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IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

THE UNITED STATES OF AMERICA,  
Plaintiff,

vs.

CASE NO. CR-99-0107-T

CHRISTOPHER KLUDING,  
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
HAD ON FEBRUARY 15, 2000  
JAMES HEARING

BEFORE THE HONORABLE RALPH G. THOMPSON, JUDGE PRESIDING.

A P P E A R A N C E S

MS. BARBARA POARCH and MR. MICHAEL JAMES, Assistant  
United States Attorneys, Western District of Oklahoma, Oklahoma  
City, Oklahoma, appeared on behalf of the plaintiff, United  
States of America.

MR. E. JOE LANKFORD, Attorney at Law, Oklahoma City,  
Oklahoma, appeared on behalf of the defendant.

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43

\* \* \* \* \*

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1 PROCEEDINGS:

2 -----  
3 THE COURT: United States of America versus  
4 Christopher Kluding.

5 Appearances, please.

6 MS. POARCH: Barbara Poarch and Michael James on  
7 behalf of the United States.

8 MR. LANKFORD: E. Joe Lankford on behalf of  
9 Christopher Kluding.

10 THE COURT: This is Case Number Criminal-99-107-T.

11 The hearing this afternoon is what is referred to as a  
12 James hearing requested by the defendant, not by that name but  
13 in the form of a motion in limine which the Court has construed  
14 to be a request for a James hearing, and it bearing on the  
15 admissibility of the statements of co-conspirators.

16 The government is prepared to go forward, Ms. Poarch?

17 MS. POARCH: Yes, we are, Your Honor.

18 THE COURT: I might also acknowledge the fact that on  
19 September 14, 1999, the government properly, under the rules,  
20 filed its notice to the defendant of its intent to use 404(b)  
21 evidence and evidence intrinsic to the counts charged,  
22 specifying what types of evidence it intended to offer. There  
23 was no response or acknowledgement or any kind of action on  
24 behalf of the defendant with regard to that intended evidence,  
25 no effort to exclude it, no objections raised.

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1           The trial is in the morning, and I trust that, in absence  
2 of the objection in proper and timely form, there are no  
3 objections and that category of evidence, 404(b) being  
4 different from co-conspiracy hearsay, can be considered  
5 admissible under those circumstances.

6           And we will limit this hearing, of course, to the matter  
7 of the co-conspiracy hearsay issue under Rule 801(d)(2)(e) of  
8 the Federal Rules of Evidence, and that will be the scope of  
9 this hearing.

10          I trust that those findings and conclusions are agreeable  
11 to counsel.

12          Yes.

13          MR. LANKFORD: They are, Your Honor.

14          THE COURT: Thank you.

15          And Ms. Poarch, would you or Mr. James proceed with your  
16 first witness.

17          And as you know, it's been my preference in these hearings  
18 for the government to be as specific as possible in identifying  
19 by name, date, a period within the conspiracy as claimed, and  
20 other bases for admissibility under the particular rule so  
21 that --

22          MS. POARCH: Yes, Your Honor.

23          THE COURT: -- not only can those statements be  
24 evaluated properly in this hearing, they will be more easily  
25 identified during the course of the trial, both for you, for

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1 the Court, and for Mr. Lankford, as well.

2 MS. POARCH: Yes, Your Honor.

3 THE COURT: Proceed, please.

4 MS. POARCH: The government calls Special Agent Mark  
5 Creamer.

6 (WITNESS SWORN)

7 MS. POARCH: Your Honor, Mr. Lankford and I had  
8 discussed before our hearing this afternoon an issue concerning  
9 the rule of sequestration, which we do intend to invoke the  
10 rule tomorrow at the onset of the trial with some exceptions  
11 that are agreed upon that we'll mention tomorrow.

12 There is one area of disagreement, and that pertains to a  
13 defense witness, Don Webb. It's my understanding that he will  
14 be called to testify as a character witness on behalf of the  
15 defendant. He is present, I understand, in the courtroom this  
16 afternoon to hear this hearing, and we would like him excluded  
17 and will ask that he be excluded at trial tomorrow from hearing  
18 the testimony of other witnesses.

19 We would also invoke that, in the reading of Rule 16, we  
20 see no distinction between the trial or -- and of this hearing,  
21 and so we would ask also that he be excluded from this hearing,  
22 as well, since it does discuss the entire essence of this case,  
23 the conspiracy.

24 THE COURT: Mr. Lankford?

25 MR. LANKFORD: Your Honor, I did contact Ms. Poarch

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1 the other day about -- to talk about exclusions from the rule.  
 2 I did ask that Mr. Don Webb be excluded -- excused from the  
 3 rule because he is a personal friend of the defendant and he is  
 4 going to testify only as a character witness. I told her that  
 5 we would not use him for any fact defense whatsoever.

6 And as I said, at the time, she agreed. She re-thought  
 7 the matter and would like him excluded. And I don't think  
 8 that, whatever happens here, would affect his testimony  
 9 whatsoever. I don't see how it could. And we'd ask that he be  
 10 excused from the rule for that reason.

11 THE COURT: Mr. Lankford, the scope of inquiry of a  
 12 character witness under the rule, of course, is so limited, in  
 13 any event, on matters that are well established, all having to  
 14 do with a handful, really, of questions that can be asked of a  
 15 character witness.

16 I can't think of any reason, Ms. Poarch, unless you can,  
 17 that would make exclusion necessary under those circumstances.

18 And when I say that, of course, I assume that counsel will  
 19 limit himself strictly to those specific questions allowed of  
 20 character witnesses and not attempt to go beyond it, and I have  
 21 no thought that you would, although sometimes counsel do get a  
 22 bit expansive in those regards, and that causes objections and  
 23 causes difficulties.

24 So if I'm assured that you will follow the limited line of  
 25 inquiry of character witnesses, I really don't see any

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1 particular vice in leaving the witness here.

