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United States District Court,
 N.D. Iowa, Western Division.

UNITED STATES OF AMERICA, Plaintiff,
 v.
 Anna **DOSE**, aka Ann **Dose**, Carla Weber, and
 Larry Hinman Defendants.

No. CR04-4082-MWB.

Jan. 12, 2005.

R. Scott Rhinehart, Richard Rhinehart &
 Associates, Sioux City, IA, Anne M. Lavery,
 Willey, O'Brien, Mullin, Lavery & Hanrahan, LC,
 Cedar Rapids, IA, for Defendants.

Sean R. Berry, US Attorney's Office, Cedar
 Rapids, IA, for Plaintiff.

REPORT AND RECOMMENDATION ON
 PENDING MOTIONS

ZOSS, Magistrate J.

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I. INTRODUCTION

*1 This matter is before the court on a number of pretrial motions filed by the defendants Anna **Dose** and Larry Hinman. **Dose** has filed a supplemental motion to dismiss Counts 3-8 of the Superseding Indictment on the basis of a double jeopardy argument (Doc. No. 52). Hinman has filed a motion to strike the "Notice of Additional Relevant Facts" from the Superseding Indictment (Doc. No. 56); a motion to dismiss the Superseding Indictment for failure to state an offense (Doc. No. 57); a motion to dismiss, or to require the plaintiff to elect counts (Doc. No. 58); and a motion to suppress and motion in limine relating to evidence Hinman claims is subject to the attorney-client privilege (Doc. No. 59). All of the motions have been resisted and briefed. (The court will refer to the appropriate docket numbers in discussing the individual motions.)

Pursuant to the trial scheduling orders filed September 2 and October 5, 2004 (Doc. Nos. 11 & 39), pretrial motions in this case were assigned to the undersigned United States Magistrate Judge for review, and the issuance of a report and recommended disposition. Accordingly, the court held two hearings on the motions. An evidentiary hearing was held on December 9, 2004, at which all parties and their counsel were present. Hinman offered the testimony of four witnesses (including himself), and the plaintiff (the "Government") recalled one witness for rebuttal testimony. In addition, Defense Exhibits A through Q were admitted into evidence, and Government Exhibit 4 was admitted under seal. (*See* Minutes, Doc. No. 78) All of the evidence offered at the hearing was related to Hinman's motion to suppress and motion in limine (Doc. No. 59). The hearing was recessed before the parties were able to present oral argument on the remaining motions.

The court held a telephonic hearing on all of the above-listed motions on January 4, 2005. Only the parties' counsel were present.

II. FACTUAL BACKGROUND

The defendants are charged in a nine-count Superseding Indictment (Doc. No. 18) with charges relating to various acts of health care fraud, making false statements, and obstructing a federal audit. The charges against the defendants arise from an incident that occurred in June 1999, at Indian Hills Nursing and Rehabilitation Center in Sioux City, Iowa ("Indian Hills"), a facility owned and operated by Care Initiatives, Inc. At that time, Anna **Dose** was employed by Care Initiatives as a consulting nurse for the company's nursing homes in western Iowa, including Indian Hills. Carla Weber was employed as Nurse Manager for the south side of the Indian Hills facility. Larry Hinman was employed by Care Initiatives as a regional director. His responsibilities included overseeing the management and operations of various nursing homes, including Indian Hills.

Other individuals with knowledge about the incident in question include Scott Frank, Administrator of Indian Hills; Missy Kolar, Nurse Manager for the north side of the Indian Hills facility; Becky Medbourne, a nurse at the facility; and nurses' aides Becky Rodgers and Toni Ohl. The facility's Director of Nursing, Sue Harder, was out of the facility in training at the time of the incident in question.

*2 Indian Hills received Medicare and Medicaid funds in connection with its care of beneficiaries of those federal health care programs. To be certified to receive funding under Medicare and Medicaid, Indian Hills was subjected annually to an unannounced quality assurance inspection (called a "survey"). The purpose of the survey, in part, was to ensure that the residents of Indian Hills were being cared for properly. One such survey was conducted in May 1999, by the Iowa Department of Inspections and Appeals ("DIA"), operating as an agent of the federal Health Care Financing Administration ("HCFA"), the executive branch agency that makes the certification determination. During its May 1999 survey of Indian Hills, DIA

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identified at least one deficiency that required additional action. Specifically, DIA determined the facility was not providing its residents with adequate supervision and assistance devices to prevent accidents. Indian Hills was required to submit a proposed plan to correct the deficiency, and then to undergo a revisit to verify that the deficiency had been corrected.

Sometime after the May 1999 survey, but before the revisit, a resident of Indian Hills (the "Resident") fell from a gerichair (similar to a wheelchair) and was seriously injured. The Resident required stitches to close a wound on the Resident's face, and other medical attention.

From June 23 to 25, 1999, DIA inspector Michael Streepy conducted the revisit. Upon his arrival at Indian Hills, Streepy requested a list of all residents who had fallen since the May survey was concluded. The list was prepared by one or more Indian Hills employees, possibly including Carla Weber. The Resident's name was omitted from the list. The charges in the Superseding Indictment relate to that omission, and to other actions the Government alleges the defendants took to prevent Streepy from finding out about the Resident's fall. In brief, the Government generally alleges the defendants conspired to commit health care fraud, to make false statements or conceal material facts related to a health care benefit program, to make false statements or conceal material facts within the jurisdiction of the HCFA, to obstruct a federal auditor in the performance of official duties relating to an entity receiving in excess of \$100,000 from the United States during a one-year period, and to defraud the HCFA and the United States. (*See* Doc. No. 18)

As discussed fully below, the motions currently before the court relate to the manner in which the offenses are charged, and some of the factual allegations included in the indictment. In addition, Hinman seeks to suppress and exclude from the evidence at trial statements he made to Care Initiatives' attorney Mark Weinhardt and his legal assistant Cheryl Mendenhall, and to preclude the Government from interviewing Weinhardt and Mendenhall about information provided by Hinman. Hinman claims his statements to Weinhardt and Mendenhall were protected by the attorney-client

privilege.

