

U.S. DISTRICT COURT

GUILTY PLEA and PLEA AGREEMENT


United States Attorney
Northern District of Georgia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN OPEN COURT
U.S.D.C. - Atlanta

MAR 21 2007

CRIMINAL NO 1:07-CR-00063

JAMES N. HATTEN, Clerk
By:  Deputy Clerk

HOWARD BERKOWITZ, defendant, having received a copy of the above-numbered Indictment and having been arraigned, hereby pleads GUILTY to Count One thereof. The defendant, his counsel, and the United States Attorney for the Northern District of Georgia ("the Government"), as counsel for the United States, subject to approval by the Court, have agreed upon a negotiated plea in this case, the terms of which are as follows:

1. Defendant's Admission of Guilt

The defendant admits that he is pleading guilty because he is in fact guilty of the health care fraud scheme charged in the Indictment, and the execution of that scheme charged in Count One.

2. Trial Rights

The defendant understands that by pleading guilty, he is giving up the right to plead not guilty and the right to be tried by a jury. At a trial, the defendant would have the right to an attorney, and if the defendant could not afford an attorney, the Court would appoint one to represent the defendant. During the trial, the defendant would be presumed innocent and the Government would

have the burden of proving him guilty beyond a reasonable doubt. The defendant would have the right to confront and cross-examine the witnesses against him. If the defendant wished, he could testify on his own behalf and present evidence in his defense, and he could subpoena witnesses to testify on his behalf. If, however, the defendant did not wish to testify, that fact could not be used against him. If the defendant were found guilty after a trial, he would have the right to appeal the conviction. The defendant understands that by pleading guilty, he is giving up all of these rights and there will not be a trial of any kind. The defendant also understands that he ordinarily would have the right to appeal his sentence and, under some circumstances, to attack the sentence in post-conviction proceedings. By entering this Plea Agreement, the defendant may be waiving some or all of those rights to appeal or collaterally attack his sentence, as specified below. Finally, the defendant understands that, to plead guilty, he may have to answer questions posed to him by the Court concerning the rights that he is giving up and the facts of this case, and the defendant's answers, if untruthful, may later be used against him in a prosecution for perjury or false statements.

3. Maximum Mandatory and Minimum Penalties

The defendant understands that, based on his plea of guilty, he will be subject to the following maximum and mandatory minimum penalties:

- (a) Maximum term of imprisonment: ten years
- (b) Mandatory minimum term of imprisonment: none
- (c) Term of supervised release: three years
- (d) Maximum fine: \$250,000.00

(e) Full restitution to all victims of the offense(s) and relevant conduct.

(f) Mandatory special assessment: \$100.00.

The defendant understands that, before imposing sentence in this case, the Court will be required to consider, among other factors, the provisions of the United States Sentencing Guidelines. Ultimately, it is within the Court's discretion to impose a sentence up to and including the statutory maximum. The defendant also understands that no one can predict his exact sentence at this time.

4. Dismissal of Counts

The Government agrees that upon the sentencing of the defendant, and with leave of the Court, it will file a dismissal of Counts 2 through 5 of the Indictment pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure. The defendant understands that the Probation Office and the Court may still consider the conduct underlying such dismissed counts in determining relevant conduct under the Sentencing Guidelines.

5. No Additional Charges

The United States Attorney for the Northern District of Georgia agrees not to bring further criminal charges against the defendant related to the charges to which he is pleading guilty. The defendant understands that this provision does not bar prosecution by any other federal, state, or local jurisdiction.

6. Acceptance of Responsibility

The Government will recommend that the defendant receive the two-level

adjustment for acceptance of responsibility pursuant to Section 3E1.1 of the Sentencing Guidelines, and the additional one-level adjustment if the offense level is 16 or higher. However, the Government will not be required to recommend acceptance of responsibility if, after entering this Plea Agreement, the defendant engages in conduct inconsistent with accepting responsibility. Thus, by way of example only, should the defendant falsely deny or falsely attempt to minimize his involvement in relevant offense conduct, give conflicting statements about his involvement, fail to pay the special assessment, or participate in additional criminal conduct, including unlawful personal use of a controlled substance, the Government will not be required to recommend acceptance of responsibility.