2 MS. POARCH: Your Honor, our only concern was that we  
3 learned that Mr. Webb's wife is in business with the defendant  
4 in the health care area, and we were just concerned that  
5 Mr. Lankford might exceed the scope of acceptable examination  
6 into character and get into areas pertaining to the facts at  
7 issue in this case.

8 But with assurance from --

9 THE COURT: Properly examined, a character witness  
10 can be often on the stand with no more than a handful of  
11 questions; wouldn't you agree, Mr. Lankford?

12 MR. LANKFORD: That's correct, Your Honor.

13 THE COURT: And that's your intention?

14 MR. LANKFORD: That's correct, Your Honor.

15 THE COURT: Under those circumstances, I really see  
16 no necessity in excluding the gentlemen.

17 MS. POARCH: Nor do I.

18 THE COURT: All right, thank you.

19 MR. LANKFORD: Thank you.

20 THE COURT: Proceed, please.

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1 MARK ALAN CREAMER,  
2 having been first duly sworn to tell the truth, the whole truth  
3 and nothing but the truth, testified as follows:

4 DIRECT EXAMINATION

5 BY MS. POARCH:

6 Q. Would you state your name for the record and spell your  
7 last name, please.

8 A. Mark Alan Creamer. The spelling of my last name is  
9 C-r-e-a-m-e-r.

10 Q. And Agent Creamer, are you the case agent in this case, --

11 A. That's correct, ma'am.

12 Q. -- United States versus Kluding?

13 And with what agency are you employed?

14 A. I'm employed as a Special Agent with the U.S. Department  
15 of Health and Human Services, Office of Inspector General,  
16 Office of Investigations.

17 Q. And does your work primarily involve investigation of  
18 health care fraud?

19 A. That's correct.

20 Q. And you're familiar, of course, with the indictment in  
21 this case?

22 A. Yes, ma'am, I am.

23 Q. And with respect to Count 1 of the indictment, it has  
24 charged the defendant with a conspiracy; is that correct?

25 A. That's correct.

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1 Q. And what is the object of that conspiracy?

2 A. To defraud the United States Government and to submit  
3 false statements on a Medicare Cost Report that's filed with  
4 Medicare.

5 Q. And based on your investigation of this case, who have you  
6 identified to be the members of this conspiracy?

7 A. Christopher Kluding; his former wife, Tracy Kluding; and  
8 James Andrew Gilbert.

9 Q. Is Tracy Kluding also known by Tracy Reed, her current  
10 name?

11 A. That's correct.

12 Q. And what is the relationship of these individuals?

13 A. Chris Kluding and Tracy Kluding were married, and Andrew  
14 Gilbert met the Kludings in nursing school in the early 1990s.

15 Q. All right. And would you describe, according to your  
16 conversations with -- with these individuals, particularly with  
17 Mr. Gilbert, that they were friends?

18 A. Yes, they were friends.

19 Q. All right. And would you tell the Court what time frame  
20 we are concerned with with respect to this defendant in the  
21 case, Christopher Kluding, the time frame of the conspiracy?

22 A. Spring 1995 until the summer of 1996.

23 Q. Now, the indictment, as I recall, goes a little bit  
24 further than that; doesn't it, Agent Creamer?

25 A. That's correct.

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1 Q. And what's the reason for that?

2 A. The -- There was a cost report that was filed and a  
3 related party was not placed on the cost report.

4 Q. And that was some time later, and that was done by the  
5 co-defendant, Tracy Kluding.

6 A. That's correct.

7 Q. So for purposes of our discussion this afternoon and for  
8 purposes of our evidence that we intend to introduce in this  
9 trial, we're really talking about a fairly narrow period of  
10 time, spring of '95 to the summer of '96.

11 A. That's correct.

12 Q. And the statement that we're going to be discussing this  
13 afternoon that were given by the co-defendants were made during  
14 that time frame.

15 A. That's correct.

16 Q. Would you tell the Court the government's proof of the  
17 existence of the conspiracy. How did it start?

18 A. In 1993, Tracy Kluding, Chris Kluding, and James Andrew  
19 Gilbert formed a company called QualiCare, which was a home  
20 health agency.

21 Q. Were they equal partners, equal owners?

22 A. Yes, they were.

23 The business continued to grow until the early part of  
24 1995. Tracy Kluding and Chris Kluding approached James Andrew  
25 Gilbert, and Tracy Kluding and Chris Kluding stated that they

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1 wanted to form a management company so that they could pay  
2 themselves higher salaries than they knew would be allowed by  
3 Medicare, and this is when the agreement was reached.

4 Q. These statements, particularly the statements that we're  
5 going to be talking about this afternoon, Agent Creamer, how  
6 did you learn of them?

7 A. From interviews.

8 Q. And this is with James Andrew Gilbert?

9 A. That's correct.

10 Q. Known as Andy Gilbert?

11 A. Yes, ma'am.

12 Q. And Mr. Gilbert has already entered a plea in this case;  
13 is that right?

14 A. That's correct.

15 Q. And he's cooperating with the government in the trial of  
16 this case?

17 A. That's correct.

18 Q. And you've interviewed him on a number of occasions?

19 A. Yes, ma'am.

20 Q. All right. This particular conversation was there at the  
21 offices of QualiCare?

22 A. I do not know where that particular conversation took  
23 place.

24 Q. To the best of Mr. Gilbert's recollection, when did the  
25 conversation take place?

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1 A. Sometime around the first part of 1995.

2 Q. After this conversation and statements made by Tracy  
3 Kluding and Christopher Kluding, what -- what developed from  
4 that, if anything?

5 A. Chris Kluding and James Andrew Gilbert entered into an  
6 agreement where they would sell their stock in QualiCare to  
7 Tracy Kluding.

8 Q. Did any money change hands?

9 A. Yes.

10 Q. When?

11 A. It was in April of 1996.

12 Q. For the following year, --

13 A. Right.

14 Q. -- a year later.

15 A. That's correct.

16 Q. And do you know what precipitated the exchange of money?

17 A. There were discussions between James Andrew Gilbert and  
18 his attorney over possible problems with related parties.