*3 The court will discuss each of the pending motions separately, below.

III. DISCUSSION

A. Hinman's motion to strike "Notice of Additional Relevant Facts"

Hinman has filed a motion to strike the section of the Superseding Indictment entitled "Notice of Additional Relevant Facts," and a supporting brief. (Doc. No. 56) The Government has filed a brief in resistance to the motion. (Doc. No. 67)

Hinman's arguments in favor of striking the Notice of Additional Relevant Facts (the "Notice") from the Superseding Indictment are identical to the arguments raised by **Dose** and Weber in previous motions. (*See* Doc. Nos. 29 & 43) The undersigned filed a Report and Recommendation ("R & R") on those motions on October 22, 2004 (Doc. No. 50), with a recommendation that the motions be denied. The court now withdraws the prior R & R, and reverses its recommendation.

In light of today's decision by the United States Supreme Court in *United States v. Booker* and *United States v. Fanfan*, Nos. 04-104 and 04-105, 2005 WL 50108 (S.Ct. Jan. 12, 2005) ("*Booker*"), the court recommends all of the defendants' motions (Doc. Nos. 29, 43, & 56) to strike the Notice of Additional Relevant Facts (the "Notice") from the Superseding Indictment be granted. In *Booker*, the Court held that those portions of the Sentencing Reform Act of 1984 that make the United States Sentencing Guidelines mandatory, or that depend upon the Guidelines' mandatory nature, are constitutionally infirm and must be severed and excised from Act.

Because the Court has held the Sentencing Guidelines are not mandatory, but are advisory only, none of the facts contained in the Notice was proven to a jury in order for the court to consider those factors at the time of sentencing. Therefore, the Notice is surplusage and should be stricken from the indictment.

B. Motions to dismiss, or require election of counts, based on double jeopardy

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Dose has filed a motion to dismiss Counts Three through Eight of the Superseding Indictment, or in the alternative to dismiss Counts Six, Seven and Eight because they are duplicative of Counts Three, Four and Five. (Doc. No. 52) The Government has filed a brief in resistance. (Doc. No. 53) Hinman also has filed a motion to dismiss, or to require the Government to elect between multiplicitous counts. (Doc. No. 58) The Government has filed a brief in resistance. (Doc. No. 68) **Dose** and Hinman both seek relief on the same basis; i.e., they argue the same facts are required to prove a violation of both 18 U.S.C. § 1001 and 18 U.S.C. § 1035, and charging them under both statutes is redundant and violates their Fifth Amendment right against double jeopardy.

Dose notes the question of whether charges under sections 1001 and 1035 are duplicative appears to be a matter of first impression in the Eighth Circuit. Indeed, the court has been unable to locate a case directly addressing the issue from any circuit, and the parties have cited no authorities comparing the two statutes. However, a substantial body of case law exists addressing the proper analysis the court should employ in considering a double jeopardy argument.

*4 Preliminarily, before addressing the merits of these motions, the court observes that any ruling at this juncture puts the cart before the horse, to some extent. The Government has stated its intention to dismiss Count 2, and the health care fraud object of the conspiracy charged in paragraph 2.A. of Count 1, as to all defendants. The Government further intends to seek a second superseding indictment that combines Counts 3 and 4, and Counts 6 and 7. The prosecutor stated he prefers to receive the court's ruling on the current Superseding Indictment so he will have guidance on how to proceed in drafting the second superseding indictment. To some extent, then, the Government is seeking an advisory opinion based on court's guess about how the second superseding indictment might look.

Nevertheless, the form the indictment may take probably is irrelevant to the issue of whether the defendants' alleged conduct may form the basis for simultaneous charges under both section 1001 and section 1035. Therefore, the court will undertake the analysis of the issue despite the fact that it is

preliminary to the filing of a second superseding indictment. In addition, based on the Government's representations, the court recommends Count 2, and paragraph 2.A of Count 1, be stricken from the Superseding Indictment.

Before discussing the applicable law, the court will set out the provisions of each of the two sections in question.

Section 1035 provides as follows:

(a) Whoever, in any matter involving a health care benefit program, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or

(2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) As used in this section, the term "health care benefit program" has the meaning given such term in section 24(b) of this title.

18 U.S.C. § 1035. Section 24(b) defines "health care benefit program" as

any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

18 U.S.C. § 24(b).

Section 1001 provides as follows:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

*5 (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

18 U.S.C. § 1001.

Dose and **Hinman** argue sections 1035 and 1001 are cumulative or multiplicitous because they require proof of the same facts, violating their right against double jeopardy. "The Double Jeopardy Clause 'protects against multiple punishments for the same offense.'" *United States v. Ervasti*, 201 F.3d 1029, 1039 (8th Cir.2000) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). " 'In order to support a claim of double jeopardy, a defendant must show that the two offenses charged are in law and fact the same offense.'" *Id.* (quoting *United States v. Bennett*, 44 F.3d 1364, 1368 (8th Cir.1995)). Here, the court must determine whether the offenses set forth in sections 1035 and 1001 are the same for purposes of double jeopardy.

As the Eighth Circuit Court of Appeals explained in *Ervasti*:

Our starting point in determining whether [the charged offenses] are the "same offense" for double jeopardy purposes is the same elements analysis of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), which provides: "[W]here the same act or

transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." 284 U.S. at 304, 52 S.Ct. 180, 76 L.Ed. 306.

Ervasti, 201 F.3d at 1039.

