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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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| UNITED STATES OF AMERICA | ) | CR. NO. 09-00345 SOM |
| | ) | |
| Plaintiff, | ) | UNITED STATES' RESPONSE TO DEFENDANTS' HYDE AMENDMENT MOTION; CERTIFICATE OF SERVICE |
| | ) | |
| vs. | ) | |
| | ) | |
| ALEC SOUPHONE SOU, (01)<br>MIKE MANKONE SOU, (02) | ) | |
| | ) | |
| Defendants. | ) | |

UNITED STATES' RESPONSE TO DEFENDANTS' MOTION
FOR ATTORNEY'S FEES AND EXPENSES
PURSUANT TO HYDE AMENDMENT

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# MEMORANDUM OF POINTS AND AUTHORITIES

After the government moved on August 4, 2011 to dismiss the Indictment against defendants Alec Sou and Mike Sou ("defendants"), the Court entered an Order for Dismissal. On September 2, 2011 defendants moved for attorney's fees and expenses pursuant to the Hyde Amendment, 18 U.S.C. § 3006A (Note), which permits a prevailing party to recover fees and expenses where the "position of the United States was vexatious, frivolous, or in bad faith."

As explained below, and as detailed in the attached Affidavit, the defendants' motion is without merit. They have failed to show that the "position of the United States was vexatious, frivolous, or in bad faith." The defendants' motion should accordingly be denied.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 27, 2009, a grand jury in the District of Hawaii returned a 3-count Indictment charging the defendants and co-defendant William Khoo ("Khoo") with conspiring, along with other co-conspirators, to commit forced labor and visa fraud, and charging the defendants with conspiring, along with other co-conspirators, to commit document servitude. On October 27, 2010, another grand jury returned a 12-count First Superseding Indictment ("Indictment") charging the defendants with forced labor conspiracy and forced labor (18 U.S.C.

§§ 1589 and 371); document servitude (18 U.S.C. § 1592); visa fraud conspiracy (18 U.S.C. §§ 1546(a) and 371); harboring illegal aliens for financial gain (8 U.S.C. § 1324), and obstruction of justice (18 U.S.C. § 1512).

The government presented the Indictment based on a two-year investigation led by the Federal Bureau of Investigation (FBI) into the operations of Aloun Farms, Inc., a business owned and operated by the defendants. The FBI-led investigation followed investigations by the Department of Labor ("DOL") and the Department of Homeland Security's Bureau of Immigration and Customs Enforcement ("ICE"). The attached Affidavit of FBI Supervisory Special Agent Gary Brown, who served as the lead case agent from November 2008 through June 2011, establishes that during the investigation, federal agents interviewed 40 Thai men who worked at Aloun Farms between April 2003 and February 2005. Based on the interviews and other investigation, including surveillance of the Aloun Farms premises, interviews of Aloun Farms employees and business associates, documentary evidence from DOL, ICE, and elsewhere, and immigration and visa records, the FBI uncovered evidence of a scheme by the defendants and their co-conspirators to recruit Thai men to work at Aloun Farms, and then to hold them in fear that they would face serious harm, including financial ruin, if they did not remain in the defendants' service on the defendants' terms.

Dozens of witness interviews, as corroborated in part by documentary evidence, revealed that beginning in approximately 2003, the defendants joined forces with co-conspirators Khoo, Chowsanitphon, and others, to recruit workers from rural, impoverished areas of Thailand, through DOL's Seasonal and Temporary Agricultural Worker Program ("H-2A program"). As part of this recruitment scheme, the defendants and their co-conspirators charged the Thai men up-front recruitment fees of thousands of U.S. dollars, causing the Thai men to incur huge debts secured by their families' subsistence lands and homes. Interviews with over 30 of the Thai workers, by multiple federal law enforcement agents, revealed credible, consistent, mutually corroborating accounts of the defendants' recruitment scheme.

According to these accounts, as detailed in the Affidavit, recruiters in Thailand, including co-conspirator Khoo and others, recruited the Thai workers on behalf of Aloun Farms to work for the defendants. The recruiters verbally promised that, after paying the up-front recruitment fees, the workers would be paid over nine dollars per hour; eight hours a day, six days a week, for one to three years, and Aloun Farms would pay for transportation and housing. As subsistence farmers from impoverished areas, the workers had to take out substantial loans to pay the up-front recruitment fees. The workers consistently related that the promised one- to three-year term was critical to their willingness to enter into

contracts with Aloun Farms, because they understood they would have no means of repaying their loans unless they worked for multiple years. Once the workers accepted the verbal offer, recruiters pressed them to sign written documents, without sufficient opportunity to review and understand them.

