

Instruction No. /

OPENING

Members of the Jury, you have heard the evidence and it is now my duty to instruct you on the applicable law. You will be provided a written copy of these instructions for your use during deliberations.

You should not construe anything said in these instructions or on the verdict form to suggest what verdict I think you should find. It is your duty to determine the facts. Your only interest is to determine whether the prosecution has proven the defendant guilty beyond a reasonable doubt.

The evidence in this case consists of the sworn testimony of the witnesses, and all exhibits received in evidence.

At times during trial you saw lawyers make objections to questions asked by other lawyers, and to answers by witnesses. This simply meant the lawyers were requesting that I make a decision on a particular rule of law. Do not draw any conclusion from either the

objections or my rulings. These are only related to the legal questions that I had to determine and should not influence your thinking.

It is my job to decide what rules of law apply. I have explained some of these rules to you before and I will explain others to you now. This is my job; it is not the job of the lawyers. So, while the lawyers may have commented during the trial on some of these rules, you are to be guided only by what I say about them. You must not follow some rules and ignore others. Even if you disagree or do not understand the reasons for some of the rules, you are bound to follow them.

Instruction No. 2

REVIEW THE INDICTMENT

You will recall that I read the superseding Indictment to you during jury selection. Normally, I would read either a summary or the superseding Indictment to you again at this time. Counsel have agreed that it is not necessary that it be read to you but that instead you may read it yourselves. It is included in my written instructions as Instruction No. 3 and I instruct you to read it early in your deliberations.

Instruction No. 3

SUPERSEDING INDICTMENT

The Federal Grand Jury Charges:

Introduction

At all times material to this Superseding Indictment:

1. Marie Detty Youth and Family Services Center, Inc., (hereinafter Marie Detty) is a non-profit corporation located in Lawton, Oklahoma that administers a Head Start Program with a grant received from the US Department of Health & Human Services, Administration for Children and Families (HHS-ACF).

2. The defendant, PAUL L. SMITH, became the Executive Director of Marie Detty on September 11, 1989. He terminated his position as Executive Director on December 31, 2004.

3. Marie Detty applied for a grant from HHS-ACF for fiscal years 2002 and 2003. In those grant applications, Marie Detty designated a certain amount of funds to be paid to Principal Financial

Group for the Marie Detty Youth and Family Service Center Inc., Profit Sharing Plan. Principal Financial Group was the Plan's third party administrator, record keeper, and Plan custodian. That money was budgeted and required to be paid over to Principal Financial as approved by HHS-ACF.

4. On April 30, 2002 and again on May 31, 2002, the defendant, PAUL L. SMITH, directed the fiscal director of Marie Detty to write checks to Principal Financial in the amounts of \$3,315.92 and \$49,167.74 respectively, for the Marie Detty employee profit sharing plan. After having written the checks, the fiscal director was told by the defendant, PAUL L. SMITH, to hold the checks and not remit them to Principal Financial for payment into the employee profit sharing plan.

5. On April 30, 2003 and again on May 26, 2003, the defendant PAUL L. SMITH, directed the fiscal director of Marie Detty to write two checks to Principal Financial, each in the amount

\$52,483.66. Both checks were voided by the fiscal director at the direction of PAUL L. SMITH and never remitted to Principal Financial for payment into the employee profit sharing plan.

6. The Plan Administrator, Marie Detty Youth and Family Service Center Inc., acting through its Board of Directors, was the fiduciary for the Marie Detty employee profit sharing plan.

7. The defendant engaged in deceptive practices regarding the funding of the Marie Detty employee profit sharing plan. Specifically, the defendant falsely reported to the Board of Marie Detty that there were insufficient funds available to fund the profit sharing plan for 2002 and 2003, when in fact the defendant knew that there were sufficient funds provided from the HHS-ACF grant, that provided a "line item" in the budget fully funding contributions to the employee profit sharing plan.