The Supreme Court has summarized the *Blockburger* test as follows:

In both the multiple punishment and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. *See, e.g., Brown v. Ohio*, 432 U.S. 161, 168-169, 97 S.Ct. 2221, 2226-2227, 53 L.Ed.2d 187 (1977); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) (multiple punishment); *Gavieres v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 422, 55 L.Ed. 489 (1911) (successive prosecutions). The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

*6 *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556 (1993). *See Lewis v. United States*, 523 U.S. 155, 177, 118 S.Ct. 1135, 1147, 140 L.Ed.2d 271 (1998) (Scalia, J. and Thomas J., concurring) ("Two offenses are different, for double jeopardy purposes, whenever each contains an element that the other does not.... That test can be easily and mechanically applied, and has the virtue of producing consistent and predictable results.") (citing *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182). *See also McIntyre v. Caspari*, 35 F.3d 338, 340 (8th Cir.1994) ("[T]he Supreme Court has made clear that the *Blockburger* 'same-elements' test is the sole standard by which we must determine whether a subsequent prosecution violates the Double Jeopardy Clause." [Citations omitted.]).

The Eighth Circuit Court of Appeals has recognized that the Supreme Court, in *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), further refined the *Blockburger* test to

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provide that "[e]ven if the elements of two offenses are the same, prosecution on the second charge is permissible under the Double Jeopardy Clause if the legislature intended that the second offense be separately punishable from the first." *United States v. Johnson*, 352 F.3d 339, 343 (8th Cir.2003). In the present case, the Government argues Congress evidenced such an intent with regard to sections 1035 and 1001, and, therefore, that the defendants' motions must fail even if the court were to determine the two sections required proof of the same elements.

The Government argues the elements of sections 1001 and 1035 are different because section 1001 requires a false statement within the Government's jurisdiction, while section 1035 requires a false statement in connection with a health care matter. The defendants respond that the Government is making a distinction without a difference because under the facts of this case, the health care benefits programs for purposes of section 1035 are Medicare and Medicaid, and there can be no argument that those programs are not under the Government's jurisdiction. Therefore, they argue that proving a violation of section 1035 *ipso jure* encompasses a violation of section 1001.

The defendants argue further that although it is clear from the legislative history of section 1035 that Congress was aware of the existence of section 1001, there is nothing in the legislative history to indicate Congress recognized or intended that a person who violates section 1035 could be subject to double punishment under both 1035 and 1001. (See Doc. No. 58-2, p. 6; citing *United States v. Sink*, 851 F.2d 1120, 1123-24 (8th Cir.1988) ("Congress ordinarily does not intend multiple punishments for the commission of two offenses where those offenses proscribe the same conduct."), in turn citing *Whalen v. United States*, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 1437-38, 63 L.Ed.2d 715 (1980)). Instead, the defendants claim that because the bulk of the language of the two sections is identical, "[t]he clear implication is that Congress intended to extend the criminal penalties in existence for making false statements in a matter within the jurisdiction of the government to making false statements in a matter involving a health care benefit program." (Doc. No. 58-2, pp. 6-7)

*7 The Government responds by noting that Congress, having recognized some health care false statement crimes were being prosecuted under section 1001, then passed section 1035 "without limiting its application to only those crimes that could not be prosecuted under the existing Section 1001." (Doc. No. 53, pp. 4-5) The Government relies on the fact that Congress never suggested the two statutes could not be applied together, and notes the court should not assume " 'Congress was unaware that it had created two different offenses permitting multiple punishment for the same act.' " (Doc. No. 53, p. 5, quoting *United States v. Woodward*, 469 U.S. 105, 109, 1051 S.Ct. 611, 613, 83 L.Ed.2d 518 (1985); and citing *United States v. Bennett*, 44 F.3d 1364, 1373 (8th Cir.1995) ; *United States v. Henderson*, 19 F.3d 917, 926 (5th Cir.1994)).

The Government further notes Congress included both section 1001 and section 1035 in its statutory definition of a "Federal health care offense," which is specifically defined to include a violation of, or a criminal conspiracy to violate, section 1035 (see 18 U.S.C. § 24(a)(1)), and section 1001 "if the violation or conspiracy relates to a health care benefit program" (see 18 U.S.C. § 24(a)(2)). (Doc. No. 53, p. 6)

In evaluating the two statutes pursuant to the *Blockburger* test, the court first will compare the elements necessary to prove a violation of each of the statutes.

A defendant must knowingly and willfully:

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Section 1001

(in a matter within jurisdiction of the federal government)

falsify, conceal, or cover up a material fact, by a trick, scheme, or device; or

make a materially false, fictitious, or fraudulent statement or representation; or make or use a false writing or document knowing it contains a materially false, fictitious, or fraudulent statement

or entry.

Thus, the differences in the elements required to prove a violation of the two statutes are as follows: the section 1001 act must be done in a matter that is within the jurisdiction of the federal government, while the section 1035 act must be done in a matter involving a health care benefit program, and in connection with delivery of or payment for health care benefits, items, or services.

The court notes that a health care benefit program involved in a section 1035 violation may or may not fall under the jurisdiction of the federal government. A person could violate section 1035 in connection with the delivery of health care services under a private health care benefit program and not concurrently violate section 1001. Conversely, a person could violate section 1001 in connection with any number of matters that fall within the jurisdiction of the federal government but have nothing to do with a health care benefit program.

*8 In the present case, the only way one reaches the conclusion urged by the defendants is by considering the particular factual allegations underlying the current charges. Clearly, every violation of section 1035 that involves a federal benefit program such as Medicare or Medicaid necessarily will entail a violation of section 1001. This gives rise to the question of whether, under

Section 1035

(in a matter involving a health care benefit program)

falsify, conceal, or cover up a material fact, by a trick, scheme, or device; or

make a materially false, fictitious, or fraudulent statement or representation; or make or use a false writing or document knowing it contains a materially false, fictitious, or fraudulent statement

or entry, in connection with delivery of or payment for health care benefits, items, or services.