As detailed in the Affidavit, multiple Thai workers reported that, upon their trip to Hawaii and following their arrival at Aloun Farms, representatives of the defendants confiscated their passports, either temporarily or for an extended time. Thereafter, the defendants, along with their co-conspirators and associates, told the workers that their contracts were just a piece of paper; that Aloun Farms would not honor the promised wages or work hours; and that there was no assurance the jobs would last for one to three years as promised. The defendants then placed the workers in overcrowded housing, later moving some of them to isolated, sub-standard housing in metal containers without air conditioning or indoor plumbing; provided inadequate food; and instructed them not to leave the premises.

As further attested in the Affidavit, the investigation established that the Thai workers, heavily indebted and without alternatives, believed they had no choice but to endure the substandard conditions and unfavorable terms they encountered at Aloun Farms. Dozens of workers recounted fears that, unless they remained in the defendants' service on the defendants' terms, they would default on their loans, exposing their families to financial ruin. They further reported, in

independent, mutually corroborating statements, that if they asked for their passports, complained about working conditions, or attempted to leave without permission, the defendants and their associates would have them sent back to Thailand, depriving them of any chance to pay off their loans, and placing them at risk of leaving them and their families homeless and destitute.

These accounts of multiple victim-witnesses were corroborated by other sources. As explained in the Affidavit, the defendants' business associate and co-conspirator Matee Chowsanitphon provided statements during the investigation that corroborated significant aspects of the defendants' scheme as related by over 30 victim-witnesses. During the investigation, Chowsanitphon described, *inter alia*, meetings between himself, charged co-conspirator Khoo, and defendant Alec Sou in Thailand where the men discussed collecting recruitment fees and confiscating passports to prevent workers from running away. Chowsanitphon further confirmed the workers' accounts that the defendants and their associates told the workers, shortly after their arrival at Aloun Farms, that they would not be paid according to the contracts. Chowsanitphon's statements were further corroborated by travel records and business records.

Statements of the Thai workers and evidence obtained from other sources, including Chowsanitphon and documentary evidence, revealed that the defendants made false statements in their applications for the H-2A visas to bring the Thai

workers into the United States. In those applications, the defendants certified that they had accurately disclosed the material terms and conditions of employment. To the contrary, the terms and conditions stated in the H-2A applications differed materially from the actual terms and conditions. The misrepresentations included failure to disclose that the workers paid transportation costs and large up-front fees, as well as misrepresentations about the rate of pay and duration of the job. The FBI also reviewed evidence developed in previous DOL and ICE investigations, including documentary evidence further corroborating the workers' accounts, as well as workers' statements taken up to two years earlier that were consistent with workers' statements to the FBI during this investigation.

In August 2009, after the investigation revealed that the Thai workers' visas had expired in February 2005, the FBI learned from a source close to Aloun Farms that two of the workers were still working at Aloun Farms, without valid visas, and that the defendants were paying them in cash rather than by check. ICE encountered and detained the two workers at Aloun Farms, and record checks confirmed they were unlawfully present in the United States.

After a grand jury returned a three-count Indictment on August 27, 2009, the defendants entered into plea agreements, pleading guilty to conspiracy to commit forced labor. In their plea agreements, and in sworn stipulations in Court on January 13, 2010, the defendants, represented by counsel, attested under oath that

they participated in a scheme to hold workers at Aloun Farms, knowing that the workers feared they would face serious harm, including financial ruin, if they failed to remain in the defendants' service. Subsequently, at sentencing hearings on June 7, 2010, July 19, 2010, and September 9, 2010, the defendants disputed numerous issues, ultimately withdrawing the guilty pleas.[1]

At the July 19, 2010 sentencing hearing, the defendants presented, and the Court admitted into evidence, a videotape of individuals purporting to have served, respectively, as a cook and a driver for the Thai workers. These individuals described conditions they observed during their supposed interactions with the Thai workers, contradicting the detailed accounts that over 30 workers had provided in extensive law enforcement interviews. The FBI investigated the videotape and the individuals who appeared on camera, interviewing workers and others. From this investigation, it was determined that the individuals in the videotape misrepresented their knowledge of the Thai workers' circumstances, and that the videotape was presented in an effort to mislead the Court.

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[1] The subsequent charges against the defendants were based on the evidence developed in the investigation, and not on the defendants' admissions in their guilty plea colloquies. However, the fact that the defendants, on the advice of counsel, made extensive admissions consistent with the voluminous evidence developed in the investigation, and with the government's analysis of that evidence, further underscores the government's reasonableness and good faith in crediting that evidence. The defendants' sworn admissions are summarized in the attached affidavit.