19 Q. So, at the advice of Mr. Gilbert's lawyer, --

20 A. That's correct.

21 Q. -- money exchanged hands.

22 And was given to -- excuse me -- Tracy Kluding.

23 A. That's right.

24 Q. I said that wrong.

25 Tracy Kluding paid Andy Gilbert and Christopher Kluding,

1 her husband, for the stock --

2 A. That's correct.

3 Q. -- a year after the fact.

4 A. That's correct.

5 Q. Has Andy Gilbert told you if Christopher Kluding and Tracy  
6 Kluding said anything to him about -- any additional  
7 information about how this would work, the establishment of a  
8 management company?

9 A. They would form a management company called Monarch  
10 Management, that James Andrew Gilbert would be the owner of  
11 that company, and Chris Kluding would be an employee of that  
12 company.

13 Q. Why would he be an employee?

14 A. James Gilbert said that he did -- that they wanted to  
15 alleviate any fears of the related-party issue, and Chris  
16 Kluding wanted to go form other companies.

17 Q. So Tracy Kluding would be the sole owner of QualiCare, --

18 A. That's correct.

19 Q. -- Andrew Gilbert would be the sole owner of the new  
20 management company, --

21 A. That's correct.

22 Q. -- and what was the name of the management company?

23 A. Monarch Management.

24 Q. And Christopher Kluding would simply be Mr. Gilbert's  
25 employee?

1 A. That's correct.

2 Q. Was there any discussion about how they would divvy up the  
3 money?

4 A. Yes. What they would do is they would take Chris's salary  
5 and -- Chris Kluding's salary and James Andrew Gilbert's  
6 salary, and then they would add in Tracy Kluding's salary at  
7 QualiCare so that everybody received an equal portion of  
8 one-third.

9 Q. And who said that this would be the way that the money  
10 would be divided?

11 A. Chris Kluding.

12 Q. In order to establish with -- with some degree of comfort  
13 when this conversation took place about how this management  
14 company would be formed, how it would be -- the money would be  
15 divided, who would own what, can we look at when Monarch  
16 Management itself was formed, and can you tell the Court when  
17 that happened.

18 A. It was formed in May of 1995.

19 Q. And when does Andrew Gilbert tell you that these  
20 conversations about the formation of Monarch Management  
21 occurred in relation to when it actually was formed?

22 A. Prior to May 1995.

23 Q. Was it years before?

24 A. No. Perhaps a month, if that.

25 Q. So, contemporaneous with the startup of Monarch were

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1 conversations about the startup of Monarch Management?

2 A. That's correct.

3 Q. Were there any discussions at the same time, around the  
4 formation of Monarch Management, and again we're talking about  
5 sometime around May of 1995, were there any discussions by the  
6 defendant of what would happen if QualiCare were eventually  
7 sold?

8 Again, we're talking about the home health agency the  
9 three of them owned.

10 A. Yes, there were. Each of them would receive a portion of  
11 the proceeds of the sale of QualiCare.

12 Q. And -- and who said this? Who came up with that theory?

13 A. Chris Kluding.

14 Q. And this would be the sale of QualiCare after Chris  
15 Kluding and James Gilbert, on paper, no longer owned it?

16 A. That's correct.

17 Q. They would still share in the proceeds of this sale?

18 A. That's correct.

19 Q. Let's talk a moment about the formation of Monarch.

20 Who opened the bank account?

21 A. Chris Kluding.

22 Q. And you've looked at the bank records and know that?

23 A. That's correct.

24 Q. Was his signature on the account?

25 A. Yes, ma'am, he was.

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1 Q. Who negotiated the lease for the offices of Monarch  
2 Management?

3 A. Chris Kluding.

4 Q. Did Chris Kluding have any conversations with -- with  
5 James Andrew Gilbert about the negotiation of the lease or  
6 about the terms of the lease?

7 A. Yes, he did.

8 Q. What was that?

9 A. James Andrew Gilbert stated he had some reservations about  
10 Tracy Kluding signing as the guarantor on the lease, and Chris  
11 Kluding responded, quote/unquote, plausible deniability.

12 Q. And was this lease for the property or the lease of the  
13 offices there that were going to be used by Monarch Management,  
14 --

15 By the way, were they here in Oklahoma City, as well?

16 A. Yes, ma'am, they were.

17 Q. And was that lease negotiated and executed sometime around  
18 the formation of Monarch, again May of 1995?

19 A. That's correct.

20 Q. And so this statement about plausible deniability in  
21 response to Gilbert's reluctance to have Tracy Kluding  
22 guarantee the lease, was that made about the same time as -- as  
23 when that lease was actually executed?

24 A. Yes, ma'am.

25 Q. So again, the statement would have been made sometime

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1 around May of '95?

2 A. That's correct.

3 Q. Who obtained the furniture for Monarch Management, the  
4 furniture that was actually used there?

5 A. Chris Kluding.

6 Q. How was it paid for?

7 A. By a check drawn on the QualiCare account.

8 Q. Signed by whom?

9 A. Chris Kluding.

10 Q. Let's talk a moment about, after the formation of Monarch  
11 Management there in May of 1995, how it actually operated here  
12 in furtherance of the conspiracy.

13 Tell the Court, if you would, what Gilbert's  
14 responsibilities were there at Monarch Management.

15 A. His responsibilities were clinical aspects over QualiCare.

16 Q. Meaning he dealt with nurses, staffing issues, that sort  
17 of thing?

18 A. That's right.

19 Q. Making sure they had qualified people out seeing the  
20 patients?

21 A. That's correct.

22 Q. And what about Christopher Kluding, what were his  
23 responsibilities?

24 A. He handled the financial aspects of QualiCare and Monarch.

25 Q. Meaning what?

1 A. Well, he paid all the bills, he handled hiring and firing.

2 Q. All right. And what was Tracy Kluding doing back over at  
3 QualiCare offices?

4 A. She was supposed to be the administrator of QualiCare.

5 Q. Would it be fair to say and will the testimony be at trial  
6 that the work that was performed by these individuals didn't  
7 change once Monarch Management was formed?