Blockburger, the court is permitted to consider the analysis within the factual context of an individual case. The court finds it is not. The test must be applied by focusing on the statutory elements of the offense, and not on the particular facts of the case. See *Albernaz v. United States*, 450 U.S. 333, 338, 101 S.Ct. 1137, 1142, 67 L.Ed.2d 275 (1981) ("As *Blockburger* and other decisions applying its principle reveal ... the Court's application of the test focuses on the statutory elements of the offense.") (quoting *Iannelli v. United States*, 420 U.S. 770, 785 n. 17, 95 S.Ct. 1284, 1293 n. 17, 43 L.Ed.2d 616 (1975)).

However, even if the court had found both statutes to proscribe identical conduct, the court still would find charging the defendants under both statutes is permissible because the court finds Congress expressed its intent clearly. The court is persuaded by the reasoning in *United States v. Woodward*, 469 U.S. 105, 105 S.Ct. 611, 83 L.Ed.2d 518 (1985), in which the Court applied the *Blockburger* test to determine whether a currency reporting violation necessarily included proof of a section 1001 offense. In its analysis, which parallels the analysis in the present case, the Court held as follows:

It is clear that in passing the currency reporting law, Congress'[s] attention was drawn to 18 U.S.C. § 1001, but at no time did it suggest that

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the two statutes could not be applied together. We cannot assume, therefore, that Congress was unaware that it had created two different offenses permitting multiple punishment for the same conduct....

Woodward, 469 U.S. at 109, 105 S.Ct. at 613 (citing *Albernaz*, 450 U.S. at 341-42, 101 S.Ct. at 1143-44).

The Court further found that Congress's "intent to allow punishment under both 18 U.S.C. § 1001 and [the currency reporting statute] is shown by the fact that the statutes 'are directed to separate evils.'" *Id.* (quoting *Albernaz*, 450 U.S. at 343, 101 S.Ct. at 1144). The *Woodward* Court noted that section 1001 "was designed 'to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.'" *Id.* (quoting *United States v. Gilliland*, 312 U.S. 86, 93, 61 S.Ct. 518, 522, 85 L.Ed. 598 (1941)). On the other hand, the purpose of section 1035 is to "combat waste, fraud, and abuse in health insurance and health care delivery." 1996 WL 579893 (Leg.Hist.), Introduction to H.R. Conf. Rep. 104-736 (1996), reprinted in 1996 U.S.C.C.A.N.1990.

*9 The court finds the legislative history reveals Congress's intent that conduct may be punishable under both section 1001 and section 1035. The court therefore recommends denial of **Dose's** and Hinman's motions to dismiss or to require the Government to elect counts, with the exception of Count 2, and paragraph 2.A. of Count 1, which should be dismissed pursuant to the Government's representation that it will not pursue those charges. (See Doc. No. 69, p. 2; Doc. No. 75)

C. Hinman's motion to dismiss for failure to state an offense

Hinman has moved for dismissal of the Superseding Indictment on the basis that it fails to state an offense. (Doc. No. 57) The Government has resisted the motion (Doc. No. 69), Hinman filed a reply to the Government's resistance (Doc. No. 74), and the Government filed a response to Hinman's reply (Doc. No. 76). Preliminarily, the court notes the motion should be granted with respect to Count 2, and paragraph 2.A. of Count 1 based on the Government's representation that it intends to

dismiss those charges. (*See id.*)

1. Law applicable to motions to dismiss

The Eighth Circuit Court of Appeals has considered the minimum requirements for a sufficient indictment on numerous occasions. In *United States v. Cuervo*, 354 F.3d 969 (8th Cir.2004), the court explained:

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974); see [*United States v. Dolan*, 120 F.3d [856,] 864 [(8th Cir.1997)] ("To be sufficient, an indictment must fairly inform the defendant of the charges against him and allow him to plead double jeopardy as a bar to future prosecution."). Typically an indictment is not sufficient only if an essential element of the offense is omitted from it. [*United States v. White*, 241 F.3d [1015,] 1021 [(8th Cir.2001)]].

Cuervo, 354 F.3d at 983. See *Bousley v. United States*, 523 U.S. 614, 618, 118 S.Ct. 1604, 1609, 140 L.Ed.2d 828 (1998) ("[T]he first and most universally recognized requirement of due process" is that a defendant receive "real notice of the true nature of the charge against him.") (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941)).

In the *White* opinion cited by the court in *Cuervo*, the Eighth Circuit noted, "Usage of a particular word or phrase in the indictment is not required as long as we can recognize a valid offense and the form of the allegation 'substantially States the element[s].' ... In fact, we will find an indictment insufficient only if an 'essential element "of substance" is omitted.'" *White*, 241 F.3d at 1021 (quoting *United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir.1988)). However, as Chief Judge Mark W. Bennett noted in *United States v. Nieman*, 265 F.Supp.2d 1017 (N.D.Iowa 2003):

*10 Although no particular words or phrases are necessarily required, "[i]t is well-established in this circuit that citation of the statute, without more, does not cure the omission of an essential element of the charge because bare citation of the

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statute 'is of scant help in deciding whether the grand jury considered' the missing element in charging the defendant." [*United States v. Olson*, 262 F.3d [795,] 799 [(8th Cir.2001)] (quoting *United States v. Camp*, 541 F.2d 737, 740 (8th Cir.1976), and also citing *United States v. Zangger*, 848 F.2d 923, 925 (8th Cir.1988)). *Nieman*, 265 F.Supp.2d at 1028 (quoting *United States v. Johnson*, 225 F.Supp.2d 1009, 1015-16 (N.D.Iowa 2002) (footnote omitted)). Judge Bennett explained the court first must determine how the statutes and case law define the offenses charged in each count of the indictment, and then must determine whether the counts of the indictment adequately allege the offenses, as defined. *Nieman*, 265 F.Supp.2d at 1029.