Based on the continuing investigation, the government presented, and the grand jury returned, the 12-Count Superseding Indictment on October 27, 2010, charging the defendants and others with forced labor conspiracy; forced labor; document servitude; visa fraud conspiracy; alien harboring; and obstructing an official proceeding. The defendants challenged the basis for the obstruction charge. The Court denied their motion. See Order Affirming Magistrate Judge's Order Denying Defendants' Motion to Unseal Grand Jury Transcripts and Materials (#167) (April 15, 2011). The defendants then moved to dismiss Counts 1 through 8, challenging the basis for the forced labor and document servitude charges. The Court denied their motion, holding that the applicable statutes clearly encompassed fear of serious economic harm. See Order Denying Motion to Dismiss Counts 1 to 8 of the First Superseding Indictment (#258) (July 26, 2011). Trial commenced July 29, 2011. Based on developments at trial, which impacted the government's analysis of its ability to discharge its burden of proof beyond a reasonable doubt, the government, exercising its prosecutorial discretion, moved on August 4, 2011 to dismiss the Indictment in the interests of justice. The defendants then filed the instant motion pursuant to the Hyde Amendment.

## II. ARGUMENT

The Hyde Amendment authorizes an award of attorney's fees and expenses to "a prevailing party" where the court finds that "the position of the United States was vexatious, frivolous, or in bad faith." The Hyde Amendment is a waiver of sovereign immunity that permits recovery in extremely limited circumstances, and Hyde Amendment claimants bear the burden of establishing their entitlement to recovery. United States v. Braunstein, 281 F.3d 982, 994 (9th Cir. 2002). The Hyde Amendment establishes a high bar for recovery, and was never intended to chill prosecutors' enforcement of federal criminal laws. United States v. Gilbert, 198 F.3d 1293, 1303 (11th Cir. 1999) (allowing recovery of fees "on a legal issue of first impression … would chill the ardor of prosecutors and prevent them from prosecuting with earnestness and vigor. The Hyde Amendment is not intended to do that."). Thus, a Hyde Amendment claim is appropriate only when the government's position is clearly and obviously wrong. Id. The defendants must prove that the government's position at the time of indictment was so frivolous that it amounted to prosecutorial misconduct. Braunstein, 281 F.3d at 995 ("the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake"); United States v. Capener, 608 F.3d 392, 402 (9th Cir. 2010) ("mere faulty judgment is not vexatious, frivolous, or in bad faith") (citations omitted). The government retains the discretion to dismiss charges, and courts have held that the Hyde

Amendment is not intended to "deter the prosecution from exercising its discretion to dismiss cases." United States v. Knott, 256 F.3d 20, 33 (1st Cir. 2001).[2]

### A. Applicable Legal Standards

The Hyde Amendment provides for recovery of fees and expenses where the prosecution was vexatious, frivolous, or in bad faith. A Hyde Amendment claimant may prevail by proving that the prosecution meets any one of these three definitions. United States v. Tucor Int'l, Inc., 238 F.3d 1171, 1178 (9th Cir. 2001). The defendants, alleging deficiencies in the investigation and the evidence, aver that the prosecution was "frivolous" because the charges were "unfounded and the Government failed to conduct an adequate investigation." Br. at 1-17.[3]

A Hyde Amendment claimant bears a heavy burden of proving that a prosecution is frivolous. "Frivolous" is defined as "groundless . . . with little

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[2] The Hyde Amendment defines a party eligible to seek recovery as "an individual whose net worth did not exceed $2,000,000." The defendants bear the burden of proving they meet this definition, and a "bare assertion" unsupported by any evidence is insufficient. United States v. Heavrin, 330 F.3d 723, 732 (6th Cir. 2003). Rather, "the movant should at least proffer an affidavit showing that the statutory criteria have been met." Id. The defendants have made no such showing. Unless and until they do so, their claim must fail.

[3] Defendants assert that Count 12 was "motivated more by prosecutorial vindictiveness than an objective assessment of the evidence." Id. at 17. This assertion is baseless, given the sound legal and evidentiary basis for Count 12, as set forth in Section II.B.3., *infra*, and in the Affidavit. The charges in this case are neither frivolous, nor vexatious, nor brought in bad faith.

prospect of success" or "foreclosed by binding precedent or so obviously wrong as to be frivolous." Braunstein, 281 F.3d at 995. "To say in hindsight that a case could not be proved beyond a reasonable doubt is hardly the same as showing that the case was unfounded." United States v. Sherburne, 249 F.3d 1121, 1127 (9th Cir. 2001) (rejecting Hyde Amendment claim following acquittal); United States v. Hristov, 121 Fed. Appx. 699, 701, 2005 WL 176264, *1 (9th Cir. 2005) (rejecting Hyde Amendment claim following acquittal, and holding that while defendant's denials "presented a jury question, this does not render his prosecution frivolous"); United States v. Schneider, 395 F.3d 78, 87-88 (2d Cir. 2005) (rejecting Hyde Amendment claim where defendant alleged "insufficiency of the evidence"); United States v. Monson, 636 F.3d 435, 440 (8th Cir. 2011) (defining "frivolous" as "utterly without foundation in law or fact").