7. Applicable Guidelines

The Government and the Defendant agree that the applicable offense guideline is Section 2B1.1. Based on the information available to the Government, the parties agree as follows:

- (a) the Defendants submitted fraudulent bills to Blue Cross Blue Shield of Georgia seeking more than \$2.5 million, but less than \$7 million, as part of the scheme to defraud;
- (b) the Defendants actually obtained more than \$1 million, but less than \$2.5 million, from Blue Cross Blue Shield of Georgia as a result of these fraudulent submissions;
- (c) the Government's legal position is that the Defendant should be sentenced based on the amount fraudulently billed as stated in subsection (a) above. The Defendant's legal position is that he should be instead sentenced based on the

amount fraudulently obtained as stated in subsection (b) above. The parties agree that this issue may be litigated at sentencing.

(d) so long as the final offense level computed by the Court, before considering acceptance of responsibility, or any downward departure requested by the Government for substantial assistance, is at least 24, the Government agrees to recommend a sentence at the low end of the guidelines range. The Government is not bound to recommend a low-end sentence if the Defendant seeks and obtains a variance or downward departure from the otherwise applicable sentencing guidelines (except for any departure requested by the Government in consideration of any substantial assistance by the Defendant).

8. Full Restitution

Within ninety (90) days of the execution of this agreement, the defendant agrees to pay \$2,450,364 in full as restitution to the victim of the offense to which he is pleading guilty, Blue Cross Blue Shield of Georgia, Inc., and any relevant conduct, including any counts dismissed as a result of this Plea Agreement.

9. Restitution Payment within 90 Days – No Forfeiture

If the defendant complies with his agreement to pay restitution within 90 days, the Government agrees not to pursue any forfeiture of assets relating to the charges. If the defendant does not pay the full amount owed, within 90 days, the Government may then pursue forfeiture remedies. In that event, the defendant agrees to the entry of a forfeiture money judgment, above and beyond the restitution judgment, in the amount of \$2,450,364, pursuant to 18

U.S.C. § 982.

10. Failure to Pay Restitution within 90 Days- Forfeiture

If the Defendant fails to pay restitution within 90 days, and the Government pursues forfeiture, Defendant agrees to fully assist the Government in the forfeiture of assets, and to take whatever steps are necessary to pass clear title to the United States (subject to the security interests of innocent lienholders), including but not limited to surrender of title, execution of any documents necessary to transfer his interest in any of his property to the United States, and taking whatever steps are necessary to ensure that said assets are not sold, disbursed, wasted, destroyed, hidden or otherwise made unavailable for forfeiture. The Defendant agrees that his interest in the following properties is subject to forfeiture and may be forfeited for purposes of satisfying the money judgment:

1. Wachovia Account, Number 1000200977194;
2. Wachovia Account, Number 2000134928027;
3. Fidelity Account, Number 285809934;
4. Salomon Smith Barney Account, Number 412-02572-19;
5. Charles Schwab Account, Numbers 1532-7010, 1532-0014

The Defendant understands that this list of undisputed forfeitable assets does not limit the Government's rights, and that the Government may additionally seek forfeiture of other properties.

11. Waiver of Forfeiture Defenses

Defendant voluntarily waives all constitutional, legal and equitable defenses

to the forfeiture of the assets specifically listed above in any proceeding (if forfeiture proceedings are necessary). If any assets are forfeited and liquidated, the Government (i.e., the United States Attorney's Office for the Northern District of Georgia) agrees to make whatever recommendations are necessary to have the proceeds paid over to the victim. The parties agree that the amount of the restitution judgment should be reduced by whatever forfeiture proceeds are paid to the victim prior to sentencing. The parties agree that the amount of the restitution judgment as stated in the Defendant's Judgment and Commitment will not be reduced by any additional forfeiture proceeds that are anticipated to be paid to the victim after sentencing. However, the parties agree that the Defendant's restitution obligation would be satisfied to the extent of any such forfeiture proceeds paid to the victim after sentencing.