The court will apply these standards to Hinman's challenges to the Superseding Indictment. The parties have presented their arguments separately as to certain Counts of the Superseding Indictment, and the court will follow suit in its analysis.

2. *Count 1, paragraph 2.E. and Count 9's "intent to defraud" allegation* [FN1]

FN1. This portion of Hinman's brief also addresses Count 1, paragraph 2.A., and Count 2 (*see* Doc. No. 57-2, pp. 5-10), both of which the Government has indicated it will not pursue. (*See* Doc. No. 69, p. 2; Doc. No. 75) The court, therefore, will not address Count 1, paragraph 2.A., or Count 2 in its discussion.

Hinman seeks to dismiss the charge that the defendants conspired to defraud the HCFA and the United States (Count 1, paragraph 2.E.), and the charge that the defendants attempted to influence, obstruct, and impede a federal auditor with the intent to defraud the United States. [FN2] Hinman argues neither of these Counts contains an allegation as to how the defendants intended to defraud the Government; e.g., whether they intended to obtain money illegally, obstruct a lawful governmental function, etc. Hinman asserts each of these offenses "has as an essential element a scheme or artifice or an intent to defraud the government or one of its agencies or programs," the proof of which requires the Government to show the defendants contemplated " 'some actual harm or injury.' " (Doc.

No. 57-2, p. 5-6; quoting *United States v. Whitehead*, 176 F.3d 1030, 1037 (8th Cir.1999)) Hinman argues the charges are insufficient because they fail to identify the intended ends of the alleged fraud.

FN2. Count 9 charges the defendants with acting with the intent to "deceive and defraud" the United States. (*See* Doc. No. 18, Count 9) However, Hinman's argument in this section only addresses the claim that the defendants intended to defraud the Government. (*See* Doc. No. 57-2, p. 6) His argument that the remainder of Count 9 should be dismissed is address in section II.C.4., *infra*.

In support of his argument, Hinman cites *United States v. Bobo*, 344 F.3d 1076 (11th Cir.2003), in which the court held an indictment was insufficient in several respects. The Government attempts to distinguish *Bobo* on its facts, and on the particular deficiencies found in the *Bobo* indictment. Where *Bobo* is similar to the present case, however, is in the *Bobo* indictment's allegations regarding fraud. In *Bobo*, the Government charged the defendant with conspiracy and attempted health care fraud in connection with the bidding process for a Government-funded program to provide health care services to pregnant women on Medicaid. Basically, the Government alleged the defendant in *Bobo* had offered to pay another health care provider not to submit a bid for the Government-funded contract.

*11 The court found the indictment made "only a broad allegation of fraud in a health care benefit program without the required specificity," holding the indictment "fail[ed] to specify of what precisely Dr. Bobo was allegedly trying to defraud the ... program: benefits, items, services, or money." *Bobo*, 344 F.3d 1084. The court noted an indictment typically "sets forth what the scheme was designed to deprive the victim 'of' and then describes by what means the scheme was designed to be accomplished." *Id.* (citing *Belt v. United States*, 868 F.2d 1208, 1211 (11th Cir.1989); *United States v. Dynalectric Co.*, 859 F.2d 1559, 1572 (11th Cir.1988)). The court found the indictment "require[d] speculation on a fundamental part of the charge," and therefore it was insufficient. *Id.* (citing *Hamling v. United States*, 418 U.S. 87, 117, 94

S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974)).

The Superseding Indictment in the present case similarly is defective. Although it alleges the defendants committed certain acts which the Government contends were fraudulent, it fails to specify the harm or injury that allegedly was the intended result of the fraud. The court finds that without alleging the specific intended result of the fraud, there is "no reasonable construction [that] can be said to charge the offense," *United States v. Peterson*, 867 F.2d 1110, 1114 (8th Cir.1989) (citing *United States v. Young*, 618 F.2d 1281, 1286 (8th Cir.1980)), and the indictment therefore is insufficient.

Accordingly, the court recommends Count 1, paragraph 2.E. and the portion of Count 9 alleging intent to defraud, be dismissed.

3. Counts 3 through 8, and related portions of Count 1

Hinman argues Counts 3 through 8, and the corresponding conspiracy allegations in Count 1, should be dismissed because they fail to allege Hinman "intended that any falsification or concealment would bear a relation or a purpose to some matter within the jurisdiction of any department or agency of the United States." (Doc. No. 57-2, pp. 15-16) Hinman notes the indictment alleges he made false representations to an inspector of the Iowa Department of Inspections and Appeals, but fails to allege he knew the DIA inspector "had any relationship to, reported to or provided information to any department or agency of the United States." (*Id.*, p. 16) Hinman States that although Counts 3 through 5 allege violations of section 1035, and Counts 6 through 8 allege violations of section 1001, the applicable case law applies equally to both sections. (*Id.*)

In support of his argument, Hinman cites *Ebeling v. United States*, 248 F.2d 429, 434 (8th Cir.1957), and *United States v. Popow*, 821 F.2d 483, 486 (8th Cir.1987). Hinman describes the holdings of these cases as "clearly defin[ing] the offense prohibited by 18 U.S.C. § 1001 to include an element that the defendant intended that the falsification or concealment bear a relation or purpose as to some matter which is within the jurisdiction of a

department or agency of the United States." (Doc. No. 57-2, p. 15)