8 A. That's correct.

9 Q. They, essentially, did the same thing as they were doing  
10 before; is that right?

11 A. That's correct.

12 Q. What was Christopher Kluding's salary before the formation  
13 of Monarch Management?

14 A. Approximately 70,000 per year -- dollars per year.

15 Q. And is that true with Tracy Kluding and James Gilbert, as  
16 well?

17 A. That's correct.

18 Q. In that \$70,000 range?

19 A. That's correct.

20 Q. After Monarch Management was formed, what was Gilbert's  
21 salary?

22 A. Approximately \$253,000 --

23 Q. And what --

24 A. -- per year.

25 Q. And what was Christopher Kluding's salary?

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1 A. Approximately \$416,000 per year.

2 Q. Did Monarch Management have any other clients, paying  
3 clients, other than QualiCare?

4 A. No, ma'am. There were no paying clients other than  
5 QualiCare.

6 Q. What did Monarch actually do for QualiCare? What service  
7 did it perform?

8 A. Mainly the billing for QualiCare.

9 Q. We're talking about the Medicare billing?

10 A. Medicare billing.

11 Q. What will the testimony be at trial concerning QualiCare's  
12 patients and what percentage of -- and I'm just asking for an  
13 approximation -- of their patients were Medicare patients?

14 A. Approximately 95 percent, thereabouts.

15 Q. So the bulk of their business was Medicare business.

16 A. That's correct.

17 Q. From the period of May of '95 through May of '96, how much  
18 money did QualiCare pay Monarch Management to do its Medicare  
19 billing?

20 A. Approximately \$1.1 million.

21 THE COURT: What was the period again?

22 MS. POARCH: From May of '95 through May of '96.

23 A. That's correct. It was \$1.1 million.

24 Q. (BY MS. POARCH) For the Court's benefit, the reason that  
25 we ended that -- or carried that that distance, from May of '95

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1 thru May of '96, would you explain that to the Court with  
2 respect to how that fits in with the defendant, Chris Kluding?

3 A. James Andrew Gilbert and his attorney had discussions  
4 concerning possible related-party problems, and they had a  
5 meeting with Chris Kluding in which they, basically, fired him.

6 Q. So, after May of '96, Christopher Kluding was no longer  
7 there?

8 A. That's correct.

9 Q. So the funds that we're looking at, this 1.1 million,  
10 really is just what QualiCare paid Monarch during the time that  
11 Christopher Kluding was at Monarch?

12 A. That's correct.

13 Q. Did Monarch Management and QualiCare operate at arms  
14 length? Were they treated as separate entities, separate  
15 companies?

16 A. No, ma'am. They were treated as the same company.

17 Q. What will the government's evidence be, just in very  
18 general terms, at trial about how they operated?

19 A. Chris Kluding maintained the QualiCare checkbook in his  
20 desk at Monarch Management. He had complete authorization to  
21 write checks on the QualiCare account.

22 He also was involved in the hiring and firing of personnel  
23 at QualiCare while he was at Monarch Management.

24 He also approved salary increases for QualiCare employees.

25 Q. Okay.

1 A. He also instructed personnel to place Tracy Kluding's  
2 mother on the Monarch Management payroll.

3 Q. And in your investigation, did Tracy Kluding's mother do  
4 any work for Monarch Management?

5 A. No.

6 Q. What did she do, if you know?

7 A. She was a -- she was a baby-sitter for the Kluding's  
8 children.

9 Q. If we can look at it from the QualiCare side, did  
10 QualiCare -- and, of course, we're talking about Tracy Kluding  
11 here -- did she, likewise, have dealings with and participate  
12 in -- in the running of Monarch to -- to a degree?

13 A. Yes, she did.

14 Q. And in what way?

15 A. She participated in hiring and firing of Monarch  
16 employees. She was also engaged in the -- in the negotiation  
17 of the lease on Monarch -- Monarch Management property.

18 Q. She guaranteed the lease.

19 A. Yes, she did.

20 Q. And will the government have evidence that Chris Kluding  
21 held himself out to be an owner of QualiCare even after, on  
22 paper, he had sold his interest and had moved over to Monarch  
23 Management as Gilbert's employee?

24 A. That's correct.

25 Q. And what is that evidence?

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1 A. In -- It was after Chris Kluding was, basically, fired.  
2 Chris Kluding called James Gilbert and they met at a bagel  
3 shop, and Andrew Gilbert and his brother, Michael Gilbert, went  
4 out to meet with Chris Kluding, and Chris Kluding told Andrew  
5 Gilbert that he wanted him to testify at Chris Kluding's  
6 divorce hearing that Chris Kluding still maintained control of  
7 QualiCare and no money exchanged hands over the promissory  
8 notes.

9 Q. Okay. Again, that conversation took place sometime just  
10 prior to or immediately after Chris Kluding was asked to leave?

11 A. It was almost immediately after he was asked to leave.

12 Q. So somewhere in the time frame of April or May of '96?

13 A. That's correct.

14 Q. I want to go back in time just a little bit and talk about  
15 another conversation that Chris Kluding had with -- with  
16 Gilbert that took place in Las Vegas, Nevada. And at the  
17 moment we may be unclear as to the exact date, but it was -- if  
18 you would tell the Court about -- about that conversation in  
19 Las Vegas.

20 A. James Gilbert told us that he and Jay Howard and Chris  
21 Kluding traveled to Las Vegas, Nevada, to see a Mike Tyson  
22 fight --

23 Q. And who --

24 A. -- which did not occur.

25 Q. Okay. And who is Jay Howard?

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1 A. Jay Howard was a Monarch Management employee.