12. Payment of Fine/Restitution

The defendant agrees to pay any fine and/or restitution imposed by the Court to the Clerk of Court for eventual disbursement to the appropriate account and/or victim. The defendant also agrees that the full fine and/or restitution amount shall be considered due and payable immediately. If the defendant cannot pay the full amount immediately and is placed in custody or under the supervision of the Probation Office at any time, he agrees that the custodial agency and the Probation Office will have the authority to establish payment schedules to ensure payment of the fine and/or restitution. The defendant further agrees to cooperate fully in efforts to collect the fine and/or restitution obligation by set-off of program payments, execution on non-exempt property, and any other means the Government deems appropriate. Finally, the

defendant and counsel agree that Government officials may contact the defendant regarding the collection of any fine and/or restitution without notifying and outside the presence of counsel.

13. Special Assessment

The defendant agrees that, within 30 days of the guilty plea, he will pay a special assessment in the amount of \$100.00 by money order or certified check made payable to the Clerk of Court, U.S. District Court, 2211 U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia 30303. The defendant agrees to provide proof of such payment to the undersigned Assistant United States Attorney within 30 days of the guilty plea.

14. Cooperation

The defendant agrees to cooperate truthfully and completely with the Government, including being debriefed and providing truthful testimony at any proceeding resulting from or related to cooperation. The defendant also agrees to disclose the existence of and to produce to the Government any and all books, papers, documents, and other items of evidentiary value that are in his actual or constructive possession. The defendant understands that the Government alone will determine what forms of cooperation to request from the defendant, and the defendant agrees that he will not engage in any investigation that is not specifically authorized by the Government.

15. Consent to Contact

The defendant and counsel agree that, after sentencing, Government attorneys

and law enforcement agents may contact the defendant without notifying and outside the presence of counsel for purposes relevant to the defendant's cooperation.

16. Section 1B1.8 Protection

Pursuant to Section 1B1.8 of the Sentencing Guidelines, the Government agrees that any self-incriminating information that was previously unknown to the Government and is provided to the Government by the defendant in connection with his cooperation and as a result of this Plea Agreement will not be used in determining the applicable sentencing guideline range, although such information may be disclosed to the Probation Office and the Court. The Government also agrees not to bring additional charges against the defendant, with the exception of charges resulting from or related to violent criminal activity, based on any information provided by the defendant in connection with his cooperation that was not known to the Government prior to the cooperation. However, if the Government determines that the defendant has not been completely truthful and candid in his cooperation with the Government, he may be subject to prosecution for perjury, false statements, obstruction of justice, and any other appropriate charge, and all information he has provided may be used against him in such a prosecution.

17. Conditional 5K/Rule 35

The Government agrees to make the extent of the defendant's cooperation known to the sentencing court and to recommend that the defendant be sentenced at the lowest end of the applicable sentencing guideline range, subject to the conditions set forth in Paragraph 7(d) of this plea agreement. In

addition, if the cooperation is completed before sentencing and the Government determines that such cooperation qualifies as "substantial assistance" pursuant to Title 18, United States Code, Section 3553(e) and/or Section 5K1.1 of the Sentencing Guidelines, the Government will consider whether to file a motion at sentencing recommending a downward departure from the applicable guideline range. If the cooperation is completed after sentencing and the Government determines that such cooperation qualifies as "substantial assistance" pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, the Government will consider whether to file a motion for reduction of sentence. In either case, the defendant understands that the determination as to whether he has provided "substantial assistance" rests solely with the Government. Good faith efforts by the defendant that do not substantially assist in the investigation or prosecution of another person who has committed a crime will not result in either a motion for downward departure or a Rule 35 motion. The defendant also understands that, should the Government decide to file a motion pursuant to this paragraph, the Government may recommend any specific sentence, and the final decision as to what credit, if any, the defendant should receive for cooperation will be determined by the Court. If the defendant fails to cooperate truthfully and completely, or if the defendant engages in additional criminal conduct or other conduct inconsistent with cooperation, will not be entitled to any consideration whatsoever pursuant to this paragraph.