*12 The Government argues *Ebeling* and *Popow* no longer represent current law in the Eighth Circuit, citing *United States v. Hildebrandt*, 961 F.2d 116 (8th Cir.1992), and *United States v. Yermian*, 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984), for the proposition that intent to deceive the Government, and knowledge that a false statement is being made in connection with a matter under Government jurisdiction, are not elements of an offense under section 1001. The Government asserts it must prove only that Hinman knowingly and willfully intended to make, or cause to be made, a false statement. (Doc. No. 76, pp. 3-4)

Hinman responds that neither the Supreme Court in *Yermian* nor the Eighth Circuit in *Hildebrandt* addressed whether it must be reasonably foreseeable to a defendant that his false statements are related to a matter within Government jurisdiction. (Doc. No. 74). The Government agrees with Hinman's assertion, but points out that "every federal court of appeals to have considered this issue since *Yermian* has concluded that no such proof of foreseeability is necessary." (Doc. No. 76, p. 5, citing, *e.g.*, *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir.1984) ("We are persuaded that no mental state is required with respect to federal involvement in order to establish a violation of section 1001."); *United States v. Bakhtiari*, 913 F.2d 1053 (2d Cir.1990) (finding *Yermian* supports the conclusion that no "standard of jurisdictional awareness less than actual knowledge" is required, and finding "no doubt that Congress--through § 1001--acted within its powers to criminalize the issuance of an intentionally false statement within the jurisdiction of a federal department or agency, regardless of the defendant's awareness that the statement will be so delivered").

The court is persuaded by the reasoning in *Bakhtiari* and *Green*, and finds no scienter requirement with regard to the jurisdictional awareness of a false statement. The only intent the Government must prove the defendant had was the intent to make the false statement. By alleging Hinman made a false statement, or caused a false statement to be made, the indictment fairly apprises him of the conduct the Government alleges violated

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the statute. [FN3] Therefore, the court recommends Hinman's motion to dismiss Counts 3 through 8, and the corresponding conspiracy allegations in Count 1, be denied.

FN3. *Cf. Green* 745 F.2d at 1211 ("A person who knowingly and willfully makes a false statement cannot be deemed to have engaged in entirely innocent conduct.") (citing *United States v. Duncan*, 693 F.2d 971, 976 (9th Cir.1982); *United States v. Carrier*, 654 F.2d 559, 562 (9th Cir.1981)).

4. Count 9 and Count 1, paragraph 2.D.

In addition to his argument that Count 9 fails to allege intent to defraud sufficiently (discussed in section II.C.2., above), Hinman also argues Count 9 and the corresponding conspiracy allegation in Count 1, paragraph 2.D., fail to state an offense because the indictment "contains no factual allegations relating to the required element of [an] 18 U.S.C. § 1516 offense that the Defendant intended to deceive or defraud the United States." (Doc. No. 57-2, p. 19) Specifically, Hinman claims the indictment is insufficient because it fails to allege he "knew of any relationship between the Iowa Department of Inspections and Appeals inspector and the federal government," and fails to allege he knew the DIA inspector would communicate any false statement or concealment to the Government. (*Id.*)

*13 The court finds section 1516 contains no scienter requirement with respect to the jurisdictional prerequisites for a conviction under the statute. The court has found no authorities, and Hinman has cited none, holding a defendant must know the auditor he seeks to deceive is performing official duties on behalf of the federal government. The Superseding Indictment sufficiently alleges the defendants acted with the intent to deceive the DIA auditor. Whether or not the defendants knew, or had reason to know, the DIA auditor was acting on behalf of the Government is irrelevant to their culpability. As noted above with respect to Hinman's argument regarding the section 1001 allegations, the similar language in section 1516 is jurisdictional in nature and is irrelevant to the defendant's intent to deceive. *See Hildebrandt*, 961 F.2d at 118-19.

Section 1516 prohibits a person who, "with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties...." 18 U.S.C. § 1516(a). Count 9 alleges the defendants "with intent to deceive and defraud the United States, endeavored to influence, obstruct, and impede a Federal auditor, namely a DIA surveyor, in the performance of official duties...." (Doc. No. 18, Count 9) The court finds the requisite intent is satisfied if the Government proves the defendant intended to influence, obstruct, or impede an official auditor.

Because the court finds Count 9 is sufficient with regard to the allegation that the defendants intended to "deceive" the United States, the court therefore recommends Hinman's motion to dismiss Count 9, and the corresponding conspiracy allegation in Count 1, paragraph 2.E., be denied.

D. Hinman's motion to suppress and in limine

Hinman has filed a motion to suppress, and to exclude from evidence at trial, evidence and documents he claims are protected by the attorney-client privilege. (Doc. No. 59) The Government has resisted the motion. (Doc. Nos. 70 & 79) At the hearing on December 9, 2004, Hinman introduced a number of exhibits, some of which will be discussed in more detail below. The exhibits include correspondence between and among Care Initiatives' attorney Mark Weinhardt, Assistant U.S. Attorney Sean Berry, and Thomas Hanson, attorney for some other individuals involved in the investigation (Def.Exs.A-D). The exhibits also include a Care Initiatives inter-office memorandum (Def.Ex. E); a Joint Defense Agreement between Anna Dose, Missy Kolar, Care Initiatives, and their respective counsel (Def.Ex. F); and portions of summaries of interviews conducted by Weinhardt and other members of his law firm with Hinman and others during the course of Care Initiatives' investigation of this matter (Def.Exs.G-Q). An additional exhibit, admitted into evidence under seal, is an unredacted copy of interview notes prepared by Cheryl Mendenhall from Weinhardt's interview with Hinman (Gov't Ex. 4; compare Def. Ex. M).