COUNT 1

8. From on or about April 30, 2002 and continuing through July 10, 2006, in the Western District of Oklahoma and elsewhere,

----- PAUL L. SMITH, -----

the defendant herein, did unlawfully, willfully and knowingly, embezzle, steal, abstract and converted to his own use moneys, funds, securities, premiums, credits, property and other assets of Marie Detty Youth and Family Service Center Inc., Profit Sharing Plan, an employee pension benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 and of a fund connected with such plan. Specifically, the defendant defeated the plan's right to collect amounts contractually due from the employer or its agent by engaging in certain deceptive practices.

All in violation of Title 18, United States Code, Section 664.

COUNT 2

9. The Grand Jury realleges an incorporates paragraphs 1 through 3, 6 and 7 as though fully set forth herein.

10. On or June 30, 2003, the defendant, PAUL L. SMITH, directed the fiscal director of Marie Detty to write a check to Principal Financial, in the amount \$39,206.03. The check was voided by the fiscal director at the direction of PAUL L. SMITH and never remitted to Principal Financial for payment into the employee profit sharing plan.

11. From on or about July 1, 2003 and continuing through July 10, 2006, in the Western District of Oklahoma and elsewhere,

----- PAUL L. SMITH, -----

the defendant herein, did unlawfully, willfully and knowingly embezzle, steal, abstract and converted to his own use moneys, funds, securities, premiums, credits, property and other assets of Marie Detty Youth and Family Service Center Inc., Profit Sharing Plan, an

employee pension benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974 and of a fund connected with such plan. Specifically, the defendant defeated the plan's right to collect amounts contractually due from the employer or its agent by engaging in certain deceptive practices.

All in violation of Title 18, United States Code, Section 664.

COUNT 9

20. On or about February 11, 2008, in the Western District of Oklahoma,

----- PAUL L. SMITH, -----

the defendant herein, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to a Special Agent of the United States Department of Labor Office of Inspector General (DOL-OIG) and an Investigator of the Employee Benefits Security Administration (DOL-EBSA) who were investigating allegations that Paradigm Associates was merely an alter ego of the

defendant and had not provided advice, consulting services or direction on management matters to Marie Detty. As part of that investigation, agents with DOL-OIG and DOL-EBSA began tracing the checks Marie Detty wrote to Paradigm Associates to determine who ultimately received the money, since they were unable to locate a business address for Paradigm Associates. The defendant falsely told the agents that Paradigm Associates provided advice to him as the Executive Director and identified two consultants, Bob Beesley and Scott Selby who allegedly worked for Paradigm.

All in violation of Title 18, United States Code, Section 1001(a)(2).

COUNT 10

21. On or about February 11, 2008, in the Western District of Oklahoma,

----- PAUL L. SMITH, -----

the defendant herein, knowingly and willfully made a materially false, fictitious and fraudulent statement and representation to a Special Agent of the United States Department of Labor Office of Inspector General (DOL-OIG) and an Investigator of the Employee Benefits Security Administration (DOL-EBSA) who were investigating allegations that the defendant used Paradigm Associates to embezzle money from Marie Detty. During the interview with the agents, the defendant falsely represented that he received no financial benefit from Paradigm Associates when, in truth and fact, the defendant deposited the proceeds from the checks written from Marie Detty to Paradigm Associates into his personal account and the Paradigm Associates account at Southwest Oklahoma Federal Credit Union, formerly the Lawton Teachers Federal Credit Union.

All in violation of Title 18, United States Code, Section 1001(a)(2).

Instruction No. 4

PLEA AND PRESUMPTION OF INNOCENCE

To the Superseding Indictment herein, defendant has entered a plea of not guilty, which casts upon the government the burden of proving the essential allegations beyond a reasonable doubt before you would be justified in returning a verdict of guilty.

The Superseding Indictment is simply the means by which a defendant is placed upon trial and sets forth in a formal way the offense of which the defendant is accused. It is in and of itself no evidence of the guilt of a defendant, and you should not allow yourselves to be influenced against a defendant by reason of the filing of the Indictment.

The defendant is presumed to be innocent of the crimes charged and of each and every element.