A prosecution must be assessed based on the facts known to the government at the time the indictment was sought. United States v. Shaygan, -- F.3d --, 2011 WL 3795469 at *13 (11th Cir. Aug. 29, 2011) (court "must assess the basis for pursuing charges from the perspective of the government *at the time*") (emphasis in original) (quoting Knott, 256 F.3d at 35). As the Ninth Circuit has explained:

> The trial process is fluid and involves ... strategic and evidentiary decisions, many of which cannot be predicted at the outset, and many of which depend on contested evidentiary and other trial rulings—not to mention the uncertainties associated with witnesses' testimony. The trial process also implicates judgment, strategy, and prosecutorial discretion. This is not to say that prosecutors may operate without

> limits, but simply that the test... under the Hyde Amendment should not be an exercise in 20/20 hindsight ....

Sherburne, 249 F.3d at 1127.

A defendant cannot prevail under the Hyde Amendment merely because individual allegations, or even individual charges, are groundless. Rather, "when assessing whether the position of the United States was vexatious, frivolous, or in bad faith, the district court should . . . make only one finding, which should be based on the case *as an inclusive whole*." Shaygan, 2011 WL 3795469 at *17 (citing Heavrin, 330 F.3d at 725); Schneider, 395 F.3d at 90 ("the statute does not allow an award for any instance of vexatious, frivolous, or bad-faith conduct. An award is allowed only where ... "*the position of* the United States was vexatious, frivolous, or in bad faith") (emphasis in original).

The defendants have not established that the prosecution in this case meets the Hyde Amendment's definition of "frivolous." Rather, the defendants make a series of piecemeal factual assertions which, they claim, undermine the strength of the government's evidence and investigation. They fail to assert, much less establish, that the prosecution *as a whole* was so lacking in a legal or evidentiary basis at time of indictment as to be frivolous under the Hyde Amendment. Accordingly, their motion must fail.

**B. The defendants have failed to establish that the Forced Labor charges at the center of the prosecution were vexatious, frivolous, or in bad faith.**

The defendants' claim that the prosecution was frivolous rests on an erroneous characterization of the primary charges in the Indictment and a fundamental misapplication of the legal standards under the Hyde Amendment. The defendants contend that the "government's primary claim" is that it was illegal for the defendants to charge recruitment fees, and that one of the government's prosecutors misstated the law on this point. This claim is factually incorrect, and mischaracterizes the prosecution. The legality or illegality of recruitment fees is not an element of *any* of the charged offenses. The prosecution, when properly viewed as a whole, is not primarily about recruitment fees; it is about forced labor in violation of 18 U.S.C. § 1589. Counts 1 through 6 of the First Superseding Indictment charge the defendants with committing and conspiring to commit forced labor. The forced labor statute provides in relevant part:

> Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means . . .
> (2) … serious harm or threats of serious harm …;
> (3) … abuse or threatened abuse of law or legal process; or
> (4) … any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm …
> [shall by guilty of a crime].

As detailed more fully in the Affidavit, the charges of forced labor conspiracy and forced labor are based on extensive evidence including, *inter alia*, over 30 of the

interviewed Thai workers who expressed fear that they would face serious harm if they did not remain in the defendants' service. The workers recounted fears of financial devastation, including loss of their families' homes and subsistence lands, resulting from the debts they incurred in connection with the defendants' recruitment scheme. As the Affidavit explains, multiple witnesses, corroborated in part by other evidence, recounted that the defendants and their co-conspirators promptly broke the promises that lured the workers to Aloun Farms, and threatened to send workers back to Thailand with no way to repay their debts, holding them in fear of financial ruin to their families.

While defendants attempt to dispute whether fear of serious financial harm can give rise to a forced labor violation, their argument is foreclosed by well-established law, and by the Court's well-reasoned ruling in this case. See Order Denying Motion to Dismiss Counts 1 to 8 (# 258) (July 26, 2011). The law is clear that "serious harm" includes any consequences, physical or nonphysical, that are sufficient, under the surrounding circumstances, to compel a reasonable person in the same circumstances as the victim to provide, or to continue providing, labor or services. See H.R. Conf. Rep. No. 106-939 at 101 (2000), 2000 WL 1479163 (Oct. 5, 2000); 22 U.S.C. § 7101(b) (congressional findings and purposes relating to enactment of section 1589); United States v. Bradley, 390 F.3d 145, 150-151 (1st Cir. 2004), vacated and remanded for resentencing on other grounds, 125 S. Ct.

2543 (2005); United States v. Dann, -- F.3d -- 2011 WL 2937944 at *10, 13 (9th Cir. July 22, 2011) (upholding forced labor conviction based on fear of serious financial harm). This Court has thoroughly analyzed and correctly resolved this issue, holding that the forced labor statute in effect at the relevant time clearly encompasses fear of serious economic harm. See Order Denying Motion to Dismiss Counts 1 to 8 (# 258). The defendants' attempt to re-litigate that issue must fail.