*14 Weinhardt was retained by Care Initiatives in

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2001, to representation the company in connection with the grand jury investigation that resulted in the pending charges. On September 27, 2001, Weinhardt wrote to AUSA Berry asking Berry to "consider Care Initiatives and its officers, directors, and employees to be represented by counsel for the purposes of this investigation." (Def.Ex. A) Berry responded in a letter dated September 28, 2001, that Weinhardt's blanket assertion of representation was invalid, and he asked for "a list of Care Initiatives employees who have specifically agreed to be represented by [Weinhardt's] firm." (Def.Ex. B) On October 9, 2001, Weinhardt wrote to Berry stating that the rules of professional responsibility precluded *ex parte* contacts by government agents with employees of Care Initiatives who had managerial responsibility in the organization, employees whose conduct might impute liability to the company, and employees whose statements might constitute an admission on the part of the company. (Def.Ex. C) Weinhardt asked that "the government consider all Care Initiatives employees who fit into any of [these] three categories to be represented for purposes of this investigation." (*Id.*)

Two days later, on October 11, 2001, Weinhardt met with Hinman in a conference room at Care Initiatives' home office in West Des Moines, Iowa. At the start of the meeting, Weinhardt made some preliminary remarks, the contents of which are in dispute. Weinhardt testified he gave Hinman some general information about the Government's investigation, and then told Hinman that he represented and had an attorney-client relationship with Care Initiatives. He advised Hinman that an attorney-client privilege attached to the meeting, but the privilege belonged to the company, and the company could waive the privilege. He told Hinman that if he wanted his own attorney, the company would provide one for him. He then gave Hinman a copy of a "memorandum of rights," although Hinman did not have a chance to read the memorandum during the meeting.

Weinhardt had drafted the "memorandum of rights" dated October 1, 2001, which purported to be from Hulon Walker, the president of Care Initiatives, to "Employees of Care Initiatives." (Def.Ex. E) The memorandum provided, in part, as follows:

As you may know, the federal government is investigating certain activities which occurred at

the Care Initiatives Indian Hills facility. As part of this investigation, agents of the U.S. government may attempt to interview employees of Care Initiatives. These agents may be from various agencies, such as the Department of Health and Human Services Office of Inspector General, the FBI, the U.S. Department of Justice, the United States Attorney's Office, or others. The agents may seek to contact people either at home or at work, in person or by phone.

If government agents contact you requesting an interview, you have the right to do any of three things:

- *15 (1) You may grant the interview and speak with the agents;
- (2) You may decline the interview and not speak with the agents;
- (3) You may put off making your decision until a later time and contact the agents after you have made your decision.

If you grant an interview, you may request that the interview be conducted at a convenient and appropriate time and place. You may refuse to answer certain questions or stop the interview if you wish. If you grant an interview, you must tell the truth at all times. It is a crime to make a false statement to a government agent. Anything you say in the interview can be held against you.

You have the right, if you wish, to consult with a lawyer prior to any interview. You also have the right have your lawyer present with you at any interview if you choose. Care Initiatives has lawyers who are also available to talk to you about this process. The lawyers for Care Initiatives cannot give you legal advice individually. They can, however, help you contact a lawyer for yourself if you want one....

According to Hinman, at the start of the October 11, 2001, meeting, Weinhardt stated he had been retained by Care Initiatives to represent the company and its employees. From this, Hinman concluded that Weinhardt was his attorney. Hinman denied Weinhardt told him that he was only representing Care Initiatives or that the company would provide him with an outside attorney. Hinman stated if he had known the company would have provided him with a separate attorney, he would have gotten one. He also denied ever receiving a copy of the memorandum of rights. Hinman testified that Weinhardt told him he was

being interviewed to reach closure on the investigation, and to defend both the company and Hinman. According to Hinman, Weinhardt made it clear that the interview would be kept confidential.

The only witness to the meeting was Cheryl Mendenhall, a legal assistant working for Weinhardt's law firm. She testified she had no specific recollection of what was said during the meeting other than what was contained in her meeting notes. [FN4] (Def.Ex. M) In her notes, she stated, in relevant part, "[Weinhardt] discussed the grand jury process with [Hinman] and told him the company will provide counsel outside of Belin law firm if he wants and needs counsel. [Weinhardt] gave copy of memo regarding Hinman's rights."

FN4. Both Mendenhall and Weinhardt testified that Mendenhall did not have complete notes of what was said at the beginning of the meeting. Mendenhall took the notes on a laptop computer, and she had had trouble getting the computer to boot up properly at the beginning of the meeting.

The court has evaluated the evidence, including the witnesses' testimony, and makes the following findings of fact. Weinhardt and his law firm were retained by Care Initiatives to conduct an internal investigation of potential federal criminal charges against the company. On October 11, 2001, as part of this investigation, Weinhardt interviewed Hinman at the company's headquarters. At the start of the interview, Weinhardt advised Hinman that he and his law firm represented the company, and not Hinman. Weinhardt also told Hinman that the company would provide him with his own attorney if he wanted one. Weinhardt provided Hinman with a copy of the memorandum of rights dated October 1, 2001, but Hinman did not read it, at least until after the interview. During the interview, Hinman provided Weinhardt with no information that, on its face, would have raised a "red flag" to Weinhardt that Hinman likely was criminally liable for his actions in connection with the incident being investigated by the Government. In 2004, pursuant to an agreement between Care Initiatives and the Government, Weinhardt provided the Government with notes from his interviews of certain of the company's employees, including notes of the

October 11, 2001, interview of Hinman (Gov't Ex. 4).