The presumption of innocence with which a defendant enters a trial continues until such time, if ever, as guilt is shown beyond a

reasonable doubt, and if, upon a consideration of all the evidence, facts and circumstances in the case, you entertain a reasonable doubt of the guilt of a defendant as to the crime charged against him, you must give him the benefit of doubt and return a verdict of not guilty.

Instruction No. 5

BURDEN OF PROOF – REASONABLE DOUBT

The government has the burden of proving the defendant guilty beyond a reasonable doubt. The law does not require a defendant to prove his innocence or produce any evidence at all. The government has the burden of proving defendant guilty beyond a reasonable doubt, and if it fails to do so, you must find the defendant not guilty.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a defendant's guilt. There are few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning a defendant's guilt. A reasonable doubt is a doubt based on reason and common sense after careful and impartial consideration of all the evidence in the case. If, based on your consideration of the evidence, you are firmly convinced that a defendant is guilty of the

crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 6

CAUTION – CONSIDER ONLY CRIMES CHARGED

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or crime not charged in the indictment.

Instruction No. 7

COUNTS ARE SEPARATE CRIMES

You are instructed that a separate crime or offense is charged in each count of the superseding indictment. Each crime or offense as charged, and its evidence, should be considered separately, and a verdict of guilty or not guilty as to each count or offense should likewise be considered separately. Of course, some evidence may pertain to more than one count.

The fact that you may find a defendant guilty or not guilty as to the crime or offense charged in one count should not control your verdict with reference to the other counts or offenses.

Instruction No. 8

EVIDENCE – DEFINED

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence.

Instruction No. 9

CREDIBILITY OF WITNESSES

I remind you that it is your job to decide whether the government has proved the guilt of the defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or “believability” of each witness and the weight to be given to the witness’s testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should think about the testimony of each witness you have heard and decide whether you believe all or any part of what each witness had to say, and how important that testimony was. In making that decision, I suggest that you ask yourself a few questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of

the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he or she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? When weighing the conflicting testimony, you should consider whether the discrepancy has to do with a material fact or with an unimportant detail. And you should keep in mind that innocent misrecollection – like failure of recollection – is not uncommon.

In reaching a conclusion on a particular point, or ultimately in reaching a verdict in this case, do not make any decisions simply because there were more witnesses on one side than on the other.

Instruction No. 10

**EVIDENCE - INFERENCES -
DIRECT AND CIRCUMSTANTIAL**

"Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances from which you may infer some other fact indicating either the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of a defendant's guilt beyond a reasonable doubt before a defendant can be convicted. If after weighing all of the evidence, you are not convinced of the guilt of a defendant beyond a reasonable doubt, you must find the defendant "not guilty." If, after weighing the evidence, you are so convinced, your verdict should be "guilty."

Instruction No. 11

DEFENDANT'S SILENCE

The Constitution of the United States grants to a defendant the right to remain silent. The defendant has entered a not guilty plea and therefore has denied the charges of the prosecution. No inference of guilt may be drawn by any juror from the fact that he did not take the witness stand and testify. It is the government's obligation to prove guilt beyond a reasonable doubt and the defendant has no obligation to speak.

Instruction No. 12

**THEFT OR EMBEZZLEMENT FROM
EMPLOYEE BENEFIT PLAN -- 18 U.S.C. § 664**

Section 664 of Title 18, of the United States Code provides, in
part that:

Any person who embezzles, steals or unlawfully and
willfully abstracts or converts to his own use or to the use
of another, any of the moneys, funds, securities,
premiums, credits, property or other assets of any . . .
employee pension benefit plan, . . .

shall be guilty of an offense against the United States.