2 Q. Okay. And what did Chris Kluding say while there in  
3 Las Vegas?

4 A. He said that Monarch Management and QualiCare were  
5 cooperative, and that he, Tracy Kluding, and Chris Kluding  
6 shared salaries equally by one-third.

7 Q. So Mr. Gilbert's testimony about this, at least, would  
8 narrow the time frame within some time after the formation of  
9 Monarch in May of '95 and before Chris Kluding's leaving in May  
10 of '96?

11 A. That's correct.

12 Q. And if he can find out when there was a canceled Mike  
13 Tyson fight, we assume that he can narrow it down even further?

14 A. That's correct.

15 Q. Okay. Again, going back to an earlier statement that was  
16 made at a time when the Kluding's began having some marital  
17 problems, would you tell the Court about that.

18 A. Yes. James Gilbert -- Well, Chris Kluding told James  
19 Gilbert, right around the time that Chris Kluding and his wife  
20 were having marital problems, that he wanted to negotiate an  
21 agreement with Tracy Kluding that he would receive the proceeds  
22 from QualiCare.

23 Q. And again, would that have -- Proceeds from QualiCare  
24 meaning in the event of a sale.

25 A. Of a sale.

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1 Q. And again, this conversation would have taken place some  
2 time after the formation of Monarch --

3 A. That's correct.

4 Q. -- in May of '95 and before Chris Kluding's leaving in May  
5 of '96?

6 A. That's correct.

7 Q. You started at the beginning of your testimony, Agent  
8 Creamer, to discuss a little bit about what this fraud is, this  
9 conspiracy that has this two-fold objective, a scheme to  
10 defraud and commit substantive offences.

11 In a nutshell, how would you describe for the Court what  
12 this fraud is that the government's alleging?

13 A. There are salary caps that Medicare has in their  
14 regulations, and it's based on a point system.

15 Q. Salary caps on what?

16 A. On salaries for home health agency owners and  
17 administrators.

18 Q. So home health agency owners are -- are limited to a  
19 certain amount of salary that they can earn?

20 A. That's correct.

21 Q. And so what is the fraud that we're alleging here?

22 A. They formed a home health agency -- I'm sorry -- a  
23 management agency to -- so that they could obtain a greater  
24 salary, and the home health -- I'm sorry -- the management --  
25 the real- -- the management of the home health agency was not

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1 reported on the Medicare cost report as a possible related  
2 party.

3 Q. So one aspect of the fraud is the circumvention of the  
4 salary caps placed by Medicare on the home health agency  
5 owners?

6 A. That's correct.

7 Q. And I believe you testified earlier that the amount of  
8 money that they were making, and we'll assume, and there'll be  
9 testimony about this, but assuming, for sake of argument, that  
10 they paid themselves as much as they could when they all three  
11 owned QualiCare, I believe you said it was about \$70,000 a  
12 year?

13 A. That's correct.

14 Q. And so they exceeded it substantially, when the formation  
15 of Monarch they made approximately how much each?

16 A. When they formed Monarch, Chris Kluding made approximately  
17 \$416,000, and James Gilbert made about \$253,000.

18 Q. And Tracy Kluding?

19 A. I don't know.

20 Q. Did Christopher Kluding, Tracy Kluding, or James Gilbert  
21 disclose to Medicare that Monarch Management, whom they -- whom  
22 QualiCare did business with, was actual Andy Gilbert and  
23 Christopher Kluding? Was that disclosed to Medicare?

24 A. No, that was not disclosed to Medicare.

25 Q. And is that specific question is not --

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1 Not that specific question.

2 Is there a question that appears on the Medicare Cost  
3 Report that asks about transactions that the home health agency  
4 has throughout that reporting year with a related party?

5 A. Yes, there is.

6 Q. And will the government have testimony introducing that  
7 cost report and specifically that question?

8 A. That's correct.

9 Q. And does that question also, on the form, on the cost  
10 report, even give examples of what a related transaction or  
11 related party is?

12 A. That's correct.

13 Q. And how did the co-defendant, Tracy Kluding, answer that  
14 question?

15 A. "No." It was not disclosed.

16 Q. And so, in that respect then, did these defendants, having  
17 paid themselves \$1.1 million in the course of the year, did  
18 they succeed in their conspiracy, the object of the conspiracy?

19 A. Yes.

20 MS. POARCH: Your Honor, I don't believe I have  
21 anything further, and I don't believe we have anything -- any  
22 further statements that we'll be introducing, with the -- with  
23 the exception of a statement that we can discuss later of an  
24 admission of a party opponent, which is really a different  
25 issue. But, with respect to co-conspirator hearsay, I have no

1 further questions of Agent Creamer.

2 THE COURT: Mr. Lankford?

3 MR. LANKFORD: Just One second, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. LANKFORD:

6 Q. Do you pronounce it Creamer or Cramer?

7 A. Cramer.

8 Q. Cramer?

9 A. Yes, sir.

10 Q. Okay. It's spelled Creamer but it's pronounced Cramer.

11 Agent Creamer, the '95 cost report that you referred to,  
12 who filed the '95 cost report?

13 A. It was signed by Tracy Kluding.

14 Q. And, as far as you know, she's the one that filed it?

15 A. As far as I know, yes.

16 Q. Okay. Do you know what the date was that she signed it  
17 and filed it?

18 A. The date that appears on the document is May 31st, 1996.

19 Q. And do you know who prepared that '95 cost report?

20 A. No, I do not.

21 Q. You're not aware of that in your investigation?

22 A. I -- I understand that there possibly was an attorney  
23 involved in the preparation, Mark Patzkowski.

24 Q. Who is Mark Patzkowski?

25 A. He's an attorney.

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1 Q. An attorney for who?

2 A. He --

3 Q. Was he representing somebody at the time the '95 cost  
4 report was filed?

5 A. I believe he was rep- -- representing QualiCare.

6 Q. Other than that representation, do you know anything about  
7 Patzkowski?

8 A. Yes, I do.

9 Q. What do you know about him?

10 A. He was an agent, Special Agent with the U.S. Department of  
11 Health and Human Services, Office of Inspector General.