18. Guideline Recommendation

The Government agrees to recommend that the defendant be sentenced to the

low end of the applicable guideline range, subject to the conditions set forth in Paragraph 7(d) of this plea agreement, unless the defendant seeks and obtains a downward departure or variance from the applicable guideline range.

19. Right to State Facts and Make Recommendations

The Government reserves the right to inform the Court and the Probation Office of all facts and circumstances regarding the defendant and this case, and to respond to any questions from the Court and the Probation Office and to any misstatements of fact or law. Except as expressly stated elsewhere in this Plea Agreement, the Government also reserves the right to make recommendations regarding application of the Sentencing Guidelines.

20. Limited Waiver of Appeal

LIMITED WAIVER OF APPEAL: To the maximum extent permitted by federal law, the defendant voluntarily and expressly waives the right to appeal his sentence and the right to collaterally attack his sentence in any post-conviction proceeding on any ground, except that the defendant may file a direct appeal of an upward departure from the otherwise applicable sentencing guideline range. The defendant understands that this Plea Agreement does not limit the Government's right to appeal, but if the Government appeals the sentence imposed, the defendant may also file a direct appeal of sentence.

21. Biological Evidence

The parties agree that no biological evidence (as defined in 18 USC § 3600A) has been identified in this case; therefore, the defendant understands and

agrees that no evidence will be preserved for DNA testing.

22. Failure to Meet Obligations of Plea Agreement

If the defendant fails in any way to fulfill each one of his obligations under this Plea Agreement, the Government may elect to be released from its commitments under this Plea Agreement. The Government may then prosecute the defendant for any and all Federal crimes that he has committed related to this case, including any charges dismissed pursuant to this Plea Agreement, and may recommend to the Court any sentence for such crimes up to and including the maximum sentence. The defendant expressly waives any statute of limitations defense and any constitutional or statutory speedy trial defense to such a prosecution, except to the extent that such a defense exists as of the date he signs this Plea Agreement. In addition, the defendant agrees that, in such a prosecution, all admissions and other information that he has provided at any time, including all statements he has made and all evidence he has produced during proffers, interviews, testimony, and otherwise, may be used against him, regardless of any constitutional provision, statute, rule, or agreement to the contrary. Finally, the defendant understands that his violation of the terms of this Plea Agreement would not entitle to withdraw guilty plea in this case.

23. Nonbinding

The defendant understands and agrees that the recommendations of the Government incorporated within this Plea Agreement or otherwise discussed between the parties are not binding on the Court and that the Court's failure to

accept one or more of the recommendations will not constitute grounds to withdraw his guilty plea or to claim a breach of this Plea Agreement.


24. No Other Agreements

There are no other agreements, promises, representations, or understandings between the defendant and the Government.

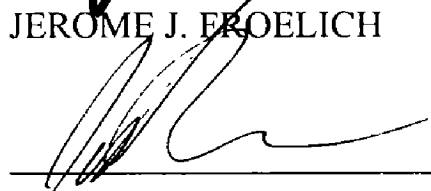
In Open Court this 21st day of March, 2007.



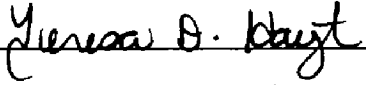
SIGNATURE (Attorney for Defendant)
JEROME J. FROELICH