Instruction No. 13

THEFT OR EMBEZZLEMENT FROM
EMPLOYEE BENEFIT PLAN
ELEMENTS

The defendant is charged in counts 1 and 2 with violating 18 U.S.C. §664. This law makes it a crime to embezzle, steal, unlawfully and willfully convert, and abstract moneys, funds, securities, premiums, credits, property and other assets of an employee pension benefit plan.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: The Marie Detty Youth and family Service Center Inc., Profit Sharing Plan was established or maintained as an employee pension benefit plan subject to Title I of the Employee Retirement Income Security Act (which I shall hereafter refer to as "ERISA");

Second: The defendant embezzled, stole, abstracted, or converted to his own use or the use of others the monies, funds, securities, premiums, credits, property, or other assets of such employee benefit plan; and

Third: The defendant acted unlawfully and willfully.

The parties have stipulated that the Marie Detty Youth and Family Services Inc., Profit Sharing Plan was established or maintained as an employee benefit plan subject to Title I of ERISA. Therefore you should consider the first element as conclusively established.

For purposes of ERISA, the term “employee benefit plan” refers to an employee pension benefit plan.

An “employee pension benefit plan” within the meaning of ERISA is a plan, fund, or program that is established or maintained by an employer, or by an employee organization, or by both an employer and employee organization and that by its express terms or as a result of surrounding circumstances either provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.

For purposes of section 664, “embezzlement” is the unauthorized conversion of money or property to one’s own use or for the use of someone other than the plan or connected fund, by a person who had acquired lawful custody or possession of such monies or property in a fiduciary capacity or other position of trust. Embezzlement includes the use of monies or property placed in one’s custody for a limited purpose in an unauthorized manner or to an unauthorized extent.

“Stealing” involves the taking of property, money, or other assets from an employee benefit plan without permission and depriving the plan of the rights and benefits of ownership in the property. Stealing is distinguished from embezzlement in that embezzlement requires that the money or property first have come into the custody or possession of the alleged embezzler lawfully. Stealing does not presuppose lawful custody of the assets of the plan or a connected fund. Therefore, one who is not in lawful custody of the assets of the plan or connected fund may be guilty of violating section 664 by converting

to his own use, or to the use of another person, money or property of the plan or connected fund through the act of stealing.

“Conversion” as used in section 664 means using the monies or property of the employee benefit plan in an unauthorized manner or to an unauthorized extent.

The phrase “to his own use or the use of another” means unlawfully using the money, property or other assets of an employee benefit plan for an unauthorized or non-plan related purpose which may also benefit either a defendant or some person other than the plan and its participants and beneficiaries. It does not mean, nor is the government required to prove, that the defendant necessarily pocketed the money or other assets. In other words, the defendant need not have benefitted personally and directly from an act which deprived the plan of the beneficial use of its property.

“Abstraction” means to take or withdraw property from the possession and control of the plan or connected fund without consent

or any lawful right or authority or with intent to injure or defraud the plan or connected fund.

Each of the four means of violating section 664 requires that an employee benefit plan be deprived of the use of its property which section 664 broadly defines as any of the “moneys, funds, securities, premiums, credits, property or other assets” of the plan. Although section 664 does not expressly define the phrase “moneys, funds, securities, premiums, credits, property or other assets,” the reach of the statute is not limited to protecting money and property already contributed or transferred to employee benefit plan accounts or to the plan's administrator(s). Section 664 may also apply to property or assets of the plan or connected fund which have been entrusted to the custody or control of an employer (or an employee organization) before money has been contributed or transferred to employee benefit plan accounts as required by the plan's agreement or other documents governing the plan. Section 664 also reaches “credits” of the plan or

connected fund consisting of the plan's right to collect monies which are contractually due the plan.

For purposes of section 664, a defendant can convert a plan's contractual right to employer contributions by effectively preventing a plan's exercise of its contractual right to collect contributions owed to it. For example, a defendant would be guilty of converting a plan's contractual right to employer contributions owed to the plan if he caused the plan to refrain from collecting the contributions by either deceiving the plan administrator of the existence or amount of the contribution debt owed the plan or by seeking to corrupt the plan administrator for that purpose. Therefore, you may conclude that the plan's contractual right to collect contributions has been willfully converted if you find beyond a reasonable doubt that a defendant prevented another person with the obligation to collect contributions on behalf of the plan from collecting all or part of the debt owed to the plan by misleading such person about the existence of any amount of

the contribution debt owed the plan and/or by seeking to influence such person from collecting the debt.