12 Q. A job similar to the one that you hold?

13 A. That's correct.

14 Q. Was he in a special position to know what the cost report  
15 was and how it needed to be filed?

16 A. I don't know the answer to that question.

17 Q. Well, do you know how long he worked at the Office of  
18 Inspector General for the Department of Health and Human  
19 Services?

20 A. Several years.

21 Q. Okay. And at the time the '95 cost report was prepared,  
22 was he, as far as you know, a licensed attorney in Oklahoma?

23 A. As far as I know, yes.

24 Q. Did he hold himself out as a -- an attorney in Oklahoma?

25 A. Yes, he did.

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1 Q. And did he also hold himself out as a fraud investigator?

2 A. He has a designation that I recognize as a certified fraud  
3 examiner.

4 Q. And did he also perform, as far as your investigations  
5 show, an audit of QualiCare, Inc., and Monarch Management for  
6 several months prior to the filing of the '95 cost report?

7 A. I don't know what -- I know there was an audit, but I  
8 don't remember what the particular date of that audit was.

9 Q. Have you ever talked with Mr. Patzkowski?

10 A. Yes, I have.

11 Q. And in talking to him, did you talk to him about his  
12 relationship with QualiCare and Monarch?

13 A. No, I haven't.

14 Q. Are you then not aware, based upon your investigation of  
15 the case, that he, in fact, performed an audit and spent  
16 several months studying and investigating the relationship and  
17 the working of QualiCare and Monarch prior to the filing of the  
18 '95 cost report?

19 A. I don't know.

20 Q. Okay. If, Mr. Creamer, a lawyer were representing a home  
21 health care agency and had spent several weeks and months  
22 investigating the workings of that home health care agency and  
23 its relationship with its management company, and if that  
24 attorney held himself out as a fraud investigator and had spent  
25 several years as a Special Agent with the Department -- United

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1 States Department of Health and Human Services at the officer  
2 -- Office of Inspector General, would you expect that person to  
3 be able to know, in preparing a cost report, what should or  
4 should not go in that cost report?

5 MS. POARCH: Calls for a conclusion.

6 THE COURT: Overruled.

7 A. I would expect he would have some basic idea of how a cost  
8 report should be filed.

9 Q. (BY MR. LANKFORD) In the hypothetical I just gave you,  
10 are you not aware that Mr. Patzkowski was that individual  
11 lawyer with a background with the -- with your department?

12 A. He would have a basic idea of how a cost report is filed.

13 Q. As far as you know in your testimony today, are you  
14 telling the Court that you are not aware that Mr. Patzkowski  
15 prepared that '95 cost report, after an investigation that I  
16 described, and prepared the cost report and sent it to Tracy  
17 Kluding for her signing and filing?

18 A. I'm aware that his name appears on a questionnaire that's  
19 in connection with the cost report.

20 Q. But are you aware of his involvement as I described?

21 A. I'm aware of his involvement with the cost report.

22 Q. Can you --

23 A. I don't know the extent of his involvement with it.

24 Q. Okay. If he was that involved as I described, would you  
25 have any reason to believe that he was also not involved in the

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1 conspiracy to hide -- to hide from the federal government the  
2 fact that there was a related-party issue?

3 A. I don't know the answer to that question.

4 Q. Now, you said that, in Mr. Gilbert's statements to you,  
5 you expect him to testify that he was contacted by both Tracy  
6 Kluding, now Tracy Reed, and Christopher Kluding, the defendant  
7 in this case, and approached about forming a management  
8 company; is that correct?

9 A. Would you repeat the question, please?

10 Q. Okay. I believe your testimony was, was it not, that --  
11 that Mr. Gilbert tells you, and you expect him to testify, that  
12 it was Tracy Reed and Christopher Kluding who approached him  
13 about forming this management company?

14 A. That's correct.

15 Q. And that this happened in early 1995?

16 A. That's correct.

17 Q. And at that time, Mr. Gilbert; Ms. Reed, then Tracy  
18 Kluding; and Christopher Kluding were all three partners in  
19 QualiCare, Inc., equal partners, equal shareholders.

20 A. Yes.

21 Q. Okay. And they remained that way until May of 1995?

22 A. That's correct.

23 Q. And is it not true that Mr. Gilbert contacted a -- an  
24 attorney specializing in -- in home health agency law by the  
25 name of Laura Cross here in Oklahoma City?

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1 A. Yes. At some point he did.

2 Q. Okay. And in contacting this lawyer --

3 Do you know Laura Cross?

4 A. No, sir, I don't.

5 Q. Okay. You said in contacting this lawyer --

6 It was his idea to contact this lawyer; is that correct?

7 A. I don't know whose idea it was.

8 Q. Okay. But he talked to the lawyer?

9 A. Yes, he did.

10 Q. And then all three of them, at some point, talked with

11 Laura Cross?

12 A. I don't know who talked with Laura Cross.

13 Q. Okay. According to your investigation, who do you believe

14 talked to Laura Cross, of the three defendants?

15 A. Chris Kluding and James Gilbert.

16 Q. All right. Okay. Did -- to your knowledge, did Laura

17 Cross tell them how they could legally form Monarch Management

18 and how the makeup should be in terms of ownership of QualiCare

19 and in terms of ownership of -- of Monarch Management in order

20 to comply with Medicare regulations?

21 A. I don't know what the discussions were concerning that.

22 Q. You didn't talk to -- about that with Mr. Gilbert?

23 A. Yes, we did. There -- there were discussions concerning

24 the -- going to the attorney. Yes.

25 Q. Okay. But they sought the advice of a lawyer before they

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1 formed Monarch Management; is that correct?