The fear of serious economic harm was consistently articulated by multiple, similarly situated victims, underscoring the fact that this fear was reasonable when assessed, as it must be, from the perspective of a reasonable person in the victims' situation, and in light of the victims' vulnerabilities. See H.R. Conf. Rep. No. 106-939 at 101, 2000 WL 1479163 (Section 1589 is to be construed with respect to "individual circumstances" and "background" of the victims that are relevant in determining whether a particular type or degree of coercion is sufficient to compel the victim's labor); Bradley, 390 F.3d at 153.

Based on the evidence at the time of indictment, dozens of Thai workers were prepared to testify that the debts they incurred as a pre-condition to working for the defendants placed them in a desperately vulnerable position. Those workers were prepared to testify to *their understanding* of the terms of employment as offered at the time of recruitment, and as altered in Hawaii. The

defendants, citing terms in the written documents, seek to refute the victims' account of the recruitment scheme and terms and conditions of employment. However, as the Affidavit details, the victims' mutually corroborating accounts clearly established that they were not afforded an adequate opportunity to read and understand the documents, and their understanding of the terms and conditions derived from the verbal promises and statements of the defendants and their co-conspirators, during recruitment and later in Hawaii. This evidence establishes the clear legal and factual basis for the charges that the defendants' scheme held the victims in reasonable fear of financial ruin, giving rise to a reasonable fear of serious harm within the meaning of the forced labor statute.

The defendants assert possible benign explanations for their charged conduct, and argue that these benign explanations belie the charge that they held the victims in forced labor. See Br. at 6-10. However, assertions of possible innocent explanations are irrelevant to the Hyde Amendment analysis, and the fact that the defendants had a plausible defense to present at trial does not make the government's litigating position frivolous. See United States v. Lain, 640 F.3d 1134, 1139-40 (10th Cir. 2011) (government's legal position is not frivolous so long as supported by a factual basis, even if jury does not agree with government's version of the facts); United States v. Mitselmakher, 347 Fed. Appx. 649, 650, 2009 WL 3109862, *1 (2d Cir. 2009) (Hyde Amendment does not permit recovery

where government's evidence, if credited, would support conviction). Rather, the purpose of a trial is for a jury to resolve factual disputes and decide whether the government has proven the charges beyond a reasonable doubt. A case is "frivolous" under the Hyde Amendment only when the government's position is so clearly legally foreclosed that it was improper even to seek the indictment. See United States v. Isaiah, 434 F.3d 513, 521 (6th Cir. 2006) (prosecution not frivolous where legal position is reasonable and arguably supported by law and evidence, including circumstantial evidence).

The defendants claim that the forced labor charges were foreclosed by the fact that the victims had signed documents providing for a refund of their recruitment fees if they were dissatisfied by their employment in Hawaii. The defendants, who bear the burden of proving that the prosecution was wholly frivolous, have failed to establish that the document in question controlled the employment relationship between the victims and the defendants. The defendants' argument fails to distinguish between one-page documents prepared by Thai recruiters and Aloun Farms employment contracts which do not provide for refunds. Moreover, the defendants have not cited *any legal authority* for the proposition that the government is foreclosed from bringing a forced labor charge where the victims signed written documents purportedly "agreeing" to terms and conditions. There is no such authority, and the written terms are not dispositive of

whether the employment relationship was coercive in light of the evidence of the victims' reasonable fears of serious harm. Multiple victims were prepared to testify that they could not read well, were rushed into signing documents, and did not understand the documents. Some victims were also prepared to testify that the documents significantly understated the actual amount of their recruiting fees. Thus, any promise of a refund in one of the documents would not, and did not, abate the victims' reasonable fears of serious harm accruing if they defaulted on their debts. Victims were also prepared to testify that the defendants, along with their co-conspirators, told the victims, once in Hawaii, that their contracts were just a piece of paper.

Where multiple victims independently articulated why they remained in fear of serious harm, the charges are not frivolous. Courts have expressly held that where the witness testimony, if credited by the jury, would establish criminal liability, the charge is not frivolous, even if there is countervailing evidence, as prosecutors are entitled to adjudge the validity of the evidence in an exercise of their prosecutorial discretion. See, e.g., Schneider, 395 F.3d at 90 (case not frivolous where witness testimony, if credited by jury, would have established culpability, despite conflicting evidence). The workers' statements that they feared economic ruin would, if credited, establish a fear of serious harm, notwithstanding a refund provision that many did not understand, and that understated the amount

of the debt. Accordingly, courts have affirmed forced labor convictions, even where victims purportedly expressed their assent to the terms offered by the defendants. See, e.g., United States v. Farrell, 563 F.3d 364, 370 (8th Cir. 2009) (affirming peonage conviction arising from coerced labor of foreign workers, despite victims' letters requesting to remain in defendants' service, where victims testified they had no other way to repay debts); United States v. Kaufman, 546 F.3d 1242 (10th Cir. 2008) (upholding convictions despite victims' statements of consent to conditions, where evidence established conditions were coercive).