Instruction No. 14

FALSE STATEMENT - - 18 U.S.C. § 1001(a)(2)

Section 1001(a)(2) of Title 18, of the United States Code provides, in part that:

. . . whoever, in any matter within the jurisdiction of the executive, . . . branch of the Government of the United States, knowingly and willfully -

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

shall be guilty of an offense against the United States.

Instruction No. 15

FALSE STATEMENT

The defendant is charged in counts 9 and 10 with violating 18 U.S.C. § 1001(a)(2). This law makes it a crime to knowingly and willfully make a false statement or representation concerning a material fact within the jurisdiction of the U.S. Department of Labor, Office of Inspector General, within the executive branch of the United States Government.

To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt:

- First: the defendant made a false statement or representation to the government; specifically the U.S. Department of Labor, Office of Inspector General;
- Second: the defendant made the statement knowing it was false;
- Third: the defendant made the statement willfully, that is deliberately, voluntarily and intentionally;

Fourth: the statement was made in a matter within the jurisdiction of the executive branch of the United States Government, and

Fifth: the statement was material to the U.S. Department of Labor, Office of Inspector General.

A fact is “material” if it has a natural tendency to influence or is capable of influencing a decision of the U.S. Department of Labor, Office of Inspector General.

It is not necessary that the U.S. Department of Labor, Office of Inspector General was in fact influenced in any way.

Instruction No. 16

FALSE STATEMENT - - VENUE

The parties stipulate that the statements referred to in Counts 9 and 10 were made in Minnesota. If you find beyond a reasonable doubt that defendant made a false statement or representation as outlined in Counts 9 and/or 10, you are instructed to consider the substance of the statement. If you find, by a preponderance of the evidence, that is that it is more probable than not, that the substance of that statement relayed facts, events, or circumstances which occurred in or related to the alleged wrongdoing occurring in this district, you must find venue is proper in this district and render a verdict of guilty. If you do not find the substance of the statements related to events or circumstances occurring in this district or to alleged wrongdoing in this district, you must find the defendant not guilty

Instruction No. 17

PUNISHMENT

If you find the defendant guilty, it will be my duty to decide what the punishment will be. You should not discuss or consider the possible punishment in any way while deciding your verdict.

Instruction No. 14

CLOSING

When you retire you should elect one juror as your presiding juror. That person will preside over your deliberations and speak for you with the Court. You will then discuss the case with your fellow jurors to reach an agreement if you can do so.

Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors. You must not use any method of chance in arriving at your verdict.

The verdict of the jury in this case must be unanimous, which means that each juror must agree and concur in the verdict. Do not be afraid to change your opinion if the discussion persuades you that you should. Do not, however, come to a decision simply because other jurors think it is right or for the mere purpose of returning a verdict.

A form of verdict will be sent to the jury room with you, along with these written instructions of the Court. When you have reached a verdict, the presiding juror will sign and date it. Notify the bailiff by a written note to the Court when you have arrived at a verdict, so that you may return it into open court, where I will read the verdict. You are advised that the verdict form includes a blank space after the words “guilty” and “not guilty” for the count charged against the defendant. If you find the defendant guilty or not guilty, simply place a mark in the appropriate box.

In a few moments, you will go with the bailiff to the jury room to begin your deliberations. If any of you have cellphones or similar devices with you, you are instructed to be sure they are turned off and then to turn them over to the bailiff as you enter the jury deliberation room. They will be held by the bailiff for you and returned to you after your deliberations are completed and during any lunch break or similar period when you are not deliberating. The purpose of this

requirement is to avoid any interruption or distraction during your deliberations and to avoid any question of outside contact with the jury during your deliberations.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff signed by your presiding juror. In the message do not tell me how you stand on your verdict. No member of the jury should ever attempt to communicate with me except by a signed writing. You will note from the oath about to be taken by the bailiff, that during the course of your deliberations, the bailiff, as well as other persons, is forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

 10/15/09
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE