The need for general deterrence is especially compelling because of how lucrative and difficult-to-detect violations of the Anti-Kickback Statute are. *See United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) ("Considerations of (general) deterrence argue for punishing more heavily those offenses that either are lucrative or are difficult to detect and punish, since both attributes go to increase the expected benefits of a crime and hence the punishment required to deter it."). While it may be difficult for the government to discover violations of the Anti-Kickback Statute, prospective violators should know that there are penal repercussions when those violations are uncovered. Finally, the Court's sentence should also demonstrate that when medical professionals knowingly place patients' care at risk for monetary gain, they are simultaneously putting themselves at risk too.

F. The Need to Avoid Unwarranted Sentencing Disparities

A sentence predicated on a Guidelines calculation that takes into account Kuchipudi's victimization of a multitude of vulnerable victims, his violation of his fiduciary obligations to his patients and Medicare, and the totality of the benefits he received from the scheme is appropriate. In *United States v. Woods*, the Seventh Circuit suggested that courts consider nationwide sentencing disparities when deciding the sentence to impose upon a defendant. *Woods*, 556 F.3d 616, 623 (7th Cir. 2009) ("[W]e do not view a discrepancy between sentences

of codefendants as a basis for challenging a sentence . . . we look at a disparity only of it is between the defendant's sentence and all other similar sentences imposed nationwide.").

The best way to avoid unwarranted sentencing disparities is to give serious consideration to the Guidelines, which serve as a mechanism to assess the seriousness of federal crimes throughout the United States, so that defendants are treated relatively equally for the same conduct wherever they are prosecuted. *See, e.g., United States v. Mykytiuk*, 415 F.3d 606,608 (7th Cir. 2005) ("The Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country"); *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006) ("Sentencing disparities are at their ebb when the Guidelines are followed, for the ranges themselves were designed to treat similar offenders similarly"). In adopting the applicable Guidelines, Congress and the Sentencing Commission wanted to ensure that the Guidelines would reflect the seriousness of white collar offenses, which prior sentencing had not always done. *See United States v. Hagerman*, 525 F. Supp. 2d 1058, 1065 (S.D. Ind. 2007) (Hamilton, J.). The impositions of sentences of incarceration were seen as necessary as a matter of fairness and for purposes of deterrence. *See* S. Rep. No. 98–225, at 76 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3259 (noting that "major white collar criminals often are sentenced to small fines and little or no imprisonment," creating the impression that "certain offenses are punishable only by a small fine that can be written off as a cost of doing business"); *United States v. Rivera*, 994 F.2d 942, 955 (1st Cir. 1993) (Breyer, J.) (noting Commission's intent to equalize punishment for white collar and blue collar crime); *United States v. Mueffelman*, 470 F.3d 33, 40 (1st Cir. 2006) (noting the importance of "the minimization of discrepancies between white- and blue-collar offenses"). As the Supreme Court explained in *Rita v. United States*, 551 U.S. 338, 350 (2007), it is fair to assume that the Guidelines "reflect a rough approximation of sentences

that might achieve § 3553(a)'s objectives." *See also id.* at 348 ("The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale. . . . [The Commission] has tried to embody in the Guidelines the factors and considerations set forth in § 3553(a)."); *United States v. Goldberg*, 491 F.3d 668, 673 (7th Cir. 2007) (describing the Guidelines as "drafted by a respected public body with access to the best knowledge and practices of penology.").

G. A Non-Custodial Sentence Would Not Serve the Purposes of Section 3553(a)

In his sentencing memorandum, Kuchipudi asks the Court to sentence him to probation. R. 1114 at 35-37. His characterization of this proposed punishment as a substantial loss of liberty and sufficiently punitive reflects his lack of appreciation for his criminal conduct. A sentence that did not include a period of incarceration would not only diminish the serious nature of his conduct, it would undermine the integrity of the other sentences that the Court has imposed.

As noted above, Kuchipudi's conduct differs from the "typical" kickback case. Patients were not directed between otherwise equivalent providers for cash. The sophistication of the scheme that the defendants employed to conceal the kickbacks Kuchipudi received is unique. This case also stands apart in the way in which it had the potential to affect, and did affect, patient care. Finally, this case was remarkable in how Kuchipudi outsourced virtually every medical obligation except billing at Sacred Heart.[18] Yet, at trial and again in his submission to the Court, Kuchipudi argues that he fulfilled his obligation to his patients because he remained

[18] ER physicians examined Kuchipudi's referrals when they arrived at the hospital; mid-level practitioners and Dr. Stamboliu conducted physical examinations of and developed and implemented plans of care for those patients; and when issues arose concerning those patients' care, the hospitals' nurses were instructed to contact the PAs / NPs during the day and Stamboliu at night for guidance.

ultimately "liable" for their care. K.Tr. 5099 ("That's a huge thing, right? When you're the doctor, you have the responsibility if something goes wrong."). It is an argument that rings hollow. The care of patients is not about who shoulders malpractice responsibility; it is about the professional commitment to healing the sick. At Sacred Heart, Kuchipudi shamelessly abdicated that responsibility. He nevertheless continued to refer ever-increasing numbers of patients to the hospital in order to bill for the Medicare Part B professional services provided by the practitioners Sacred Heart dedicated to him.

The government respectfully submits that the Court account for the totality of this conduct and sentence Kuchipudi within the applicable Guidelines.

Respectfully submitted,

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