The same analysis applies to the defendants' erroneous contention that the written documents controlled the terms and conditions of the victims' service. While the defendants were permitted to argue at trial that the contracts belie the evidence that the victims reasonably felt coerced, there is nothing "frivolous" about the government's decision to charge the defendants based on detailed statements of more than 30 witnesses that, notwithstanding a document that they barely understood, these impoverished, indebted, and uneducated Thai workers did not believe they could leave the defendants' service without risking serious harm. As detailed in the Affidavit, the extensive evidence from the victims and other sources precludes any assertion that the forced labor charges at the center of the Indictment were "frivolous" under the Hyde Amendment.

Similarly, the defendants' claim that the victims were free to come and go from Aloun Farms, because they had bicycles, is wholly immaterial to whether the forced labor charges were frivolous. Again, the defendants, who bear the burden of establishing frivolousness, cite no legal authority precluding a forced labor charge simply because the victims had some freedom of movement. To the contrary, the government is not required to prove physical restraint, and the law is clear that any opportunity to escape is irrelevant if the defendant has placed the victim in such fear that the victim does not believe he can safely escape without suffering serious harm. See Farrell, 563 F.3d at 376 (holding that "even assuming that there were points at which the workers could have escaped the [defendants'] control, a rational jury could have concluded that the workers' employment was involuntary"); Bradley, 390 F.3d at 153-54 (opportunity to flee is not determinative of forced labor where victims fear that serious harm will result from attempt to escape). Because the victims' statements established that they feared they could not leave the defendants' service without risking serious harm, the opportunity to leave the premises on occasion by bicycle is immaterial.

The Affidavit demonstrates that the forced labor charges rested on extensive evidence, including statements of over 30 witnesses, indicating that the impoverished, indebted workers from rural Thailand felt coerced to remain in the

defendants' service despite unfavorable terms and conditions.[4] The charges, therefore, are not frivolous.

The defendants cite trial testimony of Chowsanitphon, who testified on cross-examination that he pled guilty in connection with the defendants' recruitment scheme because the prosecution had erroneously informed him that recruitment fees were illegal. Defendants aver, based on this testimony, that the charges were based on an erroneous reading of H-2A regulations, and thus were frivolous. To the contrary, Chowsanitphon's trial testimony is immaterial to the Hyde Amendment analysis, which turns on the evidence available *at the time of indictment*. As detailed in the Affidavit, during the investigation, Chowsanitphon provided information that corroborated the victims' statements in significant respects, strengthening the ample legal and factual basis for the charges.

Moreover, the assertion that Chowsanitphon's understanding of H-2A regulations derived from a prosecutor's misstatement is inaccurate. As detailed in the Affidavit, during the investigation, Chowsanitphon, citing independent research and consultations, explained his understanding of H-2A regulations to the government. Furthermore, contrary to the defendants' assertion that the legality of

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[4] The defendants cite purported defense evidence, asserting that the government should have discovered such evidence. However, "[t]he Hyde Amendment does not impose on prosecutors a duty, once they have identified evidence sufficient to bring a prosecution, to cull the field for witnesses who might testify on behalf of the defendant." Schneider, 395 F.3d at 89. The recitations of purported defense evidence are thus wholly immaterial to their Hyde Amendment claim.

recruitment fees was central to the theory of the prosecution, the recruitment fee issue is wholly immaterial to the charges of forced labor, document servitude, alien harboring, and obstruction. While recruitment fees have some relevance to the Count 9 visa fraud conspiracy, the defendants inaccurately portray this as an issue of law bearing on an element of a charged offense. To the contrary, the *legality or illegality* of such fees is immaterial to the elements of visa fraud. The fees are relevant only to whether the defendants' visa applications materially misrepresented the terms and conditions of employment, including transportation and recruitment fees, wages, and duration of the job. Accordingly, defendants' emphasis on Chowsanitphon's trial testimony is misplaced. Trial testimony is not determinative of the evidence at the time of indictment, which indicated that Chowsanitphon researched recruitment fees independently. Moreover, recruitment fees bear only limited relevance to only one of the twelve charged counts.

### C. The defendants have failed to establish that the other charges were vexatious, frivolous, or in bad faith.

As explained above, the forced labor charges were anything but frivolous. For that reason alone, the prosecution, which must be viewed as a whole, is not frivolous and the defendants' motion must fail. See Shaygan, 2011 WL 3795469 at *17; Schneider, 395 F.3d at 90. The other charges are also supported by ample evidence, further precluding the defendants' claim. The defendants' claim that the

document servitude charges are frivolous rests again on the trial testimony of Chowsanitphon, who stated that the defendants did not permanently hold the victims' passports. The defendants erroneously contend that they therefore could not have committed document servitude. However, Section 1592 requires only that defendants "possess" the victims' documents for the purpose of coercing or attempting to coerce the victims' labor, or in the course of doing so. There is no requirement that the documents be locked up or permanently withheld. See Dann, 2011 WL 2937944 at *13 ("the statute … requires merely that the defendant "possess [ ]" the document, not that the defendant lock it up").