2 A. I don't -- I don't recall what -- at what point they  
3 sought the advice of a lawyer.

4 Q. Did you ever talk to Laura Cross?

5 A. No, sir.

6 Q. Do you know anyone in this -- associated with this  
7 investigation who did talk to Laura Cross?

8 A. No.

9 Q. Now, in your direct examination by Ms. Poarch, you  
10 testified that no money changed hands on the sale of the  
11 QualiCare stock that occurred in May of 1995, that no money  
12 actually exchanged hands until a year later; is that correct?

13 A. That's correct.

14 Q. And you testified that that was because of a related-party  
15 problem that precipitated the payment of that money?

16 A. That's correct.

17 Q. Actually, what precipitated the payment of that money was  
18 something else; was it not, Agent Creamer?

19 A. I'm sorry, would you repeat the question?

20 Q. Sure. Have you examined and looked at the government's  
21 exhibits that they have presented me with in the last week?

22 A. Yes.

23 Q. Do you remember, and I'll be happy --

24 MR. LANKFORD: Judge, we don't have all the copies we  
25 normally will have at trial.

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1 May I approach the witness and show him my copy of this  
2 exhibit book?

3 THE COURT: Yes.

4 Q. (BY MR. LANKFORD) If you will --

5 Excuse me.

6 If you will look, Agent Creamer, at Government's Exhibit  
7 Number 9 and Number 10, what are those?

8 A. Number 9 is a promissory note between James Andrew Gilbert  
9 and Tracy L. Kluding.

10 Q. What was the date of that promissory note? When was it  
11 executed?

12 A. It states that it was executed the 30th day of April of  
13 1995.

14 Q. And in that promissory note, what is the consideration for  
15 that note?

16 A. It states that the principal amount of this note shall be  
17 the total purchase price of the stock, \$8,500.

18 Q. And, according to that promissory note, when was the money  
19 on -- when was the payoff of that promissory note to be made?

20 A. "All monies owed as a result of this promissory note shall  
21 be due and payable on April 30th, 1996."

22 Q. And when were those monies paid?

23 A. Approximately April 30th, 1996.

24 Q. Do you want to take -- change your testimony here as to  
25 what precipitated the payment of money in April or May of 1996

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1 concerning the sale of stock from Andrew Gil- -- from Andrew  
2 Gilbert to Tracy Kluding?

3 A. No.

4 Q. You don't think the fact that that promissory note was due  
5 at that time may have precipitated that payment?

6 A. No.

7 Q. Okay. And Government's Exhibit Number 10 is what?

8 A. A promissory note between Christopher Kluding and Tracy L.  
9 Kluding.

10 Q. And is it -- It is essentially the same terms of Exhibit  
11 Number 9, except instead of involving James Andrew Gilbert it  
12 involves Christopher Kluding; is that correct?

13 A. That's correct.

14 Q. And again, do you believe that that note precipitated the  
15 payment of the money owed to Christopher Kluding by Tracy  
16 Gilbert (sic) and the payment that he received in April of  
17 1996?

18 A. No.

19 MR. LANKFORD: May I, Your Honor?

20 THE COURT: Yes.

21 MR. LANKFORD: Thank you.

22 Q. (BY MR. LANKFORD) Okay, you described, Agent Creamer,  
23 Christopher Kluding, the things that he did at Monarch after he  
24 left QualiCare.

25 What was his position at Monarch Management?

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1 A. He was the chief financial officer.

2 Q. And I said that -- I recall that you said that he had  
3 checks that he would write for QualiCare, Inc. --

4 A. That's correct.

5 Q. -- and for Monarch Management?

6 A. Yes, he did write checks for Monarch Management, also.

7 Q. And he could sign those checks?

8 A. Which --

9 Could you repeat the question?

10 Q. Yes. You said that part -- that his duties entailed  
11 writing and signing checks for QualiCare, Inc., and for Monarch  
12 Management; is that correct?

13 A. That's correct.

14 Q. Did you think that it was unusual that the chief financial  
15 officer of a corporation would sign -- would write and sign  
16 checks for that company?

17 A. For which company? I --

18 Q. Okay, let's take them one at a time.

19 He had authority to write and sign checks on Monarch  
20 Management for Monarch Management; is that correct?

21 A. That's correct.

22 Q. Do you think that it is normal for the chief financial  
23 officer to have those duties?

24 A. Yes.

25 Q. Okay. And did he also -- Part of his duties, you said,

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1 were that he could hire and fire, give raises, and handle  
2 human-resources matters at Monarch Management?

3 A. That's correct.

4 Q. And do you think that that's unusual for a chief financial  
5 officer to have those duties?

6 A. At Monarch Management?

7 Q. Monarch Management.

8 A. No.

9 Q. Okay. Now let's turn to QualiCare.

10 What was Monarch Management -- According to the  
11 management agreement, what was Monarch Management supposed to  
12 do, as best you know, for QualiCare, Inc.?

13 A. Primarily -- primarily Medicare billing.

14 Q. Okay. Handle the financial affairs of QualiCare, Inc.?

15 A. Could -- could you be more specific?

16 Q. Yes. The management agreement between QualiCare, Inc.,  
17 and Monarch Management, are you familiar with that?

18 A. Uhm --

19 Q. Generally.

20 A. Generally.

21 Q. Okay. Am I correct in saying that part of the things  
22 that -- that the things that Monarch Management was supposed to  
23 do for QualiCare, Inc., was to take care of their financial  
24 affairs, write/sign checks for bills, and things of that  
25 nature?

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1 A. I believe part of the agreement was to handle the  
2 accounting, not specifically signing checks.

3 Q. Okay. Well, you said that -- earlier that the things that  
4 Chris Kluding was doing for QualiCare while he was at QualiCare  
5 were similar to the things he was doing for QualiCare while he  
6 was at Monarch Management; is that a fair statement?

7 A. Could you repeat that again?

8 Q. Yes, sir. And if I misstate your prior testimony, I  
9 apologize.

10 Is it not true, according to your testimony, that the  
11 duties that Chris Kluding had when he was at QualiCare, prior  
12 to May of 1995, were similar to the things that he did for  
13 QualiCare while he was working at Monarch Management?