*16 In his motion to suppress, Hinman asks the court to suppress notes of his interview, as well any testimony by Weinhardt or Mendenhall concerning what Hinman said during the interview, and any leads or other information derived by the Government from its knowledge of what Hinman told Weinhardt during the interview. Hinman, as the party asserting the existence of the attorney-client privilege, has the burden of proving the privilege applies to the communication at issue. *United States v. Sawyer*, 878 F.Supp. 295, 296 (D.Mass.1995). The court finds Hinman has not met this burden. He has failed to prove he ever had a personal attorney-client relationship with Weinhardt. Instead, the record establishes that Weinhardt interviewed Hinman on behalf of Care Initiatives, and Hinman's relationship to Weinhardt was as a company official, not as an individual. *See In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir.2001) (default assumption is that corporate counsel only represents the corporate entity, not the individuals within the corporate sphere); *In re Beville*, 805 F.2d 120, 124 (3d Cir.1986) ("[A]ny privilege that exists as to a corporate officer's role and functions within a corporation belongs to the corporation, not the officer.") (citing *CFTC v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1990-91, 85 L.Ed.2d 372 (1986)). In fact, the correspondence between AUSA Berry and Weinhardt immediately prior to the Hinman interview (Def.Exs.A-C) establishes that Weinhardt was representing Care Initiatives' managerial employees as representatives of the company, and not as individuals.

During arguments on the motion to suppress, Hinman's counsel acknowledged that there was never an attorney-client relationship between Hinman and Weinhardt. However, he argued that a joint defense privilege resulted from a joint defense agreement among Care Initiatives and its employees, and from application of the "common interest doctrine," which prohibited the company from disclosing privileged documents to the Government. If a joint defense privilege existed, the privilege could not be waived without the consent of all parties to the joint defense agreement. *See In re Grand Jury Subpoena*, 112 F.3d 910, 940 (8th Cir.1997).

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In *Hanson v. United States Agency for International Development*, 372 F.3d 286 (4th Cir.2004), the court described the "common interest doctrine" as follows:

Courts have established rules as to when the attorney-client privilege may apply to multiple parties. Described " 'as an extension of the attorney client privilege,' " *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir.1996) (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989)), the common interest doctrine applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest. *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 124 (4th Cir.1994); see also *Cavallaro v. United States*, 284 F.3d 236, 249- 50 (1st Cir.2002). In this context the communications between each of the clients and the attorney are privileged against third parties, and it is unnecessary that there be actual litigation in progress for this privilege to apply. *Aramony*, 88 F.3d at 1392.

*17 *Id.*, 372 F.3d at 292.

In order to establish the existence of a joint defense privilege, Hinman must show that the communication sought to be protected from disclosure was made as " 'part of an on-going and joint effort to set up a common defense strategy.' " *In re Bevell*, 805 F.2d at 126 (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.1985)). The burden of establishing the existence of a joint defense agreement falls on the person claiming it. *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir.1997). Hinman's problem here is that he never was part of any such "on-going and joint effort." To prove this, Hinman would have to show "[s]ome form of joint strategy ... rather than merely the impression of one side...." *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir.1999). Such an agreement is present only when parties to actual or potential litigation enter into an agreement to exchange information for the purpose of advancing their common interest. *John Morrell & Co. v. Local 304A, United Food & Comm'l Workers*, 913 F.2d 544, 556 (8th Cir.1990).

Here, the record establishes only that Weinhardt interviewed Hinman as part of an in-house investigation by the company into allegations by the Government against the company. There was no

"exchange" of information. Weinhardt had no knowledge from which he could have concluded that Hinman potentially was criminally liable for his actions. Weinhardt simply was seeking information in connection with his internal investigation on behalf of the company. No joint defense agreement can be implied from these facts. See *Weissman*, 195 F.3d at 99. While Care Initiatives and Hinman may have had some common interests in the investigation, neither the company, nor Weinhardt on its behalf, entered into any agreement with Hinman concerning a joint defense or a joint defense privilege. [FN5]

FN5. Hinman points to the fact that Care Initiatives entered into a verbal joint defense agreement with Thomas Hanson, an attorney who represented another employee of Care Initiatives, and entered into a written joint defense agreement with another employee (Def.Ex. F). This evidence does not help Hinman to establish he had such an agreement with the company. In fact, it distinguishes Hinman's situation, where there is no evidence of such an agreement, from the situation of the other employees who entered into such an agreement. Hinman's position also is not helped by the fact that Weinhardt's law firm apparently breached the joint defense agreement with attorney Hanson's client.

There simply was no joint defense agreement, either express or implied. Accordingly, Hinman's motion to suppress and in limine should be denied.

IV. CONCLUSION

For the reasons discussed above, IT IS RECOMMENDED, unless any party files objections to this Report and Recommendation as specified below, that Hinman's motion to strike the Notice of Additional Relevant Facts (Doc. No. 56) be granted; **Dose's** motion to dismiss Counts 3 through 8 on the basis of double jeopardy (Doc. No. 52) be denied; Hinman's motion to dismiss for failure to state an offense (Doc. No. 57) be granted in part and denied in part (to dismiss Count 1, paragraph 2.E., and portion of Count 9 alleging intent to defraud; and to deny motion as to other

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counts); Hinman's motion to dismiss or to require the Government to elect counts (Doc. No. 58) be denied; and Hinman's motion to suppress and in limine (Doc. No. 59) be denied.

In addition, the court withdraws its prior Report and Recommendation (Doc. No. 50), and, for the reasons discussions in section II.A. above, recommends **Dose's** and Weber's motions (Doc. Nos. 29 & 43) to dismiss the Notice of Additional Relevant Facts be granted. The court notes **Dose** and Weber have filed objections to the court's previous Report and Recommendation. (*See* Doc. Nos. 54 & 64) Those objections are deemed moot by virtue of this decision.

***18** Any party who objects to this report and recommendation must serve and file specific, written objections by no later than January 25, 2005. Any response to the objections must be served and filed within five court days after service of the objections.

IT IS SO ORDERED.

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