Here, as the Affidavit demonstrates, mutually corroborating statements of multiple workers indicated that the defendants and their co-conspirators and associates confiscated the victims' passports, compounding their sense that they had no alternative but to remain at Aloun Farms or face fears of serious harm. While Chowsanitphon testified at trial that workers could request access to their passports, his statements during the investigation, as well as multiple victims' statements, established that the defendants retained the victims' documents, in some instances for extended periods. While defendants were entitled to dispute the significance of this conduct at trial, none of their assertions render the document servitude charges "frivolous." Id. at *13 (dispute between defendant's innocent

explanation for holding documents and victim's claim that defendant held documents coercively was jury question for trial).

Count 9 charges the defendants with visa fraud conspiracy in violation 18 U.S.C. §§ 1546(a) and 371. Section 1546 provides in relevant part as follows:

> Whoever knowingly makes under oath, or as permitted under penalty of perjury . . . knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any false statement or which fails to contain any reasonable basis in law or in fact . . . [is guilty of a federal offense].

Count 9 is based on evidence that the defendants, in seeking H-2A visas for the workers, falsely represented the material terms and conditions of employment, including wages, hours, transportation costs, recruitment fees, work conditions, and duration of the job. As the Affidavit sets forth, the defendants failed to disclose the large recruitment fees or the fact that workers paid transportation costs out of those fees; represented that the workers would earn over $9.00 per hour, forty-eight hours per week; and failed to disclose that they had promised one to three years of employment, whereas the H-2A visas were temporary and seasonal.

The defendants contend that this charge is frivolous because there was no controlling legal authority that expressly required them to disclose recruitment fees, and because, they claim, they did in fact pay the workers as promised. The defendants are incorrect. First, the charging of substantial recruitment fees can

constitute a material term and condition of employment, regardless of whether regulations expressly required disclosure of the fees. Relevant DOL regulations prohibited employers from imposing certain charges that reduced wages below the prevailing minimum wage. See Arriaga v. Florida Pac. Farms, L.L.C, 305 F.3d 1228, 1236 (11th Cir. 2002). Those regulations also required that employers attest that they have disclosed to DOL "all the material terms and conditions of the job." See 20 C.F.R. § 653.501(d)(3); Arriaga, 305 F.3d at 1233 n.5 (citing C.F.R. provision). Because the H-2A visa petition process requires disclosure of all material terms and conditions, the defendants' failure to disclose those material terms and conditions, while falsely certifying that they had done so, constitutes visa fraud, regardless of whether fees are illegal or are expressly required to be disclosed. This charge, therefore, is not frivolous. See United States v. Phillips, 543 F.3d 1197, 1205-07 (10th Cir. 2008) (construing the "application, affidavit, or other document" language of 1546(a), but not other paragraphs of 1546(a), to include DOL forms submitted in support of visa applications). The defendants' misplaced focus on whether the regulations explicitly required disclosure of recruitment fees is therefore irrelevant to whether the defendants made false and misleading representations when they certified that they had disclosed all of the material terms and conditions of employment.

While the defendants contend that they paid the workers as promised, this factual question is vigorously disputed by the workers themselves, many of whom reported that the actual working conditions and pay differed markedly from the terms they were promised, and who reported that the defendants told them that their written contracts were just a piece of paper. Based on the ample evidence of materially misleading representations in the process of applying for the H-2A visas, the visa fraud conspiracy charge is far from frivolous.[5]

Counts 10 and 11 charge the defendants with harboring illegal aliens for financial gain. The defendants do not dispute that the workers identified in those counts were in the United States illegally, or that they were working for the defendants. Rather, the defendants contend they did not know the workers were illegal because they had documents indicating otherwise. While the defendants were entitled to challenge the *mens rea* evidence at trial, the charges were based on the evidence detailed in the Affidavit, including the evidence that the workers' visas had expired in February 2005; that the workers were employed at Aloun

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[5] The defendants, citing testimony of a DOL witness, contend that they were not expressly required to disclose recruitment fees. However, they cite no authority foreclosing the proposition that substantial recruitment fees were among the material terms and conditions that the defendants were required to disclose. Absent legal authority foreclosing this proposition, the government's position is not frivolous. See, e.g., United States v. Lawrence, 217 Fed. Appx. 553, 2007 WL 627887 (7th Cir. 2007) (rejecting Hyde Amendment claim where defendant failed to establish that government's position was "clearly foreclosed" by binding precedent).

Farms in August 2009; and that the workers were paid in cash while those lawfully present were often paid by check. In addition, victims and witnesses indicated that the defendants informed workers that their visas were expiring, and referenced potential immigration problems after their visas expired. Based on this evidence, the charges in Counts 10 and 11 are not frivolous.