14 A. Yes.

15 Q. And do you think that he did those things because that's  
16 what the management agreement between Monarch and QualiCare  
17 required of him as a chief financial officer of Monarch  
18 Management?

19 A. No.

20 Q. Why do you say that?

21 A. I believe that signing checks was not in the management  
22 agreement.

23 Q. You don't think that's an understood duty when you're  
24 handling the financial affairs, as a management company, of  
25 another corporation?

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1 A. Not -- not for a management company handling the finances  
2 of another corporation.

3 Q. Have you, in the course of your job, ever seen management  
4 companies that handled the financial affairs of a home health  
5 agency similar to what happened here?

6 A. No, I've never heard of that before.

7 Q. Okay. You used the term, "plausible deniability; is that  
8 right? Was it "possible" or "plausible"?

9 A. "Plausible."

10 Q. "Plausible deniability."

11 And you attributed that statement to Christopher Kluding?

12 Or, excuse me, Mr. Gilbert attributed that statement to  
13 Mr. Kluding; is that correct?

14 A. That's correct.

15 Q. Did -- When did he tell you that?

16 A. When did James Gilbert tell me that?

17 Q. Yes, sir.

18 A. Several days ago.

19 Q. Okay. So if it does not appear that -- that statement  
20 does not appear anywhere in any of his -- in his 302 statements  
21 the FBI took, or the statement that you took on behalf of your  
22 agency, or in his testimony before the grand jury, does that  
23 explain it, that he didn't tell you that until just a few days  
24 ago?

25 A. He told me that a few days ago.

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1 Q. Did you ask him why he didn't tell you that earlier?

2 A. I believe he told me that he just recalled it the day that  
3 we were speaking about it.

4 Q. And when did you make the U.S. Attorney -- Assistant U.S.  
5 Attorney for the Western District of Oklahoma aware of that  
6 statement for the first time?

7 A. That day of the interview.

8 Q. Which was --

9 A. Several days -- several days ago.

10 Q. Okay. To your knowledge, has that statement ever been  
11 turned over to the defendant in this case or myself prior to  
12 today's hearing?

13 A. I don't know.

14 Q. Did you have any interview with Tracy Kluding Reed?

15 A. Yes, I did.

16 MR. LANKFORD: Excuse me, Your Honor.

17 Q. (BY MR. LANKFORD) As far as you know, is Tracy Kluding  
18 Reed expected to testify in this case?

19 MS. POARCH: Objection, Your Honor.

20 THE COURT: Sustained.

21 Q. (BY MR. LANKFORD) I have to apologize, Agent Creamer.  
22 There was a statement that you made in your direct examination  
23 and I -- my hearing failed me towards the tail end of it, and I  
24 tried to take my notes, and probably would be better if you  
25 just restated it in your own words rather than me try to put

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1 words in your mouth.

2 It was when you were describing a meeting in Las Vegas  
3 where Mr. Gilbert, Mr. Jay Howard, and Mr. Christopher Kluding  
4 were at -- in Las Vegas at some -- it wasn't a meeting. I'm  
5 sorry. It was an expected fight, prize fight that didn't come  
6 off; do you remember that?

7 A. Yes, I remember that.

8 Q. Mike Tyson fight, I think it was.

9 A. That's correct.

10 Q. And you attributed some statement there that Mr. Gilbert  
11 told you about that Christopher Kluding made concerning the  
12 relationship of QualiCare, Inc., and Monarch.

13 What was that, sir?

14 A. That it was a cooperative, and that each of the parties,  
15 Tracy Kluding, Chris Kluding, and James Gilbert shared equally  
16 one-third.

17 MR. LANKFORD: May I have just a minute, Your Honor?

18 THE COURT: Yes.

19 MR. LANKFORD: That's all I have, Your Honor.

20 THE COURT: Anything else?

21 MS. POARCH: No redirect, Your Honor.

22 THE COURT: Step down, please.

23 (WITNESS EXCUSED)

24 THE COURT: Ms. Poarch?

25 MS. POARCH: We have no further witnesses, Your

*Larry E. Marks, CP, CM*  
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1 Honor.

2 THE COURT: Mr. Lankford, anything further?

3 MR. LANKFORD: No we don't.

4 THE COURT: The matter will be considered submitted.  
5 I will study it further and have a formal ruling before any of  
6 these statements are offered in the course of the trial.

7 However, for your planning purposes, it might be helpful  
8 for you to know that, assuming that the government can and will  
9 satisfy the foundational and evidentiary requirements for the  
10 statements that they have identified here this afternoon, it's  
11 my present impression that they probably will qualify under the  
12 rule.

13 I tell you that so that you can plan on using them and  
14 plan on meeting them on the defense, but if, on reflection and  
15 further study, I come to a different conclusion, I'll let you  
16 know before the trial begins. But I believe, on the basis of  
17 the evidence before me, that the statements will qualify.

18 Counsel, it my be helpful, to facilitate the trial itself,  
19 if I could meet with you just briefly in chambers as soon as we  
20 recess, and see if there are any matters that need to be  
21 discussed. I won't keep you more than three or four minutes,  
22 but I think it would be helpful for me, at least, and let's do  
23 that, if you would, please.

24 Court will be in recess.

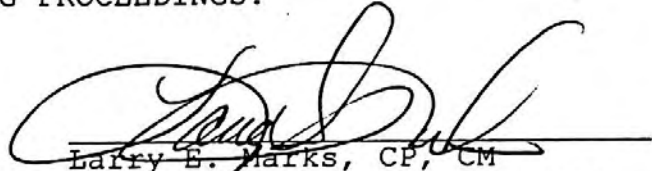
25 (PROCEEDINGS CLOSED)

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REPORTER'S CERTIFICATE

I HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT  
TRANSCRIPT OF THE FOREGOING PROCEEDINGS:



Larry E. Marks, CP, CM  
United States Court Reporter  
Western District of Oklahoma

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