SIGNATURE (Defendant)
HOWARD BERKOWITZ



SIGNATURE (Assistant U.S. Attorney)
JUSTIN S. ANAND



SIGNATURE (Assistant U.S. Attorney)
TERESA D. HOYT

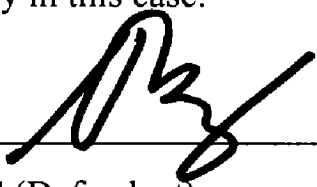


SIGNATURE (Approving Official)
PAUL N. MONNIN
Deputy Chief, Economic Crimes

3/16/07
DATE

I have read the Indictment against me and have discussed it with my attorney. I understand the charges and the elements of each charge that the Government would have to prove to convict me at a trial. I have read the foregoing Plea Agreement and have carefully reviewed every part of it with my attorney. I understand the terms and conditions contained in the Plea Agreement, and I voluntarily agree to them. I also

have discussed with my attorney the rights I may have to appeal or challenge my sentence, and I understand that the appeal waiver contained in the Plea Agreement will prevent me, with the narrow exceptions stated, from appealing my sentence or challenging my sentence in any post-conviction proceeding. No one has threatened or forced me to plead guilty, and no promises or inducements have been made to me other than those discussed in the Plea Agreement. The discussions between my attorney and the Government toward reaching a negotiated plea in this case took place with my permission. I am fully satisfied with the representation provided to me by my attorney in this case.

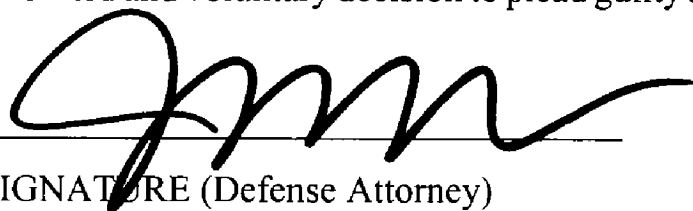


SIGNATURE (Defendant)

3/24/07

DATE

I am HOWARD BERKOWITZ's lawyer. I have carefully reviewed the charges and the Plea Agreement with my client. To my knowledge, my client is making an informed and voluntary decision to plead guilty and to enter into the Plea Agreement.



SIGNATURE (Defense Attorney)

3/31/07

DATE

Jerome J. Froelich

INFORMATION BELOW MUST BE TYPED OR PRINTED

JEROME J. FROELICH

HOWARD BERKOWITZ

NAME (Attorney for Defendant)

Sub 1250
1349 West Peachtree St

STREET

NAME (Defendant)

5305 Old Hundred Lane

STREET

Atlanta, GA 30309

CITY & STATE ZIP CODE

Atlanta, GA 30327

CITY & STATE ZIP CODE

PHONE NUMBER 404 881-1111

PHONE NUMBER 404-250-1820

STATE BAR OF GEORGIA NUMBER 278150

Filed in Open Court

By _____

U. S DEPARTMENT OF JUSTICE
Statement of Special Assessment Account

This statement reflects your special assessment only. There may be other penalties imposed at sentencing.

ACCOUNT INFORMATION	
CRIMINAL ACTION NO..	1.07-CR-063
DEFENDANT'S NAME:	HOWARD BERKOWITZ
PAY THIS AMOUNT·	\$100.00

INSTRUCTIONS:

- 1 PAYMENT MUST BE MADE BY **CERTIFIED CHECK** OR **MONEY ORDER**
PAYABLE TO·

CLERK OF COURT, U.S DISTRICT COURT

PERSONAL CHECKS WILL NOT BE ACCEPTED

- 2 PAYMENT MUST REACH THE CLERK'S OFFICE WITHIN 30 DAYS OF THE
ENTRY OF YOUR GUILTY PLEA
- 3 PAYMENT SHOULD BE SENT OR HAND DELIVERED TO

Clerk of Court, U.S. District Court
2211 U.S. Courthouse
75 Spring Street, S W.

Atlanta, Georgia 30303

(Do not Send Cash)

- 4 INCLUDE DEFENDANT'S NAME ON **CERTIFIED CHECK** OR **MONEY ORDER**
5. ENCLOSE THIS COUPON TO INSURE PROPER AND PROMPT APPLICATION OF PAYMENT
6. PROVIDE PROOF OF PAYMENT TO THE ABOVE-SIGNED AUSA WITHIN 30 DAYS OF THE GUILTY PLEA