Finally, the defendants claim that the obstruction charge is frivolous. Count 12 charges the defendants with obstructing an official proceeding by presenting a videotape as evidence in court proceedings falsely portraying the conditions of the workers' employment at Aloun Farms. As summarized in the Affidavit, the FBI investigation yielded evidence that the videotape was materially false and misleading, establishing a sound legal and factual basis for the obstruction charge. While the defendants contend that the government should have believed the defense witnesses over the witnesses the government credited in its investigation, the government is entitled to base its charges, in an appropriate exercise of its prosecutorial discretion, on the evidence it deems credible, and is not bound by the defendants' view of the evidence. See, e.g., Sherburne, 506 F.3d at 1189-90 (noting that the government is entitled to construe evidence in light favorable to the government); Isaiah, 434 F.3d at 520 (6th Cir. 2006) (rejecting Hyde Amendment claim where issue of defendant's intent "was a close one," and emphasizing that government was "not required to credit [defendant's] denial, and that "even if the

government could not prove its case beyond a reasonable doubt, the government's position was supported by probable cause" and therefore was not frivolous or vexatious); Schneider, 395 F.3d at 89 (noting that evaluating witness credibility and subject culpability "is just the sort of judgment call that "'generally rests within the broad discretion of the prosecutor'") (quoting United States v. Alameh, 341 F.3d 167, 173 (2d Cir. 2003)). As the Affidavit outlines, the FBI investigated the production and presentation of the videotape, including evidence that the individuals appearing in the videotape were, in fact, not the cook and driver of the Thai workers. The charge, therefore, is not frivolous.[6]

For the reasons set forth above and in the Affidavit, the defendants have failed to establish that the indictment *as a whole* was frivolous, vexatious, or brought in bad faith. Indeed, they have failed to establish that *any* of the charges were frivolous, vexatious, or in bad faith. Reviewing the evidence at the time the

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[6] The Court has previously rejected defendants' challenge to the obstruction charge. See Order Affirming Magistrate Judge's Order Denying Defendants' Motion to Unseal Grand Jury Transcripts and Materials (#167) (April 15, 2011). To the extent that the defendants allege bad faith or vindictiveness, Br. at 17, they offer no evidence to substantiate any such claim. The ample probable cause underlying this charge forecloses any claim based on prosecutorial bad faith. See Shaygan, 2011 WL 3795469 at *13-14 (holding that Hyde Amendment claimant cannot establish "bad faith" or "vexatiousness" based solely on prosecutor's "subjective ill-will;" rather, prosecution must also be "objectively deficient, in that it lacked either legal merit or factual foundation," and Hyde Amendment claim was barred where government had "objectively reasonable basis for the superseding indictment") (citations and internal quotations omitted).

charges were brought, it is clear that the indictment was based on ample evidence developed throughout an extensive investigation.[7]

The government had abundant evidence upon which to charge the defendants. Based on developments at the time of trial, including testimony elicited during trial, which impacted the government's analysis of its ability to discharge its burden of proof beyond a reasonable doubt, the government exercised its prosecutorial discretion to seek dismissal of the charges in the interests of justice. Such a dismissal does not in any way suggest that any aspect of the prosecution was at any time frivolous, vexatious, groundless, or brought in bad faith. Indeed, courts have recognized that drawing any inference of frivolousness from a government dismissal of an indictment would not only impinge on the government's prosecutorial discretion, but would, moreover, also potentially deter the government from seeking dismissal in appropriate circumstances. See, e.g., Knott, 256 F.3d at 33 ("We would not want the Hyde Amendment to deter the prosecution from exercising its discretion to dismiss cases ..."). The prosecution in this case was, at all times, based on substantial evidence and sound legal

[7] The defendants do not seek additional discovery; nor would the Hyde Amendment permit them to do so. United States v. Truesdale, 211 F.3d 898, 907 (5th Cir. 2000) (Hyde Amendment "does not provide for discovery or a hearing as a matter of right"); Capener, 608 F.3d at 405 ("Hyde Amendment's tools for developing evidence are extremely limited," as Hyde Amendment incorporates statute requiring that claim be "determined on the basis of the record").

theories, and the dismissal of charges based on developments at trial does not imply otherwise.

## III. CONCLUSION

The government charged the defendants after a lengthy investigation yielded substantial evidence of the defendants' roles in a scheme to recruit Thai workers, hold them in forced labor, confiscate their passports, misrepresent material terms and conditions in visa applications, harbor undocumented workers, and obstruct official proceedings. The charges were far from frivolous, but rather were founded on ample evidence and well-established law. The defendants' motion fails to analyze the indictment as a whole based on the evidence at the time of indictment, as required under the Hyde Amendment, and instead erroneously cites testimony elicited at trial and factual disputes appropriate for resolution at trial. Both legally and factually, the defendants' motion fails to establish that the prosecution was frivolous, vexatious, or brought in bad faith within the meaning of the Hyde Amendment. Accordingly, their motion is without merit and must be denied.

DATED: October 10, 2011 at Washington, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that, on the date and by the method of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

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